S.C. No. 29696

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

DOUGLAS LEONE AND PATRICIA A. PERKINS-LEONE, as Trustees under that certain unrecorded Leone-Perkins Family Trust dated August 26, 1999, as amended, Plaintiffs/Appellants, vs. COUNTY OF MAUI, a political subdivision of the State of Hawaii; 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 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) HON. JOSEPH E. CARDOZA, JUDGE)

PLAINTIFFS/APPELLANTS' REPLY BRIEF

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PLAINTIFFS/APPELLANTS' REPLY BRIEF

INTRODUCTION

The following facts are not disputed:

1. Maui County wanted to acquire the Leones' land at Palauea for a beach park but lacked the funds, so the Council designated Palauea as "Park" land on the Kihei-Makena Community Plan ("KMCP"), after being advised by the Office of Corporation Counsel that the County might be sued for inverse condemnation.

2. The Leones have no economically viable use of their land under the KMCP, and their land is now being used as a *de facto* public beach park.

3. Under the applicable rules and policies, the Planning Director and the Planning Commission have no authority to approve any economically viable use of the Leones' land. This cannot change unless the KMCP is amended, an action that will require the approval of a majority of the Planning Commission, a majority of the County Council, and the Mayor.

4. The Planning Commission has no intention of allowing the Leones to develop their land, and any further efforts or appeals by the Leones would be futile.

The same office that advised the Council that the County would be sued for inverse condemnation now tells this Court that the Leones "jumped the gun" by filing suit before exhausting their administrative remedies. See **Record on Appeal: CV-1-0496 Document** (hereinafter **"ROA Doc.") 0007 at PDF 241.** In support of its position, the County makes several misstatements of fact -- necessarily without citation to the record, and thus

in violation of Hawaii Rules of Appellate Procedure Rule 28(b)(3).

For example, the County now claims (without citation to the record) that "[w]hen they purchased the Property, [the Leones] were quite aware that an amendment to the Community Plan . . . would be required in order for them to be able build their house." See Answering Brief ("AB"), p. 6. In fact, the record shows that when they bought the land in 2000 (**ROA Doc. 0001 at PDF 3 ¶6**), the Leones, like other Palauea lot owners, believed they could build homes on the lots, because that was the Mayor's position at the time. See **ROA Doc. 0069 at PDF 1514 ¶¶47-48, PDF 1516-17 ¶¶67-70, PDF 1518 ¶¶85-86, PDF 1520-21 ¶¶106-9.**

The County is grasping at straws. Even if this new allegation were true, it would not bar suit, because a landowner who purchases property with knowledge of an offending regulation still has the right to assert a takings claim. See Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001) (finding the landowner's "claim [was] not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction").

Also, contrary the County's assertions, the Leones do not allege that their claims ripened when the KMCP was enacted. See, e.g., **ROA Doc. 0001 at PDF 9-10 ¶34.** The Leones have consistently taken the position that their takings claim ripened in 2007, when Defendant/Appellee Hunt refused to process their SMA assessment application.

The undisputed evidence in the record shows that, by taking the Leones' property without payment of just compensation, the County and its responsible officials, acting under color of

state law, deprived the Leones of their rights under the U.S. Constitution, and are liable for damages under 42 United States Code § 1983 (1996). This Court should reverse and remand the case with instructions to enter partial summary judgment in favor of the Leones on their inverse condemnation claims.

ARGUMENT

I. THE LEONES RECEIVED A "FINAL DECISION" WHEN THE PLANNING DIRECTOR DENIED THEIR SMA ASSESSMENT APPLICATION

The County argues that the Leones' claims are not ripe because they did not receive a decision on a plan amendment application from the County Council. See AB, pp. 16-17. The County's argument is flawed. The law is clear: the final decision maker is "the government entity charged with **implementing the regulation**" who "makes a final decision **regarding the application of the regulations** to the property at issue." Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985) (emphasis added); see also Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001). In Williamson County, the U.S. Supreme Court specifically identified the final decision maker as an administrative agency. See, e.g., 473 U.S. at 191.

The County Council, which ultimately approves plan amendments, is not the County agency charged with implementing the laws and regulations governing the use of the Leones' land. In this instance, the final decision maker is the Planning Director, whose decision to reject the SMA assessment application clearly established that the Leones can make no economically

viable use of their land. See GATRI v. Blane, 88 Hawaii 108, 962 P.2d 367 (1998); and **ROA Doc. 006 at PDF 77-78.**

In fact, the County's argument that the Council 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" (AB, p. 4) only supports the Leones' position that such an action is a legislative one.

