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Attorneys for Defendants
STATE OF HAWAII and
HAWAI'I PUBLIC HOUSING AUTHORITY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

HAZEL MCMILLON; GENE STRICKLAND; TRUDY SABALBORO; KATHERINE VAIOLA; and LEE SOMMERS, each individually and on behalf of a class of present and future residents of Kuhio Park Terrace and Kuhio Homes who have disabilities affected by architectural barriers and hazardous conditions, Plaintiffs,	CIVIL NO. CV 08 00578 JMS/LEK (Class Action) **DEFENDANTS STATE OF HAWAII AND HAWAII PUBLIC HOUSING AUTHORITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, FILED DECEMBER 16, 2009;**

vs.

STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY; REALTY LAUA LLC, formerly known as R & L Property Management LLC, a Hawaii limited liability company,

Defendants.

STATE OF HAWAII; HAWAII PUBLIC HOUSING AUTHORITY,

Third-Party Plaintiffs,

vs.

URBAN MANAGEMENT CORPORATION DBA URBAN REAL ESTATE COMPANY, DOES 1-20,

Third-Party Defendant.

EXHIBITS A – E; DECLARATION OF MARK S. ALPER, EXHIBITS 1 – 3; DECLARATION OF GORDON ERNST, EXHIBITS 1 – 3; DECLARATION OF LYDIA CAMACHO, EXHIBITS 1a – 5; DECLARATION OF BARBARA E. ARASHIRO, EXHIBIT 1 – 6; DECLARATION OF GEORGINA KAWAMURA; CERTIFICATE OF SERVICE

Hearing:
Dates: Feb. 22 and 23, 2010
Time: 10: 00 a.m.
Judge: Hon. J. Michael Seabright

Trial is August 3, 2010

DEFENDANTS STATE OF HAWAI AND HAWAII PUBLIC HOUSING AUTHORITY'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, FILED DECEMBER 16, 2009

I. INTRODUCTION

Defendants STATE OF HAWAII and HAWAII PUBLIC HOUSING AUTHORITY (hereinafter collectively "HPHA"), by and through Attorney General Mark J. Bennett, and the undersigned Deputy Attorneys General, oppose Plaintiffs' Motion for Preliminary Injunction, filed December 16, 2009.

II. FACTS

The general facts of this case are well known to this court having been the subject of two previous motions. The salient facts are that KPT was completed in 1965 at a cost of $7.25 Million and consists of two 16-story, Y-shaped towers constructed of concrete. It contains 306 residential units with a current population of about 3,300 residents. The details and specifics of many facts are disputed and will be addressed in conjunction with the specific opposition to each request for injunction.

III. APPLICABLE LAW – PRELIMINARY INJUNCTION

The purpose of a preliminary injunction is to preserve the relative positions of the parties, the status quo, until a full trial on the merits can be conducted. *University of Texas v. Camenisch,* 451 U.S. 390, 395 (1981).[1] The limited record

[1] The HPHA joins in the arguments of co-Defendant, Realty Laua, that Plaintiffs are in reality seeking a mandatory injunction, which is greatly disfavored as a Preliminary Injunction. *Stanley v. Univ. S. Cal.*, 13 F.3d 1313, 1320 (9th Cir. 1994).

usually available on such motions ordinarily renders a final decision on the merits inappropriate. *Brown v. Chote*, 411 U.S. 452, 456 (1973).

In the Ninth Circuit, motions for preliminary injunctions are governed under the same standard applied to motions for temporary restraining orders: the court must apply a "sliding scale" analysis in balancing a plaintiff's likelihood of success on the merits with the hardships that would be caused to the plaintiff, defendant, or the public if the injunction were granted or denied. *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1389 (9th Cir. 1988). To obtain injunctive relief, a plaintiff must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions on the merits are raised and the balance of hardships tips sharply in his favor. *Id.* (Citations omitted); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir.1993), *cert. denied*, 511 U.S. 1030 (1994).

These formulations are not different tests, but represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases. *Int'l Jensen Inc. v. Metrosound U .S.A. Inc.,* 4 F.3d 819, 822 (9th Cir.1993) (citations omitted); *Alaska v. Native Village of Venetie, supra.* Moreover, under any formulation, the moving party must demonstrate a "significant threat of irreparable injury." *Arcamuzi v. Continental Air Lines, Inc.,* 819 F.2d 935, 937 (9th Cir.1987). A plaintiff must do more than

merely allege imminent harm sufficient to establish standing; he or she must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief. *Associated Gen. Contractors of Cal., Inc. v. Coalition For Econ. Equity*, 950 F.2d 1401, 1410 (1991), *cert. denied*, 503 U.S. 985 (1992).

