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S.C. No. 030159

D. MORIOKA, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII
Clerk, Second Circuit Court and
ex-officio Clerk, Supreme Court
OF HAWAII

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Travis C. Larson GST Exempt Trust U/A January 20, 1999 and WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Troy T. Larson GST Exempt Trust U/A January 20, 1999,

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

CIVIL NO. 09-1-0413 (2)

APPEAL FROM:

(1) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ENTERED SEPTEMBER 29, 2009; and

(2) FINAL JUDGMENT ENTERED OCTOBER 15, 2009

HONORABLE SHACKLEY R. RAFFETTO,
JUDGE

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

APPENDIX 1

CERTIFICATE OF SERVICE

BRIAN T. MOTO 5421
Corporation Counsel
MARY BLAINE JOHNSTON 1755
Deputies Corporation Counsel
200 South High Street
Wailuku, Maui, Hawaii 96793
Telephone: (808) 270-7741
Facsimile: (808) 270-7152

ATTORNEYS FOR DEFENDANTS/APPELLEES
COUNTY OF MAUI and JEFFREY S. HUNT

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

I. INTRODUCTION

The question presented by this appeal is whether a property owner can bring a "taking" action based on a decision of the Maui County Planning Director without first appealing that decision to the Maui County Planning Commission. Plaintiffs/Appellants brought such an action and it was properly dismissed for failure to exhaust administrative remedies. The Court below determined that because Appellants did not obtain a final decision by the Maui Planning Commission, the final decision maker about the permitted use of their properties, Appellants' "taking" claim was not ripe for adjudication. This Court should confirm the lower Court's decision.

II. STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs/Appellants¹ William L. Larson and Nancy H. Larson, as Trustees under that certain unrecorded Larson Family Trust dated October 30, 1992, as amended ("Appellants"), filed a Complaint in the Second Circuit Court on June 1, 2009 alleging that the designation of their two beach front lots located on Palauea Beach in Makena, Maui, Hawaii as "park" in the 1998 Kihei-Makena Community Plan ("KMCP") resulted in a "taking" of those properties

¹On February 24, 2010, this Court entered an Order Granting former Plaintiffs/Appellants' Motion for Substitution of WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Travis C. Larson GST Exempt Trust U/A January 20, 1999 and WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Troy T. Larson GST Exempt Trust U/A January 20, 1999, as Plaintiffs/Appellants in this Appeal.

because the "park" designation precludes any economically viable use of the properties and renders them worthless.

Appellants should have known about the properties' 1998 KMCP "park" designation when they purchased their lots in 2000. However, Appellants allege that their "taking" claim arose on November 18, 2008 when Director Hunt sent letters to them ("Director's decisions") informing them that their SMA Assessment Applications ("applications") could not be processed.

Section 12-202-12(e)(2) of the Maui Planning Commission Rules ("SMA Rules") identifies twelve areas of concern for the Director to weigh in deciding whether a proposed action in the SMA is excluded from the SMA Requirements in Hawaii's Coastal Zone Management Act ("CZMA"), Hawaii Revised Statutes ("HRS") Chapter 205A, or if an SMA permit must be obtained. The Director's decisions identified several of the concerns set out in §12-202-12(e)(2) for which Appellants failed to provide sufficient information for him to process their applications and pointed out that the proposed use of the lots for single family homes was inconsistent with the KCMP use designation of "park." If the proposed use is not exempt, the CZMA requires consistency. HRS 205A-26(2)(C)

Appellants did not provide the missing information. Nor did Appellants submit house plans that would avoid the potentially adverse SMA impacts identified by the Director's decisions. Nor did they appeal the Director's decision to the Planning Commission pursuant to §12-202-26 of the SMA Rules. Rather, seven months after Appellants were informed that their applications could not be processed, they filed their Complaint herein (ROA 0001 at PDF 8-9).

Appellants' Complaint incorrectly alleges that the Planning Director has the "final authority" to determine whether a proposed project is a "development" subject to the CZMA or, on the other hand, is not a "development" and is excluded from CZMA requirements. Appellants ignore SMA Rule §12-202-26, the 1997 amendment which provides for appeals of Director's decisions to the Maui Planning Commission for a final determination as to whether or not a proposed use is excluded from the CZMA and SMA requirements.

Appellants also argue that even if an appeal of the Director's decisions is "available," they are "excused" from having to pursue an appeal because they predict that the Planning Commission would uphold the Director's decisions as correct based on the SMA rules and, thus, an appeal would be "futile."

Appellees' Motion to Dismiss the Complaint, or in the Alternative for Summary Judgment ("Motion to Dismiss") (ROA Doc. 0004), presented two arguments in support of their position that Appellants' Complaint for inverse condemnation was not ripe for adjudication by the Court. First, Appellants had failed to obtain the final decision of the final decision maker on the issue of whether or not their proposed uses were excluded from the CZMA by appealing the Director's Decision to the Maui Planning Commission. Second, if the Court held that an appeal was not necessary, Appellants had not asked the Maui County Council to amend the KMCP to change the use designation for their lots from "park" to "single family residence," which would have made the proposed use consistent, and as a result, they had not obtained a final decision by the final decision maker pursuant to the holding in Williamson

County Regional Planning Com'n v. Hamilton Bank of Johnston City, 473 U.S. 172 (1985), the seminal case on "ripeness" of claims for inverse condemnation.

Appellants argue they did not have to appeal the Director's decisions to the Planning Commission because §12-202-26 ("Appeal of director's decision") added to the SMA Rules in 1997, provides only for appeals of the Director's decisions made pursuant to the immediately preceding section of the SMA Rules, §12-202-25 ("Penalties"), which authorizes the director to assess fines for any violations of the Rules (OB at pp. 28-29). Appellants concede the incorrectness of their interpretation of what can be appealed pursuant §12-202-26, as they admit the Planning Commission is authorized to hear appeals of denial of an SMA minor permit pursuant to §12-202-14 (OB at p.29), although they fail to note that §12-202-16 also expressly provides for appeals of SMA emergency permit decisions by the Director.

The Circuit Court rejected Appellants' interpretation of the SMA Rules, finding that Appellants did have a right to appeal the Director's November 18, 2008 Decisions to the Planning Commission, and agreeing with Appellees that Appellants' claims were not ripe for determination by the Court as Appellants had failed to exhaust the administrative remedy of an appeal available to them (ROA Doc 0007 at PDF 339-40). The Court made no ruling on Appellees' second argument that Appellants were required to seek from the Maui County Council a community plan amendment to change their lots' use designation of "park" to another use, and have their requested amendment denied before their claim of inverse condemnation would

be ripe for review by the Court.

B. Proceedings in the Circuit Court

The Complaint filed on June 1, 2009 (ROA Doc. 0001 at PDF 1-21) was served on Defendants on June 16, 2009 (ROA Docs. 0002 and 0003 at PDF 22-25). Appellees filed the Motion to Dismiss on June 26, 2009 (ROA Doc. 0004 at PDF 26-183). The Circuit Court granted Appellees' Motion to Dismiss stating in the Order:

10. Plaintiffs' Complaint is dismissed on the basis that Plaintiffs have failed to exhaust their administrative remedies. The instant case is not ripe for adjudication. Thus, this Court lacks jurisdiction over the subject matter. (ROA Doc. 0007 at PDF 340.)

C. Statement of Facts

In 1996, the Maui County Council passed Resolution 96-121 calling for the County of Maui to purchase all nine of the Palauea Beach lots with a KMCP "park" designation to be used as a public beach park (ROA Doc. 0005 Exh. 4 at PDF 233-38). In 1999, the County Council determined that there were insufficient funds to purchase all nine lots. It passed Resolution 99-183 authorizing the County to acquire two lots which were purchased by the County in January, 2000 (ROA Doc. 0007, Exh. 5 at PDF 239-47). The seven other lots were sold to private individuals.

In 2000, Appellants purchased the Palauea Lots designated as Parcels 16 and 17 (ROA Doc. 0004 Exhs. 5 & 6 at PDF 87-89). Appellants and the purchasers of the other five lots designated for "park" use bought them with the express intent to erect residences on their lots, a use inconsistent with the KMCP designation of the

lots for "park" use.² At the time they purchased their lots, Appellants were aware that an amendment to the KMCP to change the land use designation for their lots from "park" to "single family" might be required for them to be able to build their houses.

In 2006, the Maui Planning Department agreed to work with the owners of parcel 15 (Leones), parcels 16 and 17 (Larson), and parcel 20 (Schatz, now Altman) to initiate the process to change the KMCP designation of the lots from "park" to "single family" and to change the zoning from "HM, Hotel and A-2 Apartment" to "R-3, Residential." The beach lot owners agreed to pay for the Environmental Assessment ("EA") required by HRS § 343-5(a)(6) in conjunction with an Application to Amend the Community Plan (ROA Doc. 0005 at PDF 302-303). The Planning Department submitted an EA for the Palauea Beach Lots to the Planning Commission for review and comment prior to asking the Maui County Council to approve the proposed Amendments to the KMCP (ROA Doc. 0005 at PDF 305-320).

In the meantime, Appellants decided to submit SMA Assessment Applications to the Department of Planning to obtain a determination of whether their proposed projects would be deemed not to be "developments" and that they had no adverse impact on the environment or ecology, thereby making the proposed use of their lots excluded from SMA requirements pursuant to HRS 205A-22 which provides that "construction of a single-family residence that is

² As will be discussed in more detail below, the owners of two of the seven lots: Sweeney, parcel 13 and Lambert, parcel 14, as the result of appeals to the Commission have built homes on their lots which are still designated "park" by the KMCP (ROA Doc. 0004 Exhs. 5 & 6 at PDF 87-89; Exh. J at PDF 140-66).

not part of a larger development" is excluded from the definition of "development."

On November 18, 2008, the Planning Director advised Appellants:

"I have determined that the Department cannot complete the assessment[s] due to various deficiencies in the application[s], Attachment A, and/or Exhibits provided as detailed below." (ROA Doc. 0004 at PDF 132-39.)

The concerns the Director found were not adequately addressed in Appellants' applications included: the impact the proposed project would have on cultural resources, inconsistency of the projects with the community plan designation, impacts on environmentally sensitive areas (flood plain, shoreline), effects of grading, handling of wastewater and views of the shoreline (ROA Doc. 0004 at PDF 100-101).

