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

PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' REPLY BRIEF TO DEFENDANTS/APPELLEES/CROSS-APPELLANTS' ANSWERING BRIEF;
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INTRODUCTION[1]

The County fails to identify any economically beneficial use the Leones may make of their Property.[2] The County abandons its argument that, as a legal matter, the mere passive holding of land for investment, or "land banking," is an economically beneficial use. Nor does the County make any effort to defend the trial court's decision to allow testimony to that effect. The County says nothing about the Declaration, which allows only single-family residential use, and the County makes no effort to show that there is any commercial use available. The undisputed facts are:

1. The Planning Director refused to process the Leones' SMA assessment application on October 25, 2007, for the sole reason that their proposed single-family residence was inconsistent with the "Park" designation on the Community Plan, and informed the Leones that no future application would be processed for a use inconsistent with that designation. The Rejection Letter prevented the Leones from building their planned home, and it has never been amended or rescinded.

2. The County has never given the Leones permission to build anything on the Property.

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[1] Certain terms are defined in Plaintiffs/Appellants' Opening Brief filed April 13, 2016 (in CAAP-15-0000599, at Dkt #379, "Leones' Opening Brief"); ***Appendices A-Z*** are attached thereto.

[2] *See* Defendants/Appellees/Cross-Appellants County of Maui's and William Spence, in his capacity as Director of the Department Planning of the County of Maui's Answering Brief filed July 22, 2016 (in SCAP-15-0000599, at Dkt #42, "County's Answering Brief"). The County's Answering Brief contains many misrepresentations of fact and law, some of which are rebutted in Plaintiffs/Appellants' Answering Brief filed July 22, 2016 (in SCAP-15-0000599, at Dkt #35, "Leones' Answering Brief").

3. Despite warnings from its own counsel that the County would be sued for inverse condemnation, the Planning Commission never changed the "Park" designation.

4. The net effect of the County's actions has been that it paid for only two of the three vacant Palauea Beach Lots being used by the public, and the Property has for years been used for public purposes, as a public beach.[3]

5. The County never paid the Leones just compensation, notwithstanding the public's continuing use of their land as a beach park.

Although the County is entitled to regulate land use for public benefit, "[a] strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416, 43 S.Ct. 158, 160 (1922).

ARGUMENT

I. THE UNDISPUTED FACTS ESTABLISH THAT THE LEONES SUFFERED A REGULATORY TAKING

The County claims that "[t]he LEONES relied at trial only on the ... opinions of experts to make their case for loss of all economically beneficial use ...." County's Answering Brief, p.30 (emphasis in original). However, the Leones' expert testimony was cumulative of undisputed facts showing that loss.

A. The Property Cannot Be Used For a Home

The Community Plan states: "proposed land uses and developments shall be consistent with the ... Community Plan."

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[3] The Leones cannot even build a fence to exclude the public. Dkt #140, pp.29-31 (4/8/15 PM, Tsujimura). As the Supreme Court noted in Dolan v. City of Tigard, 512 U.S. 374, 383, 114 S.Ct. 2309, 2316 (1994), "public access would deprive [the landowner] of the right to exclude others, 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

ROA pt.27 at 392 (Community Plan, Ex.D-4).[4] When Planning Director Jeffrey Hunt refused to process the Leones' SMA assessment application for a home, he wrote that any future application "will require consistency with the Community Plan in order to be processed." ***App.K*** (Dkt #390), **ROA** pt.25 at 567-68 (Rejection Letter, Ex.P-68).

The County's counsel repeatedly admitted in this case that the "Park" designation and the SMA Rules (***App.I***, Dkt #388), at §12-202-12(f)(5), prevent the Leones from building a single-family residence on the Property. *See* **ROA** pt.1 at 270, 277, 1680.[5] And the ICA so held in Leone v. County of Maui, 128 Haw. 183, 194n8, 284 P.3d 956, 967n8 (Haw. App. 2012) ("Leone Opinion," ***App.A***, Dkt #380).

Meanwhile, a storm in late 2011 caused waves to wash ao far up onto the Property that the resulting shoreline setback leaves no buildable footprint.[6] *See* Leones' Opening Brief, pp.15-16.

