No. 29696

IN THE INTERMEDIATE COURT OF APPEALS OF THE 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-Appellants, vs. COUNTY OF MAUI, a political subdivision of the State of Hawaii; JEFFREY S. HUNT, in his capacity as Director of the Department of Planning of the County of Maui; DOE ENTITIES 1-50, Defendants-Appellees.	CIVIL NO. 07-1-0496 (3) APPEAL FROM (1) ORDER GRANTING DEFENDANTS' MOTION TO DISMISS COMPLAINT FILED NOVEMBER 19, 2007, OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT ENTERED MARCH 2, 2009; (2) FINAL JUDGMENT ENTERED MARCH 2, 2009; (3) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR AN AWARD OF FEES, COSTS AND EXPENSES ENTERED HEREIN ON MAY 18, 2009; AND (4) AMENDED JUDGMENT ENTERED HEREIN ON JUNE 5, 2009 Circuit Court of the Second Circuit, State of Hawaii HON. JOSEPH E. CARDOZA, JUDGE

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Statutes, Charters, and Ordinances

Miscellaneous

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION

Amicus Curiae Pacific Legal Foundation (PLF) submits this brief in support of the Plaintiffs-Appellants Douglas and Patricia Leone (the Leones) on their first Point of Error.

I

SUMMARY OF ARGUMENT

A claim that a land use regulation takes property in violation of the Fifth Amendment's Takings Clause is ripe for judicial review under *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985), as soon as the government makes a final decision applying the regulation to the plaintiff's property, and the property owner is not required to seek a change in the law before it can come to court.

This brief first provides the context of the *per se* regulatory taking alleged by the Leones, which results from an application of the Hawaii Supreme Court's decision in *GATRI v. Blane*, 88 Haw. 108, 962 P.2d 367 (1998). Next, this brief addresses three issues:

First, the County's summary refusal to process the Leones' application under *existing* law was all that was required to ripen their Fifth Amendment takings claim, and is a "final decision" under *Williamson County* subject to judicial review.

Second, the Leones were required to do nothing further before asserting their federal takings claims, such as subject themselves to the County's political processes and pursue a change in the law.

Finally, in order to assert their federal takings claims, the Leones were not required to exhaust any administrative remedies that might have been available, since exhaustion of remedies plays no part in Fifth Amendment analysis.

The issues presented by this appeal are of national importance because the circuit court failed to adhere to well-established U.S. Supreme Court precedent requiring only a "final decision" by the County, and which does not mandate a property owner lobby the County to adopt new, more lenient regulations. The circuit court's judgment should be reversed.

II

IDENTITY AND INTEREST OF AMICUS CURIAE

Founded in 1973, PLF is a nonprofit tax-exempt public interest law foundation organized under the laws of the State of California, registered with the State of Hawaii, supported primarily by voluntary private donations from thousands of citizens across the country, including numerous supporters in Hawaii. PLF has offices in Honolulu, as well as Sacramento, California; Stuart, Florida; and Bellevue, Washington. Policy for PLF is set by a Board Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when PLF's position is deemed to have broad public support within the general community. The Board of Trustees has authorized the filing of a brief as a friend of the court in this appeal. PLF attorneys have extensive experience in the area of takings ripeness, having litigated important precedent on the issue at the United States Supreme Court and in lower courts. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-26 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 735 (1997) (scope of final decision requirement). PLF attorneys have also published extensively on *Williamson County*'s ripeness rules. *See, e.g.*, Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1 (1992); J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of* San Remo Hotel—*The Supreme Court Relegates Federal Takings Claims to State Courts Under A Rule Designed to Ripen the Claims for Federal Review*, 33 B.C. Envt'l. Aff. L. Rev. 247 (2006).

