

App. No. 17A1395

IN THE
SUPREME COURT OF THE UNITED STATES

DOUGLAS LEONE AND PATRICIA A. PERKINS-LEONE,
AS TRUSTEES UNDER THAT CERTAIN UNRECORDED LEONE-PERKINS
FAMILY TRUST DATED AUGUST 26, 1999, AS AMENDED,

Applicants,

v.

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,

Respondents.

**APPLICATION FOR A FURTHER EXTENSION OF TIME
TO FILE A PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF HAWAII**

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**PETITIONERS' APPLICATION FOR A FURTHER EXTENSION OF TIME
TO FILE A PETITION FOR A WRIT OF CERTIORARI**

To the Honorable John G. Roberts, Jr., as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioners Douglas Leone and Patricia Leone-Perkins, in their capacity as trustees under that certain unrecorded Leone-Perkins Family Trust dated August 26, 1999, as amended, respectfully request that the time to file a petition for a writ of certiorari in this case be extended for an additional thirty days to September 12, 2018. Applicants will ask this Court to review a judgment by the Supreme Court of Hawaii issued on April 13, 2017. *See* App. A, at 1. Absent a further extension of time, the petition would be due on August 13, 2018. Petitioners are filing this application at least ten days before that date. *See* Sup. Ct. R. 13.5. The Court has jurisdiction under 28 U.S.C. § 1257(a) to review this case. Although Petitioners set forth the background of the case in their first application for an extension of time, it is included in full below for the convenience of the Court.

Background

This case involves whether a regulatory taking occurs when the government prohibits all viable economic use of land except for holding it as an investment.

1. Petitioners are Douglas Leone and Patricia Leone-Perkins, in their capacity as trustees under that certain unrecorded Leone-Perkins Family Trust dated August 26, 1999, as amended. App. A, at 1. Over seventeen years ago, the Leones bought a parcel of beachfront property in order to build a family home. *Id.* at 3-4. They have been unable to build that home because the applicable Maui Community Plan

designates their private property as “park” land. *Id.* at 5. This designation, in conjunction with other restrictions, prohibits the Leones from developing their property. *Leone v. County of Maui*, 284 P.3d 956, 961 (Haw App. 2012). In 2007, the Leones’ application for permission to build a home on their land was rejected. The Leones then sued respondent County of Maui, a political subdivision of the State of Hawaii (the “County”), and its Director of Planning in his official capacity alleging, *inter alia*, that this rejection effected a taking of their land without payment of just compensation by depriving them of all economically beneficial use of their land in violation of the Civil Rights Act, 42 U.S.C. § 1983. App. A, at 13.

2. The County filed a motion to dismiss, which the trial court granted. *Id.* at 9. The Hawaii Intermediate Court of Appeals reversed, holding that the case was ripe for adjudication because the Leones were prevented from building a single-family home, which satisfied the finality requirement under *Williamson County Regional Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Leone*, 284 P.3d at 966.

On remand, the case went to trial. The County argued that there was no regulatory taking because the Leones could still “use” the land as an investment. App. A, at 29-30. The trial court admitted testimony to this effect over the Leones’ objection that, *inter alia*, this “passive investment” theory is not a cognizable basis for defeating a takings claim. *Id.* at 15-16, 30. The jury returned a verdict for the County. *Id.* at 23. The Leones then moved for judgment as a matter of law, and the trial court denied the motion. *Id.* The Supreme Court of Hawaii affirmed. It concluded that the trial court did not err in endorsing the investment-as-use theory. *Id.* at 44-46. Today, the

land is still being used as a public beach access and park, as it has been for the last ten years after the County refused the Leones permission to build.

Reasons for Granting an Extension of Time

The time to file a petition for a writ of certiorari should be extended for an additional thirty days, to September 12, 2018, for several reasons:

1. The forthcoming petition will present an important question of federal law that this Court should resolve. Though this Court has held that a regulatory taking occurs when the state deprives land of economically viable use, *see Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992), it has never addressed whether the possible value of retaining land as an investment constitutes such a use. If allowed to stand, the Supreme Court of Hawaii's decision will effectively undermine this Court's regulatory takings jurisprudence. Whenever a regulatory taking occurs, there will always be some investment value in the property as long as, among other reasons, there is an investor willing to gamble that the government will change its policy. The Court's guidance is needed to address this important constitutional question, which the Supreme Court of Hawaii decided incorrectly.

2. Petitioners retained new outside counsel with Supreme Court expertise shortly before seeking the initial extension to assist in this case. Additional time is necessary and warranted for counsel to review the record in the case, research case law in state and federal courts, and prepare a clear and concise petition for certiorari for the Court's review.

3. No prejudice would arise from the extension. Whether it is permitted or not, the case would be heard next Term should the Court choose to grant review.¹

4. The press of other matters before the federal courts makes submission of the petition difficult absent an extension. Petitioners' counsel is counsel in a number of other cases in which filings are due in the next month, including *Sturgeon v. Frost*, No. 17-949 (S. Ct.), in which petitioner's brief on the merits is due on August 7, 2018; *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 14-cv-14176 (D. Mass.), in which summary judgment opposition briefs were due on July 30, and reply briefs are due on August 30, 2018; and *Higginson v. Becerra*, No. 3:17-cv-2032 (S.D. Cal.), in which preliminary injunction and motion to dismiss papers are due this month.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended thirty days to and including September 12, 2018.

Dated: August 2, 2018

Respectfully submitted,

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¹ Moreover, respondents would suffer no prejudice from the extension because the public continues to enjoy the free use of petitioners' land as a public beach access and park and the County continues to collect real property taxes from petitioners.