

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

DOUGLAS LEONE AND	) Civil No. 07-1-0496(3)
PATRICIA A. PERKINS-	) (Other Civil Action)
LEONE, as Trustees under	)
that certain unrecorded	) ORDER GRANTING
Leone-Perkins Family	) DEFENDANTS' MOTION
Trust dated August 26,	) TO DISMISS COMPLAINT
1999, as amended,	) FILED NOVEMBER 19,
	) 2007 OR IN THE
Plaintiffs,	) ALTERNATIVE, MOTION
	) FOR SUMMARY
vs.	) JUDGMENT OR PARTIAL
COUNTY OF MAUI, a	) SUMMARY JUDGMENT;
political subdivision of the	) CERTIFICATE
State of Hawaii; JEFFREY	) OF SERVICE
S. HUNT, in his capacity as	)
Director of the Department	)
of Planning of the County of	)
Maui, DOE ENTITIES 1-50;	)
	)
Defendants.	)

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**ORDER GRANTING DEFENDANTS' MOTION  
TO DISMISS COMPLAINT FILED NOVEMBER  
19, 2007 OR IN THE ALTERNATIVE,  
MOTION FOR SUMMARY JUDGMENT  
OR PARTIAL SUMMARY JUDGMENT**

Defendants COUNTY OF MAUI and JEFFREY S. HUNT'S ("Defendants") motion to dismiss complaint filed November 19, 2007 or in the alternative, motion for summary judgment or partial summary judgment

was heard on February 20, 2008 and December 12, 2008.

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[9] III. STANDARD OF REVIEW

Review of a motion to dismiss for lack of subject matter jurisdiction “is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. Dismissal is improper unless ‘it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.’” *Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 240, 842 P.2d 634, 637 (1992), *aff’d*, 512 U.S. 246 (1994). Further “when considering a motion to dismiss pursuant to Rule 12(b)(1) the [trial] court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.” *Id.* “Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.” *Hawaii Rules of Civil Procedure* Rule 12(h)(3).

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[17] DATED: Wailuku, Hawai‘i, March 2, 2009

/s/ Joseph E. Cardoza [SEAL]  
JUDGE OF THE ABOVE-  
ENTITLED COURT

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

_____	)	
Douglas Leone and	)	
Patricia A. Perkins-Leone,	)	
Trustees,	)	
	)	
Plaintiffs,	)	CIVIL NO: 07-1-0496(2)
vs.	)	
County of Maui, et al.,	)	
	)	
Defendants.	)	
_____	)	

TRANSCRIPT OF PROCEEDINGS

had before the Honorable Peter T. Cahill, Circuit Court Judge presiding, on Wednesday, April 15, 2015. A.M. Session. Jury Trial.

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[13] Q. And can you tell us what kind of information would be contained in P-240?

A. Property record cards contain the information that we have on file for each parcel – it contains the information that we have for each parcel in a report format.

Q. And is this a certified copy of – is P-240 a certified copy of the property cards for Lot 15?

A. Yes.

MS. ROSENBLATT: Your Honor, I move P-240 into evidence.

THE COURT: Mr. Bilberry?

MR. BILBERRY: I'm going to object as to relevance.

THE COURT: May I see that document, please. Thank you.

Can you step down, Ms. Martin, for a moment. Stand over there.

And would counsel please come up.

(The following was held at the bench outside the hearing of the jury.)

THE COURT: The objection is relevance. What is the relevance of this document?

MS. ROSENBLATT: Your Honor, in 2009, the Real Property Tax Division started discounting the assessed value of the land due to restrictions on development. In 2012, they valued it and decreased the assessed value by 90 percent.

[14] THE COURT: They did what?

MS. ROSENBLATT: In 2012, they valued the land and park property and decreased the assessed value by 90 percent.

THE COURT: And what issue does that go to in this case?

MS. ROSENBLATT: Well, under Penn Central, the decline in value of the property is relevant – is a relevant factor.

MR. BILBERRY: Penn Central, you say?

MS. ROSENBLATT: Right.

THE COURT: You still want to object, Mr. Bilberry?

MR. BILBERRY: My objection is withdrawn.

THE COURT: Do I now have to now allow their expert to come in to talk about fair market value of 2014?

MS. ROSENBLATT: No, it's as of the date taken.

MR. BEAMAN: What happened, Your Honor, is in 2009, the County was informed that the owners could make no use of these properties. And the Leone's property was assessed at a significantly lower valuation. In fact, the diminution of value, this witness we expect to testify, was approximately 90 percent, attributable to the fact that no building permit could lawfully be obtained by the owner.

THE COURT: Right.

MR. BEAMAN: In 2012, after Altman got permission to build, the assessment went back up to fair market value because the tax office believed that you could build. So it goes not [15] only to value of the property, it also goes to what residual value the property might have if one is not able to build on the land.

MS. ROSENBLATT: Right. And Yamamura is valuing the land as if you can build a single-family house. So that is not relevant to diminution of value.

THE COURT: I understand the County may be withdrawing the objection. But the bottom line is I don't see how this goes to any issue in this case. The fair market value has to be as of the alleged date of the taking, which is in 2011, the County readjusting the rates. And frankly, this opens up this entire door as to bringing Tom Welch back and his negotiations with the County. It all occurred after the fact. And so the Finance Department assesses it as a park. What does that have to do with any issue in this case?

MS. ROSENBLATT: It's that the diminution is ninety percent is lower, and their expert – the fair market value, assuming that you can build a single-family house.

THE COURT: But that's not coming –

MS. ROSENBLATT: Exactly. But your argument is it would have to come in.

THE COURT: Well, I think it –

MS. ROSENBLATT: – assuming there's no taking.

THE COURT: Well –

MS. ROSENBLATT: – assuming it's a single-family [16] house.

THE COURT: Well, you're assuming there was a taking.

MS. ROSENBLATT: Right. The evidence of valuation is – understanding that there is a taking, how much does the property decline.

THE COURT: I have to tell you, Ms. Rosenblatt, the County – you folks have argued over and over again that this is not a Penn Central case. And now you're telling me, after arguing for years before me that now I have to weigh in evidence that it goes to the Penn Central matter. It's just – the County valued this at less, and now they value it more. That's not evidence of a taking. That's evidence of what the real estate appraiser at the County is saying. The value is for tax purposes, not for use purposes.

MR. BEAMAN: Let me be real clear, Your Honor. This is not a Penn Central case. But Penn Central does address a question of how much the plaintiff is entitled by way of damages.

You may recall, for example, the Loveladies Harbor case addresses the same issue. That is the amount the owners are entitled to is the differences between – of the fair market value as of the taking and the

residual value of the property after the taking. What we seek to establish today is the residual value after the taking – that is, it is no more than ten percent, according to the County’s own assessor.

[17] THE COURT: What is it now? What’s it assessed at now?

MR. BEAMAN: It’s approximately \$5 million.

THE COURT: Okay.

MR. BEAMAN: Last year, it was approximately 7.5.

THE COURT: You still want to put this in?

MR. BEAMAN: Yes, Your Honor.

THE COURT: What’s your position?

MR. BILBERRY: Well, I heard a lot there. If they wanted to put into the evidence the fair market value of the property before the alleged taking and after the alleged taking, they should have had an appraisal done after the alleged taking. They didn’t do that. And now they’re trying to get in what is – essentially, what Your Honor pointed out is a tax assessed value as an appraisal so they can make this argument.

If it does get in, we are going to be requesting that we be allowed to call Mr. Yamamura back to talk about fair market values after 2014, when he conducted an appraisal, which is a little more than a tax assessed value.

As to the Penn Central – mention of Penn Central, I also share in the Court’s bewilderment at the mention of that case as somehow now what this claim is about. We’ve heard Lucas, Lucas, Lucas from the beginning.