In cases involving the public interest, the court must also examine whether the public interest favors the plaintiff. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (citing *Caribbean Marine Serv. Co. v. Baldridge*, 844 F.2d 688, 674 (9th Cir. 1988); *Northern Alaska Environmental Ctr. v. Hodel*, 803 F.2d 466, 471 (9th cir. 1986)).

As applied to this case, for the Plaintiffs to be entitled to any sort of injunction, Defendants must be violating or threatening immediate violation of legal or equitable rights of the Plaintiffs. On a basic level, Defendants must owe Plaintiffs a duty. If there is no duty, there is no legal or equitable right to enforce. Moreover, for a preliminary injunction there must be an immediate threat of irreparable harm. *Associated Gen. Contractors, supra.* Although past violations of Plaintiffs' rights may be evidence of threatened harm, that evidence is far from conclusive. *LaDuke v. Nelson,* 762 F.2d 1318, 1323 (9th Cir. 1985) ("[W]hen injunctive relief is sought, litigants must adduce a 'credible threat' of recurrent injury."); *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding

injunctive relief.") If the situation has changed such that Plaintiffs' rights are no longer threatened, a necessary element of the preliminary injunction motion has been lost. *Los Angeles v. Lyons, 160 U.S. 95 (1983).* It may be called "mootness" or simply the lack of immediate threat. Even if Plaintiffs could satisfy the above tests, they must still tip that sliding scale and further establish that their injunction would be in the public interest, in the larger universe. *Alaska v. Native Village*, 856 F.2d at 1389. Finally, it is a standard principle of equity that courts will not order a party to do that which cannot be done. As this court has more than once stated from the bench "Obviously, these things can't be done overnight . . . You can't fix elevators in two days; it just doesn't happen." *See* Exhibit "A" Partial Transcript of the Hearing on Motion to Dismiss, dated June 8, 2009, at 4.

IV. ARGUMENT

A. ADA and § 504 Do Not Require Defendants to Remove Access Barriers at KPT and Kuhio Homes

Plaintiffs' claims, indeed Plaintiffs' federal jurisdiction in this case are premised on the ADA and § 504 of the Rehabilitation Act. Defendants have repeatedly stated in previous pleadings and motions that because of the age and structural character of the buildings (built even before the Architectural Barriers Act, before the Rehabilitation Act, and of course, before the ADA) involved, HPHA is not required to make structural modifications or remove barriers to mobility. It has further been Defendants' position that reasonable accommodations

for accessibility can be made by moving the affected tenants to other projects within the system. Accessibility standards of the ADA only apply to buildings if the construction was commenced after January 26, 1992 [28 CFR 35.151(a)] or if the building has since been substantially rehabilitated. [24 CFR 8.23(a)]. Substantial rehabilitation requires that the cost of alterations be 75% or more of the replacement cost of the completed facility. [HUD Notice PIH 2002-01 (HA)]. Current construction costs for similar housing is $350,000[2] per unit or a total of $214 Million for KPT [AMP 40]. In 2001 the estimated demolition cost just for the two towers was quoted at $145,000,000, giving us a total replacement cost of at least $359 Million. One can readily see that HPHA has spent nowhere near 75% of that on rehabilitation.

The ADA does not apply and § 504 does not require HPHA to remove any of the architectural barriers within the KPT towers, Kuhio Homes low rise buildings or the pathways leading to either of the two housing complexes. The bottom line is that HPHA has no duty, no legal obligation to comply with ADAGS or to remove any access barriers at KPT.[3] Declaration of Mark S. Alper at 23.

B. Reasonable Accommodations

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[2] This figure is based on the present cost, $300,000 per unit, of construction of the Makiki Vista project being built for HFDC. The additional $50,000 per unit represents the upgrade to concrete construction and inflation.

