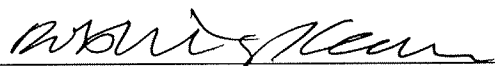


Civil Procedure Rules 7 and 56 for a partial summary judgment in their favor declaring that the subject Ordinance No. 3418, on its face or as applied to Plaintiffs, violates Plaintiffs' substantive due process and equal protection rights in violation of the Fourteenth Amendment to the United States Constitution.

This motion is supported by the attached memorandum of law, the pleadings, admissions and records on file in this action, and the separate concise statement of facts, along with the declarations, exhibits and other papers submitted therewith, each of which is adopted herein by this reference.

DATED: Honolulu, Hawai'i, August 13, 2008.



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and ALAKU POINTE LP

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

| | | |
|----------------------------|---|------------------------------|
| KAMAOLE POINTE DEVELOPMENT |) | CIVIL NO. CV07-00447 DAE LEK |
| LP; ALAKU POINTE LP, |) | (Civil Rights) |
| |) | |
| Plaintiffs, |) | MEMORANDUM IN SUPPORT |
| |) | OF MOTION |
| vs. |) | |
| |) | |
| COUNTY OF MAUI; et al., |) | |
| |) | |
| Defendants. |) | |
| |) | |
| |) | |
| |) | |

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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This action arises from Defendants' enactment of Ordinance No. 3418 ("Ordinance")—an unprecedented ordinance that requires Plaintiffs to dedicate 50% of their private property for affordable housing in order to build on their two urban-zoned, vacant real estate parcels. The Ordinance, on its face and/or as applied to Plaintiffs, violates the Equal Protection Clause and Substantive Due Process Clause of the Fourteenth Amendment to the United States Constitution.

None of Defendants' asserted bases for the Ordinance bear a rational relationship to the Ordinance's targeting of residential developers such as Plaintiffs to carry the burden of Maui County's need for affordable housing. Likewise, the requirements of the Ordinance—including its arbitrary 40% - 50% set-aside requirement—do not further any legitimate governmental purpose. Rather, the evidence establishes that the Ordinance will have negative effects on the provision of affordable housing. Indeed, application of the Ordinance has rendered Plaintiffs' projects cost-prohibitive, thus eliminating the addition of hundreds of homes to the County's supply of residential housing. Additionally, the Ordinance fails to provide for individualized consideration and lacks a meaningful mechanism for review. As such, the Ordinance is unconstitutional and must be struck down, or at the very least, declared unconstitutional as applied to Plaintiffs.

II. STATEMENT OF FACTS

A. Plaintiffs' Kamaole Pointe and Kihei Pointe Projects

Plaintiffs own two parcels of vacant land in the urban corridor of Kihei, Maui, which are zoned and suitable for multi-family residential housing or hotel/resort use. See Concise Statement of Facts (“CSOF”), ¶1. Prior to the passage of the Ordinance, Plaintiffs and their predecessors-in-interest invested hundreds of thousands of dollars into the planning and design of two residential projects on the two parcels: (1) the Kamaole Pointe project (124 units), and (2) the Kihei Pointe project (127 units). CSOF, ¶¶3, 7-8. Both properties are in an urban district surrounded by developed, high-density residential and commercial sites and mature and ample existing infrastructure. Id. at ¶4. As classic “in-fill” projects (vacant parcels surrounded by existing development of like character to the proposed project), they are consistent with existing zoning. Id. at ¶4. With these entitlements and plans already in place, and in reliance on the projects’ feasibility under existing zoning and laws, Plaintiffs invested millions of dollars toward the purchase of the two parcels in March 2006. Id. at ¶¶3, 5-8.

Neither of Plaintiffs’ two projects is expected to appreciably increase the need for *any* affordable workforce housing. CSOF, ¶9. Together, the projects would add more than 250 residential units to the overall *supply* of housing in Maui County. Id. at ¶3. The projects *will not likely increase the demand* for workforce

housing because Plaintiffs plan to hire local workers who already live on Maui to build the project. Id. at ¶9. The projects would create the opportunity for Maui residents to occupy such units, or for the owners of such units to rent to existing Maui residents. Plaintiffs have done nothing to create or exacerbate any affordable housing problem in Maui County, either before or after buying the two properties in question. Id. at ¶10.

B. Pre-Existing Administrative/Legal Framework Concerning Affordable Housing Requirements

After Plaintiffs purchased their lots, but before the Ordinance was passed, the administrative and legal framework for affordable housing set-asides in the State of Hawai'i and Maui County was described by local real estate attorney A. Bernard Bays in an article appearing in the Hawaii Bar Journal, as follows:

Presently the State of Hawaii does not have a blanket affordable housing requirement for developers planning to build houses on land already zoned for residential use. Only a zoning change triggers a state affordable housing assessment.

....

