Electronically Filed
Supreme Court
SCWC-10-0000150
18-DEC-2013
08:58 AM

SCWC-10-0000150

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

GEOFFREY MOLFINO,

Petitioner/Plaintiff-Appellant

vs.

CHRISTOPHER J. YUEN in his capacity as Planning Director, County of Hawai‘i; COUNTY OF HAWAI‘I; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL UNITS 1-10; and DOE ENTITIES 1-10,

Respondents/Defendants-Appellees

CAAP 10-0000150; Civil No. 07-1-0378

RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI FROM THE SUMMARY DISPOSTION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS, FILED ON AUGUST 28, 2013

HAWAII INTERMEDIATE COURT OF APPEALS

HONORABLE KATHERINE G. LEONARD
Presiding Judge
HONORABLE LAWRENCE M. REIFURTH
Associate Judge
HONORABLE LISA M. GINOZA
Associate Judge

RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI FROM THE SUMMARY DISPOSITION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS, FILED ON AUGUST 28, 2013

AND

CERTIFICATE OF SERVICE

LINCOLN S. T. ASHIDA 4478
Corporation Counsel

LAUREEN L. MARTIN 5927
MICHAEL J. UDOVIC 5238
Deputies Corporation Counsel
333 Kilauea Avenue, 2nd Floor
Hilo, Hawai'i 96720
Telephone: (808) 961-8251
Facsimile: (808) 961-8622
E-mail: lmartin@co.hawaii.hi.us

Attorneys for Respondents/Defendants-Appellees
CHRISTOPHER J. YUEN in his capacity as
Planning Director, County of Hawai'i;
and COUNTY OF HAWAI'I

TABLE OF CONTENTS

TABLE OF AUTHORITIES ....i-iii

I. INTRODUCTION 1

II. STATEMENT OF THE FACTS 2-3

III. ARGUMENT 3-15

A. Molfino Makes Numerous Inaccurate and Unsupported Statements 3-4

B. Molfino's Complaint Failed to Allege Liability Based Upon Review of the County Records 5-6

C. Molfino Raised Issues and Arguments Not Raised Below 6-8

D. The County Owed No Duty to Molfino 8-12

1. County Has No Duty to Maintain Pre-Existing Lot Determinations 8-11

2. Molfino's Action is Barred by the Public Duty Doctrine 11

3. The County Has No Duty to Unforeseen Third Parties 12

E. Even Assuming A Duty Did Exist, Summary Judgment Was Still Appropriate 12-15

1. There is No Evidence of a Breach of Duty 13

2. Molfino is Unable to Prove the Element of Causation 13-14

3. Damages Sought by Molfino are Speculative and Not Recoverable 14

4. The County are Entitiled to Qualified Immunity 15

5. Molfino Failed to Exhaust Administrative Remedies 15

6. Molfino's Claim is Barred by the Economic Loss Rule 15

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Acoba v. General Tire, Inc.,
92 Hawai‘i 1, 986 P.2d 288 (1999) 12

Association of Apartment Owners of Newtown Meadows ex rel. v. Venture 15, Inc.,
115 Hawai‘i 232, 167 P.3d 225 (2007) 15

Chun v. Park,
51 Haw. 501, 462 P.2d 905 (1969) 12

City and County of Honolulu v. Bonded Inv. Co., Ltd.,
54 Haw. 414, 507 P.2d 1084 (1973) 14

City Exp., Inc., v. Express Partners,
87 Hawai‘i 466, 959 P.2d 836 (1998) 15

Citizens Against Recklass Development v. Zoning Bd. of Appeals of City & County of Honolulu,
114 Hawai‘i 184, 159 P.3d 143 (2007) 9

Cootey v. Sun Inv., Inc.,
68 Haw. 480, 718 P.2d 1086 (1986) 9, 10, 11

Dlugos v. Zoning Bd. of Appeals of Trumbull,
36 Conn.Supp. 217, 416 A.2d 180 (1980) 3

Hawaii Housing Authority v. Rodrigues,
43 Haw. 195, 1959 WL 11635 (Haw.Terr. 1959) 14

Hawaii Motorsports Inv., Inc. v. Clayton Group Services,
Not Reported in F.Supp.2d, 2009 WL 3109941 (D.Hawai‘i,2009) 12

Kelley v. Kokua Sales & Supply, Ltd.,
56 Haw. 204, 532 P.2d 673 (1975) 8

Kernan v. Tanaka,
75 Haw. 1, 856 P.2d 1207 (1993) 7

Kona Old Hawaiian Trails Group By and Through Serrano v. Lyman,
69 Haw. 81, 734 P.2d 161 (1987) 15

