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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAUI VACATION RENTAL ASSOCIATION, INC., a Hawaii corporation; WILLIAM GOULD, DEBORAH VON TEMPSKY, SUCCESSOR TRUSTEE OF HELEN VON TEMPSKY TRUST; THE MOTHER OCEAN LLC AND WILLARD GARY DEARDORFF AND JOAN DEARDORFF; MANAHALE ESTATE LLC AND JAMES C. WAYNE,

Plaintiffs,

v.

CIVIL NO.: 20-00307-JAO-RT
(Declaratory Judgment and Other Civil Action)

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF WITH PREJUDICE; CERTIFICATE OF COMPLAINCE WITH LOCAL RULES 7.5 AND 7.8; CERTIFICATE OF SERVICE

MAUI COUNTY PLANNING DEPARTMENT; COUNTY OF MAUI; MAYOR MICHAEL VICTORINO, successor in interest; MICHELE MCLEAN, in her official capacity as Director of the Maui County Planning Department; DOES 1-20; JANE DOES 1-20; DOE PARTNERSHIPS 1-20; DOE CORPORATIONS 1-20; DOE ENTITIES 1-20 and DOE GOVERNMENTAL UNITS 1-20, Defendants.	JUDGE: HON. JILL OTAKE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

I. INTRODUCTION

As set forth below *Pullman*[1] abstention is not appropriate. Thus, the County request to stay the federal action while Counts III, VI, VIII, IX, XI, and XV-XVII are litigated and decided in state court should be denied. Moreover, the County's alternative request for dismissal of Counts I-IV, VI-IX, XI, XII, and XVI of the Complaint must fail because taking all the facts plead as true, Plaintiffs have sufficiently alleged a case in controversy and plead each claim for relief warranting a rejection of Defendants' motion in its entirety. Plaintiffs have a fundamental right to bring their claims and have their allegations heard in a court of law. Pleadings are not an end in themselves. They are only a means to assist in the presentation of a case to enable it to be decided on the merits. *Giuliani v. Chuck*, 1 Haw. App. 379, 386, 620 P. 2d 733, 738 (1980); *citing* 6 Wright & Miller, Federal Practice and Procedure.

II. FACTUAL BACKGROUND[2]

Fundamentally, this action arose because by adopting the Ordinance 5059, Plaintiffs' reasonable use of properties was taken away. *See* Complaint gen. The

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[1] *Railroad Commission of Texas v. Pullman Co.,* 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941).

[2] Plaintiffs request that this Court takes judicial notice of documents attached to the opposition pursuant to Federal Rules of Evidence ("FRE") 201 and *United States v.*

County of Maui rushed through a flawed, unfair, and illegal Bill 22, and in its haste against the non-resident short-term vacation rental homeowners took away their rights, including the right to renew their permits. *See Id.* at 1. Plaintiffs, the owners of the real properties on Molokai for years used their properties as permitted STRH. *See* Compl. at 55, 56, 57, 58. Ordinance 5059 banned their operations and revoked their permits without the possibility of a renewal. *Id.* at 1.

In 2012, the County of Maui adopted Ordinance 3941, to regulate short-term vacation rentals and set up a procedure to obtain STRH permits. *Id.* at 21. The purpose of the Ordinance was to protect the community character, provide unique accommodations for visitors and increase the benefits of tourism. *Id.* at 24. Mayor Alan Arakawa stated, "[t]he legislation should protect our residents from noisy rental operations while at the same time allowing legitimate rentals a way to conduct their business." *Id.* at 26. When the Ordinance 3941 was first approved, the council could

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Ritchie, 342 F. 3d 903, 908 (9th Cir. 2003) ("courts may consider certain materials-documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice-without converting the motion to dismiss into a motion for summary judgment." In addition, courts may consider evidence on which the complaint "necessarily relies" if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b) (6) motion. *See Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994), overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); see also *Warren*, 328 F.3d at 1141 n. 5, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 n. 3 (2d Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b) (6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

have created a zero cap for Molokai. *Id.* at 33. But they did not, and they allowed those permits to be issued and the use to be legally established, and renewed, provided the operators were meeting the conditions outlined in their "permits". *Id.* at 28 and Exh. A to the Compl. at 25-26 and Exh. A to MTD at 15. The intent of the Ordinance 3941 was expressly reflected in the MCC "to implement land use policies consistent with the County's general plan and the State's land use laws", "retain the character of residential neighborhoods" and "to allow for varied accommodations and experiences for visitors and to allow small businesses to benefit from tourism." (emphasis added). *Id.* at 17-18 being MCC 19.65.010. This intent was also consistent with the Molokai Community Plan adopted in 2018. *See* Compl. at 39. As requested by Council Chair Danny Mateo, in 2014 a review of the Ordinance 3941 was conducted and reported that the law was working. *Id.* at 23, 29-30.

