NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

DOUGLAS LEONE and PATRICIA A. PERKINS-LEONE, as Trustees under that certain unrecorded Leone-Perkins Family Trust dated August 26, 1999, as amended, Respondents-Plaintiffs-Appellants, 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, Petitioners-Defendants-Appellees. WILLIAM L. LARSON and NANCY H. LARSON, as Trustees under that certain unrecorded Larson Family Trust dated October 30, 1992, as amended, Respondents-Defendants-Appellants, vs.	CIVIL NO. 07-1-0496(3) ICA NO. 29696 APPEAL FROM: (1) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT FILED NOVEMBER 19, 2007 OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT ENTERED MARCH 2, 2009; (2) FINAL JUDGMENT ENTERED MARCH 2, 2009; (3) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR AN AWARD OF FEES, COTS AND EXPENSES ENTERED HEREIN ON MAY 18, 2009; AND (4) AMENDED JUDGMENT ENTERED HEREIN ON JUNE 5, 2009 CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII The Honorable Joseph E. Cardoza, Judge

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,

Petitioners-Defendants-Appellees.

APPLICATION FOR WRIT OF CERTIORARI

APPENDIX A

AND

CERTIFICATE OF SERVICE

DEPARTMENT OF THE CORPORATION COUNSEL 205

PATRICK K. WONG 5878
Corporation Counsel
MARY BLAINE JOHNSTON 1755
Deputy Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Maui, Hawaii 96793
Telephone: (808) 270-7741
Facsimile: (808) 270-7152
email: mary.johnston@co.maui.hi.us

Attorneys for Petitioner-Defendant-Appellee
COUNTY OF MAUI and WILLIAM SPENCE, in his capacity as Director of the Department of Planning

APPLICATION FOR WRIT OF CERTIORARI

I. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

In its decision of June 22, 2012, reported at 128 Hawai`i 183, 284 P.3d 956 (2012),[1] the Intermediate Court of Appeals ("ICA") misapplied this Court's opinion in GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998) and the U.S. Supreme Court's decision in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). The ICA opinion announced a novel rule: "the exhaustion doctrine . . . applies when a party seeks judicial review of the substance of an adverse administrative decision," Leone, 284 P.3d at 965, but not where the landowner's claim is "based on the effect of the decision." Id. The ICA also decided a novel issue of law unnecessarily in a case in which no subject matter jurisdiction existed in the first place. Pursuant to Rule 40.1 of the Hawaii Rules of Appellate Procedure, Petitioners-Defendants-Appellees County of Maui and William Spence, in his capacity as Director of the Maui County Department of Planning ("Petitioners") seek a writ of certiorari to address and resolve these errors:

A. Did the ICA misconstrue and misapply this Court's decision in GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998) and the U.S. Supreme Court's decision in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) in ruling that Respondents were not required to exhaust their administrative remedies by appealing a Planning Director's decision to the Maui Planning Commission, when the Commission had the authority to overrule the Director?

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[1] Because the page citations are not yet available to cite to the official reporter, the ICA's opinion will be cited throughout this memorandum as "Leone, 284 P.3d at ___." A copy of the ICA's opinion is attached hereto as Appendix "A".

B. Did the ICA unnecessarily decide a legal issue of first impression in Hawaii by ruling that Respondents were not required to seek a community plan amendment before filing suit for inverse condemnation?

II. STATEMENT OF PRIOR PROCEEDINGS

This case concerns three parcels of beachfront property located in Maui's Special Management Area ("SMA") that are subject to special permitting requirements under the Coastal Zone Management Act, or CZMA. See Hawaii Revised Statutes ("HRS) § 205A-22, § 205A-26, § 205A-28. The CZMA empowers counties to adopt rules for issuing SMA permits. HRS § 205A-29(a). The CZMA restricts "developments" in the SMA. HRS §§ 205A-28, 205A-26. Single-family residences are expressly excluded from the definition of "development" unless the relevant county authority concludes that the proposed residence may have a "cumulative impact, or a significant environmental or ecological effect on a special management area[.]" HRS § 205A-22.

