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IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

DOUGLAS LEONE AND PATRICIA A. PERKINS-LEONE, as Trustees under that certain unrecorded Leone-Perkins Family Trust dated August 26, 1999, as amended,

Plaintiffs/Appellants,

vs.

COUNTY OF MAUI, a political subdivision of the State of Hawaii; WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui; DOE Entities 1-50,

Defendants/Appellees.

CIVIL NO. 07-1-0496(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/APPELLANTS' COUNTY OF MAUI's and WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui's OPENING CROSS-APPEAL BRIEF; APPENDICES 1 AND 2; 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'

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10) APRIL 20, 2015 GRANT OF PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE NO. 15;
11) JURY INSTRUCTION NOS. 22, 37, 39, and 40; and
12) SPECIAL VERDICT FORM

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

Defendants/Appellants COUNTY OF MAUI and WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui, hereby respectfully submit their Opening Cross-Appeal Brief pursuant to Hawai'i Revised Statutes § 641-1(a) and Hawai'i Rules of Appellate Procedure, Rule 4.1.

I. CONCISE STATEMENT OF THE CASE

A. NATURE OF THE CASE

Plaintiffs/Appellants/Cross-Appellees DOUGLAS LEONE and PATRICIA A. PERKINS-LEONE (the "LEONES," "Plaintiffs," "Appellants," or "Cross-Appellees") claim inverse condemnation. Plaintiffs/Appellants allege a "regulatory taking" of their ocean front parcel located at Palauea Beach, Makena, Maui ("LOT 15") by 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," Appellees," or "Cross-Appellants").[1] The fragility of Palauea Beach is known and documented. JEFS Dkt 54 and PDF pp. 81-82. [*Transcript,*

[1] 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.

2015-04-15 a.m.].

LOT 15 abuts the shoreline of Palauea Beach, within an area of well know, historic and archaeological significance, and was discovered to contain Hawai'ian cultural human remains sometime following the LEONES' purchase of the property.

The LEONES claim under current COUNTY regulations that their ocean front parcel has no economically beneficial or viable use, and has therefore been inversely condemned. The regulatory taking is specifically alleged to have occurred by virtue of a letter sent to the LEONES from then Maui County Planning Director Jeffrey Hunt on **October 25, 2007**, returning their Special Management Area Assessment Application ("SMA Assessment Application") unprocessed. JEFS Dkt 256 and PDF pp. 562-568. The LEONES argue the SMA could not be processed *as a matter of law*, because the parcel is also included within an area designated as "park" by the 1998 Kihei-Makena Community Plan ("KMCP").[2]

The LEONES also claim, somewhat inconsistently, that the Director of the Department of Planning himself thwarted their plans to build a single-family residence on

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[2] LOT 15 is one of eleven ocean front lots located at Palauea Beach. JEFS Dkt 256 and PDF pp. 834; JEFS Dkt 264 and PDF 390. 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 is governed by the Special Management Area Rules for the Maui Planning Commission. LOT 15 lies within the County of Maui's Special Management Area. JEFS Dkt 208 and PDF pp. 224-225. Nine of the eleven ocean front lots at Palauea Beach, including LOT 15, are and have been at all relevant times designated "park" under the KMCP. JEFS Dkt 260 and PDF pp. 343-408. The nine 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.].

Although it was excluded from trial, the COUNTY attempted to get in evidence that Palauea 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. at pp. 17-22*]

the parcel, by refusing to process the application which the LEONES argue could not legally be processed.

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 345-398. 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. JEFS Dkt 208 and PDF pp. 221-239.

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 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. DISPOSITION OF 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.
>
> V. ORDER
>
> 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 Cross-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.[3] 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

[3] 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 Larsons owned two parcels neighboring the LEONES' parcel at Palauea Beach, and were represented by the same law firm as the LEONES in a separate suit. 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.

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 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).

C. DISPOSITION OF PROCEEDINGS POST-REMAND

On remand the LEONES' case involved voluminous discovery,[4] 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.*]

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

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. at pp. 55-56*]; JEFS Dkt 160 and PDF55-56. 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., and additionally argued that the County's lawyer 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 Renewed Motion for Judgment Notwithstanding the Verdict was also denied. JEFS Dkt 268 and PDF pp. 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.

II. FACTS MATERIAL TO QUESTIONS AND POINTS PRESENTED ON CROSS-APPEAL

A. EVIDENCE INTRODUCED AT TRIAL

The evidence introduced at trial demonstrated as follows:

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 attorney 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 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 Dkt264 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.[5] The record obtained in discovery,

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[5] The LEONES listed LOT 15 for sale within four (4) months after purchasing it, marking it up $1,050,000. JEFS Dkt260 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,

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 Palauea Beach.[6] JEFS Dkt 54 and PDF pp. 83-84 [*Transcript 2015-4-15 a.m.*]. The LEONES' counsel also introduced into evidence, and placed in issue the existence of several cultural burial sites within the area of adjacent lots at Palauea 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. p. 37.*

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 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 Jon Min testified to the State Historic Preservation Division's and Burial Council's involvement in reviewing archaeological

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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.

[6] Notably, Palauea 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 Palauea 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.*]

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. at pp. 52-56*]. 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. at pp. 48-49*].

Evidence at trial also demonstrated that several owners of ocean front lots at Palauea Beach, which also fell within the KMCP "park" designation, had already constructed single-family residences on their Palauea 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 Palauea 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 Palauea 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 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 Palauea 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 adn 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].[7] 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.

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 attorney Tom Welch directed Munekiyo to submit the SMA Assessment Application prepared three (3) years

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[7] The LEONES did group together with several other owners of parcels falling within the KMCP "park" designation at Palau'ea Beach, and collectively these owners hired Munekiyo to pursue an omnibus amendment to the KMCP to eliminate the park designation for all privately owned ocean front parcels at Palau'ea Beach. JEFS Dkt 50 and PDF pp. 9-11. [*Transcript 2015-04-07 p.m. (Vol. 2)*] Two of those owners contributing to Munekiyo's effort had years prior already completed construction of exempted single-family residences on their parcels. JEFS Dkt 154 and PDF pp. 15-18 [2015-04-27]. There are two parcels at Palau'ea Beach owned by the County of Maui. JEFS Dkt 50 and PDF p. 10. [*Transcript 2015-04-01 a.m (Vol. 2).*] Munekiyo's partner, planner Gwen Hiraga was responsible for pursuing the environmental assessment for the omnibus community plan change, and testified the County's parcels would not be subject to the community plan change. JEFS Dkt 50 and PDF pp. 10 [Transcript *2015-04-07 p.m. (Vol. 2)*] Ms. Hiraga also made it crystal clear that Munekiyo & Hiraga's work was on behalf of the private lot owners at Palau'ea Beach, not the County of Maui. JEFS Dkt 50 and PDF p. 10. [*Transcript 2015-04-07 p.m. (Vol. 2)*]

The LEONES' attorneys drew much attention at trial to the purported relevance of the Planning Commission's failure to accept Munekiyo's omnibus environmental assessment on its face. JEFS Dkt 142 and PDF pp. 40-43 [*Transcript 2015-04-09 p.m.*] The LEONES' trial attorney argued to the jury that but for the Planning Commission's refusal to accept the omnibus 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.*] The evidence at trial showed, however, the Planning Commission did not reject the proposals, but requested additional information from the landowners' 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. 574-625; JEFS Dkt 260 and PDF pp. 592-597; JEFS Dkt 188 and PDF pp. 34-37 [*Transcript 2015-04-23 p.m.*]. Ultimately, Munekiyo partner Gwen Hiraga indicated that the Planning Commission was never provided with the additional information it requested, because her firm was again told to stop work. JEFS Dkt 50 and PDF pp. 24-31. [*Transcript 2015-04-07 p.m.*].

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 Mr. Welch 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 Mr. Welch and Mr. Munekiyo acknowledged the intention of having the application returned, so Welch could seek further administrative review with the planning commission, in support of the application for the omnibus community plan amendment. Id., JEFS Dkt 136 and PDF pp. 64-66, 78-80 [*Transcript 2015-04-07 a.m.*]. Mr. Welch 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.

B. THE LEONES' ARGUMENT AND REQUESTS FOR JUDICIAL NOTICE

The LEONES' argument in this lawsuit has been inconsistent, culminating at trial with an erroneous and unworkable interpretation of the SMA Rules. As discussed further below, at trial the LEONES opted to argue that permitting requirements imposed pursuant to the SMA Rules on a "development" (as defined by Hawai'i Revised Statutes Chapter 205A), precluded as a matter of law the processing of their proposed single-family residence as a possible "exempted" use within the SMA.

i. LEONES' COMPLAINT

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. Yet, despite asserting that Director Hunt had no choice but to reject their SMA Assessment Application under the Rules, the Complaint also recognizes that legally the LEONES could have applied for an "exempted" use.

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.

ii. PLAINTIFFS' PRETRIAL MOTIONS' ARGUMENTS ABOUT THE *LEONE* DECISION

Rather, the LEONES ultimately elected at trial to pivot away from the alleged right to an exempt status. Instead, they argued at trial that their SMA Assessment Application *could not* be processed under any circumstance, because any proposed use of LOT 15 other than as a "park" as designated in the KMCP was "illegal." JEFS Dkt 186 and PDF pp. 95-96 [*2015-04-21 a.m.*] The LEONES repeatedly referred the trial court to a footnote in the Leone decision as supporting their erroneous conclusion that it was/is "illegal" for the Director to allow, or even review anything other than a proposed park for development at Palauea Beach (and therefore, LOT 15 was effectively taken by regulation).

In support of an evidentiary motion filed on February 23, 2015, and a trial brief filed on March 30, 2015, the LEONES argued:

> The ICA, however, concluded that the County's regulatory scheme **required the County to reject an SMA assessment application if the proposed use was inconsistent with the community plan.** *Leone*, 128 Haw. at 194 fl8, 284 P.3d at 967 n8.

JEFS Dkt 236 and PDF pp. 449-454 at 451.[8] (Emphasis added). In a trial brief Plaintiffs further argued:

> Accordingly, **the Director had no choice but to issue the rejection letter** since, as is undisputed in this case, a single-family home is inconsistent with the Community Plan designation of "park." The Planning Commission could not have legally overturned this determination by the Director, so any appeal would been pointless.
>
> The *Leone* opinion drove this point home:
>
> Under the expressed language of the code [Maui County Code], neither the Director not the Planning Commission may approve land uses that are inconsistent with the Kihei-Makena Community Plan.
>
> Id. at 194, n.8, 284 P.3d 967 n.8.

JEFS Dkt 250 and PDF pp. 522-529 at 526.[9]

iii. PLAINTIFFS' INTRODUCTION OF THE LEONE OPINION AT TRIAL

The LEONES' counsel was further allowed to identify the Leone decision to the jury, despite having no foundation for doing so, without any credible showing of relevance, and contrary to a preliminary in-limine ruling by the trial court ordering that while the parties could request judicial notice of relevant holdings from the Leone decision, the decision itself could not be brought to the attention of the jury, so as to avoid confusion and potential prejudice to the COUNTY.[10]

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[8] Plaintiff's Reply Memorandum Re Motion In Limine No. 1 (Re Allegedly Defective SMA Application), filed February 23, 2015. JEFS Dkt 236 and PDF pp. 449-454.