[3] This is not to say that HPHA should not aspire to make modifications where feasible, it is simply not required to. *See*, HUD Memorandum re Accessibility Requirements of September 29, 2008 (attached as Exhibit "B")

Unlike the duty to remove access barriers at KPT and Kuhio Homes, HPHA does have the obligation to make reasonable modifications within a resident's unit (such as the installation of grab bars) to accommodate a disability. That obligation is limited by structural infeasibility, and by whether doing so would result in a fundamental alteration in the nature of its program or an "undue financial and administrative burden". [24 CFR 8.4(b)(i), 8.24 and 8.33] The "undue financial and administrative burden" will be discussed in greater detail *infra*. However, HPHA always has the option of offering to move the disabled resident to another project which would accommodate his or her disability if the modification cannot reasonably be made at the resident's current unit at KPT. As HUD published in the Federal Register, June 2, 1988 (Vol.53, No. 106), at page 20225, accompanying the original publication of HUD's § 504 administrative rules:

> "PHA's are thus required by Part 8.25 to operate each of their programs or activities so that the program, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This does not necessarily mean that a PHA must make each of its existing facilities accessible to and usable by individuals with handicaps. A PHA is also not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of its program or undue financial and administrative burdens."

HPHA is in compliance with the above § 504 guidelines. Moreover, HPHA has in place procedural requirements and forms for any eligible, disabled resident to request a reasonable accommodation as a result of a disability. As discussed,

infra, these procedures have been revised by NCHM, to comply with changes in the law and are expected to be promulgated by the HPHA Board of Directors at its next regularly scheduled meeting in February. These procedures are required by HUD under 24 C.F.R. Part 8, 24 C.F.R. § 960, *et seq.*, and the Admissions and Continued Occupancy Policy (ACOP) required by HUD for the federally assisted Public Housing Program under 24 C.F.R. Titles V, VII and IX.

A Notice of the procedures is provided to every applicant upon their admission into public housing and annually. At deposition, each named Plaintiff acknowledged receipt of the Notice.

A. Plaintiffs Are Unable To Meet The Standard Of Proof Required To Obtain Injunctive Relief

1. Plaintiffs are not likely to prevail on the merits.

The grant of a preliminary injunction is the exercise of a very far reaching power never to be indulged except in a case clearly warranting it. *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970). In evaluating the likelihood of success on the merits, a plaintiff must establish a "strong likelihood" or "reasonable certainty" of prevailing on the merits. *Id.* Indeed, "the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered[.] *11A Wright, Miller, Kane, Federal Practice and Procedure*, CIVIL 2D § 2948.1. As such, the Court must balance the hardships in the present case,

and determine whether Plaintiffs will suffer irreparable injury. *Amoco Production Co.*, 480 U.S. 531 at 542 (rejecting a presumption of "irreparable damage").

At this juncture in our discussion, we also wish to point out to the Court that practically all of the fixes, contracts, or programs discussed below, which "moot" Plaintiffs' claims were initiated prior to the filing of the Complaint in this case. As with any governmental agency, over time the personnel change, the board changes, even the agency itself was reorganized. When the Transition Plan was written in 1999, public housing came under the Housing and Community Development Corporation of Hawaii ("HCDCH") which also was in charge of developing affordable housing. Now public housing is under the Hawaii Public Housing Authority, which only administers public housing. Most observers would agree that there has been a noticeable improvement in Hawaii public housing over the past several years. Therefore, past failings are not good indicators of future failings nor the imminent threat of irreparable harm.

B. <u>The Specific Injunction Requests</u>

We will address Plaintiffs' specific requests for Preliminary Injunction in the order set forth in their moving papers:

1. "Immediately ensure at least two working elevators in buildings A and B of KPT at all times."

This issue is simply moot, or otherwise impossible. Even before this suit was filed, HPHA was already taking bids for a $4,000,000 contract to "modernize"

all of the elevators at KPT. The 45 year old elevators are the original with the buildings and are not only worn out but obsolete: often no repair parts are available and must actually be fabricated on the mainland. Declaration of Gordon Ernst at 12-14. Only when it became clear that the elevators could not be kept in a reliable running condition did the agency commit to the large capital expenditure to replace those elevators. The contract is in place and work is in progress with two (out of six) new elevators scheduled to be on line by May 2010, two more by November 2010 and the remaining two by May 2011. Plaintiffs' demand would require the impossible: that is a guaranty that one (or until May of this year two) of the old, unreliable, obsolete elevators be always operational. Declaration of Gordon Ernst at 19.

2. "Within thirty (30) days, adopt and implement a regular and effective elevator maintenance program to ensure continued access."

