No. 18-

In the
Supreme Court of the United States

DOUGLAS LEONE, *et al.*,

Petitioners,

v.

MAUI COUNTY, HAWAII, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Hawaii

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2000, Douglas Leone and Patricia Perkins-Leone bought beachfront property in Hawaii on which they planned to build a home for their family. The land was zoned for single-family residences, but Maui County decided it should be used as a public park. Instead of buying the land, however, the County wielded its regulatory authority to block the Leones from developing their property in any way.

The Leones challenged the County's refusal to allow them to use or develop their property as a taking under the Fifth and Fourteenth Amendments and sought just compensation. In particular, the Leones claimed they had suffered a "categorical" regulatory taking because the County had forced them to keep their land "substantially in its natural state." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992). The Hawaii Supreme Court disagreed. It held that, for two reasons, the Leones had not been denied "all economically beneficial or productive use of land." *Id.* at 1015. First, the undeveloped property still had "investment use" because the Leones could sell it. Second, the undeveloped property could be used as a beach park at which the Leones potentially could sell concessions.

The question presented is:

Whether holding undeveloped property as an "investment" or using it as a "park" in its natural state constitutes economically beneficial or productive use of land under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners in this case are Douglas Leone and Patricia Leone-Perkins, in their capacity as trustees of the Leone-Perkins Family Trust.

Respondents are the County of Maui, a political subdivision of the State of Hawaii, and William Spence, in his capacity as Director of the Department of Planning of the County of Maui.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Douglas Leone and Patricia Leone-Perkins submit this petition for a writ of certiorari to review the judgment of the Supreme Court of Hawaii.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 404 P.3d 1257 (Haw. 2017), and is reproduced in the Appendix ("App.") at 1a-58a.

JURISDICTION

The Supreme Court of Hawaii rendered its judgment on April 13, 2018. App. 59a-60a. On May 22, 2018, Justice Kennedy extended the time to file this petition for a writ of certiorari to August 13, 2018. The Chief Justice then extended the time to file this petition for a writ of certiorari to September 10, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment provides in relevant part: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

This litigation "arises from Maui County's troubled attempts to create a public park at Palauea Beach in Makena, Maui." App. 69a. For many years, the County had sought to convert privately owned beachfront land into a public park. But Maui could not afford to buy the land. So it sought to achieve that objective through a regulatory blockade. As one elected official put it: If development were blocked, "then the whole beach would remain as it is now and they would not be able to build on the land that they own. Granted, we can't buy it but if we say no you can't develop it then we then have access to it, at least the beach." App. 72a-73a. This regulatory strategy, in other words, "would 'allow the people of Maui to utilize the beach area' while preventing property owners from constructing homes." App. 73a.

Douglas Leone and Patricia Leone-Perkins own one of these beachfront lots. After the County blocked them from building a single-family home on their land, the Leones filed suit in state court alleging a "categorical" regulatory taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). For two reasons, however, the Hawaii courts held that the Leones had not been denied "all economically beneficial or productive use of land." *Id*. First, the land had "'investment use,'" meaning it retained "value because the Leones could hold on to [the] property, wait until it increased in value, and sell it for a profit." App. 41a. Second, the Leones could use their land as a "park" and potentially "engage in commercial sales of concessions on their lot." App. 22a.

This Court's intervention is plainly warranted as the Hawaii Supreme Court has effectively rendered *Lucas* a dead letter. If holding undeveloped land as an investment or labeling it a park is an economically beneficial use, then it will be impossible to establish a categorical regulatory taking. All property has at least some investment value, and landowners can always theoretically open a concession stand on barren land and call it a park. A constitutional rule that promises landowners "total" protection from confiscatory regulations, *Lucas*, 505 U.S. at 1026, will in fact offer them *no* protection if the Hawaii Supreme Court's blinkered rationale is allowed to stand.

But the ruling below is not just important. It is legally unsustainable. A categorical regulatory taking "typically" occurs when the landowner is forced to leave his property "substantially in its natural state." *Id.* at 1018. When a landowner must "leave his property economically idle," *id.* at 1019, he "alone" has been forced "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (citations and quotations omitted). That is the case here. The County made it known that it wanted this land to be used as a public park. The financial burden of that policy choice should have been borne by all the people of Maui—not just the Leones.

The "investment use" rationale is nothing more than an attempt to circumvent this bedrock constitutional rule. This Court has never held that selling the property—the only way the landowner could recoup its investment value—is "economically beneficial or productive *use*" of the land. *Lucas*. 505 U.S. at 1015 (emphasis added). Nor is there support for the idea that a categorical taking has not

occurred so long as the owner could still use the property as a park. That reasoning is exactly backwards. After all, this controversy is about the County's efforts to convert private property into a de facto public park without just compensation. The Constitution surely does not allow the government to claim that there has been no categorical taking under *Lucas* because the owners could put the land to the same undeveloped "use" for which the government wanted the property in the first place.

This petition therefore offers the Court an important opportunity to clarify several aspects of takings doctrine. As the decision below underscores, this Court's haphazard references—in *Lucas* and other cases—to "use" and "value" have produced deep confusion in federal and state courts. Some courts, agreeing with the Leones, appropriately focus on whether the landowners have been forced to keep the property in its natural state. Other courts, like the Hawaii Supreme Court, instead focus on whether the land retains any residual value. And some courts split the difference, holding that the land's residual value is relevant—but not dispositive—under *Lucas*. The Court should grant review to resolve this confusion and to reverse the judgment of the Hawaii Supreme Court.

STATEMENT OF THE CASE

A. Factual Background

This case is about beachfront land at Palauea Beach on Maui. The disputed property is one of nine contiguous lots at this scenic location. For nearly thirty years, the Maui County Council has wanted to convert these lots into a public beach park. App. 3a. Palauea Beach "was one of

the last undeveloped leeward beaches on Maui" and there was "an outpouring of community support for the creation of a beach park." App. 69a. In 1996, the Council adopted a resolution "authorizing the Mayor to acquire the Palauea Beach lots for the creation of a public park." App. 69a.

Those beachfront lots were (and still are today) "zoned 'Hotel-Multifamily,' permitting a variety of economically beneficial uses, including single-family residences." App. 70a. But, in 1998, the County enacted the Kihei-Makana Community Plan, which "assigned the beach lots a 'park' land use designation" that prohibits "construction of single-family residences." App. 69a. The Community Plan has the force of law. *GARTI v. Blane*, 962 P.2d 367, 371-74 (Haw. 1998).

Furthermore, and crucially, the lots also are located in a "special management area (SMA) under the Hawaii Coastal Zone Management Act (CZMA)." App. 70a (citing Hawaii Revised Statutes (HRS) § 205A-22). "The CZMA imposes stringent permit requirements for 'developments' within special management areas." App. 70a (citing HRS §§ 205A-28, 205A-26). But a single-family residence is not a "development" unless it will "have a cumulative impact, or a significant environmental or ecological effect on a special management area." HRS § 205A-22.

The CZMA delegates administration of SMAs to the County. HRS §§ 205A-22, 205A-27. The County, in turn, created a procedure for "allowing landowners ... to seek a determination that the proposed use is not a 'development' under HRS § 205A-22." App. 71a. But the Director of the Department of Planning cannot process that application if the "proposed action ... is not consistent

with the community plan." App. 88a (citing *GARTI*, 962 P.2d. at 369); *see* SMA Rule 12-202-12(f).

In 1999, the Council affirmed "its 'official policy' to 'preserve Palauea Beach'" and "urged" the County "to acquire two of the Palauea Beach lots." App. 69a. In January 2000, the County purchased those lots. App. 69a. But it "was unable to allocate sufficient funds to purchase the remaining seven lots, which were then sold to private individuals." App. 69a. Yet the County has never amended or repealed the Community Plan.

The Leones bought one of the lots in February 2000. As part of their effort to build a single-family residence, the Leones and other property owners supported an effort to change the Community Plan designation from "park" to "residential" by funding an environmental assessment. App. 72a. But the Planning Commission "refused to accept the environmental assessment and instead requested additional archeological studies and historical narratives. Several commissioners advocated for prolonging the amendment process as a deliberate strategy to preserve the status quo—a de facto beach park on the privately-owned lots." App. 72a.

One commissioner explained: "So if we decide on no action on this thing then the whole beach would remain as it is now and they would not be able to build on the land that they own. Granted, we can't buy it but if we say no you can't develop it then we then have access to it, at least the beach." App. 72a-73a. The strategy "would 'allow the people of Maui to utilize the beach area' while preventing property owners from constructing homes." App. 73a. Another commissioner added "that moving forward with

the process would result in a loss of the 'de facto parking that people are enjoying now' on the private lots and could force Maui County to use its own parcels for parking." App. 73a. "At least one commissioner," moreover, "expressly sought to preserve the public's illegal camping, which had resulted in littering, defecating, and parking on the private beach lots, bemoaning the landowners' resort to hiring security guards to remove the trespassers." App. 73a.

After their effort to amend the Community Plan was thwarted, the Leones sought a determination "that their proposed use is exempt from the SMA permit requirements." App. 73a. In accordance with SMA Rule 12-202, the Director rejected the Leones' proposed use as "inconsistent with" the property's "'park' designation in the Community Plan." App. 73a.

Procedural History

In 2007, the Leones filed suit claiming, among other things, that the denial of the application to build a single-family home "was an inverse condemnation pursuant to the Fifth and Fourteenth Amendments" because it "left [them] with no economically viable use of their property." App. 7a-8a.[1] The trial court dismissed the Leones' suit as "unripe" principally because they "failed to exhaust administrative remedies" by not "appealing the Director's decision to the Planning Commission." App. 74a.

[1] The Leones brought additional claims under both federal and state law. App 28a n.9. They do not seek this Court's review of those claims.

The Hawaii Intermediate Court of Appeals reversed. App. 66a-95a. Under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), "ripeness ... simply requires a final, definitive, decision by the initial land-use decision-maker regarding how it will apply the regulations at issue to the subject property, which inflicts an actual, concrete injury." App. 82a. Thus, the Leones "were not required to appeal the Director's decision that their assessment application could not be processed because the proposed Single-Family dwelling is inconsistent with the Community Plan. The Director's decision satisfied the finality requirement for ripeness by setting forth a definitive position regarding how Maui County will apply the regulations at issue to the particular land in question." App. 87a (quotations and alterations omitted); *see also* App. 89a-91a n.8.[2] The Hawaii Supreme Court declined review. App. 10a n.4.

On remand, the parties staked out conflicting legal positions as to whether the rejection of the Leones' request to build a single-family home on their lot deprived them of all "economically beneficial use of their property." App. 2a. Throughout the trial-court proceedings, the Leones argued that the prohibition was a "categorical" regulatory taking because the County had forced them to leave "the land in its natural state." App. 46a. The County's position was that there had not been a categorical regulatory taking because, despite the land-use restrictions, the Leones' "property had value." App. 41a.

2. The appellate court also rejected the argument that the Leones needed to obtain a final decision on their thwarted effort to have the Community Plan amended. Seeking a legislative amendment was not akin to seeking a variance, App. 87a-95a, and therefore could not "be required as a step in reaching a final agency determination for ripeness purposes," App. 94a (citation omitted).

The trial court sided with the County. After rejecting some of the Leones' claims at summary judgment, the court set their inverse condemnation claim for trial. App. 11a. n.6. At trial, the County's expert was permitted to testify (over the Leones' objections) that the property "had 'investment use.'" App. 41a. The court also permitted the County to argue that the Leones could use their property as a "park" and "engage in commercial sales of concessions on their lot." App. 22a. It permitted argument that the Leones, for example, could "engage in refreshment sales." App. 24a.

The Leones also requested a jury instruction on "economically beneficial use" consistent with the position they took from the start: "Land has economically beneficial use, if, under the applicable regulations, all three of the following are true: (1) there is a permissible use for the land, *other than leaving the land in its natural state*, (2) the land is physically adaptable for such use and (3) there is a demand for such use in the reasonably near future." App. 29a. The trial court deleted the phrase "other than leaving the land in its natural state" from the instruction before delivering it to the jury. App. 29a.

The jury returned a verdict for the County. App. 63a-65a. The Leones then renewed their motion for judgment as a matter of law. The court again rejected the Leones' argument that, under *Lucas*, they had suffered a "categorical" regulatory taking as a matter of law. App. 62a.

The Hawaii Supreme Court affirmed. App. 1a-58a. The court recognized "that regulations that require land to be left 'substantially in its natural state' *suggest* that the owner of the land is being deprived of all economically

beneficial use of the land." App. 46a (quoting *Lucas*, 505 U.S. at 1018). But, according to the court, "regulations that leave land in its natural state" do not "*always* constitute a taking." App. 46a. Thus, "while property value should not be considered to the exclusion of other factors, it is still a relevant factor in the economically viable use analysis." App. 40a (citations omitted).

Applying this standard, the court held that there was "evidence to support the jury's finding that the County did not deprive the Leones of economically beneficial use of their land." App. 53a. First, there was evidence that the property has "'investment use,'" meaning the Leones could "hold it for a period of time, and as it increases in value and depending on [their] strategy and financial objectives, sell it for profit.'" App. 54a. Second, there was evidence "that the Leones could potentially conduct commercial activities on their property as a park." App. 55a. Accordingly, "the County's regulations did not amount to a taking of the Leones' property." App. 56a.

REASONS FOR GRANTING THE PETITION

I. The Hawaii Supreme Court's decision threatens to eviscerate the right to just compensation in "categorical" regulatory takings cases.

This Court has divided regulatory takings claims into two distinct categories: (1) "categorical" regulatory takings, *Lucas*, 505 U.S. at 1015; and (2) regulatory takings where the right to just compensation depends "on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed

expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Penn Cent Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)). This is a "categorical" regulatory taking claim. App. 14a.

As the label suggests, a "categorical" taking claim does not permit a "case-specific inquiry into the public interest advanced in support of the restraint," *Lucas*, 505 U.S. at 1015. The regulation's "economic impact" and "the extent to which [it] has interfered with distinct investment-backed expectations" also are irrelevant. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005). Just compensation is required—without exception—so long as the regulation denies the Leones "all economically beneficial or productive use of [their] land." *Lucas*, 505 U.S. at 1015. This kind of taking "typically" occurs when the owner is forced to leave the land "substantially in its natural state." *Id.* at 1018. Hence, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id*. at 1019; *see also Palazzolo*, 533 U.S. at 631.

The Hawaii Supreme Court's holding that there has been no "categorical" regulatory taking—even though the land is economically idle—because it has "investment value" or has use as a "park" dismantles this framework and makes it impossible for landowners to prevail under *Lucas*. The issue no longer is whether the "regulations ... leave the owner of land without economically beneficial or productive options for its use." *Lucas*, 505 U.S. at 1018. The issue instead is whether the property has any "value." To prevail, in other words, a landowner must "demonstrate

that a regulation destroyed all land value, regardless of its source." *Lost Tree Village Corp. v. United States*, 787 F.3d 1111, 1118 (Fed. Cir. 2015); *see id.* at 1117-18 (rejecting this sale-as-use theory of categorical regulatory takings). It is difficult—if not impossible—to imagine that there is land with *no* value in the marketplace.

Indeed, the process of litigating a *Lucas* claim would itself ensure that the land has some value. The landowner's claim that the property is valueless, paradoxically, would invite speculators to bet on it being worth purchasing on the cheap—either because the *Lucas* claim might prevail or because the land-use restrictions presently thwarting development might be lifted down the road. "Land value resulting from such speculation would defeat the very *Lucas* claim on which the speculation was based." *Lost Tree Village*, 787 F.3d at 1118.

But even without speculators, the government itself could defeat the *Lucas* claim by offering to purchase the property for pennies on the dollar once its regulations have sharply diminished the land's value. At that juncture, the government would argue that the owner's "categorical" claim should fail because the property's value has merely been "reduced," but not eliminated. *Lucas*, 505 U.S. at 1019 n.8. There is no constitutional basis for a rule that so easily permits the government to manipulate its way around the duty to pay just compensation.