Landowners in Maui may seek an assessment that their proposed construction is not a "development" under HRS § 205A-22. Under the Special Management Area Rules for the Maui Planning Commission ("SMA Rules"), the initial assessment is made by the Planning Director ("Director"). Anyone dissatisfied with the Director's decision has the right to appeal to the Maui Planning Commission ("Commission"). SMA Rules, § 12-202-26. The Commission, rather than the Director, has the authority to reach a final decision on whether a proposed single-family residence is a "development." See id.

In 2007, the Leone Respondents submitted an SMA Assessment Application seeking a determination that the house they proposed to build on their beachfront lot was not a "development," and was therefore exempt from SMA permitting

requirements. In 2008, the Larson Respondents did the same with respect to their two beachfront lots.

The Director advised Respondents that pursuant to SMA Rule § 12-202-12(f)(5), their assessment applications could not be processed without a concurrent application for a community plan amendment because the proposed residential use of their property was inconsistent with the park designation for their lots found in the Kihei-Makena Community Plan ("Community Plan").

Respondents had a right to appeal the Director's decision to the Maui Planning Commission pursuant to § 12-202-26(a) of the SMA Rules. Instead of pursuing this available administrative remedy, Respondents filed complaints for inverse condemnation in the Second Circuit Court, captioned respectively Douglas Leone and Patricia Leone v. County of Maui, Civil No.07-1-0496(3) and William Larson and Nancy Larson v. County of Maui, Civil No.09-1-0413(2). Each complaint alleged that Respondents' oceanfront property had been inversely condemned by the County as a result of the designation of their lots for "park" use in the 1998 Community Plan.

Neither complaint recited that the Respondents had exhausted all administrative remedies available to them. Instead, each complaint alleged that Respondents did not have to appeal the Director's decision to the Commission because the Director's decision was correct and consistent with the Commission's SMA Rules. Respondents alleged that the Commission would also have to conclude that any available appeal or further administrative action would be futile.

Two judges of the Second Circuit Court rejected the Respondents' futility argument. On March 2, 2009, Judge Joseph E. Cardoza granted Petitioners' motion to dismiss the Leones' complaint, ruling that the court lacked subject

matter jurisdiction due to Respondents' failure to exhaust their administrative remedies:

> Plaintiffs have failed to exhaust their administrative remedies and do not qualify under the "futility" exception to the exhaustion doctrine. The instant case is not ripe for adjudication. Thus, this Court lacks jurisdiction over the subject matter. (ROA Doc. 88 at PDF 2125)

On August 12, 2009, Judge Shackley F. Raffetto granted Petitioners' motion to dismiss the Larsons' complaint on similar grounds:

> Plaintiffs did not pursue the administrative procedure available to them, i.e. an appeal to the Planning Commission pursuant to § 12-202-26 of the SMA rules. Plaintiffs failed to exhaust the administrative procedure ("remedy") available to them. As a result, their claims are not ripe for adjudication by the Court. (ROA Doc. 8 at PDF 367-368)

The Respondents appealed, and on June 22, 2012, the ICA issued its decision reversing and remanding the decisions of the two Second Circuit Court judges.

III. STATEMENT OF THE CASE

Two Second Circuit Court judges correctly determined that they lacked subject matter jurisdiction over Respondents' inverse condemnation suits because Respondents failed to exhaust available administrative remedies. The ICA misconstrued and misapplied this Court's decision in GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998) and the U.S. Supreme Court's decision in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) in ruling that Respondents were not required to exhaust their administrative remedies by appealing the Director's decision to the Maui Planning Commission.

Furthermore, the ICA unnecessarily decided a legal issue of first impression in Hawaii by ruling that Respondents were not required to seek a community plan amendment before filing suit for inverse condemnation, an issue not addressed

or decided by either Circuit Court judge below. Prior to the ICA's decision, no Hawaii appellate court had considered this issue. Because the Respondents failed to exhaust administrative remedies through an appeal of the Director's decision to the Planning Commission, the Circuit Courts correctly dismissed the actions on jurisdictional grounds, making it unnecessary for the ICA to reach the community plan issue.

