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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

SONIA DAVIS, JESSICA LAU, LAURALEE
B. RIEDELL, and ADAM M. WALTON,

Plaintiffs/Appellants,

v.

MICHAEL P. VICTORINO, County of Maui
Office of the Mayor, SCOTT TERUYA,
County of Maui Department of Finance, and
COUNTY OF MAUI,

Defendants/Appellees.

Civil No. 2CCV-21-0000305

Agency Docket/Case No. n/a

MOTION FOR LEAVE TO SUPPLEMENT
THE RECORD; DECLARATION OF
COUNSEL; EXHIBITS “1”-“16”;
CERTIFICATE OF SERVICE

MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

SONIA DAVIS, JESSICA LAU, LAURALEE B. RIEDELL, and ADAM M. WALTON
(together, “Plaintiffs/Appellants” or “Houseless Appellants”) respectfully submit this Motion for
Leave to Supplement the Record with the following documentary evidence:

- (1) Sworn declarations of each of the Houseless Appellants (*See* Exhibits 1 to 4);
- (2) Maui County press releases dated September 1, 2021, September 17, 2021,
September 21, 2021, and September 22, 2021 (“Maui County Press Releases”) (*See*
Exhibits 5 to 8);

- (3) County Appellees’ “Notice to Vacate County Property” (“Notice to Vacate”) (*See* Exhibit 9); and
- (4) The ACLU of Hawai‘i’s September 21, 2021 letter to County Appellees regarding “Maui County sweeps of people experiencing houselessness at Pu‘uhonua o Kanaha,” dated September 21, 2021 (“ACLU of Hawai‘i Demand Letter”) (*See* Exhibit 10).
- (5) News articles dated between September 22, 2021 and October 2, 2021 which describe the actions of MICHAEL P. VICTORINO, SCOTT TERUYA, and COUNTY OF MAUI (together, “Defendants/Appellees” or “County Appellees”) in relation to their final decision to execute the forced eviction and vacatur of people and their belongings from putative County of Maui property on or about September 20, 2021 through September 22, 2021 (the “Kānahā Sweep”) (together, “Kānahā Sweep News Articles”) (*See* Exhibits 11 to 16);

In conformity with Hawai‘i Revised Statutes (HRS) § 91-14(e), this evidence is material to the issues in the case, and Houseless Appellants were improperly prevented from presenting such evidence in an agency proceeding because County Appellees did not provide Houseless Appellants with a constitutionally required hearing before executing the Kānahā Sweep—despite Houseless Appellants having filed requests for a contested case. Further, this evidence is highly relevant and material, and is not subject to exclusion under HRS § 91-10.

I. Houseless Appellants were improperly prevented from presenting the evidence sought to be supplemented in an agency proceeding before County Appellees

In an agency appeal, judicial review is generally confined to the administrative record. HRS § 91-14(f); *DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC*, 339 P.3d 685, 714 (Sup. Ct. Haw. 2014). Section 91-14(e), however, provides that:

If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper.

HRS § 91-14(e); *see also DW Aina*, at 714–15.

Houseless Appellants meet the § 91-14(e) standard here. In this case, Houseless Appellants were prevented entirely from presenting *any* evidence before County Appellees—who were the relevant “agencies” with the legal authority to make decisions in this instance—in violation of their constitutional and statutory rights. HRS § 91-1. *See generally* Statement of the Case, Dkt. #1. Despite Houseless Appellants’ constitutionally protected property interests in their belongings at the Kanahā Area¹, their liberty and privacy interests, and the fact that Houseless Appellants filed written requests for a contested case, County Appellees did not hold contested case hearings (or any hearing) before they conducted the Kanahā Sweep. This was a violation of Houseless Appellants’ procedural due process rights, which require “notice and an opportunity to be heard at a meaningful time and in a meaningful manner,”² and also constituted unlawful procedure under HRS § 91-14(g)(3). Because County Appellees did not respond at all to Houseless Appellants’ requests for a contested case, Houseless Appellants were improperly prevented from presenting any evidence before the final agency action at issue was taken. Given that Houseless Appellants were wrongfully deprived of their opportunity to provide evidence

¹ As defined in Plaintiff/Appellants’ Statement of the Case, Dkt. #1 at 3, the Kanahā Area encompasses property near “Amala Place and Keoneone Street, along with the portion known as the Kahului Wastewater Treatment Plant” in Kahului, Maui.

