NO. 29696

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI`I

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

Plaintiffs/Appellants,

vs.

COUNTY OF MAUI, a political subdivision of the State of Hawaii; JEFFREY S. HUNT, in his capacity as Director of the Department of Planning of the County of Maui; DOE ENTITIES 1-50,

Defendants/Appellees.

Civil No. 07-1-0496(3)

APPEAL FROM: (1) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT FILED NOVEMBER 19, 2007 OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT ENTERED ON MARCH 2, 2009; (2) FINAL JUDGMENT ENTERED MARCH 2, 2009; (3) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR AN AWARD OF FEES, COSTS AND EXPENSES ENTERED HEREIN ON MAY 18, 2009; AND (4) AMENDED JUDGMENT ENTERED HEREIN ON JUNE 5, 2009

Circuit Court of the Second Circuit, State of Hawaii

Honorable Joseph E. Cardoza

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DEFENDANTS/APPELLEES COUNTY OF MAUI AND JEFFREY S. HUNT'S ANSWERING BRIEF

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DEFENDANTS/APPELLEES COUNTY OF MAUI AND JEFFREY S. HUNT'S ANSWERING BRIEF

I. STATEMENT OF FACTS

A. Nature of the Case

Plaintiffs/Appellants Douglas Leone and Patricia A. Perkins-Leone, Trustees ("Appellants") filed a Complaint in the Second Circuit Court on November 19, 2007, alleging that the County of Maui ("Appellee") had inversely condemned Appellants' lot located on Palauea Beach in Makena, Maui, Hawaii, purchased by them in 2000. The taking by Appellee County of Maui is alleged to have occurred at the time and as a result of the 1998 Kihei-Makena Community Plan ("KMCP") designation of Appellants' property for "Park," a land-use designation which Appellants assert does not allow them to make any economically viable use of their property. Appellants claim they are entitled to compensation for this "taking" pursuant to both the Hawaii State Constitution and the Federal Constitution. The Complaint also alleges that the actions of Appellees were taken "under color of state law," and that Appellants are entitled to damages arising from violation of their federal equal protection and substantive due process rights pursuant to 42 U.S.C. § 1983.

The specific issue before this Appellate Court is whether the Circuit Court was correct in its ruling that it did not have jurisdiction over Appellants' claims on the basis that their claims were not ripe for adjudication as a result of the Appellants' failure to pursue all remedies available to them before initiating

the lawsuit.

The Circuit Court held in its Order Granting Appellants' Motion to Dismiss the Complaint Filed November 19, 2007 or in the Alternative, Motion for Summary Judgment or Partial Summary Judgment (R:CV07-1-0496, Doc. 0088, PDF 2109) (Appendix 1.) that the following procedural remedies which could have ameliorated the problems resulting from the KMCP "Park" designation for their property were available to Appellants and that they were required to pursue the remedies prior to filing their lawsuit in the Second Circuit Court:

1) Appellants failed to appeal to the Maui Planning Commission the decision of the Planning Department's Director ("Director") that their SMA Assessment Application could not be processed because of the inconsistency between the proposed use of their property to build a dwelling and the KMCP designation of their property for "Park."

2) Appellants failed to seek an exemption from the SMA requirements and apply directly for an SMA permit, an application that could be processed, notwithstanding the inconsistency, if an application for a Community Plan Amendment to change their property's use designation were processed concurrently with the permit application.

3) Appellants did not pursue obtaining a final decision about how they would be able to use their property from the final decision-maker, i.e., the Maui County Council, through the process of submitting an Application for an Amendment to the KMCP to change the "Park" designation for their lot.

Appellants argue in their Opening Brief that the Circuit Court erred in holding that they had not exhausted the administrative remedy available to them by way of an appeal to the Planning Commission of the Director's determination that their SMA Assessment Application could not be processed. They assert that the Special Management Area ("SMA") Rules for the Maui Planning Commission do not provide for an appeal from the Director's decision.

Appellants argue in their Opening Brief that the Circuit Court erred in holding that their takings claim was not ripe for adjudication because they had not applied for an amendment to the KMCP to change the land-use designation of their property from "Park" to "Residential." Notwithstanding the fact that the form to apply for a community plan amendment is readily available, and that persons who have applied for such amendments have been successful, Appellants claim they do not have to exhaust the plan amendment procedure because it is a "legislative" act, and they are not required to "change the law."

Appellants argue that a "final decision," as the term is defined by the United States Supreme Court in Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), the seminal case on ripeness in the land use context, occurred when the Planning Department's Director notified them by letter dated October 25, 2007 that pursuant to § 12-202-12 (f)(5) of the Special Management Area Rules of the Maui Planning Commission their SMA Assessment Application could not be processed due to the lack of consistency between their proposed use of their

property to build a house and the KMCP's designated use for their property as "Park." The Maui County Council is undisputedly the County entity that both approves a community plan and processes amendments to the community plans, and is the final decision-maker as to whether a person will be granted an amendment to a community plan to change a land-use designation. However, Appellants are asking this Court to find that it was the Director's determination that he could not process their SMA Assessment Application that was the "final decision" as to how they could use their property that complied with the Williamson ripeness requirement that:

> ". . . a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Id. at 186.

Finally, Appellants' position that landowners are not required to apply for a community plan amendment and have the application denied by the Maui County Council before their takings claim is ripe for Court review raises a far-reaching issue that Appellants fail to address in any way in the Opening Brief. Appellants propose the "Park" designation in the Community Plan effects a taking by the government at the moment the Community Plan is adopted. If a property owner is not required to apply to amend the Community Plan, the Community Plan designations become a "final" determination of how the land must be used rather than a "guide" for land use development and planning. Such a ruling would essentially wipe out the purpose and goals of Hawaii Revised Statutes ("HRS") Chapter 226 "Hawaii State Planning Act" and make it unwise, if not impossible,

for counties to comply with the requirements of HRS § 226-58 which mandates that each county is to formulate county general and development plans. The counties would be understandably reluctant to designate any area for "park" use as they could be faced with inverse condemnation lawsuits requiring them to buy these parcels even if the plan's designation were no longer workable as a result of changes in planning goals on the economic inability of the county to purchase the properties.

