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2007 SEP 27 PM 5:42

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Lani Ng

THIRD CIRCUIT COURT
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

COUNTY OF HAWAII, a municipal
corporation,

Plaintiff,

vs.

ROBERT NIGEL RICHARDS, TRUSTEE
UNDER THE MARILYN SUE WILSON
TRUST; C&J COUPE FAMILY LIMITED
PARTNERSHIP; MILES HUGH WILSON, et
al.,

Defendants.

) CIVIL NO. 00-1-181K (Consolidated)
) CIVIL NO. 05-1-015K (Consolidated)
)

) **FIRST AMENDED FINDINGS OF**
) **FACT, CONCLUSIONS OF LAW,**
) **AND ORDER**
)

) Trial Dates:

) July 9-13, 2007
) July 16-20, 2007
) July 23-27, 2007
) July 30-August 2, 2007
)

) Post Trial Proposed Findings of Fact,
) Conclusions of Law, and Order,
) submitted: August 23, 2007
)

) Judge:

) Honorable Ronald Ibarra
)

FIRST AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER¹

I hereby certify that this is a full, true and correct
copy of the original on file in this office.


Clerk, Third Circuit Court, State of Hawaii

¹ This amendment is based on the Court's Notice Amending Findings of Fact, Conclusions of Law, and Order, Filed 9/25/2007, and Notice Amending Final Judgment, Filed 9/25/2007, Pursuant to Rule 60(a) of the Hawaii Rules of Civil Procedure, filed September 27, 2007.

A consolidated non-jury trial in the above entitled matter was held on July 9-13, 2007; July 16-20, 2007; July 23-27, 2007, and; July 30-August 2, 2007, before the Honorable Ronald Ibarra. Plaintiff and Counterclaim Defendant County of Hawaii was represented by Joseph K. Kamelamela, Esq. and Michael J. Udovic, Esq.. Defendant, Counterclaim, Third-Party and Cross-claim Plaintiff C&J Coupe Family Limited Partnership were represented by Kenneth R. Kupchak, Esq., Robert H. Thomas, Esq., and Mark M. Murakami, Esq.. Third-Party Defendant and Cross-claim Defendant 1250 Oceanside Partners was represented by William Meheula, Esq., and Derek T. Mayeshiro, Esq..

The Court has reviewed the proposed Findings of Fact and Conclusions of Law submitted by Plaintiff and Counterclaim Defendant County of Hawaii on July 3, 2007, by Defendants, Counterclaim, Third-Party and Cross-claim Plaintiff C&J Coupe Family Limited Partnership on July 3, 2007, and by Third-Party Defendant and Cross-claim Defendant 1250 Oceanside Partners on July 3, 2007. The Court has also reviewed the additional Proposed Findings of Fact and Conclusions of Law that were submitted after the trial by Plaintiff and Counterclaim Defendant County of Hawaii on August 23, 2007, by Defendants, Counterclaim, Third-Party and Cross-claim Plaintiff C&J Coupe Family Limited Partnership on August 23, 2007, and by Third-Party Defendant and Cross-claim Defendant 1250 Oceanside Partners on August 23, 2007. The Court, having received testimonial and documentary evidence, having reviewed the written arguments of counsel, being otherwise fully advised in the premises, judging the credibility of the witnesses, and making reasonable inferences therefrom, hereby makes and enters the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

The Court makes the following consolidated Findings of Fact. If it should be determined that any of these consolidated Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such. The headings are used for organizational purposes only. The Court has considered the facts under each heading for all claims.

Identity of the Parties:

1. Plaintiff and Counterclaim Defendant County of Hawaii ("County") is a municipal corporation of the State of Hawai'i.
2. Defendant, Counterclaim, Third-Party and Cross-claim Plaintiff C&J Coupe Family Limited Partnership ("Coupe") is a Hawaii limited partnership with its principal place of business in Honolulu, Hawaii. Defendant Robert Nigel Richards, Trustee of the Marilyn Sue Wilson Trust, is a resident of California, and is not participating in trial.² Defendant Miles Hugh Wilson is a resident of Georgia, and is not participating in trial (collectively, "Defendants").³ Collectively, the Coupe's, Robert Nigel Richards, as Trustee of the Marilyn Sue Wilson Trust, and Miles Hugh Wilson own 300.7 acres of land in the Onouli ahupuaa on the Island, County, and State of Hawaii ("Property"). (*Exhibit J-438*).

² On June 25, 2007, the Court filed its Interim Order Regarding [County's] Motion for Partial Default Judgment, filed May 25, 2007, wherein the Court also ordered that trial "shall serve as the proof hearing for the default judgment against Robert Nigel Richards, Trustee under the Marilyn Sue Wilson Trust and against Miles Hugh Wilson."

³ See *supra* note 1 and accompanying text.

3. Third-Party Defendant and Cross-claim Defendant 1250 Oceanside Partners (“Oceanside”) is a Hawaii limited partnership with its principal place of business on the Island, County, and State of Hawaii.

The Property

4. The Coupe’s, Defendants Robert Nigel Richards, as Trustee of the Marilyn Sue Wilson Trust, and Miles Hugh Wilson own a plot of land that consists of about 300-acres in Onouli, Island of Hawaii, that runs from the ocean to the Mamalahoa Highway, and is the land area designated by tax map key parcels 8-1-007-057 and 8-1-007-45 including Parcel 18B. This land area contains the 3.348 acre parcel of land (“the Property”) that is the subject of these consolidated condemnation actions. (*Exhibits J-290; J-439; J-440*).
5. Seventy-two (72%) percent of the Property belongs to the Coupe’s, and twenty-eight (28%) percent of this land belongs to Defendant Robert Nigel Richards, Trustee Under The Marilyn Sue Wilson Trust and Miles Hugh Wilson. (*Exhibits J-439, D-147*).

County Need

6. By 1979, the County recognized a need for a road to bypass the Mamalahoa Highway due to the projected inadequacies of existing highway, high accident rates, higher anticipated traffic volume and congestion, and the need for a route continuously around the island in a 1979 study conducted by the Hawaii Department of Transportation entitled *Hawaii Belt Road Holualoa to Papa Preliminary Engineering Report*. (*Exhibit D-2*).

7. In 1982, the Kona Regional Plan had identified traffic problems along the Mamalahoa Highway, and determined that the traffic was equal to or exceeded the roadway design capacity. The County also found that the rapid increase in traffic placed a heavy burden on the roadway network, and increased both travel time and inconvenience. (*Exhibit D-14*).
8. In response, the County adopted the proposed 1979 State Bypass Highway and Alii Drive Extension on the 1989 County General Plan Public Facilities Map. (*Exhibit J-245*).
9. The County further conducted the following studies: (*Test. of W. Moore, 7/9/07*); (*Test of N. Burns, 7/10/07*).
 - a. The 1989 Hawaii County Council General Plan adopted the 1979 State Bypass Highway and the Alii Highway. (*Exhibit J-245*).
 - b. A 1993 study by Parson, Brinckerhoff, Quade and Douglas found that a bypass highway would be sufficient to relieve all existing and projected future regional congestion on Mamalahoa Highway. (*Exhibit J-382*).
 - c. A 1998 study prepared for the Hawaii Department of Transportation, entitled *Hawaii's Long Range Land Transportation Plan Final Report*, recognized the need for the Mamalahoa Bypass Highway based on traffic safety considerations. (*Exhibit J-382*).
 - d. A 1998 study prepared for the State of Hawaii Department of Transportation recognized the need, based on traffic safety considerations, for the Mamalahoa Bypass Highway. (*Exhibit J-135*).

Oceanside's Situation

10. Oceanside is a land developer who acquired 1250 acres of land makai of the Mamalahoa Highway in Kona in the late 1980's and early 1990's, and 660 acres of land at Keopuka in the early 1990's. (*Exhibits J-45; J-287*).
11. Oceanside's team includes: Richard T. Frye, Project Manager for Hokulia and Keopuka projects; Bill Moore, former County planning official; Wayne Yoshioka, Parsons Brinckerhoff traffic engineer; and, Nancy Burns, civil engineer. (*Generally, Test. of R. Frye, 7/25/07; Test. of W. Moore, 7/9/07; Test. of W. Yoshioka, 7/27/07; Test. of N. Burns, 7/10/07*).
12. Oceanside has sought land use entitlements from the County of Hawaii for its luxury golf course real estate development project on its Kona and Keopuka properties. This project was formerly known as the Villages at Hokukano, and is now known as Hokulia. (*Exhibits J-45; J-300; J-301*).

Oceanside's Proposal

13. Recognizing the County's need for new roads, Oceanside proposed to build the bypass highway in exchange for a change of zoning for the Hokulia development project. County Ordinance Number 94-73 accepted Oceanside's proposal, and changed the zoning for the Hokulia project while requiring Oceanside to acquire and build the bypass highway at its own expense. (*Exhibit J-24*).
14. According to County Ordinance Number 94-73, the southern terminus of the bypass highway was to be in the vicinity of Napoopoo Road and the northern terminus was to be at Kuakini Highway. (*Exhibit J-24*).

