CAAP-15-0000599

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

DOUGLAS LEONE AND PATRICIA A. PERKINS-LEONE, as Trustees under that certain unrecorded Leone-Perkins Family Trust dated August 26, 1999, as amended, Plaintiffs/Appellants, vs. COUNTY OF MAUI, a political subdivision of the State of Hawaii; WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui; DOE ENTITIES 1-50; Defendants/Appellees.	Civil No. 07-1-0496 (2) APPEAL FROM: (1) FINAL JUDGMENT ENTERED JUNE 1, 2015; (2) ORDER DENYING PLAINTIFFS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL FILED JUNE 10, 2015, ENTERED AUGUST 5, 2015; AND (3) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR TAXATION OF COSTS FILED JUNE 12, 2015, ENTERED AUGUST 5, 2015 Circuit Court of the Second Circuit, State of Hawaii HON. PETER T. CAHILL

PLAINTIFFS/APPELLANTS' OPENING BRIEF;
APPENDICES A-Z; STATEMENT OF RELATED CASES;
CERTIFICATE OF SERVICE

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CONCISE STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an inverse condemnation case under the takings clause of the Fifth Amendment to the United States Constitution and Article 1, Section 20 of the Hawaii Constitution, which require payment of just compensation when private property is taken for public use. A regulatory taking occurs when government, applying land use regulations, prevents a landowner from making any economically beneficial use of his land. Defendants/Appellees COUNTY OF MAUI and WILLIAM SPENCE, as Director of the Department of Planning (collectively, the "County") engaged in such a regulatory taking of a half-acre beachfront lot at Makena, Maui owned by Plaintiffs/Appellants DOUGLAS LEONE and PATRICIA A. PERKINS-LEONE (the "Leones") when they refused to process the Leones' Special Management Area ("SMA") assessment application on October 25, 2007.

This case is before this Court for a second time. Leone v. County of Maui, 128 Haw. 183, 284 P.3d 956 (Haw. App. 2012) (***Appendix A***, **ROA** pt.2 at 372-93), reversed the trial court's dismissal of the Leones' claims on ripeness grounds, observing that the case arose from "Maui County's troubled attempts to create a public park at Palauea Beach." *Id.*, 128 Haw. at 188, 284 P.2d at 960 (***App.A***). This Court recognized that the Leones could not use their property in a manner inconsistent with its "Park" designation on the County's Kihei-Makena Community Plan (the "Community Plan"). *Id.*

Upon remand, after a five-week trial, the jury rendered a verdict in favor of the County, finding that the County did not deprive the Leones of economically beneficial use of their land. ***Appendix W*** at 2, **ROA** pt.24 at 1188. However, the evidence permitted only one reasonable conclusion: that there is no economically beneficial use for the Leones' land. The County

Planning Director who denied their SMA assessment application could identify no use other than that the Leones could "walk out on their property." Dkt #180, p.100 (4/10/15 AM, Hunt). Even though the trial court erroneously allowed the County's appraiser to testify that the property had passive "investment" value, the County failed to identify any legally permissible use which would not merely leave the land in its current non-productive, natural state.

The County failed to carry its burden to produce evidence that the Leones had any economically beneficial use of their land after October 25, 2007. Instead, the County presented legally irrelevant testimony that the Leones knew of the park designation when they bought the land and that its taking served public purposes. The Leones now ask that this Court reverse the judgment and remand for entry of judgment in their favor for the undisputed amount of their losses.

II. FACTS

Except where specifically noted, the following facts are not disputed, and were established by documentary evidence and/or the testimony of the County's own witnesses. The credibility of the Leones' witnesses is not material to disposition of this appeal.

A. The Property.

In 2000, the Leones purchased a half-acre parcel fronting the ocean at Palauea Beach on Maui (the "Property"). **ROA** pt.38 at 232-38 (deed); Dkt #134, p.10 (4/6/15 AM, P.Leone).[1] The Property is one of nine lots between Old Makena Road and Palauea Beach identified by tax map key numbers (2) 2-1-11-13 through -21 (collectively, the "Palauea Beach Lots"). *See* ***Appendix B***, **ROA** pt.25 at 834 (tax map, Ex.P-139), **ROA** pt.25 at 291 (lot map, part

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[1] The Property was purchased by the Leones individually (**ROA** pt.38 at 232-38) and transferred to their family trust in 2004 (**ROA** pt.25 at 408-15, Ex.P-43); the deeds are attached as ***Appendix U***.

of Ex.P-24 [for identification]), **ROA** pt.26 at 287 (aerial photo, Ex.P-183).

The Property, lot 15, is approximately 100 feet wide by 200 feet deep, and 0.47 acre in size. ***App.B***, ROA pt.25 at 291 (lot map); ***App.U***, **ROA** pt.38 at 237 (2000 deed), **ROA** pt.25 at 414 (2004 deed, Ex.P-43). The Property is bounded by other private lots to the north and south, by the beach to the west, and by Old Makena Road to the east. ***App.B*** (tax map, Ex.P-139; aerial photo, Ex.P-183; lot map, part of Ex.P-24). There are boulders near the roadway, and a low coastal berm on the ocean front. ***Appendix O***, **ROA** pt.26 at 339-41 (photos, Ex.P-203); Dkt #190, pp.15-16 (4/28/15 PM, Owens). A footpath, used by the public, extends along the length of the Property from the boulders facing Old Makena Road to the public beach. The footpath becomes wider as it approaches the beach, where the vegetation becomes much more sparse.[2] A 2002 shoreline certification showed the shoreline running along the top of the coastal bank. Dkt #148, p.75; **ROA** pt.26 at 296 (shoreline survey, Ex.P-236); Dkt #186, pp.26-28 (Ariyoshi); **ROA** pt.26 at 295 (shoreline map, Ex.P-235).

The Property is subject to a Declaration of Covenants and Restrictions (the "Declaration," ***Appendix C***), which states that "[a] Lot shall be used **only for single family residential purposes** ...." **ROA** pt.26 at 347 (Ex.P-210), ***App.C*** at 5 (emphasis added).[3]

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[2] ***App.O***, **ROA** pt.26 at 339-41 (photos, Ex. P-203); ROA pt.26 at 413-18 (photos, Ex.P-251 through Ex.P-256); Dkt #186, pp.70-82 (4/21/15 AM, D.Leone); Dkt #186, pp.37-38 (4/21/15 AM, Ariyoshi).

[3] The Declaration was recorded March 25, 1999 (***App.C***, **ROA** pt.26 at 342, Ex.P-210), and a Supplemental Declaration annexing the Property was recorded February 16, 2000 (**ROA** pt.25 at 414-15, Ex.P-43), a few days before the Leones' deed (***App.U***, **ROA** pt.38 at 232).

Like the other Palauea Beach Lots, the Property is zoned Hotel-Multifamily ("HM"), but designated "Park" (**ROA** pt.2 at 484) on the Community Plan (**ROA** pt.27 at 343-408, Ex.D-4). Dkt #178, pp.53-54 (4/8/15 AM, Tsujimura). A single-family residence is permitted under the zoning,[4] but prohibited by the "Park" designation. ***Appendix K*** at 1, **ROA** pt.25 at 567-68 (rejection letter, Ex.P-68).

B. The County Tries to Create a Public Park at Palauea Beach.

In 1990, ten years before the Leones purchased the Property, the Maui County Council (the "Council") discussed the possibility of acquiring the Palauea Beach Lots for a public beach park. **ROA** pt.2 at 485. One Maui Planning Commissioner noted in 1993 that "[t]he people in Kihei and I'm sure the whole island would like to see [Palauea Beach] remain as a public beach area." **ROA** pt.8 at 883. Another Planning Commissioner testified that "[t]here were thousands of bumper stickers 'Save Palauea' on cars. It was a movement ...." Dkt #188, pp.44-46 (4/23/15 PM, Starr).

In 1996, the Council adopted Resolution No. 96-121 (***Appendix D***, **ROA** pt.2 at 486-91), calling for the acquisition of all of the Palauea Beach Lots for public park use. ***App.D*** at ¶¶1-2, **ROA** pt.2 at 487. Some officials, however, expressed concern over the County's fiscal constraints. **ROA** pt.9 at 401-2 (minutes); **ROA** pt.9 at 405-6 (press release). After openly speculating that designating the Palauea Beach Lots as "Park" on the Community Plan might lower the price of the lots,[5] in 1998, the Council

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[4] The HM zoning, Maui County Code ("MCC") §19.14.020, allows for "[a]ny use permitted in residential and apartment districts." The residential zoning, in turn, allows for single-family residences. MCC §19.08.020 (***Appendix Q*** at 2).

[5] For example, on July 15, 1997, a Councilmember stated that a "Park" designation on the Community Plan "may be better for us in negotiations if we're going to buy it." **ROA** pt.9 at 413-14.

designated the Palauea Beach Lots as "Park" on the Community Plan. **ROA** pt.2 at 484; **ROA** pt.27 at 343-408 (Ex.D-4).

Even after this designation, it was still permissible to build homes on the Palauea Beach Lots. On June 29, 1999, Maui's Corporation Counsel, responding to an inquiry from the Council (**ROA** pt.25 at 244 [Kane memo, Ex.P-8]) opined as to whether the "community plans [have] the force and effect of law, thereby prohibiting the issuance of building permits ... for developments which are not consistent with the community plan designation," citing Maui County Code §2.80B.030(B), which requires all administrative actions to conform to the Community Plans. ***Appendix E***, p.2, **ROA** pt.25 at 246 (Takayesu letter, Ex.P-9); *see also* Leone, 128 Haw. at 194 n8, 284 P.3d at 967 n8 (***App.A***). Corporation Counsel concluded:

> **No**, the ... community plans are intended to guide the decisions of County officials and do not themselves regulate the use of land ....
>
> * * *
>
> [Otherwise,] in the case of the Palauea property, the park designation on the community plan would make it difficult, if not impossible, for a private landowner to make reasonable use of the property .... The County then would have to consider purchasing the property or **likely be faced with an inverse condemnation claim for an unconstitutional taking.**

App.E at 2,7, **ROA** pt.25 at 246, 251 (emphasis added); Dkt #52, pp.9-10 (4/9/15 AM, admissions); **ROA** pt.18 at 680; Dkt #52, pp.13-23 (4/9/15 AM, Takayesu). Asked to reconsider, Corporation Counsel affirmed his original opinion on August 19, 1999. Dkt #52, p.10 (4/9/15 AM, admission); **ROA** pt.18 at 680.

So advised, in 1999 the Council authorized $13.7 million in bonds to purchase the Palauea Beach Lots. Dkt #52, p.36 (4/9/15 AM, Kane). Later that year, Dain Kane, Chair of the Council's Committee of the Whole, proposed that the Council acquire **three** of the Palauea Beach Lots, including the Property, in order to provide the public with "multiple access" points to Palauea

Beach. Dkt #52, pp.48-50 (4/9/15 AM, Kane); ***Appendix X*, ROA** pt.25 at 285-86 (news article, Ex.P-19 [for identification]); *see also* **ROA** pt. 34 at 360-67,471-78 (proposed resolution).

The Council rejected Mr. Kane's proposal. Dkt #52, p.51 (4/9/15 AM, Kane). Pressured by increasing property values and the imminent expiration of the bond authorization, the Council instead adopted Resolution No. 99-183 (***Appendix F*, ROA** pt.25 at 262-67 [Ex.P-17]), to "encourage the Administration to negotiate for the purchase" of **two** of the lots "for a purchase price of up to $6.7 million[.]" ***App.F*** at 4, **ROA** pt.25 at 265. The Council passed that resolution despite the Mayor's "appropriately raised concerns about the County's present financial constraints ...." ***App.F.*** at 3, **ROA** pt.25 at 264.

In January 2000, the County purchased two of the Palauea Beach Lots (lots 18 and 19) for park use. Dkt #52, p.10 (4/9/15 AM, admission); **ROA** pt.18 at 680. By its own admission, the County did not purchase the Property, or any of the other Palauea Beach Lots, because it did not have the funds to do so. **ROA** pt.25 at 489 (Hunt memo, Ex.P-57); *see* Dkt #48, pp.46-47 (4/6/15 PM, Welch).