Matter of Cowan v. Kern,
41 N.Y.2d 591, 394 N.Y.S.2d 579 (1977) 3

McGann v. Incorporated Vil. of Old Westbury,
256 A.D.2d 556, 682 N.Y.S.2d 443 (1998) 3

Mednick v. Davey,
87 Hawai'i 450, 959 P.2d 439 (Haw.App.,1998) 6

Namauu v. City and County of Honolulu,
62 Haw. 358, 614 P.2d 943 (1980) 9

Nuuanu Valley Ass'n v. City and County of Honolulu,
119 Hawai'i 90, 194 P.3d 531 (2008) 7, 11

Perry v. Perez-Wendt,
129 Hawai'i 95, 294 P.3d 1081 (2013) 9

Reed v. City and County of Honolulu,
76 Hawai'i 219, 873 P.2d 98 (Haw. 1994) 15

Ruf v. Honolulu Police Dept.,
89 Hawai'i 315, 972 P.2d 1081 (1999) 11

Tabieros v. Clark Equipment Co.,
85 Hawai'i 336, 944 P.2d 1279 (1997) 13

Towse v. State,
64 Haw. 624, 647 P.2d 696, (1982) 15

Waianae Model Neighborhood Area Ass'n, Inc. v. City and County of Honolulu,
55 Haw. 40, 514 P.2d 861 (1973) 12

White v. Sabatino,
526 F.Supp.2d 1143 (D.Haw. 2007) 11

Statutes

Hawai'i Revised Statute
Chapter 92F 7
Chapter 502 6
Chapter 508D 9
§ 46-43 6
§ 92-1 6
§ 92-21 6
§ 92-32 6
§ 92F-2 6
§ 92F-11 .... 6, 7

§ 92F-12 6
§ 92F-13 6
§ 92F-17 7
§ 92F-18 6
§ 92F-27 6
§ 92F-42 6
§ 502-83 6
§ 710-1017 6

Hawaiʻi County Code
Chapter 23 3
§ 2-29 .... 6, 8
§ 23-5 15
§ 23-57 6
§ 23-62 .... 6, 7
§ 23-74 6
§ 23-74(b) 8
§ 23-114 .... 6, 8
§ 23-117 10
§ 23-119 .... 9, 10

<u>Miscellaneous</u>

Hawaiʻi County Planning Department Rules of Practice and Procedure
§ 1-8 .... 6, 7, 8, 9

SCWC-10-0000150

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

GEOFFREY MOLFINO, Petitioner/Plaintiff-Appellant, vs. CHRISTOPHER J. YUEN in his capacity as Planning Director, County of Hawai‘i; COUNTY OF HAWAI‘I; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL UNITS 1-10; and DOE ENTITIES 1-10, Respondents/Defendants-Appellees	CAAP 10-0000150; Civil No. 07-1-0378 **RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI FROM THE SUMMARY DISPOSTION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS, FILED ON AUGUST 28, 2013**

RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI FROM THE SUMMARY DISPOSITION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS, FILED ON AUGUST 28, 2013

I. INTRODUCTION

Petitioner/Plaintiff-Appellant Geoffrey Molfino (“Molfino”) claims society is at risk of collapsing because a letter was temporarily missing from a government file. However, there is nothing particularly unusual or dramatic about a file missing a letter, whether in a private or public office. In contrast, imposing tort liability simply because a file is missing a document will create broad liability which will burden the County of Hawai‘i Planning Department (“County”) and taxpayers. Significantly, the undisputed facts demonstrate Molfino was not damaged. Molfino quickly obtained twice what he paid for it. Molfino agreed to sell the property months prior to the County ever reaching a decision on his request to recognize seven lots. Therefore, the County’s denial had nothing to do with Molfino’s decision to sell his property.

II. STATEMENT OF THE FACTS

On June 13, 2003, Molfino, along with three other individuals, purchased a forty-nine a parcel ("the property") for $350,000.00. DOC-32, ROA at 659-671; ¶ 6 at ROA 752.[1] Apparently wanting to realize an immediate profit, Molfino listed the property for $795,000.00; more than double the amount he had paid. DOC-32, ROA at 678-680; ¶ 21 at ROA 754. After listing the property for sale, Molfino requested a determination from the County that the property consisted of seven pre-existing lots. DOC-32, ROA at 683-684; ¶ 26 at ROA 755.

Prior to receiving a decision from the County regarding his request for pre-existing lots, Michael Pruglo ("Mr. Pruglo") offered to purchase the property for the asking price of $795,000.00.[2] DOC-32, ROA at 687-703. Rather than waiting for a determination from the County, Molfino quickly decided to accept the offer and entered into a binding contract for the sale of the property. DOC-32, ROA at 687-703; ¶¶ 28-34 at ROA 755. [3] Pursuant to the contract, Molfino transferred title to the property in July 2004. DOC-32, ROA at 706-712; ¶ 73 at ROA 761. Shortly before the ownership of the property was legally transferred, but well after Molfino entered into a binding contract to sell the property, the County informed Molfino that based upon the documentation submitted, he was entitled to two lots. DOC-32, ROA at 715; ¶ 68 at ROA 760. However, since Molfino had already entered into a binding contract to sell the property this decision was of no consequence. DOC-32, ¶ 69 at ROA 760.