B. Proceedings in the Circuit Court

In response to the Complaint filed on November 17, 2007, (R:CV07-1-0496, Doc. 001), Appellees filed on January 18, 2008 a Motion to Dismiss, or, in the Alternative for Summary Judgment or Partial Summary Judgment (R:CV07-1-0496, Doc. 006) on the basis that the Circuit Court lacked jurisdiction as Appellants' claims were not ripe for adjudication. Rather than granting the Motion to Dismiss at the time of the hearing on February 20, 2008 because Appellants' attorney indicated he wanted to conduct discovery, the Court continued the hearing to June 20, 2008 (Trans. 8216, pp.2-6, 14). As a result of the massive discovery undertaken by Plaintiffs, the continued hearing on the Motion to Dismiss did not take place until December 12, 2008, at which time the Court granted Appellee County of Maui's Motion to Dismiss (Trans. p. 8191). The Order granting Defendants' Motion to Dismiss was filed on March 2, 2009 (R:CV07-1-0496, Doc. 0088, PDF 2109).

C. Statement of Facts

In 1996, the Maui County Council passed Resolution 96-121 calling for the County of Maui to purchase all nine of the lots with

a "Park" KMCP designation to be used as a public beach park (R:CV07-1-0496, Doc. 0007, Ex. 4, PDF 191). By 1999, after the Council determined that there were insufficient funds to purchase all nine lots, it passed Resolution 99-183 authorizing the purchase of only Parcels 18 and 19, which lots were purchased by the County in January, 2000 (R:CV07-1-0496, Doc. 0007, Ex. 5, PDF 197). The seven other lots were sold to private individuals, with Appellants purchasing the lot designated as Parcel 15 in 2000 ("the Property"). The purchasers of all seven lots intended to erect residences on their lots, a use inconsistent with the KMCP designation of the lots for "Park" use.

When they purchased the Property, Appellants were quite aware that an amendment to the Community Plan to change the land use designation from "Park" to "Residential" would be required in order for them to be able to build their house. In 2004, Munekiyo & Hiraga, the Planning Consultants retained by the Appellants, wrote to the various county departments advising them that the Appellants were proceeding to file and prepare documents necessary to apply for a Community Plan Amendment (R:CV07-1-0496, Doc. 0069, Ex. W, PDF 1609.) Despite these early steps taken by Appellants in preparation for filing an Application for a Community Plan Amendment, they never filed the Application to request a change in the use designation for the Property. Thus, the Maui County Council, the government entity with the authority to render a final decision on how Appellants may use their property, has never been given the opportunity to make the definitive ruling required by Williamson, supra, before a takings claim becomes ripe for review by the Court.

In 2006, because the then Maui Planning Director Mike Foley anticipated that there would continue to be disputes about the use of the Palauea Beach Lots, the Maui Planning Department agreed to work with the owners of parcel 15 (Leones), parcels 16 and 17 (Larson), and parcel 20 (Schatz, now Altman) to initiate the process to amend the Community Plan to change the designation of the lots from "Park" to "Residential" and to change the zoning from HM, Hotel and A-2 Apartment to "Single Family." The beach lot owners agreed to pay for an Environmental Assessment that was required to be submitted pursuant to HRS § 343-5(a)(6) in conjunction with an Application to Amend the Community Plan. The steps taken by the Planning Department toward obtaining a Community Plan Amendment for the Palauea Beach Lots up to February, 2008 are detailed in Exhibits E-L attached to the Appellees' Motion to Dismiss, (R:CV07-1-0496, Doc. 0088, PDF 87-122); an update on the County's efforts to obtain a Community Plan Amendment is set out in the Declaration of Clayton Yoshida attached to Appellants' Reply Memorandum in Support of Motion to Dismiss filed on December 9, 2008 (R:CV07-1-0496, Doc. 0074, PDF 2002.)

Although Appellants knew about the Planning Department's efforts to process a Community Plan Amendment for all of the Palauea Beach Lots, knew that they could not proceed to develop their Property without the KMCP amendment and knew that the Planning Department could not process their SMA Assessment Application, they nevertheless, submitted a request for a Special Management Area ("SMA") assessment for a determination that they were exempt from SMA requirements to the Department of Planning in September, 2007

(R:CV07-1-0496, Doc. 0006, PDF 77-78), as alleged in their Complaint at ¶¶ 19-20 (R:CV07-1-0496, Doc. 0001 at PDF 6).

After being advised by the Director in his letter dated October 25, 2007 that their application could not be processed because of the inconsistency, rather than appealing this decision to Planning Commission, as is expressly provided for by § 12-202-26 of the appeal provisions of SMA Rules of Practice and Procedure of the Maui Planning Commission, (R:CV07-1-0496, Doc. 0009, PDF 501, Appendix 3), Appellants initiated the Circuit Court action on November 19, 2007.

II. STANDARD OF REVIEW

Whether a court possesses subject matter jurisdiction is a question of law reviewable de novo. See In re Doe Children, 105 Hawai'i 38, 52, 93 P.3d 1145, 1159 (2004); Hawaii Management Alliance Ass'n v. Insurance Com'r, 106 Hawai'i 21, 26, 100 P.3d 952, 957 (2004), recon. denied 106 Hawai'i 21, 100 P.3d 952 (2004).

Questions of law are reviewable under the right/wrong standard. Hawaii Prince Hotel Waikiki Corp. v. City and County of Honolulu, 89 Haw. 381, 388, 974 P.2d 21, 28 (1999).

As no facts were in dispute, the Court's Order appears to be a granting of the Motion to Dismiss. However, to the extent that this Court interprets the Circuit Court's ruling in this case as granting of summary judgment, this Court reviews the Circuit Court's ruling de novo, using the same standard applied by the Circuit Court when considering a summary judgment motion. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992), recon. denied, 74 Haw. 650, 843 P.2d 144 (1992).