C. <u>The County's Regulatory Scheme for Palauea Beach</u>.

The Palauea Beach Lots are located in a "special management area" or "SMA" as defined in the Hawaii Coastal Zone Management Act, Hawaii Revised Statutes ("HRS") Chap. 205A (the "Act") at HRS §205A-22 (***Appendix G*** at 18-20,32-33).[6] The Act, which requires a permit for "development" in an SMA, is implemented and enforced by the counties. HRS §205A-1 (***App.G*** at 12); HRS §205A-22 (***App.G*** at 18-20,32-33); HRS §205A-28 (***App.G*** at 22,34). In Maui County, the Planning Commission is the statutory "authority"

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[6] "Special management area" means the land extending inland from the shoreline as delineated on the maps filed with the County Planning Commission. HRS §205A-22 (***App.G*** at 18-20,32-33).

responsible for administering the Act. HRS §205A-22 (***App.G*** at 18-20,32-33); HRS §205A-26 (***App.G*** at 20-22,33); HRS §205A-27 (***App.G*** at 22,33-34).

The Act exempts from its coverage certain land uses by specifically excluding them from the definition of a "development." HRS §205A-22 (***App.G*** at 18-20,32-33). Before 2001, the Act defined "development" to exclude "construction of a single-family residence that is not part of a larger development ...." Dkt #138, p.34 (4/7/15 PM, Welch). In 2001, the law was changed so that if "any excluded use [including single-family residential use], activity, or operation may have a **cumulative impact**, or a significant environmental or ecological effect on a special management area, that use, activity or operation shall be defined as a 'development' ...." *See* 2001 Hawaii Laws Act 169 (H.B. 538)(***Appendix H***), pp.12-13; HRS §205A-22 (***App.G*** at 18-20,32-33) (emphasis added).

In response to the new law, the Planning Director began requiring Palauea Beach Lot owners to submit SMA assessment applications to determine whether their proposed houses were exempt. Dkt #54, pp.57-58 (4/15/15 AM, Min); Dkt #138, pp.34-35,37 (4/7/15 PM, Welch). Thus, after 2001, the Leones' right to build a house turned on the County's assessment of its "cumulative" environmental effects.

The Planning Commission's Special Management Area Rules (the "SMA Rules") (***Appendix I***) govern the SMA permitting process for Maui County. Under the SMA Rules, all proposed actions within the SMA are subject to an assessment by the Planning Director as to whether the proposed action is exempt from the definition of a "development," and hence from the permitting requirements. Dkt #154, p.41 (4/27/15 PM, Hunt); Dkt #178, p.54-55 (4/8/15 AM, Tsujimura); Dkt #48, pp.70-71 (5/6/15, PM Welch).

Section 12-202-12(f) of the SMA Rules provides as follows:

> (f) Based upon the assessment and review of the application, the director shall make a determination and notify the applicant in writing within thirty calendar days after the application is complete that the proposed action either:
>
> (1) Is exempt from the requirements of this chapter because it is not a development ... ;
>
> (2) Requires a special management area minor permit ... ;
>
> (3) Requires a special management area use permit ... ;
>
> (4) Requires a special management area emergency permit ... ; or
>
> (5) **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.

(***App.I*** at 202-11 to 12)(emphasis added).[7] If a proposed land use is **not** exempt from the definition of a "development," then an SMA permit is required.

The Act prohibits issuance of an SMA permit for a development that is not consistent with the Community Plan. HRS §205A-26(2)(C); GATRI v. Blane, 88 Hawai`i 108, 115, 962 P.2d 367, 374 (1998).[8] Therefore, a house may not be built in the SMA

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[7] *See also* Leone, 128 Haw. at 194, n8, 284 P.3d at 967, n8. At trial, the Leones' attorney Tom Welch referred to Rule 12-202-12(f)(5) as the "don't open the envelope rule." Dkt #136, pp.28-29 (4/7/15 AM, Welch). The County then tried to deny the very existence of Rule 12-202-12(f)(5) by calling former Planning Director Hunt to testify that he had never heard of a "don't open the envelope rule." Dkt #154, pp.32-33 (4/27/15 PM, Hunt).

[8] The developer in GATRI sought an SMA permit, and the Leones sought an exemption from the definition of a "development" under SMA Rules §12-202-12(f)(1) (***App.I***), but the SMA assessment applications were rejected for the same reason. In fact, the (continued...)

on a parcel designated "Park" on the Community Plan since, as this Court has observed, under the County's regulatory scheme, a landowner can neither process an application for exemption from SMA permitting nor obtain a permit for any use inconsistent with the Community Plan.[9]

D. The Leones Purchase the Property.

The Leones testified that they purchased the Property in 2000 intending to build a house there -- the only use permitted under the Declaration. ***App.U***, **ROA** pt.38 at 232-38 (2000 deed); Dkt #134, p.10 (4/6/15 AM, P.Leone); ***App.C*** at 5, **ROA** pt.26 at 347 (Declaration, Ex.P-210). The Leones reasonably believed they could build a home at the time. Dkt #186, pp.62-63 (4/21/15 AM, D.Leone). Mr. Leone was so advised by Maui attorney Tom Welch, Maui planners Munekiyo & Hiraga, and Maui architect Greg Bayless, all of whom testified at trial about their efforts on the Leones' behalf to help them build a home.[10] Planning Director John Min

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[8](...continued)
rejection letters at issue in both cases are almost identical. *Compare* GATRI, 88 Haw. at 110, 962 P.2d at 369, *with* ***App.K***, **ROA** pt.25 at 567-68 (rejection letter, Ex.P-68). In GATRI, 88 Hawai`i at 111, 962 P.2d at 370, the Hawaii Supreme Court held that refusing to process an application, under the same rule, was a denial of such an application. And this court so held in Leone, 128 Haw. at 193 284 P.3d at 966 (***App.A***).

[9] Leone, 128 Haw. at 194-95 n8, 284 P.3d at 967-68 n8 (***App.A***) (under the MCC and the SMA Rules, "neither the director nor the Planning Commission may approve land uses that are inconsistent with the Kihei-Makena Community Plan" and "the Director's determination of inconsistency with the Community Plan precludes further processing under applicable law"); *see also* Dkt #178, pp.53-55 (4/8/15 AM, Tsujimura).

[10] Dkt #48, pp.17,19-22,24,26-29,33-35,47-48,74-76 (4/6/15 PM, Welch); Dkt #140, pp.56, 58-62 (4/8/15 PM, Bayless); **ROA** pt.26 at 244-48 (plans, Ex.P-145); **ROA** pt.25 at 249 (plan, Ex.P-147); Dkt #178, pp.16-18,21 (4/8/15 AM, Munekiyo); Dkt #62, pp.32-33,40-42 (4/27/15 AM, Munekiyo); Dkt #154, pp.5-6 (4/27/15 PM, Munekiyo);
(continued...)

acknowledged that at that time, the Planning Department did not require persons seeking permission to build single-family homes in an SMA to submit an assessment application. **ROA** pt.25 at 310 (Min letter, Ex.P-31); Dkt #154, pp.57-58 (4/15/15 AM, Min); *see also* Dkt #138, pp.34-35,37 (4/7/15 PM, Welch).

E. The County's Inconsistent Policies.

At first, Palauea Beach Lot owners who applied for an exemption for a single-family residence were granted that exemption, notwithstanding the inconsistency with the "Park" designation on the Community Plan. In late 2001, the Warmenhoven family was granted an exemption and allowed to build a home on lot 21. **ROA** pt.25 at 719-21 (Warmenhoven exemption, Ex.P-96); Dkt #158, p.81 (4/30/15, Welch). In late 2002, the Lamberts and the Sweeneys, owners of lots 13 and 14, were granted exemptions for homes. **ROA** pt.25 at 777-78 (Sweeney exemption, Ex.P-111); **ROA** pt.25 at 779-80 (Lambert exemption, Ex.P-112).

But in 2003, under a new administration, the County reversed course and Planning Director Foley purported to revoke the Lamberts' and Sweeneys' exemptions, on the basis that the proposed residential use was inconsistent with the Community Plan. Dkt #136, pp.28-29,52 (4/7/15 AM, Welch). The Lamberts and Sweeneys then sued the County, alleging estoppel. Dkt #136, pp.44,56; Dkt #48, pp.26-27 (4/6/15 PM, Welch). In 2005, the Lambert and Sweeney cases settled, allowing the lot owners to build homes. Dkt #136, p.56; Dkt #48, pp.26-27,45,59.

Despite that settlement, the County continued refusing to process SMA assessment applications for new houses on the other

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[10](...continued)
ROA pt.25 at 392-407 (Munekiyo letter, Ex.P-42). The Leones briefly listed the Property for sale after they bought it in 2000. *See* Dkt #55, pp.44-57 (4/17/15 AM, Merriman).

Paluaea Beach Lots. Dkt #48, pp.27-28 (4/6/15 PM, Welch).[11] Another Palauea Beach Lot owner, the Schatz family, submitted an SMA assessment application for lot 20; after being "suspended pending resolution" of the Lambert and Sweeney cases, the application was rejected in March 2006. **ROA** pt.2 at 855-56 (County opposition memo); **ROA** pt.25 at 775-76 (Schatz rejection letter, Ex.P-105).

F. The Planning Director's Proposed Community Plan Amendment.

In 2006, Planning Director Foley acknowledged that the County had a risk of liability for denying Palauea Beach Lot owners the use of their properties, and agreed to cooperate with the owners to change the Community Plan designation for the Palauea Beach Lots from "Park" to "Residential." Dkt #48, pp.28-31 (4/6/15 PM, Welch).

The first step in the process was for the Planning Department to seek Planning Commission approval. In 2007 the new Planning Director, Jeffrey Hunt, transmitted a "Draft Environmental Assessment" to the Commission, in which he proposed "to initiate land use amendments that reflect[ed] the intended residential use of the properties and the existing park use of the County-owned properties" in order "to prevent **future problems** associated with the inconsistencies between the Kihei-Makena Community Plan and Zoning."[12] Planning Director Hunt admitted the "problems" he was concerned about included potential

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[11] In 2003, the Leones' consultants had been in the process of preparing an SMA assessment application, but they stopped work in 2004, when County officials indicated that an exemption would not be granted. **ROA** pt.25 at 324-90 (draft application, Ex.P-40 [for identification]); **ROA** pt.25 at 392-407 (engagement letter, Ex.P-42); **ROA** pt.25 at 465 (Munekiyo email, Ex.P-45).

[12] **ROA** pt.25 at 488-90 (489) (Hunt memo, Ex.P-57). The Director also sought a zoning amendment to down-zone the private properties to residential (as opposed to HM) zoning, and the County's properties to park zoning. **ROA** pt.25 at 488-90.

lawsuits. Dkt #180, pp.83-84 (4/10/15 AM, Hunt). At the County's request, Palauea Beach Lot owners, including the Leones, paid for the requisite environmental assessment ("EA"). Dkt #48, pp.34-35 (4/6/15 PM, Welch); **ROA** pt.25 at 466-87 (Welch letter, Ex.P-47).

The Planning Commissioners, however, did not cooperate with the Planning Director's efforts to solve the inconsistency problem. The first time the EA was considered by the Planning Commission, Commissioner William Iaconetti candidly suggested taking no action to "prevent [the lot owners] from developing the property for residential purposes" while allowing "the people of Maui to utilize this beach area." ***Appendix J*** at 53, **ROA** pt.25 at 493 (minutes, Ex.P-61).

> So if we decide on no action on this thing then the whole beach would remain as it is now and they would not be able to build on the land that they own. Granted, we can't buy it but if we say no you can't develop it then we then have access to it, at least the beach.

Id. Commissioner Jonathan Starr explained that "property owners who, you know, I don't think they're members of the community from here ... have not in fact proven over time to be the best stewards of that land." ***App.J*** at 62, **ROA** pt.25 at 502. Commissioner Jon Guard bemoaned the potential loss of the "defacto parking that people are enjoying now." ***App.J*** at 56, **ROA** pt.25 at 496.

G. The County Refuses to Process the Leones' SMA Assessment Application.

In September 2007, the Leones' planners, Munekiyo & Hiraga, submitted an SMA assessment application to the Planning Department, seeking permission to build the home designed by Mr. Bayless for the Property. **ROA** pt.25 at 566 (transmittal, Ex.P-67); **ROA** pt.26 at 244-48 (plans, Ex.P-145); **ROA** pt.25 at 249 (plan, Ex.P-147). By letter dated October 25, 2007, Planning Director Hunt, acting for the County, refused to process the

Leones' application for a single reason:

> The subject property is designated "Park" on the Kihei-Makena Community Plan (Community Plan). The proposed Single-Family dwelling is inconsistent with the Community Plan. An application for a Community Plan Amendment was not submitted concurrent with the subject application.
>
> Section 12-202-12(f)(5) states that an application "cannot be processed because the proposed action is not consistent with the County General Plan, Community Plan, or Zoning, unless a General Plan, Community Plan, or Zoning Application for an appropriate amendment is processed concurrently with the SMA Permit Application.
>
> Based on the foregoing we are returning the above application. If you wish to proceed in the future, a new application with appropriate submittals will be required. Said application will require consistency with the Community Plan in order to be processed.

