

Document ID: 410961_2_JAK

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Attorneys for KUKUI GARDENS CORPORATION

IN THE UNITED STATES DISTRICT COURT

STATE OF HAWAII

KUKUI GARDENS ASSOCIATION,)	CIVIL NO. CV06-00534 SOM LEK
FAITH ACTION FOR COMMUNITY)	
EQUITY,)	DEFENDANT KUKUI GARDENS
)	CORPORATION'S ANSWER TO
Plaintiff,)	PLAINTIFFS' COMPLAINT FILED
)	OCTOBER 2, 2006
vs.)	
)	
ALPHONSO JACKSON, in his capacity)	
as SECRETARY OF THE UNITED)	
STATES DEPARTMENT OF)	
HOUSING AND URBAN)	
DEVELOPMENT, KUKUI GARDENS)	
CORPORATION, CARMEL)	
PARTNERS, INC.)	
)	
Defendants.)	
_____)	

Document ID: 410961_2_JAK

DEFENDANT KUKUI GARDENS CORPORATION'S ANSWER TO
PLAINTIFFS' COMPLAINT FILED OCTOBER 2, 2006

Defendant KUKUI GARDENS CORPORATION ("KGC") by and through its attorneys Kobayashi, Sugita & Goda, in Answer to the Complaint filed herein on October 2, 2006 (the "Complaint"), by Plaintiffs KUKUI GARDENS ASSOCIATION and FAITH ACTION FOR COMMUNITY EQUITY alleges and avers as follows:

1. In answer to paragraph 1, Defendant admits that Kukui Gardens is a 857-unit apartment development located in Honolulu, Hawaii that was built with a \$16 million loan insured by the United States Department of Housing and Urban Development ("HUD") under Section 221(d)(3) of the National Housing Act. Defendant denies that Kukui Gardens is a low income rental housing project; although some of its residents qualify as low income. As to the intentions of HUD and whether or not Kukui Gardens is meeting a critical need for low income rental housing in the area, the Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments therein, and on that basis specifically and generally denies each and every averment contained therein. Defendant denies all remaining allegations contained in paragraph 1.

Document ID: 410961_2_JAK

2. Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in paragraph 2, and on that basis specifically and generally denies each and every averment contained therein.

3. Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in paragraph 3, and on that basis specifically and generally deny each and every averment contained therein.

4. In answer to paragraph 4, Defendant admits that Alphonso Jackson is Secretary of HUD and has been sued in his official capacity. With regard to the remaining allegations of paragraph 4, Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments therein, and on that basis specifically and generally deny each and every averment contained therein.

5. Defendant admits the allegations contained in paragraph 5.

6. Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in paragraph 6, and on that basis specifically and generally denies each and every averment contained therein.

7. Defendant denies the allegations contained in paragraph 7.

8. Defendant denies the allegations contained in paragraph 8.

Document ID: 410961_2_JAK

9. Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in paragraph 9, and on that basis specifically and generally denies each and every averment contained therein.

10. Defendant admits the allegations contained in the introductory sentence of paragraph 10.

11. Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in paragraph 10a, and on that basis specifically and generally denies each and every averment contained therein.

12. In answer to paragraph 10b, Defendant admits that KGC, as owner of Kukui Gardens, has an interest relating to the subject of this action and is so situated that the disposition of the action in its absence would impair or impede its ability to protect its interests in Kukui Gardens. Defendant denies the remaining allegations contained in paragraph 10b.

13. In answer to paragraph 11, Defendant admits that the National Housing Act of 1937 and 12 USC § 17151(a) speak for themselves

14. In answer to paragraph 12, Defendant admits that 2 USC § 17151(a) speaks for itself.

Document ID: 410961_2_JAK

15. In answer to paragraph 13, Defendant admits that Section 250(a) of the National Housing Act was added by Section 433 of the Housing and Urban-Rural Recovery Act of 1983, and is codified at 12 USC 1715z-15. Defendant admits that one of Congress' stated concerns in enacting Section 250(a) was to ensure that low income subsidized projects not be converted to market rate housing and therefore lost as a low income housing resource. Defendant denies prepayment of Kukui Gardens' mortgage will result in a loss of a low income housing resource. Defendant admits that the text of Section 250(a) currently enacted is as set forth in paragraph 13 of the complaint and that it speaks for itself. Defendant denies the remaining allegations contained in paragraph 13.

