IN THE CIRCUIT COURT OF THE SECOND CIRCUIT
STATE OF HAWAI'I

KAREN GOO, et al.,	)	CIV. NO. 07-1-0258(1)
	)	
Plaintiffs,	)	FINDINGS OF FACT, CONCLUSIONS OF
vs.	)	LAW, AND ORDER GRANTING
	)	PLAINTIFFS' MOTION FOR PARTIAL
MAYOR CHARMAINE TAVARES, et al.,	)	SUMMARY JUDGMENT; CERTIFICATE
	)	OF SERVICE
Defendants.	)	
	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The Court, having heard arguments regarding Plaintiffs' Motion for Partial Summary Judgment, seeking declaratory and injunctive relief, on December 9, 2008 with David Gierlach, Esq. present representing the Plaintiffs, Madelyn D'enbeau, Esq. Deputy Corporation Counsel, representing Defendant County of Maui "Defendant County"), Paul Horikawa, Esq., representing Intervenor Takahashi, and David Merchant, Esq. (*pro se* intervenor) and having considered the entire record in this case, including all the memoranda, pleadings herein, the testimony of witnesses, and having considered the arguments of counsel, and being fully apprised in the premises, hereby enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. To facilitate the reading of this order, the Court includes this section for reference regarding the multiple abbreviations and references used throughout.

Board of Variance and Appeals ("BVA")
Department of Public Works and Environmental Management ("DPWEM")
Department of Public Works and Environmental Management, Development Services Administration ("DPW&EM, DSA")
Department of Public Works and Waste Management ("DPW&WM")
Development Services Administration ("DSA")
Fairways Development or Fairways Project (also referred to as Lot 1-D)
Hawaii Revised Statutes ("HRS")
Maui County Charter ("Charter")
Maui County Code ("MCC")
Maui County Council ("Council")
Maui Lani Project District ("MLPD")
Phase I, II, and II (also referred to as Phase 1, 2, and 3)

Development of Project Districts in Maui County

1. Development of a project district is subject to three phases of approvals. Maui County Code ("MCC") § 19.45.050.
2. After receiving an application for a project district development, the planning director submits to the Planning Commission one or more proposed project district ordinances, which provide project district zoning standards including permitted land uses, densities, and heights, among other standards. MCC § 19.45.050 (A)(1).

3. The Planning Commission then holds a public hearing on the proposed ordinances in the affected community plan region. *Id.*

4. After the public hearing, the Planning Commission submits its recommendations and proposed ordinances to the Maui County Council ("Council"). The Council may approve the ordinances with or without modifications, which approval constitutes Phase I approval. *Id.*

5. "If the project district ordinance requires unilateral or bilateral agreements then, after the council approves the project district ordinance, the applicant shall negotiate the terms of the agreements with the mayor or his designated representative. Agreements shall be drafted so as to be enforceable by the County, and shall bind all persons having an interest in the property. The unexecuted agreements shall be submitted to the council. The Council may approve unilateral agreements with or without modifications and, after proper execution, shall record the agreements with the bureau of conveyances or the land court. A copy of the recorded unilateral agreement . . . shall be transmitted to the council." MCC § 19.45.050(A)(2).

6. Phase II approval encompasses the preliminary site plan, which must conform to the project district ordinance and must include proposals for streets, parking, utilities, grading, landscaping, architectural design concepts and guidelines, building elevations, building sections, construction phasing, open spaces, land uses, and signage, among other things. MCC § 19.45.050 (B)(1).

7. The planning director then submits the preliminary site plan to the Planning Commission, which holds a public hearing in the affected community plan region. MCC § 19.45.050 (B)(2).

8. The Planning Commission may approve the preliminary site plan, with or without modifications, which approval constitutes Phase II approval. *Id.*

9. After Phase II approval, the applicant submits a final site plan for the project district development to the planning director. MCC § 19.45.050 (C)(1).

10. The planning director shall approve a final site plan if it conforms in all substantial respects to the approved preliminary site plan, which approval constitutes Phase III approval. *Id.*

11. Other County land use laws shall apply within project districts, except to the extent that such laws conflict with the procedural requirements imposed pursuant to MCC Chapter 19.45, which establishes the project district processing regulations. MCC § 19.45.030.

12. The project approvals and all associated permits are a matter of public record, insofar as they are kept by the respective departments that authorized the approvals or granted the permits in the ordinary course of business.

Title 19 of the MCC

13. Title 19 of the MCC pertains to Zoning. Title 19 is divided into four Articles, of which Art. II is known as "the Comprehensive Zoning Ordinance." MCC § 19.04.010.

14. The purpose and intent of Article II, Title 19 is to "regulate the utilization of land in a manner encouraging orderly development in accordance with" state and county law, as well as the county's general and community plans. MCC § 19.04.015(A). Its purpose is also "to provide reasonable development standards which implement the community plans of the county. These standards include, but are not limited to, the location, *height*, density, massing, size, … open space, density of population, and use of buildings, structures, and lands to be

utilized for agricultural, industrial, commercial, residential, or any other purpose." MCC § 19.04.015 (C) (emphasis added).

15. The Comprehensive Zoning Ordinance contains a "supremacy clause," which states that "where this article imposes a greater restriction upon the use of buildings or premises or upon height of buildings or requires larger open spaces than are imposed or required by other ordinances, rules, regulations or easements, covenants or agreements, the provisions of this article shall govern." MCC § 19.04.030.

16. Article II contains the general definitions to be used "in title 19 of this code, unless the context clearly indicates a different meaning." MCC § 19.04.040.

17. Also contained within Article II is the generic residential height restriction, which states "[n]o building shall exceed two stories nor thirty feet in height." MCC § 19.08.050.

18. Article III of Title 19 encompasses the ordinance that created the Maui Lani Project District ("MLPD"), Chapter 19.78. Chapter 19.78 was promulgated in June, 1990, as Ordinance 1924 and in September, 1990 as Ordinance 1939.

19. MCC Chapter 19.78 has as its purpose "to provide for a flexible and creative approach to development which considers physical, environmental, social, and economic factors in a comprehensive manner." MCC § 19.78.010.

20. The general standards of development in Chapter 19.78 state that "[a]ny tract of land or project site for which development is sought in the Maui Lani project district shall be subject to the approval and any conditions of the County departments of planning [and] public works..." among others. MCC § 19.78.070.

21. Maui County Code Chapter 19.78 contains detailed development standards regarding

residential sub-districts, including the following: "Maximum building height: two-stories, not exceeding thirty feet." MCC Ch. 19.78.020.

22. There is no formula in Chapter 19.78 for determining how the maximum height of thirty feet is to be measured within the MLPD and no amendment to Ordinance 1924 has ever indicated that the height of residential structures within MLPD is to be determined by standards which existed prior to the passage of the Comprehensive Zoning Ordinance of September 1991.

23. According to the Charter of the County of Maui, the director of the Department of Planning is charged with enforcing the zoning ordinances. Maui County Charter § 8-8.3 (6) ("Charter").

24. The Board of Variances and Appeals "shall hear and determine appeals alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision, or building ordinances which is within [its] jurisdiction ...." MCC § 19.520.040.

Subdivision Approval Process

25. The October 8, 2007, Declaration of Milton Arakawa, the Director of the Department of Public Works, Maui, describes in brief the subdivision approval process set out in MCC Chapter 18. At each stage of the application's processing, the application is sent to various departments and agencies of the state and county for review and comment. The department's or agency's approval is indicated by a check-mark and the date of approval next to the respective department or agency. Def.'s VP&PK, (ML) LLC and KCOM Corp. Memo. Opp. to Plaintiffs' Mot. Part. Summ. J. Ex. "L" ¶¶ 5-6,.

26. The Department of Planning is responsible for ascertaining compliance with the applicable zoning provisions, including height requirements, and the Department of Planning's approval indicates compliance. The director of the Department of Planning "shall not approve any subdivision that does not conform to or is inconsistent with the county general plan, community plans, land use ordinances, the provisions of the Maui County Code, and other laws relating to the use of land...."[1] MCC § 18.04.030.

History of Ordinance 2031

27. In 1991, the Maui County Department of Planning initiated a change to the Zoning Code's definition section modifying the method by which residential building height was determined in Maui County. According to Charles Jencks, who was the director of the Department of Public Works in 1991, the "reason for this change was driven by a homebuilder in Kuau who took a single family lot, placed fill on the lot and built his house. The adjacent neighbors complained about the size of the home and fill activity, the county investigated the matter . . .." The result was that the Department of Planning proposed and the Planning Commission and the Council approved the change in the methodology for determining building height, which has continued to be the formula for measuring the height of residences since 1991. Def.'s VP&PK (ML), LLC and KCOM Corp. Supp. Memo. Opp. to Plaintiffs' Mot. Pre. Injunction Ex. "EE" [hereinafter "Jencks letter"] [2].

