LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
Sent: Thursday, February 06, 2014 12:42 PM
To: PSMTestimony
Cc: marantzgl@juno.com
Subject: Submitted testimony for SB2270 on Feb 6, 2014 15:00PM

SB2270
Submitted on: 2/6/2014
Testimony for PSM on Feb 6, 2014 15:00PM in Conference Room 224

Submitted By	Organization	Testifier Position	Present at Hearing
george marantz	Individual	Support	No

Comments: I am in support of SB 2270. All to often the State as well as City & County are put into a position where the have no clear legal remedies, all because an individual has found a loop hole in the law. There are occasions, where as individuals, must solve our own problems swiftly and without delay.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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LATE TESTIMONY

From: mailinglist@capitol.hawaii.gov
Sent: Wednesday, February 05, 2014 9:44 PM
To: PSMTestimony
Cc: jeannine@hawaii.rr.com
Subject: Submitted testimony for SB2270 on Feb 6, 2014 15:00PM

SB2270
Submitted on: 2/5/2014
Testimony for PSM on Feb 6, 2014 15:00PM in Conference Room 224

Submitted By	Organization	Testifier Position	Present at Hearing
Jeannine Johnson	Individual	Support	No

Comments: From my experience in dealing with zoning violations, the City has taken from two years to up to a decade to enforce its own land use laws. The time and effort spent by homeowners to document these violations are wasted when the City refuses to investigate, enforce or collect outstanding fines from violators. This language will allow the courts to do their job according to existing law. Mahalo.

Please note that testimony submitted less than 24 hours prior to the hearing, improperly identified, or directed to the incorrect office, may not be posted online or distributed to the committee prior to the convening of the public hearing.

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LATE TESTIMONY

From: Lawrence Bartley <barteng@hawaii.rr.com>
Sent: Thursday, February 06, 2014 12:05 AM
To: PSMTestimony
Cc: Sen. Will Espero; Sen. Roz Baker; Sen. Sam Slom; Sen. Josh Green; Sen. Brickwood Galuteria
Subject: *****SPAM***** Testimony for the PSM committee 2-6-14 Lawrence Bartley supports SB2270
Attachments: Westlaw_Document_14_19_46.doc; Pavsek Complaint.pdf; Real-Estate-Law-Journal.pdf

Dear Chair Espero, Vice-Chair Baker, and Senators Galuteria, Slom, and Green,

I am writing to support SB 2270.

The reason for SB2270 is a response to the dilemna stated in the attachment Real Estate Law Journal, backed up by the ICA opinion stated on page 6 of the attached Westlaw Document 14 19 46. The attached Pavsek Complaint gives background details.

You can see that HRS 46-4 already gives neighbors the right to sue over LUO violations (new SB2270 language underlined)

http://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=SB&billnumber=2270&year=2014

" The council of any county shall prescribe rules, regulations, and administrative procedures and provide personnel it finds necessary to enforce this section and any ordinance enacted in accordance with this section. The ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county ***or the owner*** *or owners of real estate directly affected by the ordinances.*

Any civil fine or penalty provided by ordinance under this section may be imposed by the district court, or by the zoning agency after an opportunity for a hearing pursuant to chapter 91. The proceeding shall not be a prerequisite for any injunctive relief ordered by the circuit court.

A property owner shall have a private right of action and may file suit directly in circuit court to enforce zoning violations on neighboring properties that directly affect them."(new language added by SB2270)

This language is a housekeeping measure to direct the courts to do their job according to existing law.

I have served on the Kailua Neighborhood Board Planning and Zoning Committee for most of the past 25 years. During that tenure, the committee has been faced with complaint after complaint that the Honolulu government is unable or unwilling to enforce much of its Land Use Ordinance. This has resulted in horror stories of abuse of the LUO that have forced people to dramatically change their lifestyles, sleeping habits, or even have to sell their homes for a below-market price to escape the LUO abuse of their neighboring residents or businesses.

Finally one neighbor, the Pavseks of the North Shore, sought justice through the long-existing HRS 46-4 that gave them the right to sue - only to first have the lower court declare that it did not have jurisdiction. Pavsek appealed and prevailed on the issue of jurisdiction, only to have the Intermediate Court of Appeals tell him that

he had the right to sue but first had to exhaust all remedies through the County - which he had already spent years trying to get enforcement of the Honolulu LUO.

Imaging having to go the city department responsible for enforcement, the DPP, to get them to officially declare that they could/would not enforce the LUO - obviously impossible. I.e., the citizen right to sue, guaranteed in the HRS, does not exist in the courts. I believe that the new language offered in SB2270 will direct the state courts to honor the legislature's original intent of giving citizens the right to sue.

As in the Pavsek case, the right to sue will be used only as a last resort. It will not lead to a barrage of "neighbor suing neighbor," as such lawsuits are very expensive to the plaintiff if not well-founded and winnable.

Please review the attachments and VOTE YES on SB 2270.

I intend to testify in person.

Lawrence Bartley
217 Ohana Street
Kailua, Hawai'i 96734
(808) 261-0598
(808) 224-4040 cell

H

Intermediate Court of Appeals of Hawai'i.
Joseph **PAVSEK** and Ikuyo **Pavsek**, Plaintiffs–Appellants,
v.
Todd W. SANDVOLD; Juliana C. Sandvold; Kent Sather; Joan Sather; Waialua Oceanview LLC; Hawaii Beach Homes, Inc.; Hawaii Beach Travel, Inc.; and Hawaii on the Beach, Inc., Defendants–Appellees,
and
John Does 1–10; Jane Does 1–10; Doe Partnerships 1–10; Doe Corporations 1–10 and Doe Entities 1–10, Defendants.

No. 29179.
June 13, 2012.
As Corrected Aug. 3, 2012.

Background: Neighbors brought action against residential property owners, alleging that the properties were being used for short-term rentals in violation of city's land use ordinance and seeking injunctive relief and damages. The Circuit Court, First Circuit, Victoria A. Marks, J., dismissed the complaints, and neighbors appealed.

Holdings: The Intermediate Court of Appeals, Nakamura, C.J., held that:
(1) neighbors had a private right of action;
(2) neighbors had standing as "owners of real estate directly affected" by the ordinance;
(3) under the primary jurisdiction doctrine, neighbors were required to first petition city before bringing action;
(4) failure to join city as a party did not require dismissal of complaint;
(5) court on remand was required to consider whether any unfair disadvantage would result from dismissal of neighbors' claims;
(6) allegation that owners "overburdened" shared private road was conclusory and insufficient to state a claim for breach of fiduciary duty; and
(7) neighbors could not maintain unjust enrichment claim absent any valid allegations that they conferred a benefit upon the owners.

Affirmed in part, vacated in part, and remanded.

West Headnotes

[1] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory rights of action. Most Cited Cases

Zoning and Planning 414 ⚿1782

414 Zoning and Planning
414XI Enforcement of Regulations
414k1780 Persons Entitled to Sue
414k1782 k. Private persons. Most Cited Cases

Statute providing that zoning ordinances enacted by the counties may be enforced "by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances" creates a private right of action for "directly affected" real estate owners to sue to enforce zoning ordinances. HRS § 46–4(a).

