No. 29887

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

COUNTY OF HAWAII, a municipal corporation, Plaintiff-Appellee, vs. ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; MILES HUGH WILSON, *et al.*, Defendants, and C&J COUPE FAMILY LIMITED PARTNERSHIP, Defendant-Appellant.	CIVIL NO. 00-1-0181K CIVIL NO. 05-1-015K (Kona) (Condemnation) (Consolidated) APPEAL FROM SUPPLEMENTAL FINAL JUDGMENTS (entered May 14, 2009) THIRD CIRCUIT COURT Honorable Ronald Ibarra

OPENING BRIEF FOR THE APPELLANT

APPENDICES "1" —— "11"

STATEMENT OF RELATED CASES

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STATEMENT OF THE CASES

These consolidated appeals from the County of Hawaii's two attempts to take the property of the C&J Coupe Family Limited Partnership involve critically important – but separate – issues. First, whether County's stated public purpose in Condemnation 2 was a pretext masking its actual purpose and an overwhelming private benefit. Second, whether the Coupes are entitled to be made economically whole under Haw. Rev. Stat. § 101-27 (1993) because Condemnation 1 was illegal.[1]

These issues will be addressed separately. Part I of this brief addresses the pretext issues in Condemnation 2. Part II addresses the issue of section 101-27 damages in Condemnation 1.

PART I: CONDEMNATION 2 PRETEXT

I. NATURE OF THE CASE

A. Summary

Condemnation 2 was plainly and obviously pretextual, and not about a public road. In 2007, the circuit court invalidated County's first condemnation attempt because the County-Oceanside Development Agreement illegally delegated County's eminent domain power to Oceanside.[2] However, the court upheld Condemnation 2. It accepted at face value County's stated purpose in Resolution 31-03,[3] and ignored the overwhelming evidence of County's actual purpose, and the private benefit to Oceanside.

In the first appeal, the Supreme Court vacated Condemnation 2 and remanded to the circuit court to "thoroughly consider" "any and all evidence that [the Coupes] argued indicating that the private benefit to Oceanside predominated," including whether the Development Agreement continued to limit County's eminent domain discretion when it adopted Resolution 31-03:

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[1] For continuity, this Brief will continue to refer to Civil No. 05-1-015K as "Condemnation 2" and Civil No. 00-1-181K as "Condemnation 1," as in the Court's opinion in the earlier appeal. *See County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 356, 198 P.3d 615, 619 (2008). Appellant C&J Coupe Family Limited Partnership will be referred to as the "Coupes," Appellee County of Hawaii as "County," and Appellee 1250 Oceanside Partners *aka* Hokulia as "Oceanside."

[2] "Development Agreement" refers to the Development Agreement (Apr. 20, 1998) between County and Oceanside. R:CV05-1-015K Doc. 01057 at 9471, J-45, PDF at 327-533 (copy attached as Appendix 1).

[3] *See* R:CV05-1-015K Doc. 01057 at 9480, J-241, PDF at 2098-2102 (County of Hawaii Resolution No. 31-03 (Draft 2) (Feb. 5, 2003) (copy attached as Appendix 2)).

> Despite the lack of reference to the Development Agreement in Resolution 31-03, it is not apparent from the record whether any or all of the same provisions in the Agreement that led the court invalidate Condemnation 1 were still in effect and underlay Condemnation 2, or whether other conditions existed such that the private character predominated. Those issues may be relevant to the pretext issue.

Coupe, 119 Haw. at 383, 198 P.3d at 646.

On remand, however, the circuit court again validated Condemnation 2. It concluded there is "no evidence" that the stated purpose in Resolution 31-03 was pretextual, or "was driven by County's desire to comply with its obligations under the Development Agreement." As in its first review, the circuit court did not look beyond the Resolution, and despite the Supreme Court's express remand order and the Coupes' counterclaim seeking a declaratory judgment on this specific issue, did not address whether the Development Agreement was in effect.

The Condemnation 2 portion of the appeal seeks two holdings regarding pretext.

First, a taking is *per se* pretextual if instituted when a contract which delegates government's eminent domain discretion to a private party has not been affirmatively rescinded by the parties, or finally declared invalid. In this situation, there is no need for a searching inquiry into County's motives.

Second, the undisputed evidence reveals that County's stated purpose in Resolution 31-03 was patently and unmistakably pretextual. When County adopted Resolution 31-03 in 2003, Condemnation 1 was on the verge of failing, which meant that County would be liable to Oceanside for potential breach of its Development Agreement covenant to condemn on demand, and to the Coupes for section 101-27 damages. County's actual purpose in adopting Resolution 31-03 was to insulate itself from liability if Condemnation 1 did not succeed.

Moreover, Oceanside – not County – stood to receive the overwhelming benefit from Condemnation 2. On one side, the private benefit was overwhelming – without County taking the Coupes' property, Oceanside's $90 million Hokulia project was doomed. Conversely, the purported public benefit of taking the Coupe property was illusory because Oceanside possesses the remainder of the road, and County had no assurance that Oceanside would be viable when the time came for it to build the road. The Coupe property is an isolated remnant, not a road. Further reflecting the lack of public purpose, County had no comprehensive plan of which Condemnation 2 was a part. It has no right to the remainder of the road, and admitted it had no budget or means of paying to acquire

the remainder, or to build a road. The only "plan" County had was the Development Agreement, which could not substitute for a comprehensive condemnation plan, and is illegal and unenforceable.

If Condemnation 2 is sustained, the circuit court's award of just compensation was erroneous because it did not take into account the appreciation in land values of approximately 239% between 2000 and 2005.

B. Questions Presented

1. *Per Se* Pretext

In 2007, the circuit court held that the Development Agreement illegally delegated County's condemnation power to Oceanside for Oceanside's private benefit, and that judgment is final. It is not disputed that in 2003 when County adopted Resolution 31-03, that the Development Agreement had not been rescinded by the parties, and had not been ruled invalid.

The first question presented is whether in these circumstances, Condemnation 2 was *per se* pretextual under the Fifth and Fourteenth Amendments of the U.S. Constitution, and article I, section 20 of the Hawaii Constitution.

2. Actual Purpose, Overwhelming Private Benefit

The Supreme Court remanded Condemnation 2 to determine whether the Development Agreement "underlay" Resolution 31-03, because a taking instituted to comply with the Development Agreement would be for a predominantly private purpose. The circuit court found the record contains "no evidence" that Condemnation 2 was influenced by County's desire to comply with the Development Agreement. Rather, the circuit court found the "passage of Resolution 31-03 (Condemnation 2) evidences County's . . . public purposes." This conclusion does not reflect the undisputed evidence in the record of overwhelming private benefit, and lack of public benefit from Condemnation 2. It also does not reflect that Resolution 31-03 was adopted only when it appeared that Condemnation 1 was on the verge of failing, and County has never offered any explanation why it instituted a second condemnation action to take property it was already seeking.

The second question presented is whether the objective "circumstances beyond the mere face of the Resolution" show that County's actual purposes in adopting Resolution 31-03 were: (1) to provide "a predominantly private benefit to Oceanside," because without Condemnation 2, Oceanside's $90 million Hokulia project was dead; and (2) as a hedge against liability for breach of

the Development Agreement, and liability for damages under Haw. Rev. Stat. § 101-27 (1993) in the event Condemnation 1 failed.

3. Appreciation In Value

If Condemnation 2 is affirmed, the alternative question presented is whether the circuit court's valuation of the property failed to account for the appreciation in value between 2000 and 2005.

C. Relief Sought On Appeal

The Supplemental Final Judgment (May 14, 2009) should be reversed, and judgment entered for the Coupes. *See* Haw. R. App. P. 35(e) ("'reverse' ends litigation on the merits"); *Coupe*, 119 Haw. at 374 & n. 24, 198 P.3d at 637 & n.24.

Alternatively, if the circuit court's Condemnation 2 judgment is not reversed, at minimum it should be vacated and remanded. Its conclusion there was "no evidence" of pretext – without any discussion of the Supreme Court's mandate that it "thoroughly examine" the record, including determining whether the Development Agreement was still in effect at the time Resolution 31-03 was adopted and underlay Condemnation 2 – requires remand for the considered examination mandated by the Supreme Court. *See* Haw. R. App. P. 35(e).

If the circuit court's judgment regarding Condemnation 2 is affirmed, the court's judgment regarding the valuation of the property should be vacated.

II. FACTS

The Supreme Court remanded Condemnation 2 for a thorough consideration of evidence of County's "actual purposes," its "motive" for adopting Resolution 31-03, and whether Oceanside's Development Agreement "underlay" Condemnation 2. *Coupe*, 119 Haw. at 384, 375, 198 P.3d at 647, 638. An understanding of why County undertook a second condemnation attempt while it continued to prosecute the first begins with County's relationship with Oceanside, the developer of the "Hokulia" and "Keopuka" projects.

A. County Had No Plan And No Ability To Build A Road

County has repeatedly admitted – most recently in the Supreme Court oral arguments in 2008 – that it had neither the plans nor the means to acquire property to construct a road to bypass the Mamalahoa Highway. County did not own the right of way over any Kona property where its General Plan, the only officially adopted plan for future development, denoted a desire for two traffic

corridors. It also did not have the funds to acquire any property, or build a road. R:CV05-1-015K Doc. T0008, 07/16/07 TR at 4:13-16 (Test. of Gerald Takase); *id.* at 4:17-19 (same).

B. Oceanside's Projects Before The Development Agreement

As originally conceived, Hokulia was a 1500-plus unit Pebble Beach-style gated project on agricultural land on the north side of the Coupe property, and "Keopuka" was a similar project on the south side. R:CV05-1-015K Doc. 01057 at 9477, J-164 (map denoting Hokulia, Keopuka and the Coupe property) (copy attached as Appendix 3). Before Oceanside received its initial zoning approval for Hokulia, it recognized that neither of its proposed projects would be permitted because the County's existing road system could not accommodate the impacts from either project, let alone both. Oceanside would have to alleviate the impacts of these developments as a condition of obtaining approvals. R:CV05-1-015K Doc. 01031 at 8702 (FOF 13) (a copy of the First Amended FOF/COLs and Order, filed Sept. 27, 2007, is attached as Appendix 4). Consequently, in Ordinance No. 94-73, County conditioned the rezoning of the first phase of Hokulia on Oceanside acquiring the property for – and building – a road of sufficient size to accommodate the impact of Hokulia. This road would be one of the two roads noted on the General Plan, a portion of which would have run through the Hokulia parcel parallel to the shoreline, and which would have bisected the project. *See* R:CV05-1-015K Doc. 01057 at 9470, J-24, PDF at 128-69 (ordinance); *id.* at 9480, J-245, PDF at 2120-22 (GP facilities map).

Under Ordinance 94-73, after Oceanside had negotiated purchase of the necessary land from its neighbors and constructed the road – *without County assistance* – it would convey it to County. R:CV05-1-015K Doc. 01031 at 8702 (FOF 13). Until Oceanside accomplished that, Hokulia could not be subdivided. *Id.* at Doc. 01031 at 8703 (FOF 17); R:CV00-1-0181K Doc. T0003, 12/10/02 TR at 8:22-9:4.

C. Kamehameha Schools Threatened The Hokulia Project

Kamehameha Schools (KS) owned extensive property north of Hokulia, including the Keauhou Shopping Village. R:CV05-1-015K Doc. 01057 at 9485, J-349, PDF at 3188-89. Oceanside knew KS opposed the road alignment and did not want to bear the financial liability for construction. *Id.* at Doc. 01059 at 9516, D-50, PDF at 631; *id.* at 9515, D-41, PDF at 595. Oceanside considered KS a "serious threat" to its zoning. *Id.* at Doc. 01057 at 9478, J-182, PDF at 1712-13. Oceanside's architects for its access road were project manager Richard Frye and planning consultant Bill Moore.

R:CV05-1-015K Doc. 01031 at 8702 (FOF 11). Moore and Frye were confronted by the reality that because of the traffic impacts of Hokulia, Oceanside was unable to obtain subdivision approvals without developing the road. *Id.* at 8703 (FOF 17).

