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FILED
CIRCUIT COURT OF
THE THIRD CIRCUIT
STATE OF HAWAII

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CLERK L. GLASGOW

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

PUNA PONO ALLIANCE, *et al.*,	)	Civil No. 15-1-0034
	)	(Hilo) (Declaratory Judgment)
Plaintiffs,	)	
	)	PLAINTIFFS' MEMORANDUM OPPOSING
vs.	)	DEFENDANT COUNTY OF HAWAI'I'S
	)	MOTION TO DISMISS COMPLAINT filed
PUNA GEOTHERMAL	)	March 5, 2015; CERTIFICATE OF SERVICE
VENTURE, *et al.*,	)	
	)	Hearing: April 14, 2015
Defendants.	)	Time: 8:30 a.m.
	)	Judge: Hon. Greg K. Nakamura
	)	Trial date not set

PLAINTIFFS' MEMORANDUM OPPOSING DEFENDANT COUNTY OF HAWAI'I'S MOTION TO DISMISS COMPLAINT

Plaintiffs Puna Pono Alliance, Jon Olson and Hillary E. Wilt oppose the motion filed by Defendant County of Hawai`i (COH) seeking dismissal of this case pursuant to Hawai`i Rules of Civil Procedure (HRCP) Rule 12(b)(6).

I. Introduction

A. The issue: *is PGV subject to Hawai`i County Code § 14-114?*

PGV operates a geothermal facility in Kapoho and, from time to time, drills wells attempting to locate geothermal resources. After PGV's especially noisy and disruptive drilling of the well known as KS-15 in 2012, the Hawai`i County Council passed a law restricting well drilling between the hours of 7:00 p.m. and 7:00 a.m. within one mile of a

residence.[1] Plaintiffs reside near PGV's site and would benefit from PGV's obeying the law. PGV contends the 2012 night drilling ban does not apply to its subsequent drilling – such as its present drilling operations for a well known as KS-16[2] – and COH agrees.

The COH motion claims Plaintiffs failed to state a claim against the County in this litigation. However, the purpose of this litigation is to resolve the controversial position (taken by both PGV and COH) that Code § 14-114 does not apply to PGV. Hawai`i Revised Statutes (HRS) Chapter 632, *Declaratory Judgments*, provides the vehicle for judicial resolution of this type of controversy. The situation involves a simple question: ***is PGV subject to Code § 14-114?***

II. Applicable Law

Hawai`i County Code Article 19, *Geothermal Drilling*, provides:

> **Section 14-113. Definitions.**
> For the purposes of this article, the following words and phrases, unless the context otherwise requires, shall be defined as indicated:
> "Residence" means a building or a part thereof permitted and designed for or used for a home.
> "One mile" means the measurement made from the well bore, in a straight
> **Section 14-114. Restrictions.**
> Geothermal resources exploration drilling and geothermal production drilling operations being conducted one mile or less from a residence, shall be restricted to the operating hours of 7:00 a.m. – 7:00 p.m.

The **Hawaii State Constitution**, Article XI, § 9 (as amended in 1978), provides:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

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[1] Bill 292, became Ordinance 12-151 when signed by the Mayor December 5, 2012, and was subsequently codified as Hawai`i County Code §§ 14-113 and 114.

[2] It is not disputed that each time PGV wants to drill a new well it must first obtain a drilling permit from the Department of Land and Natural Resources (DLNR).

Dismissal pursuant to HRCP Rule 12(b)(6) "is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." *Rosa v. CWJ Contractors, Ltd.*, 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983) (citation omitted).

> In appraising the sufficiency of the complaint under Rule 12(b)(6), the accepted rule is that well-pleaded allegations of fact are taken as admitted and the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Midkiff v. Castle and Cooke, Inc.*, 45 Haw. 409, 414, 368 P.2d 887, 890-91 (1962). "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Giuliani v. Chuck*, 1 Haw. App. 379, 385, 620 P.2d 733, 737 (1980). 5 Wright and Miller, Federal Practice and Procedure: *Civil* § 1357 (1969).
>
> *Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175, 185-86 (1985)

Consideration of a 12(b)(6) motion"is strictly limited to the allegations of the complaint, and we must deem those allegations to be true." *In re Estate of Rogers*, 103 Hawai`i 275, 281, 81 P.3d 1190, 1196 (2003), as quoted in *Pavsek v. Sandvold*, 127 Haw. 390, 403, 279 P.3d 55, 68 (App. 2012), as corrected (Aug. 3, 2012).