Each of the counties has its own ordinances or guidelines for imposing affordable housing assessments on developers, but they all share common elements: generally they are triggered by zoning change requests and include a percentage assessment, a system of credits and bonuses, delivery options and re-sale restrictions on affordable house owners, or rent controls on subsidized affordable rental units.

....

Kauai and Maui presently have administrative guidelines or policies through their housing agencies where the required assessments have typically been 15%. . . .

A. Bernard Bays and Michelle D. DaRosa, The Scramble to Protect the American Dream in Paradise: Is Affordable Housing Possible in Hawaii, (“Bays and DaRosa”), 10 Haw. B.J. 37, 43-45 (2007).¹ Although the prior practice was to impose such affordable housing requirements under “guidelines” or “policies,” they were technically imposed on an *ad hoc* basis as conditions for the issuance of building permits or other discretionary approvals.

C. Passage of the Ordinance

As the County elections heated up in mid 2006, the clamor for affordable housing impacted the political campaigns. Mayor (then Councilmember) Charmaine Tavares and other councilmembers made campaign promises to meet the needs of Maui residents for affordable housing. CSOF, ¶13. Leading up to the elections, the Maui County Council had been considering a bill to enact an ordinance requiring residential developers to dedicate 30% of their projects to affordable housing subject to strict and inflexible price controls. *Id.* at ¶12. During her political campaign, Tavares, who touted herself as a champion for affordable housing, pushed for enactment of an even more aggressive ordinance imposing an 80% set-aside. See Bays and DaRosa, 10 Haw. B.J. at 46; Ex. 17 (Tavares official campaign website).

¹ Although the Bays and DaRosa article was published in 2007, its content indicates that it was written and finalized in the Summer of 2006.

Economists and other commentators urged restraint, and cautioned that the unprecedented magnitude of any mandatory affordable housing set-aside over 30% would kill most if not all residential development on Maui, and result in a *de facto* moratorium on residential development that would exacerbate the affordable housing problem in the long run. CSOF, ¶15. Legal scholars questioned the legality and constitutionality of the proposed ordinance. Id. at ¶14.

No studies were conducted to support the existence of a relationship between residential development projects of five or more units and a worsening of the affordable housing problem. Id. at ¶19. In addition, the County undertook no studies or empirical analyses to assess *the degree* to which such developments would impact the need for affordable housing so as to justify the imposition of *any* specific mandatory affordable housing set-aside, whether at the 80% level, the 30% level, or at any other percentage. Id.

Ultimately, although the Council backed down from an 80% requirement, it passed the subject Ordinance in December 2006, which mandated an unprecedented 50% mandatory affordable housing set-aside for any development project of five or more units if more than half of the units were to be sold at \$600,000 or more. Id. at ¶16 (Ordinance attached as Ex. 8). If more than half of the units were to be sold at less than \$600,000, the developer needed to devote

40% of the units as affordable housing units. Id. Maui Mayor Alan Arakawa vetoed the Ordinance, but the Council overrode his veto. See Ex. 15, p.38.

D. Impact of the Ordinance

The Ordinance targets owners of land suitable for medium or large scale residential development projects (five or more units), like Plaintiffs. See Ex. 8, § 2.96.030. The majority of the private sector is unaffected by the Ordinance. Most notably, the Ordinance does not target commercial developers and employers who create or attract jobs without adding to the housing supply. Id.

Plaintiffs immediately sought professional advice and analysis concerning the impact of the Ordinance from their planners who had been working on their projects. CSOF, ¶22. Based on such advice and analysis, Plaintiffs determined that complying with the Ordinance was so cost-prohibitive as to render both of their projects infeasible. See id. at ¶23. In response, Plaintiffs halted all work on the Kamaole Pointe and Kihei Pointe projects. Id.

The only relief available to a landowner from the onerous terms of the Ordinance is an “appeal” for a “waiver” that must be presented to the County Council for decision. Ex. 8, § 2.96.030(C). Under the terms of the Ordinance, Plaintiffs were assigned the burden of “presenting substantial evidence” supporting the *absence* of a reasonable nexus between their projects and the requirements set forth in the Ordinance. Id. § 2.96.030(C)(1), (2). The Ordinance does not provide

for an appeal from the Council’s decision, nor are there any other procedural mechanisms to ensure that the appeal review process is meaningful, or to guard against unfairness in the proceedings. See id. § 2.96.030.C. Plaintiffs were advised to pursue the waiver relief under the Ordinance. CSOF, ¶24.

E. The County Denies Plaintiffs’ Request for a Waiver

In an appeal initiated in February 2007, Plaintiffs asked the County Council for a waiver of the Ordinance’s requirements for both projects. See CSOF, ¶25. Plaintiffs submitted the following facts and evidence in support of their appeal: (1) the land is currently vacant; (2) thus, the projects will not decrease the supply of existing affordable housing; (3) Plaintiffs expected to hire local contractors to build and manage the projects; (4) thus, the projects will not increase the demand for affordable housing in the future; (5) the projects were classic “in-fill” developments consistent with the character of the surrounding neighborhood and existing zoning in the Kihei urban corridor; and (6) the projects will add to the overall supply of housing in an underserved niche, thereby alleviating price pressures and providing opportunities for Maui residents to rent or buy the units or to rent or buy existing affordable units vacated by Maui residents who move into Plaintiffs’ projects. See Exs. 3 and 4.

