SCAP-15-0000599

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

Plaintiffs/Appellants/
Cross-Appellees,

vs.

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

Defendants/Appellees/
Cross-Appellants.

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

APPEAL FROM: (1) FINAL JUDGMENT ENTERED JUNE 1, 2015; (2) ORDER DENYING PLAINTIFFS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL FILED JUNE 10, 2015, ENTERED AUGUST 5, 2015; AND (3) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR TAXATION OF COSTS FILED JUNE 12, 2015, ENTERED AUGUST 5, 2015 [*continued on following page*]

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

DEFENDANTS/APPELLEES/CROSS-APPELLANTS COUNTY OF MAUI's and WILLIAM SPENCE'S REPLY TO PLAINTIFFS' ANSWERING BRIEF TO OPENING CROSS-APPEAL BRIEF; DECLARATION OF COUNSEL; APPENDIX; CERTIFICATE OF SERVICE

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

8) APRIL 20, 2015 GRANT OF PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE NO. 13;
9) APRIL 20, 2015 GRANT OF PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE NO. 14;
10) APRIL 20, 2015 GRANT OF PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE NO. 15;
11) JURY INSTRUCTION NOS. 22, 37, 39, and 40; and
12) SPECIAL VERDICT FORM

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DEFENDANTS/APPELLEES/CROSS-APPELLANTS COUNTY OF MAUI'S and WILLIAM SPENCE'S REPLY TO PLAINTIFFS' ANSWERING BRIEF TO OPENING CROSS-APPEAL BRIEF

I. REPLY ARGUMENT

Plaintiffs/Appellants/Cross-Appellees DOUGLAS LEONE'S and PATRICIA PERKINS-LEONE'S (the "LEONES" or "Cross-Appellees") Answering Brief, as with the case they made at trial, rests mostly on a singular and fundamentally flawed assumption – that the decision of the Intermediate Court of Appeals in Leone, et al. v. County of Maui, 128 Hawai'i 183, 284 P.3d 956 (2012) ("Leone Decision") holding the LEONES' claim was ripe, was properly extended as essentially dispositive of their liability claims for an alleged Fifth Amendment constitutional taking. Cross-Appellees argue that under the "law-of-the-case" in the Leone Decision, they were not required to complete their application or the administrative process of review for an exempt single-family use within the Special Management Area ("SMA") in order to establish their parcel at Palau'ea Beach ("Lot 15") was taken by regulation in violation of the Fifth Amendment.

Cross-Appellees erroneously argue that under the Kihei-Makena Community Plan ("KMCP") designation of their parcel as "park," the Maui County Planning Director could not under the SMA Rules legally process their application for a single-family residential use under any circumstances because of "inconsistency" of the proposed use with the KMCP.

First, Cross-Appellees' flawed argument and assumptions misapply the Leone Decision's discussion regarding the "park" designation of Cross-Appellees' land under the KMCP. The Leone Decision does discuss the LEONES' proposed single-family residential use of their land as "inconsistent" with the KMCP "park" designation. The Leone Decision discusses the Planning Director's review of the LEONES' proposed land use, however, as presumably *determined to be a "development" for SMA permitting purposes*. The Leone Decision held that the Planning Director's ostensible refusal and/or inability to process an application *for a development* within the SMA due to its "inconsistency" with the KMCP "park" designation, ***ripened*** their purported takings claim. *See*, Leone, 128 Hawai'i at 196, 284 P.3d at 969 (footnote 8). This Honorable Court has already held that this is all the Leone Decision stands for. *See*, Blake v. County of Kaua'i Planning Commission, 131 Hawai'i 123, 315 P.3d 749 (2014) ("On appeal, the ***only*** issue the ICA considered was whether the claims

were ripe for adjudication."). (Emphasis added). The Intermediate Court of Appeals also held that the LEONES were not required to seek to amend the community plan *in order to ripen their claim*, nothing more.

The LEONES argued at trial, however, that under the Leone Decision, the SMA Rules must be interpreted to preclude the Director's review of ***any*** application for a proposed land use allegedly "inconsistent" with the KMCP "park" designation, to include *uses otherwise exempt* from the permitting requirements within the SMA under the rules. These exempt uses would include a single-family residence which can be determined under the SMA Rules to have no "cumulative impacts or significant environmental and ecological effects."[1]

Cross-Appellants the COUNTY OF MAUI and Planning Director WILLIAM SPENCE (the "COUNTY" or "Cross-Appellants") argue that by accepting Cross-Appellees' flawed logic and misapplication of the Leone Decision, the trial court excluded much material evidence at trial, erroneously ruling that evidence to be irrelevant under the "law-of-the-case" purportedly established by the Leone Decision. The relevance of the excluded evidence specifically went to show that the LEONES were entitled to apply for and build their single-family residence as ***an exempted use*** within the SMA, ***but they clearly elected not to.*** Cross-Appellants maintain that because an exempt single-family residence was an option for the use of the LEONES' parcel, the COUNTY did not "take" the parcel in violation of the Fifth Amendment, or deprive the LEONES all economically beneficial use of their land.

Second, the record of this case clearly reflects that Cross-Appellees ultimately argued that under the "law of the case" in the Leone Decision, the Planning Director *could not in any event legally process their SMA application.* Moreover, Cross-Appellees themselves now argue the trial court properly allowed the identification of the Leone Decision to the jury at

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[1] The LEONES' real estate attorney acknowledged at trial that the burden of demonstrating entitlement to an exempted use is on the landowner seeking the exemption:

> Q. And have you, in fact, taken the position that it was your clients' burden to show no cumulative impact or significant ecological and environmental effect?
> A. I'm not sure that I made a conscious decision about burden. But common sense was that -- that it made sense to present the facts relating to those matters to the Planning Director for his consideration. And one hopes -- one hoped for a favorable disposition of that.

JEFS Dkt 48 and PDF pp. 71-72 [*Transcript 2015-04-06 p.m.*].

trial *expressly to support this absurd conclusion*. The logic of the LEONES' claim is therefore, that their property was taken in violation of the Fifth Amendment, because the Planning Director followed the law by rejecting their application (or purportedly *refused to violate the law by accepting it*). It should be obvious that this erroneous conclusion would make the Planning Director's purported decision on the LEONES' SMA application completely irrelevant ***to establishing*** the Cross-Appellees' taking claim (as much so as the material evidence excluded at trial was erroneously determined to be). This is because the alleged taking would have occurred when the purported offending land designation - the KMCP "park" designation of the subject parcel - was made in **1998**.

Moreover, the only conclusion which can be drawn by the LEONES' flawed reading of the Leone Decision, is that the LEONES' property *had allegedly lost all economically beneficial use in **1998***, nine (9) years prior to the LEONES submitting their SMA application, and two years prior to the LEONES purchasing the parcel located at Palauea Beach,[2] which under the facts of this case is absurd. Setting the absurdity aside, in light of the LEONES' position, the COUNTY'S appraiser Ted Yamamura's appraisal that Lot 15 retained significant development value for a single-family residence was absolutely relevant to dispute the contention that Lot 15 lost all economically beneficially use since that time. *See*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (The State Supreme Court did not err in finding that petitioner failed to establish a deprivation of all economic use, for it is undisputed that his parcel *retains significant development value*.) In fact, Lot 15's retention of significant development value was undisputed at trial - Plaintiffs' own appraiser valued the property at $7.2 million dollars as of **October 25, 2007**, *nine (9) years after the alleged deprivation would have occurred in **1998***. JEFS Dkt 260 and PDF pp. 497-531; JEFS Dkt 180 and PDF pp. 61-62 [Transcript *2015-04-10 a.m.*].