IV. ARGUMENT

A. The ICA Erred In Its Application of GATRI To The Allegations in Respondents' Complaints

The ICA erroneously concluded that the Director's decision satisfied the finality requirement for ripeness. Leone, supra, 284 P.3d at 966. The ICA reached that decision based in part on this Court's decision in GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998), which arose under similar facts, but a different regulatory structure, from the case at bar.

The plaintiff in GATRI applied to the Planning Director for an SMA minor permit to build a snack shop on its property. The property had the necessary B-R Resort/Commercial zoning, but was designated "single-family residential" in the Community Plan. The Planning Director concluded that the application could not be processed, due to the inconsistency between the zoning and the Community Plan. Id., 88 Hawai'i at 110, 962 P.2d at 369. The landowner sought direct judicial review of the Planning Director's decision. Id., 88 Hawai'i at 111, 962 P.2d at 370. This Court ruled that the landowner did not have to exhaust administrative remedies by appealing the Director's decision to the Maui Planning Commission, because the Commission had delegated authority for SMA matters to the Planning Director. Id. This Court determined that "[t]he decision of the

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

When the GATRI case arose in 1996, there was no provision in the SMA Rules for appeal of a Director's decision to the Maui Planning Commission, and thus, GATRI was correctly decided by this Court. However, in late September, 1997, the SMA Rules were amended to provide for an appeal to the Commission of a decision by the Director and thereafter, for an appeal of the Commission's decision to the Circuit Court:

> § 12-202-26: Appeal of director's decision
>
> (a) Appeal of the director's decision may be made to the commission in writing not later than ten days after the receipt of the director's written decision . . . . The commission may reverse and remand the decision to the director if the appellant sets forth facts or law of a convincing nature demonstrating clear error, or manifest injustice.
>
> (b) Appeal of the commission's decision may be made to the circuit court of the second circuit as provided for in the commission's rules and chapter 91, HRS, as amended. [Eff. January 1, 1994; am September 28, 1997.]

Since September 28, 1997, as a result of the amendments to the Commission's SMA Rules, the Commission, rather than the Planning Director, has the final decision-making authority on SMA matters. Therefore, before a party may invoke the Court's jurisdiction, it must appeal a Director's decision to the Commission for a final determination. Due to the intervening change in the Commission's SMA Rules, the GATRI opinion does not provide any basis for concluding that the Director's decisions in the Respondents' cases were final.

Instead of determining that the Director's decision was not final, because the Maui Planning Commission was now the final authority in SMA matters, the ICA announced a novel legal theory: that there is a distinction between a challenge to the "substance" of a Director's decision and a challenge to the "effect" of a Director's decision:

> 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.

Leone, supra, 284 P.3d at 967.

The ICA did not cite to any authority for the proposition that there is a difference between the substance of a decision as opposed to the effect of a decision. Instead, the ICA concluded that the Respondents were not required to appeal the Director's decision on the theory that "[t]he 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 [community] plan." Leone, supra, 284 P.3d at 966. This conclusion ignored the appeal process established by the Planning Commission in its amendment to the SMA Rules and the fact that unlike the situation in GATRI, the Commission now has the final authority in such matters, rather than the Director.

In accepting Respondents' argument that any appeal to the Commission would have been futile, the ICA also ignored the Commission's 2005 ruling based on a similar decision of the Planning Director pertaining to two of Respondents' neighbors, the Lamberts and the Sweeneys. The Planning Director had declined to make an SMA exemption determination because the Lambert and Sweeney properties were designated "park" in the Community Plan. The Lamberts and Sweeneys appealed the Director's decision to the Maui Planning Commission, and on April 15, 2005, the Commission interpreted its SMA Rules as providing for an appeal of a denial of an SMA exemption determination by the Planning Director:

> Maui SMA Rule § 12-202-26 . . . provides the standard of review in matters of (1) denial of exemption determinations pursuant to Rule 12-202-12, and (2) SMA use permit decisions pursuant to §12-202-14, -15 and -16. Additionally, there is no language in § 12-202-26 that limits its application to appeals of decisions under § 12-202-14." (ROA Doc. 88 at PDF 2123)