Plaintiffs’ appeal was placed on the agenda for the County Council’s consideration. CSOF, ¶28. The Council heard Plaintiffs’ appeal on July 24, 2007.

Id. at ¶29. Corporation Counsel Edward Kushi stated that, as he had previously advised the Council, without the waiver provision “this ordinance could be attacked on its face as unconstitutional.” Id. at ¶27; see also Ex. 5, p.8. He further opined that, unlike other government agencies, the County Council need not conduct a contested case hearing on Plaintiffs’ appeal even when the Council was not acting in a “non-legislative” manner. Id. at pp.6-7.

The Councilmembers were extremely hostile to Plaintiffs’ appeal and waiver request. CSOF, ¶31. Council Chair Danny A. Mateo prefaced the Council’s deliberations by observing: “Members, by enacting the Residential Workforce Housing Policy, the Council had already made a finding that the impact of any applicable development is presumed to bear a rational relationship to the affordable housing shortage.” Ex. 5, p.9. Chairman Mateo then recommended that Plaintiffs’ waiver request be rejected. CSOF, ¶33.

The Councilmembers’ comments at this meeting revealed that the waiver process was a sham, and they clearly signaled that no waivers would ever be granted. CSOF, ¶¶35-40. Member Michael P. Victorino stated: “[W]hen someone comes in and [is] asking for a waiver, A) they’ve gotta understand *we’re not gonna give waivers*; and B) if they want something then they should make sure that they’re ready to make that move toward affordable housing.” See Ex. 5, p.11; CSOF, ¶38 (emphasis added). Victorino made it clear he was not just speaking for

himself: “We’ve talked about it. We had a conference last week Friday on it, *and we’re not gonna change our mind.*” Id. (emphasis added). Member Jo Anne Johnson said she was “offended” that Plaintiffs did not concede that the construction of their projects would require the importation of off-island workers that she apparently *assumed* would be required. Ex. 5, p.12. Johnson erroneously claimed that Plaintiffs did not “address the issue.” Id. In fact, Plaintiffs specifically stated in their appeal that their projects would not increase the demand for housing because they planned to hire Maui contractors and workers to build their projects. See Ex. 4, p.2. Council Vice Chair Riki Hokama said: “[W]e need to make a direction adjustment to provide for those who are living here and not for those who would like to come and move here.” Ex. 5, p.10.

On August 21, 2007, the Council passed a resolution rejecting Plaintiffs’ waiver request. The resolution stated: “[A]fter due consideration of the evidence . . . , the Council finds that there is a . . . nexus between the impact of the development and the residential workforce housing requirements for the development.” CSOF, ¶41; Ex. 12. No facts or evidence, however, were presented in support of this “finding.” Id. Plaintiffs’ projects remain stalled as a result. Id. at ¶42.

III. SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the initial burden of “identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact.” T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). If the moving party meets its burden, then the non-movant must present admissible evidence showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044 (9th Cir. 1995).

IV. ARGUMENT

By its terms, the Ordinance was enacted to address the Council’s finding that “there is a critical shortage of affordable housing, making home acquisition by the majority of County resident workers extremely difficult, and creating a shortage of affordable rental units.” Ex. 8, § 2.96.010. Defendants have asserted that the lack of affordable housing has caused “a severe labor shortage, which is contributing to the slowing of economic growth.” Ex. D, p.6; see also Ex. 10, pp.6-7.

Additionally, according to Defendants, “the number of development permits that can be issued is limited by infrastructure constraints” such as the limited supply of

water and roadway infrastructure. Ex. D, p.7. “By adopting the Workforce Housing Ordinance, the Maui County Council addressed the need to allocate limited resources in order to maintain a sufficient workforce” Id.

As more fully discussed below, none of these asserted bases have a rational relationship to the Ordinance’s targeting of residential developers such as Plaintiffs, nor do they provide a rational basis for the Ordinance’s arbitrary 40% - 50% set-aside requirement. Rather, the evidence establishes that the Ordinance will have negative effects on the provision of affordable housing. As such, the Ordinance violates both the Equal Protection Clause and the Substantive Due Process Clause.

A. The Ordinance Violates the Equal Protection Clause on its Face and/or as Applied to Plaintiffs

The Equal Protection Clause prohibits the government from enacting legislation dictating “that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.” Reed v. Reed, 404 U.S. 71, 75-76 (1971). “A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’” Id. (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)). The government “may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the

distinction arbitrary or irrational.” City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985). Laws have been invalidated for arbitrarily discriminating against “a politically unpopular group.” Id. at 447. Residential developers are the unpopular group that is arbitrarily singled out by the Ordinance in this case.