D. Oceanside's Wish List: Private Condemnation Power and Kamehameha Schools Cooperation

As early as October 26, 1994, Oceanside also realized that it could not obtain financing without the use of County's condemnation power to force the acquisition of any property owners who did not choose to sell voluntarily. R:CV05-1-015K Doc. 01031 at 8704 (FOF 23). To deal with KS and Oceanside's inability to compel a landowner to sell its property for the road, Oceanside created a "wish list" of the items which it wanted to include in a development agreement:

> We'll be creating a *wish list* to help get the highway done and to assure a partial payback agreement, cooperation with Bishop Estate and other matters.

Id. at Doc. 01057 at 9479, J-209, PDF at 1984 (copy attached as Appendix 5). These "other matters" included:

> 1. Encourage Kamehameha Schools/Bishop Estate to participate in the planning and development of the Mamalahoa Bypass Project[.]
>
> . . . .
>
> 5. The Mayor will support the potential "rights-of-way agreements" with impacted property owners.
>
> . . . .
>
> b. If the landowners [*sic*] requires payment for the right-of-way acquisition, the landowner would be required to pay his "fair share"
>
> . . . .
>
> . . . .
>
> [6]b. Reimbursement from other major landowners . . . based on their calculated "fair share" contribution as required by the County. . . .
>
> . . . .
>
> 8. The County will agree to accept the entire roadway in the event the State Department of Transportation does not approve the final project right-of-way and/or design . . . .
>
> 9. The County will undertake best efforts to expedite review of the project components in the most expedient manner . . . .
>
> . . . .
>
> 11. The County will undertake best efforts to finalize the Development Agreement . . . [to] include:

a. Reimbursement Provisions from other projects . . . .

. . . .

c. County's use of eminent domain powers in the event a landowner does not voluntarily agree to sell . . . .

R:CV05-1-015K Doc. 01057 at 9478, J-187, PDF at 1729-30 (copy attached as Appendix 6).

Thus, the die was cast. The "wish list" became the blueprint for, and guided Oceanside and County through the filing of Condemnation 2.

E. Oceanside Aligned Its Road To Quell Objections To Hokulia

As part of its "wish list" attempts to neutralize KS's concerns and jointly develop its two projects, Oceanside considered how it could maximize their respective development potentials, while alleviating the burden of those projects on County's roads. *See* R:CV05-1-015K Doc. 01057 at 9490, J-450, PDF at 4443-44; *id.* at 9477, J-162, PDF at 1655-59. As a result of KS's opposition, Oceanside developed an "alignment strategy that gives something to everyone." *Id.* at Doc. 01057 at 9478, J-182, PDF at 1712-13; *id.* at Doc. T0029, 07/25/07 TR at 53:17-24 (Test. of R. Frye). KS's proposed alignment was contrary to Oceanside's traffic engineer's recommendation. *Id.* at Doc. T0029, 07/25/07 TR at 18:24-49:3 (Test. of R. Frye). It had not been studied by Oceanside or County. *Id.* at Doc. T0029, 07/25/07 TR at 87:13-20 (Test. of R. Frye). Similarly, Oceanside did not disclose the alignment alternatives that bisected Hokulia more dramatically. *Id.* at Doc. 01057 at 9471, J-37, PDF at 256-58; *id.* at Doc. T0029, 07/25/07 TR at 86:5-7 (Test. of R. Frye). However, it is the alignment that eventually was approved. *Id.* at Doc. 01057 at 9473, J-77, PDF at 765-68; *id.* at 9475, J-120, PDF at 1304-10; *id.* at 9485, J-354, PDF at 3190-3202 (Ord. No. 96-8). Separate from the benefit to KS, the modified alignment had a $10 million cost savings to Oceanside. *Id.* at 9478, J-187, PDF at 1729-30.

As a result, Oceanside created a new alignment not contemplated by either the General Plan or Ordinance 94-73. Instead of two parallel traffic corridors, Oceanside would propose one hybrid diagonal traffic corridor going from KS's Keauhou Shopping Village to Napoopoo. *Id.* at Doc. T0004, 07/10/07 TR at 39:24-40:5 (Test. of N. Burns). This alignment required less of Hokulia's land and essentially opened up much more of Hokulia for development on the more lucrative makai side of the road. Further, this alignment would also traverse less of Keopuka and do so closer to its

less valuable mauka end. *See id.* at Doc. T0023, 07/10/07 TR at 50:1-51:9 (Test. of N. Burns) (design engineer testifying that the move mauka was made so as "to not split [Oceanside's] property"); *id.* at Doc. 01057 at 9471, J-37, PDF at 256-58 (illustration of road options, B bisecting Hokulia); *id.* at 9476, J-146, PDF at 1495-96. Additionally, the road's north end alignment removed KS as an opponent. *See* R:CV05-1-015K Doc. 01058 at 9501, R-203, PDF at 343-48; *id.*, R-212, PDF at 351-53; *id.*, R-218, PDF at 361-63.

F. Condemnation-On-Demand Lynchpin

Hokulia would eventually require $90 million or more, and Oceanside required investors. Oceanside discovered, however, that investors were reluctant to fund the development without a guarantee the property needed for the road could be acquired. *Id.* at Doc. 01031 at 8704 (FOFs 24 & 25) (acquisition of all properties prior to financing was mandatory). As its "wish list" anticipated, Oceanside could not do this without County's powers of eminent domain. *See id.* at 8705 (FOF 27); *id.* at 8712 (FOF 56) ("Our proposed Development Agreement . . . requires the County to condemn parcels we are not able to acquire."); *id.* at Doc. 01057 at 9478, J-202, PDF at 1959; *id.*, J-203, PDF at 1960 ("In our proposed Development Agreement (DA) with the County there is a provision requiring the County to condemn where we have not been able to successfully negotiate a purchase. I would think an investor would be comfortable *that purchasing the necessary right-of-way will no longer be an issue if the County approves the DA*") (emphasis added). "County under stood that Oceanside's financing structure required the ability to condemn in the event a landowner would not sell." *Id.* at Doc. 01031 at 9705 (FOF 28).

Oceanside proposed, drafted and lobbied for the County to use a Development Agreement to relieve Oceanside of its existing obligations under Ordinance 94-73 to acquire the property for, and to build a road without County assistance, and to convey this right-of-way to County. R:CV05-1-015K Doc. 01031 at 8704 (FOF 26); *id.* at Doc. 01057 at 9470, J-24, PDF at 128-69.[4] Further,

[4] The other critical part of the Development Agreement was the so-called "fair share" provision, which potentially slid the cost of the road to other property owners in the area who may have sought to develop their land. R:CV05-1-015K Doc. 01057 at 9472, J-56, PDF at 649-51 (Oceanside memo to County stating that reimbursement agreement was primary purpose of Development Agreement). If they sought County permissions, the Development Agreement required County impose a fee, which would be given to Oceanside. *Id.* at Doc. 01031 at 8708-09 (FOFs 42-45). Either way, Oceanside benefitted: the provision kept other property owners from competing with Oceanside's developments, or if they chose to develop, Oceanside was reimbursed for the cost of the road. *See also id.* at 8707-10 (FOFs 37-51). The

Oceanside knew that, but for the Development Agreement, County could never have afforded to acquire or build the road on its own, would never risk the resultant liability for breaching this commitment, potentially requiring the County to pay for the entire project, and perhaps not even obtain the road. *Id.* at Doc. 01031 at 8705 (FOF 27); *id.* at Doc. 01057 at 9478, J-203, PDF at 1960 ("Should the County breach the agreement and not condemn the [*sic*] would be potentially liable for the projects [*sic*] failure. I can't imagine they would ever take such a risk."). Based on investor concerns and County's understanding of the financing structure, the Development Agreement included the critical "wish list" requirements regarding condemnation and reimbursement. *Id.* at Doc. 01031 at 8705 (*FOF 29*); *see also id.* at Doc. 01057 at 9471, J-45, PDF at 327-533.

KS threatened to scuttle the Development Agreement unless Oceanside both relocated the North access to the vicinity of its Keauhou Shopping Village and exempted KS's significant land holdings in this area from the "fair share" scheme.[5] *See* R:CV05-1-015K Doc. 01057 at 9482, J-277, PDF at 2442-43; *id.* at 9490, J-451, PDF at 4445-47; *id.* at 9482, J-278, PDF at 2444. Oceanside acceded to KS's demands at the eleventh hour by inserting a new map – Exhibit "P" to the Development Agreement – which never saw the light of public scrutiny. *See id.* at 9490, J-451, PDF at 4445-47; *id.* at 9488, J-408, PDF at 3991-92; *id.* at Doc. T0022, 07/23/07 TR at 11:18-20 (Test. of V. Goldstein); *id.* at Doc. 01058 at 9512, R-450, PDF at 966. The Development Agreement then excluded KS's lands from the full impact of Oceanside's "fair share" reimbursement plan. *See id.*, R-451, PDF at 967; *id.* at Doc. 01057 at 9471, J-45, PDF at 486 (Ex. "P" to Development Agreement).

G. Development Agreement Delegation

Under the enabling statute, the only valid purposes of a development agreement is to vest a developer's land uses and allow a county to exact more from the developer than it otherwise could. The Oceanside Development Agreement, however, went further, and "provided that, if any landowner refused to sell their private land to Oceanside, the County's power of eminent domain

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"fair share" requirement was ruled illegal by the circuit court and that decision was not appealed. *Coupe*, 119 Haw. at 383 n.35, 198 P.3d at 646 n.35.

[5] Bob Rosehill, a Kamehameha Schools' employee, sat on the County Council considering the Development Agreement. R:CV05-1-015K Doc. T0017, 07/11/07 TR at 94:13-20 (*Test. of W. Moore*). His superior, Robert Lindsey (KS's West Hawaii land manager), testified against Oceanside's proposals. *See id.* at Doc. 01059 at 9515, D-44, PDF at 603, 611.

would be used to acquire the parcel for Oceanside to construct the Mamalahoa Bypass Highway." R:CV05-1-015K Doc. 01031 at 8705 (FOF 30); *id.* at 8705-06 (FOFs 31-33). Further, Oceanside would be reimbursed for the construction through "fair share" assessments from Oceanside's neighbors. *Id.* at 8705 (FOF 31); *id.* at Doc. 01057 at 9471, J-45, PDF at 342-44. The Development Agreement also included these provisions:

- Oceanside's consent was required before County could adopt more restrictive land use regulations. *Id.*, PDF at 331, ¶ M.

- Oceanside's written directive required County to condemn. *Id.*, PDF at 339, §§ 10(c) and 11(a).

- Oceanside's written directive "shall constitute a 'formal initiation of condemnation action.'" *Id.*, PDF at 339, § 11(a); *id.* at Doc. 01031 at 8706 (*FOF 33*); *compare id.* at Doc. 01057 at 9470, J-24, PDF at 128-69 (Oceanside's obligation to acquire only relieved upon initiation of condemnation).

- Oceanside would pay County for expenses incurred in the taking of parcels which Oceanside has determined "in its sole and absolute discretion that there is a need for possession." *Id.* at 9471, J-45, PDF at 339, § 11(b); *id.* at Doc. 01031 at 8706 (FOF 35); *id.* (FOF 36).

- If a property owner donated its land to Oceanside for the road, County would promise to not impose additional "fair share" exactions. *Id.* at Doc. 01057 at 9471, J-45, PDF at 340, § 12(c).

- It established the standards of the actual construction of the road. *Id.*, PDF at 340, § 13(a).

- It permitted Oceanside, not County, to determine the alignment of a highway, including intersections. *Id.*, PDF at 341, § 13(b); *id.* at Doc. 01031 at 8706 (FOF 34).

- It required Oceanside to dedicate the road and County to accept the dedication. *Id.* at Doc. 01057 at 9471, J-45, PDF at 341-42, § 14.

H. Resolution 266-00: Refuse Oceanside's Purchase Offer? Get Condemned

Even before the Development Agreement was formally approved, Oceanside began threatening property owners along the route of the road that unless they agreed to Oceanside's price, the County would force acquisition by condemning their properties. R:CV05-1-015K Doc. 01031 at 8703 & 8710-11 (FOFs 19 & 52). For example, it invited a property owner to open discussions

so "eminent domain proceedings will not be necessary." *Id.* at Doc. 01057 at 9474, J-93, PDF at 1127. It informed another owner that if it did not convey its land, "Oceanside will be forced to rely on the condemnation provisions of the Development Agreement." *Id.*, J-94, PDF at 1128-29. It warned another that "[b]y submitting this matter to the County for condemnation, Oceanside would be absolved from providing the [owners] any of the benefit it is offering to the owners . . . . [T]he 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." *Id.* at 9473, J-87, PDF at 1090. It thanked other owners for their anticipated cooperation "otherwise we must submit the matter to the County of Hawaii for its Eminent Domain/Condemnation processes." *Id.*, J-96, PDF at 1131. With the exception of three parcels, Oceanside acquired most of the property needed for the road. Two landowners, however, refused to sell to Oceanside: the Coupes and the Pearnes. *See id.* at Doc. 01031 at 8711 (FOF 55).