15. County Ordinance Number 96-8 amended 94-73 to include a shift in the alignment of the bypass highway from Kuakini Highway to the “approximate vicinity of Keauhou.” (*Exhibit J-354*).
16. On December 15, 1995, a councilmember asked Mr. Frye if “[U]nder this bill [County Ordinance Number 96-8], you folks are going to build that road, right? The bypass road?” Mr. Frye responded, “Yes.” (*Exhibit D-61 at 2340*).
17. Under either County Ordinance 94-73 or 96-8, Oceanside was also required to demonstrate that it owned or controlled the right-of-way for the bypass highway prior to Final Subdivision Approval for its zoning requests. (*Exhibit J-24*).
18. Oceanside’s planning consultant, Bill Moore, testified that his interpretation of County Ordinance Number 94-73 was that County would condemn private property if the owner refused to sell the land to Oceanside for the bypass. (*Test. of W. Moore, 7/1//07*).
19. Oceanside sent “threat letters” regarding condemnation to its neighboring landowners along the bypass corridor if they failed to sell their private property to Oceanside for the Bypass. Before County and Oceanside even entered into the Development Agreement, on August 13, 1997, Oceanside’s attorney, John R. Dwyer, Jr., wrote to Clifford Miller, an attorney for Kona Trust, complaining about John Michael White’s (Kona Trust representative) statement that Bishop Estate prefers a particular alignment for the bypass. Dwyer continued: “If we can not agree (and we have been at it for months now) I feel that the County will have to proceed with condemnation.” (*Exhibit J-91*).

Development Agreement

20. On April 1, 1998, County and Oceanside signed a Development Agreement for Oceanside's Hokulia development project. (*Exhibit J-45*).
21. The Development Agreement purports to bind the County for thirty (30) years. (*Exhibit J-45*).
22. In accordance with County Ordinance Numbers 94-73 and 96-8, the Development Agreement also obligated Oceanside to construct the Mamalahoa Bypass Highway. (*Exhibit J-45*).
23. Before the Development Agreement was signed, Oceanside weighed the costs and benefits of Oceanside's acquisition of the land to build the Mamalahoa Bypass Highway by purchase and condemnation. (*Exhibit R-226*).
24. Oceanside's investors were concerned with the construction of the bypass being a condition of approval on the zone change when Oceanside did not own or control the property along the bypass corridor. (*Exhibits J-201; J-204; Test. of L. Anderson, 7/26/07 (24:6-27:25)*). At the very least, Oceanside's investors wanted assurances of condemnation before committing to investment in the project. (*Exhibits J-272; R-215*).
25. At least one Oceanside investor stated that "[a]cquisition of all twenty-five properties for the [Mamalahoa Bypass Highway] prior to US \$40M[] equity financing is mandatory." (*Exhibit J-201*).
26. Oceanside's counsel drafted the Development Agreement. (*Exhibit J-214*).

27. Before entering into the Development Agreement, Oceanside considered a provision to require the County to condemn privately owned land for the Mamalahoa Bypass Highway. (*Exhibits J-202; J-203; J-214*).
28. County understood that Oceanside's financing structure required the ability to condemn in the event a landowner would not sell. (*Test. of G. Takase, 7/16/07 (13:21-16:10)*).
29. Based on Oceanside's investor concerns and the County's understanding of Oceanside's financing structure, the Development Agreement included provisions regarding condemnation and reimbursement. (*Exhibit J-45*).
30. Regarding condemnation, the Development Agreement provided that, if any landowner refused to sell their private land to Oceanside, the County's power of eminent domain would be used to acquire the parcel for Oceanside to construct the Mamalahoa Bypass Highway. (*Exhibit J-45*).
31. Regarding reimbursement, the Development Agreement also provided that the County would reimburse Oceanside for construction costs of the bypass highway through the "fair share" assessments that could be levied on neighboring landowners. (*Exhibit J-45*).

Development Agreement -- Condemnation

32. Section 10 of the Development Agreement states the following:

OCEANSIDE shall attempt to negotiate a purchase price with any and all Persons. Should OCEANSIDE and any Person be unable to negotiate a mutually agreeable purchase price, then OCEANSIDE shall provide [a list of appraisers. The landowner must then choose one of the appraisers from that list and accept the price established by appraiser]. Should OCEANSIDE and the Person be unable to select an Appraiser, or if the Person and OCEANSIDE cannot decide on a price recommended by mutually selected Appraiser, then upon written request to the Mayor, the COUNTY shall be required to use its condemnation powers to acquire the Segment(s) from the Person pursuant to Paragraph (11)

[I]f the Person fails to participate in negotiations with Oceanside for the purchase of Segment(s) of the Right-of-Way from the Person despite OCEANSIDE's good faith attempts to negotiate, then OCEANSIDE may, in its sole discretion, submit a letter to the Mayor to have the COUNTY utilize its condemnation powers. Upon receipt of the written request, the COUNTY shall be required to use its condemnation powers to acquire the Segment(s) from the Person pursuant to Paragraph (11).
(*Exhibit J-45*, sections 10.b-c) (emphasis added).

33. Section 11 of the Development Agreement states the following:

Upon OCEANSIDE's tender of a requirement of condemnation by letter to the COUNTY, the COUNTY shall within thirty (30) days begin to immediately and expeditiously exercise the same pursuant to HRS Chapter 101. OCEANSIDE'S tender of such requirement of condemnation to the COUNTY shall constitute a "formal initiation of condemnation action" as that term is used in Condition L(2) of Ordinance 96-8 and Condition M(2) of Ordinance 96-7 and shall relieve OCEANSIDE of all further liability or obligation to purchase Segment(s) of the Right-Of-Way from such Person. . . .

The COUNTY shall submit to OCEANSIDE a written request for payment of any and all reasonable costs and expenses incurred by the COUNTY for the acquisition of the condemned land in conjunction with the COUNTY'S exercise of its condemnation powers when OCEANSIDE has determined in its sole and absolute discretion that there is a need for possession or in the event that a Court orders payment for the acquired land.
(*Exhibit J-45*, sections 11) (emphasis added).

34. The Development Agreement also gives Oceanside the ability to designate the private property to be condemned by allowing Oceanside to "[d]etermine the final Right-of-Way for the alignment of the entire Bypass Highway, including intersection areas." (*Exhibit J-45*).

35. The language of Section 11 of the Development Agreement indicates that, at the time the parties entered into the agreement, the County intended to condemn any private property that Oceanside has determined, in its sole and absolute discretion, as necessary for the construction of the Mamalahoa Bypass Highway.
(*Exhibit J-45*).

36. Section 11 further states, "Within forty-five (45) days of written notice from the COUNTY, OCEANSIDE shall reimburse the COUNTY for any and all reasonable

costs and expenses incurred by the COUNTY for the acquisition of the condemned land in conjunction with the COUNTY'S exercise of its condemnation powers." (*Exhibit J-45*).

Development Agreement -- Reimbursement

37. Oceanside retained the Parsons engineering firm, specifically Wayne Yoshioka, to develop the reimbursement model based on traffic analysis. (*Test. of W. Yoshioka, 7/23/07 (45:21-40:10)*). In developing his methodology, Yoshioka relied heavily on the traffic model from the 1991 Hawaii Long Range Highway Plan ("LRP"). (*Exhibit J-347*); (*Test. of W. Yoshioka, 7/23/07 (53:25-54:4)*).
38. The LRP used 1986 traffic data with 1987 traffic conditions. (*Exhibit J-347*).
39. Yoshioka used the Traffic Analysis Zone ("TAZ's") from the LRP. (*Exhibit J-347*); (*Test. of W. Yoshioka, 7/23/07 (63:8-65:14)*). These TAZ's are regional areas that are used to geographically divide the island.
40. Yoshioka's report relied upon the completion of the Alii Highway and only analyzed the traffic situation out to 2005 and 2010. (*Exhibit J-384*); (*Test. of W. Yoshioka, (7/23/07 (71:2-4)*). Yoshioka did not analyze the traffic impact of the workforce for the Kohala resorts driving from Ka'u. (*Test. of W. Yoshioka, (67:9-19)*).
41. The stated methodology for the allocation of a percentage of a developer's "fair share" assessment was the impact on traffic a prospective developer's project would have or "but for" the bypass which developers would not be allowed to build. (*Test. of W. Moore, 7/10/07 (60:24-61:9)*).