[2] Zoning and Planning 414 ⚿1782

414 Zoning and Planning

414XI Enforcement of Regulations
414k1780 Persons Entitled to Sue
414k1782 k. Private persons. Most Cited Cases

Neighbors of owners of rented residential property had standing, as "owners of real estate directly affected," to bring action for enforcement of city land use ordinance regarding short-term rentals, even though they were not contesting the application of the ordinance to their own real estate. HRS § 46–4(a).

[3] Zoning and Planning 414 ⚿1779

414 Zoning and Planning
414XI Enforcement of Regulations
414k1779 k. Availability and exhaustion of other remedies. Most Cited Cases

Under the primary jurisdiction doctrine, neighbors of owners of rented residential properties were required to first petition city department of planning and permitting regarding owners' alleged violation of city land use ordinance regarding short-term rentals, and then appeal any adverse determination to the zoning board of appeals, before proceeding with their private right of action to enforce the ordinance in circuit court. HRS § 46–4(a).

[4] Action 13 ⚿69(7)

13 Action
13IV Commencement, Prosecution, and Termination
13k67 Stay of Proceedings
13k69 Another Action Pending
13k69(7) k. Actions and administrative proceedings. Most Cited Cases

Administrative Law and Procedure 15A ⚿228.1

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak228.1 k. Primary jurisdiction. Most Cited Cases

Under the primary jurisdiction doctrine, a court has original subject matter jurisdiction over a claim, but "suspends" the judicial process so that issues pivotal to the claim's resolution can first be determined by an administrative body with responsibility for, and special competence in, deciding the issue.

[5] Administrative Law and Procedure 15A ⚿229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases

The exhaustion of administrative remedies doctrine applies in situations where the court lacks original subject matter jurisdiction over a claim, and the court can only exercise jurisdiction after the administrative process for resolving the claim has been completed.

[6] Zoning and Planning 414 ⚿1617

414 Zoning and Planning
414X Judicial Review or Relief
414X(B) Proceedings
414k1617 k. Dismissal. Most Cited Cases

Neighbors' failure to join city as a party to their action against residential property owners, in which neighbors alleged that the properties were being used for short-term rentals in violation of city land use ordinance, did not require dismissal of the action, even assuming that city was an indispensable party, as there

was no basis to conclude that city could not be joined as a party. Rules Civ.Proc., Rule 19(b).

[7] Nuisance 279 ⚿42

279 Nuisance
279I Private Nuisances
279I(D) Actions for Damages
279k42 k. Grounds of action and conditions precedent. Most Cited Cases

Doctrine of primary jurisdiction applied to neighbors' nuisance claims against owners of residential properties, as nuisance claims were predicated on owners' alleged violation of city land use ordinance through illegal short-term rentals.

[8] Action 13 ⚿69(7)

13 Action
13IV Commencement, Prosecution, and Termination
13k67 Stay of Proceedings
13k69 Another Action Pending
13k69(7) k. Actions and administrative proceedings. Most Cited Cases

Administrative Law and Procedure 15A ⚿228.1

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak228.1 k. Primary jurisdiction. Most Cited Cases

Where the doctrine of primary jurisdiction applies, the court has the discretion either to retain jurisdiction and stay the proceedings or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice.

[9] Appeal and Error 30 ⚿1178(1)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(D) Reversal
30k1178 Ordering New Trial, and Directing Further Proceedings in Lower Court
30k1178(1) k. In general. Most Cited Cases

Pursuant to the primary jurisdiction doctrine, trial court on remand was required to consider whether any unfair disadvantage would result from dismissal of neighbors' zoning enforcement and nuisance claims against owners of residential properties allegedly rented in violation of city land use ordinance, and consider whether a stay or dismissal without prejudice was appropriate. HRS § 46–4(a).

[10] Tenancy in Common 373 ⚿21

373 Tenancy in Common
373II Mutual Rights, Duties, and Liabilities of Cotenants
373k21 k. Enjoyment and use of property in general. Most Cited Cases

Neighbors' allegation that owners of rented residential properties "overburdened" shared private road "through the increased and traffic and use" associated with the rentals was conclusory and insufficient to state a claim for breach of fiduciary duty, absent any allegation that the increased traffic interfered with, prevented, or ousted neighbors from using the right of way for its intended purpose.

[11] Pretrial Procedure 307A ⚿624

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in Gen-

eral

307Ak623 Clear and Certain Nature of Insufficiency

307Ak624 k. Availability of relief under any state of facts provable. Most Cited Cases

A 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 or her claim that would entitle him or her to relief. Rules Civ.Proc., Rule 12(b)(6).

[12] Pretrial Procedure 307A ⚿679

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak679 k. Construction of pleadings. Most Cited Cases

Pretrial Procedure 307A ⚿681

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak681 k. Matters considered in general. Most Cited Cases

On a motion to dismiss for failure to state a claim, consideration is strictly limited to the allegations of the complaint, and the court must deem those allegations to be true. Rules Civ.Proc., Rule 12(b)(6).

[13] Pretrial Procedure 307A ⚿689

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak689 k. Matters not admitted. Most Cited Cases

In weighing the allegations of the complaint as against a motion to dismiss for failure to state a claim, the court is not required to accept conclusory allegations on the legal effect of the events alleged. Rules Civ.Proc., Rule 12(b)(6).

[14] Pretrial Procedure 307A ⚿622

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)4 Pleading, Defects In, in General
307Ak622 k. Insufficiency in general. Most Cited Cases

While a complaint attacked by a motion to dismiss for failure to state a claim does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do; factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true, even if doubtful in fact. Rules Civ.Proc., Rule 12(b)(6).

[15] Tenancy in Common 373 ⚿21

373 Tenancy in Common
373II Mutual Rights, Duties, and Liabilities of Cotenants
373k21 k. Enjoyment and use of property in general. Most Cited Cases

Where a commonly-owned property is a private right of way, such as a privately-owned roadway, one co-owner may use the property to its fullest extent as a roadway so long as he or she does not interfere with

his or her co-tenant's use of the roadway for the same purposes and the co-owner's use does not result in disseisen or ouster of the other co-tenants.

[16] Implied and Constructive Contracts 205H ⚷3

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(A) In General
205Hk2 Constructive or Quasi Contracts
205Hk3 k. Unjust enrichment. Most Cited Cases

Neighbors could not maintain unjust enrichment claim against owners of allegedly illegally rented residential properties absent any valid allegations that they conferred a benefit upon the owners.

[17] Implied and Constructive Contracts 205H ⚷3

205H Implied and Constructive Contracts
205HI Nature and Grounds of Obligation
205HI(A) In General
205Hk2 Constructive or Quasi Contracts
205Hk3 k. Unjust enrichment. Most Cited Cases

To prove unjust enrichment, a plaintiff must show that he or she conferred a benefit upon the opposing party and that the retention of that benefit would be unjust.