Consequently, as the Development Agreement provided, Oceanside told County to condemn the Coupes' land. *See id.* at Doc. 01031 at 8713 (FOF 61); *id.* at Doc. 01057 at 9480, J-237, PDF at 2087 ("[T]his letter shall serve to instruct you to proceed with the eminent domain proceedings[.]"); *see also id.* at Doc. 01031 at 8712 (FOF 60). In 2000, after Oceanside's command that it do so, County adopted Resolution 266-00, authorizing the taking of the Coupe's property, and the initiation of Condemnation 1. County then filed the Condemnation 1 complaint to condemn 2.9 acres, more or less, of the Coupe's property. *See* R:CV00-1-0181K Doc. 00001 at 1-9 (*County of Hawaii v. Richards*, Civil No. 00-1-181K (filed Oct. 9, 2000)).

In Condemnation 1, County did not follow its usual practice of obtaining its own survey, title report, and appraisal before a condemnation. R:CV05-1-015K Doc. T0007, 07/16/07 TR at 46:18-20 (Test. of G. Takase). Instead, Oceanside determined the property to be taken, and the amount of compensation offered. *Id.* at 8713 (FOF 62). Oceanside's surveyor, R.M. Towill Corporation, conducted the survey of the condemned property. *See* R:CV00-1-0181K Doc. 00001 at 7; R:CV05-1-015K Doc. 00701 at 8-12.[6]

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[6] In *Pearne*, a condemnation case which was eventually settled by stipulated judgment, Oceanside's attorneys even appeared and signed pleadings on behalf of County. *Id.* at Doc. 01031 at 8711 (FOF 55). Moreover, Oceanside paid for the compensation to the Pearnes, used Oceanside's attorneys to prosecute the condemnation suit, and even paid for County attorneys to appear on behalf of the County in the action. *Id.* at Doc. T0007, 07/16/07 TR at 48:19-49:9 (Test. of G. Takase).

I. Development Agreement's Delegation Appeared On The Face Of Resolution 266-00

The illegal delegation of County's eminent domain power appeared on the face of Resolution 266-00. Consequently, the Coupes objected to Condemnation 1, asserting, among other things, that County illegally delegated its power of eminent domain to Oceanside, that the claimed public use in Resolution 266-00 and Condemnation 1 was a pretext, and the taking was not for a public use or purpose. The circuit court granted County's motion for summary judgment on public use, *see* R:CV00-1-0181K Doc. 00037 at 394-95 (November 27, 2001 Order), granted an order of possession, *see id.* at Doc. 00004 at 20-22 (Oct. 10, 2000 Order), and Oceanside began work on the land. *See* R:CV05-1-015K Doc. T0007, 07/16/07 TR at 56:20-61:16 (Test. of G. Takase). Two years passed while other issues were litigated.

J. Evolving Pretext Law

When the Condemnation 1 complaint was filed in 2000, there was little legal authority providing guidance about when a proffered public purpose was unconstitutional pretext. However, in a series of cases after Condemnation 1 was filed, courts nationwide began addressing the issue and provided a concrete methodology for analyzing pretext. *See 99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003).

K. Condemnation 1 In Serious Jeopardy

On September 5, 2002, the circuit court *sua sponte* reversed the prior order granting summary judgment in favor of County on the issue of public use, then denied County's request for reconsideration. *See* R:CV00-1-0181K Doc. 00056 at 725-26; *id.* at Doc. 00061 at 802-03. On December 11, 2002, the circuit court stayed its earlier order allowing County to take possession of the Coupes' property, legal possession of the land was returned to the Coupes, and Oceanside's construction activity was halted in its tracks. *See id.* at Doc. 00079 at 1286-87.

Despite this order, neither County nor Oceanside actually relinquished control of the land and did not remedy the damage done during their possession. *See* R:CV05-1-015K Doc. 01057 at 9480, J-229, PDF at 2065-66. During the time County was in possession, it caused the property to be subdivided. *See id.*, 07/16/07 TR at 53:22-24 (Test. of G. Takase). County never advised the Coupes

about the involuntary subdivision of their property, even though it admitted its attorney knew of the statutory requirement to provide notice to the property owners prior to subdivision. *Id.*, 07/16/07 TR at 54:3-19 (Test. of G. Takase).

L. Resolution 31-03

A little more than a month after these events, on January 23, 2003, Resolution 31-03 was introduced in the Hawaii County Council. R:CV05-1-015K Doc. 01057 at 9480, J-241, PDF at 2098-2102 (Reso. 31-03, at 2).

Shortly thereafter, on or about April 8, 2003, Oceanside sought a writ of mandamus in the Supreme Court directing Judge Ibarra "to rescind his sua sponte order transferring the hearing on 1250 Oceanside Partners' motion for the disqualification or recusal of the Honorable Ronald Ibarra from presiding as the judge in" Condemnation 1. *See* R:CV00-1-0181K Doc. 00124 at 2217-2339.[7]

On February 5, 2003, on the heels of the reopening of the public use issue, the loss of possession, and the attempt to remove Judge Ibarra, the Hawaii County Council adopted Resolution 31-03 authorizing the initiation of Condemnation 2.

This second resolution was not materially different from Resolution 266-00, except that it sought an additional half-acre of land Oceanside discovered it wanted in the course of Condemnation 1, referenced "the Kona Regional Plan" (a plan which had existed before Condemnation 1 was instituted, and had not changed in the interim), and, most critically, *omitted every reference in Resolution 266-00 to the Development Agreement and Oceanside. See* R:CV05-1-015K Doc. 01057 at 9480, J-241, PDF at 2098-2102.

M. County Waited Two Years to File Condemnation 2

County waited nearly two years to file the complaint in Condemnation 2. The only explanation it offered is that "Deputy Corporation Counsel Gerald Takase testified that the three-year delay in filing this complaint [Condemnation 2] was because the County wanted to resolve the *Kelly* case, Civil No. 00-1-0192K, before proceeding with what became [Condemnation 2]." Plaintiff-

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[7] *See also* R:CV00-1-0181K Doc. 00126 at 2346-47 (Order Denying Third-party Defendant 1250 Oceanside Partners aka Hokulia's Petition for a Writ of Mandamus Directing the Honorable Ronald Ibarra to Rescind His Sua Sponte Order Transferring the Hearing on 1250 Oceanside Partners aka Hokulia's Motion for the Disqualification or Recusal of the Honorable Ronald Ibarra from Presiding as the Judge in this Lawsuit to the Honorable Riki May Amano, *County of Hawaii v. Richards, et al.*, No. 25747 (Apr. 10, 2003)).

Appellee County of Hawaii's Answering Brief (filed May 16, 2008), *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, No. 28822, at 6 n.6. As in Condemnation 1, County did not follow its usual eminent domain procedures, but used Oceanside's survey and description from Condemnation 1. It did not alter the claimed valuation of the property, despite the passage of five years and the obvious appreciation of the property. It even "shifted" the Condemnation 1 deposit to Condemnation 2, and did not provide the separate deposit required by statute.

III. PROCEEDINGS IN THE COURT BELOW

A. Resolution 266-00 And Condemnation 1

County instituted Condemnation 1 in 2000, based upon Resolution 266-00. The circuit court initially granted County's motion for summary judgment on the public use issue and granted possession of the property to County and Oceanside. Two years later, however, as noted above, the circuit court *sua sponte* reversed the summary judgment, and stayed the order of possession. Oceanside then attempted to remove Judge Ibarra from the case.

B. Resolution 31-03 And Condemnation 2

Shortly thereafter, County adopted Resolution 31-03, but waited two years to file the Condemnation 2 complaint. On March 31, 2005, the circuit court consolidated Condemnation 1 and Condemnation 2 for trial, although each case maintained its separate identity. *Coupe*, 119 Haw. at 371, 198 P.3d at 634 ("Condemnation 1 and Condemnation 2 retained their separate identities and the court entered separate judgments in each action . . . [t]hus, the consolidation did not merge" the cases.).

C. Consolidated Trial

During the trial in July 2007, County and Oceanside attempted to "disclaim" the Development Agreement's effects by seeking to introduce a letter from County to Lyle Anderson dated July 24, 2007, in which they purported to agree that the Development Agreement did not delegate eminent domain power. *See* R:CV05-1-015K Doc. 01060 at 9525, P-17, PDF at 1046-47 (copy attached as Appendix 7).

At the conclusion of the consolidated trial, the circuit court issued separate findings of fact and conclusions of law. The circuit court held that Condemnation 1 was invalid, and that the Development Agreement's condemnation and "fair share" provisions were illegal. The circuit court

did not rule on the Coupe Family's request for section 101-27 damages for the failed Condemnation 1, and their motion was deemed denied by operation of law.

The circuit court upheld Condemnation 2. County did not appeal the circuit court's judgment that Condemnation 1 lacked a public purpose and the Development Agreement delegated eminent domain power to Oceanside, and that judgment is final. *Coupe*, 119 Haw. at 357 & n.5, 198 P.3d at 620 & n.5 ("Appellant notes that [County] has not appealed from dismissal of Condemnation 1, the period to appeal pursuant to HRAP Rule 4(a)(1) (2008) has expired, and, therefore, the Judgment in Condemnation 1 is final and cannot now be appealed.").

D. First Appeals To Hawaii Supreme Court

The Coupe Family appealed the denial of the request for 101-27 damages in Condemnation 1, and the judgment in Condemnation 2. The Supreme Court vacated the denial of section 101-27 damages and remanded that portion of Condemnation 1 to the circuit court for calculation of damages, including "costs and attorneys' fees, as well as any expenses that may have been incurred by reason of [County] taking possession of the property." *Coupe*, 119 Haw. at 368, 198 P.3d at 631.

The Court also held that substance, not form, matters when government adopts a resolution of taking. *Id.* at 383, 198 P.3d at 646. The Court vacated the circuit court's approval of Condemnation 2, and remanded with instructions to "thoroughly consider" evidence of pretext and private benefit by examining County's "actual purposes," its "veracity," and by "look[ing] behind the government's stated public purpose" with a "closer *objective* scrutiny of the justification being offered." *Coupe*, 119 Haw. at 375, 198 P.3d at 638 ("[O]ur case law supports the proposition that a court can look behind the government's stated public purpose."). *see also id.* at at 379, 198 P.3d at 642.

The Court held the circuit court erroneously accepted County's stated purpose at "face value," and the "single fact that a project is a road does not per se make it a *public* road." *Id.* at 381, 198 P.3d at 643 (emphasis original). The Court instructed the circuit court to review the Record for County's "actual reason" and its "motive" underlying Resolution 31-03. *Coupe*, 119 Haw. at 380, 198 P.3d at 643 (quoting *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1130 (C.D. Cal. 2001))."[T]he court was obligated to consider any and all evidence that [the Coupes] argued indicating that the private benefit to Oceanside predominated." *Coupe*, 119 Haw. at 387, 198

P.3d at 650. The Court remanded for a determination whether Condemnation 2 was motivated by factors other than an established plan to benefit the public:

> [T]he ultimate question for the [circuit] court [on remand] is whether the "actual purpose [of Condemnation 2] was to bestow a private benefit[,]" *Kelo*, 545 U.S. at 478, or whether the taking was "clearly and palpably of a private character," *Ajimine*, 39 Haw. at 550.

Coupe, 119 Haw. at 389, 198 P.3d at 652.

E. Circuit Court's Supplemental Judgment

On remand, the circuit court did not consider additional evidence and did not take additional argument or briefing. On May 14, 2009, the circuit court issued two supplemental findings of fact and conclusions of law. The court concluded there was "no evidence" in the Record that the Development Agreement drove Condemnation 2. The only evidence the circuit court referred to was Resolution 31-03 itself, and a transcript of a hearing:

> 9. 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 Road built for public purposes. (Exhibits J-241 Resolution No. 31-03), J-331 (July 7, 2003) hearing)).