In reliance on Ordinance 3941, Plaintiffs followed the rigorous and pricy requirements of the permitting process, made investments and expanded efforts to comply with the conditions of the STRH permits to obtain the promised renewal.[3] *Id.* at 36. Meantime, enacting of ordinance 5059 originated as a county

[3] Under MCC 19. 65.070B ". . . in reviewing a renewal application, the director or Molokai planning commission as appropriate shall require evidence of compliance with conditions of the short-term rental home permit and this chapter. The permit shall remain in effect while the renewal application is being processed for up to six months after the expiration date, unless the applicant fails to provide requested information to the department within sixty days."

communication from former Council member Stacey Crivello seeking a cap of 40 permits for Molokai. *Id.* at 38. It did not seek to eliminate existing permits. In the Molokai planning commission meetings, or subsequent committee meetings, no evidence was ever brought up as basis for setting a cap at zero. *Id.* at 48 and MTD footnote 4. Nevertheless, under the sway of corporate hotel interests (which Defendant describes as supposed "community outcries") Ordinance 5059 passed and imposed the strictest regulation a municipality can impose, a flat prohibition of operations despite the absence of any specific complaints. *See MTD* at P. 12-13. It is simply politicians picking winners (hotels) and losers (short-term rentals homeowners) via unconstitutional means.

I. LEGAL STANDARD

FRCP12(b)(6) does not present a high hurdle to clear — "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v Twombly*, 550 U.S. 544, 570 (2007)); see also *Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (9th Cir. 2008)); Fed. R. Civ. P. 8(a)(2) & 12(b)(6). It need only allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp*, 550 U.S. 544, 570 (2007). The Court must accept as true all material allegations in the complaint, as well as any reasonable inference that may be drawn from them. *Rowe v. Educ. Credit Mgmt.*

Corp., 559 F.3d 1028, 1029-30 (9th Cir. 2009). It must construe the complaint in a light most favorable to the plaintiff. *Id.* Plaintiffs' complaint is, at a minimum, a "short and plain statement" which gives the Defendant "fair notice of what claims are and the grounds upon which they rest." *See* FRCP 8(a)(1). Moreover, pleadings must be construed to do justice. Rule 8(e) of the FRCP.

II. PULLMAN ABSTENTION DOES NOT APPLY

Pullman abstention does not apply. *See Midkiff v. Tom*, 702 F.2d 788, 799 (9th Cir. 1983) (Pullman abstention on state constitutional grounds is generally "limited to application of a specialized state constitutional provision with no clear counterpart in the federal constitution."), rev'd on other grounds sub nom. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 81 L. Ed. 2d 186, 104 S. Ct. 2321 (1984). And even if state issues pervade that claim, there is no authority for abstaining from non-constitutional issues simply because of the significance of state law. *See Tomiyasu v. Golden*, 358 F.2d 651, 654 (9th Cir. 1966). Plaintiffs' constitutional claims under the equal protection and due process are based on their fundamental right to make reasonable use of their properties and their legitimate claim of entitlement, after going through an onerous permitting process and meeting the permitting criteria for years. *See* Compl. at 36. Plaintiffs' permits were decreed out of existence without due process of law because of alleged unsubstantiated "community outcries." *See* MTD at P. 13.

Abstention from the exercise of federal jurisdiction "is the exception, not the rule" *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S. Ct. 1236, 1244, 47 L. Ed. 2d 483 (1976) (underline added). *Pullman* abstention is appropriate only when three concurrent criteria are all satisfied: (1) the federal plaintiff's complaint must require resolution of a sensitive question of federal constitutional law; (2) that question must be susceptible to being mooted or narrowed by a definitive ruling on state law issues; and (3) the possibly determinative state law must be unclear. *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1104 (9th Cir. 1998). Thus, the absence of any one of these three factors is sufficient to prevent the application of Pullman abstention. *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003).

Not only is there a presumption in favor of retention of federal jurisdiction once obtained, it is also well established that the doctrine "contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S. Ct. 1177, 1182, 14 L. Ed. 2d 50 (1965). Pullman-type abstention is not required where the federal court faces the naked question, uncomplicated by an unresolved state law, . . . whether [the contested state law] on its face is unconstitutional. *Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971). For purposes of Pullman abstention, "[r]esolution of an issue of state law might be uncertain because the particular statute is ambiguous, or

because the precedents conflict, or because the question is novel and of sufficient importance that it ought to be addressed first by a state court." *Pearl Inv. Co. v. City & Cnty. of San Francisco*, 774 F.2d 1460, 1465 (9th Cir. 1985).

