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NO. CAAP-23-0000310

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAIʻI

HILO BAY MARINA, LLC, and KEAUKAHA MINISTRY LLC Plaintiffs-Appellants, vs. STATE OF HAWAII; BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES 1-10, Defendants-Appellees.	Civil No. 3CCV-22-0000095 APPEAL FROM: (1) FINAL JUDGMENT FILED ON APRIL 13, 2023, AND (2) DEFENDANT STATE OF HAWAII'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED ON MARCH 21, 2023 CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAIʻI HON. HENRY T. NAKAMOTO

DEFENDANTS-APPELLEES STATE OF HAWAIʻI,
AND
BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAIʻI'S
ANSWERING BRIEF

APPENDIX A

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DEFENDANTS-APPELLEES STATE OF HAWAIʻI AND BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII'S
ANSWERING BRIEF

I. INTRODUCTION

A missionary purchases land to use solely as a church and cemetery in 1922. The Territory of Hawaiʻi sells said land for nominal consideration as authorized by its Organic Statute. The deed contains a restriction that the land may only be used for church and cemetery purposes. A century later, that land has changed hands but still contains the deed restriction. This case asks if such a deed restriction is valid or if only the controlling land-use regulation is the County of Hawaii's "V, Resort-Hotel District." Clearly, the deed restriction is valid and the parties only have the property rights actually purchased in 1922.

In 2000, Plaintiff-Appellant Hilo Bay Marina, LLC ("Hilo Bay") purchased land in Hilo subject to a deed restriction, in place since 1922, requiring that the property be used for "church purposes only." In 2015, Hilo Bay sold part of the property to Plaintiff-Appellant Keaukaha Ministries LLC. Although both Appellants freely purchased the property at issue subject to the deed restriction, they now claim that the deed restriction violates HRS § 515-6(b), the First Amendment, and Haw. Const. art. I, § 4. Appellants argued before the Circuit Court that they are entitled to own the property in fee simple absolute rather than fee simple determinable because the State,[1] not a private party, owns the possibility of reverter. Because Appellants' theories lack merit, the State respectfully requests that this Court affirm the Circuit Court's Findings of Fact, Conclusions of Law, and Decision and Order and its Final Judgment.

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[1] The Department of Land and Natural Resources is a department of the sovereign state. The Board of Land and Natural Resources ("Board" or "BLNR") is the executive head of the Department. For purposes of this lawsuit, they are referred to as the State of Hawaiʻi or the State.

II. CONCISE STATEMENT OF THE CASE

Prior to Statehood, the Territorial Government had the authority to manage allowable land uses through land dispositions and use-restrictions. This was a valid exercise of police power for purposes of planning to ensure health, safety, and welfare, just as the State and counties do today through zoning laws.

In 1922, Heber J. Grant freely entered into an agreement to purchase land from the Territorial Government with the subject deed restriction.[2] CC Dkt. 114 [FOF 1] at 3.[3] He purchased land for the sole purpose of using it as a church and cemetery and bargained for a purchase price of $20 that accounted for that deed restriction. *See id.* The land has changed hands since its initial purchase by Heber J. Grant, and the deed restriction has remained part of the bargained price each time. *Id.* at 3-5. Appellant Hilo Bay Marina, LLC purchased the land with the deed restriction in 2000 and sold part of the parcel to Keaukaha Ministries LLC in 2015, also with the deed restriction in place. *Id.* Although the denominations have changed, for 100 years, the land has been used for church purposes, including under Appellants' ownership. *See id.* No

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[2] The subject deed restriction is:

> The land covered by this Grant is to be used for Church purposes only. In the event of its being used for other than Church purposes, this Grant shall become void and the land mentioned herein shall immediately revert and revest in the Territory of Hawaii; further, should any portion of the land herein mentioned be used for Cemetery purposes, same shall at all times be subject to all rules and regulations of the Territorial Board of Health as authorized by law for the interment of the dead, and respecting cemeteries and burying grounds.

CC Dkt. 114 [FOF 2] at 3.

