SCWC NO. 10-150

IN THE SUPREME COURT OF THE STATE OF HAWAII

GEOFFREY MOLFINO, Plaintiff-Appellant and Petitioner, vs. CHRISTOPHER J. YUEN, in his capacity as Planning Director for the County of Hawaii, and COUNTY OF HAWAII, Defendants-Appellees and Respondents.	CIVIL NO. 07-1-0378 APPLICATION FOR WRIT OF CERTIORARI FROM THE SUMMARY DISPOSITION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS, FILED ON AUGUST 28, 2013. HAWAII INTERMEDIATE COURT OF APPEALS HON. KATHERINE G. LEONARD HON. LAWRENCE M. REIFURTH HON. LISA M. GINOZA Associate Judges

APPLICATION FOR WRIT OF CERTIORARI

EXHIBITS A-D

and

CERTIFICATE OF SERVICE

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I.

QUESTION PRESENTED

BECAUSE THE HAWAII COUNTY PLANNING DEPARTMENT MAINTAINS PERMANENT SUBDIVISION RECORDS, FOR BOTH ITS OWN PURPOSES AND PUBLIC ACCESS, DOES THE COUNTY HAVE A DUTY TO EXERCISE REASONABLE CARE IN THEIR MAINTENANCE AND PRESERVATION?

II.

STATEMENT OF PRIOR PROCEEDINGS

The policy question before this Court, is whether the Hawaii County Planning Department, which issues critical rulings regarding subdivisions on Big Island property, and maintains permanent subdivision records for its own purposes and public access, has a duty to exercise reasonable care in the maintenance of existing subdivision records. Although unable to locate any precedent on this unresolved issue in Hawaii case law, the ICA ruled, in a five-page SDO of first impression, that "strong policy considerations compel us to reject Molfino's argument that Appellees owed a duty to maintain accurate and complete records for persons who seek information regarding the degree to which real property may be capable of subdivision."

On November 16, 2007, Plaintiff-Appellant and Petitioner GEOFFREY MOLFINO (Molfino) filed a complaint in the Third Circuit Court against Defendants-Appellees and Respondents CHRISTOPHER J. YUEN, in his capacity as Planning Director for the County of Hawaii, and COUNTY OF HAWAII (together, "the County"), seeking damages for, *inter alia*, negligence, for failing to maintain existing Planning Department records, falsely representing the subdivision status of his Big Island property, and issuing a different and more beneficial decision to the next owner. *See* Computerized Index, Document No. 1, November 16, 2007 (Doc 1) at 9-10.

On April 21, 2010, the County moved for partial summary judgment on all but Count V, Molfino's negligence count. Doc 32. The County also moved to dismiss that portion of Count V which claimed damages caused by the Planning Department's 2004 ruling rejecting Molfino's request for a 7-lot subdivision. *Id*. On June 23, 2010, Third Circuit Judge Greg K. Nakamura granted partial summary judgment, dismissing Counts, I, II, III, IV, VI, VII and VIII, but declining to limit Molfino's negligence claims. Doc 50; *see* Exhibit A. "[T]he better approach is to allow the parties to argue the impact of the [June 2, 2004, letter rejecting Molfino's subdivision request] to the

jury," the court ruled, "therefore, the motion is denied as to Count V." *Id*. at 4.

On August 9, 2010, the County filed a motion for summary judgment on the remaining claims, attacking Count V. Doc 57. On October 12, 2010, Judge Nakamura changed his mind, granted summary judgment, and dismissed the case. Doc 64; *see* Exhibit B. "Imposing a duty to maintain Planning Department records with reasonable accuracy invites unremitted [sic] liability," the court ruled, "the Planning Department owes no duty to keep its records accurate and complete for persons who seek information regarding the degree to which real property may be capable of subdivision." *Id*. at 1, 3. On January 11, 2011, Judge Nakamura filed a Judgment, confirming summary judgment on all claims and granting the County $17,238 in costs. Doc 75; *see* Exhibit C.