[1] "DOC" refers to the docket number and "ROA" refers to the record on appeal.
[2] Both Mr. Pruglo and Molfino purchased the property anticipating they could subdivide it. DOC-32, ROA at 683-684, 731, 833-834.
[3] This is contrary to the complaint which states he decided to sell the property after receiving the decision. DOC-1, ROA at 24-36. When confronted with the contract, Molfino admitted he entered into the binding contract prior to receiving the County's decision. DOC-57, ¶ 53 at ROA 758; ¶ 70 at ROA 760.

Sometime later, Molfino learned that Mr. Pruglo, the new owner, had obtained permission to have the property declared six pre-existing lots. DOC-59, ¶ 17 at ROA 897. This determination was made when the new owner provided additional documentation to the County, documentation which Molfino failed to submit with his request.[4]

III. ARGUMENT

A. Molfino Makes Numerous Inaccurate and Unsupported Statements

Molfino's brief contains numerous inaccurate and unsupported statements, including the following:

1. The missing letter granted subdivision approval. The letter was merely a pre-existing lot determination which is separate from the subdivision process. A pre-existing lot determination simply recognizes that the property consists of more than one lot. *See* Chapter 23 of the Hawai'i County Code ("HCC"). Molfino never submitted a subdivision application, nor did the prior owners. DOC-59, ¶ 11 at ROA 895; ROA at 905-907. Molfino's own letter recognizes he was not seeking subdivision approval. DOC-59, ROA at 683-684.

[4]In 2000, the County granted a request by the prior owner to recognize six pre-existing lots. The letter containing this determination was temporarily absent from the County's file. DOC-1, ROA 24-36. Molfino failed to provide this letter to the County. DOC-1, ROA at 24-36. However, when Mr. Pruglo, the subsequent purchaser, submitted his request for six pre-existing lots, he provided the letter to the County. DOC-1, ¶ 21 at ROA 28. The HCC provisions related to pre-existing lots were enacted and/or revised in 2002, two years after the 2000 determination which likely explains the inconsistent decisions. The mere fact that one property owner receives a benefit while another is denied, does not constitute a basis for legal action. *See Matter of Cowan v. Kern*, 41 N.Y.2d 591, 595, 394 N.Y.S.2d 579 (1977); *McGann v. Incorporated Vil. of Old Westbury,* 256 A.D.2d 556, 558, 682 N.Y.S.2d 433, 447 (1998)(mere fact prior owner of property obtained variance did not give vested right to similar benefit); *Dlugos v. Zoning Bd. Of Appeals of Trumbull*, 36 Conn.Supp. 217, 222, 416 A.2d 180, 183 (1980). Pursuant to his policy, Defendant Yuen chose to honor the prior determination when the subsequent purchaser produced the 2000 decision.

2. In addition to the missing letter, other documents were also missing from the file, including land grants and a map. Brief at 7, n.1. However, these land grants and map were apparently attached to the letter, not separate documents in the file. DOC-59, ROA at 904-907.

3. 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 might never have been filed." Brief at 9. Molfino filed the lawsuit against the County for one purpose, to obtain millions of dollars. DOC-1, ROA at 24-36. This lawsuit is not about hurt feelings because of the lack of remorse or failing to launch an investigation as to why a letter might have been missing from a file. Molfino never asked the County to apologize or investigate what had happened. Rather, Molfino filed the lawsuit seeking millions of dollars and does not complain about a lack of "remorse" or the failure to investigate. Instead, the only remedy Molfino seeks is money. *Id.*

4. Future owners, sellers, buyers, lessors, lessees, legislators and judges rely upon these records. Brief at 13. Molfino fails to cite to the record for support. The planning file is kept by the County for its internal purposes. DOC-1, ¶ 14 at ROA 27. There is no evidence it is relied upon by judges, legislators, owners, sellers, lessors, and lessees.[5]

5. The Circuit Court did not "change its mind". Based upon Molfino's assertion that his negligence claim hinged upon a missing letter, the Circuit Court refused to dismiss the negligence claim as to the June 2, 2004 letter because it was intertwined with the alleged failure to properly maintain the file, which was not before the Court at that time. DOC- 50, ¶ 5 at ROA 588-589. Therefore, the Court did not rule Molfino's claim based had merit. Rather, the Court did not want to enter judgment on a portion of the negligence claim.