Focusing on whether the property could be sold for a profit would not make the "investment value" concept any more defensible. Whether a property is worth more or less than its purchase price changes daily, monthly, and yearly based on external factors such as inflation

and the health of the economy. Two neighbors could bring identical *Lucas* claims, and one might win and the other might lose based on when the claim becomes ripe or when it is adjudicated—even though the same regulation forced both landowners to keep their land economically idle. It would be arbitrary to allow "'external economic forces' ... to artificially skew the takings inquiry." *Lost Tree Village Corp.*, 787 F.3d at 1118 (quoting *Del Monte Dunes at Monterey v. City of Monterey,* 95 F.3d 1422, 1433 (9th Cir. 1996)). Yet that would be the inevitable result if the success of a *Lucas* claim turned on whether landowners could sell the property for a profit.

It also would be unfair. An "owner with the resources to hold" land is not supposed to be in a superior position to "the owner with the need to sell." *Palazzolo*, 533 U.S. at 628. But focusing on the land's "investment use" leads to that exact outcome. Landowners with significant resources can navigate an investment-based regime in ways that landowners lacking such financial wherewithal cannot. An interpretation of the Takings Clause that discriminates between landowners based on vagaries of timing, market forces, and economic resources would be "capricious" and "quixotic." *Id.* at 627-28.

The Hawaii Supreme Court's other rationale—that the Leones' property could be used as a park despite the prohibition on any productive development—strays even farther from this Court's precedent. The government could label almost any undeveloped land a "park" at which "concessions" could be sold. App. 27a. For example, there is no reason why the undeveloped property at issue in *Lucas* could not have been used as a park. As here, Lucas owned "beachfront" property. *Lucas*, 505 U.S. at

1020. And, as here, forcing Lucas to use his land as a park instead of building "single-family residences" would have advanced the government's goal of preserving "ecological resources." *Id.* at 1024-25. That argument failed in *Lucas* because the Takings Clause exists to ensure that when "a regulation ... declares 'off-limits' all economically productive or beneficial uses of land ... compensation must be paid to sustain it." *Id.* at 1030. Recasting a regulation forbidding owners from developing their property in any way as approving its use as a park is Orwellian.

As the Court has repeatedly explained, the purpose of the Takings Clause is "to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Murr*, 137 S. Ct. at 1943 (citation and quotations omitted). The Takings Clause, in other words, "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893).

It is hard to imagine a case that more squarely tests the durability of that proposition. The County made clear that it wanted "the people of Maui" to "utilize the beach area while preventing property owners from constructing homes." App. 73a. That objective was perfectly legitimate, but it required the County to purchase the land it wished to encumber. Instead of doing that, the County prevented the Leones from developing their land in the hope it would facilitate beach access and create a de facto public park.

The suggestion that the Leones' takings claim should fail because they could still use their land as a park merely adds insult to injury and makes explicit that the County sought to convert private property into a public amenity. The people of Maui can have a beachfront park for the public to enjoy. But the Leones cannot be forced to bear that cost alone.

* * *

This case's implications are dramatic. If landowners such as the Leones—whose property has been effectively confiscated—can no longer bring a categorical regulatory takings claim, it is difficult to see who can. All property (especially beachfront property) has residual market value, and just about any unspoiled land can be reimagined as a park. The Hawaii Supreme Court's ruling thus transforms a "categorical rule that total regulatory takings must be compensated" into one that does not offer any protection to landowners. *Lucas*, 505 U.S. at 1026. The *Lucas* claim will exist in name only.

II. The Hawaii Supreme Court's decision conflicts with *Lucas* and this Court's other regulatory takings cases.

The Hawaii Supreme Court's ruling conflicts with this Court's decisions. The starting point for determining if the Leones have been denied "all economically beneficial or productive use" is whether the land remains "substantially in its natural state." *Lucas*, 505 U.S. at 1015, 1018. That is "typically" the situation in which a total regulatory taking occurs. *Id.* at 1018. This case falls within the heartland of the *Lucas* rule. There is no doubt that "in the name of the common good," the land has been rendered "economically

idle." *Id*. at 1019. The Leones should have prevailed under a straightforward application of *Lucas*.

But the Hawaii Supreme Court held that the Leones had not been deprived of all economic or productive use because they could "hold on to [the] property, wait until it increased in value, and sell it for a profit," App. 41a, or, in the alternative, call their undeveloped land a "park" and sell "concessions on their lot," App. 22a. Both rationales conflict with *Lucas*.

First, forcing the Leones to sell their land is not an economic or productive *use*. "When there are no underlying economic uses, it is unreasonable to define land *use* as including the *sale* of the land. Typical economic uses enable a landowner to derive benefits from land ownership rather than requiring a landowner to sell the affected parcel." *Lost Tree Village Corp.*, 787 F.3d at 1117. Contra the decision below, "*Lucas* does not suggest that a land sale qualifies as an economic use." *Id*.

This follows not only from first principles and basic logic, but also from the facts of *Lucas*. Lucas also could have sold his land. *See Lucas*, 505 U.S. at 1038 n.3 (Blackmun, J., dissenting); *Resource Investments, Inc. v. United States*, 85 Fed. Cl. 447, 488 (Fed. Cl. 2009) ("Even the property at issue in *Lucas* retained some accounting or appraised value."). But because South Carolina made it "'off-limits'" for Lucas to make "economically productive or beneficial uses of [his] land," the taking of his property was categorical. *Lucas*, 505 U.S. at 1029-30 (majority opinion). So too here.[3]

---

3. To be sure, the Court has at times employed "use" and "value" interchangeably. Indeed, the issue arose in *Tahoe-Sierra*

Telling the Leones they should call their undeveloped property a park and sell concessions on it no more complies with *Lucas* than telling them to sell it. Forcing the Leones to surrender to the County's longstanding demand that they use their undeveloped property as a park is not an "economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015, in any legitimate sense. The government cannot defeat a *Lucas* claim by instructing the owner to put the land to the very use that motivated the restriction in the first place. "To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation .... This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

Indeed, if the Hawaii Supreme Court is correct, then it is hard to see how a landowner could ever prevail when the government wants the land to be preserved in its natural state. Take, for example, a land-use restriction motivated by the desire to create a bird sanctuary. Under the decision below, it would not be a categorical regulatory taking to block development because the owner still could use their property as a bird sanctuary and charge avid birdwatchers for refreshments. This makes a mockery of the Takings Clause and gives the government virtually unbridled authority to impose confiscatory regulations on private land.

Preservation Council v. Tahoe Regional Planning Agency—a case involving a moratorium on development. *See* 535 U.S. 302, 350 (2002) (Rehnquist, C.J., dissenting). But the Court had no occasion to resolve the matter because it instead held that *Lucas* does not apply to any taking that, on its face, is "temporary." *Id.* at 336 (majority opinion). *Lucas* applies in cases—like this one—where the regulatory taking "is permanent." *Id.*

The Hawaii Supreme Court emphasized that although "regulations that require land to be left 'substantially in its natural state' *suggest* that the owner of the land is being deprived of all economically beneficial use of the land ..., this rule does not state that regulations that leave land in its natural state *always* constitute a taking." App. 46a (citations omitted). But the court never explained why the "investment" and "park" rationales overcame the strong presumption that blocking all development is a categorical regulatory taking. It never explained, in other words, why these exceptions do not swallow the *Lucas* rule.

The most the Hawaii Supreme Court would say is that, "while property value should not be considered to the exclusion of other factors, it is still a relevant factor in the economically viable use analysis." App. 40a. But it *did* rely on value to the exclusion of all other factors. The court offered no limiting principle that might address the serious concern that the "investment" and "park" rationales make it impossible to succeed under *Lucas* and, in turn, require the landowner to survive the *Penn Central* gauntlet in every case. Even if "value" plays a role under *Lucas*, the decision below is indefensible.

II. The lower courts are deeply confused over when a regulation deprives a property owner of "all economically beneficial use of the land."

"The term 'economically viable use' has yet to be defined with much precision." *Del Monte Dunes*, 95 F.3d at 1432 (alteration and citation omitted); *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, No. 11-00414, 2018 WL 3149489, at *8 (D. Haw. June 27, 2018) (same). This has led to deep confusion over the role of the property's

"value" under *Lucas*. *Robinson v. City of Baton Rouge*, No. 13-375, 2016 WL 6211276, at *38 (M.D. La. Oct. 22, 2016) ("*Lucas* is somewhat ambiguous and does not appear to answer the question of whether a categorical takings claim survives if the owner is able to sell his property for a million dollars."); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 Ecology L.Q. 307, 331 (2007) ("*Lucas* ... is ambiguous as to whether plaintiff must show a total loss of both economic use *and value*. *Lucas* itself left the inclusion of value unclear, since many of its references were to residual use.").

First, some courts agree with the Leones that "use"—not "value"—is the touchstone in determining whether a total regulatory taking has occurred. *See Lost Tree Village*, 787 F.3d at 1117-19; *Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1362-63 (Fed. Cir. 2000). "Both in its holding and its reasoning, *Lucas* ... focuses on whether a regulation permits *economically viable use* of the property, not whether the property retains some value on paper." *Resource Investments*, 85 Fed. Cl. at 486. The Leones would have prevailed under this rule.

Second, the Ninth Circuit has held that although the "focus is primarily on use, not value," the property's "value ... is relevant to the economically viable use inquiry." *Del Monte Dunes at Monterey*, 95 F.3d at 1433. Under this rule, "the ability to sell property is an economically beneficial use only when '*the property use allowed by the regulation* is sufficiently desirable to permit property owners to sell the property to someone for *that* use'; if 'no competitive market exists for the property *without the possibility of a legal change permitting development*, a taking may have occurred.'" *Bridge Aina Le'a, LLC*,

2018 WL 3149489, at *10 (quoting *Del Monte Dunes at Monterey*, 95 F.3d at 1433 (alterations omitted)). The Leones would have won under this rule too. The uses allowed by the County obviously are not desirable.

Third, other courts (including the Hawaii Supreme Court) hold that there is no *Lucas* claim so long as the land retains "value." *See Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 441 (8th Cir. 2007); *Robinson*, 2016 WL 6211276, at *40; *Rzadkowolski v. Metamora Twp.*, No. 14-12480, 2016 WL 3230535 (E.D. Mich. June 13, 2016); *Nammari v. Town of Winfield*, No. 07-306, 2008 WL 4757334, at *11 (N.D. Ind. Oct. 29, 2008); *Brian B. Brown Const. Co. v. St. Tammany Par.*, 17 F. Supp. 2d 586, 590 (E.D. La. 1998). In these courts, "to prevail on a categorical taking claim, the property must lose *all value*." *Robinson*, 2016 WL 6211276, at *40 (citing *Tahoe-Sierra*, 535 U.S. at 332).

This is an appropriate case in which to resolve this deep confusion. The distinction between "use" and "value" is decisive. If the Leones are right about *Lucas*, they have suffered a categorical regulatory taking. Indeed, the Leones would prevail so long as the property's value is tied to the use permitted by the regulation. The Leones did not suffer a categorical regulatory taking only if the legal rule is focused myopically on the property's residual value. The Court's intervention is needed to decide this important and unsettled federal issue.

CONCLUSION

For these reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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September 10, 2018

APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF HAWAI'I, FILED OCTOBER 16, 2017

IN THE SUPREME COURT OF
THE STATE OF HAWAI'I

SCAP-15-0000599

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

Plaintiffs-Appellants/Cross-Appellees,

vs.

COUNTY OF MAUI, a political subdivision of the State of Hawai'i; WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui,

Defendants-Appellees/Cross-Appellants.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND CIRCUIT. CAAP-15-0000599;
CIVIL NO. 07-1-0496(2).

October 16, 2017, Decided
October 16, 2017, Electronically Filed

RECKTENWALD, C.J., NAKAYAMA, McKENNA, POLLACK, AND WILSON, JJ.

Appendix A

OPINION OF THE COURT BY NAKAYAMA, J.

I. INTRODUCTION

Over seventeen years ago, Plaintiffs-Appellants/Cross-Appellees Douglas Leone and Patricia A. Perkins-Leone (collectively, the Leones) bought a beachfront lot in Makena, Maui with the expressed intent of building a family house on it. Today the house has not yet been built, and the Leones contend that the County of Maui's land use regulations and restrictions prevented them from doing so. In 2007, the Leones filed suit against Defendants-Appellees/Cross-Appellants County of Maui and William Spence, in his capacity as Director of the Department of Planning of the County of Maui (collectively, the County), asserting, among other counts, that the County's actions constituted a regulatory taking for which the Leones were entitled just compensation. On May 5, 2015, a jury delivered a verdict in favor of the County.

This case requires this court to decide, *inter alia*, whether the County's land use regulations constituted a regulatory taking of the Leones' property. But we do not decide on a blank slate. The jury determined that the County did not deprive the Leones of economically beneficial use of their property. We conclude that there was evidence to support the jury's verdict in favor of the County. As such, we affirm the Circuit Court of the Second Circuit's (circuit court): 1) June 1, 2015 judgment in favor of the County and against the Leones, 2) August 5, 2015 order denying the Leones' renewed motion for judgment as a matter of law or, in the alternative, motion for a new

trial, and 3) August 5, 2015 order granting in part and denying in part the County's motion for costs.

BACKGROUND

In 1996, the Maui County Council (county council) adopted Resolution No. 96-121, authorizing the Mayor to acquire nine beach lots at Palau'ea Beach in Makena, Maui for the creation of a public park. The county council noted that Palau'ea Beach was "one of the last undeveloped leeward beaches on Maui" and that the community supported the creation of a beach park. Because of budgetary constraints, the County was able to buy only two of the nine lots (Lots 18 and 19), and the seven remaining lots were sold to private individuals.

The beach lots were subject to the following regulations and designations:

1) The 1998 Kihei-Makena Community Plan (the community plan), which designated the lots as "park" land. Maui Cty., Kihei-Makena Community Plan 59 (1998). This designation "applies to lands developed or to be developed for recreational use." *Id.*

2) A Special Management Area (SMA) designation pursuant to the Hawai'i Coastal Zone Management Act (CZMA). Any development within an SMA is prohibited unless the developer applies for and receives an SMA

permit.[1] Hawai'i Revised Statutes (HRS) §§ 205A-21 and 205A-26 (2001).

3) A "Hotel-Multifamily" zoning designation, which permits, *inter alia*, the building of single-family residences.

4) A Declaration of Covenants and Restrictions (the declaration), which states, "[a] lot shall be used only for single family residential purposes regardless of whether the applicable zoning would permit a more intensive or different use."

In February 2000, the Leones bought one of the lots ("Lot 15" or "the property") for $3.7 million. The Leones initially relisted the property for $7 million and, in 2002, they received two offers for its purchase,[2] which the Leones refused.

Four years after buying Lot 15, the Leones hired a land use planning firm, Munekiyo & Hiraga, Inc. (Munekiyo), to prepare a draft environmental assessment (DEA) of Lot 15 so that they could eventually apply for SMA and development permits to build a single-family

---

1. More specifically, under the CZMA, "development" does not include the "[c]onstruction of a single-family residence that is not part of a larger development." HRS § 205A-22 (2001). However, if the "authority finds that any excluded use . . . may have a cumulative impact, or a significant environmental or ecological effect on a special management area," then the excluded use, including the construction of a single-family residence, "shall be defined as 'development' for the purpose of this part." HRS § 205A-22.

2. The offers were for $4.5 million and $4.6 million.

residence. As part of the environmental assessment process, Munekiyo sent out an early consultation letter, seeking comments from governmental agencies and non-profits on the Leones' proposed development of Lot 15. In this letter, Munekiyo described the property and the development plan as follows:

> The parcel is located within the "Urban" district, is zoned Hotel "H-M" by the County of Maui and is designated as "Park" under the Kihei-Makena Community Plan. The owner intends to file a community plan amendment and change in zoning application with the County of Maui, Department of Planning for review by the Maui Planning Commission, and final action by the Maui County Council to achieve land use consistency for the parcel. Since a community plan amendment will be sought, the applicant will submit a Draft Environmental Assessment (DEA) in accordance with Chapter 343, Hawaii Revised Statutes (HRS).

