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2018 MAR 23 PM 2:16
A. PERRETT, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII
ORIGINAL

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; VIC H. HENRY; AND PETER A. BAGATELOS, Plaintiffs, vs. COUNTY OF MAUI; MAUI COUNTY COUNCIL; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; AND DOE ENTITIES 1-10, Defendants.	CIVIL NO. 13-1-0848 (2) (Other Civil Action) COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW; ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ILLEGALITY OF THE TIMESHARE REAL PROPERTY TAX CLASSIFICATION, FILED DECEMBER 19, 2017, AND DENYING AS MOOT PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, BASED ON USE, AS TO COUNT I (EQUAL PROTECTION) OF THE SECOND AMENDED COMPLAINT FILED AUGUST 12, 2016, FILED SEPTEMBER 29, 2017; CERTIFICATE OF SERVICE

COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW; ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT RE: ILLEGALITY OF THE TIMESHARE REAL PROPERTY TAX CLASSIFICATION, FILED DECEMBER 19, 2017, AND DENYING AS MOOT PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, BASED ON USE, AS TO COUNT I (EQUAL PROTECTION) OF THE SECOND AMENDED COMPLAINT FILED AUGUST 12, 2016, FILED SEPTEMBER 29, 2017

Having considered the evidence presented with the Motion and other briefs, and the arguments of counsel in the briefs and at the hearing, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. If any of the following findings of fact are deemed conclusions of law, they shall be construed as such.

Factual Background

2. From 1997 to 2005, the County of Maui included all timeshares in the Hotel/Resort ("Hotel") real property tax classification. See Gardens at West Maui Vacation Club v. Cty. of Maui, 90 Hawai'i 334, 338, 978 P.2d 772, 776 (1999).

3. On October 6, 2004, the Budget and Finance ("B&F") Committee of the Maui County Council ("Council") transmitted Draft Bill 76 (2004) to the entire Council. The proposed Bill would create a new real property tax classification for timeshares in fiscal year 2006. See Ordinance No. 3227 (Exhibit 2 to Motion).

4. The bill proposed to amend Maui County Code ("MCC") section 3.48.305.A to add the Timeshare classification, and to amend section 3.48.305.C, governing condominium classifications, as follows:

> SECTION 2. Section 3.48.305, Maui County Code, is amended by amending subsection C, to read as follows:
>
> C. When property is subdivided into condominium units, each unit shall be classified upon consideration of its actual use into one of the general classes as follows . . . .
>
> 4. Hotel [Resort] and resort. Units occupied by transient tenants for periods of less than six consecutive months [and units subject to a time share plan as defined in section 514E-1, Hawaii Revised Statutes,

as amended,] shall be classified as "hotel and resort."

5. Time share. Units occupied by transient tenants for periods of less than six consecutive months and units subject to a time share plan as defined in section 514E-1, Hawaii Revised Statutes, as amended, shall be classified as "time share."

SECTION 3. Material to be repealed is bracketed. New material is underscored.

5. B&F Committee Report 04-187 reported the bill's transmission and recommended the creation of the Timeshare classification. B&F Committee Report 04-187 (Exhibit 4 to Motion).

6. B&F Committee Report 04-187 failed to cite any difference between the actual use of hotels and timeshares. Instead it focused solely on the difference in the Transient Accommodations Tax ("TAT") formulas for hotels and timeshares:

> Your Committee notes that the draft bill removes Time Share properties from the Hotel and Resort real property tax classification, and establishes a new classification for Time Share properties. The Council will consider real property tax rates for this new classification during the Fiscal Year 2006 budget session. Your Committee further notes that Time Share properties are transient units subject to a time share plan under Section 514E-1, Hawaii Revised Statutes (HRS).
>
> Your Committee recognized that the **application of the [TAT] HRS Chapter 237D is different for Hotel and Resort properties and Time Share properties.** The TAT for Time Share properties is 7.25 percent of the unit's fair market rental value. Under HRS Section 237D-1, "fair market rental value means an amount equal to one-half the gross daily maintenance fees that are paid by the owner . . ." The TAT for Hotel and Resort properties is 7.25 percent of the gross rental proceeds. **With the application of these formulas, Time Share properties generate considerably less TAT revenue per unit than Hotel and Resort properties do.**
>
> The Director of Finance stated that he supports the establishment of a real property tax classification for Time Share Properties.