The Commission ruled that the Lamberts and the Sweeneys could build residences on their beachfront lots without obtaining a community plan amendment, changing the community plan designation from "park" to "single-family residential." (ROA Doc. 69 at PDF 1510-1550) This evidence was in the record before the ICA (ROA Doc. 68 at PDF 1456) and was raised by the Petitioner in its Answering Brief. (Answering Brief pp. 7, 14) Had Respondents appealed the Director's decision to the Planning Commission, the Commission most likely would have decided their cases the same way that their neighbors' cases were decided, thereby "avoiding premature adjudication" arising from claims that were not ripe for presentation to the Court. Grace Business Dev.Corp.V. Kamikawa, 92 Haw. 608, 612, 994 P.2d 540, 544 (2000).

The ICA also misconstrued the U.S. Supreme Court's decision in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). The ICA apparently failed to notice key factual distinctions between the powers of the reviewing board in Williamson and the powers of the Maui Planning Commission hearing an appeal of a Planning Director's decision.

The Williamson opinion did not state that ripeness would never require an appeal under administrative processes. Instead, the court in Williamson found an appeal unnecessary under the particular regulatory scheme at issue because "the Board was empowered, at most, to review that rejection, not participate in the Commission's decision making." Id. By contrast, the Maui Planning Commission has broad authority not only to review, but also to participate in decision making. Indeed, under the regulatory structure allowing for an appeal of the Director's decision, the Commission had the option to "affirm the decision of the director, or [to] remand the case to the hearing officer, if any, with instructions for further

proceedings; or [to] reverse the decision of the director if the substantial rights of the appellant may have been prejudiced" by a decision of the director. SMA Rule § 12-202-32. Unlike the land use authority in Williamson, the Maui Planning Commission has the ability to modify or revoke the Director's decision. Although the ICA recognized that "a court cannot possibly discern the nature and extent of permitted development on the subject property" absent an appeal to the Commission, Leone, 284 P.3d at 964, citing MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351 (1986),[2] the ICA erroneously concluded that the Maui Planning Commission lacked the authority to permit the Respondents' residential

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[2] Several other courts have distinguished Williamson in determining whether ripeness requires an administrative appeal. In Vashi v. Charter Township of West Bloomfield, 159 F.Supp.2d 608, 619 (E.D. Michigan 2001), judgment affirmed 74 Fed.Appx. 575 (6th Cir. 2003), the court found that, in absence of an appeal, ripeness did not attach to a constitutional claim arising from rejection of a use permit because the administrative appellate authority would have "enjoyed express authority to affirm, modify or reverse any decision of the planning commission . . . put differently, the Board was empowered to participate in the final site plan decision making process . . . ." A similar result was reached in Southern Pacific Transportation Co. v. City of Los Angeles, 922 F.2d 498, 503 (9th Cir. 1990), where the court determined a takings claim was not ripe for adjudication because "those who have not followed available routes of appeal cannot claim to have obtained a final decision, particularly if they have foregone an opportunity to bring their proposal before a decisionmaking body with broad authority to grant different forms of relief or to make policy decisions which might abate the alleged taking." In another similar case, the Sixth Circuit Court of Appeals held that in order for their free exercise claim to be ripe, the plaintiffs needed to appeal a zoning violation citation to the Zoning Board because "rather than merely reviewing the initial decision of township officials made during the site plan review procedures, the zoning board is empowered to participate in the decision-making process from the outset, and it is only through that process that the township can provide what Williamson County demands: a definitive position on the issue. Miles Christi Religious Order v. Township of Northville, 629 F.3d 533, 541 (6th Cir. 2010) (internal citations omitted). See also Murphy v. New Milford Zoning Commission, 402 F.3d 342, 352 (2d Cir. 2005) (holding that an appeal to the Zoning Board of Appeals was required to achieve ripeness because "the Zoning Board of Appeals possessed the authority to review the cease and desist order de novo to determine whether the zoning regulations were properly applied . . . in fact, a zoning board of appeals 'is in the most advantageous position to interpret its own regulations and apply them to the situations before it'").

building projects to proceed, notwithstanding the park designation in the Community Plan. See Leone, supra, 284 P.3d at 964.