On May 20, 2004, the County of Maui's Department of Planning (the Department) sent Munekiyo comments in response to the early consultation letter. The Department initially noted that "the proposed action requires a Community Plan Amendment which therefore triggers Chapter 343, HRS." The Department then provided the following comments:

> 1. Provide a view analysis from Makena-Keoneolo Road. The analysis should assume a 60% buildable area and 40% open view corridor

> for the property and address impacts of the structure's massing.
>
> 2. The Erosion Rate for the Property is approximately one foot per year. As such, the shoreline setback area is calculated as 60 feet from the certified shoreline.
>
> 3. Lateral access along the shoreline shall be provided.
>
> 4. In addition to the applications for a Community Plan Amendment and Change in Zoning, the proposed action requires a Special Management Area assessment.

On June 3, 2004, the Leones directed Munekiyo to stop work on the project. In an intra-office email, Munekiyo explained why the Leones instructed the firm to halt work on the project:

> I received a call from Doug Leone this morning. He asked that we stop work and close the project. He felt that the political climate is much too difficult to be seeking any land use entitlements for the property. He was not willing to accommodate a 40% road frontage view corridor and felt that it would be better for him to just hold on to the property for now.

In 2007, the Leones restarted the permitting process and Munekiyo submitted the SMA assessment application to the Department on September 28, 2007. One month

later, the Department sent a letter declining to process the SMA application with the following explanation:

> 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 letter further explained that, in order for the Leones to proceed, they would have to file a new application consistent with the community plan and with the appropriate submittals.

A. Initial Circuit Court Proceedings[3]

On November 19, 2007, the Leones filed a lawsuit against the County, alleging that, because of the County's actions, the Leones were left with no economically viable

3. The Honorable Joseph E. Cardoza presided over the initial circuit court proceedings.

use of their property. The Leones brought five counts against the County: 1) inverse condemnation pursuant to article I, section 20 of the Hawai'i Constitution, 2) inverse condemnation pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, 3) equal protection violation pursuant to 42 U.S.C. § 1983, 4) substantive due process violation pursuant to 42 U.S.C. § 1983, and 5) punitive damages under 42 U.S.C. § 1983. The Leones asserted that the County was required to provide the Leones with just compensation for their property, and that they were also entitled to punitive damages in the amount of $50 million.

The County filed a motion to dismiss, which the circuit court granted on March 2, 2009. The circuit court determined that "there [were] effective remedies still available" to the Leones, such as proceeding with a new application with appropriate submissions, seeking an amendment to the community plan, or applying for a special management use permit pursuant to the provisions of HRS §§ 12-202-13 and 12-202-15. Because "effective remedies" were still available to the Leones, the circuit court concluded that the Leones had "failed to exhaust their administrative remedies." As such, the circuit court ruled that the case was "not ripe for adjudication" and that the circuit court lacked jurisdiction over the subject matter of the case.

Bial ICA Proceedings

The Leones appealed this decision and on June 22, 2012, the Intermediate Court of Appeals (ICA) published

an opinion which vacated the circuit court's judgment and remanded the case for further proceedings. *See Leone v. Cty. of Maui*, 128 Hawai'i 183, 284 P.3d 956 (App. 2012) (*Leone I*). The ICA concluded that the circuit court erred in determining that it lacked subject matter jurisdiction because the Leones' claims were not ripe for adjudication. *Id.* at 196, 284 P.3d at 969. The ICA specifically determined that the Department's letter, which declined to process the Leones' SMA assessment application, satisfied the finality requirement for ripeness, and that the Leones were not required to seek a change in the community plan, which amounted to seeking a change in the existing law, before they could bring their inverse condemnation claims. *Id.* at 193-96, 284 P.3d at 966-69.

Of import to the proceedings on remand, the ICA commented in a footnote on the inconsistencies of the Maui County permitting process:

> [T]he proposed use - the construction of single-family residences - is not considered a "development" under the CZMA unless the authority finds a cumulative impact or significant environmental effects. HRS § 205A-22. Although the CZMA does not expressly require consistency for proposed land uses that are not considered "developments," the Maui County Code (MCC) renders the Community Plan binding on all county officials. MCC 2.80B.030(B)(2006). Under the express language of the code, neither the director nor the Planning Commission may approve land

> uses that are inconsistent with the Kihei-Makena Community Plan. The language of the SMA Rules comports with this outcome, stating in mandatory terms that "the director *shall* make a determination . . . that the proposed action *either*: . . . (5) Cannot be processed because the proposed action is not consistent with the county general plan, community plan, and zoning[.]" SMA Rule 12-202-12(f) (emphasis added). In any case, the Director's decision that Appellants' assessment applications could not be processed had the same effect as a determination that it was a development. If, because of a "cumulative impact or a significant environmental or ecological effect," a single-family residence is considered a development, then an SMA permit would be required. If a permit were required, it could not be approved because it would be inconsistent with the Community Plan. Thus, regardless of the denomination of the assessment application, the Director's determination of inconsistency with the Community Plan precludes further processing under applicable law.

Id. at 194 n.8, 284 P.3d at 967 n.8 (alterations in original) (citations omitted). Accordingly, the ICA vacated and remanded the case to the circuit court for further proceedings. *Id.* at 196, 284 P.3d at 969.[4]

---

4. On October 29, 2012, the County applied for a writ of certiorari to this court, which was denied on December 12, 2012. *Leone v. Cty. of Maui*, No. SCWC-29696, 2012 Haw. LEXIS 393, 2012 WL 6200401 (Haw. Dec. 12, 2012).

Circuit Court Proceedings on Remand[5]

A jury trial was held from March 30 through May 5, 2015 on the same five counts.[6] During opening statements, the Leones showed the jury a tax map that depicted the Palau'ea Beach properties and explained who owned them and how they were developed:

> And these are the present owners of properties. The north end of the beach you have Mr. Sweeney and Mr. Lambert's properties. They have homes on them today, and the reason why they have homes on them, we'll explore in more detail.
>
> This is the Leones' property. It has a path on it leading from Old Makena Road to the beach that is used every day by members of the public.
>
> This is the Larsons' properties. These two lots are owned by Bill and Nancy Larson. This parcel, Lot 52, is now being built upon, and the reasons why Mr. Larson got approval to build on his property we'll go in to also.

---

5. The Honorable Peter T. Cahill presided.

6. Prior to the start of the jury trial, the circuit court entered an order granting the County's motion for summary judgment as to Count V of the Leones' complaint, which asserted a claim for punitive damages pursuant to 42 U.S.C. § 1983. As such, only counts I-IV proceeded to the jury trial.

> These two lots in the middle of the beach are owned by the County. The County bought them for beach-park purposes back in the end of 1999, but never improved the property. . . .
>
> This property is owned by Mr. Altman. This next property is owned by an associate of Mr. Leone's named Dan Warmhoven, Galando, and Luzco, and these three properties are on the rocky point at the south end of the beach, and they're improved with homes on them today.

According to the Leones, the shifting political climate on Maui was the reason why some landowners at Palau'ea Beach were allowed to build homes on their properties, while the Leones were denied that same right:

> Under Mayor Apana's administration, some of the other lot owners were able to get those approvals. They got SMA Assessment Applications filed. The exemptions were granted by Planning Director Min, building permits were issued, and they went forward and started building their homes; Lambert and Sweeney among others.
>
> After Mayor Arakawa took office, during his first administration, he appointed a new Planning Director named Michael Foley, and within eight days after taking office, Planning Director Foley announced there would be no more approvals for homes at Palauea Beach and stopped granting extensions at Palauea.

The Leones contended that it was at that time that they sought to obtain permits for building a single-family residence on their property, after Mayor Arakawa took office and the new Planning Director decided to stop development at Palau'ea Beach. The Leones further explained that after Mayor Arakawa took office for the second time, the policy shifted again, but it was too late for the Leones to build at that point:

> Now, after Mayor Arakawa takes office for the second time, the political winds shift again, and beginning in 2012, the current Arakawa administration begins granting approvals to some of the other lot owners to build.
>
> The problem from the Leones' perspective is that in September of 2011, there was a 40-year storm off of New Zealand, which came up over the coastal dunes and into their property and left debris much further inland than it had been before. The debris line creates a shoreline, and since the debris line came so much farther inland than it had before, the Leones were unable to build.[7]

7. The Leones contended that they applied for a shoreline certification on January 10, 2014, but that they were informed by the Department of Land and Natural Resources (DLNR) of this court's recent opinion in *Diamond v. Dobbin*, 132 Hawai'i 9, 29, 319 P.3d 1017, 1037 (2014), which required DLNR to "consider historical evidence" in making its shoreline determination. The Leones contended that, because of the 2011 storm and this court's decision in *Diamond*, the shoreline setback on the property would have overlapped the front yard setback, leaving no buildable area on the property. At this point, the Leones withdrew their shoreline certification application.

As such, the Leones contended that the "effect of the County's actions was to deprive the Leones of all economically viable use of their land."

For its part, the County presented the following opening argument:

> The County submits that the evidence in this case is not going to show that the Leones were denied the right to build on their lot. The evidence in this case is going to show that they did not want to go through the same process, the difficult process that each of the other seven lot owners out here who have single family residences on their lot went through. That's why we're here today.
>
> . . . .
>
> Regulations are not inflexible. We've got seven other lot owners out there who are, again, living in very luxurious single family homes. They dealt with these regulations. They built on the lot. There's a guy out there building now.

The testimony during trial focused almost exclusively on two distinct but interrelated inquiries: 1) whether the County's regulations prevented the Leones from building a single-family residence, and 2) if so, whether this deprived the Leones of economically beneficial use of their property. As to the first query, the circuit court ultimately instructed the jury that the County's actions

had prevented the Leones from building a house on their property:

> Ladies and gentlemen, at an earlier point during the trial, I read to you the law as you must apply in this case. I'm going to read three additional portions of the law that you must apply to the facts of this case.
>
> The first instruction to you is as follows: Following an appeal at an earlier stage of this case, the Hawaii Intermediate Court of Appeals issued an opinion entitled *Leone, et al., vs. County of Maui, et al.* That opinion is the law of this case and is binding on the parties and this Court.
>
> Second instruction. In the *Leone* opinion, the Intermediate Court of Appeals stated as follows: The language of the SMA Rules state in mandatory terms that the Director shall make a determination that the proposed action either cannot be processed -- actually that's either, five, cannot be processed because the proposed action is not consistent with the County General Plan, Community Plan, and Zoning. That's SMA Rule 12-202-12, subparagraph F.
>
> In any case, the Director's decision that the Leones' Assessment Applications could not be processed has the same effect as a determination that it was a development. If,

> because of a cumulative impact or a significant environmental or ecological effect, a single family residence is considered a development then an SMA permit would be required.
>
> If a permit were required, it could not be approved because it would be inconsistent with the Community Plan. Thus, regardless of the denomination of the Assessment Application, the Director's determination of the inconsistency with the Community Plan precludes further processing under applicable law.
>
> The final instruction at this point of the case is as follows: Under the Maui SMA Rules, the Planning Director may not legally process an application for an SMA exemption for a land use that is inconsistent with the Kihei-Makena Community Plan.

(Formatting altered.) These rulings shifted the parties' focus to the second inquiry: whether the County's regulations deprived the Leones of economically beneficial use of their property.

Both parties called expert witnesses to testify as to the use and value of the Leones' property. The County called Ted Yamamura (Yamamura), a real estate appraiser with over thirty-five years of experience appraising Maui real property, to testify on the value and use of the Leones'

property.[8] At the outset, Yamamura testified that he has done thousands of real estate appraisals on Maui over decades and that he determines the “best uses” for the real estate in doing an appraisal. Yamamura explained the test that he uses for determining highest and best use: “There’s a four-item test; that use must be legally permissible, physically possible, financially feasible, and maximally productive, which means that use will yield the highest value for that land.”

Counsel for the County then asked Yamamura about investment use:

> [COUNTY:] Mr. Yamamura, let me start by asking, what is meant by investment in land?
>
> [YAMAMURA:] It’s the use of land as an investment tool. In other words, people would buy land, hold it for a period of time, and as it increases in value and depending on the buyer’s strategy and financial objectives, sell it for profit.
>
> . . . .
>
> [COUNTY:] Do you have an opinion as to whether investment is a use of land?

8. Prior to trial, the Leones filed a motion to exclude or limit Yamamura’s testimony on the basis that he was not qualified to opine on “economically viable use.” The circuit court granted in part and denied in part this motion, explaining that Yamamura could not testify on the current value of the property.

. . . .

[YAMAMURA:] I consider investment as a bona fide use of land. It happens all the time. People by [sic] land, hold on to it; after it appreciates over time, people sell it for profit. I think that's a bona fide land use.

. . . .

[COUNTY:] In your opinion, Lot 15 at Palauea -- based on your analysis of Lot 15 at Palauea, does it have potential use as an investment?

. . . .

[YAMAMURA:] Absolutely, yes.

[COUNTY:] And looking at the first factor of your analysis, which is legally permissible, why do you draw that conclusion based on that particular factor?

. . . .

[YAMAMURA:] Legally permissible. It's -- the underlying Zoning of that lot is HM.

[COUNTY:] Meaning?

[YAMAMURA:] Hotel.

> [COUNTY:] Hotel.
>
> [YAMAMURA:] But there's a conflict in the Community Plan, but if -- under the context of legally permissible, if the issue of that conflict can be mitigated, then we can look at it as being a legally permissible use in the context of highest and best use because that issue or that conflict can be mitigated.

The circuit court overruled the Leones' objections to this testimony.

Rick Tsujimura (Tsujimura), a real estate attorney, testified as an expert witness for the Leones. Tsujimura opined that the inconsistences between the community plan and the zoning requirements left the Leones "deprived of all economically beneficial use for that lot." Tsujimura explained:

> The Community Plan is designated park. On the Zoning it's hotel, multi-family. So as you can see, there's an inconsistency between those two. They don't line up.
>
> The original intent of the State Plan, the State land use, the General Plan, the Community Plan was for all of this to line up and, consequently, what has happened is we're in a situation, because of this inconsistency, when the Leones come in for an SMA permit -- Assessment Application, part of the law, both at the State

> level and Chapter 205A and the County SMA law in Chapter 12-202-12, it requires that these pieces align. And when they don't, when they're not the same, these all end up causing the Assessment Application to be denied.
>
> And this is the problem for the landowner right now. Because of this inconsistency, this prevents the Leones from doing anything to start the process to do anything with the lot, no matter what they wanted to do because they can't get past this inconsistency.
>
> So what happens is you're basically left with a piece of property that's zoned for hotel family -- multi-family, Community Plan park, and because of that, you can't do anything. And so there's no economically beneficial use that they can use on that lot because of this.

On cross-examination, Tsujimura explained why he did not consider the property to have any investment value:

> [TSUJIMURA:] Investment value is premised upon an ability to use the property, and my opinion, as I've articulated, is that because of the inconsistency between the Community Plan and the Zoning, there is no ability to use the property.
>
> So if you're asking me from an investment perspective, I would say in this particular

case, it would be zero because you could never harvest that value given the current situation.

[COUNTY:] So would you disagree with me, then, that there's potential economic benefit in the ownership and possession of a piece of real estate?

[TSUJIMURA:] In a general sense, yes. But specifically to this particular property, no.

[COUNTY:] So are you saying there's no economic benefit in the Leones' lot as a vehicle for an -- as an investment?

[TSUJIMURA:] Not in the current situation because of the inconsistency.

[COUNTY:] Really? Are you familiar with the Doug Schatz' lot at Palauea?

[TSUJIMURA:] No.