**57 Paul Alston, Thomas E. Bush (Alston Hunt Floyd & Ing), Ken T. Kuniyuki, on the briefs and argument, for plaintiffs-appellants.

Gregory W. Kugle, Noelle B. Catalan (Damon Key LeongKupchak Hastert), on the briefs and argument, for defendants-appellees, Todd W. Sandvold, Juliana C. Sandvold, and Hawaii Beach Homes, Inc.

David B. Rosen (The Law Office of David B. Rosen, ALC), on the briefs and argument, for defendants-appellees, Waialua Oceanview, LLC, Hawaii Beach Travel, Inc., and Hawaii on the Beach, Inc.

Rosemary T. Fazio, Francis P. Hogan, Zachary J. Antalis, Ashford & Wriston, on the briefs and argument, for defendants-appellees, Kent Sather and Joan Sather.

NAKAMURA, C.J., and FUJISE and REIFURTH, JJ.

Opinion of the Court by NAKAMURA, C.J.

*392 This case arises out of a dispute over the alleged illegal rental and use of residential properties as bed and breakfast homes or transient vacation units. Plaintiffs–Appellants Joseph **Pavsek** and Ikuyo **Pavsek** (collectively, the **Pavseks**) live on Papailoa Road on the North Shore of O"ahu. The Pavseks filed*393 **58 a lawsuit in the Circuit Court of the First Circuit (Circuit Court) against the owners of three residential properties on Papailoa Road and companies involved in managing and arranging rentals for those properties. In their complaint, the **Pavseks** alleged that the three properties were being used for short-term rentals in violation of the Land Use Ordinance (LUO) of the City and County of Honolulu (City), and sought injunctive relief and damages. The Circuit Court dismissed the complaint with prejudice.[FN1]

FN1. The Honorable Victoria A. Marks presided.

This appeal presents the question of whether Hawaii Revised Statutes (HRS) § 46–4(a) (Supp. 2011) [FN2] creates a private right of action that authorizes a "directly affected" private real estate owner to seek judicial enforcement of the LUO, without first bringing his or her claim before the administrative agency charged with enforcing the LUO. We hold

that: (1) HRS § 46–4(a) does create a private right of action in favor of a real estate owner directly affected by an alleged LUO zoning violation, but that the owner's action is subject to the doctrine of primary jurisdiction; (2) under the doctrine of primary jurisdiction, the **Pavseks** are required to seek an administrative determination of their claim that their neighbors have been violating the LUO before proceeding with their suit to obtain judicial enforcement of the LUO; (3) the nuisance claims raised by the **Pavseks** in their complaint were derived from their claim of the LUO violation and therefore are also subject to the primary jurisdiction doctrine; (4) the Circuit Court properly dismissed the claims alleging breach of fiduciary duty and unjust enrichment for failure to state a claim for relief; and (5) the Circuit Court's remedy of dismissal *with prejudice* of the claims subject to the primary jurisdiction doctrine is not consistent with the remedies applicable to that doctrine. Accordingly, we vacate the Circuit Court's dismissal of the claims that are subject to the primary jurisdiction doctrine; we remand the case with instructions that as to those claims, the Circuit Court consider the appropriate remedy under the primary jurisdiction doctrine; and we affirm the Circuit Court's dismissal of the claims for breach of fiduciary duty and unjust enrichment.

FN2. HRS § 46–4(a) provides in relevant part:

> The council of any county shall prescribe rules, regulations, and administrative procedures and provide personnel it finds necessary to enforce this section and any ordinance enacted in accordance with this section. The ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.

BACKGROUND

I.

The **Pavseks** are owner-occupants of a residence on Papailoa Road. Papailoa Road runs parallel to the beach and is near two tourist attractions, Laniakea Beach, known for the presence of sea turtles, and the beach that served as the set of the ABC television show "Lost." Defendants–Appellees Todd W. Sandvold and Juliana C. Sandvold (Sandvolds), Kent Sather and Joan Sather (Sathers), and Waialua Oceanview LLC (Waialua Oceanview) (collectively, Owner Defendants) own residences on Papailoa Road. In their complaint, the **Pavseks** alleged that Defendant–Appellee Hawaii Beach Homes, Inc. (HBH) "acts as a booking agent and/or property manager for rentals" of the Sandvolds' and the Sathers' properties, and that Defendants–Appellees Hawaii Beach Travel, Inc. (HBT) and Hawaii on the Beach, Inc. (HOB) act, respectively, as "a booking agent for rentals" and "a booking agent and property manager for rentals" of Waialua Oceanview's property.[FN3] The **Pavseks**' property is near, but not adjacent to, Owner Defendants' properties. The **Pavseks**, the Sandvolds, and certain other lot owners on Papailoa Road are co-tenants in a private right of way that provides beach access from Papailoa Road.

FN3. We will collectively refer to the Sandvolds, the Sathers, Waialua Oceanview, HBH, HBT, and HOB as "Defendants."

II.

The lots on Papailoa Road owned by the **Pavseks** and Owner Defendants are located ***394 **59** in a residential district and are zoned "R–5." LUO § 21–3.30, Zoning Map 17. Under the LUO, properties zoned R–5 are generally limited in use to detached one-family dwellings, detached two-family dwellings, and public uses and structures. LUO Table 21–3.

Property that is zoned R–5 cannot be used as a bed and breakfast home or a transient vacation unit unless a nonconforming use certificate has been obtained. *See* LUO §§ 21–4.110–1, 21–4.110–2.[FN4] The LUO defines a "bed and breakfast home" as "a use in

which overnight accommodations are provided to guests for compensation, for periods of less than 30 days, in the same detached dwelling as that occupied by an owner, lessee, operator or proprietor of the detached dwelling." LUO § 21–10.1. The LUO defines a "transient vacation unit" as "a dwelling unit or lodging unit which is provided for compensation to transient occupants for less than 30 days, other than a bed and breakfast home." *Id.* Owner Defendants do not claim that they have a nonconforming use certificate that authorizes them to use their properties as a bed and breakfast home or a transient vacation unit.

> FN4. With respect to properties zoned R–5, LUO §§ 21–4.110–1 and 21–4.110–2 provide that failure to obtain a nonconforming use certificate within nine months of December 28, 1989, shall mean that as of December 28, 1989, the use of the property as a transient vacation unit or bed and breakfast home is an illegal use.

III.

The **Pavseks** filed a complaint against Defendants in the Circuit Court. In Count I, which sought enforcement of the LUO against all Defendants, the **Pavseks** alleged that Defendants have been advertising and renting Owner Defendants' properties as transient vacation units or bed and breakfast homes in violation of the LUO. The **Pavseks** stated that the "illegal" rentals have caused irreparable injury to them in the form of

> increased traffic noise and congestion in this residential neighborhood; negatively affected the value of [their] property; prevented or interfered with [their] use and enjoyment of [their] lot for residential purposes; imperiled and/or destroyed the residential character of the neighborhood in violation of the intent of the zoning ordinances; overburdened a private right of way easement providing beach access for [their] lot; and has created increased noise levels, trash, litter, discarded cigarette but[t]s, beer bottles and drug paraphernalia in this residential neighborhood and the beach in front of this neighborhood.

