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FILED
MAR - 2 2009
AT 4:30 P.M.
/s/ M. Filipelli
Clerk
Second Judicial Circuit

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

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, 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.	Civil No. 07-1-0496(3) (Other Civil Action) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT FILED NOVEMBER 19, 2007 OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT; CERTIFICATE OF SERVICE

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT FILED NOVEMBER 19, 2007 OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

Defendants COUNTY OF MAUI and JEFFREY S. HUNT'S ("Defendants") motion to dismiss complaint filed November 19, 2007 or in the alternative, motion for summary judgment or partial summary judgment was heard on February 20, 2008 and December 12, 2008. Mary Blaine Johnston, Esq., Deputy

Corporation Counsel for the County of Maui appeared on behalf of Defendants. Andrew Varnum Beaman, Esq. appeared on behalf of Plaintiffs DOUGLAS LEONE and PATRICIA A. PERKINS-LEONE ("Plaintiffs").

At the hearing held on February 20, 2008 Plaintiffs requested time to conduct discovery. This request was granted and further hearing on Defendants' motion was scheduled for June 20, 2008. By agreement of the parties, further hearing on the instant motion was held on December 12, 2008. On that date, the Court placed on the record an approximately 11 page ruling granting Defendants' motion to dismiss and instructed movant to prepare an appropriate order. None of the parties requested findings of fact and conclusions of law. By letter dated January 2, 2009, and pursuant to the Rules of the Circuit Courts of the State of Hawai'i, Rule 23, movant submitted to the Court proposed findings of fact, conclusions of law and order, a proposed final judgment, and a copy of the December 12, 2008 transcript of proceedings. By letter dated January 8, 2009, Plaintiffs submitted a copy of a proposed order granting Defendants' motion to dismiss complaint filed November 19, 2007 or in the alternative, motion for summary judgment or partial summary judgment. By letter dated January 9, 2009, Defendants responded to Plaintiffs' letter dated January 8, 2009. By letter dated January 12, 2009, Plaintiffs responded to Defendants' letter dated January 9, 2009, and transmitted to the Court Plaintiffs'

proposed findings of fact and conclusions of law. Finally, by letter dated January 13, 2009, Defendants' responded to Plaintiffs' letter of January 12, 2009 and noted their objections to Plaintiffs' proposed findings and conclusions. After careful consideration of all of the submissions of the parties, the Court elects to enter the following order granting Defendants' motion in the form that appears below.

I. INTRODUCTION

Plaintiffs filed their complaint in the above matter on November 19, 2007. The complaint asserts claims of inverse condemnation under both the Constitutions of the State of Hawai`i and the United States of America alleging that Plaintiffs' beachfront property located at Palauea Beach, Makena, Maui, has "no economically viable use" because the property was designated for "park" use by the 1998 Kihei-Makena Community Plan. Plaintiffs allege that such designation constituted a "taking of private property for public use" by the County of Maui. Thus, Plaintiffs contend that the County of Maui should buy the subject property from Plaintiffs. Plaintiffs also contend they are entitled to "just compensation" under Article I, Section 20 of the Hawai`i State Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs also assert claims under 42 U.S.C. § 1983 for both equal protection and substantive due process violations, and punitive damages under 42 U.S.C. § 1983 in the amount of $50,000,000.

Defendants filed the instant motion on January 18, 2008. The motion came before the Court for hearing on February 20, 2008 at which time the parties presented oral arguments. Plaintiffs requested an extension to allow discovery to be conducted in order to respond to Defendants' motion. The Court granted an extension to allow discovery to be conducted and allowed the parties to file supplemental memoranda. Defendants filed their supplemental memorandum in support of the instant motion on November 21, 2008. In their supplemental memorandum, Defendants withdrew their request for partial summary judgment. Defendants, however, reserved the right to re-file motions for partial relief in the event that the complaint was not dismissed in its entirety. Plaintiffs filed their response to Defendants' supplemental memorandum on December 4, 2008.