Plaintiffs' challenge of Ordinance 5059 does not present with the novel state law issues and the state law in question is not likely to obviate the need for adjudication of the constitutional question. Ordinance 5059 is unambiguous and there are no novel state law issues present– Maui County has eliminated **all** short-term rentals of single-family homes on Molokai, with no exceptions. Plaintiffs already had permits and challenged the legality of Ordinance 5059 banning their operations and revoking their permits without renewal. *See* Compl. at 1, 55, 56, 57, 58. Plaintiffs seek a general, facial review of the Ordinance 5059. There is no unsettled question of state law that could obviate Plaintiffs' federal claims, no complex statutory scheme based primarily on local factors, no pending state court proceeding, and no other reason for this Court to abstain. Ordinance 5059 on its face, violates federal law and it is not uncertain. It is well settled that there are limits on simply wiping out settled and long-standing expectations without due process and by taking and not paying for them. *See e.g. Brown v. Thompson*, 91 Hawai'i 1, 11, 979 P.2d 586, 596 (1999) (boat mooring and live-aboard permits are property and may not be revoked without due process); *Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Hawai'i 343, 353-54, 949 P.2d 183, 193-94 (Haw. Ct.

App. 1997) (vested rights are property rights for purposes of the federal and state constitutions). Plaintiffs have "a legitimate claim of entitlement" to the right to continue their STRH operations but Ordinance 5059 decreed Plaintiffs' property rights out of existence. There is no unsettled question of law, thus, Plaintiffs' claims do not require this Court to "forecast" state law. While it is true, that the Ordinance 5059 in question has not been construed by the state courts, mere absence of judicial interpretation does not necessarily render its meaning unsettled or uncertain. Moreover, Ordinance 5059 is not ambiguous or subject to a limiting construction, in fact, its language is very clear in effect, that is, to ban the short-term vacation rental operations and terminate Plaintiffs' permits on December 31, 2020. *See* Compl. at 55, 56, 57, 58. There is no other interpretation of the Ordinance 5059 under which Plaintiffs might be permitted to conduct their operations. Therefore, even if the remaining factors are satisfied, abstention is inappropriate.

III. COUNT I SHOULD NOT BE DISMISSED[4]

Plaintiffs properly alleged that they suffered an actual injury, caused by enacting the Ordinance 5059. *See* Compl. at 61. An irreparable injury occurs when a property interest is affected, loss of real property or business enterprise is likely to occur, or reputation is being harmed. *See State of Hawaii v. Trump*, No.

[4] Plaintiffs briefly address this count out of abundance of caution since Defendant moved to dismissed it as part of due process arguments. See MTD at IV.B. on Page 17.

1:2017cv00050 - Document 270 (D. Haw. 2017), *see also Varsames v. Palazzolo*, 96 F.Supp.2d 361, 367 (S.D.N.Y. 2000) (holding that deprivation of the movants' ability to make productive use of their own property rises to the level of irreparable injury). Likewise, if a party's very business existence is threatened, such as by a loss of customers, the harm is considered irreparable. *See American Passage Media Corp.*, 750 F.2d 1470 (9th Cir. 1985). Irreparable injury may also take the form of injury to competition. *See American Passage Media Corp.*, 750 F.2d at 1473. Plaintiffs have alleged that after going through an onerous permitting process and meeting the permitting criteria for years Plaintiffs' legitimate claim of entitlement were decreed out of existence without due process of law by enacting Ordinance 5059. *See* Compl. at 36, 67-68. Accordingly, Plaintiffs have a claim for a declaratory relief that the law is invalid and unenforceable in its entirety or, at a minimum, as to Plaintiffs and all other similarly situated permit holders in Molokai.

IV. COUNTS II-III FOR DUE PROCESS ARE PROPERLY PLEAD

Counts II, III and IV alleging due process are properly plead because Plaintiffs' fundamental right to make reasonable use of their properties and their legitimate claim of entitlement were decreed out of existence without due process of law by enacting Ordinance 5059 and their property interest protected by the Constitution was properly plead. *See* Compl. at 36, 62-69. "[T]he right of a property owner to the continued existence of uses and structures which lawfully existed prior

to the effective date of a zoning restriction is grounded in constitutional law." *Waikiki Marketplace Inv. Co.*, 949 P.2d at 193 (internal citation omitted) (analyzing the U.S. Constitution Amend. V and Haw. Const art. I, § 5). Consequently, the states do not have a completely free hand in regulating and defining property rights, as their own constitutions and the United States Constitution place limits on their ability to simply wipe out settled and long-standing expectations without due process and by taking and not paying for them. *Id.* at 193-94 ("due process principles protect a property owner from having his or her vested rights interfered with, ..., and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate."); *see also Robert D. Ferris Trust v. Planning Commission of County of Kauai, 138 Hawai'i 307 (2016)* (Hawaii case law recognizes that pre-existing property rights are considered "vested rights" and may not be abrogated by zoning ordinances). Here, as properly alleged, in compliance with Ordinance 3941 Plaintiffs obtained STRH permits and relied on assurances and applicable renewal requirements. *See* Compl. at 36, 55-58. Per MCC 19. 65.070, those renewal conditions include the evidence of compliance with conditions of the short-term rental home permit and compliance with MCC 19.65. *Exh. A to* Compl. *at 25-27*. The renewal of the permit is not remotely as discretionary as Defendants claim it to be, and they are cutting off all permits at the end of December. *Id.* at 55-58. The criteria are enumerated and were historically followed, the main one being

