S.C. No. 030159

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Travis C. Larson GST Exempt Trust U/A January 20, 1999 and WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Troy T. Larson GST Exempt Trust U/A January 20, 1999, Plaintiffs/Appellants, vs. COUNTY OF MAUI, a political subdivision of the State of Hawaii; JEFFREY S. HUNT, in his capacity as Director of the Department of Planning of the County of Maui; DOE ENTITIES 1-50, Defendants/Appellees.	CIVIL NO. 09-1-0413 (2) APPEAL FROM: (1) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ENTERED SEPTEMBER 29, 2009; and (2) FINAL JUDGMENT ENTERED OCTOBER 15, 2009 HONORABLE SHACKLEY R. RAFFETTO, JUDGE

DEFENDANTS/APPELLEES COUNTY OF MAUI AND JEFFREY S. HUNT'S ANSWERING BRIEF

APPENDIX 1

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I. INTRODUCTION

The question presented by this appeal is whether a property owner can bring a "taking" action based on a decision of the Maui County Planning Director without first appealing that decision to the Maui County Planning Commission. Plaintiffs/Appellants brought such an action and it was properly dismissed for failure to exhaust administrative remedies. The Court below determined that because Appellants did not obtain a final decision by the Maui Planning Commission, the final decision maker about the permitted use of their properties, Appellants' "taking" claim was not ripe for adjudication. This Court should confirm the lower Court's decision.

II. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs/Appellants[1] William L. Larson and Nancy H. Larson, as Trustees under that certain unrecorded Larson Family Trust dated October 30, 1992, as amended ("Appellants"), filed a Complaint in the Second Circuit Court on June 1, 2009 alleging that the designation of their two beach front lots located on Palauea Beach in Makena, Maui, Hawaii as "park" in the 1998 Kihei-Makena Community Plan ("KMCP") resulted in a "taking" of those properties

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[1]On February 24, 2010, this Court entered an Order Granting former Plaintiffs/Appellants' Motion for Substitution of WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Travis C. Larson GST Exempt Trust U/A January 20, 1999 and WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Troy T. Larson GST Exempt Trust U/A January 20, 1999, as Plaintiffs/Appellants in this Appeal.

because the "park" designation precludes any economically viable use of the properties and renders them worthless.

Appellants should have known about the properties' 1998 KMCP "park" designation when they purchased their lots in 2000. However, Appellants allege that their "taking" claim arose on November 18, 2008 when Director Hunt sent letters to them ("Director's decisions") informing them that their SMA Assessment Applications ("applications") could not be processed.

Section 12-202-12(e)(2) of the Maui Planning Commission Rules ("SMA Rules") identifies twelve areas of concern for the Director to weigh in deciding whether a proposed action in the SMA is excluded from the SMA Requirements in Hawaii's Coastal Zone Management Act ("CZMA"), Hawaii Revised Statutes ("HRS") Chapter 205A, or if an SMA permit must be obtained. The Director's decisions identified several of the concerns set out in §12-202-12(e)(2) for which Appellants failed to provide sufficient information for him to process their applications and pointed out that the proposed use of the lots for single family homes was inconsistent with the KCMP use designation of "park." If the proposed use is not exempt, the CZMA requires consistency. HRS 205A-26(2)(C)

Appellants did not provide the missing information. Nor did Appellants submit house plans that would avoid the potentially adverse SMA impacts identified by the Director's decisions. Nor did they appeal the Director's decision to the Planning Commission pursuant to §12-202-26 of the SMA Rules. Rather, seven months after Appellants were informed that their applications could not be processed, they filed their Complaint herein (ROA 0001 at PDF 8-9).

Appellants' Complaint incorrectly alleges that the Planning Director has the "final authority" to determine whether a proposed project is a "development" subject to the CZMA or, on the other hand, is not a "develoment" and is excluded from CZMA requirements. Appellants ignore SMA Rule §12-202-26, the 1997 amendment which provides for appeals of Director's decisions to the Maui Planning Commission for a final determination as to whether or not a proposed use is excluded from the CZMA and SMA requirements.

Appellants also argue that even if an appeal of the Director's decisions is "available," they are "excused" from having to pursue an appeal because they predict that the Planning Commission would uphold the Director's decisions as correct based on the SMA rules and, thus, an appeal would be "futile."

