CAAP-22-0000368

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAII

SONIA DAVIS, JESSICA LAU, LAURALEE B. RIEDELL, and ADAM M. WALTON, Plaintiffs-Appellees, vs. MICHAEL P. VICTORINO, County of Maui Office of the Mayor, SCOTT TERUYA, County of Maui Department of Finance, and COUNTY OF MAUI, Defendants-Appellants.	Civil No.: 2CCV-21-0000305 (1) NOTICE OF APPEAL OF THE ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS NOTICE OF APPEAL (DKT. 114), FILED ON MARCH 16, 2022 CIRCUIT COURT OF THE SECOND CIRCUIT COURT; STATE OF HAWAII Judge: Honorable Kirstin M. Hamman

DEFENDANTS-APPELLANTS MICHAEL P. VICTORINO, County of Maui Office of the Mayor, SCOTT TERUYA, County of Maui Department of Finance and, COUNTY OF MAUI'S OPENING BRIEF

STATEMENT OF RELATED CASES

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. STATEMENT OF POINTS OF ERROR 4

III. STANDARD OF REVIEW 5

IV. ARGUMENT 6

A. THE COURT ERRONEOUSLY ISSUED CONCLUSIONS OF LAW ON ISSUES THAT WERE NOT PART OF THE COUNTY'S MOTION 6

B. PLAINTIFFS-APPELLEES DID NOT HAVE A COGNIZABLE PROPERTY INTEREST THAT WAS ADJUDICATED BY THE COUNTY'S ACTION 7

C. PLAINTIFFS-APPELLEES WERE NOT ENTITLED TO A CONTESTED CASE HEARING PRIOR TO REMOVAL OF THEIR PROPERTY FROM COUNTY LAND 12

1. The Private Interest which will be Affected 13

2. The Risk of Erroneous Deprivation of Such Interest Through the Procedures Actually Used, and the Probable Value, if any, of Additional or Alternative Procedural Safeguards 14

3. The Governmental Interest Including the Burden that Additional Procedural Safeguards Would Entail 18

V. CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Aitken v. City of Aberdeen,
393 F. Supp. 3d 1075 (W.D. Wash. 2019) 9

Bush v. Hawaiian Homes Com'n,
76 Hawaii 128, 870 P.2d 1272 (1994)..... 6, 18

De-Occupy Honolulu v. City & Cty. of Honolulu,
No. CIV. 12-00668 JMS, 2013 WL 2285100 (D. Haw. 2013) 11, 15, 16

Flores v. Board of Land and Natural Resources,
143 Hawaii 114, 424 P.3d 469 (2018)..... 6, 12, 13

Grace v. Drake,
832 F. Supp. 1399 (D. Haw. 1991) 11, 15, 16

Hawaii Gov't Employees' Ass'n, AFSCME Loc. 152 v. Pub. Emps. Comp. Appeals Bd. of State of Hawaii,
10 Haw. App. 99, 861 P.2d 747 (1993)..... 8

Holdman v. Olim,
59 Haw. 346, 581 P.2d 1164 (1978)..... 8

Hooper v. City of Seattle,
No. C17-0077RSM, 2017 WL 591112 (W.D. Wash. Feb. 14, 2017) 16, 17

James v. City and County of Honolulu,
125 F. Supp. 3d 1080 (D. Haw. 2015) 17

Lavan v. City of Los Angeles,
693 F.3d 1022 (9th Cir. 2012)..... 10

Lingle v. Hawaii Gov't Emps. Ass'n, AFSCME, Loc. 152, AFL-CIO,
107 Hawaii 178, 111 P.3d 587 (2005)..... 5

Martin v. City & Cty. of Honolulu,
No. CV 15-00363 HG-KSC, 2015 WL 5826822 (D. Haw. 2015) 18

Martin v. City of Boise,
920 F.3d 584 (9th Cir. 2019)..... 9

Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.,
136 Hawaii 376, 363 P.3d 224 (2015)..... 21

Medeiros v. Hawaii Cty. Plan. Comm'n,
8 Haw. App. 183, 797 P.2d 59 (1990) 12

Miralle v. City of Oakland,
No. 18-CV-06823-HSG, 2018 WL 6199929 (N.D. Cal. 2018) 9

Proctor v. D.C.,
310 F. Supp. 3d 107 (D.D.C. 2018) 11

Public Access Shoreline Hawaii v. Hawaii County Planning Commission,
79 Hawaii 425, 903 P.2d (1995) 6, 7

Sharma v. State, Dep't of Land & Nat. Res.,
66 Haw. 632, 673 P.2d 1030 (1983) 20

Sheehan v. Grove Farm Co., Inc.,
114 Hawaii 376, 163 P.3d 179 (2005) 7

Shipp v. Schaaf,
379 F. Supp. 3d 1033 (N.D. Cal. 2019) 9

State v. Jordan,
53 Haw. 634, 500 P.2d 560 (1972) 8

Sullivan v. City of Berkeley,
No. C 17-06051 WHA, 2017 WL 4922614 (N.D. Cal. 2017) 9, 11, 15, 17, 18

Yeager v. City of Seattle,
No. 2:20-CV-01813-RAJ, 2020 WL 7398748 (W.D. Wash. 2020) 10

Young v. City of Los Angeles,
No. CV-2000-709-JFW-RAO, 2020 WL 616363 (C.D. Cal. 2020) 9

Statutes

HRS § 91-9 20

HRS § 91-9.5 20

HRS § 91-10 7

HRS § 91-11 21

HRS § 91-12 21

HRS § 91-14 ..... 3, 4, 5, 6, 12, 18, 21

HRS § 286-41 13

HRS § 286-42 13

HRS § 290-2 ..... 2, 14, 15

HRS § 708-800 8

HRS § 708-815 8

Rules

HRCP Rule 12(b) 5

HRCP Rule 12(b)(l) 5

HRCP Rule 28 1

HRCP Rule 32 1

DEFENDANTS-APPELLANTS MICHAEL P. VICTORINO, County of Maui Office of the Mayor, SCOTT TERUYA, County of Maui Department of Finance and,
COUNTY OF MAUI'S OPENING BRIEF

Comes now Defendants-Appellants MICHAEL P. VICTORINO, County of Maui Office of the Mayor, SCOTT TERUYA, County of Maui Department of Finance, and COUNTY OF MAUI (hereinafter "County") hereby submits their Opening Brief in accordance with Rule 28 and Rule 32 of the Hawai'i Rules of Appellate Procedure ("HRAP").

