SCAP-15-0000599

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

PLAINTIFFS/APPELLANTS/CROSS-APPELLEES' ANSWERING BRIEF TO DEFENDANTS/APPELLEES/CROSS-APPELLANTS' OPENING BRIEF;
APPENDICES AA-DD;
CERTIFICATE OF SERVICE

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CONCISE STATEMENT OF THE CASE

I. NATURE OF THE CASE

The cross-appeal[1] filed by Defendants/Appellees/Cross-Appellants County of Maui and its Director of the Department of Planning (collectively, the "**County**") is procedurally defective and substantively flawed.

Procedurally, since the County prevailed in the trial court, it has no standing to appeal as an "aggrieved party." The County seeks an improper advisory opinion on a series of interlocutory orders and rulings.[2]

Substantively, the County fails to show that the Leones could make economically beneficial use after its regulatory taking of their land on October 25, 2007. Instead, the County argues that the Leones did not get permission to build because they abandoned efforts to amend the applicable community plan in 2004. However, the ICA's decision in Leone v. County of Maui, 128 Haw. 183, 284 P.3d 956 (Haw.App. 2012) (the "**Leone Opinion**"), held, *inter alia*, that the Leones were not required to seek a

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[1] *See* 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 filed April 13, 2016 (in CAAP-15-0000599, at Dkt ##409-413, the "**County's Opening Brief**").

[2] Plaintiffs/Appellants/Cross-Appellees Douglas Leone and Patricia A. Perkins-Leone (the "**Leones**") moved to dismiss the County's cross-appeal (CAAP-15-0000599, Dkt ##318-23), but the Intermediate Court of Appeals ("**ICA**") ruled that the issue of the County's standing to appeal was "best left to the merit panel" (Dkt #363, p.4).

plan amendment before filing this lawsuit.[3]

The County also argues that the public's interests in protecting beaches and archaeological sites justify taking land without paying for it. But the Supreme Court of the United States, in Lingle v. Chevron, 544 U.S. 528, 543, 125 S.Ct. 2074, 2084 (2005), has held that the public's interests served by government action - no matter how compelling - are irrelevant in a regulatory takings case.

II. COUNTER-STATEMENT OF FACTS

A. The Property

In 2000, the Leones purchased a half-acre vacant parcel fronting the ocean at Palauea Beach[4] on Maui (the "**Property**"). **ROA** pt.38 at 232-38 (deed); Dkt #134, p.10 (4/6/15 AM, P.Leone).[5] The Property is one of nine lots between Old Makena Road and Palauea Beach identified by tax map key numbers (2) 2-1-11-13 through -21 (collectively, the "**Palauea Beach Lots**"). *See* ***App.B*** (Dkt #381), **ROA** pt.25 at 834 (tax map, Ex.P-139), **ROA** pt.26 at 287 (aerial photo, Ex.P-183).

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[3] *See* ***App.A*** (Dkt #380) to Plaintiffs/Appellants' Opening Brief filed April 13, 2016 (in CAAP-15-0000599, at Dkt ##379-407, the "**Leones' Opening Brief**"). ***App.A*** through ***App.Z*** are attached to the Leones' Opening Brief; ***Appendices AA*** through ***DD*** are attached hereto.

[4] The County says that "the fragility of Palauea Beach is known and documented" (County's Opening Brief, Dkt #409, p.1), but in fact there is no evidence that Palauea is more "fragile" than any other beach in the State of Hawaii that lacks a protective barrier reef. Tara Owens, the County's coastal geologist, admitted that Palauea is a "classic" crescent shaped beach, and that erosion events are "very common" and the "natural function of the beach." Dkt #190, pp.13, 24 (4/28/15 PM, Owens).

[5] All references to the record on appeal and all transcripts are to CAAP-15-0000599, in which the record was filed prior to the transfer of this case to this Court on June 29, 2016 (Dkt #437 in CAAP-15-0000599; Dkt #31 in SCAP-15-0000599).

Like the other Palauea Beach Lots, the Property is zoned Hotel-Multifamily, but designated "Park" (**ROA** pt.2 at 484) on the Kihei-Makena Community Plan (the "**Community Plan**") (**ROA** pt.27 at 343-408, Ex.D-4). Dkt #178, pp.53-54 (4/8/15 AM, Tsujimura). A single-family residence is permitted under the zoning,[6] but as explained below, currently prohibited by the "Park" designation. ***App.K*** (Dkt #390) at 1, **ROA** pt.25 at 567-68 (rejection letter, Ex.P-68). The Property is subject to a Declaration of Covenants and Restrictions (the "**Declaration**," ***App.C***, Dkt #382),[7] which requires the Property to be used "only for single family residential purposes ...." **ROA** pt.26 at 347 (Ex.P-210), ***App.C*** (Dkt #382) at 5. The Declaration requires that the residence have a minimum of 2,500 square feet and conform to certain other development standards. **ROA** pt.26 at 350 (Ex.P-210), ***App.C*** at 8.

The Property, TMK parcel 15, is approximately 100 feet wide by 200 feet deep, and 0.47 acre in size. **ROA** pt.25 at 291 (lot map); **ROA** pt.38 at 237 (2000 deed), **ROA** pt.25 at 414 (2004 deed, Ex.P-43). The Property is bounded by other private lots to the north and south, by the beach to the west, and by Old Makena Road to the east. There are boulders near the roadway, and a low coastal berm on the ocean front. **ROA** pt.26 at 339-41 (photos, Ex.P-203); Dkt #190, pp.15-16 (4/28/15 PM, Owens). A footpath, carved by the public over the years, extends along the length of

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[6] The HM zoning, Maui County Code ("**MCC**") §19.14.020, allows for "[a]ny use permitted in residential and apartment districts." The residential zoning, in turn, allows for single-family residences. MCC §19.08.020 (***App.Q***, Dkt #396, at 2).

[7] The Declaration was recorded March 25, 1999 (***App.C***, Dkt #382, **ROA** pt.26 at 342, Ex.P-210), and a Supplemental Declaration annexing the Property was recorded February 16, 2000 (**ROA** pt.25 at 414-15, Ex.P-43), a few days before the Leones' deed (***App.U***, Dkt #400, **ROA** pt.38 at 232).

the Property from the boulders facing Old Makena Road to the public beach. The footpath becomes wider as it approaches the beach, where the vegetation becomes more sparse.[8] A shoreline certification approved by the State in 2002 shows the shoreline running along the top of the coastal bank. Dkt #148, p.75; **ROA** pt.26 at 296 (shoreline survey, Ex.P-236); Dkt #186, pp.26-28 (Ariyoshi); **ROA** pt.26 at 295 (shoreline map, Ex.P-235).

The County says that "evidence at trial also demonstrated the existence of traditional Hawaiian access through LOT 15" (County's Opening Brief, Dkt #409, p.12), but that is not true. Isaac Hall, an attorney for Hui Alanui O Makena, witnessed the creation of the public footpath in the 1980s. Mr. Hall testified there was a fence separating the Property from Old Makena Road and that no footpath was visible at that time. Dkt #152, p.14 (4/23/15 AM, Hall). He was present when the fence was forcibly removed to create the footpath. Dkt #152, pp.15-16 (4/23/15 AM, Hall). When Mr. Hall tried to tell the jury that there had been "traditional" access to the beach there, the trial court properly struck his testimony. Dkt #152, p.14 (4/23/15 AM, Hall). Mr. Hall's stricken testimony was not "evidence."[9] There was no evidence of a footpath on the Property before the 1980s.

The County claims that "the LEONES . . . placed in issue the existence of several cultural burial sites within the area of adjacent lots at Palauea Beach." County's Opening Brief, Dkt

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

[9] "[S]tricken testimony or exhibits are not evidence and must not be considered for any purpose." Hawaii Civil Jury Instructions, Instr. 2.2.

#409, p.9.[10] In fact, the Leones moved in limine to exclude such evidence, because it is irrelevant.

Dr. Paul Rosendahl prepared an archaeological assessment survey for the Property dated August 23, 1999. **ROA** pt.29 at pp.259-60. The County complains (County's Opening Brief, Dkt #409, p.34) that this report was excluded from evidence, but Dr. Rosendahl's survey actually found no remains or artifacts on the Property. His report concludes:

> No surface archaeological resources of any kind were encountered on this parcel during the previous projects, nor were any subsurface cultural deposits encountered on this or any of the adjacent parcels. . .

ROA pt.29 at 259-60.

If such artifacts were discovered on the Property, that would not prevent the Leones from building a home. As Dr. Rosendahl's report explains: "any development [that] did not involve intrusion into the underlying natural soil deposits would not affect or damage any historic remains that might be present." *Id.* Even if cultural remains were discovered in the location where the Leones planned to build a home, they could still build if they prepared appropriate monitoring and/or mitigation plans.[11] The County so admits.[12] The County also admits that the

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[10] The evidence cited by the County is a record of the minutes of the Planning Commission meeting, at which a member of the public claimed that there were burials found on other lots (**ROA** pt.25 at 587-88).

[11] A landowner may build by working with the State Historic Preservation Division of the Department of Land and Natural Resources (**ROA** pt.42 at pp.1048-1050 (Suyama)) pursuant to Hawaii's historic preservation law (Hawaii Revised Statutes "**HRS**" Chapter 6E). HRS §6E-42 provides for a review and comment process for "any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property ... or a burial site ...." HRS §6E-42 (***Appendix AA***). This process (which is not

(continued...)

Leones' neighbors obtained approvals to build homes after preparing such plans. County's Opening Brief, Dkt #409, p.5n3.

B. The County's Efforts to Create a Park at Palauea Beach

In 1996, four years before the Leones purchased the Property, the Maui County Council (the "**Council**") adopted Resolution No. 96-121 (***App.D***, Dkt #383, **ROA** pt.2 at 486-91), calling for the acquisition of all of the Palauea Beach Lots "for public purposes, to wit: park and recreational purposes." ***App.D*** (Dkt #383) at ¶¶1-2, **ROA** pt.2 at 487. Some officials, however, expressed concern over the County's fiscal constraints. **ROA** pt.9 at 401-2 (minutes); **ROA** pt.9 at 405-6 (press release). Others openly speculated that designating the Palauea Beach Lots as "Park" on the Community Plan might lower the price of the lots.[13] In 1998, the Council designated the Palauea Beach Lots as "Park" on the Community Plan. **ROA** pt.2 at 484; **ROA** pt.27 at 343-408 (Ex.D-4).

On June 29, 1999, Maui's Corporation Counsel, responding to an inquiry from the Council (**ROA** pt.25 at 244 [Kane memo, Ex.P-8]), warned that if the County prohibited owners from building on the Palauea Beach Lots, it would "**likely be faced with an inverse**

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[11](...continued)
limited to the SMA context) is governed by Hawaii Administrative Rules ("**HAR**") Chapter 13-284. *See* ***Appendix BB.***

[12] The County notes that "if appropriate mitigating measures were demonstrated, and required agency approvals obtained by the landowner, an exemption . . . would be granted to an owner, even whose parcel contained significant historical sites." County's Opening Brief, Dkt #409, p.11.

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

condemnation claim for an unconstitutional taking."[14]

In 1999, Councilmember Dain Kane proposed acquiring **three** of the nine Palauea Beach Lots, including the Property, to provide the public with "multiple access" points to Palauea Beach. Dkt #52, pp.48-50 (4/9/15 AM, Kane); **ROA** pt.34 at 360-67,471-78 (proposed resolution). The Council rejected Mr. Kane's proposal. Dkt #52, p.51 (4/9/15 AM, Kane), and instead adopted Resolution No. 99-183 (***App.F***, Dkt #385, **ROA** pt.25 at 262-67 [Ex.P-17]), to "encourage the Administration to negotiate for the purchase" of only **two** of the lots. ***App.F*** (Dkt #385) at 4, **ROA** pt.25 at 265. In January 2000, the County purchased parcels 18 and 19 for park use. Dkt #52, p.10 (4/9/15 AM, admission); **ROA** pt.18 at 680. The County did not purchase the Property, or any of the other Palauea Beach Lots, because it did not have the funds to do so. **ROA** pt.25 at 489 (Hunt memo, Ex.P-57); *see* Dkt #48, pp.46-47 (4/6/15 PM, Welch).

C. The Leones Reasonably Believed They Could Build a Home on the Property When They Purchased It

The County argues that the Leones purchased the Property with the knowledge that it was designated as "Park" under the Community Plan. County's Opening Brief, Dkt #409, p.8. However, in a takings case, a landowner's knowledge of the confiscatory regulation prior to acquisition of the property is irrelevant. *See* pp.39-40, *infra*. And the record clearly shows that the Leones reasonably believed, when they purchased the Property in 2000, that they could build a home under then-existing regulations. Dkt #186, pp.62-63 (4/21/15 AM, D.Leone).

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[14] **ROA** pt.25 at 246, 251 (emphasis added); Dkt #52, pp.9-10 (4/9/15 AM, admissions); **ROA** pt.18 at 680; Dkt #52, pp.13-23 (4/9/15 AM, Takayesu).

The Palauea Beach Lots are located in a "special management area" or "**SMA**" as defined in the Hawaii Coastal Zone Management Act, HRS Chap. 205A (the "**Act**") at HRS §205A-22 (***App.G***, Dkt #386, at 18-20,32-33).[15] Part II of the Act regulates only "developments," and exempts from its coverage. Certain land uses by specifically excluding them from the definition of a "development." HRS §205A-22 (***App.G***, Dkt #386, at 18-20,32-33). Before 2001, the Act defined "development" to exclude "construction of a single-family residence that is not part of a larger development ...." Dkt #138, p.34 (4/7/15 PM, Welch). When the Leones purchased the Property in 2000, they had the right to build a home on the Property without going through the SMA assessment process. Dkt #138, p.34 (4/7/15 PM, Welch); Dkt #186, pp.62-63 (4/21/15 AM, D.Leone).

In 2001, the Act was changed. *See* 2001 Hawaii Laws Act 169 (H.B. 538)(***App.H***, Dkt #387), pp.12-13; HRS §205A-22 (***App.G***, Dkt #386, at 18-20,32-33); Leones' Opening Brief, Dkt #379, p.7. In response to the new law, the Maui County Planning Director began requiring Palauea Beach Lot owners to submit SMA assessment applications to determine whether their proposed houses were exempt. Dkt #54, pp.57-58 (4/15/15 AM, Min); Dkt #138, pp.34-35,37 (4/7/15 PM, Welch).

The Planning Commission's Special Management Area Rules (the

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[15] "Special management area" means the land extending inland from the shoreline as delineated on the maps filed with the County Planning Commission. HRS §205A-22 (***App.G***, Dkt #386, at 18-20,32-33). The Act, which requires a permit for "development" in an SMA, is implemented and enforced by the counties. HRS §205A-1 (***App.G*** at 12); HRS §205A- 22 (***App.G*** at 18-20,32-33); HRS §205A-28 (***App.G*** at 22,34). In Maui County, the Planning Commission is the statutory "authority" responsible for administering the Act. HRS §205A-22 (***App.G*** at 18-20,32-33); HRS §205A-27 (***App.G*** at 22,33-34).

"**SMA Rules**") (***App.I***, Dkt #388) govern the SMA permitting process for Maui County. With respect to SMA assessment applications, section 12-202-12(f) of the SMA Rules provides:

> (f) Based upon the assessment and review of the application, the director shall make a determination and notify the applicant in writing within thirty calendar days after the application is complete that the proposed action ...
>
> (5) **Cannot be processed** because the proposed action is **not consistent** with the county general plan, **community plan**, and zoning....

(***App.I***, Dkt #388, at 202-11 to 12)(emphasis added). *See also* Leone, 128 Haw. at 194n8, 284 P.3d at 967n8.

Since consistency of the proposed land use with the Community Plan is required merely **to process** an application, if the Planning Director makes a finding of inconsistency, a landowner trying to build a home on land designated as "Park" (such as the Leones) cannot get an exemption. If a proposed land use is **not** exempt from the definition of a "development," then an SMA permit is required. However, the County is prohibited from issuing an SMA permit for any development inconsistent with the Community Plan. HRS §205A-26(2)(C)("No development shall be approved unless the authority has first found ... [t]hat the development is consistent with the county general plan"); and GATRI v. Blane, 88 Haw. 108, 115, 962 P.2d 367, 374 (1998) ("... a proposed development which is inconsistent with the [Kihei-Makena Community Plan] may not be awarded an SMA permit without a plan amendment.")

Therefore, once the Planning Director finds inconsistency under Section 12-202-12(f) of the SMA Rules, a house may not be built on a parcel designated "Park" on the Community Plan. Leone, 128 Haw. at 194n8, 284 P.3d at 967n8 ("neither the director nor the Planning Commission may approve land uses that

are inconsistent with the Kihei-Makena Community Plan.") (***App.A***, Dkt #380);[16] *see also* Dkt #178, pp.53-55 (4/15/15 AM, Tsujimura).

D. The County's Changing Policies

Until 2003, Palauea Beach Lot owners who applied for an exemption for a single-family residence were granted that exemption, notwithstanding the "Park" designation on the Community Plan. **ROA** pt.25 at 719-21 (Warmenhoven exemption, Ex.P-96); Dkt #158, p.81 (4/30/15, Welch); **ROA** pt.25 at 777-78 (Sweeney exemption, Ex.P-111); **ROA** pt.25 at 779-80 (Lambert exemption, Ex.P-112).