II. FACTUAL BACKGROUND

The instant action concerns one of eleven beachfront lots located at Palauea Beach, Makena, Maui, collectively referred to as the "Palauea Beach Lots" (Parcels 13-23). Nine of the lots, including Plaintiffs' (Parcel 15) have a land use designation of "Park" under the 1998 Kihei-Makena Community Plan ("KMCP"). The nine "Park" lots lie within the State Land Use Commission's Urban District and the County of Maui's Special Management Area ("SMA"). The State of Hawai`i enacted Chapter 205A of the Hawai`i Revised Statutes, pursuant to the Federal Coastal Zone Management Act, in order to protect coastal areas in

the State, identified as "special management areas." Parcels 13-19 are currently zoned HM, Hotel.

In 1996, the Maui County Council passed Resolution 96-121 calling for the County of Maui to purchase nine of the lots with the "Park" designation to be used as a public beach park. By 1999, the Council determined that the County lacked sufficient funds to purchase all nine lots. Instead, the County determined that it was only able to purchase two of the lots. Thus, the Maui County Council passed Resolution 99-183 authorizing the purchase of Parcels 18 and 19. The seven other lots were sold to private individuals.

In February, 2000, Plaintiffs purchased Parcel 15, particularly described as Tax Map Key No. (2) 2-1-011-015, with the address of 4492 Makena Keoneoio Road, Makena, Hawaii (the "subject property"). The subject property has a "Park" designation under the KMCP and is in a "special management area" as defined in H.R.S. § 205A-22, and therefore is governed by the Special Management Area rules for the Maui Planning Commission, as codified in Chapter 202 of the Department of Planning, County of Maui Regulations ("SMA Rules"). Plaintiffs proposed to build a single-family residence on their parcel, a use inconsistent with the KMCP designation for "Park" use.

Plaintiffs began taking initial steps to apply for a community plan amendment as early as 2003. In 2004, Munekiyo & Hiraga, the planning consultants retained by Plaintiffs, wrote to

various County departments advising them that the Plaintiffs were filing and preparing documents necessary to apply for a community plan amendment. In 2003, the owners of Parcels 13 and 14 initiated administrative and court proceedings against the County of Maui in conjunction with efforts by these owners to build residences on their lots. The Department of Planning for the County of Maui anticipated that there would continue to be disputes abut the use of the Palauea Beach Lots. Thus, in 2006, the Planning Department and other Palauea Beach lot owners initiated a process to amend the KMCP 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 Planning Department stated it would present the requests for the changes to the Maui County Council, the body charged pursuant to Maui County Code §2.80B.60 and the Maui County Charter §§8-8.4 and 8-8.6 with making the final determination whether there should be an amendment to a community plan and change the zoning. As an environmental assessment ("EA") would be necessary for such a change and the County did not have the funds to pay for such a process, the County requested and the Palauea Beach Lot owners agreed to pay for the EA.

A preliminary draft environmental assessment was provided to the Planning Department by Munekiyo & Hiraga. On February 20, 2007, Munekiyo & Hiraga responded to comments that had been made by the County of Maui about the Preliminary Draft

EA, producing a revised Draft EA entitled "Draft Environmental Assessment: Entitlements Action for Palauea Parcels" to the County for its review. On February 22, 2007, the Planning Department forwarded a copy of the Draft EA to the Office of Environmental Quality Control ("OEQC") for publication in *The Environmental Notice*, which provides the public with the opportunity to review and comment on all projects that may have an impact on the environment. The notice of the Draft EA was published in *The Environmental Notice* on March 8, 2007. Also in February, 2007, the Draft EA was submitted by the Planning Department to the Maui Planning Commission for its review and comments. Planning Director Jeffrey Hunt stated in his February 26, 2007 letter to the Planning Commission transmitting the Draft EA: "To prevent future problems associated with the inconsistencies between the Kihei-Makena Community Plan and Zoning, the Planning Director proposes to initiate land use amendments that reflect the intended residential use of the properties and the existing park use of the County-owned properties."

On March 8, 2007, Deputy Planning Director Colleen Suyama circulated the Draft EA to various county, state, federal and other agencies for comment and recommendations. The Draft EA was discussed at length by members of the Planning Commission at its March 13, 2007 meeting.

On September 25, 2007, Plaintiffs, through their planners Munekiyo & Hiraga, Inc., submitted an SMA Assessment Application pursuant to §12-202-12 of the SMA Rules. The Final EA was submitted by Munekiyo & Hiraga in October 2007. The Planning Department recommended to the Planning Commission that it accept the Final EA and issue a "Findings of No Significant Impact" ("FONSI") determination. The Final EA was placed on the agenda for the Planning Commission at its January 22, 2008 meeting.