***App.K*, ROA** pt.25 at 567-68 (the "Rejection Letter," Ex.P-68).[13]

A month later, the Leones filed the present action against the County. **ROA** pt.1 at 221-41.

H. <u>The County Fails to Resolve the Inconsistency Problem</u>.

The Planning Commission again considered the Planning Director's proposed plan amendment for the Palauea Beach Lots on February 12, 2008. ***Appendix L*, ROA** pt.25 at 574-625 (minutes, Ex.P-73). At that hearing, Deputy Planning Director Colleen Suyama explained the inconsistency problem:

> [T]he way the rules are written is that **if you lack consistency, we don't even review the application**, we

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[13] The County now claims, without evidentiary support, that the Leones' SMA assessment application was defective because it included an outdated shoreline survey, but in fact the record shows it was rejected solely for the inconsistency problem. The Planning Department never identified any other reason for refusing to process the application or asked the Leones' planners to cure any deficiencies. Dkt #178, pp.21-22 (4/8/15 AM, Munekiyo). This Court ruled that any such defects would be irrelevant because the application would be rejected regardless. <u>Leone</u>, 128 Haw. at 188 n4, 284 P.3d at 961 n4 (***App.A***).

> return it to the property or the applicant saying that we're unable to process your application unless the inconsistencies are resolved ....

App.L at 26-27, **ROA** pt.25 at 576-77 (emphasis added). A minority of the Planning Commission decried the County's contempt for both the rights of the Leones and the Constitution:

> [W]e're basically going through a **charade** of trying to stretch these guys out to the point where they have to sell their property because we're throwing more and more stumbling blocks in front of them. **I don't think it's fair** to the people.
>
> * * *
>
> I think we need to be very, very careful in terms of doing things that abridge private property rights along the beach and to try and acquire a property in an unfair manner.

App.L at 56, **ROA** pt.25 at 606 (emphasis added). The Commissioners eventually voted to defer action on the final EA pending submittal of additional information, including an archaeological study and an "acquisition study" of the "options, feasibility and funding mechanisms" for the County to acquire the remaining vacant Palauea Beach Lots. ***App.L*** at 72, **ROA** pt.25 at 622.

It was not until October 2008 -- eight months after the vote to defer -- that the Planning Department requested funds for those studies. Dkt #154, pp.93-94 (4/27/15 PM, Hunt); **ROA** pt.35 at 1209-11 (Hunt depo). Even then, the Planning Department requested only a portion of the necessary funds, apparently assuming that the Palauea Beach Lot owners would once again pick up the rest of the tab for the County. Dkt #154, pp.93-94; **ROA** pt.35 at 1209-11.

In September 2008, the Larsons, a family owning two of the Palauea Beach Lots, had submitted SMA assessment applications to build a home on each of their lots. Leone, 128 Haw. at 187-89, 284 P.3d at 960-61 (***App.A***). The Planning Director rejected those applications too, and the Larsons also sued the County. *Id.*; **ROA**

pt.3 at 661-66.

Four years later, in 2012, with the Community Plan amendment still pending -- and the prior appeal in this case pending in this Court -- the County again began granting SMA assessment exemptions for houses on the Palauea Beach Lots, despite the inconsistency problem. Dkt #158, pp.80-81 (4/30/15, Welch). Another family with a Palauea Beach Lot, the Altmans, had submitted an SMA assessment application (for lot 20, formerly owned by the Schatz family) in October 2011. **ROA** pt.2 at 895. When the County accepted that application for processing it was the first time the County had processed an SMA assessment application for the area since 2002. Dkt #48, p.25-26 (4/6/15 PM, Welch). The Altmans received an exemption in April 2012 -- the first exemption granted at Palauea Beach since 2002. **ROA** pt.2 at 899 (Altman exemption); Dkt #48, p.25-26; Dkt #158, pp.80-81 (4/30/15, Welch); **ROA** pt.2 at 895-900.[14]

The Larsons submitted a second SMA assessment application for one of their lots in May 2013, and received an exemption in October 2013. **ROA** pt.2 at 901-2; **ROA** pt.2 1311-15. The Larsons' complaint against the County was settled in early 2015. *See, e.g.*, **ROA** pt.12 at 237-41, 479-81; **ROA** pt.13 at 737-38; **ROA** pt.14 at 741-44; Dkt #114, pp.5-18 (2/18/15 hearing).

I. <u>The Property Is No Longer Buildable</u>.

In late 2011, a storm caused waves to wash over the coastal berm and far up onto the Property. Dkt #190, pp.22-24 (4/28/15 PM, Owens); Dkt #148, pp.13-14 (4/20/15 AM, Siarot). Tara Owens, a scientist attached to the Planning Department, took photos of the debris and e-mailed them to the Department of Land and Natural Resources ("DLNR"). Dkt #148, pp.13-15,53 (4/20/15 AM, Siarot); Dkt #190, pp.22-27 (4/28/15 PM, Owens); ROA pt.28 at

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[14] The exemption "acknowledge[d] that the project has been held up [since 2007] to evaluate the 1998 ... Community Plan designation of 'Park' for the parcel." **ROA** pt.2 at 896.

729-38 (photos, Ex.D-485). After the Leones applied for shoreline certification[15] on January 10, 2014,[16] they were informed by DLNR of a newly published opinion issued by the Supreme Court of Hawaii requiring DLNR to "consider historical evidence" in making its shoreline determination. Diamond v. Dobbin, 132 Haw. 9, 29, 319 P.3d 1017, 1037 (2014) (***Appendix N***); Dkt #186, pp.31-33 (4/21/15 AM, Ariyoshi); *see also* **ROA** pt.26 at 284-86 (Ariyoshi report, Ex.P-171 [for identification]). Previously, DLNR's consideration of evidence was limited to the upper reaches of the waves in the most recent year. Diamond, 132 Haw. at 29, 319 P.3d at 1037 (***App.N***).

As Mr. Leone and his architect Greg Bayless testified -- without any rebuttal -- because of the 2011 storm, the shoreline setback on the Property (*i.e.*, as dictated by Diamond) would have been so far inland that it would overlap the front yard setback,[17] leaving no buildable area on the Property. Dkt #186, pp.93-94 (4/21/14 AM, D.Leone); Dkt #140, p.68 (4/8/15 PM, Bayless). The Leones then withdrew their shoreline certification application; had they not, DLNR would have certified the shoreline at the inland 2011 storm line. Dkt #148, pp.16,23-24 (4/20/15 AM, Siarot).

Mr. Leone testified that, but for the County's taking on October 25, 2007, he would have built a single-family residence on the Property. Dkt #186, pp.84,100 (4/21/15 AM, D.Leone).

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[15] SMA assessment applications must include a shoreline survey. SMA Rules §12-202-12(c)(2)(D)(***App.I***). Under Chapter 13-222 of the Hawaii Administrative Rules (***Appendix M*** at 222-3 and 222-5), DLNR oversees the shoreline certification process.

[16] **ROA** pt.26 at 282-83 (letter to DLNR, Ex.P-170); Dkt #148, p.17-18 (4/20/15 AM, Siarot).

[17] Under the shoreline rules, the setback would have been 65 to 70 feet from the re-certified shoreline. **ROA** pt.27 at 614 (Owens letter, Ex.D-275); Dkt #190, at p.69 (4/28/15 PM, Owens).

J. There is No Economically Beneficial Use for the Property.

Today, the Property remains vacant, and Councilmember Kane's vision of "multiple access points" for the public at Palauea (*see* ***App.X***, **ROA** pt.25 at 285-86 [news article, Ex.P-19 (for identification)]) has been realized -- even though the County has actually paid for only two of the three public lots. For sixteen years, Mr. and Mrs. Leone have owned a vacant lot that is used as a *de facto* public beach park. ***App.O***, **ROA** pt.26 at 339-41 (photos, Ex. P-203).

Despite Deputy Planning Director Suyama's explanation to the Planning Commission of the need to amend the Community Plan (***App.L*** at 26-27, **ROA** pt.25 at 576-77), Planning Director Hunt's application for a Community Plan amendment remains in limbo before the Planning Commission, and the Palauea Beach Lots are still designated "Park" on the Community Plan. **ROA** pt.27 at 343-408 (Community Plan, Ex.D-4); Dkt #48, p.54 (4/6/15 PM, Welch); Dkt #192, p.16 (4/29/15 PM, Spence). Corporation Counsel, reporting on this case, warned the Planning Commission on March 23, 2010 that "[i]f the designation is ultimately not changed, ... they're going to have to be selling a lot of sweet bread to raise money, because it's going to be very, very expensive." **ROA** pt.25 at 637 (minutes, Ex.P-82 [for identification]). But the County has not heeded its attorneys' advice. The "Park" designation on the Palauea Beach Lots has not changed since 1998, even though the County is required to review the Community Plan every ten years. MCC 2.80B.080 (***Appendix P*** at 4).

As the County knows, the public has been illegally camping, littering, urinating, defecating and parking on the Property. Leone, 128 Haw. at 189, 284 P.3d at 961 (***App.A***); ***App.J*** at 60-62, ***App.L*** at 43, 45-46, **ROA** pt.25 at 500-02,593, 595-96 (minutes, Ex.P-61,P-73); Dkt #186, p.72 (4/21/15 AM, D.Leone); Dkt #134, p.20 (4/6/15, AM P.Leone); Dkt #140, pp.63-64 (4/8/15 PM,

Bayless).

Over the last fifteen years, the Leones have paid the County nearly $400,000 in real property taxes on the Property, but the County has never allowed them to build. **ROA** pt.26 at 422-23 (RPT records, Ex.P-241a); Dkt #54, pp.22-26 (4/15/15 AM, Martin).[18] In 2014 alone, the County billed the Leones, and the Leones paid, over $68,000 in real property taxes. **ROA** pt.26 at 422; Dkt #54, p.26.

III. DISPOSITION OF THE CASE BELOW

On November 19, 2007, the Leones filed their Complaint (**ROA** pt.1 at 221-241), alleging the following claims: Count I for inverse condemnation claims under Article I, §20 of the Hawaii Constitution; Count II for inverse condemnation claims under the Fifth Amendment to the United States Constitution; Count III under the Civil Rights Act, 42 U.S.C. §1983; Count IV for substantive due process claims under 42 U.S.C. §1983; and Count V for punitive damages under 42 U.S.C. §1983.

A. The First Appeal

On March 2, 2009, the trial court[19] made findings of fact and dismissed the Leone case for lack of subject matter jurisdiction under Rule 12(b)(1) of the Hawaii Rules of Civil Procedure ("HRCP"),[20] ruling that the Leones' takings claims were

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[18] In 2009, the Maui County Real Property Tax Division ("RPTD") learned the Palauea Beach Lot owners could make no use of their land. **ROA** pt.27 at 560-63 (Welch letter, Ex.D-89). For the next four years, the Property was assessed at a much lower valuation, because no building permit could lawfully be obtained; but in 2013, after the County resumed processing SMA assessment applications for Palauea Beach Lots, the RPTD raised its tax assessment values. **ROA** pt.26 at 387 (RPT records, Ex.P-239); Dkt #54, pp.31-32 (4/15/15 AM, Martin).

[19] The Honorable Joseph E. Cardoza presided.

[20] Judge Cardoza's opinion (**ROA** pt.1 at 2329-46) correctly notes that, on a Rule 12(b)(1) motion to dismiss for lack of

(continued...)

not "ripe" for adjudication. **ROA** pt.1 at 2329-49. On October 15, 2009, the trial court[21] similarly dismissed the Larson case. Leone, 128 Haw. at 186-7, 284 P.3d at 959-60 (***App.A***).

This Court consolidated the two cases and reversed, holding that the Leones' claims were ripe because the County's October 25, 2007 decision to refuse to process the Leones' SMA assessment application was a "final" decision under Williamson Cnty. Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108 (1985). Leone, 128 Haw. at 193-96, 284 P.3d at 966-69 (***App.A***).[22] In so holding, as mentioned above, this Court expressly stated that the County could not legally process an SMA assessment application for a use inconsistent with the Community Plan designation:

> Under the express language of the [Maui County Code], neither the director nor the Planning Commission may approve land uses that are inconsistent with the Kihei-Makena Community Plan. *** The language of the SMA Rules comports with this outcome, stating in mandatory terms that "the director **shall** make a determination ... that the proposed action **either**: ... (5) Cannot be processed because the proposed action is not consistent with the county general plan, community plan, and zoning[.]"