Appellants were advised by the Director in his November 18, 2008 letters that their applications could not be processed because of incompleteness and inconsistency, and that they had 10 days to appeal this decision (ROA Doc. 0004 at PDF 132-139). Appellants did not appeal the Director's decisions as is expressly provided for by § 12-202-26, et seq.³ of the SMA Rules to have the Commission review whether the Director was correct in not processing the Assessment Applications on the basis of lack of

³After the 1997 Amendments, the SMA rules were amended again in 2002 to provide more detailed provisions governing appeals. As will be discussed below, §§12-202-27 through 32 further evidence that the right to appeal extends to all decisions of the Director, and not, as Appellants argue, just to decisions about penalties that can be imposed by the Director as set out in § 12-202-25.

consistency. They did not resubmit their applications with the information the Director had determined was needed. They did not submit a revised project proposal which addressed the environmental concerns pointed out in the Director's Decision, and they did not submit an application for an SMA permit. Instead, on June 1, 2009, Appellants initiated this inverse condemnation action which was dismissed because Appellants' claims were not ripe for adjudication (ROA Doc. 0007 at PDF 337-40).

III. STANDARD OF REVIEW

A. Summary Judgment Is Reviewed De Novo Under Same Standards As Applied by the Court Below

The grant or denial of summary judgment is reviewed de novo under the same standard applied by the circuit courts. Hawai'i Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The evidence must be viewed in the light most favorable to the non-moving party." Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 (2004).

B. Findings of Fact Are Reviewed Under the Clearly Erroneous Standard

Hawaii Rules of Civil Procedure, Rule 52(a) mandates that "findings of fact shall not be set aside unless clearly erroneous." Findings of fact are reviewed under the clearly erroneous standard. State v. Hutch, 75 Haw. 307, 328, 861 P.2d 11, 22 (1993). A finding of fact is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been made. A finding of

fact is also clearly erroneous when the record lacks substantial evidence to support the finding. Substantial evidence is credible evidence of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. Beneficial Hawai'i, Inc. v. Kida, 96 Hawai'i 289, 305, 30 P.3d 895, 911 (2001).

Appellants' citation to a holding by the Indiana appellate court to argue that ". . . any findings of fact are entitled to no deference here" should be disregarded (OB at p. 16).

C. Mixed Questions of Fact and Law are Reviewed Under the Clearly Erroneous Standard of Review

"Where the court's conclusions are dependent upon the facts and circumstances of each individual case, the clearly erroneous standard of review applies." Coll v. McCarthy, 72 Haw. 20, 28, 804 P.2d 881, 886 (1991).

D. Conclusions of Law Are Freely Reviewable Under the Right/Wrong Standard

A Conclusion of Law is freely reviewable for its correctness. AIG Hawai'i Ins. Co. v. Estate of Caraang, 74 Haw. 620, 628, 851 P.2d 321, 326 (1993).

IV. ARGUMENT

A. Introduction

The Maui Planning Commission SMA Rules set out the standards the Maui Planning Commission ("Commission") uses to assess a proposed action in the SMA to determine if an SMA permit is required. The SMA Rules were promulgated to comply with the mandates of the CZMA. The CZMA designates the Commission as the authority for actions proposed for Maui's SMA districts (HRS §205A-

22) and mandates that every development within the SMA obtain an SMA permit from the Commission before it can proceed. HRS §205A-28. The SMA assessment process is necessary because the CZMA excludes certain actions, including single family residences not part of a larger development, from its definition of development. HRS §205A-22. However, effective May 29, 2001, the CZMA requires that even the enumerated actions be deemed developments if they "may have a . . . significant environmental or ecological effect on a special management area." HRS §205A-22. In order to comply with these requirements, it is necessary for the Commission to obtain a review of each proposed action. The Commission has delegated assessment authority to the Maui Planning Director, SMA Rule §12-202-12(a), but has limited the Director's discretion by identifying a number of factors that must be considered and by providing that the Director's decision may be appealed to the Commission pursuant to SMA Rule §12-202-26.

SMA Rule §12-202-12(e), sets forth twelve criteria that the Director must evaluate in determining whether or not a proposed action "may have a significant environmental or ecological effect on a special management area." Those factors include evaluating whether or not the proposed action "is contrary to the state plan, county's general plan, appropriate community plans, zoning and subdivision ordinances." §12-202-12(e)(2)(H). The SMA Rules also instruct the Planning Director that, after completing the assessment, he or she may inform the applicant that the proposed action "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." §12-202-12 (f)(5).

Appellants Larson submitted SMA Assessment Applications for each of their two Palauea Beach lots, including plans for proposed houses and garages. The Planning Director determined that the applications did not include sufficient information for him to properly assess whether the proposed projects would have "any substantial adverse environmental or ecological effect." HRS §205A-26(2)(A). Despite being informed of the appeal provisions in the SMA Rules, Appellants chose not to appeal and initiated the action below. Because they did not appeal the Director's decision to the Planning Commission, the Court below held Appellants' claims for inverse condemnation were not ripe because they had not obtained a final decision from the Maui Planning Commission on their assessment applications.

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

Appellants argue that the Court below erroneously concluded that 1) they had a right to appeal to the Planning Commission the Director's November 18, 2008 decisions that their SMA Assessment Applications could not be processed and, 2) in not concluding that even if Appellants had a right of appeal under the SMA Rules, they did not have to appeal because it would be "futile" for them to do so. Appellants' arguments are factually and legally incorrect.

1. The Holding in the GATRI Case Does Not Support Appellants' Argument That They Did Not Have to

Appeal the Director's Decision to the Planning Commission

Appellants argued below and argue again on appeal (OB at 26-30) that the case GATRI v. Blane, 88 Haw. 108, 962 P.2d 367 (1998) supports their position that they did not have a right of appeal from the Director's November 18, 2008 decisions. Appellants misleadingly quote The Supreme Court's holding in GATRI that the Director's refusal to process the SMA minor permit applications due to the lack of consistency was "a final decision equivalent to a denial of the application." (OB at p. 28.)

At the time the GATRI case arose in 1996, the SMA Rules then in effect designated the Director of the Maui Planning Department as the final authority (ROA Doc. 0004 at PDF 116; OB Appendix L). However, in 1997, as noted by Appellants, the SMA Rules were amended to add §12-202-26 which specifically provides for an appeal from a Decision of the Director to the Planning Commission, making the Commission, rather than the Director, the final authority (ROA Doc. 0004 at PDF 116; AB, Appendix 1). Thus, since September, 1997, the Planning Commission **not** the Planning Director has the final decision-making authority. Additionally, Appellants ignore the fact that the SMA Rules were amended again in 2002 to add §§12-202-27 through 12-202-32, which further clarify appeal rights and procedures (ROA Doc 0004 at PDF 90-118, AB, App. 1).

Appellants continue to suggest that the holding in GATRI is controlling and supports their position that the SMA Rules do not provide for an appeal of the Directors' November, 2008 decisions to the Planning Commission. Appellants' theorize (OB at 28-29):

"It is clear that §12-202-26 must be read to apply to the enforcement of the SMA Rules, and that "the director's decision referred to in subsection 26 means the director's decision to impose a penalty under the immediately preceding rule, subsection 12-202-25, as opposed to any other decisions by the director."

Appellants' "construction" of the appeal provisions of SMA Rules (§12-202-26 through §12-202-32) in effect when their "takings claims" allegedly arose is incorrect, as is clear both from a careful analysis of the Rules and from the interpretation by the Planning Commission of its Rules in (1) In the Matter of Rescission of Special Management Assessment Determination for the Lambert Residence (Case No. App. 2003/001), and 2) In the Matter of Appeal of Charles Sweeney and Nell Sweeney (Case No. App. 2003/002), ("Lambert and Sweeney appeals") (ROA Doc 0004 at PDF 140-180). These appeals were brought by two other Palauea Beach Lot owners challenging Planning Director Mike Foley's interpretation that "inconsistency" was one basis for rescinding an exemption from SMA requirements issued by his predecessor Director Jon Min.

2. **Proper Construction of the SMA Rules Makes Clear §12-202-26 Provides for an Appeal of Each of the Five Different Determinations the Director Can Make Pursuant to §12-202-12(f) of the SMA Rules**

Rules of statutory construction require that a statute be construed to give effect to the intention of the legislature in passing the rule and be read in the context of the entire statute. Paul v. Dept. of Transp., State of Hawaii, 115 Hawai'i 416, 426-7, 168 P.3d 546, 556-7 (2007):

Furthermore, our statutory construction is guided by established rules:

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the

legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose (citations omitted). . . . Furthermore, [i]n construing an administrative rule, general rules of statutory construction are applicable. Mahiai v. Suwa, 69 Haw. 349, ... 358, 742 P.2d 359, 366 (1987). When a rule does not conflict with statutory and constitutional requirements, courts will ascertain and effectuate the intent of the agency which promulgated the rule. Life of the Land, Inc. v. West Beach Dev. Corp., 63 Haw. 529, 531, 631 P.2d 588, 590 (1981); Mahiai, 69 Haw. at 358, 742 P.2d at 366. Courts strive to give meaning to all parts of an administrative rule and to avoid construing any part as superfluous. Int'l Bhd. of Elec. Workers[, Local 1357] v. Hawaiian Tel. Co., 68 Haw. 316, 325, 713 P.2d 943, 951 (1986). Courts will not construe rules in a manner which produces an absurd result. Mahiai, 69 Haw. at 358, 742 P.2d at 367.

Appellants' theory that the appeal provision set out in SMA Rule §12-202-26 applies only to §12-202-25, the enforcement provision for assessing fines, ignores the principles of statutory construction that an administrative rule being applied shall be construed so that no part is superfluous and so that it does not produce an absurd result.

The organizational framework of the SMA Rules for the Maui Planning Commission in effect at the time the Appellants submitted their SMA Assessment Application for review by the Director (ROA Doc. 0004 at PDF 90-118; AB, Appendix 1) consisted of three "Subchapters." Subchapter 1 is entitled "General Provisions" and includes a statement of purposes of the Rules, scope and exemptions, definitions, reference to where maps which set out the boundaries of the special management area can be found and a provision that the Director shall provide application forms to effect the Rules. Subchapter 2 entitled "Special Management Area

Permit Procedures" includes a statement of the SMA objectives and policies, SMA review guidelines, description of SMA assessment and determination procedures. Subchapter 3 which is entitled "Procedures to Adopt Special Management Area Rules, Declaratory Rulings; and Adoption and Amendment of Boundaries and Maps" is a "catch-all" section covering several different topics. The title of the Subchapter, which was adopted in 1994, did not change when the Rules were amended in 1997 to add the "Enforcement" provisions (§§12-202-23 through 12-202-25) and the "Appeal" provision (§12-202-26) (OB, Appendix M), or when the Rules were amended again in 2002 to add further appeal provisions (§§ 12-202-27 through 2-202-32) (ROA Doc. 0004 at PDF 90-118); AB, Appendix 1).