B. The ICA Erred In Ruling On A Novel Legal Question Not Addressed By The Circuit Courts Below

The ICA recognized that the Circuit Courts' "sole determination was that Appellants' claims were not ripe[.]" Therefore, the ICA stated that it would only consider that issue. Leone, supra, 284 P.3d at 962.

However, instead of limiting its decision to matters actually considered and decided by the courts below, the ICA unnecessarily ruled on an issue of first impression in Hawaii, namely, whether Respondents were required to seek a community plan amendment before they could sue the County for inverse condemnation.

Because the Circuit Courts lacked jurisdiction over the Complaints, they made no rulings on any facts, other than the failure of Respondents to exhaust their administrative remedies. Thus, the ICA's holding that Respondents were not required to seek a community plan amendment before filing suit rested on a factual determination that was not and could not have been made by the Circuit Courts. Given the lack of subject matter jurisdiction due to Respondents' failure to appeal the Director's decision to the Planning Commission, there was no need for the ICA to address the issue of their own volition.

Apparently, the issue has never been addressed by a Hawaii appellate court. All of the case law relied on by the ICA came from other jurisdictions. The issue may need to be squarely addressed in Hawaii some day. However, in the procedural and factual posture of the instant case, there was no need for the ICA to make new law now.

V. CONCLUSION

The Maui Planning Commission has adopted rules that allow landowners an avenue of appeal from adverse decisions of the Planning Director. Respondents sought to avoid that process by prematurely taking their inverse condemnation case to Circuit Court. By contrast, two of Respondents' neighbors availed themselves of the available administrative remedy, appealing the Planning Director's adverse decision to the Maui Planning Commission. As a result, the neighbors were able to build residences on their beachfront lots, despite the property's designation as "park" under the relevant Community Plan.

Respondents could have resolved the controversy the same way that the Lamberts and Sweeneys did. Had Respondents appealed the Director's decision to the Maui Planning Commission in the first instance, two judges of the Second Circuit Court, the ICA, and this Court would have been spared the necessity of weighing in on a land use decision best addressed by the Maui Planning Commission.

As the ICA itself acknowledged, in inverse condemnation cases, the ripeness doctrine ensures that courts do not prematurely deprive land use authorities the opportunity to exercise discretion in favor of the landowner. Leone, supra, 284 P.3d at 964. Because the Maui Planning Commission has the authority to modify or revoke a decision of the Planning Director, a court cannot possibly discern the nature and extent of permitted development on the subject property unless the landowners have first exhausted their administrative remedies through an appeal to the Commission. Id.

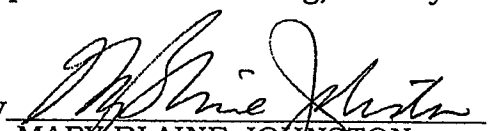
If this Court does not agree to hear the instant case, Maui County's land use professionals and members of the Maui Planning Commission will be left to guess at the reach of the Commission's appellate authority, and the courts will be

clogged with land use cases that could be resolved by the Maui Planning Commission. Moreover, landowners will be required to engage attorneys and to prosecute expensive civil actions instead of availing themselves of a relatively quick administrative remedy.

Therefore, for the reasons stated above, Petitioners respectfully ask this honorable Court to grant this application for a writ of certiorari, and to reverse the Intermediate Court of Appeals' June 22, 2012 decision in its entirety.

DATED: Wailuku, Maui, Hawaii, October 29, 2012.

PATRICK K. WONG
Corporation Counsel
Attorneys for Petitioners County of
Maui and William Spence, Director,
Department of Planning, County of Maui

By 
MARY BLAINE JOHNSTON
Deputy Corporation Counsel

Westlaw.

284 P.3d 956
128 Hawai'i 183, 284 P.3d 956
(Cite as: 128 Hawai'i 183, 284 P.3d 956)

C

Intermediate Court of Appeals of Hawai'i.