the absence of noise complaints from neighbors. *Id.* at 27. Plaintiffs complied with those conditions and made irrevocable commitments which created "a property right deserving constitutional protection." *County of Kauai v. Pac. Standard Life Ins. Co.*, 65 Haw. 318, 320-21, 653 P.2d 766, 770 (1982) [hereinafter Nukolii]. These property rights are not limited to real property and include development and permit rights (. . .). *See Kaiser Aetna v. United States,* 444 U.S. 164, 100 S. Ct. 383, 62 L.Ed.2d 332 (1979) at 178 ("economic advantage" that has "the law back of it" cannot be interfered with without exercising eminent domain); Arrow of Time: Vested Rights, Zoning Estoppel, And Development Agreements in Hawai'i 27 U. Haw. L. Rev 17 (2004) *citing* Order Granting Summary Judgment, *Maunalua Assocs. v. City & County of Honolulu*, No. 89-3539-119SSM (Haw. Cir. Ct. filed Nov. 14, 1989) (noting just compensation and damages owed for taking land and permit).

A. Plaintiffs' Claims for Procedural Due Process Under the U.S. and Hawaii Constitutions Are Properly Plead

Plaintiffs sufficiently plead that Defendants failed to take fair steps and ensure the fair manner of adoption of Ordinance 5059 before deprivation of Plaintiffs' significant property interest. *See* Compl. at 62-68. Determination of the specific procedures required to satisfy due process requires a balancing of several factors under the *Matthews* test (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and

the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail. *Mathews v. Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)*; Silver v. Castle Mem'l Hasp.*, 53 Haw. 475,484,497 P.2d 564, 571 (1972). The County's passing of the Ordinance 5059 was not meaningful, there was no showing that the permitted properties had negative impacts, the driving force was (supposedly) generalized opposition to the STRH. *See Id.* at 48 and MTD at P. 12-13. Defendants disregarded Plaintiffs' legitimate claim of entitlement and right to make reasonable use of their property, making it an unconstitutional violation of due process. *See* Compl. at 67. Just like a vessel and its accompanying mooring and live-aboard permits are constitutionally protected "property," of which an individual may not be deprived without notice and an opportunity to be heard. *Brown,* 91 Hawai'i 1, 979 P.2d 586 (1999). This meaningful way of being heard was completely disregarded. Plaintiffs were blindsided. In *Tri County Industries, Inc. v. District of Columbia*, the court reinstated the original jury verdict of $5,000,000 for the suspension of a building permit in response to public opposition, in violation of the permit holder's right to procedural due process. *Tri County Industries, Inc. v. District of Columbia*, 200 F.3d 836 (D.C. Cir. 2000). Certainly, Plaintiffs adequately pled a procedural due process claim. *See* Compl. at 36, 62-68.

B. Plaintiffs Stated a Claim for Substantive Due Process under the U.S. Constitution

Plaintiffs sufficiently alleged that Ordinance 5059 is arbitrary and unreasonable and does not advance legitimate governmental interests that serve the public health, safety, morals, and general welfare. *See Applications of Herrick*, 82 Haw. 329, 349, 922 P.2d 942, 962 (1996) (under minimum rationality due process analysis, a statute must be rationally related to the public health, safety, or welfare); *also see Lum Yip Kee, Ltd. v. Honolulu*, 70 Haw. 179, 190, 767 P.2d 815, 822 (1989) (the zoning power of the counties is limited to those regulations that are reasonable in the exercise of the police power). As plead in the Complaint, and contrary to Defendants' argument that there was no great tradition of protecting short-term rentals and that they were generally unlawful, the very purpose of the Ordinance 3941 was to regulate short-term vacation rentals by allowing legitimate rentals a way to conduct their legitimate and beneficial businesses. *See e.g.* Compl. at 24, 26 and MCC 19.65.10. The goal was to protect the community character, provide unique accommodations for visitors and increase the benefits of tourism. *Id.* The stringent permitting requirements were imposed to protect the residents from noisy rental operations. *See Id.* at 28, 35. The County intensified enforcement of Ordinance 3941 to maintain the residential character. *See Id.* at 31-32. Plaintiffs (who are part of only 17 permit holders), despite having no complaints against them, were foreclosed from renewal, in effect banned from operations, with no showing that they were

negatively impacting neighborhoods. *Id.* at 37, 48. The sole driving force were supposed generalized community outcries (as opposed to any actual problem with the use of any particular Plaintiff's property) to take away the permits from permit holders. *See* MTD at P. 12-13. In *Town of Orangetown v. Magee*, the New York Court of Appeals affirmed an award of $5,137,126 for violation of substantive due process rights where a municipality interfered with an owner's property rights simply to appease public opposition to an already-approved project. *Town of Orangetown v. Magee*, 665 N.E.2d 1061 (1996). Here, the County banned the short-term vacation rentals *with no rational basis* rather because of pure politics, bias against mainland owners, phony hysteria and to appease corporate hotel interest. *See MTD* at P. 12-13. The County's ban bears no reasonable relation and is inconsistent with the objectives of the general plans. *See* Compl. at 24, 39. Defendants decided to wipe them all out on Molokai despite the absence of a single individualized complaint against any Plaintiff. Plaintiffs have adequately alleged the claim for a substantive due process under U.S. Constitution.