But in January 2003, under a new administration, the County reversed course. The new Planning Director, Michael Foley, revoked the exemptions given to the Lamberts and the Sweeneys, the Leones' neighbors, on the basis that the proposed residential uses were inconsistent with the Community Plan. Dkt #136, pp.28-29,52 (4/7/15 AM, Welch). The Lamberts and Sweeneys then sued the County, alleging estoppel. Dkt #136, pp.44,56; Dkt #48, pp.26-27 (4/6/15 PM, Welch). In 2005, the cases settled, allowing the owners to build homes. Dkt #136, p.56; Dkt #48, pp.26-27,45,59. Despite that settlement, the County continued refusing to process SMA assessment applications for new houses on any of the other Palauea Beach Lots. Dkt #48, pp.27-28 (4/6/15 PM, Welch).

E. The Leones Actively Sought to Build a Home

The County falsely contends that the Leones held the Property "for four (4) years without proceeding with any

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[16] The County asks this Court to ignore the footnotes in the Leone Opinion, (County's Opening Brief, Dkt #409, pp.17,46), but "[a] footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect." Melancon v. Walt Disney Prods., 127 Cal. App. 2d 213, 214, 273 P.2d 560, 561 (1954).

development plans." County's Opening Brief, Dkt #409, p.10. The record shows that the Leones diligently pursued approval to build. Dkt #158, p.65 (4/30/15 Welch); Dkt #154, p.9 (4/27/15 PM, Munekiyo). In 2003, the Leones hired architect Greg Bayless to prepare plans for their home, which were completed that year. Dkt #140, pp.56, 58-62 (4/8/15 PM, Bayless); **ROA** pt.26 at 244-48 (plans, Ex.P-145); **ROA** pt.26 at 249 (plan, Ex.P-147); Dkt #186, pp.62-63 (4/21/15 AM, D.Leone). Mr. Bayless had designed homes for other Palauea Beach Lot owners, was familiar with the terms of the Declaration, and designed the Leones' home to conform to the development standards in the Declaration. Dkt #140, pp.51-55 (4/8/15 PM, Bayless).

1. <u>The Leones attempted to amend the Community Plan</u>

The County claims the Leones "abandoned and failed" to complete the requirements to develop the Property in 2004. County's Opening Brief, Dkt #409, pp.3,10-14,28n13,43,51n20. That is not true. In 2003, Planning Director Foley had made it clear that he would not approve any new houses at Palauea unless the "Park" designation on the Community Plan was changed. **ROA** pt.29 at 262. So the Leones hired the Munekiyo & Hiraga planning firm ("**M&H**") to seek an amendment of the Community Plan's "Park" designation for their lot.[17] At the time, the Leones were the only Palauea Beach Lot owners to try to change that designation. Dkt #158, pp.65-66 (4/30/15 Welch); Dkt #154, pp.5-6 (4/27/15 PM, Munekiyo). The Leones suspended their efforts only after Director Foley advised them that he would not support the proposed plan amendment unless they gave up 40% of their land for

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[17] **ROA** pt.27 at 532-48 (Ex.D-51) and **ROA** pt.25 at 392-407 (Ex.P-42)(M&H proposals); Dkt #60, pp.40-41 (4/22/15 AM, Munekiyo); Dkt #136, pp.45-46 (4/7/15 AM, Welch); Dkt #158, pp. 65-66 (4/30/15, Welch).

a "view corridor." **ROA** pt.28 at 278-79.[18] The Leones then believed that their efforts to amend the plan would be futile. **ROA** pt.25 at 465 (Munekiyo email, Ex.P-45).[19]

2. The Leones contributed to the Planning Director's efforts to change the Community Plan for all Palauea Beach Lots

In 2006, Planning Director Foley acknowledged that the County had a risk of liability for denying Palauea Beach Lot owners the use of their properties, and he therefore initiated[20] a request for a Community Plan amendment for all nine Palauea Beach Lots in order to clean up the "mess" created by the inconsistency problem. Dkt #48, pp.28-31 (4/6/15 PM, Welch).

The first step in the amendment process was for the Planning Department to seek Planning Commission approval. In 2007, the new Planning Director, Jeffrey Hunt, transmitted a Draft Environmental Assessment (the "**Draft EA**") to the Commission,

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[18] Director Foley's attempt to exact a "view corridor" from the Leones was improper. Under Dolan v. City of Tigard, 512 U.S. 374, 391, 114 S.Ct. 2309, 2319 (1994), such an exaction must be "roughly proportional" -- and not merely related -- to the adverse impact of the Community Plan amendment, and there is no evidence of "rough proportionality" here.

[19] In any event, the ICA correctly held that the Leones had no obligation to seek a Community Plan amendment before pursuing this lawsuit for inverse condemnation. Leone, 128 Hawaii at 195, 284 P.3d at 969 (***App.A***, Dkt #380) ("[w]e hold that [the Leones] are not required to seek a change in the applicable law, *i.e.*, the Community Plan ....").

[20] The County argues that "Ms. Hiraga ... 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." County's Opening Brief, Dkt #409, p.13n7. However, when asked "who was ... initiating that proposed change[,]" she testified, "the planning department." Dkt #50, p.10 (4/7/15 PM, Hiraga). And the Planning Director's letter to the Planning Commission shows the same thing. **ROA** pt.25 at 488 (Hunt memo, Ex.P-57) (the effort was "Planning Director initiated").

seeking "to initiate land use amendments that reflect[ed] the intended residential use of the properties and the existing park use of the County-owned properties" so as "to prevent **future problems** associated with the inconsistencies between the Kihei-Makena Community Plan and Zoning."[21] Planning Director Hunt admitted that these "problems" included potential lawsuits. Dkt #180, pp.83-84 (4/10/15 AM, Hunt). At the County's request, Palauea Beach Lot owners, including the Leones, paid for the Draft EA. Dkt #48, pp.34-35 (4/6/15 PM, Welch); **ROA** pt.25 at 466-87 (Welch letter, Ex.P-47).

The Planning Commissioners did not cooperate. When the Draft EA first came before the Commission in early 2007, Commissioner William Iaconetti candidly suggested taking no action to "prevent [the lot owners] from developing the property for residential purposes" while allowing "the people of Maui to utilize this beach area." ***App.J*** (Dkt #389) at 53, **ROA** pt.25 at 493 (minutes, Ex.P-61).

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

Id. Commissioner Jonathan Starr explained that "property owners who, you know, I don't think they're members of the community from here ... have not in fact proven over time to be the best stewards of that land." ***App.J*** (Dkt #389) at 62, **ROA** pt.25 at 502. Commissioner Jon Guard bemoaned the potential loss of the "defacto parking that people are enjoying now." ***App.J*** (Dkt #389) at 56, **ROA** pt.25 at 496.

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[21] **ROA** pt.25 at 488-90 (489) (Hunt memo, Ex.P-57) (emphasis added).

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

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

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

App.K (Dkt #390), **ROA** pt.25 at 567-68 (the "**Rejection Letter,**" Ex.P-68).

Citing deposition testimony of Thorne Abbott, a former Planning Department employee whose testimony was not proffered at trial, the County claims that the Leones' SMA assessment application was "indisputably incomplete" and therefore defective. County's Opening Brief, Dkt #409, pp.28n13,31-33. But the Leone Opinion explains why any such defects would be irrelevant:

> ... upon the Director's determination that the

> application could not be processed due to inconsistency with the Community Plan, any other deficiencies became irrelevant to the ripeness analysis because even if such deficiencies were remedied, the application could not be processed.

Leone, 128 Haw. at 188 n4, 284 P.3d at 961 n4 (***App.A***, Dkt #380). Indeed, as just noted, the Planning Director's stated position on October 25, 2007 was that any such application "will require consistency with the Community Plan in order to be processed."[22]

The County falsely claims that Deputy Director Colleen Suyama "acknowledged the Leones' SMA Assessment Application could not be fairly assessed and processed owing to its incompleteness alone." County's Opening Brief, Dkt #409, p.32. The County cites to Deputy Director Suyama's deposition testimony, which was not proffered at trial. In truth, as the County's own record reference shows, she did **not** say the Leones' application was "incomplete," and she **did** testify that, in the case of deficiencies, the Planning Department "inform[s] the applicant of any deficiency in the application and **give[s] them the opportunity to correct the deficiency.**" **ROA** pt.14 at p.469 (emphasis added). Former Planning Director Hunt, who signed the Rejection Letter, agreed with her. Dkt #154, pp.63-64 (4/27/15 PM, Hunt).

Had the Planning Department noticed a particular defect in the Leones' SMA assessment application, it would simply have

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[22] Mr. Abbott's deposition testimony is meaningless for several other reasons. The County never proffered Mr. Abbott as a witness or made any offer of proof with respect to his testimony, as required by HRE Rule 103(a)(2). There was no foundation for his opinions, and the County never presented an expert report from Mr. Abbott, as required by the trial court. **ROA** pt.3 at 663. Finally, the Planning Department never identified any other reason for refusing to process the Leones' application. Dkt #178, pp.21-22 (4/8/15 AM, Munekiyo).

asked the Leones or their consultants for the necessary information. **ROA** pt.14 at p.468-471. As Ms. Suyama and Mr. Hunt explained, even if the Leones' SMA assessment application had been "deficient," it would not have been rejected.

The County again misrepresents the record when it says that the Leones' attorney, Tom Welch, "instructed" Deputy Director Suyama to deny the Leones' SMA assessment application.[23] County's Opening Brief, Dkt #409, pp.32-33,50. The County seemingly implies that a private attorney could control the Planning Department's decisions. Mr. Welch's email actually stated:

> We understand that you will respond the same way you did with [another Palauea Beach Lot owner's] application, based on the inconsistency and inability of the Dept to process.

ROA pt.29 at 262. Regarding his email, Mr. Welch testified:

> I didn't ask the County not to process [the application]. I asked the County to finish up their work on it, one way or the other.

Dkt #136, p.31 (4/7/15 AM, Welch). While he expected the County to refuse to process the application, he hoped that it would be processed and approved regardless. Dkt #136, pp.65-70 (4/7/15 AM, Welch). He sought the exemption because the Leones wanted to build a home on the Property. **ROA** pt.25 at 566 (transmittal, Ex.P-67); **ROA** pt.26 at 244-48 (plans, Ex.P-145); **ROA** pt.25 at 249 (plan, Ex.P-147).

The County states that the Leones "did not appeal to the Planning Commission" from the Planning Director's determination

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[23] The trial court correctly noted that "motive is not relevant or material to any issue in this case." Dkt #176, p.87 (4/2/15 AM). The principal issue is "whether or not [the Property] can be used for an economically beneficial use. That's the issue to be determined here, not [the Leones'] motive in how they got here." Dkt #136, p.12 (4/7/15 AM).

of inconsistency and refusal to process their SMA assessment application. County's Opening Brief, Dkt #409, p.15. The ICA explained, in the Leone Opinion, why the Leones were not required to take such an appeal before their claim ripened. Leone, 128 Haw. at 193, 284 P.3d at 966 (***App.A***, Dkt #380) ("we conclude that [the Leones] were not required to appeal the Director's decision that their assessment application could not be processed ....") The ICA therefore did not reach the issues of whether the SMA Rules authorize such an appeal in the first place (*see id.*, 128 Haw. at 193, 284 P.3d at 966) or whether such an appeal would have been futile.[24]

G. The County Fails to Resolve the Inconsistency Problem

The Planning Commission again considered the Planning Director's proposed plan amendment for the Palauea Beach Lots on February 12, 2008. ***App.L*** (Dkt #391), **ROA** pt.25 at 574-625 (minutes, Ex.P-73). At that hearing, Deputy Director Suyama explained the inconsistency problem:

> [T]he way the rules are written is that **if you lack consistency, we don't even review the application,** we return it to the property or the applicant saying that we're unable to process your application unless the inconsistencies are resolved ....

App.L (Dkt #391) at 26-27, **ROA** pt.25 at 576-77 (emphasis added).

The commissioners voted to defer action on the Draft EA pending submittal of additional information, including an "acquisition study" of the "options, feasibility and funding mechanisms" for the County to acquire the remaining vacant Palauea Beach Lots. ***App.L*** (Dkt #391) at 72, **ROA** pt.25 at 622. A

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[24] There is no evidence suggesting either that the Planning Commission had the authority to overturn the Planning Director's determination that the Leones' proposed home was inconsistent with the Community Plan, or that a majority of the commissioners -- whose views on the subject were already clear -- would have been inclined to do so.

minority of the commissioners dissented:

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

App.L (Dkt #391) at 56, **ROA** pt.25 at 606 (emphasis added).

In September 2008, the Larsons, a family owning two of the Palauea Beach Lots, had submitted SMA assessment applications to build a home on each of their lots. Leone, 128 Haw. at 187-89, 284 P.3d at 960-61 (***App.A***, Dkt #380). The Planning Director refused to process those applications too, and the Larsons also sued the County. *Id.*; **ROA** pt.3 at 661-66.

Four years later, in 2012, with the Community Plan amendment still pending -- and the prior appeal in this case pending in the ICA -- the County again began granting SMA assessment exemptions for houses on the Palauea Beach Lots, despite the inconsistency problem. Dkt #158, pp.80-81 (4/30/15, Welch). In May 2013, after the ICA had published the Leone Opinion, the Larsons submitted a second SMA assessment application for one of their lots, and they received an exemption from Planning Director William Spence in October 2013. **ROA** pt.2 at 901-2; **ROA** pt.2 1311-15.

H. The Leones Have No Economically Beneficial Use

The Declaration allows the Leones only one use of the Property: they must build a single-family residence of at least 2,500 square feet.[25] However, the Property cannot legally be

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[25] *See* ***App.U***, **ROA** pt.38 at 232-38 (2000 deed), **ROA** pt.25 at (continued...)

used for a single-family residence under the County's regulations after the Director determines that such use is inconsistent with the Community Plan "Park" designation. *See* pp.9-10, 14-15, *supra*. Even if the Declaration permitted a park to be developed on the Property, the Property would still have no economically beneficial use, because the Leones cannot legally use it as a park. *See* pp.25-26, *infra*.

Nor can the Property -- now -- be used for a single-family residence, even if the Leones received an SMA exemption. A storm in late 2011, during the period of the regulatory taking, caused waves to wash so far up onto the Property that the shoreline setback, if certified, would overlap with the front yard setback, leaving no buildable footprint on the Property. *See* Leones' Opening Brief, Dkt #379, pp.15-16,42-43.

Today, Councilmember Kane's vision of "multiple access points" for the public at Palauea[26] has been realized -- although the County actually paid for only two of the three public lots. For over fifteen years, the Leones have owned a *de facto* public beach park. The Property remains vacant, used by the public for parking and beach access. ***App.O*** (Dkt #394), **ROA** pt.26 at 339-41 (photos, Ex. P-203). The public has been illegally camping, littering, urinating, defecating and parking on the Property. Leone, 128 Haw. at 189, 284 P.3d at 961 (***App.A***, Dkt #380); ***App.J*** (Dkt #389) at 60-62, ***App.L*** (Dkt #391) at 43, 45-46, **ROA** pt.25 at 500-02,593, 595-96 (minutes, Ex.P-61,P-73); Dkt #186, p.72

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[25](...continued)
408-15 (2004 deed); ***App.C*** at 5, **ROA** pt.26 at 347, 350 (Declaration); Dkt #144, p.61 (4/15/15 PM, Whitney); Dkt #186, p.93 (4/21/15 AM, D.Leone); Dkt #140, pp.55,67 (4/8/15 PM, Bayless).

[26] *See* ***App.X*** (Dkt #403), **ROA** pt.25 at 285-86 [news article, Ex.P-19 (for identification)].

(4/21/15 AM, D.Leone); Dkt #140, pp.63-64 (4/8/15 PM, Bayless).

Despite Deputy Director Suyama's explanation to the Planning Commission of the need to amend the Community Plan (***App.L***, Dkt #391, at 26-27, **ROA** pt.25 at 576-77), the Planning Director's proposed amendment remains in limbo before the Planning Commission, and the Palauea Beach Lots are still designated "Park."[27] **ROA** pt.27 at 343-408 (Community Plan, Ex.D-4); Dkt #48, p.54 (4/6/15 PM, Welch); Dkt #192, p.16 (4/29/15 PM, Spence). Corporation Counsel, reporting on this case, warned the Planning Commission on March 23, 2010 that "[i]f the designation is ultimately not changed, ... **they're going to have to be selling a lot of sweet bread to raise money**, because it's going to be very, very expensive." **ROA** pt.25 at 637 (minutes, Ex.P-82 [for identification]) (emphasis added).

III. COUNTER-STATEMENT OF DISPOSITION OF CASE BELOW

A. The Complaint

On November 19, 2007, the Leones filed their Complaint (**ROA** pt.1 at 221-241), alleging the following claims: Count I for inverse condemnation claims under Article I, §20 of the Hawaii Constitution; Count II for inverse condemnation claims under the Fifth Amendment to the United States Constitution; Count III under the Civil Rights Act, 42 U.S.C. §1983; Count IV for substantive due process claims under 42 U.S.C. §1983; and Count V for punitive damages under 42 U.S.C. §1983. The prayer for relief seeks an award of damages for just compensation. The Leones' complaint has never been amended.

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[27] Indeed, the "Park" designation on the Palauea Beach Lots has not changed since 1998 -- even though the County is required to review the Community Plan every ten years. MCC 2.80B.080 (***App.P***, Dkt #395, at 4).

B. **The First Appeal**

In moving to dismiss the complaint, the County took the position that its regulatory scheme prevents the Leones from building a single-family residence on the Property:

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

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

On March 2, 2009, the trial court[28] dismissed the case for lack of subject matter jurisdiction under Rule 12(b)(1) of the Hawaii Rules of Civil Procedure, ruling that the Leones' takings claims were not ripe. **ROA** pt.1 at 2329-49.