B. The Property Cannot Be Used as a Park

The County does not dispute that the Declaration (***App.C***, Dkt #382) **requires** the Property to be used "only for [a] single family residential" house of least 2,500 square feet. **ROA** pt.26 at 347, 350 (Ex.P-210), ***App.C*** (Dkt #382) at 5, 8 (emphasis added). Nor does the County take issue with the holding of Bowles v. United States, 31 Fed.Cl. 37 (1994) that restrictive

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[4] The record on appeal and all transcripts are filed in CAAP-15-0000599.

[5] The County does not rebut the Leone's argument that the County is judicially estopped from arguing otherwise now. *See* Leones' Opening Brief, Dkt #379, pp.39-40.

[6] The County argues that the 2011 storm is irrelevant. County's Answering Brief, pp.5-6 n.5. But the storm took place after October 25, 2007, and the County did not resume granting SMA exemptions for Palauea Beach Lots until April 2012. *See* Leones' Opening Brief, pp.10-15.

covenants are relevant in regulatory takings determinations. *See* Leone's Opening Brief, pp.37-39.

Even if the Declaration permitted a park to be developed on the Property, it would still have no economically beneficial use. The Community Plan "Park" designation "applies to lands developed or to be developed for **recreational use.**" **ROA** pt.27 at 405 (Community Plan, Ex.D-4) (emphasis added). And under the MCC, parks "shall not be operated for a commercial purpose" and therefore have no economically beneficial use. MCC §19.615.020(A), ***App.Q*** (Dkt #396) at 4.

The current Deputy Planning Director admitted that, for purposes of determining consistency with the Community Plan, the Department looks to the "Park Districts" zoning ordinance for permissible uses for the Property. MCC §19.615.010(A), ***App.Q*** (Dkt #396) at 4; **ROA** pt.44 at 507-08 (McLean). The County fails to rebut the point that the Leones cannot legally use the Property as a park because, *inter alia*, it is too close to neighboring houses under that ordinance. *See* Leones' Opening Brief, p.42.

Some state courts, interpreting their own constitutions, have held that viable economic use must be "reasonable use." *See, e.g.*, Steel v. Cape Corp., 677 A.2d 634, 649 (Md. App. 1996). In Steel, the court considered a regulation limiting property to open space use, and after thorough discussion of both state and federal regulatory takings law, concluded no reasonable economically viable use could be made of the property. *Id.* at 650; *see also* Dunlap v. City of Nooksack, No. 63747-9-I, 2010 WL 4159286, at *6 (Wash. App. Oct. 25, 2010) ("building a 480-square-foot house would not be economically viable and there is no other economically viable use for the property other than residential development").

C. **The Property Has No Other Use**

The County argues that one of the Leones' experts, R. Brian Tsujimura, "in response to a juror question, later admitted to the jury [that] his original opinion was wrong, and ... that under the [Hotel Districts zoning] ... certain types of commercial recreational activities would be permitted" on the Property. County's Answering Brief, p.15. That is not true. Mr. Tsujimura never changed his opinion that the Leones have no economically beneficial use of the Property. Dkt #140, p.8 (4/8/15 PM, Tsujimura). A juror asked him if "the Leones [are] allowed to sell beverages and snacks to the general public from their lot[.]" Dkt #140, p.38 (4/8/15 PM, Tsujimura). Mr. Tsujimura responded from memory: "[U]nder the code, any beverages sold, actually, has to be run by a County agency." *Id.* After Corporation Counsel read him the zoning code, which requires government "supervision" of commercial activities in parks,[7] he acknowledged that his memory of the code was less than perfect, but did not change his opinion. An extensive discussion of the semantic difference between "control" and "supervision" followed. *Id.*, pp.41-42. Mr. Tsujimura ultimately testified, "we ... disagree on that issue." *Id.*, p.44. And as Mr. Tsujimura explained, commercial park use would be possible only "[i]f you can get the proper permitting" which "would lead to, again, this problem with the SMA." *Id.*

It is undisputed that the Leones have been forced to leave the Property in its natural state. An economically beneficial use must permit some use of property other than leaving it in its "natural state." Lucas v. South Carolina Coastal Council, 505

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[7] Residential Districts zoning permits only non-commercial use, except that "certain commercial amusement and refreshment sale activities may be permitted when under the supervision of the government agency in charge of the park or playground." MCC §19.08.020(C), ***App.Q*** (Dkt #396) at 2.