C. Plaintiffs Stated a Claim for Substantive Due Process Under Hawaii Constitution

Plaintiffs gave sufficient notice of violation of a substantive due process under Hawaii Constitution. *See* Compl. 70-75. Aside from being vague, the Ordinance 5059 is not a rational exercise of legislative power and is standard-less. See *Id*. It was a rubber-stamp for the phony alleged "outcry." *See* MTD at P. 12-13.

V. COUNT IV IS PROPERLY PLEAD

Plaintiffs sufficiently plead a violation of their right to equal protection. Compl. at 76-78. Parties who have been disadvantaged by distinctions drawn by the legislature in the enactment of a statute have standing to challenge the constitutionality of the statute on grounds that it breaches the equal protection of the laws guaranteed by the U.S. Constitution Amend. XIV and this section. *Shibuya v. Architects Haw.*, 65 Haw. 26, 647 P.2d 276, 1982 Haw. LEXIS 184 (Haw. 1982). The equal protection clause does not prohibit the state from passing laws which treat classes of people differently, but only from treating classes differently when the basis of the discrimination does not bear a rational relationship to a legitimate statutory objective. *State v. Bloss*, 62 Haw. 147, 613 P.2d 354, 1980 Haw. LEXIS 163 (Haw. 1980). Whether the level of review is based on a protected class or on a rational basis, Defendants cannot even meet the lowest standard. Under rational basis review, a classification will be upheld as long as there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. *Heller v. Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). A law must have only a legitimate interest, and that the law rationally undertakes that interest. *Romer v. Evans,* 517 U.S. 620, 116 S. Ct. 1620, 134 L.Ed.2d 855 (1996). Defendants claim that the preservation of the character of neighborhoods is that interest. *See* MTD at 15. But there is no connection between enacting the Ordinance

5059 and preservation of the character of neighborhoods. *See* Compl. at 48. Plaintiffs' properties have been and are part of their character of their neighborhoods and had never had any complaints filed against them. *Id*. at 55-58. Therefore, there were no legitimate interests in need of protection. Plaintiffs did nothing wrong but are suffering a collective punishment for the very reason stated by the County of Maui: because they are from out of State. *Id.* at 50. Their rights were taken away because of the community outcry against haoles permit holders making it discriminatory as to certain people or certain pieces of property (euphemistically described by Defendant as "community supported" cap on TVRs and STRHs). *See* MTD 12-13. There was no rational basis to enact Ordinance 5059.

VI. COUNT VI IS PROPERLY PLEAD

The courts have long recognized that zoning performs a valid police-power function when exercised in conformity with enabling legislation and constitutional rights. Plaintiffs properly plead that Defendants failed to follow HRS Section 46-4 and did not act within the framework of a long-range, comprehensive general plan. *See* Compl. 48, 51, 84-89. The thrust of HRS 46–4(a) is not to dictate the manner in which zoning ordinances are promulgated, but to assure that, however enacted, those ordinances comport with that long-range general plan, "and to insure the greatest benefit for the State as a whole." *Kauai Springs, Inc. v. Planning Comm'n of Kaua'i,* 133 Hawai'i 141, 324 P.3d 951 (2014).

The Ordinance 5059 is contrary to Ordinance 3941, and the MCC 19.65.70 which sets the renewal of permits on Molokai and does not comply with the general plans. Ordinances must not only conform with the express terms of the charter, but they must not conflict in any degree with its object or with the purposes [of the charter]. *Harris v. De Soto*, 80 Hawai'i 425, 431, 911 P.2d 60, 66 (1996), citing *Fasi v. City Council*, 72 Haw. 513, 518, 823 P.2d 742, 744 (1992). Accord, *Neighborhood Board No. 24 (Waianae Coast) v. State Land Use Commission*, 64 Haw., 265, 639 P.2d 1097 (1982). If at the time Ordinance 3941 was enacted, Molokai had set a cap of zero, the arguments would have been different, but no cap was initially set for Molokai and permits were lawfully issued. The initial county communication from Council member Crivello originating the enactment of Ordinance 5059 did not seek to eliminate existing permits rather to set a cap of 40 permits for Molokai. *See* Compl. 38. No evidence was ever presented showing unmitigated impacts warranting any ban. *Id.* at 48. Nevertheless, under supposed public pressure against non-local STRHs, Ordinance 5059 imposed the strictest regulation requiring invalidation under HRS 46-4.