The arbitrary distinctions that violate Plaintiffs’ right to equal protection under the law are plainly set forth in the terms of the Ordinance. The Ordinance targets owners of land suitable for medium or large scale residential development projects, like Plaintiffs. See Ex. 8 § 2.96.030. However, commercial developers and employers who create or attract jobs without adding to the supply of housing are not targeted by the Ordinance. Id. There is no rational reason to impose the onerous 50% workforce housing burden on *residential* developers who, of all segments of society, are the ones most actively adding to the supply of residences, while exempting *commercial* developers and virtually all other employers.

The affordable housing ordinance in Commercial Builders v. City of Sacramento, only applied to *non-residential* developers who were not adding to the supply of housing, but who were attracting more workers into an area that sorely needed affordable workforce housing. 941 F.2d 872, 873 (9th Cir. 1991). The city officials who proposed the ordinance commissioned a detailed study that arrived at a formula that quantified the impact of such developments on the need for affordable housing. Id. at 875. The city cut that figure in half to arrive at the

formula by which the impact fee would be calculated. Id. With respect to the Maui County Ordinance, however, there are no studies whatsoever establishing *any* net adverse impact caused by applicable *residential* development. CSOF, ¶19.

In fact, such a conclusion is counterintuitive. Logic instructs that the more housing added to the supply, the more affordable houses will become.² This is reflected in the empirical data. See Benjamin Powell, Ph.D & Edward Stringham, Ph.D, Housing Supply and Affordability: Do Affordable Housing Mandates Work?, at <http://www.reason.org/ps318.pdf> (April 2004) (inclusionary zoning less onerous than the Ordinance actually makes housing more expensive). This was also made clear to the Council through the testimony of developers, legal scholars, economists, and other commentators. See, e.g., Ex. 13, p.19 (Professor David Callies: “It’s very difficult to find a close connection or indeed much of a connection at all between the provision of market residential units and the need for affordable units.”), p.29 (Mr. Mark Walker: “[T]his bill skews the economics so as to make most currently

² Plaintiffs ask that the Court take judicial notice of well-known macro-economic principles regarding the effect of supply and demand on the price of housing. See C.I.R. v. Shattuck, 97 F.2d 790, 792 (7th Cir. 1938) (taking judicial notice of the law of supply and demand). Cf. Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575, 582 (9th Cir. 1991) (“According to the law of supply and demand, the market price of a product will rise as consumers want more of it, unless the supply increases commensurately. If the price of housing in Los Angeles is high, this is simply the free market’s mechanism for ensuring efficient allocation of existing housing resources and creating incentives for an increase in the supply of housing which, eventually, will drive down the price.”), reh’g granted, vacated on other grounds, 973 F.2d 704 (9th Cir. 1992), cert. denied, 506 U.S. 1081 (1993).

contemplated projects that will be affected by this bill unfeasible.”); Ex. 14, p.35 (Mr. Raphael Wellerstein: “[Y]our proposed bill would actually have the reverse effect of its intention and cause more economic damage to Maui”); Ex. 15, p.25 (Mayor Arakawa: “You have also heard Hawaii’s top economists . . . state unequivocally that the policy Bill 57 proposes is wrong-headed and likely to cause more harm than good.”). Moreover, the County’s own consultants concluded: “The affordable housing requirement set forth by [the Ordinance] is likely to cause many developers to reevaluate planned production and may result in a significant reduction in production.” See Ex. 19, p.1.

Indeed, the evidence establishes that the Ordinance will hurt residential development by targeting residential developers like Plaintiffs. Accordingly, this classification is not rationally related to any cognizable government interest in creating more affordable housing and therefore, violates the Equal Protection Clause on its face and/or as applied to Plaintiffs. See Parks v. Watson, 716 F.2d 646, 655 (9th Cir. 1983) (holding that City’s denial of plaintiffs’ request to vacate certain platted City streets unless the plaintiffs dedicated to City portion of its property containing geothermal wells violated Equal Protection Clause because even though City likely had a legitimate governmental purpose, “[t]he distinction drawn between [plaintiffs] and others who secured vacations [who did not own property containing geothermal wells] was not rationally related to any cognizable governmental interest

in vacation and is precisely the sort of arbitrary discrimination proscribed by the equal protection clause.”).

Defendants have not proffered any rational reason for arbitrarily choosing residential developers like Plaintiffs to carry the burden of the need for affordable housing. Certainly, the fact that there is limited infrastructure does not provide a rational basis for such a classification. Rather, the record is replete with evidence of an irrational bias against residential developers, especially as applied to Plaintiffs, even though they did not contribute to any affordable housing problem. See Ex. 13, p.113 (Member Mateo: “For too long, the developers have been running the . . . candy shop, enjoying the treats and sweets. This [Ordinance] sends a direct notice that the candy shop is under new management and there will be change.”); Ex. 14, p.36 (testifier noted the Council’s perception that “developers are money driven and evil”), p.141 (Member Anderson: “I especially applaud Chairman Danny Mateo for having the guts and the bravery to stand strong despite all the bitching and moaning by those whose pockets are heavy with profits from Maui No Ka Oi.”). “Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.” Cleburne, 473 U.S. at 448 (citation omitted).