U.S. 1003, 1018, 112 S.Ct. 2886, 2894-95 (1992). Nor can it be disputed that the public is using the Property as a beach park.[8]

D. The Leones Have Suffered a Permanent Taking

The County relies on Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S.Ct. 1465 (2002) to argue that a 95% reduction in the value of property would not amount to a regulatory taking. County's Answering Brief, p.39. The passage quoted by the County is mere dicta, because it is irrelevant to the Court's holding in that case that no per se taking occurred where development was temporarily halted by a 32-month moratorium. *Id.* at 337, 122 S.Ct. at 1486.[9]

Other courts have recognized that the hallmark of Tahoe-Sierra is the temporary nature of the taking:

> The regulation at issue in Tahoe-Sierra expressly specified it was only a "temporary moratorium" on development. It was not a permanent regulation cut short....

Ward Gulfport Properties, L.P. vs. Mississippi State Highway Commission, 176 So.3d 789, 796 (2015) (citations omitted).

The present situation is very different from the temporary restriction at issue in Tahoe-Sierra: the Leones are subject to an existing law with no expiration date which leaves the Leones with no productive use of their land. Without such use, the

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[8] The County ignores the evidence that the public is illegally camping, littering, urinating, defecating, and parking on the Property. *See* Leones' Opening Brief, pp.17-18. The Leones' neighbors so testified before the Planning Commission. **ROA** pt.25 at 593. Doug Leone testified that he saw the evidence of such activity. Dkt #186, pp.81-82 (4/21/15 AM, D.Leone). Dr. Paul Rosendahl's 1999 report noted that the Property was "being used by the general public ... as an overnight camping location" and that it was "strewn with litter and human waste." **ROA** pt.29 at 259. *See* Leones' Opening Brief, pp.17-18, for more evidence.

[9] "Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted." Tahoe-Sierra, 535 U.S. at 332, 122 S.Ct. at 1484.

Property has no more than a nominal or speculative value. Dkt #140, p.16 (4/8/15 PM, Tsujimura); Dkt #178, pp.51-52 (4/8/15 AM, Tsujimura); Dkt #361, p.33 (4/16/15 PM, Whitney).

As explained by Mr. Welch, "no sensible purchaser would be willing to invest any more than a nominal amount as a gamble" that the County would permit development. **ROA** pt.27 at 560-63 (Welch letter, Ex.D-89). Tahoe-Sierra cannot be read to suggest that a merely nominal or speculative valuation of land, based on the hope that some day a confiscatory regulation might be amended, defeats a Lucas takings claim. For example, in Bowles, *supra*, and other U.S. Claims Court decisions cited in the Leones' Opening Brief, owners were compensated even though their lands retained some residual value after regulatory takings effectuated by denial of Clean Water Act permits.

E. Federal Cases Do Not Limit the Leones' Rights

The County's reliance on Tahoe-Sierra also ignores the fact that the Hawaii constitution, which prohibits property from being "taken **or damaged** for public use" without just compensation, expressly affords greater protection to landowners than the takings clause of the Fifth Amendment. *See* Leones' Opening Brief, pp.31-32. The County failed to answer that point. While this Court has not yet had occasion to interpret that language in the context of an inverse condemnation case, it is not mere surplusage. In City and Cnty. of Honolulu v. Market Place, Ltd., 55 Haw. 226, 231n2, 517 P.2d 7, 13n2 (1973), this Court acknowledged the Legislature's findings that "the phrase 'damaged for public use' ... is not so vague and indefinite as to escape practicable applicability."[10]

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[10] The County does not dispute that, with the broader language, this Court should "afford greater protection than that required by federal constitutional interpretations and [has] not hesitated to do so where warranted by logic and due regard for the purposes of those protections." Hawaii Housing Authority v. Lyman, 68 Haw. 55, 69, 704 P.2d 888, 896 (1985).

Many other state courts have developed their own takings jurisprudence consistent with identical state constitutional provisions prohibiting "damage" to private property without just compensation.[11] They hold that a regulatory taking occurs if the state "materially lessens" the value of land, or denies the owner "substantially all" economically beneficial use.[12]

F. The Leones Carried Their Burden

The Leones produced sufficient evidence to shift the burden of production to the County, under both Bowles, 31 Fed.Cl. at 48 (burden shifts upon a prima facie showing) and Loveladies Harbor, Inc. v. United States, 21 Cl.Ct. 153, 158 (1990), *aff'd* 28 F.3d 1171 (Fed.Cir. 1994) (burden shifts upon a showing of entitlement to a directed verdict).[13] The County concedes that the Leones made a prima facie case at trial. *See* County's Answering Brief, p.38. Under the either standard, the jury could have reached

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[11] *See* DeCook v. Rochester Int'l Airport Joint Zoning Bd., 796 N.W.2d 299, 306 (Minn. 2011), the appellate court highlighted its power to "interpret and apply the Minnesota Constitution differently than the U.S. Constitution."