[COUNTY:] Are you aware that after Doug Schatz got the very same return -- the same letter returning his application with the same language as the Leones' lot, that he turned around and sold that property to somebody named Altman who's got a house on it today?

[COUNSEL FOR LEONES] Objection; relevance and beyond the scope.

[THE COURT:] Sustained.

Also on cross-examination, the County examined Tsujimura about whether the Leones' property could be used for other purposes, to which Tsujimura conceded that the property could potentially be used for commercial purposes:

> [COUNTY:] Mr. Tsujimura, you were asked whether the Leones could engage in commercial sales of concessions on their lot, and I believe you acknowledged that under the hotel district zoning, that they could, in fact, operate a park; correct?
>
> [TSUJIMURA:] Yes.
>
> [COUNTY:] And then you said that they can only engage in noncommercial uses under the hotel zoning, but I'm going to read to you what the hotel zoning ordinance actually says.
>
> And it says, *"Permitted uses:"* -- this is 19.14.020 -- *"Within Hotel Districts, the following uses shall be permitted: Any use permitted in residential and apartment districts."*
>
> Then when you go to 19.08.020, which says, *"Permitted uses in Residential Districts,"* what it actually says, Mr. Tsujimura, is, *"Parks and playgrounds, noncommercial: Certain commercial, amusement, and refreshment*

sale activities may be permitted when under the supervision of the government agency in charge of the park or playground."

Which means a private land owner can engage in these commercial activities, but it's just subject to permitting requirements and regulations under the agency, in this instance, the County; isn't that correct?

[TSUJIMURA:] I agree with you, Mr. Corporation Counsel. It should have been under the supervision of the County.

[COUNTY:] All right. And so, in fact, the answer to the question, which you said, as to whether commercial uses would be allowed and to which you answered no, your answer is actually incorrect; right?

[TSUJIMURA:] Well, my answer was that it would be subject to operation by the County.

[COUNTY:] And that's where your answer was incorrect. Because the ordinance which I actually just read to you said under the -- wait. You got to let me finish -- says under the supervision of the County, not the operation. That's different; right?

[TSUJIMURA:] Except if you -- as you read it -- it went further to say that the agency would

have control over the park, which suggests that it's who controls the park. If the Leones control the park, it's not controlled by the Parks Department.

[COUNTY:] The word "control" didn't appear anywhere in what I just read --

[TSUJIMURA:] Supervise.

[COUNTY:] -- so I'm going to read it again. There's a difference between the word "supervise" and the word "control." Correct?

[TSUJIMURA:] There could be.

[COUNTY:] . . . Isn't what that says, is that the Leones can engage in refreshment sales and certain commercial activities as long as they get the proper permitting from the Department of Planning? Isn't that what that says?

[TSUJIMURA:] If you can get the proper permitting. If they intentionally try to put any sort of hard scape [sic] on it, it would lead to, again, this problem with the SMA.

[COUNTY:] So your answer to the question originally was incorrect because a private land owner can, in fact, engage in commercial sale activities on their lot as long as they get the correct permits from the County of Maui; isn't that correct?

> [TSUJIMURA:] If it's supervised by the County.
>
> . . . .
>
> [COUNTY:] So subject to permitting and supervision, it's allowed, isn't it?
>
> [TSUJIMURA:] Yes, if you can get an SMA assessment through.

Dr. William H. Whitney (Dr. Whitney), a real estate economist, also testified as an expert witness for the Leones. As part of his evaluation of the property's economically beneficial use, Dr. Whitney created a speculative real estate investment model for Lot 15, which allowed him to predict the profit value the Leones lost because they were not allowed to develop their property. Dr. Whitney summarized his findings to the jury, and estimated that, if the Leones had been allowed to develop their property, they would have realized a value upwards of $19 million by 2017.

On cross-examination, counsel for the County examined Dr. Whitney about the possibility of using the Leones' property for commercial park uses. Dr. Whitney testified that one of the main factors in determining whether the Leones' property retained economically beneficial use in a commercial context is whether commercial activity is economically feasible. Dr. Whitney explained that he did not fully study whether commercial activities were economically feasible, because he was operating under the assumption that commercial activities were not legally permitted on the Leones' property:

[COUNTY:] Okay. Let's assume -- and I'm sure you can do this. Let's assume that your opinion on whether parks and playgrounds and certain commercial activities are permissible at the Palauea lots are incorrect.

Let's assume they are permitted as reflected in the applicable Zoning Codes.

And then let's talk about the second component of your analysis, which is the financial feasibility. And I handed you what was marked as -- what is marked as P-241, which is in evidence, and your testimony yesterday was that, even if you could engage in these activities, they're not going to cover the property taxes, and you said that in 2014 the property taxes were $68,103.63.

So my question to you was, did you do any sort of analysis to determine whether or not the types of activities we're talking about, recreational or amusement, would, in fact, be able to generate $68,103.63, per annum, to cover the property tax?

. . . .

[WHITNEY:] I did not do any analysis. I relied on my judgment, as one who has provided leasing advisory services over the years and done park feasibility studies, and I would say, in my judgment, it's very unlikely that that kind

> of activity at that location, on my judgement, wouldn't cover the property taxes and perhaps the other costs that the Leones would face; the provision of utilities, security, and other activities that might be necessary to keep the property in good standing.
>
> . . . .
>
> [COUNTY:] Did you do any exploration on Maui to determine how amusement and concession refreshment actually work on the beaches and parks in Maui?
>
> [WHITNEY:] No. No investigation.
>
> . . . .
>
> [COUNTY:] Did you ask anybody on Maui, running that type of concession, how much they're able to generate annually in income?
>
> [WHITNEY:] No.
>
> [COUNTY:] Renting surfboards, renting kayaks, selling refreshments on crowded beaches; you didn't ask anybody that, did you?
>
> [WHITNEY:] No.

Douglas and Patricia Leone also testified at trial. Both testified on direct examination that they bought the

property with the expectation of building a single-family home on it. Patricia testified that her family "love[d] Maui, and we thought it would just be great to build a home where our family could come for years -- you know, for years and be together." Douglas similarly testified that he bought the property because he "wanted a dream home for my wife, our four children, and eventually our grandchildren." On cross-examination, Patricia testified that she and her husband, as trustees of the Leone Family Trust, owned eight residential properties in addition to Lot 15 at Palau'ea Beach. Patricia also acknowledged on cross-examination that one of the purposes of the trust was to "invest and reinvest in real estate." Neither of the Leones could recall at trial having relisted Lot 15 for $7 million soon after buying it or receiving and refusing offers for it.

At the close of evidence, the Leones moved for judgment as a matter of law on Counts I and II -- the inverse condemnation claims.[9] The circuit court denied this motion.

On May 1, 2015, the parties appeared before the court to settle jury instructions. Of relevance to the issues raised on appeal, the Leones requested the following three jury instructions, which the circuit court either modified or refused.

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9. During the trial, the Leones voluntarily dismissed Count IV, the substantive due process claim, and Count III to the extent that it alleged a denial of equal protection. As such, the only claims remaining for the jury to determine were the inverse condemnation claims.

First, the Leones requested a jury instruction (proposed Jury Instruction No. 51) on economically beneficial use:

> Land has economically beneficial use, if, under the applicable regulations, all three of the following are true: (1) there is a permissible use for the land, *other than leaving the land in its natural state*, (2) the land is physically adaptable for such use and (3) there is a demand for such use in the reasonably near future.

(Emphasis added.) The circuit court modified this jury instruction (Jury Instruction No. 22) over the Leones' objection, deleting the underlined phrase "other than leaving the land in its natural state[.]" The circuit court explained that it was deleting that phrase because "this is a factual issue and better left for argument[.]"

Second, the Leones requested the following jury instruction (proposed Jury Instruction No. 73) on the burden of production:

> Plaintiffs initially bear the burden to produce evidence that they lack economically beneficial use of their property. Once Plaintiffs have produced such evidence, the burden of production shifts to the Defendants. To meet their burden of production on a proposed economically beneficial use, Defendants must produce evidence of reasonable probability that the land is both physically adaptable for such

> use and that there is a demand for such use in the reasonably near future.

However, the circuit court refused that jury instruction. Instead, the circuit court issued the following jury instruction on burdens (Jury Instruction No. 9): "Plaintiffs have the burden of proving by a preponderance of the evidence every element of each claim that plaintiffs assert. Defendants have the burden of proving by a preponderance of the evidence every element of each affirmative defense that defendants assert."[10] The circuit court explained why it modified the Leones' proposed jury instruction:

> [T]his is an issue to be determined by the Court and has been determined by the Court in terms of the motions for directed verdict and judgment by the plaintiffs and [to] instruct the jury on burdens of production would unnecessarily and potentially confuse the jury and suggest to them that the burden of proof has somehow shifted.
>
> Even though the words burden of production, this is a very complex area even for evidence professors at law school, and to now start to discuss all of these issues, I think, would be unduly confusing to the jurors, and also I am

10. Additionally, Jury Instruction No. 10 explained that "[t]o 'prove by a preponderance of the evidence' means to prove that something is more likely so than not so. It means to prove by evidence which, in your opinion, convinces you that something is more probably true than not true."

> not sure that it's -- while it may be an accurate reflection of what the law is, it's not an accurate reflection of what has occurred in this case, based on my rulings.

Lastly, the Leones requested the following jury instruction (proposed Jury Instruction No. 71) regarding the effect of the declaration of covenants and restrictions:

> Plaintiffs' lot is subject to a declaration of covenants and restrictions ("DCR") that restricts what Plaintiffs may do with their land. Under the DCR, Plaintiffs may use their land only for single-family residential purposes. You may consider the DCR when determining whether Plaintiffs have any economically beneficial use of their land.

The circuit court refused this instruction.

The circuit court also issued the following relevant jury instruction:

- **Jury Instruction No. 23**:

> There is a difference between economically beneficial use and value. A property that has value may not have "economically beneficial use." To determine whether a defendant denied Plaintiffs economically beneficial use of their property, you may consider whether Plaintiffs were able to use their property in an economically beneficial way.

On May 5, 2015, the jury returned a verdict in favor of the County, concluding that the County had not deprived the Leones of economically beneficial use of their land. On June 1, 2015, the circuit court entered judgment in favor of the County and against the Leones.

On August 5, 2015, the circuit court: 1) denied the Leones' June 10, 2015 renewed motion for judgment as a matter of law and, alternatively, motion for a new trial, and 2) granted in part and denied in part the County's June 12, 2015 motion for taxation of costs, awarding the County $40,522.72 in costs.

The Leones appealed and challenged the County's expert testimony, certain jury instructions, the circuit court's denial of the Leones' motion for judgment as a matter of law, and the award of costs to the County. The County cross-appealed and filed an application for transfer of the appeal to this court, which was granted on June 29, 2016.

II. STANDARDS OF REVIEW

A. Expert Witness Qualifications and Testimony

> [I]t is not necessary that the expert witness have the highest possible qualifications to testify about a particular manner [sic], . . . but the expert witness must have such skill, knowledge, or experience in the field in question as to make it appear that his opinion or inference-drawing would probably aid the

> trier of fact in arriving at the truth. . . . Once the basic requisite qualifications are established, the extent of an expert's knowledge of subject matter goes to the weight rather than the admissibility of the testimony.
>
> "'Whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of discretion.'"

Estate of Klink ex rel. Klink v. State, 113 Hawai'i 332, 352, 152 P.3d 504, 524 (2007) (alterations in original) (citations omitted) (quoting *Tabieros v. Clark Equip. Co.*, 85 Hawai'i 336, 351, 944 P.2d 1279, 1294 (1997)).

B. Jury Instructions

> When jury instructions, or the omission thereof, are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading. Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.

Nelson v. Univ. of Haw., 97 Hawai'i 376, 386, 38 P.3d 95, 105 (2001) (quoting *Hirahara v. Tanaka*, 87 Hawai'i 460, 462-63, 959 P.2d 830, 832-33 (1998)).

G. Judgment as a Matter of Law

> It is well settled that a trial court's rulings on motions for judgment as a matter of law are reviewed *de novo*.
>
> > When we review the granting of a [motion for judgment as a matter of law], we apply the same standard as the trial court.
> >
> > A [motion for judgment as a matter of law] may be granted only when after disregarding conflicting evidence, giving to the non-moving party's evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in the non-moving party's favor, it can be said that there is no evidence to support a jury verdict in his or her favor.
>
> *Miyamoto v. Lum*, 104 Hawai'i 1, 6-7, 84 P.3d 509, 514-15 (2004) (internal citations omitted).

Aluminum Shake Roofing, Inc. v. Hirayasu, 110 Hawai'i 248, 251, 131 P.3d 1230, 1233 (2006) (brackets in original).

IV. DISCUSSION

Before addressing the arguments, a brief summary of the relevant law on takings provides useful context.

The Takings Clause

The Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." This -- the Takings Clause -- is made applicable to the states through the Fourteenth Amendment. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942, 198 L. Ed. 2d 497 (2017). Similarly, article 1, section 20 of the Hawai'i Constitution provides, "[p]rivate property shall not be taken or damaged for public use without just compensation."

The United States Supreme Court (Supreme Court) has established two discrete categories of government action as compensable: physical and regulatory takings. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). The first are "regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* The second are "regulation[s that] den[y] all economically beneficial or productive use of land." *Id.; see also Pub. Access Shoreline Haw. v. Haw. Cty. Planning Comm'n*, 79 Hawai'i 425, 451-52, 903 P.2d 1246, 1272-73 (1995) ("A regulatory taking occurs when the government's application of the law to a particular landowner denies all economically beneficial use of his or her property without providing compensation."). The relevant inquiry in the current case is whether a regulatory taking occurred.

The Supreme Court in *Lucas* explained that a regulatory taking occurs when the "regulation denies *all* economically beneficial or productive use of land." 505 U.S. at 1015 (emphasis added). The Supreme Court explained

that "regulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service . . . ." *Id.* at 1018.

More recently, in *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001), the Supreme Court considered whether a taking could still occur even though the regulation did not deprive a landowner of *all* beneficial use of land. Palazzolo owned a waterfront parcel of land in Rhode Island and almost all of it was designated as coastal wetlands under state law. *Id.* at 611. Because of this designation, Palazzolo's development proposals for portions of his property were rejected by the Rhode Island Coastal Resources Management Council (the Council), and Palazzolo sued, claiming that the Council's application of its wetland regulations constituted a taking without just compensation. *Id.*

In *Palazzolo*, the Supreme Court expanded the rule established in *Lucas* when it stated:

> Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.

Id. at 617 (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)). Utilizing this test, the Supreme Court concluded that Palazzolo was left with more than a "token interest" in his land because of the regulations. *Id.* at 631. The Supreme Court explained that, while some portions of Palazzolo's property could not be developed because of the regulations, an upland portion of the property could be improved and actually retained $200,000 in development value even under the State's wetlands regulations. *Id.* at 630-31. As such, the Supreme Court concluded that a "regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'" *Id.* at 631 (quoting *Lucas*, 505 U.S. at 1019).

As the Supreme Court most recently noted, adjudication of regulatory takings cases "requires a careful inquiry informed by the specifics of the case." *Murr*, 137 S. Ct. at 1943. However, "[i]n all instances, the analysis must be driven 'by the purpose of the Takings Clause, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* (quoting *Palazzolo*, 533 U.S. at 617-18).

With this framework in mind, we turn to the arguments on appeal.

B. The Leones' Arguments on Appeal

The Leones present four points for our review. The Leones contend that the circuit court erred in: 1) denying

the Leones' motion for judgment as a matter of law, 2) allowing Yamamura to testify that "investment use" is an "economically beneficial use" of land, 3) modifying Jury Instruction No. 22, refusing proposed Jury Instruction No. 73 and replacing it with Jury Instruction No. 9, and refusing proposed Jury Instruction No. 71, and 4) awarding costs to the County.

We address the second and third points first, as their resolution is helpful in considering the Leones' renewed motion for judgment as a matter of law.