42. The Development Agreement contains a provision on “fair share” reimbursement from the County to Oceanside. (*Exhibit J-45*)
43. Section 15(c) of the Development Agreement requires the County to reimburse Oceanside as soon as the County assesses a “fair share” contribution for new re-zonings in the vicinity of the Mamalahoa Highway pursuant to a percentage schedule in the Development Agreement. (*Exhibit J-45*).
- a. Specifically, Section 15(c) states, “In the event that the COUNTY collects such “fair share” contributions, or similar fees, as may be allowed by the rezoning ordinances . . . from developers and landowners whom the COUNTY has determined as benefiting from the Bypass Highway, the COUNTY shall reimburse OCEANSIDE from such funds as they are collected” (*Exhibit J-45*).
44. According to the Development Agreement, reimbursement funds are derived, at least, from the following three sources: (a) “fair share” contributions paid to the County to address potential regional impacts of their development on road facilities; (b) an Impact Fee Ordinance that assesses or imposes an impact fee either for the County as a whole or for the region extending from Keauhou to Milolii, and; (c) any other monetary contribution paid to the County from developers or land owners that benefit from the Bypass Highway. (*Exhibit J-45*).
45. According to the Development Agreement, for a period of thirty years, a percentage of this reimbursement fund will be paid to Oceanside. This percentage varies by geographic area, and is described as follows:
- (1) twenty-five percent (25%) of the funds received from Keauhou will be paid to

- Oceanside; (2) eighty percent (80%) of the funds received from the Honalo-Captain Cook-Existing Mamaloha Highway Corridor will be paid to Oceanside; (3) one hundred percent (100%) of the funds received from the Honalo-Captain Cook-Mauka Area will be paid to Oceanside; (4) one hundred percent (100%) of the funds received from the Honalo-Captain Cook-Makai Area will be paid to Oceanside, and; (5) sixty-five percent (65%) of the funds received from the Captain Cook to Milolii area will be paid to Oceanside. (*Exhibit J-45*).
46. County Ordinance 96-8 authorized a reimbursement process for the costs incurred by Oceanside for the construction of the Mamalahoa Bypass Highway from funds collected by the County from other developers or landowners that have benefited from the road. (*Exhibit J-354*).
47. This provision also referred to the Development Agreement to set forth the terms and conditions of reimbursement for costs incurred for the construction, land acquisition and design of the Mamalahoa Bypass Highway. (*Exhibit J-354*).
48. The Development Agreement created a “fair share” allocation scheme that was based on benefits to landowners rather than on the impacts of their re-zoning. (*See generally Test. of Bill Moore, 7/9/07 – 7/12/07*).
49. The County then adopted this allocation based on benefits conveyed to the landowners rather than the impacts imposed by the landowners. (*Test. of B. Leithead-Todd, 7/13/07 (23:23-25); J-362 at 3316*).
50. None of the private landowners participated in the negotiations for this thirty-year “fair share” allocation in the Development Agreement. (*Exhibit J-45*).

51. The County has tried to pass an impact fee ordinance, but has never successfully adopted one. (*Test. of B. Leithead-Todd*, 7/13/07 (23:10-14)).

Oceanside and County's Performance Under the Development Agreement

52. After Oceanside and County entered into the Development Agreement, Dwyer sent "threat letters" regarding condemnation on Oceanside's behalf against landowners along the bypass. (*Exhibits J-87; J-93; J-94; J-95; J-96*).
- a. John R. Dwyer, Jr.'s letter to Gary W. Vancil regarding John A. Pearne on May 29, 1998, stated, "[W]e would like to open discussions with Mr. Pearne to acquire that parcel at a mutually agreeable price so that eminent domain proceedings will not be necessary." (*Exhibit J-93*).
 - b. John R. Dwyer, Jr.'s letter to Clifford J. Miller regarding the Kona Trust property on June 5, 1998, stated, "If Kona Trust is not willing to unequivocally agree that it will convey the subject Right-of-Way to Oceanside or the County (at its election) when the conveyance is requested by Oceanside, then Oceanside will be forced to rely on the condemnation provisions of the Development Agreement." (*Exhibit J-94*).
 - c. John R. Dwyer, Jr.'s letter to Charles Coupe on May 26, 1999, stated, "[B]y submitting this matter to the County for condemnation, Oceanside would be absolved from providing the Coupe/Wilson group any of the benefits it is offering to the owners. For instance in terms of monetary considerations, the County would offer only the fair market value of the parcel being condemned rather than the \$17,000 per acre amount being

offered by Oceanside; The Coupe/Wilson group would also then be responsible for the payment of its attorneys fees.” (*Exhibit J-87*).

d. John R. Dwyer, Jr.’s letter to Gary Yamagata on May 26, 1999, stated, “[I]f you find the enclosed Agreement acceptable, please advise so that execution copies can be forwarded to you Thank you for your anticipated cooperation . . . otherwise, we must submit the matter to the County of Hawaii for its Eminent Domain/Condemnation processes.” (*Exhibit J-95*).

e. John R. Dwyer, Jr.’s letter to Caroline Smith on May 26, 1999, stated, “[I]f you find the enclosed Agreement acceptable, please advise so that execution copies can be forwarded to you Thank you for your anticipated cooperation . . . otherwise, we must submit the matter to the County of Hawaii for its Eminent Domain/Condemnation processes.” (*Exhibit J-96*).

53. Oceanside coordinated with the County in negotiations and acquiring private properties through condemnation. (*Exhibit J-100*).

54. Under the Development Agreement, Oceanside identified the property to be condemned and directed the County to condemn. (*Exhibit J-45*).

55. Oceanside’s attorneys from the Dwyer firm appeared as counsel of record on pleadings representing the County in a separate condemnation suit, Civil No. 00-1-006K. (*Exhibit D-116*).

56. On October 22, 1997, Mr. Frye sent a letter to Mr. Takeda of Japan Air Lines. Frye stated that the Development Agreement was designed to “require” the

County to condemn right-of-way lands. (*Exhibit J-202*). Specifically, the letter provides as follows:

As we have discussed there may be a need for the County to condemn certain properties along the . . . by-pass route The Mayor has said that he would condemn properties that we are not able to acquire. Our proposed Development Agreement, if approved as currently structured, requires the County to condemn parcels we are not able to acquire. (*Exhibit J-202*) (emphasis in original).

57. Oceanside also paid the landowner's compensation for County condemnation actions, funded the customary pre-condemnation title search and appraisal, and provided the initial deposit of compensation supporting the Orders of Possession. (*Exhibit J-105*); (*Test. of G. Takase, 7/16/07*).
58. In 1999, Oceanside was faced with the choice of going forward with the construction of only the golf course or with the substantially more expensive development of the golf course along with Phase I of the lots. (*Exhibits D-102; D-146*); (*Test. Anderson, 7/26/07*).
59. In December 1999, Oceanside made the decision to go forward with construction of the golf course and the development and sale of lots in Phase I. As a result of this decision, Oceanside closed \$37M in sales in December 1999, and also committed to its new lot purchasers to complete the infrastructure elements of Hokuli'a. Oceanside expended \$50M on construction in 2000. (*Exhibits D-102; D-146*); (*Test. of Anderson, 7/26/07*).

Civil No. 00-1-181K -- Condemnation Proceedings

60. When County counsel suggested Oceanside's counsel Dwyer to negotiate with the Coupe's, Dwyer balked and directed the County to proceed with condemnation. (*Test. of G. Takase, 7/16/07, Vol. II (6:20-7:5)*).

61. In a letter dated May 23, 2000, the County was informed by an attorney for Oceanside that there has been an impasse in negotiations with the Defendants, and that the County should initiate condemnation proceedings. (*Exhibits R-322; J-237*); (*Test. of Gerald Takase, 7/16/07*).
62. Pursuant to Oceanside's directive under Paragraph 11 of the Development Agreement, the County initiated an eminent domain action in Civil No. 00-1-181K on October 9, 2000, against Defendants, Counterclaim Plaintiffs, Third-Party and Cross-claim Plaintiffs Charles William Coupe; Joan Elizabeth Coupe; and Joan Coupe, Trustee Under The Revocable Trust of Joan Coupe (hereinafter "Richards Family"); and Defendants Robert Nigel Richards, Trustee Under The Marilyn Sue Wilson Trust, and Miles Hugh Wilson based on Resolution 266-00. This condemnation action in Civil 00-1-181K was based on County Resolution Number 266-00 that was passed by the Hawaii County Council on July 26, 2000. (*Exhibit J-232*)
63. The County served its Complaint for Civil No. 00-1-181K on Joan Coupe, individually and as Trustee under Revocable Trust of Joan Coupe dated March 30, 1989, and Charles William Coupe on November 6, 2000. (*See Return and Acknowledgment of Service (Joan Elizabeth Coupe Served on 11/6/00 with Documents No. 1, 2, 3, and 4), filed November 13, 2000; Return and Acknowledgment of Service (Charles William Coupe Served on 11/6/00 with Documents No. 1, 2, 3, and 4), filed November 13, 2000*).
64. The complaint for Civil No. 00-1-181K was served on Robert Nigel Richards, Trustee Under The Marilyn Sue Wilson Trust and Joan Elizabeth Coupe Trust by