² *Sandy Beach Defense Fund v. City Council of City and County of Honolulu*, 70 Haw. 361, 773 P.2d 250, 261 (1989).

before final agency action was taken, Houseless Appellants respectfully request that the record now be supplemented with the below materials.

II. The evidence is relevant, material, and not unduly repetitious

HRS § 91-10 provides, in relevant part: “any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” The evidence with which Houseless Appellants seek to supplement the record meet that standard here: they are highly relevant and material to the present dispute—and are in no way “irrelevant, immaterial, or unduly repetitious” within the meaning of HRS § 91-10. The evidence thus also meets the HRS § 91-14(e) requirement that additional evidence added under the provision be “material.”

A. Sworn declarations of each of the named Houseless Appellants (Exhibits 1–4)

Despite filing formal, written requests for a contested case with County Appellees, Houseless Appellants were improperly deprived of their right to be heard before final agency action was taken by County Appellees. As a result, they did not have the opportunity to testify and/or submit evidence,³ argue about the unlawfulness of the Kanahā Sweep,⁴ request accommodations,⁵ and/or describe their personal circumstances.⁶ These details are highly

³ *See, e.g.*, Exhibit 4 (Declaration of Adam M. Walton), ¶ 12 (stating that the County “provided no opportunity to contest what was about to happen”).

⁴ *See, e.g.*, Exhibit 2 (Declaration of Jessica Lau), ¶ 20 (stating that “I knew that what [the County Appellees] were doing was wrong and a violation of our rights”).

⁵ *See, e.g.*, Exhibit 4 (Declaration of Adam M. Walton), ¶ 12 (stating that “[w]e would have asked for guidelines or further instructions on where to find a space place to sleep without being harassed by police or criminalized”).

⁶ *See, e.g.*, Exhibit 1 (Declaration of Sonia Davis), ¶ 12 (stating how, after being “arrested in September for missing my probation officer’s phone call,” she was “released from jail” on September 15, 2021 and that “[f]ive days was not enough time” to gather her and her family’s belongings).

material and relevant to the central issues of the case. Houseless Appellants thus respectfully request that this Court grant them the opportunity to submit testimony via declaration now. Such testimony encompasses statements Houseless Appellants would have made had they been afforded their constitutional right to a hearing before County Appellees took final agency action.⁷ Such testimony also provides details about the inadequate, ineffective notice provided by County Appellees⁸; the County Appellees' various failures to comply with constitutional requirements before, during, and after the Kanahā Sweep⁹; and the harm that the Kanahā Sweep caused to Houseless Appellants.¹⁰

B. Maui County press releases (Exhibits 5–8), Notice to Vacate County Property (Exhibit 9), and ACLU of Hawai'i Demand Letter (Exhibit 10)

Given the lack of a hearing or otherwise publicly available information regarding County Appellees' decision-making process relating to Houseless Appellants' requests for a contested

⁷ Of course, it is impossible to determine, after the fact, precisely what testimony Houseless Appellants would have provided had they been provided a constitutionally required hearing.

⁸ Even when the Notice to Vacate did reach the Houseless Appellants, it did not include, as constitutionally required, any information on “procedures available for challenging th[e] action.” *Brown v. Thompson*, 91 Haw. 1, 9, 979 P.2d 586, 594 (1999), *as amended* (July 13, 1999). *See, e.g.*, Exhibit 4 (Declaration of Adam M. Walton), ¶ 12 (stating that “[t]here was no contact information provided to ask questions or learn more about the process . . . the way the notice was written indicated that there was nothing that could be done”).

⁹ *See, e.g.*, Exhibit 2 (Declaration of Jessica Lau), ¶¶ 21, 29 (stating how “One police officer . . . intentionally tagged both of my cars and marked my tires with yellow chalk, even though he knew that those were both my cars and they were not abandoned . . . they pried [car] doors open with crowbars, cleaned and threw out [unabandoned] property onto the ground so that the bulldozer could then pick it up”); Exhibit 1 (Declaration of Sonia Davis), ¶¶ 16-17 (stating that “I saw trucks tow away cars that were still being used to store houseless people’s items and/or were not abandoned vehicles . . . I lost property during the sweep . . . [including] [a]t least one vehicle . . . and my family’s belongings”).