The **Pavseks** further asserted in Count I that they have complained about the "illegal activities" to the City's Department of Planning and Permitting (DPP) on numerous occasions "to no avail." Based on the DPP's investigations arising out of their complaints, the **Pavseks** alleged "upon information and belief" that the DPP had issued one citation to the Sathers and two citations to Waialua Oceanview, and the **Pavseks** indicated that the DPP apparently had not issued any citations to the Sandvolds. The **Pavseks** cited HRS § 46–4 as the basis for their entitlement to bring their lawsuit to enforce the LUO, and they requested injunctive relief to permanently bar Defendants from any further and continued violation of the LUO.

In addition to Count I, the **Pavseks** asserted the following counts:

Count II—Nuisance against Owner Defendants for allowing their properties to be used for illegal rentals;

Count III—Conspiracy and/or Aiding and Abetting a Nuisance against HBH, the Sandvolds, and the Sathers;

Count IV—Conspiracy and/or Aiding and Abetting a Nuisance against HBT, HOB, and Waialua Oceanview;

Count V—Breach of Fiduciary Duty against the Sandvolds for overburdening the right of way jointly owned with the **Pavseks** as a result of the Sandvolds' illegal rentals;

Count VI—Aiding and Abetting a Breach of Fiduciary–Duty against HBH; and

> Count VII—Unjust Enrichment against all Defendants for profiting at the expense of the **Pavseks** from the illegal rentals of Owner Defendants' lots.

The **Pavseks** filed a motion for preliminary injunction to prohibit Defendants from advertising*395 **60 and renting Owner Defendants' properties as transient vacation units or bed and breakfast homes. Defendants filed memoranda in opposition to the motion for preliminary injunction. Owner Defendants denied that they were illegally using their properties as bed and breakfast homes or transient vacation units. They asserted that they were in compliance with the LUO because they rent their properties for thirty days or more, even though the renters may not occupy the property for a full thirty days.

Defendants also filed motions to dismiss the complaint, in which they argued, among other things, that: (1) that the Circuit Court lacked subject matter jurisdiction over Count I because HRS § 46–4(a) does not grant the **Pavseks** a private right of action to sue to enforce the LUO; (2) the Circuit Court lacked subject matter jurisdiction over Count I under the doctrines of exhaustion of administrative remedies and primary jurisdiction; (3) the complaint should be dismissed for failure to name the City, which is an indispensable party as to Count I; (4) the nuisance counts (Counts II, III, and IV) are dependent on proof of the LUO violation alleged in Count I and fail to state a claim upon which relief can be granted; and (5) the breach of fiduciary duty counts (Counts V and VI) and the unjust enrichment count (Count VII) fail to state a claim upon which relief can be granted.

The Circuit Court held a consolidated hearing on the **Pavseks**' motion for preliminary injunction and Defendants' motions to dismiss. At the hearing, the Sandvolds' counsel argued that HRS § 46–4(a) did not establish a private right of action for the **Pavseks** to file suit to enforce the LUO, and that even if it did, the primary jurisdiction doctrine would require that the **Pavseks** first "go through the administrative process."

The Circuit Court orally granted Defendants' motions to dismiss. The Circuit Court stated that it found the arguments of the Sandvolds' counsel persuasive, and it indicated that it was dismissing Count I for lack of subject matter jurisdiction based on its interpretation of HRS § 46–4 and the doctrines of exhaustion of administrative remedies and primary jurisdiction. The Circuit Court noted:

> And I think the scheme of things is that it's best for the county to enforce its zoning regulations or to look at its zoning regulations at least in the first instance rather than the parties coming to court.

As to Counts II, III, and IV, the Circuit Court stated:

> When I go to the other counts of the complaint, the nuisance count, the aiding and abetting a nuisance, I think that all of those are premised on or dependent upon the alleged violation of the zoning ordinance. The language in those counts talks about how the Defendants allegedly "illegally rented" their homes.
>
> So I think all of those counts are dependent on a finding that there is illegal rental going on. And because that needs to be decided by the administrative agency in the first instance, I think those counts would fail as well.

The Circuit Court also found as to Counts V and VI, that the **Pavseks** had not made a sufficient showing of the alleged breach of fiduciary duty. As to Count VII, the Circuit Court found that the **Pavseks** had not alleged that they conferred any benefit upon Defendants to support their unjust enrichment claim.

The Circuit Court subsequently issued a written "Order Granting Defendants' Motions to Dismiss as to All Claims and All Parties" (Dismissal Order). The

Dismissal Order states that "[a]ll of Plaintiffs' claims as to all parties are ... dismissed with prejudice for the reasons stated in the [Defendants' motions to dismiss] and on the record in open court." On May 22, 2008, the Circuit Court entered a "Final Judgment" (Judgment) in favor of Defendants and against the **Pavseks** as to all claims raised in the **Pavseks**' complaint. This appeal followed.

IV.

On appeal, the **Pavseks** argue that the Circuit Court erred in dismissing their complaint because: (1) the **Pavseks** have a private right of action under HRS § 46–4(a) to file suit to enjoin Defendants' alleged violation*396 **61 of the LUO as set forth in Count I; (2) the **Pavseks**' failure to join the City in their lawsuit did not justify dismissal of Count I; (3) the **Pavseks**' complaint stated a claim for nuisance; (4) the **Pavseks**' complaint stated a claim for breach of fiduciary duty; and (5) the **Pavseks** have a valid claim for unjust enrichment.

For the reasons discussed below, we conclude that: (1) with respect to Count I, the **Pavseks** have a private right of action under HRS § 46–4(a) to enforce Defendants' alleged LUO violation, but the **Pavseks**' enforcement action is subject to the doctrine of primary jurisdiction; (2) the **Pavseks**' failure to join the City did not provide a basis for dismissing Count I; (3) the **Pavseks**' nuisance claims (Counts II, III, and IV) were dependent on the alleged LUO violation and therefore also subject to the primary jurisdiction doctrine; and (4) the **Pavseks**' complaint failed to state a claim for breach of fiduciary duty (Counts V and VI) and unjust enrichment (Count VII). We vacate the Judgment with respect to the claims subject to the primary jurisdiction doctrine (Counts I, II, III, and IV), and we remand the case with instructions that the Circuit Court consider whether a stay or dismissal without prejudice of Counts I, II, III, and IV is the appropriate remedy under the primary jurisdiction doctrine. We affirm the Judgment with respect to Counts V, VI, and VII.

DISCUSSION

I.

A.