In light of all of this, it is not difficult to see how the COUNTY OF MAUI and Director WILLIAM SPENCE are parties aggrieved by numerous evidentiary rulings made at trial. The effect of these rulings was not only to keep the jury unaware of obviously relevant and material evidence in this case, but also to call into question the legality of thousands of exempted uses

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[2] The LEONES' purchased Lot 15 for $3.75 million in **February 2000**. JEFS Dkt 144 and PDF pp. 80-81; JEFS Dkt 134 and PDF p. 82 [*Transcript 2015-04-06 a.m.*].

the Maui County Planning Department has lawfully allowed within the Special Management Area pursuant to the SMA Rules. JEFS Dkt 21 and PDF pp. 4-5.

II. RELEVANT RECORD FACTS IN REPLY

A. THE TRIAL COURT'S PURPORTED FINDINGS OF FACT. The Cross-Appellees argue that Judge Cardoza made findings of fact upon which the Intermediate Court of Appeals relied in the Leone Decision, but did not cite to a single one of these purported findings in either their 54-page Answering Brief on Cross-Appeal, or their 55-page Opening Brief on Appeal. Yet, based only on their argument that findings were made by Judge Cardoza, Cross-Appellees suggest that the Intermediate Court of Appeals then made factual findings in their favor. Cross-Appellees ignore that the allegations on the face of the Complaint are only accepted as true for purposes of review on a motion to dismiss. *See*, Norris v. Hawaiian Airlines, Inc., 74 Hawai'i 235, 240, 842 P.2d 634, 637 (1992). These presumptions are not findings and not evidence.

B. THE LEONES' INCOMPLETE SMA ASSESSMENT APPLICATION. Cross-Appellees astonishingly suggest in their Answering Brief to this Honorable Court that evidence excluded from trial demonstrates that there were no Hawai'ian cultural human remains discovered on the LEONES' Lot 15. In fact, Cross-Appellees filed their Motion *in Limine* No. 1 to exclude mention of the known cultural human remain discovered *on the LEONES' lot* from the jury at trial. JEFS Dkt 230 and PDF pp. 489-534. Cross-Appellees also erroneously state that the COUNTY did not attempt to present evidence of these known Hawai'ian cultural humans remains on Lot 15 to the trial court. The COUNTY presented evidence of these remains in opposition to Plaintiffs' Motion in Limine No. 1, which is the one of the subjects of this Cross-Appeal. JEFS Dkt 234 and PDF pp. 347-504 at 443-449, 455-456, 460-463.[3]

Moreover, the COUNTY attempted to present evidence of the existence of these remains, as indisputably documented in the LEONES' SMA Assessment Application. JEFS Dkt 61 and PDF p. 40 [*Transcript 2015-04-27 a.m.*]; JEFS Dkt 266 and PDF pp. 348-398. The

[3] The deposition of planner Thorne Abbott, who reviewed and testified to the myriad deficiencies with the LEONES' SMA Assessment Application was included with the County's Memorandum in Opposition to Plaintiffs' Motion in Limine No. 1 re Human Remains. JEFS Dkt 234 and PDF pp. 443-449, 455-456, 460-463.

SMA Assessment Application contained an archaeological inventory summary, dated **December 15, 2002**, which specifically noted:

> A total of 12 backhoe trenches and 5 hand test units were excavated within the approximate ½ acre parcel (Fig. 1). All trenches were negative for cultural remains except for backhoe trenches (BT's) 1, 2, 7, 8 and 12.
>
> * * * * *
>
> Backhoe Trench 1-(BT 1) was placed along the ocean close to the boundary line of parcels 14 and 15 and this trench contained previously disturbed human remains and three military refuse pits. Five test units were excavated within the trench to determine the origin of the human remains and to examine the pit features. The testing concluded the human remains had been previously disturbed probably by military activity. The remains recovered were from one individual, however only 30-40% of that individual was collected.[4] It is therefore presumed that more displaced human remains will be collected within this parcel and the adjoining parcel 16. JEFS Dkt 266 and PDF pp. 393-394.

The LEONES' counsel ***objected*** to the admission of their own SMA Application into evidence, and the trial court ***sustained*** their objection, ruling the very SMA Application the LEONES' assert was wrongly rejected was irrelevant for the jury's consideration. JEFS Dkt 61 and PDF p. 40 [*Transcript 2015-04-27 a.m.*].

The COUNTY maintains that the relevance was to show that the despite the discovery of these cultural human remains five (5) years before the LEONES' SMA application was submitted for consideration, the LEONES failed and/or refused to obtain and include with their SMA Assessment Application a required monitoring plan, preservation plan, or data collection plan for the remains, thereby precluding a determination that their proposed single-family residence would have no "cumulative impacts or a significant environmental or ecological effects." Failing this the LEONES failed to demonstrate any entitlement for their proposed single-family residence as *an exempt use* within the Special Management Area.

In fact, the LEONES do not appear to have completed an inventory of Lot 15 to even determine whether there were additional remains on their lot, as their archaeologist opined was probable. JEFS Dkt 266 and PDF pp. 393-394. The myriad of other deficiencies with the SMA Assessment Application were also particularly glaring and relevant for the jury in this

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[4] In their Motion in Limine No. 1 the LEONES suggested that the discovered cultural remains were inconsequential since only 30-40% of a human were recovered and since they had presumably had already been disturbed. JEFS Dkt 230 and PDF pp. 489-534.

regard. JEFS Dkt 234 and PDF pp. 347-504 at 443-449, 455-456, 460-463. This included the lack of a valid certified shoreline for Lot 15, since the Certified Shoreline Survey submitted with the LEONES' SMA Assessment Application had expired five (5) years prior to submission, as had the engineers' license under which it had been prepared five (5) years earlier, not exclusively. JEFS Dkt 266 and PDF p. 398.

C. THE LEONES' ERRONEOUS AND UNSUPPORTED ASSERTION OF A POLICY DENYING THEM ENTITLEMENT TO BUILD A SINGLE-FAMILY RESIDENCE. Contrary to what Cross-Appellees assert, the evidence at trial demonstrated that former Planning Director Foley rescinded the SMA exemptions for lots 13 and 14 not because of a purportedly "policy," but rather in part because of his concern for preservation of public views along Makena Alanui Road, **and** because of a failure of one lot owner to address known cultural deposits on one of the lots within the Special Management Area. JEFS Dkt 270 and PDF pp. 885-887, 892-894. As it turned out, Director Foley's concerns were well founded because, *after* lots 13 and 14 were developed, the Maui Planning Commission heard evidence that Hawai'ian cultural human remains were discovered on certain of the developed Palau'ea lots, contrary to the representations made in archaeological surveys and inventories submitted to Director Min. JEFS Dkt 256 and PDF pp. 574-625; JEFS Dkt 260 and PDF pp. 592-597; JEFS Dkt 188 and PDF pp. 34-37 [*Transcript 2015-04-23 p.m.*].[5]

D. WILLIAM WHITNEY'S CONFLICTED TESTIMONY ABOUT THE LEONE DECISION. Cross-Appellees erroneously argue that the Leone Decision was admissible because their expert read *and* relied on it for his opinions. The record reflects clearly that the LEONES' counsel never asked Whitney if he *read or relied* on the Leone Decision. This maneuver disregarded the trial court's late instruction that this foundation needed to be laid before the Leone Decision could be introduced to support Whitney's opinions. JEFS Dkt 361 and PDF pp. 50-54 [*Transcript 2015-04-16 p.m.*]. Rather, the LEONES' counsel asked Whitney if the Leone Decision *confirmed* opinions Whitney had purportedly made years earlier. JEFS Dkt 361 and PDF p. 55 [*Transcript 2015-04-16 p.m.*]. The immediate reaction to this ruse was a

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

question from a juror asking "What is a[n] appellate decision." JEFS Dkt 361 and PDF p. 63 [*Transcript 2015-04-16 p.m.*].

