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CONCURRING AND DISSENTING OPINION BY MOON, C.J.,  
IN WHICH LEVINSON, J., JOINS

I concur with the majority's opinion, except I respectfully dissent from its decision to remand Condemnation 2 "for an express determination by the [trial] court of whether the asserted public purpose was pretextual." Majority Opinion at 85. I believe the Circuit Court of the Third Circuit was correct in concluding that Condemnation 2 had a valid "public purpose"<sup>1</sup> under the Public Use Clauses of the United States and Hawai'i Constitutions. Consequently, I would affirm the trial court's September 27, 2007 amended final judgment on the issue of public purpose.

I. DISCUSSION

This court has previously indicated that the Public Use Clause of the federal constitution is "substantially similar" to that of the Hawai'i Constitution; thus, the Supreme Court's interpretation of the federal Public Use Clause "is persuasive authority for our review of the Hawai'i constitutional provision." Hawai'i Hous. Auth. v. Lyman, 68 Haw. 55, 69, 704 P.2d 888, 896 (1985). Consequently, I begin my discussion with

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<sup>1</sup> Many courts differentiate between a "public purpose" analysis and a "public use" analysis. The latter requires that the property taken be usable by the general public, whereas the former requires only that the overall objective of the project comprises a public benefit. Kelo v. City of New London, 545 U.S. 469, 479-80 (2005). At the end of the nineteenth century, the United States Supreme Court rejected the public use test and adopted the public purpose test. Id.; see also Majority Opinion at 52.

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the Supreme Court's interpretation of the federal Public Use Clause.

The United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. "This provision applies to the states through the Fourteenth Amendment." Richardson v. City & County of Honolulu, 124 F.3d 1150, 1156 (9th Cir. 1997) (citation omitted). Moreover, the Supreme Court "has declared that a taking should be upheld as consistent with the Public Use Clause . . . as long as it is rationally related to a conceivable public purpose." Kelo, 545 U.S. at 490 (Kennedy, J., concurring) (internal quotation marks omitted) (citing Hawai'i Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984), and Berman v. Parker, 348 U.S. 26 (1954)).

In the case at bar, the parties' arguments (and the majority's analysis) with regard to public purpose focus on the Supreme Court's recent decision in Kelo. More specifically, the appellants seemingly argue that Kelo stands for the proposition that the condemning authority's motives should be scrutinized and that a standard beyond the well-established and longstanding rational-basis test should be applied when reviewing a purported public purpose in the federal eminent domain context. In other words, the appellants are seemingly urging this court to adopt the purported test espoused by Justice Kennedy in his concurrence in Kelo. However, inasmuch as Justice Kennedy's concurrence

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obviously expresses the view of a single justice of the Court, any purported test espoused therein must be grounded in the opinion of the Kelo majority [hereinafter, Majority or Kelo Majority] upon which it could be said that Justice Kennedy further expounded in his concurrence. Accordingly, a review of the Kelo Majority's opinion is necessary to determine whether, in fact, Kelo requires scrutiny beyond the established rational-basis test.

A. The Kelo Majority

As indicated by the majority's opinion in the case at bar [hereinafter, majority or Coupe majority], the Kelo Majority "summarized the Court's public purpose jurisprudence as 'wisely eschew[ing] rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.'" Coupe Majority Opinion at 54 (quoting Kelo, 545 U.S. at 483). In so doing, the Kelo Majority stated that "two polar positions [were] perfectly clear," 545 U.S. at 477:

On the one hand, it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.

Id. With regard to the first proposition, the Majority further stated that

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the City would no doubt be forbidden from taking [landowners]' land for the purpose of conferring a private benefit on a particular private party. See Midkiff, 467 U.S. at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"). Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.

Id. at 477-78 (some citations and footnote omitted). In examining whether the taking at issue in Kelo bestowed a purely private benefit, the Majority reasoned that "[t]he takings before us . . . would be executed pursuant to a 'carefully considered' development plan . . . [and] there was no evidence of an illegitimate purpose[.]" Id. at 478 (citation omitted). Therefore, the Majority determined that "the City's development plan was not adopted to benefit a particular class of identifiable individuals," i.e., there was no pretext of public purpose. Id. (internal quotation marks omitted).

