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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

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

Plaintiffs/Appellants,

v.

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

Defendants/Appellees.

Civil No. 2CCV-21-0000305
Agency Appeal

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS NOTICE OF
APPEAL, FILED NOVEMBER 9, 2021
(DKT. 33)

HEARING MOTION

Dates: Dec. 7, 2021 & Feb. 22, 2022
Time: 8:15 A.M.
Judge: Hon. Kirstin M. Hamman
Trial Date: none

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS'
MOTION TO DISMISS NOTICE OF APPEAL, FILED NOVEMBER 9, 2021 (DKT. 33)

On November 9, 2021, Defendants MICHAEL P. VICTORINO, SCOTT TERUYA, and COUNTY OF MAUI (together, "Defendants/Appellees" or "County Appellees") filed a Motion to Dismiss ("Motion," Dkt. 33) the present agency appeal filed by SONIA DAVIS, JESSICA LAU, LAURALEE B. RIEDELL, and ADAM M. WALTON (together, "Plaintiffs/Appellants" or "Houseless Appellants"). On November 29, 2021, Plaintiffs filed an Opposition (Dkt. 37) to the Motion. On December 7, 2021, Defendants filed a Reply (Dkt. 39). On December 7, 2021,

the Court held a hearing on the Motion, at which Jongwook “Wookie” Kim appeared on behalf of Plaintiffs and Deputy Corporation Counsel Caleb P. Rowe appeared on behalf of Defendants. During the hearing, the Court requested further briefing on the second step of the two-step analysis used to evaluate the right to a hearing under constitutional due process. On January 31, 2022, Plaintiffs and Defendants filed such further briefing (Dkts. 99 & 97). On February 22, 2022, a further hearing was held on the Motion, at which Jongwook “Wookie” Kim appeared on behalf of Plaintiffs and Deputy Corporation Counsel Caleb P. Rowe appeared on behalf of Defendants.

Having considered the written submissions of the parties, arguments by counsel, and the record and files in the present matter, and being otherwise fully advised, the Court makes the following ruling on the Motion.

Findings of Fact

The Court makes the following findings of fact. To the extent these findings of fact contain conclusions of law, they shall be considered as such.

1. On or about September 1, 2021, Defendants issued a press release advising the public of a sweep to occur, at a future date, on public lands surrounding the Kanahā Pond Wildlife Sanctuary and the Wailuku-Kahului Wastewater Treatment Plant, including on or near Amala Place (the “Kanahā area”). ROA 0007.

2. On or about September 14, 2021, Defendants distributed a paper copy of a “notice to vacate” (the “Notice to Vacate”) to houseless residents in the Kanahā area, which notice indicated that “[t]he premises will be cleared of personal property and vehicular access will be restricted” from Monday, September 20, 2021 through Wednesday, September 22, 2021. Dkt. 52 (Record on Appeal (“ROA”) 0064).

3. The Notice to Vacate also stated that “All campsites, personal property, and vehicles must be removed from these Premises by or before the above date and time. Any person who remains on the ‘Premises’ during this time may be cited for Trespassing under Hawaii Revised Statutes section 708-815.” Dkt. 52 (ROA 0064).

4. The Notice to Vacate identified whom to contact “For Services,” (listing Mental Health Kokua, Ka Hale A Ke Ola, Family Life Center, and Salvation Army), but did not provide any information on how to retrieve any seized personal property post-seizure or pre-destruction, whether and for how long such property would be stored, or what procedures were available for challenging the planned sweep. Dkt. 52 (ROA 0064).

5. Some Plaintiffs did not receive the Notice to Vacate from Defendants. Dkt. 14 at ¶ 13; Dkt. 15 at ¶ 9.

6. On or around September 20, 2021 through September 22, 2021, consistent with the Notice to Vacate, Defendants conducted its sweep of the Kanahā area (the “Kanahā Sweep”), during which Defendants seized vehicles and personal property left behind.

7. The record does not show that Defendants had any procedures in place to hold, store, or return personal property (other than vehicles) seized by Defendants during the Kanahā Sweep.