16. In answer to paragraph 14, Defendant denies that Section 433 of the Housing and Urban-Rural Recovery Act of 1983, codified at 12 USC 1715z-15, relates to all multifamily rental housing projects; however, Defendant admits that it relates to Kukui Gardens.

17. In answer to paragraph 15, Defendant admits that 12 USC § 1701t of the U.S. Housing Act and 42 USC § 3608(3)(5) of the Fair Housing Act speak for themselves. Defendant denies the remaining allegations contained in paragraph 15.

Document ID: 410961_2_JAK

18. In answer to paragraph 16, Defendant admits that Kukui Gardens is a 857-unit apartment development located in Honolulu, Hawaii that was built with a \$16 million loan insured by the United States Department of Housing and Urban Development (“HUD”) under Section 221(d)(3) of the National Housing Act. Defendant denies that Kukui Gardens is a low income rental housing project; although some of its residents qualify as low income. Defendant admits that KGC was formed by the trustees of The Clarence T.C. Ching Foundation in 1967 with the purpose to develop, own and operate a 857 unit rental housing project and that the “KGC incorporation documents” speak for themselves. Defendant denies the remaining allegations contained in paragraph 16.

19. In answer to paragraph 17, Defendant admits that in addition to the \$16,101,100.00 paid by Kukui Gardens Corporation to develop Kukui Gardens, additional pre-development costs were paid by paid by Clarence T.C. Ching personally. Defendant further admits that the Regulatory Agreement will terminate when HUD is no longer obligated to insure the mortgage.

20. In answer to paragraph 18, Defendant admits that the Regulatory Agreement referred to herein speaks for itself. The Defendant denies all remaining allegations of paragraph 18.

Document ID: 410961_2_JAK

21. In answer to paragraph 19, Defendant admits that the Regulatory Agreement referred to herein speaks for itself and that as of the date of this filing it remains in effect for Kukui Gardens. The Defendant denies all remaining allegations of paragraph 19.

22. In answer to paragraph 20, Defendant admits that the mortgage note attached as Exhibit "B" to the Complaint speaks for itself.

23. In answer to paragraph 21, the Defendant admits that the Regulatory Agreement governs Kukui Gardens as long as the HUD-insured mortgage remains in place. The Defendant admits that Section 250 of the National Housing Act speaks for itself. The Defendant denies all remaining allegations of paragraph 21.

24. In answer to paragraph 22, the Defendant admits that current rents for the rental units at Kukui Gardens are capped at \$444, \$555, \$650, \$720, and \$818 for one bedroom, two bedroom, three bedroom/one bathroom, three bedroom/one-and-a-half bathroom and four-bedroom units respectively. Defendant denies that Section 250 would not permit prepayment of the Kukui Gardens mortgage. As to all the remaining allegations contained in paragraph 22, the Defendant is without information or knowledge sufficient to form a belief as to

Document ID: 410961_2_JAK

the truth of the averments therein, and on that basis specifically and generally denies each and every averment contained therein.

25. In answer to paragraph 23, the Defendant admits that HUD issued Notice H-2006-11 (the "Notice") dated August 8, 2006 and that the Notice speaks for itself. Defendant admits that the content of the is nearly identical to that of Notice H-2004-17. As to if the policy promulgated in the Notice was subject to public notice and comment, Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments therein, and on that basis specifically and generally denies each and every averment contained therein. Defendant denies all remaining allegations of paragraph 23.

26. Defendant denies the allegations contained in paragraph 24.

27. In answer to paragraph 25, Defendant admits Kukui Gardens Corporation publicly announced that it intended to sell Kukui Gardens. Defendant denies all remaining allegations contained in paragraph 25.

28. Defendant denies the allegations contained in paragraph 26.

29. In answer to paragraph 27, the Defendant admits that the Regulatory Agreement and Chapter 13 of HUD Handbook 4350.1 speak for themselves. Defendant denies all remaining allegations of paragraph 27.

Document ID: 410961_2_JAK

30. In answer to paragraph 28, the Defendant admits that HUD Handbook 4350.1, Section 13-18A speaks for itself and that KGC is seeking to sell Kukui Gardens. Defendant denies that the HUD Handbook constitutes a rule. Defendant denies all remaining allegations of paragraph 28.

31. In answer to paragraph 29, the Defendant admits that HUD Handbook 4350.1, Section 13-19c speaks for itself. Defendant denies that the HUD Handbook constitutes a rule. Defendant denies all remaining allegations of paragraph 29.