[12] *See* Utah Dept. of Transp. v. Admiral Bev. Corp., 275 P.3d 208, 215 (Utah 2011) (landowners must be compensated "when there is any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed"); Anchorage v. Sandberg, 861 P.2d 554, 557-58 (Alaska 1993) ("the Alaska Constitution affords the property owner broader protection than that conferred by the Fifth Amendment.... We have consistently held that a taking occurs when a landowner is deprived of substantially all beneficial use of property..."); Newman Signs, Inc. v. Hjelle, 268 N.W.2d 741, 755-56 (N.D. 1978) (a taking occurs if regulation is not "reasonably related to a proper purpose" and "deprive[s] the property owner of all or substantially all beneficial use of his property").

[13] The County notes that Bowles and Loveladies were bench trials. *See* County's Answering Brief, p.38 n.16. But the logic underlying the burden-shifting paradigm applies both to bench and jury trials. *See* Leones' Opening Brief, pp.36-37.

only one reasonable conclusion at the close of the Leones' case: the Property has no economically beneficial use.

II. THERE IS NO EVIDENCE OF ECONOMICALLY BENEFICIAL USE

When the burden of production shifted to the County, it failed to produce any evidence of economically beneficial use. *See* Leones' Opening Brief, p.37. The trial court correctly observed that "[t]he Defendant ... in its case in chief in defense, did not present any evidence [of economically beneficial use]." Dkt #158, p.21 (4/30/15). Nor is there any evidence that the Property, under the existing regulatory scheme, has any value. The Leones' experts testified that the Property has zero value, and that any residual value after the date of the taking would be speculative. Dkt #140, p.16 (4/8/15 PM, Tsujimura); Dkt #178, pp.51-52 (4/8/15 AM, Tsujimura); Dkt #361, p.33 (4/16/15 PM, Whitney).[14]

The County presented no evidence of the Property's value after the County began enforcing SMA Rule §12-202-12(f)(5) (in January 2003) or after the date of taking (on October 25, 2007). The County points to offers to purchase the Property **before** 2003. County's Answering Brief, p.30. Mr. Leone testified that he received no offers for the Property after October 25, 2007. Dkt #186, pp.83-84 (4/21/15 AM, D.Leone).

The County also cites the testimony of Chris Ponsar, the Leones' appraiser, that the value of the Property **on** October 25, 2007 was $7.2 million, assuming that they could build a single-family home (Dkt #180, pp.61-62 (4/10/15 AM, Ponsar). County's

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[14] The County claims the opinions on value were not "supported by appraisal, valuation, estimate, or even guess work." County's Answering Brief, p.30. Both experts are well qualified to give those opinions (*see* Dkt #144, pp.5-45 (4/15/15 PM, Whitney); Dkt #178, pp.32-40 (4/8/15 AM, Tsujimura)) and arrived at their conclusions after analyzing the County's regulations (Dkt #178, pp.52-54 (4/8/15 AM, Tsujimura); Dkt #144, pp.52-53 (4/15/15 PM, Whitney)).

Answering Brief, p.30. That number is not evidence of value **after** the date of taking, but rather showed the Leones' damages.

Although Ted Yamamura, the County's appraiser, valued the Property as of July 2014, that evidence was properly excluded because the 2014 date is irrelevant to the calculation of damages. Also, that appraisal was wrongly premised on an "extraordinary assumption" that the Leones had the right to build a home on the Property. **ROA** pt.33 at 231-56.

Likewise, Mr. Yamamura's testimony about the Property's "tremendous investment opportunity" is unsubstantiated and irrelevant. County's Answering Brief, p.33.[15] The County has now abandoned its argument that "investment" use is (by itself) "economically beneficial." A landowner who has been denied use of his property suffers a taking even where he has been able to sell the property for more than he paid for it. *See* Leones' Opening Brief, p.46, discussing Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996) *aff'd*, 526 U.S. 687, 119 S.Ct. 1624 (1999).