1. The circuit court did not abuse its discretion in allowing Yamamura to testify.

The Leones take issue with the following testimony from the County's expert witness, real estate appraiser, Yamamura:

> [COUNTY:] Do you have an opinion as to whether investment is a use of land?
>
> . . . .
>
> [YAMAMURA:] I consider investment as a bona fide use of land. It happens all the time. People by [sic] land, hold on to it; after it appreciates over time, people sell it for profit. I think that's a bona fide land use.
>
> . . . .

> [COUNTY:] In your opinion, Lot 15 at Palauea -- based on your analysis of Lot 15 at Palauea, does it have potential use as an investment?
>
> . . . .
>
> [YAMAMURA:] Absolutely, yes.

The Leones argue that the circuit court abused its discretion in allowing Yamamura to testify on investment use for two reasons. First, the Leones argue that "investment use" is not an economically beneficial use as a matter of law. Second, the Leones argue that Yamamura was not qualified to opine on "economically beneficial use."

a. Testimony on investment use

The Leones contend that the circuit court abused its discretion in allowing the County to introduce evidence that "investment use" is an economically beneficial use of land.

While there is no Hawai'i legal authority on this point, there is case law from other jurisdictions that discusses this issue. For instance, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1425 (9th Cir. 1996) (*Del Monte Dunes I), aff'd*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999), the City of Monterey persistently denied Del Monte Dunes' development permits for thirty-seven ocean-front acres in which Del Monte Dunes sought to build a residential complex. Del Monte Dunes sued the City, and the jury found that the City's actions

denied Del Monte Dunes equal protection and were an unconstitutional taking. *Id.* On appeal before the Ninth Circuit, the City argued, *inter alia*, that it was entitled to a judgment as a matter of law on both the equal protection and inverse condemnation claims. *Id.*

In arguing that the City had not denied Del Monte Dunes of all economically viable use of its property, the City noted that Del Monte Dunes sold the property to the State of California for $800,000 more than it originally paid for it. *Id.* at 1432. The Ninth Circuit was not persuaded by this argument, noting that "[f]ocusing the economically viable use inquiry *solely* on market value or on the fact that a landowner sold his property for more than he paid could inappropriately allow external economic forces, such as inflation, to affect the takings inquiry." *Id.* at 1432-33 (emphasis added). Then, the Ninth Circuit explained that "*[a]lthough the value of the subject property is relevant* to the economically viable use inquiry, *our focus is primarily on use, not value*" and that "the mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law, defeat a taking claim." *Id.* at 1433 (emphases added).

Thus, *Del Monte Dunes I* established that, while property value should not be considered to the exclusion of other factors, it is still a relevant factor in the economically viable use analysis. *See also MacLeod v. Santa Clara Cty.*, 749 F.2d 541, 547 n.7 (9th Cir. 1984) ("Holding property for investment purposes can be a 'use' of property."); *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 902-03 (Fed. Cir. 1986) (noting that a "qualified real estate dealer" testified that the property had "fair market value

subject to the regulation" because there were "investors willing to forego immediate income in hope of long-term gain" and concluding that this was evidence of "sufficient remaining use of the property to forestall a determination that a taking had occurred"); *City of San Antonio v. El Dorado Amusement Co.*, 195 S.W.3d 238, 245 (Tex. App. 2006) ("A restriction denies a landowner all economically viable use of the property or totally destroys the value of the property if the restriction renders the property valueless.").

In the present case, Yamamura testified that the Leones' property had "investment use" or, in other words, that the property had value because the Leones could hold on to property, wait until it increased in value, and sell it for a profit. While *Del Monte Dunes I* established that property value should not be the sole focus in an economically viable use inquiry, the Ninth Circuit did not foreclose the admissibility of such evidence. In fact, the Ninth Circuit noted that "the value of the subject property is relevant." *Del Monte Dunes I*, 95 F.3d at 1433. Thus, guidance from other jurisdictions suggests that testimony on investment use is appropriate in takings cases.

Additionally, the circuit court took mitigating measures in order to ensure that the jury did not improperly give the "value" evidence more weight than it was legally entitled. For example, Jury Instruction No. 23 instructed the jury that:

> There is a difference between economically beneficial use and value. *A property that has value may not have "economically beneficial*

> *use*." To determine whether a defendant denied Plaintiffs economically beneficial use of their property, you may consider whether Plaintiffs were able to use their property in an economically beneficial way.

(Emphasis added.) This instruction specifically explained to the jury that the determination of whether property has any economically beneficial use does not turn on whether the property has value.

As such, we cannot conclude that the circuit court abused its discretion in allowing testimony on investment use.

b. Testimony on economically beneficial use

The Leones also argue that Yamamura was not qualified to opine on "economically beneficial use" and that the trial court abused its discretion in permitting him to testify on that topic. According to the Leones, Yamamura "is an appraiser, not an economist, and his testimony should have been limited to the field of real estate appraisal."

Hawai'i Rules of Evidence (HRE) Rule 702 (1993) provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a

> fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.

HRE Rule 702 commentary explains that "[t]he rule liberalizes the traditional common law stricture limiting expert testimony to some science, profession, business or occupation . . . beyond the ken of the average layman" and that, now, "Rule 702 requires only that the testimony be of assistance to the trier of fact." HRE Rule 702 cmt. (1993) (ellipsis in original) (quotations and citations omitted).

In line with this rule, Hawai'i courts have noted that "[i]t is not necessary that the expert witness have the highest possible qualifications to testify about a particular [matter;]" instead, "the expert witness must have such skill, knowledge, or experience in the field in question as to make it appear that his opinion or inference-drawing would probably aid the trier of fact in arriving at the truth." *Klink*, 113 Hawai'i at 352, 152 P.3d at 524 (quoting *State v. Wallace*, 80 Hawai'i 382, 419 n.37, 910 P.2d 695, 732 n.37 (1996)). Additionally, "the determination of whether or not a witness is qualified as an expert in a particular field is largely within the discretion of the trial judge and, as such, will not be upset absent a clear abuse of discretion." *State v. Torres*, 60 Haw. 271, 277, 589 P.2d 83, 87 (1978).

Yamamura testified to the following: he has been a real estate appraiser for almost forty years, and that he has been working for his current Maui-based firm, ACM Consultants, Inc., for approximately thirty-five years; he has been a licensed real estate appraiser in Hawai'i since 1991; as part of his job, he conducts real estate appraisals on "single-family residential properties, individual condominium units, improved and unimproved vacant land," as well as on commercial and industrial properties, and open space and park uses; he conducts about 200 appraisals a year, and that he is "intimately familiar with real estate on Maui"; as part of his work, he has "to determine what the best uses for those lands would be every time [he does] an appraisal"; he determines the "highest and best use[es] of the property" by conducting a "four-item test[:] that use must be legally permissible, physically possible, financially feasible, and maximally productive"; he has used this highest and best use test "in connection with thousands of properties that [he] appraised on Maui in [his] 35 years of experience."

The Leones contend that "[a]s an appraiser, Mr. Yamamura's expertise is in opining as to the value, not the use, of real property" and that Yamamura was not familiar with the term "economically viable use." However, Yamamura's testimony establishes that he has extensive knowledge and experience in evaluating the "use" of real property. Yamamura testified that, for over thirty-five years, he has been a real-estate appraiser on Maui and that, as part of his work, he has to determine the "highest and best use" of the properties he evaluates. Yamamura estimated that he conducted this highest and best use test "in connection with thousands of properties . . . on Maui."

Under the parameters set by HRE Rule 702 and Hawai'i case law, this testimony is enough to qualify Yamamura as an expert witness in this area of expertise.

As such, given Yamamura's considerable experience and expertise in appraising real property, and specifically Maui real property, the circuit court did not abuse its discretion in allowing Yamamura to testify as an expert witness.

2. The circuit court did not err in issuing the challenged jury instructions.

The Leones also argue that the circuit court erred in the issuance of three jury instructions. First, the Leones contend that the circuit court erroneously defined "economically beneficial use" in Jury Instruction No. 22. Second, the Leones contend that the circuit court refused to instruct the jury, per the Leones' request, on the burden-shifting paradigm in takings cases. Third, the Leones contend that the circuit court failed to instruct the jury on the effect of the declaration. Each of these arguments will be addressed in turn.

a. Jury Instruction No. 22: economically beneficial use

First, the Leones assert that they requested the following jury instruction on economically beneficial use:

> Land has economically beneficial use, if, under the applicable regulations, all three of the following are true: (1) there is a permissible

> use for the land, *other than leaving the land in its natural state*, (2) the land is physically adaptable for such use and (3) there is a demand for such use in the reasonably near future.

(Emphasis added.) The Leones assert that the circuit court's Jury Instruction No. 22, which omitted the underlined text, was erroneous because "it failed to correctly state the law by omitting that such use cannot leave the land in its natural state."

The Leones' interpretation of the law on this point is too restrictive for a number of reasons. First, a regulation could potentially require land to be left substantially in its natural state and still not be considered a taking. It is true that case law provides that regulations that require land to be left "substantially in its natural state" *suggest* that the owner of the land is being deprived of all economically beneficial use of the land. *See Lucas*, 505 U.S. at 1018 ("[R]egulations that leave the owner of land without economically beneficial or productive options for its use -- *typically, as here, by requiring land to be left substantially in its natural state* -- carry with them a heightened risk that private property is being pressed into some form of public service . . . ." (emphasis added)). However, this rule does not state that regulations that leave land in its natural state *always* constitute a taking. As such, Jury Instruction No. 22 is an accurate articulation of the law.

Second, as the circuit court noted when modifying the language of the instruction, the issue of whether the

government has deprived the landowners of economically beneficial use of their land is a factual query better left for the jury to decide:

> Okay. I'm familiar with the cases. I am deleting it, principally, on the grounds that I do think that, although the language is used, this is a factual issue and better left for argument, but the balance of the instruction is an accurate reflection of the law as we've discussed.

The circuit court's reasoning is in line with well-established case law. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 720, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (*Del Monte Dunes II*) ("In actions at law predominantly factual issues are in most cases allocated to the jury."). Specifically, regulatory takings cases are "ad hoc, factual inquiries" that are "informed by the specifics of the case." *Murr*, 137 S. Ct. at 1942, 1943. As such, "the issue whether a landowner has been deprived of all economically viable use of his property is a predominantly factual question" and "is for the jury." *Del Monte Dunes II*, 526 U.S. at 720-21.

Accordingly, the circuit court properly instructed the jury on economically beneficial use.

Jury Instruction No. 9: burden of production

Second, the Leones assert that the circuit court erred by refusing the following proposed jury instruction:

> Plaintiffs initially bear the burden to produce evidence that they lack economically beneficial use of their property. Once Plaintiffs have produced such evidence, the burden of production shifts to the Defendants. To meet their burden of production on a proposed economically beneficial use, Defendants must produce evidence of reasonable probability that the land is both physically adaptable for such use and that there is a demand for such use in the reasonably near future.

Instead, the circuit court instructed the jury that "[p]laintiffs have the burden of proving by a preponderance of the evidence every element of each claim that plaintiffs assert." The Leones argue that the circuit court prejudiced the Leones by not giving the requested instruction because it relieved the County of meeting its burden of production.

As support for their argument, the Leones ask us to rely on two cases from other jurisdictions: *Bowles v. United States*, 31 Fed. Cl. 37 (1994) and *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990). These cases, while persuasive, are not binding on Hawai'i courts. Moreover, these cases were federal bench trials and, as such, are distinguishable from this case, which was tried by a jury. The circuit court implicitly acknowledged this distinction when it explained why it refused the proposed burden-shifting instruction:

> [To] instruct the jury on burdens of production would unnecessarily and potentially confuse

> the jury and suggest to them that the burden of proof has somehow shifted.
>
> Even though the words burden of production, this is a very complex area even for evidence professors at law school, and to now start to discuss all of these issues, I think, would be unduly confusing to the jurors . . .

Additionally, even if this court were to rely on the cases cited by the Leones, the Leones' proposed jury instruction regarding burden shifting is not an accurate articulation of the law as reflected in *Bowles* and *Loveladies*. For instance, the Leones requested that the court instruct the jury that "[p]laintiffs initially bear the burden to produce evidence that they lack economically beneficial use of their property. Once Plaintiffs have produced such evidence, the burden of production shifts to the Defendants." This proposed instruction, as written, suggests that once the Leones have produced *any* evidence that their property lacks economically beneficial use, they have satisfied their burden on that issue. This is incorrect. Instead, a plaintiff in a takings case must produce sufficient evidence to persuade the court that "it is more likely true than not that there remains no economically viable use for their property" before the burden shifts to the defendant.[11] *Loveladies*, 21 Cl. Ct. at 158 (brackets omitted); *Bowles*, 31

11. And, in fact, this is what the circuit court told the jury in Jury Instruction No. 10: "To 'prove by a preponderance of the evidence' means to *prove that something is more likely so than not so*. It means to prove by evidence which . . . convinces you *that something is more probably true than not true*." (Emphases added.)

Fed. Cl. at 47. Thus, the Leones' proposed jury instruction on this topic is an inaccurate articulation of the law that they themselves rely upon. The circuit court did not err in refusing it.

Proposed Jury Instruction No. 71: effect of the declaration

Third, the Leones argue that the circuit court erred when it "failed to instruct the jury that the only permissible economically beneficial use of the Property is as a single-family residence." The Leones explain that they requested the following jury instruction, which was refused by the circuit court:

> Plaintiffs' lot is subject to a declaration of covenants and restrictions ("DCR") that restricts what Plaintiffs may do with their land. Under the DCR, Plaintiffs may use their land only for single-family residential purposes. You may consider the DCR when determining whether Plaintiffs have any economically beneficial use of their land.

The Leones contend that "[t]he jury must consider restrictive covenants when making takings determinations." The Leones' argument here is unpersuasive for two reasons.

First, there is no authoritative legal support for the Leones' contention that a jury must be instructed on the effect of a private restrictive covenant on a regulatory takings analysis. The circuit court, in giving jury

instructions, is limited to instructing the jury on the applicable law. *See Tittle v. Hurlbutt*, 53 Haw. 526, 530, 497 P.2d 1354, 1357 (1972) ("The function served by jury instructions is to inform the jury of the law applicable to the current case."); *Udac v. Takata Corp.*, 121 Hawai'i 143, 149, 214 P.3d 1133, 1139 (App. 2009) ("The boundaries of the trial judge's discretion in informing the jury of the law applicable to the current case are defined 'by the obligation to give sufficient instructions and the opposing imperative against cumulative instructions.'" (quoting *Tittle*, 53 Haw. at 530, 497 P.2d at 1357)). The Leones cite to no Hawai'i or Supreme Court case for their contention that a jury *must* be informed on the effect of private restrictive covenants. As such, the circuit court acted well within its discretion when it refused a jury instruction not grounded in the law.

Second, the two cases relied upon by the Leones for their persuasive weight are inapposite to the issue before this court. In both *Bowles v. United States* and *Knight v. City of Billings*, the government defendants argued that the restrictive covenants -- not their own action -- were responsible for the taking. *Bowles*, 31 Fed. Cl. at 49 ("[T]he government also argues that the diminution in value of Lot 29 was somehow 'caused' by non-federal action."); *Knight*, 197 Mont. 165, 642 P.2d 141, 146 (Mont. 1982) ("We turn now to consider whether the declaration of restrictions of Lillis Subdivision limiting the use of plaintiffs' lots to residential purposes until the year 2000 prevents recovery through inverse condemnation."). Both courts rejected this argument, determining that it was the government action, not the private restriction, that resulted in the elimination of the economically beneficial use of the property. *Bowles*,

31 Fed. Cl. at 49 ("In this case it is *only* because of the federal government's refusal to issue a fill permit that Lot 29 has no fair market value or economically viable use.") (emphasis in original); *Knight*, 642 P.2d at 146 ("It is not the restrictions that are damaging plaintiffs' properties; it is the action of the City in making the improvements that is making their properties nearly unusable and unmarketable for residential purposes."). Essentially, these cases assert that the existence of a restrictive covenant is irrelevant to a takings analysis.