¹⁰ *See, e.g.*, Exhibit 2 (Declaration of Jessica Lau), ¶ 33 (noting that “The sweep was very traumatic and disruptive, and I’m feeling overwhelmed with everything”); Exhibit 3 (Declaration of Lauralee B. Riedell), ¶ 26 (stating that “I’m so tired, and don’t even have the energy to go to work because I feel so exhausted from this ordeal”).

case and the Kanahā Sweep, County Appellees’ final agency action was taken based on an administrative record the scope of which is currently unknown. To ensure that certain relevant and material matter is included in the record before this Court, Houseless Appellants submit such matter and—to the extent it has not already been explicitly included—request that it be added to the record at this time. Specifically, Houseless Appellants request that the following evidence should properly be considered part of the administrative record in this case: the Maui County Press Releases (Exhibits 5–8), Notice to Vacate (Exhibit 9), and ACLU of Hawai‘i Demand Letter (Exhibit 10).

All of this matter should properly be considered a part of the administrative record because they were available to County Appellees and should have been considered by them before final agency action was taken and/or continued, whether as “intermediate rulings” of the County Appellees or “[e]vidence received or considered.”¹¹

Further, all of this matter is relevant, material, and not unduly repetitious. HRS § 91-10.

The Maui County Press Releases (Exhibits 5–8) were issued by County Appellee County of Maui and, among other things, describe County Appellees’ actions during the Kanahā Sweep, reveal the public-facing messaging regarding the agency action (including public statements made by Appellee Mayor Victorino), and explain the alleged reasoning behind the execution of the Kanahā Sweep. Such statements are relevant to the issues of whether County Appellees gave adequate, effective notice and procedural due process to Houseless Appellants.

The Notice to Vacate (Exhibit 9) was also issued by County Appellees and is likewise instructive on the issues of adequate and effective notice to Houseless Appellants and procedural

¹¹ See HRS § 91-9(f) (defining the “record” for the “purpose of agency decisions” to include “intermediate rulings” and “[e]vidence received or considered” by the agency).

due process. Although Houseless Appellants' Statement of the Case describes the Notice to Vacate, Houseless Appellants submit a complete copy of the Notice for the Court's consideration.

Finally, the ACLU of Hawai'i Demand Letter (Exhibit 10) described—at the time County Appellees were continuing to execute the Kanahā Sweep—the serious constitutional and safety concerns the agency action created. County Appellees nevertheless continued the sweep despite having received notice of these concerns—and knowing that they would be infringing Houseless Appellants' procedural due process rights by failing to provide them with adequate notice or an opportunity to be heard. The demand letter also provides other relevant facts about the situation on the ground in the Kanahā Area, the lack of available shelter space on Maui, and other actions that were taken by County Appellees during the Kanahā Sweep.

C. Additional evidence that contextualizes the agency action: Kanahā Sweep News Articles (See Exhibits 11–16)

Finally, Houseless Appellants also seek leave to supplement the record with additional evidence that provides further context to the present dispute: news articles covering the Kanahā Sweep (Exhibits 11–16). These news articles, published between September 22, 2021 and October 2, 2021, describe the actions of County Appellees surrounding the Kanahā Sweep, and include public statements from Appellee Mayor Victorino. These articles provide material and relevant context surrounding the Kanahā Sweep, the lack of adequate notice and insufficient process County Appellees provided to Houseless Appellants and others affected by the sweep, as well as some of County Appellees' putative reasoning behind their actions.

II. Conclusion

For the foregoing reasons, Houseless Appellants respectfully request leave to supplement the administrative record in this matter with the exhibits appended to this Motion.

DATED: Honolulu, Hawai'i, October 27, 2021.

Respectfully submitted,

/s/ Jongwook "Wookie" Kim
JONGWOOK "WOOKIE" KIM

ACLU OF HAWAII FOUNDATION
Attorney for Plaintiffs/Appellants

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CERTIFICATE OF SERVICE

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I hereby certify that on this date, a copy of the document within was served via

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DATED: Honolulu, Hawai'i, October 27, 2021.

Respectfully submitted,

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