> "Summary 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 of material fact and the moving party is entitled to a judgment as a matter of law.'" (Citing Hawaii Rules of Civil Procedure ("HRCP") 56(c) 1990.)

The standard for review for Conclusions of Law ("COL") is stated in Amfac Inc., 74 Haw. at 119:

> "A COL is not binding upon an appellate court and is freely reviewable for its correctness. See, e.g., Nani Koolau Co., 5 Haw.App. at 141, 681 P.2d at 585 (citing **29 Molokoa Village Development Co. v. Kauai Electric Co., 60 Haw. 582, 593 P.2d 375 (1979)). A COL that is supported by the trial court's FOFs and that reflects an application of the correct rule of law will not be overturned. Id. 5 Haw.App. at 141, 681 P.2d at 585 (citing Friedrich v. Department of Transportation, 60 Haw. 32, 586 P.2d 1037 (1978))."

III. ARGUMENT

A. Appellants' Claims Are Not Ripe For Court Review

Appellants have failed to obtain a final decision regarding the application of the "Park" use designation to their property and the availability of an exception from the designation by way of a community plan amendment to change the "Park" designation. Appellants contend that they have taken all of the steps they are required to take to get a "final" determination of how they can use their property as a result of the Planning Director's not processing their SMA Assessment application because of an inconsistency. This conclusion is based on the arguments that there is no provision for them to appeal the determination to the Planning Commission and that they do not have to apply for a community plan amendment because they are not required to pursue "legislative" processes. These arguments are fatally flawed.

First, neither the Planning Director nor the Planning Commission is the final decision-maker on the issue of whether a Community Plan Amendment, essentially a "variance" from the provisions of the Community Plan, will be granted. The Planning Department is not the decision-maker that makes the final decision as to the KMCP land use designations; that decision is in the sole province of the Maui County Council. Thus, Appellants have not met the requirements of Williamson and its progeny that they obtain a final decision from the correct final decision-maker.

Second, as will be discussed below, the Community Plan Amendment is not necessarily "legislative" in nature, but may be construed by this Appellate Court to fall within the ambit of "administrative" type actions engaged in by a legislative body.

Finally, Appellants' application for an exemption from the provisions of the SMA requirements, which application they claim constitutes "a development plan," is not a request for a final, definitive determination as to how they can use the property from the entity charged with implementing the zoning regulations. Williamson, supra, 473 U.S. at 186.

B. Legal Definition of "Ripeness"

A general description of the "ripeness" requirements for maintaining a claim for inverse condemnation or a "taking" of property by a governmental entity is set out in the respected treatise 11 McQuillin Mun. Corp. § 32.75.05 (3rd Ed.):

> Where the regulation or regulatory scheme in question allows a property owner to apply for a change in or an exemption from the regulation, for example a zoning variance, a "final decision" is necessary for a takings claim to be ripe. In other words, the agency which is

> charged with implementing the law must have turned down at least one request from the disgruntled landowner before the landowner can make a valid takings claim. Whenever a property owner ignores or abandons some relevant form of review or relief, such that a takings decision cannot be said to be final, the takings claim should be dismissed as unripe. (footnotes omitted)

The legal requirements for a takings claim to be "ripe" for presentation to a Court is set out by the U.S. Supreme Court in the seminal case Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City[1], supra, 473 U.S. at 186:

> "As the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."

Citing to Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981), the Williamson Court describes the rationale behind the doctrine of "ripeness:

> "[I]f the property owners were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." Id. at 187.

To have a claim that is ripe to present to a court, a

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[1] The Opening Brief is devoid of any discussion of the Williamson analysis of the ripeness doctrine or how Appellants' case is in compliance with the Williamson "test" for ripeness. Further, although Appellants assert that the Director's determination not to process their SMA Assessment was the "final decision" by the County of Maui, there is no explanation of how the Director can make a final decision on land use designations, a determination that only the Maui County Council has the legal authority to make.

Plaintiff not only has to exhaust all administrative remedies, but also must obtain a "final decision" from the government entity charged with implementing the regulations:

> "Respondent's claim is in a posture similar to the claims the Court held premature in Hodel. Respondent has submitted a plan for developing its property . . . But, like the Hodel plaintiffs, respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat, notwithstanding the Commission's finding that the plat did not comply with the zoning ordinance and subdivision regulations. It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat. The Board of Zoning and Appeals had the power to grant certain variances from the zoning ordinance . . . Nevertheless, respondent did not seek variances from either the Board or the Commission." Id.

Appellants' claims are not ripe for adjudication because they failed to appeal the Director's decision to the Maui Planning Commission and they did not apply for a determination by the Maui County Council as to whether it would approve a change in the land-use designation for their property set out in the KMCP so that a house could be built on the property.

C. The Court below Correctly Held That Appellants' Claims Were Not Ripe for Adjudication by the Court Because Appellants Failed to Appeal the Planning Director's Decision to the Maui Planning Commission

Appellants failed to pursue the administrative avenue open to them, i.e., an appeal to the Maui Planning Commission, to challenge the determination contained in the Director's October 25, 2007 letter which stated that Appellants' SMA Assessment Application could not be processed because of the inconsistency between their proposed use of their property for a residential dwelling and the KMCP designation of their property for Park use. Appellants argued below and continue to argue on Appeal (OB pp. 28-30) that Appellants

had an immediate right of appeal from the Director's Decision based on the statement in GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998) that:

> "The decision of the Director not to process GATRI's application is a final decision equivalent to a denial of the application. Therefore, it is appealable under HRS § 91-14(a)." Id. at 111.

The GATRI decision was rendered in 1998. GATRI's claims arose in 1996 when there was no provision in the SMA Rules for appealing a decision by the Director, and, thus, the Director's decision was the final step in the Planning Department's administrative process. In 1997, the SMA Rules were amended, and § 12-202-26, the specific provision providing for an appeal from a decision of the Director was adopted: (Appendix 2.)