28. The 1991 ordinance changed the definition of building height to read as follows:

[1] There are some exceptions to this conformity requirement, none of which are applicable here.

"'Building height' means the same as 'height'" and "'Height' means the vertical distance measured from a point on the top of a structure to a corresponding point directly below on the natural or finish grade, *whichever is lower*." MCC § 19.04.040 (emphasis added). "Finish grade" is defined as "the final elevation of the ground surface after man-made alterations such as grading, grubbing, filling or excavating have been made on the ground surface." *Id.* The prior definition of height read as follows: "the vertical distance from finished grade to the highest point of the finished roof surface."

29. Ordinance 2031 contained one grandfathering provision, Section 9, which states that "section 5 of this ordinance shall not apply" to grading permits for golf courses "which were lawfully issued, fully comply with all requirements of law, and where substantial changes in the land have already occurred," or to "building permits, special management area use permits, or planned development approvals which were lawfully issued and which fully comply with all requirements of law as of the effective date of this ordinance."[3] [4] Def.'s VP&PK, (ML) LLC and KCOM Corp. Memo. Opp. to Plaintiffs' Mot. Part. Summ. J. Ex. "I" [hereinafter Ex. "I"].

History of Maui Lani Project District

30. On September 29, 1988, A&B Properties, Inc., the then-owner of land that later became the Maui Lani Project District, filed applications for Phase I Project District Approval and for a Change in Zoning. Def.'s VP&PK, (ML) LLC and KCOM Corp. Memo. Opp. to Plaintiffs'

[2] The Jencks letter references "1997" as the date of the events described. However, the Court finds that this must be a typographical error, since the definition was changed in 1991.
[3] Section 5 of Ord. 2031 creates a new section in Title 19, entitled "Park Districts."

Mot. Part. Summ. J. Ex. "D" ¶ 7 [hereinafter Oct. 8, 2007 Decl. of Clayton Yoshida].

31. Following notice and public hearings required by law, the Maui Planning Commission recommended approval of both the Phase I Project District Application and the Change in Zoning Application for the Maui Lani Project District at its March 21, 1989 meeting. Oct. 8, 2007 Decl. of Clayton Yoshida ¶¶ 8-13.

32. In 1989, Everett Dowling (who was then a general partner of Maui Lani Partners) signed a "Unilateral Agreement and Declaration for Conditional Use." The sole specific condition for development in the unilateral agreement was that a portion of the residential units in the Maui Lani Project District would be affordable housing. The "unilateral agreement" was also signed by Haunani S.Y. Lemn, Deputy Corporation Counsel. The unilateral agreement was recorded with the Land Court in December, 1989.[5] Def.'s VP&PK, (ML) LLC and KCOM Corp. Memo. Opp. to Plaintiffs' Mot. Part. Summ. J. Ex. "Q" [hereinafter Ex. "Q"].

33. Subsequently, on January 5, 1990, the Maui County Council ("Council") enacted Ordinance 1872, which approved the proposed Change in Zoning for the Maui Lani Project District and which became effective on January 22, 1990. Section 2 of the ordinance stated that the zoning established was expressly subject to the sole condition set forth in Exhibit B which addresses affordable housing requirements. Def.'s VP&PK, (ML) LLC and KCOM Corp. Memo. Opp. to Plaintiffs' Mot. Part. Summ. J. Ex. "E" [hereinafter Ex. "E"].

34. On June 20, 1990, the Council enacted Ordinance 1924, which constituted Phase I approval

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[4] Part (c) exempts the same types of permits as (b) which were "properly filed, though not yet issued," as of the date of the first reading of the ordinance.

[5] The year is unclear on the date stamp of the document submitted. However, given that the document was signed in late November, 1989 and that the County passed Ordinance 1872 on January 5, 1990, the Court will assume that the recordation occurred in December of 1989.

for the Maui Lani Project District. A second ordinance, Ordinance 1939, was adopted by the Council on September 11, 1990 and together these ordinances established the Wailuku-Kahului Project District 1 (Maui Lani Project District) and are codified as MCC Chapter 19.78. Oct. 8, 2007 Decl. of Clayton Yoshida ¶¶ 14-21.

35. On September 18, 1990, after holding public hearing as required by the MCC, the Maui Planning Commission approved the preliminary site plan, which constituted Phase II Approval for the Maui Lani Project District. Oct. 8, 2007 Decl. of Clayton Yoshida ¶ 34-35.

36. A September 22, 1990 letter from the Maui Department of Planning to Maui Lani Partners described the Phase II approval. That letter contained the following: "Please be advised that the Maui Planning Commission . . . voted to recommend approval of the application . . . subject to the following conditions: 1. That the approval herein is based on plans and specifications received by the Department of Planning on May 21, 1990 and the revised land use plan dated September 10, 1990. ... 13. That the subject Phase II Project District Approval shall not be transferred without prior written approval of the Planning Commission. ... 16. That full compliance with all other applicable governmental requirements shall be rendered, including but not limited to Phase III Project District requirements, in accordance with Section 19.45.050.C of the Maui County Code." Def.'s VP&PK, (ML) LLC and KCOM Corp. Memo. Opp. to Plaintiffs' Mot. Part. Summ. J. Ex. "H" [hereinafter Ex. "H"].

37. At the time of Phase I and Phase II approvals for the Maui Lani Project District ("MLPD"), the MCC defined building height as "the vertical distance from finished grade to the highest point of the finished roof surface...." Oct. 8, 2007 Decl. of Clayton Yoshida ¶ 38.

38. On December 28, 1990, then Maui Planning Director, Christopher L. Hart, granted Phase III

approval for development of 1164 residential units and a golf course at MLPD. Oct. 8, 2007 Decl. of Clayton Yoshida ¶ 40.

39. It appears that no further Phase III approvals were granted for any MLPD development until 1999. Oct. 8, 2007 Decl. of Clayton Yoshida ¶ 40-41.

40. Approximately ten years passed between Phase II approval for the two projects at issue in the instant case, the Sandhills project and the Fairways project, and issuance by the County of any relevant construction permits.

41. Between 1999 and 2003, several MLPD subdivisions received Phase III approval from Maui Planning Directors. Oct. 8, 2007 Decl. of Clayton Yoshida ¶¶ 41-45. During said period the issue of what height definition was to apply never arose as an issue in the community and the Department of Planning never sought to enforce Ordinance 2031 as to Maui Lani Project District developments nor did it take the effects of grading into account.

History of Maui Lani Project District Subdivisions Since 2003

42. On October 18, 2003, the Sandhills Project within the MLPD received preliminary subdivision approval from the Department of Public Works and Environmental Management, Development Services Administration ("DPW&EM, DSA"). The letter stated that approval was contingent on compliance with specific conditions imposed by the various County Departments. However, preliminary subdivision review comments from the Department of Planning were not included in the letter as they had not yet been received. Oct. 8, 2007 Decl. of Clayton Yoshida ¶ 46; Def.'s VP&PK (ML), LLC and KCOM Corp. Supp. Memo. Opp. to Plaintiffs' Mot. Pre. Injunction Ex. "Y" [hereinafter "Ex. Y to Supp. MIO"]. According

to the October 8, 2007 declaration of Milton Arakawa, the comments from the Department of Planning relative to the preliminary plat approval were received by the DPW&EM, DSA approximately one month later, in November, 2003. Ex. "L"

43. On March 12, 2004, Planning Director Michael Foley granted Phase III approval to the Sandhills project. Def.'s VP&PK, (ML) LLC and KCOM Corp. Memo. Opp. to Plaintiffs' Mot. Part. Summ. J. Ex. "S" ¶ 11 [hereinafter Dec. 7, 2007 Decl. of Michael Foley]; Def.'s VP&PK, (ML) LLC and KCOM Corp. Supp. Memo. Opp. to Plaintiffs' Mot. Pre. Injunction Ex. "Z" [hereinafter "Ex. Z to Supp. MIO"].

44. The Phase III approval letter from Director Foley says simply that "the subdivision complies with the standards of development for the [MLPD]. The subdivision is located within the SF-5 Single Family Subdistrict . . . and meets the unit density of 6 units per acre." The letter makes no reference to reviewing the project relative to finish grade. Ex. Z to Supp. MIO.