32. In answer to paragraph 30, the Defendant admits that on June 7, 2006, U.S. Rep. Neil Abercrombie hosted a meeting involving HUD and state officials, Kukui Gardens tenants and tenant advocates, and representatives of KGC and Carmel Partners. Defendant admits that among the issues raised during the meeting were the two TPA related issues noted in paragraphs 28 and 29 of the Complaint. Defendant denies all remaining allegations of paragraph 30.

33. In answer to paragraph 31, Defendant admits that on or about July 24, 2006, Kukui Gardens Corporation issued a notice to Kukui Gardens tenants informing them of Kukui Gardens Corporation's intent to prepay the mortgage on or after December 22, 2006 and that a copy of said notice is attached to the Complaint as Exhibit "C". As to all remaining allegations contained in

Document ID: 410961_2_JAK

paragraph 31 Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments therein, and on that basis specifically and generally denies each and every averment contained therein.

34. In answer to paragraph 32, the Defendant admits that 12 USC § 1715z(a)(2) and the Notice speak for themselves. The Defendant denies all remaining allegations of paragraph 32.

35. In answer to paragraph 33, the Defendant admits that KGC did provide notice to the Kukui Gardens tenants that included a copy of what the Defendant believes to be the appropriate HUD-approved form of Use Agreement and that the Use Agreement did not specify the initial rents under the Use Agreement. The Defendant denies all remaining allegations of paragraph 33.

36. Defendant denies the allegations contained in paragraph 34.

37. In answer to paragraph 35, the Defendant admits that the Notice speaks for itself. Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments in paragraph 35 relative to how HUD will respond to Kukui Gardens' request and on that basis specifically and generally denies this averment. The Defendant denies all remaining allegations of paragraph 35.

Document ID: 410961_2_JAK

38. Defendant denies the allegations contained in paragraph 36.

39. Defendant denies the allegations contained in paragraph 37.

40. Defendant denies the allegations contained in paragraph 38.

41. In answer to paragraph 38a, the Defendant HUD's Transfer of Physical Assets policy as set forth in Chapter 13 of the HUD Handbook 4350.1, Multifamily Asset Management and Project Services speaks for itself. The Defendant denies all remaining allegations of paragraph 38a.

42. In answer to paragraph 38b, the Defendant admits that the provisions regarding allowable rent increases found in the Regulatory Agreement and the Use Agreement speak for themselves. The Defendant denies all remaining allegations of paragraph 38b.

43. Defendant denies the allegations contained in paragraph 38c.

44. In answer to paragraph 38d, the Defendant admits that the Regulatory Agreement and Use Agreements speak for themselves.

45. Defendant denies the allegations contained in paragraph 38e.

46. Defendant denies the allegations contained in paragraph 38f.

47. Defendant denies the allegations contained in paragraph 38g.

Document ID: 410961_2_JAK

48. In answer to paragraph 39, the Defendant denies that prepayment would result in higher rents or a diversion of sales proceeds. As to all the remaining allegations contained in paragraph 39, the Defendant is without information or knowledge sufficient to form a belief as to the truth of the averments therein, and on that basis specifically and generally deny each and every averment contained therein.

49. In answer to paragraph 40, the Defendant admits that attached as Exhibit "E" to the Complaint is a letter dated September 15, 2006 from counsel for Plaintiffs and that said letter speaks for itself. The Defendant denies all remaining allegations of paragraph 40.

50. In answer to paragraph 41, the Defendant admits that attached as Exhibit "F" to the Complaint is a letter dated September 26, 2006 from Beverly Miller, the Director of the HUD Office of Asset Management, and that said letter speaks for itself. The Defendant denies all remaining allegations of paragraph 41.

51. Defendant denies the allegations contained in paragraph 42.

52. In answer to paragraph 43 the Defendant repeats and incorporates herein its previous answers to all of the allegations of the Complaint.

53. Defendant denies the allegations contained in paragraph 44.

Document ID: 410961_2_JAK

54. Defendant denies the allegations contained in paragraph 45.

55. Defendant denies the allegations contained in paragraph 46.

56. Defendant denies the allegations contained in paragraph 47.

57. In answer to paragraph 48, the Defendant repeats and incorporates herein its previous answers to all of the allegations of the Complaint.