R:CV05-1-015K Doc. 1110 at 10888 (Supp. FOF 19) (a copy of the Supp. FOF/COLs as to Condemnation 2 is attached as Appendix 8). The court also found:

> [n]otwithstanding the [circuit] 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 was referred in Condemnation 1 is the construction of the Bypass for public use.*

Id. at 10888-89 (Supp. FOF 22) (emphasis added).

Because the circuit court upheld Condemnation 2, it entered an award of just compensation of $162,204.83 for approximately 3.4 acres of land.

The circuit court entered a Supplemental Final Judgment (May 14, 2009). *See id.* at Doc. 1114 at 10922-25 (copy attached as Appendix 9). These appeals followed.

STATEMENT OF POINTS OF ERROR

I. ERROR 1: CONDEMNATION 2'S STATED PURPOSE WAS *PER SE* PRETEXTUAL

The circuit court erred when it failed to consider whether any or all of the same provisions in the Development Agreement that led the court to invalidate Condemnation 1 were still in effect and underlay Condemnation 2, and when it entered a judgment that Condemnation 2 was valid. The circuit court should have entered a judgment in favor of the Coupes that Condemnation 2 was not for a public purpose. The error by the circuit court is in the Record at R:CV05-1-015K Doc. 1110 at 10881-92 (Supp. FOF/COLs) and *id.* at Doc. 1114 at 10922-25 (Supp. Final Judgment). Appellant objected to the error. *See id.* at Doc. 1095 at 10257-99.

II. ERROR 2: THE UNDISPUTED EVIDENCE REVEALED CONDEMNATION 2'S STATED PURPOSE WAS PRETEXTUAL

The circuit court erred when it concluded the Record contains "no evidence" that the Development Agreement underlay Condemnation 2, or that other conditions existed such that the private character predominated. The circuit court should have focused on the "circumstances of the approval process" to analyze whether they "so greatly undermine[d] the basic legitimacy of the outcome reached," and entered a judgment that County's stated purpose was pretextual, and Condemnation 2 provided a predominantly private benefit to Oceanside. The circuit court also should have entered a judgment that County's actual purpose in adopting Resolution 31-03 was to avoid liability for breach of the Development Agreement, and for damages under Haw. Rev. Stat. § 101-27 (1993). The error by the circuit court is in the Record at R:CV05-1-015K Doc. 1110 at 10881-92 (Supp. FOF/COLs) and *id.* at Doc. 1114 at 10922-25 (Supp. Final Judgment). Appellant objected to the error. *See id.* at Doc. 1095 at 10257-99.

III. ERROR 3: IMPROPER VALUATION OF PROPERTY SUBJECT TO CONDEMNATION 2

The circuit court erred when it found no appreciation between October 9, 2000 and January 28, 2005 in determining the Coupes' property's value in Condemnation 2. The error by the circuit court is in the Record at R:CV05-1-015K Doc. 1114 at 10922-25 (Supp. Final Judgment). Appellant objected to the error. *See id.* at Doc. 1095 at 10257-99.

STANDARD OF REVIEW

A challenge to the "validity of the asserted public purpose underlying the condemnation presents a question of constitutional law, which [the] court reviews *de novo* under the right/wrong standard." *Coupe*, 119 Haw. at 374, 198 P.3d at 637 (citing *State v. Cuntapay*, 104 Haw. 109, 113, 85 P.3d 634, 638 (2004) ("We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case. Thus, we review questions of constitutional law under the right/wrong standard.")).

The circuit court's conclusion the record contains "no evidence" is reviewed under the clearly erroneous standard. Haw. R. Civ. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous. . . ."). "A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made." *In re Guardianship of Carlsmith*, 113 Haw. 211, 223, 151 P.3d 692, 704 (2006) (quoting *Child Support Enforcement Agency v. Roe*, 96 Haw. 1, 11, 25 P.3d 60, 70 (2001)).

Findings of fact should be "clear, specific and complete," and must be "sufficiently comprehensive and pertinent to the issue to form a basis for the decision and whether they are supported by the evidence." *Shannon v. Murphy*, 49 Haw. 661, 668, 426 P.2d 816, 820 (1967). Findings of fact must include as much of the subsidiary facts as are necessary to disclose to the appellate court the steps by which the trial court reached its ultimate conclusion on each factual issue. *Lopez v. Tavares*, 51 Haw. 94, 97, 451 P.2d 804, 806 (1969); *Scott v. Contractors License Bd.*, 2 Haw. App. 92, 93-96, 626 P.2d 199, 200-02 (1981) (circuit court under an obligation under Haw. R. Civ. P. 52(a) to enter findings sufficient to enable appellate court to determine the steps by which it reached its ultimate conclusion on each issue).

ARGUMENT

I. *PER SE* PRETEXT

A taking is *per se* pretextual if it is instituted while a contract delegating government's eminent domain discretion to a private party has not been either affirmatively rescinded by the parties or finally declared invalid.

A. Condemnations Pursuant To A Delegation Agreement Are *Per Se* Invalid

Condemnations instituted pursuant to a contract which delegates the power of eminent domain to a private party are invalid as a matter of law, without inquiry into any benefits which may

result from the taking. *See, e.g., Coupe*, 119 Haw. at 381 & n.34, 198 P.3d at 644 & n.34 ("Either illegal delegation, *or* lack of a valid public purpose, will invalidate a taking.") (emphasis original); *In re Condemnation of 110 Washington Street*, 767 A.2d 1154, 1160 (Pa. Commw. Ct. 2001) (taking held invalid as a matter of law because it was instituted pursuant to agreements which delegated condemnation power to private party; court did not inquire whether the stated purpose of blight abatement was genuine) (citation omitted); *Evans v. Smyth-Wythe Airport Comm'n*, 495 S.E.2d 825 (Va. 1998) (airport commission could not relinquish its power or right of eminent domain; judgment entered pursuant to settlement agreement with a landowner was void *ab initio* because it limited the commission's ability to take the landowner's property).

B. Condemnations Instituted While The Condemnation Power Is Delegated Are *Per Se* Invalid

A similar rule invalidates Condemnation 2 as lacking a public purpose. It was enough that Condemnation 2 was instituted before the Development Agreement was repudiated or invalidated. It thus tainted any condemnation instituted, and a court reviewing for pretextual purposes need not scour the factual record in search of motivations or actual reasons, which most likely will be a futile exercise, since the government is rarely careless, or self-destructively candid.[8] As Justice Scalia correctly observed, legislative bodies should not be presumed to employ "stupid staffs" who do not understand how to avoid judicial scrutiny by tailoring a record. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992). The undisputed evidence in the record gathered in the nine years these takings have been pending reflect that in the run-up to County's adoption of Resolution 31-03, Condemnation 1 was literally falling apart, and the only objectively reasonable conclusion is that County instituted another condemnation as a hedge in the event the first taking failed and to benefit Oceanside.

However, in the situation where a Development Agreement plainly delegates governmental powers to a private self-interested party, the overwhelming risk of private influence is too great to for the Fifth and Fourteenth Amendments, and the public use clause of the Hawaii Constitution to

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[8] Given the state of public use jurisprudence at the time Resolution 266-00 was adopted in 2000, County's candid admission in the resolution that the Development Agreement underlay the taking was hardly surprising. Public use challenges were considered a "dead letter." *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. 61, 61 (1986) ("[M]ost observers today think the public use limitation is a dead letter"); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 161 (1985) ("To judge from the cases and the scholarship on the subject, this chapter [on public use] deals with an empty question.").

tolerate any taking; the same rationale which supports a bright line rule that condemnations admittedly resulting from agreements delegating eminent domain power are invalid without an examination of private purpose or public benefit, also supports a *per se* rule that takings commenced while such an agreement could be controlling are never valid. In the case at bar, the only material facts in this inquiry are undisputed, or have already been resolved by final judgment: the Development Agreement was believed to be in effect when County adopted Resolution 31-03, and the Development Agreement delegated County's eminent domain power to Oceanside for its benefit.

This rule guards the process against the obvious risks inherent in instituting a condemnation action for supposedly neutral reasons while a seemingly-valid agreement exists in which the government has sold its eminent domain discretion to a private party to direct the taking of the very property being condemned. *See Kelo*, 545 U.S. at 493 (Kennedy, J., concurring) ("There may be private transfers in which the risk of undetected impermissible favoritism of private parties is so acute that a presumption (rebuttable or otherwise) of invalidity is warranted under the Public Use Clause.") (citing *Eastern Ent. v. Apfel*, 524 U.S. 498, 549-50 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (retroactive legislation is intrinsically suspicious, and deserves heightened scrutiny)). This concern is particularly acute where, as here, a delegation of governmental powers is involved. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. at 87-90 (higher judicial scrutiny when government delegates power of eminent domain to private party).

The very existence of the Development Agreement so tainted County's decision to adopt Resolution 31-03 that a *per se* rule is merited. In other words, the "giving" of condemnation powers in the Development Agreement tainted any taking instituted while the Development Agreement could be said to be in effect. *See* Daniel S. Hafetz, *Ferreting Out Favoritism: Bringing Pretext Claims After* Kelo, 77 Fordham L. Rev. 3095, 3109 & n.112 (2009) ("The improper purpose thus taints what might otherwise be a valid endeavor – what Professors Robert Ellickson and Vicki Been term '[w]hen a 'giving' taints a taking.") (citing Robert C. Ellickson & Vicki L. Been, *Land Use Controls: Case and Materials* 837 (3d ed. 2005)).

C. A *Per Se* Rule Protects The Appearance Of Government Independence

When a contract which controls government's eminent domain power is reasonably believed to be in effect and the government institutes a taking, the risk of improper purpose is at its zenith. Instituting a taking in the shadow of a contract which delegates condemnation powers to private parties for private benefit is inherently ripe for abuse and capture by private parties. *See, e.g., Aaron*

v. Target Corp., 269 F. Supp. 2d 1162, 1177 (E.D. Mo. 2003) (government asserted taking was to abate blight, but court held real reason for taking was to act as the "default broker of land.") (quoting *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 786 N.E.2d 1, 10 (Ill. 2002)). Private involvement in the condemnation process increases the risk of corruption and "rent seeking" (capture of the process by private interests). *See* Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L. Rev. at 86 (1986) ("rent seeking" is competitive lobbying for government favors).

A bright line rule protects the public against the danger of unrevealed private purchase and control of public processes, strengthens public confidence that the condemnation power is being exercised impartially and free of insider influence, and protects individual property owners by preserving meaningful judicial review if government is tempted to use private agreements as a substitute for a true public consideration and condemnation procedure. *Cf.* Charles E. Cohen, *Eminent Domain After* Kelo v. City of New London*: An Argument for Banning Economic Development Takings*, 29 Harv. J.L. & Pub. Pol'y, 491, 549 (2006) (arguing for a *per se* rule by state courts or legislatures prohibiting all economic development takings to preserve "respect for the legal system and political process, as most citizens would intuitively (and correctly) conclude that the beneficiaries of [an economic development taking] would be rich and powerful interests profiting at the expense of ordinary property owners"). The rationale is even more pronounced in the present situation, since the Development Agreement unquestionably sold a government power, and authorized a private insider to exercise that power. Thus, even if Resolution 31-03 was somehow free of private influence – despite all obvious appearances otherwise – the risk of appearing that a powerful private interest continues to exercise governmental powers and still controls the machinery of eminent domain for its own enrichment is simply too great.