45. According to the declaration of Michael Foley, he issued this Phase III approval "[p]ursuant to Phase I and Phase II approvals...." Dec. 7, 2007 Decl. of Michael Foley ¶ 12. "[T]he Planning Department reviewed the project relative to the finished grade and did not consider the effect of fill on building heights." Dec. 7, 2007 Decl. of Michael Foley ¶ 12. Clayton Yoshida echoed this in his declaration of October 8, 2007. *See* Oct. 8, 2007 Decl. of Clayton Yoshida ¶ 47.

46. On August 2, 2004, the Department of Public Works and Waste Management ("DPW & WM") issued a Grading and Grubbing Permit for the Sandhills project. Plaintiffs' Mot. Part. Summ. J. Ex. "5" [hereinafter Ex. "5"].

47. The Grading and Grubbing Permit included the following statement: "The applicant is advised that there are zoning restrictions of building heights which are measured from the top of the structure to the natural or finish grade, whichever is lower. ... Placing fill on your lot will reduce the allowable height to less than 30 feet from finished grade." Ex. 5.

48. On August 2, 2004, the County DPW&EM, DSA also granted preliminary subdivision approval for the Fairways project (also referred to as Lot 1-D) within MLPD. The approval letter stated the following as a recommendation or comment from the Department of Planning: "The proposed grading of the lots shall be consistent with the maximum building heights for the respective zoning. Building heights for new structures are limited to 30 feet above the existing natural grade." Plaintiffs' Mot. Part. Summ. J Ex. "6" [hereinafter Ex. "6"].

49. On October 21, 2004, the DPW&EM, DSA granted final subdivision approval for the Sandhills project. Oct. 8, 2007 Decl. of Clayton Yoshida ¶ 51; Def.'s VP&PK (ML), LLC and KCOM Corp. Supp. Memo. Opp. to Plaintiffs' Mot. Pre. Injunction Ex. "CC" [hereinafter "Ex. CC to Supp. MIO"].

50. The letter references an enclosure, the "Approved Final Plat," but the document attached as an exhibit is incomplete and illegible. The Court cannot determine if there is reference to building heights in the approved final plat for the Sandhills project subdivision. Exhibit CC to Supp. MIO.

51. On December 13, 2004, then-Director of DPW&EM Gilbert Coloma-Agaran issued a memo relative to "Grading Permit Applicants" indicating that the natural grade will be used as the measuring point for building height, if it is lower than the finished grade. Plaintiffs'

Mot. Part. Summ. J. Ex. "7" [hereinafter Ex. "7"].

52. On December 14, 2004, Planning Director Foley rescinded the Department of Planning's grant of final subdivision approval for the Sandhills project. Dec. 7, 2007 Decl. of Michael Foley at ¶ 14; Plaintiffs' Mot. Part. Summ. J. Ex. "8" [hereinafter Ex. "8"].

53. Foley's Interdepartmental Transmittal relating to the rescission of the final subdivision approval stated that "[i]ssues have arisen regarding the current grading and the future compliance with building height restrictions. The subdivider is required to submit documentation that all of the re-graded lots can accommodate a dwelling or structure not exceeding 30 feet in height as measured from the original or finish grade, whichever is lower." Ex. "8".[6]

54. On December 22, 2004, eight days the Department of Planning rescinded its recommendation for final subdivision approval, a private meeting was held at the office of the Mayor on the issue of height restrictions to be applied to the Maui Lani Project District. In attendance at the meeting were then-Mayor Alan Arakawa, Planning Director Michael Foley and other representatives of the Department of Planning, a representative from the Office of Corporation Council, representatives of the County's Public Works Department, former Director of the Department of Public Works and Waste Management Charlie Jencks (who was at the time of the meeting was associated with the Maui Contractors Association), and representatives of Maui Lani developers. Plaintiffs' Mot. Part. Summ. J. Ex. "9" ¶ 11

[6] Mr. Foley's December 7, 2007 declaration, he described the reason for rescinding the approval was because he "was advised of a possible conflict to the September 4, 1991 Height definition as applied to the Sandhills Project due to the importation of fill material." Def.'s VP&PK, (ML) LLC and KCOM Corp. Memo. Opp. to Plaintiffs' Mot. Part. Summ. J. Ex. "S" [hereinafter Dec. 7, 2007 Decl. of Michael Foley].

[hereinafter Sept. 13, 2006 Decl. of Val Peroff][7]; Dec. 7, 2007 Decl. of Michael Foley ¶ 15; Jencks' Letter.

55. During the December 22, 2004 meeting, representatives of the Sandhills project "expressed their concern as to the County's reversal of its interpretation of the height restriction, and rescission of County's final subdivision approval" for the project. Sept. 13, 2006 Decl. of Val Peroff ¶ 11.

56. The developers "expressed their belief that Ordinance 1924 authorized the use of the height definition that existed prior to the 1991 Amendment. [Representatives of] New Sand informed Defendant County that sales of the lots within the Sandhills project were already underway and that New Sand had already expended substantial funds in conjunction with the Sandhills project." Sept. 13, 2006 Decl. of Val Peroff ¶ 11.

57. At this meeting, representatives of the developers informed Defendant County that the County's actions of insisting on application of the 1991 height definition would have serious and adverse effects upon their ability to construct, market and sell the lots within the Fairways project. Sept. 13, 2006 Decl.of Val Peroff ¶ 11.

58. County personnel then met to confer without the representatives of the developers. Sept. 13, 2006 Decl.of Val Peroff ¶ 12.

59. In a letter to Mayor Arakawa, dated the same day as the December 22, 2004 meeting, Charles Jencks described the "flexible methodology" formerly employed by the Department of Public Works ("DPW') and the Planning Department based upon their belief that a "one size fits all definition [of height] simply did not work...." Mr. Jencks described several large-

[7] Mr. Peroff's declaration was submitted in 2006 for the *Heu v. Arakawa* suit.

scale projects which were approved with this "flexible methodology,"[8] in which the DPW and Department of Planning discussed the building height issue with the entity applying for the required permits for grading, building, etc.. During these discussions, according to Jencks, both departments were "flexible and understanding in their interpretation of the code and realized that it was in the best interests of all that some accommodation [was] made to facilitate the development of housing and the economy of Maui County." *See* Jencks letter.

60. Mr. Jencks' letter characterized the December, 2004 emails and memos issued by the Department of Planning as "inflexible" in the interpretation of the definition of building height. *See* Jencks letter.

61. Mr. Jencks' letter does not mention Phase I or Phase II approval for project districts as a justification for employing the "flexible methodology." Nor does the letter mention any prior approvals issuing from the Mayor's office under this "flexible methodology." *See* Jencks letter.

62. Shortly after the meeting between Mayor Arakawa and other County officials, the Mayor advised the developers that "the County would continue to adhere to Ordinance 1924 to interpret the height restriction since the Sandhills and the Fairways Projects had already received Phase I and Phase II Project District Approvals prior to the 1991 enactment of the building height restriction amendment and were within the Maui Lani Project District."[9] Sept. 13, 2006 Decl.of Val Peroff at ¶ 12.

63. On May 31, 2005, Mayor Arakawa sent a letter to Mr. Peroff in response to his "inquiry

[8] The "flexibility" was in establishing a "base datum" for building height. For example, given highly uneven terrain, mass grading was required for some project sites to create a buildable [*sic*] area that was suitable for the construction of the project and to achieve a reasonable density."

for clarification on the county's granting of the Project District Phase [III] Approval for Lot 1-D," the Fairways project. The letter appears to confirm their prior oral agreement that the Defendant County would allow the projects to proceed with the building heights determined from finish grade. Mayor Arakawa wrote that he had made an "administrative decision to allow the project to proceed with the building heights determined from the finished grade" and that "Project District Phase III approval was granted based on this decision." The Mayor also wrote that the "DPWEM in their review of the mass grading permit did not consider the impacts the finished grades would have relative to the zoning height." The letter mentioned nothing about the express notice contained in the relevant grading permit forms regarding the consequences of grading on determining height limitations. Plaintiffs' Mot. Part. Summ. J. Ex. "14" [hereinafter Ex. "14"].

64. The same letter was sent seven months later (on December 22, 2005) to Planning Director Foley regarding the Sandhills project and the Fairways project. Plaintiffs' Mot. Part. Summ. J. Ex. "15" [hereinafter Ex. "15"].

65. Also on December 22, 2005,[10] Mayor Arakawa sent another letter to Planning Department Director Michael Foley. This letter was in reference to Mr. Foley's "inquiry for clarification on the County's granting of Project District Phase 3 Approval" for the Fairways project. The letter explains that the approval was granted based on Phase I and Phase II project district approvals and a mass grading approval by the DPW&EM. The developer

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[9] Nothing in Ordinance 1924 delineates a formula for measuring building height.

