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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT STATE OF HAWAII, ORME LAURENCE CLERK, THIRD CIRCUIT COURT, STATE OF HAWAII

COUNTY OF HAWAII, a municipal corporation,) CIVIL NO. 00-1-0181K
Plaintiff,) CIVIL NO. 05-1-015K
vs.) (Kona) (Condemnation)(Consolidated)
ROBERT NIGEL RICHARDS,)
TRUSTEE UNDER THE MARILYN SUE)
WILSON TRUST; C&J COUPÉ FAMILY)
LIMITED PARTNERSHIP; MILES)
HUGH WILSON, *et al.*)
Defendants.)
SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW AND
ORDER TO FIRST AMENDED
FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER FILED
SEPTEMBER 27, 2007 AS TO
CONDEMNATION 2
TRIAL: July 9, 2007
JUDGE: The Honorable Ronald Ibarra

**SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER
TO FIRST AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

FILED SEPTEMBER 27, 2007 AS TO CONDEMNATION 2

Civil No. 05-1-015K (Condemnation 2) is before the Court on remand from the Hawaii Supreme Court's opinion and order in *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (Haw. 2008)(Moon, C.J., concurring and dissenting), and subsequent judgment on appeal (Jan. 21, 2009). The Supreme Court vacated this Court's First Amended Final Judgment (Sep. 27, 2007), as it pertains to Condemnation 2. The Hawaii Supreme Court held:

Therefore, (1) automatic denial of statutory damages pursuant to Hawai'i Revised Statutes § 101-27 in Condemnation 1 is vacated and the case is remanded for a determination of damages, (2) the court's conclusion that the Condemnation 2

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was not abated by Condemnation 1 is affirmed, and (3) the court's Judgment in Condemnation 2 is vacated and the case is remanded for a determination of whether the public purpose asserted in Condemnation 2 was pretextual.

119 Haw. 352, 357, 198 P.3d 615, 620 (Haw. 2008)(Moon, C.J., concurring and dissenting).

Pursuant to the Supreme Court's order and opinion, this Court has reviewed the record of the consolidated trial in Civil No. 00-1-018K (Condemnation 1) and Condemnation 2 which was held before the Honorable Ronald Ibarra from July 9, 2007 through August 2, 2007, heard the arguments of the parties at the hearing held on January 22, 2009, and reviewed the proposed Supplemental Findings of Fact and Conclusions of Law in Civil No. 05-1-015K submitted by the parties on March 20, 2009. The Court, being otherwise fully advised in the premises, having reviewed the exhibits and judging the credibility of the witnesses makes and enters the following Supplemental Findings of Fact and Conclusions of Law in Civil No. 05-1-015K:¹

SUPPLEMENTAL FINDINGS OF FACT

The Court makes the following Supplemental Findings of Fact. If it should be determined that any of these Supplemental Findings of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. After a non-jury trial on the merits this Court found the Condemnation in Civil No. 00-1-181K (Condemnation 1) invalid and entered judgment in favor of C&J Coupe Family Limited Partnership; Robert Nigel Richards, Trustee Under The Marilyn Sue Wilson Trust;

¹ The Court's First Amended Findings of Fact and Conclusions of Law (filed Sep. 27, 2007) are incorporated by reference herein. Should there be any conflicts from the First Amended Findings of Fact and Conclusions of Law (filed Sep. 27, 2007) and these Supplemental Findings of Fact and Conclusions of Law as to Condemnation 2, these supplemental Findings of Fact and Conclusions of Law supersede the prior First Amended Findings of Fact and Conclusions of Law (filed Sep. 27, 2007) to the extent they are in conflict.

and, Miles Hugh Wilson and against County of Hawaii, because County Resolution 266-00 illegally delegated the County's power of condemnation, through the Development Agreement, to a private party, 1250 Oceanside Partners, and therefore did not have a proper public purpose. (First Amended Findings of Fact, Conclusions of Law, and Order filed September 27, 2007). In this Court's First Amended Findings of Fact and Conclusions of Law (filed Sep. 27, 2007), the Court's basis for invalidating Condemnation 1 as lacking a valid public purpose rested exclusively on the conclusion that the taking represented an illegal delegation of the County's power of condemnation.²

