SCAP-15-0000599

IN THE SUPREME COURT 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/
Cross-Appellees,

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/
Cross-Appellants.

CIVIL NO. 07-1-0496(3)
(Other Civil Action)

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 [*continued on following page*]

Circuit Court of the Second Circuit, State of Hawai'i
Judge: Honorable Peter T. Cahill

DEFENDANTS/APPELLEES/CROSS-APPELLANTS COUNTY OF MAUI's and WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui's ANSWERING BRIEF TO PLAINTIFFS/APPELLANTS/ CROSS-APPELLEES' OPENING APPEAL BRIEF; CERTIFICATE OF SERVICE

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CROSS APPEAL FROM 1) ORDER DENYING DEFENDANT COUNTY OF MAUI'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFFS' CLAIMS FOR DAMAGES FILED OCTOBER 13, 2014, ENTERED January 22, 2015;
2) ORDER DENYING DEFENDANT COUNTY OF MAUI'S MOTION FOR SUMMARY JUDGMENT AS TO COUNTS 1 AND 2 OF COMPLAINT FILED NOVEMBER 19, 2007, FILED AUGUST 28, 2013, ENTERED January 22, 2015;
3) ORDER GRANTING PLAINTIFFS' MOTION IN LIMINE NO. 1 (Re Allegedly Defective SMA Application) FILED FEBRUARY 2, 2015, ENTERED April 6, 2015;
4) ORDER GRANTING WITHOUT PREJUDICE PLAINTIFFS' MOTTON IN LIMINE NO. 5 (REGARDING HUMAN REMAINS), FILED FEBRUARY 2, 2015, ENTERED May 7, 2015;
5) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT COUNTY OF MAUI's and WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui's MOTION FOR PRELIMINARY RULING ON ADMISSIBILITY RE WILLIAM WHITNEY OPINIONS ON LOST VACATION RENTAL INCOME OPPORTUNITY FILED MARCH 2, 2015, ENTERED August 17, 2015;
6) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION UNDER RULE 104, HAWAII RULES OF EVIDENCE, TO PRECLUDE OR LIMIT EXPERT TESTIMONY BY TED YAMAMURA, FILED MARCH 6, 2015, ENTERED MAY 7, 2015;
7) APRIL 2, 2015 DENIAL OF DEFENDANT COUNTY OF MAUI's and WILLIAM SPENCE's REQUEST FOR JUDICAL NOTICE OF LAW NO. 2;
8) APRIL 20, 2015 GRANT OF PLAINTIFFS'

REQUEST FOR JUDICIAL NOTICE NO. 13;
9) APRIL 20, 2015 GRANT OF PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE NO. 14;
10) APRIL 20, 2015 GRANT OF PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE NO. 15;
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Defendants/Appellees/Cross-Appellants COUNTY OF MAUI and WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui (the "COUNTY," "Defendants," and/or "Appellees"), hereby respectfully submit their Answering Brief to Plaintiffs/Appellants/Cross-Appellees' Opening Cross-Appeal Brief pursuant to Hawai'i Revised Statutes § 641-1(a) and Hawai'i Rules of Appellate Procedure, Rules 4 and 28.

SUMMARY OF APPELLANTS' POSITION

Plaintiffs/Appellants DOUGLAS LEONE and PATRICIA PERKINS-LEONE (the "LEONES," Plaintiffs," and/or Appellants") raise essentially two main points of error in their appeal.[1] First, Appellants assert the trial court abused its discretion in denying their request for a judgment notwithstanding a verdict rendered against them at trial. Second, Appellants assert entitlement to a new trial, because the COUNTY'S attorney purportedly mislead the jury in this case to Plaintiffs' prejudice. Both of these positions are refuted by a common thread - At trial, *it was Plaintiffs* who introduced in largest measure and argued as relevant the evidence by which the jury clearly could have found against them on their liability and damages claims.

With the exception of the testimony of Defendants/ Appellants' appraiser Ted Yamamura, ***Plaintiffs do not appear to otherwise contest the legal sufficiency of any of the evidence adduced and introduced at trial.*** The evidentiary record of this case certainly does not lack or want of a "legally sufficient evidentiary basis for a reasonable jury to [have found] for [the

[1] Appellants' Points of Error Nos. 2, and 3a, 3b and 3c do not appear to have been raised in their Notice of Appeal or their Civil Docketing Statement. JEFS Dkt 268 and PDF pp. 1039-1048; JEFS Dkt 3 and PDF pp. 1-12. Points of Error Nos. 2 and 3a, 3b, and 3c were not raised in Plaintiffs' Motion for Judgment Notwithstanding the Verdict. JEFS Dkt 266 and PDF pp. 654-1325.

County Defendants]." *See*, Hawai'i Rules of Civil Procedure, Rule 50. Rather than dispute the sufficiency of the facts and evidence, Plaintiffs/Appellants argue that under the controlling law, the trial court was compelled to conclude that "the County has taken the Property without payment of just compensation." JEFS Dkt 379 and PDF p. 43. Plaintiffs/Appellants misunderstand the standard on a Motion for Judgment Notwithstanding the Verdict.

Plaintiffs elected to label their inverse condemnation case as a *per se* taking under the United States Supreme Court case Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). Under Lucas, the United States Supreme Court held 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." Lucas, 505 U.S. at 1019. Yet, at trial Plaintiffs/Appellants methodically introduced a myriad of testimonial, documentary, and circumstantial evidence undermining their own position. To wit, Plaintiffs/Appellants set out to demonstrate for the jury 1) the bad character of the COUNTY'S regulatory actions, 2) the LEONES' distinct, but as demonstrated below, *conflicting* investment-backed expectations when they purchased an oceanfront property fronting the stunning shoreline of Palau'ea Beach, Makena, Maui, and 3) an alleged, but utterly *unsupported* economic impact on the value of their ocean front parcel.

Plaintiffs/Appellants shifting positions clearly entitled the COUNTY to inquire into, comment on, and introduce further evidence to rebut these same contentions. *See*, Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) ("[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. . . . [s]o, too,

is the character of the government action."). The trial court was correct in the many instances it allowed the COUTNY to rebut Plaintiffs' factual assertions and argument, as well as in its denial of the LEONE Plaintiffs' request for judgment notwithstanding the jury verdict and/or for a new trial.

It is equally clear from the record that, relying on the very evidence and assertions introduced by the LEONES at trial, the jury had more than an adequate evidentiary basis to render a verdict against the LEONES on their inverse condemnation claim. Finally, the COUNTY attorney's identification for the jury of the evidence *introduced by Plaintiffs*, in order to refute the dizzying array of misleading and stigmatizing assertions and affirmative arguments Plaintiffs made at trial, cannot fairly be characterized as "misleading" or "prejudicial."

I. CONCISE STATEMENT OF THE CASE

This case does not arise out of a COUNTY regulation which deprived the LEONE Plaintiffs/Appellants of any use and/or value of their ocean front real estate. Rather, it arises out of the LEONES' failure and unquestionable refusal to commit to and complete the same regulatory process of review that the owners of five (5) similarly situated lots fronting Palau'ea Beach committed to and completed in order to obtain approvals and to build single-family residences on their parcels. Rather than commit to and complete the regulatory requirements, the LEONES decided to sue the COUNTY, and sought as compensatory damages nearly four times the $3.75 million dollars they made on their original real estate investment. The LEONES also specifically prayed for $50 million dollars in *punitive* damages.

A. NATURE OF THE CASE AND THE LEONES' COMPLAINT

The LEONE Plaintiffs filed their Complaint for inverse condemnation on **November 19, 2007**, within thirty (30) days after their Special Management Area ("SMA") Assessment

Application was returned on **October 25, 2007** unprocessed. JEFS Dkt 208 and PDF pp. 221-239. The LEONE Plaintiffs pled causes of action for an alleged "regulatory taking" of their ocean front parcel. The LEONES maintain that under *current* COUNTY regulations their ocean front parcel has no economically beneficial use, no value, and has therefore been inversely condemned as a matter of law. *See*, Lucas v. South Carolina Coastal Council, *supra.*

The regulatory taking is very specifically alleged to have occurred by virtue of a letter sent to the LEONES from then Maui County Planning Director Jeffrey Hunt[2] on **October 25, 2007**. Director Hunt's letter returned the LEONES' indisputably *incomplete* SMA Assessment Application unprocessed.[3] JEFS Dkt 256 and PDF pp. 562-568. The LEONES argue the COUNTY could not legally process the SMA Application *despite its being incomplete*, because the parcel is also included within an area designated as "park" by the 1998 Kihei-Makena Community Plan ("KMCP").[4] The LEONES' ultimately argued that because their proposed residential use of the lot is "inconsistent" with the KMCP park designation, it was not legal for

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[2] The Complaint was originally brought against former Planning Director Jeffrey Hunt, who after leaving office on or around May 30, 2010, was substituted nominally by Plaintiffs with his successor Planning Director William Spence.

[3] The State of Hawai'i enacted Chapter 205A of the Hawai'i Revised Statutes, pursuant to the Federal Coastal Zone Management Act, in order to protect coastal areas in the State. As defined by Haw. Rev. Stat. § 205A-22, LOT 15 lies within the County of Maui's Special Management Area. LOT 15 is governed by the Special Management Area Rules for the Maui Planning Commission. The Commission by statute is the governing authority over land use with the Special Management Area. JEFS Dkt 208 and PDF pp. 224-225.

[4] LOT 15 is one of eleven ocean front lots located at Palau'ea Beach. JEFS Dkt 256 and PDF p. 834; JEFS Dkt 264 and PDF p. 390. Nine (9) of the eleven ocean front lots at Palau'ea Beach, including LOT 15, are and have been at all relevant times designated "park" under the 1998 KMCP. JEFS Dkt 260 and PDF pp. 343-408. The nine (9) lots are and have been at all relevant times zoned HM, Hotel. JEFS Dkt 48 and PDF pp. 30-31 [Transcript 2015-04-06 p.m.]. Two of the lots are owned by the COUNTY, and remain available for public access and use.

Although it was excluded from trial, the COUNTY attempted to get in evidence that Palau'ea Beach was identified in the **1985** Kihei-Makena Community Plan for "park" use. JEFS Dkt 192 and PDF pp. 17-22 [*2015-04-29 p.m.*]

them to build a single-family residence on LOT 15.

The LEONES' Complaint alleges entitlement to "just compensation" pursuant Article 1, § 20 of the Hawaii Constitution (Count I) and the Fifth Amendment to the United States Constitution (Count II), violations of equal protection and due process pursuant to 42 U.S.C. § 1983 (Counts III and IV), and punitive damages (Count V). JEFS Dkt 208 and PDF pp. 221-239. The LEONES sought $50,000,000 in punitive damages. The punitive damages claim was dismissed by written order on January 29, 2015. JEFS Dkt 230 and PDF pp. 487-488.

The LEONES contended at trial that the COUNTY should pay them $12,500,000 for the purported loss of use and/or value of their ocean front property. The LEONES paid $3.75 million for LOT 15 when it was purchased in 2000. JEFS Dkt 144 and PDF pp. 80-81; JEFS Dkt 134 and PDF p. 82 [*Transcript 2015-04-06 a.m.*].

B. THE SUBJECT PARCEL

The parcel in question is identified as TMK No. 2-1-11-15 ("LOT 15"). LOT 15 abuts the shoreline of Palau'ea Beach, Makena, Maui, within an area of well known historic and archaeological significance, and was discovered to contain Hawai'ian cultural human remains sometime following the LEONES' purchase of the property. JEFS Dkt 256 and PDF pp. 574-625; JEFS Dkt 260 and PDF pp. 592-597; JEFS Dkt 188 and PDF pp. 34-37 [*Transcript 2015-04-23 p.m.*]. The fragility of Palau'ea Beach is well known and documented. JEFS Dkt 54 and PDF pp. 81-82. [*Transcript, 2015-04-15 a.m.*]. The LEONES' themselves put on evidence of a storm event in 2011, at which time, the high wash of the ocean waves inundated LOT 15, resulting in an alleged loss of buildable area on the parcel. JEFS Dkt 148 and PDF pp. 13-14.[5]

[5] Despite having made no committed effort since 2000 to develop and protect LOT 15 from this known potential coastal hazard, the LEONES argue the COUNTY Defendants are liable to them for the alleged loss of buildable area on LOT 15 by the storm. The COUNTY notes here that, to the extent the LEONES' assert under Lucas a loss of all economically beneficial use of LOT 15

C. THE LEONES' INDISPUTABLY INCOMPLETE SMA ASSESSMENT APPLICATION

The LEONES' SMA Assessment Application was submitted on or about **September 27, 2007**, seven (7) years after the LEONES purchased LOT 15, and three (3) years after DOUG LEONE abandoned and failed to complete the environmental assessment, review, and permitting required for development of the parcel. JEFS Dkt 266 and PDF pp. 345-398. As demonstrated in the COUNTY Cross-Appellants' Opening Cross-Appeal Brief, evidence excluded from trial would have demonstrated unequivocally that the LEONES' SMA application was indisputably incomplete. JEFS Dkt 134 and PDF pp. 9-10 [*Transcript 2015-04-06 a.m.*]; JEFS Dkt 256 and PDF p. 465; JEFS Dkt 256 and PDF p. 566. The SMA Assessment Application included a five (5) year old and expired shoreline certification, and failed to include a required monitoring plan, data recovery plan, and preservation plan for known Hawai'ian cultural human remains on LOT 15, not exclusively. JEFS Dkt 234 and PDF pp. 347-504 at 443-449, 455-456, 460-463.