[10] There is some confusion regarding the date of this letter, as well as the letter sent to Mr. Foley that was identical to the letter sent to Mr. Peroff. However, given the facts that the Fairways project was granted Project District Phase III approval in January, 2005, and that the letter refers to the approval in the past tense, the Court accepts that the letter was sent in December, 2005, and not December, 2004. What remains confusing is why the Mayor would explain a decision to Mr. Foley that only Mr. Foley was authorized to make and why he would do so many months after the fact.

made "substantial improvements" to the subdivision based on the grading permit, according to Mayor Arakawa, and alleged that DPW&EM "did not consider the impacts the finished grades would have relative to the zoning height" when it reviewed the mass grading permit. Mayor Arakawa repeats the assertion at the end of the letter, that he "made an administrative decision to allow the projects to proceed with the building height determined from finished grade. Project District Phase 3 approval was granted on this decision." Ex. 15.

66. It is unclear to the Court why (1) Director Foley would inquire about an approval that only he himself was authorized to issue; (2) how Phase III approval could be issued by Mayor Arakawa when only the Planning Director is vested with the authority to do so; and (3) how an agency could "not consider" language contained in its own permit when issuing an approval.

67. Former Mayor Arakawa testified at a hearing in this case on October 24, 2007. During his testimony, Mayor Arakawa alleged that up until the latter part of 2004 it was his understanding that there had been no historical, consistent County policy concerning enforcement of the 1991 height ordinance relative to MLPD and that most of those developments were just being approved as a matter of course. *See* Transcript of Proceedings, Civ. No. 07-1-0258(1) Session of Preliminary Injunction Hearing, October 24, 2007.

68. Former Mayor Arakawa further testified on October 24, 2007 that a "new policy" was developed in December of 2004 by County officials, including himself, in response to a specific question regarding which definition of building height applied to MLPD. He stated, "[a]ll of us at the meeting agreed that this was the policy we were going to follow." Intervenors New Sand Hills, et al., Motion to Dismiss Plaintiffs' Third Amend. Complaint

Ex. "C", further designated as Ex. "M" p. 27, line 15-17.

69. Mayor Arakawa further testified that the County was "required to grant people rights because . . . they'd been told by the County that they could do things, that those prior rights existed." New Sand Hills, et al., Motion to Dismiss Plaintiffs' Third Amended Complaint Ex. "C", further designated as Ex. "M" p. 20, line 7-17.

70. This view appears to be akin to a policy based on vested rights and an acknowledgement of reliance concerns expressed by the developers at the December 22, 2004 meeting.

71. The sequelae of the meetings between the developers and the County officials and subsequent events were that the County administration made a decision to formally establish a policy relative to enforcement of the building height definition within the MLPD. The formal policy was that projects which had secured Phase I and Phase II approvals prior to the enactment of the September 1991 height definition would be able to have residences built under the old definition, i.e. measuring height as 30 feet from finished grade. Dec. 7, 2007 Decl. of Michael Foley ¶¶ 17-18.

72. This policy had the effect of eliminating the developers' concerns over grading planes and the amount of fill which had been deposited within the Fairways project and Sandhills project.

73. Defendant County continued to issue subdivision approvals, Phase III approval for the Fairways project, Mass Grading permits, Grading and Grubbing permits[11] and approvals for construction plans in MLPD, some of which continued to contain language referring to the

[11] Mass grading and Grading & Grubbing permits are very similar, especially insofar as they both contain a warning to the applicant that "[p]lacing fill on the lot will reduce the allowable height to less than 30 feet from the finished grade. *See* Def.'s VP&PK (ML), LLC and KCOM Corp.'s Supp. Memo in Opp. to Plaintiffs' Motion for Pre. Injunction Ex. "AA" and Ex. "KK".

1991 definition of height and the effect of fill on the maximum building height and some of which made no reference to building height at all. Sept. 13, 2006 Decl.of Val Peroff ¶¶ 13-20; Dec. 7, 2007 Decl. of Michael Foley ¶¶ 21-25; Oct. 8, 2007 Decl. of Clayton Yoshida ¶¶ 54-64.

74. On January 5, 2005, Planning Department Director Foley granted Phase III written approval for the Fairways development. However, the only basis stated for this new lease on life for the project was that the project met the unit density of six units per acre. Nothing was mentioned about the Planning Department Director's prior concerns related to fill material causing potential building height problems. Nothing was mentioned by Mr. Foley about alleged vested rights based on Phase II approvals having been granted in 1990. Plaintiffs' Mot. Part. Summ. J. Ex. "10" [hereinafter Ex. "10"].

75. A representative of the Department of Planning checked off the department's approval of the final plats for the Sandhills project and the Fairways project on January 5, 2005 and July, 2007, respectively.[12] *See* County of Maui's exhibits submitted for the October 18, 2007 evidentiary hearing on Plaintiff's Motion for a Preliminary Injunction, Ex. "1" and "2".

76. Mr. Milton Arakawa acknowledged that the grading permits issued regarding the Sandhills project and the Fairways project included language warning the applicant that adding fill to a lot would reduce the permissible maximum building height. However, he dismissed the language as essentially "boilerplate" used for all projects and that "language with respect to the definition of height was not understood to apply to Maui Lani because of the County's consistent position that, with respect to Maui Lani Project District areas that had received

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[12] The day in July that the approval was granted is illegible on the exhibit submitted.

Phase II approval before September 4, 1991, the 'finished grade' height definition would apply." Oct. 8, 2007 Decl. of Milton Arakawa ¶ 22.

77. Despite the claims of Mr. Arakawa it seems clear that at least until mid-December, 2004, Planning Department Director Mike Foley consistently took the position that the 1991 height definition contained in MCC § 19.04.040 would apply to both the Sandhills project and the Fairways project.

78. Upon review of the record, it is clear that it was Mayor Arakawa's decision to apply the old definition of height to projects that had received Phase II approval before the definition of height changed in 1991.

Plaintiffs' claims

79. Plaintiffs do not dispute the fact that the 1991 definition of height has not been enforced regarding the MLPD.

80. Plaintiffs live adjacent to or within close proximity to the development area impacted by the ordinance they seek to have enforced.

81. A large concrete masonry unit ("CMU") retaining wall has been built along the edge of the Fairways project, and tons of fill material have been graded to ascend behind the wall to create residential lots.

82. Some of the Plaintiffs have alleged that their views have been cut off by the wall and mounds of fill built in close proximity to their property line.

83. Plaintiffs have alleged an actual or threatened injury as a result of the former Mayor's and Planning Director's *de facto* negation of Ordinances affecting the dwellings heights in

the development area in close proximity to their homes. Plaintiffs' Motion for Part. Sum. J. p. 5.

84. Notices to the property owners in Maui Lani Project District have been mailed, and several persons and entities have intervened in the suit.

85. A case raising similar issues was filed in 2006 in the Second Circuit Court by other plaintiffs. That case, *Heu v. Arakawa*, Civ. No. 06-1-0230(3) resulted in a stipulated judgment. Def's VP&PK (ML), LLC and KCOM Corp.'s Memo. Opp. Plaintiffs' Mot. Part. Summ. J. Ex. "N" [hereinafter Ex. "N"].

86. The stipulated judgment in *Heu* found that Ordinance 1924 has, since 1990, been historically and consistently interpreted by the County such that the measurement of height of any structure within the Maui Lani Project District is measured from the finished grade. Ex. "N".

87. As a form of relief, the Stipulated Judgment in *Heu* stated that subdivisions and purchasers of lots within these subdivisions shall receive all necessary permits based on the historical interpretation. Ex. "N".

88. The legal validity of that "interpretation" remains an issue. Furthermore, the alleged consistency of that historic interpretation is contrary to the record that has been presented in this case.

89. In the prior litigation, there were no conclusions of law entered concerning (1) the prospective application of the 1991 Ordinance redefining the word "height" as it applied to residential structures in Maui Lani Project District; (2) the effect of the supremacy clause in MCC § 19.04.030; (3) the application of the theory of vested rights to Maui Lani Project

District projects; (4) the degree of notice plaintiffs were historically provided concerning the fill which would be permitted within Maui Lani Project District and adjacent to their properties; or (5) the power of the Mayor and/or Department of Planning to essentially nullify an ordinance passed by the County Council relative to the manner in which height would be determined in developments designed and constructed subsequent to 1991.