Perhaps more importantly, the LEONES' expert Whitney testified the opposite of what Plaintiffs claim the Leone Decision stands for. Whitney expressly recognized on cross-examination that the LEONES could have sought to exempt their single-family residence from the SMA permitting requirements, but *elected not to*, and decided to file a lawsuit against the COUNTY instead. JEFS Dkt 172 and PDF pp. 23-24 [*Transcript 2015-04-01 a.m.*].

III. ARGUMENT AND ANALYSIS

The COUNTY Cross-Appellants maintain on this Cross-Appeal, that *an exempt use* under the SMA Rules does not require an SMA permit, and contrary to Cross-Appellees' conflicted argument and the trial court's erroneous rulings, *does not require "consistency" with the KMCP*. A single-family residence can under the SMA Rules be determined not to have "cumulative impacts or significant environmental or ecological effects," and as such is entitled as an exempted use.[6]

The LEONES certainly could have supported their entitlement to build their single-family residence as an ***exempted use***, but their incomplete SMA Assessment Application submittals and their decision to sue the COUNTY instead clearly demonstrate they *elected not to*. The LEONES could have made appropriate and ***complete submittals*** with their SMA Assessment Application, permitting the Planning Director to make a determination of "no cumulative impacts or significant environmental or ecological effects," and thereby been able to proceed with their single family residence as an exempted use. This is exactly what all of the LEONES' neighbors did.[7]

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[6] On pages 50-51 of their Answering Brief, Cross-Appellees assert "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." The COUNTY cannot find any record of this purported admission as cited in Cross-Appellees' Answering Brief.

[7] On page 23 of their Answering Brief on Cross-Appeal, Cross-Appellants assert "in fact, the County actually paid the Larsons $800,000, and promised them building permits, to settle their lawsuit." The statement is not supported by the record reference made in the Answering Brief. It is also pejorative and intentionally misleading, because it ignores the fact that Bill Larson and Nancy Larson submitted ***complete submittals*** with their SMA Assessment Applications well in advance of settling their claims with the COUNTY. *See*, Appendix; *see also*, Declaration of Counsel, attached hereto. The submittals included the required preservation plans approved by the State of Hawai'i Historic Preservation Division for both of their lots, in addition to valid shoreline certifications for both lots. Id. The LEONES' trial and appellate counsel also represented the Larsons at the time these submittals were made.

Moreover, as explained further below, it is not unreasonable under the SMA Rules to require the LEONES to seek a community plan amendment to build their single-family residence as a proposed "development."

A. THE *LEONE* DECISION DID NOT HOLD THE LEONES' PROPOSED SINGLE-FAMILY RESIDENTIAL USE COULD NOT LEGALLY BE EXEMPT FROM THE SMA PERMITTING REQUIREMENTS

The Leone Decision specifically recognized and discussed the distinction between an exempt use under the COUNTY'S SMA Rules, and a use determined to be a "development":

> In its rules implementing the CZMA, Maui County offers *an assessment procedure allowing, inter alia, landowners to seek a determination that their proposed use is not a "development"* under HRS § 205A-22. *See*, Maui Department of Planning Special Management Area Rules for the Maui Planning Commission Rule (SMA Rule) 12-202-12 (2004). Upon review of an assessment application, the Director must make a determination that the proposed use either:
>
> > (1) Is exempt from the requirements of this chapter because it is not a development pursuant to section 205A-22, HRS, as amended;

Leone, et al. v. County of Maui, et al., 128 Hawai'i at 188, 284 P.3d at 961. (Emphasis added). Pursuant to Haw. Rev. Stat. § 205A-22 "Development" does not include the following:

> (1) Construction of a single-family residence that is not part of a larger development;
>
> ...provided that whenever the authority finds that any excluded use, activity, or operation may have a *cumulative impact, or a significant environmental or* ecological *effect on a special management area*, that use, activity, or operation shall be defined as "development" for the purpose of this part.

Haw. Rev. Stat. § 205A-22 (Emphasis added); *see also* Leone, 128 Hawai'i at 187, 284 P.3d at 960. If the landowner fails to make the showing for an exemption, then an application for an SMA permitted must be submitted. Id.

In determining that the LEONES' claims were ripe, the Leone Decision itself recognized that a final decision had been made on their proposed use, *as determined to be a development*:

> *If*, because of a "cumulative impact or a significant environmental or ecological effect," a single-family residence ***is considered a development***, then an SMA permit would be required. *If* a permit were required, it could not be approved because it would be inconsistent with the Community Plan.

Leone, 128 Hawai'i at 190, 192, 196, 284 P.3d at 963, 965, 969. (Emphasis added). In making its ripeness determination, the Leone Decision made no specific holding that the LEONES' proposed single-family residential use of Lot 15 could not have been shown to have no "cumulative impact or a significant environmental or ecological effect," and thereby *exempted* from the SMA permitting requirements. In fact, the Leone Decision specifically recognized that Hawai'i Revised Statutes, Chapter 205A, the State of Hawai'i Coastal Zone Management Act pursuant to which the COUNTY'S SMA Rules are promulgated, "*does not expressly require consistency for proposed land uses that are not considered developments.*" Leone, 128 Hawai'i at 196, 284 P.3d at 969 (footnote 8). (Emphasis added).

Finally, Cross-Appellees' repeated reliance on GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (2012) to support a requirement for community plan consistency for *any* proposed use within the SMA should be unavailing. GATRI specifically addressed the requirement of consistency for purposes of an *SMA permit application*, not an *exempt* use within the SMA. Moreover, this Honorable Court expressly recognized in GATRI the requirement for community consistency within the SMA context *for a development requiring an SMA permit.*[8]

B. THE LEONE DECISION DID NOT HOLD THE LEONES WERE PRECLUDED FROM OTHERWISE PURSUING AN EXEMPT SINGLE-FAMILY RESIDENCE IN THE SMA

"'[B]roadly speaking, mandates require respect for what the higher court decided, ***not for what it did not decide.***'" *See*, Snow-Erlin v. U.S., 470 F.3d 804, 807 (2006). (Emphasis added). It is also well established in Hawai'i that dicta not essential to the appellate court's holding is not binding on a circuit court:

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

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[8] Cross-Appellants reference here to page 3 of the Kihei-Makena Community Plan, which states the "Purpose of the Kihei-Makena Community Plan" and "The Role of the Community Plan in the Planning Process." JEFS Dkt 260 and PDF pp. 343-408.