---

[5]Perhaps Molfino was confusing the Planning Department file with the property files kept by the Real Property Division, which is presumably relied upon more frequently by the public.

B. Molfino's Complaint Failed to Allege Liability <u>Based Upon Review of the County Records</u>

Molfino claims he repeatedly reviewed the file and even copied the entire file.[6] However, Molfino admits he purchased the property with the intention of subdividing it into seven lots. DOC-59, ¶ 7 at ROA 894. Molfino even wrote to the County arguing he was entitled to seven pre-existing lots. DOC-32, ROA at 683-684.

Importantly, the Complaint is devoid of any allegations that Molfino had examined the file at the Planning Department and relied upon the absence of information in the file. DOC-1, ROA at 24-36. In fact, the allegations in the Complaint are inconsistent with this contention.

Paragraph 14 of the Complaint states:

> Plaintiff Molfino is **<u>informed and believes</u>** and thereon alleges that, the May 22, 2000 letter prepared by the Planning Department was absent from the official Hawai'i County Public record maintained by the Hawai'i County Planning Department during the period June 13, 2004 through July 19, 2004 (emphasis added). DOC-1, ROA at 27.

Therefore, rather than asserting that Molfino had reviewed the file and determined a letter was absent from it, Molfino alleged he had been "informed" a letter was missing. The Complaint then states: "…Shirai examined the Subject Property's file at the Planning Department…" DOC-1, ¶ 15 at ROA 27. Nowhere in the Complaint does Molfino ever allege he had repeatedly reviewed the file and relied upon the lack of a letter being part of the file.

Instead, the sole basis for the negligence claim is the alleged wrongful determination for recognizing only two pre-existing lots. DOC-1, ROA at 32-33. Molfino alleged that upon receiving this wrongful determination he sold the property to Mr. Pruglo. DOC-1, ¶ 19 at ROA 28. However, during discovery it became apparent that Molfino had entered into a binding contract to sell the property months before he received the decision. DOC-32, ROA at 687-703,

---

[6]One wonders why it would have been necessary to review the file more than one time, particularly if Molfino had obtained a copy of the "entire file". Such repeated inspections indicate that Molfino expected the contents of the file to change.

715; ¶ 34 at ROA 755; ¶ 68 at ROA 760. As a result, it was impossible for the County's decision to be the cause of Molfino's sale four months earlier. After Molfino admitted the County's decision had come after his decision to sell the property, Molfino began arguing he had repeatedly reviewed the file at the Planning Department and had relied upon the absence of the letter. It is this belated theory which now serves as the basis for Molfino's negligence claim. However, as noted, this theory is not contained in the Complaint. In reviewing an award of summary judgment, the Appellate Court must first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. *Mednick v. Davey*, 87 Hawai'i 450, 457, 959 P.2d 439, 446 (Haw.App.,1998). Therefore, Molfino's alleged review of the file and any negligence claim which flows from it cannot provide a basis to reverse the decision.

C. <u>Molfino Raised Issues and Arguments Not Raised Below</u>

Molfino attempts to rely upon various statutes which he now claims imposes a duty upon the County to perfectly maintain all records, no matter how old. Molfino relies upon Hawai'i Revised Statutes ("HRS") § 46-43,[7] HRS § 92-1, HRS § 92-21, HRS § 92-32, HRS § 92F-2, HRS § 92F-11, HRS § 92F-12, HRS § 92F-13, HRS § 92F-18, HRS § 92F-27, HRS § 92F-42, HRS § 710-1017, HCC § 2-29, § 23-57, § 23-62, § 23-74, § 23-114 .[8] Brief at 10-11, 14-15. Molfino criticizes the Intermediate Court of Appeals ("ICA") for relying solely upon §1.8 of the Planning Department Rules ("Planning Rules"). Brief at 15. However, this rule was the only legal basis Molfino provided to the Circuit Court to impose a duty. DOC-59, ROA at 880. Molfino never argued below that any other statute or rule was applicable and imposed a duty for

[7]HRS § 46-43 applies to fiscal records of the Counties. Therefore, it is inapplicable to an internal Planning Department file.

[8]Molfino also relies upon HRS Chapter 502 regarding the Bureau of Conveyances. These provisions are clearly not applicable to an internal file kept at the Planning Department. The Bureau of Conveyance has a unique role in property ownership and is designed to protect good faith purchasers. *See* HRS § 502-83.

the County to maintain its records in perfect order.[9] DOC-59, ROA at 880. This was consistent with Molfino's answers to interrogatories which also only referenced § 1-8 of the Planning Rules. DOC-59, ¶ 30 at ROA 727. Molfino's failure to raise these issues below precluded the ICA from considering them. *Kernan v. Tanaka*, 75 Haw. 1, 35, 856 P.2d 1207, 1224 (1993).