III

ARGUMENT

A. *GATRI* Wipeout Takings

It is well-settled under both the Fifth Amendment and the Hawaii Constitution's takings clause that application of a land use regulation to property effects a *per se* taking when the regulation deprives the owner of all economically beneficial uses, also known as a "wipeout." *See, e.g., Lucas v. South Carolina Coast Council*, 505 U.S. 1003, 1015 (1993); *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 79 Haw. 425, 903 P.2d 1246 (regulatory taking occurs when

application of a law to a particular landowner denies all economically beneficial use of the property), *cert. denied*, 517 U.S. 1163 (1995); *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 475 P.2d 679 (1970) (when regulation goes too far, it will be recognized as a taking).[1] The Leones assert that the County of Maui's refusal to allow any development of their property inconsistent with the "Park" designation in the Kihei-Makena Community Plan deprives them of all economically beneficial use of their land. Their property is zoned "Hotel-Multifamily," which permits a variety of economically beneficial uses, including single-family residences. However, they have been prevented from building their home because the parcel is located in the shoreline Special Management Area (SMA), and all proposed uses for SMA parcels must be consistent with the Community Plan's "Park" designation. Residential uses are not consistent with the "Park" designation, despite being consistent with the parcel's zoning.[2]

Generally, Community and General Plans designations for parcels outside the SMA do not have the force and effect of law, and plan-zone consistency is not required; as long as a proposed use is consistent with the parcel's zoning, the property owner has a right proceed. *See Protect Ala Wai Skyline v. Land Use Controls Committee of the City Council of the City and County of Honolulu*, 6 Haw. App. 540, 547, 735 P.2d 950, 954 (1987) ("[T]he General Plan is a statement of broad policies for the long-range development of Honolulu and does not have the force and effect of law."), *overruled on other grounds*, *GATRI*, 88 Haw. 108, 962 P.2d 367. However, parcels within the SMA are treated differently, and the Leones' takings claim in the case at bar is the holding of *GATRI* applied.

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1. A *per se* regulatory taking also occurs when a regulation requires a property owner allow others to physically occupy his or her land. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (federal government's requirement of public access to private marina a taking); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (state agency's requirement that property owner surrender public easement as a condition of obtaining a development permit a taking).

2. The zone-plan inconsistency is a consequence of the County's aborted attempt to acquire the Leones' property and those of their neighbors for a public beach park in the 1990's. In anticipation of purchase, the County changed the Community Plan designation for the area to "Park," but was only able to afford to buy two of the neighboring parcels. The remaining parcels—including the Leones'—were left as "Park" without regard to the County's continuing inability to purchase them, and despite warnings from the County's attorneys that the "Park" designation worked a taking.

In *GATRI*, the Hawaii Supreme Court held the statutory language in the Hawaii Coastal Zone Management Act, Haw. Rev. Stat. § 205A-26(2)(C) (1993) (CZMA), required that a proposed use within the SMA be consistent with both zoning and the applicable general plan. *See id.* ("No development shall be approved unless the authority has first found . . . [t]hat the development is consistent with the county general plan and zoning.").[3] Thus, the fact that the Leones' proposed use of their property as a single-family residence was inconsistent with the "Park" Community Plan designation resulted in the County refusing to process their application.

After the Leones brought their federal and state takings claims in state court, the circuit court determined as a matter of law it could not review the claims because they were not "ripe" until the Leones attempted to change the Community Plan "Park" designation to "Residential" by convincing the Maui County Council to enact a new ordinance. The circuit court concluded "[p]laintiffs have failed to pursue and obtain a final decision by the Maui County Council on the proposed amendment to the KMCP [Kihei-Makena Community Plan] to change the land use designation of the property from 'Park' to 'Residential.'" Order at 10 (Mar. 2, 2009) (Record on Appeal doc. 0088).