Appellants' statement that "'the director's decision' referred to in subsection 26 means the director's decision to impose a penalty under the immediately preceding rule, subsection 12-202-25, as opposed to any other decision by the director" (OB at 28-29) is patently incorrect as appeals of the Director's decisions about both SMA minor and emergency permits are expressly subject to appeal to the Planning Commission:

§12-202-14 Special management area minor permit procedures

(a) ... The director shall approve, approve with conditions, or deny such permit in accordance with the guidelines in section 205A-26, HRS, as amended. Any final decision shall be transmitted to the applicant in writing and **shall be appealable pursuant to section 12-202-26**. (emphasis added) (ROA Doc. 0004 at PDF 104.)

and

§12-202-16(i) Special management area emergency permit procedures:

If the director denies the emergency permit, the denial shall be in writing, setting forth factssufficient to

If the director denies the emergency permit, the denial shall be in writing, setting forth factssufficient to demonstrate the application did not meet the requirements for issuance of the emergency permit pursuant to subsection (d). **The applicant shall be informed of his right to appeal pursuant to section 12-202-26 herein.** (emphasis added) (ROA Doc.0004 at PDF 108.)

As noted above, in 2002, the SMA Rules were further amended, adding six new "appeal" provisions §§12-202-27 through 12-202-32 which clarified and augmented the right to appeal as set out initially in § 12-202-26. Sections 12-202-26 through 12-202-32 of the Rules provide for an appeal to the Planning Commission of all five of the determinations the Director may make upon assessment pursuant to §12-202-12(f).

That Appellants' "interpretation" that the only decisions of the Director that are subject to appeal are those related to penalties assessed for violation of the Rules under §12-202-25 is incorrect is further supported by an analysis of other sections of the SMA Rules dealing with appeals. Sections 12-202-29 and 12-202-31 of the Rules allow persons other than the Applicant and persons who have not been assessed any fine nor submitted an assessment application, to appeal a decision by the Director:

§12-202-29 Service of the notice of appeal. If the appellant is someone other than the applicant, appellant shall serve a file-marked copy of the appeal by mail or delivery thereof to counsel of record for each other party, or, if a party is not represented by counsel, to the party at the party's last known address. Proof of service shall be filed with the department within seven days after the filing of the notice of appeal.

(emphasis added)

§12-202-31 Contested case hearing on appeal. The commission shall hold a contested case hearing on the appeal. The director, the appellant, and, **where the appellant is someone other than the applicant**, the applicant shall be parties to the proceedings.... (emphasis added)

As pointed out by the Court in Paul, supra: "Courts will not construe rules in a manner which produces an absurd result." Appellants' "construction" that the Rules only provide for an appeal of the Director's decision about fines to be imposed pursuant to §12-202-25 is rendered absurd in light of the express provision set out in §§12-202-29 and 12-202-31 that persons who have not had fines assessed against them or have not submitted applications, have a right of appeal of a decision by the Director.

3. **The Planning Commission's Interpretation of Its SMA Rules in the Lambert and Sweeney Appeals Clarifies That §12-202-26 Provides for Appeal of All Decisions by the Director**

In arguing that they have no right to appeal the Director's decisions, Appellants ignore the interpretation by the Planning Commission of its Rules in the Lambert and Sweeney appeals (ROA Doc. 0004 at PDF 140-180) allowing an appeal to the Commission of the Director's denial of an exemption for a single family dwelling. The April 15, 2005 Conclusions of Law in the Lambert and Sweeney appeals specifically refute Appellants' arguments that only a decision of the Director related to fines can be appealed.

Lambert and Sweeney, owners of Palauea Beach Lots 14 and 13, (ROA Doc. 0004 at PDF 87-89) proposed single family dwellings and were exempted by Planning Director Jon Min from SMA requirements despite the fact that their lots were designated "park" on the KMCP. Subsequent Planning Director Mike Foley "rescinded" the exemption, partly because of the "inconsistency" in the proposed use and the KMCP "park" designation. The Lamberts and Sweeneys appealed and the Planning Commission reversed Director Foley's

rescission. The single family dwellings proposed by Lamberts and Sweeneys were deemed excluded from SMA requirements.

The Commission unequivocally stated in its Conclusion of Law 51 (ROA Doc. 0004 at PDF 173):

51. County has no valid interest in not-providing pre-deprivation process, and has not shown that additional procedural safeguards would unduly burden it. **If the Director refuses to recognize an exemption pursuant to Maui SMA Rule §12-202-12, the owner is entitled by rule to a contested case. Maui SMA Rule §12-202-26...** (emphasis added)

Further, the following Conclusions of Law entered in the Lambert and Sweeney appeals, refute Appellants' argument that an assessment application cannot be processed and a determination as to whether a project is exempt from SMA requirements cannot be made if there is an inconsistency (ROA Doc. 0004 at PDF 168-69):

4. Maui SMA rules §12-202-26(a) provides in part: "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." (Maui SMA Rules §12-202-26(a).

14. The CZMA does not require consistency between a parcel's Community Plan designation and zoning for all activities within the SMA, only when a proposed use is "development" and is not exempt and an SMA use permit is required. Haw.Rev.Stat. §205A-26; GATRI v. Blane, 88 Haw. 108, 962 P.2d. 367 (1998).

15. The CZMA does not mandate that the authority examine consistency between a parcel's Community Plan designation and its zoning to determine whether a proposed action is "development." Haw.Rev.Stat. §205A-26; GATRI v. Blane, 88 Haw. 108, 962 P. 2d. 367 (1998).

16. The Maui SMA Rules, however, require the Director in determining whether a proposed action is "development," to examine consistency: "In considering the significance of potential environmental and ecological effects, the directors shall evaluate ...[whether]...[a] proposed action [i]s contrary to the state plan, county's general plan, appropriate community plans, zoning and subdivision ordinances." Maui SMA Rules §12-202-12(e)(2)(H).

17. The Maui SMA Rules also allow the Director (but do not make it mandatory) to inform an applicant for an assessment that an application "[c]annot 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." Maui SMA Rules §12-202-12 (f). (emphasis added)

In Conclusion of Law 17, the Maui Planning Commission concludes that its SMA Rules "allow" but do not "mandate" that an application not be processed because of lack of consistency. While it is not known how the Planning Commission might have ruled on an appeal by the Larsons, it is clear that in the past the Commission interpreted its SMA Rules contrary to what Appellants herein argue is the "only way the Rules can be interpreted."

C. Appellants' Argument That It Would Be "Futile" for Them To Exhaust the Administrative Remedy of An Appeal Is Without Merit

Appellants argue that, pursuant to SMA Rule §12-202-12(f)(5), the "lack of consistency" between their proposed projects and the KMCP "park" designation is an unchallengeable basis for rejection by the Director of their SMA assessment applications and, as such, an appeal would be "futile". Although not pled in the Complaint because of its misidentification of the Director rather than the Planning Commission as the "Final Authority," Appellants argue that they did not have to seek review of the Director's decisions by the Planning Commission because "The Director's decision not to process the Larsons' applications was indisputably mandated by the SMA Rules." (OB at 32.)

In other words, Appellants argue that they do not have to obtain a final decision because they are able to predict what the final decision maker will do and it would be futile to ask. Similar arguments have been expressly rejected. For example, in the case Larson v. Multanomah County, 121 Ore.App.119, 122-23, 854 P.2d. 476, 478 (1993), the Court observes:

We further concluded, in Joyce and Dority, that arguments based on the futility exception to the ripeness rule should seldom be entertained and should not ever be considered if they amount to nothing more than predictions about the success of applications to the local governments. The underpinning for our conclusion was that the court should not use the futility rationale as a device for making decisions about the permissibility of uses that are for other branches or levels of government to make initially. See 114 Or.App. at 248, 835 P.2d 127; see also MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 352 n. 8, 106 S.Ct. 2561, 2568 n. 8, 91 L.Ed.2d 285 (1986). (emphasis added)

In Joyce v. Multanomah County, 114 Ore.App.244, 247 855 P.2d 127, 129 (1992), cited to in Larson, supra, in determining that Petitioner's takings claims were not ripe for judicial review, the Court observed:

Petitioner also contends that it would be futile for him to seek a variance or a conditional use permit for other uses. He maintains that the grounds for the county's denial of his application for the dwelling are inconsistent with its approval of a variance under its ordinance standards and that the characteristics of the property, together with the grounds for LUBA's and the county's decisions, preclude the approval of any uses for which he might apply. **The particulars of petitioner's arguments, however, come to little more than a weighing of the evidence that he anticipates would be produced against him in variance or permit proceedings that have not been held.** We cannot say, on the basis of this record, that the county's or LUBA's decisions on this application or the applicable county legislation preordains the outcome of those other possible proceedings. (emphasis added)

The "futility exception" is properly invoked only after a party has exhausted avenues open to it for obtaining approval for a particular use for its land. Appellants Larson, other than submitting incomplete SMA assessment applications, have taken no steps toward getting approval for their projects.

The case Kinzli v. City of Santa Cruz, 818 F.2d 1449, 1455 (9th Cir. 1987), opinion amended by 830 F.2d 968 (9th Cir. 1987) which Appellants cite as providing a definition of the "futility exception" (OB at p. 31) does not support Appellants' invocation of the exception:

Under these principles, the Kinzlis cannot rely upon the futility exception. We need not determine the point at which reapplications for development become futile. Under MacDonald and Hamilton Bank, at least one "meaningful application" must be made. The Kinzlis have neither submitted a development plan nor applied for a variance. The application made by the developer was not meaningful since it was abandoned at an early stage in the application process.

In Appellants Larsons' case, while they submitted applications for an SMA Assessment which included plans for their proposed houses, the applications were returned because of incompleteness and rather than revising and submitting a "meaningful application," Appellants chose to file a lawsuit.