B&F Committee Report 04-187 (Exhibit 4 to Motion) (emphases added).

7. The full Council passed the bill on November 19, 2004, and the resulting Ordinance No. 3227 became effective on January 1, 2005. See Ordinance No. 3227 (Exhibit 2 to

Motion).

The County and Council's Judicial Admissions

8. On December 20, 2017, Defendants the County of Maui and the Council (collectively, the "County") filed their Request for Judicial Notice of Fact No. 6 As To The Stated Policy for Establishing the Timeshare Tax Classification and Rate ("Request for JN No. 6").

9. Request for JN No. 6 stated in part:

> THEREFORE, the COUNTY asks the court take judicial notice in this case as follows:
>
> One of the COUNTY OF MAUI'S purposes and policies for establishing the "Timeshare" real property tax class and rate in Budget and Finance Committee Report No. 04-78 was "creating a new real property tax rate classification for timeshare **units in order to collect a more equitable share of taxes for services used by owners of timeshare units."**

10. On December 21, 2017, the County filed its Request for Judicial Notice of Fact No. 8 As To Maui County's Purpose to Eliminate Tax Disparity in Maui's Visitor Industry as Between Hotels and Timeshares ("Request for JN No. 8").

11. Request for JN No. 8 stated in part:

> THEREFORE, the COUNTY asks the court take judicial notice in this case as follows:
>
> One of the purposes and policies the County of Maui and Maui County Council sought to effect by establishing the "Timeshare" real property tax class and rate was and is to eliminate tax disparity in Maui's visitor industry as between hotels and timeshares.

12. The County's Request for JN No. 6 and Request for JN No. 8 are not proper requests for judicial notice. They are, however, admissions of what the County believed its powers to be **and** admissions on how the County exercised its powers of taxation including the creation of a separate timeshare real property tax classification.

13. Request for JN Nos. 6 and 8 submitted by the County also constitute admissions that it sought to remedy a tax disparity that the Hawai'i State Legislature created by taxing Hotels and Timeshares, both transient accommodations, differently.

14. The County's Request for JN No. 6 and Request for JN No. 8 are also admissions that the County's purpose in establishing the Timeshare real property tax classification was to remedy a perceived disparity in TAT assessments.

15. These admissions are consistent with the prior position taken by the County that "the creation of the separate classification and rate was/is rationally based in the [County's] authority to remedy disparate tax impacts in the visitor industry, viewed as having an adverse impact on Maui's tourism and economy." Defendant County of Maui and Maui County Council's Settlement Conference Statement, filed July 8, 2016 (Exhibit 38 to Motion), at 7 (emphasis added).

16. The County has characterized the purpose of the classification as taxing "a commercial industry." Defendant County of Maui and Maui County Council's Memorandum in Opposition to Ocean Resort Villas Vacation Owners Association, et. [sic] al.'s Motion for Partial Summary Judgment as to Count I (Equal Protection) of the First Amended Complaint Filed August 28, 2014, filed July 21, 2016 (Exhibit 39 to Motion), at 1 (emphasis in original).

17. The County has admitted that it created the Timeshare real property tax classification to "address and remedy a known and obvious disparity among two classes of corporate taxpaying entities within a commercial industry." Id. (emphasis added); see also id. ("the COUNTY and COUNCIL were aware of a disparity in tax treatment between two types of taxpaying entities, both operating in the commercial visitor industry within the state") (emphasis in original).

18. The County admits that, after it created the Timeshare real property tax classification, it then set the Timeshare rate higher than the Hotel rate to "remedy" "what was perceived as an unfair disparity in [TAT] burdens as between these two subcategories of the visitor industry . . . ." Id. at 1-2.

There Are No Questions of Material Fact.

19. There is no evidence in the history of Ordinance No. 3227 or anywhere else to suggest that the actual use of timeshares changed in any way from 1999 (when Gardens at West Maui was decided) to 2004 (when the County established the separate Timeshare real property tax classification), or to the present day.

20. The parties have not disputed the authenticity or admissibility of any of the exhibits before the Court on the Motion.