VII. COUNT VII IS PROPERLY PLEAD

Plaintiffs sufficiently alleged a claim under 18 USCS § 1346. *See* Compl. 91-92. The scope of 18 USCS § 1346 includes the prosecution of state and local officials and public employees for depriving citizens they serve of the right to their honest

services. *United States v. Antico*, 275 F.3d 245 (3d Cir. 2001), cert. denied, 537 U.S. 821, 123 S. Ct. 100, 154 L. Ed. 2d 30 (2002), *see also United States v. Frankel*, 721 F.2d 917, 920-21 (3d Cir. 1983) ("Schemes to defraud come within the scope of the statute even absent a false representation."). Count VII should survive. Plaintiffs paid taxes, jumped through all the hoops to get their permits and are now suffering simply due to an illegitimate scheme to deny them their property rights simply based on where they are from.

VIII. COUNT VIII IS PROPERLY PLEAD

The County's power to legislate under Art. 2, 3, and 4 of the Maui County Charter derives from HRS 91. The agencies, such as the Department of Planning, can promulgate rules within the scope of its lawful authority, but the process by which they reach that result must be logical and rational. *See* Compl. at 98. The adoption of the Ordinance 5059 was not logical, relied solely on the public outcry in contradiction to the intent of the county communication originating its adoption, the general plans and long-term rights of the permit holders like Plaintiffs. *Id.* at 48, MTD at 12-13. Here, many permit holders relied on the assurances and permit renewal and were unaware of the true intentions behind the Ordinance 5059. It was adopted with no rational basis, with no consideration of the stated purpose or evaluation of relevant factors, like land use planning issues and impacts created by STRH operations, before prohibiting those operations and further renewals. *See Id.*

Defendants failed to examine the relevant data and articulate a satisfactory explanation for banning the STRH including any rational connection to the choice made. *See Id.* at 48. The process of adopting the Ordinance 5059 constitutes illegal rulemaking and is not valid or enforceable.

IX. COUNT IX IS PROPERLY PLEAD

Plaintiffs have a right to rely and relied on the assurances (assurances of the continuing nature of their short-term rental permit entitlement if the permit requirements were met) and the MCC 19.65 and the Ordinance's purpose. *See* Compl. at 101. Hawaii case law recognizes that pre-existing property rights are considered "vested rights" and may not be abrogated by zoning ordinances. *Robert D. Ferris Trust*, 138 Hawai'i 307 (2016) (citations omitted). Plaintiffs went through a rigorous permitting process, necessary inspections, expanded money and time to obtain their STRH permits and complied with the renewal requirements. *Id.* at 55-58. Those substantial expenditures were made in reliance on those assurances, the intent of the Ordinance, STRH permits and renewal policies. *Id*. 103. Under the doctrine of zoning estoppel, when a land owner changes position by substantial monetary expenditures based on "official assurance on which he has a right to rely that his project has met zoning the government may be equitably estopped based on the land owner's change of position requirements". *Life of the Land, Inc. v. City Council of Honolulu,* 60 Haw. 446, 592 P.2d 26 (1979*)* [hereinafter Life of the Land

I], on appeal after remand, 61 Haw. 390, 606 P.2d 866 (1980) [hereinafter Life of the Land II].

Once the government provides official assurances-whatever those may be under the circumstances-the property owner is entitled as a matter of law to rely on that approval in making expenditures . . . once that approval is in hand, the landowner may proceed without fear that the rug can be pulled out from under him. *See Arrow of Time* at 47 elaborating on *Nukolii* and *Life of Land II*.

Courts estop local governments from interfering with land development projects even if landowners rely on invalid governmental assurances or permits, provided they rely in good faith and the permission or approval is sufficiently definite and precise. The statutory protection of lawfully existing uses and structures "prior to the effective date of a zoning restriction is grounded in constitutional law." *Waikiki Marketplace Inv. Co.*, 949 P.2d at 193 (citing McQuillin Municipal Corporations §§ 25.180-25.180.20, at 8-9 (3d ed. 1994)). Under the United States and Hawai'i Constitutions, "preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate." *Id.* at 193-94.

Plaintiffs demonstrated they have a vested right to operate STRHs beyond the expiration date of their current permits and/or a vested right to renewal of their permits. *See e.g.* Compl. at 2, 101. Plaintiffs sufficiently plead that Ordinance 5059

is an unconstitutional restraint on property rights, its broad application unreasonably impairs previously granted property rights, and its application does not serve any legitimate public purpose or benefit.

X. COUNT XI IS PROPERLY PLEAD

For purposes of this Motion, the allegations in the Complaint are taken as true and inferences therefrom are viewed in the light most favorable to the Plaintiffs. *See Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993) at 54. The required elements of count XI have been fully plead and Defendants have been given full advisement of the allegations made against them. *See* Compl. gen. The Complaint by incorporation sufficiently sets forth factual allegations that support a claim for relief under HRS 480 because of the County's conduct. See Compl. at 107-109.

The statute "was constructed in broad language in order to constitute a flexible tool to stop and prevent unfair competition and fraudulent, unfair or deceptive business practices for the protection of both consumers and honest businessmen and [businesswomen]." *Han v. Yang,* 84 Hawai'i 162, 177, 931 P.2d 604, 619 (App. 1997)) (*quoting Ai v. Frank Huff Agency Ltd.*, 61 Hawai'i 607, 616, 607 P.2d 1304, 1311 (1980)).