The Kelo Majority recognized that, "[w]ithout exception, our cases have defined th[e] concept [of public purpose] broadly, reflecting our longstanding policy of deference to legislative judgments in this field." Id. at 480. Thus, the Kelo Majority looked to the City's "carefully formulated" development plan to determine whether it served a public purpose. Id. at 483. Recognizing "the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of [the Court's] review[.]" id. at 484, the Majority determined it was appropriate "to resolve the challenges

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of the individual owners, not on a piecemeal basis, but rather in light of the entire plan." Id. "Because that plan unquestionably serve[d] a public purpose," id., the Kelo Majority "[d]eclin[ed] to second-guess the City's considered judgments about the efficacy of its development plan," id. at 488, and held that the challenged takings "satisf[ied] the public use requirement of the Fifth Amendment." Id. at 484.

The Kelo majority, in my view, affirmed Midkiff and Berman, which cases applied a rational-basis test in their respective public purpose analyses. 545 U.S. at 481-82, 488. Thus, I believe that the rational-basis test -- which includes deference to the government's statement of public purpose -- remains the appropriate test for determining the constitutionality of a "public use" under the federal constitution.

Nevertheless, the appellants rely heavily on Justice Kennedy's concurrence for the proposition that "[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits[.]" Kelo, 545 U.S. at 491 (Kennedy, J., concurring) (emphasis added) (original brackets omitted); see Coupe Majority Opinion at 58. In other words, the appellants urge this court to follow Justice Kennedy's willingness to investigate the veracity of an asserted public purpose where such

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argument is raised. I believe the appellants' reading of Justice Kennedy's concurrence is overly broad and requires closer examination.

B. Justice Kennedy's Concurrence

Justice Kennedy begins his concurrence by stating, "I join the opinion for the Court and add these further observations." Kelo, 545 U.S. at 490 (emphasis added) (Kennedy, J., concurring). He acknowledges that the Supreme Court

has declared that a taking should be upheld as consistent with the Public Use Clause . . . as long as it is "rationally related to a conceivable public purpose." This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses.

Id. (emphasis added) (quoting Midkiff, 467 U.S. at 241) (citing Berman, supra) (other citations omitted). He then observes:

The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause.

A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

Id. at 490-91 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446-47, 450 (1985); Dep't of Agric. v. Moreno, 413 U.S. 528, 533-36 (1973) (emphases added). Justice Kennedy's citations to Cleburne and Moreno are particularly instructive. In Cleburne, the Court, applying a rational-basis

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analysis, held unconstitutional a zoning ordinance that required a special use permit for homes for the mentally retarded inasmuch as the ordinance "appear[ed] to [the Court] to rest on an irrational prejudice against the mentally retarded." 473 U.S. at 447, 450. Likewise, the Court, in Moreno, applied a rational-basis analysis in reviewing the "unrelated person provision" of a food stamp statute. 413 U.S. at 537. The subject provision excluded from participation in the food stamp program any household in which an individual, living in the household, was unrelated to other household members. Id. at 529. The Court struck down the provision inasmuch as it created an "irrational classification," i.e., it did not "rationally further some legitimate governmental interest." 413 U.S. at 532-33, 534. In my view, Justice Kennedy's references to Cleburne and Moreno, coupled with his additional observations quoted infra note 2, (1) confirms his adherence to the applicability of the rational-basis test and (2) demonstrates that, although rational basis analysis requires great deference to the legislature, such deference is not absolute.<sup>2</sup>

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<sup>2</sup> Justice Kennedy further observed:

A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose. . . .

. . . .

(continued...)

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The position espoused by Justice Kennedy in his concurrence is, in my view, substantially similar to that of the Kelo Majority, i.e., the rational-basis test applies when analyzing a constitutional challenge to a proposed taking under the Public Use Clause. More importantly, notwithstanding the observations made by Justice Kennedy, the Majority did not, in its opinion, see fit to explore "the possibility that a more stringent standard of review than that announced in Berman and Midkiff might be appropriate[.]" Id. at 493. In fact, neither did Kennedy, who specifically stated that "[t]his is not the occasion for conjecture as to what sort of cases might justify a more demanding standard," id., concluding that "no departure from Berman and Midkiff is appropriate here." Id.; see also supra

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<sup>2</sup>(...continued)

My agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case, does not foreclose the possibility that a more stringent standard of review than that announced in Berman and Midkiff might be appropriate for a more narrowly drawn category of takings. 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. Cf. Eastern Enterprises v. Apfel, 524 U.S. 498, 549-550 (1998) (Kennedy, J., concurring in judgment and dissenting in part) (heightened scrutiny for retroactive legislation under the Due Process Clause). This demanding level of scrutiny, however, is not required simply because the purpose of the taking is economic development.