I. STATEMENT OF THE CASE

On September 1, 2021, the County of Maui issued a press release informing the public that clean-up efforts of County property on Amala Place near Kanaha Pond and the Wailuku-Kahului Wastewater Treatment Plant would commence in late September. *Record on Appeal* ("ROA"), Dkt. 014, Doc. 51, pp. 007-009.[1] For several months in advance of this notice, the County had begun outreach efforts with the assistance of the Family Life Center and other community groups to assist houseless individuals on Amala Place with finding alternative housing. See *ROA*, Dkt. 014, Doc. 51, pp. 0013-0014; 0017-0020, ¶ 4; 0021; 0022-0024, ¶ 4. A subsequent press release was issued on September 17, 2021 indicating that the cleanup efforts would begin on about September 19, 2021 and last through September 24, 2021. *ROA*, Dkt. 014, Doc. 051, pp. 0005-0006.

On September 14, 2021, the County provided notice to houseless persons on Amala Place by issuing and posting Notices to Vacate County Property by September 20, 2021. *ROA*, Dkt. 014, Doc. 51, pp. 11-12. All of the Plaintiffs-Appellees acknowledge having received actual advanced

[1] For the purposes of this brief, the first number in each citation represents the Intermediate Court of Appeals Docket number in this case, and shall appear as "Dkt." Subsequent numbers represent the docket number in the Circuit Court case and shall appear as "Doc."

notice of the County's planned cleanup efforts.[2] In addition, both Plaintiffs-Appellees Davis and Lau stated that they personally met with the mayor in advance of the County's September 20, 2022 cleanup efforts. *Declaration of Jessica Lau,* ROA, Dkt. 014, Doc. 013, p. 1, ¶ 8 ("I was one of the Pu'uhonua o Kanaha community members who attended the meeting with Mayor Victorino and his wife a few days before the Kanaha Sweep began"); *Declaration of Sonia Davis,* ROA, Dkt. 014, Doc. 012, p. 3, ¶ 14 ("I was present at the meeting with Mayor Victorino and other Kanaha residents in September before the sweep occurred.") Plaintiffs-Appellees Riedell and Walton were able to remove their personal items from County property prior to the County's clean-up efforts. See *Declaration of Lauralee B. Riedell,* ROA, Dkt. 014, Doc. 14, p. 5, ¶ 22 ("we were lucky enough to not have los anything during the sweep"); *Declaration of Adam M. Walton,* ROA, Dkt. 014, Doc. 15, p. 4, ¶ 18 ("we did not lose any property during the sweep").

The County commenced its clean-up efforts on or around September 20, 2021, which continued through September 22, 2021. ROA, Dkt. 014, Doc. 051, pp. 0001-0004. The County impounded several vehicles during the course of its clean-up efforts. The County provided notice and additional process to the registered owners of impounded vehicles in conformity with HRS

[2] Plaintiff-Appellee Sonia Davis acknowledged that a police officer spoke to her and "handed" her "a physical copy on September 15, 2021, approximately 5 days before the County initiated its cleanup efforts. *Declaration of Sonia Davis,* ROA, Dkt. 014, Doc. 12, p. 2, ¶ 12. Plaintiff-Appellee Jessica Lau "filed a contested case request with the County on or about September 6, 2021," indicating she had personal knowledge of the proposed clean-up efforts at least two weeks in advance. *Notice of Appeal to the Circuit Court,* ROA, Doc. 014, Doc. 1, pp. 6-7, ¶ 9. Similarly, Plaintiffs-Appellees Lauralee Riedell and Adam Walton "filed a contested case request with County Appellees on or about September 16, 2012," indicating they were aware of the impending County efforts at least four days prior. *Notice of Appeal to the Circuit Court,* ROA, Dkt. 014, Doc. 1, p. 7, ¶¶ 10,11.

§ 290-2[3] and Maui County Code ("MCC") § 20.20.060(B)[4]. Notices were sent to all identifiable registered owners of the vehicles which were impounded during the County's cleanup efforts.[5] None of the Plaintiffs-Appellees were the registered owners of any of the seized vehicles and to date, none of the Plaintiffs-Appellees have identified which vehicles they are asserting an interest in. ROA, Dkt. 014, Doc. 053, pp. 0066-0076.

Rather than filing a direct civil action, Plaintiffs-Appellees Sonia Davis, Jessica Lau, Lauralee B. Reidel, and Adam M. Walton filed their action as an Agency Appeal on October 20, 2021. In it, they brought a total of four claims, all under HRS § 91-14: (I) Violation of Constitutional Provisions under Hawaii Revised Statutes ("HRS") § 91-14(g)(1), (II) Unlawful

[3] "Upon taking custody of any abandoned vehicle, a written notice shall immediately be sent by registered or certified mail to the legal and registered owner of the vehicle at the address on record at the vehicle licensing division. The notice shall contain a brief description of the vehicle, the location of custody, and intended disposition of the vehicle if not repossessed within ten days after the mailing of the notice, or in the case where the address of the registered owner on record at the vehicle licensing division is an out-of-state address, within twenty business days after the mailing of the notice. A notice need not be sent to a legal or registered owner or any person with an unrecorded interest in the vehicle whose name or address cannot be determined. Absent evidence to the contrary, a notice shall be deemed received by the legal or registered owner five days after the mailing."

[4] "Notice to Owner. Upon taking custody of any vehicle, a written notice shall immediately be sent by registered or certified mail with a return receipt, to the legal and registered owner of the vehicle at the address on record at the Department of Finance. The notice shall contain a brief description of the vehicle, location of custody, and intended disposition of the vehicle if not repossessed within ten days after the mailing of the notice. A notice need not be sent to a legal or registered owner or any other person with an unrecorded interest in the vehicle whose name and address cannot be determined.