III. THE COUNTY'S ANSWERING BRIEF MISSTATES APPLICABLE LAW AND RELEVANT FACTS

A. The Leone Opinion Is Law of the Case

When the County sought a writ of certiorari in 2012, this Court denied the application. **ROA** pt.2 at 1004-5. The holdings in the Leone Opinion on ripeness and finality, and attendant findings on the facts and the law, bind the County under the doctrine of law of the case. This doctrine applies to "issues that have been decided either expressly or by necessary implication," and applies to "single proceedings, and operates to

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[15] Mr. Yamamura testified that the Property is "an ocean front lot on one of the best beaches in south Maui, and **just by that alone**, we know that it has tremendous opportunities for increases in values. So it's a good investment." Dkt #156, pp.81-82 (4/28/15 AM, Yamamura)(emphasis added). But Mr. Yamamura assumed that the Leones had the right to build a house on the Property. **ROA** pt.33 at 231, 234.

foreclose re-examination of decided issues **either on remand or on a subsequent appeal....**" Ditto v. McCurdy, 98 Haw. 123, 128, 44 P.3d 274, 279 (2002) (emphasis added). *See* Leones' Answering Brief, p.43.

The County argues that the ICA's decision was limited only to the issue of "ripeness." County's Answering Brief, pp.42-44. After Leone, the County may no longer assert that the Leones had to exhaust administrative remedies before suing for the lack of an economically beneficial use. "Ripeness" means, as the Leone Opinion held, that the County made a final decision as to what could be done with the Property. 128 Haw. at 193, 284 P.3d at 966 (***App.A***, Dkt #380). The next inquiry -- the one presented at trial -- was whether that decision left the Leones with economically beneficial use.

The County argues that the ICA's holdings in the Leone Opinion are superfluous dicta. County's Answering Brief, p.42. "Dicta" should be defined in accordance with Black's Law Dictionary 1177 (9th Ed. 2009), as "a remark made or opinion expressed by a judge ... that is, incidentally or collaterally and not directly upon the question before the court ...." State v. Hussein, 122 Haw. 495, 514, 229 P.3d 313, 332 (2010)(citations omitted). The ICA's analysis of the issue of inconsistency is necessarily related to its holding on ripeness, and is not "dicta." In order to determine that the County had made a "final decision" under Williamson Cnty. Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the ICA had to recognize and explain the impact and the importance of the Director's October 25, 2007 finding of inconsistency.

B. The Leones Actively Sought to Build a Home

The County contends that this case "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 ... committed to and completed in order to obtain approvals to build...." County's Answering Brief, p.3 (*see also* pp.6, 18), p.10 n.6. That is false. *See* Leones' Answering Brief, pp.12-13, as to the Leones' efforts. Other Palauea Beach Lot owners did not receive building approvals because they tried harder than the Leones: like the Leones, all but one of their neighbors had to sue the County to obtain their approvals to build. Dkt #136, pp.44,56; Dkt #48, pp.26-27,45,59 (4/6/15 PM, Welch); **ROA** pt.3 at 661-66.

C. It was County Policy to Refuse to Process SMA Assessment Applications for Palauea Beach Lots

The County does not dispute the testimony of former Planning Director John Min that, before 2001, it was his policy "not to require a formal [SMA] assessment application for projects that are clearly not a development." Dkt #54, pp.57-58 (4/15/15 AM, Min).

Despite Corporation Counsel's warning that "the County may be subject to takings liability if the Council decides to retain the current Park Community Plan designation" (**ROA** pt.25 at 313-23 (Ex.P-37)), the County later adopted a new policy of enforcing SMA Rule §12-202-12(f)(5) (***App.I***, Dkt #388 at 202-11 to 12) and refusing to process SMA assessment applications for uses inconsistent with the Community Plan. This policy started in January 2003, when Planning Director Foley revoked the exemptions given to the Lamberts and the Sweeneys, the Leones' neighbors. **ROA** pt.31 at 885-87, 892-94; Dkt #136, pp.28-29,52 (4/7/15 AM, Welch). The County says that "Director Foley rescinded the SMA exemptions for [the Lamberts and the Sweeneys] in part because of his concern for preservation of public views ... and because of a failure to address known cultural deposits on one of the lots ...." County's Answering Brief, p.21. But the rescission notices themselves state that the Lambert and Sweeney assessment

applications were being revoked because houses are inconsistent with the Community Plan:

> [A] Special Management Area assessment determination should not have been made for the subject property because the proposed action is not consistent with the Kihei-Makena Community Plan, and the applicant should have been notified that the assessment application could not be processed.