Here, the Leones argue the opposite -- that "[t]he jury *must* consider restrictive covenants when making takings determinations." (Emphasis added.) This is certainly not the holding of *Bowles* and *Knight*.[12] Additionally, such a reading of the law contravenes takings jurisprudence, which contemplates, first and foremost, *government* action. Just as the *Bowles* and *Knight* courts determined that the existence of private restrictive agreements cannot be used as a defense for government actions, we similarly determine that the existence of such private agreements cannot saddle the government with liability in a takings analysis. At all times in a takings analysis, it is solely the government action that must be evaluated.

For these reasons, the circuit court did not err in declining to instruct the jury on the effect of the declaration.

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12. Significantly, *Bowles* and *Knight* did not touch on the issue of whether jury instructions must include information about the existence of restrictive covenants.

3. The circuit court did not err in concluding that the Leones were not entitled to judgment as a matter of law.

Next, we must determine whether the trial court erred in concluding that the Leones were not entitled to a judgment as a matter of law. The Leones assert that the evidence presented at trial permitted only one reasonable conclusion: the County's regulation of the Leones' property constituted a taking for which they are owed just compensation. We review a trial court's ruling on a motion for judgment as a matter of law *de novo. Aluminum Shake Roofing*, 110 Hawai'i at 251, 131 P.3d at 1233. A motion for judgment as a matter of law can be granted only when "it can be said that there is no evidence to support a jury verdict in [the non-moving party's] favor." *Id.* Additionally, a court must give to the non-moving party's evidence "all the value to which it is legally entitled," and to indulge "every legitimate inference which may be drawn from the evidence in the non-moving party's favor." *Id.*

This point on appeal presents a two-part inquiry: 1) whether the County's regulations prohibited the Leones from building a single-family residence, and, if so, 2) whether the County's regulations deprived the Leones of economically beneficial use of their land. Because the circuit court instructed the jury that the County's regulations prohibited the Leones from building a single-family residence on their property, *see supra* Section II.C, we need only address the second inquiry: whether there is evidence to support the jury's finding that the County did not deprive the Leones of economically beneficial use of their land.

The parties offered conflicting testimony on whether the Leones' property retained economically beneficial use. The Leones' expert witnesses included Tsujimura and Dr. Whitney, who both testified unequivocally on direct examination that the County's regulations deprived the Leones of all economically beneficial use of their property. Tsujimura testified that "[b]ecause of this [community plan] inconsistency, this prevents the Leones from doing anything to start the process to do anything with the lot" and that "there's no economically beneficial use that they can use on that lot because of this." Dr. Whitney similarly testified that the community plan prohibited the Leones from building a single-family home on their property, and that this regulation prevented the Leones from realizing upwards of $19 million in value for their property.

On the other hand, the County introduced expert testimony from Yamamura, who testified on direct examination that the Leones' property had great "investment use." Yamamura testified that "investment in land" means "the use of land as an investment tool" and further explained that this occurs when "people . . . buy land, hold it for a period of time, and as it increases in value and depending on the buyer's strategy and financial objectives, sell it for profit." When asked if the property had potential as an investment, Yamamura answered, "[a]bsolutely, yes." Yamamura then explained that the property had "tremendous opportunities for increases in value[]" because it was "a very scarce commodity" and "an ocean front lot on one of the best beaches in south Maui . . . ."

Indeed, the Leones' attempts at selling their property soon after buying it support Yamamura's investment use testimony. A year after purchasing the property, the Leones relisted it for $7 million, a $4 million increase in the price they paid for it, and received two offers, which the Leones eventually refused. The offers -- one for $4.5 million and the other for $4.6 million -- would have garnered the Leones, if accepted, close to $1 million in profit. Also supporting Yamamura's investment use theory is the fact that the property is included in the Leone Family Trust, which Patricia Leone conceded at trial was created, at least in part, for the purpose of "invest[ing] and reinvest[ing] in real estate." Because we have already determined that investment use is a relevant consideration in a takings analysis, *see supra* Section IV.B.1.a, we conclude here that the record adduces some evidence that the property retained a reasonable, economically viable use, specifically in the form of an investment.

In addition to Yamamura's testimony about investment use, there is also some evidence to support the County's contention that the property had economically beneficial use in the commercial context. For instance, on cross-examination, Tsujimura conceded that the Leones could potentially conduct commercial activities on their property as a park. Additionally, on cross-examination, Dr. Whitney similarly conceded that point, and also conceded that he did not undertake any research to determine whether commercial activity on the Leones' property was economically viable.

As such, there is evidence to support the jury's finding that the property retained some economically beneficial use. Although the Leones were prevented from building a single-family residence on the property, evidence was presented showing that the property had value as an investment property and could potentially be used in the commercial context as well. *See Penn Cent.*, 438 U.S. at 130 ("[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.").

In sum, we conclude that there is evidence to support the jury's verdict that the County's regulations did not amount to a taking of the Leones' property. *See Aluminum Shake Roofing*, 110 Hawai'i at 251, 131 P.3d at 1233 ("A [motion for judgment as a matter of law] may be granted only when . . . it can be said there is *no* evidence to support a jury verdict in [the non-moving party's] favor." (first brackets in original) (emphasis added)). Accordingly, the circuit court did not err in denying the Leones' motion for judgment as a matter of law.[13]

4. The circuit court did not err in awarding costs to the County.

The Leones argue that the circuit court erred in awarding costs to the County because the County

13. The Leones also contend that they are entitled to a judgment as a matter of law on their civil rights act claim. Because we affirm the circuit court's judgment that a taking did not occur, we need not address the Leones' civil rights argument here.

is not the "prevailing party" under Hawai'i Rules of Civil Procedure (HRCP) Rule 54(d). This argument is contingent on this court's decision to vacate and remand this case on the grounds the Leones raised in the previous sections. Because we affirm the circuit court's judgment, the Leones' argument that the circuit court erred in awarding costs to the County is unavailing.

6. The County's Arguments on Cross-appeal

Because we rule in favor of the County, we may quickly dispense with its cross-appeal. In its cross-appeal, the County raises seven points for our review. The Leones argue that the County's cross-appeal is not permitted by law because the County is not an aggrieved party.

"Generally, the requirements of standing are (1) the person must first have been a party to the action; (2) the person seeking modification of the order of judgment must have had standing to oppose it in the trial court; and (3) *such person must be aggrieved by the ruling." Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd. P'ship*, 75 Haw. 370, 393, 862 P.2d 1048, 1061 (1993) (emphasis added). This court defines an aggrieved party in the civil context "as 'one who is affected or prejudiced by the appealable order.'" *Id.* (quoting *Montalvo v. Chang*, 64 Haw. 345, 351, 641 P.2d 1321, 1326 (1982)). Thus, under the general rule, the County is not an aggrieved party and would not be able to appeal its case.

However, as this court noted in *City Exp., Inc. v. Express Partners*, 87 Hawai'i 466, 468 n.2, 959 P.2d 836, 838 n.2 (1998), "[w]hile the general rule is that a prevailing

party may not file a direct appeal, there is an exception for cross-appeals." This court specifically determined that "[i]f the appellate court reverses the ruling of the lower court, then it must address any relevant issues properly raised on cross-appeal." *Id.* In *Express Partners*, because we affirmed the circuit court's directed verdict in favor of the cross-appellants, we concluded that the cross-appeal was moot. *Id.*

Similarly, because we affirm the circuit court's judgment in favor of the County, we find its cross-appeal moot.

V. CONCLUSION

For the foregoing reasons, we affirm the circuit court's: 1) June 1, 2015 judgment in favor of the County and against the Leones, 2) August 5, 2015 order denying the Leones' renewed motion for judgment as a matter of law or, in the alternative, motion for a new trial, and 3) August 5, 2015 order granting in part and denying in part the County's motion for costs.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

APPENDIX B — JUDGMENT ON APPEAL OF THE SUPREME COURT OF THE STATE OF HAWAI‘I, FILED APRIL 13, 2018

IN THE SUPREME COURT
OF THE STATE OF HAWAI‘I

SCAP-15-0000599

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

Plaintiffs-Appellants/Cross-Appellees,

vs.

COUNTY OF MAUI, a political subdivision of the State of Hawai‘i; WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui,

Defendants-Appellees/Cross-Appellants.

APPEAL FROM THE CIRCUIT COURT
OF THE SECOND CIRCUIT
(CAAP-15-0000599; CIVIL NO. 07-1-0496(2))

JUDGMENT ON APPEAL

Appendix B

(By: Nakayama, J., for the court)[1]

Pursuant to the opinion of the Supreme Court of the State of Hawai‘i entered on October 16, 2017, the Circuit Court of the Second Circuit's: (1) June 1, 2015 judgment in favor of the County and against the Leones, (2) August 5, 2015 order denying the Leones' renewed motion for judgment as a matter of law or, in the alternative, motion for a new trial, and (3) August 5, 2015 order granting in part and denying in part the County's motion for costs are affirmed.

DATED: Honolulu, Hawai‘i, April 13, 2018.

FOR THE COURT:

/s/ Paula A. Nakayama
Associate Justice

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1 Court: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.

APPENDIX C — ORDER OF THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII, FILED AUGUST 5, 2016

IN THE CIRCUIT COURT
OF THE SECOND CIRCUIT
STATE OF HAWAII

CIVIL No. 07-1-0496(2)
(Other Civil Action)

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; WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui; DOE ENTITIES 1-50,

Defendants.

Hearing Date: July 17, 2015
Hearing Time: 8:15 a.m.

Judge: Honorable Peter T. Cahill

Trial Date: March 30, 2015

Appendix C

ORDER DENYING PLAINTIFFS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL FILED JUNE 10, 2015

Plaintiffs DOUGLAS LEONE and PATRICIA A. PERKINS-LEONES' Renewed Motion for Judgment as a Matter of Law or, in the Alternative, Motion for a New Trial ("Plaintiffs' Motion"), filed June 10, 2015, came on for hearing before the Honorable Peter T. Cahill on July 17, 2015, Andrew Beaman and Leroy Colombe appeared on behalf of Plaintiffs Douglas Leone and Patricia A. Perkins-Leone, as Trustees under that certain unrecorded Leone-Perkins Family Trust dated August 26, 1999, as amended, and Brian A. Bilberry appeared on behalf of Defendants County of Maui and William Spence, in his capacity as Director of the Department of Planning of the County of Maui.

The Court having reviewed the submissions of the parties and having heard the arguments of Counsel, and good cause appearing therefor, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion is DENIED.

DATED: Wailuku, Maui, AUG - 4 2015.

/s/ PETER T. CAHILL (SEAL)
JUDGE OF THE ABOVE-ENTITLED COURT

APPENDIX D — JUDGMENT OF THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII, FILED JUNE 1, 2015

IN THE CIRCUIT COURT
OF THE SECOND CIRCUIT
STATE OF HAWAII

CIVIL NO. 07-1-0496(2)
(Other Civil Action)

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; WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui; DOE ENTITIES 1-50,

Defendants.

JUDGMENT

The above captioned matter came on for jury trial between the Plaintiffs DOUGLAS LEONE and PATRICIA A. PERKINS-LEONE, as Trustees under that certain unrecorded Leone-Perkins Family Trust

dated August 26, 1999, as amended (the "LEONE Plaintiffs") and Defendants COUNTY OF THE MAUI, a political subdivision of the State of Hawai'i and WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui (the "COUNTY DEFENDANTS"), on Monday, March 30, 2015 through Tuesday, May 5, 2015. The LEONE Plaintiffs were represented by the law firm of Chun Kerr LLP, a limited liability law partnership, and the COUNTY Defendants were represented by the Maui County Department of Corporation Counsel.

The allegations, claims, and causes of action tried and submitted to the jury for deliberation were noticed in the Complaint, filed November 19, 2007, including Count I for inverse condemnation in violation of Article 1, § 20 of the Hawai'i Constitution, Count II for inverse condemnation in violation of the Fifth Amendment of the United States Constitution, Count III for denial of Equal Protection, Count IV for denial of Substantive Due Process. The LEONE Plaintiffs' Complaint brought causes of action pursuant to 42 U.S.C. § 1983. The Complaint also identified Count V for punitive damages.

On February 2, 2015 the Court entered its Order Granting Defendant County of Maui's Motion for Summary Judgment as to Count V of the Complaint Filed November 19, 2007, Filed October 13, 2014;

On April 21, 2015 the COUNTY Defendants moved for a direct verdict, and Plaintiffs voluntarily dismissed Count III of the Complaint to the extent Count III made claims

for denial of equal protection, and voluntarily dismissed Count IV of the Complaint for denial of Substantive Due Process. Trial continued on the LEONE Plaintiffs claims for inverse condemnation under Counts I and II, and 42 U.S.C. § 1983.

On May 5, 2015, the jury rendered its verdict in favor of the COUNTY Defendants on all remaining Counts and claims.

Therefore, pursuant to Rule 58 of the Hawai‘i Rules of Civil Procedure, and based on the jury verdict in this case, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Judgment be and is hereby entered in favor of the COUNTY Defendants and against the LEONE Plaintiffs as to all Counts in the Complaint.

Any claims not specifically identified herein are hereby dismissed.

DATED: Wailuku, Maui, Hawai‘i JUN - 1 2015.

/S/ PETER T. CAHILL (SEAL)
JUDGE OF THE ABOVE-ENTITLED COURT

APPENDIX E — OPINION OF THE INTERMEDIATE COURT OF APPEALS OF HAWAI‘I, FILED JUNE 22, 2012

IN THE INTERMEDIATE COURT OF APPEALS OF HAWAI‘I

NO. 29696*

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

v.

COUNTY OF MAUI, a political subdivision of the State of Hawai‘i, WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui, DOE ENTITIES 1-50,

Defendants-Appellees

(CIVIL NO. 07-1-0496(3))

and

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* On November 9, 2010, Case Nos. 29696 and 30159 were consolidated in Case No. 29696.

Appendix E

WILLIAM L. LARSON and NANCY H. LARSON, as Trustees under that certain unrecorded Larson Family Trust dated October 30, 1992, as amended,

Plaintiffs-Appellants

v.

COUNTY OF MAUI, a political subdivision of the State of Hawai‘i, WILLIAM SPENCE, in his capacity as Director of the Department of Planning of the County of Maui, DOE ENTITIES 1-50,

Defendants-Appellees

(CIVIL NO. 09-1-0413(2))

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT. CIVIL NOS. 07-1-0496(3) and 09-1-0413(2).

June 22, 2012, Decided
June 22, 2012, Filed

NAKAMURA, CHIEF JUDGE, FOLEY and LEONARD, JJ.

OPINION OF THE COURT BY LEONARD, J.

In this consolidated appeal, Plaintiffs-Appellants Douglas Leone and Patricia A. Perkins-Leone (**Leones**),

as Trustees under that certain unrecorded Leone-Perkins Family Trust dated August 26, 1999, as amended, appeal from the Circuit Court of the Second Circuit's (**Circuit Court**) June 5, 2009 Amended Final Judgment dismissing their inverse condemnation, equal protection, due process, and 42 U.S.C. § 1983 claims.[1] Plaintiffs-Appellants William L. Larson and Nancy H. Larson (**Larsons**), as Trustees under that certain unrecorded Larson Family Trust dated October 30, 1992, as amended, appeal from the Circuit Court's October 15, 2009 Final Judgment dismissing their inverse condemnation, equal protection, due process, and 42 U.S.C. § 1983 claims, which are, in relevant part, identical to the Leones' claims.[2]

The Leones and Larsons (collectively, **Appellants**) argue that the Circuit Court erred in dismissing their claims for lack of subject matter jurisdiction on ripeness grounds. They also request that this court grant partial summary judgment against Defendants-Appellees County of Maui (**Maui County**) and Director of the Department of Planning of the County of Maui, William Spence (**Director**),[3] on their claims of inverse condemnation. For the reasons discussed below, we conclude that the

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1. The Honorable Joseph E. Cardoza presided.