By letter dated October 25, 2007 ("Rejection Letter"), Director Jeffrey Hunt, acting through the Planning Department, returned to Plaintiffs' consultant the SMA Assessment Application, stating that the application would not be processed because:

> The subject property is designated "Park" on the Kihei-Makena Community Plan (Community Plan). The proposed Single-Family dwelling is inconsistent with the Community Plan. An application for a Community Plan Amendment was not submitted concurrent with the subject application.
>
> Section 12-202-12(f)(5) states that an application "cannot be processed because the proposed action is not consistent with the County General Plan, Community Plan, or Zoning, unless a General Plan, Community Plan, or Zoning Application for an appropriate amendment is processed concurrently with the SMA Permit Application.

The Rejection Letter further stated that "[i]f you wish to proceed in the future, a new application with appropriate submittals will be required. Said application will require

consistency with the Community Plan in order to be processed." Plaintiffs did not appeal the Rejection Letter to the Planning Commission.

At the Planning Commission's meeting of February 12, 2008, the Planning Commission discussed the proposed KMCP plan amendment and deferred further action on the Final EA requesting a full archeological study be completed.

Plaintiffs filed their complaint on November 19, 2007.

III. STANDARD OF REVIEW

Review of a motion to dismiss for lack of subject matter jurisdiction "is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. Dismissal is improper unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 240 842 P.2d 634, 637 (1992), *aff'd*, 512 U.S. 246 (1994). Further "when considering a motion to dismiss pursuant to Rule 12(b)(1) the [trial] court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *Id.* "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Hawaii Rules of Civil Procedure* Rule 12(h)(3).

IV. DISCUSSION

Defendants contend that the Court should dismiss the Complaint in its entirety because the Court lacks jurisdiction as Plaintiffs' claims are not ripe for adjudication. Defendants argue that Plaintiffs have failed to pursue the administrative avenues open to them to obtain rulings that could result in their being able to proceed with building a house on their property, specifically:

(1) Plaintiffs have failed to exhaust their administrative remedies in not appealing Planning Director Jeffrey S. Hunt's October 25, 2007 decision to the Maui Planning Commission as provided by §12-202-26 of the SMA Rules of the Maui Planning Commission;

(2) Plaintiffs have failed to pursue the administrative avenue available to them by submitting an SMA Permit Application (as opposed to an SMA Assessment Application) for an SMA Major Permit pursuant to §12-202-12(f)(5) of the SMA Rules; and

(3) Plaintiffs have failed to pursue and obtain a final decision by the Maui County Council on the proposed amendment to the KMCP to change the land use designation of their property from "Park" to "Residential."

"Under the ripeness doctrine, a court should 'reserve judgment upon a law pending concrete executive action to carry its policies into effect[.]'" *Save Sunset Beach Coalition* v.

City and County of Honolulu, 102 Hawai'i 465, 483, 78 P.3d 1, 19 (2003), *quoting*, *Bremner v. City & County of Honolulu*, 96 Hawai'i 124, 144, 28 P.3d 350, 360 (App.2001), *reconsideration denied*, (July 5, 2001), *cert. denied*, (August 13, 2001). "The need to avoid premature adjudication supports a definition of 'dispute' that requires more than a 'difference of opinion' as to policy. The rationale underlying the ripeness doctrine and the traditional reluctance of courts to apply injunctive and declaratory remedies to administrative determinations is 'to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effect felt in a concrete way by the challenging parties.'" *Id.*, *citing*, *Grace Business Development Corp. v. Kamikawa*, 92 Hawai'i 608, 612, 994 P.2d 540, 544 (2000).

Plaintiffs, through their initial memorandum in opposition to Defendants' motion filed on February 12, 2008, relied on *GATRI v. Blane*, 88 Haw. 108, 962 P.2d 367 (1998) in support of their argument that the Director's Rejection Letter of October 25, 2007 was a "final decision" or "final adverse action" by an administrative agency, and thus Plaintiffs have exhausted all their administrative remedies and the case is ripe for adjudication.