However, even if the ICA were to consider these new arguments, Molfino was still unable to prevail. Molfino argues that Chapter 92F, the Uniform Information Practices Act ("UIPA") imposes a duty upon the County to keep records accurate and complete. However, UIPA does not obligate agencies to create or retain documents. This Court noted:

> … should we construe HRS § 92F-11 as imposing a requirement upon a government agency to "maintain" a report the moment that the agency receives it, we would be imposing an "affirmative obligation" upon the agency, which is contrary to this court's conclusion that the UIPA simply requires *access* to those records the agency has in fact "maintained. Accordingly, whether the engineering reports are "actually maintained" by [the agency] depends on whether [the agency] chose to retain possession or control of the records (internal citations and quotations omitted).

Nuuanu Valley Ass'n v.City and County of Honolulu, 119 Hawai'i 90, 97, 194 P.3d 531, 538 (2008).

Therefore, Chapter 92F does not provide any obligation to maintain records. Furthermore, it should be noted the remedy for a violation of Chapter 92F are listed in HRS § 92F-17. There is nothing within HRS § 92F-17 which provides any relief for individuals who claim to have been damaged as a result of a government agency having an incomplete file.

Similarly, sections of the HCC cited by Molfino are inapplicable because none of these provisions relate to a pre-existing lot determination which is at issue here. For example, HCC § 23-62 provides only to the tentative approval of "the preliminary plat" of a subdivision, HCC

[9]Molfino argues that in addition to the rule, Chapter 92F was raised below. However, as Molfino admits, it was not raised by him. Therefore, he never argued Chapter 92F created a duty below. Brief at 15-16.

§ 23-114 requires the applicant to file a map relative to a "farm subdivision, HCC § 23-74(b) applies to the "final approval" of a plat, and HCC § 2-29 applies to records of the Windward and Leeward Planning Commissions, not the Planning Department. As noted, the 2000 determination simply recognized six pre-existing lots. It was not an application or approval of a subdivision. As a result, these newly relied upon provisions are inapplicable and impose no duty upon the Planning Department to keep a flawless file. Molfino has cited virtually every statute, HCC provision or Planning Rule which references information or documents in any manner. Despite the plethora of citations, Molfino's exhaustive search has come up empty. The inescapable conclusion is that there is no statute, HCC provision or Planning Rule which imposes a duty upon the County to maintain its records in flawless condition.

D. The County Owed No Duty to Molfino

The scope of a duty of care is subject to limitation because without a reasonable and proper limitation on the scope of duty, the defendants would be confronted with an unmanageable, unbearable, and totally unpredictable liability.[10] *See Kelley v. Kokua Sales & Supply, Ltd.,* 56 Haw. 204, 209, 532 P.2d 673, 676 (1975). The County owed no duty to Molfino because: 1) the County does not have a duty to maintain every record which it ever possessed; 2) the County has a duty to act for the benefit of the general public rather than Molfino specifically; and 3) the duty does not extend to unforeseen individuals.

1. County Has No Duty to Maintain Pre-Existing Lot Determinations

Molfino argues the County has a duty to maintain pre-existing lot determinations based upon Planning Rule § 1-8, entitled "Public Records". DOC-32, ¶ 30 at ROA 727. However, § 1-8 does not require the County to maintain records. Rather it merely states "[a]ll public records

[10]Molfino appealed the summary judgment as to the negligence claim only. DOC-66, ROA at 1023-1028. All other claims were dismissed previously. DOC-50, ROA at 586-589.

shall be available for inspection by any person…" DOC-32, ROA at 859. While § 1-8 creates a duty to ***disclose*** public records, there is no corresponding duty to ***maintain*** those records. Importantly, HCC § 23-119 requires applicants, ***not the County***, to provide reasonable proof for a pre-existing lot certification. Therefore, Molfino had an affirmative obligation to provide sufficient evidence to demonstrate he was entitled to seven pre-existing lots. DOC-32, ROA at 860-861. It is undisputed Molfino never provided the County with the 2000 letter which purported to grant six pre-existing lots. Therefore, it was reasonable for the County to believe that no pre-existing lot determination had previously been made. After all, if one had been granted, why would the owner apply for it again or at the very least wouldn't it be included in the current request? It is not unreasonable to expect the property owner to be the most knowledgeable as to his own property.[11]

Whether there is a duty of care owed is generally determined by an analysis of legislative intent.[12] *Cootey v. Sun Inv., Inc.,* 68 Haw. 480, 485, 718 P.2d 1086, 1091 (1986). The duty only extends to those persons whose protection or benefit the statute was enacted for and only for injuries of the character it was designed to protect against. *Namauu v. City and County of Honolulu,* 62 Haw. 358, 362, 614 P.2d 943, 946 (1980).