Appellees' Motion to Dismiss the Complaint, or in the Alternative for Summary Judgment ("Motion to Dismiss") (ROA Doc. 0004), presented two arguments in support of their position that Appellants' Complaint for inverse condemnation was not ripe for adjudication by the Court. First, Appellants had failed to obtain the final decision of the final decision maker on the issue of whether or not their proposed uses were excluded from the CZMA by appealing the Director's Decision to the Maui Planning Commission. Second, if the Court held that an appeal was not necessary, Appellants had not asked the Maui County Council to amend the KMCP to change the use designation for their lots from "park" to "single family residence," which would have made the proposed use consistent, and as a result, they had not obtained a final decision by the final decision maker pursuant to the holding in Williamson

County Regional Planning Com'n v. Hamilton Bank of Johnston City, 473 U.S. 172 (1985), the seminal case on "ripeness" of claims for inverse condemnation.

Appellants argue they did not have to appeal the Director's decisions to the Planning Commission because §12-202-26 ("Appeal of director's decision") added to the SMA Rules in 1997, provides only for appeals of the Director's decisions made pursuant to the immediately preceding section of the SMA Rules, §12-202-25 ("Penalties"), which authorizes the director to assess fines for any violations of the Rules (OB at pp. 28-29). Appellants concede the incorrectness of their interpretation of what can be appealed pursuant §12-202-26, as they admit the Planning Commission is authorized to hear appeals of denial of an SMA minor permit pursuant to §12-202-14 (OB at p.29), although they fail to note that §12-202-16 also expressly provides for appeals of SMA emergency permit decisions by the Director.

The Circuit Court rejected Appellants' interpretation of the SMA Rules, finding that Appellants did have a right to appeal the Director's November 18, 2008 Decisions to the Planning Commission, and agreeing with Appellees that Appellants' claims were not ripe for determination by the Court as Appellants had failed to exhaust the administrative remedy of an appeal available to them (ROA Doc 0007 at PDF 339-40). The Court made no ruling on Appellees' second argument that Appellants were required to seek from the Maui County Council a community plan amendment to change their lots' use designation of "park" to another use, and have their requested amendment denied before their claim of inverse condemnation would

be ripe for review by the Court.

B. Proceedings in the Circuit Court

The Complaint filed on June 1, 2009 (ROA Doc. 0001 at PDF 1-21) was served on Defendants on June 16, 2009 (ROA Docs. 0002 and 0003 at PDF 22-25). Appellees filed the Motion to Dismiss on June 26, 2009 (ROA Doc. 0004 at PDF 26-183). The Circuit Court granted Appellees' Motion to Dismiss stating in the Order:

> 10. Plaintiffs' Complaint is dismissed on the basis that Plaintiffs have failed to exhaust their administrative remedies. The instant case is not ripe for adjudication. Thus, this Court lacks jurisdiction over the subject matter. (ROA Doc. 0007 at PDF 340.)

C. Statement of Facts

In 1996, the Maui County Council passed Resolution 96-121 calling for the County of Maui to purchase all nine of the Palauea Beach lots with a KMCP "park" designation to be used as a public beach park (ROA Doc. 0005 Exh. 4 at PDF 233-38). In 1999, the County Council determined that there were insufficient funds to purchase all nine lots. It passed Resolution 99-183 authorizing the County to acquire two lots which were purchased by the County in January, 2000 (ROA Doc. 0007, Exh. 5 at PDF 239-47). The seven other lots were sold to private individuals.

In 2000, Appellants purchased the Palauea Lots designated as Parcels 16 and 17 (ROA Doc. 0004 Exhs. 5 & 6 at PDF 87-89). Appellants and the purchasers of the other five lots designated for "park" use bought them with the express intent to erect residences on their lots, a use inconsistent with the KMCP designation of the

lots for "park" use.[2] At the time they purchased their lots, Appellants were aware that an amendment to the KMCP to change the land use designation for their lots from "park" to "single family" might be required for them to be able to build their houses.

In 2006, the Maui Planning Department agreed to work with the owners of parcel 15 (Leones), parcels 16 and 17 (Larson), and parcel 20 (Schatz, now Altman) to initiate the process to change the KMCP designation of the lots from "park" to "single family" and to change the zoning from "HM, Hotel and A-2 Apartment" to "R-3, Residential." The beach lot owners agreed to pay for the Environmental Assessment ("EA") required by HRS § 343-5(a)(6) in conjunction with an Application to Amend the Community Plan (ROA Doc. 0005 at PDF 302-303). The Planning Department submitted an EA for the Palauea Beach Lots to the Planning Commission for review and comment prior to asking the Maui County Council to approve the proposed Amendments to the KMCP (ROA Doc. 0005 at PDF 305-320).