CONCLUSIONS OF LAW

Standing

1. Standing is that aspect of justiciability that deals with whether a party seeking judicial relief has alleged such a personal stake in the outcome of the controversy as to justify his invocation of the court's jurisdiction and to justify the exercise of the court's remedial powers. *Bremner v. City & County of Honolulu*, 96 Haw. 134, 139 (Haw. App. 2001).

2. The modern trend has been toward a more expansive interpretation of standing. *Bremner*, 96 Haw. at 140.

3. There is a three-part "injury-in-fact" test, which requires the Court to determine if:

    a. There is alleged an actual or threatened injury which

    b. Is causally related to the Defendant's conduct and

    c. Is likely to be remedied by a favorable judicial decision.

Sierra Club v. Hawaii Tourism Authority, 100 Haw. 242, 250 (2002)

4. When a plaintiff seeks the court's declaratory jurisdiction pursuant to Hawaii Revised Statute ("HRS") Chapter 632, the law providing for standing "is to be liberally interpreted and administered with a view to making the courts more serviceable to the people." *Citizens for Protection of North Kohala Coastline v. County of Hawai'i, et al.*, 91 Haw. 94, 100 (1999)

5. Aesthetics and environmental well-being have been acknowledged as sufficient interests to invoke the court's jurisdiction. *See, e.g., East Diamond Head Assn. v. Zoning Bd. of Appeals*, 52 Haw. 518, 521 (1971); *Dalton v. City & County of Honolulu*, 51 Haw. 400, 402-403 (1969).

6. The Court concludes that the Plaintiffs have alleged a sufficient personal stake in this controversy to acquire standing.

7. Even if the three-prong test advocated by the Defendant is applied, standing is still not defeated because Plaintiffs have alleged actual or threatened injuries. They have alleged that their injuries are causally related to the failure of Defendant County to recognize and apply an ordinance passed in 1991 relative to the measurement of dwelling height. Ongoing and future development of areas adjacent to or in close proximity to their homes would be regulated by the enforcement of ordinances already passed by the County Council.

8. Pursuant to the Court's interpretation of Hawaii's declaratory judgment statute, there must be some legally cognizable right at issue in order for the Court to issue relief. The initial question is whether there is some independent statute that creates a right upon which Plaintiffs may seek relief under Haw. Rev. Statutes ("HRS") § 632-1. *See Rees v. Carlisle*, 113 Haw. 446 (2007).

9. Hawaii Revised Statutes ("HRS")§ 46-4 controls a county's power to zone by ordinance and the power to enforce zoning ordinances. No legislation passed by a county can be in derogation of the rights and powers set out in HRS § 46-4.

10. HRS § 46-4 explicitly states that the zoning power granted to the counties includes the power to pass ordinances that relate to the height and size of buildings.

11. HRS § 46-4(a) also explicitly states that "[t]he ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances." (emphasis added).

12. The Court concludes that HRS § 46-4 permits zoning ordinance enforcement by persons

other than county officials.

13. The term "directly affected" is not defined in the subject statute.

14. When construing a statute, the court's foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. The statutory language must be read in the context of the entire statute and construed in a manner consistent with its purpose. *State v. Koch*, 107 Haw. 215, 220 (2005) (*quoting Gray v. Administrative Director of the Court* 84 Haw. 138, 148 (1997) (brackets and ellipses in original) (footnote omitted)).

15. The Court finds that the term "directly affected" is unambiguous and means an owner whose property interest is affected in any significant way by an ordinance.

16. A search of the legislative history of HRS § 46-4 reveals no legislative history regarding this "private civil enforcement" provision. The law was written in 1957 and the language cited above has remained virtually the same since that time.

17. Plaintiffs are owners of real estate so "directly affected" by the alleged lack of enforcement of the comprehensive zoning ordinance that they come within the ambit of the explicit private right of action language of HRS § 46-4(a) for purposes of declaratory and injunctive relief because they have shown that they are sufficiently affected by alleged non enforcement of an ordinance and their properties are in close proximity to or within MLPD.

18. The Court concludes, therefore, that the Plaintiffs have standing to bring a declaratory action against Defendant County.

19. Because the Court has found standing for the Plaintiffs to bring a declaratory action, the Court also finds that Plaintiffs have standing for their injunctive relief claim as well.

Indispensable Parties

20. Dismissal pursuant to Hawaii Rules of Civil Procedure ("HRCP") Rule 19 involves a two-part analysis. HRCP Rule 19; *UFJ Bank Ltd. v. Ieda*, 109 Haw. 137, 142-143 (2005).

21. Initially, the circuit court must determine whether the absent party is a "necessary" party and, if so, the court shall order that the person be made a party. *UFJ Bank Ltd.*, 109 Haw. at 142-143 (*citing* HRCP Rule 19(a) (quotations omitted)).

22. A person is "necessary" if she or he is subject to service of process and if either (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. HRCP, Rule 19(a).

23. Where joinder is feasible, the court need not proceed under Rule 19(b) to determine whether to proceed or dismiss for lack of an indispensable party.

24. The Court previously found that there are lot owners who have an interest in the maximum development of their land situated in MLPD and who would potentially be affected by a grant of declaratory relief in that they might have to seek variances from the Board of Variances and Appeals.

25. Because the declaratory relief sought by Plaintiffs presents questions of law or fact common to all property owners within MLPD, the Court ordered Plaintiffs to use reasonable diligence in ascertaining the names and addresses of non party owners and to use reasonable

diligence in notifying those lot owners who may have an interest in the subject matter of the current litigation. The purpose of the notice was to give owners the opportunity of filing a petition to intervene if they believed that the litigation might impair the owners' ability to develop their properties.

26. If a person as described in HRCP Rule 19 (a)(1)-(2) cannot be made a party, the court is to determine "whether in equity and good conscience the action should proceed among the parties before it." HRCP, Rule 19(b).

27. Applying the non-exclusive factors presented in HRCP Rule 19(b), the Court concludes first that there is no prejudice to persons already parties to this suit in allowing the case to proceed in the absence of persons who were notified, but chose not to intervene.

28. Second, the Court concludes that it can shape the provisions of any judgment, and shape the relief to protect against any potential prejudice to the parties.

29. Third, the Court concludes that a judgment rendered in the absence of all of the Maui Lani Project District lot owners will still be adequate to clarify the application of the relevant zoning ordinances. The absence of certain lot owners within the Maui Lani Project District will not prevent complete relief among those already parties to this lawsuit and a ruling relative to the applicability of MCC § 19.04.040 to Maui Lani Project District should not create inconsistent obligations.

30. Fourth, the Court concludes that the Plaintiffs will have no remedy if the action is dismissed for failure to join all potentially necessary parties.

31. Therefore, the Court concludes that while there may be necessary parties to this action, they are not so indispensable such that, in equity and good conscience, the action should not

proceed among the existing parties.

Preclusive effect of *Heu* Judgment:

32. The doctrine of res judicata, or claim preclusion, holds that when a court of competent jurisdiction issues a judgment, that judgment bars new action in any court between the same parties or their privies, concerning the same subject matter, and precludes relitigation not only of the issues actually litigated but also of all grounds of claim and defense which might have been properly litigated in the first action but were not litigated or decided. *In re Dowsett Trust*, 7 Haw. App. 640, 644 (1990).

33. "The defense of res judicata bars a subsequent action only if the following questions can be answered in the affirmative: (1) Was the issue [*claim*] decided in the prior action identical with the issue presented in the present action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party against whom the doctrine is asserted a party or in privity with a party to the previous adjudication?" *Caires v. Kualoa Ranch, Inc.*, 6 Haw. App. 52, 55 (1985).

34. Both plaintiffs, in *Heu* and in the instant case, claim damages resulting from the County's failure to enforce County ordinances relative to height restrictions within the MLPD. The factual issue decided by the stipulated judgment in *Heu* was that the County had "historically interpreted" the 1991 height ordinance to be inapplicable to the Maui Lani Project District developments. The Plaintiffs and parties here do not dispute the fact that Defendant County has not historically applied the 1991 height definition to the MLPD.

35. The Court concludes, however, that there is no privity between the *Heu* plaintiffs and the

current Plaintiffs.

36. There is no clear, legal definition of privity. *In re Dowsett*, *supra*, 7 Haw. App. at 646. The determination of who are privies "requires careful examination into the circumstances in each case as it arises." *Id.* (citing 46 Am.Jur. 2d *Judgments* § 532 at 683 (1969)).

37. Because res judicata is an affirmative defense under HRCP 8(c), the party asserting it bears the burden of proving adequate representation of the interests and proper protection of the rights of the nonparty in the prior action. *In re Dowsett*, *supra*, 7 Haw. App. at 646.