Douglas LEONE and Patricia A. Perkins–Leone, as Trustees under that certain unrecorded Leone–Perkins Family Trust dated August 26, 1999, as amended, Plaintiffs–Appellants

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

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)).

No. 29696.[FN*]

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

June 22, 2012.

Background: Owners of beachfront lots in area designated "park" in community plan brought actions against county, alleging inverse condemnation, equal protection, due process, and § 1983 claims following denial of their applications for determination that their proposed construction of single family homes on the lots was exempt from special management (SMA) permit requirements. The Circuit Court, Second Circuit, Joseph E. Cardoza and Shackley R. Raffetto, JJ., dismissed the claims, and landowners appealed.

Holdings: On consolidated appeal, the Intermediate Court of Appeals, Leonard, J., held that:

(1) County Department of Planning Director's decision that assessment applications could not be processed satisfied the finality requirement for ripeness, and

(2) lot owners were not required to seek a change in community plan before brining inverse condemnation claims.

Vacated and remanded.

West Headnotes

[1] Action 13 ⇐6

13 Action
13I Grounds and Conditions Precedent
13k6 k. Moot, hypothetical or abstract questions. Most Cited Cases

Ripeness is an issue of subject matter jurisdiction.

[2] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In general. Most Cited Cases

Whether a court possesses subject matter jurisdiction is a question of law reviewable de novo.

[3] Eminent Domain 148 ⇐1

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k1 k. Nature and source of power. Most Cited Cases

Eminent Domain 148 ⇐13

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k12 Public Use
148k13 k. In general. Most Cited Cases

Eminent Domain 148 ⚖122

148 Eminent Domain
148II Compensation
148II(C) Measure and Amount
148k122 k. Necessity of just or full compensation or indemnity. Most Cited Cases

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. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[4] Eminent Domain 148 ⚖4

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k4 k. Power of state in general. Most Cited Cases

Eminent Domain 148 ⚖9

148 Eminent Domain
148I Nature, Extent, and Delegation of Power
148k6 Delegation of Power
148k9 k. To municipality. Most Cited

Within 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. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[5] Eminent Domain 148 ⚖266

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k266 k. Nature and grounds in general. Most Cited Cases

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. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[6] Eminent Domain 148 ⚖277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

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. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[7] Eminent Domain 148 ⚖277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

Ripeness of a regulatory taking claim 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. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[8] Eminent Domain 148 ⚖277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

Absent a final decision, courts cannot accurately examine the economic impact of the regulation on the property at issue; 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 regu-

lation extends, nor can they determine whether any beneficial use remains, a core aspect of the inverse condemnation inquiry. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[9] Eminent Domain 148 ⚿277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases
The "just compensation" determination in an inverse condemnation action is dependent on a final decision. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[10] Eminent Domain 148 ⚿277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases
Ripeness is a prerequisite to the examination of the takings claim itself. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[11] Eminent Domain 148 ⚿277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases
In order for an inverse condemnation claim to be ripe, the relevant land-use authority, utilizing reasonable procedures, must first have decided the reach of a challenged regulation. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[12] Eminent Domain 148 ⚿277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases
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. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[13] Eminent Domain 148 ⚿277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases
Ripeness, in the context of a regulatory 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. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[14] Eminent Domain 148 ⚿277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases
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, 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, for the takings claim to become ripe. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[15] Administrative Law and Procedure 15A ⚿229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending

Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases
The exhaustion of administrative remedies doctrine applies when a party seeks judicial review of the substance of an adverse administrative decision.

[16] Administrative Law and Procedure 15A ⚿229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases
Under the exhaustion of administrative remedies doctrine, exhaustion of any appeals permitted within the administrative process is required before seeking relief from the courts.

[17] Administrative Law and Procedure 15A ⚿229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases
Under the exhaustion of remedies doctrine, if an administrative remedy is provided by statute, a claimant must seek relief first from the administrative body before judicial relief is available; in such cases, in the interest of judicial economy, the doctrine of exhaustion temporarily divests a court of jurisdiction.