[9] Plaintiff's Trial Brief re Irrelevancy of Appeal of Director's Rejection of Leones' SMA Assessment Application to Planning Commission, filed March 27, 2015. JEFS Dkt 250 and PDF pp. 522-529.

[10] 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 in Limine No. 2 to Exclude Intermediate Court of Appeals Factual Background and Dicta Statements In *Leone, et al. v. County of Maui*, 128 Hawai'i 183, 284 P.3d 956 (2012), filed February 2, 2015, was heard on March 6, 2015. JEFS Dkt 166 and PDF pp. 1-41; JEFS Dkt 232 and PDF pp, 383-411.

After trial was well underway, on April 16, 2016, the trial court *sua sponte* determined that Plaintiffs would be allowed to advise the jury of the existence of the Leone decision, purportedly as somehow relevant to the opinion(s) of Plaintiffs' real estate economist William Whitney:

> Q. Mr. Whitney, let me ask, were you at any time requested to change or revise your understanding that, "As a result, any new development activity is subject to a series of regulatory considerations under a permitting process that is intended to mitigate unfavorable environmental consequences from such development"?
> MR. BEAMAN: Same objection; misstates the report. I can explain this if you'd like.
> MR. BILBERRY: I just read right from the report, your Honor.
> THE COURT: No, I'll overrule the objection, but this is fair game on Redirect at this point. **This door's been opened.**
> BY MR. BILBERRY:
> Q. Do you see that?
> A. I see that.
> Q. Were you ever asked to revise or change that?
> A. No.
> Q. Okay. So just so we're clear, your understanding as to how the SMA rules work is it's the land owner's burden to show that their proposed single-family residential use will not have a harmful impact on the environment before they are entitled to get to that exemption; correct? [11]

JEFS Dkt 361 and PDF pp. 9-10 [Transcript *2015-04-16 p.m.*] (Emphasis added).

During a bench conference, the trial court explained why in its view the COUNTY on cross-examination "opened the door" to the identification of the appellate decision for the jury:

> [THE COURT]: Secondly, given all of your cross-examination, you've brought the *Leone* appellate opinion into this case. **It's encompassed in the third page of his report at the top.** You know, I don't know how it could be done on such short notice, but, frankly, you know --
> MR. BILBERRY: Your Honor, I didn't refer to --

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[11] Whitney never implied he relied on the Leone decision. His opinions were purported to be based on his readings of the SMA Rules. JEFS Dkt 182 and PDF pp. 73-75, 88-89 [*2015-04-16 a.m.*]; JEFS Dkt 361 and PDF pp. 4-6 [*Transcript 2015-04-16 p.m.*]

THE COURT: -- the door has been opened.

MR. BILBERRY: Your Honor, I didn't refer him to the third page of this report, and I made no mention of the *Leone* opinion. That opinion also appears --

THE COURT: You are absolutely correct, Mr. Bilberry, but you're trying to seal the Plaintiffs' mouth to rehabilitate their witness on cross-examination where the report specifically says certain things. And **I don't know whether he has ever heard of the Leone appellate opinion or not. I'm not going to say that he can talk about the opinion, but those doors have been opened.**

MR. BILBERRY: Your Honor, you said Page 3 of the report --

THE COURT: Well, maybe it's not Page 3.

MR. BILBERRY: I don't see it anywhere in this report, your Honor. We're looking at a report dated --

THE COURT: Okay. Well, we'll deal with it if the Plaintiffs dare to bring it up.

MR. BILBERRY: -- March 21st, 2013, P-158. That's the report we've been discussing.

THE COURT: Right.

MR. BILBERRY: I don't see a reference to the Leone opinion on Page 3.

THE COURT: I didn't say there was. Don't put words in my mouth, Mr. Bilberry.

MR. BILBERRY: I'm sorry, your Honor. That's what I thought I heard -- I thought I heard that's why I was opening the door, but I don't see that in the report.

THE COURT: The top of Page 3 of the report -- you've cross-examined this witness on the first portion. Perfectly fine. I don't have a problem with that. He put it in the report. But the report goes on, "We understand that such an application will not be processed by the County if the proposed use is inconsistent." He's testified to that. **Plaintiffs are permitted to discuss that and the basis for that opinion, <u>if he has one</u>**, other than Mr. Beaman telling him. But **<u>if</u> Mr. Beaman told him an appellate court has ruled in this matter**, that, that is what the law is, you opened the door.

MR. BILBERRY: Your Honor --

THE COURT: You have opened the door on your cross-examination.

MR. BILBERRY: Yeah, I disagree, your Honor.

THE COURT: No, I understand, but that's my ruling. That's my ruling.

MR. BILBERRY: All right.

THE COURT: So as far as what you want to do -- I don't know where we are at this point so just --

MR. BILBERRY: Well, I'm going to finish my cross-examination, and if you are going to allow Mr. Beaman to question him about the appellate decision, we'll do that.

THE COURT: No, I'm saying you opened the door. Whether they wish to step through it or not is a totally different thing. I'm not sure they're going

to do that. I'm not sure. But I'm giving you fair warning because I'm trying to anticipate potential arguments so that we don't take up too much more of the time, but you'll have as much time as you want. I mean, we're moving at such a pace here that I'm not concerned about it, frankly. But I'm just telling you -- because if Mr. Beaman gets up and all of a sudden the question comes up, we're going to have to have this argument, so I'm just telling you in advance. Okay. So we'll come back at 3:00.

JEFS Dkt 361 and PDF pp. 39-40 [*Transcript 2015-04-16 p.m. pp. 39-40*]. (Emphasis added).

On redirect examination by the LEONES' counsel, Mr. Whitney was permitted to tell the jury about the existence of the Leone opinion as follows:

Q. Now, Mr. Bilberry asked you some questions about your Phase I report or report in this case. May we have P-158, please. Oh, you have P-158 with you, Bill.

A. I have a copy of P-158.

Q. Okay. Could you refer to that, please.

A. Yes.

Q. And is Exhibit P-158 your Phase I report in this case?

A. Yes.

Q. You recall that Mr. Bilberry asked you some questions about paragraph number four of your report beginning on the second page and continuing until the third page.

A. Yes.

Q. And specifically the subparagraph that is titled, "Special Management Area Statutes" he read to you.

A. Yes.

Q. Would you read for us, out loud, please, that paragraph in its entirety.

A. Yes. "Special Management Area (SMA) Statutes: The Leone property is located in an area that has been designated as a special management area or SMA. As a result, any new development activity is subject to a series of regulatory considerations under a permitting process that is intended to mitigate unfavorable environmental consequences from such development.

However, the construction of a single-family residence that is not part of a larger development is specifically defined in the regulations as not being development and can be exempted from the SMA permitting process provided that such construction is found by the local planning authority as likely not to have a significant impact on the environment.

However, under the Maui County regulations implementing the SMA, the burden of proof with respect to showing that the proposed

development is "likely not to have a significant impact" is placed on the land owner who must submit an SMA assessment application.

Per the County's letter indicating its unwillingness to process the Leones' SMA assessment application, **we understand that such an application will not be processed by the County if the proposed use is inconsistent** with either the existing Zoning or **the use designation of the Kihei-Makena Community Plan** as discussed below."

Q. **Are you aware of any opinion by an appellate court in this case confirming that opinion?**

MR. BILBERRY: Your Honor, object; move to strike.

THE COURT: Overruled.

THE WITNESS: Yes.

MR. BEAMAN: May I have P-156, please.

MR. BILBERRY: May we approach, your Honor?

THE COURT: Wait until there's a question.

BY MR. BEAMAN:

Q. For the record, Dr. Whitney, I've handed you what's been marked as Exhibit P-156 for identification in this case, and my question to you is, is that the opinion?

MR. BILBERRY: Objection, your Honor. May we approach?

THE COURT: You may. Don't answer the question yet, Mr. Whitney -- or, Dr. Whitney, if you would step down for a moment.

THE WITNESS: Step down?

THE COURT: Yes, please.

JEFS Dkt 361 and PDF pp. 47-50 [*Transcript 2015-04-16 p.m.*]. (Emphasis added).

Again at the bench, the trial court clarified the basis of its *sua sponte* determination about the relevance of the Leone decision to Plaintiffs' expert Whitney's opinions, expressly instructing that the opinion was only relevant if Plaintiffs' expert Whitney *relied* on the Appellate decision for his own opinions:

THE COURT: Okay.

MR. BILBERRY: Your Honor, I asked Mr. Whitney on Direct -- on Cross-Examination what the basis of his conclusions and opinions were in this paragraph, and he did not mention this opinion. He was apparently -- let me withdraw that.

If you read what he actually says here, which is, "We understand that such an application will not be processed by the County," that has got no -- that can have no basis in the ICA opinion.

He says, "We understand the County will not process" -- not that we understand the County is not permitted to or that there's some opinion out there that says the County can't do that.

If you look at what he wrote prior to those remarks on the previous page, he talks about the burden of proof with respect to showing entitlement to an exemption. That doesn't appear anywhere in the ICA opinion.

This witness has been questioned about the subject matter and the basis of these statements on Cross-Examination. He said nothing about the ICA opinion. And after the colloquy we had before break, he is now coming back in here and is now going to say that he has somehow relied upon that opinion for these statements, your Honor. I'm very concerned about him being allowed to make those kinds of statements given that he did not disclose any of this when asked about it on Cross-Examination.

THE COURT: You didn't ask him. Mr. Beaman.

MR. BILBERRY: I did ask him, your Honor. I asked him what the basis of these statements were.

THE COURT: Only with respect to the sentence and you stopped at the comma in the paragraph which you're entitled to do. Go ahead, Mr. Beaman.

MR. BEAMAN: Thank you, your Honor. The question pending is **whether that is the opinion, not whether he relied upon it**.

THE COURT: Right.

MR. BEAMAN: And --

MR. BILBERRY: Then what's the point?

MR. BEAMAN: Counsel, please let me finish.

THE COURT: Go ahead.

MR. BEAMAN: Counsel in this case has called into question the validity of Dr. Whitney's opinion that inconsistency precludes the Leones from making a viable use of their land. **The Intermediate Court of Appeals agrees with Dr. Whitney**; that inconsistency precludes them from making a viable use. The jury is entitled to know that.

In addition, Mr. Bilberry has repeatedly in this case suggested to this jury, through this witness and many other witnesses, that if the Leones had simply tried harder, if they had resubmitted an application, they could have gotten a lawful permit to build, and that is not true, and it is time for the jury to know that.

MR. BILBERRY: Your Honor, the ICA opinion did not say that the Leones weren't entitled to an exemption and they were denied a permit because of the inconsistency within the Community Plan. Before **they stated that the Director made a determination that their proposed use was a development**, and that is whereby the ICA concludes that there is an inconsistency within the Community Plan that precluded that application from being processed.

THE COURT: Okay. The objection is overruled. However, ***you can only inquire in terms of the opinion, whether he, in some fashion, relied upon it***. The issues you wish to raise, Mr. Beaman, will be taken care of in some fashion, one way or another, through the Court, whether I take judicial notice -- and I will tell you, I will probably take judicial

notice. It's really, as I said, what the jury is going to be told. But **this expert shouldn't be talking about what the ICA did**. That, I'm going to restrict.

It's only a question of is he aware of it and ***did he rely upon it*** in any way in rendering his opinion. If his answer is no, then the inquiry [stops] (sic). If the answer is yes, then you may ask him how so? And then Defense can cross-examine him if that's what they wish.