2. The Honorable Shackley R. Raffetto presided.

3. During the pendency of this Appeal, William Spence, Director of the Department of Planning of the County of Maui, succeeded Jeffrey S. Hunt. Thus, pursuant to Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 43(c), Spence has been substituted automatically for Hunt in this case.

Circuit Court erred in dismissing Appellants' inverse condemnation claims as unripe. However, we decline to grant Appellants' request for partial summary judgment. Accordingly, we vacate the judgments and remand for further proceedings.

I. BACKGROUND

This appeal arises from Maui County's troubled attempts to create a public park at Palauea Beach in Makena, Maui. The 1998 Kihei-Makena Community Plan (**Community Plan**) assigned the beach lots a "park" land use designation, which does not permit the construction of single-family residences. In 1996, the Maui County Council (**County Council**) adopted Resolution No. 96-121, authorizing the Mayor to acquire the Palauea Beach lots for the creation of a public park. At that time, Palauea Beach was "one of the last undeveloped leeward beaches on Maui," and the County Council noted "an outpouring of community support" for the creation of a beach park.

In 1999, the County Council adopted Resolution No. 99-183, affirming its "official policy" to "preserve Palauea Beach in South Maui." Despite the Mayor's "appropriately raised concerns about the County's present financial constraints," the County Council urged the administration to acquire two of the Palauea Beach lots. Maui County purchased the two lots in January of 2000. However, it was unable to allocate sufficient funds to purchase the remaining seven lots, which were then sold to private individuals.

The Leones purchased Palauea Beach parcel 15 in February of 2000. The Larsons purchased Palauea Beach parcels 16 and 17 in December of 2000. Their properties are zoned "Hotel-Multifamily," permitting a variety of economically beneficial uses, including single-family residences. However, these parcels are among nine Palauea Beach lots that are designated "park" in the Community Plan.

The Palauea Beach lots are also located in a "special management area" (**SMA**) under the Hawai'i Coastal Zone Management Act (**CZMA**). *See* Hawaii Revised Statutes (**HRS**) § 205A-22 (2001). The CZMA was enacted, pursuant to the federal Coastal Zone Management Act, to protect valuable shoreline and coastal resources by establishing heightened land use controls on developments within protected zones, or special management areas. HRS § 205A-21 (2001). The Legislature delegated responsibility for administering the SMA provisions to the county planning commissions or councils. HRS § 205A-22.

The CZMA imposes stringent permit requirements for "developments" within special management areas. HRS §§ 205A-28, 205A-26 (2001). The term "development" expressly excludes, *inter alia,* single-family residences, *unless* the relevant county authority finds the proposed construction may have a "cumulative impact, or a significant environmental or ecological effect on a special management area[.]" HRS § 205A-22 (2001 & Supp. 2011). Three types of SMA permits are available, depending on the nature of the proposed development: minor use

permits, major use permits, and emergency use permits. *Id.* The CZMA empowers the county authorities to adopt rules implementing procedures for issuing SMA permits. HRS § 205A-29(a) (2001).

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

> (1) Is exempt from the requirements of this chapter because it is not a development pursuant to section 205A-22, HRS, as amended;
>
> (2) Requires a special management area minor permit pursuant to section 205A-22, HRS, as amended, which shall be processed in accordance with section 12-202-14;
>
> (3) Requires a special management area use permit pursuant to section 205A-22, HRS, as amended, which shall be processed in accordance with sections 12-202-13 and 12-202-15;
>
> (4) Requires a special management area emergency permit pursuant to section 205A-22,

> HRS, as amended, which shall be processed in accordance with section 12-202-16; or
>
> (5) *Cannot be processed because the proposed action is not consistent with the county general plan, community plan, and zoning, unless a general plan, community plan, or zoning application for an appropriate amendment is processed concurrently with the SMA permit application.*

SMA Rule 12-202-12(f) (emphasis added).

Appellants and other Palauea Beach lot owners sought to construct single-family residences on their respective properties. The Director, *inter alia,* initiated a process for changing the Community Plan designation from “park” to “residential.” Property owners, including Appellants, funded the requisite environmental assessment because Maui County was unable to do so. However, the Planning Commission refused to accept the environmental assessment and instead requested additional archaeological studies and historical narratives. Several commissioners advocated for prolonging the amendment process as a deliberate strategy to preserve the status quo - a de facto beach park on the privately-owned lots. As one commissioner explained:

> So if we decide on no action on this thing then the whole beach would remain as it is now and they would not be able to build on the land that they own. Granted, we can’t buy it but if we say

> no you can't develop it then we then have access to it, at least the beach.

This strategy would "allow the people of Maui to utilize [the] beach area" while preventing property owners from constructing homes. Another commissioner acknowledged that moving forward with the process would result in a loss of the "de facto parking that people are enjoying now" on the private lots and could force Maui County to use its own parcels for parking. At least one commissioner expressly sought to preserve the public's illegal camping, which had resulted in littering, defecating, and parking on the private beach lots, bemoaning the landowners' resort to hiring security guards to remove the trespassers.

Appellants nevertheless filed assessment applications under SMA Rule 12-202-12, seeking a determination that their proposed use is exempt from the SMA permit requirements. The Director rejected Appellants' applications because, *inter alia,* the proposed use was inconsistent with the properties' "park" designation in the Community Plan.[4]

Appellants then filed inverse condemnation claims under article I, § 20 of the Hawai'i Constitution and the

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4. The Lees' assessment application apparently did not comply with certain other requirements of SMA Rule 12-202-12. However, upon the Director's determination that the application could not be processed due to inconsistency with the Community Plan, any other deficiencies became irrelevant to the ripeness analysis because, even if such deficiencies were remedied, the application could not be processed.

Fifth and Fourteenth Amendments to the United States Constitution, alleging that Maui County had engaged in regulatory takings by depriving their properties of any economically viable use. They also asserted equal protection and substantive due process violations and, pursuant to 42 U.S.C. § 1983, sought compensatory damages, attorneys' fees, and punitive damages. In both cases, the Maui County filed motions to dismiss or, in the alternative, for summary judgment. The County's argument in both cases was that Appellants' claims were not ripe because they failed to exhaust available administrative remedies.

The Circuit Court dismissed all claims in both cases for lack of subject matter jurisdiction on ripeness grounds. It concluded that the claims were unripe for adjudication because Appellants failed to exhaust administrative remedies, namely: (1) appealing the Director's decision to the Planning Commission; (2) waiving assessment procedure and submitting an SMA permit application; and (3) seeking an amendment to the Community Plan to change the properties' designation from "park" to "residential." The court rejected Appellants' contention that such remedies would be futile.

The Leones and Larsons timely filed notices of appeal.

II. POINTS ON APPEAL

Appellants' core argument on appeal is that the Circuit Court erred in concluding their claims were unripe

for adjudication. More specifically, Appellants raise the following points of error:

(1) The Circuit Court erred in concluding that they were required to exhaust all available administrative remedies;

(2) The Circuit Court erred in concluding that Appellants' failure to appeal the Director's determination to the Maui Planning Commission rendered their claims unripe; and

(3) The Circuit Court erred in concluding that Appellants' failure to seek a community plan amendment rendered their claims unripe.

III. APPLICABLE STANDARD OF REVIEW

"It is axiomatic that ripeness is an issue of subject matter jurisdiction." *Kapuwai v. City & Cnty. of Honolulu, Dep't of Parks & Recreation*, 121 Hawai'i 33, 39, 211 P.3d 750, 756 (2009). "Whether a court possesses subject matter jurisdiction is a question of law reviewable *de novo*." *Kaho'ohanohano v. Dep't of Human Servs.*, 117 Hawai'i 262, 281, 178 P.3d 538, 557 (2008) (internal quotation marks and citation omitted).

IV. DISCUSSION

The Circuit Court's sole determination was that Appellants' claims were not ripe and, therefore, the Circuit

Court lacked subject matter jurisdiction. Accordingly, on this appeal, we will consider only that issue.

A. Inverse Condemnation and Regulatory Takings

The Fifth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides, in relevant part, that "private property [shall not] be taken for public use, without just compensation." Article I, § 20 of the Hawai'i Constitution likewise provides: "Private property shall not be taken or damaged for public use without just compensation." Thus, a governmental body can take private property, but it is subject to the requirements of a "public purpose" and "just compensation" to the property owner. *See*, *e.g.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38, 25 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (discussing the Takings Clause of the Fifth Amendment).

Within these constitutional parameters, the State of Hawai'i or any county may exercise the power of eminent domain by instituting proceedings for the condemnation of private property, as set forth in HRS Chapter 101 (Eminent Domain). Although not specifically provided by statute, an "inverse condemnation" proceeding is the means by which a property owner can seek to recover the value of property that has been taken by the government for public use without exercising the power of eminent domain. *See Black's Law Dictionary* 332 (9th ed. 2009) (defining "inverse" condemnation).

Appendix E

Until the United States Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922), only the direct appropriation or physical invasion of privately-held property was considered to effect a taking. *Lingle*, 544 U.S. at 537. Beginning with Justice Holmes's decision in *Pennsylvania Coal*, the Supreme Court recognized that, in some instances, land use regulations can go "too far" and thus reduce the use of the property to such an extent that it constitutes a "regulatory taking" requiring just compensation under the Fifth Amendment. *Id.* at 537-39, citing, *inter alia, Pennsylvania Coal*, 260 U.S. at 413, 415; *see also* David L. Callies, *Takings: An Introduction and Overview*, 24 U. Haw. L. Rev. 441, 443 (2002).

The Supreme Court has recognized at least two categories of compensable regulatory takings: (1) where "regulations [] compel the property owner to suffer a physical 'invasion' of his property . . . no matter how minute the intrusion"; and (2) "where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992) (citations omitted). In this case, Appellants appear to contend that, in denying them the opportunity to build a single-family residence, Maui County has deprived them of all economically beneficial use of their property.[5]

5. As the only issue before us is whether Appellants' claims are ripe for adjudication, and Appellants' claim that they have been deprived of all economically beneficial use, we need not address the distinction between total takings and partial takings. *See generally* Callies, *Takings*, 24 U. Haw. L. Rev. at 445-50.

B. Ripeness

The Supreme Court has further held that, before a property owner may initiate a suit seeking compensation for a taking, the claim must be ripe. *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). A claim that the application of a regulation effects a taking becomes ripe when "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.* In *Williamson*, the respondent sought to develop residential homes on its tract of land. *Id.* at 178-81. The Planning Commission refused to approve the preliminary plat because it failed to conform to various subdivision regulations. *Id.* at 181, 187-88. The Court held that the takings claims were unripe because the respondent failed to seek available variances, and thus the decision was not final. *Id.* at 188, 193-94. Ripeness arises when the land-use authority "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* at 191.

This finality requirement is rooted in the nature of the Takings Clause inquiry. *Id.* at 190-91. Absent a final decision, courts cannot accurately examine the economic impact of the regulation on the property at issue. *Id.*; *Palazzolo v. Rhode Island*, 533 U.S. 606, 618, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001). Courts cannot determine whether a land use restriction goes "too far," so as to constitute a regulatory taking, until the appropriate

agency has determined just how far the regulation extends. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348, 106 S. Ct. 2561, 91 L. Ed. 2d 285 (1986) (quoting *Pennsylvania Coal*, 260 U.S. at 415). Nor can they determine whether any "beneficial use" remains, a core aspect of the inverse condemnation inquiry. *Williamson*, 473 U.S. at 189 n.11. Likewise, the "just compensation" determination is dependent on a final decision. *Id.* at 190-91. Ripeness is therefore a prerequisite to the examination of the takings claim itself. *Id.*

Moreover, land use determinations often involve a high degree of discretion. *Palazzolo*, 533 U.S. at 620. The ripeness doctrine, as applied in inverse condemnation cases, ensures that courts do not prematurely deprive land-use authorities of the opportunity to exercise discretion in favor of the landowner. *Id.* The relevant land-use authority, utilizing reasonable procedures, must first have decided "the reach of a challenged regulation." *Id.* If the land-use authority retains the ability to modify or revoke its decision, a court cannot possibly discern "the nature and extent of permitted development" on the subject property. *MacDonald, Sommer & Frates*, 477 U.S. at 351. However, "once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo*, 533 U.S. at 620.

C. Ripeness versus Exhaustion of Administrative Remedies

The Supreme Court in *Williamson* recognized the distinction between the ripeness doctrine and the exhaustion of administrative remedies. *Williamson*, 473 U.S. at 192-93. Citing *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982), the respondent in *Williamson* argued that it should not be required to seek variances that would have allowed it to develop its property "because its suit is predicated upon 42 U.S.C. § 1983, and there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action." *Id.* at 192. The Court explained why that assertion could not be sustained and, in doing so, explained the difference between ripeness and exhaustion:

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Patsy* concerned the latter, not the former.

The difference is best illustrated by comparing the procedure for seeking a variance with the procedures that, under *Patsy*, respondent would not be required to exhaust. While it appears that the State provides procedures by which an aggrieved property owner may seek a declaratory judgment regarding the validity of zoning and planning actions taken by county authorities . . ., respondent would not be required to resort to those procedures before bringing its § 1983 action, because those procedures clearly are remedial. ***Similarly, respondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking***.

Resort to those procedures would result in a judgment whether the Commission's actions violated any of respondent's rights. In contrast, resort to the procedure for obtaining variances would result in a conclusive determination by the Commission whether it would allow respondent to develop the subdivision in the manner respondent proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents respondent from developing its subdivision without obtaining the necessary variances,

> but leaves open the possibility that respondent may develop the subdivision according to its plat after obtaining the variances. In short, the Commission's denial of approval does not conclusively determine whether respondent will be denied all reasonable beneficial use of its property, and therefore is not a final, reviewable decision.

Williamson, 473 U.S. 192-94 (citations omitted; emphasis added).[6]

Thus, ripeness, in the context of a takings claim, simply requires a final, definitive, decision by the initial land-use decision-maker regarding how it will apply the regulations at issue to the subject property, which inflicts an actual, concrete injury. If the regulatory scheme allows for a variance from the requirements of the land-use law, then a decision that does not foreclose a variance is not a final decision regarding the extent of governmental restriction on the subject property. However, as noted above, once that final decision is made, no appeal is required, and no collateral declaratory judgment action attacking the application of the land use law is required,

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6. *Williamson* enunciated a second barrier to ripeness in federal court takings cases, which is that the plaintiff must first seek compensation through the procedures that a state provides for seeking just compensation, or demonstrate that such procedures are unavailable or inadequate. *Williamson*, 473 U.S. at 194-97. This second requirement is plainly inapplicable to state court proceedings.

for the takings claim to become ripe. The exhaustion doctrine, by contrast, applies when a party seeks judicial review of the substance of an adverse administrative decision. Thus, exhaustion of any appeals permitted within the administrative process is required before seeking relief from the courts.

Although perhaps less explicitly, Hawai'i case law is in accord. Under the exhaustion doctrine, "if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available." *Williams v. Aona*, 121 Hawai'i 1, 9, 210 P.3d 501, 509 (2009) (internal quotation marks and citation omitted). In such cases, in the interest of judicial economy, "the doctrine of exhaustion *temporarily* divests a court of jurisdiction." *Id.* In *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 734 P.2d 161 (1987), the Hawai'i Supreme Court discussed "primary jurisdiction" cases, in which claims are "originally cognizable in the courts," but their enforcement requires resolution of issues that have been delegated to administrative agencies. *Id.* at 93, 734 P.2d at 168 (citation omitted). In such cases, courts should suspend review pending the administrative disposition of issues the agency is empowered to resolve. *Id.* Similarly, the exhaustion doctrine provides that where a claim is "cognizable in the first instance by an administrative agency alone", courts may not interfere in the agency's decision-making until all relevant administrative remedies have been exhausted. *Id.* at 93, 734 P.2d at 169 (citation omitted). These principles are doctrines of comity designed to outline the relationship between courts and administrative agencies and secure their proper spheres of authority. *Id.* at 93, 734 P.2d at 168.