- certified mail on November 3, 2000. (*Return and Acknowledgment of Service (Joan Elizabeth Coupe Served on 11/3/00 with Documents No. 1, 2, 3, and 4), filed November 14, 2000*).
65. An Order Putting Plaintiff in Possession was granted, and filed on October 10, 2000. (*Order Putting Plaintiff In Possession, filed October 10, 2000*).
66. The County filed a Motion for Partial Summary Judgment as to Defendants/Counterclaimants' Sixth and Seventh Affirmative Defenses and First Claim for Relief Asserted in the Answer and Counterclaim Filed January 24, 2001 (Hereinafter, "Motion for Partial Summary Judgment"). (*Plaintiff County of Hawaii's Motion for Partial Summary Judgment As To Defendant/Counterclaimant's Sixth and Seventh Affirmative Defenses and First Claim for Relief Asserted in the Answer and Counterclaim Filed January 24, 2001, filed September 4, 2001*).
67. The Court originally granted County's Motion for Partial Summary Judgment on November 27, 2001. (*Order Granting County of Hawaii's Motion for Partial Summary Judgment as to Defendants/Counterclaimants' Sixth and Seventh Affirmative Defenses and First Claim For Relief Asserted in the Answer and Counterclaim Filed January 24, 2001*).
68. The Court revisited the issue of public purpose, requested supplemental briefs from the parties, and held a hearing on that issue on July 11, 2002. (*Defendants Robert Nigel Richards, Trustee Under The Joan Elizabeth Coupe Trust, Charles William Coupe, Joan Elizabeth Coupe, and Joan Coupe, Trustee Under The Revocable Trust of Joan Coupe dated March 30, 1989, filed July 5,*

2002; Plaintiff County of Hawaii's Supplemental Reply filed July 9, 2002, Defendants' Second Supplemental Memorandum in Opposition filed July 29, 2002; Plaintiff County of Hawaii's Second Supplemental Reply Memorandum to Defendants' Memorandum in Opposition to Plaintiff County of Hawaii's Motion for Partial Summary Judgment, filed August 14, 2002).

69. After reviewing the pleadings and oral argument on July 11, 2002, the Court found a genuine issue of material fact as to public purpose in Civil No. 00-1-181K in its Order Amending Order Granting County of Hawaii's Motion For Partial Summary Judgment As To Defendants/Counterclaimants' Sixth and Seventh Affirmative Defenses and First Claim For Relief Asserted in the Answer And Counterclaim Filed January 25, 2001, filed on September 5, 2002. (*See Order Amending Order Granting County of Hawaii's Motion For Partial Summary Judgment As To Defendant/Counterclaimants' Sixth and Seventh Affirmative Defenses and First Claim For Relief Asserted In The Answer and Counterclaim Filed January 25, 2001, filed on September 5, 2002).*
70. Based on a finding of a genuine issue of material fact as to public purpose by the Court, the Coupe's filed Defendants'/Counterclaimants' Motion to Vacate Order Putting Plaintiff in Possession, Or In the Alternative for a Stay on the Order Putting Plaintiff in Possession Until Final Judgment on November 27, 2002. (*See Defendants'/Counterclaimants' Motion to Vacate Order Putting Plaintiff in Possession, Or In the Alternative for a Stay on the Order Putting Plaintiff in Possession Until Final Judgment on November 27, 2002).*

71. An Order Granting Defendants'/Counterclaimants' Motion to Vacate Order Putting Plaintiff In Possession, or in the Alternative For a Stay On The Order Putting Plaintiff In Possession Until Final Judgment Filed November 27, 2002 (hereinafter, "*Order Staying Possession*") was filed on December 11, 2002. (See *Order Granting Defendants'/Counterclaimants' Motion to Vacate Order Putting Plaintiff In Possession, or in the Alternative For a Stay On the Order Putting Plaintiff In Possession Until Final Judgment Filed November 27, 2002, filed December 11, 2002*).
72. The Order Staying Possession had stayed the Order Putting Plaintiff in Possession Until Final Judgment, but had not vacated the previous order. *Id.*
73. The Court granted the Richards' Family's Stipulation for First Extension of Time that was filed on December 4, 2000. (See *Stipulation for First Extension of Time for Defendants Robert Nigel Richards, Trustee Under The Marilyn Sue Wilson Trust; Robert Nigel Richards, Trustee Under The Joan Elizabeth Coupe Trust; Charles William Coupe; Joan Elizabeth Coupe; Miles Hugh Wilson; and Joan Coupe, Trustee Under The Revocable Trust of Joan Coupe Dated March 30, 1998, to File Answer to Complaint, filed December 4, 2000* [hereinafter "*Stipulation for First Extension*"]).
74. The Stipulation for First Extension was filed over ten days from the granting and filing of the Order Putting Plaintiff in Possession. The Richards Family did not file any response before the Stipulation for First Extension of Time. The Defendants filed two other stipulations to extend time before filing their Answer to Complaint on January 24, 2001. (See *Defendants Robert Nigel Richards, Trustee Under*

The Joan Elizabeth Coupe trust; Charles William Coupe; Joan Elizabeth Coupe and Joan Coupe, Trustee under Revocable Trust of Joan Coupe, dated March 30, 1989, Answer to Complaint, Filed October 9, 2000, Filed January 24, 2007 [hereinafter “The 2000 Answer”]).

75. Civil No. 00-1-181K was an eminent domain action based on County Resolution Number 266-00. It was filed by the County against the Richards Family, Robert Nigel Richards, Trustee Under The Marilyn Sue Wilson Trust. (*Exhibit J-232*).
76. County Resolution Number 266-00 was based on, and cites to, the Development Agreement between the County and Oceanside for the development of the Mamalahoa Bypass Highway. (*Exhibit J-231*).
77. County Resolution Number 266-00 provides that the County shall use its condemnation powers to secure the property of any landowner who fails to sell their private land to Oceanside. *Id.*

Civil No. 00-1-181K – Public Purpose

78. The eminent domain action in Civil No. 00-1-181K has County Resolution Number 266-00 as its basis for public purpose. (*Exhibits J-232; J-231*).
79. County Resolution Number 266-00 states that is necessary for public use and purpose to construct the Mamalahoa Bypass Highway pursuant to the Development Agreement. Public purpose, if any, would be within that Development Agreement. (*Exhibits J-232; J-231*).
80. The County of Hawaii entered into a Development Agreement with Oceanside. (*Exhibit J-45*).

81. The County Council approved of the Development Agreement, and passed County Resolution Number 266-00 on July 26, 2000. (*Exhibit J-231*).
82. The 2000 Hawaii County Council was composed of the following nine members: James Y. Arakaki, Al Smith, Dominic Yagong, Bobby Jean Akane Leithead-Todd, Aaron S.Y. Chung, Julie Jacobson, Nancy Pisicchio, J. Curtis Tyler III, and Leningrad Elarionoff. Council-members Arakaki, Chung, Elarionoff, Tyler and Yagong voted for the Resolution. Council-member Jacobson voted against, and Council-members Leithead-Todd, Pisicchio and Smith abstained. County Resolution Number 266-00 was passed with five (5) votes for, one (1) vote against, and with three (3) abstentions. *Id.*
83. County Resolution Number 266-00 authorizes the condemnation of approximately 2.90 acres of private land in the Property. *Id.*
84. Civil Number 00-1-181K also requests the condemnation of approximately 2.90 acres of private land in the Property. (*Exhibit J-232*).

Condemnation – Civil No. 05-1-15K

85. On January 28, 2005, County initiated a second eminent domain action in Civil 05-1-15K against the Richards Family, Robert Nigel Richards, Trustee Under The Marilyn Sue Wilson Trust, and Miles Hugh Wilson based on Resolution 31-03, passed by the Hawai'i County Council on February 5, 2003. (*Exhibit J-242*).
86. County realized that the Bypass required more land than Civil No. 00-1-181K and County Resolution 266-00 was attempting to condemn. Over four years later, County filed Civil No. 05-1-15K and passed County Resolution 31-03 to condemn

- a larger parcel of the Property for the Bypass. (*Exhibit J-241; J-242*); (*Test. of G. Takase, 7/16/07 (51:10-55:13)*)).
87. Civil No. 05-1-15K is an eminent domain action based on County Resolution Number 31-03. (*Exhibit J-242*).
 88. Pursuant to Defendant's Motion, Civil No. 05-1-15K and Civil No. 00-1-181K were consolidated on March 31, 2005 due to the similarity in parties, property, and public use issues. (*Order Granting In Part Defendants' Motion to Dismiss or in the Alternative to Consolidate with Civil No. 00-1-181, Filed February 7, 2005, filed March 31, 2005*).
 89. The Richards Family filed their Answer on April 11, 2005. (*Defendants Robert Nigel Richards, Trustee Under The Joan Elizabeth Coupe Trust; Charles William Coupe; Joan Elizabeth Coupe; and Joan Coupe, Dated March 30, 1989's Answer to Complaint filed January 28, 2005, filed April 11, 2005*).
 90. A Stipulation to Substitute C&J Coupe Family Limited Partnership as Defendants, Counterclaimants, Third-Party and Cross-claim Plaintiffs for the Richards Family was filed on May 23, 2007 as to both Civil No. 00-1-181K and Civil No. 05-1-15K. (*Stipulation to Substitute Party and Order, filed May 23, 2007*).
 91. County Resolution Number 31-03 states that the proposed Mamalahoa Bypass Highway will provide a regional benefit for a public purpose and use which will benefit the County of Hawaii. (*Exhibits J-241; P-5; P-6*).
 92. No reference is made to the Development Agreement in County Resolution Number 31-03. (*Exhibit J-241*).