[5] See *ROA*, Dkt. 014, Doc. 53, pp. 0066-0076, 0082, 0084, 0086; Doc. 54, pp. 0093, 0095, 0100, 0102, 0105; Doc. 55, pp. 0109, 0114; Doc. 56, pp. 0120, 124, 128, 132, 134, 135; Doc. 57, p. 0141; Doc. 58, pp. 0149, 01522, 0157; Doc. 60, pp. 0163, 0164, 0167, 0172; Doc. 61, p. 0178; Doc. 62, pp. 0183, 0189, 0191; Doc. 63, pp. 0198, 0199, 0201, 0203, 0207, 0209, 0213, 0214; Doc. 64, pp. 0220, 0221, 0223, 0224; Doc. 65, pp. 0229, 0232, 0233, 0235, 0236, 0238; Doc. 66, pp. 0244, 0247, 0249; Doc. 67, pp. 0254, 0259, 0263, 0264; Doc. 68, pp. 0269, 0271; Doc. 69, pp. 0277, 0283, 0285; Doc. 70, pp. 0291, 0295, 0300; Doc. 72, pp. 0303, 0309; Doc. 73, pp. 0317, 319; Doc. 74, pp. 0323, 0326, 0333; Doc. 75, pp. 0339, 0341; Doc. 76, pp. 0345, 0348, 0353; Doc. 77, p. 0360; Doc. 78, pp. 0364, 0367, 0374; Doc. 79, pp. 0376, 0379, 0385, 0388, 0392, 0394; Doc. 80, p. 0404; Doc. 81, pp. 0411, 0417; Doc. 082 pp. 0423, 0424, 0431; Doc. 83, p. 0438.

Procedure under HRS § 91-14(g)(3), (III) Clearly Erroneous under HRS § 91-14(5) and (IV) Arbitrary, Capricious, Characterized by Abuse of Discretion, or Clearly Unwarranted Exercise of Discretion under HRS § 91-14(g)(6). *Notice of Appeal*, ROA, Dkt. 014, Doc. 001. The County filed a *Motion to Dismiss* on November 9, 2021 ("Motion") seeking to dismiss this matter for lack of jurisdiction, as there was no "final decision and order in a contested case" for the purposes of HRS § 91-14. *Motion*, ROA, Dkt. O14, Doc. 033. The County's Motion was heard by the Court on December 7, 2021 and the hearing was continued to February 22, 2022. The *Motion* was granted as to Plaintiffs-Appellees Adam M. Walton and Lauralee B. Reidel and denied as to Plaintiff-Appellees Sonia Davis and Jessica Lau. *Minutes*, ROA, Dkt. 014, Doc. 101.

Plaintiffs-Appellees submitted their *Proposed Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Notice of Appeal* ("Proposed Order"), on March 4, 2022, without the County's signature indicating its approval as to form. *Proposed Order*, ROA, Dkt. 014, Doc. 106. The County filed its *Objection to Proposed Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Notice of Appeal* ("Objection"), on March 9, 2022. *Objection,* ROA, Dkt. 014, Doc. 108. On March 16, 2022, this Court issued its *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Notice of Appeal* ("Order") over the County's objection. *Order*, ROA, Dkt. 014, Doc. 114. The County was granted leave to take this interlocutory appeal on May 6, 2022. *Order Granting Defendants Michael Victorino, Scott Teruya and County of Maui's Application for Leave to Take Interlocutory Appeal*, ROA, Dkt. 014, Doc. 131. This Appeal was timely filed on June 1, 2022.

II. STATEMENT OF POINTS OF ERROR

1) Was it proper for the Court to make findings on the issues of finality, the following of applicable agency rules and standing when those issues were not raised by any party in either briefing or hearings on the County's Motion to Dismiss?

The County raised this issue in its *Objection to Proposed Order Granting in Part and Denying in Part Defendants' Motion to Dismiss. Record on Appeal*, ("ROA"), Dkt. O14, Doc. 108.

2) Did the Court err in making substantive findings on the merits of Plaintiffs' allegations and issuing Findings of Fact in its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Notice of Appeal?

The County raised this issue in its *Objection to Proposed Order Granting in Part and Denying in Part Defendants' Motion to Dismiss.* ROA, Dkt. O14, Doc. 108.

3) Did the Court err in determining that Constitutional Due Process required a contested case hearing before Defendants could remove houseless Plaintiffs and their belongings from County property?

The County raised this issue in its *Motion to Dismiss Notice of Appeal (*"Motion"), ROA, Dkt. O14, Doc. 033, *Reply in Support of Motion to Dismiss Notice of Appeal* ("Reply"), ROA, Dkt. 014, Doc. 039, and *Supplemental Brief*, ROA, Dkt. 014, Doc. 097.

4) Did the Court err in Denying the County's Motion to Dismiss as to the claims of Plaintiffs SONIA DAVIS and JESSICA LAU?

The County raised this issue in its *Motion*, ROA, Dkt. 014, Doc. 033, *Reply*, ROA, Dkt. 014, Doc. 039, and *Supplemental Brief*, ROA, Dkt. 014, Doc. 097.

III. STANDARD OF REVIEW

Motions to dismiss are governed under the Hawaii Rules of Civil Procedure ("HRCP") Rule 12(b). Grounds for such dismissal include, "lack of jurisdiction over the subject matter." HRCP Rule 12(b)(l). In general, "the right to appeal is purely statutory and exists only when jurisdiction is given by some constitutional or statutory provision." Lingle v. Hawaii Gov't Emps. Ass'n, AFSCME, Loc. 152, AFL-CIO, 107 Hawaii 178, 184, 111 P.3d 587, 593 (2005).