II. AMENDMENT OF A COMMUNITY PLAN IS A LEGISLATIVE ACT

The County argues that a community plan amendment is non-legislative and must be pursued to ripen the Leones' takings claims. See AB, pp. 16-26. The County's argument is belied by the County's own laws and the authorities cited by both parties.

The process for amendment of a community plan is clearly spelled out in the County Charter and County Code. The Planning Director, the County Council, or an individual may apply for an amendment. This application must include an Environmental Assessment and other information. See Maui County Code (MCC) §§ 2.80B.100 (2005), 2.80B.110 (2006). After a public hearing and a determination that the application is complete, the Planning Commission transmits to the County Council its findings, conclusions, and recommendations. See MCC §§ 2.80B.100 (2005), 2.80B.110 (2006), 19.510.020(A)(6)-(7) (1994); Charter of the County of Maui (CCM) § 8-8.4 (2002). The County Council then holds another public hearing regarding the amendment. See MCC § 2.80B.110(D) (2005). If the County Council approves the amendment, it must adopt it by ordinance. See CCM § 8-8.6(1) (2002). The ordinance approving the amendment must be submitted

to and approved by the Mayor to become effective. See CCM § 4-3.1 (1982).

The County argues -- again, without any citation -- that an amendment to the community plan is "essentially a variance from the provisions of the Community Plan." See AB, pp. 9, 10, and 30. A variance seeks to change the effect of the existing law, not the law itself, and is granted under specific criteria based on the hardship imposed on the landowner. See MCC § 19.520.050 (1991). A plan amendment seeks to change the plan (*i.e.*, the law) itself and is not based on hardship. See MCC § 2.80B.110 (2006). As the Hawaii Supreme Court noted in GATRI v. Blane, 88 Hawaii 108, 962 P.2d 367 (1998), the KMCP has the force and effect of law, at least for properties within the SMA. Under the Comprehensive Zoning Ordinance, MCC Title 19, like the zoning scheme involved in Williamson County, 473 U.S. 172, a landowner who suffers hardship has the right to seek a variance. The Leones have no such avenue of relief available, because there is no such thing as a "variance" from a "plan."

For that reason, the distinction between legislative and administrative remedies is not merely a matter of semantics for landowners like the Leones, who are left with no economically viable use of their land. Indeed, the record shows that is exactly what the County intended. The County wanted to take the Leones' land for a public beach park without paying for it, and the County has achieved that objective. In response, and again without referring to the record, the County argues that it "has a form for amending their community plans," and that "other landowners in Maui County have managed to change the law

applicable to their land." AB, pp. 3 and 18. These statements, even if they were true, would be immaterial. A plan amendment is still a legislative act.

The County argues that this process is "not necessarily legislative" by drawing a false analogy to the approval processes for special management area ("SMA") permits in the City and County of Honolulu. See AB, pp. 21-25. In Sandy Beach Defense Fund v. City Council of City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989), the Honolulu City Council -- acting as the "authority" under the Hawaii Coastal Zone Management Act, Hawaii Revised Statutes (HRS), Chapter 205A, and following the provisions thereof -- denied an SMA permit application by resolution, which was found to be a non-legislative act. Sandy Beach is distinguishable, first, because the Maui County Council is not the "authority" under the CZMA. Second, the Maui County Council adopts plan amendments by ordinance and has complete legislative discretion in adopting such amendments. See CCM § 8-8.6(1) (2002); MCC §§ 2.80B-100 (2005), 2.80B-110 (2006); see also CCM §4-1 (1982) (legislative acts are adopted by ordinance, while non-legislative acts are adopted by resolution).

Kaahumanu v. County of Maui, 315 F.3d 1215 (9th Cir. 2003) is also inapposite. In that case, the Ninth Circuit Court of Appeals stated that the Council's denial of a conditional use permit was administrative, in part, because issuance of such a permit was not akin to a change in the zoning (id. at 1221-22). In contrast, a community plan amendment normally affects more than one landowner and so has a greater impact on the "public at large." Indeed, in the present case, the proposed KMCP amendment

to which the County refers, would affect **all** of the Palauea Beach Lots (**ROA 0069, PDF 1478-80**), not just the Leones' land.