8. The record does not show that Defendants held, stored, or returned personal property (other than vehicles) seized by Defendants during the Kanahā Sweep.

9. Instead, the record suggests that, aside from vehicles that were taken under Chapter 290 of the Hawai‘i Revised Statutes (“HRS”), Defendants proceeded to destroy the personal property left behind in the Kanahā Area, and that Defendants had seized, during the Kanahā Sweep.

10. While Plaintiff JESSICA LAU was able to save most of her personal property from seizure, she lost several items of personal property during the Kanahā Sweep, including a portable water tank, fishing poles, and Bluetooth speakers. Dkt. 13 at ¶ 26.

11. Plaintiff SONIA DAVIS also lost personal property (including pots and pans, tents, a canopy, folding tables, diapers, a stroller, a playpen, a baby car seat) as well as four vehicles during the Kanahā Sweep. Dkt. 12 at ¶ 17.

12. Plaintiffs LAURALEE B. RIEDELL and ADAM M. WALTON did not lose any personal property during the Kanahā Sweep. Dkts. 14 & 15.

13. Between September 6, 2021 and September 20, 2021, Plaintiffs (among others) filed contested case hearing requests with Defendants, each arguing that “I have a property interest in my shelter and belongings and must be afforded procedural due process before the County may permanently deprive” such property. Dkts. 12 at ¶ 5, 13 at ¶ 6, 14 at ¶ 11, & 15 at ¶ 7.

14. Although they had received Plaintiffs’ contested case requests, Defendants did not respond to the contested case requests, and did not conduct a contested case hearing (or any other hearing) before conducting the Kanahā Sweep.

Conclusions of Law

Based on the foregoing findings, the Court makes the following conclusions of law. To the extent these conclusions of law contain findings of fact, they shall be considered as such.

1. The Court has jurisdiction over the present agency appeal under HRS § 91-14.
2. HRS § 91-14(a) provides that “[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending

entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review.”

3. There are four requirements 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. *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*, 79 Hawai‘i 425, 431, 903 P.2d 1252 (1995).

4. Defendants do not contest that the latter three elements are present here.

5. In any event, the latter three elements are satisfied here: Plaintiffs appeal from a decision with sufficient finality given Defendants’ final decision to conduct the Kanahā Sweep, they appropriately filed contested case requests with Defendants, and they had standing because they were injured by the agency action when Defendants seized their chattels.

6. Specifically as to finality, an agency’s denial of a request for a contested case hearing is a sufficiently final decision for judicial review by this Court. See *Kaleikini v. Thielen*, 124 Hawai‘i 1, 26, 237 P.3d 1067, 1092 (2010); *Kilakila ‘O Haleakala v. Bd. of Land & Nat. Res.*, 131 Hawai‘i 193, 195, 317 P.3d 27, 29 (2013).

7. Further, failing to act on a properly made request for a contested case—*i.e.*, neither granting nor denying such a request—is an effective denial that may also serve as the basis for circuit court jurisdiction. See *Kilakila*, 131 Hawai‘i at 203, 317 P.3d at 37.

8. Here, by proceeding with final agency action (*i.e.*, by conducting the Kanahā Sweep) without responding to Plaintiffs’ contested case requests or otherwise holding a hearing of any kind, Defendants effectively denied Plaintiffs’ contested case requests.

9. As to the first element, the Court concludes that a contested case hearing was “required by law” within the meaning of HRS § 91-14.

10. A contested case hearing is “required by law” when it is “required by (1) statute; (2) administrative rule; or (3) constitutional due process.” *Flores v. Board of Land and Natural Resources*, 143 Hawai‘i 114, 125, 424 P.3d 469, 479 (2018); *Matter of Hawai‘i Elec. Light Co., Inc.*, 145 Hawai‘i 1, 13, 445 P.3d 673, 685 (2019).

11. There is no statute or administrative rule requiring a contested case hearing here, so the Court must determine whether a contested case hearing is required by constitutional due process.