[3] All page number citations refer to the PDF page number of the electronic document. All citations to "CC Dkt." refer to dockets filed in the Circuit Court of the Third Circuit of the State of Hawaii, case number 3CCV-22-0000095. All citations to "ICA Dkt." refer to dockets filed in the Intermediate Court of Appeals of the State of Hawaii, case number CAAP-23-0000310.

party was coerced into purchasing the land. And no party asserts any type of takings claim because this land has always carried the same deed restriction present in each transaction. *See id.*

Appellants filed their Complaint for Declaratory Relief on April 5, 2022. CC Dkt. 1. Appellants filed their First Amended Complaint on April 25, 2022. CC Dkt. 7. The First Amended Complaint alleged only that the deed restriction was void under HRS § 515-6(b) and the First Amendment of the U.S. Constitution based on *Lemon v. Kurtzman*, 403 U.S. 602 (1971). CC Dkt. 25 ¶¶ 25, 33. On June 27, 2022, the U.S. Supreme Court issued its decision in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), confirming that *Lemon* is no longer good law. Appellants then filed their Second Amended Complaint, adding a claim under Haw. Const. art. I, § 4 and alleging that under *Kennedy*, the deed restriction is void. CC Dkt. 40.

Appellants and the State filed cross-motions for summary judgment. *Id.* at 2; CC Dkt. 57 [State's MSJ]; CC Dkt. 89 [Plaintiffs' MSJ]; CC Dkt. 91 [Plaintiffs' Mem. Opp. to State's MSJ]; CC Dkt. 93 [State's Mem. Opp. to Plaintiffs' MSJ]; CC Dkt. 95 [State's Reply]; CC Dkt. 97 [Plaintiffs' Reply]. The Circuit Court found that neither HRS § 515-6(b), U.S. Const. amend. I, nor Haw. Const. art. I, § 4 voided the deed restriction. CC Dkt. 114 [COL 13, 19, 21-22] at 5-6. The Circuit Court entered final judgment in favor of the State and against Appellants. CC Dkt. 118 [Final Judgment].

III. STANDARD OF REVIEW

Summary Judgment is Reviewed *De Novo*

"On appeal, the grant or denial of summary judgment is reviewed de novo." *Tax Found.*, 144 Hawai'i 175, 185, 439 P.3d 127, 137 (2019) (citing *First Ins. Co. of Hawai'i v. A&B Properties*, 126 Hawai'i 406, 413-14, 271 P.3d 1165, 1172-73 (2012) (citation omitted)).

> [S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there

> is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and inferences drawn therefrom in the light most favorable to the party opposing the motion.

Id. at 185-86, 439 P.3d at 137-38 (citation omitted) (brackets in original).

IV. ARGUMENT

This Court should affirm the Circuit Court's Findings of Fact, Conclusions of Law, and Decision and Order and Final Judgment because each of Appellants' claims lacks merit and summary judgment was properly granted to the State. First, Appellants misinterpret the plain language of HRS § 515-6(b), which specifically does not void the deed restriction at issue here. Second, historical zoning practices and understandings of zoning practices in 1922 demonstrate that the deed restriction does not run afoul of the Establishment Clause of the First Amendment to the United States Constitution. And third, the deed restriction complies with Haw. Const. art. I, § 4, whether the *Kennedy* standard or the *Lemon* test applies.

A. HRS § 515-6(b) Does Not Void the Deed Restriction.

1. Appellants raise new arguments as to why HRS § 515-6(b) voids the deed restriction, but these arguments are waived.

Before the Circuit Court, Appellants contended that HRS § 515-6(b) invalidates religious-based restrictive covenants unless the grantor is a religious organization when arguing plain language. CC Dkt. 89 [Plaintiffs' MSJ] at 12-15. Remnants of this argument appear in the *in pari materia* arguments. ICA Dkt. 25 [Opening Brief] at 24-26. However, Appellants now seem to agree with the Circuit Court's conclusion that HRS § 515-6(b)'s exemption applies to a conveyance where the grantee is a religious organization. *Id.* at 22-26. This sudden turn seems to be grounded in their theory that if the grantee is not a religious organization, HRS § 515-6(b)

voids the deed restriction. This is incorrect for a multitude of reasons. But the primary issue is that Appellants never alleged they were not religious institutions during the Circuit Court proceedings. Their opening brief is the first instance of this ever being raised. *Id.* at 24 ("neither Plaintiff-Appellant Hilo Bay Marina, LLC nor Plaintiff Appellant Keaukaha Ministry is a religious institution"). But "it is not the function of the appellate court to conduct its own evidentiary analysis[.]" *Matter of Elaine Emma Short Revocable Living Tr. Agreement Dated July 17, 1984*, 147 Hawai‘i 456, 465, 465 P.3d 903, 912 (2020). Whether or not Appellants are religious organizations within the meaning of HRS § 515-6(b) would have been a question of fact for the Circuit Court to decide. Because Appellants failed to ever raise this issue, it is waived. *Kemp v. State of Hawai'i Child Support Enf't Agency*, 111 Hawai‘i 367, 391, 141 P.3d 1014, 1038 (2006); *see also State v. Moses*, 102 Hawai‘i 449, 456, 77 P.3d 940, 947 (2003) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases"); *State v. Hoglund*, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) ("generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal").