But nevertheless, we’ll be filing a separate motion on that because there was a lot of testimony gleaned last week [18] about a whole host of official acts that were not relevant to the decision, which was the crux of the complaint in this matter. And we think that, in itself, opened up the door to a lot of other issues.

I’m sorry. I don’t mean to digress, Your Honor.

THE COURT: No, I hear you.

MR. BILBERRY: So –

THE COURT: Okay. Here’s –

MR. BILBERRY: I let the first document in.

THE COURT: I’m going to sustain the objection.

And the provided reasons for – although Penn Central may be talking about valuations, I don’t think you’ve laid the foundation to establish this was done in accordance with the appropriate appraisal after your own expert has testified as to how an appraisal is done. This is something that’s done for the tax purposes.

There was also pretrial material put into this record that the plaintiff’s attorney negotiated at some length to try and get the County to reduce this by

putting this document into evidence. I would not be able to preclude the defense from calling Tom Welch to discuss those negotiations. That's opening up the door to potential absolute confusion as to what's going on in this case. And what these folks are trying to determine is whether there was a taking, whether the taking deprived the Leone's of the diminished economic benefit or use [19] of their property; and if so, what the loss is to them.

The loss has been testified to by the plaintiff's appraiser to be 7. – not the loss. The fair market value of the property as of October 20 – or September 25, 2011, was \$7.2 million. This, I do not view, is an admission of the County that the property is worth less. There may be some evidence of that, but I think that is – now I'm starting to jog my mind what you're talking about.

But frankly, that also establishes numbers for the jury. They can come in and accept if there were damages, that the real estate property was, in fact, worth 90 percent less. I don't see how the defense would be precluded from arguing in closing that, well, the plaintiffs put this in and they're admitting that arguably this is only worth ten percent because we did the appraisal. But because of the issues of confusion here – and I will tell you, I'm totally confused. And this is all after the fact. I'm not going to allow this document in.

MR. BILBERRY: Well, Judge, just let me give you and plaintiff's counsel a heads-up. They did get in the 239, which is basically a summary of what those values were for each year. And I have Mr. Welch's

letter here, where he sent it to the Real Property Tax Department to negotiate these reductions in the taxes value.

THE COURT: Then you can recall him in your case.

MR. BILBERRY: Well, actually, Ms. Martin was copied on [20] the letter, so I was going to ask her about it. I'm giving you a heads-up.

THE COURT: Fair enough. It's in evidence. I'm not going to preclude discussion about it, but I'm not going to let that in if you got a summary of it, then this is cumulative.

MR. BEAMAN: Thank you, Your Honor.

THE COURT: Thank you.

\* \* \* \* \*

[80] THE CLERK: Circuit Court is reconvened. You may be seated.

THE COURT: Okay. The (sic) [A]ll the jurors are present.

Mr. Bilberry, would you continue.

Mr. Min, is also back on the witness stand.

MR. BILBERRY: Thank you, Your Honor.

THE COURT: You're welcome.

MR. BILBERRY: I would like to show Mr. Min what is marked as Exhibit P-112.

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Q. Here you go, sir. Mr. Min, I've handed you a letter, which is dated October 31st, 2002. And it is to Michael Munekiyo from you. And it looks like somebody signed for you, Clayton Yoshida.

Who's Clayton Yoshida?

A. Clayton was the Deputy Planning Director.

Q. And Mr. Yoshida had authority to sign for you?

A. Yes.

Q. You recognize his writing on your signature?

A. Yes.

Q. And I'll let you have a minute to look at this letter.

A. I've reviewed the letter.

Q. Okay. And do you have a recollection of being asked, or your department being asked to review (sic) [] and an assessment application for the Lambert property?

[81] A. Yes.

Q. And the letter in front of you reflects that your department responded to that application and granted the Lambert's an exemption so they could build on their lot. Correct?

A. Yes.

Q. And that exemption would have been based on your department's significance criteria review and

a determination that the Lambert's proposed single-family residence was not going to cause harm to the environment; and, therefore, was exempt from the permitting requirements. Correct?

A. Correct.

MR. BILBERRY: And, Your Honor, I'd like to move P-112 into evidence.

MR. BEAMAN: No objection, Your Honor.

THE COURT: Okay, 112 is in evidence. Thank you.

(Exhibit P-112 received in evidence.)

BY MR. BILBERRY:

Q. And if you look at some of the things that you reviewed and P – as reflected in P-112, the first one you wrote, that revised plans submitted by the Lamberts indicated that no construction activities would take place less than 60 feet from the certified shoreline. Do you see that?

A. Yes.

Q. And that would have been a similar – that would have [82] been similar to the concern that was raised with the Sweeney residence right next door, right, because of the fragility of the beach. Correct?

A. Correct.

Q. And you indicated you were familiar with a UH study which talked about the fragility of Palauea Beach. Is that correct?

A. Correct.

Q. And that wouldn't just be the Lambert/Sweeney lots, that would be the Lambert lot, the Sweeney lot, the Leone lot, the Larson lots, as well as the County lot and Altman lot. Correct?

A. Correct.

Q. So the whole beach had been studied and had been determined as a fragile ecosystem. Correct?

A. Correct.

Q. Going back to the exhibit I handed you, which is D-266. Do you have that document in front of you?

A. Yes.

Q. And I'm looking at page 2, where it's indicated that Palauea Beach lacks a protective fringing reef; and therefore, fully exposed to storm waves.

MR. BEAMAN: Your Honor, this letter is not in evidence.

THE COURT: Which one?

[83] MR. BILBERRY: I'll move to put D-266 in evidence.

MR. BEAMAN: Object for relevance and hearsay.

THE COURT: Hold on. I had it open, and then I was looking at something else.

MR. BILBERRY: Let me ask – I'm sorry.

THE COURT: Yeah, the objection is sustained. Go ahead.

BY MR. BILBERRY:

Q. Mr. Min, do you recollect the draft letter that's attached with Exhibit D-266, relating to the Sweeney residence?

A. I'm not sure.

Q. Okay. The UH study you referred to that discusses Palauea Beach. In your recollection, did that study talk about there being a lack of a protective reef, a fringe reef at Palauea?

A. I don't recall that specifically. But it was identified as a vulnerable area.

Q. Okay. And in the UH study, the beach was identified as a vulnerable area?

A. That may not be the term. I'm just using it descriptively.

Q. And based on the letters we reviewed, you also understood that Palauea Beach had archeological significance. Correct?

A. Correct.

[84] Q. What is your understanding as to what that significance was?

A. Well, there were a number of – the area had been settled, you know, many years ago. And there were archeological findings, burials in the area.

Q. When you say many, years ago, you're talking?

A. Pre-contact, pre-780.

Q. And you're aware that behind the lots here, there's the remains of an ancient Hawaiian fishing village?

A. I don't recall. But I know there were a lot of archeological sites in that area.

Q. Including sites on the beach?

A. Correct.

Q. And one of the significance criteria that you were asking the homeowners who were seeking exemptions to build single-family residences to address was the presence of archeological sites on the beach. Correct?

A. Correct.

Q. And potentially human remains on the beach. Correct?

A. Correct.

Q. And what would happen if somebody found remains on the beach on a lot that they wanted to build on?

MR. BEAMAN: Object. Relevance, lack of foundation.

THE COURT: Sustained.

[85] BY MR. BILBERRY:

Q. Looking back at your letter, which is P-112, which is admitted into evidence. If you go down to – this is for the Lambert residence. If you go down to the bullet point number four. Do you see that?

A. Yes.

Q. And you wrote that you had received – or that the Lamberts had demonstrated to you approval of an archeological inventory survey by the State Historic Preservation Division, indicating that no adverse impact will result in historical sites. Do you see that?

A. Yes.

Q. Why was this approval required?

A. The State Historic Preservation Division was the agency that advised and reviewed archeological surveys, advised our department regarding the adequacy of these archeological studies, and advised us on what would be appropriate mitigative measures, if necessary. So we relied a lot on that agency to provide us guidance on archeological significance.