The County tells this Court that "Judge Cardoza noted that both parties submitted proposed findings and conclusions, but it is apparent that none were expressly made in the Order...." County's Opening Brief, Dkt #409, p.4. The County goes on to say that his order "is based on the contents of the complaint . . . accepted as true," implying that the Leone Opinion ultimately was predicated only on facts alleged by the Leones. County's Opening Brief, Dkt #409, p.5. In fact, Judge Cardoza considered a great deal of evidence. His order ran to 16 pages and contained extensive findings of fact. **ROA** pt.1 at 2329-46. Those findings, while not set forth in separately numbered paragraphs, were based on the evidence. His order (**ROA** pt.1 at 2329-46) correctly notes that, on a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, "the trial court is **not restricted to the face of the pleadings**, but may review any

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[28] The Honorable Joseph E. Cardoza presided.

evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." **ROA** pt.1 at 2337, *quoting* Norris v. Hawaiian Airlines, Inc., 74 Haw. 235, 240, 842 P.2d 634, 637 (1992), *aff'd*, 512 U.S. 246 (1994) (emphasis added).[29]

On October 15, 2009, the trial court similarly dismissed the lawsuit filed by the Larsons. Leone, 128 Haw. at 186-7, 284 P.3d at 959-60 (***App.A***, Dkt #380).

The ICA consolidated the two cases and reversed, holding that the Leones' claims were ripe because the County's October 25, 2007 decision to refuse to process the Leones' SMA assessment application was a "final" decision under Williamson Cnty. Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108 (1985). Leone, 128 Haw. at 193-96, 284 P.3d at 966-69 (***App.A***, Dkt #380). In so holding, the ICA expressly stated that the County could not legally process an SMA assessment application for any use inconsistent with the Community Plan designation:

> [N]either the director nor the Planning Commission may approve land uses that are inconsistent with the Kihei-Makena Community Plan. ... The language of the SMA Rules comports with this outcome, stating in mandatory terms that "the director **shall** make a determination ... that the proposed action **either**: ... (5) Cannot be processed because the proposed action is not consistent with the county general plan, community plan, and zoning[.]"

Leone, 128 Haw. at 194n8, 284 P.3d at 967n8 (***App.A***, Dkt #380)

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[29] The County has presented no evidence that any of Judge Cardoza's findings were untrue, has not contradicted any of the factual statements in the Leone Opinion, and indeed has admitted to the material facts set forth in the Leone Opinion, including that its regulatory scheme prevents the Leones from building a single-family residence on the Property. *See* **ROA** pt.1 at 270,277,1680.

(emphasis in original; citations omitted).

C. Pretrial Proceedings

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

The Larsons' complaint against the County was settled in early 2015. *See, e.g.*, **ROA** pt.12 at 237-41, 479-81; **ROA** pt.13 at 737-38; **ROA** pt.14 at 741-44; Dkt #114, pp.5-18 (2/18/15 hearing). The County implies that the Larsons, unlike the Leones, settled because they were able to obtain an SMA exemption based on burial mitigation plans. County's Opening Brief, Dkt #409, p.5n3. But in fact, the County actually paid the Larsons $800,000, and promised them building permits, to settle their lawsuit. **ROA** pt.12 at 237, 254-55; Dkt #114, p.18 (2/8/15 hearing).

In February, 2015, both parties filed motions in limine. First, the Leones filed a motion in limine to exclude evidence of human remains, since any such evidence would be irrelevant and prejudicial. **ROA** pt.12 at 639-703. The trial court granted the motion in part and permitted the County to discuss the issue only to the extent that they "might affect the value" of the Property (*i.e.*, the Leones' damages). *See* Dkt #120, pp.36-37 (3/18/15); **ROA** pt.29 at 233-35. The County presented no such evidence.

Second, the Leones filed a motion in limine to exclude evidence of the alleged insufficiency of the Leones' 2007 SMA assessment application on the basis that such evidence was irrelevant, as explained in the Leone Opinion at n4. **ROA** pt.12

at 489-534. The trial court granted the motion. **ROA** pt.23 at 863-65.

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

For its part, the County filed a motion to exclude or limit the testimony of the Leones' expert real estate economist, Dr. William Whitney. **ROA** pt.15 at 554-664. The trial court mistakenly believed that "single family residential use," required by the Declaration, was inconsistent with vacation rental use, and so granted the motion in part, and denied it in part. Dr. Whitney was not permitted to testify as to the "value of the [Leones'] property as used for short term or vacation rental"; but Dr. Whitney was permitted to testify as to the Leones' damages not based on short term or vacation rental use. **ROA** pt.30 at 1026-27, 1034-35.

The County also moved in limine to prevent the Leones from introducing the Leone Opinion, arguing that it was based on so-called "presumptive facts." **ROA** pt.13 at 383-411. To prevent juror confusion, the trial court granted the motion "to the extent that no party will be permitted to refer [to the Leone Opinion] directly or indirectly[.]" **ROA** pt.30 at 1024-25. The trial court reasoned that "tell[ing] the jury that this [case] went up on appeal" is "potentially totally confusing because then we have to start explaining things[.]" Dkt #166, p.32 (3/6/15).

D. The Trial

A jury trial was held from March 30, 2015 through May 5, 2015. **ROA** pt.1 at 19-36.

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

Dr. Whitney[30] testified that, given the Rejection Letter, the only conceivable use of the Property would be for park purposes. Dkt #144, pp.49-50,53-54 (4/15/15 PM, Whitney). However, he explained that there is no economically beneficial "Park" use of the Property, in part because the zoning code prohibits private commercial park uses. Dkt #144, pp.54-58; MCC §19.615.020(A) (***App.Q***, Dkt #396, at 4). The isolated location of the Property does not permit a sufficient market presence for economically beneficial or "commercial" park use. Dkt #361, p.58 (4/16/15 PM, Whitney).[31]

The County produced no evidence that any commercial use of the Property -- even if permitted -- would be economically viable. Over the last fifteen years, the Leones paid the County nearly $400,000 in real property taxes, but the County never

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[30] Dr. Whitney has over forty years of experience as a real-estate economist and advisor. He uses computer based economic modeling to evaluate real estate development. He has conducted numerous market feasibility studies on the possible uses of large real estate projects worldwide and in Hawaii, including the Four Seasons Hualalai, the Mauna Lani Resort, Parker Ranch, Queen Kaahumanu Shopping Center, and Aloha Tower. He is a pre-eminent economist and has been qualified many times, in many courts, as a testifying expert for both government and private developers. Dkt #144, p.4-45 (4/15/15 PM, Whitney).

[31] Dr. Whitney testified in detail that he had reviewed and evaluated several possible park uses, and that none would be economically viable. Dkt #144, pp.54-58 (4/15/15 AM, Whitney). Even Ala Moana Beach Park, which is located along a very busy corridor, has "very little, if any" commercial park use. Dkt #361, p.58.

allowed them to build. **ROA** pt.26 at 422-23 (RPT records, Ex.P-241a); Dkt #54, pp.22-26 (4/15/15 AM, Martin).[32] A use that cannot generate enough income to pay real property taxes is not an economically beneficial use, as a matter of law.[33]

Dr. Whitney explained that, "under this set of circumstances, the Leones did not have a viable economic use available to them" (Dkt #144, pp.57-58) and that any residual value of the Property after the date of taking would be "speculative." Dkt #361, p.33 (4/16/15 PM, Whitney). The County presented no evidence to rebut Dr. Whitney's opinion.

Mr. Yamamura, an appraiser who is not an economist, was permitted to testify, over the Leones' objections,[34] that "investment [is] a bona fide use of land." Dkt #156, p.68. "People [buy] land, hold on to it; after it appreciates over time, people sell it for profit. I think that's a bona fide land use." *Id.*

The Leones' land use regulation expert R. Brian Tsujimura,[35]

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[32] In 2009, the Maui County Real Property Tax Division ("**RPTD**") reduced the Palauea Beach Lot owners' tax assessments because they could make no use of their land. **ROA** pt.27 at 560-63 (Welch letter, Ex.D-89). After the Planning Department again began granting exemptions, RPTD raised the assessments. Dkt #54, pp.22-26, 31-32. In 2014, the County billed the Leones, and the Leones paid, over $68,000 in real property taxes. **ROA** pt.26 at 422; Dkt #54, p.26.

[33] *See* Bowles v. United States, 31 Fed.Cl. 37, 48 (1994) (property "became a liability after the government action because [the landowner] would still be liable for annual property tax assessments"); Res. Investments, Inc. v. United States, 85 Fed.Cl. 447, 490 (2009) ("[t]he most glaring error of this sort ignores the property tax status of the parcel").

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

[35] Mr. Tsujimura is an attorney who had regular dealings with (continued...)

explained the fallacy of Mr. Yamamura's assertions:

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

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

When asked what economically beneficial use the Leones could make of their land, Planning Director Hunt could suggest only that "they can walk out on their property." Dkt #180, p.100 (4/10/15 AM, Hunt).

The County presented no evidence that the Leones could make any economically beneficial use of the Property after the taking on October 25, 2007. Mr. Yamamura did not testify as to any such use of the Property (other than "investment") on or after that date, and Mr. Leone testified that he received no offers for the Property after that date. Dkt #186, pp.83-84 (4/21/15 AM, D.Leone).

2. The Leone Opinion was introduced at trial only after the County "opened the door."

The County "opened the door" to the introduction of the Leone Opinion by trying to mislead the jury into believing that the Leones could have built a house if only they had tried harder. Consistent with the County's own admissions before the ICA, and consistent with n8 of the Leone Opinion, quoted above,

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

Dr. Whitney opined that the County is precluded from processing an SMA assessment application if the Director finds a landowner's proposed use is inconsistent with the Community Plan designation. **ROA** pt.26 at pp.279-80. Specifically he explained that, "such an application will not be processed by the County if the proposed use is inconsistent with ... the use designation of the Kihei-Makena Community Plan[.]" **ROA** pt.26 at pp.279-80 [Whitney report, Ex.P-158 (for identification)].

Corporation Counsel, during his cross-examination of Dr. Whitney, disputed that testimony and tried to create the misleading impression that the Planning Director rejected the Leones' SMA assessment application not for inconsistency with the Community Plan, but because it did not show sufficient plans to mitigate environmental impacts. Specifically, Corporation Counsel asked:

> Q. Mr. Whitney, ... 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. ...
>
> THE COURT: No, I'll overrule the objection, but this is fair game on Redirect at this point. **This door's been opened.**

Dkt #361, p.9 (4/16/15 PM, Whitney) (emphasis added).

Corporation Counsel had previously sought to create the same false impression -- through other witnesses -- that the Leones could build by simply seeking and obtaining an SMA exemption. For example, he had asked former Planning Commissioner Wayne Hedani:

> And you also understood that any single family residential structure proposed by any of the private landowners at Palauea Beach, which could be shown by

> that landowner to not have an adverse impact on the ecology in the environment at Palauea, would be exempted from the permitting requirements under the SMA; correct?

Dkt #180, p.11 (4/10/15 AM, Hedani).

The trial court then permitted the Leones to introduce the Leone Opinion on redirect examination to rehabilitate Dr. Whitney and his opinions. *See* Dkt #361, pp.9, 38-41 (4/16/15 PM, Whitney).

The County falsely argues that "Whitney never implied he relied upon the Leone decision." County's Opening Brief, Dkt #409, p.19n11. The truth is that Dr. Whitney issued a report before the Leone Opinion was published in 2012 (**ROA** pt.3 at 240-42) opining that the Leones had no "economically-viable use" of the Property, and a second report after the 2012 Leone Opinion was published, re-confirming his original conclusion (**ROA** pt.3 at 245-48). He was aware of and had read the Leone Opinion at the time he issued the updated report. Dkt #361, pp.49,55 (4/16/15 PM, Whitney).

3. The County Did Not Show That Evidence as to Cultural and Archaeological Issues Was Relevant.

The County repeatedly referred to "archaeological sites" and "remains" and attempted to introduce evidence thereof. County's Opening Brief, Dkt #409, pp.2,5n3,9-11,30-35,50-51. Such evidence was properly excluded. *See* Dkt #120, pp.36-37 (3/18/15, Motions in Limine); **ROA** pt.29 at 233-35. The County failed to establish the relevance of such sites or remains, having conceded that even if such remains were found under the footprint of the Leones' planned home (and there is no evidence that they were), that would not prevent the Leones from building the home. The County failed to offer any expert witness showing what the effect of any such items would be on the Property's value. And the

prejudicial effect that such evidence would have had is self-evident.

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

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

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

On May 5, 2015, the jury returned a verdict in favor of the County on the Inverse Condemnation Claims, specifically finding that "Defendant County of Maui or the Defendant Planning Director [did not] deprive Plaintiffs of economically beneficial use of their land" and that "Defendant Planning Director [did not] act in violation of 42 U.S.C. Section 1983." ***App.W*** (Dkt #402), **ROA** pt.24 at 1187-89. Final Judgment against the Leones was entered on June 1, 2015. **ROA** pt.29 at 640-42.

F. Post-Trial Proceedings.

On June 10, 2015, the Leones renewed their motion for judgment as a matter of law. **ROA** pt.29 at 653-1325. The County complains that the Leones' renewed motion accused its attorney of

"mis-conduct." County's Opening Brief, Dkt #409, p.7. But the record shows that the trial court admonished and reprimanded the County's attorney for his misconduct more than thirty times during the trial. *See* **ROA** pt.29 at 803-907. The trial court entered its order denying the motion on August 5, 2015. **ROA** pt.30 at 1009-10.

G. The Present Appeal and Cross-Appeal.

The Leones filed a notice of appeal on August 25, 2015 (**ROA** pt.30 at 1039-48), from the final judgment, the order denying the renewed motion for judgment, and order awarding the County its costs. On September 8, 2015, the County filed two substantively identical notices of cross-appeal (**ROA** pt.30 at 1071-1162, 1258-1341), from twelve interlocutory orders and rulings. *See* Dkt #318, pp.5-6.

On February 8, 2016, the Leones moved to dismiss the cross-appeal on the grounds that the County prevailed at trial and is not an "aggrieved party" entitled to appeal. Dkt ##318-23. The ICA denied the motion, finding that whether the appealed "interlocutory orders ... sufficiently aggrieve[d] the [County] to qualify them for a cross-appeal" was "best left to the merit panel in this appeal" Dkt #363.

On May 23, 2016 the County filed an application to transfer the case to the Hawaii Supreme Court. SCAP-15-0000599, Dkt ##1-6. The Leones opposed the application. SCAP-15-0000599, Dkt ##7-18. The case was transferred to this Court on June 29, 2016. Dkt #437 in CAAP-15-0000599; Dkt #31 in SCAP-15-0000599.

IV. STANDARD OF REVIEW FOR POINTS ON APPEAL

The parties agree that the points raised in the cross-appeal are reviewed under a "right/wrong" standard. Leones' Opening Brief, Dkt #379, pp.29-31; County's Opening Brief, Dkt #409, pp.39-40.

V. ARGUMENT

A. The County Was Not Aggrieved by the Final Judgment, so its Cross-Appeal Is Not Permitted by Law

The right to appeal is found in HRS Chap. 641: "[a]ppeals shall be allowed in civil matters from all final judgments, orders or decrees of circuit and district courts ...." HRS §641-1(a) (appeals as of right). However, under HRS §641-2, "No judgment, order or decree shall be reversed, amended, or modified ... **unless** the court is of the opinion that **it has injuriously affected the substantial rights of the appellant**" (emphasis added).

The procedures for taking an appeal or cross-appeal are set forth in Hawaii Rules of Appellate Procedure ("**HRAP**") Rules 3, 3.1, 4 and 4.1. Under HRAP Rule 4.1 (Cross-Appeals), "[i]f a timely notice of appeal is filed by a party, any other party may, **if allowed by law**, file a cross-appeal." HRAP Rule 4.1(a)(1) (emphasis added). "The cross-appeal proceeds in the same manner as an ordinary appeal" (except that transcripts are not required to be ordered). HRAP Rule 4.1(c).

This Court interprets HRS §641-1(a) to permit only an aggrieved party to appeal. As the Court explained in Montalvo v. Chang:

> ... a party bringing an appeal must have been "aggrieved" by the trial court's final order, for questions capable of judicial resolutions are best "presented in an adversary context." And an "aggrieved party," we have held, is one who is affected or prejudiced by the appealable order.

64 Haw. 345, 351, 641 P.2d 1321, 1326 (1982)(citations omitted).

In Bailey v. Dart Container Corp. of Michigan, 292 F.3d 1360, 1362 (Fed. Cir. 2002), the court was confronted with a "conditional" cross-appeal filed by a prevailing party, "so that it could raise arguments ... in the event that [the appellate]

court reverses[.]" The court, in dismissing the cross-appeal, reasoned:

> It is only necessary and appropriate to file a cross-appeal when a party seeks to enlarge its own rights under the judgment or to lessen the rights of its adversary under the judgment. Thus a party must file a cross-appeal when acceptance of the argument it wishes to advance would result in a reversal or modification of the judgment rather than an affirmance.
>
> In sum, allowing a cross-appeal to proceed in [the absence of such] circumstances ... is not permitted and unnecessarily expands the amount of briefing that is otherwise allowed, as well as giving the appellee an unfair opportunity to file the final brief and have the final oral argument, contrary to established rules.