Application of Sherretz, 39 Haw. 431, 437 (1952).[9]

The dicta statements which the Intermediate Court of Appeals otherwise made in footnotes 4 and 8 of the Leone Decision, suggesting the futility of the LEONES applying for their proposed single-family residence as an ***exempted use*** within the SMA, are not essential to the holding that the LEONES' claims were ripe. The content and effect of these footnotes as argued by the LEONES otherwise 1) are contrary to the SMA Rules, 2) are contrary to the county's history and practice in interpreting and implementing those rules, and 3) erroneously suggests that community plans dictate review of proposed exempt uses within the SMA. The SMA rules themselves and legislative history outlined in Cross-Appellants' Opening Brief on Cross-Appeal demonstrate these presumptions as incorrect. Once a proposed land use is determined exempt from the SMA permitting requirements, the requirement for community plan consistency imposed on "developments" is simply not applicable.

In this later circumstance, a proposed use exempted from the SMA permitting requirements is subject only to ministerial building permitting. As the legislative history of Maui County Code §2.80B demonstrates, building permits issued pursuant to MCC (otherwise subject to zoning compliance) were never intended to be subject to restriction by community planning designations. *See*, Cross-Appellants' Opening Brief on cross-appeal at pp. 43-45, and Appendices 1 and 2, Planning Committee Report No. 02-204, dated **December 17, 2002**, and Planning Committee Report No. 14-151, dated **December 5, 2014**, attached thereto.

Moreover, the dicta in footnotes 4 and 8 of the Leone Decision, made on a 12(b)(6) motion to dismiss, cannot be said to have fairly resolved the factual issues and circumstances surrounding *why* the LEONES' SMA Assessment Application was returned to them. *Cf.* Robinson v. Ariyoshi, 65 Hawai'i at 652-653, 658 P.2d at 297 (further holding "Upon continuation of the case at the trial level such determination would constitute the "law of the case" and would serve as the foundation for any further action. But it would not necessarily

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[9] *See also*, Robinson v. Ariyoshi, 65 Hawai'i 641, 652, 658 P.2d 287, 297 (1982) ("We have also noted that an inferior tribunal might not be bound under the doctrine of stare decisis if the pronouncement of a superior court is actually dictum."). "Since the appellate reversal provided no instruction to the contrary, the McBryde judgment after appeal was only a partial quantification of the parties' appurtenant water rights. No other final determination with res judicata effect remained."). (Emphasis added). Id. It is notable that apart from limiting its holding to the determination of ripeness, the Leone Decision made no instruction to the trial court regarding the substance of the LEONES' claims.

be completely dispositive of such an action. For *McBryde* necessarily left unresolved factual and legal issues that would require a determination by a trial court prior to any final judgment respecting the distribution of the waters of the Hanapepe.").

The evidence both admitted and excluded from this case demonstrated that the LEONES' SMA Application was returned because it was incomplete, and because the LEONES' real estate attorney wanted the "rejection" letter to make an appeal to the Planning Commission. JEFS Dkt 136 and PDF pp. 65-69. [*Transcript 2015-04-07 a.m.*]. The evidence *did not* show that the Director could not legally process the application, or that some "policy" which the LEONES' alleged but failed to demonstrate at trial was in place that precluded it.

C. THE LEONE DECISION DID NOT HOLD THAT THE LEONES' WERE NOT REQUIRED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES TO ESTABLISH A TAKING

Plaintiffs continue to assert that the Leone Decision was also relevant because the COUNTY mislead the jury to believe that the LEONES only needed to try harder to get approval for their proposed land use, including obtaining a community plan amendment. The argument continues to make erroneous presumptions about what the Leone Decision held. Leone, 128 Hawai'i at 193, 284 P.3d at 966 stated:

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

Notably, the Leone opinion post-dated the Planning Director's **October 25, 2007** letter returning the LEONES' SMA Assessment Application to Munekiyo by five (5) years. Not once during this period of time did the LEONES seek any review of the purported decision by the Planning Commission, despite making it a point to note that two of their neighbors did [Lambert and Sweeny], both of whom the LEONES also disclosed at trial were granted their exemptions to build their single-family residences.

As distinct from the ICA's ripeness analysis and ruling, the U.S. Supreme Court has repeatedly discussed the principle underlying its holding that:

> [A] land owner ***may not establish a taking*** before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation.

Tahoe-Sierra Preservation Council, Inc., 535 U.S. 302, 339 (2002) (citing Palazzolo, 533 U.S. at 620-621 (J. Kennedy, concurring)). (Emphasis added). The Court has additionally held that a final decision on land-use by the regulating authority means "allow[ing] regulatory agencies to exercise ***their full discretion in considering development plans*** for the property, ***including the opportunity to grant any variances or waivers allowed by law.***" Id. (Emphasis added).

> [I]n the face of ***respondent's refusal to follow the procedures for requesting a variance***, and its refusal to provide specific information about the variances it would require, ***respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.***

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 at 190 (1985) ("It is not clear whether the jury would have found that the respondent had been denied all reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance. . . . Accordingly, until the Commission determines that no variances will be granted, it is impossible for the jury to find, on this record, whether respondent 'will be unable to derive economic benefit' from the land."). (Emphasis added); *see also*, Leone, 128 Hawai'i at 191. 284 P.3d at 964.

Notably, in their first appeal the LEONE Plaintiffs had requested the Intermediate Court of Appeals grant them summary judgment on their 5th Amendment takings claim, stated in Counts I and II of their Complaint. ICA Case # S.C. 29696, *Leone Opening Brief, filed July 17, 2009*, and PDF pp. 26-27. In their Reply Brief, filed October 22, 2009, the LEONE Plaintiffs requested:

> The Orders and Judgments appealed from herein should be vacated in their entirety and the action should be remanded with instructions to enter partial summary judgment in favor of the Leones as to Counts I and II of their Complaint.

ICA Case # S.C. 29696, *Leone Appellate Reply Brief, filed October 22, 2009, and PDF p. 11.* The Intermediate Court of Appeals **DENIED** the LEONES' request for judgment as a matter of law, which is essentially the very same request they are now making of this Honorable Court on this appeal.

Notwithstanding the Intermediate Court of Appeals' rejection of the LEONES' request for judgment as a matter of law, Cross-Appellees throughout their Answering Brief misleadingly assert the COUNTY justifies "its taking of the[ir] property" by asserting it had legitimate government interest in doing so. First, the COUNTY has *never* conceded a taking of Plaintiffs' property occurred. "The COUNTY'S interests in protection of Hawai'i's shorelines, maintaining public beach access and open space, and preservation of Hawaiian history and cultural artifacts is otherwise indisputable. The relevance of these legitimate governmental interests to this Cross-Appeal is as expressed and embodied for implementation through the State Coastal Zone Management Act, and through the significance criteria contained in the SMA Rules for evaluating land uses proposed by land owners as exempt under the SMA Rules, not exclusively.

The LEONES demonstrated disregard for these significance criteria, and the trial court's rulings excluding the LEONES' demonstrated disregard for this criteria from the jury, inflicts harm on the COUNTYS' prerogatives to regulate and review proposed land uses for compliance, put in place to effect these indisputable governmental interests at issue.[10]

Also notable, the Leone opinion post-dated DOUG LEONE'S termination of Munekiyo's efforts to obtain a community plan amendment for Lot 15 by (8) years. DOUG LEONE simply abandoned that effort and has not taken it up since. JEFS Dkt 256 and PDF p. 465; JEFS Dkt 60 and PDF pp. 80-82 [*Transcript 2015-04-22 a.m.*]. The Leone Decision certainly did not hold that the LEONES were not required to exhaust this administrative process in order to establish a taking, only that they were not obligated to seek a community plan amendment in order *to ripen* their claims. *See*, Leone, 128 Hawai'i at 196, 284 P.3d at 969 ("Because a Community Plan amendment is not an administrative act, it cannot reasonably be required as a step in reaching a final agency determination ***for ripeness purposes***"). (Emphasis Added).