ROA pt.31 at 885-87, 892-94. Following these two revocations, the policy became common knowledge. **ROA** pt.25 at 467 (Welch letter, Ex.P-47).

The County now denies that its planning directors had any such policy. County's Answering Brief, pp.8, 21-22. But the County's admissions and actions prove otherwise:

- Planning Director Foley admitted that was his policy. **ROA** pt.33 at 744.[16]
- Planning Director Hunt admitted that was his policy. Dkt #180, p.78 (4/10/15 AM, Hunt).[17]
- Deputy Planning Director Suyama admitted that was the Department's policy. ***App.L*** at 26-27, **ROA** pt.25 at 576-77 (minutes, Ex.P-73).

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[16] In addition, he rescinded previously-granted exemptions in 2003 because the proposed homes were inconsistent with the Community Plan. **ROA** pt.31 at 885-87, 892-94; Dkt #136, pp.28-29,52 (4/7/15 AM, Welch). He also told Mr. Welch that was his policy. **ROA** pt.25 at 598 (minutes, Ex.P-73).

[17] And his actions were in accordance. He refused to process SMA assessment applications for numerous Palauea Beach Lot owners: the Schatzs in 2006 (**ROA** pt.25 at 775-76), the Leones in 2007 (***App.K*** (Dkt #390), **ROA** pt.25 at 567-68 (Rejection Letter, Ex.P-68)), and the Larsons in 2008 (Leone, 128 Haw. at 187-89, 284 P.3d at 960-61 (***App.A***, Dkt #380)), because their proposed homes were inconsistent with the Community Plan. And as part of his effort to amend the Community Plan in 2007, he explained to the Planning Commission that "[t]he current inconsistencies have led to litigation and appeals (Lambert Sweeney)...." **ROA** pt.25 at 489 (Hunt memo, Ex.P-57).

- The County did not process any SMA assessment applications for any Palauea Beach Lots between 2003 and 2011. Dkt #48, p.25-26; Dkt #158, pp.80-81 (4/30/15, Welch).

D. The County's Hypothetical Alternatives Have No Merit

The County insists that the jury could have found against the Leones because they sued in 2007, rather than seeking to amend the Community Plan. County's Answering Brief, pp.46-47. The County argues that it "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 community plan amendment." *Id.*, p.47. The County conveniently neglects to quote the sentence that follows: "Said application will require consistency with the Community Plan in order to be processed." ***App.K*** (Dkt #390), **ROA** pt.25 at 567.

It is the responsibility of the **County**, not the landowner, to revise the Community Plan to allow for economically beneficial use -- as explained at length in the Leone Opinion. *See* 128 Haw. at 193-96, 284 P.3d at 966-69 (***App.A***, Dkt #380).

The County complains that it was not given the "opportunity to grant any variances or waivers allowed by law." County's Answering Brief, p.48. The County fails to explain what "variances or waivers" would have been available. As the ICA noted in the Leone Opinion, "[a] Community Plan Amendment cannot be equated with a zoning variance or similar relief." 128 Haw. at 195, 284 P.3d at 968 (***App.A***, Dkt #380).

The County also continues to insist that the Leones could have applied for an exemption rather than file the present lawsuit.[18] It is undisputed that the Leones **did** seek an

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[18] The County makes much of Dr. Whitney's statements that the Leones "have the option to seek an exemption" and "chose[] an alternative course of action." County's Answering Brief, pp.48-49. But Dr. Whitney said twice that he was "not privy" to the (continued...)

exemption and that the County responded with the Rejection Letter, a decision equivalent to denial.[19]

CONCLUSION

This Court should remand this case to the Circuit Court with instructions 1) to enter judgment as a matter of law in favor of the Leones and against the County for just compensation of no less than $7.2 million, plus pre-judgment interest and the Leones' reasonable attorneys' fees and costs, and 2) to vacate the trial court's award of costs to the County.

DATED: Honolulu, Hawaii, August 15, 2016.

/s/ Andrew V. Beaman
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[18](...continued)
Leones' decision making. *See* Leones' Answering Brief, p.16 n.23.

[19] As this Court recognized in GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998) "[t]he decision of the Director not to process GATRI's application is a final decision equivalent to a denial of the application." 88 Haw. at 111, 962 P.2d at 370.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing document was duly served upon the parties identified below, via electronic court filing (JEFS), on this date:

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DATED: Honolulu, Hawaii, August 15, 2016.

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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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