Id. at 1362 (citations omitted; emphasis added).[36]

This cross-appeal, like the one in Bailey, is merely conditional: the County concludes its brief by asking that "**[i]f** this case is remanded ... the points of error above should be addressed by instruction to the Honorable Trial Court from this Honorable Court." *See* County's Opening Brief, Dkt #409, p.54 (emphasis added).[37] The fact that the County does not seek

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[36] *See also* Crocker v. Piedmont Aviation, Inc., 49 F.3d 735,741 (D.C. Cir. 1995) ("cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary") (quoting Jordan v. Duff & Phelps, Inc., 815 F.2d 429,439 (7th Cir. 1987)); Shoemaker v. Takai, 57 Haw. 599, 561 P.2d 1286 (1977), quoting 5 Am.Jur.2d *Appeal and Error* §708 ("no cross-appeal is necessary in order that an appellate court may review a question closely related, in substance, to a question raised by the appeal").

[37] The County asks this Court to issue an advisory opinion. Such a request is improper and contravenes this Court's "long-standing prohibitions" against rendering such opinions. In re Estate of Kam, 110 Haw. 8, 23 n26, 129 P.3d 511, 526 n26 (2006); *see also* Wong v. Bd. of Regents, University of Hawaii, 62 Haw. 391, 394, 616 P.2d 201, 204 (1980) (this Court must "not give opinions upon moot questions or abstract propositions, or to (continued...)

reversal of the judgment in its favor demonstrates that it is not an aggrieved party. It appears that the County filed its cross-appeal for the purpose of "unnecessarily expand[ing] the amount of briefing" and giving the County "an unfair opportunity to file the final brief." Regardless of its motives, the County's cross-appeal is not permitted by law.[38]

Rather than filing a cross-appeal, the County should have addressed its issues in the answering brief in the Leones' appeal. "An appellee may urge in support of the judgment appealed from any matter appearing in the record ...." Federal Elec. Corp. v. Fasi, 56 Haw. 57, 64, 527 P.2d 1284, 1289 (1974).

The orders that are the subject of the County's Notice of Cross-Appeal[39] are all interlocutory. HRS §641-1 (appeals as of right or interlocutory, civil matters) provides:

> (a) Appeals shall be allowed in civil matters from all **final** judgments, orders or decrees of circuit and district courts and the land court ....
> (b) Upon application made within the time provided by the rules of court, an appeal in a civil matter may be allowed by a circuit court in its discretion from ... any interlocutory judgment, order or decree whenever the circuit court may think the same advisable for the speedy termination of litigation ....

HRS §641-1 (emphasis added). Neither of these two provisions is applicable to the twelve orders and rulings from which the County purports to appeal. None of them is a final judgment, order or decree. The County did not ask the trial court to allow the

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[37](...continued)
declare principles or rules of law which cannot affect the matter in issue in the case before it.")

[38] For a fuller discussion, *see* Plaintiffs/Appellants Motion to Dismiss Defendants/Appellees' Cross-Appeal filed in the ICA on February 8, 2016 (Dkt ##318-23).

[39] Dkt #24, filed September 8, 2015.

appeal of any of these twelve orders or rulings, and the trial court did not rule that an appeal from any of these interlocutory orders was advisable for the speedy termination of this litigation.[40]

B. The Leones are Entitled to Just Compensation.

The central issue in this case is whether the Leones have economically beneficial use of the Property. As explained in the Leones' Opening Brief, Dkt #379, pp.31-47, no such use exists. The County's Opening Brief lacks any argument or discussion on the issue. The County does not identify any economically beneficial use available to the Leones. Instead, the County makes much of its "legitimate governmental interests" and the Leones' knowledge of the inconsistent regulations at the time they purchased the Property. County's Opening Brief, Dkt #409, pp.1,2,5n3,9-11,30-35,50-51. Neither of those issues is relevant.

1. The Leones have consistently alleged that this is a Lucas Takings Case.

The County asserts that the Leones "pivoted" and took "inconsistent" positions throughout this case. County's Opening Brief, Dkt #409, pp.15-17,42-43,46. In fact, as noted in the Leone Opinion (128 Haw. at 188-89, 284 P.3d at 961-62; ***App.A***, Dkt #380), the Leones have always contended that they are entitled to just compensation under the United States and Hawaii constitutions because they have been denied all economically beneficial use of the Property under Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S.Ct. 2886 (1992). Their

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[40] *See* Jenkins v. Cades Schutte Fleming & Wright, 76 Haw. 115, 119, 869 P.2d 1334, 1338 (1994), which established "bright line rules" re appeals from interlocutory orders; *see also* Lui v. City and County of Honolulu, 63 Haw. 668, 671 634 P.2d 595, 598 (1981)("the words 'speedy termination' are ... crucial").

complaint, filed in 2007, prays for just compensation, and it has never been amended. *See* Complaint; **ROA** pt.1 at 221-41; Dkt #54, p.16 [4/15/15 AM]; *see also* **ROA** pt.24 at 721.[41]

The takings clause of the Fifth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." ***Appendix T*** (Dkt #399). Art. I §20 of the Hawaii Constitution, more broadly, provides: "Private property shall not be taken **or damaged** for public use without just compensation." *Id.* (emphasis added).

The U.S. Supreme Court has explained that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415, 43 S.Ct. 158, 160 (1922). A regulation **categorically** goes "too far" and requires compensation under the Fifth Amendment when it denies the landowner all economically beneficial use of his property. Lucas, 505 U.S. at 1015, 112 S.Ct. at 2893.

In Lucas, a real estate developer bought two vacant lots in a beachfront subdivision, intending to build houses like those on neighboring lots. The developer sued the South Carolina Coastal Commission because South Carolina's Beachfront Management Act, which the commission enforced, prohibited him from building the houses. *Id.*, 505 U.S. at 1007, 112 S.Ct. at 2888. The South Carolina Coastal Commission argued that the prohibition was important to prevent beach erosion, but the developer sought

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[41] It is the County that has been inconsistent in its positions. The County has expressly **admitted** that the Leones cannot legally build a single-family residence on the Property due to inconsistency with the Community Plan. *See* **ROA** pt.1 at 270, 277, 1680, quoted above at p.25.

compensation regardless of any legitimate public objectives. *Id.*, 505 U.S. at 1009, 112 S.Ct. at 2890. The U.S. Supreme Court agreed, holding that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.*, 505 U.S. at 1019, 112 S.Ct. at 2895.

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

2. Any "legitimate governmental interest" served by the County's regulatory scheme is irrelevant.

The County asserts that its taking of the Property served a number of important and salutary public purposes. For instance, the County suggests that it has an interest in protection of a "fragile" beach and prevention of erosion. County's Opening Brief, Dkt #409, pp.1,8. The County further suggests there is a public interest in protection of "archaeological sites." *Id.*, pp.2,5n3,9-11,30-35,50-51.[42] However, as explained above, the

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[42] The County raised similar issues in trial. During voir dire, the County told potential jurors that this case was about the Public Trust Doctrine, and asked them "whether it's appropriate for the government to have a policy that Hawaii's coasts and shorelines and beaches are held in trust for the public[.]" Dkt #126, pp.78-79 (3/31/15 AM). In its opening statement, the County stated that oceanfront property in Hawaii (continued...)

County's stated public purpose for seeking to acquire the beach in 1996 was "park and recreational" use. ***App.D*** (Dkt #383), **ROA** pt.2 at 487. The citizens of Maui coveted the Property for the same reason the Leones did: it is located next to a beautiful recreational beach. The difference is that the citizens of Maui have effectively acquired the Property without paying for it.

Regardless, any public interest in protecting Palauea Beach or regulating development -- whether for recreation, to prevent erosion, to protect the beach, or to preserve cultural remains -- is irrelevant in a regulatory takings case. Dkt #150, pp.4-6 (4/22/15 PM); Dkt #140, p.28 (4/8/15 PM, Tsujimura).

In Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543, 125 S.Ct. 2074, 2084 (2005), the U.S. Supreme Court held that, in any regulatory takings case, the government's "legitimate interests" in implementing a regulation are not relevant to whether the regulation effects a taking. In so holding, the Supreme Court abrogated prior jurisprudence that held that a regulation effects a taking if it "does not substantially advance legitimate state interests." Lingle, 544 U.S. at 540, 125 S.Ct. at 2083 (citing Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138 (1980)). The Court explained that the Fifth Amendment

> **presupposes that the government has acted in pursuit of a valid public purpose.** ... Conversely, if a government action is found to be impermissible, for instance, because it fails to meet the "public use" requirement or is arbitrary as to violate due process -- that is the end of the inquiry. No amount of compensation can authorize such action.

Lingle, 544 U.S. at 543, 125 S.Ct. at 2084 (emphasis added).

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[42](...continued)
is "heavily regulated" because it is "held in trust for the citizens of Maui[.]" Dkt #170, p.22 (3/31/15 PM). The County also presented irrelevant testimony about beach erosion and coastal hazards. Dkt #190, pp.10-12, 47 (4/28/15 PM, Owens).

The Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." Lingle, 544 U.S. at 537, 125 S.Ct. at 2080 (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315, 107 S.Ct. 2378 (1987)) (italics in original). The proper inquiry in a takings case is on "the severity of the burden that government imposes upon private property rights." Lingle, 544 U.S. at 539, 125 S.Ct. at 2082.

> ... [T]he "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to basic justification for allowing regulatory actions to be challenged under the Clause.

Id. at 542, 125 S.Ct. at 2084 (italics in original).

In short, as Mr. Tsujimura explained, the County may well have a legitimate interest in protecting the public from crime or fire, but if it takes private land to build a police station or fire station, it must pay just compensation to the landowner. Dkt #140, pp.27-28 (4/8/15 PM, Tsujimura).

3. The Leones' knowledge of the County's inconsistent regulatory scheme is irrelevant

The County argues that the seller's disclosures "specifically identified [the Property] as located within a 'Special Management area,' as regulated under [the Act], and designated as 'Park' under the [Community Plan]." County's Opening Brief, Dkt #409, p.8. The County also says that Mr.

Welch advised the Leones of the "Park" designation "prior to their purchase." *Id.*[43] Regardless of what the Leones knew or did not know about any land use regulation in 2000, they are entitled to just compensation.

In Palazzolo v. Rhode Island, 533 U.S. 606, 121 S.Ct. 2448 (2001), the trial court determined that a purchaser of land had "notice" of a confiscatory regulation, and therefore could not claim a taking from that regulation. Palazzolo, 533 U.S. at 626-27, 121 S.Ct. at 2462-63. The U.S. Supreme Court reversed, observing that unreasonable regulations "do not become less so through passage of time or title," and that, otherwise, government "would be allowed, in effect, to put an expiration date on the Takings Clause." *Id.* The Court held that "[t]he State may not by this means secure a windfall for itself." *Id.* The Supreme Court went on to note that a rule barring later purchasers from asserting regulatory takings claims would be "capricious in effect," because

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

Id., 533 at 628, 121 S.Ct. at 2463. *See also* Carpenter v. United States, 69 Fed.Cl. 718, 732 (2006) ("prior enactment of the [offending] legislation does not, in and of itself, cut off plaintiff's rights to pursue her ... claim").

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[43] The County also raised the same issue in trial. In closing argument the County emphasized that the Property was "designated park, p-a-r-k, park" on the Community Plan, and that the Leones "knew that before they bought the property." Dkt #160, p.10 (5/5/15 PM, closing). Urging the jury to ignore the trial court's instructions, the County argued that the Leones' claim should therefore be barred. *Id.*, pp.32-34 ("... the Leones knowingly bought a parcel in 2000 designated park. ... What does your commonsense tell you about all this, really?").

The County's former attorney so **admitted** in reporting to the Planning Commission on this very case: "[o]ddly enough, the law says [such knowledge] **doesn't make any difference.** Even if [the Leones] walked in there and they knew they had this problem and they knew they were going to have to resolve it; and, in fact, they did on their own up until about 2004 take steps to go forward with the community plan amendment[.]" **ROA** pt.25 at 639 (emphasis added).

C. The County's Points of Error are Without Merit.

1. The trial court properly admitted testimony concerning the Leone Opinion.

The County's Point of Error "a" complains about the trial court's "identification and introduction of the Leone decision to the jury." County's Opening Brief, Dkt #409, pp.37-38. The trial court did not "introduce" the Leone Opinion, and it was not admitted into evidence. Rather, the trial court allowed the Leones to present testimony related to it.

While the County expresses puzzlement as to how it "opened the door" to testimony concerning the Leone Opinion in trial (County's Opening Brief, Dkt #409, p.47), the trial court properly allowed such testimony. The trial court's order excluding any reference to the Leone Opinion (**ROA** pt.30 at 1024-25) was intended to prevent juror confusion (Dkt #166, p.32 (3/6/15). The County took advantage of that order during questioning of Dr. Whitney, Commissioner Hedani, and other witnesses by falsely suggesting, contrary to the Leone Opinion, that the Leones had the right to an SMA exemption. *See* pp.27-29, *supra*. It thereby "opened the door" to testimony regarding the Leone Opinion. Dkt #361, pp.4-11 (4/16/15 PM, Whitney).

If the credibility of a party's witness is attacked in cross-examination, that party is entitled to rehabilitate the

witness during redirect examination. *See* Hodges v. State Highway Commission, 422 P.2d 570, 572 (Kan. 1967) ("testimony is admissible to sustain a witness whose credibility has been challenged"); People v. Cleveland, 32 Cal.4th 704, 746, 86 P.3d 302, 330 (2004) ("[r]edirect examination's principal purposes are to explain or rebut adverse testimony or inferences developed on cross-examination, and to rehabilitate a witness whose credibility has been impeached") (citations and internal quotations omitted); *3 Lane Goldstein Trial Technique §21:2* (3rd ed.) (a party is entitled to "rehabilitate the witness and ... and to explain or rebut any adverse inferences or testimony that arose as a result of cross-examination"); *see also id. §21:16* ("an opponent's cross-examination can also 'open the door' to issues for redirect").

Under the doctrine of "curative admissibility," the introduction of inadmissible evidence by one party allows an opponent to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission. Nguyen v. Southwest Leasing & Rental Inc., 282 F.3d 1061, 1067 (9th Cir. 2002).

2. The trial court properly took judicial notice of the Leone Opinion.

The County's Point of Error "b" states that "[t]he trial court erred in taking Judicial Notice of the Leone decision as the 'law-of-the-case'" when it read Judicial Notice Instructions numbers 13, 14, and 15 to the Jury." County's Opening Brief, Dkt #409, p.38. Taking judicial notice of those instructions -- quoted on pp.25-26 of the County's Opening Brief -- was entirely proper. Leone, 128 Haw. at 194n8, 284 P.3d at 967n8 (***App.A***, Dkt #380).

As this Court has explained:

> The doctrine of the law of the case states that a determination of a question of law made by an appellate court in the course of an action becomes the law of the case and **may not be disputed** by a reopening of the question at a later stage of the litigation. This doctrine applies to issues that have been decided either expressly or by necessary implication.

Weinberg v. Mauch, 78 Hawaii 40, 47, 890 P.2d 277, 284 (1995) (quoting Glover v. L.K. Fong, 42 Haw. 560, 578 (1958))(emphasis added; quotation marks omitted). Under HRE Rule 202(b), the court **must** take judicial notice of "the common law." The term "common law" includes a published case such as the Leone Opinion. *See* Ditto v. McCurdy, 98 Hawaii 123, 131, 44 P.3d 274, 282 (2002) ("HRE Rule 202(b)(1) **mandates** that the trial court was required to take judicial notice of Ditto I") (emphasis added).

3. The trial court properly admitted Dr. Whitney's testimony regarding actual losses.

The County's Point of Error "d"[44] claims that Dr. Whitney's "'Value of Loss' Opinions Should Have been Excluded from the Jury as Unqualified Speculation." County's Opening Brief, Dkt #409, p.38. The County does **not** attack Dr. Whitney's opinion that the Property had no economically beneficial use. Instead, the County argues that Dr. Whitney should not have been allowed to opine on the Leones' taking damages, because he is not an appraiser. County's Opening Brief, Dkt #409, p.51.

The County confuses the issue of admissibility with the issue of licensure.

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

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[44] The County skipped Point of Error "c." *See* County's Opening Brief, Dkt #409, pp.37-39.

> training, or education may testify thereto in the form of an opinion or otherwise.

HRE Rule 702.

The State of Hawaii requires a real estate appraisal license only for persons preparing an appraisal "in connection with a federally or non-federally related real estate transaction." HRS §466K-4 (***Appendix CC***). The administrative rules define a "federally related transaction" as "any real estate-related financial transaction ... that (1) Any federal financial institutions regulatory agency, Resolution Trust Corporation, or any regulated institution engages in or contracts for; and (2) Requires the services of an appraiser." HAR §16-114-2 (***Appendix DD*** at 6). Real-estate related financial transactions are in turn defined as:

> any transaction involving: (1) The sale, lease, purchase, investment in, or exchange of real property, including interests in property, or the financing thereof; (2) The refinancing of real property or interests in real property; or(3) The use of real property or interests in real property as security for a loan or investment, including mortgage-backed securities.

Id. (***App.DD*** at 7). None of these circumstances apply to the present case.

Dr. Whitney's testimony was undoubtedly relevant. As explained in footnote 30 above, he was well qualified as a real estate economist to express his opinions.

The goal of awarding just compensation is to place the landowner in the position he or she would have occupied but for the taking. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74, 93 S.Ct. 791, 794 (1973). In a regulatory takings case, this is achieved by awarding the landowner the property's fair market value at the time of the

taking. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10, 104 S.Ct. 2187, 2194 (1984). Fair market value, however, "is not limited to the value of the property as presently used, but includes any additional market value it may command because of the prospects for developing it to the 'highest and best use' for which it is suitable." United States v. 320.0 Acres of Land, More or Less in Monroe Cnty., State of Fla., 605 F.2d 762, 781 (5th Cir. 1979).