Otherwise, the Intermediate Court of Appeals in the Leone Decision notes this as an issue of first impression:

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[10] This certainly in-itself qualifies the COUNTY as an aggrieved party.

> As the issue was not presented in *GATRI*, the supreme court did not consider whether an amendment to the Community Plan was in the nature of a variance for the purpose of a takings claim ripeness analysis.
>
> * * * * *
>
> In some respects, the process for obtaining a Community Plan amendment appears similarly administrative in nature: an individual landowner may apply, on an individual basis, at any time for an amendment on a promulgated form; and the Planning Commission reviews the application and sets it for a public hearing. MCC § 2.80B.110(A), (B) (2006).

See, Leone, 128 Hawai'i at 195, 284 P.3d at 968. The Leone Decision goes on to describe the process as not a "reasonably" required step in the process of administrative review. Id., 128 Hawai'i at 195-6, 284 P.3d at 968-9.

Yet, the LEONES' land use planning consultant Munekiyo was otherwise crystal clear at trial that he had obtained community plan amendments for a least two (2) dozen clients prior to being hired to obtain one for the LEONES. JEFS Dkt 52 and PDF pp. 48-49. [*Transcript 2015-04-22 a.m.*]. Munekiyo even had determined a date by which he anticipated having the LEONES' community plan amendment. JEFS Dkt 60 and PDF p. 56 [*Transcript 2015-04-22 a.m.*]. In light of this testimony, and in light of the Leone Decision's expressed determination of its own holding in this regard as *limited to the issues of ripeness*, it is not correct to assume that the Leone Decision determined as a matter of law that the LEONES were not required to accomplish this step in order ***to establish a taking*** of Lot 15. Even if the Maui County Council and ultimately the mayor's approval was required, the administrative agency itself in this instance, which indisputably includes the Planning Commission as the designated authority under the SMA Rules, should have been given "its full discretion," and the opportunity "using its own reasonable procedures, to decide and explain the reach of [the] challenged regulation." *See*, Tahoe Sierra, *supra*. This is "***including the opportunity to grant any variances or waivers allowed by law,***" in this instance a community plan amendment.

D. THE LEONES' MISPLACED RELIANCE ON PALAZZOLO DEMONSTRATES THE RELEVANCE OF APPRAISER TED YAMAMURA'S APPRAISAL OF LOT 15, AS WELL AS THE ACTUAL SIGNIFICANCE OF THE LEONES' OWN APPRAISAL

Finally, Plaintiffs' misplaced reliance on the holding in Palazzolo v. Rhode Island, 533 U.S. 606 (2001), nevertheless undermines their claim for a taking under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). While the Palazzolo court did hold that

acquisition of title after the effective date of the regulations did not bar regulatory takings claims, Palazzolo also held:

> The State Supreme Court did not err in finding that petitioner failed to establish a deprivation of all economic use, for it is undisputed that his parcel retains significant development value. Petitioner is correct that, assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest. This is not the situation in this case, however. A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property "economically idle."

Palazzolo, 533 U.S. at 609, 121 S.Ct. at 2453-4 (citing Lucas, supra, at 1019). As noted above, by Plaintiffs' own conflicted argument, the deprivation of Lot 15 occurred in **1998**, when the KMCP park designation of Lot 15 was put in place, thereby divesting the Planning Director of any and all discretion to exempt their proposed single-family residential use from the SMA permitting requirements.

In light of this, the COUNTY'S appraiser Ted Yamamura's appraisal was relevant to demonstrate that notwithstanding this purported deprivation, the LEONES' lot retained significant development value as a single-family residence. JEFS Dkt 254 and PDF pp. 430-486. The LEONES simply cannot otherwise dispute the retained development value of Lot 15 for a single-family residence, despite the alleged deprivation of all economically beneficial use in **1998**. This is because their own appraiser Chris Ponsar opined that as of **October 25, 2007**, Lot 15 had retained significant development value as a single-family residence, and valued Lot 15 at $7.2 million. JEFS Dkt 260 and PDF pp. 497-531; JEFS Dkt 180 and PDF p. 61 [Transcript *2015-04-10 a.m.*].[11] This was nine (9) years after the KMCP designated Lot 15 for "park" use.

IV. CONCLUSION

The Leone Decision as argued by the LEONES and as applied as "the-law-of-case" to this dispute was erroneous.

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[11] The LEONES' purchase of Lot 15 for $3.75 million in **February 2000**, two (2) years after the alleged offending regulation in **1998**, also reflects significant development value of Lot 15, and undermines their Lucas claim of a total economic deprivation.

DATED: Wailuku, Maui, Hawaii, August 15, 2016.

PATRICK K. WONG
Corporation Counsel
Attorneys for Defendants/Appellees/
Cross-Appellants County of Maui and
William Spence, in his capacity
as Director of the Department of Planning

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

SCAP-15-0000599

IN THE SUPREME COURT OF THE STATE OF HAWAII

DOUGLAS LEONE AND PATRICIA A. PERKINS-LEONE, as Trustees under that certain unrecorded Leone-Perkins Family Trust dated August 26, 1999, as amended, Plaintiffs/Appellants/ Cross-Appellees, vs. COUNTY OF MAUI, a political subdivision of the State of Hawaii; WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui; DOE Entities 1-50, Defendants/Appellees Cross-Appellants.	CIVIL NO. 07-1-0496(3) (Other Civil Action) DECLARATION OF COUNSEL

DECLARATION OF COUNSEL

I, the undersigned counsel, declare under penalty of law that the following is true and correct.

1. I am currently a Deputy Corporation Counsel with the Department of Corporation Counsel for the County of Maui, and attorney for Defendants/Appelless/Cross-Appellants. I was

the County of Maui's and William Spence's lead trial counsel, and currently remain lead counsel handling the appeal of this case.

2. I make this declaration on personal knowledge.

3. Attached hereto as the Appendix are true and correct copies of two letters from Planning Director William Spence, both of which were copied to the Department of Corporation Counsel and which are retained in our Department's files.

4. The first letter is dated October 1, 2013, and is addressed to The Larson Family Trust.

5. The second letter is dated September 18, 2014 and is addressed to Mr. William Larson.

6. I participated in and handled the settlement negotiations on behalf of the County of Maui, with the Honorable Joel E. August (ret.) serving as mediator.

7. Neither of the attached letters were provided to William and Nancy Larson as consideration for the settlement of the Larson's claims and lawsuit against County.

DATED: Wailuku, Maui, Hawaii, August 15, 2016.

By _____
BRIAN A. BILBERRY

ALAN M. ARAKAWA
Mayor

WILLIAM R. SPENCE
Director

MICHELE CHOUTEAU McLEAN
Deputy Director

COUNTY OF MAUI

DEPARTMENT OF PLANNING

October 1, 2013

The Larson Family Trust
P. O. Box 6043
Carmel, California 93921

Dear Larson Family Trust:

SUBJECT: SPECIAL MANAGEMENT AREA (SMA) ASSESSMENT TO CONSTRUCT A SINGLE-FAMILY RESIDENCE, INCLUDING COVERED LANAIS, AND AN ATTACHED GARAGE TOTALLING 7,438 SQUARE FEET (SQ. FT.) ON A 0.57 ACRE PARCEL, AT 4500 MAKENA-KEONEOIO ROAD, PALAUEA BEACH AREA, MAKENA, ISLAND OF MAUI, HAWAII; TMK: (2) 2-1-011:016 (SMX 2008/0427) (SM5 2013/0239) (EAE 2013/0092)

The Department of Planning (Department) has reviewed your application for the above-referenced revised project which was received on May 17, 2013. In addition, the Department is in receipt of revised plans received on September 13, 2013. The Department understands that Munekiyo and Hiraga, Inc. is your authorized representative.