But the door was open on this specific area of questioning, Mr. Bilberry. The point is this, is just because you get the response that you want, doesn't preclude the other side from now trying to clear up what the answer was in response to the question.

MR. BILBERRY: Your Honor, I don't understand how I opened the door on this by asking him what's in his report.

THE COURT: Right.

MR. BILBERRY: Which makes no mention of this opinion.

THE COURT: You are correct, but **that doesn't mean that he didn't rely upon it**, and your repeated questions stopped at the period in the last sentence on that page, but the opinion continues. And all Mr. Beaman is doing now is trying to bring that out to the jury's attention.

MR. BILBERRY: All right. Let's read that, your Honor.

THE COURT: No, we don't have to read it. It's in the record and it was just read into the record, so's that's my ruling. The objection is overruled.

MR. BILBERRY: Your Honor, I don't --

MR. BEAMAN: Thank you, your Honor.

THE COURT: Let's continue.

JEFS Dkt 361 and PDF pp. 50-54 [*Transcript 2015-04-16 p.m.*] (Emphasis added).

Upon continuing redirect examination of Whitney, Plaintiffs' counsel did not ask Whitney if he relied on the Leone decision for his own opinions, but rather, Whitney was again asked if the Appellate decision "confirmed" his opinions:

THE COURT: So the objection is overruled, and with my cautionary instruction, Mr. Beaman, you may proceed.

BY MR. BEAMAN:

Q. Mr. Whitney, is Exhibit P-156 **that appellate opinion confirming what you have written there**?

MR. BILBERRY: Objection; relevance.

THE COURT: Overruled.

THE WITNESS: Yes.

JEFS Dkt 361 and PDF p. 55 [*Transcript 2015-04-16 p.m.*]

Mr. Whitney was not asked anything further about the Appellate decision in Leone. Mr. Whitney was never asked if he relied on the decision. Mr. Whitney was not asked if he read the decision. Whitney was not even asked when he purportedly became aware of the Leone decision. JEFS Dkt 361 and PDF pp. 47-50 [*Transcript 2015-04-16 p.m.*]; JEFS Dkt 361 and PDF p. 55 [*Transcript 2015-04-16 p.m.*].

iv. LEONES' REQUEST FOR JUDICIAL NOTICE

Subsequent to the identification of the Leone decision by Mr. Whitney, the LEONES were granted specific instructions of law from the trial court to the jury identifying the Leone decision as "the law of the case." These instructions came after three weeks of evidence taken at trial, and on the day that the LEONES' rested their case-in-chief:

> The first instruction to you is as follows: Following an appeal at an earlier stage of this case, the Hawai'i Intermediate Court of appeals issued an opinion entitled Leone, et al. v. County of Maui, et al. That opinion is the law of this case, and is binding on the parties and this Court.

JEFS Dkt 186 and PDF p. 51 [*Transcript 2015-04-21 a.m.*]

The jury was then read the following language quoted from the Leone opinion, as "the law of the case:"

> Second Instruction. In the Leone opinion, the Intermediate Court of Appeals states as follows: The language of the SMA Rules state in mandatory terms that the Director shall make a determination that the proposed action either cannot be processed – actually that's either, five, cannot be processed because the proposed action is not consistent with the County General Plan, Community Plan, and Zoning. That's SMA Rule 12-202-12, subparagraph F.
>
> In any case, the Director's decision that the Leones' Assessment Applications could not be processed has the same effect as a determination that it was a development. **If, because of a cumulative impact or a significant environmental or ecological effect, a single family**

residence is considered a development, then an SMA permit would be required.

If a permit were required, it could not be approved because it would be inconsistent with the Community Plan. Thus, regardless of the denomination of the Assessment Application, the Director's determination of the inconsistency with the Community Plan precludes further processing under applicable law.

JEFS Dkt 186 and PDF pp. 51-52 [*Transcript 2015-04-21 a.m.*]

Finally, the jury was further read an instruction, the language and meaning of which does not appear anywhere in the Leone decision:

The final instruction at this point of the case is as follows: Under the SMA Rules, the Planning Director **may not legally process an application for an SMA exemption** for a land use that is inconsistent with the Kihei-Makena Community Plan.

JEFS Dkt 186 and PDF p. 52 [*Transcript 2015-04-21 a.m. at p. 52*][12] (Emphasis added).

v. PLAINTIFFS' OFFER OF PROOF OF "ILLEGALITY" AS RELEVANCE OR EFFECT OF THE *LEONE* OPINION

Ultimately, the LEONES through their counsel elected to argue directly to the jury that because of the Leone decision, it was "illegal" under the SMA Rules for anyone to build a single-family residence at Palauea Beach, and therefore LOT 15 was effectively taken by regulation: Specifically, counsel made an offer of proof at trial:

MR. BEAMAN: My offer of proof, your Honor, is that Mr. Leone, if asked, would testify that he believes that it's illegal for him to use his land, that he has never made an illegal use of any land that he owns; and that, if asked for the basis of his understanding, he would testify that is based on his reading of the Intermediate Court of Appeals' opinion and everything else that he's heard.

THE COURT: Mr. Bilberry.

MR. BILBERRY: Yeah. I don't understand how it's relevant, your Honor. I'm trying to, but if the offer is that it has been illegal for Mr. Leone to build on his land as of the date of purchase, and they may want to clarify the understanding of that, then I don't have any objection to that.

---

[12] JEFS 184 and PDF pp. 5-44 [*2015-04-20 p.m.*]; JEFS 186 and PDF pp. 5-23 [*2015-04-21 a.m.*].

But if it's just, "I read an opinion in 2012 that tells me that it's illegal for me to build on my land," well, there's no foundation for the understanding, at any point in time, based upon that opinion, from 2012, going back to when the lot was purchased.

So I don't understand how it's relevant.

THE COURT: All right. Well, I agree with Mr. Bilberry on this particular issue. I just instructed the jury as a matter of law on some of what you now want to elicit from Mr. Bilberry -- I mean, from. I apologize. From Mr. Leone.

In 2000 -- Mr. Leone's understanding of the opinion and his interpretation of it, given the instructions that I've already given, frankly, are not relevant from an evidentiary standpoint for the jury's consideration.

Had this occurred before the letter from Mr. Hunt, then, arguably, there might be some basis because then it could be the basis why he didn't do certain things, but after the fact the lawsuit is pending. Just because there is an Appellate opinion, I don't see its relevance from an evidentiary standpoint. So I'm not going to permit that line of questioning.

However, when Mr. Leone comes back, if you have other questions, then you can ask him and then conclude, and then Mr. Bilberry can do his Cross-examination. So --

MR. BEAMAN: Okay.

THE COURT: -- we'll see you guys back at 1:30.

MR. BEAMAN: Thank you, your Honor.

THE CLERK: All rise. Court stands in recess.

JEFS Dkt 186 and PDF pp. 95-97 [*Transcript 2015-04-21 a.m.*]

DOUG LEONE was not permitted to testify as to his lay interpretation of the Intermediate Court of Appeals opinion, but testified as follows:

Q. Have you ever built anything illegal on any property that you own?

A. No.

Q. Would you ever build anything illegal on anything that you own? A. No.

JEFS Dkt 186 and PDF p. 100 [*2015-04-21 a.m.*].

Finally, despite the trial court's clear instruction that Mr. LEONE would not be permitted to testify about the Leone decision, Mr. LEONE elected to do so anyway, implying that all other lot owners at Palauea may have illegally constructed residences on

their properties, and telling the jury the Leone decision precluded him from building on LOT 15, and:

> THE COURT: Let me -- two questions I have from our jurors. First question, "Why have you or your team not attempted to contact the other owners to find out what was needed to be done in order to obtain SMA approval?"
>
> THE WITNESS: It's my understanding that, since the County cannot process an SMA application, cannot process, cannot open the envelope, I do not know what kind of approval the other homeowners had. Are they legal? Are they not? Do Maui citizens have a right to take action against the other homeowners or the County for those? That's not my business. What I do know is the SMA Application cannot be processed. As the Intermediate Court of Appeals stated, it cannot be processed.
>
> MR. BILBERRY: Your Honor --
>
> THE COURT: What's your request?
>
> MR. BILBERRY: Never mind.
>
> THE COURT: No. No. Okay.
>
> MR. BILBERRY: Yeah, I'm going to move to strike.
>
> THE COURT: Okay. The last portion of Mr. Leone's testimony regarding what the Intermediate Court of Appeals said is stricken. You're not to consider it. Ladies and gentlemen, only the Court can instruct you on the law; not the witnesses or the attorneys.
>
> THE WITNESS: Sorry.[13]

JEFS Dkt 186 and PDF pp. 102-103 [Transcript *2015-04-21 a.m.*].

C. PLAINTIFFS' EXPERT WILLIAM WHITNEY'S "VALUE OF LOSS" TESTIMONY

Plaintiffs identified Dr. William Whitney as a "real estate economist" to offer not only opinions on liability, but as to purported damages. Mr. Whitney constructed a speculative real estate investment model for LOT 15, premised on a purported "value of

[13] It certainly requires mentioning here that the Leone decision was not issued until 12 years after the LEONES purchased LOT 15; 8 years after DOUG LEONE terminated Munekiyo's environmental assessment of LOT 15; and 5 years after the LEONES real estate lawyer directed Munekiyo to submit the LEONES' SMA Assessment Application to the Department of Planning with indisputably incomplete submittals for environmental review. 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 566.

loss[t]" [profit] to the LEONES associated with their Property never having been developed.[14] JEFS Dkt 144 and PDF p. 63. [*Transcript 2015-04-15-p.m.*].

Whitney's assumptions for his speculative real estate investment model included wholly hypothetical variables for completed regulatory approvals and permitting costs, construction costs, construction financing, inflation, appreciation, a discount rate, and a property valuation for the year 2017. JEFS Dkt 144 and PDF pp. 18-43, 65-80, [*Transcript 2015-04-15 p.m.*] and JEFS Dkt 361 and PDF pp. 22-27, 30-36, [*Transcript 2015-04-16 p.m.*]; JEFS Dkt158 and PDF pp. 30-47 [*Transcript 2015-04-30 p.m.*].

Mr. Whitney is not, and has never been a licensed appraiser in any state. JEFS Dkt 218 and *PDF pp. 226-531*. Mr. Whitney admitted that his valuation of the hypothetically developed LOT 15 for sale in 2017 did not involve an appraisal, or even use any comparable properties. JEFS Dkt 218 and *PDF pp. 226-531*. Mr. Whitney did not follow any appraisal standards for his 2017 valuation of the hypothetically developed LOT 15. JEFS Dkt 218 and *PDF pp. 226-531*; JEFS Dkt 158 and PDF p. 42 [*Transcript 2015-04-30*]

Whitney was allowed to testify that the LEONES would have realized an appreciation in the value of their hypothetically developed property of up to $19,000,000 by 2017. JEFS Dkt 182 and PDF p. 15 [*Transcript 2015-04-16 a.m.*]. Whitney testified this would have translated to $12,500,000 million, discounted from his wholly

[14] Mr. Whitney and the LEONES' counsel indiscriminately and erroneously referred to this alleged "value of loss" as a "loss in value" or "actual loss" to the LEONES' parcel. JEFS Dkt 144 and PDF pp. 79, 81 [*2015-04-15 p.m.*]; JEFS Dkt 182 and PDF pp. 11, 15-16, 21 [*Transcript 2015-04-16 a.m.*]. The purported value of loss was calculated by way of a net present value formulation. JEFS Dkt 144 and PDF pp. 33-34 [*Transcript 2015-04-15-p.m.*].

speculative 2017 valuation back to a net present value as of the date the LEONES received Mr. Hunt's letter on October 25, 2007. JEFS Dkt 144 and PDF p. 80 [*Transcript 2015-04-15 p.m.*]; *JEFS Dkt 182 and PDF pp. 15-16* [*Transcript 2015-04-16 a.m.*].