King v. Seattle, 84 Wash.2d 239, 525 P.2d 228 (Wash. 1974), overruled on other grounds by City of Seattle v. Blume, 134 Wash.2d 243, 947 P.2d 223, (Wash. 1997) cited by Appellants (OB at p. 33) provides no support for Appellants' assertion of the "futility exception." This case was not an inverse condemnation case, but was a suit by landowners King for damages arising from the City's

failure to issue a building permit that would allow them to construct a building on their property. The Court identified the Kings' claim as one for the tort of "interference with prospective economic advantage." At issue was whether the City should be held liable for the Kings' damages. The Court ruled against Plaintiffs observing that:

"The plaintiffs made no effort to exhaust their federal administrative remedies nor did they attempt to avoid their damages" Id. at 251.

Appellants cite to two other cases, Orion Corp. v. State of Washington, 103 Wash.2d 441, 693 P.2d 1369 (Wash. 1985) and Estate of Friedman v. Pierce County, 112 Wash.2d 68, 768 P. 2d 462 (Wash. 1989), presumably in support of their argument that it would have been futile for them to appeal the Planning Director's decisions.

In Orion, the combined effect of Washington's Coastal Zone Management Act and the Washington State Coastal Zone Management Program made Plaintiff Orion Corp. virtually unable to develop in any way the land it owned lying in Padilla Bay. The Court concluded that "the State and County have made a policy choice to prevent development of Padilla Bay" and held that Orion need not attempt to exhaust administrative remedies. Id. 460, 1380.

In the case of Appellants, rather than taking steps to minimize or block their ability to use their property, Appellee Maui County's Planning Department and Planning Director have spearheaded, since 2006, the effort to seek an amendment to the KMCP to have the land use for all the privately owned Palauea Beach lots changed from "park" to "single family." The holding in Orion

has no factual relevance to the Appellants' situation.

The Friedman case cited by Appellants held that the Plaintiff had failed to demonstrate futility that would excuse it from exhausting administrative remedies. In making its ruling, the Court identifies the policies that establish the strong bias in favor of the exhaustion doctrine:

[T]o (1) insure against premature interruption of the administrative process, (2) allow the agency to develop the necessary factual background on which to base a decision, (3) allow the exercise of agency expertise, (4) provide a more efficient process and allow the agency to correct its own mistake, and (5) insure that individuals are not encouraged to ignore administrative procedures by resort to the courts. Id. at 467, 78.

Further, the Court in Friedman, in addressing the "futility issue," points out that a landowner in an inverse condemnation claim has a substantial burden in establishing futility when administrative procedures have not been exhausted. (Id.)

Finally, Appellants assert "factual futility," based on alleged "hostile animus" on the part of the County as a result of a couple of off-handed comments made by two Planning Commissioners at meetings in 2007 and 2008 which they purport is "evidence" that the Commission would not agree to a Community Plan Amendment. The Planning Commission does not make the final decision on the granting of a Community Plan Amendment; that final determination is within the province of the County Council so whatever personal feelings a couple of Commissioners may express about the beach lots is simply irrelevant to the Appellants' success in obtaining a Community Plan Amendment. As Appellants have failed to seek a change from the existing land use designation for their property in

the KMCP by way of submitting an application for a Community Plan Amendment, they have no basis for a claim that it would be factually "futile" for them to obtain the final decision from the final decision maker, the Maui County Council, on how they may use their property. As will be discussed below, Appellants' claims are not ripe for review under the requirements set out in the Williamson County, supra.

D. Pursuant to the Holdings in the Williamson County Case and Its Progeny, Appellants' Claims Are Not Ripe for Court Review

The Court below did not make a ruling on that part of Appellees' Motion to Dismiss that argued Appellants' claims were not ripe for adjudication because the final decision maker on how Appellants would be able to use their lot, the Maui County Council, had not been presented with and denied a request to amend the KMCP designation of their property from "park" to "single family." However, Appellants have chosen to re-argue this issue on appeal, presenting the same flawed analysis of the "ripeness" requirement set out by the U.S. Supreme Court in the seminal case Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City, supra, 473 U.S. at 186:

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

The Supreme Court in Williamson does not suggest that "government entity" refers only to administrative bodies and

excludes legislative bodies. To the contrary, the Court recognized that under Tennessee law:

[R]esponsibility for land-use planning is divided between the legislative body of each of the State's counties and regional and municipal "planning commissions." The county legislative body is responsible for zoning ordinances to regulate the uses to which particular land and buildings may be put, and to control the density of population and the location and dimensions of buildings. Tenn.Code Ann. § 13-7-101 (1980). The planning commissions are responsible for more specific regulations governing the subdivision of land within their region or municipality for residential development. §§13-3-403, 13-4-303. Enforcement of both the zoning ordinances and the subdivision regulations is accomplished in part through a requirement that the planning commission approve the plat of a subdivision before the plat may be recorded. §§ 13-3-402, 13-4-302 (1980 and Supp.1984). Id. at 176.

The Court in Williamson did not make a distinction between "administrative" and "legislative" remedies in its ruling. Rather, it mandates that a potential takings plaintiff must apply for and receive a final negative decision as to the use of his property from the appropriate government entity.

In Maui County, the County Council is the final decision maker on broad range land use planning by way of adoption by it of a General Plan and separate Community Plans approximately every ten years. (Maui County Code Chapter 2.80B; OB App. H; Maui County Charter §§8-8.4 and 8-8.5; OB App. G) These plans assign use designations for broad areas of land. Owners of individual lots may request "non-decennial amendments" to community plans requesting that the relevant plan's use determination for a specific parcel be changed. These requests for amendment are processed by the Planning Director, are reviewed by the Planning Commission and transmitted to the County Council for review and

action. (MCC §2.80B.110)

Appellants argued below and again on appeal that they are not required to seek a Community Plan Amendment as the process for obtaining an amendment is "legislative" rather than "administrative," and that they are "not required to change the law." Appellants provide no authority that supports their generalization that simply because a procedure for obtaining relief from land use regulation may be by way of a "legislative" process rather than an "administrative" process, a landowner is excused from having to pursue the necessary procedural avenues.

To the contrary, Hawaii cases which have dealt with efforts by property owners to develop their property in ways that are inconsistent with existing regulations, have found, explicitly or implicitly, that it is the property owner's legal obligation to seek relief from the regulations through the avenues that are open to them to obtain relief from the inhibiting regulation before asserting claims for a taking or for damages against the County.

In the Hawaii case, Lai v. City and County of Honolulu, 841 F.2d 301 (9th Cir. 1988), cert. denied, 488 U.S. 994 (1988), Plaintiff developers initiated an inverse condemnation action against the City and County of Honolulu because they were denied a Certificate of Appropriateness for their proposed high-rise condominium pursuant to the City's zoning ordinance which restricted construction on an area more than twenty-five feet above ground level. The purpose of the restriction was to protect the view of Punch Bowl Crater from the H-1 Freeway. The U.S. District Court ruled in favor of the Lais and awarded them damages. The Ninth

Circuit Court, on appeal, reversed the ruling, finding "the Lais do not yet have a justiciable claim," on the basis that the District Court could not rule on the merits of any of plaintiffs' theories because the plaintiffs had not pursued all avenues of relief before presenting a "takings" claim, pointing out that Plaintiffs were required to seek variances from the regulations. Id. at 303. More specifically, the Court citing to the Williamson case, found Plaintiffs had failed to obtain a "final and authoritative determination of the type and intensity of development legally permitted on the subject property."

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

"In fulfilling his responsibility in this legislative process, the CPO [chief planning officer] serves as the initial fact finder for the city council, and **he is in that sense performing a function which a legislative committee would normally perform.** He reviews applications for revisions and amendments, R.C.H. s 5-403(1973), and makes his recommendations to the planning commission which in turn reviews the proposals and transmits its own recommendations to the city council. Throughout this process, the CPO and planning commission are performing a purely advisory function." (emphasis added) Id. at 433.

There is no indication in this opinion that ITT was not required to pursue a plan amendment to obtain a higher economic use

of its property than could be realized under the "open space" designation.

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

"It is well established that the City Council has both legislative and non-legislative powers. Section 3-201 of the Charter provides: 'Every legislative act of the council shall be by ordinance. Non-legislative acts of the council may be by resolution[.]' In Life of the Land v. City Council of the City and County of Honolulu, 61 Haw. 390, 423-24, 606 P.2d 866, 887 (1980), we recognized that the Council has both legislative and none legislative powers and distinguished between them as follows:

A legislative act predetermines what the law shall be for the regulation of future cases falling under its provisions.

A non-legislative act executes or administers a law already in existence. (Citations omitted.)

The issuance of an SMA use permit involves the application of general standards to specific parcels of real property. Therefore, the City Council's approval of Kaiser's SMA use permit application was a non-legislative act because it administered a law already in existence, the Coastal Zone Management Act." Id. at 369.

A person's applying for an amendment to the KMCP to change a

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

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

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

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

"(1) Ad hoc. . .

The district court rightly concluded that the Council's decision was ad hoc. The decision was taken based on the circumstances of the particular case and did not effectuate policy or create a binding rule of conduct. **Typically, a zoning ordinance establishes a rule of general application, but here the ordinance would have affected only a single permit and a single parcel of land.** As the district court noted, regardless of whether the County Council voted to deny or grant Plaintiffs' CUP, those seeking to conduct business similar to Plaintiffs' wedding operation would be required to obtain their own CUP in accordance with the provisions of the Maui County Code. Enactment of the ordinance would not have created a new category of expressly permitted or special uses and therefore did not modify or supersede the policies contained in the existing comprehensive zoning ordinance." (Emphasis added.) Id. at 1220.

"(2) Whether the act applies to a few individuals or the public at large: When the act in question applies to a few individuals rather than the public at large, legislative immunity is disfavored." Id. at 1222.

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

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

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

The final conclusion of the Ninth Circuit Court was to find

that the actions of the Maui County Council in voting to deny the CUP were not legislative, but were administrative in nature:

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

When the analysis of Kaahumanu is applied to the nature of the actions taken by the Maui County Council in approving or disapproving an amendment to a Community Plan, an action which affects only one or a few parcels of land, as in this case, it is clear that such act is not necessarily "legislative" as Appellants conclude, but could, under the previous Court rulings in Hawaii land use and regulation cases, be construed as "quasi-legislative" or "administrative" in nature. Thus, Appellants' unilateral declaration that they do not even have to attempt to get a variance from the land-use designation for their property by pursuing a community plan amendment because they do not have to "change the law" does not excuse them from the procedural steps they must take for their takings claim to meet ripeness requirements.