58. Defendant denies the allegations contained in paragraph 49.

59. Defendant denies the allegations contained in paragraph 50.

60. In answer to paragraph 51, the Defendant repeats and incorporates herein its previous answers to all of the allegations of the Complaint.

61. Defendant denies the allegations contained in paragraph 52.

62. Defendant denies the allegations contained in paragraph 53.

63. Defendant denies the allegations contained in paragraph 54.

64. In answer to paragraph 55, the Defendant repeats and incorporates herein its previous answers to all of the allegations of the Complaint.

Document ID: 410961_2_JAK

65. In answer to paragraph 56, the Defendant admits that the Administrative Procedures Act at 5 USC § 553 speaks for itself. The Defendant denies all remaining allegations of paragraph 56.

66. Defendant denies the allegations contained in paragraph 57.

67. Defendant denies the allegations contained in paragraph 58.

68. Defendant denies the allegations contained in paragraph 59.

69. In answer to paragraph 60, the Defendant repeats and incorporates herein its previous answers to all of the allegations of the Complaint.

70. Defendant denies the allegations contained in paragraph 61.

71. Defendant denies the allegations contained in paragraph 62.

72. Defendant denies the allegations contained in paragraph 63.

73. Defendant denies the allegations contained in paragraph 64.

74. Defendant denies the allegations contained in paragraph 65.

SEPARATE AFFIRMATIVE DEFENSES

Defendant states the following affirmative defenses without assuming the burden of proof on such defenses that would otherwise rest on the Plaintiff:

Document ID: 410961_2_JAK

First Affirmative Defense

The Defendant gives notice that it intends to rely on the defense that the Complaint and each purported claim fails to state a claim on which relief may be granted.

Second Affirmative Defense

Defendant gives notice that it intends to rely on the defense that the Plaintiffs' Complaint fails to present a justiciable controversy between Plaintiffs and Kukui Gardens Corporation.

Third Affirmative Defense

The Defendant gives notice that it intends to rely on the defense that it was privileged to take the actions upon which Plaintiffs' Complaint is based

Fourth Affirmative Defense

The Defendant gives notice that it intends to rely on the defense that the Plaintiff is barred from recovery by virtue of the equitable doctrines of waiver, estoppel, and unclean hands.

Fifth Affirmative Defense

The Defendant gives notice that it intends to rely on the defense that the Plaintiffs' claims are barred by virtue of the equitable doctrine of laches.

Sixth Affirmative Defense

Document ID: 410961_2_JAK

The Defendant gives notice that it intends to rely on the defense that the Plaintiffs' claims are barred for failure to join all necessary parties.

Seventh Affirmative Defense

The Defendant gives notice that it intends to rely on the defense that the Plaintiffs' claims are barred as Section 250 does not apply to Kukui Gardens because it is not a low income project.

Eighth Affirmative Defense

The Defendant gives notice that it intends to rely on the defense that the Plaintiffs' claims are barred on grounds that the application of Section 250 to Kukui Gardens as proposed the Plaintiffs amounts to an illegal taking.

Ninth Affirmative Defense

The Defendant gives notice that it intends to rely on the defense that the Plaintiffs' claims are barred where Section 250 does not apply to Kukui Gardens because it was adopted after execution of the Kukui Gardens note, mortgage and Regulatory Agreement.

Tenth Affirmative Defense

The Defendant gives notice that it intends to rely on the defense that the Plaintiffs' lack standing to assert the claims set forth in the Complaint.

Document ID: 410961_2_JAK

Eleventh Affirmative Defense

The Defendant gives notice that it intends to rely upon any other matter constituting an avoidance of affirmative defense as set forth in Rule 8(c) of the Federal Rules of Civil Procedure, and that it intends to seek leave to amend this answer to specifically allege those defenses of which it may become aware of during the course of further investigation, discovery, or trial of this matter.

Defendant reserves the right to assert other defenses as this case progresses.

WHEREFORE, Defendant prays that:

- A. The Complaint be dismissed with prejudice;
- B. The Court award Defendant its costs, expenses and attorney's fees incurred herein; and
- C. The Court award such other and further relief as it deems just and equitable.

DATED: Honolulu, Hawaii December 11, 2006.

/s/ Jonathan A. Kobayashi
BERT T. KOBAYASHI, JR.
JONATHAN A. KOBAYASHI
Attorneys for Defendant
KUKUI GARDENS CORPORATION