As noted above, the LEONES filed their Complaint for inverse condemnation on **November 19, 2007**, within thirty (30) days after their SMA Assessment Application was returned on **October 25, 2007** unprocessed, in part for being incomplete. JEFS Dkt 208 and PDF pp. 221-239. As demonstrated at trial, and discussed further below, in addition to being incomplete, the LEONES' SMA Assessment Application was returned in largest part because the LEONES' real estate development lawyer sought and specifically requested from then Deputy Director of Planning Colleen Suyama a cover letter rejecting the application. JEFS Dkt 61 and PDF p. 33 [*Transcript 2015-04-27 a.m.*]; JEFS Dkt 256 and PDF p. 566; JEFS Dkt 178 and PDF pp. 24-25, 27 [*Transcript 2015-04-08 a.m.*]; JEFS Dkt 136 and PDF pp. 64-66, 78-80 [*Transcript 2015-04-07 a.m.*]. The letter was requested so that the LEONES' lawyer could stake

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as a result of regulation, the loss of buildable area to LOT 15 by coastal wave inundation would be absolutely irrelevant to their case.

out a legal position with the Maui Planning Commission. JEFS Dkt 136 and PDF pp. 65-69 [*2015-04-07 a.m.*].

Instead of going to the Planning Commission, the LEONES filed this lawsuit alleging *the letter* itself resulted in a "taking" of LOT 15.

D. LEONES' CONFLICTED VERSION OF A REGULATORY TAKING

The LEONES' specific allegations as to the act constituting a taking is pure legal argument, and ignores factual reality. The LEONES' Complaint at ¶ 26 alleges that Director Hunt's **October 25, 2007** letter "returned to Plaintiffs' consultant the SMA Assessment Application[.]" JEFS Dkt 208 and PDF pp. 227-228. The Complaint alleges at ¶ 28 - "The Rejection Letter is consistent with, and indeed is mandated by, [SMA Rule] § 12-202-12(f) of the Regulations." JEFS Dkt 208 and PDF p. 228. (Emphasis added).

At paragraph 29 the Complaint alleges:

> 29. Any available appeal or further administrative action in regards to the Rejection Letter would be futile as refusal to process Plaintiffs' SMA assessment application is mandated by the Regulations and by the Property's designation as "Park" on the KMCP. JEFS Dkt 208 and PDF p. 228. (Emphasis added).

The Complaint goes on to assert that Director Hunt had no choice but to decline assessing and processing the LEONES' SMA Assessment Application:

> 34. Since (i) the Property is designated "Park" on the KMCP, (ii) no SMA assessment application may be processed for any use inconsistent with that designation, and (iii) no SMA permit may be obtained for any use inconsistent with that designation, Plaintiffs are left with no economically viable use for the Property. (Emphasis added). JEFS Dkt 208 and PDF pp. 229-230. (Emphasis added).

The Complaint fails to note that Director Hunt's letter stated that the LEONES could submit "a new application with appropriate submittals[.]" JEFS Dkt 256 and PDF pp. 567-568.

Despite asserting that Director Hunt had no choice but to reject their SMA Assessment

Application under the Rules, the Complaint does recognizes that legally the LEONES could have sought to be "exempted" from the SMA permitting requirements imposed on "developments."

For example, the Complaint apparently acknowledges the LEONES could have sought to exempt their single-family residence from the permitting requirement imposed by the SMA Rules, specifically pleading that Director Jeff Hunt himself, and not a "mandate" under the SMA Rules, was the impediment to their proposed single-family residential development:

> 31. Even if Plaintiffs were allowed to process an SMA assessment application despite inconsistency with the KMCP, Defendant Hunt would not make an assessment that Plaintiffs were entitled to an exemption due to Defendants' policy that any proposed action on a beachfront parcel requires an SMA permit.

JEFS Dkt 208 and PDF p. 292.

More directly, the Complaint at ¶ 53 alleges that the LEONES were denied substantive due process rights because Director Hunt deprived the LEONES of:

> **[T]he right to proceed with a proposed action** (i.e. a single-family residence) **which is not a "development"**, by (i) **refusing to grant an exemption** through the SMA assessment application process; and (ii) arbitrarily applying a blanket policy requiring landowners of beachfront parcels to obtain an SMA permit whether or not their proposed action is a "development" and/or **whether such proposed action "may have a cumulative impact, or a significant environmental or ecological effect** on a special management area."

JEFS Dkt 208 and PDF p. 233. (Emphasis added).

Not in their Complaint, or by any evidence at trial, did the LEONES demonstrate "a policy" that deprived them of their "right" to an exemption from the SMA permitting requirements. Moreover, the LEONES did not make any meaningful effort at trial to prove to the jury that their SMA Assessment Application *should have* been reviewed for a determination of exempt status under the SMA Rules and assessment procedures.

E. PRETRIAL DISPOSITION OF CASE AND PROCEEDINGS PRE-REMAND

The LEONES' Complaint was originally dismissed on jurisdictional grounds by the

Honorable Joseph E. Cardoza. The *Order Granting Defendants' Motion to Dismiss Complaint Filed November 19, 2007 or in the Alternative, Motion for Summary Judgment or Partial Summary Judgment* ("Order Granting Defendants' Motion to Dismiss") was filed **March 2, 2009**. JEFS Dkt 208 and PDF pp. 2329-2346. The *Order Granting Defendants' Motion to Dismiss* stated as grounds:

> Here, there are effective remedies still available to Plaintiffs. First, Plaintiffs may still proceed with a new application via an appropriate submission. Plaintiffs are still free to seek amendment to the KMCP, an avenue of relief that Plaintiffs once contemplated. Such proposed amendment could be submitted concurrently with a new SMA Assessment Application, as contemplated under §12-202-12(f)(5). Under §12-202-12(b), Plaintiffs still ha[ve] the ability to waive assessment and apply for a special management area use permit pursuant to the provisions of §12-202-13 and §12-202-15. Since effective remedies remain available to Plaintiffs, the "futility" exception to the exhaustion doctrine under Hawai'i law has no application here.
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> V. ORDER
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> Plaintiffs have failed to exhaust their administrative remedies and do not qualify under the "futility" exception to the exhaustion doctrine. The instant case is not ripe for adjudication. Thus, this Court lacks jurisdiction over the subject matter.

JEFS Dkt 208 and PDF pp. 2344-2345.

As also relevant to this Appeal are two specific statements made by Judge Cardoza as a matter of record in the *Order Granting Defendants' Motion to Dismiss*. First, Judge Cardoza noted that "[n]one of the parties requested findings of fact and conclusions of law." JEFS Dkt 208 and PDF p. 2330. Judge Cardoza noted that both parties submitted proposed findings and conclusions, but it is apparent that none were expressly made in the *Order Granting Defendants' Motion to Dismiss*. JEFS Dkt 208 and PDF pp. 2330-2346.

Second, and perhaps more importantly, Judge Cardoza instead noted in the *Order Granting Defendants' Motion to Dismiss* that "[r]eview of a motion to dismiss for lack of subject

matter jurisdiction 'is based on the contents of the complaint, *the allegations of which we accepted as true and construe in the light most favorable to the plaintiff.*'" (citing to Norris v. Hawaii Airlines, Inc., 74 Haw. 235, 240, 842 P.2d 634, 637 (1992). JEFS Dkt 208 and PDF p. 2337. (Emphasis added).

On **March 9, 2009**, the LEONE Plaintiffs filed their Notice of Appeal, et. seq. from *Order Granting Defendants' Motion to Dismiss* and from the Final Judgment entered on March 2, 2009. JEFS Dkt 208 and PDF pp. 2389-2440.[6] In the 2009 appeal, Plaintiffs raised questions regarding 1) whether the LEONES were required to exhaust their administrative remedies for their takings claim to be ripe, 2) whether a "final" determination by the planning director on their SMA Assessment Application ripened their takings claim, 3) whether they were required to administratively appeal the planning director's determination on their SMA Assessment Application to the Planning Commission to ripen their takings claim, and/or 4) whether they were required to seek an amendment to the KMCP to ripen their takings claim. JEFS Dkt 208 and PDF p. 2415.

The Hawai'i Intermediate Court of Appeals vacated and remanded the case, holding the Maui County Planning Director's determination that the application could not be processed satisfied the finality requirement for ripeness, and that the LEONES were not required to seek an amendment to the KMCP to change the "park" designation before bringing their inverse

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[6] The LEONE appeal was consolidated with an appeal by Plaintiffs William and Nancy Larson from a similar September 29, 2009 order of dismissal and October 15, 2009 Final Judgment entered by Judge Shackley F. Raffetto in Civil No. 09-1-0413. The LEONES and Larsons were represented by the same law firm. Subsequent to remand, and pending litigation, the Larsons completed their required environmental assessments for each of two lots they owned, including preservation plans approved by the Burial Council for treatment of known and verified Hawai'ian cultural human remains on both Larson lots. After demonstrating mitigation of cumulative impacts and adverse effects to the environment, the Larsons were exempted from SMA permitting requirements, as provided by the SMA Rules. The Larsons then settled their claims with the COUNTY.

condemnation claims. Leone, et al. v. County of Maui, et al., 128 Hawai'i 183, 187, 284 P.3d 956, 960 (2012). Of particular concern to this Cross-Appeal is the Intermediate Court of Appeals' specific limitation to its ruling:

> The Circuit Court's sole determination was that Appellants' claims were not ripe and therefore, the Circuit Court lacked subject matter jurisdiction. Accordingly, on this appeal, *we will consider only that issue.*
>
> * * * * *
>
> The *only issue before us is whether Appellants' claims are ripe* for adjudication[.]"

Leone, et al. v. County of Maui, et al., 128 Hawai'i at 187, 284 P.3d at 960, and footnote 5. (Emphasis added). *See also* Blake v. County of Kaua'i Planning Commission, 131 Hawai'i 123, 315 P.3d 749 (2014) ("On appeal, the *only* issue the ICA considered was whether the claims were ripe for adjudication."). (Emphasis added).

F. DISPOSITION OF PROCEEDINGS POST-REMAND

On remand the LEONES' case involved voluminous discovery,[7] and proceeded to trial before a jury from **March 30, 2015** through **May 5, 2015**.

At the close of the LEONES' case-in-chief, the County moved for a directed verdict on Plaintiffs' 42 U.S.C. § 1983 claims. JEFS Dkt 58 and PDF pp. 7-10. The LEONES voluntarily dismissed their constitutional equal protection and due process claims. JEFS Dkt 58 and PDF pp. 8 [*Transcript 2015-04-21 p.m.*].

Trial continued on the LEONES' inverse condemnation claims under Counts I and II of the Complaint, including a questionably pled violation of 42 U.S.C. § 1983, predicated on the inverse condemnation claim(s). On **May 5, 2015**, after 23 days of trial, the jury returned a verdict adverse to the LEONES. JEFS Dkt 254 and PDF pp. 1187-1189 [*2015-05-05 p.m.*];

[7] The combined pretrial discovery included but was not limited to 10 set of interrogatories, 8 sets of document requests, 9 records subpoenas, and 33 oral depositions.

JEFS Dkt 160 and PDF pp. 55-56. The jury determined by Special Verdict that the COUNTY Defendants did not deprive the LEONES of economically beneficial use of their property, and did not act in violation of 42 U.S.C. § 1983. JEFS Dkt 254 and PDF pp. 1187-1189.

The LEONES filed their written Renewed Motion for Judgment Notwithstanding the Verdict on **June 10, 2015**. The Renewed Motion for Judgment Notwithstanding the Verdict essentially argued that the jury disregarded the Court's instructions, based on what was argued as the "law-of-the-case" under Leone decision. Additionally, the LEONES argued that the COUNTY'S attorney engaged in "misconduct," allegedly misleading the jury by referring to and relying on facts and evidence which the LEONES had themselves largely introduced to the jury on their case-in-chief. JEFS Dkt 266 and PDF pp. 654-1325. The County filed its Memorandum in Opposition to the Renewed Motion for Judgment Notwithstanding the Verdict on July 9, 2015. JEFS Dkt 226 and PDF pp. 384-870. The Renewed Motion for Judgment Notwithstanding the Verdict was also denied. JEFS Dkt 268 and PDF p. 1009.

Final Judgment was entered against the LEONES on **June 1, 2015**. JEFS Dkt 266 and PDF pp. 640-642. The Order Denying Plaintiffs' Renewed Motion for Judgment as a Matter or Law or, in the Alternative, Motion for New Trial Filed June 10, 2105, was entered on **August 5, 2015**. JEFS Dkt 268 and PDF pp. 1009-1010. The LEONES filed their Notice of Appeal on **August 25, 2015**. JEFS Dkt 268 and PDF pp. 1039-1048. The COUNTY Appellants' Cross-Appeal was filed on **September 8, 2015**. JEFS Dkt 268 and PDF pp. 1-84.