Appellants point to four cases which they claim support their position that they are "not required to change the law." Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), Palazzolo v. Rhode Island, 533 U.S. 606 (2001), Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 938 F.2d 153 (9th Cir. 1991) and Orion, supra. None of these cases stand for the proposition that, as a matter of law, a property owner does not

have to pursue "legislative" remedies. Nor do the cases provide a basis for the Appellants to ignore the ripeness requirements laid out in the Williamson Supreme Court decision. The Courts in these cases held that Plaintiffs were not required to seek legislative changes, after noting that there were large tracts of land who were so encumbered by legislation or regulations that it would be very complicated, expensive, time-consuming and virtually impossible for an individual to prevail in their efforts to obtain a change in use.

In reaching its holding that the Plaintiffs did not have to proceed with a "change in the law," the Court in Palazzolo v. Rhode Island, supra, at 620, repeated the obligation of the landowner to pursue the avenues that would permit it to use his or her property, observing:

"[A] landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening the property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established."
(emphasis added)

In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra, there were 364 individuals, in addition to the Council, named as plaintiffs with varying claims as to numerous parcels. While there is a finding by the Court that some of the plaintiffs were not required to try to amend a whole regional plan

prior to the litigation, the Court also found that some of the plaintiff's claims were not ripe and dismissed them. Id. at 156. The Tahoe case does not stand for the general proposition being advanced by Appellants herein that a property owner need not give a regulatory agency the opportunity to grant variances and waivers if the process for having the agency review their claim is "legislative" in nature. Appellants are not required to go through the lengthy process to have a new community plan adopted. All they need to do is apply for a single change of a land use designation for a single lot. Their failure to take even the first step, i.e., submitting an application for an amendment to the KMCP plan, renders their claims unripe for review by the Circuit Court.

V. CONCLUSION

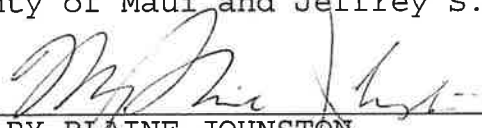
The legal issue before the Circuit Court and this Court on appeal is whether the Appellants' takings claim was ripe as a matter of law so that the Circuit Court could take jurisdiction over the claim. Appellees believe that the Circuit Court's dismissal of the Appellants' Complaint for lack of ripeness on the basis that Appellants' claims were not ripe for adjudication because they failed to exhaust the administrative remedy available to them of an appeal of the Planning Director's decisions to the Maui Planning Commission was a correct ruling and should be upheld on appeal.

The Circuit Court made no ruling on Appellees' argument raised below in its Motion to Dismiss the Complaint that Appellants are required to seek a community plan amendment and be denied such amendment before their taking claim is ripe for presentation to the

Court. Appellants, however, have raised this argument in their appeal. Should the Court decide to rule on this issue, Appellees believe that the Court must hold that Appellants' takings claim is not ripe for Court review because they must first obtain an unfavorable decision from the final decision maker, in this instance the Maui County Council, upon a request to amend the community plan, pursuant to the law set out by the United States Supreme Court in Williamson County and applied in numerous cases by many other Courts.

DATED: Wailuku, Maui, Hawaii, April 28, 2010.

BRIAN T. MOTO
Corporation Counsel
Attorneys for Defendants/Appellees
County of Maui and Jeffrey S. Hunt

By 

MARY BLAINE JOHNSTON
MADELYN S. D'ENBEAU
Deputies Corporation Counsel

TITLE MC-12
DEPARTMENT OF PLANNING
SUBTITLE 02
MAUI PLANNING COMMISSION
CHAPTER 202

SPECIAL MANAGEMENT AREA RULES

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SUBCHAPTER 1

GENERAL PROVISIONS

§12-202-1 Title. The rules in this chapter shall be known as the "Special Management Area Rules for the Maui Planning Commission". [Eff 1/1/94] (Auth: HRS §§91-2, 205A-27) (Imp: HRS §205A-29)

§12-202-2 Purpose. The purpose of these rules is to implement Hawaii Revised Statutes chapter 205A, relating to coastal zone management and special management areas, and to establish application procedures for special management area emergency permits, minor permits, and use permits, time periods within which hearings must be held, and procedures to provide notice to individuals whose property rights may be affected. The rules further the policy of the state to preserve, protect, and where possible, restore the natural resources of the coastal zone. The rules also assist the commission in giving full consideration to the state policy of establishing special controls on development within the areas along the shoreline to avoid permanent loss of valuable coastal resources and foreclosure of land use and management options of these resources, and to provide adequate access to beaches, recreational areas and natural reserves. [Eff 1/1/94] (Auth: HRS §§91-2, 205A-27, 205A-29, 205A-30) (Imp: §§ HRS 205A-1 to 205A-33)

§12-202-3 Scope and exemptions. (a) The rules contained in this chapter shall apply to the special management area on the island of Maui as designated on the special management area maps and specifically excluding the islands of Kahoolawe, Molokai and Lanai.

(b) The rules in this chapter shall not apply to special management area and shoreline setback area applications that have been deemed complete by the director before the effective date of these rules. An application shall be deemed complete by the director upon receipt of final agency comments and a letter is sent by the director to the applicant to that effect.

Applications deemed complete shall be processed under the rules in effect at the time the application was deemed complete. [Eff 1/1/94] (Auth: HRS §§46-4, 91-2, 205A-27, 205A-29) (Imp: HRS §205A-23)

§12-202-4 Definitions. For the purposes of this chapter, and unless it is plainly evident from the context that a different meaning is intended, the definitions of this chapter shall be those set forth in sections 205A-1, 205A-22, and 205A-41, HRS (a copy of which shall be provided pursuant to section 12-202-7), and as follows:

"Central coordinating agency" means the development services administration division of the department of public works and environmental management, County of Maui.

"Commission" means the Maui planning commission.

"Crops" means agricultural produce or parts of plants or trees cultivated for commercial or personal use, including but not limited to the raising of livestock and aquaculture.

"Cultural resources commission" means the Maui County cultural resources commission established under chapters 2.40 and 2.88 of the Maui County Code.

"Debris line" means a line marking the landward limit of debris deposits resulting from the upper reaches of the wash of waves.

"Department" means the department of planning of the County of Maui.

"Director" means the director of the department of planning of the County of Maui.

"Director of public works and environmental management" means the director of the department of public works and environmental management of the County of Maui.

"Environmental impact statement" or "EIS" means an informational document that is in compliance with chapter 343, Hawaii Revised Statutes, and the rules of the office of environmental quality control.

"Estuarine sanctuary" means a research area which may include any part or all of an estuary, adjoining transitional areas, and adjacent uplands, constituting to the extent feasible a natural unit, set aside to provide scientists and students the opportunity to examine over

a period of time the ecological relationships with the area.

"Estuary" means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage.

"Family" means a family as defined in title 19 of the Maui County Code, as amended.

"HRS" means the Hawaii Revised Statutes, as amended.

"Hana advisory committee" means the Hana advisory committee to the Maui planning commission pursuant to chapter 2.28 of the Maui County Code.

"NBCIDAC" means the Napili Bay civic improvement district advisory committee.

"Nonstructural improvements to existing commercial structures" means non-habitable improvements to existing structures, which improvements are adjunct to the main structure not to exceed fifty square feet in floor area; or temporary structures for special events not to exceed fourteen consecutive days. Improvements may include, but not be limited to, window or door replacement or addition, reroofing, storage additions, signage, tents, and booths.

"Owner" means all holders of an equitable or legal interest in real property on the island of Maui, including any lessee holding under a recorded lease with a term of five years or more.

"Plot plan" means a detailed map prepared to a scale, based upon an accurate instrument survey, defining and showing the design of the proposed action and the existing physical condition of the land, including but not limited to parcel boundaries, topography, natural and man made features, trees, and structures. The director may require the applicant to set forth in the plot plan cross sections of the site at designated locations.

"Proposed action" means any use, activity or operation proposed by an applicant on land within the special management area.

"Scenic amenities" means significant coastal features including, but not limited to, areas of vegetation, growth, land forms such as dunes or rock outcroppings, mountain and seaward visual corridors, beaches, aquatic areas, and archeological and historic sites.

"Shoreline survey" means the actual field location

of the shoreline prepared by a land surveyor registered in the State of Hawaii. Such survey maps developed by the registered land surveyor shall bear the surveyor's signature and date of field survey and the certifying signature and date of the chairman of the board of land and natural resources.

"Single-family residence" means a single-family dwelling and any accessory dwelling thereto, as defined in, and provided by, title 19 of the Maui County Code, as amended.

"Urban design review board" means the Maui County urban design review board as established under chapters 2.26 and 2.40 of the Maui County Code, as amended.

"Use" means a use as defined in title 19 of the Maui County Code, as amended.

"Vegetation growth" means any plant, tree, shrub, grass, or groups, clusters, or patches of the same naturally rooted and growing.

"Vegetation line" means a line marking the seaward limit of vegetation growth. [Eff 1/1/94; am 9/28/97, am and comp 9/25/03] (Auth: HRS §§91-2, 205A-29) (Imp: HRS §205A-29)

§12-202-5 Severability. If any provision of these rules or the application thereof to any person is held invalid, the invalidity shall not affect other provisions or applications of these rules which can be given effect without the invalid provision or application. To that extent the provisions of these rules are severable. [Eff 1/1/94] (Auth: HRS §§91-2, 205A-29) (Imp: HRS §§91-2, 205A-9)

§12-202-6 Special management area boundaries and maps. The special management area shall be all lands so designated on the maps adopted by the commission as of November 19, 1975, or as amended pursuant to section 205A-23, HRS, which maps are in the keeping of the department. These maps shall be the official special management area to be administered and enforced under these rules. [Eff 1/1/94] (Auth: HRS §§91-2, 205A-23, 205A-27, 205A-29) (Imp: HRS §205A-23)

§12-202-7 Implementation of rules. The director

shall provide such applications in a form as may be necessary to accomplish the intent of these rules, and shall provide upon request, a copy of sections of Hawaii Revised Statutes referenced in these rules. Such copies shall be provided as a convenience to the public and shall be accompanied with a disclosure cautioning readers that reproduced sections should not be relied upon to be accurate, complete, or applicable to any particular application and that reference should be made to the Hawaii Revised Statutes, all supplements thereto and Acts of the state legislature. A charge may be imposed for copying costs. [Eff 1/1/94] (Auth: HRS §§91-2, 205A-290) (Imp: HRS §205A-29)

§12-202-8 (Reserved)

§12-202-9 (Reserved)

SUBCHAPTER 2

SPECIAL MANAGEMENT AREA PERMIT PROCEDURES

§12-202-10 Special management area objectives and policies. (a) The objectives and policies of this chapter shall be those set forth in section 205A-2, HRS, as amended.