93. County Resolution Number 31-03 provides that a condemnation action by the County of Hawaii must be authorized by a resolution of the County Council. (*Exhibit J-241*).
94. County Resolution Number 31-03 authorizes the condemnation of approximately 3.348 acres of the Property. *Id.*
95. Civil 05-1-15K also requests the condemnation of approximately 3.348 acres of the Property. *Id.*

Civil No. 05-1-15K -- Public Purpose

96. The eminent domain action in Civil No. 05-1-15K has County Resolution Number 31-03 as its basis for public purpose. (*Exhibit J-241*).
97. County Resolution Number 31-03 states that the proposed construction and use of the Mamalahoa Bypass Highway would provide a public benefit to the County of Hawaii. *Id.*
98. The Hawaii County Council approved of the Mamaloahoa Bypass Highway to be a public purpose and passed County Resolution Number 31-03 on February 5, 2003. (*Exhibit J-241*).
99. The 2003 Hawaii County Council was composed of the following nine members: James Y. Arakaki, Aaron S.Y. Chung, Leningrad Elarionoff, Fred C. Holschuh, Bob Jacobson, Bobby Jean Leithead-Todd, Joe Reynolds, Gary Safarik, and J. Curtis Tyler III. Council-members Arakaki, Elarionoff, Holschuh, Leithead-Todd, Reynolds, and Safarik voted for the Resolution. Council-members Jacobson and Tyler voted against, and Council-member Chung abstained.

County Resolution Number 31-03 was passed with six (6) votes for, two (2) against, and with one (1) abstention. *Id.*

100. The Mamalahoa Bypass Highway was to be built to State Highway Design Standards. (*Test. of N. Burns, 7/10/07; Exhibit J-45*).
101. The alignment of the Mamalahoa Bypass Highway, with a northern terminus at Alii Highway was preferred and selected by the County of Hawaii's Department of Public Works, and is consistent with the General Plans that have been adopted by the County. (*Test. of N. Burns, 7/10/09; Test. of W. Moore, 7/12/07*); (*Exhibits J-251; J-245; P-7*).
102. In County Resolution Number 31-03, the final determination of the Mamalahoa Bypass Highway remained with the County of Hawaii Department of Public Works. (*Exhibits J-45; J-231; J-241*).

Trespass

103. The Court's Order Putting Plaintiff in Possession was granted on October 10, 2000, and was effective until it was stayed by the Court's Order Staying Possession on December 11, 2002.
104. County and Oceanside conducted blasting operations up until the hearing on the Richards Family Motion to Vacate Order of Possession on December 10, 2002. (*Test of G. Takase, 7/16/07, Vol. 1 (59:3-61:12)*); (*Exhibits J-226; J-332*).
105. If the Coupe's trespass claim existed, it first arose in 2002 with the filing of the Order staying the Order of Possession in December 2002. The Coupe's did not raise the trespass claim until their Cross-claim in Civil No. 05-1-15K filed on February 12, 2007.

106. County's initial entry onto the Property was lawful pursuant to the Court's Order Putting Plaintiff In Possession.

Inverse Condemnation

107. The "fair share" assessment negatively impacted the value of the Defendants' property. (*Test. of J. Medusky, 7/20/07*); (*Exhibit R-430*)).

Just Compensation

108. County offered the testimony and report of Robert Bloom to provide evidence of the amount due in just compensation. (*See generally Test of R. Bloom, 7/19/07*).

109. The Coupe's appraiser was Jan Medusky, certified appraiser, Member of the Appraisal Institute, and an instructor of eminent domain valuation. (*See generally Test. of J. Medusky, 7/20/07*); (*Exhibit R-430*).

110. Professional appraisers are required to be licensed by the State of Hawaii and perform their appraisals guided by the Uniform Standards of Professional Appraisal Practice or USPAP. (*See generally Test. of R. Bloom, 7/19/07*); (*see generally Test. of J. Medusky, 7/20/07*).

111. County's appraiser, Robert Bloom, estimated the fair market value of the Property to be taken at \$140,500 in Civil No. 00-1-181K and Civil No. 05-1-15K. (*Exhibits P-11*).

112. After performing the before and after valuation, Jan Medusky provided valuations based on the Civil No. 00-1-181K filing date in October 2000 and the Civil No. 05-1-15K filing date in January 2005. (*Exhibit R-430*).

113. Jan Medusky testified that the valuation in Civil No. 00-1-181K of fair market value for the Property was \$56,000. (*See Test. of J. Medusky, 7/20/07*).

114. Jan Medusky testified that the valuation in Civil No. 05-1-15K of fair market value for the Property is \$68,000. *See id.*
115. Jan Medusky testified that the partial taking caused severance damages to the remaining parcel. (*See generally Test. of J. Medusky, 7/20/07; (Exhibit R-430)*).
116. Robert Bloom stated that there were no severance damages because of the topographical similarities and the lack of planned development, while the Mamalahoa Bypass Highway would provide access to power utilities and the roadway. (*See Test. of R. Bloom, 7/19/07*).
117. Based on the evidence presented, and the credibility of the witnesses, the Court finds that there are no severance damages in Civil No. 00-1-181K and in Civil No. 05-1-15K.
118. Jan Medusky provided the only evidence as to the blight damages, and testified that a 10% per annum interest rate is reasonable. (*See generally Test. of J. Medusky, 7/20/07*).
119. The filing of a complaint for condemnation negatively affected the Property's value. *Id.*
120. Because the Complaint filed in Civil No. 00-1-181K on October 9, 2000 caused a decrease in the Property's land value, the Court concludes that Blight of Summons damages should be included and computed on the fair market value of the land from October 9, 2007 to the filing date of Civil No. 05-1-15K, on January 28, 2005.
121. The Court finds that the fair market value of the Property in Civil No. 00-1-181K is \$140,500.

122. For Civil No. 00-1-181K, based on the fair market value of the land sought to be taken, the blight damage percentage is set at 10% per annum, and damages computed from October 9, 2000 to January 28, 2005. The Court finds that four years, three months, and nineteen days have elapsed between the two dates. With the percentage set at 10% per annum, and with the fair market value of the Property in Civil 00-1-181K at \$140,500, blight damages are \$60,443.87.
123. The Court finds that the fair market value of the Property in Civil No. 05-1-15K is \$162,204.83.
124. For Civil No. 05-1-15K, based on the fair market value of the land sought to be taken, the blight damage percentage is set at 10% per annum, and computed from January 28, 2005 until date paid.
125. Robert Bloom did not testify as to an appropriate percentage for blight damages. (*See generally Test. of R. Bloom, 7/19/07*).
126. Just compensation for Civil No. 05-1-15K shall be as follows: \$162,204.83 (fair market value) plus 10% (blight damages) per annum until paid.

CONCLUSIONS OF LAW

The Court makes the following Conclusions of Law. If it should be determined that any of these Conclusions of Law should have been set forth as Findings of Fact, then they shall be determined as such. The headings are used for organizational purposes only. The Court has considered the conclusions under each heading for all claims.

Common Conclusions of Law in Civil No. 00-1-181K and Civil No. 05-1-15K

Jurisdiction

1. The Court has personal jurisdiction over the parties.
2. The Court has subject matter jurisdiction.
3. Venue is proper in this Court.

Violation of Chapter 101 of the Hawaii Revised Statutes

4. The Coupe's allege, in their First Claim for Relief, that the attempted condemnation violates chapter 101 of the Hawaii Revised Statutes, Article I, Section 20 of the Hawaii Constitution, the Fifth and Fourteenth Amendments to the United States Constitution, and 42 United States Code section 1983.
5. The Court concludes that the Coupe's have failed to meet their burden of proof.

Abatement

6. Abatement may be invoked where: (1) the party is the same in a pending suit, (2) the cause is the same, and (3) the relief is the same. *Shelton Eng'g Contractors v. Hawaii Pac. Indus.*, 51 Haw. 242, 249 (1969). If abatement is invoked, the second action is generally the one that is dismissed. *Bertelmann v. Lucas, et al.*, 31 Hawaii 71, 72 (Hawai'i Terr. 1929).