This issue is moot. There is and has been in place an elevator maintenance contract with Kone, Inc. Declaration of Gordon Ernst at 20. Kone does what it can to keep the old elevators operational, but, as stated above, often no repair parts are available and must actually be fabricated. Until the modernization is complete, no maintenance contract could guaranty two working elevators. Everything that reasonably can be done, is being done.

3. "Within thirty (30) days, complete installation of the fire alarm system, implement interim fire and life safety

measures for KPT as identified by Plaintiffs' fire expert, develop and implement effective evacuation plans for KPT and KH, post evacuation route maps in common areas, ensure easy access to plans by Defendants' appropriate personnel and emergency personnel, and provide residents with mobility impairments written directions, a brochure, or a map showing locations of usable circulation paths or areas of refuge."

Again, this request is basically moot. Structures such as KPT are only required to comply with the fire and building codes that were in effect at the time of construction. They are essentially "grandfathered in." 1997 Uniform Fire Code § 102.1. There is one notable exception, in 1992, the Honolulu City Council did adopt an ordinance (No 92-61) requiring smoke detectors in every unit in all high rise residential buildings. That has been complied with at KPT; otherwise there have been no significant changes.

As stated in the Robert Faleafine Declaration dated July 24, 2009 [#5 on Doc. 136, Plaintiffs' Motion for Preliminary Injunction] the management company has maintained a physical fire watch because the alarm system was not functioning, primarily due to vandalism. KPT also has a Disaster Evacuation Plan maintained by Realty Laua. Moreover, Realty Laua maintains a list of residents with mobility impairments to be provided to the Honolulu Fire Department in case any portion of the buildings need to be evacuated. Due to the concrete nature of the construction of the buildings, residents are advised, in the event of fire, to stay

in their units, unless, of course, the fire is in or near their unit, and be prepared to follow directions of the fire department.

In July 10, 2008, HPHA entered into a contract with American Electric for the installation of a modern, vandal resistant fire alarm system. A second contract will provide video monitoring at a central location. That fire alarm system has been installed and is scheduled for testing and placement into full operation on February 2, 2010. Declaration of Lydia Camacho at 17. At that time it will become necessary to implement a new evacuation plan. Because it is not otherwise provided by local ordinances,[4] the evacuation plan defaults to the HUD requirements:

> Every HUD recipient should have an emergency evacuation plan for each of its buildings. In the preparation and updating of this plan, the HUD recipient should inform residents that with the resident's consent, they will provide information to the fire department which identifies residents with special needs in case of an emergency evacuation. Applicants should be given the opportunity to decide whether they want the recipient to provide this information to the fire department. The HUD recipient may share this information with the local fire and police departments provided consent is given. [http://www.fhasecure.gov/offices/fheo/disabilities/sect504faq .cfm#anchor263905]

Upon approval of the new alarm system by HFD, HPHA plans to distribute a notice of the new fire alarm system, advise the residents what to do in case of fire

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[4] To the extent that Plaintiffs may be seeking injunctive relief under state law or local ordinance rather than federal law, their claims are barred by the Eleventh Amendment.

(as recited above) and provide a return form for anyone who needs assistance in evacuating to be placed on the emergency list.

4. **"Within thirty (30) days, remove hazardous paths of travel, as identified by Plaintiffs' access expert, that pose a particularly severe harm to mobility impaired residents, are inexpensive to fix and can be fixed within a short period of time."**

Defendants acknowledge that the sidewalks on Linapuni Street connecting the various residential buildings to the entrance on School Street are old with some normal cracking and displacement of slabs. Plaintiffs' expert is simply wrong in his assertion that the State is required to fix them[5] (Declaration of Mark S. Alper at 23) and is simply further naïve in his assertion that they could be fixed inexpensively and quickly. Declaration of Lydia Camacho at 7. Moreover, even if the access route does not comply with ADAGS (which does not apply), named plaintiffs in their depositions have denied experiencing any access problems. Declaration of R. Aaron Creps, dated July 24, 2009 [#2 - 5 on Doc. 98, Defendant Realty Laua LLC's Memorandum in Opposition to Plaintiffs' Motion for Class Certification, filed June 3, 2009] The cross slopes are primarily due to driveways, all constructed before 1992, as indeed was the entire access route, and is exempt from any requirement to be brought up to standards. Be that as it may, following

[5] The sidewalks are part of the entire "program" which like the buildings themselves were all constructed prior to January 26, 1992; therefore ADAGS does not apply.

the suggestion of W. Glenn Stevens, president of NCHM (National Center for Housing Management) Defendant's expert compliance consultant, non-structural repairs have been made which greatly alleviate access barriers to wheelchairs, wheeled walkers and similar aides to mobility. Declaration of Lydia Camacho at 5.