2. A number of studies and plans undertaken by the County and State of Hawai'i ("State"), determined the public need for a roadway to bypass the Māmalahoa Highway and that an arterial highway in the area of the Bypass Highway ("the subject road") would relieve unacceptable traffic congestion of the Māmalahoa Highway. (Test. of William Moore (7/9/07p.m., p. 17-18); Test. of Nancy Burns (7/10/07 a.m., p. 31); Exhibits J-245 (1989 General Plan), J-380 (1998 State Department of Transportation Long Range Plan), J-135 (1999 Bypass Environmental Study), and P-7 (2006 General Plan)).

3. A 1979 State Department of Transportation study stated that a highway to bypass the Māmalahoa Highway would be beneficial because the Māmalahoa Highway did not conform to the desired level of service criteria due to the inadequate physical elements of the existing highway, high accident rates, anticipated higher traffic volume and congestion,

² The Court concluded that because the County unlawfully delegated its condemnation power in Condemnation 1 there was no valid public purpose. The Hawaii Supreme Court in its opinion, *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 381 198 P.3d 615, 644 (Haw. 2008)(Moon, C.J., concurring and dissenting) explained . . . courts generally speak of illegal delegation and public purpose as two distinct considerations. Either delegation, or lack of a valid public purpose, will invalidate a taking. It is unclear from the court's findings and conclusions whether there were additional considerations that led the court to conclude that Condemnation 1 lacked a valid public purpose . . . However, Condemnation 1 was not appealed and therefore is final and binding. . . . Therefore, we only consider whether Appellant's pretext argument was fully considered as to Condemnation 2.

The Court now addresses whether the public purpose asserted in Condemnation 2 was pretextual.

and the need for a route continuously around the island. (Exhibit D-2, (Hawai'i Belt Road Hōlualoa to Papa Preliminary Engineering Report (June 1979) at III- 3)).

4. The Department of Planning *Kona Regional Plan* (1982) stated that "traffic counts [on Māmalahoa Highway] show the traffic to be equal to or exceeding the roadway design capacity which is an undesirable traffic condition. . . . [resulting in] heavy burden on the roadway network, increasing both travel time and inconvenience." A community survey conducted in connection with the report indicated that the deteriorating traffic condition was viewed as a major problem by a third of the sample group. (Exhibit P-6, (Kona Regional Plan (1982))).

5. The 1989 *Hawaii County Council General Plan* (Ordinance 89-142) adopted the 1979 State Bypass highway and Ali'i Highway. The General Plan's South Kona transportation course of action identified as desirable the construction of a roadway from Keauhou to Nāpō'opo'o. (Exhibit J-245 (1989 General Plan, Facilities Map Ordinance 89-142)).

6. A November 1995 traffic study stated that the Bypass Highway "will result in a beneficial reduction of traffic volumes on Māmalahoa Highway." (Exhibit D-138 (Parson Brinckerhoff Quade and Douglas, Inc., Traffic Impact Study, p.10); Test. Yoshioka (7/27/07am, pp.97-100)).

7. A June 1997 traffic study concluded that: "The fundamental public enhancement provided by the proposed project [Bypass] will be its contribution to helping relieve the congested regional transportation system." The traffic study again confirmed that there was a limited ability to improve the Māmalahoa Highway between the areas of Honalo and Captain Cook because of the limits to the existing highway right of way, the existing

businesses and structures that presently exist on the right of way and a number of other topographical constraints. (Test. of Warren Yamamoto (7/17/07 p.m., p. 24); Deposition of Richard Frye, pp. 114 and 118-19; Exhibits D-71 (June 1997 M&E Pacific TIAR) and Exhibit J-135 (M&E Pacific, Māmalahoa Bypass Road Final EIS)).