G. APPELLATE PROCEEDINGS

2016-02-10 - The LEONE Cross-Appellees' Motion to Dismiss the COUNTY Cross-Appellants' Cross-Appeal was filed. JEFS Dkt 325 and PDF pp. 1-26;

2016-02-11 - The COUNTY Cross-Appellants' Memorandum in Opposition to the Motion to Dismiss the COUNTY Cross-Appellants' Cross-Appeal was filed. JEFS Dkt 340 and PDF pp. 1-9;

2016-02-11 - The COUNTY Cross-Appellants' Amended Memorandum in Opposition to the Motion to Dismiss the COUNTY Cross-Appellants' Cross-Appeal was filed. JEFS Dkt 342 and PDF pp. 1-9;

2016-03-09 - The Intermediate Court of Appeals' *Order Denying Motion to Dismiss Cross-Appeal* was entered. JEFS Dkt 363 and PDF pp. 1-5;

2016-04-13 - The LEONE Appellants' Opening Brief was filed. JEFS Dkt 379 and PDF pp. 1-67;

2016-04-13 - The COUNTY Appellees' Opening Cross-Appeal Brief was filed. JEFS Dkt 409 and PDF pp. 1-58;

2016-05-23 - The COUNTY Appellees/Cross-Appellants' Application for Transfer to this Honorable Court was filed. JEFS Dkt 1 and PDF pp. 1-27;

2016-05-31 - The LEONE Appellants/Cross-Appellees' Memorandum in Opposition to the COUNTY Appellees/Cross-Appellants' Application for Transfer was filed. JEFS Dkt 7 and PDF pp. 1-30;

2016-06-02 - The COUNTY Appellees/Cross-Appellants' Request for Leave to File Original Declaration of Michele McLean in Support of the Application to Transfer was filed. JEFS Dkt 19 and PDF pp. 1-4;

2016-06-06 - The LEONE Appellants/Cross-Appellees' Memorandum in Opposition to the COUNTY Appellees/Cross-Appellants Request for Leave to File Original Declaration of Michele McLean was filed. JEFS Dkt 24 and PDF pp. 1-12;

2016-06-09 - This Honorable Court's Order Granting Appellees/Cross-Appellants' Request for Leave to File Original Declaration of Michele McLean in Support of the Application to Transfer was entered. JEFS Dkt 27 and PDF pp. 1-2;

2016-06-16 - The LEONE Appellants/Cross Appellees Further Memorandum in Opposition to the COUNTY Appellees/Cross-Appellants' Application for Transfer to this Honorable Court was filed JEFS Dkt 29 and PDF pp. 1-10; and

2016-06-29 - This Honorable Court's Order Granting Application for Transfer was entered. JEFS Dkt 31 and PDF pp. 1-2.

II. FACTS MATERIAL TO POINTS PRESENTED ON PLAINTIFFS/APPELLANTS' APPEAL

PROLOGUE: PLAINTIFFS' OPENING STATEMENT

Two areas of discussion during the LEONES' trial counsel's opening statement set the direction, tone, and stage of this trial for the jury, as well as opened the door for the COUNTY'S defenses at trial:

1) Counsel identified on a site map each of the remaining eight (8) privately owned lots at Palau'ea Beach surrounding the LEONES' parcel by the owners' names, including the five (5) located in the KMCP "park" designated area, and told the jury that every single one of those lots were already developed with a single-family residence. JEFS Dkt 170 and PDF pp. 10-11 [*Transcript 2015-03-31 p.m.*]; *see also*, JEFS Dkt 256 and PDF p. 834.

2) Counsel told the jury that beach park goers at Palau'ea were accessing the LEONES' lot "every day," also recreating, camping, and using the LEONES' lot as a "public toilet," that County was aware of this activity, and that the COUNTY Defendants' regulatory actions allowed this alleged activity to continue. JEFS Dkt 170 and PDF pp. 8 and 10 [*Transcript 2015-03-31 p.m.*].

From the outset, the jury was thus made aware by Plaintiffs/Appellants' attorney that the owners of at least five (5) other beach front lots at Palau'ea were able to accomplish what the LEONES purportedly could not, the permitting and construction of a single-family residence at Palau'ea Beach. DOUG LEONE later testified in response to a specific juror question as to why he was not able to build a single-family residence, arguing that his neighboring lot owners' single-family residences at Palau'ea Beach were all *illegally* permitted and constructed.

Also from the outset, the jury was thus advised that recreational activity at Palau'ea, to include beach access and camping were occurring at the LEONES' parcel. The LEONES' retained legal expert on cross-examination in response to a juror question, later admitted to the jury his original opinion was wrong, and he acknowledge that under the Maui County Code certain types of commercial recreational activities would be permitted within the KMCP designated "park" area at Palau'ea Beach and on LOT 15.

Finally, from the outset the LEONES' trial attorney thus made it clear that the LEONES at trial would be questioning the character of COUNTY'S regulatory actions as related to Palau'ea Beach, and LOT 15 in particular. Even in their Opening Appellate Brief the LEONES argue to this Honorable Court that the COUNTY was aware of public obscenities occurring at Palau'ea Beach, and that its regulatory decisions were motivated to allow this to continue.[8]

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[8] In their Opening Brief Plaintiffs/Appellants state "[a]s the County knows, the public has been illegally camping, littering urinating, defecating and parking on the Property." JEFS Dkt 379 and PDF p. 29. Notably, the *only* evidence of the obscenities alleged are a hearsay statement of observations purportedly made by an archaeologist on **July 23, 1999**. JEFS Dkt 260 and PDF pp. 414-415. The purported observations are documented in a letter, dated August 23, 1999, which was not even written by the observing archaeologist. Id. The letter also predates Plaintiffs' purchase of LOT 15 by more than 6 months. In light of this, it is disturbing to the COUNTY that Plaintiffs would argue these alleged obscenities as *a factual* finding, among others, made by the Intermediate Court of Appeals as supportive of a regulatory taking claim. *See*, Leone, et al. v. County of Maui, et al., 128 Hawai'i 183, 188, 284 P.3d 956, 961 (2012). Moreover, Plaintiffs objected to the introduction of the archaeologist's letter into evidence. JEFS Dkt 134 and PDF pp. 56-59 [*Transcript 2015-04-06 a.m.*] Therefore, no factual basis

The COUNTY'S counsel was surprised at the proffers made in the LEONES' opening statement. The trial judge even commented at the bench:

> THE COURT: Well, we're not going there yet because ***I was a little stunned at your opening as well as to what you're going to be proving***, but be that as it may – JEFS Dkt 170 and PDF p. 26 [*Transcript 2015-03-31 p.m.*]. (Emphasis added).

In the end, it was this questionable strategy to hedge on their Lucas claim by additionally putting on a Penn Central case which largely undid Plaintiffs' case at trial. As reflected in the factual record on appeal, Plaintiffs' trial counsel introduced volumes of evidence, and argued factual circumstances for a case which went beyond an alleged taking under Lucas.

A. UNCONTESTED EVIDENTIARY RECORD AT TRIAL

In or around **February 2000,** DOUG LEONE and PATRICIA PERKINS-LEONE (the "LEONES") purchased for $3.75 million an oceanfront parcel at Palau'ea Beach, Makena, Maui, Hawai'i, identified as TMK (2) 2-1-11-15 ("LOT 15"). JEFS Dkt 134 and PDF p. 82 [*Transcript 2015-04-06 a.m.*]. The Standard Oceanfront Property Addendum included with the Seller's Disclosures specifically identified LOT 15 as located within a "Special Management Area," as regulated under Hawai'i's Coastal Zone Management Act [Haw. Rev. Stat. Chapter 205A], and designated as "Park" under the Kihei-Makena Community Plan ("KMCP"). JEFS Dkt 264 and PDF p. 390.

As part of his due diligence, the LEONES' real estate lawyer Tom Welch also advised the LEONES that the LOT 15 was designated "park" prior to their purchase. JEFS Dkt 48 and PDF pp. 67-69 [*2015-04-06 p.m.*]. The LEONES were also advised by way of the Standard Oceanfront Property Addendum that "[t]he location of the shoreline boundary of the Property [ ] may be subject to change because of the action of the waves in adding to or taking away land

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whatsoever existed for Plaintiffs' attorney to make these inflammatory statements at trial, or to this Honorable Court in Plaintiffs/Appellants' Opening Brief.

along the shoreline . . . For example, the shoreline boundary may advance inland, due to erosion, and the square footage of the Property may decrease accordingly." JEFS Dkt 264 and PDF p. 390.

The LEONES did not immediately proceed to develop or seek permits for LOT 15. Rather, they repeatedly listed LOT 15 for sale.[9] The record obtained in discovery, and prepared in anticipation of trial identified and verified the existence of significant pre-contact archaeological sites, and Hawai'ian cultural burials across the lots fronting Palau'ea Beach.[10] JEFS Dkt 54 and PDF pp. 83-84 [*Transcript 2015-4-15 a.m.*]. The LEONES' trial attorneys also introduced into evidence, and placed in issue the existence of several cultural burial sites within the area of adjacent lots at Palau'ea Beach. JEFS Dkt 180 and PDF pp. 28-29, 34-37 [*Transcript 2015-04-10 a.m.*]; JEFS Dkt 256 and PDF pp. 574-625. This included the LEONES' parcel. JEFS Dkt 180 and PDF p. 37 [*Transcript 2015-04-10 a.m.*].

The LEONES' real estate attorney Mr. Welch wrote a letter on **July 10, 2003** to then Planning Director Mike Foley, noting that in preparation for negotiating within the exemption

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[9] The LEONES listed LOT 15 for sale within four (4) months after purchasing it, marking it up $1,050,000. JEFS Dkt 260 and PDF pp. 479-486. The listing was also testified to by the LEONES' realtor Robert Merriman. JEFS Dkt 56 and PDF pp. 46-48, 56-59 [*Transcript 2015-04-17 a.m.*]. The LEONES again re-listed the undeveloped property, marking it up another $3,500,000 to $7,000,000, and then reduced the listing $5,950,000 two (2) years after their purchase. JEFS Dkt 260 and PDF pp. 487-496. The LEONES received two sequential offers to purchase the lot, for $4.5 million and $4.6 million. JEFS Dkt 260 and PDF pp. 497-512; JEFS Dkt 260 and PDF pp. 513-531.

[10] Notably, Palau'ea Beach fronted a 20-acre cultural preserve, containing the archaeological remains of an ancient Hawai'ian fishing village. The archaeological preserve was described in testimony of former Maui County Council member Dain Kane, with the support of a County Resolution 99.183, introduced into evidence by Plaintiffs. JEFS Dkt 52 and PDF pp. 59-65 [Transcript *2015-04-09 a.m.*]; JEFS Dkt 256 and PDF pp. 262-267. Mr. Kane was also assisted in his presentation by aerial images introduced into evidence by Plaintiffs. JEFS Dkt 142 and PDF pp. 4-8 [*Transcript 2015-04-09 p.m. 4-8*]; JEFS Dkt 258 and PDF pp. 255, 420, 287, and 421. Evidence at trial also reflected the Palau'ea Beach lots and the cultural preserve were once connected as part of an ahupua'a land division. JEFS Dkt 180 and PDF pp. 30-31. [*Transcript 2015-04-10 a.m.*]

guidelines of the SMA Rules, archaeological work was underway at LOT 15 in consultation with the Burial Council. JEFS Dkt 48 and PDF pp. 73-76 [*Transcript 2015-04-06 p.m.*]. Former Planning Director John Min testified to the State Historic Preservation Division's and Burial Council's involvement in reviewing archaeological studies and verifying the adequacy of preservation plans for historical and cultural finds. JEFS Dkt 54 and PDF pp. 85-86 [*2015-04-10 a.m.*].

Having held and listed LOT 15 for four (4) years without proceeding with any development plans, the LEONES eventually hired the land use planning firm of Munekiyo & Hiraga, Inc. ("Munekiyo"). JEFS Dkt 256 and PDF pp. 392-407. Munekiyo was retained to prepare an environmental assessment of LOT 15 in preparation for obtaining required approvals and development permits. JEFS Dkt 256 and PDF pp. 52-56; JEFS Dkt 60 and PDF pp. 52-56 [*Transcript 2015-04-22 a.m.*]. In connection with moving forward to develop LOT 15 at that time, the LEONES' real estate attorney Tom Welch had a discussion with then Planning Director Michael Foley about seeking an amendment to the KMCP, and pursuing an SMA development permit to build a single-family residence on LOT 15. JEFS Dkt 60 and PDF pp. 52-56. [*Id.*]

Michael Munekiyo testified at trial that he had successfully obtained around two dozen community plan amendments for other clients prior to being hired by DOUG LEONE to do so for LOT 15. JEFS Dkt 52 and PDF pp. 48-49. [*Transcript 2015-04-22 a.m.*].

Evidence at trial also demonstrated that several owners of ocean front lots at Palau'ea Beach, which also fell within the KMCP "park" designation, had already constructed single-family residences on their Palau'ea Beach lots. The *LEONES' counsel* had in fact identified these residences to the jury in his opening argument. JEFS Dkt 170 and PDF pp. 10-11. [*Transcript 2015-03-31 p.m.*]. The evidence at trial included testimony and letters from then

Planning Director John Min, demonstrating these several owners at Palau'ea Beach completed and submitted environmental assessments to the Department of Planning with their SMA Assessment Applications. JEFS Dkt 140 and PDF pp. 56-57, 87-91 [*Transcript 2015-04-08 p.m.*]; JEFS Dkt 256 and PDF pp. 777-778; JEFS Dkt 54 and PDF pp. 58-60, 70-75, 80-81 [*Transcript 2015-04-15 a.m.*]; JEFS Dkt and PDF pp. 719-721, 779-78]. Plaintiffs did not object to any of this evidence, and in fact marked and introduced into evidence a fair portion of it themselves.