In the meantime, Appellants decided to submit SMA Assessment Applications to the Department of Planning to obtain a determination of whether their proposed projects would be deemed not to be "developments" and that they had no adverse impact on the environment or ecology, thereby making the proposed use of their lots excluded from SMA requirements pursuant to HRS 205A-22 which provides that "construction of a single-family residence that is

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[2] As will be discussed in more detail below, the owners of two of the seven lots: Sweeney, parcel 13 and Lambert, parcel 14, as the result of appeals to the Commission have built homes on their lots which are still designated "park" by the KMCP (ROA Doc. 0004 Exhs. 5 & 6 at PDF 87-89; Exh. J at PDF 140-66).

not part of a larger development" is excluded from the definition of "development."

On November 18, 2008, the Planning Director advised Appellants:

> "I have determined that the Department cannot complete the assessment[s] due to various deficiencies in the application[s], Attachment A, and/or Exhibits provided as detailed below." (ROA Doc. 0004 at PDF 132-39.)

The concerns the Director found were not adequately addressed in Appellants' applications included: the impact the proposed project would have on cultural resources, inconsistency of the projects with the community plan designation, impacts on environmentally sensitive areas (flood plain, shoreline), effects of grading, handling of wastewater and views of the shoreline (ROA Doc. 0004 at PDF 100-101).

Appellants were advised by the Director in his November 18, 2008 letters that their applications could not be processed because of incompleteness and inconsistency, and that they had 10 days to appeal this decision (ROA Doc. 0004 at PDF 132-139). Appellants did not appeal the Director's decisions as is expressly provided for by § 12-202-26, et seq.[3] of the SMA Rules to have the Commission review whether the Director was correct in not processing the Assessment Applications on the basis of lack of

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[3]After the 1997 Amendments, the SMA rules were amended again in 2002 to provide more detailed provisions governing appeals. As will be discussed below, §§12-202-27 through 32 further evidence that the right to appeal extends to all decisions of the Director, and not, as Appellants argue, just to decisions about penalties that can be imposed by the Director as set out in § 12-202-25.

consistency. They did not resubmit their applications with the information the Director had determined was needed. They did not submit a revised project proposal which addressed the environmental concerns pointed out in the Director's Decision, and they did not submit an application for an SMA permit. Instead, on June 1, 2009, Appellants initiated this inverse condemnation action which was dismissed because Appellants' claims were not ripe for adjudication (ROA Doc. 0007 at PDF 337-40).

III. STANDARD OF REVIEW

A. Summary Judgment Is Reviewed De Novo Under Same Standards As Applied by the Court Below

The grant or denial of summary judgment is reviewed de novo under the same standard applied by the circuit courts. Hawai'i Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The evidence must be viewed in the light most favorable to the non-moving party." Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 (2004).

B. Findings of Fact Are Reviewed Under the Clearly Erroneous Standard

Hawaii Rules of Civil Procedure, Rule 52(a) mandates that "findings of fact shall not be set aside unless clearly erroneous." Findings of fact are reviewed under the clearly erroneous standard. State v. Hutch, 75 Haw. 307, 328, 861 P.2d 11, 22 (1993). A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been made. A finding of

fact is also clearly erroneous when the record lacks substantial evidence to support the finding. Substantial evidence is credible evidence of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Beneficial Hawai'i, Inc. v. Kida, 96 Hawai'i 289, 305, 30 P.3d 895, 911 (2001).

Appellants' citation to a holding by the Indiana appellate court to argue that ". . . any findings of fact are entitled to no deference here" should be disregarded (OB at p. 16).

C. Mixed Questions of Fact and Law are Reviewed Under the Clearly Erroneous Standard of Review

"Where the court's conclusions are dependent upon the facts and circumstances of each individual case, the clearly erroneous standard of review applies." Coll v. McCarthy, 72 Haw. 20, 28, 804 P.2d 881, 886 (1991).

D. Conclusions of Law Are Freely Reviewable Under the Right/Wrong Standard

A Conclusion of Law is freely reviewable for its correctness. AIG Hawai'i Ins. Co. v. Estate of Caraang, 74 Haw. 620, 628, 851 P.2d 321, 326 (1993).