> The permit process by which the County approves or disapproves the development of a proposed subdivision reflects an effort by government to require

---

[11]It is the seller of real property that has an affirmative duty to disclose material information to the buyer. *See* HRS Chapter 508D. Therefore, it is the individual who sold the property to Molfino who owed a duty to Molfino, not the County.

[12]Molfino attempts to find fault with the ICA for not examining legislative history. However, Rule § 1-8 is clear on its face. When the plain language of a statute or ordinance is clear, no ambiguity exists the legislative history need not be consulted, as no interpretation is required. *See Perry v. Perez-Wendt,* 129 Hawai'i 95, 294 P.3d 1081 (2013); *Citizens Against Reckless Development v. Zoning Bd. of Appeals of City & County of Honolulu,* 114 Hawai'i 184, 193, 159 P.3d 143, 152 (2007)(where language is plan and unambiguous the sole duty is to give effect to meaning). Importantly, Molfino does not identify any legislative history which mandates a different outcome.

> the developer to meet his responsibilities under the subdivision rules, regulations, and laws. We hold that the primary responsibility of providing an adequate and safe development rests with Sun Investment, the developer, *and not with the County* (emphasis added).

Cootey v. Sun Inv., Inc., 68 Haw. 480, 485, 718 P.2d 1086, 1091 (1985).

The responsibility of providing adequate and reasonable proof of compliance rests with the applicants, not the County. The purpose of the pre-existing lot ordinance "is to specify the criteria by which a pre-existing lot may be recognized and to state how certain uses will be accounted for during a consolidation/resubdivision action." *See* HCC § 23-117 (2000); DOC-32, ROA at 860-861. Rather than creating a duty upon the County, the provisions regarding the determination of a pre-existing lot creates a duty upon the applicant to provide proof of a pre-existing lot. *See* HCC § 23-119 (2000); DOC-32, ROA at 860-861.

Another factor is "how far it is desirable and socially expedient to permit the loss of distributing function of tort law to apply to governmental agencies, without thereby unduly interfering with the effective functioning of such agencies for their own socially approved ends." *Cootey,* 68 Haw. at 485, 718 P.2d at 1091. "Without a reasonable and proper limitation of the scope of duty of care owed…the County would be confronted with an unmanageable, unbearable, and totally unpredictable liability." *See id.* at 484, 718 P.2d at 1090. Holding the County liable to third parties, such as Molfino, for the maintenance of records would "be impermissibly reallocating the County's resources, reordering its priorities, and setting policies that more rightly belongs to the legislative body of the County." *See id*. at 486, 718 P.2d at 1091. Doing so would expose the County to potentially infinite liability, given the number of its transactions and the length of time that it has been conducting such transactions. The increased liability would also "unduly lengthen the permit process, or could very well dissuade the County from enacting rules, regulations and laws applicable to proposed subdivisions and intended for

the protection and welfare of the public, a result contrary to the public interest." *Cootey,* 68 Haw. at 486, 718 P.2d at 1091. Therefore, the ICA appropriately concluded:

> 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.
>
> Molfino's Appendix D at 5.

The ICA recognized the burden imposing such a duty would create upon the County and is consistent with *Nuuanu Valley Ass'n v. City and County of Honolulu*, 119 Hawai'i 90, 97, 194 P.3d 531, 538 (2008). In *Nuuanu Valley*, this Court held the State Uniform Information Practices Act only imposed a duty to provide access to records, not a duty to maintain records. The Court noted the government is not obligated to create or retain documents. Rather, it is only obligated to provide access to the records which have been retained. *Id.* This Court's decision is in accord with the U.S. Supreme Court which had reached a similar conclusion relative to the Freedom of Information Act. *Id.* Similar to state and federal law, the Planning Rules only requires the County to make records accessible.

2. Molfino's Action is Barred by the Public Duty Doctrine

Under the public duty doctrine, a municipality is deemed to act for the benefit of the general public rather than specific individuals. *Ruf v. Honolulu Police Dept.,* 89 Hawai'i 315, 322 n.5, 972 P.2d 1081, 1088 (1999). Molfino is asking this Court to create a duty to maintain records in order to optimize profits for investment speculation. However, imposing such a broad duty would expose the County to "unmanageable and unpredictable liability, which would inhibit and interfere with the… promulgation and enforcement of beneficial rules and thus hurt the public's interest." *White v. Sabatino*, 526 F.Supp.2d 1143, 1158 (D.Haw. 2007).