Hawaii courts hold that a development or income stream model is the **best** evidence of the value of property where the landowner has established that the proposed use is reasonably probable.[45] In City & Cnty. of Honolulu v. Market Place, Ltd., 55 Haw. 226, 244, 517 P.2d 7, 20 (1973), this Court analyzed admissibility of evidence regarding "just compensation" for land on which the condemnee had planned to pursue a condominium project on the property. The condemnee, however, "had sold no condominium units and the City was withholding a building permit for the project." *Id.* at 228-29, 517 P.2d at 11. Confronted with the question of whether a development model was admissible to show the value of the condemned land based on an income stream from condominium sales, the Court held that:

> A trial judge may properly reject unrefined figures ... On the other hand, evidence showing that a certain income-producing use at the time of condemnation was reasonably probable should be admitted. Once the trial court is persuaded by this evidence that the argued use is not so fanciful as to confuse the jury, expert testimony utilizing legitimate income stream analysis is wholly appropriate and should be admitted.

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[45] Hawaii courts apply "liberal standards on the admissibility of an expert's opinion on value." City & Cnty. of Honolulu v. Int'l Air Serv. Co., 63 Haw. 322, 327, 628 P.2d 192, 197 (1981).

Id. at 244, 517 P.2d at 20. In fact, the Court found that, for any use that is reasonably probable:

> [p]erhaps the **most important** consideration in the valuation of income-producing property is the anticipated income .... When discounted at a rate which reflects both the time value of money and all the risks ... that income stream is generally considered to be **by definition** the **'value'** of the property.

Id. at 243, 517 P.2d at 19-20(emphasis added).

The Court held that the trial court committed reversible error by excluding testimony regarding the "market demand for the proposed condominium units." *Id.* at 245, 517 P.2d at 21. Such testimony was "crucial to the issue of just compensation." *Id.* Once testimony had established that there was "reasonable probability" of use for condominium units, then "expert testimony of value utilizing risk and return analysis ... would have been entirely appropriate." *Id.* at 246, 517 P.2d at 21.

This is not a case such as City & Cnty. of Honolulu v. Int'l Air Serv. Co., *supra*, where the court denied admission of a development model that involved "ingenious development schemes designed to demonstrate maximal use of the property, not only under existing lot sizes and configurations but also under an assumed 'reparcelization' of the land." 63 Haw. at 338, 628 P.2d at 204. Building a beachfront home is not an "ingenious development scheme."

4. The trial court properly excluded testimony regarding the value of the Property as of July 2014.

The County's Point of Error "e" states that Mr. Yamamura's "valuation of LOT 15 was relevant and probative of the actual economic benefit which LOT 15 has sustained, and was wrongly excluded." County's Opening Brief, Dkt #409, pp.38-39. Mr. Yamamura's valuation of the Property as of July 2014 is a date

with no significance in this case.[46] The County contends the appraisal was relevant to show the "value" of the Property. However, there are two other problems with this argument.

First, as explained in the Leones' Opening Brief, Dkt #379, pp.46-47, the fact that the Property may retain some theoretical "investment" value does not mean the Leones have an economically beneficial **use**. *See* Lost Tree Village Corp., v. United States, 787 F.3d 1111, 1117 (Fed.Cir. 2015) ("When there are no underlying economic uses, it is unreasonable to define land **use** as including the sale of the land.") (emphasis in original); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1432-33 (9th Cir. 1996) *aff'd*, 526 U.S. 687, 119 S. Ct. 1624 (1999) ("focusing solely on property value confuses the economically viable use inquiry with the diminution of value inquiry"). Mr. Yamamura's opinions about the value of the Property are immaterial if the Leones cannot actually do anything with the Property.

Second, Mr. Yamamura's 2014 appraisal contained the "extraordinary assumption" that, the Community Plan "Park" designation notwithstanding, the Leones had the right to build a house on the Property. **ROA** pt.33 at 231-56. Mr. Yamamura admitted that his conclusion was based on the fact that other Palauea Beach Lot owners had built houses. Dkt #130, pp.34-36 (4/1/15 PM, Rule 104); **ROA** pt.33 at 291. The trial court properly excluded the appraisal since it was premised on an

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[46] The expert witness presented by the County to rebut Dr. Whitney's opinion on damages concluded that the actual loss suffered by the Leones **as of the date of taking** (October 25, 2007) was $7,900,000, which is **higher** than the $7,200,000 value arrived at by the Leones' expert appraiser, Chris Ponsar. Leone's Opening Brief, Dkt #379, pp.22-23.

"extraordinary" assumption directly contrary to the law, as stated in the Leone Opinion.

The County relies on Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 122 S.Ct. 1465 (2002) for the proposition that the Property did not suffer a regulatory taking so long as it still has **some** value. However, Tahoe-Sierra addressed the question of whether a temporary moratorium on development of property -- lasting 32 months -- constituted a taking. The court held that, given the limited time-frame of the moratorium, no taking had occurred. *Id.* at 320-22, 330-31, 122 S.Ct. at 1477-78, 1483-84. The present case does not involve a temporary moratorium, but rather a permanent taking effectuated by implementing a confiscatory regulatory scheme, clearly intended to effectuate the taking of private property for public purposes without payment of just compensation, which, the County has failed to correct, over its own lawyers' objections, in the nine years since this action was filed.

5. The trial court properly instructed the jury that a regulatory taking occurs when a landowner is denied economically beneficial use of his property.

The County's Point of Error "f" claims that "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." County's Opening Brief, Dkt #409, p.39. The instruction actually reads: "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." Dkt #198, p.15

(5/5/15 AM). That instruction accurately restates the law under Lucas and Del Monte Dunes, *infra*.[47]

6. The trial court properly instructed the jury that it should not consider the existence of single-family residences at Palauea Beach.

The County's Point of Error "g" claims that "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." County's Opening Brief, Dkt #409, p.39. The County attacks the instruction[48] based on the Leones' reference to other residences at Palauea Beach, and an alleged failure to object to the County's evidence as to these houses. County's Opening Brief, Dkt #409, p.53.[49] However, the County does not appeal the admission or exclusion of such evidence, but rather an instruction to the jury. Instruction No.39 was merely a logical extension of a judicial instruction that "the Planning Director may not legally process an application for an SMA exemption for a

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[47] While the trial court properly instructed the jury as to denial of economically beneficial use giving rise to a regulatory taking, it failed to properly instruct the jury as to the **definition** of "economically beneficial use." The trial court failed to instruct the jury that a landowner is denied such use where he is required to leave his land in a "natural state." *See* Leones' Opening Brief, Dkt #379, pp.50-51.

[48] This instruction read: "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." Dkt #198, pp.19-20 (5/5/15 AM).

[49] In fact, the Leones did object to the County's reference to other homes at Palauea Beach. Dkt #180 (4/10/15 AM, Hedani) p.40.

land use that is inconsistent with the ... Community Plan." Dkt #186 (4/21/15 AM), p.52.

7. The trial court properly instructed the jury on awarding damages.

The County's Point of Error "h" claims that "[t]he Special Verdict Form erroneously allowed the jury to consider damages for an alleged violation of [42] U.S.C. §1983, even if no constitutional deprivation by way of a regulatory taking occurred." County's Opening Brief, Dkt #409, p.39. But the jury did not award the Leones any damages. ***App.W*, ROA** pt.24 at 1187-89. In instructions on the Special Verdict Form (quoted in full on pp.36-37 of the County's Opening Brief), the jury was instructed to consider damages **only if** it determined that the County deprived the Leones of economically beneficial use of the Property. *Id.*

D. The County's Implied Arguments Should be Ignored.

The County raises several arguments unrelated to its Points of Error. They are also without merit.

1. The County's arguments contradict its own regulatory scheme and the Leone Opinion.

The County's discussion of the SMA Rules and Community Plan at pp.41-46 of the County's Opening Brief (Dkt #409) contradicts both its own regulatory scheme and the Leone Opinion. The County asserts that the Leones'

> ... 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.

County's Opening Brief, Dkt #409, pp.42-43 (italics in original). The County's former attorney admitted in connection with the last appeal that the opposite is true: the County may **not** process an

SMA assessment application for **any** use which is inconsistent with the Community Plan designation.[50] *See* pp.9-10, 14-15, *supra*.

The County also cites legislative history for the proposition that "ministerial acts" do not require consistency with the Community Plan. County's Opening Brief, Dkt #409, pp.43-45. The County then defines "ministerial acts" as "including issuance of building permits for exempt land uses." *Id.* While the issuance of a building permit may be "ministerial," the Director's review of an SMA assessment application, and his determination of inconsistency under the SMA Rules, are not "ministerial."

The County refers to the trial testimony of former Planning Director William Spence that the community plans are merely "aspirational." County's Opening Brief, Dkt #409, p.45. But in GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998), this Court held, in the context of an SMA permit application in the County of Maui, that the Community Plan has "the force and effect of law." The County's SMA Rules are consistent with GATRI since they prohibit the Planning Director from processing an SMA assessment application if the proposed use is inconsistent with the Community Plan designation.[51]

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[50] In a cryptic footnote (County's Opening Brief, Dkt #409, p.43n17), the County warns of dire consequences for "thousands of exempted land uses" in the SMA, and "permitted uses outside the SMA." The County offers neither further explanation nor any support in the record. After the Leone opinion was published four years ago, no such dire consequences followed.

[51] The County argues it is "flawed" to "assum[e] that the Maui County Code governs the process of permitting and review within the Special Management Area. It does not." County's Opening Brief, Dkt #409, p.46. This argument is a straw man. Various MCC provisions may not expressly "govern" the "process of permitting and review," but the County's SMA Rules certainly do.

The County confuses the Community Plan amendment process with the SMA exemption process. For instance, the County claims that M&H was retained in 2003 to "obtain required approvals and development permits" (County's Opening Brief, Dkt #409, p.10), as opposed to preparing a request for a Community Plan amendment. By juxtaposing those two processes, the County creates the false impression that the Leones' 2007 SMA assessment application was rejected for failing to include a mitigation plan. The County is conflating two separate attempts to amend the Community Plan.

Furthermore, the County asserts that the Planning Director permitted the other Palauea Beach Lot owners, in 2001 and 2002, to construct homes "based on ... completed environmental assessments." County's Opening Brief, Dkt #409, p.11. Again, the County is wrong. As Mr. Welch explained,

> You don't need an environmental assessment to apply for an SMA assessment. You only need an environmental assessment to apply for a Community Plan change.

Dkt #138, p.27 (4/7/15 PM, Welch).

2. The trial court properly excluded evidence inconsistent with the Leone Opinion.

The County complains that the Leone Opinion was used to improperly "frame" the case and exclude certain evidence including the Leones' "incomplete" SMA assessment application, email communication where Mr. Welch allegedly "instructed" the County to reject the Leones' application, and an archaeological assessment survey and evidence of remains. County's Opening Brief, Dkt #409, pp.48-51.

First, the contents of the application are not at issue. The Leone Opinion and the law of the case instruct that incompleteness is irrelevant:

> ... upon the Director's determination that the application could not be processed due to inconsistency with the Community Plan, any other deficiencies became

> irrelevant to the ripeness analysis because even if such deficiencies were remedied, the application could not be processed.

Leone, 128 Haw. at 188 n4, 284 P.3d at 961 n4 (***App.A***, Dkt #380).[52] And the Director's Rejection Letter itself states that any application by the Leones "will require consistency with the Community Plan in order to be processed."

Likewise, the lower court correctly excluded evidence of email communication between Mr. Welch and the County. County's Opening Brief, Dkt #409, p.50. The email communications are not relevant: it was the County, not Mr. Welch, who designated the Palauea Beach Lots as "Park," and it was the Planning Director, not Mr. Welch, who determined the Leones' proposed use was inconsistent with that designation, and refused to process their SMA assessment application.

The County also complains that the trial court wrongly excluded "evidence" that the Leones could not have processed their SMA assessment application without fully resolving the issue of any remains. County's Opening Brief, Dkt #409, pp.33-34,50-51. As explained above at p.5n11, an owner of land with remains and cultural artifacts may build by working with the State Historic Preservation Division of the Department of Land and Natural Resources. **ROA** pt.42 at pp.1048-1050 (Suyama).

But even if the Leones were required to work through such issues before their exemption was granted, it would not have

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[52] If the Planning Director had merely asked for more information, his decision would not have been final, and the case would not have been ripe. For this reason, the County's argument that the Leone Opinion was merely about ripeness (County's Opening Brief, Dkt #409, pp.5-6) is a gross over simplification. Once a regulatory takings claim is ripe -- *i.e.*, a final decision has been made about the application of existing law to the landowner's property -- the inquiry moves to the question of economically beneficial use.

mattered -- the County's regulatory scheme and the Planning Director's finding of inconsistency would have prevented the Leones from building their home.

In any event, the County fails to identify and preserve its Points of Error as to exclusion of such evidence. HRAP Rule 28(b)(4)(A) requires the County, for points involving the admission or rejection of evidence, to set out "a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected." However, in its Points of Error (County's Opening Brief, Dkt #409, pp.37-39), the County fails to identify the evidence which it believes was improperly rejected on account of the Leone Opinion. Therefore, the Court should not consider the County's complaints regarding exclusion of evidence. *See* HRAP Rule 28(b)(4) ("points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented"); Sprague v. California Pacific Bankers & Ins. Ltd., 102 Haw. 189, 196, 74 P.3d 12, 19 (2003) (appellate court may disregard point of error which excluded "a quotation of the grounds urged for the objection in the points of error section of the opening brief").

VI. CONCLUSION

This Court should dismiss the County's cross-appeal at the threshold because the County is not an "aggrieved party." If the Court considers the cross-appeal, it should be dismissed for lack of merit. The Court should vacate the judgment of the lower court, and remand this case with instructions to enter judgment in favor of the Leones and against the County for the reasons set forth in the Leones' Opening Brief.

DATED: Honolulu, Hawaii, July 22, 2016.

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§6E-42 Review of proposed projects. (a) Except as provided in section 6E-42.2, before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity to review and comment on the effect of the proposed project on historic property, aviation artifacts, or burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places. If:

(1) The proposed project consists of corridors or large land areas;

(2) Access to properties is restricted; or

(3) Circumstances dictate that construction be done in stages,

the department's review and comment may be based on a phased review of the project; provided that there shall be a programmatic agreement between the department and the project applicant that identifies each phase and the estimated timelines for each phase.

(b) The department shall inform the public of any project proposals submitted to it under this section that are not otherwise subject to the requirement of a public hearing or other public notification.

(c) The department shall adopt rules in accordance with chapter 91 to implement this section. [L 1988, c 265, pt of §1; am L 1990, c 306, §12; am L 1995, c 187, §3; am L 1996, c 97, §10; am L 2013, c 85, §3; am L 2015, c 224, §3]

Law Journals and Reviews

Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection. 33 UH L. Rev. 321 (2010).

Case Notes

Where rules implementing §6E-8 and this section required that historic properties be identified in the "project area", and the broad definition of "project area" contained in the rules encompassed the entire rail project, the rules did not permit the state historic preservation division (SHPD) to concur in the rail project absent a completed archeological inventory survey (AIS) for the entire project area; because an AIS was not completed before the SHPD gave its concurrence in the project, the SHPD's concurrence in and the city's commencement of the project were improper. 128 H. 53, 283 P.3d 60 (2012).

The count of plaintiff's amended complaint alleging that state and county defendants failed to comply with the requirements of chapter 13-284, Hawaii administrative rules, the historic preservation review process, by allowing the project to advance before the review process was completed, and by relying on outdated and flawed reports, was ripe for adjudication, where plaintiff's contentions focused on the failure of defendants to follow the historic review process, a determination that could be made regardless of whether the subject road was used as the access point to the development. 131 H. 123, 315 P.3d 749 (2013).

This section requires a permitting agency to seek state historic preservation division review and comment only when the permitting agency knows, or has reason to suspect, that the project may impact a burial or other historic site; where there was no evidence that defendant city department of planning and permitting knew or should have known that a burial site existed on the property, the circuit court properly ruled that the city did not violate this section. 122 H. 171 (App.), 223 P.3d 236 (2009).

As: (1) this section applies to any project "which may affect historic property ... or a burial site", as defined by §6E-2; (2) a burial site can be found in a cemetery; and (3) a cemetery can also be a historic property, as also defined by §6E-2, church building project was not exempt from the historic preservation review process required by this section and its implementing rules because the project involved a cemetery. 128 H. 455 (App.), 290 P.3d 525 (2012).

The state historic preservation division (SHPD) violated chapter 13-284, HAR, its rules implementing this section, by failing to require the completion of an archaeological inventory survey (AIS); by accepting an archaeological monitoring plan as a substitute for an AIS, the SHPD skipped to the mitigation step of the review process and allowed construction on the church building project to commence without identifying the significant historic properties at issue and evaluating the impact of the project on them, thereby limiting the potential options for their protection and preservation. 128 H. 455 (App.), 290 P.3d 525 (2012).

Where the main footprint of the church building project had not been maintained and actively used as a cemetery for over sixty years and the church was not in the process of removing or redesignating the project site as a cemetery when

government approval for the project was sought, §6E-43(a), which excludes human skeletal remains found in a "known, maintained, actively used cemetery", did not apply to the project; thus, the project and the burial sites it affected were subject to the requirements of this section. 128 H. 455 (App.), 290 P.3d 525 (2012).

Where the state historic preservation division (SHPD) did not make a determination that no historic properties were present or that an adequate archaeological inventory survey (AIS) existed and that historic properties were present, thereby allowing for evaluation of the significance of the historic properties, completion of an AIS was a necessary first step to replace the church buildings; thus, the SHPD: (1) should have required the church to complete an AIS before concurring in the church building project; and (2) violated its own rules by failing to require an AIS before permitting the project to go forward. 128 H. 455 (App.), 290 P.3d 525 (2012).