Where landowners seek to challenge the decision of a land-use authority under the CZMA, HRS sections 91-14 and 205A-6(c) provide the mechanism for judicial review. *See Kona Old*, 69 Haw. at 91-93, 734 P.2d at 167-69. This review requires judicial intervention in matters that have been placed "within the special competence of the county planning department." *Id.* at 93, 734 P.2d at 169 (internal quotations and citation omitted). Accordingly, for courts to exercise jurisdiction in this situation, landowners must first demonstrate that they have sought relief on their dispute through available administrative remedies, including any administrative review process. *Id.*

On the other hand, where landowners do not challenge the substance of the decision of the land-use authority, but instead raise constitutional claims based on the effect of the decision, the doctrines of exhaustion and primary jurisdiction are not implicated. In such cases, the ripeness doctrine operates 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 effects felt in a concrete way by the challenging parties." *Grace Bus. Dev. Corp. v. Kamikawa*, 92 Hawai'i 608, 612, 994 P.2d 540, 544 (2000) (citation and internal quotation marks omitted). Ripeness only requires that the appropriate agency make a formal, final, concrete determination that affects the party before it. *Id.*; *accord Williamson*, 473 U.S. at 193 (takings claim is ripe when "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury"). Thus, the ripeness issue before us is whether

a formal, final, concrete determination has been made affecting Appellants' use of their properties.

D. Application of the Ripeness Doctrine

Turning to the case at hand, we must decide whether the Director's refusal to process Appellants' assessment applications constituted final decisions regarding the application of the subject regulations to the properties at issue. *Williamson*, 473 U.S. at 186. Maui County argues, and the Circuit Court concluded, that Appellants' claims are not ripe because: (1) Appellants failed to exhaust the administrative remedy of an appeal of the Director's decision to the Commission; and (2) Appellants failed to apply for an Amendment to the Community Plan.

1. The Director's Decision Was a Final Decision

The parties dispute whether, under the applicable rules, an appeal from the Director's decision to the Commission was available to Appellants in this case. Maui County cites SMA Rule 12-202-26, which provides that an "[a]ppeal of the director's decision may be made to the commission." Appellants contend, based on arguments of statutory construction, that the appeals process set forth in SMA Rule 12-202-26 applies to other parts of the SMA Rules, but that it does not apply to the Director's decision, under SMA Rule 12-202-12, refusing to process Appellants' assessment applications due to inconsistency with the Community Plan. We need not resolve this issue.

Maui County's argument concerning appealability to the Commission would be pertinent to whether an applicant had exhausted its administrative remedies prior to seeking judicial review of a decision by the Director, but it is of no consequence to the ripeness analysis applied to takings claims. The *Williamson* decision was crystal clear:

> While the policies underlying the two concepts [ripeness and exhaustion] often overlap, ***the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury***; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson, 473 U.S. at 193 (emphasis added).

The Supreme Court specifically rejected the proposition that the initial, concrete, decision must be appealed before a takings claim becomes ripe:

> [R]espondent would not be required to appeal the Commission's rejection of the preliminary plat to the Board of Zoning Appeals, because the Board was empowered, at most, to review that rejection, not to participate in the Commission's decisionmaking.

Id.

Accordingly, we conclude that Appellants were not required to appeal the Director's decision that their assessment application could not be processed because "[t]he proposed Single-Family dwelling is inconsistent with the Commmunity Plan." The Director's decision satisfied the finality requirement for ripeness by setting forth a definitive position regarding how Maui County will apply the regulations at issue to the particular land in question.

2. Amendment to the Community Plan

Maui County argues that Appellants failed to obtain a final decision regarding the application of the "park" use designation for their properties because they did not seek an amendment to the Community Plan to change the "park" designation. The County argues that a Community Plan amendment is essentially a "variance" from the Community Plan and, thus, as with the possibility of a variance in *Williamson*, the Director's decision leaves open the possibility that Appellants may develop their properties after obtaining an amendment to the Community Plan. *Cf. Williamson*, 473 U.S. at 192-94. Appellants argue that, under *GATRI v. Blane*, 88 Hawai'i 108, 114, 962 P.2d 367, 373 (1998), the Community Plan has "the force and effect of law" and that the doctrine of ripeness does not require property owners to seek a change in law prior to seeking just compensation for a regulatory taking.

It is undisputed that, in *Williamson*, the Supreme Court held that the property owners claims were not ripe for adjudication because they had not availed themselves of the procedure for obtaining variances. *See Williamson*, 473 U.S. at 188, 193-94. The dispute here is whether an amendment to the Community Plan is, in effect, a variance that must be sought in order for Appellants' claims to be justiciable.

First, we must consider the nature of the Community Plan itself, as explicated by the Hawai'i Supreme Court in *GATRI*. The plaintiff in *GATRI* submitted an SMA minor permit application to the Director, seeking to build a 470 square foot snack shop on its property, which was zoned B-R Resort/Commercial, but designated "single-family residential" in the Community Plan.[7] *GATRI*, 88 Hawai'i at 109, 962 P.2d at 368. It was undisputed that the proposed use was allowable under the applicable zoning. *Id.* Similar to the Director's decision in this case, the Director in *GATRI* concluded, *inter alia,* that "the proposed action cannot be processed because it is not consistent with the community plan[.]" *Id.* at 110, 962 P.2d at 369.

The plaintiff in *GATRI* appealed the Director's decision to the Circuit Court. *Id.* The Circuit Court reversed the Director's decision and the Director appealed to the Hawai'i Supreme Court. *Id.* at 110-11, 962 P.2d at 369-70. The supreme court addressed two issues. The

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[7] The Community Plan at issue in *GATRI* was Kihei-Makena Community Plan, as adopted by the Maui County Council in 1985, in Ordinance No. 1490. That Community Plan was updated in 1997 and is now referred to as the 1998 Kihei-Makena Community Plan, the same plan that is at issue in the instant case.

supreme court's disposition of the first issue, whether GATRI exhausted its administrative remedies prior to its appeal to the circuit court, is not relevant to the ripeness issue in this case. *See GATRI*, 88 Hawai'i at 111-12, 962 P.2d at 370-71. In *GATRI*, the plaintiff sought direct judicial review of the substance of the Director's decision. Thus, the exhaustion of administrative remedies was at issue. Here, the Appellants have not sought direct judicial review of the Director's decision; rather, Appellants have brought claims based on the effect of the Director's decision.

In the second issue before it, the supreme court held that the Director did not err in his decision not to process GATRI's application because it was inconsistent with the Community Plan, which in the County of Maui is a part of the general plan, and which contains a specific, relatively-detailed land use plan. *GATRI*, 88 Hawai'i at 112-15, 962 P.2d at 371-74. The supreme court based its conclusion on its interpretation of the governing law, reflected in its holding that the Community Plan "was adopted after extensive public input and enacted into law by the Maui County Council . . . as an amendment to section 2.80.050 of the Maui County Code", "[i]t is part of the general plan of Maui County," and, "[t]herefore, it has the force and effect of law and a proposed development which is inconsistent with the [Community Plan] may not be awarded an SMA permit without a plan amendment." *Id.* at 115, 962 P.2d at 374.[8]

8. We note that the developer in *GATRI* sought an SMA minor use permit for a proposed "development" under the CZMA. 88 Hawai'i at 109-10, 962 P.2d at 368-69. Here, by contrast, the

proposed use - the construction of single-family residences - is not considered a "development" under the CZMA unless the authority finds a cumulative impact or significant environmental effects. HRS § 205A-22. Although the CZMA does not expressly require consistency for proposed land uses that are not considered "developments," the Maui County Code (**MCC**) renders the Community Plan binding on all county officials. MCC 2.80B.030(B) (2006). Under the express language of the code, neither the director nor the Planning Commission may approve land uses that are inconsistent with the Kihei-Makena Commmunity Plan. *Id.*; *see also Pono v. Molokai Ranch, Ltd.*, 119 Hawai'i 164, 192, 194 P.3d 1126, 1154 (App. 2008) ("Under the MCC, before the [Department of Public Works and Waste Management] or any other county agency issues a permit, the agency must ensure that the project in question adheres to the specifications of the general plan and community plans of Maui County"), *abrogated on other grounds by County of Hawai'i v. Ala Loop Homeowners*, 123 Hawai'i 391, 235 P.3d 1103 (2010); *see also* MCC 19.04.015(A) (1991) (purpose of zoning is to regulate land usage in accordance with general and community plans); MCC 19.510.040(A)(4)(b) (1991) (change of zoning must comply with community plan). The language of the SMA Rules comports with this outcome, stating in mandatory terms that "the director *shall* make a determination . . . that the proposed action *either*: . . . (5) Cannot be processed because the proposed action is not consistent with the county general plan, community plan, and zoning[.]" SMA Rule 12-202-12(f) (emphasis added). In any case, the Director's decision that Appellants' assessment applications could not be processed had the same effect as a determination that it was a development. If, because of a "cumulative impact or a significant environmental or ecological effect," a single-family residence is considered a development, then an SMA permit would be required. If a permit were required, it could not be approved because it would be inconsistent with the Community Plan. Thus, regardless of the denomination of the assessment application, the Director's determination of inconsistency with the Community Plan precludes further processing under applicable law. *See*

Accordingly, the supreme court has determined that the Community Plan before us is a legislative enactment, with the full force and effect of law. As the issue was not presented in *GATRI*, the supreme court did not consider whether an amendment to the Community Plan was in the nature of a variance for the purpose of a takings claim ripeness analysis. Nevertheless, Maui County's argument that a Community Plan amendment is essentially an administrative remedy akin to a variance is incompatible with the supreme court's characterization of the Community Plan.

Moreover, a legislative act "predetermines what the law shall be for the regulation of future cases falling under its provisions," whereas a non-legislative act "executes or administers a law already in existence." *Sandy Beach Defense Fund v. City Council of the City & Cnty. of Honolulu*, 70 Haw. 361, 369, 773 P.2d 250, 256 (1989) (quoting *Life of the Land v. City Council of the City & Cnty. of Honolulu*, 61 Haw. 390, 423-24, 606 P.2d 866, 887 (1980)). Issuing SMA permits involves "application of general standards to specific parcels of real property," and is therefore an administrative act. *Id.* By contrast,

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GATRI, 88 Hawai'i at 115, 962 P.2d 374; *see also Palazzolo*, 533 U.S. at 620-21; *McCole v. City of Marathon*, 36 So.3d 750, 754 (Fla. Dist. Ct. App. 2010) (decision is ripe when it becomes clear that further applications would be futile); *Howard v. County of San Diego*, 184 Cal. App. 4th 1422, 109 Cal. Rptr. 3d 647, 653 (Cal. Dist. Ct. App. 2010) (recognizing futility as an exception to ripeness); *accord*, *Schooner Harbor Ventures, Inc. v. United States*, 92 Fed. Cl. 373, 381-82 (Fed. Cl. 2010).

a Community Plan amendment can only be achieved by ordinance of a legislative body, the Maui County Council — an act that does not merely execute or administer a law already in existence. *See* Maui County Charter § 3-6 (2003) (designating the council as the county's legislative body); § 4-1 (2003) ("[e]very legislative act of the council shall be by ordinance").

A Community Plan amendment cannot be equated with a zoning variance or similar relief. A variance is a thoroughly administrative mechanism that changes the effect of an existing law on a particular property. *See* MCC § 19.520.050 (1991). Because the Community Plan is legally binding, an amendment amounts to a change of the existing law rather than an administrative exception to its application.

A comparison of the two processes supports this conclusion. The Maui Board of Variances and Appeals, an administrative agency, has authority to grant variances from an existing land use regulation if it determines the regulation imposes unique hardship on a specific property. MCC § 19.520.050(C). The landowner must file an appropriate application, and the board must hold a public hearing. MCC §§ 19.520.020 (1997), 19.520.030 (1991).

In some respects, the process for obtaining a Community Plan amendment appears similarly administrative in nature: an individual landowner may apply, on an individual basis, at any time for an amendment

on a promulgated form; and the Planning Commission reviews the application and sets it for a public hearing. MCC § 2.80B.110(A), (B) (2006). However, the bulk of the process is legislative. Following review of the application, the Planning Commission has no authority to approve or deny a proposed amendment. Instead, its role is limited to providing findings, conclusions, and recommendations. MCC § 19.510.020(A)(6)-(7); Maui County Charter § 8-8.4. The Commission must transmit the application along with its recommendations to the Maui County Council, which has the ultimate decision-making authority. Maui County Charter § 8-8.6(1); MCC § 2.80B.110(B), (C). The County Council must first hold another public hearing on the proposed amendment. MCC § 2.80B.110(D). The council may approve an amendment only by ordinance, which must be submitted to the mayor and either approved or vetoed. Maui County Charter §§ 8-8.6(1), 4-3(1). Indeed, unlike an administrative variance, there are no specific criteria that govern the council's decision on whether to amend the Community Plan. The amendment process is therefore more akin to enacting a zoning ordinance than obtaining a variance from existing regulations. *See Save Sunset Beach Coal. v. City & Cnty. of Honolulu*, 102 Hawai'i 465, 473-74, 78 P.3d 1, 9-10 (2003) (holding that rezoning is a legislative function).

In *Kailua Community Council v. City & County of Honolulu*, the supreme court addressed this issue in the nearly identical context of a general plan amendment, which on O'ahu is accomplished by ordinance of the city council. 60 Haw. 428, 432-33, 591 P.2d 602, 605

(1979). The chief planning officer and the planning commission performed "a purely advisory function," akin to that of a legislative committee, in submitting their recommendations to the city council. *Id.* at 433, 591 P.2d at 606. The court observed that "the final operative act giving legal effect to the proposal is the legislative action of the city council." *Id.* at 432, 591 P.2d at 605. As a result, the council's approval or denial of a proposed general plan amendment is an "exercise of its legislative function." *Id.*

Because a Community Plan amendment is not an administrative act, it cannot reasonably be required as a step in reaching a final agency determination for ripeness purposes. *See, e.g., Ward v. Bennett*, 79 N.Y.2d 394, 592 N.E.2d 787, 790, 583 N.Y.S.2d 179 (N.Y. 1992) (holding that landowners were not required to pursue a legislative "demapping" procedure for ripeness purposes); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 938 F.2d 153, 157 (9th. Cir. 1991) ("[R]ipeness did not require the plaintiffs to ask [the government] to amend the 1984 [regional] Plan before bringing their [federal takings] claims."); *GSW, Inc. v. Dep't of Natural Res.*, 254 Ga. App. 283, 562 S.E.2d 253, 255 (Ga. Ct. App. 2002). Ripeness requires only that landowners take advantage of any available variances or waivers under existing law; it does not require them to undertake changing the law itself. *See Palazzolo*, 533 U.S. at 620.

In a California case nearly identical to the one at bar, the court held that the landowners' failure to obtain a general plan amendment was not a bar to ripeness.

Howard, 109 Cal. Rptr. at 654-55. Although the *process* for obtaining a general plan amendment could be characterized as administrative in nature, the ultimate decision was, as here, "a legislative one to be voted on, after notice and a hearing, by the County's Board of Supervisors." *Id.* at 654. Accordingly, the landowners could not be required to pursue a legislative remedy to attain ripeness. *Id.* at 655.

For these reasons, we hold that Appellants are not required to seek a change in the applicable law, *i.e.*, the Community Plan, in order to satisfy the ripeness requirement for their takings claims.

V. CONCLUSION

We conclude that the Circuit Court erred in its determination that it lacked subject matter jurisdiction because Appellants' claims were not ripe for adjudication. Accordingly, we vacate the Circuit Court's June 5, 2009 Amended Judgment in Civil No. 07-1-0496 and October 15, 2009 Final Judgment in Civil No. 09-1-0413, and we remand for further proceedings.

/s/ Craig H. Nakamura

/s/ Daniel R. Foley

/s/ Katherine G. Leonard