§ 12-202-26: Appeal of director's decision

> (a) **Appeal of the director's decision may be made to the commission** in writing not later than ten days after the receipt of the director's written decision. The appellant shall state the reasons for the appeal ans submit an administrative fee as established in the county budget. The commission may reverse and remand the decision to the director if the appellant sets forth facts or law of a convincing nature demonstrating clear error, or manifest injustice.
>
> (b) **Appeal of commission's decision may be made to the circuit court of the second circuit** as provided for in the commission's rules and chapter 91, HRS, as amended. [Eff. January 1, 1994; am September 28, 1997] (emphasis added)

Since September 28, 1997, as a result of the Planning Commission's Amendments to the SMA Rules, the Planning Commission, **not** the Planning Director, has the final decision making authority.

Appellants continue to make the same erroneous argument in this Appeal, stating that "the SMA Rules do not provide for an appeal"

and that the appeal provision set out in § 12-202-26 of the SMA Rules (R:CV07-1-0496, Doc. 0009, Ex. N, PDF 501) applies only to SMA minor permits and does not apply to decisions about SMA assessments. The Circuit Court rejected this argument below, observing that the Planning Commission's decision and order filed on April 15, 2005 in two proceedings: (1) In the Matter of Rescission of Special Management Assessment Determination for the Lambert Residence and 2) In the Matter of Appeal of Charles Sweeeney and Nell Sweeney, Ex. S to Defendants' Supplemental Memorandum in Support of Motion to Dismiss (R:CV07-1-0496, Doc. 0069, PDF 1510), interpreted the Commission's Rules as providing for an appeal to the Commission of a denial of an exemption determination:

> "Maui SMA Rule § 12-202-26 . . . provides the standard of review in matters of (1) *denial of exemption determinations pursuant to Rule 12-202-12,* and (2) SMA use permit decisions pursuant to §12-202-14, -15 and -16. (*Emphasis added*). Additionally, there is no language in § 12-202-26 that limits its application to appeals of decisions under § 12-202-14." (R:CV07-1-0496, Doc. 0088, PDF 2123.)

Appellants' argument that the appeal provisions of § 12-202-26 do not apply to a determination not to process an SMA Assessment Application because of "inconsistency" is further contradicted by Appellants' previous attorney and their designated expert in this case, Thomas D. Welch Jr., who invoked SMA Rule § 12-202-26 as the basis for an Appeal to the Maui Planning Commission in an unrelated case from the decision of Planning Director Hunt to not process an SMA Assessment Application due to the "inconsistency" in the property's "Park" KMCP designation and the desired use of the property to build a family residence. This Notice of Appeal is from

the Directors' Determination that is almost identical to the Determination the Appellants received and demonstrates the administrative avenue Appellants were required to follow before the claims alleged in their Complaint could become ripe for adjudication (R:CV07-1-0496, Doc.0069, Ex. Y, PDF 1617).

Appellants argue that they are excused from having to exhaust their administrative remedies because it would be "futile" for them to do so. The Court below rejected Appellants' "futility exception" argument observing that in cases that have found it would be futile for a party to appeal, "ordinarily futility refers to the inability of an administrative process to provide the appropriate relief," and pointing out that Appellants had effective remedies available to them (R:CV07-1-0496, Doc. 0088, PDF 2123). However, Appellants' "futility argument" is that it would be "futile" for them to appeal to the Planning Commission as the Director's determination not to process their SMA Assessment was a correct determination and the Planning Commission would have to come to the same conclusion, i.e., that the SMA Application could not be processed because of the "inconsistency." Appellants cite to no law which backs up their argument that if a party or a party's attorney unilaterally decides it could not or should not prevail on an administrative appeal, the party may simply ignore the appeal process and proceed to Court.

Further, Appellants do not discuss the determination by the Maui Planning Commission which resulted in the owners of two of the other Palauea Beach "Park" designated lots being able to build residences upon their lots without obtaining community plan amendments. The property owners in the Lambert and Sweeney appeals

identified above owned Palauea Beach Lots designated for "Park" use by the KMCP plan. As a result of the favorable outcome of their appeals to the Maui Planning Commission of certain decisions and actions by the then Director, they were able to build residences on their lots notwithstanding that their lots still had the land use designation of "Park."

The decisions in the Lambert and Sweeney Appeals are also significant as the Planning Commission expressly interpreted its own SMA Rules as providing for an appeal of the provisions related to SMA exemptions. Appellants have ignored these findings made by the Planning Commission undoubtedly because it is fatal to their contention that the SMA Rules do not provide for an appeal of the Director's October 25, 2007 decision (Appendix 3.) that Appellants' SMA Assessment Application could not be processed.

On the basis alone that Appellants failed to exhaust their administrative remedies by not appealing the Director's October 25, 2007 determination to the Planning Commission, the Circuit Court's dismissal of Appellants' Complaint should be upheld as the claims were Clearly Not "Ripe" for Adjudication.

D. The Court below Correctly Concluded That Appellants' Claims Were Not Ripe for Adjudication by the Court Because Appellants Failed to Obtain a Decision By the County Entity with the Authority to Make a Final Decision as to How Appellants Could Use Their Property

In addition to concluding that Appellants' claims were not ripe for adjudication because they had failed to exhaust the administrative remedy of an appeal to the Planning Commission, the Court below held that Appellants' claims were not ripe for Court

review as they had failed to apply for an Amendment to the KMCP to change the land-use designation for their property from "Park" to a designation that would permit them to build their house. Appellants argued below and again on appeal that they are not required to seek a Community Plan Amendment as the process for obtaining an amendment is "legislative" rather than "administrative," and that they are "not required to change the law." While the Opening Brief cites to three cases in which Courts determined that the landowners under the specific facts of their situation were not required to "change the law," Appellants provide no authority that supports their generalization that simply because a procedure for obtaining relief from land use regulation may be or appear to be by way of a "legislative" process rather than an "administrative" process, a landowner is excused from having to pursue procedural avenues, avenues that could afford relief prior to initiating a Court proceeding for a "takings" claim.