When the probability of private influence is too risky in similar circumstances, courts impose bright line prohibitions. For example, the U.S. Supreme Court recently determined an elected state judge must recuse himself when the circumstances would lead to the "objective or reasonable perception" that the judge might be influenced by campaign contributions. There was no indication the judge had actually demonstrated any bias in favor of the contributor, yet the Court adopted a blanket rule designed to avoid the probability and appearance of bias:

> [T]here are objective standards that require recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

Caperton v. A.T. Massey Coal Co., Inc., 129 S. Ct. 2252, 2257 (2009) (citation omitted). As in the case of eminent domain pretext, exposing undue influence in campaign contributions in judicial elections is nearly impossible because the evidence necessary to prove influence cannot be accessed by third parties. As the Court recognized in *Nixon v. Shrink Mo. Gov't Pac*, 528 U.S. 377 (2000), private influence is most often exercised in ways other than classic open and notorious *quid pro quo*. *Id.* at 389 (quoting *Buckley v. Valeo*, 421 U.S. 1, 28 (1976)). Consequently, the Court adopted a blanket rule based on objective criteria. "The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." *Caperton*, 129 S. Ct. at 2263. Similarly, in a taking instituted under the cloud of a delegation contract, "[t]he government will rarely acknowledge that it is acting for a forbidden reason." *Franco v. Nat'l Capital Revitalization Corp.* 930 A.2d 160, 169 (D.C. 2007), *quoted in Coupe*, 119 Haw. at 379, 198 P.3d at 642.[9]

D. A *Per Se* Rule Protects Judicial Review

In the absence of a bright line rule, serial takings such as Condemnation 2 would render judicial review futile:

> Futility refers to a court's inability to prevent governmental actions that are based on impermissible motivations because of the government's ability to circumvent judicial scrutiny. For example, government officials can hide their actual motivations, including pretextual ones. Moreover, even if a court detects an impermissible motivation and invalidates a governmental action on that basis, officials may decided to take the same action without disclosing their actual motivation, thereby circumventing the judicial test.

Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Government, and Impermissible Favoritism*, 17 Sup. Ct. Econ. Rev. ___, ___ (2009). Condemnation 2 could be the paradigmatic example of futility. The undisputed evidence regarding Resolution 31-03 and Condemnation 2, when objectively viewed, leads inescapably to the conclusion that County's stated reason for adopting the

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[9] In addition to *Coupe*, courts in other jurisdictions have adopted the objective standard to evaluate public purpose. *See, e.g., In re Condemnation by the Redevelopment Authority of Lawrence County*, 962 A.2d 1257 (Pa. Commw. Ct. 2008) (a "blight" determination supporting a taking must be determined by reference to objective criteria and the reasonable person standard, and a court may not simply accept the government's claim that a property is blighted). *See also Middletown Township v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007) (objective standard; taking ostensibly for farmland invalidated because it was a pretext to hide the "true purpose" of the taking for recreational purposes).

resolution were not its actual stated reasons. Yet, condemnors seeking to avoid a repeat claim of private influence can simply say nothing on the second attempt, as County did in Resolution 31-03 (particularly where the arguments in Condemnation 1 provided a clear blueprint about how to hide the Development Agreement's control). *See, e.g., Coupe*, 119 Haw. at 360, 198 P.3d at 623 (the Court noted that County adopted the second resolution of taking only "[f]or unstated reasons.").

Thus, in the absence of a per se rule focusing on objective criteria and external evidence, direct "clear and palpable" proof of pretext would be impossible to muster as a practical matter, because "[t]he government will rarely acknowledge that it is acting for a forbidden reason," *Franco v. Nat'l Capital Revitalization Corp.* 930 A.2d 160, 169 (D.C. 2007), *quoted in Coupe*, 119 Haw. at 379, 198 P.3d at 642. The only way to mitigate the overwhelming possibility that County altered Resolution 31-03's form, but did not change the substance of its purpose from Resolution 266-00 and Condemnation 1, is by a *per se* rule prohibiting the exercise of condemnation power while these agreements are reasonably believed to be valid.

II. CONDEMNATION 2'S ACTUAL PURPOSES: AVOID LIABILITY, BENEFIT OCEANSIDE

The undisputed evidence reveals that County's stated purpose in Resolution 31-03 was patently and obviously pretextual, and its true purpose was two-fold: to insulate County from liability to Oceanside and to the Coupes, and to provide an overwhelming private benefit to Oceanside. Far from containing "no evidence" as the circuit court concluded, the record is replete with uncontradicted evidence that, when viewed objectively, reveals a process so compromised that it is entitled to no judicial deference whatsoever. The only way to conclude the Development Agreement played *no role* in County's decision to institute Condemnation 2 would be to deny that which is patently obvious.

A. The "Circumstances Of The Approval Process" "Greatly Undermine[d] The Basic Legitimacy" Of Condemnation 2

The Supreme Court recognized that direct evidence will rarely be available, so instructed the circuit court to examine the Record for"circumstances beyond the mere face of the Resolution." *Coupe*, 119 Haw. at 387, 198 P.3d at 650. The Court further noted about the circuit court's first review of County's stated purpose in Resolution 31-03:

> The [circuit] court's conclusions do not indicate that the court actually looked further than the *passage* of Resolution 31-03, or considered factors other than the *language* of that Resolution to determine that the stated public purpose was valid.

Id. at 388, 198 P.3d at 651 (emphasis original). On remand, however, the circuit court concluded there was "no evidence" in the record that the Development Agreement drove Condemnation 2, based solely on "passage" of the Resolution. R:CV05-1-015K Doc. 1110 at 10888 (Supp. FOF 19). The only evidence the circuit court referred to was Resolution 31-03 itself, and a transcript of a hearing. *Id.*

In the constitutional inquiry into whether Resolution 31-03 was adopted for an improper purpose despite being cloaked in public goals, the critical evidence will nearly always be circumstantial. *See, e.g., Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."). Consequently, the court must look to the context and the reasonable motivations of County officials, and apply an objective standard. *See Coupe*, 119 Haw. at 383, 198 P.3d at 646 (Did "other conditions" exist "such that private character predominated. Those issues may be factors relevant to the pretext issue."); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) ("[W]e may determine the city council's object from both direct and circumstantial evidence," which includes "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."); *Vill. of Arlington Heights*, 429 U.S. at 266 (judicial inquiry into whether racially discriminatory purpose was a motivating factor in decision to deny rezoning looks to "circumstantial and direct evidence of intent as may be available"). Although these cases involved equal protection and the free exercise of religion, the inquiry is no different when property is involved, since private property is also a fundamental constitutional right that must be respected. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1992) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

In the present case, the court must look to the context of Condemnation 2 and the factual situation surrounding it, which includes the historical context of the taking, the specific series of events leading to Resolution 31-03 and Condemnation 2 to determine whether Condemnation 2 was

pretexual. *See, e.g., Pheasant Ridge Assoc. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1156-57 (Mass. 1987) ("In determining the state of mind of a person or group of persons [in public use challenge], we consider not only what they have said but we also draw inferences concerning their intentions from what they have done and what they have not done." The court affirmed summary judgment for property owner because "[t]he record requires the inference that the town, acting through its town meeting, was concerned only with blocking plaintiffs' development."); *Vill. of Arlington Heights*, 429 U.S. at 267 (when determining whether a municipality was motivated by racial animus to deny rezoning to racially integrated development, "[t]he historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.") (citations omitted). In *Arlington Heights*, the Court also held the "specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Id.* at 267. A court should look for a "clear pattern, unexplainable on grounds other than [improper grounds]." *Id.* at 266. Also highly relevant are "[d]epartures from the normal procedural sequences [which] also might afford evidence that improper purposes are playing a role." *Id.* at 267. Of course, the Court need not wear blinders and ignore common sense when evaluating the factual context and circumstances. *See, e.g., McConnell v. FEC*, 540 U.S. 93, 152-53 (2003) ("This crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising exposed by the record in this litigation . . .").

B. Resolution 31-03 Was An Attempt To Avoid Liability To Oceanside For Breach, And To The Coupe Family For 101-27 Damages

County's "actual purpose" for adopting Resolution 31-03 was to avoid liability for breach of the Development Agreement, and liability for section 101-27 damages. A court searching for the "actual reason" underlying Condemnation 2 must focus on the "circumstances of the approval process" to analyze whether they "so greatly undermine[d] the basic legitimacy of the outcome reached." *Coupe*, 119 Haw. at 380, 198 P.3d at 643 (quoting *Goldstein*, 516 F.3d at 63). In other words, whether the events which led up to Resolution 31-03 were "such an unusual exercise of government power [which] would certainly raise a suspicion that a private purpose was afoot." *Kelo*, 545 U.S. at 487 (footnote omitted). The undisputed factual context surrounding Resolution 31-03 and Condemnation 2 shows they were not simply "unusual," they were aberrations.

1. Continuing Threat Of Development Agreement Breach

The "clear pattern" which emerges from the undisputed facts is that County adopted Resolution 31-03 to avoid liability to Oceanside for the breach of the Development Agreement. *See Vill. of Arlington Heights*, 429 U.S. at 266 ("Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."). In 2003 at the time of Resolution 31-03, it appeared County had no discretion to refuse Oceanside's directive to take the Coupes' property, as it had already bound itself to comply. Indeed, the Development Agreement expressly stated that County would be liable to Oceanside if it "impede[s] OCEANSIDE in carrying out the transactions contemplated" in the Development Agreement. R:CV05-1-015K Doc. 01057 at 9471, J-45, PDF at 350, § 31. Most importantly, as the circuit court had not yet invalidated the Development Agreement, County *believed* the Development Agreement tied its hands.

At the time County was considering and adopting Resolution 31-03, the Development Agreement in which it illegally delegated its condemnation and other powers to Oceanside, appeared to be in full force and effect. Both County and Oceanside asserted it was valid. Thus, County *believed* it had obligated itself to comply with the Development Agreement by taking the Coupe Family's property, upon pain of liability for breach. The elephant in the room which the circuit court refused to see in Condemnation 2 was the Development Agreement. This is particularly curious given the circuit court's determination that the same Development Agreement had fatally corrupted County's decision to institute Condemnation 1. In 2003 when County adopted Resolution 31-03, neither the Development Agreement nor the parties' obligations thereunder were known to have changed. The Hawaii Supreme Court remanded with instructions to determine whether the Development Agreement could have motivated County in 2003. *Coupe*, 119 Haw. 383, 198 P.3d at 646 ("Despite the lack of reference to the Development Agreement in Resolution 31-03, it is not evident from the record whether the invalidated condemnation and impact fee provisions were still in effect at the time Condemnation 2 was instituted.") (footnote omitted). Yet, the circuit court did not address the issue of whether the Development Agreement was still in effect in 2003, and concluded it played no part in Condemnation 2, even though it had not been ruled invalid, and County had no reason to believe its obligations under the Development Agreement had terminated.

2. Avoidance Of Section 101-27 Liability

Confirming this conclusion is County's posture in the first appeal, where it argued it was not liable to the Coupe Family for damages for the failed Condemnation 1 under Haw. Rev. Stat. § 101-27 (1993), because it "finally took" the property in Condemnation 2. *See Coupe*, 119 Haw. at 363, 198 P.3d at 626. Section 101-27 provides, in pertinent part:

> [I]f, for any cause, the property concerned is not *finally taken* for public use, a defendant who would have been entitled to compensation or damages had the property been finally taken, shall be entitled, in such proceedings, to recover from the plaintiff all such damage as may have been sustained by the defendant by reason of the bringing of the proceedings . . . including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses. . . .

Haw. Rev. Stat. § 101-27 (1993) (emphasis added). Throughout the first appeal, County argued that the existence of Condemnation 2 insulated it from liability under section 101-27 even if Condemnation 1 did not succeed, because the property was "finally taken" in Condemnation 2:

> [County] argues [the Coupes'] fee motion "was properly denied[.]" In support of its position, [County] makes three subarguments:
>
> > (1) HRS § 101-27 does not apply because the property was finally taken for public use in the consolidated action where [the Coupes were] awarded just compensation for the property.
> >
> > . . .
> >
> > [County] maintains in its first subargument that [the Coupes] "ha[ve] not carried [their] burden of proving that HRS § 101-27 applies to an eminent domain defendant who ultimately lost in a consolidated condemnation trial[.]"

Coupe, 119 Haw. at 362-63, 198 P.3d at 625-26. The Court rejected County's argument, holding that section 101-27 is designed to prevent serial eminent domain abuse:

> [The Coupes are] correct that [County]'s interpretation of HRS § 101-27 as precluding the recovery of damages by a defendant who prevails in one condemnation action but fails in a later condemnation action would "enable serial eminent domain abuse" by the government.

Id. at 364, 198 P.3d at 627. County advanced the same theory in circuit court, claiming that because it would (it claimed) eventually be successful in taking the Coupes' property, it could not be held liable under section 101-27 for its failure to do so in Condemnation 1. *See* R:CV05-1-015K Doc. 01043 at 9297-9306 (County's Memorandum in Opposition to 101-27 motion).