The purpose of this letter is to inform you that the SMA application has been deemed complete and no further agency comments are required. Furthermore, the application has been assessed with respect to the SMA review criteria for assessing environmental impacts, as required by the *Special Management Area Rules for the Maui Planning Commission* (SMA Rules), 12-202-12 Assessment and determination procedures.

The Department understands that:

1. The project is to construct a new Single-Family residence, pool, and garage, and appurtenant utilities on a vacant lot at the subject parcel as represented in the subject SMA Application. The revised site plans are A1 though A7, dated September 9, 2013, and LC-1, dated September 10, 2013. Related onsite infrastructure improvements include irrigation, utilities, and drainage improvements. The proposed action will utilize beach sand fill to elevate the structure up to four feet (4') to protect against coastal erosion and storm surge in the area as well as mitigate against extensive excavation in a culturally-sensitive area. The building height that is less than the thirty (30) feet permissible by Maui County Code (MCC) Title 19, Chapter 19.08.050 relating to residential districts, and MCC 19.12.040 relating to apartment districts;

EXHIBIT 1

APPENDIX

2. The parcel is a shoreline parcel and all development is to be constructed outside of the Shoreline Setback Area, defined as seventy feet (70') from the state-certified shoreline, as represented in site maps in the SMA Application. On August 23, 2012, Coastal Resources Planner James Buika, conducted a site visit to the parcel, with the Applicant's authorized representatives as well as the archaeologist for the project. During the site visit, the Department discussed all the remaining actions required by the Applicant to deem the application complete and to complete the required mitigation work to minimize potential environmental impacts required under the SMA Rules for the Maui Planning Commission, (Commission) consistent with the objectives and policies of the Coastal Zone Management Act, HRS 205A, as amended;

3. The parcel is zoned by the County "H-M, Hotel" which allows for development of a six (6) story hotel on a twenty-five percent (25%) lot coverage on the parcel, and the parcel is within the Urban Growth Boundary of the Maui Island Plan and is State zoned "Urban";

4. The Department acknowledges that the project was submitted as SMX 2008/0427 in 2008 and has been held up previously in order to evaluate the 1998 Kihei-Makena Community Plan designation of "Park" for the parcel. From the Department's understanding of the history of Palauea Beach Park, the Department has determined that the Kihei-Makena Community Plan's intent to preserve Palauea Beach Park has been met, through County acquisition of two (2) of the nine (9) parcels, which guarantees public access and use of the Palauea Beach Park; and

5. From the information provided in the SMA Application, and supplemental information requested by the Department submitted on September 12, 2013, the project has incorporated substantial mitigation into the project, commensurate with the surrounding environment, in order to protect the known cultural sites, and the marine and near-shore environment. The Department understands that the project is to be completed in a culturally-sensitive portion of Maui and that the subject parcel contains marine sand deposits, as well as three burial sites, located in the shoreline setback area, outside of the building footprint. The coastal region is noted for containing isolated and clustered burials as well as subsurface habitation areas. An Archaeological Monitoring Plan prepared for the parcel by Lisa J. Roturma-Hazuka and Jeffrey Pantaleo, of Archeological Services Hawaii, LLC, in April 2013, has been submitted to the Department of Land and Natural Resources-State Historic Preservation Division (DLNR-SHPD) for approval, and will be followed by the Applicant during all subsurface excavation activities associated with construction of the single-family residence and appurtenant structures in order to ensure protection and preservation of any potential cultural or historical resources. The Department also notes that the Applicant will not begin construction until the DLNR-SHPD has issued an acceptance letter for the submitted Archaeological Monitoring Plan.

The Department summarizes additional mitigation measures, to include:

1. The project is located outside of the Shoreline Setback Area as defined by the submitted site plans and the State Certified Shoreline Survey;
2. The project is located out of the historic tsunami zone, with no coastal hazards identified. A Flood Hazard Development Permit is not required;
3. The topography ranges from six feet to ten feet (6'-10') above sea level. The proposed development is sited at approximately ten feet (10') above sea level, accounting for additional fill, not impacting coastal processes;
4. The parcel is not located on a coastal dune, as determined by the Department during the site visit;
5. The proposed septic system is located away from the ocean and sited on the mauka portion of the property;
6. A drainage plan is proposed that will manage all storm water, will retain water on site, and will have no impact on downstream properties;
7. The Biological Resources Survey, submitted to the Department on September 12, 2013, was completed for the parcel has determined that there are no protected or endangered species located on site or known to frequent the site;
8. The pool will be designed as a separate structure from the house. Through this design, if the pool is threatened by coastal erosion, the house is not necessarily threatened;
9. The proposed project does not curtail the public's use of or access to the Palauea Beach Park parcel; and
10. The proposed project, consistent with the State Land Use Designation of "Urban", and the County Zoning of H-M Hotel District, is a low-density Single-Family Residence, intended for a family of four (4) on a County-zoned H-M Hotel District parcel that could, by County zoning code, accommodate one (1) six-story hotel building. Thus, by proposing a less intense use of Single-Family residence, environmental impacts, due to lessening of the intensification of use, will be minimized.

The Department has determined that the objectives and policies of Chapter 205A, Hawaii Revised Statute (HRS) Coastal Zone Management Act, have been met, including the objective of public participation. From the history presented in the Application, and the Departmental understanding of the history for Palauea Beach, the Department acknowledges that the Kihei-Makena Community Plan came into effect in 1998 with a Community Plan

designation of "Park" for a number of the Palauea Beach lots even though seven (7) lots are zoned hotel, including the subject parcel, and four (4) lots are zoned apartment. Beginning in 1999, the public requested the Maui County Mayor to purchase at least one (1) lot to preserve access to the beach. To meet this Kihei and Makena community request, the County purchased Lots 53 and 50, the two (2) County-owned beach park parcels, namely, TMK(s): (2) 2-2-011:018 and 019, adjacent to the subject parcel. These County actions have honored the request by the public to preserve access to Palauea Beach, fulfilling the Kihei-Makena Community Plan's requirement for meeting the community's intent of the "Park" designation for a number of the privately-owned parcels. Thus, the Department finds that public participation, as intended under HRS 205A, has effectively preserved Palauea Beach Park for public use.

Additionally, the Department concurs with your Shoreline Setback Line that is determined to be a 70-foot setback. The Shoreline Setback Area is all the lands lying between the State Certified Shoreline and the Shoreline Setback Line.

DEPARTMENT SMA ASSESSMENT AND DETERMINATION

In accordance with the SMA Rules, Sections 12-202-12 and 12-202-14, an assessment and determination has been made relative to the above-referenced project that:

1. The proposed action of a Single-Family residence, totaling less than 7,500 square feet, is not considered a "development" as defined in HRS 205A-22, Definitions;

2. The project has a valuation in excess of $500,000.00; (Valuation: $1,500,000.00)

3. The project, with mitigation incorporated as described above, does not pose any significant potential environmental or ecological effect, taking into account potential cumulative effects; and

4. The project is consistent with the objectives, policies, and SMA guidelines set forth in the HRS Chapter 205-A, and is consistent with the Countywide Policy Plan, Kihei-Makena Community Plan, and Zoning.