7. Abatement generally refers to a procedural or jurisdictional issue that can be cured. *Shelton Eng'g Contractors*, 51 Haw. at 249.
8. Abatement may still be raised as grounds for a motion to dismiss. *Matsushita v. Container Home Supply, Inc.*, 6 Haw. App. 439, 445 (1986).
9. The parties in Civil No. 00-1-181K and Civil No. 05-1-15K are the same.
10. Civil No. 00-1-181K is an eminent domain action based on County Resolution 266-00. Civil No. 05-1-15K is an eminent domain action based on County Resolution 31-03. As the basis for these two County Resolutions are substantially different from each other, and have been voted on by two “different”⁴ County Councils over four years apart, the Court concludes that Civil No. 00-1-181K and Civil No. 05-1-15K are separate claims for the purposes of abatement.
11. Civil No. 00-1-181K prays for the condemnation of 2.90 acres of the Defendants’ land. Civil No. 05-1-15K prays for the condemnation of 3.348 acres of the Defendants’ land. As there is nearly a half acre difference (0.448 acres) in the prayer for relief in the two eminent domain cases, the Court concludes that Civil No. 00-1-181K and Civil No. 05-1-15K request different relief for the purposes of abatement.

The Motion to Dismiss based on abatement made by the Coupe’s during trial is denied.

⁴ Council Members for the County Council of Hawaii changed between the passing of County Resolution 266-00 and County Resolution 31-03.

Lack of Governmental Regulatory Control, Ownership Control, and/or Contractual Control

12. The Coupe's allege in their First Claim for Relief that the eminent domain action lacks governmental regulatory control, ownership control, and/or contractual control.
13. The Coupe's have failed to meet their burden of proof.

Special Improvement District

14. The Coupe's allege that the Development Agreement was an improper attempt to create a special improvement district.
15. The Coupe's have failed to meet their burden of proof.

Due Process

16. The Court concludes that the Coupe's Due Process claims have been addressed within the Court's ruling on Failure to Object within Ten (10) Days.

Equal Protection Violation

17. Economic and social legislation exercised within the Legislature's discretion will be upheld if it is reasonable, not arbitrary, and bears a rational relationship to a permissible state objective. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 7-8 (1974) ("We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary'").
18. The Court finds that the Coupe's have failed to meet their burden of proof for an equal protection claim.

Supremacy Clause

19. The Coupe's allege that the Development Agreement violates the Supremacy Clause of the United States Constitution.
20. The Court concludes that the Coupe's have failed to meet their burden of proof.

Consideration Claim

21. The Coupe's allege in their First Claim for Relief that the Development Agreement should be declared invalid and void for "failure of consideration."
22. Consideration provided by Oceanside in the Development Agreement included:
(a) a commitment to complete the bypass within 5-years from the time construction commences, which was not required by the rezoning ordinances, and; (b) consent to the conditions of approval including the bypass exactment.
(*Exhibit J-45*); (*Test. of V. Goldstein, 7/23/07*); (*Test. of R. Frye, 7/25/07*).
23. The Court concludes that the Coupe's have failed to meet their burden of proof.

Land Use Permissions

24. The Coupe's allege in their First Claim for Relief that the Development Agreement illegally sells land use provisions.
25. The Court concludes that the Coupe's have failed to meet their burden of proof.

HRS Chapter 205 Claim

26. The Coupe's allege in their First Claim for Relief that the Development Agreement should be declared invalid and void for violating Chapter 205 of the Hawaii Revised Statutes, as amended.
27. The Coupe's have failed to meet their burden of proof for a violation of Chapter 205 of the Hawaii Revised Statutes, as amended.

Restraint of Trade Claim

28. The Coupe's allege in their First Claim for Relief that the Development Agreement should be declared invalid and void because it establishes an illegal restraint of trade including, without limitation, violation of the Sherman Anti-Trust Act, Section 5 of the Federal Trade Commission Act, and Chapter 480 of the Hawaii Revised Statutes, as amended.
29. The enforcement of the Federal Trade Commission Act is left solely to the Federal Trade Commission and private rights of action have not been recognized. *Carlson v. Coca-Cola Co.*, 483 F.2d 279, 280 (9th Cir. 1973).
30. The 4-year statute of limitations under the Sherman Anti-Trust Act and Chapter 480 of the Hawaii Revised Statutes commenced upon recordation of the Development Agreement on April 30, 1998 and expired before the Coupe's asserted any claims against Oceanside on January 2, 2003. 15 U.S.C. § 15(b); Haw. Rev. Stat. § 480-24.
31. To sustain their claim, the Coupe's must prove that any restraint was "unreasonable such that it is so inherently anticompetitive and so lacking in any redeeming virtues." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979).
32. The Court concludes that the Coupe's have failed to meet their burden of proof.

Slander of Title

33. The Coupe's allege, in their First Claim and Third Claim for Relief, that County has slandered the Coupe's title.
34. The Court concludes that the Coupe's have failed to meet their burden of proof.

Bypass Land Use Commission

35. The Coupe's allege, in their First Claim for Relief, that the Development Agreement illegally attempts to bypass the Land Use Commission.
36. The Court concludes that the Coupe's have failed to meet their burden of proof.

Amend Ordinances by Resolution

37. The Coupe's allege, in their First Claim for Relief, that the Development Agreement illegally attempts to amend ordinances by Resolution.
38. The Court concludes that the Coupe's have failed to meet their burden of proof.

Selling Police Power

39. The Coupe's allege, in their First Claim for Relief, that the Development Agreement illegally sells the police power veto.
40. The Court concludes that the Coupe's have failed to meet their burden of proof.

Conflict of Interest

41. The Coupe's allege, in their First Claim for Relief, that the County has an inherent illegal conflict in enforcing the provisions of the Development Agreement and enforcing its obligations under State law.
42. The Court concludes that the Coupe's have failed to meet their burden of proof.

Selling Investigative and Compliance Duties

43. The Coupe's allege, in their First Claim for Relief, that the County has illegally sold its investigative and compliance duties under State law.
44. The Court concludes that the Coupe's have failed to meet their burden of proof.

Illegal Exaction

45. The Coupe's allege, in their Fourth Claim for Relief, that the Development Agreement creates an exaction in violation of Article I, Section 20 of the Hawaii Constitution, the Fifth and Fourteenth Amendments to the United States Constitution, and 42 United States Code section 1983.
46. The Court concludes that the Coupe's have failed to meet their burden of proof.

Injunctive Relief

47. The Court finds that the injunctive relief requested by the Coupe's is now moot, as the proceedings have already concluded.

Laches

48. Oceanside asserted the affirmative defense of laches to the Coupe's claims that the Development Agreement should be declared invalid and void.
49. There are two elements to a laches defense: (1) unreasonable delay by the party in bringing its claim under the circumstances; and (2) that the delay resulted in prejudice to the defendant. *Adair v. Hustace*, 64 Haw. 314, 321 (1982).
50. Unreasonable delay may occur "if it appears from the evidence in the case that a person had information which would lead a reasonably prudent person to make inquiry through which he would surely learn certain facts." *Id.* at 324 n.10.
51. Oceanside decided to proceed with Phase I of their project by December of 1999. (*See supra, Findings of Fact*, ¶ 51).
52. The County initiated their condemnation proceedings against the Coupe's on October 9, 2000.

53. The validity of the Development Agreement was first challenged in these proceedings on January 24, 2001.
54. The Court concludes that this does not constitute an unreasonable delay under the circumstances, as the Coupe's responded to the County's Complaint within four months of the filing of the eminent domain complaint.
55. The Coupe's first provided notice of their legal challenges to the Development Agreement as follows: (1) alleged improper delegation of condemnation power, improper reimbursement provisions in Development Agreement and unconstitutional taking – *1/24/01 Answer and Counterclaim*; (2) alleged failure of consideration and exceeding enabling authority in the Development Agreement and violation of procurement code – *1/2/03 Third-Party Complaint*; and (3) alleged violation of Chapter 205 – *12/7/05 First Amended Third-Party Complaint*.
56. Oceanside had decided to proceed with Phase I of construction by December 1999, which was ten months before County initiated their eminent domain proceeding.
57. Because the Coupe's could not even object to public purpose until after the Order Granting Possession, the time in which the Coupe's filed their objection to public purpose was reasonable.
58. Oceanside took its chances by expending more money after the lawsuit was filed.
59. Oceanside has failed to meet their burden of proof for their laches claim.

Conclusions of Law for Civil No. 00-1-181K

Failure to Object within Ten (10) Days

60. Generally, the condemnation of private property to build a public roadway is a clear public purpose. See Haw. Rev. Stat. § 46-61 (Eminent Domain – County has the power to take private property for the purpose of establishing, laying out, extending, and widening streets and other public highways).
61. Section 101-34 of the Hawaii Revised Statutes, as amended, requires that a landowner raise an objection to public purpose within ten (10) days of the order granting immediate possession. See Haw. Rev. Stat. § 101-34.
62. A failure by a defendant in a condemnation case to raise an objection to public purpose within ten days after service of an order granting immediate possession shall be deemed an admission that the use is a public use or a superior public use, as the case may be. Haw. Rev. Stat. § 101-34.
63. A plaintiff in a condemnation action has a duty to inform the defendant of the ten-day limit to file objections pursuant to section 101-34 of the Hawaii Revised Statutes, as amended. *Brody v. Village of Port Chester*, 434 F.3d 121, 128-29 (2d Cir. 2005) (“where . . . a condemnor provides an exclusive procedure for challenging a public use determination, it must also provide notice [of that exclusive procedure].”); see also *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections”).