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3. Maui County labels its General Plans as "Community Plans." The Hawaii Supreme Court's decision in *Save Sunset Beach Coalition v. City and County of Honolulu*, 102 Haw. 465, 481, 78 P.3d 1, 18 (2003), might be read as extending the requirement of plan-zone consistency beyond the SMA:

> The dual state and county land use designation approach is analogous to the requirement that property owners comply with both the county development plans and zoning ordinances. In *GATRI v. Blane*, 88 Hawaii 108, 962 P.2d 367 (1998), this court addressed the consistency required between development plans and county-enacted zoning ordinances, both of which have the force and effect of law.

Save Sunset Beach, 102 Haw. at 481, 78 P.3d at 18 (citing *GATRI*, 88 Haw. at 109, 962 P.2d at 368). A careful reading reflects the Court was only recounting the GATRI holding, not extending it to non-SMA parcels. Indeed, because the rationale of *GATRI* was based on the statutory language in the CZMA, which by its own terms applies only to SMA property, any other reading of the above quotation is dicta. *Save Sunset Beach* did not involve an inconsistency between county zoning and county general plans, but an inconsistency between county zoning and state land use designations. The Court held that in such cases, the proposed development must be generally consistent with the state land use designation. *Save Sunset Beach*, 102 Haw. at 483, 78 P.3d at 19.

B. The County's Rejection of the Leones' Residential Application Was a "Final Decision" Under Existing Law Which Ripened Their Federal Takings Claims

All that is needed to ripen a Fifth Amendment takings claim is a final decision under *existing* law demonstrating how the law deprives the owner of all economically beneficial uses. Here, the County refused to process the Leones' application because residential uses were not consistent with the Community Plan's "Park" designation. The County's summary denial was about as final as a decision could possibly be under current law because residential uses on the Leones' parcel are categorically prohibited by the "Park" designation. In *GATRI*, the Hawaii Supreme Court held the County's refusal to process an application is the same as denial. 88 Haw. at 111, 962 P.2d at 370 ("The decision of the Director not to process GATRI's application is a final decision equivalent to a denial of the application."). The Court was not considering finality in the takings context, only for purposes of a final decision triggering judicial review under the Administrative Procedures Act, but the rationale is the same. Thus, the Leones' federal takings claims were ripe for review the instant the County refused to process their application; the County's denial was complete, and a "final decision" regarding what uses the Leones could make of the land under *Williamson County,* 473 U.S. at 185.

In *Williamson County,* the United States Supreme Court held a Fifth Amendment takings claim is ripe as soon as the government reaches a "final [administrative] decision regarding the application of the regulation to the property at issue." *Id.* The final-decision requirement is not concerned with whether the property owner has a winning claim. Instead, its sole purpose is to ensure that the government's position is concrete enough to allow a court to measure the amount of impact the challenged regulation has on the plaintiff's property. When a property owner claims a physical invasion taking has occurred, for instance, the final-decision requirement is satisfied as soon as the invasion occurs. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982). Similarly, when a property owner claims a permanent regulatory taking based on denial of economic use of property, the final decision occurs "once it becomes clear that [a land-use authority] lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty." *Palazzolo*, 533 U.S. at 620.

Thus, in cases where a property owner asserts that government action has taken his or her property because the regulations deny all beneficial uses of the land, the final decision requirement guards against the possibility that the government will allow some beneficial use of the land under existing regulations other than the use the plaintiff seeks. *See Williamson County*, 473 U.S. at 191 (ripeness requires "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question"); *County Concrete Corp v. Town of Roxbury*, 442 F.3d 159, 164 (3d Cir. 2006) (once a "decision maker has arrived at a definitive position on the issue" [the] property owner [has] been inflicted with "an actual, concrete injury"); *Maguire Oil Co. v. City of Houston*, 243 S.W.3d 714, 718 (Tex. Ct. App. 2008) (a final decision under existing law is required so a court can measure whether the existing laws go "too far").