It has only recently been learned that Linapuni Street, together with its sidewalks are the property, and hence the maintenance obligation of the City and County of Honolulu, rather than the State. Tender has been made to the City, which admits ownership but denies maintenance responsibility due to the fact that the entire campus is closed to the pubic and, therefore, Linapuni is no longer a public street. Exhibit "C".

5. "Within thirty (30) days, remedy the following barriers for residents with mobility impairments: the lack of bathroom grab bars, the lack of shower seats, the two-foot high shower barrier at KPT, and the lack of access ramps for residents with mobility impairments at KH."

This request actually falls under the "reasonable accommodation" provision of the law rather than access barriers. Were it otherwise, the agency could simply stand behind the construction date of the buildings and deny any obligation to do anything. Reasonable accommodations have been discussed briefly above and will be discussed further below. However, specific to this request, all requests for grab

bars made within the past year have been installed.[6] Declaration of Lydia Camacho at 23 and Exhibit 5. Shower seats are available on the economy for approximately $40 each. Declaration of Lydia Camacho at 22. HPHA does not prohibit them and as they do not constitute a structural item, the cost is the responsibility of the tenant.

None of the named Plaintiffs have made any request for modification of their shower stalls. The shower stalls at KPT were part of the original design and construction when it was built in 1965. The characterization of a "2-foot high shower barrier" is inaccurate. The "barrier" is actually the outside wall of the combination tub/shower. It is made of concrete and ceramic tiles and measures 171/2 inches in height and is an integral part of the bath tub. *See* photographs attached to the Declaration of Lydia Camacho at 4a – 4c. The removal of, or even substantial lowering of, the wall in question would require demolition of concrete and render the existing bath fixture, unusable as a "bath tub". Moreover, as there would no longer be a container holding the bath water in the tub area, it would be necessary to re-grade the concrete bathroom floor and probably install an additional floor drain to prevent bath water from draining into the unit below. Declaration of Lydia Camacho at 21.

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[6] Requests for grab bars in the bathroom have been accepted without the need for medical support for roughly the last 12 months.

The question of exterior wheelchair ramps at Kuhio Homes is not capable of simple resolution. At the present the question only affects Plaintiff Vaiola, who has previously been offered an accommodation by way of a transfer to a unit in the KPT towers which would accommodate her mobility problems by being entirely on one level.[7] Robert Faleafine Declaration dated July 24, 2009 [#5 on Doc. 136, Plaintiffs' Motion for Preliminary Injunction] She declined that offer and is on record again as saying she would not accept such a move. In fact, she testified at her deposition that she does not want to move back to KPT or to any other project. Declaration of R. Aaron Creps, dated July 24, 2009 [#3 on Doc. 98, Defendant Realty Laua LLC's Memorandum in Opposition to Plaintiffs' Motion for Class Certification, filed June 3, 2009] Technically, by declining the offered accommodation, Vaiola must reapply for an accommodation. Declaration of Barbara Arashiro, at 19. Nevertheless, she has been placed on the waiting list for a more accommodative unit. Ramps generally present additional problems not the least of which is disproportionally high cost and the fact that they could not lead to an "accessible route."

6. "Within fifteen (15) days, create accessible parking spots, including 7 parking spots each for KPT buildings A and B, and issue and enforce a policy requiring that designated

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[7] In her present unit the bathroom facilities are on the second floor. Due to an amputation long after her moving into that unit, Mrs. Vaiola is unable to climb the stairs.

"accessible" parking spots be reserved for authorized disabled persons."

Federal law (ADA and § 504) apply accessible parking requirements only to new construction. *See e.g.* UFAS 4.1.1. This is consistent also with ADAGS application only to construction after January 26, 1992. Moreover, because KPT has no available guest parking, it is not required to provide "handicapped" parking stalls under other law.[8]

It may be possible to provide tenants with a parking "reasonable accommodation," however. There have been no such reasonable accommodation requests received by Defendants; therefore, it would be only speculation, but it may be possible to provide an impaired tenant, by way of a reasonable accommodation, an assigned parking stall, overwidth and as near as practicable to the entrance to that tenant's building. Declaration of Lydia Camacho at 26. At present, it is premature to make any definite commitments, until such a reasonable accommodation request is actually received.