Given the total redundancy of Resolution 31-03 and Condemnation 2, the second conclusion to be drawn from the "circumstances of the approval process" is that they were instituted to avoid County's strict statutory obligation to make the Coupes whole under section 101-27 if Condemnation 1 failed. There is no other reasonable conclusion because the "clear pattern, unexplainable on grounds other than [self-dealing]" is that County's actual reason was to avoid section 101-27. *See Vill. of Arlington Heights*, 429 U.S. at 266. The findings also do not reflect the circuit court considered that County took the position that Condemnation 2 would insulate it from section 101-27 damages should Condemnation 1 ultimately fail. When "[t]he manner in which the [government] dealt with the attempted acquisition of the subject parcel was not in accord with its usual practice," the inference of improper purpose arises. *Pheasant Ridge Assoc. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987). When the evidence is not disputed, the property owner is entitled to judgment as a matter of law:

> The record requires the inference that the town, acting through its town meeting, was concerned only with blocking the plaintiffs' development. We see no dispute as to any material fact barring an award of summary judgment on this point. The public purposes for which the site purportedly was to be taken were not purposes for which the town intended in good faith to take and use the property.

Id. (footnote omitted).

None of the above undisputed facts appear in the circuit court's findings, which do not reflect that it examined the circumstances and the timing of Resolution 31-03 and the fact it was adopted only after Condemnation 1 was plainly foundering. The findings also do not show any consideration that County would be liable for the Coupes' damages pursuant to Haw. Rev. Stat. § 101-27 (1993) if Condemnation 1 were "abandoned or discontinued before reaching a final judgment, or if [in Condemnation 1], for any cause, the property concerned is not finally taken for public use." Finally, and most critically, the circuit court's findings do not reflect that it analyzed whether the Development Agreement continued to limit County's eminent domain discretion in 2003:

> Despite the lack of reference to the Development Agreement in Resolution 31-03, it is not apparent from the record whether *any or all of the same provisions in the Agreement that led the court invalidate Condemnation 1 were still in effect and underlay Condemnation 2, or whether other conditions existed such that the private character predominated.* Those issues may be relevant to the pretext issue.

Coupe, 119 Haw. at 383, 198 P.3d at 646 (emphasis added). In other words, whether County's decision to adopt Resolution 31-03 in 2003 was objectively free of the specter of the Development

Agreement's overwhelming private influence, or whether the circumstances reveal the Development Agreement continued to control the decision to adopt Resolution 31-03. The circuit court's findings do not undertake this analysis and do not consider the undisputed evidence in the record that the Development Agreement was in effect in 2003, and most importantly that County *believed* it was in effect (it was only the circuit court's judgment in 2007 which invalidated the condemnation and "fair share" provisions of the Development Agreement). *See Coupe*, 119 Haw. at 360, 383 n.35, 198 P.3d at 623, 646 n.35.

3. No Other Plausible Explanation For Two Concurrent Takings

County has never explained why it adopted Resolution 31-03 while it continued to prosecute Condemnation 1, which sought to take the same property already being taken. *See Coupe*, 119 Haw. at 360, 198 P.3d at 623 ("For unstated reasons, during the pendency of Condemnation 1, Appellee for a second time initiated procedures to condemn Appellant's property."). Resolution 31-03 was silent regarding County's reason for a second taking. The resolution recited that the highway was planned "and is being developed,"[10] but nowhere does it supply an explanation why County instituted a second condemnation action, when it was already taking virtually the same land for the same purpose.[11] The resolution merely recites conclusions. The hearing preceding adoption of the

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[10] The assertion the road "is being developed" (pursuant to the Development Agreement) shows that the Development Agreement – far from being attenuated from Condemnation 2 – continued to be the force guiding County's hand.

[11] Resolution 31-03 was not needed to take additional land. Pursuant to Haw. Rev. Stat. § 101-19 (1993), County had the nearly unlimited ability "at any stage of the proceeding" to amend the Condemnation 1 complaint to expand the "description of the lands sought to be condemned." County has not explained why it did not amend Condemnation 1 to take this additional land, as it could have:

> In all proceedings under this part the court shall have power *at any stage of the proceeding to allow amendment in form or substance in any complaint*, citation, summons, process, answer, motion, order, verdict, judgment, or other proceeding, including amendment in the description of the lands sought to be condemned, whenever the amendment will not impair the substantial rights of any party.

Haw. Rev. Stat. § 101-19 (1993) (emphasis added). County admitted that the property it was taking in Condemnation 1 was "more or less" the same property it attempted to take in Condemnation 2. While the property is not the exact same metes and bounds for purposes of abatement, *see Coupe*, 119 Haw. at 372 & n.20, 198 P.3d at 636 & n.20 (relief sought in two condemnations was different for purposes of abatement, because a second lawsuit to be abated, their must be "strict compliance" with the same relief requirement), it is for the same property for purposes of pretext.

resolution also provides no explanation, except to go into executive session to discuss "strategy." *See* R:CV05-1-015K Doc.01059 at 9512, R-451, PDF at 967.

Nor did County reveal its motivation for the second taking during the course of the consolidated litigation in the circuit court. In 2003, and continuously until 2007 when the circuit court invalidated it after trial, County asserted *both* condemnation lawsuits were supported by a valid public purpose, and that it could take the Coupes' property in Condemnation 1 and Condemnation 2. Only when the circuit court's judgment invalidating Condemnation 1 became final was County forced to solely rely on Condemnation 2. *Coupe*, 119 Haw. at 357 & n.5, 198 P.3d at 620 & n.5.

The "specific series of events leading to the enactment or official policy in question" show that County cannot even point to a rational reason why Resolution 31-03 was needed. *See Church of Lukumi Babalu Aye*, 508 U.S. at 540; *Vill. of Arlington Heights*, 429 U.S. at 267. The property was *already* being taken "for a regional road" in Condemnation 1, and there is no evidence in the Record that anything relevant to that issue had occurred between 2000 and 2003. R:CV05-1-015K Doc. T0015, 08/02/07 TR at 6:11-14 (County's closing argument).

In *Earth Management, Inc. v. Heard County*, 293 S.E.2d 455, 460-61 (Ga. 1981), the court "review[ed] some of the events leading up to the condemning of the subject property," and invalidated a taking as lacking a public purpose. The County claimed the taking was for a public park, but no other land was ever considered for the public park and no on-site surveying, planning or inspection was done prior to its condemnation. Further, there had been no attempt to negotiate a purchase of the property prior to the filing of the condemnation proceeding. The court determined the "inescapable conclusion" was that the real reason for the taking was not to acquire a park, but for the "obvious purpose" of preventing the property owner from constructing a hazardous waste disposal facility. Similarly, in Condemnation 2 (like Condemnation 1) County followed none of its normal condemnation procedures. It was Oceanside driven in all respects. Oceanside determined the land needed, its subdivided that land and it supplied the property description. Although almost five years had passed since Condemnation 1, County continued to use Oceanside's valuation. It conducted no title search or survey. It continued to rely upon the Oceanside-provided deposit in Condemnation 1. It did not even notify the Coupes of its subdivision of their property, its adoption of a second condemnation resolution or the filing of Condemnation 2. The Coupes discovered the filing of Condemnation 2 in a newspaper and promptly moved to dismiss this cloud on its title. Nothing changed between Condemnation 1 and Condemnation 2, except the surgical removal of

references to the Development Agreement; except the erosion of County's Condemnation 1; and the looming obligation to pay section 101-27 damages.

C. A Private Party And Not County Stood To Receive The Overwhelming Benefit from Condemnation 2

With no plausible explanation in the Record by County why Condemnation 2 was needed to take the Coupes' land when County was already trying to take the land in Condemnation 1, County's first actual purpose is laid bare: the Development Agreement continued to guide County's actions, and provided an overwhelming private benefit to Oceanside.

1. Oceanside, Which Had Invested in Excess of $90 Million in Hokulia, Could Not Open the Project Without Acquiring, Completing, and Conveying the Road

Condemnation 2 serves no public purpose; only Oceanside benefitted from it. County's Kona Highway System could not accommodate Oceanside's proposed project. It is res judicata in this case that County had no means or intention to build a Mamalahoa bypass or otherwise accommodate Oceanside's development's highway needs. Therefore, as a condition of its rezoning, from the adoption of Ordinance 94-73, Oceanside was obligated, at its sole cost, to (i) acquire the right-of-way; (ii) build a county standard road of sufficient size to accommodate Oceanside's development; and (iii) convey it to County. County had no obligation to assist Oceanside in satisfying its rezoning conditions. Immediately, Oceanside realized that it could not satisfy these conditions without the assistance of not only County but also Kamehameha Schools. It created a "wish list" which graphically foretold its and County's actions for over the next decade. From the outset the "Development Agreement", as referred to in the "wish list", has been the Oceanside and County guiding hand.

Oceanside required tens of millions of dollars to develop its project, including its highway obligations. Its prospective investors, however, balked unless and until County was obligated to relieve Oceanside of its acquisition obligation. In order to obtain necessary investments, Oceanside represented that the Development Agreement would obligate County to condemn, an obligation that it was aware County could not risk breaching.

Oceanside was so sure of County relieving it of its acquisition obligation that it began threatening owners along its prospective right-of-way with condemnation even before the Development Agreement was signed. Its demand letters to the owners, including the Coupes,

continued to pursue acquisition under the threat of condemnation after the signing, thereby depressing the purchase prices and clouding its entire right-of-way acquisition with the illegal Development Agreement. When the "record does contain is pervasive and undenied evidence that . . . property was condemned" to benefit a private party, the taking is invalid. *See, e.g., Brannen v. Bulloch County*, 387 S.E.2d 395, 398-99 (Ga. Ct. App. 1989) (invalidating a taking of property for a road because the record revealed the taking was to avoid inconveniencing a politically powerful lumber company by placing the road on its land).

2. County Had No Assurance That Oceanside or its Lenders Would Be Viable at the Time of Performance

Even more fatal to County's position is that, should either Oceanside go bankrupt or the Development Agreement be in fact void *ab initio*, County would have no means to condemn the right-of-way from Oceanside, whether bankrupt or not. The Development Agreement, being an executory contract, could be voided in bankruptcy, leaving County with an unsecured damage claim and the bankrupt estate with a partially built right-of-way as assets to sell to the highest bidder. County has admitted it could not bid. Further, if the Development Agreement were illegal, as the Coupes maintain, Oceanside would have no obligation to build or convey. In any case, Condemnation 2 is a sham. Why did County attempt a second condemnation? It certainly did not do it as a part of any effort on its own to acquire and build a highway. It has admitted that it had no means or plan other than the Development Agreement to do so.

County initiated Condemnation 2 to: (i) further the Development Agreement plan and avoid a claim for breach, damages for which could encompass the loss of Oceanside's entire investment; and (ii) attempt to avoid the potential of section 101-27 damages should Condemnation 1 flounder, which it did.

Condemnation 2 provided no legal benefit to County. If legal, it would, however, relieve Oceanside of its pre-existing obligation to acquire a right-of-way. As Condemnation 2 is the illegal clone of Condemnation 1, Oceanside remains obligated to acquire and build its rezoning condition road.

3. County Had No Plan Of Which Condemnation 2 Was A Part

The Record contains no evidence that Resolution 31-03 was a part of a carefully considered and integrated plan to alleviate traffic apart from the Development Agreement. A taking outside the

bounds of a carefully considered and integrated development plan raises a presumption of improper motive. A "one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot." *Kelo*, 545 U.S. at 478 n.6 (citing *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)). In *Kelo*, the Court took great pains to point out the condemnation of individual parcels were part of an "integrated" and "carefully considered" development plan. *Kelo*, 545 U.S. at 474. The Court focused on the New London Development Corporation's development plan, not on the individual takings which were part of that plan:

> Given the *comprehensive character* of the plan, the *thorough deliberation* that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to resolve the challenges of the individual owners, not on a piecemeal basis, but rather *in light of the entire plan*. Because *that plan* unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

Id. at 483-84. *See also id.* at 487 ("Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case."). The *Kelo* majority cited *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the case which upheld zoning enacted within the framework of a comprehensive plan against a due process challenge. When zoning is accomplished outside of such a plan, no deference is due.