[18] Action 13 ⚿69(7)

13 Action
13IV Commencement, Prosecution, and Termination
13k67 Stay of Proceedings
13k69 Another Action Pending
13k69(7) k. Actions and administrative proceedings. Most Cited Cases

228.1

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak228.1 k. Primary jurisdiction. Most Cited Cases
In 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, courts should suspend review pending the administrative disposition of issues the agency is empowered to resolve.

[19] Administrative Law and Procedure 15A ⚿229

15A Administrative Law and Procedure
15AIII Judicial Remedies Prior to or Pending Administrative Proceedings
15Ak229 k. Exhaustion of administrative remedies. Most Cited Cases
The exhaustion of remedies 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.

[20] Zoning and Planning 414 ⚿1571

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1571 k. Exhaustion of administrative remedies; primary jurisdiction. Most Cited Cases
Judicial review of a decision of a land-use authority under the Coastal Zone Management Act (CZMA) requires judicial intervention in matters that have been placed within the special competence of the county planning department; 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 admin-

istrative review process. HRS §§ 91–14, 205A–6(c).

[21] Zoning and Planning 414 ⚿1571

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1571 k. Exhaustion of administrative remedies; primary jurisdiction. Most Cited Cases

Zoning and Planning 414 ⚿1582

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1580 Decisions Reviewable
414k1582 k. Finality; ripeness. Most Cited Cases

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.

[22] Administrative Law and Procedure 15A ⚿704

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(B) Decisions and Acts Reviewable
15Ak704 k. Finality; ripeness. Most Cited Cases

Ripeness only requires that the appropriate agency make a formal, final, concrete determination that affects the party before it.

[23] Eminent Domain 148 ⚿277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

Owners of beachfront lots were not required to appeal County Department of Planning Director's decision that their assessment application, in which they sought declaration that lots were exempt from special management area (SMA) regulations, could not be processed because "[t]he proposed Single–Family dwelling is inconsistent with the Community Plan" before bringing inverse condemnation claims, as the Director's decision satisfied the finality requirement for ripeness by setting forth a definitive position regarding how county would apply the regulations at issue to the particular land in question. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[24] Eminent Domain 148 ⚿277

148 Eminent Domain
148IV Remedies of Owners of Property; Inverse Condemnation
148k277 k. Conditions precedent to action; ripeness. Most Cited Cases

Beachfront lot owners were not required to seek a change in community plan, which designated their lots as "park" area, in order to satisfy ripeness doctrine prior to bringing inverse condemnation action after County Department of Planning Director rejected their assessment applications for determinations that their proposed single-family housing uses of the lots were exempt from special management area rules; community plan represented the law and was legally binding, such that any amendment amounted to a change of the existing law rather than an administrative exception to its application. U.S.C.A. Const.Amend. 14; Const. Art. 1, § 20.

[25] Zoning and Planning 414 ⚿1582

414 Zoning and Planning
414X Judicial Review or Relief

414X(A) In General
414k1580 Decisions Reviewable
414k1582 k. Finality; ripeness. Most Cited Cases

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.

[26] Zoning and Planning 414 ⇐1582

414 Zoning and Planning
414X Judicial Review or Relief
414X(A) In General
414k1580 Decisions Reviewable
414k1582 k. Finality; ripeness. Most Cited Cases

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.

***959** Andrew V. Beaman (Chun, Kerr, Dodd, Beaman & Wong), (Leroy E. Colombe and Bethany C.K. Ace), with him on the briefs, for Plaintiffs–Appellants.

Mary Blaine Johnston, Deputy Corporation Counsel (Brian T. Moto, Corporation Counsel, and Madelyn D'Enbeau, Deputy Corporation Counsel), with her on the briefs, for Defendants–Appellees.

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.[FN1] 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, ***960** and 42 U.S.C. § 1983 claims, which are, in relevant part, identical to the Leones' claims.[FN2]

FN1. The Honorable Joseph E. Cardoza presided.

FN2. The Honorable Shackley R. Raffetto presided.

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)**, [FN3] on their claims of inverse condemnation. For the reasons discussed below, we conclude that the 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.

FN3. 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.

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* Hawai'i 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).