7. **"Provide interim accommodations to named Plaintiffs by removing access barriers in their individual units within thirty (30) days and, if deemed appropriate in light of their specific disabilities, transfer them to accessible units within sixty (60) days."**

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[8] To the extent that Plaintiffs may be seeking injunctive relief under state law or local ordinance rather than federal law, their claims are barred by the Eleventh Amendment.

This request is too vague as it stands. No specific access barriers within individual units are specified. Based on deposition testimony, Plaintiffs Sommers and Sabalboro use wheelchairs. Moving walls, widening doorways within KPT units cannot be done due to the concrete construction, nor is there any requirement to do so on pre-1992 buildings. Moreover, any attempt would involve an undue financial burden.

By their deposition testimony Sommers, McMillon and Sabalboro do not experience any more inconvenience than the residents at large and should be OK when the new elevators are in place. Declaration of R. Aaron Creps, dated July 24, 2009 [#2, 4 and 5 on Doc. 98, Defendant Realty Laua LLC's Memorandum in Opposition to Plaintiffs' Motion for Class Certification, filed June 3, 2009] Both of them however are also seeking units with more bedrooms and Defendants are currently trying to place them in appropriately larger units. Plaintiff Lee Sommers may be eligible to move to elderly housing which should accommodate her as well.

There are ethical as well as compliance issues with inserting named-Plaintiffs on the waiting list for a transfer ahead of others who are already there. HUD is known "to take a dim view" of jumping one tenant ahead of another when they are both seeking accessible units. HPHA has determined to consider the filing of the complaint as notice and inserted named plaintiffs on the list as of the date of the filing.

This issue impacts Plaintiffs' complaints that applicants languish for years on the waiting list. There has been no substantiation from them and HPHA records disclose a reasonable amount of time from approval of a reasonable accommodation move to the time of actual placement. Declaration of Barbara Arashiro at 19. The waiting time varies with the size of the unit requested with two bedrooms taking longer. But, by way of example, now deceased Plaintiff Lewers Faletogo moved into his four bedroom, ground floor Kuhio Homes unit within a few months from the date of his request.

8. "Distribute a new Notice of Right to Reasonable Accommodation to all present and future residents, translated into all languages required by Hawaii's language access law, substantially in the form of Exhibit "T" attached to the Declaration of Elizabeth M. Dunne."

NCHM has redrafted HPHA's reasonable accommodations policy to bring it up to date with recent HUD/DOJ requirements (Declaration of Mark S. Alper at 26) and it is anticipated that the new policy will be adopted by the HPHA board at its regular February meeting. Declaration of Barbara Arashiro at 20. NCHM is also in the process of revising forms to comply with the revised policy and it is further anticipated that NCHM will provide training to appropriate HPHA and Realty Laua personnel. Declaration of Barbara Arashiro at 20. It simply makes more sense to use a policy, forms and notices, prepared by a nationally recognized

expert on the subject rather than a form prepared by Plaintiffs' attorney. As this is in process, the request for injunction should be considered moot.

9. "Keep a written record of all reasonable accommodation requests to be provided to Plaintiffs' counsel, or a neutral third-party, on a monthly basis; and within thirty (30) days provide a written report to the Court as to the status of Defendants' compliance with the court's order."

The NCHM reasonable accommodations policy, above, provides for record keeping of reasonable accommodation requests. As there is no evidence that written records have not been kept – they have – there is no basis for enjoining this activity. Moreover, if there is no basis for a preliminary injunction, there is no basis for ordering reports by defendants; however, HPHA anticipates a high degree of transparency in its reasonable accommodations policy limited only by privacy concerns under state and federal law.