12. Here, constitutional due process required a contested case hearing before Defendants conducted the Kanahā Sweep.

13. The Court applies a two-step analysis in deciding whether a constitutional due process right to a hearing exists: (1) whether “the particular interest which claimant seeks to protect by a hearing [is] ‘property’ within the meaning of the due process clauses of the federal and state constitutions,” and (2) if so, “what specific procedures are required to protect it.” *Flores*, 143 Hawai‘i at 125, 424 P.3d at 480 (quoting *Sandy Beach Def. Fund v. City Council of City & Cty. of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989)).

14. The Court finds that Plaintiffs’ personal property and vehicles are property within the meaning of the due process clauses of the U.S. and Hawai‘i constitutions. See *Brown v. Thompson*, 91 Hawai‘i 1, 9, 979 P.2d 586, 594 (1999), *as amended* (July 13, 1999) (holding that a derelict boat was “unquestionably” property protected by due process under the Fifth Amendment to the U.S. Constitution and article I, section 5 of the Hawai‘i Constitution); *In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i 249, 260, 408 P.3d 1, 12 (2017) (confirming that procedural due process protects “chattels”); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1031 (9th Cir. 2012) (describing houseless individuals’ “interest in the continued ownership of

their personal possessions” as “the most basic of property interests encompassed by the due process clause”).

15. The Court does not agree with Defendants’ contrary argument that Plaintiffs’ personal property loses protections under constitutional due process by virtue of being maintained on public property allegedly “in violation of criminal statutes.” Dkt. 39 at 2.

16. Due process also protected the vehicles that were in Plaintiffs’ possession, regardless of who were the registered owners, since Plaintiffs were in possession of those vehicles and were using those vehicles both to store other personal property and for shelter.

17. Because Plaintiffs SONIA DAVIS and JESSICA LAU were, as noted, deprived of personal property during the Kanahā Sweep, and such personal property was “property” in the constitutional sense, Plaintiffs SONIA DAVIS and JESSICA LAU were entitled to due process before Defendants deprived them of that property. *See In re Application of Maui Elec. Co., Ltd.*, 141 Hawai‘i 249, 260, 408 P.3d 1, 12 (2017); *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai‘i 64, 68, 881 P.2d 1210, 1214 (1994); *Bush v. Hawaiian Homes Comm’n*, 76 Hawai‘i 128, 136, 870 P.2d 1272, 1280 (1994).

18. However, because Plaintiffs LAURALEE B. RIEDELL and ADAM M. WALTON were not deprived of any personal property by Defendants during the Kanahā Sweep, the Court GRANTS the Motion as to Plaintiffs LAURALEE B. RIEDELL and ADAM M. WALTON.

19. The Court concludes that constitutional due process required a contested case hearing before Defendants deprived Plaintiffs SONIA DAVIS and JESSICA LAU of their constitutionally protected interests in their personal property.

20. “The notion that an individual must be accorded sufficient procedural safeguards before being deprived of a ‘property’ interest is a cornerstone of Hawai‘i law.” *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 136 Hawai‘i 376, 409, 363 P.3d 224, 257 (2015).

21. To determine the “precise procedures” that a government entity is required to follow to comply with constitutional due process, Hawai‘i courts analyze three factors: “(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.” *Id.* at 410, 363 P.3d at 258 (citing *Sandy Beach Def. Fund*, 70 Haw. at 378, 773 P.2d at 261.

22. The Court finds that the private interests at stake here are significant. The private interests are chattels, which are core property interests under the Hawai‘i and U.S. constitutions. And they are not just any chattels, but chattels used as shelter and life-sustenance for Plaintiffs SONIA DAVIS and JESSICA LAU. *See De-Occupy Honolulu v. City & Cty. of Honolulu*, No. CIV. 12-00668 JMS, 2013 WL 2285100, at *6 (D. Haw. May 21, 2013) (recognizing that “a strong private interest exists in Plaintiffs’ continued ownership of their possessions, especially given that the possessions . . . may be everything that a homeless individual owns”); *Mitchell v. City of Los Angeles*, No. CV1601750SJOGJSX, 2016 WL 11519288, at *5 (C.D. Cal. Apr. 13, 2016) (finding that private interest was “significant” because it “touches on the basic survival of homeless individuals”).