The only basis for the Ordinance asserted by the County is that the Ordinance targets residential developers who develop homes for “millionaires from the

Mainland” to discourage such “outsiders” from moving to Maui. See Ex. E, p.25:7-10. For example, Member Hokama stated, “we need to make a direction adjustment to provide for those who are living here and not for those that would like to come and move here.” See Ex. 5, p.10. Additionally, Member Anderson stated: “Are you . . . aware that in Maui County, specifically over the last five or so years, that most of the housing has been built for people who don’t live in Maui County? Well, that’s why we feel there is a nexus.” See Ex. 13, p.21. This reason, of course, certainly does not constitute a justifiable basis for the classification. See Walsh v. City & County of Honolulu, 460 F.Supp.2d 1207, 1213-15 (2006) (holding pre-employment residency statute constitutionally impermissible as “but one in a long series of thinly veiled measures by the legislature to improperly discourage migration to Hawaii.”).

In sum, the Ordinance fails entirely to establish any rational basis for targeting residential developers such as Plaintiffs to carry the onerous burden imposed by the Ordinance to alleviate a problem that Plaintiffs have no role in causing. It is therefore unconstitutional and invalid on its face and/or as applied.

B. The Ordinance Violates Similar Provisions of the Hawai`i Constitution

The Equal Protection Clause of the Hawai`i Constitution would similarly prohibit enforcement of the Ordinance. In Hasegawa v. Maui Pineapple Co., Ltd., 52 Haw. 327, 475 P.2d 679 (1970), the Director of Labor and Industrial Relations

(“Director”) alleged that a statute that required private employers who employed more than 25 persons to pay their employees during service on a jury or public board violated the Equal Protection Clause. Id. The Hawai`i Supreme Court agreed with the Director that although the purpose of the statute was legitimate, imposing the costs on private employers constituted an irrational classification. Id. at 329-33, 475 P.2d at 681-84. The Court stated that “there is no rational basis for singling out this one group from the general populace in seeking to achieve the legislative purpose of [the statute]. . . . The cost of a proper state function conducted for the public benefit cannot be arbitrarily charged to one class in the society.” Id. at 333, 475 P.2d at 683. Thus, the Court held that the statute violated the Equal Protection Clauses of both the Hawai`i and Federal Constitutions. Id. Similarly, there is no rational basis in this case for singling out residential developers such as Plaintiffs to achieve the County’s purpose of providing affordable housing in Maui County.

C. The Ordinance Violates the Substantive Due Process Clause on its Face and/or as Applied to Plaintiffs

The U.S. Supreme Court, in Lingle v. Chevron, 544 U.S. 528, 548 (2005), reaffirmed the viability of due process challenges to property regulation:

An inquiry of this nature [analyzing the effectiveness of property regulation in achieving a legitimate public purpose] has some logic in the context of a due process challenge, for a regulation that fails to serve any

legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.

544 U.S. at 542 (internal citations omitted; emphasis added). Moreover, in his concurrence, Justice Kennedy took special care to indicate that “today’s decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process. The failure of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry.” *Id.* at 548-49 (Kennedy, J., concurring) (emphasis added). The U.S. Supreme Court is unanimous in holding that, “if a government action is found to be impermissible—for instance because it . . . is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.” *Id.* at 543. Plaintiffs bring such a claim here.

Substantive due process challenges to legislation are reviewed as follows:

A municipal act that neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights will violate substantive due process rights when it is shown that the action is not “rationally related to a legitimate governmental purpose.” *Munoz v. Sullivan*, 930 F.2d 1400, 1404 (9th Cir. 1991). We will strike down a statute on substantive due process grounds if it is arbitrary and irrational. *Del Monte Dunes v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990).

Richardson v. City & County of Honolulu, 124 F.3d 1150, 1162 (9th Cir. 1997).

Here, even if the stated goal of the Ordinance is a legitimate purpose, the Ordinance imposes such unprecedented, harsh and arbitrary requirements that have

no rational relationship to this purpose that it violates the Substantive Due Process Clause and should be struck down.