Plaintiffs otherwise made no showing, or any credible argument at trial that LOT 15 suffered any diminution in value.

D. FACTS AND EVIDENCE EXCLUDED FROM TRIAL

As will pertain to this Cross-Appeal, the trial court made certain orders and rulings resulting in the following facts and evidence being excluded from evidence:

i. *ORDER GRANTING PLAINTIFFS' MOTION IN LIMINE NO. 1.*

Plaintiffs' *Motion in Limine No. 1* was filed to exclude any evidence reflecting the LEONES' SMA Assessment Application as submitted on **September 27, 2007** was incomplete, and as such it effectively could not be accurately or fairly reviewed and assessed by the Department of Planning as required by the SMA Rules. JEFS Dkt 230 and PDF pp. 489-534.

After the LEONES' SMA Assessment Application was submitted on **September 27, 2007**, it was assigned to planning professional Thorne Abbott for review and assessment. JEFS Dkt 234 and PDF pp. 347-504 at 443-449, 455-456, 460-463. During pretrial deposition discovery on November 20, 2008, Mr. Abbott testified as to the innumerable deficiencies on the face of the required submittals accompanying the application. Had he not been excluded from doing so, Mr. Abbott would have testified at

trial that the following submittals and information were insufficient and/or effectively missing from the application:

> 1) The required State of Hawai'i shoreline certification submitted with the LEONES' application expired 5 years prior;
>
> 2) The engineer's license under which the shoreline certification with the LEONES' application was submitted expired 5 years prior;
>
> 3) The plans with the application showed the LEONES' proposed swimming pool fell inside the shoreline set back where construction was prohibited;
>
> 4) The LEONES' application failed to provide a survey or provide accurate information about coastal dunes fronting Lot 15;
>
> 5) The LEONES' application failed to include a flood development permit application;
>
> 6) The LEONES' application failed to provide an approved grading plan;
>
> 7) The LEONES' application failed to provide information for assessment of view plane and shoreline access;
>
> 8) The LEONES' application failed to provide a drainage report;
>
> 9) Despite the existence of known Hawai'ian cultural human remains on the lot, the LEONES' application failed to include a required mitigation plan to either recover or preserve remains;
>
> 10) The LEONES' failed to seek from the Burial Counsel the required approval for any recovery or preservation plan for the known cultural human remains on Lot I5; and
>
> 11) The Leones did not even remit the full filing fee amount required for processing of their application.

JEFS Dkt 234 and PDF pp. 347-504 at 443-449, 455-456, 460-463.

The trial court's Order granting *Plaintiffs' Motion in Limine No. 1*, effectively excluded Mr. Abbott from testifying at all about the incompleteness and insufficiencies with the application and submittals. JEFS Dkt 252 and PDF pp. 863-865. Mr. Abbott

was also excluded from testifying that the incompleteness of the application precluded any meaningful assessment of the LEONES' SMA proposed development plans for LOT 15.

The insufficiency of the LEONES' SMA Assessment Application was also recognized by then Deputy Planning Director Colleen Suyama, who at the LEONES' real estate attorney Welch's request received the application when it was submitted on **September 27, 2007**. JEFS Dkt 266 and PDF p. 262. Deputy Director Suyama acknowledged the LEONES' SMA Assessment Application could not be fairly assessed and processed owing to its incompleteness alone. JEFS Dkt 234 and PDF pp. 347-504 at pp. 467-473.

The trial court's reasoning in granting *Plaintiffs' Motion in Limine No. 1*, and effectively excluding from trial the evidence identified above remains unclear, despite extended discussion at the hearing on the motion. JEFS Dkt 46 and PDF pp. 2-17 [*Transcript 2015-02-27 a.m.*]. It appears to the COUNTY that facts and evidence demonstrating the incompleteness and insufficiency the LEONES' SMA Assessment Application were excluded based on the Plaintiffs' argument that the Leone decision made the evidence not relevant.

During trial additional evidence was excluded, apparently as also based on the Plaintiffs' assertions of there being no relevance to the actual submission and review of the LEONES' SMA Assessment Application, as follows:

DEFENDANTS' EXHIBIT D-104. On **September 6, 2007**, prior to the belated submission of LEONES' SMA Assessment Application that same month on **September 27, 2007**, the LEONES' real estate attorney Tom Welch sent an e-Mail to then Deputy

Director of Planning Colleen Suyama, expressly requesting the Department of Planning decline to process the LEONES' application. JEFS Dkt 266 and PDF p. 262. Mr. Welch specifically requested the language of the letter state the application could not be processed because the LEONES' proposed single-family dwelling was "inconsistent" with the KMCP "park" designation. JEFS Dkt 266 and PDF p. 262.

Mr. Welch's e-Mail marked as Defendants' Exhibit D-104 was excluded from evidence on relevance grounds. JEFS Dkt 136 and PDF pp. 68-69 [*2015-04-07 a.m.*].

DEFENDANTS' EXHIBIT D-127. After the LEONES' SMA Assessment Application was submitted on **September 27, 2007**, Deputy Director Suyama sent an e-Mail to Mr. Welch advising that Mr. Abbott was assigned to the file, and instructed to draft the letter Mr. Welch requested. JEFS Dkt 266 and PDF p. 288. Ms. Suyama's e-Mail to Mr. Welch marked as Defendants' Exhibit D-127 was excluded from evidence on relevance grounds. JEFS Dkt 136 and PDF pp. 74-75. [*2015-04-07 a.m.*].

ii. *ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION IN LIMINE NO. 5*

Plaintiffs' *Motion in Limine No. 5* was filed to exclude any evidence showing the known and verified existence of Hawai'ian human cultural remains on LOT 15. JEFS Dkt 230 and PDF pp. 638-703. The trial court granted the motion to the extent that no party was permitted to mention in their opening argument the presence of cultural human remains on the LEONES' parcel. JEFS Dkt 120 and PDF p. 32 [*Transcript 2015-03-18*]. Motion in Limine No. 5 was denied to the extent that the trial court elected to determine on a question-by-question basis whether evidence reflecting the existence of the remains would be allowed. JEFS Dkt 120 and PDF pp. 32-34. [*Transcript 2015-03-18*].

Notwithstanding the LEONES' own counsel having admitted at trial evidence of the existence of these remains, the evidence excluded included a due diligence disclosure by the seller of LOT 15 to LEONES, and the LEONES' SMA Assessment Application itself, as follows:

DEFENDANTS' EXHIBIT D-10. The due diligence disclosure made to the LEONES by the seller of LOT 15 was an **August 23, 1999** letter from Archaeologist Paul H. Rosendahl, Ph.D., documenting an archaeological assessment survey of LOT 15. JEFS Dkt 266 and PDF pp. 259-260. Dr. Rosendahl's letter specifically noted the presence of historic remains on LOT 15 was possible. Notably, the letter was interlineated and a notation in PATRICIA LEONES' handwriting appears on the document reading, "so -no bones found on surface." JEFS Dkt 266 and PDF p. 259; JEFS Dkt 234 and PDF pp. 505-637 at pp. 517-518. PATRICIA LEONE also hand notated on the letter her skepticism that a residential structure could be built over the top of any subsurface cultural remains on LOT 15, as Dr. Rosendahl suggested in the letter, by simply importing and placing fill over a burial site. JEFS Dkt 266 and PDF p. 259.

The trial court ruled the letter would not be allowed into evidence, unless the existence of cultural human remains on LOT 15 somehow went to a valuation of LOT 15. JEFS Dkt 134 and PDF pp. 56-62 [*Transcript 2015-04-06 a.m.*]. The trial court also specifically referred to the Leone decision to support its preclusion of the letter. JEFS Dkt 134 and PDF p. 61 [*Transcript 2015-04-06 a.m.*].

PLAINTIFFS' EXHIBIT P-65. On April 27, 2015, the COUNTY attempted to admit LEONES' SMA Assessment Application itself into evidence. JEFS Dkt 61 and PDF p. 40 [*Transcript 2015-04-27 a.m.*]; JEFS Dkt 266 and PDF pp. 348-398. Plaintiffs'

objection to its admission was preliminarily sustained on relevance grounds. After Plaintiffs' counsel essentially admitted there were "imputed deficiencies" to the application, as well as the identification of cultural human remains within LOT 15, the trial court ruled the admission of the SMA Assessment Application into evidence would also be "cumulative." JEFS Dkt 154 and PDF pp. 51-54 [*Transcript 2015-04-27 p.m.*].

While the SMA Assessment Application itself was not allowed into evidence, the September 27, 2007 transmittal from Munekiyo's office delivering the application to the Planning Department was met with no objection and admitted into evidence. JEFS Dkt 61 and PDF pp. 38-40 [*2015-04-27 a.m. pp. 38-40*].

iii. *APPRAISER TED YAMAMURA'S VALUATION OF LOT 15*

The COUNTY'S real estate appraiser Ted Yamamura prepared and completed an appraisal of LOT 15 on **July 23, 2014.** JEFS Dkt 254 and PDF pp. 430-486. The appraisal was performed and marked for evidence in rebuttal to Plaintiffs' arguments that LOT 15 had lost all economically viable use, and Plaintiffs' expert William Whitney's unqualified assertions at trial that because of this LOT 15 suffered some unspecified "loss in value."

Plaintiffs argued that Mr. Yamamura's valuation should be excluded from evidence, since under the "law of the case" as purportedly set forth in the Leone decision, the assumption that a single-family residence could be constructed on LOT 15 was legally erroneous. JEFS Dkt 176 and PDF p. 33 [*Transcript 2015-04-02 a.m.*]. The trial court appears to have essentially agreed. JEFS Dkt 176 and PDF pp. 59-61. [*Transcript 2015-04-02 a.m.*].

E. JURY INSTRUCTIONS

Jury Instruction No. 22 without qualification instructed the jury that *any* economic impact visited on land by a government regulation constituted a regulatory taking for which the land owner must be compensated:

> A property owner must be compensated for a regulatory taking. A regulatory taking occurs when the regulations leave the owner of land without economically beneficial or productive options for its use.

JEFS Dkt 198 and PDF p. 15 [*Transcript 2015-05-05 a.m.*].

Jury Instruction No. 39 directed the jury to disregard relevant evidence, which reflected the existence of exempted single-family residences at Palauea Beach:

> To the extent that you have seen or heard evidence that other landowners have built single-family residences on their lots at Palauea Beach, you are instructed that you may not consider this as evidence that Plaintiffs could have built a single-family residence on their Lot at Palauea Beach.

JEFS Dkt 198 and PDF pp. 19-20 [*Transcript 2015-05-05 a.m.*].