38. In *In re Dowsett,* the Intermediate Court of Appeals stated that "[w]hile [trial on the merits] is not a requirement for the application of res judicata, a trial on the merits can strengthen a finding of fairness in binding a non-party because it increases the probability that the issues have been fully addressed and resolved." *In re Dowsett,* 7 Haw. App. at 647.

39. Additionally, under the doctrine of res judicata, "a nonparty is not precluded from relitigating matters decided in a prior action simply because it passed by an opportunity to intervene." *Id. See also*, Wright, Miller & Cooper, 18A Federal Practice and Procedure, § 4452.

40. Defendants have alleged that current Plaintiffs are similarly situated property owners, but they have not shown how the prior plaintiffs adequately represented the Plaintiffs' interests in this case nor have they shown how the prior plaintiffs properly protected the rights of their then-nonparty neighbors by expeditiously entering into a consent judgment which did not contain any legal conclusions relative to the various ordinances underlying the development of the MLPD.

41. The fact that the same attorney represented both the prior plaintiffs and current plaintiffs is

not necessarily relevant to the res judicata analysis. Attorney Lance D. Collins signed the stipulated judgment in *Heu v. Arakawa* on behalf of the Plaintiffs, and is also listed as one of three attorneys of record in this case.

42. A recent United States Supreme Court decision, *Taylor v. Sturgell*, 128 S.Ct. 2161 (2008), dealt with the federal common law of preclusion. The Supreme Court rejected the theory of "virtual representation". This theory postulates that when the same attorney represents two different individuals with strikingly similar causes of action both clients' interests are represented for the purposes of establishing privity. The Supreme Court held that under such circumstances the preclusive effects of a judgment should instead be determined according to the established grounds for nonparty preclusion. The Supreme Court reasoned that a "person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor*, 128 S.Ct. at 2171 (citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (internal quotation marks omitted)).

43. The Supreme Court noted six exceptions to the rule against nonparty preclusion. *Taylor*, 128 S.Ct. at 2172. First, a person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement. *Id.* (internal quotation marks omitted). Second, nonparty preclusion may be justified based on a variety of pre-existing substantive legal relationships between the person to be bound and a party to the judgment. *Id.* Third, in certain limited circumstances, a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who

was a party to the suit. *Id.* Fourth, a nonparty is bound by a judgment if she assumed control over the litigation in which that judgment was rendered. *Taylor*, 128 S.Ct. at 2173 (internal quotation marks omitted). Fifth, a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. *Id.* Sixth, in certain circumstances a special statutory scheme may expressly foreclose successive litigation by nonlitigants, if the scheme is otherwise consistent with due process. *Id.*

44. The Respondents in *Taylor v. Sturgell* argued that "virtual representation" applied because the relationship between a party and a non-party was "close enough" to bring the second litigant within the judgment. *Taylor*, 128 S.Ct. at 2174-2175. The Supreme Court expressly rejected this argument because (1) the doctrine, with its "amorphous balancing test," ignored the discrete exceptions to the rule against nonparty preclusion that apply in limited circumstances, *Taylor*, 128 S.Ct. at 2175; (2) the doctrine of virtual representation expanded the exception for "adequate representation" beyond its limitations, *Taylor*, 128 S.Ct. at 2176; and (3) a diffuse balancing approach required to apply the virtual representation doctrine would cause more problems than it would solve. *Id.*

45. Four of these six grounds for nonparty preclusion do not apply to the instant case. There is no evidence that the Plaintiffs here agreed to be bound by the *Heu* stipulated judgment. Nor is there evidence of a legal relationship between the *Heu* plaintiffs and Plaintiffs here, or that Plaintiffs here are relitigating as a proxy for the *Heu* plaintiffs. There is also no evidence that the Plaintiffs here assumed or exercised any control over the *Heu* suit, or that this suit implicates any special statutory scheme limiting relitigation.

46. In this case argue Defendant County argues, essentially, that these Plaintiffs were

adequately represented by the *Heu* plaintiffs because they had the same interests. According to the Supreme Court in *Taylor*, some examples of "adequate representation" include properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries. *Taylor*, 128 S.Ct. at 2172-2173. Most importantly, the Supreme Court restated a core holding of a precedent case: that representation is "adequate" for purposes of nonparty preclusion, and did not violate due process, only if (at a minimum) there were either special procedures to protect the nonparties' interests or there was an understanding by the concerned parties that the first suit was brought in a representative capacity. *Id.* at 2174.

47. *Heu* was not a class action suit and there is no evidence that these Plaintiffs understood themselves to be suing on behalf of the *Heu* plaintiffs, or that the Court in *Heu* took care to protect these Plaintiffs' interests. Third, the fact that the *Heu* plaintiffs and the Plaintiffs here had at least one common attorney does not, by itself, qualify as adequate representation.

48. The Court must conclude that the stipulated judgment entered in *Heu* has no preclusive effect on this case because the Plaintiffs here were not parties in the *Heu* case, nor were they in privity with the plaintiffs in *Heu*.

Statutory Interpretation of MCC § 19.04.040

49. Construction of municipal ordinances is governed by the same rules of statutory construction. *Waikiki Marketplace Inv. Co. v. Chair of the Zoning Bd. of Appeals of the City and County of Honolulu*, 86 Haw. 343, 354 (1997) (citing *Foster Village Community Ass'n v. Hess*, 4 Haw.App. 463, 469 (1983)).

50. Laws upon the same subject matter are to be construed with reference to each other. What is

clear in one statute may be called in aid to explain what is doubtful in another so that there is maximum clarity where possible. HRS § 1-16 ; *Kam v. Noh,* 70 Haw. 321, 325 (1989).

51. Where there is an obvious irreconcilable conflict between a general and a specific legislative enactment concerning the same subject matter, the specific will be favored, but where the legislation simply overlaps in application, effect will be given to both if possible. *Richardson v. City and County of Honolulu*, 76 Haw. 46, 55 (1994).

52. When construing a statute, the court's foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. The statutory language must be read in the context of the entire statute and construed in a manner consistent with its purpose. *State v. Koch*, 107 Haw. 215, 220 (2005) (*quoting Gray v. Administrative Director of the Court* 84 Haw. 138, 148 (1997) (brackets and ellipses in original) (footnote omitted)).

53. When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. *Koch*, 107 Haw. at 220.

54. In construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. HRS § 1-15(1).

55. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool. *Koch*, 107 Haw. at 220 (2005).

56. Zoning laws and ordinances are strictly construed as they are in derogation of the common law, and their provisions may not be extended by implication. *Waikiki Marketplace, Inv. Co.,* 86 Haw. at 354.

57. Applying the canons of statutory interpretation, the Court concludes that the new definition of height found in Ordinance 2031, codified at MCC § 19.04.040 applies to MLPD, and applied when it became effective in 1991.

58. First, ordinances are presumed valid, so the Court presumes the validity of MCC § 19.04.040. The validity of the ordinance is not in dispute.

59. Interpreting Ordinance 2031, which is known as the Comprehensive Zoning Ordinance, the Court must give effect to all parts of it, including a general definitions section. The general definitions section, MCC § 19.04.040, has broad application and serves as a reference point for terms used throughout Chapter 19. *See* MCC § 19.04.040. MCC § 19.04.040 states that the general definitions are to be used "in title 19 of this code, unless the context clearly indicates a different meaning." There is nothing in the context of Chapter 19.78 which indicates that "height" has a meaning other than the meaning provided in the general definitions section.

60. Second, construing laws on the same subject matter with reference to each other, MCC Chapter 19.78 (which applies only to the Maui Lani Project District) states only the generic thirty-foot maximum height restriction for single family homes in the project district. To determine how to measure the maximum height described in Chapter 19.78, one would logically look to the definitions section of Chapter 19.

61. Third, the Court does not perceive any irreconcilable conflict between the supremacy clause in the ordinance controlling the processing of special project districts (MCC § 19.45.030) and the supremacy clause in the Comprehensive Zoning Ordinance, which imposes County-wide substantive development standards (MCC § 19.04.030).

62. The scope of § 19.45.030 is limited to ensuring that where any other county law proscribes procedures which conflict with the project district processing procedures set out in Chapter 19.45, the procedures in Chapter 19.45 will prevail.

63. Assuming that there was a conflict between the supremacy clauses contained in Chapter 19.45 and in § 19.04.030, Chapter 19.04 prevails as the "supreme" supremacy clause. It is broader in scope, but more specific as to the measurement of building heights, which is at issue herein.