1. The Circuit Court's Determination That Appellants' Claims Are Not Ripe for Judicial Review Is Overwhelmingly Supported by the Relevant Law

The key language setting out the test for ripeness in Williamson, supra, at 186, is whether "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." The Williamson Court did not make a distinction between "administrative" and "legislative" remedies in its ruling. Rather, it mandates that a potential takings plaintiff must apply for and receive a final negative decision as to the use of his property from the appropriate government entity. The decision does not state or

imply that if the relevant government entity reaches its decisions through a "legislative" process, an aggrieved party is excused from having to pursue a final decision from it.

While the Maui Planning Department and the Maui Planning Commission may make recommendations to the Maui County Council as to whether a community plan should be amended, it is the Council that is authorized to make the final decision to grant or deny a community plan amendment application. There is no dispute that there is a printed form available to the public specifically for the purposes of enabling individuals to apply for community plan amendments. (Appendix 4.) There is no dispute that Appellants never submitted an application for an amendment to the Community Plan for a change in the land-use designation for their property from "Park" use to a use that would accommodate their desire to build a house. And there is no dispute that other individuals have applied for and have been granted amendments to Community Plans, including amendments to the KMCP, that have enabled them to make use of their property in a manner that would not be possible absent the amendment (R:CV07-1-0496, Doc. 0074, Ex. BB, PDF 1977-2001).

As of the date of the filing of their Complaint, Appellants had not taken even the first step readily available to them, i.e. submission of an Application for a Community Plan Amendment, to seek a determination by the County Council as to how Appellants will be able to use their property. The failure of Appellants to give the Maui County Council as the "final decision" maker an opportunity to change the "Park" land use designation for their property makes their claims unripe for review by the Circuit Court.

Appellants' position that they do not have to seek an amendment to the KMCP because the process for obtaining an amendment is legislative in nature and they are "not required to change the law" is not supported by any Hawaii case law. To the contrary, Hawaii cases which have dealt with amendments to a general or community plan or efforts by property owners to develop their property in ways that are inconsistent with existing regulations, have found, explicitly or implicitly, that it is the property owner's legal obligation to seek relief from the regulations through the avenues that are open to them to obtain relief from the inhibiting regulation before asserting claims for a taking or for damages against the County.

In the Hawaii case, Lai v. City and County of Honolulu, 841 F.2d 301 (9th Cir. 1988), cert. denied, 488 U.S. 994 (1988), Plaintiff developers initiated an inverse condemnation against the City and County of Honolulu because they were denied a Certificate of Appropriateness for their proposed high-rise condominium pursuant to the City's zoning ordinance which restricted construction on an area more than twenty-five feet above ground level. The purpose of the restriction was to protect the view of Punch Bowl Crater from the H-1 Freeway. The U.S. District Court ruled in favor of the Lais and awarded them damages. The Ninth Circuit Court, on appeal, reversed the ruling, finding "the Lais do not yet have a justiciable claim," on the basis that the District Court could not rule on the merits of any of plaintiffs' theories because the plaintiffs had not pursued all avenues of relief before presenting a "takings" claim, pointing out that Plaintiffs were required to seek variances from

the regulations. Id. at 303. More specifically, the Court citing to the Williamson case, found Plaintiffs had failed to obtain a "final and authoritative determination of the type and intensity of development legally permitted on the subject property."

The Hawaii Supreme Court in GATRI, supra, held that the KMCP community plan "has the force and effect of law and a proposed development which is inconsistent with the KMCP may not be awarded an SMA permit **without a plan amendment.**" (emphasis added) (Id. at at 115.) Contrary to Appellants' argument that they are not required to pursue a community plan amendment, the holding in GATRI clearly recognizes plan amendment as part of the SMA permit procedure in the review and awarding of SMA permit applications pursuant to HRS § 205A-26 (1993) (Id. at 113).

Kailua Community Council v. City and County of Honolulu, 60 Haw. 428, 433, 591 P.2d 602, 605 (1979), is a case that dealt with an application of International Telephone and Telegraph (ITT) to amend the City's General Plan and Detailed Land Map to have vacant land located at Kailua, Oahu re-designated from "open space" to "commercial" and "low density apartments." In its consideration of the case, the Hawaii Supreme Court described the interplay between the chief planning officer and planning commission and the Honolulu County Council in the review of applications for amendments:

> "In fulfilling his responsibility in this legislative process, the CPO [chief planning officer] serves as the initial fact finder for the city council, and **he is in that sense performing a function which a legislative committee would normally perform.** He reviews applications for revisions and amendments, R.C.H. s 5-403(1973), and makes his recommendations to the planning commission which in turn reviews the proposals and transmits its own recommendations to the city council.

> Throughout this process, the CPO and planning commission are performing a purely advisory function." (emphasis added) Id. at 433.

There is no indication in this opinion that ITT was not required to pursue a community plan amendment to obtain a higher economic use of its property than could be realized under the "open space" designation.

Appellants assert that the community plan amendment process is "legislative" in nature, and pronounce that they are not required to "change the law." Appellants' labeling of the community plan amendment process as "legislative" is not necessarily correct. Courts that have considered the legislative/administrative actions of government entities have found that certain kinds of actions by a County Council, even when the action is taken by the passing of ordinances, do not necessarily fall in the category of legislative actions.