This issue was not addressed directly by the Hawaii Supreme Court in *GATRI*, although it impliedly rejected a requirement that a property owner avail itself of political processes and legislative changes. In that case, GATRI brought a takings challenge after its application to construct a restaurant on SMA property which was designated as "Residential" on the County's applicable Community Plan. *Id.* at 109, 962 P.2d at 368. As in the case at bar, the application was refused by the County. *Id.* The Court considered the takings claim ripe, and did not require GATRI to change the Community Plan, thus implicitly rejecting the circuit court's conclusion in the case at bar. All the Court required was the County's refusal to process an application for development under *existing* laws. *Id.* at 111, 962 P.2d at 370 ("The decision of the Director not to process GATRI's application is a final decision equivalent to a denial of the application."). *See also Dunn v. County of Santa Barbara*, 135 Cal. App. 4th 1281, 1300 (Cal. Ct. App. 2006) (takings challenge held ripe; court implicitly rejected claim property owner should have sought change in wetlands ordinance).

This Court should make explicit that which was implicit in *GATRI* and hold that the only requirement for ripening a federal takings claim is obtaining a final decision applying current laws or regulations. *Williamson County*, 473 U.S. at 191. The County reached a reviewable "final decision" when it concluded it could not process the Leones' application, because that action was "a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.* Requiring more would be contrary to controlling decisions of the U.S. Supreme Court.

C. Property Owners Are Not Required To Change the Law To Ripen a Fifth Amendment Takings Claims

The Leones were required to do nothing further before asserting their federal takings claims. Changing the Kihei-Makena Community Plan designation for their property from "Park" to "Residential" as required by the circuit court would involve a legislative change[4] and, contrary to the court's conclusion, the Leones had no obligation whatsoever to convince the Maui County Council to legislatively adopt a "Residential" designation as a prerequisite to asserting their federal claims. In essence, the circuit court held the Leones must resort to the caprices of the County's political processes instead of the courts to address their federal takings claims. However, under *Williamson County* and *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 342 (2005), state courts have an absolute obligation to consider federal constitutional challenges under the Fifth Amendment, and cannot pass those duties off to municipal political entities. Thus, a Fifth Amendment challenge is ripe without regard to whether the property owner has sought to change the applicable law, and the circuit court erred when it summarily refused to consider the Leones' federal takings claims.

For example, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 938 F.2d 153, 157 (9th Cir. 1991), the Ninth Circuit held federal takings "ripeness did not require the plaintiffs to ask [the government] to amend the 1984 Plan [a regional plan] before bringing their [federal takings] claims." *Id.* at 157, *rev'g* 911 F. 2d 1331 (9th Cir. 1990). The Ninth Circuit rejected the argument that a takings claim was not ripe until the plaintiff sought legislative changes, and explained that *Williamson County*'s final decision requirement is designed only to enable a reviewing court to confidently apply relevant federal takings tests. *Tahoe-Serrra*, 938 F.2d at 157.

Similarly, in *Maguire Oil Co. v. City of Houston*, 243 S.W.3d at 720, the court rejected the argument that the property owner was required to appeal a denial of a land use permit to the city

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4. Community Plan amendments require approval by the Planning Commission after public hearing, and if the commission's recommendation is favorable, the County Council holds public hearings and adopts the new designation by ordinance. *See* Maui County Code § 2.80B.110(b) (Planning Commission transmits recommendations regarding ordinance to Council); Maui Charter § 8-8.6(1) (2003) (Council adopts Community Plan changes by ordinance).

council. The court held the only requirement for a takings case to be ripe for judicial review is that a "final and authoritative decision must be of the type and intensity of development legally permitted on the subject property [because a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.* at 718. The court recognized that legislative redress is not necessary. *Id.* at 720.