2. Even if Appellants' new argument about HRS § 515-6(b) is not waived, it still fails to fit a square peg in a round hole.

Even if Appellants had not waived this issue, HRS § 515-6(b) does not void this restriction. Appellants have never contested that the original transaction was from the Territory of Hawai‘i to Heber J. Grant of the Church of Latter-Day Saints. This transaction falls into the exemption of HRS § 515-6(b). If a subsequent sale of the property had the effect of rendering a reversionary interest void, the exemption would be meaningless because simply selling the property would negate the rights of the interest holder the exemption seeks to protect. Such an interpretation must be rejected as it would lead to absurd results. HRS § 1-15 ("Every

construction which leads to an absurdity shall be rejected.”).

The State does not concede that an inquiry into the legislative intent is necessary. *Citizens Against Reckless Dev. V. Zoning Bd. of Appeals*, 114 Hawai‘i 184, 193, 159 P.3d 143, 152 (2007) (holding an ambiguity in statutory language only exists when there is “doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute”). But even the legislative intent demonstrates the restrictive covenant falls under the exception clause of HRS § 515(b). The purpose of the exception clause, according to Appellants’ own analysis is “*for the benefit of the religious institution*.” CC Dkt. 89 [Plaintiffs’ MSJ] at 14 n. 4.[4] Here, the original transaction was at a reduced price for the benefit of the religious institution purchasing it. Each subsequent transaction has benefited the purchaser, including Plaintiffs, because each subsequent purchaser has purchased the property at a discounted rate.

3. <u>To the extent that Appellants revive arguments made before the Circuit Court, those arguments fall short.</u>

During the Circuit Court proceedings, Appellants argued that the exception in HRS § 515-6(b) only allows religious institutions to impose deed restrictions on another party. *See, e.g.*, CC Dkt. 89 [Plaintiffs’ MSJ] at 13. Although mostly disregarded on appeal, this argument reappears in the *in pari materia* discussion. ICA Dkt. 25 [Opening Brief] at 24-26.

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[4] In their Motion for Summary Judgment, Appellants even added: “In adopting Chapter 515, the Hawaii legislature stated that a primary purpose of the chapter ‘is to prohibit discrimination because of race, color, religion or national origin in connection with real property transactions[.] H. Journal, 4th Leg., S.C. Rep. 874 (Haw. 1967), relevant portions attached hereto as Exhibit “5”; Declaration of Clint K. Hamada ¶ 3. Moreover, ‘the bill reflects many of the provisions of Chapter 6 of the Model Anti-Discrimination Act of the National Conference of Commissioners on Uniform State Laws.’ Ex. 5 at 1. In turn, the comments to Chapter 6 of the Model Anti-Discrimination Act specify that subsection 6(b)’s exception is intended to be “for the benefit of the religious institution.” Handbook of the National Conference of Commissioners on Uniform State Laws, attached hereto as Exhibit “6”, at 207; Hamada Decl. ¶ 4.” CC Dkt. 89 [Plaintiffs’ MSJ] at 14 n. 4.

When a court undertakes statutory interpretation, its "'foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself.'" *Gillan v. Gov't Emps. Ins. Co.*, 119 Hawai'i 109, 115, 194 P.3d 1071, 1077 (2008) (citing *Colony Surf, Ltd. v. Dir. of the Dep't of Planning & Permitting*, 116 Hawai'i 510, 516, 174 P.3d 349, 355 (2007)). The plain language of HRS § 515-6(b) allows for restrictive covenants for religious purposes under certain circumstances.

The statute on its face articulates that certain deed restrictions on the basis of religion are legal under certain conditions. HRS § 515-6(b) ("is void, except a limitation, on the basis of religion, on the use of real property"). The grantor is not specified. Rather, the statute only specifies the grantee, which is identified after the language "held by." *Id.* As no grantor is specified, the plain language of HRS § 515-6(b) does not prohibit anyone, including the State and its predecessor Territory, from being the grantor of such a restriction as long as the grantee is one of the ones enumerated in the statute. *Id.*; *see also* CC Dkt. 57 [State's MSJ] at 9-10; CC Dkt. 95 [State's Reply] at 7-9.