Q. Okay. So the homeowner would submit their materials for your review. And if there were archeological sites present, you would cover with the State of Hawaii Historic – or the State of Hawaii Historic Preservation Division as to the adequacy of those materials received from the landowner?

[86] A. That's one way it was done. Another would be the applicant would sometimes have their archeologist submit the report directly to the State Historic Preservation Division. They would review it and sometimes issue a letter, which they would submit with their SMA assessment determination application. So it could be done different ways. But, again, we work with the State Historic Preservation Division to get input and guidance on archeological issues.

Q. Okay. And, ultimately, you would not be able to grant an exemption to a landowner proposing a single-family residence at Palauea if there were archeological – significant archeological remains on their site until the State of Hawaii Preservation Division signed off on it. Correct?

A. Correct.

Q. And in certain instances, the Burial Council would have to sign off as well. Is that correct?

A. If there are (sic) [] burials involved, they would be the agency that we would consult.

Q. And back to Exhibit P-112. With respect to the Lambert residence, we know there are at least some sites there. And they got the requisite State Historic

Preservation approval. So you were able to sign off on, allowing them to proceed to build on their lot. Correct?

A. Correct.

Q. And as with the Sweeney letter, in the Lambert letter, [87] you wrote to them, the Department finds that the project will not have a cumulative impact or a significant environmental or ecological effect on the Special Management Area within which the project is located. And that would be your conclusion, that they had demonstrated to you that they had taken the appropriate measures to prevent harm to the beach, the fragile beach, as well as archeological findings on their site. Correct?

A. Correct.

Q. Mr. Beaman asked you about a change in the rules, meaning how you reviewed proposed uses for determining an exemption. And you indicated that when the rules were changed, they required you to go through this significance criteria review that we've been discussing. Correct?

A. Correct.

Q. And if you're able to determine that a proposed single-family residence anywhere along Palauea Beach – or if you were able to determine that, you're able to determine any proposed single-family residence along Palauea Beach was not going to have a cumulative impact or significance ecological or environmental effect, that you were able to exempt it, and that land-owner could build. Correct?

A. Correct.

Q. And it's fair to say that consistency with the Community Plan was not required for an exempted use. Correct?

[88] A. Correct.

Q. It would be required for the landowner who is not making that showing of no harm and would, therefore, be considered a development. Correct?

MR. BEAMAN: Object for lack of foundation.

THE COURT: Sustained.

MR. BILBERRY: Mr. Min, thank you for your time.

THE COURT: Any redirect, Mr. Beaman?

MR. BEAMAN: No, Your Honor.

\* \* \* \* \*

[92] CERTIFICATION

I, CAMMIE GILLET, a Registered Professional Reporter, Certified Shorthand Reporter for the State of Hawaii #438, do hereby certify that the foregoing pages comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause.

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Dated this 16th day of April 2015.

Sgd:/ Cammie Gillett

Cammie Gillett, RPR

Official Court Reporter,

State of Hawaii

Hawaii Certified Shorthand

Reporter #438

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IN THE CIRCUIT COURT  
OF THE SECOND CIRCUIT  
WAILUKU DIVISION  
STATE OF HAWAII

DOUGLAS LEONE, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.
-vs-	)	07-1-0496 (2)
COUNTY OF MAUI, et al.,	)	
	)	
Defendants.	)	
<hr/>		
WILLIAM L. LARSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.
-vs-	)	09-1-0413 (2)
COUNTY OF MAUI, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF JURY TRIAL PROCEEDINGS  
before the Honorable PETER T. CAHILL, Circuit  
Court judge, presiding on Tuesday, April 28, 2015.  
Transcript of Jury Trial Proceedings, Day Sixteen, P.M.  
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[22] BY MR. BILBERRY:

Q. Why don't you just describe for us, generally, what you observed on September 2nd, 2011, when you arrived at Palauea Beach.

A. I had heard, just anecdotally from the community, there was lots of erosion in south Maui, not just at Palauea.

So I went and visited many of the beaches. When I arrived at Palauea, I noticed some significant changes in the beaches from the time that I had been there previously. There were substantial erosion scarps.

So scarping happens on a beach, you'll know. There is usually a big grade change along the beach, usually at the face of the berm. I've referred to the berm on the beach profile already.

So that's when these strong waves come up [23] to the beach and they interact on the berm, and they carry sand away into the near-shore area.

So there was significant scarping along the berm. There was clear evidence of overwash or inundation.

So the waves reached the beach. They reached the berm. They overtop the berm.

You could see evidence of the water washing the vegetation. So there are a lot – at Palauea Beach, there is a lot of aki aki grass, which is a native grass that's common on beaches. And it was flat, washed over by the waves.

There was a very distinct debris line at the furthest mauka extent of where the waves or the water washed inland to, you know, the back beach area.

Q. Okay. Why don't we have you – you actually, when you documented that event, or when you observed that event, you took photographs?

A. I took photographs.

Q. And you also documented a debris line; correct?

A. I documented a debris line, yes.

Q. Let's have you take a look at defense Exhibit D-485.

And these are your photographs?

A. These are.

[24] Q. I'm going to put the map back up again. And the photographs, we have some – you have a ledger on some of your photos; right?

A. I do. So these photographs are annotated with my notes.

Q. Right. And you documented that a large south swell on August 30th and 31st hit Palauea Beach?

A. That's correct.

Q. And your photographs were intended to show examples of general post-swell beach conditions and impacts?

A. Correct. So I was just trying to document the observations that I made while I was there.

Q. Okay. And one of your photographs shows an erosion scarp?

A. Correct. So you can see that the substantial erosion, evidenced by the erosion scarp there, was probably about, I don't know, four or five feet grade difference from the wet beach to the dry beach on top of the berm at the erosion scarp.

And that just kind of shows you that all of that sand there would have been sort of a wedge of sand that was removed by the waves from the beach and goes off into the near-shore area. It's very common. It's the natural function of the beach.

\* \* \* \* \*

[51] BY MR. BILBERRY:

Q. Ms. Owens, the Atlas of Natural Hazards in the Hawaiian Coastal Zone, what does that Atlas document; or what is the purpose of that Atlas? And you can refer to defense Exhibit D-485.

A. The Atlas of Natural Hazards presents sort of a comprehensive look at the various coastal hazards that we're exposed to here in Hawaii.

[52] Again, that includes tsunami, stream flooding, waves, erosion, sea level rise, volcanic activity, and it looks at the topography of the land; and just as a ranking or an assessment of those coastal hazards, what might be the hazard intensity for a particular region, so to speak.

Q. It's actually something that's based on historical data and information?

A. Sure. It is based on historical data and observations.

Q. And what does that Atlas tell you about the coastal hazards that Palauea Beach is subject to?

A. You can look at the excerpt from the Atlas for Wailea.

Q. And you have that in front of you?

A. I do have that in front of me.

Q. As part of defense Exhibit 485?

A. Correct. So you can sort of zoom yourself into the region, the Palauea area, and look at the rankings that the Atlas provides.

Q. And what types of coastal hazards are ranked in the atlas?

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A. Again, included are – there's an assessment of the coastal slope. So the elevation of the land. That's important because land that is – has [53] low elevation is likely to be inundated by coastal hazards; tsunamis, hurricanes, Kona storms, high-wave events.

So there's an assessment of the slope of the land as well as the ranking of tsunami, stream flooding. So that's coming from the land. High waves, storm erosion, sea-level rise, and volcanic activity.

Q. What does the Atlas tell you the level for hazard is with respect to tsunami for Palauea Beach?

A. The tsunami ranking is at a Level 4, which is high. There are rankings of 1, 2, 3, and 4; 1 being low, 4 being high. Tsunami hazard for Palauea Beach is ranked high.

Q. So by the Atlas of Natural Hazards in the Hawaiian Coastal Zone, Palauea Beach has a high ranking for tsunami damage? Is that how we would put it?