On April 11, 2011, Molfino filed an Opening Brief (OB), claiming 1) the County's Planning Department has a duty to maintain existing records in an accurate, timely, relevant and complete manner, and to acknowledge and affirm pre-existing subdivisions, and 2) the County's other grounds for summary judgment, ignored by Judge Nakamura, are equally unavailing.

On August 28, 2008, the ICA filed a Summary Disposition Order. *See* Exhibit D. "We conclude," the ICA ruled, "that the Circuit Court did not err in concluding that the Planning Department did not have a statutorily-based duty to maintain its records with unerring accuracy." *Id*. at 5. On October 9, 2013, the ICA filed its Judgment on Appeal, and the clerk granted Molfino a 30-day extension to file his Application for Writ of Certiorari. The ICA's finding that the County has no duty to maintain existing subdivision records, is grave error. *See* **Ranches v. City and County of Honolulu**, 115 Hawai'i 462, n.1, 168 P.3d 592 (2007), *citing* **HRS** Section 602-59(a).

III.

STATEMENT OF THE CASE

On June 13, 2003, Molfino purchased TMK 32002035, a 49-acre parcel in Kapena, North Hilo, Hawaii, for $350,000. Doc 57, Exs. D, E. According to Molfino:

> A factor that motivated my decision to purchase the Subject Property was its potential for subdivision, development and re-sale. Based on my experience and my wife's real estate sales business, I was aware that there are few small acreage real properties available for sale on the Hamakua Coast, far less than the demand for such properties, which are therefore valued at a premium.

Doc 34, Molfino Dec. at 2. "Our business strategy dictated scrupulous evaluation of property records, including site visits and a thorough file evaluation." *Id*. As such:

> Before purchasing the Subject Property on June 13, 2003, I visited the County of Hawaii Planning Department to review the Subject Property's documents on file. I reviewed every page of the [Tax Map Key] file. I made a copy of the file for my own records. I understood that based on the Agricultural 20-acre zoning for the Subject Property, the County of Hawaii would recognize two lots of record.

Doc 34, Molfino Dec, at 2. Molfino found nothing in the file for TMK 32002035 indicating that the property had ever been granted a greater subdivision than two lots. *Id*. at 3.

On June 13, 2003, after purchasing the property, Molfino again visited the Planning Department and reviewed its TMK file, and again saw no information indicating a greater subdivision status. *Id*. On December 24, 2003, after listing the property at $795,000, and again searching the TMK files, Molfino wrote Planning Director Yuen requesting a "determination of lots of record," seeking approval of a 7-lot subdivision under **County of Hawaii Subdivision Control Code** Section 23-7. Doc 57, Ex. G. On February 5, 2004, after two months without a reply, Molfino sold the property for $795,000 to Michael Pruglo ("Pruglo"). *Id*., Ex. H. On June 2, 2004, Yuen finally replied, recognizing two pre-existing lots and refusing to approve seven. *Id*., Ex. J. Based on the TMK file, Molfino did not appeal the decision. Doc 34, Molfino Dec. at 5.

On July 19, 2004, the Pruglo sale closed, and he took possession. Doc 57, Ex. I. On January 12, 2005, Yuen informed Pruglo's agent Sydney Fuke that he would approve Pruglo's request for a 7-lot subdivision, the same plan requested by Molfino. *Id.*, Ex. N at 4. Molfino did not learn about Yuen's change of position until December 2006, two years after it was approved, from neighbor Mark Kellberg. Doc 34, Molfino Dec. at 6. Yuen told Kellberg he had "made a mistake," when he denied Molfino's similar request seven months before. *Id*. "This is the first time I had any notice of any admission of a mistake by the Planning Department." *Id*.