(b) In implementing these objectives and policies, the department or the commission, as appropriate, shall fully consider ecological, cultural, historic, and aesthetic values as well as needs for economic development. [Eff 1/1/94] (Auth: HRS §§91-2, 91-4.2, 205A-27, 205A-29) (Imp: HRS §§205A-2, 205A-4)

§12-202-11 Special management area review guidelines. The review guidelines set forth in section 205A-26, HRS, as amended, shall be used by the director and the commission, as appropriate, for the review of developments proposed in the special management area. [Eff 1/1/94] (Auth: HRS §§91-2, 91-4.2, 205A-29) (Imp: HRS §§205A-2, 205A-4, 205A-26)

§12-202-12 Assessment and determination procedures.

(a) All proposed actions within the special management area shall be subject to an assessment and a determination made by the director. Such assessment shall be pursuant to the significance criteria set forth in this section.

(b) The applicant or the director may waive assessment and determination, and the applicant may apply for a special management area use permit pursuant to the provisions of sections 12-202-13 and 12-202-15.

(c) Assessment applications shall be filed in accordance with the following:

- (1) Any applicant for a proposed action which has been assessed under the National Environmental Policy Act (42 U.S.C. §4321, et. seq.) or under chapter 343, HRS, and for which a findings of no significant impact (FONSI) has been filed or a required EIS has been accepted, may apply directly for a special management area use permit or special management area minor permit.

- (2) Any applicant seeking an assessment shall submit an application form, provided by the department, to the central coordinating agency. The application shall require the following information and documentation:
- (A) Identification of the applicant along with documentation of ownership or authorization by the owners of the parcel on which the proposed action is to occur;
 - (B) Tax map key number and acreage of the parcel on which the proposed action is to occur;
 - (C) A plot plan, drawn to scale, of the parcel upon which the proposed action is to occur, and photographs or VHS format video tape identifying the area where the proposed action is to occur;
 - (D) A shoreline survey if the land abuts the shoreline; provided, if the proposed action will occur outside of the shoreline setback area, the director may waive a survey if:
 - (i) the shoreline is fixed by a manmade structure or structures which have been approved by appropriate government agencies and for which engineering drawings exist to locate the interface between the shoreline and the structure;
 - (ii) the shoreline is fixed by natural stabilized geographic features such as cliffs and rock formations; or
 - (iii) the parcel is not abutting the shoreline.
 - (E) A written description of the proposed action, including but not limited to the use, length, width, height, depth, building materials, and statement of objectives;
 - (F) A written description of the anticipated impacts of the proposed action on the special management area that addresses or describes:
 - (i) The environmental setting of the parcel that is the subject of the

- (ii) proposed action;
 - (ii) The relationship of the proposed action to land use plans, policies, and control of the affected area;
 - (iii) The probable impact, including cumulative impacts, of the proposed action on the environment;
 - (iv) Any probable adverse environmental effects that can be avoided;
 - (v) Alternatives to the proposed action;
 - (vi) Mitigating measures proposed to minimize impact; and
 - (vii) Any irreversible or irretrievable commitment of resources.
- (G) A plan of the proposed action designating in dimensions the location of the proposed action on the parcel. If structures are included, the plan shall also show a dimensioned floor plan, sections, elevations, and other physical features;
- (H) A written valuation of the proposed action as estimated by an architect, engineer, or contractor licensed by the department of commerce and consumer affairs, State of Hawaii, or written valuation of the proposed action as estimated by the administrator of the development services administration, County of Maui;
- (I) The state land use district boundary designation, community plan designation, county zoning designation, and any other special designation, if applicable;
- (J) An environmental assessment and findings of no significant impact or an environmental impact statement, if required, pursuant to chapter 343, HRS;
- (K) Any oral or written comments received by the applicant from governmental or non-governmental agencies, community organizations, or individuals with regard to the proposed action, and a summary of the dates and attendance of public meetings held on the proposed action;

- (L) Any other information and documentation required by the department to properly process the application; and
 - (M) An administrative fee as established in the county budget.
- (d) The assessment application shall be reviewed as follows:
- (1) Upon submission of a completed application, the director shall review the proposed action and make a written evaluation as to:
 - (A) The valuation of the proposed action. The applicant's estimates of the total cost or fair market value may be verified by the director of public works and environmental management. The director of public works and environmental management shall use the most recent building valuation data provided by the International Conference of Building Officials. In the event of a conflict between the estimates of the applicant and the director of public works and environmental management, the higher estimate amount shall be used by the director for the purposes of an assessment of the proposed action;
 - (B) Whether the proposed action is or is not a development; and
 - (C) The potential adverse environmental and ecological effects based upon the significance criteria set forth in subsection (e).
- (e) In considering the significance of potential environmental and ecological effects, the director shall evaluate:
- (1) The sum of those effects that adversely affect the quality of the environment and the ecology, and shall evaluate the overall and cumulative adverse effects of the proposed action.
 - (2) Every phase of a proposed action, its expected primary and secondary consequences, and its cumulative and short or long-term effects. A proposed action may have a significant adverse effect on the environment

when the proposed action:

- (A) Involves an irrevocable commitment to loss or destruction of any natural or cultural resources;
 - (B) Significantly curtails the range of beneficial uses of the environment;
 - (C) Conflicts with the county's or the state's long-term environmental policies or goals;
 - (D) Substantially affects the economic or social welfare and activities of the community, county, or state;
 - (E) Involves substantial secondary impacts, such as population changes and increased effects on public facilities, streets, drainage, sewage, and water systems, and pedestrian walkways;
 - (F) In itself has no significant adverse effects but cumulatively has considerable effect upon the environment or involves a commitment for larger actions;
 - (G) Substantially affects a rare, threatened, or endangered species of animal or plant, or its habitat;
 - (H) Is contrary to the state plan, county's general plan, appropriate community plans, zoning and subdivision ordinances;
 - (I) Detrimentally affects air or water quality or ambient noise levels;
 - (J) Affects an environmentally sensitive area, such as flood plain, shoreline, tsunami zone, erosion-prone area, geologically hazardous land, estuary, fresh waters, or coastal waters;
 - (K) Substantially alters natural land forms and existing public views to and along the shoreline; or
 - (L) Is contrary to the objectives and policies of chapter 205A, HRS.
- (f) Based upon the assessment and review of the application, the director shall make a determination and notify the applicant in writing within thirty calendar days after the application is complete that the proposed

action 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. [Eff 1/1/94; am 9/28/97; am and comp 9/25/03; am and comp 10/10/03; am and comp 12/20/04) (Auth: HRS §§91-2, 205A-27, 205A-29) (Imp: HRS §§205A-2, 205A-4, 205A-29, 205A-30.)

§12-202-13 Notice of application and notice of public hearing; adequacy of notice. (a) Where a public hearing is required to be held pursuant to these rules, the applicant shall prepare a notice of application and legible map. The form of the notice shall be provided to the applicant by the department. Prior to publication, the department shall review the notice of application for completeness. The applicant shall submit the notice of application for publication to a newspaper within ten days of departmental approval. The applicant shall publish the notice of application once in a newspaper printed and issued at least twice weekly in the County and which is generally circulated throughout the County.

(b) A public hearing before the commission shall commence within one hundred twenty calendar days, or as soon thereafter, after the director has determined the

application is complete.

(c) Where a public hearing is required to be held pursuant to these rules, the department shall notify the applicant of the date of the public hearing at least forty-five days prior to the public hearing date. The applicant's mailed notice of public hearing shall be approved by the department before mailing and shall include:

- (1) The applicant's name, mailing address, and the nature of the proposed development;
- (2) The street address of the parcel that is the subject of the application (if available);
- (3) The tax map key number(s) of the parcel;
- (4) A location map;
- (5) The name of the applicant's agent and mailing address (if applicable);
- (6) The date, time, and place of the public hearing; and
- (7) A statement that additional information may be obtained at the department's office, providing the department's address and telephone number.

(d) The applicant's mailed notice of public hearing shall be mailed not less than thirty calendar days before the hearing date by certified or registered mail, postage prepaid, to owners of real property situated within five hundred feet of the boundaries of the parcel that is the subject of the application. The applicant shall also send notice to all persons who have requested the commission in writing to be notified of special management area proceedings.

(e) Not less than thirty calendar days prior to the public hearing date the director shall publish a notice of public hearing once in a newspaper that is printed and issued at least twice weekly in the County and which is generally circulated throughout the County and pursuant to section 1-28.5, HRS. The notice shall state the nature of the proposed development, the date, time, and place of the hearing, and all other matters required by law.

(f) The director may authorize the consolidation of the hearing with any other hearing required pursuant to law, or pursuant to any rules adopted thereunder.

(g) The mailed notice of public hearing shall be deemed adequate, and the failure of any owner to receive such notice shall not invalidate any application,

proceedings, assessment, or determination by the commission if the applicant, by affidavit, verifies that the names and addresses of owners of real property situated within five hundred feet of the subject parcel were obtained from the County of Maui real property tax roll, and that current ownership was verified with the records of the County's real property tax division, within thirty days of the mailing of notice of public hearing, stating both the date the addresses were obtained and the date notice was mailed, accompanied by receipts of certified mail. If there are multiple owners of the property, notification of the person(s) listed by name on the records of the County of Maui real property tax roll shall be deemed adequate notice as to all owners. [Eff 1/1/94; am 9/28/97; am 11/13/00] (Auth: HRS §§91-2, 205A-27) (Imp: HRS §§1-28.5, 205A-29)

§12-202-14 Special management area minor permit procedures. (a) If it has been determined that the proposed action requires a special management area minor permit, the assessment application submitted pursuant to section 12-202-12 may be deemed the minor permit application, provided that when development for which a minor permit is required is started before obtaining a permit, an additional fee of \$100 shall be paid by the applicant. The payment of said fee shall not relieve any persons from fully complying with the requirements of these rules nor from any penalties prescribed in section 12-202-25.

(b) The director shall approve, approve with conditions, or deny such permit in accordance with the guidelines in section 205A-26, HRS, as amended. Any final decision shall be transmitted to the applicant in writing and shall be appealable pursuant to section 12-202-26.