The **Pavseks** rely on HRS § 46–4(a) as the basis for their entitlement to file suit to enforce the LUO. The **Pavseks** assert that HRS § 46–4(a) establishes a private right of action permitting them to seek judicial enforcement of the LUO, and therefore, the Circuit Court erred in dismissing their zoning enforcement claim for lack of subject matter jurisdiction.

We conclude that HRS § 46–4(a) establishes a private right of action to seek judicial enforcement of the LUO and accordingly, that the Circuit Court had subject matter jurisdiction over the **Pavseks**' zoning enforcement claim. However, we further conclude that the Circuit Court's exercise of jurisdiction is subject to the doctrine of primary jurisdiction. Under this doctrine, the Circuit Court was justified in requiring the **Pavseks** to first pursue an administrative determination of their claim that Defendants have been violating the LUO before proceeding with judicial enforcement of the LUO.[FN5]

FN5. The **Pavseks** did not argue in the Circuit Court or on appeal that they have a private right of action pursuant to article XI, section 9 of the Hawai'i Constitution to enforce HRS § 46–4 or the LUO. Accordingly, we do not address that issue. We note that after this appeal was filed, the Hawai'i Supreme Court, in *County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 235 P.3d 1103 (2010), held that article XI, section 9 of the Hawai'i Constitution created a private right of action to enforce HRS Chapter 205 in the circumstances of that case. *Id.* at 394, 235 P.3d at 1106. The court, however, specifically stated that it was not addressing whether the doctrines of primary jurisdiction or exhaustion of administrative remedies would be applicable to limit or restrict this

private right of action. *Id.* at 418, 235 P.3d at 1130. Accordingly, *Ala Loop* does not control or conflict with our analysis in this case.

B.

We review a trial court's dismissal for lack of subject matter jurisdiction *de novo*. *Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 239, 842 P.2d 634, 637 (1992). Our review is

> based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. Dismissal is improper 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."

Id. at 239–240, 842 P.2d at 637 (internal block quote format and citation omitted)

HRS § 46–4, entitled "County zoning," concerns the zoning power granted to the counties. HRS § 46–4(a) states that

> [z]oning in all counties shall be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. Zoning shall be one of the tools available to the ***397 **62** county to put the general plan into effect in an orderly manner.

HRS § 46–4(a) provides that the zoning power granted to the counties "shall be exercised by ordinance which may relate to" matters, including:

> (2) The areas in which residential uses may be regulated or prohibited;
>
> ...
>
> (4) The areas in which particular uses may be subjected to special restrictions; [and]
>
> (5) The location of buildings and structures designed for specific uses and designation of uses for which buildings and structures may not be used or altered[.]

Of particular importance to this appeal, HRS § 46–4(a) provides:

> The council of any county shall prescribe rules, regulations, and administrative procedures and provide personnel it finds necessary to enforce this section and any ordinance enacted in accordance with this section. *The ordinances may be enforced by appropriate fines and penalties, civil or criminal, or by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances.*
>
> Any civil fine or penalty provided by ordinance under this section may be imposed by the district court, or by the zoning agency after an opportunity for a hearing pursuant to chapter 91. The proceeding shall not be a prerequisite for any injunctive relief ordered by the circuit court.
>
> ....
>
> The powers granted herein shall be liberally construed in favor of the county exercising them, and in such a manner as to promote the orderly development of each county or city and county in accordance with a long-range, comprehensive general plan to ensure the greatest benefit for the State as a whole.
>
> (Emphasis added.)

C.

[1] Defendants contend that HRS § 46–4(a) does not create a private right of action, but is simply an enabling statute that gives the City a range of en-

forcement options, including private enforcement, which the City may choose to select or reject. Defendants observe that the City has not chosen to enact an ordinance creating a private right of action to enforce the LUO, and therefore they argue that no such private right of action exists. The **Pavseks** counter that HRS § 46–4(a), by its plain language, creates a private right of action that entitles them to bring suit to enforce the LUO. We agree with the **Pavseks** that HRS § 46–4(a) creates a private right of action.

We apply the following principles when interpreting a statute:

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

Hawaii Gov't Emps. Ass'n, AFSCME Local 152, AFL–CIO v. Lingle, 124 Hawai'i 197, 202, 239 P.3d 1, 6 (2010) (internal block quote format and citation omitted).

HRS § 46–4(a) provides that zoning ordinances enacted by the counties "may be enforced ... by court order at the suit of the county or the owner or owners of real estate directly affected by the ordinances." We conclude that the plain language of the' statute clearly manifests the Legislature's intent to create a private right of action for "directly affected" real estate owners to sue to ***398 **63** enforce zoning ordinances. Defendants do not cite to anything in the legislative history of HRS § 46–4(a) that supports their contention that the language at issue was merely intended by the Legislature to provide the counties with enforcement options that the counties could select or reject. We decline to adopt Defendants' interpretation, which relies on conjecture and hidden meaning that are not supported by the statute's legislative history. Instead, we adopt what we consider to be the most natural and straightforward reading of the statute and construe it as creating a private right of action.

As Defendants acknowledge, other states have enacted statutes which establish a private right of action to enforce zoning laws. *E.g.*, Minn.Stat. § 366.16 (authorizing any adjacent or neighboring property owner to institute any appropriate action to enforce zoning laws); Neb.Rev.Stat. § 23–114.05 (authorizing owners of real estate within the district affected by the regulations to institute any appropriate action to prevent or restrain the unlawful use of property); N.J. Stat. Ann. § 40:55D–18 (authorizing an interested party to institute any appropriate action to prevent or restrain the unlawful use of property). The enactment by other states of statutory private rights of action to enforce zoning laws supports our conclusion that the Hawai'i Legislature intended to do the same in enacting HRS § 46–4(a).

[2] We reject Defendants' argument that the **Pavseks** lack standing to sue under HRS § 46–4(a). This argument is based on Defendants' contention that the phrase "the owner or owners of real estate directly affected by the ordinances" only permits suit by landowners "whose property had been the subject of a zoning ordinance and who wish[ ] to contest the applicability of that ordinance to [their] own property or petition for a change to the ordinance." Defendants' interpretation of HRS § 46–4(a) as only providing a private right of action to landowners who seek to

contest zoning ordinances affecting their own property is inconsistent with the statute's specific authorization of actions to *enforce* zoning ordinances. We are not persuaded by the equivocal inferences Defendants attempt to draw from a provision dealing with the establishment of boundaries for forest and water reserve zones, which was enacted at the same time as HRS § 46–4, that the Legislature intended the term "enforce" to mean "contest" in enacting HRS § 46–4(a). We conclude that if the allegations of the **Pavseks'** complaint are taken as true, the **Pavseks** have standing as a "directly affected" owner to bring their lawsuit to enforce the LUO.

II.

[3] The conclusion that the **Pavseks** have a private right of action under HRS § 46–4(a) to seek enforcement of the LUO does not end our inquiry. Defendants argue on appeal, as they did in the Circuit Court, that even if "[HRS] § 46–4 [(a)] authorizes a private right of action with original jurisdiction in the circuit court, the doctrine of primary jurisdiction mandates that the Director of the DPP, and then the ZBA [(Zoning Board of Appeals of the City and County of Honolulu)], be allowed to enforce the zoning [ordinance] before it can be considered by a court." We agree that the doctrine of primary jurisdiction applies to the **Pavseks'** claim for enforcement of the LUO.