F. SPECIAL VERDICT FORM

The Special Verdict Form submitted to the jury at the end of trial characterized any loss of economic benefit or use as a taking. The Verdict Form also allowed for the jury to award damages to the LEONES pursuant to 28 U.S.C. § 1983 based on conduct of the Planning Director in his official capacity which did not result in any statutory or constitutional violation(s), as follows:

> Question No. 1: Did Defendant County of Maui or the Defendant Planning Director deprive Plaintiffs of economically beneficial use of their land?
>
> [Answer "Yes" or "No" in the space provided.]
> Answer: Yes _____ No _____
>
> [*Please go to Question No. 2.*]

Question No. 2: Did Defendant Planning Director act in violation of 42 U.S.C. Section 1983?

[Answer "Yes" or "No" in the space provided.]
Answer: Yes _____ No _____

[If your answer to Questions No, 1 & 2 are "No", the foreperson shall sign and date this document and report to the Bailiff.]

[If your answer to Question No. 2 is "Yes", go to Question No. 3.]

Question No. 3: Did Defendant Planning Director's act cause damages to the Plaintiffs?

[Answer "Yes" or "No" in the space provided.]
Answer: Yes _____ No _____

[Read all of these instructions. If your answers to Questions No. 1, 2, & 3 are "Yes", please proceed to Question No. 4. If your answer to Question No. 2 is "Yes" and Question No. 3 is "No", do not answer Question No. 4, unless you answered Question No. 1 "Yes". If your answer to Question No. 2 and Question No. 3 is "No", do not answer Question No. 4 unless you answered Question No. 1 "Yes". If your answer to Question No. 1 is "Yes", please proceed to Question No. 4.

Question No. 4: What amount of damages have Plaintiffs suffered?

$ _____

JEFS Dkt 254 and PDF pp. 1187-1189.

III. STATEMENT OF POINTS OF ERROR

a. The trial court's ruling allowing the identification and introduction of the Leone decision to the jury was in error. No credible proffer of relevance was made, admission of the decision lacked foundation, and was improper. The error occurred and was objected to at JEFS Dkt 361 and PDF pp. 9-10 [Transcript *2015-04-16 p.m.*]; JEFS Dkt 361 and PDF pp. 39-40 [*Transcript 2015-04-16 p.m. pp. 39-40*]; JEFS Dkt 361 and

PDF pp. 47-50 [*Transcript 2015-04-16 p.m.*]; JEFS Dkt 361 and PDF pp. 50-54 [*Transcript 2015-04-16 p.m.*]; JEFS Dkt 361 and PDF pp. 55 [*Transcript 2015-04-16 p.m.*]. Over the objection of the COUNTY Plaintiffs' real estate economist was permitted to identify the Leone decision as confirming his unqualified legal opinions despite no foundation being laid to show the Mr. Whitney relied upon or even read the Leone decision.

b. The trial court erred in taking Judicial Notice of the Leone decision as the "law-of-the-case" when it read Plaintiffs' Requests for Judicial Notice of Law Nos. 13, 14, and 15 to the Jury. JEFS Dkt 186 and PDF p. 51 [*Transcript 2015-04-21 a.m.*]; JEFS Dkt 186 and PDF pp. 51-52 [*Transcript 2015-04-21 a.m.*]; JEFS Dkt 186 and PDF p. 52 [*Transcript 2015-04-21 a.m. at p. 52*]. The COUNTY's objections and an extended discussion of the concerns as related these Requests for Judicial Notice are located at JEFS Dkt 184 and PDF pp. 32-44 [*Transcript 2015-04-20 p.m.*]. Essentially, the COUNTY does not believe the requests accurately reflect the law. The Requests are quoted in full on pages 25 and 26 above.

d. Plaintiffs' Expert William Whitney's "Value of Loss" Opinions Should Have been Excluded from the Jury as Unqualified Speculation. The COUNTY objected to Mr. Whitney's value opinions as unqualified and speculative. The COUNTY'S legal brief and objections and the trial court's ruling allowing Mr. Whitney to testify are located at JEFS Dkt 240 and PDF 482-647; JEFS Dkt 176 and PDF pp. 6-8, 19-20, 47-59 [*Transcript 2015-04-02 a.m.*].

e. Appraiser Ted Yamamura's valuation of LOT 15 was relevant and

probative of the actual economic benefit which LOT 15 has sustained, and was wrongly excluded. The COUNTY'S legal brief and objections and trial court's ruling excluding Mr. Yamamura valuation of LOT 15 are located at JEFS Dkt 240 and PDF 482-647; JEFS Dkt 176 and PDF pp. 39-45, 59-62 [*Transcript 2015-04-02 a.m.*].

f. Jury Instruction No. 22 erroneously told the jury that ANY loss of economic benefit or use of LOT 15 to the LEONES constituted a taking. The COUNTY'S objections and the trial court's ruling on Jury Instruction No. 22 are located at JEFS Dkt 194 and PDF pp. 11-12 [*Transcript 2015-05-01 p.m*]. Jury Instruction No. 22 is quoted in full on page 35, above.

g. Jury Instruction No. 39 instructed the jury to exclude relevant and probative evidence as to exempted land uses in the Special Management Area based on an erroneous reading of the Leone decision. The COUNTY'S objections and the trial court's ruling on Jury Instruction No. 39 are located at JEFS Dkt 194 and PDF pp. 38-43. Jury Instruction No. 22 is quoted in full on page 36, above.

h. The Special Verdict Form erroneously allowed the jury to consider damages for an alleged violation of 28 U.S.C. § 1983, even if no constitutional deprivation by way of a regulatory taking occurred. The COUNTY"S objections and the trial court's ruling on the Special Verdict Form are located at JEFS Dkt 196 and PDF pp. 18-20; JEFS Dkt 254 and PDF pp. 1187-1189. The Special Verdict Form is quoted in full on pages 36-37, above.

V. STANDARD OF REVIEW

"While a trial court's exclusion of relevant evidence is reviewed for abuse of discretion, '[t]his court reviews questions of relevancy ... under the 'right/wrong'

standard[.]'" Furukawa v. Honolulu Zoological Soc., 85 Haw. 7, 12, 936 P.2d 643, 648 (1997)(*quoting* State v. Wallace, 80 Hawai'i 382, 409, 910 P.2d 695, 722 (1996) (footnotes omitted)). "This court reviews questions of relevancy, within the meaning of Hawai'i Rules of Evidence (HRE) Rules 401[15] (1993) and 402[16] (1993) under the 'right/wrong' standard, inasmuch as the application of those rules 'can yield only one correct result.'" State v. Wallace, 80 Hawai'i at 409, 910 P.2d at 722.

"[T]he meaning of a statute is a question of law that this court reviews *de* novo." Furukawa v. Honolulu Zoological Soc., 85 Haw. 7, 12, 936 P.2d 643, 648 (1997)(citing Ross v. Stouffer Hotel Co. (Hawai'i), Ltd., 76 Hawai'i 454, 460, 879 P.2d 1037, 1043 (1994).

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is obtained primarily from the language contained in the statute itself. Where the language of a statute is plain and unambiguous, our only duty is to give effect to the statute's plain and obvious meaning. Further, in interpreting a statute, we give the words their common meaning, unless there is something in the statute requiring a different interpretation.

Furukawa v. Honolulu Zoological Society, 85 Hawai'i at 12, 936 P.2d 643 at 648 (quoting Iddings v. Mee–Lee, 82 Hawai'i 1, 6–7, 919 P.2d 263, 268–69 (1996) (citations and footnote omitted)).

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[15] RULE 401 - DEFINITION OF "RELEVANT EVIDENCE" provides: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[16] RULE 402 - RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE provides: All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible.

V. ARGUMENT ON CROSS-APPEAL

A. SPECIAL MANAGEMENT AREA RULES

The SMA Rules require an environmental assessment to be prepared for review of any proposed land use with the Special Management Area. SMA Rules, §12-202-12(c)(2) provides that "[a]ny applicant seeking an assessment shall submit an application form, provided by the department, to the central coordinating agency." Section 12-202-12(c)(2) further provides that:

> The application **shall** require the following information and documentation: . . . (D) A shoreline survey if the land abuts the shoreline; . . . (F) A written description of the anticipated impacts of the proposed action on the special management area that addresses or describes: . . . (iii) The probable impact including cumulative impacts, of the proposed action on the environment; . . . [and] (vi) Mitigating measures proposed to minimize impact[,]" not exclusively.

Section 12-202-12(c)(2)(J) also requires "[a]n **environmental assessment** and findings of no significant impact or an environmental impact statement, if required, pursuant to chapter 343, HRS[.]"

SMA Rules §12-202-12(d) further provides:

> The assessment application shall be reviewed as follows: (1) Upon submission of **a completed application**, the director shall review the proposed action and make a written evaluation as to: . . . (B) Whether the proposed action is or is not a development, and (C) The potential adverse environmental and ecological effects based upon the **significance criteria** set forth in subsection (e)." (Emphasis added).

The "significance criteria" for any proposed land use in the Special Management Area in §12-202-12(e), includes: "(1) . . . the overall and cumulative adverse effects of the proposed action[,] . . . (2) . . . its cumulative and short or long term effects."

Section 12-202-12(e)(2) further provides;

"A proposed action **may** have a significant adverse effect on the environment when the proposed action: (A) Involves an irrevocable commitment to loss or destruction of any natural or cultural resources[,] . . . (E) Involves substantial secondary impacts such as . . . increased effects on . . . drainage[,] . . . **(H) Is contrary to the . . . appropriate community plans[,]** . . . (J) Affects an environmentally sensitive area, such as . . . shoreline, . . . or coastal waters; [and] . . . (K) Substantially alters natural land forms and existing public views to and along the shoreline[.]" (Emphasis added).

SMA Rules §12-202-12(f) provides in relevant part that:

"Based upon the assessment and review of the application, the director shall make a determination and notify the applicant in writing with thirty calendar days **after the application is complete** that the proposed action either:

(1) Is exempt from the requirements of this chapter because it is not a development pursuant to section 205A-22, HRS, as amended[.]"

. . . . or

(5) Cannot be processed because the proposed action is not consistent with the county general plan, community plan, and zoning, unless a general plan, community plan, or zoning application for an appropriate amendment is processed concurrently with the SMA permit application. (Emphasis added).

Hawai'i Revised Statutes § 205A-22 [*Definitions*] provides "Development" **does not include** the following: (1) Construction of **a single-family residence** that is not part of a larger development[.]"

The LEONES' pivot away from their Complaint's specific claim of a "right" to pursue a single-family residence as an exempt land use under the SMA Rules was a calculated move. The remaining argument that the Director of Planning may not legally process an SMA Assessment Application, for *any* proposed land use which is inconsistent with the KMCP "park" designation for their Palauea lot is a legal

convenience which simply ignores the SMA Rules, and decades of agency application and practice.[17]

It is easily surmised from the facts and evidence adduced at trial that their argument serves to justify years of inactivity in lieu of pursuing the development of LOT 15. Following the termination of Munekio's effort to prepare an environmental assessment and obtain a community plan amendment in **June 2004**, no effort whatsoever was made toward obtaining development permits. Rather, the LEONES' lawyer directed the LEONES' land use planner to submit to the Department of Planning an indisputably incomplete and insufficient application, *in order to leverage a legal position, and/or generate a liability claim*. The argument which the LEONES now make to justify their years of inactively is nothing more than a driver of litigation.