1. The Ordinance is Invalid on its Face

a. The Ordinance Does Not Rationally a Legitimate Governmental Purpose

This Court has previously struck down a Honolulu ordinance where, “although the Ordinance was enacted to further a legitimate public purpose, the means chosen by the drafters of the Ordinance do not rationally further that purpose.” Richardson v. City & County of Honolulu, 759 F. Supp. 1477, 1488 (D. Haw. 1991) (“Richardson I”).³ In Richardson I, the City and County of Honolulu (“City”) enacted an ordinance imposing a cap on renegotiated lease rents for residential condominiums. Id. at 1479. The Court found that, although the ordinance had a valid purpose to reduce the cost of leasehold housing in Hawai‘i, the means used did not reasonably further those goals. Id. at 1493-94. Here, as in Richardson I, although the Ordinance may have been enacted to further a legitimate public purpose, it chooses irrational means.

The County has defended the Ordinance as a measure to help the economy by attracting middle-class and upper middle-class workers to relocate to Maui, and to encourage resident workers to stay on Maui. See Ex. D, p.6; Ex. 10, pp.6-7.

³ Richardson I is still good law with respect to its discussion on substantive due process. See Lingle, 544 U.S. at 541 (noting that the “substantially advances” test can be used in the substantive due process analysis).

The County found that one reason workers were leaving or not relocating to the county was the high cost of housing. Id.; see also Ex. 8 § 2.96.010. While this problem might have been addressed in many different ways, chilling residential development cannot be one of them.

As noted above, in Commercial Builders, the affordable housing ordinance only applied to *non-residential* developers, and was enacted only after a detailed study that arrived at a formula which quantified the impact of such developments on the need for affordable housing. 941 F.2d at 875. Unlike the ordinance in that case, the Ordinance here was not based on any studies establishing a relationship between applicable residential development projects and a *net* adverse effect on either the affordability of housing generally or on the availability of housing affordable to the targeted groups. CSOF, ¶19.

Even assuming, *arguendo*, that Defendants could muster some proof that projects adding five or more residential units will create the need, during construction or otherwise, for imported workers in the targeted income groups not already living on Maui (i.e., increased demand), they further must show that any such effect on the need for affordable housing is not *offset* by the permanent increase of at least five residences in the overall housing market (i.e., increased supply). Furthermore, assuming, *arguendo*, that such projects might draw workers to Maui, then discouraging such projects cannot, as a matter of law, advance

Defendants' asserted goal of attracting workers to Maui to alleviate the labor shortage and boost the economy. Similarly, hindering medium and large scale residential projects would not be a rational way to advance the County's stated objective "to encourage the provision and maintenance of residential workforce housing units" Ex. 8 § 2.96.010.

As detailed above, the Council ignored the warnings of various developers, scholars, economists, and other commentators that the Ordinance would result in less residential production and would do more harm than good. See supra Section IV.A. Indeed, the Ordinance irrationally squelched residential development, including Plaintiffs' planned 251 multifamily dwelling units, which would have added hundreds of units to the housing market. See CSOF, ¶42; Ex. 19. The fact that a handful of developers have signed a Workforce Housing Agreement or have indicated that they are capable of complying with the Ordinance does not make it valid, or even prove it is working. As this Court recognized in its July 3, 2008, Order, "[a] third party's acquiescence or decision not to challenge a law does not somehow insulate that law from legal challenges by others." Kamaole Pointe Development LP v. County of Maui, 2008 WL 2622819, at *16 (D. Haw. July 3, 2008).

Furthermore, the inadequacy of the County's infrastructure does not provide a rational basis for the Ordinance. The lack of infrastructure does not give

Defendants the right to “allocate limited resources” that it does not own—including Plaintiffs’ land—to satisfy unrelated goals. Defendants’ theory that there is a limited number of development permits merely underscores how Defendants seek to use their “supply” of building permits to leverage unrelated set-asides. Plaintiffs’ projects are not a municipal resource to be harvested. “[T]he right to build on one’s own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a ‘government benefit.’” Nollan v. Calif. Coastal Comm’n, 483 U.S. 825, 833 n.2 (1987).

In short, there is no rational basis for the Ordinance inasmuch as its onerous impositions do not further a legitimate governmental purpose. Perhaps the only purpose it serves is to discourage development of homes that have the possibility of being sold to “millionaires from the Mainland.”⁴ Such a rationale does not satisfy the rational basis test. Accordingly, the Ordinance, on its face, violates Plaintiffs’ right to substantive due process because it is arbitrary, unreasonable, and not rationally related to the purported legislative purpose of addressing the affordable housing shortage in Maui County.

⁴ Notably, Plaintiffs’ projects were intended to provide non-luxury, multi-family housing to Maui residents. See Ex. 3.

b. The 40% - 50% Set-Aside is Arbitrary and Unreasonable

Additionally, the Ordinance imposes such unprecedented, harsh and arbitrary set-aside requirements that it violates substantive due process on its face. Defendants contend that the Ordinance is “a valid inclusionary ordinance, of the type that has withstood constitutional scrutiny in any number of jurisdictions,” but can cite no case involving an ordinance with such onerous requirements. City officials in Commercial Builders, discussed above, conservatively cut in half what their “detailed study” found to be the impact of commercial developers on the need for affordable housing. 941 F.2d at 875. By contrast, here, the whopping 50% figure was produced by politics, plucked from thin air without a single study justifying the unprecedented set-aside percentage. See Ex. 14, p.136 (Member Molina expressing his concerns that the enactment of the Ordinance has “turned into a political circus”).