In *GATRI*, GATRI submitted an application for an SMA permit for its property on March 8, 1996. On March 29, 1996, the Director of the Planning Department of the County of Maui, via letter, informed GATRI that:

> [P]lease be advised that the proposed restaurant use for the property is inconsistent with the "single-family" land-use designation in the Kihei-Makena Community plan, and therefore, said use is inconsistent with the county general plan.
>
> In accordance with the [Maui SMA Rules], Section 12-202-12, and in consideration of the above determination, the proposed action cannot be processed because it is not consistent with the community plan, unless a community plan amendment to designate business is processed concurrently with the SMA permit application.

Id., 88 Hawai'i at 109-10, 962 P.2d at 368-69.

The *GATRI* Court stated that under the SMA Rules, "[t]he decision of the Director not to process [the] application is a final decision equivalent to a denial of the application." *See, Id.*, 88 Hawai'i at 111, 962 P.2d at 370. The *GATRI* Court held that "the circuit court had jurisdiction over this appeal of a final decision of the Director. Therefore, GATRI exhausted its administrative remedies." *Id.*, 88 Hawai'i at 112, 962 P.2d at 371. The *GATRI* Court noted in its holding that "[t]here is no express procedure provided in the Maui charter or the Maui SMA rules of an appeal of the Director's decision on a minor permit application to the Commission." *Id.*

The SMA Rules in effect in 1996 that applied to *GATRI* did not contain any express provisions to appeal an adverse

decision of the Director. However, the SMA Rules have been amended to include §12-202-26, which now reads:

> Appeal of the director's decision may be made to the commission by the filing of a notice of appeal with the department not later than ten days after the receipt of the director's written decision, or, where the director's decision is not required by the commission or these rules to be served upon appellant, not later than ten days after the meeting at which the commission received notification of the director's decision.

SMA Rule §12-202-26 [Eff 1/1/94; am and comp 9/28/97; am and comp 11/4/02]. Further, §12-202-32, entitled "Disposition of appeal" states:

> The commission may affirm the decision of the director, or may remand the case to the hearing officer, if any, with instructions for further proceedings; or it may reverse the decision of the director if the substantial rights of the appellant may have been prejudiced because the decision is:
>
> (1) Based on clearly erroneous findings of material fact or erroneous application of law; or
> (2) Arbitrary or capricious in its application; or
> (3) A clearly unwarranted abuse of discretion.

SMA Rule §12-202-32 [Eff 11/4/02; comp 11/4/02; am and comp 12/20/04]. As a result ,parties now aggrieved by decisions of the Director of Planning may appeal to the Planning Commission. Thus, since the SMA Rules expressly provide a procedure for an appeal of the Director's decision, and since there is no factual allegation in the instant Complaint that Plaintiffs have availed themselves of the appeal process, Plaintiffs have not exhausted

their administrative remedies. Therefore the instant case is not ripe for adjudication.

Plaintiffs argue that they do not have the right to appeal the Rejection Letter because §12-202-206 was added to the SMA Rules in connection with an amendment to §12-202-14 on SMA minor permits, which expressly provides for appeals of such decisions under §12-202-26[1]. Plaintiffs contend that since §12-202-12 does not include such express language, §12-202-26 does not apply to SMA Assessment Applications filed under §12-202-12. However, Plaintiffs' Exhibit 19 attached to their memorandum in opposition to Defendants' motion to dismiss (Exhibit S to Defendants' supplemental memorandum) supports a different conclusion. Said exhibit contains the findings of fact and conclusions of law; decision and order filed on April 15, 2005 in two proceedings (1) *In the Matter of the Appeal of Rescission of Special Management Assessment Determination for the Lambert Residence* and *(2) In the Matter of Appeal of Charles Sweeney and Nell Sweeney*.

The appellants in the aforementioned matters were owners of two of the Palauea Beach Lots. The appeals to the Planning Commission concerned adverse decisions of the Planning Director. Though the central issue in each appeal was different

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[1] SMA Rules §12-202-14 (b) states "[t]he director shall approve, approve with conditions, or deny such permit in accordance with the guidelines in section 205A-26, HRS, as amended. Any final decision shall be transmitted to the applicant in writing and *shall be appealable pursuant to section 12-202-26.*" (emphasis added).

from the central issue here, it was concluded in those proceedings that "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.