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[20](...continued)
subject matter, "the trial court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." **ROA** pt.1 at 2337, *quoting* Norris v. Hawaiian Airlines, Inc., 74 Haw. 235, 240, 842 P.2d 634, 637 (1992), *aff'd*, 512 U.S. 246 (1994). The County has presented no evidence that any of Judge Cardoza's findings were untrue, and indeed has admitted to the material facts set forth in the Leone opinion, including that its regulatory scheme prevents the Leones from building a single-family residence on the Property. *See* **ROA** pt.1 at 270, 277, 1680.

[21] The Honorable Shackley R. Raffetto presided.

[22] The Leone and Larson cases were consolidated into the Leone case. 128 Haw. at 186, 284 P.3d at 959 (***App.A***).

Leone, 128 Haw. at 194 n8, 284 P.3d at 967 n8 (***App.A***) (emphasis in original; citations omitted).

B. Pretrial Proceedings

After remand, the Leone and Larson cases were consolidated by the trial court. **ROA** pt.3 at 661-66. On October 13, 2014, the County filed motions for summary judgment on Counts I, II, and V of the Complaint. **ROA** pt.6 at 532-58; **ROA** pt.6 at 559-91. On January 22, 2015, the trial court denied the County's motion as to Counts I and II. **ROA** pt.12 at 225-28. On February 2, 2015, the trial court granted the County's motion as to Count V, the claim for punitive damages. **ROA** pt.12 at 581-82. Thereafter, the Larsons settled with the County. *See* p.15 above.

On March 6, 2015, the Leones filed a motion to exclude or limit the testimony of the County's proffered expert appraiser, Ted Yamamura, on the basis that he was not qualified to opine on "economically viable use." **ROA** pt.16 at 402-78 (the "Rule 104 Motion"). After hearing on April 1 and 2, 2015, the trial court granted in part and denied in part the Rule 104 Motion; and Mr. Yamamura was ultimately permitted, over extensive objections, to testify that "investment" is a land use. **ROA** pt.1 at 21-22; Dkt #156, pp.48-68,93-94 (4/28/15 AM); **ROA** pt.29 at 239-41.

C. The Trial

A jury trial on Counts I, II, III and IV of the Complaint was held from March 30, 2015 through May 5, 2015. **ROA** pt.1 at 19-36.

1. The Leones Proved There is No Economically Beneficial Use for the Property

The Leones' real estate economics expert William Whitney[23] testified that, given the Rejection Letter, the only conceivable

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[23] Dr. Whitney is a pre-eminent economist with over 40 years of experience in preparing economic models of real estate projects around the world. Dkt #144, pp.5-45 (4/15/15 PM, Whitney).

use of the Property would be for park purposes. Dkt #144, pp.49-50,53-54 (4/15/15 PM, Whitney). However, as Dr. Whitney explained, the County's regulations prohibit the Leones from using the Property as a park. Dkt #144, pp.54-58. There is no economically beneficial "Park" use that may be made of the Property, in part because the zoning code prohibits private commercial park uses. MCC §19.615.020(A) ***(App.Q** at 4).

The isolated location of the Property does not permit a sufficient market presence for economically beneficial or "commercial" park use. Dkt #361, p.58 (4/16/15 PM, Whitney). Dr. Whitney testified in detail that he had reviewed and evaluated several possible park uses, and that none would be economically viable. Dkt #144, pp.54-58 (4/15/15 AM, Whitney). Even Ala Moana Beach Park, which is located along a very busy corridor, has "very little, if any" commercial park use. Dkt #361, p.58. Dr. Whitney explained that, "under this set of circumstances, the Leones did not have a viable economic use available to them" (Dkt #144, pp.57-58) and that any residual value of the property after the date of taking would be "speculative." Dkt #361, p.33 (4/16/15 PM, Whitney). The County presented no evidence to rebut Dr. Whitney's opinion.

County expert Ted Yamamura, an appraiser who is not an economist, was permitted to testify, over the Leones' objections,[24] that "**investment** [is] a **bona fide use of land.**" Dkt #156, p.68. He said, "People [buy] land, hold on to it; after it appreciates over time, people sell it for profit. **I think that's a bona fide land use.**" *Id.* (emphasis added).

The Leones' land use regulation expert R. Brian Tsujimura,[25]

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[24] *See* Dkt #156, pp.48-68, 93-94 [4/28/15 AM, Yamamura], **ROA** pt.16 at 402-78.

[25] Mr. Tsujimura is an attorney who had regular dealings with the Land Use Commission and the Department of Planning and

(continued...)

explained the fallacy of Mr. Yamamura's assertions as follows:

> Investment value is premised upon an ability to use the property, and in my opinion, ... **there is no ability to use the property.** So if you're asking me from an investment perspective, I would say in this particular case, it would be zero because you could never harvest that value given the current situation.

Dkt #140, p.16 (4/8/15 PM, Tsujimura)(emphasis added); *see also* Dkt #178, pp.51-52 (4/8/15 AM, Tsujimura). As Mr. Tsujimura explained, the Leones cannot even build a fence to exclude the public. Dkt #140, pp.29-31.

Again, the Leones' evidence was not refuted. The County presented no evidence that the Property had any value at all after the taking on October 25, 2007. Mr. Yamamura did not testify as to the value of the Property on or after that date, and Mr. Leone testified that he received no offers for the Property after that date. Dkt #186, pp.83-84 (4/21/15 AM, D.Leone). When asked what economically beneficial use the Leones could make of their land, Planning Director Hunt could suggest only that "they can walk out on their property." Dkt #180, p.100 (4/10/15 AM, Hunt).

2. <u>The Experts Established the Leones' Damages</u>

Dr. Whitney analyzed the damages suffered by the Leones due to the County's regulatory taking in terms of lost revenue. Dkt #144, pp.62-64 *et seq.* (4/15/15 PM, Whitney); **ROA** pt.26 at 373-86 (Ex.P-211 [for identification]). Dr. Whitney testified that, in his expert opinion, the loss suffered by the Leones amounted to "[i]n round numbers, 12.5 million dollars." Dkt #144, p.80; *see also* Dkt #361, p.56; **ROA** pt.26 at 388 (RPT info, Ex. P-240 [for identification]).

The Leones' expert Chris Ponsar, a qualified real estate

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[25](...continued)
Economic Development, was involved in the creation of the State Plan, and who works with land use regulation on a daily basis. Dkt #178, pp.32-40 (4/8/15 AM, Tsujimura).

appraiser, testified that the fair market value of the Property at the date of the taking -- when the County rejected the Leones' SMA assessment application on October 25, 2007 -- was $7,200,000. Dkt #180, pp.58,62,65 (4/10/15 AM, Ponsar). This valuation assumes the lot was buildable. *Id.*

The County's expert Stephen Parker, a real estate developer whose testimony was limited to his review and criticism of Dr. Whitney's opinion, admitted that the Leones' damages amounted to $7,900,000. Dkt #192, pp.49-50,81-83 (4/29/15 PM, Parker).

Thus, as a result of the County's regulatory taking of the Property, the Leones are entitled to just compensation in the amount of at least $7,200,000 for the value of the Property at the time of the taking -- an amount that was uncontroverted at trial -- plus their post-taking real property taxes, pre-judgment interest, and attorneys' fees and costs. *See* pp.52-54 below.

3. The County Misled the Jury

The County improperly and repeatedly misled the jury and appealed to its prejudices and sympathies.[26] The Court admonished the County for such misconduct on thirty-two occasions. *See* **ROA** pt.29 at 803-907 (admonitions).[27]

a. Appeals to prejudice

Before the trial, the Leones filed a Motion in Limine to alert the trial court to a significant risk of prejudice based on

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[26] As citizens of the County of Maui, many jurors may have been inclined to sympathize with the County. *See* Dkt #126, p.49 (3/31/15 AM) ("there isn't anyone in this room, including myself, ... who isn't, in some fashion or another, connected with the County of Maui"). Judge Cahill, however, refused to dismiss County employees and their spouses for cause. Dkt #124, pp.82-83 (3/30/15 AM). One juror, a County employee, wore a County of Maui T-shirt bearing the County's official seal to court every day for the entire course of the trial. **ROA** pt.29 at 690.

[27] The Leones requested a jury instruction not to base any decision on passion or prejudice. **ROA** pt.22 at 552; **ROA** pt.24 at 1147. The Leones objected to the County's appeals to prejudice. *See* **ROA** pt.29 at 914-51,967-1065.

their wealth. **ROA** pt.12 at 535-60 (MIL No.3). The trial court prohibited any reference to the Leones' wealth during opening statement (**ROA** pt.29 at 221-23), but the County repeatedly violated that order[28]:

- [Y]ou are fortunate if you're able to buy a piece of oceanfront property in Hawaii. Dkt #170, p.23 (3/31/15 PM).

- Every private landowner who has a lot at Palauea has built a single family residential home on that lot or they are in the process of building one. Luxurious homes. Homes that you and I would dream to live in. Dkt #170, p.24.

- [T]hey are all living in houses at that beach that you and I, again, would dream to live in. *Id.*, p.25.

- ... [W]hat they own is still very much an exquisite, expensive piece of land, and a piece of coveted real estate. *Id.*, pp.29-30.

Throughout, the County kept commenting on the wealth of the Leones and the size of their neighbors' houses:

- So, in fact, what you're telling us is that a beautiful lot on the oceanfront in Wailea with beautiful houses being built right next door to it, big luxurious houses - you've seen them; right? Dkt #140, p.19 (4/8/15 PM).

- So not withstanding the Community Plan designation of park, the private lot owners who have lots at Palauea Beach have not been prevented from building fairly substantial, luxurious homes on that beach; correct? Dkt #142, p.45 (4/9/15 PM).

The County continued on that theme by speculating on how many other homes the Leones owned:

- Currently, your trust has, by my last count, at least eight properties; correct? Dkt #134, p.85 (4/6/15 AM).

- Wouldn't it be more accurate to state it was going to

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[28] After the trial, Judge Cahill noted that in a recent California case, similar misconduct led to disciplinary ramifications for the offending attorney. Dkt #66, pp.26-27 (7/17/15).

be their tenth family home, not their second family home? Dkt #361, p.28 (4/16/15 PM).

- And you never gained any understanding at any time that the Leone Family Trust, which holds the property at Palauea, holds nine residential properties? Dkt #361, p.29 (4/16/15 PM).[29]

In closing, the County again appealed to the jurors' prejudice by remarking, "[w]e actually know it was going to be [the Leones'] ninth or tenth residential property and not a second home" and that "they have bought nine or ten residential properties prior to purchasing this lot at Palauea." *See* Dkt #160, p.7 (5/5/15 PM, closing). The County crowned its commentary by telling the Maui County taxpayers in the jury box that "we're here today and **you're** being asked to pay in excess of $15 million." Dkt #160, p.9 (emphasis added).

b. Violation of orders and instructions

The County also urged the jury to disregard the Court's instructions under the guise of appeals to "common sense." Dkt #160, pp.14,25,26,33 (5/5/15 PM, closing). The jury was instructed, consistent with Palazzolo, *infra*, 533 U.S. at 629-30, 121 S. Ct. at 2464, that a landowner's knowledge of a regulation before acquisition of the property is **irrelevant** in a takings case like this one. *See* **ROA** pt.24 at 1170 (No.28). Yet the County emphasized that the Property was "designated park, p-a-r-k, park" on the Community Plan, and that the Leones "knew that before they bought the property." Dkt #160, p.10 (5/5/15 PM, closing). The County argued that the Leones' claim should therefore be barred. *Id.*, pp.32-34 ("... the Leones knowingly

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[29] Initially the court sustained objections to questions concerning other properties owned by the Leones, on the basis that it was irrelevant and prejudicial, but then the court overruled those objections after the Corporation Counsel promised to connect them to relevant evidence. Dkt #134, pp.27-28, 85 *et seq.* (4/6/15 AM). That promise was never kept.

bought a parcel in 2000 designated park. ... What does your commonsense tell you about all this, really?").

The jury was instructed that the Community Plan is law and the Leones had no obligation to seek a change in the law. **ROA** pt.24 at 1179 (No.37). But the County argued that if the Leones had more diligently pursued such an amendment, "there might have been a different result." Dkt #160, pp.15-16 (5/5/15 PM, closing). The County implied that it was the Leones' own fault that they did not receive permission to build, because they "did ... nothing" for fifteen years. Dkt #160, pp.6,8-9.