For the purposes of Appeals brought under HRS § 91-14(a), jurisdiction of the Court is limited to "a final decision and order **in a contested case** or by a preliminary ruling of the nature that deferral of review pending a subsequent final decision would deprive appellant of adequate

relief." (emphasis added). Where, however, an agency action does not involve a contested case hearing, "judicial review by the circuit court … is unattainable due to lack of subject matter jurisdiction." Bush v. Hawaiian Homes Com'n, 76 Hawaii 128, 136, 870 P.2d 1272, 1280 (1994). The court does have jurisdiction, however, over the denial of contested case hearing prior to an agency action "when such a hearing is required by law … by (1) statute; (2) administrative rule; or (3) constitutional due process." Flores v. Board of Land and Natural Resources, 143 Hawaii 114, 125, 424 P.3d 469, 479 (2018).

IV. ARGUMENT

A. THE COURT ERRONEOUSLY ISSUED CONCLUSIONS OF LAW ON ISSUES THAT WERE NOT PART OF THE COUNTY'S MOTION

In its *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Notice of Appeal* ("Order"), the Court below recognized that "there are four elements for this Court to have jurisdiction under HRS § 91-14: (1) a contested case hearing that was 'required by law'; (2) finality; (3) the following of applicable agency rules; and (4) standing" citing Public Access Shoreline Hawaii v. Hawaii County Planning Commission, 79 Hawaii 425, 431, 903 P.2d 1252 (1995). *Order,* ROA, Dkt. 014, Doc. 114, p. 5, ¶ 3. The Court went on to make a finding that "the latter three elements are satisfied here." *Order,* ROA, Dkt. 014, Doc. 114, p. 5, ¶ 5. The court made this determination despite the fact that the County presented no argument regarding the issues of finality, the following of applicable agency rules, or standing in any of its briefs, nor did the Plaintiffs file any motions on those issues. These findings were unnecessary for the Court to rule on the motion before it, and effectively foreclosed an avenue of argument that could have been raised in the County's *Answering Brief.*

The court appears[6] to have based this determination on its finding that "defendants do not contest that the latter three elements are present here." *Order*, ROA, Dkt. 014, Doc. 114, p. 5, ¶ 4. This finding is clearly erroneous, however, because there was a lack of substantive briefing on those issues and no party moved for a determination on them. Indeed, the County was not required to raise those issues in its *Motion*, and could have raised them in subsequent briefing, including its *Answering Brief*, which has yet to be filed due to this interlocutory appeal. It was not required to raise these issues because, as recognized by the Court, they are jurisdictional in nature, and thus cannot be deemed to have been waived by failure to have raised them in a *Motion to Dismiss*. See Pub. Access Shoreline Hawaii, 79 Hawaii at 431, 903 P.2d at 1252 ("subject matter jurisdiction **may not be waived** and can be challenged **at any time**.") (internal citations omitted) (emphasis added).

Further, as the Plaintiffs-Appellees argued that this case was properly before the Court as an agency appeal, Plaintiffs-Appellees were the "party seeking a court's jurisdiction" and thus "[carried] the burden throughout litigation of showing proper jurisdiction." Sheehan v. Grove Farm Co., Inc., 114 Hawaii 376, 390, 163 P.3d 179, 194 (2005). See also, HRS § 91-10(5) ("the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence and well as the burden of persuasion").

B. PLAINTIFFS-APPELLEES DID NOT HAVE A COGNIZABLE PROPERTY INTEREST THAT WAS ADJUDICATED BY THE COUNTY'S ACTION

The Court erred in finding that the Plaintiffs-Appellees had a Constitutionally protected property interest that was affected by the County's action. "Constitutional due process protections mandate a hearing whenever a claimant seeks to protect a property interest" which can only be

[6] The Court made no oral findings of any of these issues when it delivered its opinion orally. See *Transcript of Electronically-Recorded Proceedings on Appeal*, February 22, 2022, Dkt. 026.

established where a person asserting that right has "more than a unilateral expectation of it," but "must, instead, have a legitimate claim of entitlement to it." Hawaii Gov't Employees' Ass'n, AFSCME Loc. 152 v. Pub. Emps. Comp. Appeals Bd. of State of Hawaii, 10 Haw. App. 99, 109, 861 P.2d 747, 753 (1993).

Here, Plaintiffs-Appellees are asserting that they have a property interest in storing their personal belongings on County property for any amount of time and in any manner they desire. They assert this right notwithstanding it being a violation of criminal statutes against trespassing,[7] and argue it continues even after being given substantial notice that they are not lawfully present and that their items will be removed. Trespassing statutes have equal application to government property as private property,[8] and the government "no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." Holdman v. Olim, 59 Haw. 346, 355, 581 P.2d 1164, 1170 (1978).

Plaintiffs-Appellees have previously cited two cases from the Ninth Circuit to support their argument that they have a property interests in maintaining their personal belongings on government property without permission and in violation of trespassing laws. Neither, however, recognizes the right that Plaintiffs-Appellees are claiming. For example, Plaintiffs-Appellees have argued that trespass statutes are unenforceable as applied against houseless persons pursuant to the

[7] See HRS § 708-815: "A person commits the offense of simple trespass if the person knowingly enters **or remains** unlawfully in or upon the premises" (emphasis added); HRS § 708-800: "Enter or remain unlawfully means to enter or remain in or upon a premises when the person is not licensed, invited, or otherwise privileged to do so. A person who, regardless of the person's intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege **unless the person defies a lawful order not to enter or remain, personally communicated to the person by the owner of the premises**." (emphasis added).

[8] "A member of the general public shares with every other member of the general public rights to use public property established by the Constitution, laws and regulations of the State. But this right to use public property is not an unlimited right. The Constitution, law and regulations of the State limited as well as permit individual use of public property in the larger interest of the citizens of the state." State v. Jordan, 53 Haw. 634, 636, 500 P.2d 560, 563 (1972).