B. COMMUNITY PLAN CONSISTENCY

The legislative history of Maui County Code § 2.80B pertaining to Maui County's General Plan and Community Plans demonstrates clearly that community plan consistency is not required for ministerial acts of County officials. This includes issuance of building permits for exempt land uses which are not subject to SMA development permitting requirements. Planning Committee Report No. 02-204, dated **December 17, 2002** noted:

> Your Committee notes that last year it conducted two rounds of informal public workshops in each of the County's Community Plan districts, except for Kahoolawe. The major recommendations brought forth by the public at the workshops were as follows:

[17] If this self-serving argument were permitted to prevail, it would undo thousands of exempted land uses within the Special Management Area, in addition to permitted uses outside of the SMA across the entirety of Maui County.

1. The County's plans should have the force and effect of law, and should be enforced.

* * * * *

By correspondence dated October 31, 2002, your Committee Chair transmitted a revised draft bill entitled "A BILL FOR AN ORDINANCE PERTAINING TO THE GENERAL PLAN AND COMMUNITY PLANS". The purpose of the draft bill is to recodify the General Plan process and the Community Plan process into separate sections of the bill.

* * * * *

The Chair of your Committee submitted a matrix document entitled

"REVISED DRAFT BILL TO IMPROVE THE GENERAL AND COMMUNITY PLAN PROCESS", dated November 14, 2002. The matrix document contained the aforementioned draft bill, and proposed revisions that were submitted by Committee members and the Department of Planning, or were made necessary by the Charter amendments that were approved by the voters at the November 5 General Election.

* * * * *

Your Committee deferred action on one proposed revision: whether all administrative actions by the County, including, but limited to, the issuance of building permits, other ministerial actions, discretionary actions, and all other administrative actions of any type shall conform to the General Plan.

Your Committee deferred this matter pending further discussion.

By correspondence dated November 25, 2002, the Chair of your Committee requested that the Department of the Corporation Counsel review potential conflicting Charter amendments as it related to the revised draft bill, and, if necessary, provide proposed revisions.

At its meeting of December 5, 2002, your Committee met with the Planning Program Administrator, Long-Range Planning Division, Department of Planning; and a Deputy Corporation Counsel.

* * * * *

The Chair of your Committee submitted a matrix document entitled "REVISED DRAFT BILL ENTITLED 'A BILL FOR AN

ORDINANCE PERTAINING TO THE GENERAL PLAN AND THE COMMUNITY PLANS'", dated December 5, 2002. The matrix document contained the draft bill as revised at your Committee's November 14th meeting, and further proposed revisions that were submitted.

* * * * *

Your Committee did not approve the proposed revision requiring that all administrative actions of any type shall conform to the General Plan. Your Committee felt that the impacts of such a requirement were unknown and potentially widespread.

See APPENDIX "1." (Emphasis added).

Planning Committee Report No. 14-151, dated **December 5, 2014** discusses recent amendments made to MCC §2.80B.030, expressly intended "to clarify which types of agency actions must comply with the General Plan" and "to clarify how the General Plan – composed of the Countywide Policy Plan, Maui Island Plan, and community plans – is applied to ministerial actions and the processing of ministerial permits:"

> Your Committee noted the proposed bill clarifies ministerial permits and approvals are not required to comply with the General Plan. Your Committee further noted Ordinance 3732 (2010) states the Countywide Policy Plan is "not intended to be used in the review of applications for ministerial permits."
>
> Your Committee was informed by representatives from the Department of Planning and the Department of Public Works **the proposed bill would not change permit review practices, and would codify longstanding interpretation.** Your Committee felt the bill would improve the clarity of the Maui County Code and would reduce reliance on legal opinions for interpretation.

See APPENDIX "2." (Emphasis added).

Notably, at the trial of this case, current Director of Planning William Spence acknowledged that community plans in-themselves are aspirational. JEFS Dkt 192 and PDF pp. 15-16 [*Transcript 2015-04-29 p.m.*]. Mr. Spence started working with the

Department of Planning in **1992** as a Planner III, and worked on Community Plans, SMA assessments, changes in zoning, Community Plan amendments, special use permits, conditional use permits, not exclusively. JEFS Dkt 192 and PDF p. 12 [Transcript *2015-04-29 p.m.*].

The LEONES' pivot away from arguing their claim of "right" or entitlement to an exemption from the permitting requirements under the SMA Rules began after the Intermediate Court of Appeals issued the Leone decision. Taking specific language from footnote 8 in that opinion,[18] the LEONES construct the fundamentally erroneous legal argument that only a park may be permitted and constructed within the KMCP "park" designated area at Palauea Beach. The argument is flawed in its assumption that the Maui County Code governs the process of permitting and review within the Special Management Area. It does not.

Review of land use permitting within the Special Management Area is governed by Hawai'i Revised Statutes Chapter 205A [*Coastal Zone Management Act*], the Maui County Charter, and SMA Rules promulgated pursuant thereto. The Maui County Charter also authorizes the Maui Planning Commission to "Act as the authority in all matters relating to the Coastal Zone Management Act." *See* Maui County Charter § 8-8.4. The Maui County Code does not govern the process for review of an SMA Assessment Application, either under the Coastal Zone Management Act, or the SMA Rules.

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[18] The specific language the LEONES latch onto reads "the Maui County Code (MCC) renders the Community Plan binding on all county officials." Given the legislative history reflected in Planning Committee Reports Nos. 2-204 and 14-151, this foot note comment taken out of the context of the entire Leone decision does merit further discussion at this juncture, but will be taken up in more detail in the COUNTYS' Reply.

C. THE *LEONE* DECISION WAS IMPROPERLY AND INAPPROPRIATELY INTRODUCED TO THE JURY

Plaintiffs' identification of the Leone decision to the jury through real estate economist William Whitney appeared to be bootstrapping at best. It remains unclear how the COUNTY's counsel purportedly "opened the door" to allowing Whitney to identify for the jury a legal decision and opinion he was never shown to have relied on, read, or even seen before it was presented to him on the witness stand at trial.

There was nothing relevant or probative about Plaintiffs' counsel twice asking Whitney if the Leone decision "confirmed" his own unqualified legal conclusions, and Whitney's highly questionable opinions that Plaintiffs had no remaining economic benefit or use of LOT 15. Rather, the identification of the Leone decision to the jury in this manner appeared as an opportunity to suggest to the jury that a higher court authority had already ruled favorably to the Leones on their legal and factual liability claims.

Otherwise, 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 23-24 [*Transcript 2015-04-01 a.m.*].

In light of this, Plaintiffs' counsel's inappropriate use of the Leone decision to rehabilitate an expert who was not shown to have relied on or read the decision was a compounded error.

D. THE *LEONE* DECISION WAS ERRONEOUSLY INTERPRETED TO FRAME AND INSTRUCT THE JUROR'S DELIBERATIONS

In line with their submission of the incomplete SMA Assessment Application to the Planning Department on **September 27, 2007**, the LEONES did not ultimately assert at trial that their SMA Assessment Application *should have* been accepted and processed by Director Hunt. As was noted in the Leone decision - "[h]ere, the Appellants have not sought direct judicial review of the Directors decision; rather Appellants have brought claims based on the [alleged] ***effect*** of the Director's decision." Leone, 128 Hawai'i 194, 284 P.3d at 967. (Emphasis added).

The "effect" alleged by the LEONES is presumably deprivation of all economic benefit or use. As noted above, however, the LEONES' failure to otherwise question the substance of the Director's "decision" was clearly calculated. More specifically, it appears the omission was calculated to avoid having to address the incomplete submittals

made with the LEONES' SMA Assessment Application, not to mention the abandoned environmental assessment of LOT 15.

Nothing in the Leone decision supports the apparent position taken by the LEONES at trial that by virtue of their having declined to question the substance of the Director's determination, the COUNTY must be precluded from doing so. Causation remained an element of LEONES' takings claim which the COUNTY was entitled to question at trial (prior to any alleged economic deprivation), and which the LEONES were required to prove in the first instance.

The application of the Leone decision by the trial court as the "law-of-the-case," and as a basis for precluding legitimate evidentiary inquiry into the incompleteness and insufficiency of the LEONES' environmental assessment, and the incompleteness of their application submittals, not exclusively, would constitute reversible error if the jury had ruled the other way in this case.

"The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Chun v. Bd. of Trustees of Employees' Ret. Sys. of State of Hawai'i, 106 Haw. 416, 430, 106 P.3d 339, 353 (2005)(quoting Metcalf v. Voluntary Employees' Benefit Ass'n of Hawai'i, 99 Hawai'i 53, 57, 52 P.3d 828, 827 (2002)).

E. THE *LEONE* DECISION WAS USED TO ERRONEOUSLY EXCLUDE EVIDENCE FROM THE JURY

Likewise, it is unclear on what basis the Leone decision, as the "law-of-the-case," precluded admission at trial of: 1) The LEONES' real estate lawyer Tom Welch's **September 6, 2007** e-Mail, which specifically requested the letter and language of Director Hunt's **October 27, 2007** letter declining to process and returning the LEONES' SMA Assessment Application. JEFS Dkt 266 and PDF p. 262 [*DEFENDANTS' EXHIBIT D-104*]; 2) Deputy Director Suyama's **October 22, 2007** e-Mail to Mr. Welch advising that Mr. Abbott was assigned to the file and instructed to draft the letter Mr. Welch requested. JEFS Dkt 266 and PDF pp. 288 [*DEFENDANTS' EXHIBIT D-127*]; 3) the Testimony of planning professional Thorne Abbott regarding the incomplete and insufficient submittals accompanying the LEONE application.

All of this evidence was clearly probative into liability. To the extent questions remained as to whether the LEONES' incomplete application was unable to be processed on its face, questions remained as to whether the COUNTY deprived the LEONES of anything at all (let alone any and all economic benefit or use of their land).[19]

Likewise, 1) the **August 23, 1999** letter from Archaeologist Paul H. Rosendahl, Ph.D., documenting an archaeological assessment survey of LOT 15. JEFS Dkt 266 and PDF pp. 259-260 [*DEFENDANTS' EXHIBIT D-10*] and 2) The LEONES' SMA Assessment

[19] Apparently, the erroneous interpretation and application of the Leone decision came as close to a dispositive ruling in the LEONES' favor as it could, positing the alleged "effect of the Director's decision" as per se causation by COUNTY. This interpretation was achieved by erroneously characterizing the Leone decision as supporting legal inability of the COUNTY to process the LEONES' SMA Assessment Application, even before it was submitted. The only question which would be left for the jury was the extent of the alleged "effect."

Application were probative of consequential facts in this case. The LEONES' claims for damages as lost profits, discounted from 2017 back to 2007 assume they would have been prepared to develop their lot in 2007. To date the LEONES have not obtained the necessary approvals to use their lot for a single-family residence (let alone start construction), to include not exclusively the required plan for preservation of cultural remains and a valid certified shoreline.[20]

F. PLAINTIFFS' EXPERTS WILLIAM WHITNEY'S OPINIONS SHOULD HAVE BEEN EXCLUDED AS SPECULATIVE AND UNQUALIFIED

Mr. Whitney is not a licensed real estate appraiser in any state, has never been, and admittedly did not follow any appraisal standards or principles for either his speculative investment model, or his "value of loss" (i.e., lost profits) determination for LOT 15. Mr. Whitney did not even conduct an appraisal of LOT 15, but rather was permitted to assume complete diminution in value and therefore conclude no economically beneficial or viable use for LOT 15.