This is not the occasion for conjecture as to what sort of cases might justify a more demanding standard, but it is appropriate to underscore aspects of the instant case that convince me **no departure from Berman and Midkiff is appropriate here.**

Id. at 491-93 (emphases added).



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note 2. Therefore, inasmuch as Justice Kennedy's concurrence -- like the Kelo Majority -- applied a rational-basis analysis to the facts of that case, I concur with the Coupe majority's decision in (1) rejecting the appellants' contention that the trial court "should have followed the roadmap to analyzing claims of pretext laid out by Justice Kennedy" and (2) "declin[ing] to adopt Justice Kennedy's concurring opinion" in Kelo. Coupe Majority Opinion at 58.

In sum, under the federal constitution, the government's use of its eminent domain power will be upheld if it is "rationally related to a conceivable public purpose." Midkiff, 467 U.S. at 241; see also Kelo, 545 U.S. at 488 ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts."). In analyzing whether the taking is for a valid public purpose, courts give great deference to the government's determination of public purpose. Kelo, 545 U.S. at 480. However, such deference is not absolute, and, as observed by Justice Kennedy, deference to the government's public purpose determination may be overcome only if the party challenging the taking makes a "clear showing" that the government's stated public purpose is "irrational," Cleburne, 473 U.S. at 446, with "only incidental or pretextual public benefits." Kelo, 545 U.S. at 491 (Kennedy, J., concurring). Under a rational basis

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analysis, this is a heavy burden. See Richardson, 124 F.3d at 1162 (recognizing that, in the analogous due process context, "[t]he challengers' burden to show that a statute is arbitrary and irrational is extremely high").

C. Hawaii's Public Use Clause

Similar to the federal constitution, the Hawai'i Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Haw. Const. art. I., § 20. In examining whether a particular taking by the state or county government is for a "public purpose," this court has long adhered to a rational-basis standard, i.e., "so long as the exercise of the eminent domain power is rationally related to the objective sought, the legislative public use declaration should be upheld unless it is palpably without reasonable foundation." Kau v. City & County of Honolulu, 104 Hawai'i 468, 478, 92 P.3d 477, 487 (2004) (citing Hous. Fin. and Dev. Corp. [(HFDC)] v. Castle, 79 Hawai'i 64, 85, 898 P.3d 576, 597 (1995)) (original emphasis omitted). In other words, "[t]he crucial inquiry is whether the legislature might reasonably have believed that application of the sovereign's condemnation powers would accomplish the public use goal." Id. (citations, original emphasis, and ellipsis omitted).

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In Hawai'i Housing Authority v. Ajimine, 39 Haw. 543 (Haw. Terr. 1952) (an early case addressing the public use clause), this court stated the "general rule" that:

Primarily, the right to declare what shall be deemed a public use is vested in the legislature; and[,] consequently, when the public nature of a use for which a taking has been authorized by law is disputed, the question as it presents itself to the courts is whether the legislature might reasonably have considered the use public, not whether the use is public. This rule rests on the presumption that a use is public if the legislature has declared it to be such. The strength of that presumption is gauged by the high regard which the courts have for a declaration of public use by the legislature as a decision of a co-ordinate department of the government on a matter within its knowledge and duty. Illustrative of such regard, all the authorities agree that legislative findings and declarations of public use are entitled to great weight. Moreover, a legislative finding and declaration that the particular uses, as here involved, are public is entitled not only to respect but to a prima facie acceptance of its correctness. Indeed, where [as here] the Legislature declares a particular use to be a public use[,], the presumption is in favor of this declaration, and will be binding upon the courts unless such use is clearly and palpably of a private character. But that does not mean that either the decision of the legislature or the presumption is conclusive, for the issue of public use is a judicial question and one of law to be decided on the facts and circumstances of each particular case. Nevertheless, the great weight accorded to the legislative finding and the prima facie acceptance of its correctness, as well as the binding effect of the presumption, demonstrates that the courts will not lightly disturb such a finding and will not overrule it unless it is manifestly wrong.