Ninth Circuit's opinion in Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019). *Opposition to Defendants; Motion to Dismiss*, ROA, Dkt. 014, Doc. 37, p. 10, fn. 6. That decision, however, is inapplicable to this case for a variety of reasons. As an initial matter, Martin concerned "prosecuting people criminally for sleeping outside on public property." Martin, 920 F.3d at 603. This is important, because the decision in Martin was based upon a finding that the criminal sanctions levied against the Plaintiffs in that case amounted to cruel and unusual punishment under the Eighth Amendment. Here, Plaintiffs-Appellees have not brought any claims under the Eighth Amendment, and because Plaintiffs-Appellees have not been criminally cited or otherwise prosecuted, there is no cruel and unusual punishment implicated. See Shipp v. Schaaf, 379 F. Supp. 3d 1033 (N.D. Cal. 2019) ("the City's decision to require Plaintiffs to temporarily vacate their encampment does not, by itself, implicate any criminal sanctions that would trigger Eighth Amendment protections.)

Further, Plaintiffs-Appellees' reading of Martin is unduly broad. Indeed, "Courts following Martin have declined to expand its holding beyond **criminalization** of homelessness. Young v. City of Los Angeles, No. CV-2000-709-JFW-RAO, 2020 WL 616363, at *1 (C.D. Cal. 2020). Specifically, courts have recognized that "Martin does not limit the City's ability to evict homeless individuals from particular public places[9]"; "Martin does not establish a constitutional right to occupy property indefinitely at Plaintiffs' option[10]"; and Martin does not prevent the government from invoking trespass statutes on its property.[11]

[9] Aitken v. City of Aberdeen, 393 F. Supp. 3d 1075, 1082 (W.D. Wash. 2019)
[10] Miralle v. City of Oakland, No. 18-CV-06823-HSG, 2018 WL 6199929, at *2 (N.D. Cal. 2018)
[11] Sullivan v. City of Berkeley, No. C 17-06051 WHA, 2017 WL 4922614, at *4 (N.D. Cal. 2017) ("BART has reasonably invoked California's trespass statute … the right to be free from trespass is one of the oldest, most universally recognized features of the law.")

Plaintiffs-Appellees have similarly argued that the Ninth Circuit's holding in Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir. 2012) establishes that Plaintiffs-Appellees have a due process right in leaving their personal belongings on County property after being provided notice[12] that those belongings would be removed. *Opposition to Defendants Motion to Dismiss*, ROA, Dkt. 014, Doc. 37, pp. 10-11. Again, Plaintiffs-Appellees interpret the Court's ruling too broadly. The proceedings involved in Lavan concerned application of Los Angeles Municipal Code § 56.11 which at the time stated, in relevant part, that "no person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk." Id., 693 F.3d 1022, 1026. In implementing the statute, the city had a "practice of on the-spot destruction of seized property." Id., 693 F.3d at 1032. The court ultimately found that, because the city "failed to provide any notice and an opportunity to be heard" prior to seizure of property and instead made a decision "to forego any process before permanently depriving Appellees of protected property interests," the seizures involved were unreasonable. Id. That case did not, however, find "the existence of a constitutionally-protected property right to leave possessions unattended on public sidewalks." Id., 693 F.3d at 1032. See also Yeager v. City of Seattle, No. 2:20-CV-01813-RAJ, 2020 WL 7398748, at *4 (W.D. Wash. 2020) (In Lavan, "the Ninth Circuit made at least two key findings. First, it determined that homeless persons had a protectable possessory interest in their unabandoned legal papers, shelters, and personal effects. Second, it determined that, because the City of Los Angeles meaningfully interfered with that possessory interest, it had to comply with the Fourth Amendment's reasonable requirement. The City of Los Angeles could not so comply, the court reasoned, because collecting and destroying Appellees' property on the spot was unreasonable.") (internal citations omitted).

[12] *See* Fn. 2, *supra.*

Unlike the Plaintiffs in Lavan, the belongings here were not collected and destroyed "on the spot." Instead, the County took several steps to provide notice to the houseless persons who were on County property. Indeed, as Plaintiffs-Appellees state, the County announced its intention to clear its property on September 1, 2021. *Notice of Appeal*, ROA, Dkt. 014, Doc. 1, p. 9, ¶ 16. Further, as acknowledged by Plaintiffs-Appellees, "on or around September 14, 2021, County of Maui Officials and police officers - acting under the direction of County Appellees - delivered copies of a 'Notice to Vacate County Property" ('Notice to Vacate') to some people in the Kanaha area." Id., p. 9, ¶ 20. Finally, all of the Plaintiffs-Appellees concede that they had *actual* notice that their belongings would be cleared at a certain date if not removed. See fn. 2, *supra.* Each Appellant had several days to make arrangements to remove their property from the area prior to the County's actions on September 20, 2021. See Grace v. Drake, 832 F. Supp. 1399, 1404 (D. Haw. 1991), aff'd, 8 F.3d 26 (9th Cir. 1993) (Finding that there was no due process violation in the destruction of structures and personal belongings that were on State land where Plaintiffs "were put on notice that they, as well as their dwelling and personal belongings, were being put at risk if they remained on the Anahola Beach Park" and "the plaintiffs' awareness of the possible destruction of their dwelling is acknowledged in their complaint"); Sullivan v. City of Berkeley, No. C 17-06051 WHA, 2017 WL 4922614, at *6 (N.D. Cal. 2017) ("unlike the policy under attack in Lavan, our plaintiffs have been given notice that their property will be seized and [had] 72 hours to make arrangements to move their property"); De-Occupy Honolulu v. City & Cty. of Honolulu, No. CIV. 12-00668 JMS, 2013 WL 2285100, at *6 (D. Haw. 2013) ("Indeed, to avoid seizure of their property, Plaintiffs may simply remove their items from public property within twenty-four hours of notice being posted); Proctor v. D.C., 310 F. Supp. 3d 107, 116 (D.D.C. 2018) (unlike the "general notice that cleanups could happen anywhere in the Skid Row district on any weekday between 8:00 a.m. and 11 a.m., leaving homeless residents unable to anticipate exactly when or

where a clean up would take place" in Lavan, "the District of Columbia provides residents with notice of the specific date, time, and place of a scheduled cleanup, allowing them two weeks to move their possessions or pack them for storage").