Plaintiffs also contend that since §12-202-26 appears after §12-202-23 relating to enforcement of the SMA Rules, §12-202-26 must be read to apply to the enforcement of the SMA Rules. However, there is nothing to suggest that the SMA Rules must be read in such a fashion nor are there any rules of statutory construction that would dictate such a conclusion.

Finally, Plaintiffs' argue that any appeal of the Director's Rejection Letter is not required under the "futility" exception to the exhaustion doctrine. "Ordinarily, futility refers to the inability of an administrative process to provide the appropriate relief[.]" *In re Doe Children*, 105 Hawai'i 38, 60, 93 P.3d 1145, 1167 (2004), *citing*, *In re Doe Children*, 96 Hawai'i at 287 n. 20, 30 P.3d at 893 n. 20 (*citing*, *Hokama v. University of Hawai'i*, 92 Hawai'i 268, 273, 990 P.2d 1150, 1155 (1999). There the Court stated:

> The bases of the "futility exception" in our jurisprudence underscore the doctrine's focus upon the adequacy of administrative remedies. In

> *Hokama*, this court excused an employee of the University of Hawai'i, who otherwise had standing, from timely filing a grievance with the university because "[i]t [was] entirely unclear ... whether the damages sought by [the plaintiff were] available under the grievance procedure." 92 Hawai'i at 273, 990 P.2d at 1155. The *Hokama* court reasoned that "[a]n aggrieved party need not exhaust administrative remedies where no effective remedies exist." *Id.* (citing *Winslow v. State*, 2 Haw.App. 50, 56, 625 P.2d 1046, 1051 (1981); *see also Lane v. Yamamoto*, 2 Haw.App. 176, 178-79, 628 P.2d 634, 636 (1981); *Waugh v. University of Hawaii*, 63 Haw. 117, 129, 621 P.2d 957, 967 (1980)). In *Winslow*, the Intermediate Court of Appeals (ICA) held "that [the] appellant could not be required to exhaust contractual remedies in an action against [a] union where no such remedies actually exist[ed]." 2 Haw.App. at 56, 625 P.2d at 1051. In *Lane*, "there was no set procedure which was available for the appellant to follow in seeking the return of his property [,]" and the ICA therefore noted that "[o]ne cannot exhaust an administrative remedy if there is no administrative remedy." 2 Haw.App. at 178-79, 628 P.2d at 636. The *Waugh* court similarly observed that the "[a]ppellant was not required to follow University [of Hawai'i's] administrative procedures [,]" inasmuch as "there were no established internal procedures for handling claims such as [the appellant's]." 63 Haw. at 129, 621 P.2d at 967.

In re Doe Children, 105 Hawai'i at 60, 93 P.3d at 1167.

Here, there are effective remedies still available to Plaintiffs. First, Plaintiffs may still proceed with a new application via an appropriate submission. Plaintiffs are still free to seek amendment to the KMCP, an avenue of relief that Plaintiffs once contemplated. Such proposed amendment could be submitted concurrently with a new SMA Assessment Application, as contemplated under §12-202-12(f)(5). Under §12-202-12(b),

Plaintiffs still has the ability to waive assessment and apply for a special management area use permit pursuant to the provisions of §§12-202-13 and 12-202-15. Since effective remedies remain available to Plaintiffs, the "futility" exception to the exhaustion doctrine under Hawai'i law has no application here.

V. ORDER

Plaintiffs have failed to exhaust their administrative remedies and do not qualify under the "futility" exception to the exhaustion doctrine. The instant case is not ripe for adjudication. Thus, this Court lack jurisdiction over the subject matter. Accordingly,

IT IS HEREBY ORDERED that Defendants' motion to dismiss complaint filed November 19, 2007 be granted. Having granted Defendants' motion to dismiss, the Court need not address Defendants' requests for alternative relief.

DATED: Wailuku, Hawai'i, March 2, 2009.

SECOND JUDICIAL COURT SEAL STATE OF HAWAII

JUDGE OF THE ABOVE-ENTITLED COURT

I hereby certify that a copy of the within was served this 2nd day of March, 2009, on:

Andrew Varnum Beaman, Esq. ✓
Mary Blaine Johnston, Esq. DCC

/s/ M. Filipelli

Clerk