[§6E-42.2] Excluded activities for privately-owned single-family detached dwelling units and townhouses. (a) An application for a proposed project on an existing privately-owned single-family detached dwelling unit or townhouse shall be subject to the requirements of section 6E-42 only if the single-family detached dwelling unit or townhouse is over fifty years old and:

(1) Is listed on the Hawaii or national register of historic places, or both;

(2) Is nominated for inclusion on the Hawaii or national register of historic places, or both; or

(3) Is located in a historic district.

(b) For the purposes of this section:

"Dwelling unit" means a building or portion thereof designed or used exclusively for residential occupancy and having all necessary facilities for permanent residency such as living, sleeping, cooking, eating, and sanitation.

"Single-family detached dwelling unit" means an individual, freestanding, unattached dwelling unit, typically built on a lot larger than the structure itself, resulting in an area surrounding the dwelling.

"Townhouse" has the same meaning as defined in section 502C-1. [L 2015, c 224, §2]

§6E-43 Prehistoric and historic burial sites.

Law Journals and Reviews

Ensuring Our Future by Protecting Our Past: An Indigenous Reconciliation Approach to Improving Native Hawaiian Burial Protection. 33 UH L. Rev. 321 (2010).

Ke Ala Pono—The Path of Justice: The Moon Court's Native Hawaiian Rights Decisions. 33 UH L. Rev. 447 (2011).

Case Notes

This section and §13-300-51, Hawaii administrative rules (HAR) confer upon an aggrieved claimant the right to a contested case hearing as long as the written petition meets the procedural requirements of §13-300-52, HAR; where it was undisputed that claimant complied with the requirements of §13-300-52, HAR—that is, claimant's written petition was proper—a contested case hearing was mandated by statute under this section and agency rule under §13-300-51, HAR, and thus, was "required by law". 124 H. 1, 237 P.3d 1067 (2010).

Where a contested case hearing was required by law under §6E-43 and §13-300-51, Hawaii administrative rules, and would have determined the rights, duties, and privileges of specific parties, and: (1) the department of land and natural resources' denial of claimant's request for a contested case hearing represented a "final decision and order"; (2) claimant followed the applicable agency rules and, therefore, was involved "in" the contested case; and (3) claimant's legal interests were injured—i.e., claimant had standing to appeal, the circuit court erred in dismissing claimant's agency appeal for lack of subject matter jurisdiction. 124 H. 1, 237 P.3d 1067 (2010).

Where the main footprint of the church building project had not been maintained and actively used as a cemetery for over sixty years and the church was not in the process of removing or redesignating the project site as a cemetery when government approval for the project was sought, subsection (a), which excludes human skeletal remains found in a "known, maintained, actively used cemetery", did not apply to the project; thus, the project and the burial sites it affected were subject to the requirements of §6E-42. 128 H. 455 (App.), 290 P.3d 525 (2012).

§6E-40 Bernice Pauahi Bishop Museum. The official designation of the Bernice Pauahi Bishop Museum shall be the State of Hawaii Museum of Natural and Cultural History. The qualifying standards and conditions related to the receipt of funds contained in chapter 42F shall not apply to funds received by the State of Hawaii Museum of Natural and Cultural History; provided that if the museum in turn contracts with a recipient or provider, then the qualifying standards, conditions, and other provisions of chapter 42F shall apply to the recipient or provider and the contract. [L 1988, c 398, §4; am L 1991, c 335, §3; am L 1997, c 190, §6]

§6E-41 Cemeteries; removal or redesignation. (a) Any person removing or redesignating any cemetery shall comply with the following requirements:

(1) Publish a notice in a newspaper of general circulation in the State, requesting persons having information concerning the cemetery or persons buried in it to report that information to the department;
(2) Photograph the cemetery generally, and take separate photographs of all headstones located in the cemetery;
(3) Turn over to the department all photographs and any other relevant historical records;
(4) Move all headstones to the place of reinterment; and
(5) Obtain the written concurrence of the department prior to any removal or redesignation if the cemetery has existed for more than fifty years.

(b) The requirements of subsection (a) shall be in addition to any requirements imposed by the department of health. [L 1988, c 265, pt of §1; am L 1990, c 22, §2]

§6E-42 Review of proposed projects. (a) Before any agency or officer of the State or its political subdivisions approves any project involving a permit, license, certificate, land use change, subdivision, or other entitlement for use, which may affect historic property, aviation artifacts, or a burial site, the agency or office shall advise the department and prior to any approval allow the department an opportunity for review and comment on the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, including those listed in the Hawaii register of historic places.

(b) The department shall inform the public of any project proposals submitted to it under this section which are not otherwise subject to the requirement of a public hearing or other public notification. [L 1988, c 265, pt of §1; am L 1990, c 306, §12; am L 1995, c 187, §3; am L 1996, c 97, §10]

§6E-43 Prehistoric and historic burial sites. (a) At any site, other than a known, maintained, actively used cemetery where human skeletal remains are discovered or are known to be buried and appear to be over fifty years old, the remains and their associated burial goods shall not be moved without the department's approval.

(b) All burial sites are significant and shall be preserved in place until compliance with this section is met, except as provided in section 6E-43.6. The appropriate island burial council shall determine whether preservation in place or relocation of previously identified native Hawaiian burial sites is warranted, following criteria which shall include recognition that burial sites of high preservation value, such as areas with a concentration of skeletal remains, or prehistoric or historic burials associated with important individuals and events,

DEPARTMENT OF LAND AND NATURAL RESOURCES

Adoption of Chapter 13-284
Hawaii Administrative Rules

October 31, 2002

SUMMARY

Chapter 13-284, Hawaii Administrative Rules, entitled "Rules Governing Procedures for Historic Preservation Review to Comment on Section 6E-42, HRS, Projects", is adopted.

HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBTITLE 13

STATE HISTORIC PRESERVATION DIVISION RULES

CHAPTER 284

RULES GOVERNING PROCEDURES FOR HISTORIC PRESERVATION REVIEW TO COMMENT ON SECTION 6E-42, HRS, PROJECTS

§13-284-1 Purpose, applicability, and participants. (a) The purpose of this chapter is to promote the use and conservation of historic properties for the education, inspiration, pleasure and enrichment of the citizens of Hawaii by articulating a historic preservation review process for projects requiring the approval of a state or county agency for a permit, license, certificate, land use change, subdivision, or other entitlement to use. Section 6E-42, Hawaii Revised Statutes, requires state and county agencies to

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afford the department an opportunity to comment on any such permit or approval. The following procedures in part define how agencies meet this statutory requirement. The goal of the review process is to identify significant historic properties in project areas, assess any effects, and then to develop and execute plans to avoid, minimize, or mitigate adverse effects to the significant historic properties in the public interest. The process supports the policy of chapter 6E, HRS, to preserve, restore and maintain historic properties for future generations.

(b) This chapter itemizes the review process that the SHPD shall follow to make comments to state and county agencies on permits, licenses, certificates, land use changes, subdivisions, or other entitlements for use which may affect historic properties, thereby meeting the opportunity to comment under section 6E-42, HRS.

(c) Participants in the historic preservation review process.

(1) The primary participants in the process are DLNR, represented by the SHPD, the agency with jurisdiction over the project, and the person proposing the project. The agency has responsibility for initiating the historic preservation review process. The agency may have others prepare the review process items.

(2) Interested persons are those organizations and individuals that are concerned with the effect of a project on historic properties.

[Eff DEC 1 1 2003] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-2 Definitions. As used in this chapter unless the context requires otherwise:

"Adverse effects" means any alteration to the characteristics of a historic property.

"Agency" means any state or county governmental entity.

"Archaeological data recovery" means the form of mitigation that archaeologically records or recovers a reasonable and adequate amount of information as determined by the department, from a significant historic property.

"Archaeological inventory survey" means the process of identifying and documenting the archaeological historic properties and burial sites in

a delineated area, gathering sufficient information to evaluate significance of the historic properties and burial sites, and compiling the information into a written report for review and acceptance by the department.

"Architectural inventory survey" means the process of identifying and documenting the architectural historic properties in a delineated area, and providing the information to the department.

"Architectural recordation" means the form of mitigation that records and analyzes through architectural study a reasonable and adequate amount of the information about a significant historic property.

"Burial site" means any specific unmarked location where prehistoric or historic human skeletal remains and their associated burial goods if any, are interred, and its immediate surrounding archaeological context, including any associated surface or subsurface features, deemed a unique class of historic property, and not otherwise included in section 6E-41, HRS.

"Comment" means the findings and recommendations of the department provided in writing to the agency.

"Consensus determination" means the evaluation of a historic property's significance, arrived at by the consensus of the SHPD and the person.

"Consultation process" means notifying interested organizations and individuals that a project could affect historic properties of interest to them; seeking their views on the identification, significance evaluations, and mitigation treatment of these properties; and considering their views in a good faith and appropriate manner during the review process.

"Department" or "DLNR" means the state department of land and natural resources.

"Detailed mitigation plan" means the specific plan for mitigation, including, but not limited to, a preservation plan, an archaeological data recovery plan, an ethnographic data recovery plan, a historic data recovery plan, a burial treatment plan, and an architectural recordation plan. The detailed mitigation plan serves as a scope of work for mitigation.

"Ethnographic documentation" means the form of mitigation that records and analyzes a reasonable and adequate amount of information about a significant historic property through interviews with knowledgeable individuals and the study of historical source materials.

"Ethnographic inventory survey" means the process of identifying and documenting historic properties in a delineated area, gathering information through interviews with individuals knowledgeable about the area and a study of historical source materials.

"Historic data recovery" means the form of mitigation that records, compiles, and analyzes a reasonable and adequate amount of information about a significant historic property prior to its destruction, through the study of historical source materials.

"Historic property" means any building, structure, object, district, area, or site, including heiau and underwater site, which is over fifty years old.

"Interested persons" means those organizations and individuals that are concerned with the effect of a project on historic properties.

"Mitigation" means the measures taken to minimize impacts to significant historic properties. Mitigation may take different forms, including, but not limited to, preservation, archaeological data recovery, reburial, ethnographic documentation, historic data recovery, and architectural recordation.

"Mitigation commitment" means the commitment to the form or forms of mitigation to be undertaken for each significant historic property.

"Person" means any individual, firm, association, agency, organization, partnership, estate, trust, corporation, company, or governmental unit that is proposing a project.

"Preservation" means the mitigation form in which a historic property is preserved.

"Project" means any activity directly undertaken by the state or its political subdivisions or supported in whole or in part through appropriations, contracts, grants, subsidies, loans, or other forms of funding assistance from the state or its political subdivisions or involving any lease, permit, license, certificate, land use change, or other entitlement for use issued by the state or its political subdivisions.

"Project area" means the area the proposed project may potentially affect, either directly or indirectly. It includes not only the area where the proposed project will take place, but also the proposed project's area of potential effect.

"Significant historic property" means any historic property that meets the criteria of the Hawaii register of historic places or the criteria enumerated in subsection 13-275-6(b) or 13-284-6(b).

"State historic preservation division" or "SHPD" means the state historic preservation division within the state department of land and natural resources. [Eff DEC 11 2003] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-3 Conducting a historic preservation review; generally. (a) A historic preservation review may involve up to six procedural steps, in order to determine if significant historic properties are present and, if so, to develop and execute a detailed mitigation plan and thereby satisfactorily take into account the impact of the project on such historic properties. Any agency involved in this review shall consult with the SHPD and shall obtain the written comments of the SHPD at each step of the review. In cases where any interim protection plans are adequately in place and any data recovery fieldwork has been adequately completed, the project may commence from a historic preservation perspective.

(b) The review steps, described in greater detail in the following sections, are as follows:

(1) Identification and inventory, to determine if historic properties are present in the project's area and, if so, to identify and document (inventory) them;
(2) Evaluation of significance;
(3) Effect (impact) determination;
(4) Mitigation commitments which commit to acceptable forms of mitigation in order to properly handle or minimize impacts to significant properties;
(5) Detailed mitigation plan, scope of work to properly carry-out the general mitigation commitments; and
(6) Verification of completion of detailed mitigation plan.

(c) Documents for review steps one through four shall be submitted concurrently.

(d) A receipt date shall be stamped on all review documents received by the SHPD.

(e) The SHPD shall send its written comments on each step's submittal to the agency within the amount of time specified under each section of this rule, or by a mutually agreed upon date. If the SHPD fails to send written comments within the set time, or by a mutually agreed upon date, then the SHPD is presumed to

concur with the agency's submittal.
[Eff DEC 1 1 2009] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-4 Fees. (a) Filing fees will be charged for the following:

(1) $50 for an archaeological assessment report;
(2) $150 for an archaeological inventory survey plan;
(3) $450 for an archaeological, architectural, or ethnographic inventory survey report;
(4) $150 for a preservation plan;
(5) $25 for a monitoring plan;
(6) $150 for an archaeological data recovery plan;
(7) $250 for a burial treatment plan;
(8) $100 for a monitoring report, if resources are reported;
(9) $450 for an archaeological data recovery report;
(10) $450 for an ethnographic documentation report;
(11) $25 for a burial disinterment report; and
(12) $50 for an osteological analysis report.

(b) Preservation plans submitted to the division for review will be charged for each of the above plans they contain.

(c) Reports or plans submitted to the SHPD for review shall be accompanied by the appropriate fee. Reports or plans will not be considered received or reviewed, until the filing fees are paid.

(d) No fee will be charged for the review of any revisions to a previously submitted plan or report.

(e) All fees shall be payable to the Hawaii historic preservation special fund.
[Eff DEC 1 1 2009] (Auth: HRS §§6E-3, 6E-16) (Imp: HRS §§6E-3, 6E-16)

§13-284-5 Identification and inventory of historic properties. (a) The agency shall ensure whether historic properties are present in the project area and, if so, it shall ensure that these properties are properly identified and inventoried.

(b) An agency shall first consult the SHPD to determine if the area proposed for the project needs to

undergo an inventory survey to determine if historic properties are present. The tax map key for the parcel or parcels involved and a map shall be submitted to the SHPD to locate and define the boundaries of the actual project. The SHPD shall supply a response in writing within thirty days of the receipt of the initiating request at the SHPD office. This response shall include a justification by the SHPD for its conclusion.

(1) If the SHPD concludes that no significant historic sites are likely to be present due to past land disturbances then the SHPD shall make this determination in the form of a "no historic properties affected" letter within thirty days; or

(2) Alternatively, the agency can submit documents claiming no significant historic sites are likely to be present. The document must present supportive evidence documenting the land altering activities (including areal extent and depth of disturbances) and documenting the likely nature and depth of historic properties that may have once existed in the area. The SHPD shall respond in writing within thirty days.

(A) If the SHPD finds that no significant historic properties are present, then the SHPD shall issue a written response to the agency in the form of a "no historic properties affected" determination and historic preservation review ends; or

(B) If the SHPD finds historic properties may be present, then a letter shall be sent to the agency specifying why. To proceed with the review process, the agency shall correct the problems, consulting with the SHPD as needed, and resubmit the documentation or shall conduct an inventory survey.

(3) The SHPD shall make all "no historic properties affected" comments available to interested persons by posting notice of all such "no historic properties affected" comments at the SHPD office and on the SHPD's website every Friday. Should the office be closed on any Friday as a result of a holiday or some type of disaster, the information shall be posted on the first following

working day. Interested persons have the opportunity to submit written comments on such determinations within thirty days of the notice's posting. During these thirty days, should historic properties be reported to the SHPD, the SHPD shall reconsider its response under the provisions of section 13-284-12.

(4) If the SHPD indicates that an adequate survey exists and that historic properties are present, then the agency shall proceed to the next step in the review process, evaluation of the significance of the historic properties according to the following section of this rule.

(5) If the SHPD concludes an inventory survey needs to be done, this survey shall identify all historic properties and gather enough information to evaluate the properties' significance. Inventory surveys fall into three main categories, and the SHPD shall indicate which category or combination of categories is needed.

(A) An archaeological inventory survey may be undertaken when the SHPD concludes that archaeological properties are present or are likely to be present. Archaeological survey often involves detailed field mapping and test excavations, laboratory analyses, and interpretive studies. Specific minimal requirements for this survey are contained in chapter 13-276. A permit, issued by the SHPD, as set forth in chapter 13-282, is required for this survey and any lesser level of archaeological survey work. The survey must be directed by a qualified archaeologist who meets the qualifications set forth in chapter 13-281. Results of the survey shall be reported either through an archaeological assessment, if no sites were found, or an archaeological survey report which meets the minimum standards set forth in chapter 13-276. An archaeological assessment shall include the information on the property and the

survey methodology as set forth in subsections 13-276-5(a) and (c).

(B) An ethnographic survey may be undertaken when the SHPD concludes that historic properties which may be significant under criterion "e" of paragraph 13-284-6(b)(5) are present or are likely to be present within the project area and when the project area is known to have been used by members of an ethnic community at least fifty years ago or by preceding generations. Guidelines for this survey can be obtained from the SHPD. The survey must be directed by a qualified ethnographer who meets the qualifications set forth in chapter 13-281.

(C) An architectural inventory survey may be undertaken when the SHPD concludes that historic buildings, structures, objects, or districts are present or are likely to be present within the project area. Minimally, information shall be of sufficient quality to complete a National Register of Historic Places nomination form. The survey must be directed by a qualified historian, architect, or architectural historian who meets the qualifications set forth in chapter 13-281.