Unbeknownst to Molfino, broker Robert Williams wrote the Planning Department on April 10, 2000, three years before Molfino's request, seeking approval of a 6-lot subdivision on the same property, which was granted by former County Planning Director Virginia Goldstein on May 22, 2000. *Id*. at 2-3.[1] Neither of these letters, however, or the subdivision map stamped by the County,

[1] The May 22, 2000, letter by Director Goldstein to Williams approving the 6-lot subdivision referred to other documents in the TMK file, including land grants recognizing a total of six lots on this property. Doc 82, Ex. 3 at 2. As such, not only the Williams/Goldstein correspondence was missing in 2003, but also the land grants cited in their correspondence.

was in the property's TMK file when Molfino searched it in 2003. *Id*. Moreover, when Yuen and/or his assistant Edward Cheplic searched the TML file in 2004, the Williams/Goldstein correspondence and subdivision map were still missing, resulting in the denial of Molfino's 7-lot subdivision request. *Id*. In January 2005, however, the missing documents mysteriously resurfaced, and Director Yuen reversed himself and approved Pruglo's request for a 6-lot subdivision. Doc 57, Ex. N at 4.[2] After obtaining a 6-lot subdivision on the same property in 2005, Pruglo sold three of the six lots for approximately $350,000 apiece. Doc 59, Molfino Dec. at 7.

Planning Department Director Yuen acknowledged "there's a written policy" in his department to "keep something like this[.]" Doc 59. Ex. 4 at 22. "All correspondence that pertains to a particular property is kept in its intended file." *Id*. at 23. There is also "an overall County policy" to retain such documents. *Id*. "That type of letter involving recognition of pre-existing lots would be kept in what the people in the department call the TMK file, which is filed by tax map key, when there is no other pending application." *Id*. at 24. "[T]he request that came in from Mr. Williams and the letter that went out in 2000 would have been put in this TMK file." *Id*. Although these documents can be checked out and copied by the public, "it's not supposed to leave the office." *Id*. at 25. Each TMK file has a "sheet of stiff paper that the person is supposed to initial." *Id*. "Any incoming or outgoing correspondence is supposed to be kept essentially forever." *Id*. at 64. Yuen was "custodian of records" of the TMK files. *Id*.

Planning Department employee Edward Cheplic researched and drafted the June 2, 2004, letter signed by Yuen denying Molfino's request for a 7-lot subdivision. Doc 59, Ex. 5 at 34. He reviewed TMK file No. 32002035, and the May 22, 2000, letter signed by Director Goldstein approving a 6-lot subdivision was not there. *Id*. at 39.at 37. "It was an important document," Cheplic said, because it is the policy of the Planning Department to recognize subdivisions that have been approved in the past. *Id*. at 35, 38. If the Williams/Goldstein correspondence had been in the file in May 2004 Cheplic's analysis "would have been different." *Id*.[3] After

[2] No one has ever explained why the Williams/Goldstein correspondence and subdivision map disappeared in 2003-2004, or suddenly reappeared in 2005. Doc 34, Molfino Dec. at 6.

[3] Cheplic is actually mentioned in that May 22, 2000, letter by Goldstein, and likely researched and wrote that letter as well. *See* Doc 59, Ex. 3 at 3. He may also have misfiled it. *Id*.

Molfino's request was denied, and the property sold, the Williams/Goldstein correspondence "appeared in the file." *Id*. at 37. Cheplic had no idea why it was absent in 2004 and how it suddenly reappeared in the TMK file in 2005. *Id*. at 4.

There is no dispute that the County erred and the critical documents were not in the TMK file in 2003-2004. In their pleadings in support of summary judgment, the County acknowledged Director Yuen's June 2, 2004, ruling was a "mistake," and that the Williams/Goldstein correspondence and subdivision map should have been available for public inspection in the property's TMK file. Doc 32; Doc 57. Neither Yuen nor anyone else at the County, however, ever told Molfino about the mistake, the missing documents, or Yuen's approval of the 6-lot request by Pruglo seven months later. Doc 34, Molfino Dec. at 6. Moreover, neither Yuen nor anyone else conducted an inquiry to determine why the Williams/Goldstein correspondence and map were missing from the TMK file in 2003-2004, and reappeared in 2005. Doc 34, Ex. 3, at 21; Doc 59, Ex. 4 at 22. If the County had shown the slightest remorse upon discovering their "mistake," investigated why it occurred, told Molfino when the missing documents were found, or informed him about the Pruglo's approval, this lawsuit would likely not have been filed.