Appellants contend that HRS § 515-6(b) should be read *in pari materia* with other sections of HRS § 515. The sections cited are not *in pari materia* because the other sections of HRS Chapter 515 do not address the same subject matter. *State v. Kamana'o*, 118 Hawai'i 210, 218, 188 P.3d 724, 732 (2008). Appellants cite HRS § 515-3, 6, 8. But their analysis falls short. HRS § 515-8 reads:

> It is not a discriminatory practice for <u>a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization</u> to give preference to members of the same religion in a real property transaction, unless membership in such religion is restricted on account of race, color, or ancestry.

HRS § 515-8 (emphasis added). The underlined portion is the language also present in HRS §

515-6(b), but HRS § 515-6(b) is not about a preference in a real estate transaction, it is about a restraint on the alienation of property. These statutes address different breadths of restrictions on what cannot be discriminated against, i.e., the number of specific bases prohibited by HRS § 515-6(b) on the left vs. HRS § 515-8's much less comprehensive list on the right:

HRS § 515-6(b)	HRS § 515-8
on the basis of race, sex, including gender identity or expression, sexual orientation, color, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection	on account of race, color, or ancestry

And on whom the actor in the statute is, i.e., the application to only religious institutions run by religious organizations vs. any religious or charitable or educational institution run by religious organizations:

held by a religious institution or organization or by a religious or charitable organization operated, supervised, or controlled by a religious institution or organization, and used for religious or charitable purposes	a religious institution or organization or a charitable or educational organization operated, supervised, or controlled by a religious institution or organization **to give preference**

Similarly, HRS § 515-4(b) provides that it is not a discriminatory practice for a religious institution used for church purposes to refuse rent or lease housing accommodations based on "sex, including gender identity or expression, sexual orientation or marital status[.]" HRS § 515-4. HRS § 515-6(b) is not about rent or lease housing accommodations. And the breadth of HRS § 515-4(b) refers to refusal to rent based solely on sex, sexual orientation, or marital status. It does not allow refusal based on religion.

These distinct differences indicate that the statutes are *expressio unius est exclusio alterius* to each other. Under this cannon of statutory interpretation, "[w]here [the legislature]

includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

B. The Deed Restriction Does Not Violate the Establishment Clause of the United States Constitution.

"Government 'may not **coerce** anyone to attend church,' . . . nor may it force citizens to engage in 'a formal religious exercise.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022) (citing *Lee v. Weisman*, 505 U.S. 577, 589 (1992)) (emphasis added). No party in this case has been coerced. Appellants have never attempted to argue that Heber J. Grant was forced to transact with the Territorial Government.[5] The Establishment Clause does not "'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious.'" *Id.* at 2427. And the Establishment Clause "must be interpreted by 'reference to historical practices and understandings.'" *Id.* at 2428 (citing *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014)).

The Supreme Court of the United States has upheld numerous laws with religious roots. *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (analyzing certain historical elements of religious establishments); *McGowan v. Maryland*, 366 U.S. 420, 437–440 (1961) (analyzing Sunday closing laws by looking to their "place . . . in the First 'Amendment's history"); *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664, 680 (1970) (analyzing the "history and uninterrupted practice" of church tax exemptions). In this case, the historical practices and understandings inquiry begins with the sovereign's right to zone under the police powers. *Vill. Of*

[5] Appellants have likewise never argued that they were coerced into purchasing the property. And that argument would fail regardless as the State has simply been the holder of the possibility of reverter since the original transaction and did not transact with Appellants when they purchased the encumbered property.

Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926). As the Circuit Court correctly found, it was common practice for the Territorial Government to engage in an early form of use-zoning through the sale of land with deed restrictions. CC Dkt. 114 [FOF 3] at 3. This included the sale of government lands for churches of many denominations as well as cemeteries and schools. *Id.*[6] Today, this same type of zoning is done through special-use permitting, which has been found to pass constitutional muster. *See e.g. Islamic Center of Mississippi, Inc. v. City of Starkville*, Miss., 840 F.2d 293 (5th Cir. 1988) (finding denial of special use permit to mosque violated free exercise clause of First Amendment); *Church of Our Savior v. City of Jacksonville Beach*, 108 F. Supp. 3d 1259 (M.D. Fla. 2015) (holding grant of conditional use permit to church with physical exactions to accommodate increased egress and ingress was constitutional); *City of Chicago Heights v. Living Word Outreach Full Gospel Church and Ministries, Inc.*, 749 N.E.2d 916 (Ill. 2001) (holding denial of church's application for special use permit was arbitrary and capricious and bore no substantial relation to police powers); *Hope Deliverance Center, Inc. v. Zoning Bd. Of Appeals of City of Chicago*, 452 N.E.2d 630 (Ill. App. Ct. 1983) (holding zoning board improperly denied church's special use permit when area in which it applied was suitable for such a use).