This same evidence at trial showed that then Planning Director John Min approved several single-family residences within the SMA at Palau'ea Beach as exempt from permitting requirements under SMA Rules, based on those completed environmental assessments. JEFS Dkt 140 and PDF pp. 56-57, 87-91 [*Transcript 2015-04-08 p.m.*]; JEFS Dkt 256 and PDF 777-778; JEFS Dkt 54 and PDF pp. 58-60, 70-75, 80-81 [*Transcript 2015-04-15 a.m.*]; JEFS Dkt and PDF pp. 719-721, 779-78]. Director Min even testified that if appropriate mitigating measures were demonstrated, and required agency approvals obtained by the landowner, an exemption from the SMA permitting requirements would be granted to an owner, even whose parcel contained significant historical sites. JEFS Dkt 54 and PDF pp. 85-86 [*Transcript 2015-04-15 a.m.*].

Mr. Munekiyo anticipated a start date of **April 15, 2004**, and completion of the community plan amendment for the LEONES by **October 2005**. JEFS Dkt 60 and PDF p. 56 [*Transcript 2015-04-22 a.m.*]. Munekiyo sent out a form early consultation letter and draft environmental assessment as part of the environmental assessment process, seeking comments from various state and county governmental agencies to the LEONES' proposed development of

LOT 15 as a single-family residence. JEFS Dkt 60 and PDF pp. 56-58; JEFS Dkt 256 and PDF pp. 416-464 [*Transcript 2015-04-22 a.m.*].

Mr. Munekiyo received comments to the draft environmental assessment, including a letter from then Maui County Planning Director Michael Foley dated **May 20, 2004**. JEFS Dkt 264 and PDF pp. 757-758; JEFS Dkt 260 and PDF pp. 603-605; JEFS Dkt 60 and PDF pp. 64-66. Among other comments, Director Foley sought to condition development of LOT 15 on the LEONES agreeing to maintain a public view corridor and public access to Palau'ea Beach. JEFS Dkt 260 and PDF pp. 603-605. Evidence at trial also demonstrated the existence of traditional Hawaiian access through LOT 15. JEFS Dkt 152 and PDF pp. 14, 23-43 [*Transcript 2015-04-23*]; JEFS Dkt 258 and PDF pp. 414-418; JEFS Dkt 264 and PDF pp. 356, 357, 359, 363, 364, 365, 367, 368.

On or around **June 3, 2004**, within 2 weeks after Foley's comments were received, DOUG LEONE directed Munekiyo to stop all work and to close Munekiyo's file. JEFS Dkt 256 and PDF p. 465; JEFS Dkt 60 and PDF pp. 68-71 [*Transcript 2015-04-22 a.m. at pp. 68-71*]. Mr. Munekiyo advised his staff that:

> I received a call from Doug Leone this morning. He asked that we stop work and close the project. He felt that the political climate is much too difficult now to be seeking any land use entitlements for the property. He was not willing to accommodate a 40% road frontage view corridor and felt that it would be better for him to just hold on to the property for now.
>
> Lori, please print out for our files, this email as notice of project closure. We will send to him a final billing for work performed up to June 1.

JEFS Dkt 256 and PDF p. 465.

Mr. Munekiyo could not recall performing or being asked to perform any work on the LEONES' behalf during the three (3) year period after he was ordered to close his file on **June 3, 2004**. JEFS Dkt 60 and PDF pp. 80-82 [*Transcript 2015-04-22 a.m. at pp. 80-82*]. The

Munekiyo firm advised the Department of Planning the LEONES would not be proceeding with the environmental assessment. JEFS Dkt 264 and PDF pp. 759-760.

i. THE PLANNING DIRECTOR'S PURPORTED POLICY

In their Opening Appellate Brief at p. 10, the LEONE Appellants assert that Director Michael Foley inappropriately implemented a "policy," whereby he rescinded SMA exemptions granted by former Director John Min for lots 13 and 14 (Lambert & Sweeney). JEFS Dkt 379 and PDF pp. 1-67. Plaintiffs argue the "policy" continued after a settlement was reached, whereby the owners of lots 13 and 14 were permitted to build on their lots, apparently *despite the purported policy Plaintiffs erroneously assert Foley put in place*. Id. Plaintiffs argue this "policy" remained in place after the settlement, because Director Foley denied the owner of lot 20 (Schatz) an SMA exemption for a single family home. Id.

In reality, the evidence at trial indicated that Director Foley rescinded the SMA exemptions for lots 13 and 14 in part because of his concern for preservation of public views along Makena Alanui Road, **and** because of a failure to address known cultural deposits on one of the lots within the Special Management Area. JEFS Dkt 270 and PDF pp. 885-887, 892-894. As it turned out, Director Foley's concerns were well founded because, *after* lots 13 and 14 were developed, Hawai'ian cultural human remains were discovered on certain of the developed Palau'ea lots, contrary to the representations made in archaeological surveys and inventories submitted to Director Min. JEFS Dkt 256 and PDF pp. 574-625; JEFS Dkt 260 and PDF pp. 592-597; JEFS Dkt 188 and PDF pp. 34-37 [*Transcript 2015-04-23 p.m.*].[11]

[11] The 2008 Planning Commission Meeting Minutes, introduced into evidence *by Plaintiffs' counsel*, reflected that "***There's already been four or five burial discovered, two by accident when they were planting trees on a developed lot***." JEFS Dkt 256 and PDF p. 587. (Emphasis added).

Plaintiffs did not otherwise offer any conclusive evidence that any act, omission, or statement made by Foley thwarted the Schatz's or their own development interests. The testimony of the LEONES' real estate lawyer about a purported "don't open the envelope" rule, said to be the "policy" initiated by Foley, amounted to little more than a vagarity. Rather, the evidence demonstrated that Foley was waiting, but never heard from Michael Munekiyo about how they wanted to proceed with the Schatz's SMA Assessment Application. JEFS 256 and PDF 775-776]; JEFS 60 Dkt and PDF pp. 83-86 [*Transcript 2015-04-22 a.m.*]. Moreover, Munekiyo did not recall getting any objection from Director Foley to the LEONES' proposal to develop a single-family residence on LOT 15 by way of a community amendment. JEFS 60 and PDF pp. 64-66 [*Transcript 2015-04-22 a.m.*].

The LEONES' real estate lawyer admitted that the purported "policy" was not written down anywhere. JEFS Dkt 136 and PDF p. 50 [*Transcript 2015-04-07 a.m.* Moreover, Director Jeff Hunt, the Planning Department Director who received the LEONES' SMA Assessment Application, testified as to never having heard of such a policy or rule. JEFS Dkt 154 and PDF pp. 32-33 [*Transcript 2015-04-27 p.m.*] Notably, Director Hunt worked under Director Foley in 2005 before becoming planning director in 2007. Id. Moreover, current Planning Department Director William Spence, who was with the Planning Department for 22 years and became Director in 2011, also testified to never having heard of such a policy. JEFS Dkt 158 and PDF pp. 109-110 [*Transcript 2015-04-30 a.m.*].

Finally, neither the LEONES' real estate lawyer, or their planner Munekiyo contacted Director Hunt before submitting the LEONES' SMA Assessment Application to find out what his position would be on processing the application. JEFS Dkt 178 and PDF p. 28. [*Transcript 2015-04-08 a.m.*]; JEFS Dkt 138 and PDF pp. 22-23 [*Transcript 2015-04-07 p.m.1*]. Rather, as

noted above, the LEONES' real estate lawyer requested in advance that the indisputably incomplete application be returned with the cover letter from Director Hunt stating it could not be processed. While the LEONES' lawyer sent e-Mails to Director Hunt's Deputy Director Colleen Suyama to make this request, Ms. Suyama could not remember much, if anything at all, about the discussion when she testified at trial. JEFS Dkt 150 and PDF pp. 21-25 [*Transcript 2015-04-15 p.m.*].

Perhaps more importantly, Plaintiffs' counsel did not bother to even question Ms. Suyama about a purported "policy" while she was on the witness stand at trial. On pages 13-14 of their Opening Brief, rather, Appellants quote a hearsay statement from Ms. Suyama about a purported policy precluding processing SMA applications for exemptions unless inconsistencies between *zoning regulations* and the community plan are first resolved.[12] JEFS Dkt 379 and PDF pp. 25-26. Notwithstanding, Plaintiffs/Appellants' trial attorney asked Ms. Suyama only one question while she was on the stand, which was intended to establish that she had no memory of events:

> BY MR. COLOMBE:
> Q. Ms. Suyama, ***just one clarification question***. When you say you don't recall any submission by the Leones of an application, you're saying that you don't recall one way or the other; you're not saying that they didn't?
> MR. BILBERRY: Well, your Honor, counsel is leading.
> THE COURT: Well, it's cross-examination. He's entitled to [-] overruled.
> THE WITNESS: I don't recall anything about that application, no.
> MR. COLOMBE: Okay. ***No further questions***, your Honor.

JEFS Dkt 150 and PDF pp. 25-26 [*Transcript 2015-04-15 p.m.*]. (Emphasis added).

[12] In this case, Plaintiffs assert that inconsistency between a proposed *land use* under the SMA Rules and the community plan "park" designation by the KMCP legally precluded the processing of their application, not an inconsistency between the parcel zoning and KMCP designation. Nevertheless, Plaintiffs did not ask Ms. Suyama at trial about any purported policy as to either type of alleged inconsistency, or even the meaning of her hearsay statement.

ii. THE PALAU'EA BEACH LOT OWNERS COLLECTIVELY PROPOSED COMMUNITY PLAN CHANGE

With Munekiyo acting on their behalf, the LEONES and several other land owners at Palau'ea Beach collectively sought to eliminate the park designation for all privately owned ocean front lots at Palau'ea Beach. JEFS Dkt 50 and PDF pp. 9-11 [*Transcript 2015-04-07 p.m.2*]. Contrary to what Appellants suggest on page 11 of their Opening Appellate Brief, the proposed collective KMPC plan change was not the COUNTY's proposed amendment. It was proposed by the LEONES' lawyer, *not* the Planning Director. JEFS Dkt 256 and PDF pp. 466-484. Moreover, while there are two parcels at Palau'ea Beach belonging to the County of Maui, Munekiyo's partner, planner Gwen Hiraga, testified the COUNTY'S lot were not subject to the proposed community plan change. *Id.* at p. 10. [JEFS Dkt 50 and PDF p. 10 [*Transcript 2015-04-07 p.m.2*]. Ms. Hiraga also made it crystal clear that Munekiyo and Hiraga's work was on behalf of the private lot owners at Palau'ea Beach, not the County of Maui.[13] Id. at p. 19. JEFS Dkt 50 and PDF p. 19 [*Transcript 2015-04-07 p.m.2*].

The LEONES' attorneys drew much attention at trial about the relevance of the Planning Commission's failure to accept on its face Munekiyo's environmental assessment in support of the community plan change. JEFS Dkt 142 and PDF pp. 40-43 [*Transcript 2015-04-07 p.m.*]. The LEONES' attorney in fact argued to the jury that but for the Planning Commission's refusal to accept the collective environmental assessment, the LEONES would have obtained a community plan amendment and developed a single-family residence on their property. JEFS Dkt 198 and PDF pp. 26-27 [Transcript 2015-05-05 a.m.].

[13] Two of the owners contributing to Munekiyo & Hiraga's effort to change the KMCP had years prior already completed construction of exempted single-family residences on their parcels. JEFS Dkt 154 and PDF pp. 15-18 [*Transcript 2015-04-27 p.m.*].

Contrary to the LEONES' attorneys' argument, the Planning Commission did not reject the proposal. Rather, the Commission requested additional information from the land owners' consultants, including assessments of known archaeological sites and four (4) cultural burials at Palau'ea Beach, before it would accept the environmental assessment. JEFS Dkt 256 and PDF pp. 586-625; JEFS Dkt 260 and PDF pp. 592-594; *and* JEFS Dkt 260 and PDF pp. 595-597. In the end, Ms. Hiraga indicated that the Planning Commission was never provided with the additional information it requested, because her firm was told to stop work. JEFS Dkt 50 and PDF pp. 24-31 [*Transcript 2015-04-07 p.m. 2*].

iii. SUBMISSION OF THE LEONES' INDISPUTABLY INCOMPLETE SMA ASSESSMENT APPLICATION

On **September 6, 2007**, three (3) years after DOUG LEONE ordered Mr. Munekiyo to stop all work to further the development of LOT 15, and seven (7) years after the LEONES had purchased LOT 15, the LEONES' real estate lawyer directed Munekiyo to submit the SMA Assessment Application prepared three (3) years earlier in 2004 to the Department of Planning. JEFS Dkt 61 and PDF p. 33 [*Transcript 2015-04-27 a.m.*]; JEFS Dkt 256 and PDF p. 566. Mr. Munekiyo testified he was not asked to complete, or even move forward the environmental assessment DOUG LEONE abandoned three (3) years earlier. JEFS Dkt 61 and PDF p. 46 [*2015-04-27 a.m.*]. The SMA Assessment Application was submitted to the Department of Planning on **September 27, 2007**. JEFS Dkt 256 and PDF p. 566.