Id. at 549-50 (emphases added) (some brackets added and some in original) (citations and internal quotation marks omitted).

The above declaration in Ajimine, as well as subsequent cases, echo the views espoused in Kelo, discussed supra, including Justice Kennedy's concurrence. For example, in Hawai'i Housing Authority v. Lyman, 68 Haw. 55, 704 P.2d 888 (1985), this court explicitly adopted the "minimum rationality standard" as the appropriate test "for judicial evaluation of the

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legislature's public use determinations." 68 Haw. at 69, 704

P.2d at 896-97. The Lyman court specifically held that,

once the legislature has spoken on the social issue involved, so long as the exercise of eminent domain power is rationally related to the objective sought, the legislative's public use declaration should be upheld unless it is palpably without reasonable foundation. The crucial inquiry is whether the legislature might reasonably consider the use public, and whether it rationally could have believed that application of the sovereign's condemnation powers would accomplish the public use goal.

Id. at 70-71, 704 P.2d at 897 (emphasis added) (internal citations omitted). Likewise, in HFDC, this court observed that the appropriate test for determining "public use" in an eminent domain action under both the Hawai'i and United States Constitutions "is substantially the same as the least demanding level of equal protection analysis -- 'rational basis,'" 79 Hawai'i at 86, 898 P.2d at 598:

Under the rational basis test, the court essentially asks whether a statute rationally furthers a legitimate state interest. In making this inquiry, a court will not look for empirical data in support of the statute. It will only seek to determine whether any reasonable justification can be conceived to uphold the legislative enactment.

Once it is determined that the legislature passed the statute at issue to further a legitimate government purpose, then the pertinent inquiry is only whether the [l]egislature rationally could have believed that the [statute] would promote its objective. Additionally, the lawmakers are under no obligation to convince the courts of the correctness of their legislative judgments. Rather, **those challenging the legislative judgment must convince the court that the legislative facts on which the [statute] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.**

Id. (underscored emphases and brackets in original) (bold emphasis added) (citations omitted) (format altered). See also Richardson, 124 F.3d at 1156 (applying a rational-basis test to a

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public purpose analysis under both the Hawai'i and United States Constitutions).

Consequently, our own case law demonstrates that the rational-basis test -- identical to that laid out in the federal precedent -- is the appropriate standard to be applied in this jurisdiction when determining whether a governmental taking has a public purpose under the public use clause of the Hawai'i Constitution, as well as the federal constitution. Under such standard, the government's determination that a particular taking is for a public purpose will be upheld if it "rationally furthers a legitimate state interest." HFDC, 79 Hawai'i at 86, 898 P.2d at 598. In other words, the legislature's "public use declaration should be upheld unless it is palpably without reasonable foundation." Lyman, 68 Haw. at 70, 704 P.2d at 897. However, as previously indicated, the great deference given to the government's determination of public purpose is not absolute, and the burden is on the party "challenging the legislative judgment [to] convince the court that the legislative facts on which the [legislation] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." HFDC, 79 Hawai'i at 86, 898 P.2d at 598 (emphasis in original).

D. Application of the Rational-Basis Test

Under a rational basis analysis, this court "essentially asks whether [the legislation] rationally furthers a legitimate [government] interest." Id. at 86, 898 P.2d at 598.

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In the context of the facts of Condemnation 2, I first address whether Condemnation 2 furthers a legitimate government interest, i.e., whether the challenged taking is for a public purpose.

**1. Public Purpose**

As previously discussed, this court will "defer to the [County's] determination regarding public use unless the use involves an 'impossibility' or is 'palpably without reasonable foundation.'" Richardson, 124 F.3d at 1158 (citing Midkiff, 467 U.S. at 204-41); see also, Kelo, 545 U.S. at 483 (deferring to the government's determination of public purpose). Moreover, "[i]n making this inquiry, a court will not look for empirical data in support of the [legislation]. It will only seek to determine whether any reasonable justification can be conceived to uphold the [County's] enactment." HFDC, 79 Hawai'i at 86, 898 P.2d at 598 (original emphasis omitted).