8. A 1998 study prepared for the Department of Transportation recognized the need, based on traffic safety considerations, for the Bypass Highway. (Exhibit J-380, (Hawai'i Long Range Land Transportation Plan Final Report (May 1998) pp. 24-32); Test. Moore (7/9/07 p.m., pp. 46-48)).

9. A 1999 Environmental Impact Statement ("EIS") stated that: "The fundamental public enhancement provided by the proposed project [Bypass] will be its contribution to helping relieve the congested regional transportation system." (Exhibits J-135, (Māmalahoa Bypass Road Final EIS); D-71; Test. Yamamoto (7/17/07pm, p.40-41, 45)).

10. On February 5, 2003, the County Council adopted Resolution No. 31-03, authorizing the County to initiate a second, independent eminent domain proceeding (Condemnation 2) for condemnation of the Richards Family bypass segment. (Exhibit J-241 (Resolution No. 31-03)). Unlike Resolution No. 266-00 (Condemnation 1), Resolution No. 31-03 neither referenced the Development Agreement nor was the Development Agreement the basis for this resolution. After duly noticed public hearings and deliberations, the County Council rejected the Coupes' arguments of no public purpose; instead finding a public purpose. (Exhibits J-241 (Resolution No. 31-03) and J-331 (January 7, 2003 hearing)).

11. By way of Resolution No. 31-03, the County Council resolved that:

[I]t is necessary for the public use and purpose, to wit: the construction and development of a road intended to bypass Māmalahoa Highway . . . , to acquire and condemn a portion of that certain private property identified on Tax Map Key(3)8-1-007:045; described in Exhibit A and delineated on Exhibit B attached hereto.

(Exhibit J-241 (Resolution No. 31-03)(emphasis added)).

12. The 2005 Hawaii County Council General Plan (Ordinance 05-25) adopted the Bypass Highway. (Exhibit P-7 (Hawaii General Plan 2005)).

13. The Coupes contend that the County has failed to prove any positive impact of the Bypass Highway on traffic in the Kona area. Contrary to their assertion, the Court finds that traffic studies and plans found that an arterial highway in the area of the Bypass Highway would relieve unacceptable traffic congestion of the Māmalahoa Highway. (Test. of Nancy Burns (7/10/07 a.m., p. 31); Exhibits J-245 (1989 General Plan), J-380 (1998 State of Hawai'i Department of Transportation Long Range Plan), J-135 (1999 Bypass Environmental Study), and P-7 (2006 General Plan)).

14. The Coupes contend that without connecting to the as yet unbuilt Ali'i Highway, the Bypass Highway would cause unacceptable traffic conditions on Kamehameha III road. Contrary to their contention, the Court finds even without completion of Ali'i Highway, having the Bypass Highway will reduce traffic volume on the Māmalahoa Highway, improve traffic operations in the area and reduce infrastructure costs at other locations. (Test. of Warren Yamamoto (7/17/07 p.m., p. 40-41); Exhibit D-71 (June 1997 M&E Pacific TIAR)).

15. Community and public meetings, including those held before the Planning Commission, the Planning Committee and the County Council, have shown support for the Bypass Highway. (Test. of William Moore (7/11/07, p. 30); Exhibits J-23 (October 18, 1994 letter from Richard Frye to Riley Smith regarding Community Information Meeting), J-134 (January 30, 1997 letter from Donna Kiyosaki to Richard Frye), J-135 (September 1999 Māmalahoa Highway Bypass Road Final Environmental Impact Statement ("EIS")), J-354 (Ordinance No. 96-8, January 15, 1996), R-144 (November 22, 1995 Planning Committee

Hearing Transcript), R-145 (December 1, 1995 Planning Committee Hearing Transcript, pp. 46 and 55), and R-188 (April 8, 1997 letter from Donna Kiyosaki to DLNR concerning the Bypass Highway and EIS)).

16. A highway to bypass the Māmalahoa Highway has thus been determined to serve the public interest and no credible evidence was presented that indicated that the County Council intended that Oceanside, as opposed to the public, would predominantly benefit from Resolution No. 31-03.