The only case cited by Defendants in defense of the Ordinance’s validity is Home Builders Assn. of Northern California v. City of Napa, 90 Cal. App. 4th 188, 192 (2001), cert. denied, 535 U.S. 954 (2002), which is easily distinguishable. First, the ordinance in that case required only 10 percent of all newly constructed units to be “affordable.” Id. Here, the Ordinance requires that any applicable development dedicate 40% - 50% of units developed to be sold or rented as affordable housing. Also, the municipal government in City of Napa conducted a

study to justify the existence of a nexus, and had a waiver procedure that was not proven to be a sham, unlike the waiver process here.

c. The Waiver/Appeal Provision Does Not Cure the Ordinance's Facial Invalidity

While it is unlikely that a meaningful opportunity for a waiver could save such a deeply flawed Ordinance that lacks, as it does, any rational basis, the Council's repudiation of the waiver provision set out in the Ordinance proves it is a sham and subterfuge. Moreover, the fact that the Council itself hears such appeals without a provision for judicial review further demonstrates the Ordinance's facial invalidity.

The County Council unequivocally and emphatically repudiated the waiver provision in the Ordinance. As Member Victorino stated: "*We're not going to grant waivers. . . We've talked about it. We had a conference last week Friday on it, and we're not going to change our mind.*" See Ex. 5, p.11 (emphasis added). Not one of Victorino's fellow councilmembers disavowed the accuracy of his report of their deliberations that had taken place the previous Friday, July 20, 2007. Because Plaintiffs' was the first waiver request to come before the Council, Corporation Counsel had cautioned Defendants that their actions could set

precedent: “As in any case, the initial one may reflect on future appeals.” Id. at p.5.⁵

Furthermore, the Ordinance uproots all governmental *ad hoc* discretionary decision-making from its usual locus in administrative agencies having actual land use expertise (and subject to contested case procedures and judicial review), and transplants such processes into a legislative body (the County Council) that is ill-equipped, unaccustomed and disinclined to fairly adjudicate waiver requests. See Ex. 8 § 2.96.030(C). The Council exercises such adjudicatory powers under the Ordinance with no procedural standards and no judicial review. In that forum, as Defendants made clear, such “adjudications” are made, not with reference to any legitimate land use considerations that would justify denying building permits altogether, but rather are rendered with the sole objective of forcing landowners to subsidize affordable housing. This Court has determined that such lack of individualized consideration as well as a meaningful mechanism for review evidences constitutional infirmity. See Richardson v. City & County of Honolulu, 802 F. Supp. 326, 335-37 (D. Haw. 1992) (finding ordinance defective because: (1) it did “not provide for consideration of individual factors which may affect the parcel of real property at the time of renegotiation,” (2) it did not account for

⁵ Defendants have alleged that no other developers have applied for a waiver or appeal. Assuming this is true, given that the waiver and appeal process is clearly a sham, it is no wonder.

situations where the landowner was unable to obtain a “fair rate of return,” and (3) the “lack of individualized consideration [was] further exacerbated by the notable absence of any meaningful review process.”⁶

2. In the Alternative, the Ordinance is Invalid as Applied to Plaintiffs.

In applying the Ordinance, Defendants made Plaintiffs go through the paces (and expense) of a sham appeal and waiver process, demanding that they submit numerous copies of their hundreds of pages of detailed evidence, only to arbitrarily reject the appeal out of hand. Defendants’ decision was allegedly based on a “finding” of a nexus. See Ex. 12. This Court has the entire verbatim minutes of the Council’s policy meeting at which Defendants heard Plaintiffs’ appeal. See Ex. 5. The *only* evidence before the Council was the undisputed evidence presented by Plaintiffs of an *absence of nexus*, and testimony from Stan Franco who merely testified about the pricing of Plaintiffs’ units being out of reach of most Maui residents. Id. at pp.2-3. Mr. Franco’s testimony did not address the nexus issue at all, and provided no basis to refute Plaintiffs’ extensive evidence.

Resolution 07-100 denied Plaintiffs’ appeal “after due consideration of the evidence *and other relevant facts and circumstances.*” Ex. 12 (emphasis added).

⁶ This type of unconstitutional “out and out plan of extortion,” see Nollan, 483 U.S. at 437, appears to have motivated the passage of the Ordinance. See, e.g., Tavares campaign website, attached as Ex. 17, pp.8-9 (“By resolving the water issue we can require developers to agree to a reasonable percentage of affordable homes or they will simply not get support for water on their projects.”).

Defendants never identified what extraneous matters they considered. It is doubtful that the Council even debated the merits of Plaintiffs' request since they indicated that they would *never* grant waivers. Id. at p.11.