Mr. Munekiyo acknowledged that he and the LEONES' real estate lawyer knew the SMA Assessment Application would be returned and not processed. JEFS Dkt 178 and PDF pp. 24-25, 27 [*Transcript 2015-04-08 a.m.*]. Both the LEONES' real estate lawyer and Mr. Munekiyo acknowledged the intention of having the application returned, so the LEONES' real estate lawyer could seek further administrative review with the Planning Commission, in support of the

application for the collective community plan amendment. Id., JEFS Dkt 136 and PDF pp. 64-66, 78-80 [*Transcript 2015-04-07 a.m.*]. The LEONES' real estate lawyer specifically stated that he needed the letter so that he could go to the Planning Commission for a community plan change. JEFS Dkt 136 and PDF pp. 65-69. [*2015-04-07 a.m.*].

Munekiyo received the **October 25, 2007** letter from Planning Department Director Jeff Hunt, which returned the LEONES' SMA Assessment Application. JEFS Dkt 256 and PDF pp. 567-568. In addition to advising the LEONES that their proposed single-family dwelling was not consistent with the KMCP park designation, the text of the letter from Director Hunt advised "[i]f you wish to proceed in the future, a new application with appropriate submittals will be required." JEFS Dkt 256 and PDF p. 568.

After receiving the letter declining to process their SMA Assessment Application, the LEONES did not appeal to the Planning Commission. Rather, they filed this lawsuit less than a month later on **November 19, 2007**. JEFS Dkt 208 and PDF pp. 221-239.

iv. THE LEONES FAILED AND/OR REFUSED TO DEMONSTRATE COMPLIANCE WITH THE SMA ASSESSMENT EXEMPTION APPLICATION REQUIREMENTS

Significantly, it was the LEONES' trial attorney who made the jury aware in his opening statement of five (5) other landowners who had built single-family residential homes at Palau'ea Beach. JEFS Dkt 170 and PDF pp. 9-10 [*Transcript 2015-03-31 p.m.*]; JEFS Dkt 256 and PDF p. 834. Also significant, the LEONES' trial attorney specifically identified one of those homeowners for jury as Warmehoven, "a business associate" of DOUG LEONE. Id. The LEONES' trial attorney also told the jury in his opening statement that the LEONES' neighbors' Bill Larson and Nancy Larson, got approval and were building a home on their lot directly adjacent to the LEONES' parcel. Id. Significantly, the LEONES' trial attorneys repeatedly voiced "no objection," to the introduction of numerous photographs of the Warmenhoven and

Sweeney homes at Palau'ea Beach into evidence and their publication to the jury. JEFS Dkt 264 and PDF pp. 377-382; JEFS Dkt 140 and PDF pp. 80-85 [*Transcript 2015-04-08 p.m.*].

Significantly, it was the LEONES' own trial attorney who first introduced evidence of an approved SMA Assessment Application, reflecting a completed archaeological assessment on the Warmenhoven property Palau'ea Beach. JEFS Dkt 256 and PDF pp. 719-721; JEFS Dkt 54 and PDF pp. 59-60 [*Transcript 2015-04-15 a.m.*]. The LEONES' trial attorney voiced "no objection" to additional evidence of approved SMA Assessment Applications and completed archaeological assessments on other "park" designated lots at Palau'ea being introduced into evidence. JEFS Dkt 256 and PDF pp. 777-780], JEFS Dkt 54 and PDF pp. 67-68, 70-75, 80-82 [*Transcript 2015-04-15 a.m.*]. Yet, the LEONES failed and/or refused to introduce any evidence of a completed archaeological survey or assessment for their own parcel. More remarkably, the LEONES' attorneys objected in front of the jury when the COUNTY's attorney tried to introduce the LEONES' own SMA Assessment Application into evidence. JEFS Dkt 61 and PDF pp. 40, 70-75, 80-82 [*Transcript 2015-04-27 a.m.*].

B. THE LEONES INTRODUCED COPIOUS EVIDENCE AT TRIAL TO ARGUE AND DISPUTE **1)** THE CHARACTER OF COUNTY'S REGULATORY ACTIONS, **2)** THEIR OWN DISTINCT INVESTMENT-BACKED EXPECTATIONS, *AND* **3)** THE PURPORTED ECONOMIC IMPACT OF THE KMCP ON LOT 15

At trial the LEONES' vigorously presented to the jury evidence and argument on the character of the COUNTY'S regulatory actions, their own conflicted distinct investment-backed expectations, *and* an alleged economic impact of the KMCP "park" designation on LOT 15. *See* Penn Central, 438 U.S. at 124 ("[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. . . . [s]o, too, is the character of the government action.").

i. PLAINTIFFS ARGUE THE BAD CHARACTER OF THE COUNTY'S ACTIONS

The LEONES argued to the jury, and continue to assert on this appeal, that the COUNTY'S efforts to establish a public beach park at Palau'ea was unwarranted. *See* Appellants Opening Brief at pp. 4-5. JEFS Dkt 379 and PDF pp. 416-17; JEFS Dkt 256 and PDF pp. 262-267; JEFS Dkt 52 and PDF 34-54 [*Transcript 2015-04-09 a.m.*]. Plaintiffs argued at trial, and continue to argue as relevant to this appeal, the COUNTY'S inability to purchase all of the beach lots at Palau'ea. JEFS Dkt 52 and PDF 34-54 [*Transcript 2015-04-09 a.m.*]; JEFS Dkt 379 and PDF pp. 16-17, 18-19. The apparent suggestion is the COUNTY had no legitimate interest in the park designation of the lots since it could purchase them. JEFS Dkt 198 and PDF 34-35 [*Transcript 2015-05-05 a.m.]*.

Plaintiffs took testimony of two Planning Commissioners and from this erroneously imputed to the entire Commission a purported malicious intent to deprive the LEONES of the use of their lot. JEFS Dkt 152 and PDF pp. 68-75 [*Transcript 2015-04-23 a.m.*]; JEFS Dkt 142 and PDF pp. 25-34, 38-43 [*Transcript 2015-04-09 p.m.*]. Plaintiffs even absurdly blame the COMMISSION as inciting and/or advocating public occupation and obscenity on LOT 15. As noted above, Plaintiffs erroneously argued the Planning Commission's deferral of approvals for an environmental assessment in support of the collective Palau'ea beach lot owners' request for a change in the community plan was intentional and bad faith delay.

Plaintiffs/Appellants continue to misleadingly argue that the COUNTY disregarded legal advice from its attorneys, purportedly admonishing the taking of lots at Palau'ea Beach. JEFS Dkt 379 and PDF p. 17. In context, the evidence demonstrates that former Corporation Counsel James "Jimmy" Takayesu rejected Plaintiffs' trial attorneys' interpretation of the SMA Rules as precluding the processing of exempted uses under the SMA. JEFS Dkt 52 and PDF pp. 24-29,

31-32 [*Transcript 2015-04-09 a.m.*]; and JEFS Dkt 256 and PDF pp. 245-254. Mr. Takayesu made it clear that community plan designations are not interpreted by the COUNTY to have the force and effect of law. JEFS Dkt 52 and PDF p. 24-29 [*Transcript 2015-04-09 a.m.*]. Specifically, Mr. Takayesu confirmed at trial that community plan designations *are not* and *have not* been interpreted by the COUNTY as zoning regulations, precisely to avoid the types of assertions and arguments the LEONES are making in this case. Id.

ii. THE LEONES' CONFLICTED INVESTMENT-BACKED EXPECTATIONS

Both Plaintiffs PATRICIA LEONE and DOUG LEONE testified when they purchased LOT 15 their intention was to build a single-family residence house on the parcel. JEFS Dkt 134 and PDF pp.10, 20 [*Transcript 2015-04-06 a.m.]*; JEFS Dkt 186 and PDF pp. 59, 84 [*Transcript 2015-04-21 a.m.*]. DOUG LEONE went so far as to say that he had no reason to believe that he would not be able to build a single-family home on LOT 15. JEFS Dkt 186 and PDF pp. 62-63 [*Transcript 2015-04-21 a.m.*]. Yet, DOUG LEONE also testified that he believed it was "*illegal*" for him to build a single-family residence on LOT 15, for the very reason disclosed in the Standard Ocean Front Addendum when the LEONES purchased the property, i.e., - that LOT 15 was designated "park" in the community plan. JEFS Dkt 186 and PDF p. 100 [2015-04-21 a.m.]. Moreover, in response to a juror question, DOUG LEONE testified that all of his neighbors' completed single-family residences at Palau'ea Beach in the "park" designation were *illegal*. JEFS Dkt 186 and PDF pp. 102-103 [2015-04-21 a.m.].

iii. THE LEONES OFFERED COPIOUS EXPERT TESTIMONY AS TO AN ALLEGED ECONOMIC IMPACT ON THE VALUE ON LOT 15

The LEONES offered experts to opine on a purported *diminution in value* LOT 15 suffered. As to the value of LOT 15, Tsujimura offered his opinion testimony, unsupported by any appraisal or study that the LEONES' ocean front parcel had "zero" value. JEFS Dkt 140 and

PDF pp. 16; 21-22 [*Transcript 2015-04-08 p.m.*]. Whitney could not say the land had absolutely no value, but that it would be speculative for anyone to put a value on the parcel. JEFS Dkt 361 and PDF p. 34 [*Transcript 2015-04-16 p.m.*]. Neither Tsujimura or Whitney' s value opinions were supported by appraisal, valuation, estimate, or even guess work. The LEONES failed to introduce any concrete or conclusive evidence of any diminution in value to their lot subsequent to October 27, 2007,[14] the date of the alleged taking when they received Director Hunt's letter.

To the contrary, the evidence of two offers to purchase the LEONES' parcel, and the valuation of LOT 15 immediately prior to the alleged taking by the LEONES' appraiser Chris Ponsar, otherwise demonstrated a steady increase in the value of LOT 15 subsequent to the LEONES' February 2000 purchase. JEFS Dkt 260 and PDF pp. 497-531; JEFS Dkt 180 and PDF p. 61 [Transcript *2015-04-10 a.m.*].

C. PLAINTIFFS' EVIDENCE ON PURPORTED LOSS OF ALL OF ECONOMICALLY BENEFICIAL USE OF LOT 15

The LEONES relied at trial only on the unsupported and conflicted opinions of experts to make their case for loss of all economically beneficial use of LOT 15. The LEONES' experts attempted to persuade the jury that there was no legally permissible use for LOT 15 under the KMCP, and that it was not otherwise financially feasible to operate any sort of recreational commercial activity on the parcel.

[14] On page 18, footnote 18 of their Opening Brief, Plaintiffs argue the COUNTY'S lower tax assessed values for LOT 15 subsequent to Hunt's October 25, 2007 letter evidences diminution in value. JEFS Dkt 379 and PDF p. 30. At trial, the COUNTY'S real property assessor testify that she relied on representations made by the LEONES' real estate attorney that LOT 15 could not be permitted for development when the COUNTY'S reduced tax assessments were negotiated. JEFS Dkt 54 and PDF pp. 27-29 [*Transcript 2015-04-15 a.m.*]. The same assessor noted that after she learned the statements to be incorrect, the assessed values returned to a market based approach. JEFS Dkt 54 and PDF pp. 31-32 [*Transcript 2015-04-15 a.m.*].

i. LEGALLY PERMISSIBLE USE

The LEONES' legal expert R. Bryan Tsujimura admitted on cross-examination that his original opinion, - that no private commercial use of Lot 15 would be legally permissible, - was erroneous. JEFS Dkt 140 and PDF pp. 41-44 [*Transcript 2015-04-08 p.m.*]. Tsujimura readily corrected his opinion and admitted that under the Maui County Code certain recreational commercial uses would be allowed as permitted and supervised by the County. Id. The LEONES' purported real estate economist William Whitney acknowledged that he is otherwise not a lawyer who would read zoning codes for "legal reasons." JEFS Dkt 144 and PDF p. 31 [*Transcript 2015-04-15 p.m.*].

Notably, the LEONES never requested their land use planning consultant Michael Munekiyo look into alternative uses for their ocean front parcel. JEFS Dkt 61 and PDF pp. 50-51 [*Transcript 2015-04-20 a.m.*]; JEFS Dkt 154 and PDF p. 4 [*Transcript 2015-04-27 p.m.*].

ii. FINANCIAL FEASIBILITY OF COMMERCIAL RECREATION USE

Whitney otherwise admitted that he did not do any study or investigation to determine whether commercial recreation activity conducted on the LEONE parcel could generate revenue to cover the carrying cost of the LEONE parcel. JEFS Dkt 182 and PDF pp. 58-61, 64-65 [*Transcript 2015-04-16 a.m.*]. Whitney admittedly did not visit any other public or private beach parks on Maui to investigate potential revenues which might be generated by offering recreational activities on LOT 15.[15] JEFS Dkt 361 and PDF pp. 57-59 [*Transcript 2015-04-16 p.m.*]. Whitney did not contact any commercial recreational venders to inquire as to potential revenues which might be generated by commercial recreation use. JEFS Dkt 182 and PDF p. 61 [Transcript 2015-04-16 a.m.]. Whitney admitted that he did not do any studies, and was not

[15] Whitney did offer to the jury that he had visited Haleakala National Park in the context of this questioning about commercial recreational activities as related to the LEONES's ocean front parcel. JEFS Dkt 361 and PDF p. 57 [Transcript 2015-04-16 p.m.].

offering any testimony as to what amount of income might be generated from running a commercial recreational activity on the LEONES' parcel. JEFS Dkt 182 and PDF pp. 63-64 [*Transcript 2015-04-16 a.m.*].