IV. ARGUMENT

A. Introduction

The Maui Planning Commission SMA Rules set out the standards the Maui Planning Commission ("Commission") uses to assess a proposed action in the SMA to determine if an SMA permit is required. The SMA Rules were promulgated to comply with the mandates of the CZMA. The CZMA designates the Commission as the authority for actions proposed for Maui's SMA districts (HRS §205A-

22) and mandates that every development within the SMA obtain an SMA permit from the Commission before it can proceed. HRS §205A-28. The SMA assessment process is necessary because the CZMA excludes certain actions, including single family residences not part of a larger development, from its definition of development. HRS §205A-22. However, effective May 29, 2001, the CZMA requires that even the enumerated actions be deemed developments if they "may have a . . . significant environmental or ecological effect on a special management area." HRS §205A-22. In order to comply with these requirements, it is necessary for the Commission to obtain a review of each proposed action. The Commission has delegated assessment authority to the Maui Planning Director, SMA Rule §12-202-12(a), but has limited the Director's discretion by identifying a number of factors that must be considered and by providing that the Director's decision may be appealed to the Commission pursuant to SMA Rule §12-202-26.

SMA Rule §12-202-12(e), sets forth twelve criteria that the Director must evaluate in determining whether or not a proposed action "may have a significant environmental or ecological effect on a special management area." Those factors include evaluating whether or not the proposed action "is contrary to the state plan, county's general plan, appropriate community plans, zoning and subdivision ordinances." §12-202-12(e)(2)(H). The SMA Rules also instruct the Planning Director that, after completing the assessment, he or she may inform the applicant that the proposed action "cannot be processed because the proposed action is not consistent with the county general plan, community plan, and

zoning, unless a general plan, community plan or zoning application for an appropriate amendment is processed concurrently with the SMA permit application." §12-202-12 (f)(5).

Appellants Larson submitted SMA Assessment Applications for each of their two Palauea Beach lots, including plans for proposed houses and garages. The Planning Director determined that the applications did not include sufficient information for him to properly assess whether the proposed projects would have "any substantial adverse environmental or ecological effect." HRS §205A-26(2)(A). Despite being informed of the appeal provisions in the SMA Rules, Appellants chose not to appeal and initiated the action below. Because they did not appeal the Director's decision to the Planning Commission, the Court below held Appellants' claims for inverse condemnation were not ripe because they had not obtained a final decision from the Maui Planning Commission on their assessment applications.

B. The Court Below Correctly Held That Appellants' Claims Were Not Ripe for Adjudication Because Appellants Failed to Appeal the Planning Director's Decision to the Maui Planning Commission

Appellants argue that the Court below erroneously concluded that 1) they had a right to appeal to the Planning Commission the Director's November 18, 2008 decisions that their SMA Assessment Applications could not be processed and, 2) in not concluding that even if Appellants had a right of appeal under the SMA Rules, they did not have to appeal because it would be "futile" for them to do so. Appellants' arguments are factually and legally incorrect.

1. The Holding in the GATRI Case Does Not Support Appellants' Argument That They Did Not Have to

Appeal the Director's Decision to the Planning Commission

Appellants argued below and argue again on appeal (OB at 26-30) that the case GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998) supports their position that they did not have a right of appeal from the Director's November 18, 2008 decisions. Appellants misleadingly quote The Supreme Court's holding in GATRI that the Director's refusal to process the SMA minor permit applications due to the lack of consistency was "a final decision equivalent to a denial of the application." (OB at p. 28.)

At the time the GATRI case arose in 1996, the SMA Rules then in effect designated the Director of the Maui Planning Department as the final authority (ROA Doc. 0004 at PDF 116; OB Appendix L). However, in 1997, as noted by Appellants, the SMA Rules were amended to add §12-202-26 which specifically provides for an appeal from a Decision of the Director to the Planning Commission, making the Commission, rather than the Director, the final authority (ROA Doc. 0004 at PDF 116; AB, Appendix 1). Thus, since September, 1997, the Planning Commission **not** the Planning Director has the final decision-making authority. Additionally, Appellants ignore the fact that the SMA Rules were amended again in 2002 to add §§12-202-27 through 12-202-32, which further clarify appeal rights and procedures (ROA Doc 0004 at PDF 90-118, AB, App. 1).

Appellants continue to suggest that the holding in GATRI is controlling and supports their position that the SMA Rules do not provide for an appeal of the Directors' November, 2008 decisions to the Planning Commission. Appellants' theorize (OB at 28-29):

> "It is clear that §12-202-26 must be read to apply to the enforcement of the SMA Rules, and that "the director's decision referred to in subsection 26 means the director's decision to impose a penalty under the immediately preceding rule, subsection 12-202-25, as opposed to any other decisions by the director."