What Whitney coins "value of loss" is really *lost profits*, not "just compensation." Moreover, there is no way to evaluate, other than speculation, the profits which the LEONES' might have made from the sale in 2017 of an as yet unbuilt single-family

[20] Plaintiffs argued and the trial court agreed with no explanation how the presence of cultural remains on the LEONES' lot was prejudicial. If the LEONES had completed a preservation plan and obtain appropriate approvals, which they will be required to do in any event proceed with the development of LOT 15, it is hard to conclude that a jury would have faulted them for complying with the law and protecting the cultural remains. Rather, it appear the LEONES' effort to exclude evidence about the existence of known Hawai'ian cultural human remains on their lot was really intended to exclude from the jury the fact that they have not appropriately addressed those remains, at any time during the 15 years to the present since they have owned LOT 15.

residence, as a discounted value back to **October 25, 2007** - the year before this century's worst financial market crisis and housing market crash.

G. APPRAISER TED YAMAMURA'S VALUATION OF LOT 15 WAS RELEVANT AND PROBATIVE

The appraisal and valuation of LOT 15 by County expert Ted Yamamura was relevant and probative of the LEONES' claims and their burden to prove loss of **all** economic benefit and use of LOT 15:

> The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of "*all* economically beneficial uses" of his land. [ ] Under that rule, a statute that "wholly eliminated the value" of Lucas' fee simple title clearly qualified as a taking. But our holding was limited to "the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted." [ ] 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%. [ ]. 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, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 330, 122 S.Ct. 1465, 1483 (2002)(citing Lucas, 505 U.S. 1003, 1017, 1019–1020, 112 S.Ct. 2886. n. 8 (1992). (Emphasis original).

Plaintiffs did not present any competent opinion as to the current value of LOT 15 at trial, or demonstrate any diminution in value to LOT 15. Rather the trial court determined that a current property valuation was not relevant to the LEONES' claim of total economic deprivation, while allowing Plaintiffs' expert to speculate that essentially the lot had a value of zero.

H. JURY INSTRUCTION NOS. 22 AND 39

In light of the above holding in Tahoe-Sierra, the language in Jury Instruction No. 22 was erroneous to the extent that it failed to instruct the jury that an owner must be left without any and all economically beneficial or productive options for use land in order for a full regulatory taking to be established.

Jury Instruction No. 39 appears to have been intended as a curative instruction, directing the jury to disregard relevant evidence of the existence of exempted single-family residences at Palauea Beach. The instruction was given despite the LEONES' counsel having identified those single-family residences in his opening statement, and despite the LEONES' making no objection to the admission into evidence of facts identifying those single-family residences as exempted from the SMA permitting requirements in the community plan "park" designation.

I. 28 U.S.C. § 1983 IS NOT IN-ITSELF AN INDEPENDENT CAUSE OF ACTION

To the extent the Special Verdict Form allowed the jury to consider damages for an alleged violation of 28 U.S.C. § 1983, even if no constitutional deprivation by way of a regulatory taking occurred, it was error. "To prevail on a section 1983 claim, plaintiffs must show that their alleged injuries amounted to a constitutional deprivation, and that the defendants' actions caused the constitutional violation." Tyson v. City of Sunnyvale, 920 F.Supp. 1054, 1060 (N.D. Cal. 1996)(citing Halverson v. Skagit County, 42 F.3d 1257, 1260 (9th Cir.1994)). 28 U.S.C. § 1983 is not in-itself an independent cause of action for which any damages may be awarded.

VI. CONCLUSION

If this case is remanded for a new trial, the points of error above should be addressed by instruction to the Honorable Trial Court from this Honorable Court.

DATED: Wailuku, Maui, Hawaii, April 13, 2016.

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

By _____
BRIAN A. BILBERRY
Deputy Corporation Counsel

COUNCIL OF THE COUNTY OF MAUI

PLANNING COMMITTEE

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December 17, 2002

Committee Report No. 02-204

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Planning Committee, having met on August 1, 2002, August 15, 2002, September 5, 2002, November 14, 2002, and December 5, 2002, makes reference to County Communication No. 98-51, from Councilmember Alan M. Arakawa, relating to improving the process for updating the County's General Plan and Community Plans.

Your Committee notes that it previously reported on this matter through Committee Report No. 02-43, which recommended that a proposed resolution entitled "PROPOSING AMENDMENTS TO THE REVISED CHARTER OF THE COUNTY OF MAUI (1983), AS AMENDED, RELATING TO THE DEPARTMENT OF PLANNING" be adopted. At its meeting of March 15, 2002, the Council referred Committee Report No. 02-43 to your Committee of the Whole, which subsequently recommended that the proposed resolution, as revised, be adopted. (Resolution No. 02-63).

Your Committee further notes that this matter arises from concerns that the County's process for updating the General Plan and Community Plans is "broken." There have been complaints that the update process takes too long to be completed. By the time the Council reviews an updated plan, social conditions have changed, technical studies are outdated, and the citizen advisory committees have long since disbanded. There have also been complaints that the implementation and enforcement of plans have been lacking. As such, methods to improve the update, implementation, and enforcement of the County's General Plan and Community Plans have been requested.

By correspondence dated July 29, 2002, the Planning Director transmitted a draft bill entitled "A BILL FOR AN ORDINANCE AMENDING SECTION 2.80A OF THE MAUI COUNTY CODE PERTAINING TO GENERAL PLANS, AND COMMUNITY PLANS". The purpose of the proposed bill is to amend the

General Plan and Community Plan update process by requiring, among other things:

1. an island-wide land use strategy for Maui, Molokai and Lanai, developed by a General Plan advisory committee, and driven by a managed and directed growth plan, and urban and rural growth boundaries;

2. implementation programs for the General Plan and Community Plans containing numeric prioritization of implementing actions, identification of funding sources, benchmarks, and annual status reports; and

3. staggered consideration of Community Plan updates based upon the date of each plan's prior adoption.

At its meeting of August 1, 2002, your Committee met with the Planning Program Administrator, Long-Range Planning Division, Department of Planning; and a Planner from the Long-Range Planning Division, Department of Planning.

Your Committee received verbal testimony from one person offering suggestions to improve the General Plan and Community Plan process.

The Planning Program Administrator provided an overview of the draft bill through a PowerPoint slide presentation.

Your Committee deferred this matter pending further discussion.

By correspondence dated August 12, 2002, your Committee Chair transmitted a copy of the "MAUI COUNTY COMMUNITY PLAN UPDATE PROGRAM: SOCIO-ECONOMIC FORECAST" (Phase I Report, Final Version, dated June 14, 2002).

At its meeting of August 15, 2002, your Committee met with the Planning Program Administrator, Long-Range Planning Division, Department of Planning; and a Deputy Corporation Counsel.

Your Committee received verbal testimony from one person offering suggestions to improve the General Plan and Community Plan update process.

The Chair of your Committee submitted a matrix document entitled "METHODS TO IMPROVE THE GENERAL AND COMMUNITY PLAN PROCESS COMPARATIVE ANALYSIS OF PROPOSED BILL AND INFORMAL MEETING RECOMMENDATIONS", dated August 15, 2002.

Your Committee notes that last year it conducted two rounds of informal public workshops in each of the County's Community Plan districts, except for Kahoolawe. The major recommendations brought forth by the public at the workshops were as follows.

1. The County's plans should have the force and effect of law, and should be enforced.

2. The County's plans should be implemented by being more specific and prioritized.

3. The County's citizen advisory committees should have more authority and longevity in order to provide recommendations regarding the County's plans.

4. The County's plans need more emphasis on island-wide and inter-regional issues.

5. The County's plans should be updated more frequently, and with deadlines.

6. Public participation in the planning process should be increased through enhanced public notice.

Your Committee reviewed the matrix document in the context of how the draft bill addressed the recommendations from the informal workshops. Your Committee noted that all of the informal workshop recommendations were addressed in the draft bill.

Your Committee deferred this matter pending further discussion.

At its meeting of September 5, 2002, your Committee met with the Planning Program Administrator, Long-Range Planning Division, Department of Planning; and a Planner from the Long-Range Planning Division, Department of Planning.

Your Committee received verbal testimony from five persons offering suggestions to improve the General Plan and Community Plan process.

Your Committee exchanged comments regarding the draft proposed bill.

Your Committee also noted that the draft bill intermixed General Plan and Community Plan processes into the same sections of the bill. This made the bill somewhat difficult to read. Your Committee requested that the draft bill be revised in order to recodify the General Plan process and the Community Plan process into separate sections of the bill.

Your Committee deferred this matter pending further discussion.

By correspondence dated October 31, 2002, your Committee Chair transmitted a revised draft bill entitled "A BILL FOR AN ORDINANCE PERTAINING TO THE GENERAL PLAN AND THE COMMUNITY PLANS". The purpose of the revised draft bill is to recodify the General Plan process and the Community Plan process into separate sections of the bill.

At its meeting of November 14, 2002, your Committee met with the Planning Program Administrator, Long-Range Planning Division, Department of Planning; and a Deputy Corporation Counsel.

Your Committee received verbal testimony from seven persons offering suggestions to improve the General Plan and Community Plan update process. Two of the testifiers also expressed concerns about the "urban and rural growth boundaries" provided for in the draft bill. In addition, four written testimonies were received.

The Chair of your Committee submitted a matrix document entitled "REVISED DRAFT BILL TO IMPROVE THE GENERAL AND COMMUNITY PLAN PROCESS", dated November 14, 2002. The matrix document contained the aforementioned draft bill, and proposed revisions that were submitted by Committee members and the Department of Planning, or were made necessary by the Charter amendments that were approved by the voters at the November 5 General Election.

Your Committee revised the draft bill as follows:

1. accepted all revisions made necessary by the Charter amendments;

2. deleted the phrase "distribution of projected population and economic growth" in order to widen the criteria for a managed and directed growth plan;

3. inserted "telecommunications systems" as an infrastructure to be assessed;

4. inserted "environmental resources" as a resource to be inventoried;

5. increased the amount of time the General Plan advisory committee has to forward its recommendations from 120 to 180 days;

6. provided that the Council or Mayor may reappoint their General Plan advisory committee members to serve on the Community Plan advisory committees; and

7. provided that where a Community Plan revision directly triggers a General plan revision, both revisions shall be processed concurrently.

Your Committee deferred action on one proposed revision: whether all administrative actions by the County, including, but limited to, the issuance of building permits, other ministerial actions, discretionary actions, and all other administrative actions of any type shall conform to the General Plan.

Your Committee deferred this matter pending further discussion.

By correspondence dated November 25, 2002, the Chair of your Committee requested that the Department of the Corporation Counsel review potential conflicting Charter amendments as it related to the revised draft bill, and, if necessary, provide proposed revisions.

At its meeting of December 5, 2002, your Committee met with the Planning Program Administrator, Long-Range Planning Division, Department of Planning; and a Deputy Corporation Counsel.

Your Committee received verbal testimony from 11 persons offering suggestions to improve the General Plan and Community Plan update process. Six of the testifiers expressed concerns about the "urban and rural growth boundaries" provided for in the draft bill. In addition, four written testimonies were received.