A. Correct. Impacts of tsunami –

Q. Impact?

A. – can be high for Palauea Beach.

Q. And how about storm hazards? How is that ranked by the Atlas of Natural Hazards in the Hawaiian Coastal Zone?

A. The storm hazard is ranked high. Historically, storms like hurricanes that have approached the Hawaiian islands, approach from the [54] south. So they

impact – they definitely have impacts on the southern-exposed coasts as well as Kona storms, which arrive or are generated usually out of the southwest.

So the storm hazard is ranked relatively high, at a 3.

Q. And how about the erosion?

A. The erosion hazard is ranked 4 out of 4, so high.

Q. How about the sea-level hazard?

A. And the sea-level hazard is ranked 3 out of 4.

\* \* \* \* \*

[107] CERTIFICATE

I, HEATHER E. PITVOREC, an Official Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 107 inclusive, comprise a full, true and correct transcript of the proceedings had in connection with the above entitled cause.

Dated this 28th day of April, 2015.

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HEATHER E. PITVOREC, RMR, CSR #456  
Official Court Reporter

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IN THE CIRCUIT COURT  
OF THE SECOND CIRCUIT  
WAILUKU DIVISION  
STATE OF HAWAII

DOUGLAS LEONE, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.
-vs-	)	07-1-0496 (2)
COUNTY OF MAUI, et al.,	)	
	)	
Defendants.	)	
<hr/>		
WILLIAM L. LARSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No.
-vs-	)	09-1-0413 (2)
COUNTY OF MAUI, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF JURY TRIAL PROCEEDINGS  
before the Honorable PETER T. CAHILL, Circuit  
Court judge, presiding on Friday, April 10, 2015. Tran-  
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[27] THE COURT: Okay. Fair enough. Go ahead.

BY MR. BILBERRY:

Q. Mr. Hedani, do you recall what information was before the Commission, when it was considering the EA on February 12th, 2008, that led to the deferral of making a decision on acceptance of that EA?

A. I don't recall specifically without reviewing the entire minutes of that particular meeting.

Q. Okay.

A. The Commission itself is very meticulous. And what it does is it asks a whole bunch of questions about things that are relevant to the Special Management Area. A deferral would mean that the Commission felt that they did not have enough information to render a decision or to complete its counts on the Assessment.

Q. Do you remember why the Commission felt it did not have enough information?

MS. ROSENBLATT: Objection; foundation.

THE COURT: Overruled. The question is just do you remember.

THE WITNESS: Yeah. What I recall is that the Commission had questions on several things; archeological surveys for the property, other issues that they wanted to have addressed.

BY MR. BILBERRY:

[28] Q. Okay. And as to archeological work, do you recall specifically what the concern was?

A. I think the concern was as to whether or not there were iwi buried on the property.

Q. I'm sorry. Whether what?

THE COURT: Iwi.

THE WITNESS: Iwi, I-W-I. Iwi is bones of the Hawaiian ancestors buried on the property, and it's a culturally significant item that the Commission takes in to consideration when it's reviewing applications in general.

MS. ROSENBLATT: Your Honor, may we approach?

THE COURT: No.

MR. BILBERRY: Thank you, your Honor.

THE COURT: Please ask the next question.

BY MR. BILBERRY:

Q. Mr. Hedani, I'm at Page 36, Plaintiffs' P-73, and I'm at Page 36 of that exhibit. Mr. Hedani, can you take a look at that page?

And, again, that's Plaintiffs' P-73 and Page 36 of a document that was admitted into evidence, and it will be available for the jury to review when they deliberate.

THE COURT: No more comments, please.

\* \* \* \* \*

[33] Thank you.

THE COURT: 330?

MR. BILBERRY: D-330.

BY MR. BILBERRY:

Q. Mr. Hedani, you have Defendants' D-330 in front of you; correct?

A. Correct.

Q. Do you recognize that as the map that Ms. De Naie passed out in the Commission meeting on February 12th, 2008?

A. I can't recall.

Q. Fair enough. Then let's put that aside for a moment.

Now, you mentioned that there was some discussion about burial sites at Palauea that the Commission was considering; correct?

A. Yeah.

MS. ROSENBLATT: Object for relevance, your Honor.

THE COURT: Overruled.

BY MR. BILBERRY:

Q. Do you remember how many were discussed?

A. I can't recall exactly. It's – or I don't know that there were burials there. The question that the Commission had was as to whether or not a [34] survey had been done to identify whether or not there were any burials.

Q. So you don't recall there was information before the Commission about burial sites in the vicinity of Palauea Beach and on Palauea Beach?

A. It was an issue that was raised for consideration.

Q. And you also recall just generally there was discussion about the archeological significance of the Palauea area; correct?

A. Right.

Q. And you recall Ms. De Naie testifying that there were approximately 50 sites, hundreds of

features, like 500 features, archeological features in the area?

MS. ROSENBLATT: Objection; argumentative, foundation, and relevance and hearsay.

THE COURT: Overruled. He's asking him what was in the minutes.

BY MR. BILBERRY:

Q. Do you remember that?

A. I believe Lucienne De Naie did testify along those lines.

THE COURT: Pardon me. I misspoke. The question pertains to Mr. Hedani's recollection of what occurred at the February 12th, 2008 meeting of the Maui [35] Planning Commission. He gave testimony on Direct, and we have minutes reflecting what occurred in open session. So the objection is overruled.

BY MR. BILBERRY:

Q. And do you recall Ms. De Naie testifying that there is a very incomplete archeological review that has been done to lands at Palauea, and Ms. De Naie noted there were already four or five burials discovered.

Do you recall her testifying to that?

A. I would have to go over the minutes of the meeting in order to verify that.

Q. Look at Page 37 of Exhibit P-73, Page 37. And I'm on the last full paragraph.

A. (Witness complies.) Okay. Can you repeat the question?

Q. Yeah. You recall her testifying to this, these archeological discoveries?

A. Yes.

Q. And you recall her testifying that two were discovered by accident when they were planting trees on a lot that had already been developed. Do you recall her testifying to that? Do you recall Ms. De Naie testifying that two burials had been discovered by accident when they were planting trees on [36] a lot that had already been developed?

A. Vaguely.

Q. You do recall that?

A. Yes.

Q. And you recall Ms. De Naie's testimony regarding these archeological finds, these specific finds, and the specific or general character of the Palauea site as having archeological sites everywhere was of concern to the Commission, wasn't it?

A. Yes.

Q. Thank you. And I think, as plaintiffs' counsel pointed out to you yesterday, the area of concern would have included the Leones' Lot 15; correct?

A. Right. The area of concern included all of lots.

Q. Yeah. Specifically it also included the Leones' lot; correct?

A. Right.

\* \* \* \* \*

[42] THE COURT: The plaintiffs, Ms. Rosenblatt asked to approach. So is there any issue or any argument that anyone wants to present?

MR. BEAMAN: Your Honor, we're very concerned that the County has now been permitted to introduce irrelevant and prejudicial information concerning human remains at Palauea Beach before the ladies and gentlemen of this jury.

That information has been excluded by the Court in limine, and the jury has now been permitted to hear it outside the context of valuation of the property. And that is a very significant concern to us.

I'm not sure at this time what the appropriate steps would be to mitigate the effect of that prejudice, but it has – in our view, the questions asked by the County are entirely improper and violative of the Court's order in limine.

THE COURT: Mr. Bilberry.

MR. BILBERRY: Well, your Honor, they put [43] a document in evidence and argued that the Commission had an ill motive in delaying environmental assessment that had been brought on behalf of the

homeowners at Palauea Beach to change the Community Plan.

Ms. Rosenblatt stated on the record yesterday that they were entitled to go through that transcript to show what information the Planning Commission had before it in order to determine what its motives were for delaying its consideration of the environmental assessment.