64. The Court concludes that Chapter 19.45 and Chapter 19.04 simply overlap in their application and effect may be given to both.

65. The intent of the Council regarding the specific definition of height found in § 19.04.040 is clear: the definition of building height was changed and the new definition applied to all of Maui County. MCC § 19.04.040 must be construed in a manner consistent with its purpose and the purpose of Title 19 was to set zoning standards for all of Maui County.

66. Further evidence of the Council's intent that the new definition apply broadly to all of Maui County is found in the express "grandfathering" provisions included in Ord. 2031, which are in Section 9 of Ord. 2031 [*See* Findings of Fact # 29, *supra*].

67. This grandfathering provision is exactly the type that would have given MLPD developers the right to build according to the old definition of building height.

68. Section 9 of Ord. 2031 reflects the Council's awareness that its amendments to Title 19 could affect projects substantially in progress.[13]

69. Section 9 of Ord. 2031 also reflects the Council's awareness of its authority to exempt

prospective application of some parts of the ordinance by merely stating the exemption.

70. Therefore, the Court concludes that the Council did not exempt the MLPD from application of the new height definition because it did not include an express "grandfathering" or exemption provision in Ord. 2031.

71. Nor can the Court conclude that the old definition of height was impliedly grandfathered into the Maui Lani Project District ordinance by Ord. 2031. The Court cannot infer from the Council's silence that such an exemption exists because it goes against the canons of statutory interpretation to infer intent from the absence of language.

72. These tenants of statutory interpretation as applied to the facts of this case lead the Court to conclude that the 1991 change to the definition of building height is that the Council intended it to apply prospectively to all projects coming within the purview of Title 19, including the MLPD.

Deference to the County's Interpretation

73. Defendant County asks the Court to defer to its interpretation and non-application of MCC § 19.04.040 to the MLPD.

74. Judicial deference is owed to an agency vested with the authority to make decisions and interpret statutory provisions, unless the construction given to the legislation is clearly erroneous. See *Maha'ulepu v. Land Use Comm'n*, 71 Haw. 332 (1990); *Brown v. Thompson*, 91 Haw. 1 (1999).

[13] Developer did not act on Phase II approval until 12 years after it was granted, so it cannot be said that the Sandhills project and the Fairways project was significantly underway when the definition of building height was amended.

75. "While an administrative agency's interpretation of the ordinance that it is responsible for implementing is normally accorded great weight, no deference is required when the agency's interpretation conflicts with or contradicts the manifest purpose of the ordinance it seeks to implement." *Coon v. City and County of Honolulu,* 98 Haw. 233, 251 (2002)

76. The Court does find that the former mayor's decision to abstain from enforcing the definition of height in the MLPD is not entitled to deference because (a) he was not vested with the authority to make such a decision nor is the mayor an agency which interprets the law; (b) his interpretation conflicts with the stated purpose of the Comprehensive Zoning Ordinance; and (c) the practice of overlooking the 1991 height ordinance, despite the length of that practice, had the prohibited effect of defeating the purpose and effect of the Comprehensive Zoning Ordinance.

Vested Rights

77. Whether a party has a vested right is a legal conclusion for a Court to make, not for a mayor to declare by means of an *ad hoc* policy decision.

78. Agency rule-making authority arises from a legislative grant of power. Absent legislative authority, an agency has no power to act. *Foytik v. Chandler*, 88 Haw. 307, 316 (1998).

79. According to HRS §91-1 (4), "rule" means "each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy. . . . The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public."

80. HRS § 91-3 sets out the procedures for adoption, amendment, or repeal of rules, which

includes providing thirty days notice before a public hearing and affording interested persons the opportunity to submit comments, orally or in writing, among other requirements.

81. Pursuant to HRS § 91-7(b), a court is required to declare that an agency's rule is void if the rule goes beyond the agency's statutory authority or was adopted without complying with the statutory rulemaking procedures of HRS Chapter 91.

82. The decision to "grandfather" the old definition of height into Ordinance 1924 was a "rule" within the meaning of HRS §91-1(4), because it stated a new policy that interpreted an ordinance.

83. First, the Court rejects the "rule" that developers who had obtained Phase II approval prior to September 1991 had "vested rights" in the pre-September 1991 ordinance defining height because it appears that the Mayor's office promulgated the "rule." In doing so, he acted beyond his authority when attempted to establish a rule.

84. The Department of Planning is vested with the authority to prepare, administer and enforce the Comprehensive Zoning Ordinance, pursuant to Maui County Charter § 8-8.3. Assuming that the Department of Planning itself implemented the new "rule" in December, 2004, the Court finds no evidence of the HRS § 91-3 rule-making process being followed by either the Department of Planning or any other County agency or department regarding the new "rule" for applying the old height definition in the Maui Lani Project District.

85. Therefore, the Court concludes that the new "rule" developed in December, 2004, is not a valid rule because it was not properly promulgated under HRS Chapter 91. Therefore, the Court also concludes that there can be no rights vested in developers of Maui Lani Project District because the rule is invalid.

86. Furthermore, the Court finds that there was no formal or official policy prior to December, 2004 regarding how Defendant County applied and enforced the definition of residential building height as set out in the relevant ordinances. County officials had allegedly employed the "flexible approach" to enforcement described by Charles Jencks and Mayor Arakawa. There is no evidence to support the theory that the developers' rights to build according to the pre-September 4, 1991 height formula vested upon Phase II approval because there is no evidence of what definition of height Defendant County approved at Phase II.

Consistent, Historical Interpretation

87. The Court finds that there is insufficient evidence to support the argument that there is a history of consistent intentional application of the pre-1991 height definition to all developments within MLPD.

88. The Department of Planning's check-mark on a checklist of department approvals for preliminary plat and final plat for MLPD subdivision approvals does not demonstrate that the Department of Planning employed the definition of height as measured from finish grade. The checkmark only indicates compliance with County zoning requirements. The issue is not whether the developers were in general compliance, but with what definition of "building height" they should have complied. The documents submitted for development approvals do not define height anywhere within said documents.

89. The Department of Planning's comments on the preliminary subdivision approval were missing from the October, 2003 approval of the Sandhills project. Without this commentary, no one can say what, exactly, was approved by the Department of Planning. Furthermore,

the lack of commentary undercuts the insistence that Defendant County was approving projects in MLPD either without considering effect of fill on building heights or according to the building height existing prior to 1991. Ex. "L".

90. In contrast, documents signed by county officials include unequivocal reference to the 1991 definition of building height, including multiple grading permits and approvals, as well as Planning Department Director Foley's December 14, 2004 letter rescinding subdivision approval for the Sandhills project.

91. These unequivocal and repeated references indicate a consistent recent history of Defendant County's application of the new definition of building height to MLPD developments until modified by Mayor Arakawa in late 2004.

92. The references also provided notice to the developers of Defendant County's interpretation or application of the building height restrictions as defined by the 1991 ordinance amendments.

93. Mayor Arakawa's, Michael Foley's and Charles Jencks' statements only refer to the County's lack of enforcing the new height definition.

94. Based upon this record the Court cannot conclude that there was a consistent, historical interpretation of the old height definition to the MLPD.

Equitable Estoppel

95. Recently, the Hawai'i Supreme Court explained that in the development context "equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on

existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurances on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project." *Brescia v. N. Shore Ohana*, 115 Haw. 477, 499 (2007) (quoting *Life of the Land Inc. v. City Council of the City and County of Honolulu*, 61 Haw. 390, 453 [parallel citation omitted] (1980)).

96. Estoppel "cannot be applied to actions for which the agency or agent of the government has no authority. . . . Zoning estoppel is not intended to protect speculative business risks. Thus, an expenditure made in compliance with underlying zoning but before final discretionary action will be disregarded for estoppel purposes." *Brescia,* 115 Haw. at 499-500 (citations omitted).

97. The Hawai'i Supreme Court in *Brescia* held that a lot owner had no right to rely on officials' assurances regarding the minimum setback required for a lot for two primary reasons: (1) the officials did not have the authority to determine the allowable setback on the property and (2) the lot owner was on notice in his deed that a Planning Commission retained the discretionary authority to impose a greater setback. *Brescia v. N. Shore Ohana,* 115 Haw. 477 (2007).

98. The *Brescia* holding applies to this case. Mayor Arakawa had no authority to enforce zoning ordinances, nor issue a variance or an exemption from the application of a Council-passed ordinance. Whatever reliance a developer placed upon an unauthorized decision is misplaced and cannot be the basis for an estoppel defense to the application of a valid ordinance. Furthermore, the developers were on notice in various permits that compliance

with the new height definition was required.