21. Based on the foregoing, there are no questions of material fact, and summary judgment is appropriate as to the Motion.

22. Ordinance No. 3227 violated MCC section 3.48.305, and the Timeshare real property tax classification is illegal. Accordingly, the associated tax rates that the County adopted for the Timeshare real property tax classification from 2005 to the present are collectively, inherently invalid and void, and ORV and ORVN have incurred damages in the amount of the real property taxes they actually paid in excess of what they would have paid had timeshares been included in the Hotel real property tax classification.

CONCLUSIONS OF LAW

1. If any of the following conclusions of law are deemed findings of fact, they shall be construed as such.

Summary Judgment Standard

2. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Haw. R. Civ. P. 56; see also Young v. Planning Comm'n of Cty. of Kaua'i, 89 Hawai'i 400, 407, 974 P.2d 40, 47 (1999).

3. "[T]he moving party has the initial burden of identifying those portions of the record demonstrating the absence of a genuine issue of material fact and 'may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent.'" Young, 89 Hawai'i at 407, 974 P.2d at 47 (citation omitted).

4. Although on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Young, 89 Hawai'i at 407, 974 P.2d at 47.

5. "A party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor is he [or she] entitled to a trial on the basis of a hope that he can produce some evidence at that time." Id. (citation, internal quotation marks omitted).

6. In deciding the Motion, the Court considers Ordinance No. 3227 and B&F Committee Report 04-187.

7. As the County has conceded, official committee reports are "the authoritative expression of legislative intent." Trial Brief, filed by the County on November 20, 2017, at 15 (quoting In re Kelly, 841 F.2d 908, 912 n.3 (9th Cir. 1988)).

8. The Court has not considered the individual statements reflecting the motivations and thoughts of individual councilmembers, whether set forth in minutes of B&F Committee meetings, or in post-adoption declarations, emails, or other communications or documents.

The County Is Not a Sovereign, and Its Power to Create Real Property Tax Classifications Is Limited to Consideration of Real Property Use.

9. As a municipal corporation, the County is not a sovereign. The County is solely the creation of the State. As such, the County may exercise only those powers that have been delegated to it. State v. Medeiros, 89 Hawai'i 361, 365, 973 P.2d 736, 740 (1999).

10. Article VIII, section 3 of the Hawai'i Constitution explicitly reserves all taxing powers to the State, with the sole exception of the power to tax real property, which the Constitution assigns to the counties.

11. Under the MCC, the County is authorized to create real property tax classifications based **only** on differences in the use of real property.

12. MCC chapter 3.48 establishes real property tax classifications that are based on the use of real property. See MCC § 3.48.305.A; Gardens at West Maui, 90 Hawai'i at 337, 978 P.2d at 775 (for the purpose of real property taxation, the County of Maui "classifies real property into . . . classifications based on use.").

13. Likewise, MCC section 3.48.305.B requires that assignments to these classifications depend upon how property is **used**.

14. MCC section 3.48.305.C, subsection 2.a, requires that when, as here, real property is subdivided into condominium units, the real property tax classifications must be based on actual use. See also Gardens, 90 Hawai'i at 343, 978 P.2d at 781 (holding that because of the same "actual use," timeshares fell within the "Hotel Resort" classification: "[t]he 'Hotel Resort' classification thus legitimately applies to properties whose actual use is transient or short-term,

regardless of whether the units are used personally") (emphasis added); see also id. at 344, 978 P.2d at 782 ("the 'Hotel Resort' classification is intended to apply to properties whose actual use is transient or short-term even though the owners may use the units personally").

15. The County may consider only the actual use of real property when creating a real property tax classification; it has no authority under the MCC to consider anything else.

16. The County has no power to consider anything other than differences in actual use when creating real property tax classifications for condominiums.

17. The County has asserted various policies it tried to implement through the creation of a separate Timeshare real property tax classification, but none of those policies relate to the actual use of real property. Because the County failed to create the Timeshare real property tax classification based only on a difference in actual use between timeshares and hotels, the classification is illegal. It cannot stand as a matter of law regardless of what policies the County tried to implement.

B&F Committee Report 04-187 Establishes that the County's Purpose in Creating the Timeshare Real Property Tax Classification Was to Equalize a Perceived Disparity in TAT.