IV.

ARGUMENT.

BECAUSE THE HAWAII COUNTY PLANNING DEPARTMENT MAINTAINS PERMANENT SUBDIVISION RECORDS, FOR ITS OWN PURPOSES AND PUBLIC ACCESS, STATE AND LOCAL LAWS IMPOSE A DUTY ON THE COUNTY TO EXERCISE REASONABLE CARE IN THEIR MAINTENANCE AND PRESERVATION.

"A prerequisite to any negligence action is the existence of a duty owed by the defendant to the plaintiff that requires the defendant to conform to a certain standard of conduct for the protection of the plaintiff against unreasonable risks." **McKenzie v. Hawaii Permanente**, 98 Hawai'i 296, 298, 47 P.3d 1209 (2002). The "existence of a duty" concerns:

> whether such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other, or, more simply put, whether the interest of a plaintiff who has suffered invasion is entitled to legal protection at the expense of a defendant.

Id., *quoting* **Tabieros v. Clark Equipment**, 85 Hawai'i 336, 353, 944 P.2d 1279 (1997). "The State . . . shall be liable in the same manner and to the same extent as a private individual under like

circumstances[.]" **HRS** Section 662-2. "The basic principle of tort liability in Hawaii is that the State and its political subdivisions shall be held accountable for the torts of governmental employees in the same manner and to the same extent as a private individual under like circumstances." **Cootey v. Sun Investment**, 68 Haw. 480, 483, 718 P.2d 1086 (1986).

According to Yuen, "any incoming and outgoing correspondence is supposed to be kept essentially forever." Doc 59, Ex. 4 at 64. "[T]he request that came in from Mr. Williams and the letter that went out in 2000," Yuen acknowledged, "would have been put in this TMK file." *Id*. at 25. To paraphrase **McKenzie,** this Court must determine "whether the County owed a duty to Molfino to maintain existing records regarding the status of his property." 98 Hawai'i at 298.

Numerous statutes address county record-keeping. **HRS** Section 46-43(a) provides "the county legislative body shall determine whether, and the extent to which, the county shall create, accept, retain or store . . . any records[.]" **HRS** Section 92-1 notes "opening up the governmental processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." **HRS** Section 92-21 states "a copy of any government record, including any map [or] plan, which is open to inspection of the public shall be furnished to any person applying for the same[.]" **HRS** Section 92-32 provides "[a copy] of a government record shall be placed in conveniently accessible files and provisions made for preserving, examining and using the same."

Hawaii's **Uniform Information Practices Act** (UIPA) makes clear that "accurate, relevant, timely and complete government records" are fundamental to a democratic society:

> The people are vested with the ultimate decision-making power. Government agencies exist to aid the people with the formation and conduct of public policy. Opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest.

HRS Section 92F-2. "This chapter shall be applied and construed to promote its underlying policies and purposes, which are to . . . *provide for accurate, relevant, timely, and complete government records*" and *"make government accountable to individuals in the collection, use and dissemination of information relating to them*[.]" *Id*.(emphasis added); *see also* **Olelo v. Office of Information Practices**, 116 Hawai'i 337, 345, 173 P.3d 484 (2007) ("accurate, relevant, timely and complete government records"); **SHOPO v. Society of Professional Journalists**, 83 Hawai'i 378, 383, 927 P.2d 386 (1996) ("accurate, relevant, timely and complete government records"); **Painting Industry of Hawaii v. Alm**, 69 Haw. 449, 452, 746 P.2d 79 (1987) ("all public records shall be

available for inspection by any person[.]") "All government records are open to public inspection unless access is restricted or closed by law." **HRS** Section 92F-11(a). These records include "land ownership, transfer and lien records, including real property tax information, and leases of state land[.]" **HRS** Section 92F-12(a)(5). They also include "final opinions . . . made in the adjudication of cases[.]" **HRS** Section 92F-12(a)(2). "Each agency may adopt rules, pursuant to Chapter 91, to protect its records from theft, loss, defacement, alteration, or deterioration[.]" **HRS** Section 92F-13(e). "Each agency shall," notes the Hawaii's UIPA:

> issue instructions and guidelines necessary to effectuate this chapter [and] take steps to assure that all employees and officers responsible for *the collection, maintenance, use and dissemination of government records* are informed of the requirements of this chapter.

HRS Section 92F-18(a) (emphasis added). "Each agency shall compile a public report [listing] the policies and practices of the agency regarding storage, retrievability, access controls, retentions, and disposal of the information maintained in records[.]" **HRS** Section 92F-18(b)(9). "Each agency shall file an "[annual] report . . . to ensure that the information remains accurate and complete." **HRS** Section 92F-18(c). "[T]he agency shall be liable to the complainant [for] damages sustained . . . as a result of the failure of the agency to properly maintain the personal record[.]" **HRS** Section 92F-27(c)(1). The Office of Information Practices "shall adopt rules which set forth uniform standards for records collection practices of agencies." **HRS** Section 92F-42(14).

Although the UIPA does not require agencies to create or retain public records, it establishes a duty to protect *existing records*, so they are "accurate, relevant, timely, and complete." **HRS** Section 92F-2(2); *see also* **SHOPO**, 83 Hawai'i at 383 ("does not obligate agencies to create or retain documents [but] to provide access to those which it in fact has created and retained"); **OIP Opinion**, Op. Ltr. No. 97-8 at 7 (1997) ("applies only to existing records.")

Hawaii County rules are in accord. According to Section 1.8 of Hawaii County's **Planning Department, Rules of Practice and Procedure**, the law cited by Judge Nakamura, "[a]ll public records shall be available for inspection by any person during established office hours[.]" Doc 57, Ex. Y.[4] Director Yuen acknowledged that in 2003-2004 "Hawaii County Planning Department

[4] **Hawaii County Code** Section 23-62(a) requires Planning Department directors to retain preliminary subdivision plats. **HCC** 23-74(b) mandates retention of final plat approvals. **HCC** 23-114 requires farm subdivisions to be filed with the Department. **HCC** 2-29 requires the

ha[d] a formal document maintenance policy[.]" Doc 59, Ex. 4 at 22. "[T]here's a written policy," he said, "you keep something like this[.]" *Id*. "All correspondence that pertains to a particular property is kept in its intended file," Yuen acknowledged, "that's the policy." *Id*. at 23. There is also "an overall county policy," said Yuen, "county and state policies applied." *Id*.

Regardless, Judge Nakamura ruled, and the ICA agreed, that '[t]here is no express requirement in Rule 1.8 of the **Planning Department, Rules of Practice and Procedure** that the Planning Department records be kept in any particular condition." Exhibit B at 2. "It does not require that the records be maintained so that they can be relied upon by the general public in making major decisions." *Id*. "The Planning Department owes no duty to keep its records accurate and complete for persons who seek information regarding the degree to which real property may be capable of subdivision." *Id*. at 3. Judge Nakamura and the ICA are wrong.

First, neither Judge Nakamura nor the ICA cite any statute, ordinance, regulation, rule or case law which holds that government agencies have no duty to maintain existing records in an accurate, relevant, timely and complete manner. *See* Exhibits B and D. Since Section 1.8 does not expressly require the County to keep accurate records, they ruled, there is no duty to do so. *Id*. That is not the law. "The existence of a duty concerns whether such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other[.]" **McKenzie**, 98 Hawai'i at 298. When there is no express statutory duty, "whether there is a duty of care . . . should be determined by an analysis of legislative intent of the applicable statute or ordinance." **Cootey**, 68 Haw. at 485. *No such analysis was performed by Judge Nakamura or the ICA*, and state and local laws make clear that accountability and open government require agencies to preserve and provide access to accurate, relevant, timely and complete existing records.