In *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 734 P.2d 161 (1987), the Hawai'i Supreme Court explained the doctrine of primary jurisdiction and the related doctrine of exhaustion of administrative remedies:

> Courts have "developed two principal doctrines to enable the question of timing of requests for judicial intervention in the administrative process to be answered: (1) primary jurisdiction; and (2) exhaustion of administrative remedies." B. Schwartz, *Administrative Law* § 8.23, at 485 (2d ed. 1984). "Both are essentially doctrines of comity between courts and agencies." *Id.* (footnote omitted).
>
> " 'Primary jurisdiction' applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pac. R.R.*, 352 U.S. 59, 63–64, 77 S.Ct. 161, 164–65, 1 L.Ed.2d 126 (1956). When this happens, "the judicial ***399 **64** process is suspended pending referral of such issues to the administrative body for its views." *Id.* at 64, 77 S.Ct. at 165 (citation omitted). In effect, "the courts are divested of whatever original jurisdiction they would otherwise possess." B. Schwartz, *supra*, § 8.24, at 488 (emphasis omitted). And "even a seemingly contrary statutory provision will yield to the overriding policy promoted by the doctrine." *Id.*
>
> "Exhaustion," on the other hand, comes into play "where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." *United States v. Western Pac. R.R.*, 352 U.S. at 63, 77 S.Ct. at 164. "The exhaustion principle asks simply that the avenues of relief nearest and simplest should be pursued first." *Moore v. City of East Cleveland*, 431 U.S. 494, 524, 97 S.Ct. 1932, 1948, 52 L.Ed.2d 531 (1977) (Burger, C.J., dissenting). "Judicial review of agency action will not be available unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process." B. Schwartz, *supra*, § 8.30, at 502.
>
> *Kona Old*, 69 Haw. at 92–93, 734 P.2d at 168–69 (brackets and ellipsis points omitted).

[4][5] Thus, under the primary jurisdiction doctrine, a court has original subject matter jurisdiction over a claim, but "suspends" the judicial process so

that issues pivotal to the claim's resolution can first be determined by an administrative body with responsibility for, and special competence in, deciding the issue. *Id.* In contrast, the exhaustion of administrative remedies doctrine applies in situations where the court lacks original subject matter jurisdiction over a claim, and the court can only exercise jurisdiction after the administrative process for resolving the claim has been completed. *Id.*

In *Kona Old,* the Hawai'i Supreme Court addressed the issue of whether HRS § 205A–6 [FN6] vested the circuit court with jurisdiction over an action brought by a private party to enforce agency compliance with the Costal Zone Management Act (CZMA), HRS Chapter 205A. HRS § 205A–6 authorizes "any person or agency [to] commence a civil action alleging that any agency" has breached or failed to comply with the CZMA in some respect. The supreme court acknowledged that the cause of action created by HRS § 205A–6 "seemingly describes a claim 'originally cognizable in the courts.' " *Kona Old,* 69 Haw. at 93, 734 P.2d at 169 (quoting *Western Pac. R.R.,* 352 U.S. at 64, 77 S.Ct. 161, a case applying the primary jurisdiction doctrine). Nevertheless, the supreme court required the plaintiff to first present the issues underlying its CZMA enforcement claim for resolution by the administrative agency with special competence to decide such issues, reasoning as follows:

> FN6. HRS § 205A–6 (2001) currently provides, as it did when construed in *Kona Old,* in pertinent part as follows:
>
> > **§ 205A–6 Cause of action.** (a) Subject to chapters 661 and 662, any person or agency may commence a civil action alleging that any agency:
> >
> > (1) Is not in compliance with one or more of the objectives, policies, and guidelines provided or authorized by this chapter within the special management area and the waters from the shoreline to the seaward limit of the State's jurisdiction; or
> >
> > (2) Has failed to perform any act or duty required to be performed under this chapter; or
> >
> > (3) In exercising any duty required to be performed under this chapter, has not complied with the provisions of this chapter.
> >
> > ....
> >
> > (c) A court, in any action brought under this section, shall have jurisdiction to provide any relief as may be appropriate, including a temporary restraining order or preliminary injunction.

[Plaintiff's] claim, however, involves the issuance of a special management area minor permit, and its enforcement "requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence" of the county planning department. [*Western Pac. R.R.,* 352 U.S. at 64, 77 S.Ct. 161]. Thus, the request for judicial intervention in the administrative process should not have preceded the resolution by the Board of Appeals of the question of whether the planning director's action in issuing the minor permit was proper. For it is

> ****65 *400** now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by the legislature for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal

> consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.
>
> *Far East Conference v. United States,* 342 U.S. 570, 574–75, 72 S.Ct. 492, 494, 96 L.Ed. 576 (1952).

Kona Old, 69 Haw. at 94, 734 P.2d at 169 (brackets omitted). Based on this reasoning, the supreme court affirmed the circuit court's dismissal of the plaintiff's complaint. *Id.*

We read *Kona Old* as applying the primary jurisdiction doctrine,[FN7] and we conclude that *Kona Old* controls our decision in this case. Here, similar to the situation in *Kona Old,* there is a statutory private right of action set forth in HRS § 46–4(a), which gives the Circuit Court original subject matter jurisdiction over the **Pavseks'** zoning enforcement claim. In addition, the rationale and justification articulated in *Kona Old* for invoking the primary jurisdiction doctrine fully applies to this case.

> FN7. In *Kona Old,* the supreme court did not specifically state that it was applying the primary jurisdiction doctrine. However, we infer from its analysis that it did. As noted, the supreme court acknowledged that the cause of action created by HRS § 205A–6 "seemingly describes a claim 'originally cognizable in the courts.' " *Kona Old,* 69 Haw. at 93, 734 P.2d at 169. The exhaustion of administrative remedies doctrine does not apply to claims originally cognizable in the courts.

The adjudication of the **Pavseks'** zoning enforcement claim requires the resolution of whether Defendants violated the LUO. The Hawai'i Legislature has granted to the City the power to establish and enforce zoning laws, and the City, in turn, has placed determinations of zoning violations within the special competence of the Director of the DPP and the ZBA. *See* HRS § 46–4(a); Revised Charter of Honolulu (RCH) §§ 6–1501, 6–1503, 6–1516 (2000 ed. & Supp. 2003).[FN8] Thus, the **Pavseks'** zoning enforcement claim satisfies the conditions for applying the primary jurisdiction doctrine. *See Kona Old,* 69 Haw. at 92–94, 734 P.2d at 168–69; *Jou v. Nat'l Interstate Ins. Co. of Hawaii,* 114 Hawai'i 122, 128, 157 P.3d 561, 567 (App.2007). Furthermore, the policy of promoting uniformity and consistency in the regulatory process, which underlies the primary jurisdiction doctrine, would be served by applying the doctrine to the **Pavseks'** enforcement claim.