All I did was exactly what they said they put that transcript in to evidence for. And it's entirely relevant because they are going to argue that somehow the inaction of these commissioners constituted a violation of their clients' rights, Federal rights under 1983, either under the substantive due process clause or under the equal protection clause.

So to the extent they intend to make those claims, the material is entirely relevant to show the motives as to why the Commission acted the way it did in connection with the Environmental Assessment.

THE COURT: Okay. Mr. Beaman, anything else?

MR. BEAMAN: Yes, your Honor. The reason those minutes were put in evidence, we do not contend [44] that the Planning Commission violated our clients' Constitutional Rights. We have never contended the Planning Commission violated their Constitutional Rights. We contend that the Planning Director violated their Constitutional Rights on October 25th,

2007, by refusing to process their SMA Assessment Application.

The County has argued that that application was presented in bad faith. The County has argued that, if the Leones had simply followed the process and gone along with the County, eventually they would have received permission to build.

And the truth of the matter is, as the Chairman of the Commission just testified yesterday, that what the Planning Commission was engaged in was a charade. And the County has acted improperly, in our view, in seeking to use that as a vehicle to introduce evidence that the Court has ruled as irrelevant and prejudicial outside the context of valuation of the property.

So I believe there's been a violation of the Court's order in limine, and it is a matter of significant concern to us.

THE COURT: Okay. Everyone sit down please.

MR. BILBERRY: May I respond to that [45] quickly?

THE COURT: Sure. Go ahead.

MR. BILBERRY: He just reiterated the points. He claims it's a charade. If they're not claiming that the Commission acted in any manner which would serve as the basis for a cause of action or a claim in this case, then we should not have been discussing any of this today.

But they put it into evidence. They put it into evidence. They raised the issue. They opened the door, and now they have to walk through it.

THE COURT: Okay. I do not find that the County has violated the Court's protective order.

I did attempt, insofar as I thought I was acting appropriately based upon questions before, trying to exclude as much of this evidence insofar as it did not pertain to the issue of value.

But the plaintiffs moved into evidence Document P-73, which are the minutes of the Maui Planning Commission of February 12th, 2008. That occurred approximately three months after the Hunt letter which – what I always thought was the lynchpin of the plaintiffs' cause of action.

At that meeting – by the way, the plaintiffs moved those minutes into evidence over the [46] objection of the County, and I overruled the County's objection and permitted the minutes to be placed in.

The specific matter before the Planning Commission at that time –

And, Mr. Bilberry, I don't think you're doing it intentionally, but you indicated to me this morning that the Planning Commission was doing this on behalf of the owners. Technically, that's true. But the County is also affected by this.

The record is absolutely clear the evidence – the pretrial evidence – I'm not sure if it's in evidence yet –

is that the County is just as much affected by the inconsistency between the Plan and the Zoning as any other landowner for purposes of use.

However, in this particular instance, the action before the Maui Planning Commission on February 12th was to approve or reject or defer the environmental assessment that had been submitted by the County.

The vote – the majority vote was to defer the action – and this is document P-73 at Page 72 of the record – to defer the action on the final environmental assessment, pending submittal of the requested information of all pertinent language in the Community Plan that has bearing on shoreline and park [47] space and archeological conditions be addressed.

That the full – well this is a typo. That the full archeological study – I'm sorry. That a – it's actually – the direct quote is “that the a full archeological study be done to locate all possible sites on the six vacant lots, which includes the two County-owned lots, and that a historical narrative be created regarding this area.”

And as to the four vacant lots, there was a request that a feasibility study be made to determine what options might be available to the County.

With the document in evidence, the plaintiffs then called Wayne Hedani. I don't believe Mr. Hedani was the chair.

MR. BILBERRY: Vice chair, your Honor.

THE COURT: Yeah. I think Johanna Amorin was the chair.

MR. BEAMAN: My mistake, your Honor.

THE COURT: It's not a big deal. It's certainly not a big deal. But the bottom line is that Mr. Hedani was called. He expressed his participation in this particular view, and the County had every right to cross-examine that witness on his actions and what occurred before the meeting without expressing opinions on what other people did.

[48] And I've excluded both parties from doing that. But this is a document that's in evidence from the plaintiffs. The plaintiffs then called a member of the Planning Commission who dissented from the action of deferral, and the deferral is based upon archeological studies.

Frankly, I think it is the plaintiffs who have opened that door as to this document and this witness, and the County is entitled to ask the questions pertaining to this.

Certainly, it doesn't deal with valuation as to this issue, but it deals directly with the basis for – one of the bases for the Maui Planning Commission deferring action. What the effect of all of this is going to be in the long run, I don't know. But in terms of a violation of the Court's protective order as to this document and this witness, I do not find that there was one.

\* \* \* \* \*

[61] So this is oceanfront property with white-sand frontage in Makena on Palauea. And, ideally, in appraiser school, they always tell you that the best comp sold yesterday and it's across the street.

Oceanfront properties are rare. And so often we have to spread the search either farther back in time or farther down the beach, but we searched for oceanfront comparables in the Makena-Wailea area.

Q. One thing I forgot to ask you, Mr. Ponsar, in terms of accepting your assignment, based on your experience as a real estate appraiser, did you reach a conclusion as to the value of the Leones' property, if they could have built the single family home?

A. Oh, yes. \$7.2 million.

Q. And then you'll explain the process of how you got to that number.

A. Sure. After we determined the highest and best use was development of a single family home, then we searched for comparables that had a similar highest and best use for the people – or the persons who were purchasing the lots also intended to build a single family home.

So we researched the sales prior to the date of value in 2007 that we viewed were most relevant. [62] There was one sale, an oceanfront sale in Wailea and five in Makena.

Q. So all of your comparables were on the island of Maui; correct?

A. Correct.

Q. And they were all in that immediate area?

A. They were all in the Makena Wailea corridor, and all were oceanfront.

Q. Okay.

A. So then the next step in the process is to look at how the properties that we've selected as comparables differ from the subject property. And so since our subject property has white-sand beach, some of the comparables had a rocky shoreline, which is less desirable, which means it should sell for less.

So what we do is make adjustments to the comparables in order to make them similar to the subjects so we can determine the value for the subject property.

Q. Can you give me a, for instance, in terms of one of the comparables you looked at and the adjustments you made?

A. Sure. One comparable would be what we called Transaction 3, which sold for 4.8 million and in 2004.

[63] Just a moment. And on that comparable, it had a rocky shoreline and the subject has a white-sand beach frontage.

So in our experience, properties that have rocky shorelines typically sell for about 20 percent less than white-sand beach properties. So we adjusted the sale

price of that property by 20 percent. That would be an example of an adjustment.

Q. Did you make any other adjustments on that particular transaction?

A. Yes. That one has slightly more lineal feet of beach than the subject property. It's 120 feet wide. So wider beaches are more desirable than narrow beaches.

So the Leone lot is 105 feet wide. Approximately, it was 120. We made a nominal adjustment of 5 percent downward.

Q. So, basically, once you have – how many comparables have you looked at?

A. We looked at six.

Q. And not to go through the adjustments for each, but basically you went through a similar process with each one?

A. Correct.

Q. And based on that, you concluded that the [64] value of the Leones' parcel, if you could build a house on it, would be what?

A. 7.2 million.

MR. COLOMBE: I have no further questions.

THE COURT: Mr. Bilberry.

**CROSS-EXAMINATION**

BY MR. BILBERRY:

Q. Mr. Ponsar, good morning.

A. Good morning.

Q. Did you have a good flight?

A. I flew in last night.

Q. Oh, good. You didn't have to catch that red eye.

So, as we sit here today, the Leones' Lot 15 at Palaua Beach is still in a highly desirable location; correct?

A. Correct.

Q. As we sit here today, the Leones' Lot 15 at Palaua Beach is a scarce resource; correct?

A. Correct.

MR. COLOMBE: Your Honor, beyond the scope. We were valuing as of the date of taking.