Here, Resolution No. 31-03, which served as the basis for Condemnation 2, recognized that: (1) a bypass road was being planned and developed; (2) the current highway was determined to be inadequate to handle the volume of traffic; and (3) the County determined that the bypass road provided a regional benefit and was necessary for a public purpose and use. Specifically, Resolution 31-03 provided in relevant part that:

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Whereas, a bypass highway has been planned and is being developed to run makai of Māmalahoa Highway from the area of Keauhou to its terminus with the Māmalahoa Highway in the vicinity of Napo'opo'o Road; and

Whereas, the **Kona Regional Plan** identified the current Māmalahoa Highway as inadequate to handle the volume of traffic currently traversing on the roadway; and

Whereas, the proposed Māmalahoa Bypass Highway has been determined by the County of Hawai'i, through its County Council, as providing a regional benefit for a public purpose and use which will benefit the County of Hawai'i[.]

Now, therefore, be it resolved by the Council of the County of Hawai'i that it is necessary for the public use and purpose, to wit: the construction and development of a road intended to bypass the Māmalahoa Highway in the approximate vicinity between Keauhou and Captain Cook, Kona, to acquire and condemn a portion of that certain private property . . . .

(Emphases added.) The Kona Regional Plan was adopted by the County Council in 1982 and was introduced into evidence (as Exhibit D-14) by the County as support of its public purpose argument.

It is well-settled that, "whenever property is taken for a highway, it is for the public use, notwithstanding that the highway may greatly benefit a private party." Rodgers Dev. Co. v. Town of Tilton, 781 A.2d 1029, 1034 (N.H. 2001) (emphasis added) (citations omitted); see also City of Novi v. Robert Adell Children's Funded Trust, 701 N.W.2d 144, 151 (Mich. 2005) (holding that a proposed road, built partly in response to traffic problems, was for a public purpose even though a private entity would be the primary user of the road and had contributed funds to the project); Garvie v. City of Ft. Walton Beach, 366 F.3d 1186, 1189-90 (11th Cir. 2004) (holding that paving a right of way across a portion of landowners' property, which

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facilitated transportation and made it easier for people and emergency vehicles to get to various places, constituted legitimate public purposes); and Coupe Majority Opinion at 62 n.32 (collecting cases for the above proposition); but cf. Bd. of County Comm'rs of County of Morgan v. Kobobel, 176 P.3d 860, 865 (Colo. Ct. App. 2007) (holding that county had no valid public purpose for its condemnation of property owners' land for use as a public road to a private cemetery because there was little public demand and no particular need for the county road).

Resolution No. 31-03 plainly states that the public purpose is "the construction and development of a road intended to bypass the Māmalahoa Highway" inasmuch as "the current Māmalahoa Highway [is] inadequate to handle the volume of traffic currently traversing on the roadway[.]" Clearly, the County's determination that the condemnation is necessary for a public purpose does not, on its face, involve an "impossibility" and is not "palpably without reasonable foundation." Richardson, 124 F.3d at 1158. In other words, without "look[ing] for empirical data in support of the [resolution]," HFDC, 79 Hawai'i at 86, 898 P.2d at 598 (original emphasis omitted), the County's stated public purpose determination was, indeed, reasonable. Moreover, the County's public purpose determination was based upon the Kona Regional Plan, and the appellants do not argue or otherwise challenge the plan as not "comprehensive" or "carefully formulated." Kelo, 545 U.S. at 483. Contrary to the majority's



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position, I believe that it was not necessary for the trial court to look beyond the face of Resolution 31-03 because the construction of a bypass road that would, unquestionably, benefit the public is a valid public purpose to which Condemnation 2 is rationally related. Consequently, inasmuch as this court's inquiry under a rational basis test "seeks only to determine whether any reasonable justification can be found for the legislative enactment," State v. Mallan, 86 Hawai'i 440, 446, 950 P.2d 178, 184 (1998), and the construction of a bypass road is a reasonable justification for the use of eminent domain, I would hold that the trial court correctly concluded that "County Resolution 31-03 is valid."<sup>3</sup>