> FN8. The Director of the DPP is "charged with the administration and enforcement of the zoning ... ordinances[.]" RCH § 6–1503. The ZBA is responsible for "hear[ing] and determin[ing] appeals from the actions of the director in the administration of the zoning ordinances[.]" RCH § 6–1516 (footnote omitted). The ZBA is organizationally part of the DPP. RCH § 6–1501.

By requiring the **Pavseks** to first pursue resolution of their claim that Defendants have been violating the LUO with the Director of the DPP and the ZBA,

> [u]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies

that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Kona Old, 69 Haw. at 92–93, 734 P.2d at 168–69. Based on *Kona Old*, we conclude that the **Pavseks** were required to first present their claim regarding Defendants' alleged violation of the LUO to the Director of the DPP, and to appeal any adverse decision of the Director to the ZBA, before proceeding ***401 **66** with their suit to obtain judicial enforcement of the LUO.

The DPP Rules of Practice and Procedure (DPP Rules) § 3–1 (1993) authorize "[a]ny interested person" to petition the Director of the DPP "for a declaratory ruling as to the applicability of any statute or ordinance relating to the [DPP]," which includes the LUO. The Director's decision on a declaratory ruling regarding the applicability of the LUO may be appealed to the ZBA. RCH § 6–1516; Rules of the Zoning Board of Appeals of the City and County of Honolulu (ZBA Rules) § 22–1 (1998). The **Pavseks** do not dispute that they did not petition the Director of the DPP for a declaratory ruling regarding the alleged LUO violations by Defendants. We conclude that under the primary jurisdiction doctrine, the **Pavseks** were required to first petition the Director of the DPP for a declaratory ruling on the alleged LUO violations, and appeal an adverse determination by the Director to the ZBA, before proceeding with their private right of action to enforce the LUO in the Circuit Court.

III.

In addition to the primary jurisdiction doctrine, the Circuit Court appeared to rely upon the purported absence of a private right of action under HRS § 46–4(a) and the purported failure to exhaust administrative remedies in dismissing the **Pavseks'** zoning enforcement claim set forth in Count I. We have already concluded that the **Pavseks** have a private right of action under HRS § 46–4(a) to bring their zoning enforcement claim in the Circuit Court. Our conclusion means that the **Pavseks'** zoning enforcement claim was originally cognizable in the Circuit Court and therefore the doctrine of exhaustion of administrative remedies is inapplicable. *See Kona Old*, 69 Haw. at 93, 734 P.2d at 169. Accordingly, the Circuit Court could not justify its dismissal of the **Pavseks'** zoning enforcement claim on the absence of a private right of action under HRS § 46–4(a) or on the doctrine of exhaustion of administrative remedies.

IV.

[6] In their motions to dismiss, Defendants argued that the **Pavseks'** zoning enforcement claim should be dismissed on the alternative ground of their failure to join the City as an indispensable party. We conclude that the Circuit Court erred to the extent that it relied upon this ground in dismissing the **Pavseks'** zoning enforcement claim. Even assuming arguendo that the City qualifies as an indispensable party under Hawai'i Rules of Civil Procedure (HRCP) Rule 19 (2000), dismissal would only be an available remedy if the City "cannot be made a party[.]" HRCP Rule 19(b). There is no basis in the record to conclude that the City could not be joined as a party to the **Pavseks'** lawsuit. Accordingly, the fact that the City had not yet been made a party did not provide a basis for dismissing the **Pavseks'** zoning enforcement claim. *See id.*; *UFJ Bank Ltd. v. Ieda*, 109 Hawai'i 137, 142–43, 123 P.3d 1232, 1237–38 (2005); *Life of the Land v. Land Use Comm'n*, 58 Haw. 292, 298, 568 P.2d 1189, 1194 (1977).

V.

[7] In its oral ruling on Defendants' motions to dismiss, the Circuit Court appeared to apply the doctrine of primary jurisdiction in dismissing the **Pavseks'** nuisance claims, Counts II, III, and IV. We conclude that the doctrine of primary jurisdiction applies to the **Pavseks'** nuisance claims. This is because the **Pavseks'** nuisance claims are predicated on Defendants' alleged violation of the LUO through illegal rentals. In Count II for nuisance against Owner Defendants, the **Pavseks** alleged that the actions of

Owner Defendants "in allowing their properties to be used for illegal rentals" constituted a nuisance. Counts III and IV alleged that various Defendants conspired to create, or aided and abetted other Defendants in creating, the nuisance attributable to the alleged illegal rentals.

We agree with the Circuit Court's assessment that the **Pavseks'** nuisance claims "are dependent on a finding that there is illegal rental going on" which "needs to be decided by the administrative agency in the first instance [.]" Because the basis for the ***402 **67 Pavseks'** nuisance claims are Defendants' alleged "illegal rentals," a determination of whether Defendants have been violating the LUO is a necessary predicate to deciding the nuisance claims. Accordingly, the primary jurisdiction doctrine applies to the nuisance counts.[FN9]

> FN9. Based on the Circuit Court's oral ruling on Defendants' motions to dismiss, we do not believe that the Circuit Court relied upon HRCP Rule 12(b)(6) (2000) in dismissing the **Pavseks'** nuisance counts. Thus, we decline to address whether these claims are subject to dismissal under HRCP Rule 12(b)(6). We note that the Circuit Court will be in a better position to evaluate whether the nuisance counts state valid claims for relief under HRCP Rule 12(b)(6), by virtue of the application of the primary jurisdiction doctrine, after it receives the benefit of an administrative determination of the issue of whether Defendants have been violating the LUO.

VI.

[8] Where the doctrine of primary jurisdiction applies, the court has the "discretion either to retain jurisdiction [and stay the proceedings] or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." *Reiter v. Cooper*, 507 U.S. 258, 269–69, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993); *see Jou*, 114 Hawai'i at 128, 157 P.3d at 567 (stating that when primary jurisdiction applies, "the court may stay the proceedings while an administrative agency decides predicate issues necessary to adjudicate ... [the] claim"); *Fratinardo v. Emps.' Ret. Sys.*, 121 Hawai'i 462, 468–69, 220 P.3d 1043, 1049–50 (App.2009).

In *Jou*, we held that

> [s]taying the proceedings conserves scarce judicial resources by allowing an administrative agency with expertise to decide the predicate issues. The agency's resolution of the predicate issues may reveal that there is no basis for ... [the] claim or may satisfy the plaintiff and obviate his or her need to further pursue the ... claim....
>
> A trial court has discretion in fashioning an appropriate remedy when applying the primary jurisdiction doctrine. As an alternative to staying the proceedings pending administrative resolution of predicate issues, the court has the discretion to dismiss the case without prejudice. However, dismissal is an appropriate remedy *only "if the parties would not be unfairly disadvantaged."*

Jou, 114 Hawai'i at 128–29, 157 P.3d at 567–68 (citation omitted; emphasis added).