(c) Should the SHPD believe unusual archaeological conditions may be present in a project area, such as the presence of paleo-environmental materials or historic archaeology, the SHPD may request an inventory plan be submitted for approval prior to the undertaking of any inventory survey work. This plan shall include, but not be limited to:

(1) All the information required in subsections 13-276-5(a) and (b) which identifies the project area, identifies the project owner, describes the environment, provides the results of background research, as applicable, and reviews any relevant prior archaeological studies.

(2) A research design for the identification of historic properties within the project area. This would be a section on the methods to be

used in the archaeological field survey which shall include:

(A) The name and qualifications of the principal investigator and investigators;

(B) The anticipated number of field personnel, and any specialized qualifications which they might possess;

(C) The anticipated duration of time for the survey;

(D) The extent of survey coverage, if applicable. If the coverage is to be less than one hundred percent, the rationale for the sample (the sampling design) must be presented in a careful discussion. Sampling designs which include analysis of possible subsurface sites under sand dunes, urban fill, and other areas must also be presented here;

(E) A discussion of any factors which might limit the survey effort, if applicable;

(F) The techniques to be used to identify archaeological properties (transects, sweeps, test excavations, augering, etc.);

(G) The anticipated extent of historic property recording (mapping, measuring, photographing, test excavations) and the techniques to be used, if applicable, with the rationale for these techniques given; and to plot site location, if applicable; and

(H) The method to be used to plot site location, if applicable.

(3) Information obtained through the consultation process with individuals knowledgeable about the project area's history, if discussions with the SHPD, background research or public input indicate a need to consult with knowledgeable individuals. This section would include all the information required in subsection 13-276-5(g).

(d) If an inventory plan is requested, once it is completed, one copy of the inventory plan shall be submitted to the SHPD for review. The plan shall meet the above requirements. The SHPD shall inform the agency within thirty days of receipt of the plan if the

information contained in the plan is adequate or inadequate.

(1) If the SHPD determines that the plan is inadequate, then a letter shall be sent to the agency stating why the plan is inadequate. To proceed with the review process, the agency shall correct the problems, consulting with the SHPD as needed to resolve differences, and resubmit the results.

(2) If the SHPD finds the plan adequate, then the agency will be sent a written notice of acceptance.

(e) If an inventory survey is needed, once it is completed, one copy of the inventory survey report or, if appropriate, an archaeological assessment shall be submitted to the SHPD. The report shall meet the requirements noted in chapter 13-276 for archaeology; shall conform with the SHPD guidelines for ethnography; or shall meet the requirements to complete a National Register of Historic Places nomination form or forms for architecture. When consultation is required, as specified in any of the reporting rules or guidelines for surveys, the report shall include a summary of the consultation process. The SHPD shall inform the agency within forty five days of SHPD receipt of the report, if the information contained in the report or archaeological assessment is adequate or inadequate.

(1) If the SHPD determines that the survey, assessment or report is inadequate (e.g., survey failed to cover the entire project area, historic properties are incompletely described, etc.), then a letter shall be sent to the agency stating why the inventory survey or archaeological assessment is inadequate. To proceed with the review process, the agency shall consult with the SHPD as needed to resolve differences, and resubmit the results.

(2) If the SHPD finds the report or archaeological assessment adequate, then the agency shall be sent a written notice of acceptance;

(3) Once the survey report or archaeological assessment is considered adequate, seven copies of the report or archaeological assessment shall be made available by the

agency to the public. Two copies shall be sent to the SHPD library with one copy going to the relevant SHPD neighbor island office libraries, one copy shall be sent to the University of Hawaii at Manoa's Hamilton Library's Pacific Collection, one copy shall be sent to the Bishop Museum's library, one copy shall be sent to the University of Hawaii at Hilo's library, one copy shall be sent to Maui Community College's library and one copy to Kauai Community College's library.

(f) If the SHPD finds the report or archaeological assessment adequate and if no historic properties are present, then historic preservation review ends and the SHPD shall include in the notice of final acceptance its written "no historic properties affected" determination.

(g) If the SHPD finds the report adequate and historic properties are present, then the significance of each property shall be evaluated as discussed in the following section. [Eff DEC 1 1 2007] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-6 Evaluation of significance. (a) Once a historic property is identified, then an assessment of significance shall occur. The agency shall make this initial assessment or delegate this assessment, in writing, to the SHPD. This information shall be submitted concurrently with the survey report, if historic properties were found in the survey.

(b) To be significant, a historic property shall possess integrity of location, design, setting, materials, workmanship, feeling, and association and shall meet one or more of the following criteria:

(1) Criterion "a". Be associated with events that have made an important contribution to the broad patterns of our history;

(2) Criterion "b". Be associated with the lives of persons important in our past;

(3) Criterion "c". Embody the distinctive characteristics of a type, period, or method of construction; represent the work of a master; or possess high artistic value;

(4) Criterion "d". Have yielded, or is likely to yield, information important for research on prehistory or history; or

(5) Criterion "e". Have an important value to the native Hawaiian people or to another ethnic group of the state due to associations with cultural practices once carried out, or still carried out, at the property or due to associations with traditional beliefs, events or oral accounts--these associations being important to the group's history and cultural identity.

A group of sites can be collectively argued to be significant under any of the criteria.

(c) Prior to submission of significance evaluations for properties other than architectural properties, the agency shall consult with ethnic organizations or members of the ethnic group for whom some of the historic properties may have significance under criterion "e", to seek their views on the significance evaluations. For native Hawaiian properties which may have significance under criterion "e", the Office of Hawaiian Affairs also shall be consulted.

(d) Significance assessments shall be submitted to the SHPD for review. The SHPD shall agree or disagree with the significance evaluations within forty five days of receipt of the significance evaluations.

(1) The assessment shall:

(A) Present a table which lists each historic property and identifies all applicable criteria of significance for each property; and

(B) Provide justification for classifying the property within these criteria, it being allowable to make this justification general for similar types of archaeological sites. Supportive documentation shall be cited; and

(C) Evidence of any consultation shall be submitted with the assessment, to include:

(i) A description of the consultation process used;

(ii) A list of the individuals or organizations contacted; and

(iii) A summary of the views and concerns expressed.

(2) If the SHPD disagrees with the initial significance assessments or if it believes more information is needed to evaluate the

significance of a historic property, a letter shall be sent to the agency presenting the SHPD's findings. To proceed with the review process, the agency shall consult with the SHPD as needed to resolve differences, and resubmit the initial significance assessments.

(3) If the SHPD agrees with the initial significance assessments, a letter of agreement shall be sent to the agency.

(4) Once agreement is reached on significance of the properties, the SHPD shall enter all significance assessments in the Hawaii inventory of historic places, as consensus determinations.

(e) If there is an agreement that none of the historic properties are significant, then the historic preservation review ends and SHPD shall issue its written concurrence to the project in the form of a "no historic properties affected" determination. When significant historic properties are present, then impacts of the proposed action on these properties shall be assessed, and mitigation commitments shall be devised as needed. [Eff DEC 1 1 2003] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-7 Determining effects to significant historic properties. (a) The effects or impacts of a project on significant properties shall be determined by the agency. Effects include direct as well as indirect impacts. One of the following effect determinations must be established:

(1) "No historic properties affected". The project will have no effect on significant historic properties; or

(2) "Effect, with agreed upon mitigation commitments". The project will affect one or more significant historic properties, and the effects will potentially be harmful. However, the person has agreed to mitigation commitments involving one or more forms of mitigation to reasonably and acceptably mitigate the harmful effects.

(b) Effects include, but are not limited to, partial or total destruction or alteration of the historic property, detrimental alteration of the properties' surrounding environment, detrimental

visual, spatial, noise or atmospheric impingement, increasing access with the chances of resulting damage, and neglect resulting in deterioration or destruction. These effects are potentially harmful.

(c) Effect determinations shall be submitted to SHPD for review. These shall be submitted with the survey report, significance assessments, and mitigation commitments. The determinations shall include a map showing the location of the project and a general discussion of the project's scope of work, so the nature of possible effects can be understood.

(1) If the SHPD disagrees with the effect determinations, a letter that specifies the disagreements shall be sent within forty five days of receipt of the effect determinations. To proceed with the review process, the agency shall consult with the SHPD as needed to resolve differences, and resubmit the effect determinations.

(2) If the SHPD agrees with the effect determinations, the SHPD shall send a letter of agreement within forty five days of SHPD receipt of the effect determinations.

(d) No historic properties affected determinations for architectural properties shall be expedited when the SHPD agrees with the agency that minor changes to a building or structure will not affect its significant character. Because these changes are typically non-controversial and require prompt processing, the SHPD shall write its concurrence as a "no historic properties affected" letter.

(e) When the SHPD comments that the action shall not affect any significant historic properties, the historic preservation review ends. When the comment of the SHPD is that the project will have an "effect, with agreed upon mitigation commitments", then detailed mitigation plans shall be developed by the agency as discussed in the following section.

[Eff DEC 1 1 2003] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-8 Mitigation. (a) If a project will have an "effect" (impact) on significant historic properties, then a mitigation commitment proposing the form of mitigation to be undertaken for each significant historic property shall be submitted by the

agency to the SHPD for review and approval. This proposed commitment shall be submitted concurrently with the survey report, significance evaluations, and effects determinations, if significant historic properties are present in the project area and will be affected.

(1) Mitigation may occur in five forms.

(A) Preservation, which may include avoidance and protection (conservation), stabilization, rehabilitation, restoration, reconstruction, interpretation, or appropriate cultural use.

(B) Architectural recordation, which involves the photographic documentation and possibly the measured drawing of a building, structure, or object prior to its alteration or destruction.

(C) Archaeological data recovery, which enables the recovery of an adequate and reasonable amount of the significant information from a significant historic property prior to its alteration or destruction. Data recovery may include archaeological mapping, surface collection, excavation, monitoring, laboratory analyses, and interpretive analyses.

(D) Historical data recovery, which involves researching historical source materials to document an adequate and reasonable amount of information about the property when a property will be altered or destroyed.

(E) Ethnographic documentation, which involves interviewing knowledgeable individuals and researching historical source materials to document an adequate and reasonable amount of information about the property when a property will be altered or destroyed.

(2) If properties with significance, so evaluated under criterion "e", as defined in paragraph 13-284-6(b)(5) are involved, the agency shall initiate a consultation process with ethnic organizations or members of the ethnic group for whom the historic properties have

significance under criterion "e" to seek their views on the proposed forms of mitigation. For native Hawaiian properties which may be significant under criterion "e", the Office of Hawaiian Affairs also shall be consulted.

(3) This proposed mitigation commitment must include:

(A) A table of the significant historic properties, indicating which form or forms of mitigation are proposed for each property--preservation, archaeological data recovery, architectural documentation, historical documentation, or ethnographic documentation;

(B) Brief text justifying these proposed treatments; similar sites can be discussed together in this justification; and

(C) If properties which may have significance under criterion "e" are involved, a description of the consultation process used, a list of the individuals and organizations contacted, and a summary of the views and concerns expressed.

(b) If the proposal is not adequate, SHPD shall send a letter outlining needed changes, within forty five days of receipt of the mitigation commitments. To proceed with the review process, the agency shall consult with the SHPD as needed to resolve differences, and resubmit the mitigation commitments.

(c) If the commitments are acceptable, the SHPD shall send a determination letter concurring with the proposed project within forty five days of receipt of the mitigation commitments.

(d) If identified unmarked burial sites are present, the relevant island burial council of the department must approve the proposed mitigation commitments for this type of historic property in the case of native Hawaiian burials, following chapter 6E-43, HRS, and section 13-300-33.

(e) After mitigation commitments are accepted the agency shall provide detailed plans for the mitigation work to the SHPD for review and approval. The approved plans shall serve as scopes of work for mitigation.

(1) Archaeological data recovery plans shall meet the minimal standards for data recovery as provided in chapter 13-277. Qualifications of the archaeologist who is the principal investigator for this work shall comply with chapter 13-281. An archaeological permit from the SHPD is required to undertake this work as provided in chapter 13-282. Plans may include monitoring of construction by a professional archaeologist where further significant historic remains are likely to be found after data recovery. Minimal standards for the monitoring and report shall comply with chapter 13-279. Qualifications of the archaeologist who is the principal investigator for the monitoring shall comply with chapter 13-281.

(2) Architectural recordation plans' photographic components shall meet the minimal standards as provided by historic American building survey (HABS) photographic specifications.

(3) Historical data recovery plans shall conform to SHPD guidelines for historic documentation. Qualifications for the historian directing this work shall comply with chapter 13-281.

(4) Ethnographic documentation plans shall conform to SHPD guidelines for ethnographic documentation. Qualifications for the ethnographer directing this work shall comply with chapter 13-281.

(5) Preservation plans shall meet the minimal standards as provided in chapter 13-277 for archaeological properties and properties deemed significant under paragraph 13-284-6(b)(5) and the Secretary of the Interior's standards for historic preservation projects for architectural properties. If preservation plans involve historic properties deemed significant under criterion "e" as provided in paragraph 13-284-6(b)(5), the agency shall consult with interested individuals and organizations of the relevant cultural group with which the properties are associated. For native Hawaiian properties deemed significant under paragraph 13-284-6(b)(5), the Office of Hawaiian Affairs shall be consulted. The plans shall describe the

consultation process used, list the individuals and organizations consulted, and summarize the views and concerns expressed.

(6) Any interested persons may comment on the detailed mitigation plans. Comments must be submitted in writing to the SHPD within thirty days of the SHPD posting notice of the receipt of the detailed mitigation plans. The SHPD shall take all comments into consideration when issuing its letter of acceptance or non-acceptance of the plans.

(7) If a detailed mitigation plan is not adequate, SHPD shall send a letter outlining needed changes, within forty five days of receipt of the plan. To proceed with the review process, the agency shall consult with the SHPD as needed to resolve differences, and resubmit the plan.

(8) If a detailed mitigation plan is adequate, the SHPD shall send a letter of agreement within forty five days of receipt of the plan. Once the plan is considered adequate, work can then proceed on the plan.

(9) If unmarked burials are involved, the detailed mitigation plan must be covered under a burial treatment plan, as specified in chapter 13-300. This treatment plan can serve as the burial site component of an archaeological data recovery plan (in cases of disinterment and reinterment elsewhere) or of a preservation plan.

[Eff DEC 11 2003] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-9 Verification of completion of the detailed mitigation plan. (a) Once the detailed mitigation plans are carried out, a request for verification shall be submitted by the agency to the SHPD. This request shall document completion of the detailed mitigation plan's tasks--usually in the form of a completion report, with one copy submitted.

(b) If the SHPD disagrees that the work has been successfully completed, it shall send a letter noting uncompleted tasks or inadequately completed tasks within thirty days of receipt of the request. To proceed with the review process, the agency shall

consult with the SHPD as needed to resolve differences, and resubmit the completion report.

(c) If the SHPD agrees that the work has been successfully concluded, SHPD shall send a verification letter within thirty days and the historic preservation process is concluded.

(d) In cases involving preservation, archaeological data recovery, or architectural recordation, the agency has the option to request an accelerated, 2-step verification, understanding that construction projects often need to proceed rapidly and that a completion report is often finished months after fieldwork is completed.

(1) Step 1. The agency shall submit documentation to the SHPD indicating that data recovery fieldwork, architectural recordation, or interim protection measures for properties to be preserved have been successfully completed. The SHPD writes a letter within thirty days to the agency agreeing and stating construction may proceed, with the understanding that Step 2 must be completed to conclude the historic preservation process. If the measures have not been successfully completed, the SHPD shall write a letter within thirty days to the agency indicating what needs to be completed. To proceed with the review process, the agency shall consult with the SHPD as needed to resolve differences, and resubmit the documentation.

(2) Step 2. The agency shall submit to the SHPD a completion report for the data recovery work, architectural recordation, or final preservation work. The SHPD shall write a letter to the agency within thirty days stating the completion report is adequate and that the historic preservation process is concluded. If the completion report is not adequate, the SHPD shall write a letter within thirty days to the agency indicating needed changes. To proceed with the review process, the agency shall consult with the SHPD as needed to resolve differences, and resubmit the completion report.

(e) In cases involving solely historic data recovery or ethnographic documentation where no field study of the historic properties is to occur, the

agency has the option to request an accelerated verification process to proceed with the construction project and to submit a completion report at a later date, agreed upon with the SHPD. The agency shall submit the request in writing to the SHPD with reasons and with a date for submittal of the completion report. If the SHPD agrees, it shall send a letter to the agency within thirty days to the agency stating construction may proceed, with the agreement that the report shall be submitted to the SHPD by the agreed upon date and shall then be reviewed in accordance with subsections 13-284-9(a-c). If the SHPD does not agree with the request, the SHPD shall write a letter within thirty days to the person indicating the SHPD's concerns. If the agency wishes to proceed with the accelerated verification process, the agency shall consult with the SHPD as needed to resolve differences, and resubmit the request.

(f) Once a final report is adequate, the agency shall ensure that seven copies are made available to the same repositories as the survey report noted in paragraph 13-284-5(c)(3). [Eff DEC 11 2003] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-10 Conclusion of the historic preservation review process. (a) The historic preservation review process ends when:

(1) SHPD agrees that adequate procedures have been taken to determine if historic properties are likely to be present in the project area, and no historic properties are found to be present or historic properties are considered unlikely to be present;

(2) SHPD agrees that the project shall have "no historic properties affected"; or

(3) SHPD agrees to a detailed mitigation plan to handle an effect to significant historic properties that are present and this plan is verified by the SHPD to have been DEC 11 2003 successfully executed. [Eff] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-11 Review of Findings Based on Agency Requests. (a) Upon the request of an agency the SHPD shall reconsider the findings under sections 13-284-5 (

adequate identification and inventory procedures), 13-284-6 (significance evaluations), 13-284-7 (determination of effects), and 13-284-8 (mitigation), should an agency believe new information has come forth regarding historic properties. To be considered, the inquiry must address specific problems in the findings with supportive new evidence presented. The person conducting the project shall be promptly notified by the SHPD of the request for reconsideration. An inquiry to the SHPD shall not suspend action on a project, but the person and agency shall take all measures to avoid adverse effects to significant historic properties while the SHPD is reviewing a request. Within 10 working days of receipt of the request at the SHPD office, the SHPD shall advise the person undertaking the project, and the agency involved, in writing of the SHPD conclusions.