3. The County Has No Duty to Unforeseen Third Parties

It is a well settled principle in Hawai‘i that an "actionable duty is generally owed to a foreseeable plaintiff subjected to an unreasonable risk of harm created by the actor's negligent conduct." *Acoba v. General Tire, Inc.,* 92 Hawai‘i 1, 18, 986 P.2d 288, 305 (1999). As to records, a duty only exists to the original parties to the transaction. There is no duty to a third party unrelated to the original transaction. *Chun v. Park*, 51 Haw. 501, 462 P.2d 905 (1969), *see also, Hawaii Motorsports Inv., Inc. v. Clayton Group Services,* Not Reported in F.Supp.2d, 2009 WL 3109941 (D.Hawai‘i,2009)(not duty because no relationship between defendant and seller).

In the instant case, the 2000 letter was intended to influence only the individuals involved with that transaction, i.e., the owner who requested the determination and could have sought consolidation and re-subdivision. However, that owner chose not to do so preferring instead to sell the property to Mr. Steven Shropshire ("Mr. Shropshire"). Mr. Shropshire then sold the property to Molfino who then sold to Mr. Pruglo. It is this last transaction, the sale to Mr. Pruglo, which Molfino alleges the County breached their duty and caused him damage. However, the prior determination is simply too far removed. The determination was clearly *not* for Molfino's benefit, nor intended to influence a transaction several times removed from the original parties.

E. Even Assuming A Duty Did Exist, Summary Judgment Was Still Appropriate

An appellate court may affirm summary judgment on any ground which appears in the record, regardless of whether the Circuit Court relied upon it. *Waianae Model Neighborhood Area Ass'n, Inc. v. City and County of Honolulu*, 55 Haw. 40, 43, 514 P.2d 861, 864 (1973).

1. **There is No Evidence of a Breach of Duty**

As noted, the breach of a duty owed is an essential element of negligence. *Tabieros v. Clark Equipment Co.,* 85 Hawai'i 336, 353, 944 P.2d 1279, 1296 (1997). Therefore, even if Molfino is able to prove that a duty does exist, Molfino must also prove the County breached that duty. In the present case, there is no evidence to establish negligence on the part of the County. At best, Molfino can only show a letter was not in a file at the Planning Department. However, the letter may have been absent from the file for a variety of reasons which do not constitute negligence. For example, personnel within the County needed those documents to perform their duties, the documents were being archived, the documents were being destroyed pursuant to a document retention policy or someone from the public wrongfully removed the documents. Simply because the letter was not in the file at a certain period of time does not equate to negligence by the County. Therefore, there is no evidence that the County breached their duty and negligently maintained the file.

2. **Molfino is Unable to Prove the Element of Causation**

Four months prior to the June 2004 determination, Molfino entered into a binding contract to sell the property for more than twice his purchase price. DOC-32, ¶¶ 69-71 at ROA 760-761. Therefore, it is impossible for the June 2004 determination to have been a substantial factor in any alleged damages. Molfino also makes the argument that since he reviewed the file at the Planning Department and the 2000 letter was not in the file, he believed he could not subdivide the property into six lots. No reasonable person would review a file and conclude they were unable to subdivide simply because there was nothing in the file indicating one way or the other. In fact, Molfino admits he did not have such a belief. Molfino alleges he reviewed the file prior to purchasing the property. DOC-32, ROA at 732. However, despite this review, he purchased the property as an "investment" and intended to subdivide into "saleable residential

lots". DOC-32, ROA at 731. His belief is clearly evidenced by his letter requesting the County recognize seven lots. DOC-32, ROA at 683-684. Therefore, the earliest possible time which Molfino could have believed he was not entitled to seven lots was after he received the June 2004 determination from the County, four months after Molfino had entered into a binding contract to sell the property, four months too late to be the proximate cause of any damages.

3. Damages Sought by Molfino are Speculative and Not Recoverable

Molfino seeks $2.2 million which he claims he would have received had he subdivided the property into seven lots. DOC-32, ¶ 4, ROA at 652. However, damages based upon the possibility of subdivision are too speculative cannot be awarded. *See, Hawaii Housing Authority v. Rodrigues*, 43 Haw. 195, 1959 WL 11635 (Haw.Terr. 1959)(evidence property could be subdivided too speculative as a matter of law); *City and County of Honolulu v. Bonded Inv. Co., Ltd.,* 54 Haw. 414, 507 P.2d 1084, 1089 (1973)(anticipated profits from a planned beachfront condominium were "too uncertain and speculative" to be awarded). Molfino's damages are even more speculative than those in *Rodrigues* or *Bonded Inv.,* because unlike those property owners, Molfino took no steps to subdivide. In fact, Molfino has no idea how many lots he would have, the size of the lots, what homes would be on each lot or the costs associated with the potential subdivision. DOC-32, ¶¶ 2-4 at ROA 766-767. The absurdity of Molfino's claim becomes apparent in light of Mr. Pruglo's plight. Had Molfino been granted six lots, he would likely have ended up in foreclosure like Mr. Pruglo.[13]