A hundred years ago, the government had similar concerns for public health, safety, and welfare as it does today regarding zoning. Viewed through this lens, the deed restriction in this deed (and in the deeds of other similarly situated parcels) is merely an exercise of the police power to build a diverse and self-contained Hawai‘i community, not an imposition of religion. Today, a church could apply for a special-use permit to use a parcel for church purposes and that would be constitutionally valid. Haw. Cnty. Rev. Ord. § 25-2-61 (1999). One hundred years ago,

[6] *See, e.g.*, CC Dkts. 58-85 [Exhibits to State's MSJ].

a church could request to buy land for the sole purpose using that land for church purposes. CC Dkt. 114 [FOF 3] at 3. This is no different and just as constitutionally valid.

Appellants spend pages of their brief attempting to analogize religious activities in schools to a freely negotiated deed restriction. ICA Dkt. 25 [Opening Brief] at 36-43. Appellants mainly rely on *Lee v. Weisman*,[7] which involved an imposition of prayer during school graduations, events students were unlikely to forego. *Id.* at 40-41. But government-imposed recitation of prayer during a school event simply is not comparable to a freely negotiated deed restriction.

Similarly, the emphasis on *Everson v. Board of Education* is misplaced. *Id.* at 37-38. Appellants contend that the deed restriction is the equivalent of the State setting up a church. *Id.* at 38. The deed restriction does not set up a state church. Nor a federal church. Nor any kind of church. It encumbers a property for "church purposes" without further specificity or requirement as to the denomination. This is not Hawaii's version of the Church of England.

As Appellants themselves admit, the Tenth Amendment reserves the police powers—including the power to zone—to the states. ICA Dkt. 25 [Opening Brief] at 42. Like the First Amendment, the Tenth Amendment was adopted in 1791 as part of the Bill of Rights. Clearly, then, police powers, such as zoning, have been understood as an inherent right of each sovereign state for at least as long as the Establishment Clause has existed. Zoning inevitably must interact with religious organizations. Undoubtedly, "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan*, 366 U.S. at 442. And as discussed, zoning

[7] Appellants also rely on *Wallace v. Jaffree*, but that case applied *Lemon* (overruled by *Kennedy*) to reach its holding. ICA Dkt. 25 [Opening Brief] at 39-40.

practices and their interactions with religious organizations, including the issuance of special-use permits, are constitutional.

The use of restrictive covenants to regulate land use by local governments is not limited to the Territory of Hawai‘i. Scholars suggest that restrictive covenants are an “alternative and more or less interchangeable means of producing generally similar results” as zoning.[8] Throughout the United States, “public regulation itself often uses private servitudes as tools of regulation.”[9] In the early twentieth century, public use of both zoning and restrictive covenants to regulate land use gained popularity.[10]

The deed restriction in this case was part and parcel of valid local land use regulation in the Territory of Hawai‘i.

C. The Deed Restriction Does Not Violate Article I, Section 4 of the Hawai‘i Constitution.

In the past, Hawai‘i courts have interpreted Haw. Const. art. I § 4 co-extensively with the First Amendment of the United States Constitution. *See, e.g.*, *Koolau Baptist Church v. Department of Labor,* 68 Haw. 410, 718 P.2d 267 (1986) (applying First Amendment establishment clause precedent to claim brought under state and federal constitutions).[11] The