Otherwise, Whitney admitted that in his 50-year career he had never previously been asked by a landowner to evaluate the development or potential economic use of a single family residential lot. JEFS Dkt 182 and PDF pp. 67-70 [*Transcript 2015-04-16 a.m.*].

iii. SUITABILITY AND DEMAND FOR RECREATION USE OF LOT 15

Whitney testified as to being taken by the LEONES' parcel's location and physical characteristics as "amenity characteristics," which would be "an important influence on what would ever be used – whatever the property would be used for." JEFS Dkt 144 and PDF p. 9 [*Transcript 2015-04-15 p.m.*]. Whitney also discussed the scarcity, desirability, and demand for properties like the LEONES' ocean front parcel. JEFS Dkt 144 and PDF p. 29 [*Transcript 2015-04-15 p.m.*]. The LEONES' appraiser Chris Ponsar testified that as of April 10, 2015, the date he testified at trial, the LEONES' parcel is in a highly desirable location and is a scarce resource. JEFS Dkt 180 and PDF p. 64 [*Transcript 2015-04-10 a.m.*].

Doug Leone testified as to campers staying on the grounds, lots of parked cars, and the high number of people he has witnessed populating Palau'ea Beach every time he has visited his parcel. JEFS Dkt 186 and PDF pp. 74, 79-81 [Transcript 2015-04-21 a.m.]. The LEONES' real estate lawyer also testified as to the frequent access to Palau'ea Beach by members of the public through the LEONE parcel. JEFS Dkt 48 and PDF p. 56 [Transcript 2015-04-06 p.m.].

D. DEFENDANTS/APPELLANTS' EVIDENCE OF USE AND VALUE

The COUNTY'S real estate appraiser Ted Yamamura offered unrebutted testimony as to the location and physical characteristics of the LEONES' ocean front parcel making it an ideal

investment property. JEFS Dkt 156 and PDF pp. 67-77 [*Transcript 2015-04-28 a.m.*]. Mr. Yamamura also testified that it was not uncommon for his own clients to retain him to conduct appraisals of property(ies) that they intended to buy and hold for investment use. Id. Mr. Yamamura explained why the LEONES' Lot 15 was a tremendous investment opportunity, including the underlying zoning for the parcel, its scarcity, and its location. JEFS Dkt 156 and PDF pp. 79-82 [*Transcript 2015-04-28 a.m.*].

Mr. Yamamura's expert opinion testimony on the investment use of the Property was independently corroborated by the evidence of the LEONES' having marked LOT 15 up an additional $1,050,000 and listing the lot within four (4) months after purchasing it. JEFS Dkt 260 and PDF pp. 479-486. The listing was testified to by the LEONES' realtor Robert Merriman. JEFS Dkt 56 and PDF pp. 46-48, 56-59 [*Transcript 2015-04-17 a.m.*]. The LEONES' realtor Mr. Merriman also testified that it was not uncommon for his clients to buy and flip ocean front lots in order to capitalize on their rapidly appreciating value. JEFS Dkt 56 and PDF pp. 53-54 [*Transcript 2015-04-17 a.m.*].

The LEONES then held LOT 15 for two (2) years, marked it up to $7,000,000 (double what they paid for it), re-listed it, and then reduced the listing $5,950,000. JEFS Dkt 260 and PDF pp. 487-496. The LEONES received two sequential offers to purchase the lot, for $4.5 million and $4.6 million. JEFS Dkt 260 and PDF pp. 497-512; JEFS Dkt 260 and PDF pp. 513-531. Rather than sell the parcel, DOUG LEONE then made a conscious decision to forego development of LOT 15 and simply held the lot for three (3) more years until Munekiyo was asked by the LEONES' real estate lawyer in 2007 to submit the LEONES' incomplete SMA Assessment Application. JEFS Dkt 61 and PDF p. 33 [*Transcript 2015-04-27 a.m.*].

III. STANDARD OF REVIEW

A. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Hawai'i Rules of Civil Procedure, Rule 50 [*Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings*], provides:

> **(a) Judgment as a matter of law.**
> (1) If during a trial by jury a party has been fully heard on an issue and there is ***no legally sufficient evidentiary basis*** for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to ***a claim or defense that cannot under the controlling law be maintained or defeated*** without a favorable finding on that issue.

"Verdicts based on ***conflicting evidence will not be set aside*** where there is substantial evidence in support of the jury's findings. Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 104, 176 P.3d 91, 103 (Hawai'i 2008) (citing Tsugawa v. Reinartz, 56 Haw. 67, 71, 527 P.2d 1278, 1282 (1974). "'[The Hawai'i Supreme Court] ha[s] defined 'substantial evidence' as 'credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion.'" *See also*, Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 502, 880 P.2d 169, 177 (Hawai'i 1994).

On the other hand, to prevail on their motion for judgment notwithstanding the verdict, the LEONES must show "there is no conflict from the evidence and but one inference can be drawn from the facts[.]" Tsugawa v. Reinartz, *supra,* 56 Haw. at 71, 527 P.2d at 1282. Additionally, "in deciding a motion for a direct verdict or JNOV, the evidence and inferences which may be fairly drawn therefrom must be considered in the light most favorable to the non-moving party and either motion may be granted only where there can be but one reasonable

conclusion as to the proper judgment." Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i at 502, 880 P.2d at 177.

B. MOTION FOR A NEW TRIAL.

The Hawai'i Rule of Civil Procedure, Rule 59(a) provides in relevant part -

> "**(a) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State."

"Unlike a directed verdict or JNOV motion, on a new trial motion, '[the] movant need not convince the court to rule that no substantial evidence supports [its] opponent's case, but only that the verdict rendered for [its] opponent is against the manifest weight of the evidence." Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i at 503, 880 P.2d at 178. (citing Petersen v. City and County of Honolulu, 53 Haw. 440, 441, 496 P.2d 4, 6 (1972). "We are of course, extremely reluctant to reverse a trial judge's assessment of the evidence." Id. Moreover,

> Both the grant and denial of a motion for new trial is within the trial court's discretion, and we will not reverse that decision absent a clear abuse of discretion. [citation] An abuse of discretion occurs where the trial court has "clearly exceeded the bounds of reason or disregarded rule or principles of law or practice to the substantial detriment of a party litigant."

Richardson, 76 Hawai'i at 503, 880 P.2d at 178 (citing Amfac, Inc. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992) (Based on the evidence noted, court could not say that the jury's verdict against Plaintiff was against the manifest weight of the evidence, holding the circuit court acted well within its discretion in denying alternative motion for a new trial.").

IV. APPELLANTS' ANSWERING POSITION AND ARGUMENT

Rather that dispute the sufficiency of the facts and evidence at trial, Plaintiffs/Appellants argue that under the controlling law, the trial court was compelled conclude that "the County has

taken the Property without payment of just compensation." JEFS Dkt 379 and PDF p. 43. Plaintiffs/Appellants misunderstand the standard on a Motion for Judgment Notwithstanding the Verdict.

First, the evidence at trial was at the least obviously conflicted as to Plaintiffs' express contention that the COUNTY Defendants deprived them of all economically beneficial use of their land. Perhaps more importantly, as the trial court recognized, the jury was not required to accept the evidence Plaintiffs put on as conclusively proving any element of their case, even if the COUNTY Defendants had not put on any evidence. JEFS Dkt 158 and PDF pp. 21-28 [*Transcript of 2015-04-30*]. **Second**, it is moreover the COUNTY'S position, that the jury could have rejected Plaintiffs' contentions that the COUNTY Defendants deprived them of the use of their land for single-family residential development in the first instance.

The conflicts in the evidence were otherwise substantial, and do not warrant setting aside the jury's verdict. *See* Kamaka v. Goodsill Anderson Quinn & Stifel, *supra*. The evidence conflicting with Plaintiffs' positions was "of sufficient quality and probative value" to enable the jury to refute the LEONES' contentions. *See* Richardson v. Sport Shinko (Waikiki Corp.), *supra*. The LEONES cannot show "there is no conflict from the evidence" or that "but one inference can be drawn from the facts[.]" *See* Tsugawa v. Reinartz, *supra*.

A. THE JURY COULD HAVE REASONABLY CONCLUDED THAT PLAINTIFFS' FAILED TO DEMONSTRATE LOSS OF ALL ECONOMICALLY BENEFICIAL USE

Plaintiffs at trial relied completely on the conflicted and unsupported testimony of experts to make their Lucas case-in-chief. "Shaky but admissible evidence is to be attacked by cross-examination, contrary evidence, and attention to the burden of proof[.]" Primiano v. Cook, 598 F.3d 558, 564 (9th Cir. 2010), as amended (Apr. 27, 2010). "The expert may testify and ***the jury decides how much weight to give that testimony***." Id., 598 F.3d at 565. (Emphasis added).

Obvious mistakes and omissions by Plaintiffs' experts Tsujimura and Whitney were apparent for the jury. Jury Instruction No. 18 allowed for the jury not only to discredit the experts, but also draw the opposite of the opinions offered:

> The testimony of expert witnesses should be judged in the same manner as the testimony of any witness. You may accept or reject the testimony in whole or in part. You may give the testimony as much weight as you think it deserves in consideration of all of the evidence in this case.

JEFS Dkt 198 and PDF 14 [*Transcript 2015-05-05 a.m.*]. Notably, the instruction was proposed by Plaintiffs. Jury Instruction No. 9 also correctly instructed the jury as to Plaintiffs' burden of proof. JEFS Dkt 198 and PDF p. 9 [*Transcript 2015-05-05 a.m.*] Moreover, the jury was specifically instructed that "'to prove by a preponderance of the evidence means' to prove that something is more likely so than no so." JEFS Dkt 198 and PDF p. 9 [*Transcript 2015-05-05 a.m.*]; *see also*, Loveladies Harbor, Inc., 21 Cl.Ct. 153 (190) (Plaintiffs correctly have characterized their ultimate burden as one of persuading the court that it is more likely true than not that there remains no economically viable use for their property).

Plaintiffs/Appellants continue on this appeal to erroneously argue their own burden proof was shifted to the COUNTY at trial. The LEONES' rely on Loveladies Harbor, Inc. v. U.S., 21 Cl. Ct. 153 (1990) and Bowles v. U.S., 31 Fed.Cl. 37 (1994) (citing to Lovelades Harbor, Inc.) to support this proposition. Both Loveladies Harbor, Inc. and Bowles, unlike this jury tried case, were federal claims court bench trials. Nevertheless, Loveladies Harbor, Inc., 21 Cl.Ct. at 158, makes clear that a *prima facie* showing only gets Plaintiffs' case to the jury, but does not in-itself shift any burden to the Defendants:

> [P]laintiffs correctly have characterized their ultimate burden as one of "persuading the court ... that ***it is more likely true than not*** that there remains no economically viable use for [their] property." In doing so, if plaintiffs produce sufficient evidence to establish a *prima facie* case, ***i.e., to go to the jury if this were a jury case, defendant may present no evidence and still prevail.*** If

plaintiffs present sufficient evidence to be entitled to a directed verdict, the burden of production will have shifted to defendant.[16] (Emphasis added).

As demonstrated below, while the LEONES' *prima facie* case went to the jury, it cannot be said the jury could only have reasonably found that Plaintiffs proved it more likely true than not that there was no economically beneficial use for the LEONES' property. Obvious mistakes and omissions by Plaintiffs' experts, and the jury instruction on this issue submitted by Plaintiffs allowed for the opposite conclusion.

Moreover, both Loveladies and Bowles cases make it clear that the threshold issue on determining economic deprivation for a Lucas[17] taking, involves "a comparison of the fair market value before the government action and that value *after* the government action." Loveladies Harbor, Inc., 21 Cl.Ct. at 160 (citing Pennsylvania Coal, 260 U.S. 393, 413, 43 S.Ct. 158, 159 (1922); *see also* Bowles v. U.S., 31 Fed.Cl. 37, 46 (1994) (In order to determine the economic impact of the regulation and whether any economically viable use remains the court must compare the fair market value of the property before the alleged taking with the fair market value of the property after the alleged taking.") (citing Florida Rock Industries, Inc. United States, 791 F.2d 893, 905 (Fed.Cir. 1986).

Contrary to what Plaintiffs/Appellants have argued in this litigation, the determination and relationship of *value* in determining *total* deprivation of use for a Lucas claim, is not irrelevant. The U.S. Supreme Court in Tahoe-Sierra noted of the holding in Lucas v. South Carolina Coastal Council:

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[16] The LEONES' further reliance on Bowles to shun their evidentiary burden of proof is equally misplaced. Tried at the bench, it was appropriate for the Court in Bowles to determine that the plaintiff's *prima facie* case had been made, and then that his burden of proof had been met. *See* Bowles, 31 Fed.Cl. at 47-48. In this jury trial, the evidence, and particularly the testimony and opinions of the LEONES' experts, was properly submitted to the jury to weigh.

[17] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

> [O]ur [*Lucas*] holding was limited to 'the extraordinary circumstance when no productive or economically beneficial use of land is permitted.' [citation]. The emphasis on the word 'no' in the text of the opinion was, in effect, reiterated in a footnote explaining that the categorical rule would not apply if the diminution in value were 95% instead of 100%. [citation]. Anything less than a 'complete elimination of value,' or a 'total loss,' the Court acknowledged, would require the kind of analysis applied in *Penn Central.*

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 330, 122 S.Ct. 1465, 1483 (2002) (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017, 1019–1020, 112 S.Ct. 2886 (1992), note 8. (Emphasis original).