18. As B&F Committee Report 04-187—the official report of Draft Bill 76—confirms, the County created the Timeshare real property tax classification specifically and solely to address the perceived disparity in TAT assessments as between timeshares and hotels.

19. B&F Committee Report 04-187 cites no distinction in the actual use of timeshares and hotels, but implicitly presumes their uses are the same, so that TAT assessments should also be the same. As the sole reason for the proposed Timeshare real property tax classification, B&F Committee Report 04-187 cites the difference in the statutory formulas for TAT assessments on hotels on the one hand, and on timeshare properties on the other.

The County Has Judicially Admitted Its Purpose of "Equalizing" a Perceived Disparity in TAT, and Its Belief That It Has the Power to Do So.

20. The County's Request for JN No. 6 and Request for JN No. 8 are judicial admissions of what the County believes its powers to be and how it actually enacted the Ordinance in question based on that belief.

21. The County's Request for JN No. 6 and Request for JN No. 8, along with B&F Committee Report 04-187, are also judicial admissions that the purpose of the County in establishing the Timeshare real property tax classification sought to remedy a perceived disparity in TAT assessments.

22. The admissions made by the County, including those in Request for JN No. 6 and Request for JN No. 8, bind it, and the Court may consider them in deciding the Motion. See Lee v. Puamana Cmty. Ass'n, 109 Hawai'i 561, 573, 128 P.3d 874, 886 (2006) ("A judicial admission is "a formal statement, either by a party or his or her attorney, in the course of a judicial proceeding that removes an admitted fact from the field of controversy.").

23. Because the County created the Timeshare real property tax classification for a reason other than any difference in the actual use of timeshares and hotels, the County exceeded its own circumscribed powers in violation of MCC section 3.48.305, and the classification is therefore illegal and void.

24. The County also exceeded its power under article VIII, section 3 of the Hawai'i Constitution, which limits the County's taxation power to real property taxes.

The MCC Definitions of Timeshare and Hotel Are Unrelated to Use.

25. As amended by Ordinance No. 3227, MCC's chapter 48, governing real property taxes, establishes as a matter of law that there is no distinction in the actual use of hotels and timeshares, because it defines that use in identical terms. MCC section 3.48.305.C classifies

condominiums as "Hotel" when, with certain exceptions, they are "occupied by transient tenants for periods of less than six consecutive months." That section classifies condominiums as Timeshare when, with certain exceptions, they are "occupied by transient tenants for periods of less than six consecutive months" and subject to a timeshare plan as defined in HRS section 514E-1.

26. Consequently, under the MCC, the only difference between a condominium classified as Hotel and a condominium classified as Timeshare is the existence of a timeshare plan, a distinction that is irrelevant to the property's actual use.

27. A timeshare plan as defined in HRS section 514E-1 relates to the legal interest in a unit, not to the actual use of a unit. See HRS § 514E-1 (defining "time share plan" primarily as "any plan or program in which the use, occupancy, or possession of one or more time share units circulates among various persons for less than a sixty-day period in any year, for any occupant.").

28. Because the only difference between the Timeshare and Hotel real property tax classifications is the existence of a timeshare plan, unrelated to use, the Timeshare classification is not based on a difference in actual use, and the County violated the MCC when it created the classification.

As a Matter of Law, Under *Gardens at West Maui* and *Stallard*, the Existence of a Timeshare Plan Is Unrelated to Use.

29. Gardens at West Maui, 90 Hawai'i 334, 978 P.2d 772, establishes as a matter of law that the existence of a timeshare plan—which is the sole factor distinguishing Hotels and Timeshares in the MCC—is irrelevant to the actual use of real property.

30. Gardens at West Maui involved a challenge to an ordinance classifying all timeshares as Hotel, and eliminating the prior classification of timeshare units as Apartment or

Hotel based on whether they were rented as a hotel unit or occupied by an owner. The County passed the ordinance to classify all timeshare units as Hotel to eliminate disproportionate real property tax burdens within that classification. 90 Hawai'i at 342, 978 P.2d at 780.