C. PLAINTIFFS-APPELLEES WERE NOT ENTITLED TO A CONTESTED CASE HEARING PRIOR TO REMOVAL OF THEIR PROPERTY FROM COUNTY LAND

The Court erred in finding that "constitutional due process required a contested case hearing before the Defendants conducted the Kanaha Sweep." *Order*, ROA, Dkt. 014, Doc. 114, p. 6, ¶ 12. Even if Plaintiffs-Appellees can establish a property interest in maintaining their personal items on County property after having been given actual notice to remove them, the existence of a property right protected by due process is only the first half of the inquiry into whether or not a contested case was necessary, and thus whether the court had jurisdiction pursuant to HRS § 91-14. "In order to determine whether Flores was entitled to a contested case hearing by constitutional due process, the following must be resolved: (1) whether [Plaintiff] sought to protect an interest which qualifies as 'property' in a constitutional sense**, and (2) if so, whether a contested case hearing was required to protect such an interest.**" See Flores v. Board of Land and Natural Resources, 143 Hawaii 114, 125, 424 P.3d 469, 480 (2018) (emphasis added). See also Medeiros v. Hawaii Cty. Plan. Comm'n, 8 Haw. App. 183, 195, 797 P.2d 59, 65 (1990) ("a contested case hearing is not essential to the guarantee of due process").

Accordingly, even if Plaintiffs-Appellees do have a property right protected by due process, that is only part of the inquiry into whether or not a contested case is needed, and the court must then consider "the specific procedures required to comply with constitutional due process" by balancing three factors:

> "(1) the private interest which will be affected; (2) the risk of erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or

> alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail."

Flores, 143 Hawaii at 126-127, 424 P.3d 469, 482 (ultimately finding that, notwithstanding having a "substantial" property interest in the outcome of the government action, the Plaintiff was not entitled to a contested case hearing).

1. The Private Interest which will be Affected

With regard to the first factor, as the County has articulated in Section III(B) *supra*, the private interest being asserted by the Plaintiffs-Appellees in this case is not that they have a right to maintain their personal items, but rather, that they have a right to indefinitely store those items on public land even after receiving notice that the County intended to clear its property. For the reasons stated therein, the County asserts that the nature of those private interests, if they do rise to the level of constitutional protection, are narrow. In addition, with relation to claims made regarding vehicles which were impounded by the County, none of the Plaintiffs-Appellees are the registered owner of any of the vehicles which were removed. See ROA, Dkt. 014, Doc. 53, pp. 0066-0076. Pursuant to § 286-42 of the Hawaii Revised Statutes, "the director of finance may accept any **county certificate of title** issued for a vehicle of **prima facie evidence of ownership**." (Emphasis Added). Similarly, pursuant to HRS § 286-41, "the director of finance **shall grant full faith and credit to the currently valid certificates of title and registration** describing the vehicle, the ownership thereof, and any liens noted thereon, issued by any title state or county in which the vehicle was last registered." (Emphasis Added). Because none of the Plaintiffs-Appellees involved in this case are the registered owners of any of the impounded vehicles, and because the Director of Finance is mandated by law to accept title as prima facie evidence of ownership, the Plaintiffs-Appellees cannot claim they had any property rights that were violated when those vehicles were

impounded. Further, to date, Plaintiffs-Appellees have not identified which of the vehicles identified in the Record on Appeal they are asserting an interest in.

2. The Risk of Erroneous Deprivation of Such Interest Through the Procedures Actually Used, and the Probable Value, if any, of Additional or Alternative Procedural Safeguards

With regard to the second issue, the "procedures actually used" by the County substantially mitigated the risk of erroneous deprivation. As the record indicates, the County began outreach efforts with the assistance of the Family Life Center and other community groups to assist houseless individuals living on Amala Place with finding alternative housing several months in advance of the clean-up efforts initiated on September 20, 2021. See *ROA*, Dkt. 014, Doc. 51, pp. 0013-0014; 0017-0020, ¶ 4; 0021; 0022-0024, ¶ 4. On September 14, 2021, the County provided notice to houseless persons on Amala Place by issuing and posting Notices to Vacate County Property on September 14, 2021. *ROA*, Dkt. 014, Doc. 51, pp. 11-12. All Plaintiffs-Appellees acknowledge having received actual notice of the County's planned cleanup efforts. *See* fn. 2, *supra.* In addition, both Appellant Davis and Appellant Lau stated that they were able to personally meet with the mayor in advance of the County's September 20, 2022 cleanup efforts. *Declaration of Jessica Lau,* ROA, Dkt. 014, Doc. 013, p. 1, ¶ 8 ("I was one of the Pu'uhonua o Kanaha community members who attended the meeting with Mayor Victorino and his wife a few days before the Kanaha Sweep began"); *Declaration of Sonia Davis,* ROA, Dkt. 014, Doc. 12, p. 3, ¶ 14 ("I was present at the meeting with Mayor Victorino and other Kanaha residents in September before the sweep occurred. We had asked the mayor for more time to gather our things before the sweep.") In addition to the general notice procedures noted above, the County also provided notice and additional process to the registered owners of impounded vehicles in conformity with HRS § 290-2 and MCC § 20.20.060(B). Notices were sent to all identifiable registered owners of the vehicles which were

impounded during the County's cleanup efforts. See fn. 5 s*upra*. This additional notice provided substantial process to prevent any deprivation related to lost vehicles.

This substantial advance notice, conceded by all Plaintiffs-Appellees, provided them with sufficient time to remove their belongings to avoid **any** deprivation whatsoever. In fact, Plaintiffs-Appellees Riedell and Walton did, in fact, avail themselves of this opportunity, and as a result, were not deprived of their property interests. See *Declaration of Lauralee B. Riedell*, ROA, Dkt. 014, Doc. 14, p. 5, ¶ 22 ("we were lucky enough to not have los anything during the sweep"); *Declaration of Adam M. Walton*, ROA, Dkt. 014, Doc. 15, p. 4, ¶ 18 ("we did not lose any property during the sweep"). On this basis, the Court granted the County's *Motion to Dismiss* as it applied to Plaintiff-Appellees Riedell and Walton. *Order*, ROA, Dkt. 014, Doc. 114, p. 4, ¶ 12; p. 7, ¶ 18.