The first amended complaint must be viewed in a light most favorable to Plaintiffs in determining whether its allegations may warrant relief under any alternative theory. *Blair v. Ing*, 95 Haw. 247, 263, 21 P.3d 452, 468 (2001), citing *Touchette v. Ganal*, 82 Hawai`i 293, 298, 922 P.2d 347, 352 (1996), that further held "dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." 82 Haw. at 303, 922 P.2d at 357). No such bar exists in this case where there is a simple legal controversy susceptible to expeditious judicial resolution.

The 1922 report of the National Conference of Commissioners On Uniform State Laws approving their *Uniform Declaratory Judgments Act* (available on the internet at

http://bit.ly/1EwVRao and www.uniformlaws.org) says, at page 3, that parties "ought not be forced to the necessity of encountering damage or assuming ruinous responsibilities before they are permitted to seek and secure a court decision as to their rights and duties.... The Declaratory Judgment allows parties who are uncertain as to their rights and duties, to ask a final ruling from the court as to the legal effect of an act before they have progressed with it to the point where any one has been injured."

> In order to have recourse to and take advantage of the Declaratory Judgment procedure it is not requisite that any wrong should have been done or any breach committed. It is to prevent and forestall such happenings by a Declaratory Judgment setting forth rights and duties for the guidance of those concerned and indicating the course to be followed, that a remedy is provided by the Act, and thus litigation is avoided. The measure is not merely preventive, it is also interpretative. It concerns itself not only with contracts, but with wills and other instruments of writing, with matters of governmental regulation, such as ordinances and the like ....
> *Ibid*, page 4[3]

In a declaratory judgment case under HRS Chpater 632, "'the question is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant a declaratory judgment.'" *Kaho`ohanohano v. State*, 114 Hawai'i 302, 332, 162 P.3d 696, 726 (2007), quoting *United Public Workers, AFSCME, Local 646 v. Yogi*, 101 Hawai'i 46, 57, 62 P.3d 189, 200 (2002).

> "'A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration'" ... "Thus, 'where a cause of action is sufficient to invoke the court's power to render a declaratory judgment ... as to the rights and other

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[3] HRS Chapter 632, originally enacted in 1921 (the year before the date of the above-quoted report) is not the Uniform Act but its purposes (according to the content of the Hawai`i statute and its interpretation by case precedent, as cited *infra*) are entirely comparable and consistent with the report's quotation.

> legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied'".
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> *Bregman v. E. Ramapo Cent. Sch. Dist.*, 122 A.D.3d 656, 657-58, 997 N.Y.S.2d 91, 94 (2014) (citations omitted)

III. The COH Motion

The COH motion relies upon HRCP Rule 12(b)(6) in seeking to dismiss Plaintiffs' first amended complaint for failure to state a claim. COH argues that the Plaintiffs' first amended complaint filed on February17, 2015, "is unartfully pled and fatally flawed and therefore, must be dismissed with prejudice ... because Plaintiffs have failed to give the County fair notice of their claims or the grounds upon which they are based ... [and] the First Amended Complaint is silent as to what type of relief is demanded by Plaintiffs from the County." The COH memorandum acknowledges that the Plaintiffs

> allege that the County "is a political subdivision of the State of Hawai`i", First Amended Complaint, ¶ 5, attached as Exhibit "A", the County's Planning Commission "permits and regulates operations of PGV's facility", id, ¶ 12, the County "has stated it believes County Code § 14-114 does not apply to PGV", *id.*, ¶ 25, and that there is an "absence of enforcement by state or county authorities"s. *Id.* , ¶ 29. The allegations in paragraphs 12, 25 and 29 of the First Amended Complaint are insufficient to state a cause of action against the County and therefore, the First Amended Complaint must be dismissed.

Cases relied upon by the COH memorandum supporting its motion are inapposite. For example, in *Au v. Au*, 63 Haw. 210, 213, 626 P.2d 173, 176 (1981), a count alleging breach of an agreement of sale was dismissed due to failure to specify what provisions of the contract were breached. In this case, there is no uncertainty as to the Code provision in question, nor is there uncertainty as to parties' respective positions. *Marsland, supra*, a suit for public nuisance abatement, is cited by the COH memorandum because it held the pleadings did not go far enough in describing regulatory violations. Here, again, the first claim is one for a declaration of rights rather than a remedy against the Defendants. In *McHenry v. Renne*, 84 F.3d 1172 (9th Cir.1996), the federal district court gave plaintiffs

multiple opportunities to comply with pleading requirements (to state a multi-defendant civil rights claim) and specific instructions on how to correct the complaint's pleading errors, but to no avail, resulting in dismissal of the third amended complaint. "The judge in this case dismissed the case pursuant to Federal Rule of Civil Procedure 41(b) for violation of a court order" (relating to previously noted deficiencies and how to fix them). 84 F.3d at 1177. *Knapp v. Hogan*, 738 F.3d 1106 (9th Cir. 2013), also involved repeated knowing violations of the pleading rules in a civil rights case.