Plaintiffs' experience illustrates precisely the unconstitutional defects of the Ordinance. At the committee "hearing," Defendants showed that the only "nexus" they cared about was how Plaintiffs' projects were going to provide affordable housing. Defendants ignored the real issue: whether there is any evidence that Plaintiffs' projects would *make the problem worse*. There was *no evidence* before the Council that Plaintiffs' projects would make housing less affordable to Maui residents. Plaintiffs' evidence that their projects were likely to have a positive or, at worst, neutral effect was undisputed. See Exs. 3-5.

Moreover, due to the Ordinance, Plaintiffs' will not be able to realize a "reasonable return." The Ordinance effectively killed their development projects. The County's own retained expert appraiser, Glenn Kunihisa, MAI, analyzed the impact of the Ordinance, and corroborated Plaintiffs' own assessment that they will be operating at a loss if they proceed with their planned development under the Ordinance. See Ex. 18.⁷ Mr. Kunihisa opined in two reports to *the County's attorney* that "the land has no value" for development purposes due to the

⁷ The County's appraiser provided this information in the context of a condemnation proceeding involving a portion of Plaintiff Alaku Pointe, LP's property which is the subject of this lawsuit in County of Maui v. Alaku Pointe, LP, et al., Civ. No. 06-1-0302(1) (Second Circuit Court). See Ex. 18.

affordable housing set-asides required by the Ordinance, and that, factoring in the in lieu fee, the “land value would probably result in a negative number.” Id. No matter what size or type of residential development Plaintiffs construct, they will be faced with the inescapable requirement of selling either 40% or 50% of their final product at costs that cannot adequately cover their expenses.

The fact that other developers can afford to comply with the Ordinance’s extortionate requirements does not refute the Ordinance’s unconstitutionality. Rather, a review of those developments demonstrates that the only developers that can afford to comply with the Ordinance are those whose developments are not similarly situated to Plaintiffs—that is, they purchased their properties as low-cost-basis agricultural lands and/or their projects actually exacerbate the problems that the Ordinance is attempting to remedy. Based on the documents produced by Defendants in response to Plaintiffs’ request, the four developments whose developers have signed a workforce housing agreement pursuant to the Ordinance, to date, are: (1) Mahana Estates Subdivision; (2) Na Hale O Kilinahe (the workforce housing site of the Pulehu Farms Subdivision); (3) Kahului Town Center Project; and (4) Hyatt Regency Addition. See Exs. F, G, H, and I.

The Mahana Estates Subdivision is zoned agricultural, as was Pulehu Farms. See Exs. J, K. Plaintiffs, on the other hand, paid top dollar for their land that is already suitable and properly zoned for large housing developments. Plaintiffs’

projects are consistent with the County’s General Plan, which encourages in-fill developments, and discourages zoning changes to develop agricultural lands for golf courses and residential subdivisions. See Ex. 21.

Moreover, of the 13 affordable houses provided by Pulehu Farms via Na Hale O Kilinahe, 8 of them were already existing units. See Ex. 20. Similarly, the Kahului Town Center is providing more than 40% of its affordable housing requirement via Kahului Town Terrace, which was developed as affordable rental housing 15 years ago. See Ex. H, p.2, ¶3; Ex. L, p.2. Plaintiffs, however, do not have the luxury of simply refurbishing already-existing units to comply with the Ordinance. Additionally, the Kahului Town Center is a mixed-use project, including commercial and retail space, thus exacerbating both the lack of affordable housing as well as using infrastructure for non-residential development. See Ex. “M.” As such, for this particular project, there is actually a basis for an affordable housing set-aside requirement. Plaintiffs however, are not likewise adding to the problems alleged in support of the Ordinance.

Finally, the Hyatt Regency Addition will be adding 131 timeshare units, which unlike Plaintiffs projects, does not add to the supply of residential housing. See Ex. “I.” The fact that these developments could afford to enter into workforce housing agreements highlights why the Ordinance, as applied to Plaintiffs, is unconstitutional. Plaintiffs are not proposing commercial development or timeshare

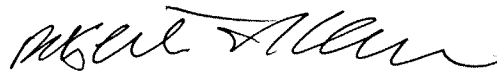
units, but rather, are proposing to add to the supply of residential housing on Maui. However, because Plaintiffs paid top dollar for their urban-zoned land, the Ordinance, as applied to them, renders their proposed residential development cost-prohibitive. Therefore, as applied to Plaintiffs, the Ordinance fails to accomplish its stated objective of providing affordable housing in Maui County.

Accordingly, Plaintiffs are entitled to summary judgment in their favor declaring that the Ordinance, on its face and/or as applied to them, violates the Equal Protection Clause and Substantive Due Process Clause of the United States Constitution.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully ask this Court to grant summary judgment for Plaintiffs on their claims for declaratory and injunctive relief, and request that the Ordinance be stricken as unconstitutional.

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