The County misrepresents the authorities cited by the Leones. For example, the County misstates the holdings of Palazzolo, 533 U.S. 606, and Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991). See AB, pp. 28-30. Palazzo's claims ripened after he submitted two development applications -- not applications to change the law. See Palazzolo, 533 U.S. at 614-615. In Tahoe-Sierra, the Ninth Circuit found some landowners' claims were ripe because "ripeness did not require the plaintiffs to ask to amend the 1984 Plan before bringing their claims." 938 F.2d at 157. The County (AB, p. 30) references a **separate** holding in the case that claims brought by a **separate** group of landowners challenging a development moratorium ordinance were unripe, because the ordinance provided a temporary mechanism for obtaining use permits. Id. at 157. There is no such mechanism available to the Leones.

Moreover, the authorities cited by Pacific Legal Foundation in its Amicus Brief, at pages 7-9, reach the same conclusion as those cited by the Leones. For example, Ward v. Bennett, 592 N.E.2d 787 (N.Y.App. 1992), held that: "the ripeness doctrine does not impose a threshold barrier requiring pursuit of all possible remedies that might be available through myriad government regulatory and legislative bodies." Id. at 790. In Ward, relief was available "only through an elaborate demapping procedure, which is costly, cumbersome, lengthy and requires the final approval of the New York City Council, the

ultimate legislative body of the city." The court found that "[n]o further administrative avenues are open" and thus "the exhaustion doctrine is not implicated here." Id.

III. THE LEONES HAVE NO RIGHT TO APPEAL THE DIRECTOR'S DENIAL OF THE SMA ASSESSMENT APPLICATION

The County ignores the specificity of section 12-202-26 (2002) of the Special Management Area Rules codified at Chapter 202 of the Rules of the Department of Planning (the "SMA Rules") in arguing that the Leones must appeal the Planning Director's decision to ripen their takings claim. See AB, pp. 12-14. Section 12-202-26 (2002) was adopted in 1997, along with a corresponding revision to section 12-202-14 (2002), adding a right of appeal of the Director's decisions on SMA minor permit applications, but leaving the SMA assessment and exemption process under section 12-202-12 (2004), at issue here, untouched. **ROA Doc. 0009 at PDF 499-503.**

The Lambert and Sweeney cases do not establish that the Leones have a right to appeal. The Lamberts and the Sweeneys appealed the Director's decision to rescind SMA exemptions issued by the previous Director after their rights therein had vested. See **ROA Doc. 0069 at PDF 1510 ¶1.** The Lamberts and Sweeneys had incurred expenses in reliance upon the prior administration's approvals and therefore asserted that the County was estopped from revoking those approvals. See **ROA Doc. 0069 at PDF 1534 ¶234.** In those cases, the issue of whether the rules allow an appeal from a refusal to process an SMA assessment application was not before the commission.

IV. THE UNDISPUTED EVIDENCE DEMONSTRATES THAT RESORT TO ANY AVAILABLE ADMINISTRATIVE REMEDIES WOULD BE LEGALLY AND FACTUALLY FUTILE

The County admits that any appeal of the Planning Director's refusal to process the Leones' SMA assessment application would have been futile because it is "only upon the denial of the Maui County Council of their application to amend the KMCP to change the 'Park' land use designation of their property that Appellants' claim will be ripe for litigation." AB, p. 30. If the only avenue to ripen the case is by amending the plan -- because it is the only effective means to change the current regulatory scheme -- then an appeal to the Planning Commission would have been pointless.

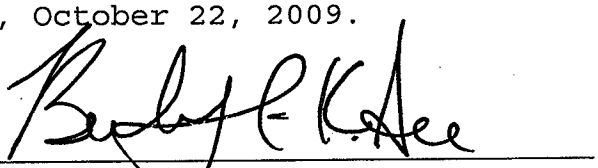
The County fails to address, let alone to rebut, the overwhelming evidence in the record that pursuit of administrative remedies, if any exist, would be futile. One of the commissioners candidly described such a process as a "charade." See **ROA Doc. 0072 at PDF 1808.** Instead, in its Conclusion, at pp. 34-35, the County makes a series of misstatements of fact -- necessarily without record references -- claiming, for example, that "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" (AB, p. 34). Statements made by the majority of the Planning Commissioners, on the record, in public, at Commission meetings, cannot fairly be characterized as "off-the-cuff personal remarks." See, e.g., comments at the March 13, 2007 and

February 12, 2008 Maui Planning Commission Regular Meetings, **ROA Doc. 0063 at PDF 1277, 1281, 1307-8, 1310, 1318, 1322-23, 1328, 1330-31, 1337-39, 1341.** The record clearly demonstrates that any further efforts by the Leones to develop their property, including an appeal to the Planning Commission, would be futile, and the County's brief utterly fails to address that evidence.

CONCLUSION

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

DATED: Honolulu, Hawaii, October 22, 2009.



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