31. The Supreme Court upheld the ordinance, concluding that it properly classified all timeshares as Hotel based on "actual use": "Multiple owners subject to a time share plan, although vested with ownership rights in their time slots, put the units to use much like transient hotel guests, resulting in intensive use of the property." Gardens at West Maui, 90 Hawai'i at 343, 978 P.2d at 781 (emphasis added). "The 'Hotel Resort' classification thus legitimately applies to properties whose actual use is transient or short-term, regardless of whether the units are used personally." Id. (emphasis added); see also id. at 344, 978 P.2d at 782 ("the 'Hotel Resort' classification is intended to apply to properties whose actual use is transient or short-term even though the owners may use the units personally").

32. Gardens at West Maui thus establishes that the existence of a timeshare plan is irrelevant to a property's actual use for real property tax purposes. The Court in Gardens at West Maui concluded that no legally cognizable distinction existed between the use of a unit by a hotel guest and the use of a unit by a timeshare owner, so that any such unit is properly included in the Hotel classification if its actual use is transient or short-term. If actual use is unaffected by the identity of the user, it is also unaffected by the existence of a timeshare plan which merely determines the identity of the user.

33. Gardens at West Maui also establishes as a matter of law that, specifically for real property tax purposes, the actual use of timeshares and hotels is the same. Gardens at West Maui, 90 Hawai'i at 343, 978 P.2d at 781.

34. Stallard v. Consolidated Maui, Inc., 103 Hawai'i 468, 83 P.3d 731 (2004), also

establishes as a matter of law that timeshare and hotel uses are identical. In Stallard, another case that arose on Maui, the Court held that, in drafting HRS section 514E-4, regarding zoning of timeshares, "it was the intent of the [State] legislature 'that time sharing and transient vacation rental use are identical uses of land . . . [, therefore] time sharing and transient vacation rentals should be either permitted or prohibited on an equal basis within an area deemed appropriate by the county." 103 Hawai'i at 474 n.18, 83 P.3d at 737 n.18 (quoting Sen. Conf. Comm. Rep. No. 8–80, in 1980 Senate Journal, at 942) (emphasis added).

The Timeshare Real Property Tax Classification Is Illegal and Void.

35. Because the County created the Timeshare real property tax classification based on considerations other than any distinction in the actual use of timeshare and hotel property, the County violated MCC section 3.48.305, and the classification is therefore illegal and void from its inception.

36. Because the legality of the Timeshare real property tax classification is implicit to Count I (Equal Protection) of the Second Amended Complaint, filed on August 12, 2016, the Court's conclusion that the classification is illegal and void disposes of Count I.

37. Because the Court concludes that the Timeshare real property tax classification violates the MCC and is thus illegal and void, the Court need not conduct a rational basis analysis, and therefore Plaintiffs' Motion for Partial Summary Judgment, Based on Use, As To Count I (Equal Protection) of the Second Amended Complaint Filed August 12, 2016, filed September 29, 2017, is moot.

ORDER

IT IS HEREBY ORDERED ADJUDGED AND DECREED that Plaintiffs' Motion for Partial Summary Judgment Re: Illegality of the Timeshare Real Property Tax Classification, filed on December 19, 2017 is GRANTED and that Plaintiffs' Motion for Partial Summary

Judgment, Based on Use, As To Count I (Equal Protection) of the Second Amended Complaint Filed August 12, 2016, filed September 29, 2017, is DENIED AS MOOT.

MAR 2 2 2018

DATED: Wailuku, Hawai'i, _____.

JUDGE OF THE ABOVE-ENTITLED COURT

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.

Robert G. Klein, Esq. [VIA U.S. MAIL]
Lisa W. Cataldo, Esq.
MCCORRISTON MILLER MUKAI MACKINNON LLP
Five Waterfront Plaza, 4th Floor
500 Ala Moana Boulevard
Honolulu, Hawai'i 96813

Attorneys for Plaintiffs

Patrick K. Wong, Esq. [VIA COURT JACKET]
Brian A. Bilberry, Esq.
DEPARTMENT OF THE CORPORATION COUNSEL
200 South High Street
Wailuku, Hawai'i 96793

Attorneys for Defendants County of Maui and Maui County Council

DATED: Wailuku, Maui, Hawai'i, MAR 23 2018

Clerk of the above-entitled Court