Second, the ICA relies almost entirely on **Cootey**, a 1986 case asserting "government is not intended to be an insurer of all the damagers of modern life, despite its ever-increasing effort to protect its citizens from peril." Exhibit D at 5, *quoting* **Cootey**, 68 Haw. at 485. While Molfino agrees with that sentiment, it does not foreclose a finding that Hawaii County has a duty to preserve existing subdivision files. Third party Patrick Cootey sued the Hawaii County Planning Department

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Department to keep records of findings and determinations of planning commissions. Finally, **HCC** 23-57 allows subdivision applicants to "call at the planning department's office for information . . . that may have a direct influence on the proposed subdivision."

for flood damages on his property, claming it negligently approved a subdivision for Sun Investment without adequate drainage. *Id*. at 482. Counties regulate flood control measures, this Court ruled, "to protect . . . the public at large," not to protect third parties from water damage. *Id*. at 485. The **Cootey** Court also found "there was no breach of any duty of care by the county in the application process utilized by the agencies in approving the subdivision[.]" *Id*. at 487. In contrast, Molfino sued the Department because of inconsistent rulings on *his property*, caused by the Department's acknowledged failure to maintain existing subdivision rulings. Complete files are necessary so planning officials and citizens can make informed decisions about *specific* property, not to "protect the public at large." *Id*. at 485. Director Yuen acknowledged his Department made a mistake when it denied Molfino's request for subdivision approval, and that such documents are "supposed to be kept essentially forever." Doc 59, Ex 4 at 64.

Third, it is the declared policy of this State that public access to existing government records is critical to a working democracy. *See* **HRS** Sections 92-1 and 92F-2. Dependable land use records are necessary for a stable society.[5] Without them, property cannot be described, contracts cannot be enforced, disputes cannot be resolved, and the ownership, use and boundaries of billions of dollars worth of public and private land cannot be determined. When a county planning agency approves a subdivision, and then loses existing records, future owners, sellers, buyers, lessors, and lessees are unable to make informed decisions or file informed requests. Moreover, legislators, judges and planning officials are unable to regulate its use. "I would say absolutely yes," Yuen said, "the county planning department has a duty to try and make as accurate a determination as possible." Doc 59, Ex. 4 at 20. "That's in keeping with the general role of the planning department to provide a public service and to administer a set of laws properly." *Id*. Because of incomplete TMK files for this property, Yuen was unable to do so in this case.

Fourth, Judge Nakamura found, and the ICA affirmed, that laws requiring public access do not require records "to be kept in any particular condition." Exhibit B at 2. Access is fruitless, however, if records are incomplete. Without accurate court records, deeds, mortgages, liens, subdivisions, taxes, licenses, marriages, births and deaths, society would collapse. *See e.g*.,

[5] That policy is also reflected in **Planning Department Rules** Section 1.8, which provides "all public records shall be available for inspection." Doc 57, Ex. Y. "Copies of records printed or reproduced for persons other than government agencies shall be given to any person[.]." *Id*.

Kawamata Farms v. United Agri Products, 86 Hawai'i 214, 256, 948 P.2d 1055 (1997) ("the highest verity, from considerations of public policy, is attributed to the records and judgments of courts as matters of evidence and they ought to be most carefully preserved and authenticated.") The preservation of accurate government records is so important that most States make it a crime to "tamper" with "official books, papers, written instruments or records created, issued, received or kept by any governmental office or agency[.]" *See* **HRS** Section 710-1017. If officials can lose or destroy them with impunity and without consequence, there is no motivation to preserve them.