THE COURT: Overruled.

BY MR. BILBERRY:

[65] Q. And as we sit here today, the physical capacity of that lot for a single family residential structure is somewhat ideal; correct?

A. You can build a single family residence there, physically.

Q. You've not been asked to render any other opinion as to whether single family residential use would or would not be permitted at any time subsequent to October 25th, 2007; correct?

A. Correct.

MR. BILBERRY: Thank you, sir.

THE COURT: Any Redirect?

MR. COLOMBE: No Redirect, your Honor.

THE COURT: Ladies and gentlemen of the jury, does anyone have any questions for Mr. Ponsar?

(No audible response.)

THE COURT: The record should reflect there are no questions.

Mr. Ponsar, you may step down. Thank you.

\* \* \* \* \*

[106] CERTIFICATE

I, HEATHER E. PITVOREC, an Official Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 106 inclusive, comprise a full, true and correct transcript of the proceedings had in connection with the above entitled cause.

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Dated this 11th day of April, 2015.

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HEATHER E. PITVOREC, RMR, CSR #456  
Official Court Reporter

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IN THE CIRCUIT COURT  
OF THE SECOND CIRCUIT  
WAILUKU DIVISION  
STATE OF HAWAII

DOUGLAS LEONE, et al.,	)	
Plaintiffs,	)	Case No.
-vs-	)	07-1-0496 (2)
COUNTY OF MAUI, et al.,	)	
Defendants.	)	
<hr/>		
WILLIAM L. LARSON, et al.,	)	
Plaintiffs,	)	Case No.
-vs-	)	09-1-0413 (2)
COUNTY OF MAUI, et al.,	)	
Defendants.	)	
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TRANSCRIPT OF 104 PROCEEDINGS

before the Honorable PETER T. CAHILL, Circuit Court judge, presiding on Wednesday, April 1, 2015, A.M. Session, Volume II, 104 hearing in the above-entitled case.

\* \* \* \* \*

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\* \* \* \* \*

[22] Q. Nobody – is it fair to say that nobody has had any discussions with you one way or the other as to whether obtaining an exemption from the permitting requirements under the SMA is an option available to the Leones?

MR. BEAMAN: Vague and ambiguous.

THE COURT: Do you understand the question?

THE WITNESS: I really don't understand the question. I mean, certainly, it's – I've had discussions with counsel on the issue, and the issue, as directed to me, is that they're pursuing a course of action that is – has resulted in this litigation. And I am not privy to anything else.

[23] BY MR. BILBERRY:

Q. Okay. So have you ever been advised that the option of obtaining an exemption from the permitting requirements under the SMA Rules is an option that is not available to the Leones?

A. I think – it's my understanding that they have the option to seek an exemption. That's pure and simple.

Q. That is your understanding?

A. That's my understanding that they have that right, yes.

Q. Has anybody advised you as to why they haven't done that?

A. Not advised me. Told me that they haven't. I have not been privy to their decision to do that. They have told me that that's not what they're doing and that's the end of it.

Q. Has anybody told you why they're not doing that?

A. They've chosen an alternative course of action.

Q. Meaning the litigation?

A. Yes.

\* \* \* \* \*

[58] CERTIFICATE

I, HEATHER E. PITVOREC, an Official Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 58 inclusive, comprise a full, true and correct

App. 51

transcript of the proceedings had in connection with  
the above entitled cause.

Dated this 2nd day of April, 2015.

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HEATHER E. PITVOREC, RMR, CSR #456  
Official Court Reporter

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IN THE CIRCUIT COURT  
OF THE SECOND CIRCUIT  
STATE OF HAWAII

Douglas Leone and Patricia	)	
A. Perkins-Leone, Trustees,	)	
	)	
Plaintiffs,	)	CIVIL NO:
vs.	)	07-1-0496(2)
	)	
County of Maui, et al.,	)	
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

had before the Honorable Peter T. Cahill, Circuit Court Judge presiding, on Tuesday, April 7, 2015. PM Session. Volume II. Jury Trial.

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\* \* \* \* \*

[23] Q. Taking a look at Exhibit D – 124, which has been received in evidence.

A. – the letter.

Q. And this is a letter to you from Jeff Hunt. Correct?

A. Correct.

Q. Planning Director at that time?

A. Yes.

Q. And it says, at its regular meeting of February 12th, 2006, the Maui planning Commission voted to defer action on the above-referenced matter, meaning voting to defer the EA. One [of] the things they request, number two, was a full archeological study shall be conduct[ed] on the six vacant lots, TMK 2-1-011:15, [24] 16, 17, 18, 19 and 20. Do you see that?

A. Yes, I do.

Q. And then it says the Planning Department notes that archeological studies were conducted on the subject properties and requested the studies be included as appendices to the draft final environmental assessment. Do you see that?

A. Yes.

Q. And your firm in fact never gave the Commission those studies that they were asking for. Correct?

A. We did not complete the final EA.

Q. The Commission was never given these studies that is being requested in this letter. Correct?

A. I don't believe so.

Q. And the reason the Commission didn't get those studies is because somebody directed your firm not to provide them. Correct? Isn't that correct?

A. No.

Q. You don't remember testifying to that at deposition?

A. We were told that we weren't going to complete work on the EA document, so we were put on hold.

Q. And on October 20th, didn't the Commission write you again?

A. Yes, we received a subsequent letter.

MR. BILBERRY: Yeah. And we can have Susan pull that one out for you to take a look at.

[25] That's D-125.

THE COURT: What's the number?

MR. BILBERRY: D-125, Your Honor.

THE COURT: Thank you.

BY MR. BILBERRY:

Q. There you are, Ms. Hiraga. Give me just a second while you're looking at that.

And, Ms. Hiraga, that's a copy of the (sic) [] letter dated the October 20th, 2008, to you from Planning Director Jeff Hunt. Correct?

A. Correct.

Q. And in this letter, Mr. Hunt notes that at a regular meeting on February 12th, 2008, the Maui Planning Commission voted to defer action on the above-referenced matter pending the submission of additional information to be included in the environmental assessment. Do you see that?

A. Correct.

Q. And then if you go down a little further, it details again some of the information they were looking for, including a copy of the previously conducted archeological studies for the vacant parcels should be included as appendices.

Do you see that? You can re[a]d a little further. It's kind of small print.

A. Is that the second paragraph?

Q. No, it's the first paragraph, four lines down –

[26] A. Sorry. A copy of the previous – yes, I see it now.

Q. Okay. So that says one of the things they were requesting was a copy of the previously conducted archeological studies for the vacant parcels should be included as appendices. And that was never provided to the Planning Commission. Correct?

A. Correct.

Q. And that's because you were directed by either Mr. Welch or by the lot owners of Palauea not to provide that information. Correct?

A. We were put on hold in completion of the final EA. And those would be appendices to the final EA document, but we never completed it.

Q. Okay. So the Planning Commission never got this information. Correct?

A. Correct.

Q. And what is your understanding as to what those archeological studies said as to the site of Palauea?

MR. COLOMBE: Your Honor, objection. Relevance.

THE COURT: Sustained.

BY MR. BILBERRY:

Q. Okay. So your understanding is that there were in fact prior archeological studies that were done. Correct?

A. That were done?

Q. Yes.

\* \* \* \* \*

App. 57

[61] CERTIFICATION

I, CAMMIE GILLETT, a Registered Professional Reporter, Certified Shorthand Reporter for the State of Hawaii #438, do hereby certify that the foregoing pages comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause.

Dated this 8th day of April 2015.