---

[13]Molfino claims Pruglo sold three of the six lots for approximately $350,000 each. This is based upon Molfino's declaration. Brief at 8. However, Molfino does not have personal knowledge to support this statement. Mr. Pruglo testified he sold one lot for $315,000 and traded one lot to the person assisting him with the subdivision. DOC-32, ROA 834-837. Mr. Pruglo also testified about the financial difficulties he experienced because of the pending lawsuits. DOC-32, ROA 849-850. As a result, Mr. Pruglo and his daughter's homes were in foreclosure. DOC-32, ROA 849. Mr. Pruglo also testified to significant expenses he incurred to subdivide the property. DOC-32, ROA 836-837.

4. <u>The County are Entitled to Qualified Immunity</u>

The government employee is entitled to qualified immunity unless the plaintiff can show by clear and convincing proof that the employee acted maliciously. *Towse v. State,* 64 Haw. 624, 631, 647 P.2d 696, 702 (1982). Rather than producing clear and convincing proof that Defendant Yuen was motivated by malice, Molfino admitted Defendant Yuen was ***<u>not</u>*** motivated by malice. DOC-32, ¶ 29 at ROA 727. Therefore, Defendant Yuen is entitled to qualified immunity. Since Defendant Yuen cannot be liable, the County is likewise not liable. *See, Reed v. City and County of Honolulu*, 76 Hawaiʻi 219, 227, 873 P.2d 98, 106 (Haw. 1994)("if an employee is immune from suit, then the employer is also immune from suit and cannot be held liable").

5. <u>Molfino Failed to Exhaust Administrative Remedies</u>

HCC § 23-5 requires a person aggrieved by a decision to file appeal within thirty days to the board of appeals. It is undisputed that Molfino never filed an appeal with the County of Hawaiʻi Board of Appeals ("BOA") after receiving the June 2004 letter. DOC-32, ROA at 737. Exhaustion of administrative remedies is required "where a claim is cognizable in the first instance by an administrative agency alone..." *Kona Old Hawaiian Trails Group By and Through Serrano v. Lyman,* 69 Haw. 81, 93, 734 P.2d 161, 169 (1987).

6. <u>Molfino's Claim is Barred by the Economic Loss Rule</u>

Molfino alleges the County's negligence caused him to lose two million dollars in "lost profits". DOC-32, ¶ 4 at ROA 652. However, the economic loss rule precludes a plaintiff from recovering purely economic losses in tort. *City Exp., Inc. v. Express Partners,* 87 Hawaiʻi 466, 469, 959 P.2d 836, 839 (1998), *see also, Association of Apartment Owners of Newton Meadows ex rel. v. Venture 15, Inc.*, 115 Hawaiʻi 232, 289, 167 P.3d 225, 282 (2007)("buyer's desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects").

IV. CONCLUSION

The ICA correctly affirmed the Circuit Court grant of summary judgment. The Planning Department did not owe a duty to Molfino to maintain its file in flawless condition. Such a duty would impose an impossible burden upon the government and result in unlimited liability. However, even assuming the ICA did err and the County owed such a duty, summary judgment was still appropriate since Molfino is unable to prove any of the essential elements of his negligence claim. Therefore, there is no reason to for this Court to accept certiorari.

Dated: Hilo, Hawai'i, December 18, 2013

Respectfully Submitted:

CHRISTOPHER J. YUEN in his capacity as
Planning Director, County of Hawai'i and
COUNTY OF HAWAI'I, Defendants

By___/s/ Laureen L. Martin __________
LAUREEN L. MARTIN
Deputy Corporation Counsel
Their Attorney

SCWC-10-0000150

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

GEOFFREY MOLFINO, Petitioner/Plaintiff-Appellant, vs. CHRISTOPHER J. YUEN in his capacity as Planning Director, County of Hawaiʻi; COUNTY OF HAWAIʻI; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL UNITS 1-10; and DOE ENTITIES 1-10, Respondents/Defendants-Appellees.	CAAP 10-0000150; Civil No. 07-1-0378 **RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI FROM THE SUMMARY DISPOSTION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS, FILED ON AUGUST 28, 2013**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 18, 2013, a copy of the foregoing document was served upon the following by the method of service noted below:

Served electronically through JEFS:

PETER VAN NAME ESSER
Suite 400, Seven Waterfront Plaza
500 Ala Moana Boulevard
Honolulu, HI 96823

peteresser@mac.com

Dated: Hilo, Hawaiʻi, December 18, 2013.

_____/s/ Laureen L. Martin ______
LAUREEN L. MARTIN
Deputy Corporation Counsel