64. Even where the plaintiff has given notice to the defendant of the ten-day limit to file objections pursuant to section 101-34 of the Hawaii Revised Statutes, as amended, the notice sent to the affected property owners in a condemnation hearing must make conspicuous mention of the exclusive procedure to object. *See Brody*, 434 F.3d at 130, (citing *Mullane*, 339 U.S. at 315).
65. The County did not provide these notices, nor did the Coupe's know of the ten-day requirement and procedure.
66. Section 101-34 of the Hawaii Revised Statutes, as amended, is not jurisdictional in nature. Failure to object in the time period is merely an evidentiary admission, and not a waiver, or a bar to objection to public use. Haw. Rev. Stat. § 101-34; *cf.* Haw. Rev. Stat. § 101-31 (Withdrawal of the deposit of estimated compensation by the property owner is an abandonment of all defenses it may have, except the sufficiency of the compensation or damage award); Haw. Rev. Stat. § 101-12 (real property valuation for purposes of tax appeal admissible as admission in eminent domain actions).
67. While a failure to object to public use within ten days following service of the Order of Possession may be an admission, this evidentiary "admission" warrants little weight in this decision based on the evidence supporting Coupe's arguments of unlawful delegation of the County's condemnation authority.
68. The Coupe's objection to public purpose was timely.

Public Purpose -- Delegation

69. The County is a municipal corporation, created by statute and with only those powers delegated to it by statute, including the power of eminent domain.

Haw. Rev. Stat. § 46-61. *See Kahale v. City and County of Honolulu*, 104 Haw. 341, 348-49 (2004).

70. Eminent domain is a fundamental power of government, and is an attribute of sovereignty that rests in the State; a county has no inherent power of eminent domain, only those powers expressly delegated to it by the State. *See People v. Adirondak Ry. Co.*, 54 N.E. 689, 692 (N.Y. 1899), *aff'd sub nom. Adirondack Ry. Co. v. New York*, 176 U.S. 335 (1900).
71. “A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is tended to favor a particular private party, with only incidental or pretextual public benefits” *Kelo v. City of New London*, 545 U.S. 469, 491 (2005) (Kennedy, J., concurring).
72. Hawaii Revised Statutes Section 46-61, as amended, delegates to the counties the limited specific powers to take private property. Haw. Rev. Stat. § 46-61 (“Each county shall have the following specific powers: To take private property for the purpose of establishing, laying out, extending and widening streets, avenues, boulevards, alleys, and other public highways and roads . . . and other public uses within the purview of section 101-2.”).
73. The County may not delegate its sovereign power of condemnation. *Richardson v. City & County of Honolulu*, 76 Haw. 46 (1994); *Hsiung v. City & County of Honolulu*, 378 F. Supp. 2d 1258, 1266 (D. Haw. 2005) (holding that the power of eminent domain, as a government power, may not be delegated to private parties).

74. Neither Hawaii's eminent domain authorization statute nor the development agreement statute permit a County to further delegate the State-granted power of eminent domain power to a private party. Haw. Rev. Stat. ch. 101; Haw. Rev. Stat. § 46-121, *et seq.*
75. Oceanside is a private party, not vested by state or county law with the power of eminent domain. Haw. Rev. Stat. § 46-1.5(6); Haw. Rev. Stat. § 101-4; Haw. Rev. Stat. § 101-13.
76. If the government attempts to delegate its power of eminent domain to a private party in an agreement whereby the developer controls what property is taken and pays for all expenses, and the private party is able to demand the government institute eminent domain proceedings against other private property owners, then the attempted delegation is illegal and void. *In re Condemnation of 110 Washington Street*, 767 A.2d 1154 (PA 2001); *See also Richardson*, 76 Haw. at 58.
77. A delegation of governmental powers must be "unmistakable." *Hsiung v. City & County of Honolulu*, 378 F. Supp. 2d 1258, 1266 (D. Haw. 2005).
78. County and Oceanside's actions prior to, and performance after, the adoption of the Development Agreement, as well as the language within the Development Agreement make it unmistakably clear that the County improperly delegated condemnation authority to Oceanside.
79. The condemnation provisions of the Development Agreement are invalid because it improperly delegates condemnation authority to a private party.

79. The condemnation provisions of the Development Agreement are invalid because it improperly delegates condemnation authority to a private party.
80. The improper delegation of condemnation authority to a private party invalidates County Resolution 266-00.

Impact Fees

81. The Development Agreement also purports to amend, supersede or substitute for ordinances and the impact fee statute. The Development Agreement imposes an impact fee, and the County has not enacted an impact fee ordinance pursuant to section 46-141 of the Hawaii Revised Statutes, as amended. Haw. Rev. Stat. § 46-141.
82. The “fair share” assessment imposed as to the Defendants and the other landowners were based on Oceanside’s study and recommendation.
83. The “fair share” assessment is based on benefits and impacts to the landowners from the Mamalahola Bypass Highway.
84. County does not have statutory authority to impose a “fair share” assessment, but has statutory authority to enact impact fee ordinances pursuant to section 46-141 of the Hawaii Revised Statutes, as amended.
85. The “fair share” assessment under the Development Agreement, in substance, is tantamount to an impact fee that does not conform to Section 46-141 of the Hawaii Revised Statutes, as amended.
86. The portion of the Development Agreement that imposes the “fair share” assessment against the Coupe’s is void for not being in compliance with Section 46-141 of the Hawaii Revised Statutes, as amended.

Blight of Summons

87. Blight of summons damages compensates a landowner in a condemnation action “for the damages resulting from the government’s delay in paying the full cash equivalent of the property taken on the day of summons.” *See Housing Fin. and Dev. Corp. v. Takabuki*, 82 Haw. 172, 176 n.5 (1996).
88. Blight damages are calculated as the “interest at a reasonable rate on the money representing the value of property from [the date of summons] until paid.” *Hawaii Hous. Auth. v. Midkiff*, 69 Haw. 247, 249 (1987).
89. Blight damages have long been established as an “integral part of just compensation.” *See Midkiff*, 69 Haw. at 248.
90. Because the Complaint filed in Civil 00-1-181K on October 9, 2000 caused a decrease in the Property’s land value, the Court concludes that “Blight of Summons” damages should be included and computed on the fair market value of the land from October 9, 2000 to the filing date of Civil No. 05-1-15K, on January 28, 2005.⁵
91. Blight damages are set at 10% per annum from October 9, 2000 to January 28, 2005, and equal \$60,443.87.

Conclusions of Law for Civil No. 05-1-15K

Development Agreement

92. The Coupe’s allege, in their First Claim for Relief, that the Development Agreement is invalid.

⁵ Blight of Summons damages for Civil 05-1-15K is addressed in paragraph 116.

93. The Court concludes that Civil No. 05-1-15K is based on County Resolution 31-03, and does not refer to the Development Agreement. The Court further concludes County Resolution 31-03 stands independently from the Development Agreement, and that there is sufficient attenuation between the Development Agreement previously mentioned and this Resolution.

Public Purpose

94. The Fifth Amendment to the United States Constitution provides, in part, “nor shall private property be taken for public use, without just compensation.” U.S. Const. amend. V.
95. The Hawaii Constitution states, “Private property shall not be taken or damaged for public use without just compensation.” Haw. Const. art. I, § 20.
96. When applying the Hawaii Constitution, Hawaii courts may interpret it to afford greater protection than provided by the U.S. Constitution. *See Hawaii Hous. Auth. v. Lyman*, 68 Haw. 55 (1985).
97. The inquiry under the public use clause of Article I, Section 20 is whether a taking is designed to further a “legitimate government purpose.” *Housing Finance & Dev. Corp. v. Castle*, 79 Haw. 64 (1992).
98. Generally, courts are bound by the legislature’s public use determination unless the use is clearly and palpably of a private character. *State v. Anderson*, 56 Haw. 566 (1976). However, the public use question is still one that remains judicial in nature. *Hawaii Hous. Auth. v. Ajimine*, 39 Hawaii 543 (1952).
99. The County Council determined that there was a public purpose in County Resolution 31-03. County Resolution 31-03 did not refer to the Development

Agreement, and was passed by a new County Council with a different Council make-up. *See supra* paragraph 92.

100. The Coupe's timely raised their objection to public purpose within the ten-day limit in Civil No. 05-1-15K; the County did not raise this issue.

101. County Resolution 31-03 is valid.

Eminent Domain

102. The Court concludes that the eminent domain action in Civil No. 05-1-15K is validly supported by public purpose, and properly passed by the County Council.

Trespass

103. The claim of trespass quare clausum fregit is shown by proof of entry by the defendant onto another's land, without lawful authority. It is a tort without proof of actual damage. *See Anderson v. State*, 88 Haw. 241 (1998).