Sgd:/ Cammie Gillett  
Cammie Gillett, RPR  
Official Court Reporter, State of Hawaii  
Hawaii Certified Shorthand Reporter #438

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IN THE CIRCUIT COURT  
OF THE SECOND CIRCUIT  
STATE OF HAWAII

DOUGLAS LEONE, ET AL.,	)	
	)	
Plaintiffs,	)	Civil No.
	)	07-1-0496(2)
vs.	)	
COUNTY OF MAUI, ET AL.,	)	TRANSCRIPT OF
	)	PROCEEDINGS
Defendants.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

had before the Honorable Peter T. Cahill, Circuit Court Judge presiding, on Thursday, April 30, 2015, in the above-entitled matter: Jury Trial.

\* \* \* \* \*

[20] The diminution in value of the land has been proved by the evidence in this case. Dr. Whitney testified that the value of the land today is speculative. Mr. Tsujimura testified in this case that the value of the land today is zero.

In the Loveladies Harbor case, contrary to what counsel for the County has argued, there was, in fact, a residual value of the land although nominal. I believe it was a thousand dollars per acre in that particular case. Here, there is no remaining value of the land, and that is the undisputed evidence in this case.

App. 59

[118] CERTIFICATE

I, Melissa Noble, a Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 118, inclusive, comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause.

Dated this 30th day of April, 2015.

/s/ Melissa Noble, RPR, CSR 376

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IN THE CIRCUIT COURT  
OF THE SECOND CIRCUIT  
WAILUKU DIVISION  
STATE OF HAWAII

DOUGLAS LEONE, et al.,	)	
Plaintiffs,	)	Case No.
-vs-	)	07-1-0496 (2)
COUNTY OF MAUI, et al.,	)	
Defendants.	)	
<hr/>		
WILLIAM L. LARSON, et al.,	)	
Plaintiffs,	)	Case No.
-vs-	)	09-1-0413 (2)
COUNTY OF MAUI, et al.,	)	
Defendants.	)	
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TRANSCRIPT OF 104 PROCEEDINGS

before the Honorable PETER T. CAHILL, Circuit Court judge, presiding on Wednesday, April 1, 2015, A.M. Session, Volume II, 104 hearing in the above-entitled case.

\* \* \* \* \*

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\* \* \* \* \*

[37] Q. So there's value in this land that we don't need to confuse with the inflation rate; correct?

A. No. There's value in the property. In other words, in my – I'm estimating that – I'm making a projection that the property, when developed, is going to appreciate at a certain rate, 3 and a half percent.

Q. What about the undeveloped land?

A. I made no assumptions about the appreciation of the land.

Q. I may ask you to make that now. It's an undeveloped parcel and oceanfront, which you say is scarce, meaning it's a commodity that's got some value; correct?

A. I don't know at this point because I don't know its development status. So I wouldn't even want to speculate on what the value of the property is in its present state or as a vacant property.

\* \* \* \* \*

App. 62

[58] CERTIFICATE

I, HEATHER E. PITVOREC, an Official Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 58 inclusive, comprise a full, true and correct transcript of the proceedings had in connection with the above entitled cause.

Dated this 2nd day of April, 2015.

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HEATHER E. PITVOREC, RMR, CSR #456  
Official Court Reporter

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IN THE CIRCUIT COURT  
OF THE SECOND CIRCUIT  
STATE OF HAWAII

DOUGLAS LEONE, ET AL.,	)	
	)	
Plaintiffs,	)	Civil No.
	)	07-1-0496(2)
vs.	)	
COUNTY OF MAUI, ET AL.,	)	TRANSCRIPT OF
	)	PROCEEDINGS
Defendants.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

had before the Honorable Peter T. Cahill, Circuit Court Judge presiding, on Thursday, April 16, 2015, PM Session, in the above-entitled matter: Jury Trial, PM Session.

\* \* \* \* \*

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**WITNESSES:**

Dr. William H. Whitney

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\* \* \* \* \*

[34] Q. As we sit here today, is it your opinion that Lot 15 at Palauea Beach owned by the Leones has no value?

A. I can't say it has absolutely no value. It has absolutely minimum value, and it would be speculative – it would be speculative for anyone to put a value on the property in its current condition given the uncertainty of its future viability as a site for development.

\* \* \* \* \*

[81] CERTIFICATE

I, Melissa Noble, a Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 81, inclusive, comprise a full, true and correct transcript of the proceedings had in connection with the above-entitled cause.

Dated this 16th day of April, 2015.

/s/ Melissa Noble, RPR, CSR 376

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IN THE CIRCUIT COURT  
OF THE SECOND CIRCUIT  
STATE OF HAWAII

DOUGLAS LEONE, ET AL.,	)	
	)	
Plaintiffs,	)	Civil No.
	)	07-1-0496(2)
vs.	)	
COUNTY OF MAUI, ET AL.,	)	TRANSCRIPT OF
	)	PROCEEDINGS
Defendants.	)	
	)	

TRANSCRIPT OF PROCEEDINGS

had before the Honorable Peter T. Cahill, Circuit Court  
Judge presiding, on Wednesday, April 15, 2015, in the  
above-entitled matter: Jury Trial, PM Session.

\* \* \* \* \*

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**WITNESSES:**

Dr. William Whitney

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\* \* \* \* \*

[62] Q. And the question was: What was your Phase II assignment?

A. My Phase II assignment – once again, I think it’s important to read so it’s accurate in the record. The Phase II assignment following the first phase, was in the event that there are no viable economic uses available to the land owner given the recent actions and interpretations made by the County of Maui with respect to the regulations, consider the magnitude of the diminution in value that has resulted from the County’s actions and interpretations of acceptable uses under either of the two following conditions: One, an effective full taking of the property with the result that there is no development undertaken by the Leones on the site.

Or the second option, an effective – what is referred to as a temporary taking of the property for the period October 25, 2007, the date of the denial of the exemption, through to December 2nd, 2014, which I’ll explain, a seven year, one month period where the Leones are denied the right to develop their property.

\* \* \* \* \*

[86] CERTIFICATE

I, Melissa Noble, a Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1 through 86, inclusive, comprise a full, true and correct transcript of the

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proceedings had in connection with the above-entitled cause.

Dated this 15th day of April, 2015.

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MELISSA NOBLE, RPR, CSR #376

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IN THE CIRCUIT COURT  
OF THE SECOND CIRCUIT  
WAILUKU DIVISION  
STATE OF HAWAII

DOUGLAS LEONE, et al.,	)	
Plaintiffs,	)	Case No.
	)	07-1-0496 (2)
-vs-	)	
COUNTY OF MAUI, et al.,	)	
Defendants.	)	
<hr/>		
WILLIAM L. LARSON, et al.,	)	
Plaintiffs,	)	Case No.
	)	09-1-0413 (2)
-vs-	)	
COUNTY OF MAUI, et al.,	)	
Defendants.	)	
<hr/>		

TRANSCRIPT OF JURY TRIAL PROCEEDINGS

before the Honorable PETER T. CAHILL, Circuit Court judge, presiding on Wednesday, April 8, 2015. Transcript of Jury Trial Proceedings, Day Five, A.M. Session.

\* \* \* \* \*

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\* \* \* \* \*

[24] THE WITNESS: Can you repeat the question, please?

BY MR. BILBERRY:

Q. Yes, I will, sir. You don't recall having conversations with the Leones' attorney, Mr. Welch, and Colleen Suyama, the Deputy Director of the Department of Planning, whereby Mr. Welch directed you to file the application on behalf of the Leones and requested that Ms. Suyama have a letter penned, returning the application based on inconsistency.

MR. COLOMBE: Objection; misstates the evidence.

BY MR. BILBERRY:

Q. Do you not remember that communication?

THE COURT: Okay. Let me just – the objection is –

MR. COLOMBE: And relevance.

THE COURT: The objection is overruled.

THE WITNESS: I recall the communication between Mr. Welch and Miss Suyama. I don't recall the specifics of the communication, however, but I do, in [25] general, recall that correspondence.

BY MR. BILBERRY:

Q. Yeah. And you recall that basically you and Mr. Welch were working with Ms. Suyama to get this letter so that Mr. Welch could have the paper in hand to go to the Commission; correct?