Discussion of the *Twombly* standard (fact allegations must be enough to raise a right to relief above the speculative level) that was adopted in *Pavsek v. Sanfivold*, 127 Haw. 390, 403, 279 P.3d 55, 68 (App. 2012), is also an evolution of civil rights litigation (*Pavsek* held an allegation a co-tenant had over-burdened a private right of way failed to state an actionable claim, 127 Haw. at 403, 279 P.3d at 68). *Daves v. Hawaiian Dredging Co.*, 114 F. Supp. 643 (D. Haw. 1953), a Fair Labor Standards Act claim, held a pleading averred no facts indicating plaintiffs were engaged in commerce and therefore could not set forth a statutory claim for relief.

On such inapposite authority, COH argues (page 7) it "is unable to determine the nature of the claims alleged against it because it has not received fair notice of what Plaintiffs' claims are or the grounds upon which they are based" and (page 9) the Plaintiffs' pleading "cannot possibly state a claim upon which relief can be granted.... it is nearly impossible to determine what happened or what the County even did.... Plaintiffs do not provide any discernable description of the events or actions that allegedly resulted in injury." The cases cited by COH are dissimilar from the facts in this case.

This case does not involve a claim of County wrongdoing nor does it seek relief for some tortious injury. Plaintiffs claim the County misunderstands the applicability of the night drilling ban, with the result being a legal controversy. The purpose of Chapter 632 is to help resolve such controversies.

IV. Argument

COH argues it cannot possibly determine why it is being sued (page 10.)[4] Yet the allegations acknowledged by COH, combined with additional averments of facts relating to the Plaintiffs' claims, are sufficient to give COH notice of why it is a necessary party in this litigation. COH believes that PGV is not subject to County Code § 14-114. Plaintiffs believe the County's law is applicable to PGV. COH permits and regulates the operations of PGV's facility, and resolving the controversy as to applicability of a County law COH says does not apply to PGV is an essential factor in how COH proceeds in that regard.

Declaratory relief pursuant to HRS Chapter 632 does not require the Plaintiffs to allege wrongdoing by, or claim damages from, COH. Circuit Courts provide declaratory relief in response to controversies where the parties have concrete but adverse interests in a legal situation (such as whether County Code § 14-114 applies to PGV.)

HRCP Rule 8(a) provides a pleading "shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks." In this case, Plaintiffs describe a controversy involving interests of the parties and seek relief by declaratory judgment resolving the legal rights of the parties, particularly by declaring that County Code § 14-114 applies to PGV, and also pray for related injunctive relief "to assure that PGV obeys applicable laws."

"Under Hawai`i's notice pleading approach, it is no longer necessary to plead legal theories with precision." *Tokuhisa v. Cutter Mgmt. Co.*, 122 Hawai`i 181, 192, 223 P.3d 246, 257 (App.2009), quoting *Leslie v. Estate of Tavares*, 93 Hawai`i 1, 4, 994 P.2d 1047, 1050 (2000) (internal quotation marks and ellipses omitted). "Hawaii's rules of notice

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[4] The COH motion is comparable to similar parts of PGV's motion pending for hearing on the same date. Therefore, *Plaintiffs' Memorandum Opposing Defendant County of Hawai`i's Motion to Dismiss Complaint filed March 5, 2015*, also is, by this reference, incorporated herein in response to the COH motion.

pleading require that a complaint set forth a short and plain statement of the claim that provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests. Pleadings must be construed liberally." *Id*., quoting *Genesys Data Techs., Inc. v. Genesys Pac. Techs., Inc*., 95 Hawai`i 33, 41, 18 P.3d 895, 903 (2001).

HRS Chapter 632 is a remedial law intended "to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to maintain an ordinary action. ... It is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people." HRS § 632-6.

HRS § 632-1 allows a declaratory judgment even if a controversy is susceptible of relief through another remedy. In situations of an actual controversy, a Circuit Court may "make binding adjudications of right" in civil cases if a party asserts a concrete interest in a legal right that is denied by an adversary party with a concrete interest therein, "and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding." § 632-1. HRCP Rule 57 says "existence of another adequate remedy does not preclude a judgment for declaratory relief...."

Both Plaintiffs and COH have concrete interests in the controversy about the legal rights and obligations set forth in Code §14-114. The Plaintiffs' first amended complaint says COH's Planning Commission, "among other agencies with jurisdiction, permits and regulates operations of PGV's facility, including in particular a Geothermal Resource Permit identified as GRP-2" issued by the COH that requires PGV to obtain a permit from the for each geothermal well it drills, and said permit for KS-16 requires PGV to "comply with all valid requirements" of County law (¶ 12-18.)