Unilateral development agreement

99. Hawaii Revised Statutes § 46-121, the statute regarding Development Agreements, was promulgated to provide more certainty to the development approval process for large real estate projects. The legislature found, among other things, that development agreements can strengthen and encourage participation in the public planning process and reduce the economic cost of development. HRS § 46-121.

100. Development agreements support the vesting of property rights by protecting such rights from the effect of subsequently enacted legislation which may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project. HRS § 46-121. The obvious purpose of the law is to prevent the prejudicial effects of subsequent legislation upon projects which are well into the process of development.

101. Pursuant to HRS § 46-123, each county must authorize its executive branch by ordinance to enter into a development agreement. This is a threshold requirement for the statute's application. Such enabling ordinances shall include provisions requiring the designated agency to conduct periodic reviews of compliance with the terms and conditions of the development agreement; and include provisions establishing reasonable time periods for the review and appeal of modifications of the development agreement, among other provisions. HRS § 46-123.

102. A development agreement must state the property's permitted uses, the maximum building

height of structures, and the agreement's termination date. HRS § 46-126.

103. There is no evidence of Defendant County enacting such an enabling ordinance for a development agreement relative to the MLPD. This point is not disputed.

104. Even assuming the existence of enabling legislation, the "unilateral agreement" entered into between the original developers and Defendant County does not meet the requirements set out in the statute, such as the inclusion of a termination date or delineation of maximum building heights.

105. The 1989 agreement entitled "Unilateral Agreement and Declaration for Conditional Use" between the Council and Everett Dowling (a general partner of Maui Lani Partners at that time) is not a development agreement pursuant to HRS Chapter 46-121, et seq., which vested property rights in the project and protected those rights from the effect of subsequent legislation enacted several years prior to the commencement of any construction. The sole condition in the unilateral agreement, which was incorporated by reference into Ordinance 1872, was that the development must provide residential units which qualified as "affordable housing".

106. In fact, what the unilateral agreement appears to be is an agreement described in MCC § 19.45.050 (within the chapter regarding Project District processing procedures). MCC § 19.45.040 uses the specific term "unilateral agreement," whereas HRS §§ 46-121, et seq., refers to a "Development Agreement". The record also reflects that the developer followed the procedures for securing a unilateral agreement and the agreement's content tracks the requirements described in MCC § 19.45.040. Everett Dowling negotiated an agreement with Corporation Counsel, who was presumably the mayor's representative. The agreement

included a provision which stated that the affordable housing condition ran with the property and bound all subsequent persons claiming an interest in the property, and granted the right to Maui County to enforce its terms. The unilateral agreement was recorded at the Land Court in early December, 1989 and the County Council passed Ordinance 1872 (which included the sole condition, but not the entire agreement). VP&PK (ML) LLC and KCOM Corp. Memo. Opp. Plaintiffs' Motion for Partial Summary Judgment Ex. "Q" (Agreement); Ex. "E" (Ordinance 1872).

107. Furthermore, MCC § 19.45.040 does not state that a unilateral agreement creates "vested rights" of any kind. Instead, it appears to create obligations upon the developers and all subsequent owners of the property.

108. Therefore, the Court concludes that no specific rights to build or develop according to the old definition of height vested in the developers by virtue of the unilateral agreement signed by Everett Dowling in 1989.

Failure to Exhaust Admin Remedies

109. As outlined above, the Board of Variances and Appeals hears appeals "alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision, or building ordinances...." MCC § 19.520.040.

110. Because the decision to allow the subject projects to measure the maximum building height of 30 feet from the finish grade came from the mayor's office, the Board of Variances and Appeals has no jurisdiction to hear appeals to this decision. There was no appeal which could have been taken by Plaintiffs.

111. Furthermore, even if the Planning Director made the decision, the Plaintiffs could not have taken an appeal because they had no notice of the decision. They had no notice of any meeting. There was no indication in the approved development permits that the 30 feet building height limit would be measured from finished grade, which is a variance or exemption from the existing height restriction. To reiterate, the grading permits issued to developers by Defendant County explicitly refer to the new height definition.

112. Thus, the Plaintiffs had no administrative remedies to exhaust before bringing the instant suit.

Laches

113. The doctrine of laches has two components, both of which must exist before the doctrine will apply. First, there must have been an unreasonable delay by the plaintiff in bringing his claim based upon the circumstances. Delay is reasonable if the claim was brought without undue delay after the plaintiff knew of the wrong or knew of facts and circumstances sufficient to impute such knowledge to him. *Adair v. Hustace*, 64 Haw. 314, 321 (1982).

114. Second, that delay must have resulted in prejudice to the defendant. Prejudice can result from a loss of evidence with which to contest the plaintiff's claims, including the fading memories or deaths of material witnesses, changes in the value of the subject matter, changes in the defendant's position, and intervening rights of third parties. *Id.*

115. Plaintiffs delayed in bringing their claims against Defendant County, but the claim was brought without undue delay after Plaintiffs became aware of the wrong or the facts and circumstances sufficient to impute such knowledge to them.

116. Plaintiffs were not on notice of a violation or a pending violation of the height restriction law, as described herein.

117. Plaintiffs cannot be expected to look for this quasi-variance or exemption from the height restriction law because it was not obtained through an open public process or with proper public review. Developers and Defendant County are estopped from arguing that Plaintiffs took too long to react to an agreement that was effectively removed from public review.

118. Plaintiffs appear to have discovered the results of the agreement when the developers/contractors began grading the adjacent lots with massive amounts of fill.

119. Therefore, Plaintiffs' delay was not unreasonable because they brought suit within a reasonable time after discovering the potential violation of the ordinance measuring the height of residents from the natural or finish grade whichever is lower. Since the first component of laches (unreasonable delay) is non-existent in this case, the doctrine does not apply.

Summary Judgment

120. Summary judgment should be granted where the pleadings, affidavits, and other evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Haw. R. Civ. P. 56(c); *Fernandes v. Tenbruggencate*, 65 Haw. 226, 227-228 (1982). In applying this standard, all factual inferences must be drawn in favor of the non-moving party. *Chuck Jones & MacLaren v. Williams*, 101 Haw. 486, 496 (2003). "If the evidence presented on the motions is subject to conflicting interpretations, or reasonable men [and women] might differ as to its significance,

summary judgment is improper." *Id.* at 497.

121. The existence of a factual dispute is not necessarily fatal to a motion for summary judgment. *Wilder v. Tanouye*, 7 Haw.App. 247, 254 (1988). A factual issue that is not necessary to the decision is not material and a motion for summary judgment may be granted without regard to whether it is disputed. *Id.* at 254-255.

122. A material fact is a fact that, if proven, would have the effect of establishing or negating an essential element of a claim or defense asserted by the parties. *Id.* at 254.

123. For the reasons stated above, the Court finds, upon viewing the record in a light most favorable to Defendant County of Maui, that there are no disputed issues of material of fact that warrant refraining from granting partial summary judgment in Plaintiffs' favor. The Court acknowledges that there are some factual disputes among the parties, but finds that such that disputes are not material to the essential elements of the claims raised.

ORDER

The Court hereby GRANTS, in part, Plaintiffs' Motion for Partial Summary judgment for declaratory relief and injunctive relief. Declaratory relief shall apply to the Maui Lani Project District as a whole; however, the scope of the injunctive relief will be limited to two sub-divisions, the Sandhills project and the Fairways project, so that the remedy is no more burdensome to Defendant County of Maui than necessary to provide complete relief to Plaintiffs.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The Maui Lani Project District, as a whole, is subject to the residential height restriction as determined in 1991 and codified at Maui County Code § 19.04.040, which states that building height "means the vertical distance measured from a point on the top of a structure to a corresponding point directly below on the natural or finish grade, whichever is lower."
2. Defendant, County of Maui, is enjoined from taking any action which conflicts with the Court's determination of the applicable height restriction relative to the Sandhills project and the Fairways project including, but not limited to, the issuance of building permits the result of which would be inconsistent with Maui County Code § 19.04.04.
3. This Order shall remain in effect until further order of the Court.

DATED: Wailuku, Maui, Hawai'i, DEC 31 2008.

JUDGE OF THE ABOVE-ENTITLED COURT

SECOND JUDICIAL CIRCUIT STATE OF HAWAII SEAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was duly served upon the following parties at their last known address by U.S. MAIL, postage pre-paid or by court jacket on DEC 31 2008.

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DATED: Wailuku, Maui, Hawaii, DEC 31 2008.

LAW CLERK OF THE ABOVE-ENTITLED COURT