Plaintiffs-Appellees Davis and Lau, however, chose not to take similar actions to avoid deprivation. In Grace v. Drake, 832 F. Supp. 1399, 1404 (D. Haw. 1991), aff'd, 8 F.3d 26 (9th Cir. 1993), the Court found that there was no due process violation where Plaintiffs "were put on notice that they, as well as their dwelling and personal belongings, were being put at risk if they remained" and, as here, "the plaintiffs' awareness of the possible destruction of their dwelling is acknowledged in their complaint." In this case, Plaintiff-Appellee Lau had nearly two weeks after receiving actual notice in which she could have removed her personal items from the County's property. *Notice of Appeal to the Circuit Court*, ROA, Dkt. 014, Doc. 1, pp. 6-7, ¶ 9. Plaintiff-Appellee Davis had approximately five days to remove her property after receiving notice. *Declaration of Sonia Davis*, Dkt. 014, Doc. 12, p. 2, ¶ 12. Courts have recognized sufficient notice has been provided in cases where much less notice than that was provided. See De-Occupy Honolulu v. City & Cty. of Honolulu, No. CIV. 12-00668 JMS, 2013 WL 2285100, at *6 (D. Haw. 2013) (twenty-four hour notice of an impending seizure was sufficient for the purposes of due process); Sullivan v. City of Berkeley, No. C 17-06051 WHA, 2017 WL 4922614, at *6 (N.D. Cal. 2017) (no due process

violation where houseless individuals had "72 hours to make arrangements to move their property"); Hooper v. City of Seattle, No. C17-0077RSM, 2017 WL 591112, at * 5 (W.D. Wash. Feb. 14, 2017) (temporary restraining order applicant did not have likelihood of success on the merits, and thus were not entitled to an injunction preventing planned cleanup of a houseless encampment on public property, where the government "posts notices of the upcoming clean-up at least 72 hours in advance"). Further, Plaintiffs-Appellees could have availed themselves of alternative opportunities to be heard, including seeking preliminary injunctive relief from the courts. See Grace v. Drake, 832 F. Supp. 1399, 1404 (D. Haw. 1991), aff'd, 8 F.3d 26 (9th Cir. 1993) (finding that "plaintiffs had ample opportunity to be heard" through predeprivation processes including but not limited to a Writ of Mandamus to the Supreme Court of Hawaii and a motion temporary restraining order.") Plaintiff-Appellee's did not avail themselves of these opportunities.

Finally, it is difficult to see what value additional safeguards would have produced by a contested case hearing. Plaintiff-Appellants would not have established that they owned the property, that the County had no interest in protecting its property to assure public access, that the State Wildlife Sanctuary should be abandoned, or that its Wailuku-Kahului Wastewater Treatment Plant should be shutdown. Even if assuming *arguendo* that procedures as described above were insufficient to prevent the risk of erroneous deprivation of Plaintiffs-Appellees' alleged property interests, and additional safeguards may have decreased that risk, it does not follow that a contested case hearing was required **prior** to the County's cleanup efforts. Indeed, several Courts within the Ninth Circuit have recognized procedures that are much less onerous than a contested case hearing which provide "additional or alternative safeguards" of wrongful deprivation. For example, in De-Occupy Honolulu, No. CIV. 12-00668 JMS, 2013 WL 2285100, p. *5, the U.S. District Court of Hawaii reviewed whether a hearing was required "before or after the seizure of personal property." The Court determined, however, where statutory safeguards were in place including pre-seizure

notice of the government action, post-seizure notice of the property seized, and the holding of items for a period of time prior to destruction, "**a hearing, whether pre- or post-seizure, would add little to prevent an erroneous deprivation**." Id., at 6 (emphasis added). See also James v. City and County of Honolulu, 125 F. Supp. 3d 1080, 1094 (D. Haw. 2015) ("there are multiple opportunities to prevent permanent deprivation of personal property, and a hearing, whether pre-or post-seizure, would add little to prevent erroneous deprivation. Indeed, **it would only increase the administrative burden**.") (emphasis added).

Similarly, schemes providing notice of planned clean-ups, and post-seizure procedures for retrieving seized property have been upheld despite there being no pre-seizure contested case hearing provided. See Sullivan v. City of Berkeley, No. C 17-06051 WHA, 2017 WL 4922614, at *6 (N.D. Cal. 2017) (Plaintiffs were unlikely to succeed on the merits of their due process claims where "plaintiffs have been given notice that their property will be seized 72 hours to make arrangements to move their property," and there was a "policy of storing personal property that is taken after an encampment is removed and providing notice of the property's location and an opportunity to recover the property"); Hooper v. City of Seattle, No. C17-0077RSM, 2017 WL 591112, at * 5 (W.D. Wash. Feb. 14, 2017) (Plaintiff was unlikely to prove a due process violation where the city provided "notices of upcoming clean-ups at least 72 hours in advance," items were stored and inventoried, and the City had procedures "for an individual to identify and retrieve their personal property.")

These "alternative procedures" have been determined to decrease the likelihood of erroneous deprivation of property interests while being substantially less onerous than providing individualized contested case hearings to any person who chooses to store their personal belonging on public land prior to being able to undertake clean-up efforts. Accordingly, a contested case hearing prior to clean-up efforts was not a necessary procedural safeguard, and thus a contested

case hearing was not needed, and this Court's jurisdiction is not implicated. If Plaintiffs-Appellees were denied due process by the lack of such procedures, they have alternative remedies outside the scope of HRS § 91-14 which can be pursued. See Bush, 76 Haw. at 136–37, 870 P.2d at 1280–81 ("To disallow an appeal under HRS § 91–14(a) with no alternative would seem unjust inasmuch as the Commission would therefore hold what appears to be unfettered discretion to grant or deny a contested case hearing, thereby controlling appellate review. An alternative, however, is available … Plaintiffs-Appellees are not barred from contesting the Commission's actions through alternative means, but they are prohibited from accessing review of these actions through inappropriate means, in this case a direct appeal to circuit court"); HRS § 91-14(a) ("nothing in this section shall be deemed to prevent resort to other means of review, redress, relief or trial de novo.").