The first amended complaint further says, in relevant part, that while the language in County Code § 14-114 "is plain, clear, unambiguous and unmistakable in its meaning" (¶ 22), "PGV has publicly stated its opinion that Hawai`i County Code § 14-114 does not

apply to work on KS-16 (¶ 23). Most specific as to Plaintiffs' controversy with COH, ¶ 25 says, " COH has stated it believes County Code § 14-114 does not apply to PGV."

The first amended complaint further says Plaintiffs reside near PGV's location and that they "would suffer damage, disruption, injury and even possible loss of life if PGV fails to obey applicable laws." (¶ 26.) "Plaintiffs believe County Code § 14-114 applies to PGV. Plaintiffs have publicly and actively challenged PGV's stated intent to violate Code § 14-114 by drilling KS-16 at night. In the absence of enforcement by state or county authorities, it has become necessary for Plaintiffs to prosecute this action to assure that PGV obeys applicable laws." (¶¶ 27-29.)

The first amended complaint concludes:

> 30. Pursuant to Hawai`i Revised Statutes Chapter 632, an actual controversy involving interests of the parties has arisen so that relief by declaratory judgment may be appropriately granted to determine and resolve the legal relations, status, rights, or privileges of the parties.
>
> 31. Plaintiffs are entitled to declaratory and injunctive relief as prayed for herein, requiring that PGV obey applicable laws.
>
> Wherefore Plaintiffs pray the Court (a) declare County Code § 14-114 applies to PGV; (b) issue preliminary injunctive relief as prayed for herein; (c) enter final judgment in favor of the Plaintiffs against the Defendants for declaratory and permanent injunctive relief as prayed for herein; (d) award Plaintiffs costs and reasonable attorneys fees, and (e) award such further relief as the Court deems just and equitable.

The first amended complaint does not lack merit. It provides fair notice of what the Plaintiff's claim, with facts sufficient to support declaratory relief based on concrete adversarial interests in the legal controversy over applicability of Code §14-114 to PGV.

It became necessary for Plaintiffs to prosecute this litigation when government agencies responsible for regulating PGV's activities (the COH Planning Department, for example) failed to do so.

The language of County Code § 14-114 is free of any ambiguity or uncertainty in its meaning. The Court is bound by its plain, clear and unambiguous language. Words of

a law "are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." HRS § 1-14.

> "The construction or interpretation of a statute may be indulged in only in case of ambiguity or uncertain meaning. Where, as in this case, the language is plain and unmistakable, there is no room for construction – there is nothing to construe," *Hawaiian Hotels v. Borthwick*, 35 Haw. 788, 794 (1941); and, thus, it must be given its "plain and obvious meaning." *Hawaii Consolidated Railway v. Borthwick*, 34 Haw. 269, 272 (1937). The Court is bound by the plain, clear and unambiguous language of the statute. *University of Hawaii v. Leahi Foundation*, 56 Haw. 404, 537 P.2d 1190 (1975).
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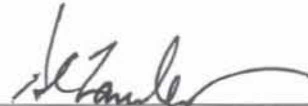
> *Matter of Grayco Land Escrow, Ltd.*, 57 Haw. 436, 455, 559 P.2d 264, 277 (1977)[5]

V. Conclusion

COH believes in error that PGV is exempt from the County Code § 14-113. The appropriate remedy in this type of controversy is a declaratory ruling on the applicability of the law. Therefore, this Court should deny the COH motion to dismiss.

DATED: Hilo, Hawai`i, April 2, 2015.



GARY C. ZAMBER
Attorney for Plaintiffs

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[5] *Matter of Grayco* is also cited in *State v. Sylva*, 61 Haw. 385, 387-88, 605 P.2d 496, 498 (1980) ("when the language is plain and unmistakable the court is bound by the plain, clear and unambiguous language of the statute"); *Kahalewai v. Rodrigues*, 4 Haw. App. 446, 451, 667 P.2d 839, 843 (1983) ("we find that the language of HHCA § 209(1) is 'plain and unmistakable' and we are 'bound by the plain, clear and unambiguous language' therein"); *State v. Palama*, 62 Haw. 159, 162, 612 P.2d 1168, 1170 (1980) ("[a]mbiguity exists where there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute; when the language is plain and unmistakable, the court is bound by the plain, clear and unambiguous language of the statute").

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing was on this date duly served by personal delivery to:

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Attorney for Defendant Puna Geothermal Venture

and

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DATED: Hilo, Hawai`i, April 2, 2015.

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