(b) If the SHPD conclusions identify an inaccurate significance evaluation, an inappropriate general mitigation commitment, or a flaw in the detailed mitigation plan, then the SHPD, the person undertaking the project, and the agency responsible for the permit or action shall attempt to reach agreement on how to correct the problem. [Eff DEC 1 1 2003] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-12 Discovery of previously unknown historic properties during implementation of a project. If a previously unknown historic property is found after the acceptance of an inventory report or during the implementation of a project, then the historic preservation review process shall be reopened. This action, however, applies only to the immediate area where a historic property is discovered, and the historic preservation review process shall be accelerated, following the procedures of 13-280. [Eff DEC 1 1 2003] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-42)

§13-284-13 Penalty. Failure to obtain the written comments of the SHPD in accordance with this chapter shall result in a SHPD comment to the agency not to proceed with the project. [Eff DEC 1 1 2003] (Auth: HRS §6E-3) (Imp: HRS §§6E-1, 6E-3, 6E-10, 6E-11, 6E-42)

DEPARTMENT OF LAND AND NATURAL RESOURCES

Chapter 13-284, Hawaii Administrative Rules, on the Summary Page dated October 31, 2002, was adopted November 15, 2002, following public hearings held on the islands of Kauai on August 20, 2002, Hawaii on August 21 and 22, 2002, Maui on August 26, 2002, Molokai on August 27, 2002, Oahu on August 28, 2002, and Lanai on August 29, 2002, after public notice was given in the Honolulu Star Bulletin, Hawaii Tribune Herald, West Hawaii Today, Maui News, and the Garden Isle on July 21, 2002.

The adoption of chapter 13-284 shall take effect ten days after filing with the Office of the Lieutenant Governor.

Peter T. Young, Chairperson
Board of Land and Natural Resources

APPROVED:

Linda Lingle, Governor
State of Hawaii

Dated: NOV 25 2003

APPROVED AS TO FORM:

Deputy Attorney General

Filed

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LIEUTENANT GOVERNOR
STATE OF HAWAII

tion of the rules and regulations and refuse to grant a person permission to practice as a certified real estate appraiser for any cause that would be grounds for disciplining a certified real estate appraiser;

(5) To act as the designated representative of this State to implement 12 United States Code §3301 et seq.; and

(6) To appoint an advisory committee to assist with the implementation of this chapter and 12 United States Code §3301 et seq. and the rules and regulations adopted pursuant thereto. [L 1989, c 188, pt of §1; am L 1990, c 346, §2; am L 1992, c 202, §166]

§466K-4 Practice as a real estate appraiser; uniform standards. (a) No person may practice as a real estate appraiser in this State unless that person has been licensed or certified to practice in accordance with this chapter and rules adopted by the director of commerce and consumer affairs pursuant to chapter 91. All real estate appraisers who are licensed or certified to practice in this State shall comply with the current Uniform Standards of Professional Appraisal Practice approved by the director when performing appraisals in connection with a federally or non-federally related real estate transaction, or certify compliance with the current Uniform Standards of Professional Appraisal Practice in connection with any arbitration proceeding to determine the fair market value, fair market rental value, or fair and reasonable rent of real estate.

(b) This section shall not apply to any real estate appraiser employed by any county for purposes of valuing real property for ad valorem taxation.

(c) This section shall not apply to a real estate broker or real estate salesperson licensed pursuant to chapter 467 who provides an opinion as to the estimated price of real estate, regardless of whether the real estate licensee receives compensation, a fee, or other consideration for providing the opinion; provided that:

(1) The opinion as to the estimated price of real estate shall state that it is not an appraisal;

(2) The real estate licensee shall not represent that the licensee is a certified or licensed real estate appraiser; and

(3) If the real estate licensee receives compensation related to the sale of property, the licensee shall not receive any additional compensation, fee, or other consideration for providing an opinion as to the estimated price of that property. [L 1998, c 180, §1; am L 1999, c 287, §3; am L 2011, c 212, §1 and c 227, §3]

[§466K-5] Definitions. For the purposes of this chapter, unless the context otherwise requires:

"Arbitrator" means an individual appointed to render an award in a controversy that is subject to an agreement to arbitrate.

"Uniform Standards of Professional Appraisal Practice" means the most recent iteration of the Uniform Standards of Professional Appraisal Practice developed by the appraisal standards board of The Appraisal Foundation and approved by the director. [L 2011, c 227, pt of §2]

[§466K-6] Appraisers in arbitration proceedings. In an arbitration proceeding to determine the fair market value, fair market rental, or fair and reasonable rent of real property where the arbitrator is a real estate appraiser licensed under [this] chapter, the record of an award shall include but not be limited to findings of fact; the state-licensed appraiser's rationale for the award; the state-

HAWAII ADMINISTRATIVE RULES

TITLE 16

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

CHAPTER 114

REAL ESTATE APPRAISERS

Subchapter 10 Scope of Licensed and Certified Appraisers

Subchapter 11 Temporary Recognition of Licensure or Certification of Out-of-State Appraisers

Subchapter 12 Appraisal Standards

Subchapter 13 Records and Appraisal Report Retention Requirement

Subchapter 14 Advertising Practices

Subchapter 15 Disciplinary Sanctions

SUBCHAPTER 1

GENERAL PROVISIONS

§16-114-1 Objective. This chapter is intended to clarify and implement chapter 466K, Hawaii Revised Statutes, to the end that the provisions thereunder may be best effectuated and the public interest most effectively served. [Eff 3/11/91; comp 9/23/91; comp 4/17/98; comp 1/10/09; comp 8/27/12] (Auth: HRS §466K-3) (Imp: HRS §§466K-1, 466K-3)

§16-114-2 Definitions. As used in chapter 466K, HRS, and in this chapter:

"Appraisal" or "appraisal report" means a written or oral statement independently and impartially prepared, setting forth an opinion as to the market value of an adequately described property as of a specific date(s), supported by the presentation and analysis of relevant market information.

"Appraisal Foundation" means the Appraisal Foundation established on November 30, 1987, as a not-for-profit corporation under the laws of Illinois.

"Appraisal Standards Board" means the board appointed by the Appraisal Foundation to establish rules for developing and reporting of an appraisal.

"Appraiser Qualifications Board" means the board appointed by the Appraisal Foundation to establish criteria for appraiser licensing and certification.

"Appraisal Subcommittee" means the Appraisal Subcommittee of the Federal Financial Institutions Examination Council (FFIEC) consisting of representatives from the federal financial institutions regulatory agencies and from the Department of Housing and Urban Development.

"Appraiser" or "real estate appraiser" means a state licensed or state certified appraiser who for a fee or other valuable consideration prepares appraisal reports.

"Appraiser assistant" means a person who is not licensed or certified as an appraiser but who assists in the preparation of an appraisal under the direct supervision of a certified appraiser.

"Certificate" means that document issued by the director indicating that the person named thereon has satisfied the requirements for certification as a state certified appraiser.

"Certificate holder" means the person in whose name the director grants a certificate.

"Complex one-to-four family residential property appraisal" means one in which the property to be appraised, market conditions, or form of ownership is atypical and the atypical factor has a significant value contribution. For example, atypical factors may include but are not limited to:

(1) Architectural style;
(2) Age of improvements;
(3) Size of improvements;
(4) Size of lot;
(5) Neighborhood land use;
(6) Potential environmental hazard liability;
(7) Property interests;
(8) Limited readily available comparable sales data; or

(9) Other unusual factors.

"Direct supervision" means to actively and personally review the appraisal report of an appraiser assistant, and to approve and to sign the report as being independently and impartially prepared and in compliance with the uniform standards of professional appraisal practice (USPAP).

"Director" means the director of commerce and consumer affairs.

"Federal Financial Institutions Examination Council" means the council created under the Federal Financial Institutions Examination Council Act of 1978 (12 U.S.C. §3301 et seq.) consisting of representatives from the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision and the National Credit Union Administration Board or any respective successors.

"Federally related transaction" means any real estate-related financial transaction entered into on or after October 1, 1991, that:

(1) Any federal financial institutions regulatory agency, Resolution Trust Corporation, or any regulated institution engages in or contracts for; and

(2) Requires the services of an appraiser.

"Forfeit" or "forfeiture" means the immediate and automatic termination of a license or certificate without any prior consultation with the licensee or certificate holder caused by the licensee or certificate holder's failure to comply with the requirements for maintaining or renewing the license or certificate.

"Hawaii real estate appraiser advisory committee" or "committee" means the body established pursuant to section 466K-3, HRS.

"License" means the document issued by the director indicating that the person named thereon has satisfied all requirements for licensure as a state licensed appraiser.

"Licensee" means the person in whose name the director grants a license.

"Market value" means the most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

(1) Buyer and seller are typically motivated;

(2) Both parties are well informed or well advised, and acting in what each considers in the party's own best interest;

(3) A reasonable time is allowed for exposure in the open market;

(4) Payment is made in terms of cash in United States dollars or in terms of financial arrangements comparable thereto; and

(5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by any person associated with the sale.

In applying this definition of market value, adjustments to the comparable properties must be made for special or creative financing or sales concessions. No adjustments are necessary for those costs that are normally paid by sellers as a result of tradition or law in a market area; these costs are readily identifiable since the seller pays these costs in virtually all sales transactions. Special or creative financing adjustments can be made to the comparable properties by comparisons to financing terms offered by a third party financial institution that is not already involved in the property or transaction. Any adjustment should not be calculated on a mechanical dollar-for-dollar cost of the financing or concession, but the dollar amount of any adjustment should approximate the market's reaction to the financing or concessions based on the appraiser's judgment.

"Real estate" or "real property" means an identified parcel or tract of land, with improvements, and includes easements, rights of way, undivided or future interests, or similar rights in a tract of land, but does not include mineral rights, timber rights, growing crops, water rights, or similar interests severable from the land when the transaction does not involve the associated parcel or tract of land.

"Real estate-related financial transaction" means any transaction involving:

(1) The sale, lease, purchase, investment in, or exchange of real property, including interests in property, or the financing thereof;

(2) The refinancing of real property or interests in real property; or

(3) The use of real property or interests in real property as security for a loan or investment, including mortgage-backed securities.

"Regulated institution" or "federal financial institution" means any institution regulated by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, or the National Credit Union Administration or any respective successors.

"Reinstate" or "reinstatement" means the granting of permission to perform appraiser work by the director to a person whose license or certificate has been previously suspended.

"Residential property" means any parcel of real estate, improved or unimproved, that is utilized for one-to-four family purposes and where the

highest and best use is for one-to-four family purposes. A residential unit in a condominium, townhouse, or cooperative complex is considered to be residential real estate. Residential property does not include subdivisions wherein a development analysis or appraisal is necessary or utilized.

"Restore" or "restoration" means the granting of permission to perform appraiser work by the director to a person whose license or certificate has been previously forfeited.

"State certified appraiser" or "certified appraiser" means any individual who, having met the requirements of chapter 466K, HRS, and this chapter, has been certified as a state certified general appraiser or a state certified residential appraiser.

"State certified general appraiser" or "certified general appraiser" means any individual who, having met all requirements of chapter 466K, HRS, and this chapter, is certified to perform appraisal assignments for all real estate property types.

"State certified residential appraiser" or "certified residential appraiser" means any individual who, having met all requirements of chapter 466K, HRS, and this chapter, is certified to perform appraisals pursuant to section 16-114-71.

"State licensed appraiser" or "licensed appraiser" means any individual who, having met all requirements of chapter 466K, HRS, and this chapter, is licensed to perform appraisals pursuant to section 16-114-70.

"Transaction value" means:

(1) For loans or other extensions of credit, the amount of the loan or extension of credit;

(2) For sales, leases, purchases, and investments in or exchanges of real property, the market value of the real property involved; or

(3) For the purchase or sale of loans or interests in real property pooled for sale, the amount of the loan or the market value of the real property calculated with respect to each loan or real property interest in the pool.

The transaction value for a series of related transactions will be calculated as if only one transaction is involved if it appears that an entity is attempting to evade the requirements to have the appraisal performed by a state licensed or state certified appraiser. Master appraisals performed in support of Housing and Urban Development, Federal Housing Administration, or Veterans Administration loan transactions will not be considered as one transaction.

"Uniform standards of professional appraisal practice" or "USPAP" means the uniform appraisal standards including ethics and competency provisions established by the Appraisal Standards Board as adopted and as it

may subsequently be amended by the Appraisal Foundation. [Eff 3/11/91; am and comp 9/23/91; am and comp 4/17/98; am and comp 1/10/09; am and comp 8/27/12] (Auth: HRS §466K-3) (Imp: HRS §§466K-1, 466K-3)

SUBCHAPTER 2

POWERS AND DUTIES OF THE DIRECTOR

§16-114-7 Powers and duties of the director. The director shall have the following powers and duties:

(1) To grant, deny, renew, or refuse to renew permission to practice as a licensed or certified real estate appraiser in this State;

(2) To adopt, amend, or repeal rules as the director finds necessary to effectuate fully this chapter and 12 U.S.C. §3301 et seq.;

(3) To enforce this chapter and 12 U.S.C. §3301 et seq., and rules and regulations adopted pursuant thereto;

(4) To discipline a real estate appraiser for any cause prescribed by this chapter or 12 U.S.C. §3301 et seq., or for any violation of the rules and regulations and refuse to grant a person permission to practice as a real estate appraiser for any cause that would be grounds for disciplining a real estate appraiser;

(5) To act as the designated representative of this State to implement 12 U.S.C. §3301 et seq.;

(6) To appoint a Hawaii real estate appraiser advisory committee to assist with the implementation of this chapter and 12 U.S.C. §3301 et seq., and the rules and regulations adopted pursuant thereto;

(7) To revoke or suspend the permission to practice as an appraiser in this State or otherwise condition the scope of the license or certification of the appraiser for any violation of chapter 466K, HRS, or this chapter;

(8) To delegate to the regulated industries complaints office (RICO), which shall be funded by the compliance resolution fund fee, the authority to facilitate the receipt, arbitration, investigation, and prosecution of complaints or any violation of chapter 466K, HRS, or this chapter;

Amendments to and compilation of chapter 16-114, Hawaii Administrative Rules, on the Summary Page dated August 1, 2012, were adopted on August 1, 2012, following a public hearing held on August 1, 2012, after public notices were given in the Honolulu Star-Advertiser, The Garden Island, Hawaii Tribune-Herald, West Hawaii Today, and The Maui News on June 29, 2012.

These amendments shall take effect ten days after filing with the Office of the Lieutenant Governor.

/s/ Keali`i S. Lopez
KEALI`I S. LOPEZ
Director of Commerce and Consumer Affairs

APPROVED AS TO FORM: Date 8/9/12

/s/ James C. Paige
Deputy Attorney General

APPROVED: Date 8/15/12

/s/ Neil Abercrombie
NEIL ABERCROMBIE
Governor
State of Hawaii

August 16, 2012
Filed

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

Amendments and Compilation of Chapter 16-114
Hawaii Administrative Rules

August 1, 2012

SUMMARY

1. §16-114-2 is amended.
2. §16-114-19 is amended.
3. §16-114-21 is amended.
4. §16-114-70 is amended.
5. §16-114-73 is repealed.
6 §16-114-79 through 16-114-80 are amended.
7. §16-114-88 is amended.
8. Chapter 114 is compiled.

This material can be made available for individuals with special needs. Please call the Program Specialist, Professional and Vocational Licensing Division, DCCA, at 586-2692 to submit your request.

Effective 08/27/12

SCAP-15-0000599

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

CERTIFICATE OF SERVICE

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

PATRICK K. WONG, ESQ. (Pat.Wong@co.maui.hi.us)
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Attorneys for Defendants/Appellee
COUNTY OF MAUI and WILLIAM SPENCE

DATED: Honolulu, Hawaii, July 22, 2016.

/s/ Andrew V. Beaman
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DANIEL J. CHENG
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a Limited Liability Law Partnership

Attorneys for Plaintiffs/Appellants
DOUGLAS LEONE and PATRICIA A.
PERKINS-LEONE, as Trustees

NOTICE OF ELECTRONIC FILING

Electronically Filed
Supreme Court
SCAP-15-0000599
22-JUL-2016
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An electronic filing was submitted in Case Number SCAP-15-0000599. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID:	SCAP-15-0000599
Title:	Douglas Leone and Patricia A. Perkins-Keone, as Trustees under that certain unrecorded Leone-Perkins Family Trust Dated August 26, 1999, as amended, Respondents/Plaintiffs-Appellants-Cross-Appellees, vs. County of Maui, a political subdivision of the State of Hawai'i, William Spence, in his capacity as Director of the Department of Planning of the County of Maui, Petitioners/Defendants-Appellees-Cross-Appellants, Doe Entities 1-50.
Filing Date / Time:	FRIDAY, JULY 22, 2016 01:19:40 PM
Filing Parties:	Douglas Leone
	Patricia Perkins-Leone
Case Type:	Appeal
Lead Document(s):	Answering Brief
Supporting Document(s):	Appendix
Appendix	Appendix
Appendix	Certificate of Service

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai`i Electronic Filing and Service Rules.

This notification is being electronically mailed to:
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