Similarly, a taking accomplished outside a comprehensive plan is inherently suspect. In *Middleton Twp. v. Lands of Stone*, 939 A.2d 311 (Pa. 2007), the Pennsylvania Supreme Court invalidated an attempted taking of property for farmland because it was a pretext to hide the "true purpose" of the taking for recreational purposes. The property owner proffered evidence that the true purpose of the taking was to prevent development (in other words, to preserve open space), not for recreational purposes as claimed. The Supreme Court held that the record did not reflect the "true purpose" the township condemned the property was for recreational use. *Id.* at 337. Relying on the maxim that the power of eminent domain must be strictly construed against the condemnor, the court held that courts must look for the government's real reasons and need not defer to government's "mere lip service," or its retroactive justifications. *Id.* at 338. The court rejected the township's attempt to use a preexisting recreation and open space plan that included the Stone property to show that the taking was for recreational purposes. Because the plan did not show any proposed recreational use related specifically to the property, the court rejected the attempt to use *Kelo*'s

"carefully considered plan" as a panacea to actually thinking about what property is being taken. The court set forth the standard for when a taking asserted to be in accordance with a comprehensive eminent domain plan will be upheld:

> [P]recedent demonstrates that condemnations have been consistently upheld when the taking is *orchestrated according to a carefully developed plan which effectuates the stated purpose. Anything less would make an empty shell of our public use requirements.* It cannot be sufficient to merely wave the proper statutory language like a scepter under the nose of the property owner and demand that he forfeit his land for the sake of the public. *Rather, there must be some substantial and rational proof by way of a intelligent plan* that demonstrates informed judgment to prove that an authorized public purpose is the true goal of the taking.

Id. at 339 (emphasis added).

Thus, to uphold Condemnation 2, the circuit court must have first found that County had an existing comprehensive plan which included taking the Coupes' property, that County had the ability to implement that plan, and that "thorough deliberation" preceded Resolution 31-03. The Record is plain that County had no plan that fit the above standard. County does not own the right-of-way. It has no money to acquire one. It admitted that it never would acquire a right-of-way or construct a highway for this purpose. County's only "plan" and means to acquire and construct a road is embodied by the illegal Development Agreement. By surgically removing any Development Agreement reference from its 2003 second resolution to condemn the same Coupe property, County hoped that the court would cast a blind eye towards the ever pervasive presence of the Development Agreement. Unfortunately, the Development Agreement permeated every aspect of Condemnation 2. At the time of its 2003 Condemnation 2 Resolution, County still believed the Development Agreement to be valid. At the time of its filing of Condemnation 2, January 28, 2005, it still believed that Development Agreement to be valid. In fact, even at oral argument before this Court, in response to this Court's question regarding how it planned to acquire and build this "road", County said that Oceanside was obligated to complete the road and convey it to County. Thus, a right-of-way, acquired under the threat of illegal condemnation on demand powers, was still County's "plan," along with Oceanside's obligation, to build and convey the road to County pursuant to the Development Agreement. Eminent domain is a power of last resort for the good of the public; it "is not simply a vehicle for cash-strapped municipalities to finance community improvements." *Beach-Courchesne v. Diamond Bar*, 95 Cal. Rptr. 2d 265, 279 (Cal. Ct. App. 2000). Contrary to the

circuit court's finding, there has been no attenuation of the Development Agreement between Condemnation 1 and Condemnation 2.

4. The Development Agreement Cannot Be The Condemnation Plan And Is Illegal And Unenforceable

Portions of the Development Agreement have already been ruled void, including the condemnation-on-demand and "fair share" provisions, and that judgment is final. County never received any consideration under the Development Agreement in the first instance to make it enforceable. The Development Agreement ran entirely in Oceanside's favor based upon the two foundation provisions, condemnation on demand and the imposition of the fee, leading to a "fair share reimbursement" for Oceanside's double recovery of acquisition and construction costs, which costs it was also passing on to the purchasers of Hokulia lots. The circuit court did not address, however, whether the remainder of the Development Agreement survives. Even the presence of a severance clause, in the light of the failure of its basic consideration and reason for being, cannot and does not in this case, save the continued validity of the Development Agreement. *See Beneficial Hawaii, Inc. v. Kida*, 96 Haw. 289, 311, 30 P.3d 895, 917 (2001) ("[T]he general rule is that severance of an illegal provision of a contract is warranted and the lawful portion of the agreement is enforceable [only] when the illegal provision is not central to the parties' agreement and the illegal provision does not involve serious moral turpitude, unless such a result is prohibited by statute.") (emphasis added); *id.* at 311, 30 P.3d at 917 ("[C]ontract will be enforced where illegal portion does not go to essence of contract and where it is still supported by valid legal promises on both sides after illegal portion is eliminated.") (quoting *United Nat'l Bank of Miami v. Airport Plaza Ltd. P'ship*, 537 So.2d 608, 610-11 (Fla. Ct. App. 1989)).

As the Development Agreement is illegal, Oceanside has no obligation to complete the balance of the highway, or to convey the right-of-way to County. As County has neither the right-of-way nor the funds to acquire the land or to pay for the construction of a highway thereon, and would not do so as a result thereof, there is no public road for which it claims to acquire the Coupes' property, and as such this attempt to acquire the property is but a sham perpetrated pursuant to the Development Agreement, and as such, this attempted acquisition, like the first one, has no public purpose.

III. AFTER TWO OPPORTUNITIES, THE CIRCUIT COURT FAILED TO EXAMINE AND EXPOUND ON THE RECORD

The undisputed evidence in the record is sufficient to conclude that County's stated purpose was not its actual purposes. *See Pheasant Ridge Assoc. Ltd. P'ship v. Town of Burlington*, 506 N.E.2d 1152, 1157 (Mass. 1987) ("The record requires the inference that the town, acting through its town meeting, was concerned only with blocking the plaintiffs' development. We see no dispute as to any material fact barring an award of summary judgment on this point. The public purposes for which the site purportedly was to be taken were not purposes for which the town intended in good faith to take and use the property."). If not so, then the case should be remanded to the circuit court for the thorough consideration the Supreme Court required. *Coupe*, 119 Haw. at 375, 198 P.3d at 638.

The circuit court's conclusion the record lacks any evidence of Development Agreement taint and private influence is refuted by the record itself. The evidence demonstrates the Coupes have carried their burden to overcome any *prima facie* evidence of public use, and that the circuit court's conclusion that Condemnation 2 was not pretextual is manifestly wrong. Condemnation 2 is clearly and palpably of a private character. *Coupe*, 119 Haw. at 389, 198 P.3d at 652. On remand, the circuit court had instructions to "evaluate [the] veracity" of the asserted public use and look for the "actual reason" for the taking, by reviewing the "circumstances of the approval process" with an objective eye for indications that the process' basic legitimacy was compromised. *Coupe*, 119 Haw. at 379, 198 P.3d at 642. The circuit court, however, did not heed these instructions. Instead, it focused solely on the already-resolved issue of whether County could have concluded that a road was "not 'irrational' with 'only incidental or pretextual' public benefits," and concluded the road was "a much needed road for the public's benefit." R:CV05-1-015K Doc. 1110 at 10891 (Supp. COL 13). The court concluded there was "[n]o evidence supporting [the] contention [that Condemnation 2, like Condemnation 1, was driven by the County's desire to comply with its obligations under the Development Agreement,] 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." *Id.* at 10888 (Supp. FOF 19). The circuit court also concluded that "[n]o 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." *Id.* at 10887 (Supp. FOF 16).

Findings of fact should be "clear, specific and complete," and must be "sufficiently comprehensive and pertinent to the issue to form a basis for the decision and whether they are supported by the evidence." *Shannon v. Murphy*, 49 Haw. 661, 668, 426 P.2d 816, 820 (1967). Findings of fact must include as much of the subsidiary facts as are necessary to disclose to the appellate court the steps by which the trial court reached its ultimate conclusion on each factual issue. *Lopez v. Tavares*, 51 Haw. 94, 97, 451 P.2d 804, 806 (1969); *Scott v. Contractors License Bd.*, 2 Haw. App. 92, 93-96, 626 P.2d 199, 200-02 (1981) (circuit court under an obligation under Haw. R. Civ. P. 52(a) to enter findings sufficient to enable appellate court to determine the steps by which it reached its ultimate conclusion on each issue).

The circuit court's findings nowhere "indicate that [it] thoroughly considered the pretext argument as to Condemnation 2." *Coupe*, 119 Haw. at 386, 198 P.3d at 649. Instead of a "plain indication" on the face of the findings that the circuit court "actually decided the pretext issue," the findings only conclude "that the use (road) was not of a predominantly private character. The Bypass is a much needed road for the public's benefit." R:CV05-1-015K Doc. 1110 at 10891 (Supp. COL 13). The circuit court merely concluded there is "no evidence" of pretext, *id.* at 10888 (Supp. FOF 19), and that "[t]he totality of the factual circumstances beyond the face of Resolution No. 31-03 does not support the [Coupes'] claim of pretext." *Id.* at 10892 (Supp. COL 14).

Thus, the circuit court's review of the "circumstances of the approval process" to analyze whether they "so greatly undermine[d] the basic legitimacy of the outcome reached," should not have stopped at the Resolution. *Coupe*, 119 Haw. at 380, 198 P.3d at 643 (quoting *Goldstein*, 516 F.3d at 63). Instead, it should have examined the events which led up to Resolution 31-03 to determine whether Resolution 31-03 and Condemnation 2 were "such an unusual exercise of government power [which] would certainly raise a suspicion that a private purpose was afoot." *Kelo*, 545 U.S. at 487 (footnote omitted). Rather than remand Condemnation 2 to the circuit court for a third try at fulfilling its mandate to propound the necessary factual analysis and underpinning of its conclusions as directed by the Supreme Court, this Court can, under any one of three approaches, reverse the decision below and enter judgment for the Coupes on the pretext issue by:

(a) Adopting a *per se* rule that any condemnation initiated prior to the renunciation of the Development Agreement, or its being finally declared void, is invalid;

(b) Concluding that the potential for exposure to liability to either Oceanside for breach – or the Coupes for section 101-27 damages – was a sufficient restriction on County's eminent domain discretion that its independent judgment cannot be assured; or

(c) Concluding that the record is sufficient to determine that Commendation 2 was an invalid pretext because there was no attenuation between the Development Agreement and Condemnation 2, or that Oceanside, not County, was the predominant benefactor of Condemnation 2.

Otherwise, at the very least, the circuit court must yet again be required to face the facts in the record which support the above conclusions. The declaration requested by the Coupes' First Amended Answer and Counterclaims that the Development Agreement and Condemnation 2 are each invalid and void *ab initio*, may eliminate future challenges based upon the Development Agreement pretext.

IV. FAILURE TO ACCOUNT FOR 2000 – 2005 APPRECIATION[12]

Finally, if the circuit court's judgment regarding Condemnation 2 is affirmed, its valuation of the property taken must be corrected. Instead of independently determining the value of the 3.4 acres being condemned as of Jan 28, 2005 (the date Condemnation 2 was initiated), the Court merely increased the value that it determined for the 2.9 acres in Condemnation 1 by roughly 17%, approximately the difference between 2.9 acres and 3.4 acres. The circuit court concluded that County's appraiser – whom the circuit court found to be credible – determined the value of the land did not appreciate between Condemnation 1 and Condemnation 2. However, the appraiser testified that the land appreciated by 239% in that time. Thus, instead of being valued at $162,204.83, the 3.4 acres in Condemnation 2 should be valued at $387,669.54.

CONCLUSION

The circuit court's judgment in Condemnation 2 should be reversed, and judgment entered for the Coupes. Condemnation 2 was pretextual and not for a public purpose. In the alternative, the judgment should be vacated and remanded, for the thorough consideration the Supreme Court required.

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[12] Regardless of the outcome of the balance of the appeal, the value of the roughly 3.4 acres subject to Condemnation 2 must be determined. In one outcome, it is used to calculate the loss of use damage caused to the landowner from a failed condemnation for the period of impact of the failed condemnation attempt. In Condemnation 1, the Circuit Court determined this blight on value by awarding 10% on the value from the date of condemnation until paid. In the other outcome, it is the landowner's just compensation for the taking of its property.

PART II: CONDEMNATION 1 DAMAGES

I. NATURE OF THE CASE

A. Summary

Although ordered on remand by the Hawaii Supreme Court to award the Coupes "all such damages as may have been sustained by the [Coupes] by reason of the bringing of [Condemnation 1]," *Coupe*, 119 Haw. at 367, 198 P.3d at 630 (quoting Haw. Rev. Stat. § 101-27 (1993)), the circuit court asserted it had discretion to exclude two recoverable damage components from the award: the damages incurred in applying for and successfully obtaining section 101-27 damages, and the Coupes' loss of the use of their money which was tied up by the nine year defense of Condemnation 1.