In consideration of the above determination, you are hereby granted a SMA Exemption (SM5 2013/0239). A SMA Use Permit is not required for the proposed project provided that the project is constructed and the work implemented in strict accordance to the representations made and plans submitted in the SMA Assessment application supplemental plans, as noted above and as submitted on September 12, 2013. In addition, other permits, such as building permits, may be required.

ENVIRONMENTAL ASSESSMENT EXEMPTION (EAE)

The proposed project has been reviewed in accordance with Chapter 343, HRS, relative to Environmental Impact Statements (EIS). Based on the scope of the proposed activity and the representations made by the Applicant, the Department has determined that the project does not trigger any of the eight (8) triggers requiring and EIS.

Pursuant to the aforementioned, you are hereby granted an EAE Exemption (EAE 2013/0092).

Finally, the Department asks that you become familiar with and abide by the *Shoreline Rules for the Maui Planning Commission* as found on the Maui County web site at the following URL: http://www.mauicounty.gov/documents/Boards%20and%20Commissions/Maui%20Planning%20Commissions/MPC%20Rules/MPC%20Ch%20203%20Shoreline%20Area%20Rules%202010-11-30.PDF .

The Department encourages you, or your authorized representative, to fully brief every contractor on site regarding the required mitigation measures as stated in your SMA Application and as summarized in this Assessment Letter.

Thank you for your cooperation. If additional clarification on the SMA Exemption is required, please contact Coastal Resources Planner James Buika at james.buika@mauicounty.gov or at (808) 270-6271.

Sincerely,

WILLIAM SPENCE
Planning Director

xc: Clayton I. Yoshida, AICP, Planning Program Administrator (PDF)
John S. Rapacz, Planning Program Administrator (PDF)
James A. Bulka, Coastal Resource Planner (PDF)
Mary Johnston, Deputy Corporation Counsel (PDF)
David Goode, Director, Department of Public Works
Development Services Administration
Rob Parsons, Mayor's Office
Department of Land and Natural Resources-State Historic Preservation Division, Maui
Department of Land and Natural Resources-Office of Conservation and Coastal Lands
Richard S. Young (PDF)
Munekiyo and Hiraga, Inc.
EAE File
CZM File (SMX)
Project File
General File

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ALAN M. ARAKAWA
Mayor

WILLIAM R. SPENCE
Director

MICHELE CHOUTEAU McLEAN
Deputy Director

COUNTY OF MAUI
DEPARTMENT OF PLANNING

September 18, 2014

Mr. William Larson
Travis C. Larson GST Exempt Trust
and Troy T. Larson GST Exempt Trust
P. O. Box 6043
Carmel, California 93921

Dear Mr. Larson:

SUBJECT: SPECIAL MANAGEMENT AREA (SMA) ASSESSMENT TO CONSTRUCT A SINGLE-FAMILY RESIDENCE, INCLUDING COVERED LANAIS AND AN ATTACHED GARAGE, TOTALLING 6,461 SQUARE FEET (SQ. FT.) ON A 0.44 ACRE PARCEL, LOCATED AT 4508 MAKENA-KEONEOIO ROAD, PALAUEA BEACH AREA, MAKENA, ISLAND OF MAUI, HAWAII; TMK: (2) 2-1-011:017 (SMX 2008/0428) (SM5 2014/0262) (EAE 2014/0069)

The Department of Planning (Department) has reviewed your application for the above-referenced revised project which was received on March 4, 2014. The Department understands that Munekiyo and Hiraga, Inc. is your authorized representative.

The purpose of this letter is to inform you that the SMA application has been deemed complete and no further agency comments are required. Furthermore, the application has been assessed with respect to the SMA review criteria for assessing environmental impacts, as required by the *Special Management Area Rules for the Maui Planning Commission* (SMA Rules), 12-202-12 Assessment and determination procedures.

The Department understands that:

1. The project is to construct a new Single-Family residence, pool, garage, and appurtenant utilities on a vacant lot at the subject parcel as represented in the subject SMA Application. The revised site plans are A1 though A7, dated February 1, 2014, and LC-1, dated February 1, 2014. Related onsite infrastructure improvements include irrigation, utilities, and drainage improvements. The proposed action will utilize beach-quality sand fill to elevate the structure up to five feet (5') to protect against coastal erosion and storm surge in the area as well as mitigate against extensive excavation in a culturally-sensitive area. Beach quality sand will be imported from inland dunes and no local beach sand will be used in the project fill. The building height is less than the thirty feet (30') permissible by Maui County Code (MCC) Title 19, Chapter 19.08.050, relating to residential districts, and MCC 19.12.040 relating to apartment districts;

2. The parcel is a shoreline parcel and all development is to be constructed outside of the Shoreline Setback Area, defined as seventy feet (70') from the state-certified shoreline, as represented in site maps in the SMA Application. On August 23, 2012, Coastal Resources Planner James Buika, conducted a site visit to the parcel, with the Applicant's authorized representatives as well as the archaeologist for the project. During the site visit, the Department discussed all the remaining actions required by the Applicant to deem the application complete and to complete the required mitigation work to minimize potential environmental impacts required under the SMA Rules for the Maui Planning Commission, (Commission) consistent with the objectives and policies of the Coastal Zone Management Act, Hawaii Revised Statute (HRS) 205A, as amended;

3. The parcel is zoned by the County Of Maui (County) as "H-M, Hotel" which allows for development of a six (6) story hotel on a twenty-five percent (25%) lot coverage on the parcel, and the parcel is within the Urban Growth Boundary of the Maui Island Plan and is State zoned "Urban";

4. The Department acknowledges that the project was submitted as SMX 2008/0427 in 2008 and has been held up previously in order to evaluate the 1998 Kihei-Makena Community Plan designation of "Park" for the parcel. Additionally, the 1985 Kihei-Makena Community Plan also called for a park at Palauea Beach. From the Department's understanding of the history of Palauea Beach Park, the Department has determined that the Kihei-Makena Community Plan's intent to preserve Palauea Beach Park has been met, through County acquisition of two (2) of the nine (9) parcels, which guarantees public access and use of the Palauea Beach Park; and

5. From the information provided in the SMA Application, as updated March 4, 2014, and as supplemented by additional archaeological information submitted on May 1, 2014, the project has incorporated substantial mitigation into the project, commensurate with the surrounding environment, in order to protect the known cultural sites, and the marine and near-shore environment. The Department understands that the project is to be completed in a culturally-sensitive portion of Maui and that the subject parcel contains marine sand deposits, as well as one (1) burial site, located outside the Shoreline Setback Area, within the building footprint. The coastal region is noted for containing isolated and clustered burials as well as subsurface habitation areas. An Archaeological Monitoring Plan (AMP) prepared for the parcel by Lisa J. Rotunna-Hazuka and Jeffrey Pantaleo, of Archeological Services Hawaii, LLC, in April 2013, was submitted to the Department of Land and Natural Resources-State Historic Preservation Division (DLNR-SHPD) and has been accepted as final by letter dated April 2, 2014. It will be followed by the Applicant during all subsurface excavation activities associated with construction of the Single-Family residence and appurtenant structures in order to ensure protection and preservation of any potential cultural or historical resources.