Like the Texas court in *Maguire*, the New York Court of Appeals in *Ward v. Bennett*, 592 N.E.2d 787 (N.Y. 1992), repudiated the claim that property owners must seek legislative changes as the ticket to ripening their takings claims. The court held that denial of a building permit was sufficient to ripen a takings claim, and "constitutes its 'final' and 'definitive' decision regarding the availability of the permit." *Id.* at 790. Similarly, the County's summary refusal to process the Leones' application because residential uses are categorically prohibited on their parcel under the "Park" Community Plan designation was a "final" and "definitive" decision regarding what uses the County would permit. Most pertinent to the present case, the New York court expressly held that seeking legislative changes is never a requirement of ripening a takings claim:

> [T]he ripeness doctrine does not impose a threshold barrier requiring pursuit of all possible remedies that might be available through myriad government regulatory and legislative bodies. Indeed, we have said such a requirement might create a bureaucratic nightmare and undue hardship.

Id. The court concluded: "An aggrieved property owner could be effectively blocked from seeking meaningful judicial review of a confiscation claim until, for example, a change in governing law—a possibly excessively burdensome course of action, such as is presented in this case." *Id.* The court's rationale is precisely right: forcing property owners to change the law as the key to the courthouse means there would be no practical limits on what might be required. For example, the Georgia Court of Appeals held the owner of a landfill had ripened a takings claim after being denied administrative approval to operate within the proximity of a military bombing range. *GSW, Inc. v. Dep't of Natural Resources*, 562 S.E.2d 253, 255 (Ga. Ct. App. 2002). During the pendency of the case, the state legislature enacted a statute restricting the operation of landfills within two miles of federally restricted military air space used for bombing ranges. *Id.* at 254. Applying the circuit court's rationale in the present case, the claims of the prevailing landfill owner in *GSW* would be rendered

"non final" because he would have to petition the legislature to repeal the statute and to ripen the takings claim, and might even obtain relief by having the federal government amend its laws regarding restrictive air space. The Georgia court recognized the absurdity of a rule requiring a property owner to change the law, because the laws that could be changed to avoid a taking are potentially boundless. The court correctly applied *Williamson County* to require only a final decision from an administrative agency under *existing* laws and regulations. *Id.* at 255.

D. Exhaustion of Remedies Is Not Required for Fifth Amendment Ripeness

"Exhaustion of administrative remedies" plays no part in federal regulatory takings analysis. *Williamson County*, 473 U.S. at 194. The circuit court, however, confounded exhaustion with *Williamson County*'s final decision ripeness requirement. *See* Order at 17 (Mar. 2, 2009) (Record on Appeal doc. 0088) ("Plaintiffs have failed to exhaust their administrative remedies and do not qualify under the 'futility' exception to the exhaustion doctrine. The instant case is not ripe for review.").

The *Williamson County* final decision ripeness requirement in federal takings challenges is distinct from the separate requirement in some cases that a plaintiff exhaust administrative remedies, and as the U.S. Supreme Court makes clear, only the ripeness analysis applies in Fifth Amendment takings claims. In *Patsy v. Board of Regents of Florida*, 457 U.S. 496 (1982), the Court held a takings plaintiff has no obligation to exhaust administrative remedies to achieve ripeness. *Id.* at 192 (rejecting exhaustion requirement and noting, as an example, that there is no requirement that the claimant appeal to a Zoning Board of Appeal to ripen a takings claim). The Court further clarified that the "exhaustion" doctrine is not to be insinuated into the "final decision" ripeness rule, but that the two concepts are distinct:

> While the policies underlying the two concepts [ripeness and exhaustion] often overlap, the finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and
>
> obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

Williamson County, 473 U.S. at 193.

IV

CONCLUSION

The Leones are not required to change the law to ripen their regulatory takings claim for judicial review. The circuit court's conclusion that the County has not reached a "final decision" regarding how its existing land use laws impact the Leones' property until they seek a legislative change to the Community Plan should be vacated and the case remanded.

DATED: Honolulu, Hawaii, September 14, 2009.

Respectfully submitted,

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No. 29696

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date a true and correct copy of foregoing document was duly served upon the following individuals by mailing said copy, postage prepaid, to their last known addresses as follows:

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