(c) The director shall notify the commission, at the commission's next regularly scheduled meeting, of the issuance by the director of special management area minor permits, receipt of which shall be acknowledged by the commission. Such notification shall include, but not be limited to, the name of each applicant, the development authorized by the permit, and the location and purpose of the development. [Eff 1/1/94; am 9/28/97, am and comp 12/28/02] (Auth: HRS §§91-2, 91-4.2, 205A-27, 205A-29)

(Imp: HRS §§205A-26, 205A-29, 205A-30)

§12-202-15 Special management area use permit procedures.

(a) Any person whose proposed development requires a special management area use permit, or who has waived an assessment by the department, shall file an application with the department on a form provided by the department, which shall require:

- (1) All information and documentation required pursuant to section 12-202-12, excluding valuation of the development;
- (2) The real property tax map key number of parcels and the names and addresses of owners of real property for real property situated within five hundred feet of the boundaries of the parcel on which the proposed development is to occur;
- (3) An administrative fee as established in the county budget. When development for which a permit is required is started before obtaining a permit, the fee shall be doubled. The payment of the fee for development without a permit shall not relieve any persons from fully complying with the requirements of these rules nor from any penalties prescribed in section 12-202-25.
- (4) Any other relevant information and documentation required by the director.

(b) Upon review of the application for completeness, the central coordinating agency shall refer the application to the director. For purposes of central coordinating agency review, completeness means all required documents have been filed.

(c) Upon receipt of the application from the central coordinating agency, the director shall review the application based on the policies, objectives, and guidelines as provided in sections 12-202-10 and 12-202-11 and, if necessary, request that the applicant provide any additional data or information as may be required for review of the proposed development. The application shall not be deemed complete for agency transmittal until the director is satisfied that the application has addressed the policies, objectives and guidelines.

(d) The director shall submit the application, with

all relevant information, to appropriate agencies for review and comment. The director shall request such agencies, boards, and commissions to review and comment on the proposed development within thirty days from the date on which the application was distributed for review, and shall request such agencies to address the maintenance, restoration, and enhancement of the special management area consistent with the objectives, policies and guidelines of chapter 205A, HRS, as amended.

(e) The director shall inform the applicant of any legal requirement to present the proposed development, if applicable, to the urban design review board, the cultural resources commission and the NBCIDAC or the Hana advisory committee for comment and recommendations to the commission. The urban design review board and the cultural resources commission shall address the maintenance, restoration and enhancement of the special management area consistent with the objectives, policies, and guidelines of chapter 205A, HRS, as amended. The commission may designate the NBCIDAC or the Hana advisory committee to conduct the public hearing.

(f) Upon receipt of final agency comments, the application shall be deemed complete by the director and shall be scheduled for public hearing.

(g) The commission shall approve a special management area use permit, subject to terms and conditions as permitted in sections 205A-26(1) and 205A-26(3), HRS, as amended, if it finds the criteria set forth in sections 205A-26(2) and 205A-26(3), HRS, as amended, have been met.

(h) Findings of fact, conclusions of law, and decision and order shall be issued in accordance with the rules of practice and procedure for the commission in effect when action is taken. [Eff 1/1/94; am 9/28/97, am and comp 12/28/02] (Auth: HRS §§91-2, 91-4.2, 205A-26, 205A-27, 205A-29) (Imp: HRS §§205A-4, 205A-26, 205A-28, 205A-29)

§12-202-16 Special management area emergency permit procedures. (a) Any person seeking a special management area emergency permit shall file an application with the director. The application, provided by the department, shall require:

- (1) Identification of the applicant along with documentation of ownership and authorization by the owners of the parcel on which the

- proposed action is to occur;
- (2) The tax map key number(s) of the parcel on which the proposed action is to occur;
 - (3) A written description of the proposed action, including, but not limited to, the length, width, height, depth, and type of materials for any proposed action;
 - (4) A written statement of the emergency or imminent and substantial harm to the public health, safety, or welfare; and why the proposed development would be immediately required to prevent substantial physical harm to persons or property, or to allow the reconstruction of structures damaged by natural hazards to their original form;
 - (5) The most current shoreline survey, if available;
 - (6) Photographs or VHS format video tape identifying the emergency at the affected area and shoreline property boundaries;
 - (7) Any other relevant information requested by the director; and
 - (8) An administrative fee as established in the County budget.
- (b) The director may waive the filing of a written application where the applicant demonstrates to the satisfaction of the director that imminent danger and substantial harm to a habitable structure would result from the delay in filing a written application. After approval of an oral request, the director shall issue a written permit, which shall contain:
- (1) The date and time the request was made;
 - (2) The date the permit was issued;
 - (3) Applicant's and project names, address and telephone number;
 - (4) Tax map key number (if available);
 - (5) Statement of the imminent danger posed and the substantial harm that would occur to the habitable structure if the permit were not granted; and
 - (6) The permitted temporary measures.
- (c) Not more than ten calendar days after the date of the oral request, the applicant shall submit the required written emergency permit application. If the applicant fails to submit such application, information,

and documentation within the ten day period, the director may require that the temporary measures be removed.

(d) Except as provided in subsection (e), the director shall issue a special management area emergency permit where:

- (1) The director finds the criteria set forth in sections 205A-22 and 205A-30, HRS, as amended, have been met;
- (2) In the event of impending or presently occurring disaster, the mayor has waived the requirements of sections 12-202-12, 12-202-14, or 12-202-15; or
- (3) In the event of a state-declared emergency, the governor, after conferral with and the recommendation of the mayor, has waived the requirements of sections 12-202-12, 12-202-14, or 12-202-15.

(e) No special management area emergency permit shall allow the reconstruction of structures damaged by natural hazards to their original form if such structures were previously found not to be in compliance with the federal flood insurance program or were not legally constructed.

(f) The director may place reasonable terms, conditions, and time stipulations upon such permit.

(g) The director shall set an expiration date for the permit, not to exceed one hundred eighty days, and set a time limitation within which the applicant shall apply for a permit pursuant to sections 12-202-14 or 12-202-15.

(h) The director shall submit reports of all determinations regarding emergency permits to the commission for review at the next regular meeting after the permit has been issued. Such reports shall include all facts and reasons for the determination.

(i) If the director denies the emergency permit, the denial shall be in writing, setting forth facts sufficient to demonstrate the application did not meet the requirements for issuance of the emergency permit pursuant to subsection (d). The applicant shall be informed of his right to appeal pursuant to section 12-202-26 herein. [Eff 1/1/94; am 9/28/97] (Auth: HRS §§91-2, 205A-27, 205A-29) (Imp: HRS §§91-2, 91-14, 205A-30)

§12-202-17 Amendments to and determinations of permit terms, conditions, and time stipulations. (a) Any person who has been issued a special management area emergency permit, minor permit, or use permit may request the director or commission, as appropriate, to amend, delete, or determine any terms, conditions or time stipulations placed upon such permit.

(b) Any person seeking to amend, delete, or determine a permit condition shall file an application with the department in a form provided by the department, the content of which shall include:

- (1) The term, condition, or time stipulation to be amended, deleted, or determined;
- (2) If an extension of a time stipulation is requested, the length of time extension desired;
- (3) The reasons for the requested amendment, deletion, or determination;
- (4) An administrative fee as established in the County budget; and
- (5) Any other information and documentation requested by the director.

(c) Unless otherwise provided, any application for an extension of a time stipulation must be filed not less than sixty calendar days prior to the expiration date of the time condition, provided that the director for good cause may waive such sixty day requirement.

Unless waived by the applicant and the director, notice of the public hearing to amend or determine the permit shall be given pursuant to the procedures set forth in section 12-202-13. A public hearing shall not be waived if a petition to intervene was filed or any person, other than the applicant, was admitted as a party to any prior proceeding on the matter, unless a written waiver from all parties has been received by the department. In instances in which the proposed amendment or determination does not clearly pertain to or could not affect the same rights, privileges or interests on which the intervention was based, a written waiver from all parties shall not be required for purposes of waiving a public hearing.

(d) Unless otherwise specified in permit conditions, the director may issue a written approval for

a special management area use permit transfer, if the permit holder submits a written request for a permit transfer to include the following:

- (1) Reason(s) for permit transfer;
- (2) Transferor's consent; and
- (3) Notarized affidavit from transferee acknowledging the conditions established with the subject permit and agreement by transferee to comply with these conditions.

The director shall notify the commission, at the commission's next regularly scheduled meeting, of the issuance of any permit transfer, receipt of which shall be acknowledged by the commission. Such notification shall include, but not be limited to, the aforementioned information provided to the department and permit transfer approval letter. Nothing in this section shall prevent the director from forwarding any permit transfer request to the commission for consideration in accordance with procedures set forth in this section.

(e) After review and final comment by appropriate agencies, the application shall be deemed complete by the director, and the application shall be referred to the commission and, if a public hearing is required, set a date for the hearing and provide notice as required by section 12-202-13. The commission shall conduct a hearing in accordance with the procedures set forth in its rules.

(f) Findings of fact, conclusions of law, and decision and order for any special management area use permit application seeking to amend, delete, or determine permit terms, conditions, and time stipulations shall be issued in accordance with the rules of practice and procedure of the commission in effect when action is taken and the review guidelines as set forth in section 12-202-11. [Eff 1/1/94; am 9/28/97] (Auth: HRS §§91-2, 205A-29, 205A-30) (Imp: HRS §§205A-26, 205A-29)

§12-202-18 (Reserved)

§12-202-19 (Reserved)

§12-202-20 (Reserved)

SUBCHAPTER 3

PROCEDURES TO ADOPT SPECIAL MANAGEMENT AREA RULES; DECLARATORY RULINGS; AND ADOPTION AND AMENDMENT OF BOUNDARIES AND MAPS

§12-202-21 Petition and procedures to adopt, amend, or repeal special management area rules; declaratory rulings. The commission may adopt, amend, or repeal any of its rules by following the procedures outlined in its rules of practice and procedure section 12-201-92. Any interested person may petition the commission for a declaratory order as to applicability of any statutory provision or of any rule or order of the department or the commission pursuant to the commission's rules of practice and procedure section 12-201-93. [Eff 1/1/94] (Auth: HRS §91-2) (Imp: HRS §§91-3, 91-4, 91-6, 91-7)

§12-202-22 Adoption and amendment of special management area boundaries and maps. (a) Any amendment to the boundaries of any special management area map adopted and filed with the department as of November 19, 1975, or as amended pursuant to section 205A-23, HRS, as amended, and these rules, may be initiated by the director in accordance to the requirements of this section.