17. The Court finds that the alignment of the Bypass Highway from Keauhou to Captain Cook that was identified in Ordinances 96-7 and 96-8 ("Bypass") is consistent with the 1989 General Plan. (Exhibit J-245 (November 14, 1998 General Plan Facilities Map Ordinance 89-142); Test. Moore (7/9/07pm, p. 43); Test. Goldstein (7/23/07pm, p.26-27); Exhibit J-45, Development Agreement ¶23).

18. The Coupes contend that the decision to shift the alignment from Kuakini Highway to the Ali'i Highway was made by 1250 Oceanside and adopted by the County after conducting limited and cursory review that did not emphasize planning aspects. Contrary to their assertion, the Court finds the alignment of the Māmalahoa Bypass, with a northern terminus at Ali'i Highway rather than at Kuakini Highway, was preferred and selected by the County and is consistent with the General Plans that have been adopted by the County. (Test. of Nancy Burns (7/10/97 a.m., pp. 10-19, and 7/16/07 a.m., pp. 36-37), William Moore (7/12/07 a.m., p. 63) and Donna Kiyosaki (7/17/07 a.m., p. 9) Exhibits J-251 (August 25, 1997 letter from Donna Kiyosaki to Robert Stuit regarding 11 % maximum grade acceptable for Nāpō'opo'o terminus); J-45 (Development Agreement, Exh. H)); Deposition of Stephen K. Yamashiro, pp. 52-53; Exhibits P-3 (1971 Facilities Maps, Hawaii County

General Plan, Exhibit "D"), J-245 (November 14, 1989 General Plan Facilities Map Ordinance 89-142)).

19. The Coupes contend that Condemnation 2, like Condemnation 1, was driven by the County's desire to comply with its obligations under the Development Agreement. No evidence supporting this contention was presented at trial, and the Court finds passage of Resolution No. 31-03 (Condemnation 2) evidences the County's desire to get the Bypass built for public purposes. (Exhibits J-241 (Resolution No. 31-03), J-331 (July 7, 2003 hearing)).

20. The Coupes contend that construction of the Bypass Highway was necessary to provide access to Hokuli'a. Oceanside already had public access to the Māmalahoa Highway through Haleki'i Street. The Bypass Highway, which bisects Hokuli'a and connects with other public roads at both ends beyond the Hokuli'a property, does provide improved access to Hokuli'a for development of a luxury subdivision, but that does not negate the County Council's predominant purpose by enacting Resolution No. 31-03 to obtain the Bypass Highway for broader public purposes, consisting of an additional traffic corridor for those traveling through the region (as opposed to those traveling to and from Hokuli'a).

21. A highway to bypass the Māmalahoa Highway is a piece of regional infrastructure for the benefit of those residing in the Kona area and has thus been determined to serve the public interest.

22. Notwithstanding the Court finding that Condemnation 1 was invalid because the County unlawfully delegated its condemnation power to Oceanside, the County's

predominant purpose in entering into the Development Agreement with Oceanside as referred in Condemnation 1 is the construction of the Bypass for public use.

SUPPLEMENTAL CONCLUSIONS OF LAW

The Court makes the following Supplemental 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.

1. The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.
2. The Hawaii Constitution provides greater protection to property owners: "Private property shall not be taken or damaged for public use without just compensation." Haw. Const. art. I, § 20.
3. Only government entities and entities delegated the power of eminent domain by state law can take property. *Western Sunview Properties, LLC v. Federman*, 338 F. Supp. 2d 1106 (D. Haw. 2004) (holding objection to development by adjacent property owner and property developer is not a "taking" as they have no power to condemn).
4. The inquiry under the public use clause of the Fifth Amendment and article I, section 20 is whether a taking is designed to further a "legitimate government [i.e., public] purpose." *Housing Finance & Dev. Corp. v. Castle*, 79 Haw. 64, 898 P.2d 576 (Haw. 1992); *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (Haw. 2008).
5. Courts will not lightly disturb the legislature's determination of public use unless it is manifestly wrong. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (Haw. 2008). In order to overcome the *prima facie* evidence of public use, a

defendant must show that such use is clearly and palpably of a private character. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (Haw. 2008); *State v. Anderson*, 56 Haw. 566, 545 P.2d 1175 (Haw. 1976).