MR. COLOMBE: Objection; argumentative.

THE COURT: Overruled.

THE WITNESS: I believe that was the circumstances back then, yes.

BY MR. BILBERRY:

Q. Right. So it's fair to say, before you submitted the application on behalf of the Leones, you knew it was going to be returned based on inconsistency; correct?

A. That would be correct.

\* \* \* \* \*

[88] CERTIFICATE

I, HEATHER E. PITVOREC, an Official Court Reporter of the Circuit Court of the Second Circuit, State of Hawaii, do hereby certify that the foregoing pages 1

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through 88 inclusive, comprise a full, true and correct transcript of the proceedings had in connection with the above entitled cause.

Dated this 9th day of April, 2015.

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HEATHER E. PITVOREC, RMR, CSR #456  
Official Court Reporter

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

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

vs. )

COUNTY OF MAUI, a )  
political subdivision of the )  
State of Hawaii; WILLIAM )  
SPENCE, in his capacity as )  
Director of the Department )  
of Planning of the County of )  
Maui; DOE ENTITIES 1-50, )  
Defendants. )

-----  
WILLIAM L. LARSON )  
and NANCY H. LARSON )  
as Trustees under that )  
certain unrecorded Larson )  
Family Trust dated Octo- )  
ber 30, 1992, as amended, )  
Plaintiffs, )

vs. )

Civil No. 07-1-0496(3)

Volume II

COUNTY OF MAUI, a )  
political subdivision of the )  
State of Hawaii; WILLIAM )  
SPENCE, in his capacity as )  
Director of the Department )  
of Planning of the County of )  
Maui; DOE ENTITIES 1-50, )  
Defendants. )  
----- )

DEPOSITION OF MICHAEL MUNEKIYO

\* \* \* \* \*

[90] BY MR. BILBERRY:

Q. Exhibit 17 to your deposition, Mr. Munekiyo, I showed you – I’ll let you take a look at that. That’s Exhibit 17 to your deposition and you wrote to – you wrote to Colleen Suyama and Tom Welch, “In reviewing our files, the Leone application was prepared (in June 2003) but not filed.” You say, “I recall that we agreed we would hold the filing pending the outcome of the contested case proceedings.” And we discussed this email at your last deposition.

What I have now is a response from Tom Welch and Colleen Suyama. First Tom Welch responded and wrote, “Mike and Gwen.” And he responded on September 6, 2007, at 7:21 a.m. And Tom wrote – or Mr. Welch wrote, “Mike and Gwen: We should file it now, and keep things moving along.

“Colleen: We understand that you will respond the same way you did with Doug Schatz’s application,

based on the inconsistency and inability of the [Department] to process.” So – then he wrote, “Then we will be able to properly represent our documented status to the Commission and Council when it comes up for consideration. Thanks, all. Tom.”

I’ll let you take a look at that.

A. (Pause – referring.)

Q. Mr. Munekiyo, you can keep that. Actually, we can have Sandra mark it. Do you have a recollection of receiving [91] this email, Mr. Munekiyo?

(9/6/07 Email, Suyama to Munekiyo & Welch, M&H Production 128, EXHIBIT 27, marked)

A. I don’t.

Q. Do you have a recollection of Mr. Welch asking Ms. Suyama to agree to decline processing of the Leone application before it was submitted?

MR. COLOMBE: Objection; argumentative, misstates the evidence.

THE WITNESS: I don’t recall that.

BY MR. BILBERRY:

Q. Okay. So this wasn’t your idea to do this, then?

MR. COLOMBE: Objection; vague and ambiguous.

THE WITNESS: It wasn’t my idea.

BY MR. BILBERRY:

Q. I do note that you wrote here that the Leones' application was prepared in June 2003 but not filed. Do you see that? That's the email below.

A. (Pause – referring.) Yes.

Q. And the exhibit which is 18 to your deposition is a Leone application which is dated 2007. Do you know, is this the application that was prepared in 2003?

A. I'm not sure.

Q. Do you have any recollection as we sit here today of doing any updated or supplemental work on the 2003 application [92] before it was submitted in 2007?

A. I don't remember.

Q. Meaning you don't remember doing any such work?

A. Right.

Q. Does this refresh your recollection as to whether there was any work pending for submission to the department as related to the Leone lot in 2007 when the application was submitted?

MR. COLOMBE: Objection; vague and ambiguous.

THE WITNESS: It doesn't refresh my memory, but I think it makes clear the basis for compiling the application and submitting it in the form that it was.



represents, to the best of my ability, a true and correct transcript of the proceedings had in the foregoing matter.

That pursuant to Rule 30(e) of the Hawaii Rules of Civil Procedure, a request for an opportunity to review and make changes to the transcript:

Was made by the deponent or a party (and/or their attorney) prior to the completion of the deposition.

Was **not** made by the deponent or a party (and/or their attorney) prior to the completion of the deposition.

Was waived.

I further certify that I am not an attorney for any of the parties hereto, nor in any way concerned with the cause.

DATED this 27th day of October, 2014, in Maui, Hawaii.

/s/ Sandra J. Gran  
SANDRA J. GRAN, RPR,  
HI CSR 424

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

DOUGLAS LEONE AND ) CIVIL NO. 07-1-0496(2)  
PATRICIA A. PERKINS- ) SPECIAL VERDICT  
LEONE, as Trustees under ) FORM  
that certain unrecorded )  
Leone-Perkins Family )  
Trust dated August 26, )  
1999, as amended, )  
Plaintiffs, )  
vs. )  
COUNTY OF MAUI, a )  
political subdivision of )  
the State of Hawaii; and )  
WILLIAM SPENCE, in his )  
capacity as Director of the )  
Department of Planning of )  
the County of Maui, )  
Defendants. )

---

SPECIAL VERDICT FORM

The jury must answer all of the questions, unless otherwise indicated. To understand what issues are being submitted to you, you may wish to read over the entire Special Verdict Form before proceeding to answer. Answer the questions in numerical order. Follow all directions carefully. Each answer requires the agreement of at least ten (10) jurors, but the same ten (10) jurors need not agree on each answer. If you do not understand any question or if you wish to communicate

with the Court on any other subject, you must do so in writing through the Bailiff.

Question No. 1: Did Defendant County of Maui or the Defendant Planning Director deprive Plaintiffs of economically beneficial use of their land?

[Answer "Yes" or "No" in the space provided.]

ANSWER: Yes \_\_\_\_\_ No  X

[Please go to Question No. 2.]

Question No. 2: Did Defendant Planning Director act in violation of 42 U.S.C. Section 1983?

[Answer "Yes" or "No" in the space provided.]

ANSWER: Yes \_\_\_\_\_ No  X

[If your answer to Questions No. 1 & 2 are "No", the foreperson shall sign and date this document and report to the Bailiff.]

[If your answer to Question No. 2 is "Yes", go to Question No. 3.]

Question No. 3: Did Defendant Planning Director's act cause damages to the Plaintiffs?

[Answer "Yes" or "No" in the space provided.]

ANSWER: Yes \_\_\_\_\_ No \_\_\_\_\_

[Read all of these instructions. If your answers to Questions No. 1, 2, & 3 are "Yes", please proceed to Question No. 4. If your answer to Question No. 2 is "Yes" and Question No. 3 is "No", do not answer Question No. 4, unless you answered Question No. 1 "Yes".

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If your answer to Question No. 2 and Question No. 3 is “No”, do not answer Question No. 4 unless you answered Question No. 1 “Yes”. If your answer to Question No. 1 is “Yes”, please proceed to Question No. 4.

Question No. 4: What amount of damages have Plaintiffs suffered?

\$ \_\_\_\_\_

The foreperson shall sign and date this Special Verdict Form and notify the Bailiff.

DATED: Wailuku, Hawaii, May 5, 2015.

/s/ [Illegible]  
Foreperson

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