In Sandy Beach Defense Fund v. City and County of Honolulu, 70 Haw. 361, 369, 773 P.2d 250, 256 (1989), the Court, observing that the issuance of an SMA use permit involves the application of general standards to specific parcels of real property, held that the City Council's approval of Kaiser's SMA use permit application was a non-legislative act because it administered a law already in existence, the Coastal Zone Management Act. In reaching this decision, the Court defined what are and are not legislative acts by the Honolulu City Council:

> "It is well established that the City Council has both legislative and non-legislative powers. Section 3-201 of the Charter provides: 'Every legislative act of the council shall be by ordinance. Non-legislative acts of the council may be by resolution[.]' In Life of the Land

> v. City Council of the City and County of Honolulu, 61 Haw. 390, 423-24, 606 P.2d 866, 887 (1980), we recognized that the Council has both legislative and none legislative powers and distinguished between them as follows:
>
> A legislative act predetermines what the law shall be for the regulation of future cases falling under its provisions.
> . . . .
>
> A non-legislative act executes or administers a law already in existence. (Citations omitted).
>
> The issuance of an SMA use permit involves the application of general standards to specific parcels of real property. Therefore, the City Council's approval of Kaiser's SMA use permit application was a non-legislative act because it administered a law already in existence, the Coastal Zone Management Act." Id. at 369.

A person's applying for an amendment to the KMCP to change a land use designation asks the County Council to administer a law already in existence (i.e. the Community Plan use designation) as it applies to a single property; it does not ask the Council to enact a new law which will regulate future cases that concern other properties.

The Ninth Circuit Court's holding in Kaahumanu v. County of Maui, 315 F.3d 1215, 1219 (9th. Cir. 2003), is consistent with with the Hawaii Supreme Court's distinction between legislative and non-legislative acts set out in Sandy Beach. In finding that the Maui County Council Members did not have legislative immunity in their the denial of a conditional use permit to a wedding business on beachfront property, the Court stated:

> "We have recognized that 'not all governmental acts by . . . a local legislature [ ] are necessarily legislative in nature.' Cinvevision Corp. v. City of Burbank, 745 F.2d 560, 580 (9th Cir. 1984). 'Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it.'"

(Citations omitted.)

The Kaahumanu Court in its analysis of what constitutes a "legislative act" by the County Council, sets out four factors to be considered: (1) "whether the act involves ad hoc decision making, or the formulation of a policy"; (2) "whether the act applies to a few individuals, or to the public at large"; (3) "whether the act is formally legislative in character"; and (4) "whether it bears all the hallmarks of traditional legislation." Id. at 1220. The Court in Kaahumanu, after discussing each of the four factors, concluded that the denial of a conditional use permit is not "legislative" in nature, based upon the following considerations:

> "(1) *Ad hoc decision making:*
>
> . . .
>
> The district court rightly concluded that the Council's decision was ad hoc. The decision was taken based on the circumstances of the particular case and did not effectuate policy or create a binding rule of conduct. **Typically, a zoning ordinance establishes a rule of general application, but here the ordinance would have affected only a single permit and a single parcel of land.** As the district court noted, regardless of whether the County Council voted to deny or grant Plaintiffs' CUP, those seeking to conduct business similar to Plaintiffs' wedding operation would be required to obtain their own CUP in accordance with the provisions of the Maui County Code. Enactment of the ordinance would not have created a new category of expressly permitted or special uses and therefore did not modify or supersede the policies contained in the existing comprehensive zoning ordinance." Id. at 1220.
>
> "(2) *Whether the act applies to a few individuals or the public at large:* When the act in question applies to a few individuals rather than the public at large, legislative immunity is disfavored." Id. at 1222.
>
> "(3) *Whether the act is formally legislative in character.* The defendants rest their argument for

> absolute immunity in part on the formally legislative character of their decision. Their 'acts of voting . . . were in form quintessentially legislative.' . . . While this fact weighs in favor of legislative immunity it does not in itself decide the issue. . . . We, however, reached the question in Cinevision Corp. Under Cinevision, we must look beyond the formal character of the act to see whether it 'contain[s], matter which is properly to be regarded as legislative in its character and effect.'" Id. at 1223.

In evaluating the fourth consideration, *whether the act bears all the hallmarks of traditional legislation* : the Court in Kaahumanu determined it did not as:

> ". . . the Maui County Council's decision not to grant the CUP was ad hoc rather than one of policy. **In denying a single application for a CUP, the Council did not change Maui's Comprehensive zoning ordinance or the policies underlying it**, nor did it affect the County's budgetary priorities or the services the County provides to residents." Id. at 1223-24. (emphasis added)

The final conclusion of the Ninth Circuit Court was to find that the actions of the Maui County Council in voting to deny the CUP were not legislative, but were administrative in nature:

> "The Maui County Council's decision to deny the CUP was ad hoc, affected only the plaintiffs and did not bear all the hallmarks of traditional legislation. Despite its formally legislative character, the decision was administrative and the individual members of the Maui County Council are therefore not entitled to legislative immunity." Id. at 1224.

When the analysis of Kaahumanu is applied to the nature of the actions taken by the Maui County Council in approving or disapproving an amendment to a Community Plan, an action which affects only one parcel of land, as in this case, it is clear that such act is not necessarily "legislative" as Appellants conclude, but could, under the previous Court rulings in Hawaii land use and regulation cases, be construed as "quasi-legislative" or

"administrative" in nature. Thus, Appellants' unilateral declaration that they do not even have to attempt to get a variance from the land-use designation for their property by pursuing a community plan amendment because they do not have to "change the law" does not excuse them from the procedural steps they must take for their takings claim to meet ripeness requirements.

Courts in other jurisdictions, citing to the Williamson case, have held that property owners must take steps available to them to find out what precise use they will be able to make of their property by obtaining a determination by the appropriate authority, without making a distinction between "legislative" and "administrative" acts before they can maintain a lawsuit for a takings claim.

In Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1453 (9th Cir. 1987) opinion amended: cert. denied, 484 U.S. 1043 (1983), the Court held:

> "The district court properly recognized that under Supreme Court authority, the Kinzlis' claim that Measure O effected a "taking" as applied to their property does not, as a rule, present a concrete controversy ripe for adjudication unless the Kinzlis have first submitted a development plan or applied for a land use permit." (citations omitted)

Appellants' concede in the OB at p. 24, that Kinzli did involve a legislative act that impacted the plaintiffs as "Measure O" was an ordinance which restricted Plaintiffs' use of their property. Citing to the Williamson test for ripeness, the Court in Kinzli at 1456 concludes:

"The appropriate explanation for this claim's

> prematurity, however, is that the City has not yet made a final decision regarding the property. As discussed in Section II, the Supreme Court's decision in Hamilton Bank requires that the Kinzlis first obtain final decisions regarding the application of the regulations to their property and the availability of variances. 105 S.Ct. at 3124. Therefore, there is no denial of procedural due process because their substantive due process claim is not ripe."