Fifth, the ICA insists "UIPA does not impose an affirmative obligation upon a government agency to maintain records." Exhibit B at 4, *quoting* **Nuuanu Valley Ass'n v. City and County**, 119 Hawai'I 90, 97, 194 P.3d 531 (2008). "Similarly, FOIA does not obligate agencies to create or retain documents; it only obligates them to provide access to those it in fact created and retained." *Id., citing* **SHOPO v. Society of Professional Journalists**, 83 Hawai'i 378, 394, 927 P.2d 386 (1996). Molfino cited these cases in his Opening Brief, and acknowledged these laws do not require agencies to *keep* records. OB at 27. Once the decision to keep them is made, however, it is the legislatively-declared purpose and policy of this State that they be "accurate, relevant, timely and complete." **HRS** Section 92F-2(2). Agencies must "issue instructions and guidelines necessary to effectuate this chapter" and "take steps to assure that all its employees and officers responsible for the collection, maintenance, use and dissemination of government records are informed of the requirements of this chapter." **HRS** Section 92F-18(a). "That type of letter involving recognition of pre-existing lots," acknowledged Yuen, "would be kept in what the people in the department call a TMK file[.]" Doc 59, Ex. 4 at 24. TMK files are consulted by planning officials, judges, litigants, owners, sellers, purchasers, lessors, lessees, reporters, and title companies. Under 5 **U.S.C.** Chapter 552a, the federal counterpart to Hawaii's UIPA, and cited by the ICA, "every federal agency is obligated to ensure that information compiled in individuals' records . . . is accurate, relevant, timely and complete." **Hewitt v. Grabicki**, 794 F.2d 1373, 1379 (9th Cir. 1986); *see also* **Rouse v. United States**, 537 F.3d 408, 409 (9th Cir. 2009) ("provides agencies with detailed instructions for managing their records"); **Rose v. United States**. 905 F.2d 1257, 1259 (9th Cir. 1990) ("[the agency] failed accurately to maintain or timely provide five specific forms necessary to [claim] disability compensation.")

Sixth, documents reflecting County-approved subdivisions, like the deeds, easements,

liens, mortgages and subdivisions recorded at the Bureau of Conveyances, affect the value and use of all Hawaii real estate, and "ensure that the public [will] be afforded notice of the property interests detailed in the deeds and of potential claims to the property." **Wailuku Agribusiness v. Ah Sam**, 114 Hawai'i 24, 36, 155 P.3d 1125 (2007). Recordation and access "serve as notice to those who are bound to search the records." *Id*., *citing* **Petran v. Allencastre**, 91 Hawai'i 545, 556 n.20, 985 P.2d 1112 (App. 1999). "The registrar shall make and keep . . . permanent records of . . . every deed and instrument left for record[.]" **HRS** Section 502-11. The same public policy prescribing accurate and permanent record keeping in **HRS** Chapter 502 applies to subdivision correspondence and maps in county planning departments.

Seventh, the lower court granted summary judgment, in part, because"[i]mposing a duty of care to maintain Planning Department records with reasonable accuracy invites unremitted [sic] liability." Exhibit B at 2. The ICA offered similar dire warnings. *See* Exhibit D at 5 ("the County would be confronted with an unmanageable, unbearable and totally unpredictable liability.") The mere fact that no Hawaii appellate decisions exist addressing whether county agencies have a duty to maintain existing records, however, suggests such cases are rare. With respect, Judge Nakamura and the ICA exaggerate the consequences of recognizing a duty of reasonable care in this case. Contrary to the ICA's assertion, Molfino is not asking the County to "maintain its records with unerring accuracy" or "be an insurer of all the dangers of modern life." Exhibit D at 5. He merely asks that when an agency establishes a filing system, bases its decisions on those files, and provides access to applicants seeking relief, *that it take reasonable steps* to make them accurate, complete and accessible to itself and the public. OB at 31.