B. Questions Presented

When the Coupes prevailed in Condemnation 1 after nearly a decade of litigation, section 101-27 entitled it "to recover from the plaintiff all such damage as may have been sustained by the defendant by reason of the bringing of the proceedings and the possession by the plaintiff of the property concerned if the possession has been awarded including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses."

The first question is whether section 101-27 damages include attorneys fees and costs incurred in preparing and litigating the request for damages.

The second question is whether section 101-27 damages include the loss of use of funds encumbered.

C. Relief Sought On Appeal

The circuit court's denial of the damages incurred in seeking relief under section 101-27, and damages in the form of the cost of encumbered funds, should be vacated, and the case remanded with instructions to award such damages.

II. FACTS

After remand, the circuit court ordered County to pay the Coupes the attorneys fees and costs which resulted from the failed taking of their property, but asserted it had the discretion to deny fees and costs incurred in applying for section 101-27 damages, and damages resulting from the tying up of the Coupes' funds over the course of the massive nine year Condemnation 1 litigation. The circuit court concluded:

> WHEREFORE, there shall be no recovery for fees and expenses incurred in litigating the propriety of the fees to be awarded pursuant to *Hawaii Ventures, LLC v. Otaka, Inc.*, 116 Haw. 465, 173 P.3d 1122 (Haw. 2007) (holding receivers are not entitled to recover fees and expenses associated with litigation involving the propriety of the fees to be awarded to them because the law imposes on a party the duty to pay her won fees and expenses in vindicating her personal interests).

R:CV00-1-0181K Doc. 0592 at 14932-33 (Additional Damages Order at 10-11) (copy attached as Appendix 10). The circuit court also concluded:

> This Court finds there is no legal nor factual basis for the $276,762.41 in prejudgment interest sought as damages under Haw. Rev. Stat. § 101-27 as there is no allegations of undue delay by Plaintiff County.

R:CV00-1-0181K Doc. 0591 at 14921 (Supp. COL 33) (a copy of the Supp. FOF/COLs as to section 101-27 damages in Condemnation 1 is attached as Appendix 11).

STATEMENT OF POINTS OF ERROR

I. ERROR 1: DAMAGES FOR SEEKING DAMAGES RECOVERABLE

The circuit court erred when it concluded, as a matter of law, that the Coupes were not entitled to recover damages under Haw. Rev. Stat. § 101-27 for their efforts to obtain such damages, to wit: attorneys' fees for preparing the damages motions and litigating the same. R:CV00-1-0181K Doc. 0592 at 14932-33 (Order at 10-11).

II. ERROR 2: COST OF ENCUMBERED FUNDS RECOVERABLE AS DAMAGES

The circuit court erred when it concluded the Coupes were not entitled to the cost of encumbered funds under Haw. Rev. Stat. § 101-27, *see* R:CV00-1-0181K Doc. 0591 at 14921-22 (Supp. COL 33 & Order); *id.* at Doc. 0593 at 14937 (Supp. Final Judgment at 3), when the court found that those encumbered funds represented damage suffered with each invoice related to Condemnation 1 since October 2000. Where a failed condemnation action causes a property owner the loss or encumbrance of funds, then section101-27 compels compensation for the loss of use of funds so lost or encumbered. The Coupes suffered regular and continual injury from October 2000 until they received payment for their injuries in August 2009 (judgment entered on May 14, 2009).

STANDARD OF REVIEW

Interpretation of the circuit court's application of Haw. Rev. Stat. § 101-27 (1993) is *de novo*. *County of Hawaii v. C&J Coupe Family Ltd. P'Ship*, 119 Haw. 352, 362, 198 P.3d 615, 625 (2008).

ARGUMENT

When a taking fails, the property owner is entitled to be made economically whole under section 101-27:

> [I]f, for any cause, the property concerned is not finally taken for public use, a defendant who would have been entitled to compensation or damages had the property been finally taken, *shall* be entitled, in such proceedings, to recover from the plaintiff *all such damage as may have been sustained by the defendant by reason of the bringing of the proceedings* . . . including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses[.]

Haw. Rev. Stat. § 101-27 (1993) (emphasis added). The award of damages is mandatory, not discretionary. *Leslie v. Bd. of Appeals, County of Hawaii*, 109 Haw. 384, 126 P.3d 1071 (2006) ("shall" indicates mandatory language).

"[A]ll such damage[s]" connotes making the Coupes whole, as if Condemnation 1 had never been brought. *See, e.g., Tabieros v. Clark Equip. Co.*, 85 Haw. 336, 389, 944 P.2d 1279, 1332 (1997) ("'The general rule in measuring damages is to give a sum of money to the person wronged which as nearly as possible, will restore him [or her] to the position he [or she] would be in if the wrong had not been committed.'") (citation omitted); *Rodrigues v. State*, 52 Haw. 156, 167, 472 P.2d 509, 517 (1970) (same); *see also Nw. Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 434 n.2 (5th Cir. 1962) ("[D]amages are designed to place [the injured] in a position substantially equivalent" to that which the injured would have occupied had no harm occurred.); *Foley v. Parlier*, 68 S.W.3d 870, 884 (Tex. Civ. App. 2002) (proper measure of damages is that which is necessary to make party whole).

Consequently, in addition to the attorneys fees and costs they incurred in successfully defending Condemnation 1 in the circuit court, the Coupes sought the fees and costs they incurred in seeking, litigating, and successfully obtaining the section 101-27 damage award, and the damages they incurred in not having the free use of their money for the nine years in which the defense of Condemnation 1 tied up their funds.

I. DAMAGES INCLUDES THE FEES AND COSTS INCURRED IN SEEKING DAMAGES

In *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 120 Haw. 400, 208 P.3d 713 (2009), the Supreme Court awarded damages to the Coupes under section 101-27 which they incurred on appeal, including attorneys fees and costs which were incurred in applying for the damage award:

> Had the County not brought the unsuccessful proceedings in Condemnation 1, [the Coupe Family] would never have had cause to move for fees and to subsequently appeal. *Therefore, the "damage" sustained by [the Coupe Family] in seeking the fees and costs owed and in appealing the denial of such fees and costs, was part of the damage resulting from the County having brought the unsuccessful proceedings in Condemnation 1.* Consequently, under HRS § 101-27, the County should be held liable for "such damage."

Coupe, 120 Haw. at 404-05, 208 P.3d at 717-718 (emphasis added). On remand, however, the circuit court concluded "there shall be no recovery for fees and expenses incurred in litigating the propriety of the fees to be awarded." R:CV00-1-0181K Doc. 0592 at 14932. *See also id.* at 14933 ("[The attorneys' fees] sought for the preparation of billing records for Coupe Family's fee petition and/or preparation of the Coupe Family's fee petitions shall be excluded pursuant to *Otaka* as objected to by Plaintiff County[.]").

The circuit court's conclusion was wrong for two reasons. The first is that the Court in *Coupe* held otherwise. *See Coupe*, 120 Haw. at 404-05, 208 P.3d at 717-718. This is precedent as well as law of the case. The second is that the case relied upon by the circuit court to conclude that preparation fees and costs are not recoverable – *Hawaii Ventures, LLC v. Otaka, Inc.*, 116 Haw. 465, 173 P.3d 1122 (2007) – is not an eminent domain case, and did not involve section 101-27, and thus has nothing to say about whether a property owner who successfully thwarts and illegal taking is entitled to recover all of the attorneys fees and costs it incurred, including those related to preparing a request for section 101-27 damages.

II. DAMAGES INCLUDES THE COST OF ENCUMBERED FUNDS

To be made economically whole under section 101-27, damages must include those resulting from the loss of free use of funds which were tied up by the defense of Condemnation 1. The circuit court characterized this claim as prejudgment interest, and concluded: "[T]here is no legal nor factual basis for the . . . prejudgment interest sought as damages under Haw. Rev. Stat. § 101-27 as there is no allegations of undue delay by Plaintiff County." R:CV00-1-0181K Doc. 0591 at 14921 (Supp. COL 33). The circuit court's conclusion was wrong for three reasons.

A. County Waived Objections

First, the circuit court's denial of these damages cannot be reconciled with its Findings of Fact and other Conclusions of Law, which reveal County waived objection. The circuit court concluded County (1) never argued that interest is not properly awardable under section 101-27

(R:CV00-1-0181K Doc. 0591 at 14915 (Supp. FOF 38)), (2) never contested the Coupes' calculation of an appropriate award nor the applicable rate (*id.* at 14914 (Supp. FOF 37)), and (3) waived any and all arguments not made (*id.* at 14916 (Supp. COL 7)). Thus, despite the lack of objection from County, the circuit court *sua sponte* denied recovery of these damages. The court should not have interposed its own objection, when County made none. *Wong v. Takeuchi*, 88 Haw. 46, 53, 961 P.2d 611, 618 (1998) (in the absence of a specific objection, the court should approve a party's request).

B. Cost Of Encumbered Funds Is Recoverable

Second, under section 101-27, damages which make a property owner whole must include the cost of funds encumbered by a failed condemnation attempt. Over the course of nine years, the Coupes suffered injury – and thereby sustained damages – each time they incurred legal fees and expenses related to the defense of Condemnation 1. The Supreme Court held that the Coupes were entitled under section 101-27 to recover their these fees and costs, and "all such damage as may have been sustained by the defendant by reason of the bringing of the proceedings." It is well-settled that awards to account for the loss of use of funds are compensatory and are properly awarded "from the date of [injury] until the date judgment is satisfied." *Lucas v. Liggett & Myers Tobacco Co.*, 51 Haw. 346, 348, 461 P.2d 140, 143 (1969). The circuit court, however, denied recovery for damages resulting from the lost time-value of the money expended in connection with invalidating Condemnation 1, even though these amounts are real, and substantial. The loss of the use of their money over the nine years of Condemnation 1 must be a recoverable element of section 101-27 damages. Any other rule does not reflect the economic reality, and prevents the Coupes from being made truly whole. *See id.* at 348, 461 P.2d at 143 ("There is no sound reason why a [party] should not be able to recover a loss in earnings of an asset which [the other party] converted.").

C. Nine Years Is Substantial Delay

Third, the governing statute is Haw. Rev. Stat. § 101-27 (1993) in which the award of damages is mandatory, and not the prejudgment interest statute, Haw. Rev. Stat. § 636-16 (1993), under which an award is discretionary. However, even if the prejudgment interest standard was applicable, the circuit court wrongly rejected the Coupe's damage claim, because nine years is by any reasonable measure a substantial delay in the proceedings and issuance of judgment. *Ditto v. McCurdy*, 86 Haw. 93, 114, 947 P.2d 961, 982 (Haw. Ct. App. 1997) (five year and nine month delay of the issuance of judgment was "[u]nquestionably . . . greatly delayed"), *rev'd in part on other grounds*, 86 Haw. 84, 947 P.2d 952 (1997); *see also Tri-S Corp. v. Western World Ins. Co.*, 110

Haw. 473, 498-99, 135 P.3d 82, 107-08 (2006) (five year and five month delay of the issuance of judgment justified award of interest); *Coupe*, 120 Haw. at 411, 208 P.3d at 724 (interest is properly awarded "in order to correct injustice when a judgment is delayed for a long period of time for any reason."). The circuit court wrongly placed the burden on the Coupes to allege "undue delay by Plaintiff County." However, as *Ditto* and *Tri-S Corp.* make clear, no such requirement is imposed upon a party seeking to be compensated for the loss of use of encumbered funds; all that is required is that there has been delay. The Condemnation 1 record plainly shows the nine year course of proceedings, so there was no need for the Coupes to specially plead or prove it. *See* R:CV00-1-0181K Doc. 0591 at 14919 (Supp. COL 18) (acknowledging the nine year course of Condemnation 1).

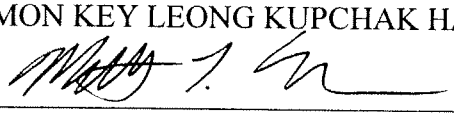
CONCLUSION

The circuit court's judgment in Condemnation 1 should be vacated, and the case remanded with instructions to award the Coupes the damages they incurred in seeking section 101-27 relief, and their damages for the cost of encumbered funds.

DATED: Honolulu, Hawaii, November 12, 2009.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT



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