The Second Circuit Court in Murphy v. New Millford Zoning Com'n, 402 F.3d 342, 348 (2nd Cir. 2005) discusses the importance of specific ripeness requirements applicable to land use disputes as developed by the Supreme Court in Williamson County, supra:

> "Four considerations, all of which motivate our decision today, undergird prong-one ripeness. First, as just explained, the Williamson County Court reasoned that requiring a claimant to obtain a final decision from a local land use authority aids in the development of a full record. See id. at 187, 105 S. Ct. 3108. Second, and relatedly, only if a property owner has exhausted the variance process will a court know precisely how a regulation will be applied to a particular parcel. See id. at 190, 105 S. Ct. 3108. Third, a variance might provide the relief the property owner seeks without requiring judicial entanglement in constitutional grounds disputes. . . . Finally, sinceWilliamson County, courts have recognized that federalism principles also buttress the finality requirement. Requiring a property owner to obtain a final, definitive position from zoning authorities evinces the judiciary's appreciation that land use disputes are uniquely matters of local concern more aptly suited for local resolution."

The Appellants have not alleged nor can they demonstrate they have attempted to obtain necessary changes in the use designation of their property. In fact, it is undisputed that they have **not** pursued the procedural avenues available to them to change the current land use designation for their property that would permit them to use their property in the manner they wish to use it. As a result of their failure to pursue the government processes open to them, they cannot identify any final act or adverse decision on

the part of the Appellees that would provide a legal basis for the maintaining of this action.

2. The Cases Cited by Appellants in Support of Their Argument That They Are Not Required to "Change the Law" Are Factually Not on Point with The Case Herein

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), Palazzolo v. Rhode Island, 533 U.S. 606 (2001), and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991) are the three cases cited to by Appellants (OB pp. 18-22) as legal "authority" for their proposition that they are not required to "change the law." None of these cases stand for the proposition that, as a matter of law, a property owner does not have to pursue "legislative" remedies. Nor do the cases provide a basis for the Appellants to ignore the ripeness requirements laid out in the Williamson Supreme Court decision. Further, while the Courts did conclude in each of these three cases that under specific fact situations of the case before them, that the Plaintiffs did not have to change the law as it applied to vast properties, the facts in these cases are clearly inapposite to the Appellants' fact situation.

At the time the Plaintiff in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), bought his two lots in 1986, the existing South Carolina Coastal Management Act required that owners of property lying within a "critical area," defined as beach and sand dunes, must obtain a permit to build a house. The Lucas lots did not lie within the "critical area" so there was no permit required for their intended use of building a residence on each

lot. However, in 1988, the South Carolina legislature passed the "Beachfront Management Act" which literally drew a line in the sand, below which construction of habitable improvements was flatly prohibited without any provision for an owner's obtaining an exception to the ban by way of seeking a permit or variance. The Lucas property fell below the line, so overnight Lucas' ability to build anything on his property was destroyed. Unlike Appellants' situation where the temporary impediment to building a house as a result of their property's "Park" use designation can be readily addressed and potentially resolved through pursuit of a community plan amendment, there was no procedure provided in the regulations affecting his property for him to use to obtain a variance or other relief from the regulation which barred him from any development of his property; thus, he was at a dead-end as to what use he could make of his property, so his claim was ripe for review by the Court.

The holding in Lucas is not relevant to the Appellants' situation as the procedure for amending the KMCP to change the use designation of their property is not only readily available to them, but, as discussed above, is currently being pursued by the Planning Department on behalf of the Palauea Beach Lot owners and has been successfully used by other land owners to effect desired changes in their land use designations. Appellants have never been told that they will not be able to amend the community plan or that any Departments in the County will oppose their efforts to amend the community plan.

Appellants cite to Palazzolo v. Rhode Island, 533 U.S. 606

(2001), as the relevant authority that their claims are ripe for adjudication by this Court. Palazzolo does not support this argument and actually supports Appellees' position that Appellants' claims are not ripe for review by this Court because they have failed to obtain a final decision about how they may use their property. Plaintiff Palazzolo had made two applications for changing land-use regulations for his property and obtained two unfavorable decisions before filing his lawsuit alleging that a taking of his property had occurred. The Court stated:

> "A takings claim challenging application of land-use regulations is not ripe unless the agency charged with implementing the regulations has reach a final decision regarding their application to the property at issue. Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). A final decision does not occur until the responsible agency determines the extent of permitted development on the land. MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 345, 106 S.Ct. 2561, 91 L.Ed.2d 285. **Petitioner obtained such a final decision when the Council denied his 1983 and 1985 applications."** Id. at 607. [emphasis added].

The Palazzolo decision at page 620 further observes:

> "[A] **landowner 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.** Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening the property depends upon the landowner's first having followed reasonable and necessary steps to allow 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.** As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established." (emphasis added)

Appellants, unlike the Plaintiffs in Palazzolo, have not "followed reasonable and necessary steps to allow regulatory

agencies . . . to grant any variances and waivers allowed by law." It is only upon the denial of the Maui County Council of their application to amend the KCMP to change the "Park" land use designation of their property that Appellants' claim will be ripe for litigation by the Court.

In the third case cited by Appellants, Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991), there were 364 individuals, in addition to the Council, named as plaintiffs with varying claims as to numerous parcels. While there is a finding by the Court that some of the plaintiffs were not required to try to amend a whole regional plan prior to the litigation, the Court also found that some of the plaintiff's claims were not ripe and dismissed them. Id. at 156. The Tahoe case does not stand for the general proposition being advanced by Appellants herein that a property owner need not give a regulatory agency the opportunity to grant variances and waivers if the process for having the agency review their claim is "legislative" in nature. Appellants are not required to go through the lengthy process to have a new community plan adopted. All they need to do is apply for a single change of a land use designation for a single lot. Their failure to take even the first step, i.e., submittal of an application for an amendment to the KMCP plan, renders their claims unripe for review by the Circuit Court.