(b) The director may at any time initiate comprehensive review and amendments to the special management area boundaries.

(c) The commission, by a two-thirds vote of its total membership, may direct the director to initiate a comprehensive review and amendments to the special management area boundaries.

(d) The director shall give notice of the director's intent to amend the special management area boundaries to the commission, the general public and the office of planning, stating the initiation date and estimated completion date of the director's review and shall submit the proposed amendments to the commission.

Not less than thirty calendar days before the public hearing date, the director shall publish a notice of public hearing once in a newspaper that is printed and issued at least twice weekly in the County and which is

generally circulated throughout the County and pursuant to section 1-28.5, HRS. The notice shall state the proposed amendment, the date, time and place of the hearing, a map of the proposed boundary amendment, and all other matters required by law.

The notice published in the newspaper shall be deemed adequate, and the failure of any owner to receive such notice shall not invalidate any amendments, proceedings, assessment or determination by the commission.

(e) The commission may amend the special management area boundaries only upon the finding that the amendments will further the objectives and policies of chapter 205A, HRS, as amended, and will be consistent with the general plan and other applicable ordinances of the County of Maui. Upon review of the office of planning, the commission shall render a final decision and issue a written order and may direct the director to issue a written order and final map within sixty calendar days after the final vote of the commission, unless otherwise extended by vote of the members of the commission. [Eff 1/1/94; am 9/28/97; am 11/13/00] (Auth: HRS §91-2) (Imp: HRS §§1-28.5, 205A-23)

§12-202-23 Enforcement. (a) The appropriate enforcement agency as designated by the County Charter shall enforce these rules, except as otherwise provided herein.

(b) Any development pursuant to section 205A-22, HRS, as amended, that has not received a required special management area emergency permit, minor permit, or use permit pursuant to this part or complied with conditions established with such a permit, shall be removed or the violation shall be corrected by immediate application for and subsequent granting of the appropriate permit or other means as determined by the director. No other state or county permit or approval shall be construed as special management area permit approval pursuant to this part.

(c) Where the shoreline is affected by a manmade structure that has not been authorized with government agency permits required by law, if any part of the structure is on private property, then for purposes of enforcement of this part, the development shall be

construed to be entirely within the special management area and shall be removed or the violation shall be corrected.

- (d) Issuance of notice of violation and order.
 - (1) The landowner or the alleged violator, or both, shall be notified by the enforcement agency by certified or registered mail of an alleged violation of this rule, any permit issued pursuant thereto, or any condition of a special management area permit approval. The notice of violation and order shall include, but not be limited to, the specific section of this rule which has been violated, the nature of the violation, and the remedy(ies) available. The notice of violation and order may also require that the violative activity cease, or that the violative development be removed; that a civil fine be paid not to exceed \$10,000 per violation; and that a civil fine be paid not to exceed \$1,000 per day for each day in which the violation persists, in addition to the foregoing and any other penalties.
 - (2) The notice of violation and order shall state that the order shall become final thirty days after the date of its mailing, unless written request for a hearing is mailed or delivered to the enforcement agency within said thirty days. Nothing in this section shall prevent the landowner or violator from seeking to negotiate a settlement or resolve a dispute.
 - (3) If the violator seeks a negotiated settlement with the enforcement agency, but waives the right to a hearing, the enforcement agency, in consultation with the department and the corporation counsel, may negotiate a settlement agreement with the landowner or, if appropriate, the violator, that provides for cure of the violation, set any fine, and inspection of parcel by the enforcement agency and the department. The proposed settlement shall be forwarded to the commission for final action.
 - (4) Any request for a hearing shall be in writing and delivered, or mailed and postmark dated,

- to the department within thirty days, as stated on the notice. Upon receipt of a request for a hearing, the department shall specify a time and place for the person subject to the order to appear and be heard. The hearing shall be conducted by the director or the director's designee in accordance with the provisions of chapter 91, HRS, as amended.
- (5) The department, in consultation with the department of the corporation counsel, may institute a civil action in any court of competent jurisdiction for the enforcement of any settlement agreement or order issued pursuant to this section.
 - (6) Nothing in this section shall prohibit the department, through the corporation counsel, from filing an order or motion directly with a court in the event that public health, safety and welfare may be at risk. [Eff 1/1/94; am 9/28/97] (Auth: HRS §205A-43, 205A-43.6) (Imp: HRS §43.6)

§12-202-24 Conflicts with other laws. In case of a conflict between the requirements of any other state law or county ordinance regarding the special management area, the more restrictive requirements shall apply in furthering the purposes of this part. Nothing contained in this part shall be construed to diminish the jurisdiction of the state department of transportation over wharves, airports, docks, piers, or other commercial harbors, and any other maritime facilities constructed by the state; provided that such plans are submitted for the review and information of the officer of the respective agency charged with the administration of the county zoning laws, and found not to conflict with any county ordinances, zoning laws, and building codes. [Eff 1/1/94; am 9/28/97] (Auth: HRS §205A-48) (Imp: HRS §205A-48)

§12-202-25 Penalties. Any person who violates any provision of these rules shall be liable for an initial civil fine not to exceed \$10,000 per violation and maximum daily fine of \$1,000 in addition to any other

penalties until the violation is corrected. A civil fine may be imposed by the department after an opportunity for a hearing under chapter 91, HRS, as amended, unless said hearing is otherwise waived. A special management area permit application submitted subsequent to an applicant's having completed the development or having been cited for the activity or construction without having obtained special management area approval, shall not stay any order to pay civil fines. [Eff 1/1/94; am 9/28/97] (Auth: HRS §205A-32) (Imp: HRS §§205A-22, 205A-26, 205A-28, 205A-29, 205A-30, 205A-33)

§12-202-26 Appeal of director's decision; filing the notice of appeal. (a) Appeal of the director's decision may be made to the commission by the filing of a notice of appeal with the department not later than ten days after the receipt of the director's written decision, or, where the director's decision is not required by the commission or these rules to be served upon appellant, not later than ten days after the meeting at which the commission received notification of the director's decision. The notice of appeal shall be filed in accordance with section 12-201-20 of the rules of practice and procedure for the Maui planning commission. The department shall notify the commission, at the commission's next regularly scheduled meeting, of the filing of the notice of appeal. [Eff 1/1/94; am and comp 9/28/97; am and comp 11/4/02] (Auth: Charter §§ 8-8.4, 13-2.15) (Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-27 Content of the notice of appeal. The notice of appeal shall identify the party or parties taking the appeal in the caption and body of the notice of appeal. The notice of appeal shall designate the decision appealed from and shall state the reasons for the appeal. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15) (Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-28 Joint or consolidated appeals. If two or more parties are entitled to appeal from a decision of the director and their interests are such as to make joinder practicable, they may file a joint notice of

appeal and thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the commission upon the commission's own motion, upon motion of a party, or upon stipulation of the parties to the several appeals. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15) (Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-29 Service of the notice of appeal. If the appellant is someone other than the applicant, appellant shall serve a file-marked copy of the appeal by mail or delivery thereof to counsel of record for each other party, or, if a party is not represented by counsel, to the party at the party's last known address. Proof of service shall be filed with the department within seven days after the filing of the notice of appeal. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15) (Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-30 Payment of fees. Upon the filing of any separate or joint notice of appeal, the appellant shall pay such fees as are set forth in the County budget ordinance. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15) (Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-31 Contested case hearing on appeal. The commission shall hold a contested case hearing on the appeal. The director, the appellant, and, where the appellant is someone other than the applicant, the applicant shall be parties to the proceedings. Subchapters 3, 4, and 5 of the rules of practice and procedure for the Maui planning commission, relating to petitions to intervene, contested case procedures, and post hearing procedures, respectively, shall govern the proceedings, except that petitions to intervene on an appeal shall be filed with the commission no later than ten days after the meeting at which the commission received notification of the filing of an appeal. [Eff 11/4/02; comp 11/4/02] (Auth: Charter §§8-8.4, 13-2.15) (Imp: HRS §§205A-29, 205A-30, 205A-49)

§12-202-32 Disposition of appeal. The commission may affirm the decision of the director, or may remand the case to the hearing officer, if any, with instructions for further proceedings; or it may reverse the decision of the director if the substantial rights of the appellant may have been prejudiced because the decision is:

- (1) Based on clearly erroneous findings of material fact or erroneous application of the law; or
- (2) Arbitrary or capricious in its application; or
- (3) A clearly unwarranted abuse of discretion.
[Eff 11/4/02; comp 11/4/02; am and comp 12/20/04] (Auth: HRS §§91-14(g)(6), 205A-43, 205A-43.5, 205A-43.6, 205A-45, 205A-49, Maui County Charter §§8-8.4, 13-2(15)) (Imp: HRS §§205A-29, 205A-30, 205A-43, 205A-43.5, 205A-43.6, 205A-45, 205A-49, Maui County Charter §§8-8.4, 13-2(15))

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IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Travis C. Larson GST Exempt Trust U/A January 20, 1999 and WILLIAM L. LARSON AND NANCY H. LARSON, as Trustees under that certain unrecorded Troy T. Larson GST Exempt Trust U/A January 20, 1999,

Plaintiffs/Appellants,

vs.

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

Defendants/Appellees.

CIVIL NO. 09-1-0413 (2)

APPEAL FROM:

(1) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT ENTERED SEPTEMBER 29, 2009; and

(2) FINAL JUDGMENT ENTERED OCTOBER 15, 2009

HONORABLE SHACKLEY R. RAFFETTO,
JUDGE

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a copy of the foregoing was duly served TODAY upon the following counsel by depositing same in the U.S. Mail, postage prepaid, at their last known address:

ANDREW V. BEAMAN, ESQ.
LEROY E. COLOMBE, ESQ.
Chun, Kerr, Dodd, Beaman & Wong
745 Fort Street, 9th Floor
Honolulu, HI 96813

Attorneys for Appellant/Plaintiffs

DATED: Wailuku, Maui, Hawaii, April 28, 2010.

BRIAN T. MOTO
Corporation Counsel
Attorneys for Defendants/Appellees
County of Maui and Jeffrey S. Hunt

By 

MARY BLAINE JOHNSTON
MADELYN S. D'ENBEAU
Deputies Corporation Counsel