[8] Valerie Jaffee, Note, *Private Law or Social Norms? The Use of Restrictive Covenants in Beaver Hills*, 116 Yale L.J. 1302, 1306-07 (2007); Robert R. Wright, *Constitutional Rights and Land Use Planning: The New and the Old Reality*, 24 Duke L.J. 841, 847 n.27 (1977).
[9] Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. Cal. L. Rev. 1261, 1263 (1982).
[10] *See* Michael Allan Wolf, *The Zoning of America: Euclid v. Ambler* 28-30 (2008).
[11] Additional cases relying on First Amendment principles and authorities to resolve claims involving religious freedoms include, *Dedman v. Board of Land & Natural Resources,* 69 Haw. 255, 740 P.2d 28 (1987), *cert. denied,* 485 U.S. 1020 (1988); *State v. Andrews,* 65 Haw. 289, 651 P.2d 473 (1982); *Medeiros v. Kiyosaki,* 52 Haw. 436, 478 P.2d 314 (1970); *State v. Blake,* 5 Haw.App. 411, 695 P.2d 336 (1985). The Hawai‘i Supreme Court also relies on First Amendment jurisprudence to resolve free speech claims brought under the state constitution. *See, e.g., State v. Hawkins,* 64 Haw. 499, 643 P.2d 1058 (commercial speech), *cert. denied,* 459 U.S. 824 (1982); *State v. Bloss,* 64 Haw. 148, 637 P.2d 1117 (1981) (same), *cert. denied,* 459 U.S.

Hawai‘i Constitution has mirrored the First Amendment of the United States Constitution since the first state constitution was promulgated in 1959. Haw. Const. art. I, § 3 (1959). This language is now reflected in Haw. Const. art. I § 4. *Compare* U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion") *with* Haw. Const. art. I § 4 ("No law shall be enacted respecting an establishment of religion").[12]

To the extent this Court interprets art. I, § 4 of the Hawai‘i Constitution consistently with the First Amendment to the U.S. Constitution, Appellants' art. I, § 4 claim fails for the same reasons articulated in section IV.B., *supra*. *Kennedy* stated that the U.S. Supreme Court had "long ago abandoned *Lemon* and its endorsement test offshoot," 142 S. Ct. at 2411, and determined that the analysis into historical practices and understandings is the proper test under the First Amendment. The deed restriction passes that test.

Even if the *Lemon* test applies to art. I, § 4, however, Appellants would not succeed. The three-part *Lemon* test requires that the statute (1) have a secular legislative purpose; (2) not advance or inhibit religion; and (3) not foster excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13.

With respect to the first prong of *Lemon*, the deed restriction has a clear secular purpose—zoning under the police powers. Even a policy is intended in part to protect a religious practice, that "would not give rise to a finding of an impermissible religious motivation." *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1044 (9th Cir. 2007).[13] Courts "have long

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824 (1982); *State v. Bumanglag,* 63 Haw. 596, 634 P.2d 80 (1981) (pornography); *State v. Manzo,* 58 Haw. 440, 573 P.2d 945 (1977) (same); *Cahill v. Hawaiian Paradise Park Corp.,* 56 Haw. 522, 543 P.2d 1356 (1975) (defamation).

[12] Relevant portions of the 1978 Hawaii Constitutional Convention Studies note that the Hawai‘i constitution follows the U.S. Supreme Court's "interpretations of identical language in the U.S. Constitution." CC Dkt. 89 [Ex. 7 of Plaintiffs' MSJ] at 69.

[13] The case law analysis in this section examines federal cases interpreting *Lemon*, but these

recognized the historical, social and cultural significance of religion in our lives and in the world," and "such secular motivations"—including, for example, "the government's protection of many religious landmarks in this country"—do not run afoul of *Lemon*. *Id.* (internal citations omitted).

The second prong of *Lemon* inquires "whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984). Courts "often look to the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between government and religious authority." *Agostini v. Felton*, 521 U.S. 203, 232 (1997). Where an action falls short of absolute vindication of a religious group's interests, the action is considered permissible accommodation. *Access Fund*, 499 F.3d at 1045 (citing *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1046 (9th Cir.2007)). In *Access Fund*, the Ninth Circuit held that the second prong of *Lemon* permitted an action when a non-member of the religious group could not "credibly view the action as preferring the [religion in question] over other religious choices." *Id.* Here, multiple religious groups have benefited from the property. Different purchasers have used the property for the benefit of different religious denominations. The deed restriction shows no preference for one denomination and does not endorse religion or any particular religious group.