The Department summarizes additional mitigation measures, to include:

1. The project is located outside of the Shoreline Setback Area as defined by the submitted site plans and the State Certified Shoreline Survey;

2. The parcel has a Flood Zone designation VE with a Base Flood Elevation of ten feet (10') absl. A Flood Hazard Development Permit is required;

3. The topography ranges from six feet to ten feet (6'-10') above sea level. The proposed development is sited at approximately 10' above sea level, accounting for additional fill, not impacting coastal processes;

4. The parcel is not located on a coastal dune, as determined by the Department during the site visit;

5. The proposed septic system is located away from the ocean and situated on the mauka portion of the property;

6. A drainage plan is proposed that will manage all storm water, will retain water on site, and will have no impact on downstream properties;

7. The Biological Resources Survey, submitted to the Department on March 4, 2014, was completed for the parcel and has determined that there are no protected or endangered species located on site or known to frequent the site. The project is not expected to have a significant negative impact on the animal resources in this part of Maui;

8. The pool will be designed as a separate structure from the house. Through this design, if the pool is threatened by coastal erosion, the house is not necessarily threatened;

9. The proposed project does not curtail the public's use of or access to the Palauea Beach Park parcel;

10. The project will attempt to enhance any possible "peek-a-boo" views through from the road to the shoreline with the adjoining Single-Family residence, as discussed between the Department and the Applicant's architect. To this end landscaping should be minimized to protect this peek-a-boo view; and

11. The proposed project, consistent with the State Land Use Designation of "Urban", and the County Zoning of H-M Hotel District, is a low-density Single-Family Residence, intended for a family of four (4) on a County-zoned H-M Hotel District parcel, that could, by County zoning code, accommodate one (1) six-story hotel building. Thus, by proposing a less intense use of Single-Family residence, environmental impacts, due to lessening of the intensification of use, will be minimized.

The Department has determined that the objectives and policies of Chapter 205A, HRS Coastal Zone Management Act, have been met, including the objective of public participation. From the history presented in the Application, and the Departmental understanding of the history for Palauea Beach, the Department acknowledges that the Kihei-Makena Community Plan came into effect in 1998 with a Community Plan designation of "Park" for a number of the Palauea Beach lots even though seven (7) lots are zoned "Hotel", including the subject parcel, and four (4) lots are zoned "Apartment". Beginning in 1999, the public requested the Maui County Mayor to purchase at least one (1) lot to preserve access to the beach. To meet this Kihei and Makena community request, the County purchased Lots 53 and 50, the two (2) County-owned beach park parcels, namely, TMK(s): (2) 2-2-011:018 and 019. These County actions have honored the request by the public to preserve access to Palauea Beach, fulfilling the Kihei-Makena Community Plan's requirement for meeting the community's intent of the "Park" designation for a number of the privately-owned parcels. Thus, the Department finds that public participation, as intended under HRS 205A, has effectively preserved Palauea Beach Park for public use.

Additionally, the Department concurs with your Shoreline Setback Line that is determined to be a seventy-foot (70') setback. The Shoreline Setback Area is all the lands lying between the State Certified Shoreline and the Shoreline Setback Line.

DEPARTMENT SMA ASSESSMENT AND DETERMINATION

In accordance with the SMA Rules, Sections 12-202-12 and 12-202-14, an assessment and determination has been made relative to the above-referenced project that:

1. The proposed action of a Single-Family residence, totaling less than 7,500 sq. ft., is **not** considered a "development" as defined in HRS 205A-22, Definitions;

2. The project has a valuation in excess of $500,000.00; (Valuation: $1,500,000.00)

3. The project, with mitigation incorporated as described above, does not pose any significant potential environmental or ecological effect, taking into account potential cumulative effects; and

4. The project is consistent with the objectives, policies, and SMA guidelines set forth in the HRS Chapter 205-A, and is consistent with the Countywide Policy Plan, Kihei-Makena Community Plan, and Zoning.

In consideration of the above determination, you are hereby granted a SMA Exemption (SM5 2014/0262). A SMA Use Permit is not required for the proposed project provided that the project is constructed, and the work implemented, in strict accordance to the representations made and plans submitted in the SMA Assessment Application supplemental plans, as noted above, and as submitted on March 4, 2014. In addition, other permits, such as building permits, may be required.

ENVIRONMENTAL ASSESSMENT EXEMPTION (EAE)

The proposed project has been reviewed in accordance with Chapter 343, HRS, relative to Environmental Impact Statements (EIS). Based on the scope of the proposed activity and the representations made by the Applicant, the Department has determined that the project does not set off any of the eight (8) triggers requiring an EIS.

Pursuant to the aforementioned, you are hereby granted an EAE Exemption (EAE 2014/0069).

Finally, the Department asks that you become familiar with, and abide by, the *Shoreline Rules for the Maui Planning Commission* as found on the County web site at the following URL: http://www.mauicounty.gov/documents/Boards%20and%20Commissions/Maui%20Planning%20Commissions/MPC%20Rules/MPC%20Ch%20203%20Shoreline%20Area%20Rules%202010-11-30.PDF.

The Department encourages you, or your authorized representative, to fully brief every contractor on site regarding the required mitigation measures as stated in your SMA Assessment Application and as summarized in this letter.

Thank you for your cooperation. If additional clarification on the SMA Exemption is required, please contact Coastal Resources Planner James Buika via email at james.buika@mauicounty.gov or by phone at (808) 270-6271.

Sincerely,

WILLIAM SPENCE
Planning Director

xc: Clayton I. Yoshida, AICP, Planning Program Administrator (PDF)
John S. Rapacz, Planning Program Administrator (PDF)
James A. Buika, Coastal Resource Planner (PDF)
Patrick Wong, Corporation Counsel (PDF)
David Goode, Director, Department of Public Works (PDF)
Rob Parsons, Mayor's Office (PDF)
Richard S. Young, Architect (PDF)
Erin Mukai, Munekiyo and Hiraga, Inc. (PDF)
Development Services Administration
Department of Land and Natural Resources-State Historic Preservation Division, Maui
Department of Land and Natural Resources-Office of Conservation and Coastal Lands
CZM File (SMX/EAE)
Project File
General File

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SCAP-15-0000599

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

Plaintiffs/Appellants/
Cross-Appellees,

vs.

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

Defendants/Appellees
Cross-Appellants.

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

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

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

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Attorneys for Plaintiffs/Appellants/Cross Appellees

DATED: Wailuku, Maui, Hawaii, August 15, 2016.

PATRICK K. WONG
Corporation Counsel
Attorney for Defendants/Appellees/Cross-Appellants County of Maui and William Spence, in his capacity as Director of the Department of Planning

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

NOTICE OF ELECTRONIC FILING

Electronically Filed
Supreme Court
SCAP-15-0000599
15-AUG-2016
05:13 PM

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: MONDAY, AUGUST 15, 2016 05:13:41 PM
Filing Parties: County of Maui
Jeffrey S. Hunt, in his capacity as Director of the Departme
County of Maui
Jeffrey S. Hunt, in his capacity as Director of the Departme
Jeffrey S. Hunt, in his capacity as Director of the Departme
County of Maui
Case Type: Appeal
Lead Document(s): Reply Brief
Supporting Document(s): Declaration
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:
Thomas Walter Kolbe *(thomas.kolbe@co.maui.hi.us)*
Brian A. Bilberry *(brian.bilberry@co.maui.hi.us)*
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