104. Trespass claims are barred by a two-year statute of limitations. Haw. Rev. Stat. § 657-7 & 8. The trespass claim also does not relate back to earlier pleadings because it does not arise out of the conduct, transaction, or occurrence pled in their earlier filings. *Mauian Hotel, Inc. v. Maui Pineapple Company*, 52 Haw. 563, 568 (1971).

105. The County and Oceanside entered the Property pursuant to the Order Putting Plaintiff in Possession, filed October 10, 2000.

106. The Court concludes that the Coupe's have failed to meet their burden of proof for their trespass claim.

Inverse Condemnation

107. Inverse condemnation is characterized as an action or eminent domain proceeding initiated by a private property owner rather than the condemnor, and is available where: (1) private property has been taken in fact for public use, although not through eminent domain procedures; and (2) it appears that the taker has no intention, willingness, or ability to bring such proceedings. 27 Am. Jur. 2d Eminent Domain § 742.
108. The Court concludes that the County had the intention, willingness, or ability to bring eminent domain procedures against the Defendants, and demonstrated that intention, willingness, or ability with the passing of County Resolution 31-03 and the filing Civil No. 05-1-15K.

Just Compensation

109. The general aim of a proceeding in eminent domain is to arrive at the amount of just compensation which as nearly as possible approximates the value which a free market would attach to taken property. The Court should consider any evidence which would aid the trier of fact in this determination. *See City and County of Honolulu v. International Air Serv. Co.*, 63 Haw. 322 (1981).
110. Fair market value for a parcel of property means the amount of money which a willing purchaser with no obligations to buy would pay a willing owner with no obligation to sell. *Hawaii Housing Authority v. Rodrigues*, 43 Haw. 195, 196 (1959).
111. When one portion of a single parcel of land is condemned and another portion of the same parcel is not condemned, owners of a single parcel are entitled not only

to compensation for the portion condemned. Instead, those owners are also entitled to damages caused to the remaining property by the severance of the two parcels by the condemnation. Haw. Rev. Stat. § 101-23; *see also City and County of Honolulu v. Bonded Inv. Co.*, 54 Haw. 523 (1973).

112. If the benefit conveyed by the public use of the condemned property is less than the damaged caused by the severance of the parcels, then the owner of the property shall be awarded damages for the severance. Haw. Rev. Stat. § 101-23.

113. Severance damages were considered along with the benefits conveyed by the Mamalahoa Bypass Highway, and the Court concludes the benefits are greater than any damages caused by the severance of the parcels. Therefore, there are no severance damages.

114. The just compensation for the Property is \$162,204.83 in Civil No. 05-1-15K.

115. Blight damages for the Property are set at 10% per annum from the filing date on January 28, 2005 until the date just compensation is paid.

Order

Based on the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED as follows:

County Complaint in Civil No. 00-1-181K

1. Count 1: [Condemnation]

The Condemnation is invalid. Judgment is hereby ordered to be entered in favor

of C&J Coupe Family Limited Partnership; Robert Nigel Richards, Trustee Under The Marilyn Sue Wilson Trust; and, Miles Hugh Wilson and against County of Hawaii, because County Resolution 266-00 illegally delegated its power of condemnation, through the Development Agreement, to a private party, 1250 Oceanside Partners, and therefore did not have proper public purpose.

C&J Coupe Family Limited Partnership Counterclaims in Civil No. 00-1-181K

2. Count 1: [Development Agreement is Illegal]

The condemnation and “fair share” assessment provisions in the Development Agreement are illegal. Judgment is hereby ordered to be entered in favor of C&J Coupe Family Limited Partnership and against County of Hawaii and 1250 Oceanside Partners, because:

- a. County Resolution 266-00 did not have a valid public purpose;
- b. County Resolution 266-00 illegally delegated the County's power of condemnation through the Development Agreement to a private party, 1250 Oceanside Partners; and,
- c. The portion of the Development Agreement that imposes an impact fee is void as to C&J Coupe Family Limited Partnership for violating Section 46-140 of the Hawaii Revised Statutes, as amended.

C&J Coupe Family Limited Partnership has failed to meet its burden of proof as to all other allegations in Count 1.

3. **Count 2: [Declaratory Judgment That Development Agreement is Illegal]**

The condemnation and “fair share” assessment provisions of the Development Agreement are declared illegal. Judgment is hereby ordered to be entered in favor of C&J Coupe Family Limited Partnership and against County of Hawaii, and 1250 Oceanside Partners because County Resolution 266-00 illegally delegated the County’s power of condemnation through the Development Agreement to a private party, 1250 Oceanside Partners.

C&J Coupe Family Limited Partnership has failed to meet its burden of proof as to all other allegations in Count 2.

4. **Count 3: [Damages for Blight, Slander to Title, Compensation for Temporary Taking, or Damages pursuant to 42 U.S.C. § 1983]**

Damages for Blight and Temporary Taking are awarded. Judgment is hereby ordered to be entered in favor of C&J Coupe Family Limited Partnership and against County of Hawaii and 1250 Oceanside Partners for “Blight of Summons.” “Blight of Summons” damages are \$60,443.87.

C&J Coupe Family Limited Partnership has failed to meet its burden of proof as to all other allegations in Count 3.

5. **Count 4: [Illegal Exaction In Violation of the Constitutions of the United States and Hawaii and 42 U.S.C. § 1983]**

There is no proof of an Illegal Exaction in Violation of the Constitutions of the United States and Hawaii and 42 U.S.C. § 1983. Judgment is hereby ordered to

be entered in favor of County of Hawaii and 1250 Oceanside Partners and against C&J Coupe Family Limited Partnership as the C&J Coupe Family Limited Partnership has failed to meet its burden of proof.

6. **Count 5: [Injunctive Relief]**

Request for Injunctive Relief is moot. Judgment is hereby ordered to be entered in favor of C&J Coupe Family Limited Partnership and against County of Hawaii and 1250 Oceanside Partners only under Civil No. 00-1-181K. This claim has been rendered moot at the conclusion of trial.

7. **Count 6: [Abatement]**

There is no abatement. Judgment is hereby ordered to be entered in favor of County of Hawaii and 1250 Oceanside Partners and against C&J Coupe Family Limited Partnership because the claims are substantially different, based on different resolutions that were passed by separate and different County Councils over four years apart, pray for different relief, and do not fall under the doctrine of abatement.

County Complaint in Civil No. 05-1-15K

8. **Count 1: [Condemnation]**

The Condemnation is valid. Judgment is hereby ordered to be entered in favor of County of Hawaii and 1250 Oceanside Partners and against Robert Nigel Richards, Trustee Under The Marilyn Sue Wilson Trust; C&J Coupe Family Limited Partnership and Miles Hugh Wilson because there was a valid public purpose in Civil No. 05-1-15K.

Just compensation for the condemnation of the Property in Civil No. 05-1-15K is \$162,204.83. Additionally, Blight of Summons damages from January 28, 2005 to the date of payment shall be 10% per annum.

C&J Coupe Family Limited Partnership Counterclaims in Civil No. 05-1-15K

9. Count 1: [Development Agreement is Illegal]

The Development Agreement was not the basis for condemnation. Judgment is hereby ordered to be entered in favor of County of Hawaii and 1250 Oceanside Partners and against C&J Coupe Family Limited Partnership as the C&J Coupe Family Limited Partnership has failed to meet its burden of proof because there is no reference to the Development Agreement in the County's condemnation action in this lawsuit. There is also sufficient attenuation between the Development Agreement previously mentioned and Resolution 31-03.

10. Count 2: [Abatement]

There is no abatement. On the Counterclaim filed in Civil No. 05-1-15K, alleging that the filing of the second complaint in Civil No. 05-1-15K should be abated, judgment is hereby ordered to be entered in favor of County of Hawaii and 1250 Oceanside Partners, and against C&J Coupe Family Limited Partnership. The Court concludes that the claims are substantially different as they are based on different resolutions that were passed by separate and different County Councils, pray for different relief, and do not fall under the doctrine of abatement.

11. Count 3: [Trespass]

There is no trespass. Judgment is hereby ordered to be entered in favor of

County of Hawaii and 1250 Oceanside Partners and against C&J Coupe Family Limited Partnership and as the C&J Coupe Family Limited Partnership has failed to meet its burden of proof.

12. **Count 4: [Inverse Condemnation]**

There is no inverse condemnation. Judgment is hereby ordered to be entered in favor of County of Hawaii and 1250 Oceanside Partners and against C&J Coupe Family Limited Partnership as the C&J Coupe Family Limited Partnership has failed to meet its burden of proof.

IT IS FURTHER ORDERED that the Court retains jurisdiction on the issue of attorney's fees and costs.

IT IS FURTHER ORDERED that all other claims, counterclaims, or cross-claims not specifically addressed herein are hereby dismissed with prejudice.

Dated: Kealahou, Hawaii

27 Sep 2007



JUDGE OF THE ABOVE-ENTITLED COURT