Ignoring a judicial instruction that "the Planning Director may not legally process an application for an SMA exemption for a land use that is inconsistent with the ... Community Plan"[30] (Dkt #186, p.52 [4/21/15 AM]), the County pointed to the neighboring houses and asked the jury, "What does your commonsense tell you about whether it's illegal to build at Palauea?" (Dkt #160, p.26 [5/5/15 PM, closing]).

c. Irrelevant testimony

During trial, the County also presented irrelevant testimony as to the public interests served by its regulatory scheme. During voir dire, the County told potential jurors that this case was about the Public Trust Doctrine, and asked them "whether it's appropriate for the government to have a policy that Hawaii's coasts and shorelines and beaches are held in trust for the public[.]" Dkt #126, pp.78-79 (3/31/15 AM). In its opening statement, the County stated that oceanfront property in Hawaii is "heavily regulated" because it is "held in trust for the citizens of Maui[.]" Dkt #170, p.22 (3/31/15 PM). The County also presented irrelevant testimony about beach erosion and

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[30] This instruction was based on this Court's holding that "neither the director nor the Planning Commission may approve land uses that are inconsistent with the ... Community Plan" (Leone, 128 Haw. at 194 n8, 284 P.3d at 967 n8 [**App.A**]).

coastal hazards. Dkt #190, pp.10-12, 47 (4/28/15 PM, Owens).

Neither the Public Trust Doctrine nor the County's interest in environmental protection justify a taking of private property for public use without payment of just compensation. *See* p.34 below. Even if the County has a legitimate interest in protecting Palauea Beach or in creating a public park, it still must pay the landowner. Dkt #140, p.28 (4/8/15 PM, Tsujimura).

D. The Leones Move For Judgment as a Matter of Law

On April 21, 2015, at the close of the Leones' case-in-chief, the County moved for judgment as a matter of law on the Leones' claims based on 42 U.S.C. §1983. **ROA** pt.1 at 31; Dkt #58, p.7 (4/21/15 PM); **ROA** pt.24 at 675-719. The motion was denied as to Counts I and II, and as to Count III to the extent it alleged 42 U.S.C. §1983 claims predicated on inverse condemnation (together, the "Inverse Condemnation Claims"). **ROA** pt.30 at 1055-57; Dkt #156, pp.95-96 (4/28/15 AM). The Court dismissed Count III to the extent it alleged a denial of equal protection, and Count IV for denial of substantive due process. Dkt #58, p.8; **ROA** pt.30 at 1057. Trial continued on the Inverse Condemnation Claims.

At the close of evidence, on April 29, 2015, the Leones moved for judgment as a matter of law on the Inverse Condemnation Claims. **ROA** pt.1 at 34; **ROA** pt.24 at 732-936; Dkt #192, pp.88-91 (4/29/15). The trial court denied the motion. Dkt #158, pp.21-28; **ROA** pt.30 at 1058-60.

On May 5, 2015, the jury returned a verdict in favor of the County on the remaining claims, specifically finding that "Defendant County of Maui or the Defendant Planning Director [did not] deprive Plaintiffs of economically beneficial use of their land" and that "Defendant Planning Director [did not] act in violation of 42 U.S.C. Section 1983." ***Appendix W***, **ROA** pt.24 at 1187-89. Final Judgment against the Leones was entered on June 1, 2015. **ROA** pt.29 at 640-42.

E. Post-Trial Proceedings

The Leones renewed their motion for judgment as a matter of law, and alternatively moved for a new trial, on June 10, 2015. **ROA** pt.29 at 653-1325. On June 12, 2015, the County moved for costs, seeking taxation of costs of $99,324.66. **ROA** pt.30 at 221-379. The trial court entered its Order Denying Plaintiffs' Renewed Motion for Judgment as a Matter of Law Or, in the Alternative, Motion for a New Trial ("Order Denying Renewed Motion") (**ROA** pt.30 at 1009-10), and its Order Granting in Part and Denying in Part Defendants' Motion for Taxation of Costs Filed June 12, 2015, awarding the County costs in the amount of $40,522.72 (the "Costs Order") (**ROA** pt.30 at 1007-8) on June 10, 2015.

On August 25, 2015, the Leones timely filed their Notice of Appeal from: (1) the Final Judgment; (2) the Order Denying Renewed Motion; and (3) the Costs Order (the "Notice of Appeal"). Dkt #1.

CONCISE STATEMENT OF POINTS OF ERROR

1. The trial court erred in concluding that the Leones were not entitled to judgment as a matter of law on the Inverse Condemnation Claims, and that the Leones were not entitled to just compensation. **ROA** pt.30 at 1058-60. The Leones raised their objections at trial (Dkt #192, pp.88-90 (4/29/15 PM)) and in the renewed motion for judgment as a matter of law (**ROA** pt.29 at 654, 663-74). This point of error is reviewed *de novo* (see below).

2. The trial court erred in permitting Mr. Yamamura to testify that "investment use" is an "economically beneficial use" of land. **ROA** pt.29 at 239-41. The Leones raised this objection at trial (Dkt #156, pp.48-50,53-54 (4/28/15 AM, Yamamura)) and in the renewed motion for judgment as a matter of law (**ROA** pt.29 at 671-73). Moreover, Mr. Yamamura, as a non-economist, was not competent to testify on "economically beneficial use." The

Leones raised that objection in the Rule 104 Motion (**ROA** pt.16 at 408-11), at the Rule 104 hearing, and during trial (Dkt #156, pp.43,48,53-54,66-68,93-94 (4/28/15 AM). This point of error is reviewed under the right/wrong standard (*see* below).

3. The trial court erred in modifying and refusing certain jury instructions, including:

a. modifying Jury Instruction No. 22, defining "economically beneficial use" by deleting "other than leaving the land in its natural state" (*compare, e.g.*, ***Appendix Z*** at 7, **ROA** pt.24 at 1087 (No.51), as requested, *with* ***App.Z*** at 1, **ROA** pt.24 at 1164 (No.22), as given);

b. refusing Proposed Jury Instruction No. 73 on burden-shifting (***App.Z*** at 10, **ROA** pt.24 at 1111); and

c. refusing Proposed Instruction No. 71 on the effect of the Declaration (***App.Z*** at 13, **ROA** pt.24 at 1109).

The Leones raised their objections during the settling of jury instructions. Dkt #194, pp.42-45 (No.71), pp.51-52 (No. 22,73). This point of error is reviewed for prejudice, insufficiency, error, and inconsistency (*see* below).

4. The trial court erred in awarding costs to the County (**ROA** pt.30 at 1007-8) as the prevailing party under HRCP Rule 54(d) and Hawaii Revised Statutes ("HRS") §607-9.

STANDARD OF REVIEW

Point of Error No.1

Rulings on motions for judgment as a matter of law are reviewed *de novo* under the same standard applied by the trial court. In re Estate of Herbert, 90 Hawai`i 443, 454, 979 P.2d 39, 50 (1999). A motion for judgment as a matter of law should be granted where, after considering "the evidence and the inferences which may be fairly drawn [from the evidence] ... in the light most favorable to the non-moving party ... there can be but one reasonable conclusion as to the proper judgment." Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai`i 92, 105, 176

P.3d 91, 104 (2008) (citations omitted).

Point of Error No.2

Generally, the admissibility of evidence is reviewed for an abuse of discretion. Kealoha v. County of Hawaii, 74 Haw. 308, 313, 844 P.2d 670, 673 (1993). However, "[w]hen application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard." *Id.* at 319, 844 P.2d at 676. Rulings on the relevancy/admissibility of expert testimony under Rules 401, 402, and 702, Hawaii Rules of Evidence ("HRE") (***Appendix V*** at 8,12,14) are reviewed under the right/wrong standard. State v. Vliet, 95 Hawai`i 94, 106-07, 19 P.3d 42, 54-55 (2001).

Point of Error No.3

The standard of review concerning jury instructions or the omission thereof is whether "when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." Miyamoto v. Lum, 104 Hawai`i 1, 6, 84 P.3d 509, 514 (2004). "It is prejudicial error for the court to refuse to give an instruction relevant under the evidence which correctly states the law unless the point is adequately and fully covered by other instructions given by the court." Tabieros v. Clark Equip. Co., 85 Hawai`i 336, 371, 944 P.2d 1279, 1314 (1997) (citation omitted).

Point of Error No.4

Under HRCP Rule 54(d), costs are awardable to the prevailing party. If a trial court judgment is reversed, an award of costs to the previously prevailing party should be vacated. *See* Hart v. Ticor Title Ins. Co., 126 Hawai`i 448, 459, 272 P.3d 1215, 1226 (2012) ("[b]ecause we are vacating the ICA's judgment and reversing the judgment of the district court, we vacate the district court's award of ... costs").

ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE LEONES WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

The evidence presented at trial permitted only one reasonable conclusion: the County has taken the Property without payment of just compensation.

A. The Leones are Entitled to Just Compensation under the United States and Hawaii Constitutions.

1. Government regulation that deprives a landowner of economically beneficial use is a taking.

The United States and Hawaii constitutions prohibit the taking of private property without payment of just compensation. *See* U.S. Const. amend. V and Haw. Const. Art. I §20, ***Appendix T.*** The Fifth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." Art. I §20 of the Hawaii Constitution, more broadly, provides: "Private property shall not be taken **or damaged** for public use without just compensation." *Id.* (emphasis added).

Hawaii courts may interpret the Hawaii Constitution to "afford greater protection than that required by federal constitutional interpretations and have not hesitated to do so where warranted by logic and due regard for the purposes of those protections." Hawaii Housing Authority v. Lyman, 68 Haw. 55, 69, 704 P.2d 888, 896 (1985) (examining whether the Hawaii Land Reform Act violates the public use requirement of Art. I §20 of the Hawaii Constitution).[31]

In fact, Hawaii's takings clause **requires** more expansive

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[31] *See also* Pele Defense Fund v. Paty, 73 Haw. 578, 601, 837 P.2d 1247, 1262 (1992) (examining the right to sue under Art. XII §4 of the Hawaii Constitution); State v. Tanaka, 67 Haw. 658, 661, 701 P.2d 1274, 1276 (1985) (examining permissible searches under Art. I §7 of the Hawaii Constitution).

takings protections than the Fifth Amendment. In 1968, the words "or damaged" were added to Hawaii's takings clause to conform it to the takings clauses of 25 other states. *See* City and Cnty. of Honolulu v. Market Place, Ltd., 55 Haw. 226, 230, 517 P.2d 7, 12 (1973). The legislature stated that "[t]he purpose of the amendment is to provide relief to a property owner where his property has been damaged without any physical taking, as a result of an undertaking for a public use." *Id.*, 55 Haw. at 231 n2, 517 P.2d at 13 n2. Accordingly, under Hawaii's takings clause,

> courts would continue to compensate individuals for condemnatory 'takings' of their property under traditional measures thereof, but would add to the class of those entitled to indemnification individuals whose property, although not technically 'taken,' is nonetheless injured by a government use elsewhere in a way that society as a whole, and not the individual property owner, ought to bear the costs.

Id., 55 Haw. at 231, 517 P.2d at 13.

The U.S. Supreme Court holds that municipalities have the power to regulate land use, but that power is limited by the Fifth Amendment. Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 387, 47 S.Ct. 114, 118 (1926) (land use "statutes and ordinances which ... are found clearly not to conform to the Constitution, of course, must fall.") The Supreme Court has explained that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014-15, 112 S.Ct. 2886, 2892-93 (1992). A landowner recovers just compensation for a such a regulatory taking by filing claims for "inverse condemnation." United States v. Clarke, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130

(1980).[32]

There are two discrete types of regulatory takings (sometimes referred to as "*per se*" takings) that, regardless of public purpose or "investment-backed expectations," **categorically** require compensation under the Fifth Amendment: (1) regulations that result in a physical invasion of the landowner's property, and (2) regulations which deny the landowner all economically beneficial use of his property. Lucas, 505 U.S. at 1015, 112 S.Ct. at 2893. This case falls into the second category.

In Lucas, a real estate developer bought two vacant lots in a beachfront subdivision, intending to build houses like those on the other lots. Two years later the South Carolina legislature enacted the Beachfront Management Act. The developer sued because the new law prohibited him from erecting any habitable structures. *Id.*, 505 U.S. at 1007, 112 S.Ct. at 2888. The South Carolina Coastal Commission argued that the prohibition was important to prevent beach erosion, but the developer sought compensation regardless of any legitimate public objectives. *Id.*, 505 U.S. at 1009, 112 S.Ct. at 2890. The Supreme Court of the United States agreed, holding that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.*, 505 U.S. at 1019, 112 S.Ct. at 2895. The court reasoned that regulations which "leave the owner of land without economically beneficial or productive options for its use -- typically, as

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[32] For years, the Supreme Court has worked to define just how far is "too far." In general, courts may weigh the landowner's investment-backed expectations against the public purpose of the regulation. *See* Penn. Central Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659 (1978). However, the Penn. Central test is not the applicable test here, as the Leones made clear at trial. Dkt #54, p.16 [4/15/15 AM]; *see also* **ROA** pt.24 at 721.

here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service ...." *Id.*, 505 U.S. at 1018, 112 S.Ct. at 2894-95.