23. The Court finds that there was a high risk of erroneous deprivation of Plaintiffs SONIA DAVIS and JESSICA LAU’s property interests through the procedures used by Defendants. The method for providing notice and procedures Defendants used did not afford

Plaintiffs with the ability to meaningfully challenge the Kanahā Sweep and the taking and destruction of their property. Among other things, the Notice to Vacate did not provide for procedures available to challenge the agency action, nor did it provide information on how to retrieve items post-seizure. *See Brown v. Thompson*, 91 Hawai‘i at 10, 979 P.2d at 595. Further, as noted, the record does not show that Defendants had any process in place to store Plaintiffs’ personal property. Instead, it appears that Defendants seized and destroyed personal property taken during the Kanahā Sweep. The absence of such procedures significantly increased the risk of erroneous deprivation. *See Mauna Kea Anaina Hou*, 136 Hawai‘i at 412, 363 P.3d at 260 (stating that “the fact that the Board’s administrative rules do not appear to provide a procedural vehicle for the Board to reverse its grant of a permit, if it were later found that the permit was improperly granted, elevated the risk of erroneous deprivation”).

24. The Court also finds that the procedures actually used by Defendants were materially different from those used by the municipalities in the decisions cited by Defendants in their briefing. *See* Dkt. 97 at 8-9 (citing cases in which municipalities had a “policy of storing personal property that is taken after an encampment is removed” and “items were stored and inventoried, and the City had procedures for people to retrieve their property”). For example, in *De-Occupy Honolulu v. City & Cty. of Honolulu*, the City and County of Honolulu was required to announce its intentions at every step, pre-seizure, post-seizure, and pre-destruction. No. CIV. 12-00668 JMS, 2013 WL 2285100, at *6 (D. Haw. May 21, 2013). Here, by contrast, Defendants did not announce their intentions at every step, and there were no alternative procedures in place, thus increasing the risk of erroneous deprivation to Plaintiffs’ property.

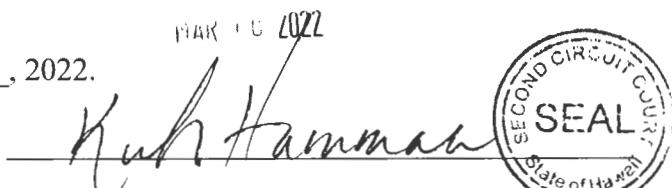
25. Under these circumstances, more or alternative procedural safeguards—including the holding of a contested case hearing—would have reduced the risk of erroneous deprivation.

26. The Court acknowledges that Defendants may have important interests in public health, safety, and the maintenance of its public spaces, but on balance they do not outweigh the significant private interests at stake, especially in light of the high risk of erroneous deprivation created by the procedures Defendants actually used. See *Mitchell*, 2016 WL 11519288, at *6 (acknowledging “significant” governmental interest and “heavy costs,” but stating that “these costs do not justify infringing the basic constitutional rights of homeless individuals” and that, “[g]iven the scope of the property interest at stake,” the city’s interest did not “outweigh[] the individual interests of homeless people”).

27. In sum, the Court, weighing all the factors, concludes that constitutional due process required a contested case hearing here. And because all four HRS § 91-14 jurisdictional elements are present, this Court has jurisdiction as to Plaintiffs SONIA DAVIS AND JESSICA LAU. But the Court does not have jurisdiction as to Plaintiffs LAURALEE B. RIEDELL and ADAM. M. WALTON because they were not deprived of any personal property by Defendants.

Therefore, IT IS HEREBY ORDERED that Defendants’ Motion is GRANTED IN PART and DENIED IN PART. The Motion is GRANTED as to Plaintiffs LAURALEE B. RIEDELL and ADAM M. WALTON, and DENIED as to Plaintiffs SONIA DAVIS and JESSICA LAU.

DATED: Wailuku, Maui, Hawai‘i, March _____, 2022.

MAR 16 2022

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

CALEB P. ROWE
Attorney for Defendants/Appellees