C. Public Interest Weighs In Favor Of HPHA

In addition to the above articulated defenses is the balance of hardships test and the public interest test. These are particularly important when considering a motion for a preliminary injunction. At the present time any order directed to the state of Hawaii that would even indirectly require the expenditure of additional funds would present an undue hardship. Declaration of Barbara Arashiro at 7 – 10. For at least the last year, hardly a day has gone by without news articles in the media regarding the state's financial plight, brought about by the generally bad

worldwide economy. By law, the State of Hawaii's general fund expenditures shall not exceed current revenues it takes in. Declaration of Georgina Kawamura at 3 – 4. Every two to three months the Council on Revenues has lowered the projected revenue receipts resulting in draconian budget cuts to comply with the Constitution. Declaration of Georgina Kawamura at 6. It is common knowledge that all state employees, including Deputy Attorneys General and the faculty at the University of Hawaii, have sustained pay cuts in the range of 5% to 13.7%, accompanied by furlough days off work. There is no end in sight. Perhaps the most dire situation is that in public education, where due to the furlough days for teachers, instructional days for public school students have been reduced to the lowest in the United States. Exhibit "D". Various state departments have all but disappeared and services discontinued. For example even with the highly publicized epidemic of rats, first in Chinatown and now all over the island, the state office of vector control has ceased to function. Exhibit "E". It is simply a fact, an inconvenient truth, that any additional monies spent on KPT (unless of course funded by HUD)[9] will necessarily come as a diversion from some other equally important state program. *See* Declarations of Georgina Kawamura at 13, and Barbara Arashiro at 10.

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[9] In his recent State of the Union address, President Obama announced his intention to limit discretionary spending in all but a few departments, of which, HUD was not one.

Further to the financial analysis is the fact that KPT is some 45 years old, and is well known to be a failed style of public housing. Similar towers all over the United States have been demolished and replaced with low or mid rise units with vastly different density patterns. HPHA and its predecessor have twice petitioned HUD for a Hope VI grant first to substantially remodel then to demolish and replace KPT. Declaration of Barbara Arashiro at 11 – 13. Both times the grant request was denied, not due to any lack of merit but rather due to the lack of available funds and/or the lack of the necessary political clout to secure the grant. With over 3000 residents at KPT and over 4000 families on the waiting list for public housing, HPHA and HUD keep KPT in operation. Certain trade offs are necessarily made. For example, presently there are fourteen ground floor units at KPT that are out of commission and unrentable due to sewage problems. The estimated cost of repair just to put those 14 units back into service is $10,000,000 and that is without any meaningful guaranty that it would work so long as the City of Honolulu's interceptor sewer that serves KPT remains substantially undersized. Many modernization projects cannot be done at KPT due to physical and fiscal restraints. Fortunately, as stated above, HUD allows PHAs to operate their programs viewed in the entirety, not requiring each facility to be accessible and usable by individuals with handicaps.

Perhaps there is a savior on the horizon in the pending sale of the entire KPT property to a private developer. Declaration of Barbara Arashiro at 22 - 23. Although the final contract has yet to be executed, negotiations are continuing and are expected to be completed relatively shortly. Declaration of Barbara Arashiro at 24. In a nutshell, the private developer (who has already done several similar conversion projects) will buy the buildings, renovate the towers as much as possible within the confines of the monolithic construction, raze the low rise buildings and build new low and mid-rise units comprising a mix of low and mid income housing as well as elderly housing and perhaps some market rate housing. At a minimum, the existing number of low income units will be preserved. Provisions will be made for the temporary housing of existing residents during the renovation. The final result should be an increased benefit to all concerned. At this juncture, just as it makes no practical sense to replace the KPT sewer line, it likewise makes little sense to commit to extensive repairs/renovations at KPT which will likely fall to the jackhammers when the private developer takes over.[10] We therefore submit that the balance of hardships and the public interest tilt in favor of defendants.

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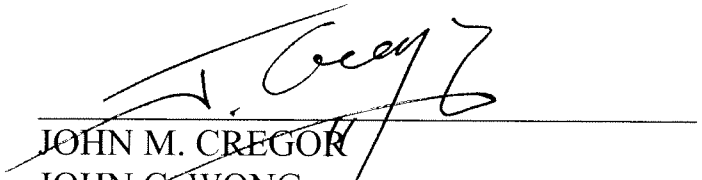
[10] That is not to say that projects already in the works, such as the elevator modernization, will not continue. Declaration of Barbara Arashiro at 25.

V. CONCLUSION

For all of the foregoing reasons, legal and factual, Plaintiffs simply have not met the test for entitlement to the extraordinary remedy of a preliminary injunction. Their Motion should be denied.

DATED: Honolulu, Hawaii, February 1, 2010.

MARK J. BENNETT
Attorney General
State of Hawaii



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