The Complaint alleges that the County's acts in banning the short-term vacation rentals while allowing the vacation rentals in condos or hotels and those with conditional permits to continue unimpacted unreasonably favors the

condominiums or corporate hotel interests over the interests of residential owners like Plaintiffs. *See* Compl. at 108 and *see Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co.,* 91 Hawai'i 224, 255 n.34, 982 P.2d 853, 884 n.34 (1999). Other than scale, and the ability to ply politicians with campaign donations, there is no substantive difference between the operations of a corporate hotel and those offered by the Plaintiffs, yet the County is arbitrarily kicking the 17 short-term rental permit holders out of Molokai marketplace through Ordinance 5059 and enforcement of its absurd total ban. These allegations are sufficient to establish that Defendants have employed an unfair method of competition or engaged in unfair or deceptive acts or practices in violation of HRS 480. S*ee State ex rel. Bronster v. United States Steel Corp.,* 82 Hawai'i 32, 51, 919 P.2d 294, 313 (1996). The Ordinance is altering the *status quo* of STRH permit holders, like Plaintiffs and prohibiting them from using their property for its original intended purposes, as short-term rentals operated for years. By prohibiting STRH permit holders like Plaintiffs from engaging in short-term rentals, the County is ensuring the visitors and tourists choose only corporate hotels, which will certainly negatively affect competition. *See Field v. NCAA*, 143 Hawaii 362, 374-75, 431 P.3d 735, 747-48 (2018) (in order to establish the second element of an unfair method of competition violation, a Plaintiff must demonstrate only how a defendant's conduct *could* negatively affect competition or harm fair competition). In *Hernandez v. City of*

Hanford, 141 Cal. 4th 279, 296-97, 159 P.3d 33 (2007), the court stated that a municipality may not legislative solely to serve impermissible anti-competitive private purposes, such as providing a favored private business with monopoly power or excluding an unpopular company from the community, which is what is being alleged, here. *See Id.* at 296-97, 159 P.3d. The Complaint sufficiently alleges that the prohibition of Plaintiffs' short-term rentals on Molokai is not serving any permissible public purpose but, instead, is simply favoring the private interests of the corporate hotels located on Molokai. *See Compl.* at 9, 43, 108.

XI. COUNT XII IS PROPERLY PLED

The Supreme Court has held that the Constitution protects a right to travel from State to State. *See Crandall v. Nevada*, 73 U.S. 35, 44 (1868). This case involves the second component under the right to travel. *Saenz v. Roe*, 526 U.S. 489, 500-03 (1999). As the Supreme Court has explained, this Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). Among other things, the Clause "insures to" citizens of one State "in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness." *Paul v. Virginia*, 75 U.S. 168, 180 (1868); *see also Saenz*, 526 U.S. at 502 (noting that the Clause provides "protections for nonresidents who enter a State whether to obtain employment, to procure medical

services, or even to engage in commercial shrimp fishing" (citations omitted)). Here, Plaintiffs alleged (and indeed Defendants have admitted, as will be demonstrated in this case) that Defendants are acting with the specific intent of discriminating against property owners from outside of the State. *See* Compl. at 50, 111. Plaintiffs have standing because "[o]ne whose legitimate interest is in fact injured by illegal action of an agency or officer should have standing because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal." *East Diamond Head Association v. Zoning Board of Appeals*, 52 Haw. 518, 523 n. 5, 479 P.2d 796, 799 n. 5 (1971) (quoting *Davis, The Liberalized Law of Standing*, 37 U.Chi.L.Rev. 450, 473 (1970)).

XII. UNJUST ENRICHMENT

This claim is based on Defendants' failure to live up to the permitting terms prescribed under the Ordinance 3941 by banning the permitted operations via Ordinance 5059 after enjoying the benefits of the permitting process. *See* Compl. at 120. Plaintiffs are simply alleging that it is unfair for the County to directly benefit from the permitting process through, among other things, permitting fees and increased taxes paid by the Plaintiffs. Taxes are listed as one of benefits that the permitting process brought to the County. *See* Compl. at 2, 36, 44. Since this case is not about the complex regulatory regime and illegal taxation, the *Burford* abstention is unwarranted because there is no reason for a state court with a greater expertise to

resolve a matter involving a complicated state regulatory scheme. *See Burford v. Sun Oil Co.,* 319 U.S. 315 (1943). Plaintiffs properly alleged that if the Ordinance 5059 is enforced against Plaintiffs, it will be unjust for the County to retain the benefits conferred on it by Plaintiffs.

XIII. CONCLUSION

Plaintiffs respectfully submit that Defendants Motion should be denied in its entirety. Alternatively, to the extent necessary and appropriate, Plaintiffs respectfully request leave to amend their pleading.