An economically beneficial use exists only where (1) there is a legally permissible use other than leaving the land in its natural state, (2) the land is physically adaptable for such use **and** (3) there is a demand for such use in the reasonably near future. *See* Lucas, 505 U.S. at 1017-18, 112 S.Ct. at 2894-95; Loveladies Harbor, Inc. v. United States, 21 Cl.Ct. 153, 158 (1990), *aff'd* 28 F.3d 1171 (Fed.Cir. 1994); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1433 (9th Cir. 1996) *aff'd*, 526 U.S. 687, 119 S. Ct. 1624 (1999).

When a taking is accomplished by the denial of economically beneficial use of land, "no inquiry into the state's interests advanced in support of the regulation is required." Del Monte Dunes, 95 F.3d at 1432; Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 543, 125 S.Ct. 2074, 2084 (2005); Dkt #150, pp.4-6 (4/22/15 PM); *see also* Lucas, 505 U.S. at 1015-16, 112 S.Ct. at 2893-94. Accordingly, the County's evidence of the salutary public interests served by the County's regulatory scheme was irrelevant here. Dkt #140, p.28 (4/8/15 PM, Tsujimura).

In order for a land use to be economically beneficial, it must generate sufficient revenue to pay expenses, including real property taxes. *See* Bowles v. United States, 31 Fed.Cl. 37, 48 (1994) (property "became a liability after the government action because [the landowner] would still be liable for annual property tax assessments"); Res. Investments, Inc. v. United States, 85 Fed.Cl. 447, 490 (2009) ("[t]he most glaring error of this sort ignores the property tax status of the parcel").

Whether the aggrieved landowner takes title to the land before or after enactment of the confiscatory regulation is

irrelevant in a regulatory takings case.[33] Palazzolo v. Rhode Island, 533 U.S. 606, 626-27, 121 S.Ct. 2448, 2462-63 (2001); Carpenter v. United States, 69 Fed.Cl. 718, 730 (2006). In Palazzolo, the trial court determined that a purchaser of land had "notice" of the existing regulatory limitation, and therefore could not claim a taking from that limitation. Palazzolo, 533 U.S. at 626-27, 121 S.Ct. at 2462-63. The Supreme Court rejected that position because unreasonable regulations "do not become less so through passage of time or title." *Id.* As the Supreme Court observed, otherwise, government "would be allowed, in effect, to put an expiration date on the Takings Clause." *Id.* "The State may not by this means secure a windfall for itself." *Id.* The Supreme Court went on to note that a rule barring later purchasers from asserting regulatory takings claims would be "capricious in effect," because

> the young owner contrasted with the older owner, the owner with resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings clause is not so quixotic.

Id., 533 at 628, 121 S.Ct. at 2463.[34]

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[33] Counsel for the County -- reporting to the Planning Commission on this case -- admitted just that: "Oddly enough, the law says it doesn't make any difference. Even if [the Leones] walked in there and they knew they had this problem." **ROA** pt.25 at 632-43 (639).

[34] The Leones also pled a claim for a "temporary taking." **ROA** pt.1 at 230-31. A taking is "temporary" if it is cut short by government "amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., 482 U.S. 304, 321, 107 S. Ct. 2378, 2389 (1987). In such cases, the government remains liable to pay just compensation for the period during which the regulation was effective. *Id.* at 321, 107 S. Ct. at 2389; Portland Natural Gas Transmission Sys. v. 19.2 Acres of Land, 318 F.3d 279, 285 (1st Cir. 2003). In this case, the County never amended or withdrew the subject regulations, and did not exercise eminent domain.

(continued...)

2. A reasonable jury could not find that the Property has any economically beneficial use.

a. Courts apply a burden-shifting paradigm.

While plaintiffs in civil cases ultimately bear the burden of persuading the trier of fact by a preponderance of the evidence, in certain circumstances, the burden to produce evidence[35] shifts between the parties.[36] In regulatory takings cases, courts apply such a burden-shifting paradigm, because requiring the plaintiff to prove a negative (the absence of economically beneficial use), is "patently unreasonable, and logically impossible." Bowles, 31 Fed.Cl. at 47-48; *see also* Loveladies, 21 Cl.Ct. at 157 ("[c]ommon sense ... indicates the impossibility of requiring the plaintiffs to prove a negative"). Thus the Leones were not required to disprove every hypothetically possible economically beneficial land use.

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[34](...continued)
The County introduced no evidence that it ever allowed the Leones to build. Accordingly, the trial court did not instruct the jury on temporary takings. Dkt #194, pp.17-19 (5/01/15 PM, jury instructions).

[35] The burden of production is defined as "the obligation of a party to introduce evidence of the existence or nonexistence of a relevant fact sufficient to avoid an adverse peremptory finding on that fact." Rule 301(3), HRE (***App.V*** at 4). Under Hawaii law, in certain cases, the burden of production shifts when plaintiff has made a *prima facie* case. *See* Shoppe v. Gucci America, Inc., 94 Haw. 368, 378, 14 P.3d 1049, 1059 (2000); Ferry v. Carlsmith, 23 Haw. 589, 592-93 (1917).

[36] For example, in employment discrimination cases, once a plaintiff establishes a *prima facie* case that he suffered some discriminatory employment action, "the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." Shoppe, 94 Haw. at 378, 14 P.3d at 1059 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 93 S.Ct. 1817, 1824-25 (1973)). It is illogical to require the plaintiff to disprove "every matter which fairly could be recognized as a reasonable basis for a refusal to hire." McDonnell Douglas, 411 U.S. at 802-03, 93 S.Ct. at 1824.

Once a plaintiff has produced sufficient evidence that his land lacks any economically beneficial use, the burden of production shifts to the government, which must produce evidence of "reasonable probability that the land is both physically adaptable for such use and that there is a demand for such use in the reasonably near future." Res. Investments, 85 Fed.Cl. at 489, *quoting* Loveladies, 21 Cl.Ct. at 158.[37]

b. The Leones carried their burden.

The Leones produced copious evidence that the County's regulations leave them with no economically beneficial use of the Property. Because (as this Court has already held) the Rejection Letter is a "final" decision denying the Leones the right to build a single-family residence on the Property, that letter alone made the Leones' *prima facie* case, and shifted the burden of production to the County. ***App.K*, ROA** pt.25 at 567-68; *see* Leone, 128 Haw. at 193-96, 284 P.3d at 966-69 (***App.A***). As discussed below, the Leones further carried their burden by showing that: (1) the Declaration requires them to build a single-family residence on the Property; (2) the Property cannot be used for a single-family residence under the County's regulations; and (3) the Property otherwise has no other economically beneficial use.

(1) The Declaration Requires the Leones to build a single-family residence on the Property.

The Property is subject to and restricted by the

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[37] In Bowles, 31 Fed.Cl. at 47-48, the court held that the burden of production shifted to the government when the landowner made a *prima facie* case. Under Loveladies, 21 Cl.Ct. at 158, the burden shifted when plaintiffs presented "sufficient evidence to be entitled to a directed verdict." The Leones met both of these standards.

Declaration, which permits only single-family residential use.[38] But, since a single-family home is inconsistent with the Community Plan, the Leones cannot legally obtain an SMA permit or exemption for that use. Leone, 128 Haw. at 194 n8, 284 P.3d at 967 n8 (***App.A***); Dkt #186, p.51-52 (4/21/15 AM, judicial instruction); ***App.K***, **ROA** pt.25 at 567-68 (Rejection Letter, Ex.P-68).

The County, however, may not avoid liability for its taking by blaming the Declaration. In Bowles, *supra*, a landowner sought a fill permit, which was necessary for him to build a single-family residence (31 Fed.Cl. at 40), as required by a restrictive covenant in the landowner's deed (*Id.* at 42). After the Army Corps of Engineers refused the permit, the Federal Claims Court determined that the lot had "no remaining economically beneficial use." *Id.* at 49. For the government to say that it was not responsible for diminution in value,

> is like saying that if the federal government drops a fire bomb on a wood house the federal government did not destroy it because the fact of having a wooden rather than a concrete house is why it burned down.
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> * * *
>
> The federal government cannot avoid its constitutional responsibilities because Bowles and his neighbors have made mutually beneficial restrictive covenants regarding the use of their land.

Id., 31 Fed.Cl. at 49. *See also* Knight v. City of Billings, 642 P.2d 141, 146 (Mont. 1982) ("[i]t is not the restrictions that are damaging plaintiffs' properties; it is the action of the City"); and Rogers v. State Roads Commission, 177 A.2d 850, 854 (Md.App. 1962) (valid, subsisting covenant running with the land and must be taken into consideration). Here too, the restrictive

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[38] *See* ***App.U***, **ROA** pt.38 at 232-38 (2000 deed), **ROA** pt.25 408-15 (2004 deed, Ex.P-43); ***App.C*** at 5, **ROA** pt 26 at 347 (Declaration, Ex.P-210); Dkt #144, p.61 (4/15/15 PM, Whitney); Dkt #186, p.93 (4/21/15 AM, D.Leone); Dkt #140, pp.55,67 (4/8/15 PM, Bayless).

covenants must govern the determination of economically beneficial use.

(2) The Property cannot be used for a single-family residence under the County's regulations.

A single-family residence is inconsistent with the Community Plan "Park" designation. As discussed *supra*, at pp.7-9, this means the Leones cannot process an SMA exemption. If the Leones skipped that step, and applied directly for an SMA permit, they still could not obtain one, due to the same inconsistency problem. *See id.*

Indeed, the County has expressly **admitted** that the Leones cannot legally build a single-family residence on the Property, due to inconsistency, and it is judicially estopped from arguing otherwise. "It is well established that a party's factual allegation in a complaint or other pleading is a judicial admission which binds the party." Lee v. Puamana Community Ass'n, 109 Hawai`i 561, 573, 128 P.3d 874, 886 (2006) (citation omitted). Under the doctrine of judicial estoppel,

> [A] party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him [through a judicial admission], at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action.

Id., 109 Haw. at 576, 128 P.3d at 889 (citation omitted). Judicial estoppel prevents parties from "playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation." *Id.*

In this case, the County repeatedly took the position that its regulatory scheme prevents the Leones from building a single-family residence on the Property:

- The County has admitted that the "Park" designation on the Community Plan "will not permit [the Leones] to build a single family dwelling." **ROA** pt.1 at 277.

- The County has admitted that "Rule 12-202-12(f)(5) of the Maui Planning Commission's SMA Rules requires that in order for the Planning Department to process an Application for an SMA Assessment, the proposed action must be consistent with the ... Community Plan ...." **ROA** pt.1 at 270.

- The County has admitted that the Leones' "Assessment Application could not be processed pursuant [to] SMA Rule 12-202-12(f)(5)." **ROA** pt.1 at 1680.

The County argued that the Rejection Letter "on its face specifically invited the Leones to ... submit a community plan amendment."[39] However, a refusal to process an SMA assessment application is the same as a rejection. GATRI, 88 Hawai`i at 111, 962 P.2d at 370. This Court has also held that amendment of the Community Plan is a legislative, not an administrative, process, so the Leones had no obligation to amend the Community Plan. Leone, 128 Haw. at 195, 284 P.3d at 968 (***App.A***).

(3) The Property has no economically beneficial use as a park.

For the foregoing reasons, the Leones proved they cannot legally build a single-family residence on the Property. Leone, 128 Haw. at 194 n8, 284 P.3d at 967 n8 (***App.A***); Dkt #178, pp.53-55 (4/8/15 AM, Tsujimura). The County's arguments that the Leones can instead use the Property as a park are also meritless.

Whether a use of land is legally permissible is a question of law for the court, not by the jury. *See* Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Haw. 217, 229, 953 P.2d 1315, 1327 (1998) ("interpretation of [an] ordinance ... is a question of law"). Even if the Declaration permitted a park to be developed on the Property -- which it does not -- the Property

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[39] *See* **ROA** pt.30 at 399. In fact, the Planning Director's proposed Community Plan amendment was pending before the Planning Commission at the time. *See* ***App.J*** at pp.1,52-53, **ROA** pt.25 at 491-3 (minutes, Ex.P-61); ***App.L*** at pp.1,25, **ROA** pt.25 at 574-75 (minutes, Ex.P-73).

would still have no economically beneficial use, because the Leones cannot legally use it as a park.