***961** 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.[FN4]

> FN4. The Larsons' 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.

Appellants then filed inverse condemnation claims under article I, § 20 of the Hawai'i Constitution and the 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. ***962** 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*

[1][2] "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*

[3] 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, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005) (discussing the Takings Clause of the Fifth Amendment).

[4][5] 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).

Until the United States Supreme Court's decision in *963*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, 125 S.Ct. 2074. 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, 125 S.Ct. 2074, citing, *inter alia, Pennsylvania Coal,* 260 U.S. at 413, 415, 43 S.Ct. 158; *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. FN5

> FN5. 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*

[6][7] 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, 105 S.Ct. 3108. The Planning Commission refused to approve the preliminary plat because it failed to conform to various subdivision regulations. *Id.* at 181, 187–88, 105 S.Ct. 3108. 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, 105 S.Ct. 3108. 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, 105 S.Ct. 3108.

[8][9][10] This finality requirement is rooted in the nature of the Takings Clause inquiry. *Id.* at 190–91, 105 S.Ct. 3108. 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, 43 S.Ct. 158). 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, 105 S.Ct. 3108. Likewise, the "just compensation" determination is dependent on a final decision. *Id.* at 190–91, 105 S.Ct. 3108. Ripeness is therefore a prerequisite to the examination of the takings claim itself. *Id.*

[11][12] Moreover, land use determinations often involve a high degree of discretion. *Palazzolo,* 533 U.S. at 620, 121 S.Ct. 2448. 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***964** 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, 106 S.Ct. 2561. 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, 121 S.Ct. 2448.

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, 105 S.Ct. 3108. 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, 105 S.Ct. 3108. 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. at 192–94, 105 S.Ct. 3108 (citations omitted; emphasis added).[FN6]

> FN6. *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, 105 S.Ct. 3108. This second requirement is plainly inapplicable to state court proceedings.

***965** [13][14][15][16] 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, 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.

[17][18][19] 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.

[20] 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.*

[21][22] 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, 105 S.Ct. 3108 (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 ***966** 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, 105 S.Ct. 3108. 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*

[23] 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, 105 S.Ct. 3108 (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 decision-making.
>
> *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 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.

2. *Amendment to the Community Plan*

[24] 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, 105 S.Ct. 3108. 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 ***967** 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, 105 S.Ct. 3108. 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.[FN7] *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.

> FN7. 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.

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 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.[FN8]

> FN8. 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 Com-

munity 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. *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 GATRI,* 88 Hawai'i at 115, 962 P.2d at 374; *see also Palazzolo,* 533 U.S. at 620–21, 121 S.Ct. 2448; *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 (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).

***968** 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, 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 exist-

ence. *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 ***969** 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.*

[25][26] 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, 583 N.Y.S.2d 179, 592 N.E.2d 787, 790 (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 (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, 121 S.Ct. 2448.

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.3d 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.

Hawai'i App.,2012.
Leone v. County of Maui
128 Hawai'i 183, 284 P.3d 956

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NO. _____

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

Respondents-Plaintiffs-Appellants,

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,

Petitioners-Defendants-Appellees.

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

Respondents-Defendants-Appellants,

vs.

CIVIL NO. 07-1-0496(3)
ICA NO. 29696

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

CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII

The Honorable Joseph E. Cardoza, Judge

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,

Petitioners-Defendants-Appellees.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of foregoing document was duly served upon the following at their address of record by e-mail and by regular U.S. mail, on October 29, 2012:

Andrew V. Beaman
(e-mail: abeaman@chunkerr.com)
Leroy E. Colombe
(e-mail: lcolombe@chunkerr.com)
CHUN, KERR, DODD, BEAMAN & WONG
745 Fort Street, 9th Floor
Honolulu, HI 96813

Attorneys for Respondents-Plaintiffs-Appellants

DATED: Wailuku, Maui, Hawaii, October 29, 2012.

PATRICK K. WONG
Corporation Counsel
Attorneys for Petitioners County of Maui and William Spence, Director, Department of Planning, County of Maui

By _____
MARY BLAINE JOHNSTON
Deputy Corporation Counsel