3. The Governmental Interest Including the Burden that Additional Procedural Safeguards Would Entail

Finally, the government has a substantial and compelling interest in being able to keep its properties clean and safe without excessive and duplicative administrative hurdles. As an initial matter, the public has a strong interest in reasonable and safe access to government property. See Martin v. City & Cty. of Honolulu, No. CV 15-00363 HG-KSC, 2015 WL 5826822, at *8 (D. Haw. 2015) ("the public has a strong interest in being able to safely use and enjoy both the public sidewalks and the City and County of Honolulu's property, including public parks.) Further, the County has an affirmative duty to maintain its lands in a safe manner, and failure to do so could put the County in considerable legal jeopardy. As the U.S. District Court for the Northern District of California recognized, "to force [a government entity] to host [a houseless] encampment would open [the government entity] to potential liability for failing to police activities." Sullivan v. City of Berkeley, No. C 17-06051 WHA, 2017 WL 4922614, at *6 (N.D. Cal. 2017). This potential liability extends not only to those residing in the houseless encampments, but also members of the

public utilizing public rights of way, as well County employees who work nearby at the Wailuku-Kahului Wastewater Treatment Plant. See ROA, Dkt. 014, Doc. 51, p. 8 ("[County] employees need to get safely in and out of the Kahului wastewater treatment plant on Amala Place to do their jobs and possibly prevent a sewage spill into the ocean in an emergency that can happen any time day or night.").

The government interest is also evidenced by the fact that "Kanaha Pond, adjacent to Amala Place, is an invaluable resource for the people of Maui and one of the most important breeding sites for numerous species of endangered water birds" and "is not only a State Wildlife Sanctuary but was designated 70 years ago as a National Natural Landmark." ROA, Dkt. 014, Doc. 51, p. 8. While houseless persons were located on Amala Place, the State was unable to "replace the perimeter fencing surrounding the 235-acre Kanaha Pond Sanctuary," which had been "vandalized." ROA, Dkt. 014, Doc. 51, p. 3. The government had an interest in making those repairs expeditiously, as the hole in the fence "allow[ed] introduced predators to kill rare native water birds that find refuge there." Id.

If a contested case hearing were required to determine the "legal rights, duties or privileges" of every person who requested a Contested Case hearing prior to being able to maintain its property, the County would have had to conduct "about 40"[13] contested case hearings prior to being able to conduct a cleanup of its property. This would require several procedural hurdles which would need to be met in order for the County to respond to damage to County infrastructure, maintain waste-water operations, assure safe public access to adjoining property, and prevent environmental degradation. None of this could be done on any sort of expedited or emergency basis if everyone

[13] "Between September 6, 2021 and September 20, 2021, about 40 people residing in Pu'uhonua o Kanaha – including Plaintiffs/Appellants – filed "REQUEST[S] FOR A CONTESTED CASE" *Notice of Appeal*, ROA, Dkt. 014, Doc. 1, p. 11, ¶ 31.

who had placed their personal items on government lands are entitled to a contested case hearing prior to initiating cleanup efforts.

Indeed, contested case hearings are lengthy endeavors which span the course of weeks or months prior to the government acting. As an initial matter, Notice conforming with HRS § 91-9 would be required, which would need to include the following information:

> (1) The date, time, place, and nature of hearing;
> (2) The legal authority under which the hearing is to be held;
> (3) The particular sections of the statutes and rules involved;
> (4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;
> (5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

HRS § 91-9(b). Such Notice would either have to be provided either by "registered or certified mail with return receipt requested at least fifteen days before the hearing," which needless to say would be difficult to satisfy with regards to houseless individuals, which would inevitably delay proceedings. HRS § 91-9.5.[14]

After proper notice, a "trial-type hearing," would be required that provided parties "opportunities to present evidence and argument of all issues" before the Agency. Sharma v. State, Dep't of Land & Nat. Res., 66 Haw. 632, 639, 673 P.2d 1030, 1035 (1983). This would require the

[14] HRS §91-9.5 does provide for service by publication, but only where the party has refused to accept service, or the agency has "been unable to ascertain the address of the party after reasonable and diligent inquiry," but doing so would even further delay any hearing because such published notice would have to appear "at least one in each of two successive weeks in a newspaper of general circulation, and "the last published notice shall appear at least fifteen days prior to the date of the hearing.

County to provide "the opportunity to issue subpoenas for witnesses to testify under oath or produce documents, to cross-examine witnesses under oath, and to present evidence by submitting documents and testimony under oath in support of their positions." Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawaii 376, 391, 363 P.3d 224, 239 (2015). Every decision rendered would then need to be accompanied by a written Findings of Fact, Conclusions of Law and "delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time." HRS § 91-12.

If a contested case hearing is heard by a Hearings Officer, any decision must first be submitted and parties would additionally be afforded an opportunity to "file exceptions and present argument." HRS § 91-11. All of this, in Plaintiffs-Appellees view, would be required anytime the County needs to clean-up its property, rendering any emergency efforts to safeguard public health, safety and welfare impossible. Indeed, Plaintiffs-Appellees' arguments, taken to their logical extreme, could have the effect of preventing the County from ever maintaining any of its properties, either by disposing of items on the beach, or locking public parks, without first conducting an evidentiary hearing. Due process does not require such an extreme result and Plaintiff-Appellees have not cited any cases in this or any jurisdiction that has demanded as much.

V. CONCLUSION

For the foregoing reasons, the Court below lacked jurisdiction over the Plaintiff-Appellants' appeals, as no contested case hearing is involved, and thus, HRS § 91-14 is not implicated. Therefore, the Court's March 16, 2022 *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Notice of Appeal* should be reversed, and this case should be dismissed in its entirety.

DATED: Wailuku, Maui, Hawaii, September 28 2022.

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