Although the Community Plan is silent as to permitted uses for the Property under its "Park" designation, State and Maui law dictate that the Property must be governed by the "Park Districts" zoning ordinance, Chapter 19.615 of the MCC (***App.Q*** at 4-8). State law requires that zoning "shall be accomplished within the framework of a long-range, comprehensive general plan."[40] HRS §46-4. The MCC states that the purpose of zoning is to "regulate the utilization of land ... in accordance with the land use directives of ... the general plan and the community plans of the County" (MCC §19.04.015(A), ***App.Q*** at 1) and that zoning ordinances "shall conform to the general plan." MCC §2.80B.030(B), ***App.P*** at 1. Implementing the general and community plans is a central purpose of the zoning code:

> [t]he purpose and intent of this comprehensive zoning article is also to promote and protect the health, safety and welfare of the people of the County by ... guiding, controlling and regulating future growth and development in accordance with the general plan and community plans of the County.

MCC § 19.04.15(B)(1) (***App.Q*** at 1). And the Community Plan itself provides that its designations are superior to zoning. **ROA** pt.27 at 352 (Community Plan, Ex.D-4) ("implementing actions ... are effectuated through various processes, including zoning").

The current Deputy Planning Director admitted that the "Park Districts" zoning ordinance supplies the permissible uses and design standards for the Property. MCC §19.615.010(A), ***App.Q*** at 4; **ROA** pt.44 at 484 (McLean). Indeed, as observed by Plaintiffs' real estate economist, the development standards for a park cannot be found in the Property's HM zoning, but rather require

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[40] The Maui general plan consists of "[t]he countywide policy plan, Maui island plan, and community plans." MCC §2.80B.030(B), ***App.P*** at 1.

reference to the zoning code section on Park Districts. See **ROA** Dkt #182, p.36 (4/16/15 AM, Whitney).

Under that ordinance, park uses must comply with certain mandatory development standards: "1. Minimum lot area, two acres; 2. Minimum lot width, two hundred feet[.]" MCC §19.615.020(C), ***App.Q*** at 5. The Property is approximately 100 feet wide and 200 feet deep, and less than half an acre in size. ***App.B***, **ROA** pt.25 at 291 (lot map, part of Ex.P-24 [for identification]); ***App.U***, **ROA** pt.38 at 237 (2000 deed), **ROA** pt.25 at 414 (2004 deed, Ex.P-43). Park use of the Property would violate Maui County's mandatory minimum development standards.

Also, under the MCC, parks "**shall not be operated for a commercial purpose.**" MCC §19.615.020(A), ***App.Q*** at 4 (emphasis added). Nor would such commercial use of the Property, even if it were permissible, be economically beneficial:

> Let me suggest that in my visiting parks in Hawaii -- take a park like Ala Moana ... on a corridor that's heavily visited, there is very little, if any, concessionaire program going on in that park.
>
> * * *
>
> [The Property is] on a very small, isolated road. It would be very, very difficult to sustain any market presence from the visitors to that park. In other words, **you simply don't have the market potential to support that use in an economically beneficial way.**

See Dkt #361, p.58 (4/16/15 PM, Whitney) (emphasis added). The County produced no evidence to contradict that testimony.

(4) The Leones can no longer use the Property.

Nor could the Property -- now -- be used for a single-family residence, even if it were permissible. The County's refusal to process SMA assessment applications for Palauea Beach Lots continued from approximately 2003 to 2011. Dkt #48, p.25-26 (4/6/15 PM, Welch); Dkt #158, pp.80-81 (4/30/15, Welch). A storm in late 2011, after the taking, caused waves to wash so far up onto the Property that the shoreline setback, if certified, would

overlap with the front yard setback, leaving no buildable footprint on the Property. *See* pp.15-16 above.

(5) Even without their witnesses, the Leones carried their burden.

Even if the jury ignored the entire testimonies of Dr. Whitney, Mr. Welch, Mr. Leone and Mr. Tsujimura, **there was still sufficient uncontroverted evidence to carry the Leones' burden.** The County admitted that the Leones cannot build a home in an area designated "Park," but the Declaration allows no other use. There is no economically beneficial "Park" use of the Property. Indeed, Planning Director Hunt has admitted that the Leones' only permissible "use" is to "walk out onto their property" (Dkt #180, p.100 (4/10/15 AM, Hunt)) and Deputy Planning Director Suyama has admitted that the inconsistency problem prevents the County from "even review[ing] the [SMA assessment] application." ***App.L*** at 26-27, **ROA** pt.25 at 576-77 (minutes, Ex.P-73).

The Leones having shown that the Property lacks any economically beneficial use, it became the County's burden to produce evidence to the contrary -- as it was required to do in order to avoid an adverse peremptory finding. Rule 301(3), HRE (***App.V*** at 4); Bowles, 31 Fed.Cl. at 47-48; Loveladies, 21 Cl.Ct. at 157-58.

c. The County did not carry its burden.

Although the County argued that the Leones have economically beneficial uses, it did not present admissible **evidence** of even one such use. Instead, the County relied on the power of suggestion, repeatedly asking one of its witnesses, Michele McLean, about a number of purely hypothetical possibilities.[41]

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[41] In a takings case, the government may not posit "convenient arguments rather than feasible alternatives." Formanek v. United States, 26 Cl.Ct. 332, 339 (1992) (government's proposed uses for property failed to meet standard of "reasonable probability"); *see also* Res. Investments, 85 Fed.Cl. at 489 (government's (continued...)

The trial court sustained the Leones' objections on this line of questioning twenty-eight times. ***Appendix S,*** Dkt #64 (4/29/15 AM, McLean).

The County's arguments boiled down to two: (1) the Property has economically beneficial use as a "Park" under HM zoning (Dkt #64, pp.17, 19-23 [4/29/15 AM, McLean]); and (2) the Property has economically beneficial "investment use." Dkt #156, p.68 (4/28/15 AM, Yamamura). Neither argument has merit.

(1) The hotel zoning ordinance does not allow for economically beneficial "Park" use.

The County failed to show any economically beneficial "Park" use under the HM zoning for the Property, which allows for "[a]ny use permitted in residential and apartment districts." MCC §19.14.020(A), ***App.Q*** at 2. Residential zoning permits only **non-commercial** parks and playgrounds, with the sole exception that "certain commercial amusement and refreshment sale activities may be permitted when **under the supervision of the government agency in charge** of the park or playground." MCC §19.08.020(C), ***App.Q*** at 2 (emphasis added). "Non-commercial" use, by definition, is not economically beneficial. And commercial uses are only allowed in a public park or playground, but the Property is **privately** owned. As Mr. Tsujimura, a land use regulation expert, noted: "If the Leones control the park, it's not controlled by the Parks Department." Dkt #140, p.43 (4/8/15 PM, Tsujimura).

Moreover, the County produced no evidence that commercial uses of the Property -- even if permitted -- would be economically beneficial. The County has "overlook[ed] that although [its] proposed use may have, in the abstract, a theoretical accounting value, that gross gain on paper might also

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[41](...continued)
proposed uses "turn out to be mere attorney argument without support in the record").

create a net loss in reality." Res. Investments, 85 Fed.Cl. at 489. The County failed to present any evidence to rebut testimony that such activity would not generate income sufficient to pay the real property taxes it assesses on the Property. Dkt #144, pp.58-61 (4/15/15 PM, Whitney). The Leones paid the County of Maui $68,103.63 in property taxes in 2014. *See* **ROA** pt.26 at 422-23 (RPT Records, Ex.P-241a); Dkt #54, p.26 (4/15/15 AM, Martin). A use that cannot generate enough income to pay real property taxes is not an economically beneficial use as a matter of law. *See* Bowles, 31 Fed.Cl. at 48-49; Res. Investments, 85 Fed.Cl. at 489.

(2) The trial court erred by allowing Mr. Yamamura to testify on "investment use."

The County's only other argument for the existence of economically beneficial use was Mr. Yamamura's testimony on "investment use." The trial court erred in allowing his testimony because (1) "investment use" is not an economically beneficial use as a matter of law, and (2) Mr. Yamamura was not qualified to opine on "economically beneficial use."

i. "Investment use" is not an economically beneficial use as a matter of law.

The County argued that "investment use" -- that is, the mere passive holding of land for its speculative value, or "land banking" -- was a "bona fide use." Dkt #156, pp.41-42,68 (4/28/15 AM, Yamamura). But Mr. Yamamura never actually testified as to "economically beneficial use." *See* p.48 below. Dr. Whitney, however, testified (consistent with the law) that "a land use is a use that is put on a property that otherwise would be vacant ... something other than just leaving the land in its natural condition." Dkt #144, p.58 (4/15/15 PM, Whitney). Mr. Welch, the Leone's Maui real estate attorney, testified:

[L]and use is just what it says. It's the use of land.

> Land use law is generally considered to be the law relating to the activities people engage in on their land and the modification of the land by construction and grading and development, essentially.

Dkt #158, p.62 (4/30/15 AM, Welch).

The test for a taking under Lucas is whether a regulation eliminates all economically beneficial **use**. Lucas, 505 U.S. 1003, 112 S.Ct. 2886 (1992); Res. Investments, 85 Fed. Cl. at 486 ("[b]oth in its holding and its reasoning, Lucas thus focuses on whether a regulation permits economically viable use of the property, not whether the property retains some value on paper").

Successful "investment" in land does not preclude a takings claim. In Del Monte Dunes, *supra*, plaintiff purchased an oceanfront property while an application to develop that property was being considered by the City of Monterey. *Id.*, 95 F.3d at 1425. That application was denied, and plaintiff sold the property to the State of California for $800,000 **more** than it had paid for the property. *Id.*, 95 F.3d at 1431-32. Despite the owner's profit, the jury awarded plaintiff $1,450,000 in just compensation for the City's taking, and the Ninth Circuit upheld the jury's verdict. *Id.*, 95 F.3d at 1435. The court explained:

> Focusing the economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry.
>
> * * *
>
> Moreover, focusing solely on property value confuses the economically viable use inquiry with the diminution of value inquiry normally applied only where no categorical taking exists.

Del Monte Dunes, 95 F.3d at 1432-33 (citations omitted).

Even though land with no legally permissible use (as is the case here) may have some "value" in the market, that value is not an economically beneficial use. In a recent case, the U.S. Court of Appeals for the Federal Circuit held that "[w]hen there are no underlying economic uses, it is unreasonable to define land **use**

as including the sale of the land." Lost Tree Village Corp., v. United States, 787 F.3d 1111, 1117 (Fed.Cir. 2015) (emphasis in original). In Lost Tree, the government argued that a landowner's ability to sell an affected parcel with "residual value" was an economic use that precluded a Lucas claim for a regulatory taking. *Id.* The Court rejected this argument because "[i]n the real world, real estate investors do not commit capital either to undevelopable property or to long, drawn-out, expensive and uncertain takings lawsuits." *Id.* at 1118.

The present case is even more compelling than Lost Tree because, here, the County presented no evidence that the Property retained **any** residual value after the taking. In fact, Mr. Tsujimura testified that the Property has no value (Dkt #140, p.16 [4/8/15 PM, Tsujimura]), and Mr. Whitney testified that any residual value would be speculative (Dkt #361, p.33 [4/16/15 PM, Whitney]). "Speculative land uses are not considered as part of a takings inquiry." Lost Tree, 787 F.3d at 1117.

Indeed, an "investment use" exception would swallow the Lucas rule. If speculative "land banking" could be considered an economically beneficial use, then there could never be a taking under Lucas. The government could always defend against such claims by arguing that land retains some value because a landowner can hold it in the hope that the offending regulation will be repealed. Such a result would contradict the very notion of inverse condemnation -- as originally envisioned by the United States Supreme Court -- to place constitutional limits on the power of states to adopt land use regulations that go "too far." Pennsylvania Coal, *supra*, 260 U.S. at 415, 43 S.Ct. at 160.

ii. Mr. Yamamura is not qualified to opine on "economically beneficial use."

Given Mr. Yamamura's qualifications, the trial court erred by permitting him to testify as to economically beneficial use. Mr. Yamamura is an appraiser, not an economist, and his testimony

should have been limited to the field of real estate appraisal. Rule 702, HRE (***App.V*** at 14), provides that "a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." However, for expert testimony to be relevant and to "assist" the trier of fact, there must be "a fit between the nature of the expertise and the subject matter of the inquiry at hand." Bowman, *Hawaii Rules of Evidence Manual*, §702-1[3][B] (2014-15 ed.).[42]

Unlike the witnesses on "economically viable use" offered by the Leones, Mr. Yamamura has no expertise which would allow him to opine whether the Leones can make use of the Property in a manner allowing for a viable economic return. As an appraiser, Mr. Yamamura's expertise is in opining as to the value, not the use, of real property. Dkt #156, pp.30 *et seq.* (4/28/15 AM, Yamamura); ***Appendix R***, **ROA** pt.33 at 255-56 (qualifications). When asked if he was familiar with the term "economically viable use" he answered, "Not really, no," and he admitted that the concept "doesn't exist in the appraisal world." Dkt #156, pp.86-87 (4/28/15 AM, Yamamura).