6. The County's assertion that the Bypass Highway is a public use or purpose appears on its face to be a public use supporting Condemnation 2. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 380, 198 P.3d 615, 643 (Haw. 2008) (explaining "[u]nder our precedents and *Kelo*, it appears that the stated public purpose in this case on its face comports with the public use requirements of both the Hawai'i and United States constitutions").

7. However, "the single fact that a project is a road does not per se make it a *public road*." *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 380, 198 P.3d 615, 643 (Haw. 2008) (emphasis original) (quoting *City of Novi v. Robert Adell Children's Funded Trust*, 701 N.W.2d 144, 150-51 (Mich. 2005)).

8. A municipal government such as County cannot take property "under the mere pretext of public purpose, when its actual purpose was to bestow a private benefit." *Kelo v. City of New London*, 545 U.S. 469, 478 (2005); *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (Haw. 2008).

9. Additionally, County's pronouncements are not conclusive, and "both *Ajimine* and *Kelo* make it apparent that, although the government's stated public purpose is subject to *prima facie* acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual." *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 381, 198 P.3d 615, 644 (Haw. 2008). See also *City of Stockton v. Marina Towers LLC*, 2009 WL 352559 at *8 (Cal. Ct. App. Feb. 13, 2009) (court did not accept the

city's litigation claim that the taking was part of a master redevelopment plan, but instead looked to the city's actual conduct; taking invalidated on public use grounds, holding the city's resolution of necessity which identified the purpose of the taking only as "the acquisition of additional land in conjunction with potential development" was so "nondescript [and] amorphous," and "so vague, uncertain and sweeping in scope that it failed to specify the 'public use' for City sought acquisition of the property").

10. A legislative act "should be determined by its 'substance and practical operation, rather than on its title, form or phraseology.'" *Sierra Club v. Dep't of Transportation*, No. 29035, slip op. at 30-31 (Haw., Mar. 16, 2009).

11. Eminent domain cannot be used for the actual purpose of "conferring a private benefit on a particular private party." *Kelo v. City of New London*, 545 U.S. 469, 479 (2005)(citing *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984)).

12. 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, 545 P.2d 1175 (Haw. 1976). However, the public use question is still one that remains judicial in nature. *Hawaii Housing Authority v. Ajimine*, 39 Haw. 543, 1952 WL 7381 (Haw. Terr. 1952).

13. The Court concludes that the use (Bypass) was not of a predominately private character. The Bypass is a much needed road for the public's benefit. A number of studies and plans prepared by the County and State of Hawaii determined a public need long before the County and Oceanside entered into the Development Agreement.

14. The Court concludes that the government's stated public purpose is not "irrational" with "only incidental or pretextual" public purpose benefits. The totality of the factual circumstances beyond the face of Resolution No. 31-03 does not support the Coupe Family's claim of pretext.

15. Despite any ostensible private benefit to Oceanside the actual purpose of Condemnation 2 was for a valid public use.

16. The County Council's adoption of Resolution No. 31-03 was rationally related to the need for the Bypass Highway and the County Council's asserted public purpose and supported by the circumstances beyond the face of the resolution was not pretextual.

ORDER

Based on the above Supplemental Findings of Fact and Conclusions of Law to First Amended Findings of Fact, Conclusions of Law, and Order filed September 27, 2007 as to Condemnation 2,

IT IS HEREBY ORDERED that judgment is entered in favor of the County of Hawai'i and against the C & J Coupe Family Limited Partnership on all claims alleged in the County's First Amended Complaint and the Coupes' Counterclaim and Cross-Claim filed in Civil No. 05-1-015K.

DATED: Kealakekua, Hawaii


5/14/09

JUDGE OF THE ABOVE-ENTITLED COURT