The Chair of your Committee submitted a matrix document entitled "REVISED DRAFT BILL ENTITLED 'A BILL FOR AN ORDINANCE PERTAINING TO THE GENERAL PLAN AND THE COMMUNITY PLANS'", dated December 5, 2002. The matrix document contained the draft bill as revised at your Committee's November 14th meeting, and further proposed revisions that were submitted.

Your Committee revised the draft bill as follows:

1. accepted further revisions made necessary by the Charter amendments;

2. inserted a purpose and intent section;

3. inserted a provision clarifying that the plans may contain regulatory provisions identifying regulatory planning standards, and that such regulatory planning standards shall be implemented through revisions to the Maui County Code or other appropriate means;

4. changed the urban and rural growth "boundaries" to urban and rural growth "areas", which shall be both consistent and "illustrative" of the General Plan;

5. stated that "preparation" of the County's budget and capital improvement program shall implement the General Plan;

6. created General Plan advisory committees for Lanai and Molokai, in addition to Maui;

7. provided that the Planning Director shall furnish the boundaries of Community Plan districts to the U.S. Census Bureau to request that census tracts be in conformance;

8. required that Community Plans shall contain a listing of scenic sites and resources, as well as an identification of bikeways;

9. clarified that action elements in Community Plans shall be broken down into both 10- and 20-year horizons;

10. required that project districts shall identify proposed land uses by percentage of total acreage and density;

11. required that planning commissions shall hold its Community Plan public hearings in the appropriate Community Plan district;

12. clarified that applications for non-decennial Community Plan amendments need not contain required information if that information is not applicable; and

13. clarified that notification of a proposed Community Plan amendment shall be provided of owners and lessees within 500 of "the boundaries" of the subject parcel.

Your Committee did not approve the proposed revision requiring that all administrative actions of any type shall conform to the General Plan. Your

Committee felt that the impacts of such a requirement were unknown and potentially widespread.

Your Committee voted to recommend that the revised draft bill, as further revised by your Committee, be passed on first reading.

Your Committee is in receipt of a proposed bill, approved as to form and legality by the Department of the Corporation Counsel, entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 2.80A, MAUI COUNTY CODE, PERTAINING TO THE GENERAL PLAN AND THE COMMUNITY PLANS". The purpose of the proposed bill is to provide an improved process to update the County's General Plan and Community Plans.

Your Planning Committee RECOMMENDS the following:

1. That Bill No. _____ (2002), attached hereto, entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 2.80A, MAUI COUNTY CODE, PERTAINING TO THE GENERAL PLAN AND THE COMMUNITY PLANS" be PASSED ON FIRST READING and be ORDERED TO PRINT; and

2. That County Communication No. 98-51 be FILED.

Adoption of this report is respectfully requested.

pc:cr:0208ab:wab

COUNCIL OF THE COUNTY OF MAUI

PLANNING COMMITTEE

Committee Report No. 02-204

CHARMAINE TAVARES	Chair	JO ANNE JOHNSON	Member
MICHAEL J. MOLINA	Vice-Chair	DAIN P. KANE	Member
ALAN M. ARAKAWA	Member	DANNY A. MATEO	Member
ROBERT CARROLL	Member	WAYNE K. NISHIKI	Member
G. RIKI HOKAMA	Member		

COUNCIL OF THE COUNTY OF MAUI

PLANNING COMMITTEE

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December 5, 2014

Committee Report No. _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Planning Committee, having met on November 20, 2014, makes reference to County Communication 14-202, from the Planning Director, transmitting a proposed bill entitled "A BILL FOR AN ORDINANCE TO AMEND CHAPTER 2.80B OF THE MAUI COUNTY CODE, PERTAINING TO GENERAL AND COMMUNITY PLANS."

The purpose of the proposed bill is to clarify which types of agency actions must comply with the General Plan.

At the request of the Chair of your Committee, the Department of the Corporation Counsel transmitted a revised proposed bill, entitled "A BILL FOR AN ORDINANCE AMENDING SECTION 2.80B.030, MAUI COUNTY CODE, TO CLARIFY THE APPLICABILITY OF THE GENERAL PLAN TO MINISTERIAL PERMITS AND APPROVALS" ("ministerial permits and approvals bill"), approved as to form and legality, incorporating nonsubstantive revisions.

The purpose of the revised proposed bill is to clarify how the General Plan – composed of the Countywide Policy Plan, Maui Island Plan, and community plans – is applied to ministerial actions and the processing of ministerial permits.

By correspondence dated November 5, 2014, the Chair of your Committee transmitted a proposed bill entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 2.80B, MAUI COUNTY CODE, RELATING TO PUBLIC HEARING REQUIREMENTS FOR AMENDMENTS TO THE MAUI ISLAND PLAN" ("public hearings bill").

The purpose of the proposed bill is to establish that public hearings on nondecennial amendments to the Maui Island Plan need only be held on the island of Maui.

On the ministerial permits and approvals bill, your Committee considered the definition of "ministerial permit." Ordinance 3732 (2010), the Countywide Policy Plan, defines ministerial permit as "a permit that does not involve judgment or discretion and is issued based on established criteria or a set of adopted standards as established by law."

Your Committee noted the proposed bill clarifies ministerial permits and approvals are not required to comply with the General Plan. Your Committee further noted Ordinance 3732 (2010) states the Countywide Policy Plan is "not intended to be used in the review of applications for ministerial permits."

Your Committee was informed by representatives from the Department of Planning and the Department of Public Works the proposed bill would not change permit review practices, and would codify longstanding interpretation. Your Committee felt the bill would improve the clarity of the Maui County Code and would reduce reliance on legal opinions for interpretation.

On the public hearings bill, your Committee noted Section 2.80B.060, Maui County Code, requires the Council to hold public hearings on nondecennial amendments to the General Plan on Lanai, Maui, and Molokai. Because the Maui Island Plan is part of the General Plan, nondecennial amendments require hearings on all three islands. The proposed bill would change the requirements, to require a hearing be held only on Maui. Your Committee noted the proposed bill would have no impact on hearing requirements for General Plan amendments related to Lanai and Molokai.

Your Committee voted 7-0 to recommend passage of the revised proposed ministerial permits and approvals bill on first reading, passage of the proposed public hearings bill on first reading, and filing of the communication. Committee Chair Couch, Vice-Chair Victorino, and members Baisa, Cochran, Crivello, Guzman, and White voted "aye".

Your Planning Committee RECOMMENDS the following:

1. That Bill _____ (2014), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE AMENDING SECTION 2.80B.030, MAUI COUNTY CODE, TO CLARIFY THE APPLICABILITY OF THE GENERAL PLAN TO MINISTERIAL PERMITS AND APPROVALS", be PASSED ON FIRST READING and be ORDERED TO PRINT;

COUNCIL OF THE COUNTY OF MAUI

PLANNING COMMITTEE

Committee Report No. _____

2. That Bill _____ (2014), attached hereto, entitled "A BILL FOR AN ORDINANCE AMENDING CHAPTER 2.80B, MAUI COUNTY CODE, RELATING TO PUBLIC HEARING REQUIREMENTS FOR AMENDMENTS TO THE MAUI ISLAND PLAN", be PASSED ON FIRST READING and be ORDERED TO PRINT; and

3. That County Communication 14-202 be FILED.

This report is submitted in accordance with Rule 8 of the Rules of the Council.

DONALD G. COUCH, JR., Chair

pc:cr:14056aa:csh

ORDINANCE NO. _____

BILL NO. _____ (2014)

A BILL FOR AN ORDINANCE AMENDING SECTION 2.80B.030, MAUI COUNTY CODE, TO CLARIFY THE APPLICABILITY OF THE GENERAL PLAN TO MINISTERIAL PERMITS AND APPROVALS

SECTION 1. Purpose. The Countywide Policy Plan, Ordinance 3732 (2010), states that it is "not intended to be used in the review of applications for ministerial permits." The council finds that this intention should apply to all components of the general plan. The purpose of this ordinance is to clarify that ministerial permits and approvals are not required to comply with the general plan.

SECTION 2. Section 2.80B.030, Maui County Code, is amended by amending subsection B to read as follows:

"B. All agencies shall comply with the general plan[.], and administrative actions by agencies shall conform to the general plan, except for ministerial permits or approvals including, but not limited to, building permits, grading permits, plumbing permits, and electrical permits. [Notwithstanding any other provision, all] All community plans, zoning ordinances, and subdivision ordinances[, and administrative actions by agencies] shall conform to the general plan. Preparation of County budgets and capital improvement programs shall implement the general plan to the extent practicable. The countywide policy plan, Maui island plan, and community plans authorized in this chapter are and shall be the general plan of the County, as provided by section 8-8.5 of the [charter.] revised charter of the County of Maui (1983), as amended."

SECTION 3. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 4. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM
AND LEGALITY:

MICHAEL J. HOPPER
Deputy Corporation Counsel
County of Maui

ORDINANCE NO. _____

BILL NO. _____ (2014)

A BILL FOR AN ORDINANCE AMENDING CHAPTER 2.80B, MAUI COUNTY CODE, RELATING TO PUBLIC HEARING REQUIREMENTS FOR AMENDMENTS TO THE MAUI ISLAND PLAN

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. The purpose of this bill is to establish that public hearings on amendments to the Maui Island Plan need to be held only on the island of Maui.

SECTION 2. Section 2.80B.060, Maui County Code, is amended to read as follows:

"**2.80B.060 Nondecennial amendments to the [general] countywide policy plan[.] and Maui island plan.** A. Nondecennial amendments to the [general] countywide policy plan and Maui island plan may be proposed by the planning director or by the council by resolution. All proposed amendments shall be referred to the appropriate planning commission for findings and recommendations. Proposals for nondecennial amendments [to the general plan] made pursuant to this subsection shall be processed in accordance with sections 8-8.4 and 8-8.6 of the [charter.] revised charter of the County of Maui (1983), as amended.

B. Nondecennial amendments to the [general] countywide policy plan and Maui island plan enacted pursuant to section 2.80B.050 [of this chapter] may be proposed by a person during July of each year, provided that such amendments shall not be accepted within one year after the enactment of a decennial revision [to the general plan pursuant to section 2.80B.050 of this chapter] to either the countywide policy plan or the Maui island plan. Applications shall follow the procedures set out in sections 19.510.010 and 19.510.020 of this code, shall include the application fee as set forth in the [County] annual budget, and shall be processed as if prepared by the planning director pursuant to section 8-8.4 of the [charter.] revised charter of the County of Maui (1983), as amended. An environmental assessment or environmental impact statement prepared in accordance with chapter 343, Hawaii Revised Statutes, shall be submitted along with the application.

C. Prior to approving any amendment to the [general] countywide policy plan pursuant to this section, the council shall hold public hearings on Lanai, Maui, and Molokai on the bill incorporating the amendment. Prior to approving any amendment to the Maui island plan pursuant to this section, the

council shall hold a public hearing on Maui on the bill incorporating the amendment.

D. Nothing in this section shall prevent concurrent processing of other actions related to a proposed amendment. Where an amendment to the [general] countywide policy plan or Maui island plan directly triggers an amendment to a community plan, such matters shall be processed concurrently, subject to [Maui County Code] subsection 2.80B.110.A."

SECTION 3. Material to be repealed is bracketed. New material is underscored. In printing this bill, the County Clerk need not include the brackets, the bracketed material, or the underscoring.

SECTION 4. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND
LEGALITY:

MICHAEL J. HOPPER
Deputy Corporation Counsel
County of Maui