Appellants' "construction" of the appeal provisions of SMA Rules (§12-202-26 through §12-202-32) in effect when their "takings claims" allegedly arose is incorrect, as is clear both from a careful analysis of the Rules and from the interpretation by the Planning Commission of its Rules in (1) In the Matter of Rescission of Special Management Assessment Determination for the Lambert Residence (Case No. App. 2003/001), and 2) In the Matter of Appeal of Charles Sweeeney and Nell Sweeney (Case No. App. 2003/002), ("Lambert and Sweeney appeals") (ROA Doc 0004 at PDF 140-180). These appeals were brought by two other Palauea Beach Lot owners challenging Planning Director Mike Foley's interpretation that "inconsistency" was one basis for rescinding an exemption from SMA requirements issued by his predecessor Director Jon Min.

2. Proper Construction of the SMA Rules Makes Clear §12-202-26 Provides for an Appeal of Each of the Five Different Determinations the Director Can Make Pursuant to §12-202-12(f) of the SMA Rules

Rules of statutory construction require that a statute be construed to give effect to the intention of the legislature in passing the rule and be read in the context of the entire statute. Paul v. Dept. of Transp., State of Hawaii, 115 Hawai'i 416, 426-7, 168 P.3d 546, 556-7 (2007):

> Furthermore, our statutory construction is guided by established rules:
>
> When construing a statute, our foremost obligation is 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. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose (citations omitted). . . . Furthermore, [i]n construing an administrative rule, general rules of statutory construction are applicable. Mahiai v. Suwa, 69 Haw. 349, ... 358, 742 P.2d 359, 366 (1987). When a rule does not conflict with statutory and constitutional requirements, courts will ascertain and effectuate the intent of the agency which promulgated the rule. Life of the Land, Inc. v. West Beach Dev. Corp., 63 Haw. 529, 531, 631 P.2d 588, 590 (1981); Mahiai, 69 Haw. at 358, 742 P.2d at 366. Courts strive to give meaning to all parts of an administrative rule and to avoid construing any part as superfluous. Int'l Bhd. of Elec. Workers[, Local 1357] v. Hawaiian Tel. Co., 68 Haw. 316, 325, 713 P.2d 943, 951 (1986). Courts will not construe rules in a manner which produces an absurd result. Mahiai, 69 Haw. at 358, 742 P.2d at 367.

Appellants' theory that the appeal provision set out in SMA Rule §12-202-26 applies only to §12-202-25, the enforcement provision for assessing fines, ignores the principles of statutory construction that an administrative rule being applied shall be construed so that no part is superfluous and so that it does not produce an absurd result.

The organizational framework of the SMA Rules for the Maui Planning Commission in effect at the time the Appellants submitted their SMA Assessment Application for review by the Director (ROA Doc. 0004 at PDF 90-118; AB, Appendix 1) consisted of three "Subchapters." Subchapter 1 is entitled "General Provisions" and includes a statement of purposes of the Rules, scope and exemptions, definitions, reference to where maps which set out the boundaries of the special management area can be found and a provision that the Director shall provide application forms to effect the Rules. Subchapter 2 entitled "Special Management Area

Permit Procedures" includes a statement of the SMA objectives and policies, SMA review guidelines, description of SMA assessment and determination procedures. Subchapter 3 which is entitled "Procedures to Adopt Special Management Area Rules, Declaratory Rulings; and Adoption and Amendment of Boundaries and Maps" is a "catch-all" section covering several different topics. The title of the Subchapter, which was adopted in 1994, did not change when the Rules were amended in 1997 to add the "Enforcement" provisions (§§12-202-23 through 12-202-25) and the "Appeal" provision (§12-202-26) (OB, Appendix M), or when the Rules were amended again in 2002 to add further appeal provisions (§§ 12-202-27 through 2-202-32) (ROA Doc. 0004 at PDF 90-118); AB, Appendix 1).

Appellants' statement that "'the director's decision' referred to in subsection 26 means the director's decision to impose a penalty under the immediately preceding rule, subsection 12-202-25, as opposed to any other decision by the director" (OB at 28-29) is patently incorrect as appeals of the Director's decisions about both SMA minor and emergency permits are expressly subject to appeal to the Planning Commission:

> §12-202-14 Special management area minor permit procedures
>
> (a) ... The director shall approve, approve with conditions, or deny such permit in accordance with the guidelines in section 205A-26, HRS, as amended. Any final decision shall be transmitted to the applicant in writing and **shall be appealable pursuant to section 12-202-26.** (emphasis added) (ROA Doc. 0004 at PDF 104.)

and

> §12-202-16(i) Special management area emergency permit procedures:
>
> If the director denies the emergency permit, the denial shall be in writing, setting forth factssufficient to