> [T]he categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 332, 122 S.Ct. 1465, 1483 (2002). (Emphasis added).

Plaintiffs' experts at trial did not otherwise produce any evidence of diminution in value to LOT 15. Both Tsujimura and Whitney offered only the conclusory statements that the LEONE'S parcel had no "value," purportedly because of legal restrictions prohibiting any productive use of the lot. No concrete or expert analysis of any loss in value beyond the conclusory opinions of Tsujimura and Whitney were offered. Neither of the experts could identify any studies, research, investigation, valuation, or even a basic inquiry into the subject matter regarding economic deprivation on which they purported to have opinions.[18] The jury in this case had no reason to assume a baseline of "zero" value for LOT 15 under Lucas, or that the LEONES' ocean front lot was valueless when considering whether the parcel had any economically beneficial use.

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[18] Whitney even presented the jury with an elaborate investment model and inflated damages figure, premised on *an assumption of diminution in value* which was never demonstrated at trial. [JEFS Dkt 144 and PDF p. 62 [Transcript 2015-04-15 p.m.]

B. THE JURY COULD HAVE FOUND ECONOMICALLY BENEFICIALLY USE

Plaintiffs/Appellants in their Renewed Motion for Judgment Notwithstanding the Verdict otherwise incorrectly quote Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1432 (9th Cir. 1996) aff'd, 526 U.S. 687, 119 S. Ct. 1624 (1999) for the factors used to determine economically beneficial use. The three-part test was stated correctly in Jury Instruction No. 22, which was accurately modeled on the Del Monte Dunes At Monterey, Ltd. and Loveladies Harbor, Inc. holdings:

> 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, (2) the land is physically adaptable for such use, and (3) there is a demand for such use in the reasonably near future.

JEFS Dkt 198 and PDF p. 15 [*Transcript 2015-05-05 a.m.*]; *see also*, Delmonte Dunes at Monterey, Ltd., 95 F.3d at 1432 ("Generally, however, the existence of permissible uses determines whether a development restriction denies a property owner economically viable use of his property"), and *see also*, Loveladies Harbor, Inc., 21 Cl.Ct. at 158 ("showing 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."); *see also*, Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604, 616 (9th Cir. 1993).

The jury was given judicial notice of Maui County Code §19.14 [*Hotel Districts*] and §19.08.02 [*Residential Districts*]. JEFS Dkt 192 and PDF p. 8 [*Transcript 2015-04-29 p.m.*]. While Plaintiffs' own legal expert Tsujimura originally testified no commercial uses would be allowed under these provisions of the Maui County Code, Tsujimura changed his opinion on cross-examination following a juror question. JEFS Dkt 140 and PDF p. 41 [*Transcript 2015-04-08 p.m.*] Mr. Tsujimura's changed opinion was that certain commercial amusement and refreshment sale activities could be legally permitted at LOT 15. JEFS Dkt 140 and PDF p. 42

[*Transcript 2015-04-08 p.m.*]. Even the trial court suggested this presented credibility issues for the witnesses. JEFS Dkt 158 and PDF p. 22 [*Transcript 2015-04-30*].

The second prong of the test was satisfied by the testimony of Plaintiffs' own expert economist Whitney, who commented on the conducive "amenity characteristics" of the LEONES' lot. The ocean front parcel is otherwise obviously physical suitable for park purposes, and particularly beach access. Both Whitney and Plaintiffs' appraiser Ponsar commented on the scarcity of undeveloped beach lots, going to satisfy the third prong of the test. Doug Leone himself and his lawyer Tom Welch both complained of the high volume of public traffic through and on the LEONES' parcel. Palau'ea Beach was clearly described for the jury as a popular and populated beach by Plaintiffs and their own witnesses, confirming a demand.

Moreover, Defendants' expert Ted Yamamura explained candidly to the jury what was most probably already obvious – A scarce undeveloped ocean front parcel in the resort area of Makena, Maui presents a tremendous real estate investment use and opportunity.[19] Plaintiffs never bothered to offer or attempt rebutting those opinions. It cannot plausibly be argued that the jury could not reasonably have concluded based on the evidence that, 1) Plaintiffs' consultant's unsupported total devaluations of LOT 15 lacked any and all merit, and 2) there are substantial economically beneficial use(s), opportunities, and value in the ocean front parcel.

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[19] Notable here is a concern expressed in Justice Anthony Kennedy's concurring opinion in Lucas about the finding made by the trial court regarding the diminution of value in that case: "The South Carolina Court of Common Pleas found that petitioner's real property has been rendered valueless by the State's regulation. [ ]. The finding appears to presume that the property has no significant market value or resale potential. This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach-front lot loses all value because of a development restriction." Lucas, 505 U.S. at 1034, 112 S.Ct. at 2886.

C. THE JURY COULD HAVE OTHERWISE REASONABLY CONCLUDED IN THE FIRST INSTANCE THAT NO REGULATION PROHIBITED PLAINTIFFS' USE OF LOT 15

To the extent the LEONE Plaintiffs/Appellants argue in their Opening Brief that an inconsistency between their proposed single-family residential development and the KMCP "park" designation of LOT 15 precluded the Planning Director from being able to process their SMA Assessment Application for an *exempt* use under the SMA Rules, the COUNTY Defendants/Appellees/Cross-Appellants addressed this argument in their Opening Cross-Appeal Brief, filed April 13, 2016, which is incorporated by reference herein. Defendants/Appellants/Cross-Appellants will also anticipate responding with further legal argument on this issue made by Plaintiffs/Appellants in their Reply Brief.

To the extent the LEONES' argue their proposed single-family residence could not legally be processed pursuant to the Intermediate Court of Appeals decision in Leone, et al. v. County of Maui, et al., 128 Haw. 183, 284 P.3d 956 (Haw. App. 2012), the COUNTY Defendants/Appellees offer the following:

The Intermediated Court of Appeal in Leone, 128 Hawai'i at 187, 284 P.3d at 960 specifically limited its opinion – "The Circuit Court's sole determination was that Appellants' claims were not ripe and therefore, the Circuit Court lacked subject matter jurisdiction. Accordingly, on this appeal, ***we will consider only that issue.***" (Emphasis added). "***The only issue before us is whether Appellants' claims are ripe*** for adjudication[.]" Id., footnote 5. (Emphasis added); *see also*, Blake v. County of Kaua'i Planning Commission, 131 Hawai'i 123, 315 P.3d 749 (2014) ("On appeal, the ***only*** issue the ICA considered was whether the claims were ripe for adjudication."). (Emphasis added).

Despite this clearly articulated limitation in the Leone opinion, Plaintiffs have repeatedly assumed the Leone opinion holds that any further attempt at processing or review of their SMA

Assessment Application seeking to exempt their proposed "single-family residential use" from SMA permitting requirements would have been "futile."

As a matter of substance and on the merits this assumption is obviously incorrect, because it would mean the ICA determined liability for an "inverse condemnation" by "regulatory taking" had already been demonstrated when it decided only the ripeness issue. Otherwise, it is well established in Hawai'i that dicta not essential to the appellate court's holding is not binding on a circuit court:

> 'Dictum' is of two kinds, 'obiter' and 'judicial.' 'Obiter dictum' is an expression of opinion by the court or judge on a collateral question not directly involved or mere argument or illustration originating with him, while 'judicial dictum' is an expression of opinion on a question directly involved, argued by counsel, and deliberately passed on by the court, though not necessary to a decision. While neither is binding as a decision, judicial dictum is entitled to much greater weight than the other and should not be lightly disregarded.

Application of Sherretz, 39 Haw. 431, 437 (1952). "We have also noted that an inferior tribunal might not be bound under the doctrine of stare decisis if the pronouncement of a superior court is actually dictum." Robinson v. Ariyoshi, 65 Haw. 641, 652, 658 P.2d 287, 297 (1982) ("Since the appellate reversal provided no instruction to the contrary, the McBryde judgment after appeal was only a partial quantification of the parties' appurtenant water rights. No other final determination with res judicata effect remained."). (Emphasis added). The Leone opinion makes no instruction.

While holding that Plaintiffs were not required to seek further administrative review for their claims to be ripe, the Leone opinion did not hold Plaintiffs could not have sought further review of the planning director's decision to decline processing of their SMA Assessment Application. The Leone opinion also did not hold Plaintiffs would not be required to demonstrate exhaustion of administrative process, as would be required at trial in order for

Plaintiffs to establish the merits of their "inverse condemnation" claim. *See* Tahoe-Sierra Preservation Council, Inc., 535 U.S. 302, 122 S.Ct. 1465 (2002).[20]

Rather, the Intermediate Court of Appeals made it crystal clear that because Plaintiffs did not question the substance of the planning director's decision declining to process their SMA Assessment Application, the appellate court ***was not exercising jurisdiction over and did not consider the questions of whether Plaintiffs exhausted the administrative process available to them.*** In fact, the Intermediate Court of Appeals specifically stated:

> The parties dispute whether, under the applicable rules, an appeal from the Director's decision to the Commission was available to Appellants in this case. . . . ***We need not resolve this issue.***
>
> Maui County's argument concerning appealability to the Commission would be pertinent to whether an applicant had exhausted its administrative remedies prior to seeking judicial review of a decision by the Director, but ***it is of no consequence to the ripeness analysis*** applied to takings claims.

Leone, 128 Hawai'i at 193, 284 P.3d at 966. (Emphasis added). Therefore, any suggestion by Plaintiffs that the Leone opinion held they established the futility of further administrative process is incorrect. It really could have been nothing more than 1) a factual presumption, given the standard of review and based on the allegations in Plaintiffs' Complaint [*see*, Norris v. Hawaii Airlines, Inc., *supra.*] or 2) dicta not bearing on or essential to the ICA's holding that Plaintiffs' claims were ripe.

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[20] "[A] land owner ***may not establish a taking*** before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." Tahoe-Sierra Preservation Council, Inc., 535 U.S. at 339, 122 S.Ct. at 1488 (citing Palazzolo, 533 U.S. 606, 620-621, 121 S.Ct. 2448 (J. Kennedy, concurring)). (Emphasis added). The Court further explained in this context that a final decision on land-use by the regulating authority means "allow[ing] regulatory agencies to exercise ***their full discretion*** in considering development plans for the property, including ***the opportunity to grant*** any variances or ***waivers allowed by law.***" Id. (Emphasis added).

Plaintiffs also cannot argue that any dicta in the Leone opinion regarding "community plan consistency" is somehow essential to the Leone holding. The Intermediate Court of Appeals in Leone specifically stated the Hawai'i Supreme Court's substantive rulings on community plan consistency in GATRI v. Blaine, 88 Hawai'i 108, 962 P.2d 367 (1998) were not at issue in the Leone case before it:

> The supreme court's disposition of the first issue, whether GATRI exhausted its administrative remedies prior to its appeal to the circuit court, ***is not relevant to the ripeness issue in this case***. In GATRI, the plaintiff sought direct judicial review of the substance of the Director's decision. Thus, the exhaustion of administrative remedies was at issue. Here, ***the Appellants have not sought direct judicial review of the Director's decision***; rather, Appellants have brought claims based on the effect of the Director's decision.

Leone, 128 Hawai'i at 194, 284 P.3d at 967 (citing GATRI, 88 Hawai'i at 111–12, 962 P.2d at 370–71). (Emphasis added).

* * * * *

Suffice it to say here, Plaintiffs should not now be heard to complain about the existence in the record of copious evidence regarding alternative reasons why the LEONES were unable to proceed with a single-family residence on LOT 15. It was the LEONES' trial attorneys who placed in issue the Maui Planning Commission's failure to accept the collective land owners' environmental assessment on its face. It was the LEONES' attorney who in fact argued to the jury that but for the Planning Commission's refusal to accept the collective environmental assessment, the LEONES would have obtained a community plan amendment and developed a single-family residence on their property. JEFS Dkt 198 and PDF pp. 26-27 [*Transcript 2015-05-05 a.m.*].

Having placed these matters in issue, the LEONES should not now be heard to complain, characterizing the rebuttal evidence demonstrating the existence of Hawai'ian cultural and

archeological sites at Palua'ea as "irrelevant." Moreover, once again it was Plaintiffs who in fact introduced the evidence reflecting those cultural remains and archeological sites into evidence. JEFS Dkt 180 and PDF pp. 46-51 [*Transcript 2015-04-10.*]. As demonstrative of the Planning Commission's actual basis for not accepting the draft environmental assessment for a community plan change at Palau'ea, the evidence rebutted the LEONES' overt suggestions that the Planning Commission aided and abetted a regulatory taking of LOT 15. JEFS Dkt 256 and PDF pp. 574-625; JEFS Dkt 260 and PDF pp. 592-594; and JEFS 260 and PDF pp. 595-597.