The final prong of *Lemon* prohibits excessive entanglement by the government with religion. The *Lemon* Court found that surveillance required to enforce the state's statutory

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cases, and the cases cited by Appellants in their analysis of *Lemon*, have been implicitly overturned by *Kennedy* to the extent that they interpret *Lemon*. The only Hawai'i case that addresses *Lemon* is *Koolau Baptist Church v. Dep't of Lab. & Indus. Rels.*, 68 Haw. 410, 718 P.2d 267 (1986).

teachers' salary supplement, which was dependent on conformance with non-religious curriculum, would require monitoring to a degree "pregnant with dangers of excessive government direction of church schools and hence of churches." *Lemon*, 403 U.S. 620. But not every form of government surveillance and monitoring reaches this degree. Routine administrative or compliance activities do not constitute impermissible "interference of . . . secular authorities in religious affairs." *Cammack v. Waihee*, 932 F.2d 765, 780 (9th Cir. 1991). The surveillance and monitoring required in this case are no different than that of what is required to enforce any other zoning regulation. In fact, a special-use permit for a church would be subject to the same surveillance. The question of entanglement comes back to the sovereign's police powers—and zoning fits squarely within these powers.[14]

Appellants cite little case law to argue that the deed restriction violates the *Lemon*. ICA Dkt. 25 [Opening Brief] at 29-31. There is little precedent in state law outside of the Court's adoption of *Lemon* in *Koolau Baptist Church* in 1986. The difficulty with applying *Lemon* is that the case law interpreting it comes from federal precedent. This begs the question of which cases should or should not apply because eventually that precedent wholly rejects *Lemon*. Either *Lemon* is interpreted in a vacuum, or its progeny is cherry picked.

D. Appellants Waived Challenging that the Deed Restriction Was a Form of Early Zoning and That Zoning Practice is Legal

Appellants challenge the Circuit Court's finding that the deed restriction was part of an

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[14] Appellants assert that enforcement of the restriction would violate the state action doctrine in *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). ICA Dkt. 25 [Opening Brief] at 43. First, the deed restriction is legally valid, so its enforcement is also legal. Second, there is no enforcement within the meaning of *Shelley* because the State holds a possibility of reverter, meaning the property reverts back to the State *automatically* if the condition is violated. Third, *Shelley* held that judicial enforcement of a racially restrictive covenant would violate the Equal Protection Clause of the Fourteenth Amendment, a claim not at issue in this case. Moreover, *Shelley* has been narrowly construed to apply to restrictive covenants based on race not religion.

early-form of zoning. ICA Dkt. 25 [Opening Brief] at 18-21. But Appellants waived this argument. They did not challenge this argument when it was presented to the Circuit Court. They instead asserted that that form of zoning would be illegal today. CC Dkt. 91 [Mem. Opp. to State's MSJ] at 15-18. In fact, when asked if their argument was that the deed restriction was part of an early form of zoning but is now illegal, Appellants responded "yes." ICA Dkt. 17 [Transcript] at 32-33. As discussed in Section IV.A.2., *supra*, failure to raise this argument results in waiver.

If this Court entertains the challenge to the conclusion that deed restrictions constituted an early form of zoning, it should be affirmed. Prior to Statehood, the Territorial Government had the authority to manage allowable land uses through land dispositions and zoning. An Act to Provide a Government for the Territory of Hawai'i, ch. 339, 31 Stat. 141 (1900). The Territorial Government also pre-dated the Hawai'i County Zoning Code. *See* Haw. Rev. Stat. (HRS) § 46-4 (2021). During this time, it was common practice for the Territorial Governor to sell its lands with lot restrictions as a way of ensuring a family-based mix of uses in a particular community—a form of early zoning. *See* CC Dkt. 58-85 [Exhibits to State's MSJ].[15] When Hawai'i County ultimately developed its modern zoning regulations, it accounted for pre-existing lot restrictions from the territorial days and contemplated these pre-existing uses in contemporary zoning decisions. *See* Haw. Cnty. Rev. Ord. § 23-118 (2002) (establishing criteria to certify pre-existing lots). Between 1911 and 1925, the Territorial Governor sold at least twenty-nine lots with deed restrictions for either church purposes, cemetery purposes, or school purposes on the Island of Hawai'i, including Plaintiffs' property. CC Dkt. 58-85 [Exhibits to State's MSJ].

[15] The Exhibits contain deeds with use-restrictions and maps of zoned areas of Hawai'i from 1911—1925, showing how land was subdivided and zoned during the Territorial Days.

This early method of zoning was a valid exercise of police power on use-restrictions for purposes of planning to ensure health, safety, and welfare, just as modern municipalities do today through zoning ordinances and special use permits.[16]

A court can only find a zoning policy unenforceable if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid*, 272 U.S. at 395. Local governments imposing zoning restrictions, "from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation[,]" and "their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable." *Gorieb v. Fox*, 274 U.S. 603, 608 (1927). Moreover, "the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use . . . is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality." *Euclid*, 272 U.S. at 388. The rationale is not a government imposition of religion, but rather a recognition that it is within the interest of public health, safety, and welfare to build a community that allows people to live near schools, churches, and cemeteries.