[9] Based on the record, we are unable to determine whether the Circuit Court considered whether any "unfair disadvantage" would result from the dismissal of the **Pavseks'** zoning enforcement and nuisance claims, Counts I, II, III, and IV. The Circuit Court also dismissed these counts *with prejudice*, a remedy that is not generally applicable under the primary jurisdiction doctrine. *See Reiter*, 507 U.S. at 268–69, 113 S.Ct. 1213; *Jou*, 114 Hawai'i at 128–29, 157 P.3d at 567–68; *Flo–Sun, Inc. v. Kirk*, 783 So.2d 1029, 1041 (Fla.2001) (concluding that dismissal with prejudice was improper when primary jurisdiction applies). Accordingly, we vacate the portions of the

Judgment that dismissed Counts I, II, III, and IV with prejudice, and we remand the case with instructions that the Circuit Court consider whether a stay or dismissal without prejudice is appropriate as to these counts.

VII.

[10] The **Pavseks** argue that the Circuit Court erred in dismissing, pursuant to HRCP Rule 12(b)(6), Count V, which alleged that the Sandvolds had breached their fiduciary duties as co-tenants in a private right of way, and Count VI, which alleged that HBH had aided and abetted the Sandvolds' breach of their fiduciary duties.

[11][12] We review *de novo* a trial court's ruling on a motion to dismiss under HRCP Rule 12(b)(6) for failure to state a claim. *Wright v. Home Depot U.S.A., Inc.*, 111 Hawai'i 401, 406, 142 P.3d 265, 270 (2006). "A 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 or her claim that would entitle him or her to relief." ***403**68***In re Estate of Rogers*, 103 Hawai'i 275, 280, 81 P.3d 1190, 1195 (2003) (block quote format and citation omitted). "[O]ur consideration is strictly limited to the allegations of the complaint, and we must deem those allegations to be true." *Id.* at 281, 81 P.3d at 1196 (block quote format and citation omitted).

[13][14] "However, in weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged." *Marsland v. Pang*, 5 Haw.App. 463, 474, 701 P.2d 175, 186 (1985).

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true (even if doubtful in fact).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (construing federal rule that is analogous to HRCP Rule 12(b)(6)) (citation and footnote omitted). We conclude that the **Pavseks** failed to state a sufficient claim for relief in Counts V and VI.

[15] The Supreme Court of the Territory of Hawai'i in *De Mello v. De Mello*, 24 Haw. 675, 676 (Haw.Terr.1919), stated that

> since the possession of one joint tenant, or tenant in common, is the possession of all, and all are equally-entitled to the use and enjoyment of the property, it follows as a general rule that one tenant cannot maintain an action at law against his cotenant in respect of the common property unless he has been disseized or ousted therefrom.

Where the commonly-owned property is a private right of way, such as a privately-owned roadway, one co-owner may use the property "to its fullest extent as a roadway so long as he [or she] does not interfere with his [or her] co-tenant's use of the roadway for the same purposes" and the co-owner's use "does not result in disseisen or ouster" of the other co-tenants. *Hewitt v. Waikiki Shopping Plaza*, 6 Haw.App. 387, 395, 722 P.2d 1055, 1061 (1986).

Here, the **Pavseks** allege in their complaint that the Sandvolds have "overburden[ed] the private right of way [in which the **Pavseks** and Sandvolds are joint owners] through the increased traffic and use associated with [the Sandvolds'] illegal rentals." The bare and conclusory allegation that the right of way was "overburdened" is insufficient to raise a right to relief

above the speculative level. The **Pavseks** do not allege that the increased traffic related to the Sandvolds' rentals interfered with, prevented, or ousted the **Pavseks** from using the right of way for its intended purpose. We conclude that the Circuit Court properly dismissed Count V for failure to state a claim. Count VI, which alleged that HBH aided and abetted the Sandvolds in the breach of their fiduciary duties, was dependent upon Count V and was therefore also properly dismissed for failure to state a claim.

VIII.

[16] The **Pavseks** argue that the Circuit Court erred in dismissing Count VII for unjust enrichment, which was asserted against all Defendants, for failure to state a claim.

[17] To prove unjust enrichment, a plaintiff must show that "he or she conferred a benefit upon the opposing party and that the retention of that benefit would be unjust." *Porter v. Hu*, 116 Hawai'i 42, 55, 169 P.3d 994, 1007 (App.2007) (internal quotation marks and citation omitted). The allegations in Count VII of the **Pavseks'** complaint are insufficient to support a valid claim that they conferred a benefit upon Defendants. Accordingly, we conclude that Count VII failed to state a claim for relief and that the Circuit Court properly dismissed Count VII.

CONCLUSION

For the foregoing reasons, we: (1) vacate the portions of the Circuit Court's Judgment dismissing Counts I, II, III, and IV of the complaint with prejudice; (2) affirm the portions of the Judgment dismissing Counts V, VI, and VII of the complaint with prejudice; ***404 **69** and (3) remand the case to the Circuit Court with instructions to consider whether a stay or dismissal without prejudice of Counts I, II, III, and IV would be an appropriate remedy under the primary jurisdiction doctrine and for further proceedings consistent with this Opinion.

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Bays Lung Rose & Holma

Hawaii Property Owners Have Private Right to Enforce County Land Use Laws

By Bruce Voss July 24, 2012

Hawaii property owners now have a right to sue in court to enforce county land use ordinances, but must wait to file suit until the county has had an opportunity to enforce the law.

That important ruling was issued this month by the Hawaii Intermediate Court of Appeals in Pavsek v. Sandvold, a case arising from allegedly illegal use of residential property for transient vacation rentals. The Pavseks own land along Waialua's Laniakea Beach, best known as the set for the ABC television series "Lost". The Pavseks claimed that some of their neighbors were repeatedly renting out their properties for short-term visits, in violation of the City & County of Honolulu Land Use Ordinance. The Pavseks alleged that they had complained to the City "to no avail". Frustrated by what they saw as the City's inaction, the Pavseks filed a lawsuit in state court, asking the judge to stop the allegedly illegal rentals.

At issue was whether a state statute, HRS 46-4, creates a so-called "private right action" to sue in court to enforce county land use laws. The state court judge dismissed the lawsuit, finding that he did not have jurisdiction to issue an injunction.

On appeal, the ICA ruled that "directly affected" property owners do have a private right to sue under county land use laws. However, that right is subject to the "doctrine of primary jurisdiction"-a fancy legal way of saying that property owners must first demand that the county enforce the laws. In this case, the Pavseks must first pursue resolution of their claim regarding illegal vacation rentals with the City Department of Planning & Permitting and then the Zoning Board of Appeals, before they can go to court.

The ruling creates a dilemma for property owners who are aggrieved by a county's failure or refusal to enforce its own land use laws. The property owner must first spend its own time and money in an administrative proceeding-and essentially accuse the county of not doing its job-before it can go to court to get an injunction to enforce the law.

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