IV. ARGUMENTS SET OUT IN THE AMICUS BRIEF FILED BY PACIFIC LEGAL FOUNDATION DO NOT PROVIDE ANY LEGAL OR FACTUAL BASIS FOR THIS COURT'S REVERSAL OF THE CIRCUIT COURT'S ORDER

As predicted by Appellee, the "Amicus Curiae" Brief filed by Pacific Legal Foundation ("PLF") does not provide an "impartial interpretation and discussion of the status of the law" for the purpose of assisting this Court, but is essentially an additional 10 pages of argument in support of Appellants. As "a friend of the Court," PLF should have used its touted expertise to provide insight into the issues that are before this Court in this Appeal. Because of the page limitation[2] for an Answering Brief imposed by HRAP 28(a), Appellee will only briefly identify a few of inadequacies of the Brief submitted by PLF.

The Amicus Brief does not address any of the practical or legal repercussions of Appellants' arguments that the "taking" of their property occurred upon the 1998 KMCP's designating their property for "Park" use, at which time they claim their federal takings claim was ripe. Under this theory, rather than being a "guide" for planning and future development as contemplated by HRS 226, the Hawaii State Planning Act, the community plan would essentially become the final planning document with its suggested land-use designations inalterably determined and unable to be changed even if subsequent conditions made the plan's proposed use designations undesirable or unattainable. For example, in 1996,

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[2]As of the date of the filing of this Answering Brief, Appellee County of Maui has not received an order granting or Appellee's Motion for Order Permitting Appellee to File an Opening Brief Which Exceeds 35 Pages filed with the Intermediate Court on September 17, 2009.

the Maui County Council passed a resolution expressing its desire to acquire the nine Palauea Beach lots for use as a public beach park. By 1999, the Council determined that the County could afford to buy only two of the lots. Under Appellants' theory, if the private individuals who purchased the remaining seven lots decided they did not want them, they could each file inverse condemnation proceedings to force the County to purchase of all the lots, even if the County could not afford to do so or even if its planning and development goals no longer designated this area for park use.

Under Appellants' theory that there was a Fifth Amendment taking of their property in 1998 as a result of the "park" use designation for their property in the KMCP, their takings claim cannot be maintained as it is time-barred by the applicable Statute of Limitations. (Appellee asserted a statute of limitations defense in its Answer to the Complaint. R:CV07-1-0496,Doc. 0016, PDF 526-536.)

Appellants' position that they are not required to seek a community plan amendment to achieve consistency would render meaningless the provisions of HRS § 205A-26(C) ("That the development is consistent with the county general plan and zoning. Such a finding of consistency does not preclude concurrent processing where a general plan or zoning amendment may also be required."), as well as the SMA Rules for the Maui Planning Commission § 12-202-12(f)(5) which provide that an application for a permit can be processed together with the application for a community plan. Additionally, this argument ignores the express holding in GATRI, supra at 374, 115 that "...a proposed development

which is inconsistent with the KMCP may not be awarded an SMA permit without a plan amendment."

The Amicus Brief makes statements that are both misleading and misrepresent the holdings in cases. For example:

The Amicus Brief states at page 6: "[T]he Hawaii Supreme Court in GATRI ... impliedly rejected a requirement that a property owner avail itself of political process and legislative changes." The Amicus Brief appears to be advancing a theory that if the Court does not expressly rule on a question (i.e. is the property owner required to apply for a community plan amendment?), its silence is to be construed as an "implied" ruling that the owner does not have to seek a change to the plan. PLF asks this Court to include its desired reading of the GATRI decision in its ruling on this appeal: "This Court should make explicit that which was implicit in GATRI and hold that the only requirement for ripening a federal takings claim is obtaining a final decision applying current laws or regulations." No legal authority is provided by PLF for the proposition that a Court's silence should be interpreted as a dispositive ruling on an issue.

Equally troublesome is PLF's doctoring of part of the Williamson decision, 473 US at 186 (incorrectly cited as bing at page 185), by inserting in the quote the word "administrative:"

> In Williamson County, the United States Supreme Court held a Fifth Amendment takings claim is ripe as soon as the government reaches a "final **[administrative]** decision regarding the application of the regulation of the property at issue.

Williamson does not specify that the requirement of a final decision by the final decision maker is limited to

"administrative" decisions. Its requirement for ripeness is much broader and, as Appellee has argued, embraces decisions that are made through either administrative or legislative processes.

V. CONCLUSION

The Opening Brief contains many statements that appear to be in the nature of the closing argument Appellants would like to make to inflame a jury to award them the $50,000,000 in punitive damages their Complaint seeks. For example, Appellants' comments that the Planning Commission wants to let the public "continue" to use Appellants' property without paying for it and that the County has made the property available to the public for a "beach park" are false and nothing in the record supports such statements. Nor is there anything in the record that supports the statement that "the Planning Commission has absolutely no intention of ever allowing the Leones to build." Off-the-cuff personal remarks made by a couple of the Planning Commissioners, who are appointed, in no way can be construed as acts by official County entities. In fact, if Appellants apply for an amendment to the KCMP, the only role the Commissioners can play is to provide recommendations to the Maui County Council, which recommendations - positive or negative - may be considered by the Council in making its final decision as to how Appellants can use their property.

The legal issue before the Circuit Court and this Court on appeal is whether the Appellants' claims were ripe as a matter of law so that the Circuit Court could take jurisdiction over the claims. Appellee believes that the Circuit Court's dismissal of the Appellants' Complaint for lack of ripeness of their claims was

a correct ruling which should by upheld by this Court on Appeal.

DATED: Wailuku, Maui, Hawaii, September 25, 2009.

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