Finally, the ICA's five-page analysis disregards most of the State and county laws addressing county records, and virtually all of the policy arguments and authority raised on appeal, claiming they were not raised below. *See* Exhibit D, n.3. "Molfino argued [below] that Appellees have a duty to maintain records based on **Planning Department Rules of Practice and Procedure** Section 1-8," the ICA declares, "on appeal, Molfino contends that various other statutes impose a duty upon Appellees to maintain records." *Id*. "[A]n argument not raised in the lower court will be deemed to have been waived on appeal." *Id*. With respect, **HRS** Chapter 92F, Hawaii's **Uniform Information Practices Act**, *contains most of the statutes addressed in the Opening Brief*, and it was cited by the County in its motion for summary judgment, where it argued, "[e]ven under **HRS**

Chapter 92F, there is no duty to maintain records." *See* Doc 57, Memo at 3 n.1, *citing* **Nuuanu Valley Ass'n v. City and County**, 119 Hawai'i 90, 97 194 P.3d 531 (2008); *see also* Doc 60 at 4 ("[the] **Uniform Information Practices Act** only imposed a duty to provide access to records, not a duty to maintain records.") Indeed, the ICA itself observed, "Section 1-8 is similar to the **Uniform Information Practices Act**, codified at **HRS** Chapter 92F, and the **Federal Freedom of Information Act**, 5 **U.S.C**. Section 552." Exhibit D at 4. Clearly those laws were before the court when it ruled, and reviewed by the ICA. *Id*. Moreover, the County posed countless arguments in support of summary judgment below (most of which were ignored by Judge Nakamura and the ICA), requiring countless counter-arguments in Molfino's opposition papers. Docs 32, 34, 57, 59. Indeed, only five pages in the Answering Brief addressed duty of care, the only issue addressed by the ICA. AB at 17-21. Regardless, the issue argued by Molfino below and on appeal, is that the Hawaii Planning Department has a duty to maintain existing subdivision records with reasonable care, and citing additional statutes, ordinances and department rules addressing government records does not constitute "raising an issue for the first time on appeal." Exhibit D at 4. "Whether there is a duty of care owed by the government tortfeasor to the injured party should be determined by an analysis of legislative intent of the applicable statute or ordinance." **Cootey**, 68 Haw. at 485. **Coutey** therefore requires consideration of any State or local law addressing existing County records, and not just Section 1-8 of the **Planning Department Rules of Practice and Procedure**. That is especially true when the trial court finds, in its order granting summary judgment, that no such duty has ever been "imposed by a legislative body." Exhibit B at 3.

V.

CONCLUSION

Based on the above, this Court is respectfully requested to accept certiorari, find that the Hawaii County Planning Department has a duty of care to preserve existing subdivision records, vacate the judgment and order granting summary judgment on Count V, and remand for trial.

DATED: December 9, 2013, in Honolulu, Hawaii.

Respectfully submitted:

___/S/ (Peter Van Name Esser)___
Peter Van Name Esser
Attorney for Plaintiff-Appellant and Petitioner
GEOFFREY MOLFINO

SCWC NO. 10-150

IN THE SUPREME COURT OF THE STATE OF HAWAII

GEOFFREY MOLFINO, Plaintiff-Appellant and Petitioner, vs. CHRISTOPHER J. YUEN, in his capacity as Planning Director for the County of Hawaii, and COUNTY OF HAWAII, Defendants-Appellees and Respondents.	)	CIVIL NO. 07-1-0378 APPLICATION FOR WRIT OF CERTIORARI FROM THE SUMMARY DISPOSITION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS, FILED ON AUGUST 28, 2013. HAWAII INTERMEDIATE COURT OF APPEALS HON. KATHERINE G. LEONARD HON. LAWRENCE M. REIFURTH HON. LISA M. GINOZA Associate Judges

CERTIFICATE OF SERVICE

The undersigned hereby certifies that counsel for the opposing parties were served on December 9, 2013, though counsel, with the above entitled document, by electronic filing in the JEFS System at the address provided in the court record:

LAUREEN LEE MARTIN
MICHAEL J. UDOVIC
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DATED: December 9, 2013 in Honolulu, Hawaii.

_____/S/ (Peter Van Name Esser)_____
Peter Van Name Esser