Appellants challenge the Organic Act as an authority to zone. ICA Dkt. 25 [Opening Brief] at 19. Specifically, section 73(k) of the Organic Act granted the Territory the ability to sell land for nominal consideration to religious organizations if the land had been occupied as a church for the preceding five years. An Act to Provide a Government for the Territory of Hawai'i, ch. 339, 31 Stat. 141 (1900). Contrary to Appellants' assertion that the Territory could

[16] Appellants contend that the Court should have considered deliberations of the Territorial Governor or Commissioner of Public Lands when selling lots with deed restrictions. ICA Dkt. 25 [Opening Brief] at 19. First, Appellants never presented any such evidence or even suggested it existed. Second, the mere possibility that contradictory evidence *may* exist does not render the Circuit Court's conclusion invalid.

include no restrictive provisions in such a sale, it would make no sense to allow a sale for nominal consideration if the organization could turn around and sell the land at fair market value. Clearly, the Organic Act's purpose was to allow religious organizations to exist without the significant financial burdens of land ownership—similar to tax exemptions for or leasing under eleemosynary statutes to religious organizations today. Appellants and their predecessors-in-interest have freely elected to benefit from this discounted property for over 100 years.

Finally, *Euclid*, a case decided only four years after this deed restriction was negotiated, stands for the proposition that the State's police powers grant it broad discretion to zone unless a court finds that a policy is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid*, 272 U.S. at 395. *Euclid*, rather than limiting the State's zoning powers, clarifies that the State has this broad power unless an exercise is so clearly arbitrary and unreasonable as to have no relation to the police powers.

Appellants further argue the deed restriction constitutes spot zoning. But spot zoning occurs when a small area of land is singled out and specially zoned for a use classification different from the surrounding area. *Life of the Land, Inc. v. City Council of City & Cnty. of Honolulu*, 61 Haw. 390, 429, 606 P.2d 866, 890 (1980). First, the Territory did not single out this parcel. The Territory freely sold the property to the original purchaser for nominal consideration in exchange for the Territory's retention of a possibility of reverter. Second, Appellants even supplied the Circuit Court with the assertion that there are at least twenty-one places of worship nearby, which runs counter to the definition of spot zoning—singling out property for a use classification different from the surrounding area. CC Dkt. 91 [Mem. Opp. to State MSJ] at 17. Finally, spot zoning raises questions under the Fourteenth and Fifth Amendments[17] of the United

[17] Regarding Fourteenth Amendment Equal Protection, the original purchaser freely contracted

States Constitution, which Appellants never raised.

Appellants identify HRS § 46-4 (2021) ("County Zoning") as voiding the deed restriction because that statute requires the counties to develop general plans based on the state functional plans and zone within the framework of those plans. Simply put, that statute applies to counties, not the State or its predecessor—the Territory. HRS § 46-4 is merely a limitation on home rule that does not apply to the State.

V. CONCLUSION

The State respectfully asks that the Circuit Court's Order and Final Judgment be affirmed.

DATED: Honolulu, Hawaiʻi, December 13, 2023.

/s/ Miranda C. Steed
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with the Territory. The Territory did not single out the original purchaser as a class. Similarly, there is no "taking" because the property was originally purchased with the encumbrance in place. The government did not subsequently impose the restriction. Because the restriction has always been in place, no interest in property has even been "taken."

NO. CAAP-23-0000310

IN THE INTERMEDIATE COURT OF APPEALS

STATE OF HAWAIʻI

HILO BAY MARINA, LLC, and KEAUKAHA MINISTRY LLC Plaintiffs-Appellants, vs. STATE OF HAWAII; BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES 1-10, Defendants-Appellees.	Civil No. 3CCV-22-0000095 APPEAL FROM: (1) FINAL JUDGMENT FILED ON APRIL 13, 2023, AND (2) DEFEDANT STATE OF HAWAII'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED ON MARCH 21, 2023 CIRCUIT COURT OF THE THIRD CIRCUIT, STATE OF HAWAIʻI HON. HENRY T. NAKAMOTO

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DATED: Honolulu, Hawaiʻi, December 13, 2023.

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