B. The Leones Are Entitled to Judgment as a Matter of Law on Their Civil Rights Act Claim.

Victims of a regulatory taking are afforded remedies under the Civil Rights Act, 42 U.S.C. §1983 (***Appendix Y***). *See* Del Monte Dunes, 95 F.3d at 1426-28. To prevail on their claim against the County alleging liability based on an official policy, practice or custom, under the Civil Rights Act, the Leones must prove: (1) the Planning Director acted under color of law; (2) the acts of the Planning Director deprived the Leones of

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[42] A proffered expert with some insight into a subject area may lack the specialized knowledge required to qualify as an expert. *See, e.g.*, Craft v. Pebbles, 78 Hawai`i 287, 302, 893 P.2d 138, 153 (1995); Barbee v. Queen's Medical Center, 119 Hawai`i 136, 162-63, 194 P.3d 1098, 1124-25 (Haw. App. 2008).

their rights under the Fifth Amendment to the United States Constitution; and (3) the Planning Director acted pursuant to an expressly adopted official policy or a longstanding practice or custom of the County. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 690-91, 98 S.Ct. 2018, 2035-36 (1978); Lytle v. Carl, 382 F.3d 978, 982 (9th Cir. 2004).

1. The County acted under color of law.

In a municipal liability case like this one, "the municipality itself is the state actor and its action in maintaining the alleged policy at issue supplies the color of law requirement under §1983." Gibson v. City of Chicago, 910 F.2d 1510, 1519 (7th Cir. 1990) (internal quotation marks omitted).

Planning Director Hunt's actions also satisfy the color of law requirement. A person acts under color of law when the person exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." West v. Atkins, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255 (1988) (citation and internal quotation marks omitted). Generally, a government employee who acts pursuant to his official duties acts under color of law. Screws v. United States, 325 U.S. 91, 111, 65 S.Ct. 1031, 1040 (1945).

Planning Director Hunt rejected the Leones' SMA assessment application in the course of his official duties.[43] The County produced no evidence that Planning Director Hunt acted *ultra vires* when he signed the Rejection Letter.

2. The County deprived the Leones of their rights under the Constitution.

As demonstrated above, the County violated the Leones'

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[43] The rejection letter is on official County letterhead. ***App.K*** at 1, **ROA** pt.25 at 567 (Rejection Letter, Ex.P-68). The letter is signed by Jeffrey S. Hunt as Planning Director for the County. ***App.K*** at 2, **ROA** pt.25 at 568. The letter was sent pursuant to Director Hunt's authority as Planning Director of the County. Leone, 128 Haw. at 193, 284 P.3d at 966 (***App.A***).

constitutional rights by taking their land without just compensation.

3. The County's official policy caused Director Hunt to reject the Leones' SMA assessment application.

A municipality's official policy includes any "policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the] body's officers." Monell, 436 U.S. at 690, 98 S.Ct. at 2035-36. SMA Rule 12-202-12(f)(5) (***App.I*** at 202-11 to 202-12) and MCC §2.80B.030(B) (***App.P*** at 1) bar processing of SMA assessment applications for uses inconsistent with the Community Plan designation. Leone, 128 Haw. at 194 n8, 284 P.3d at 967 n8 (***App.A***). Planning Director Hunt's rejection letter relied on SMA Rule 12-202-12(f)(5). ***App.K*** at 1, **ROA** pt.25 at 567 (Rejection Letter, Ex.P-68).

C. The Jury Instructions Were Prejudicial and Erroneous.

The trial court committed several reversible errors relating to jury instructions.

1. The trial court erroneously defined "economically beneficial use."

The trial court gave an instruction that erroneously defined the most important term in this case, "economically beneficial use." Dkt #194, p.23-24 (5/1/15 PM). The Leones asked for the following instruction on economically beneficial use:

> Land has economically beneficial use, if, under the applicable regulations, all three of the following are true: (1) there is a permissible use for the land, other than leaving the land in its natural state, (2) the land is physically adaptable for such use and (3) there is a demand for such use in the reasonably near future.

Dkt #194, p.23-24; ***App.Z*** at 2-3, **ROA** pt.22 at 572-73 (No.27); ***App.Z*** at 4-5,6,7, **ROA** pt.24 at 968-69 (No.27), 1063 (No.27), 1087 (No.51). Jury Instruction No. 22 (***App.Z*** at 1, **ROA** pt.24 at 1164) omitted the above underlined text.

The trial court's instruction was erroneous because,

although it instructed the jury that land with economically beneficial use must have a permissible use, it failed to correctly state the law by omitting that such use cannot leave the land in its natural state. Dkt #194, p.23-24 (5/1/15 PM); see Lucas, *supra*, 505 U.S. at 1018, 112 S.Ct. at 2894-95; Del Monte Dunes, *supra*, 95 F.3d at 1432; *see also* pp.33-34 above. The prejudice from this error is obvious: the jury returned a verdict for the County despite no evidence being adduced that the Property has any current **use**. Had the jury been properly instructed, it presumably would not have accepted leaving the land in its natural state as an economically beneficial use.

2. The trial court refused to instruct the jury on the burden-shifting paradigm in takings cases

The Leones requested the following jury instruction, which was refused by the trial court:

> Plaintiffs initially bear the burden to produce evidence that they lack economically beneficial use of their property. Once Plaintiffs have produced such evidence, the burden of production shifts to the Defendants. To meet their burden of production on a proposed economically beneficial use, Defendants must produce evidence of reasonable probability that the land is both physically adaptable for such use and that there is a demand for such use in the reasonably near future.

Dkt #194, p.51-52 (5/1/15 PM); ***App.Z*** at 8-9,10, **ROA** pt.24 at 1009-10 (No.57), 1111 (No.73).

The instruction was an accurate statement of the burden-shifting paradigm applicable to this case. *See* Bowles, *supra*, 31 Fed.Cl. at 47-48; Loveladies, *supra*, 21 Cl.Ct. at 157-58; *see also* pp.36-37 above. Failing to give it prejudiced the Leones by effectively relieving the County of meeting its burden of production -- a burden it did not carry. The trial court instead instructed the jury that: "Plaintiffs have the burden of proving by a preponderance of the evidence every element of each claim that plaintiffs assert." *See* **ROA** pt.24 at 1150 (No.9).

3. The trial court failed to instruct the jury on the effect of the Declaration.

The Court failed to instruct the jury that the only permissible economically beneficial use of the Property is as a single-family residence. ***App.Z*** at 11-12,13, **ROA** pt.24 at 1005-6 (No.55), 1109 (No.71); Dkt #194, pp.43-51 (5/1/15 PM). The Leones requested the following jury instruction:

> Plaintiffs' lot is subject to a declaration of covenants and restrictions ('DCR') that restricts what Plaintiffs may do with their land. Under the DCR, Plaintiffs may use their land only for single-family residential purposes. You may consider the DCR when determining whether Plaintiffs have any economically beneficial use of their land.

Dkt #194, pp.43-51; ***App.Z*** at 11-12,13, **ROA** pt.24 at 1005-6,1109.

The trial court's refusal was prejudicial error. The jury must consider restrictive covenants when making takings determinations. *See* Bowles, *supra*, 31 Fed.Cl. at 49; Knight, *supra*, 642 P.2d at 146; Rogers, *supra*, 177 A.2d 854; *see also* pp.37-39 above. Indeed, the Declaration proves that the Property has no economically beneficial use since it requires the Property to be used for a single-family residence, and the County has prevented the Leones from doing so. By refusing the instruction, the trial court allowed the jury to find economically beneficial use of the Property based on impermissible uses.

D. The Leones Are Owed Just Compensation.

"Just compensation" must place the landowner in the position he or she would have occupied but for the taking. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74, 93 S.Ct. 791, 794 (1973) (citations omitted). This is accomplished by awarding the landowner (1) the property's fair market value at the time of the taking, assuming that the offending regulation had never been implemented; (2) amounts paid for real property taxes since the property was taken; and (3) prejudgment interest. Kirby Forest Indus., Inc. v. United

States, 467 U.S. 1, 10, 104 S.Ct. 2187, 2194 (1984) (fair market value); HRS §§101-36 and -37 (*see* ***App.G*** at 8-9) (real property taxes); Schneider v. Cnty. of San Diego, 285 F.3d 784, 792 (9th Cir. 2002) (property owner has a constitutional right to prejudgment interest from the date of taking).

Fair market value "includes any additional market value [a property] may command because of the prospects for developing it to the 'highest and best use' for which it is suitable." United States v. 320.0 Acres of Land, More or Less in Monroe Cnty., State of Fla., 605 F.2d 762, 781 (5th Cir. 1979). HRS §478-3 (*see* ***App.G*** at 38) provides a rate of return on a judgment at 10% per annum, that statutory interest rate operates as a "floor." Schneider, 285 F.3d at 792-93.

The Leones presented evidence that the fair market value of the Property as of October 25, 2007, when the County rejected their SMA assessment application, was $7,200,000. Dkt #180, pp.62,65 (4/10/15 AM, Ponsar). The County presented no evidence to rebut this valuation. Indeed, the County's own expert, Stephen Parker, admitted that the Leones' damages as of the date of the taking came to considerably more -- $7,900,000. Dkt #192, pp.82-83 (4/29/15 PM, Parker). Moreover, another of the Leones' experts, Dr. Whitney, opined that the Leones' losses amounted to $12,500,000. Dkt #144, p.80 (4/15/15 PM, Whitney).

Over the period from 2008-2014, the County assessed, and the Leones paid, real property taxes amounting to $205,270.20, according to the County. **ROA** pt.26 at 422-23 (RPT records, Ex.P-241a); Dkt #54, pp.22-26 (4/15/15 AM, Martin). And the Leones are also entitled to their reasonable attorneys' fees and costs under 42 U.S.C. §1988 (***Appendix Y***).

Accordingly, the Leones are entitled to just compensation in a base amount of no less than $7.2 million, plus pre-judgment interest on that amount, plus their real property taxes paid to the County from the date of the taking (October 25, 2007) to the

date of judgment. The Court should remand this case for entry of judgment, in an amount to be calculated in accordance with instructions to that effect, and for a determination of the Leones' attorneys' fees and costs.

II. THE TRIAL COURT ERRED IN AWARDING COSTS TO THE COUNTY

For the foregoing reasons, the trial court's rulings on Point of Error No. 1, 2, and 3 should be reversed or vacated. The award of costs to the County should be vacated, because the County is not the "prevailing party" under HRCP Rule 54(d). *See* Hart, 126 Hawai`i at 459, 272 P.3d at 1226.

CONSTITUTIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS PERTAINING TO POINTS OF ERROR

The following provisions pertaining to the points of error are set out verbatim in the appendices, as follows: U.S. Constitution, Amendment V and Hawaii Constitution, Article I, Section 20 (***App.T***); U.S. Code, Chapter 42, Sections 1983 and 1988 (***App.Y***); Hawaii Revised Statutes, §46-4, §§101-36 and -37, Chapter 205A, §478-3, §607-9 (***App.G***); 2001 Hawaii Laws Act 169 (H.B. 538) (***App.H***); Hawaii Rules of Evidence, Rules 301, 401, 402, 702 (***App.V***); Maui County Code, §§2.80B.030 and .080 (***App.P***); Maui County Code, §19.04.015, §19.08.020, §19.14.020, Chap. 19.615 (***App.Q***); Special Management Area Rules, codified at Chapter 202 of the Rules of the Department of Planning (***App.I***).

CONCLUSION

For the foregoing reasons, the Leones have proved -- and the County has failed to refute -- that they have been deprived of all economically beneficial use of the Property as a matter of law. This Court should remand this case with instructions to enter judgment as a matter of law in favor of the Leones and against the County as to the Leones' inverse condemnation claims and 42 U.S.C. §1983 claims predicated on inverse condemnation, for just compensation of no less than $7.2 million, plus pre-

judgment interest on that amount, plus the Leones' real property taxes paid to the County from and after October 25, 2007 to the date of judgment, plus the Leones' reasonable attorneys' fees and costs. The Court should also vacate the trial court's award of costs to the County.

DATED: Honolulu, Hawaii, April 13, 2016.

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