DATED: Honolulu, Hawaii, October 2, 2020.

/s/Terrance M. Revere
TERRANCE M. REVERE
MAGDALENA BAJON
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAUI VACATION RENTAL ASSOCIATION, INC., a Hawaii corporation; WILLIAM GOULD, DEBORAH VON TEMPSKY, SUCCESSOR TRUSTEE OF HELEN VON TEMPSKY TRUST; THE MOTHER OCEAN LLC AND WILLARD GARY DEARDORFF AND JOAN DEARDORFF; MANAHALE ESTATE LLC AND JAMES C. WAYNE, Plaintiffs, v. MAUI COUNTY PLANNING DEPARTMENT; COUNTY OF MAUI; MAYOR MICHAEL VICTORINO, successor in interest; MICHELE MCLEAN, in her official capacity as Director of the Maui County Planning Department; DOES 1-20; JANE DOES 1-20; DOE PARTNERSHIPS 1-20; DOE CORPORATIONS 1-20; DOE ENTITIES 1-20 and DOE GOVERNMENTAL UNITS 1-20, Defendants.	CIVIL NO.: 20-00307-JAO-RT (Declaratory Judgment and Other Civil Action) **CERTIFICATE OF COMPLIANCE WITH LOCAL RULES 7.5 AND 7.8**

CERTIFICATE OF COMPLIANCE WITH LOCAL RULES 7.5 AND 7.8

I hereby certify that pursuant to Local Rule 7.5(e) that Plaintiffs' Memorandum In Opposition to Defendant's Motion to Dismiss Complaint for

Declaratory and Injunctive Relief with Prejudice is presented in Times New Roman, 14-point font and contains 6,222 words, exclusive of case caption, table of contents, table of authorities, and identifications of counsel, as reported by the word processing system, Microsoft Word, used to produce the document.

I hereby certify pursuant to Local Rule 7.8 that the parties had a prefiling conference on August 13, 2020.

DATED: Honolulu, Hawaii, October 2, 2020.

/s/Terrance M. Revere
TERRANCE M. REVERE
MAGDALENA BAJON
Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MAUI VACATION RENTAL ASSOCIATION, INC., a Hawaii corporation; WILLIAM GOULD, DEBORAH VON TEMPSKY, SUCCESSOR TRUSTEE OF HELEN VON TEMPSKY TRUST; THE MOTHER OCEAN LLC AND WILLARD GARY DEARDORFF AND JOAN DEARDORFF; MANAHALE ESTATE LLC AND JAMES C. WAYNE,

Plaintiffs,

v.

MAUI COUNTY PLANNING DEPARTMENT; COUNTY OF MAUI; MAYOR MICHAEL VICTORINO, successor in interest; MICHELE MCLEAN, in her official capacity as Director of the Maui County Planning Department; DOES 1-20; JANE DOES 1-20; DOE PARTNERSHIPS 1-20; DOE CORPORATIONS 1-20; DOE ENTITIES 1-20 and DOE GOVERNMENTAL UNITS 1-20,

Defendants.

CIVIL NO.: 20-00307-JAO-RT
(Declaratory Judgment and Other Civil Action)

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT, on today's date, a true and correct copy of the foregoing document was duly served on the following individuals through CM/ECF to their last known address below:

KRISTIN K. TARNSTROM, ESQ.
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DEPARTMENT OF PLANNING FOR THE COUNTY OF MAUI; COUNTY OF MAUI; MAYOR MICHAEL VICTORINO AND PLANNING DIRECTOR MICHELE MCLEAN

DATED: Honolulu, Hawaii, October 2, 2020.

/s/ Terrance M. Revere
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Activity in Case 1:20-cv-00307-JAO-RT Maui Vacation Rental Association, Inc. et al v. County of Maui et al Memorandum in Opposition to Motion

1 message

hid_resp@hid.uscourts.gov <hid_resp@hid.uscourts.gov> Fri, Oct 2, 2020 at 5:55 PM
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U.S. District Court

District of Hawaii

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The following transaction was entered by Revere, Terrance on 10/2/2020 at 5:55 PM HST and filed on 10/2/2020

Case Name:	Maui Vacation Rental Association, Inc. et al v. County of Maui et al
Case Number:	1:20-cv-00307-JAO-RT
Filer:	Joan Deardorff Willard Gary Deardorff William Gould Manahale Estate LLC Maui Vacation Rental Association, Inc. Mother Ocean LLC, (The) Deborah Von Tempsky James C. Wayne
Document Number:	24

Docket Text:

MEMORANDUM in Opposition re [18] MOTION to Dismiss *Complaint for Declaratory and Injunctive Relief ; Certificate of Compliance; Certificate of Service* filed by Joan Deardorff, Willard Gary Deardorff, William Gould, Manahale Estate LLC, Maui Vacation Rental Association, Inc., Mother Ocean LLC, (The), Deborah Von Tempsky, James C. Wayne. (Attachments: # (1) Certificate of Service)(Revere, Terrance)

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