Plaintiffs should also not be heard to complain that the evidence of the LEONES' prior retention of planning consultant Michael Munekiyo to pursue an environmental assessment and community plan amendment singularly for Lot 15, was somehow legally insufficient evidence. Jury Instruction No. 37, *which was proposed by Plaintiffs*, did not seek to exclude the jury's consideration of any of this evidence.[21] Nor did the jury instruction suggest that a community plan amendment was an unavailable or unreasonable option for the LEONES to pursue toward development of a single-family residence on their ocean front parcel. Plaintiffs' real estate lawyer also purported to tell the jury the LEONES were the most proactive landowners at Palau'ea Beach in pursuit of the environmental assessment and community plan amendment. JEFS Dkt 158 and PDF p. 65 [*Transcript 2015-04-30 a.m.*].

At the same time, by raising and opening the door to this evidence, the LEONES undermined another central assertion of their case-in-chief - that Maui County Planning Director Jeff Hunt deprived them of all opportunity to develop their lot for single-family residential use by returning their September 2007 SMA Assessment Application unprocessed. Plaintiffs planning consultant Michael Munekiyo testified for the jury that Director Hunt's October 25,

[21] At trial Plaintiffs' insisted, and the jury was instructed that "[t]o establish a regulatory taking, Plaintiffs do not need to show that they sought to change the law." JEFS Dkt 198 and PDF pp. 19 [Transcript 2015-05-05 a.m.]

2007 letter returning the LEONES' SMA Assessment Application in fact "requests that a Community Plan Amendment be filed to enable the process of an SMA application." JEFS Dkt 61 and PDF p. 45 [Transcript *2015-04-27 a.m.*]. Yet, notwithstanding their purported proactivity to obtain their land use entitlements, the LEONES did not do so. Rather they filed this lawsuit a month later.

Munekiyo also testified that he was not asked by the LEONES before the SMA Assessment Application was submitted in September 2007, to re-start the environmental assessment process for the LEONES' community plan amendment after Doug Leone stopped that work on **June 4, 2004**. JEFS Dkt 61 and PDF p. 46 [Transcript 2015-04-27 a.m.]. Mr. Munekiyo had no explanation to offer the jury as to why three (3) years after his retention by Doug Leone, specifically to pursue the community plan amendment, Munekiyo was not asked to continue that effort prior to the LEONES' SMA Assessment Application was finally submitted to the Planning Department. JEFS DKT 61 and PDF p. 46 [*Transcript 2015-04-27 a.m.*].

It also cannot simply be ignored that Director Hunt's letter on its face specifically invited the LEONES to resubmit their SMA Assessment Application concurrently with an application for a community plan amendment. JEFS Dkt 256 and PDF 567-568]. Munekiyo testified he was never asked to follow-up with Director Hunt in this regard, ***or for any reason in connection with Director Hunt returning the LEONES' SMA Assessment Application***. JEFS Dkt 61 and PDF pp. 49-50 [Transcript 2015-04-27 a.m.]. Rather than do that, the LEONES sued the County less than month after Munekiyo received Hunt's letter. The LEONES' attorney Tom Welch never sought further review of the letter by the Planning Commission, which was his stated purpose in seeking the letter.

In light of these blatant conflicts in the evidence, on issues injected into this case by the LEONES, the LEONES cannot now plausibly argue here the jury could only reasonably draw one conclusion, at the exclusion of any other, that the Planning Director (and or Planning Commission) deprived the LEONES all opportunity to develop a single-family residence on their land. *Cf.* Tahoe-Sierra Preservation Council, Inc., 535 U.S. 302, 339, 122 S.Ct. 1465, 1488 (2002) (citing Palazzolo, 533 U.S. 606, 620-621, 121 S.Ct. 2448"[A] land owner ***may not establish a taking*** before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation." (J. Kennedy, concurring)). (Emphasis added). The Court further explained in this context that a final decision on land-use by the regulating authority means "allow[ing] regulatory agencies to exercise ***their full discretion*** in considering development plans for the property, including the opportunity to grant any variances or *waivers allowed by law.*" Id. (Emphasis added).

Notably, Plaintiffs/Appellants own expert Whitney's actual understanding of SMA application procedures is at odds with the LEONES' argument that an exemption from the SMA permitting requirements is precluded by the Leone decision, as "the law-of-the-case:"

> Q. Nobody -- is it fair to say that nobody has had any discussions with you one way or the other as to whether obtaining an exemption from the permitting requirements under the SMA is an option available to the Leones?
>
> MR. BEAMAN: Vague and ambiguous.
>
> THE COURT: Do you understand the question?
>
> [WHITNEY]: I really don't understand the question. I mean, certainly, it's -- I've had discussions with counsel on the issue, and the issue, as directed to me, is that they're pursuing a course of action that is -- has resulted in this litigation. And I am not privy to anything else.
>
> BY MR. BILBERRY:
>
> Q. Okay. So have you ever been advised that the option of obtaining an exemption from the permitting requirements under the SMA Rules is an option that is not available to the Leones?
>
> A. I think -- ***it's my understanding that they have the option to seek an exemption***. That's pure and simple.
>
> Q. That is your understanding?

A. ***That's my understanding that they have that right, yes.***
Q. Has anybody advised you as to why they haven't done that?
A. Not advised me. ***Told me that they haven't.*** I have not been privy to their decision to do that. They have told me that that's not what they're doing and that's the end of it.
Q. **Has anybody told you why they're not doing that**?
A. ***They've chosen an alternative course of action.***
Q. ***Meaning the litigation***?
A. ***Yes.***

JEFS Dkt 172 and PDF pp. 23-24 [*Transcript 2015-04-01 a.m.*].

D. THE LEONES' PREJUDICED THEIR OWN CASE

In their alternative request for a new trial, Plaintiffs/Appellants again do not question the legal sufficiency of the evidence, but rather, they argue that the COUNTY'S attorney mislead and prejudiced the jury. Plaintiffs/Appellants allege this first occurred in opening statements, when the COUNTY'S counsel referred to the surrounding single-family residential homes at Palau'ea Beach, *already previously identified by the LEONES' trial attorney in his opening statement.*

Plaintiffs/Appellants allege by these comments, the COUNTY Defendant's attorney violated the Court's Order Granting in Part and Denying in Part, Without Prejudice Plaintiffs' Motion in Limine No. 3, filed May 7, 2015, which provided:

> Both parties are precluded from commenting during their opening statements about Plaintiffs' personal finances, including their net worth, their occupations, and their financial and real estate holdings. As to the remainder of the trial following the opening statements, the Motion is denied without prejudice.

JEFS Dkt 266 and PDF pp. 221-223.

The COUNTY'S counsel's remarks during opening statement did not refer to the LEONES' finances in any manner. JEFS Dkt 170 and PDF pp. 21-31. The trial court expressly found there was no violation of its Order:

THE COURT: Will counsel approach the bench, please?
(Whereupon the following proceedings were held at the bench, outside the

hearing of the jury:

THE COURT: Mr. Beaman, I will grant a motion for a mistrial if you ask for one.

Mr. Bilberry, you have twice, twice. Not once, twice, put those jurors in with when you say that we would dream. That is improper. It's improper argument. It's improper to do that in an opening statement.

If you request it, I will grant your motion, and I will grant whatever else relief you wish.

MR. BEAMAN: Thank you, your Honor. I appreciate that very much. I will consult with my clients. We will make a decision about what the appropriate action is. I think there has also been a violation of the Court's order in limine including of evidence of both and --

THE COURT: Well, we're not going there yet because I was a little stunned at your opening as well as to what you're going to be proving, but be that as it may –

JEFS Dkt 170 and PDF pp. 25-26.

Moreover, contrary to what Plaintiffs/Appellants now represent, the trial court overruled the LEONES' trial counsel's request for a limiting or cautionary instruction regarding questioning of PATRICIA LEONE about numerous real estate assets held in the Leones' personal trust:

THE COURT: Yeah, I'm not going to -- I'm not going to grant plaintiff's request. This is a standard trust document that's used that's part of estate planning. The terms that I see in here are no different than they are in almost every person that has a trust. And almost anyone that owns any property has exactly these type of provisions. The evidence that I've heard is something that the jury is going to have to assess. But I do agree it's established that the Leones own substantial amounts of real estate, and they've never once sold any of it.

The weight that would be afforded as an investment, that's going to be up to the jury. I don't see it as a violation. She did talk about -- the reason I allowed it, there was a response to a question where I thought that it allowed the defense to at least find some cross-examination.

JEFS Dkt 48 and PDF p. 9.

Otherwise, it was indisputably DOUG LEONE himself who disclosed to the jury his occupation as a venture capitalist. JEFS Dkt 186 and PDF pp. 55-58 [*Transcript 201504-21*

a.m.]. In addition, DOUG LEONE went on to tell the jury in detail about his charitable contributions. JEFS Dkt186 and PDF p. 58 [*Transcript 2015-04-21 a.m.*].

Plaintiffs/Appellants also suggest that the COUNTY'S counsel's referral of the jury to an instruction, whereby the jury was called upon to use its "common sense," was somehow prejudicial. Notwithstanding, Jury Instruction No.4, which the court specifically read to the jury did just that:

> Even though you are required to decide this case only upon the evidence presented in court, you are allowed to consider the evidence in light of your own observations, experiences, and common sense. You may use your common sense to make reasonable inferences from the facts.

JEFS Dkt 19 and PDF p. 8 [*Transcript 2015-05-05 a.m.*]. Moreover, Jury Instruction No. 4 was proposed by Plaintiffs.

Finally, the COUNTY is confident that if anyone caused prejudiced to Plaintiffs' case with the jury, it was Plaintiffs, their own expert witnesses, and Plaintiffs' counsel. For example, DOUG LEONE was asked by a juror how he could not remember listing LOT 15 for sale on numerous occasions, since PATRICIA LEONE testified he handled the LEONES' finances (because Patricia Leone also could not remember listing the property). JEFS Dkt 186 and PDF pp. 103-104 [*Transcript 2015-04-21 a.m.*].

As noted above, Plaintiffs' legal expert Tsujimura changed his opinions on cross-examination in response to a juror question. . JEFS Dkt 140 and PDF pp. 41-44 [*Transcript 015-04-08 p.m.*]. After presenting an extremely laborious and elaborate speculative real estate investment model, as supporting purported damages to the LEONES, Whitey admitted he did not follow appraisal standards, *or any standards at all* in coming up with his calculations and figures. JEFS Dkt 158 and PDF p. 42 [Transcript 2015-04-30]; JEFS Dkt 208 and PDF pp. 226-531.

Moreover, the LEONES' trial attorney called his own credibility into question with the jury on more than one occasion. On cross-examination of a COUNTY witness, Counsel attested to having lunch with the witness, and made a completely fabricated representation to the jury that the witness's family owned manufacturing interests in Mexico. JEFS Dkt 188 and PDF p. 61-62 [Transcript 2015-04-23 p.m.]. The fact these the allegations were untrue did not stop counsel in his closing argument from accusing the same witness of "lying." JEFS Dkt 198 and PDF p. 341 [*Transcript 2015-05-15*]. As noted above, counsel also attempted to suggest the COUNTY was complicit with the general public's use of LOT 15 as a "public toilet." JEFS Dkt 170 and PDF pp. 8 - 10 [*Transcript 2015-03-31 p.m.*].

Finally, having failed to establish a "policy" which deprived the LEONES' of the use of LOT 15 for a single-family residence, the LEONES' trial attorney in his closing argument specifically referred to *the COUNTY* as somehow intentionally concealing something from the jury:

> And we have the opinion in this case, that Mr. Welch told you about, *the County's* ***dirty little secret*** *that they kept from you until the last day of the trial*, that the Leones may make no economically viable use of their land.

JEFS Dkt 198 and PDF p. 26. (Emphasis added).

Given the character of the tactics and various remarks, it can reasonably be concluded that any prejudice against the LEONES caused to the jury was caused by the LEONES, their witnesses, and their own counsel.

VI. CONCLUSION

This appeal lacks merit and should denied. Plaintiffs have failed to demonstrate that there is no legally sufficient evidentiary basis for a reasonable jury to find for the COUNTY Defendants on the issue of whether Plaintiffs/Appellants were denied all economically viable use

of the Palau'ea Beach parcel, LOT 15. Plaintiff have failed to demonstrate that the verdict rendered for the COUNTY Defendants is against the manifest weight of the evidence. Finally, Plaintiffs have not demonstrated the jury was caused any prejudice by the COUNTY'S attorney.

DATED: Wailuku, Maui, Hawaii, July 22, 2016.

PATRICK K. WONG
Corporation Counsel
Attorney for Defendants
COUNTY OF MAUI and WILIAM SPENCE

By /s/ Brian A. Bilberry
BRIAN A. BILBERRY
Deputy Corporation Counsel

SCAP NO. 15-0000599

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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/
Cross-Appellees,

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/
Cross-Appellants.

CIVIL NO. 07-1-0496(2)
(Other Civil Action)

CERTIFICATE OF SERVICE

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I hereby certify that a copy of the foregoing document was duly served today via ELECTRONIC COURT FILING (JEFS) as follows:

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By /s/ Brian A. Bilberry
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Case ID: SCAP-15-0000599

Title: Douglas Leone and Patricia A. Perkins-Keone, as Trustees under that certain unrecorded Leone-Perkins Family Trust Dated August 26, 1999, as amended, Respondents/Plaintiffs-Appellants-Cross-Appellees, vs. County of Maui, a political subdivision of the State of Hawai'i, William Spence, in his capacity as Director of the Department of Planning of the County of Maui, Petitioners/Defendants-Appellees-Cross-Appellants, Doe Entities 1-50.

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County of Maui

Case Type: Appeal

Lead Document(s): Answering Brief

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