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<sup>3</sup> Specifically, the trial court concluded with regard to the public purpose of Condemnation 2:

- 97. The inquiry under the public use clause of Article 1, Section 20 is whether a taking is designed to further a "legitimate government purpose." Housing Finance & Dev. Corp. v. Castle, 76 Haw. 64 (1992).
- 98. Generally, courts are bound by the legislature's public use determination unless the use is clearly and palpably of a private character. State v. Anderson, 56 Haw. 566 (1976). However, the public use question is still one that remains judicial in nature. Hawai'i Hous. Auth. v. Ajimine, 39 Hawai'i 543 (1952).
- 99. The County Council determined that there was a public purpose in County Resolution 31-03. County Resolution 31-03 did not refer to the Development Agreement, and was passed by a new County Council with a different Council make-up.
- . . . . .
- 101. County Resolution 31-03 is valid.
- 102. The [trial c]ourt concludes that the eminent domain action in [Condemnation 2] is validly supported by public purpose and properly passed by the [Hawai'i County Council].

(Emphases added.)

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The majority concludes that the trial court was required to examine the appellants' pretext defense because "both Ajimine and Kelo make it apparent that, although the government's stated public purpose is subject to prima facie acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual." Coupe Majority Opinion at 63 (emphases added) (citation omitted). Indeed, the majority states that Ajimine "indicates that a burden-shifting regime is appropriate by referring to a 'presumption' in favor of the legislature, whose determination is subject to 'prima facie acceptance,' which is 'binding' unless that presumption is rebutted by evidence that 'such use is clearly and palpably of a private character.'" Id. at 64 n.33 (citation omitted). Notwithstanding the month-long trial and the voluminous transcripts of testimony and exhibits presented, the appellants nevertheless rely on the naked assertion that "Condemnation 2 provided a 'predominately private benefit to Oceanside,'" id. at 64 (ellipsis omitted), which is clearly not evidence. Inasmuch as the majority and the appellants have failed to point to any evidence that the public purpose of Condemnation 2 (construction of a bypass road) might have been pretextual and that the actual purpose of Condemnation 2 was to bestow a private benefit on Oceanside, they have likewise failed to rebut the presumption in favor of the legislature. Consequently, the "burden-shifting regime" is inappropriate.

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To be clear, I agree with the majority (and Justice Kennedy's concurrence in Kelo) that, in certain circumstances, it might be appropriate and, perhaps, even necessary for the trial court to closely examine the government's asserted public purpose. But, where the government's stated public purpose is to build a public highway, such purpose is not one of those "certain circumstances" that warrants closer scrutiny. Here, the public purpose of Condemnation 2 is the construction of a much-needed bypass, and such purpose, as previously discussed, "is for the public use, notwithstanding that the highway may greatly benefit a private party." Rodgers Dev. Co., 781 A.2d at 1034 (emphasis added). Thus, the majority's reliance on a string of federal cases<sup>4</sup> -- all relating to economic development condemnations (involving takings for, inter alia, private developments, a Target store, and Costco stores) -- is unpersuasive. Indeed, Kelo also involved an economic development condemnation, and the

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<sup>4</sup> See Franco v. Nat'l Capital Revitalization Corp., 930 A.2d 160, 169 (D.C. 2007) (holding that condemnee adequately pled that declared public purpose for condemning land, i.e., redevelopment to remove blight, was mere pretext for bestowing private benefit); Goldstein v. Pataki, 516 F.3d 50, 59-60 (2d Cir. 2008) [hereinafter, Goldstein II] (holding that redevelopment of blighted area, creation of affordable housing, creation of public open space, and various mass-transit improvements was rationally related to public use); Aaron v. Target Corp., 269 F. Supp. 2d 1162, 1177 (E.D. Mo. 2003), rev'd on other grounds, 357 F.3d 768, 777 (8th Cir. 2004) (granting a temporary restraining order where property owners had shown that city may have improperly condemned property so as to turn it over to a private discount retail corporation for use as a Target store); Cottonwood Christian Ctr. v. Cypress Redev. Agency, 218 F. Supp. 2d 1203, 1229-30 (C.D. Cal. 2002) (holding that property owner had demonstrated at least a fair question on the merits of its takings claim on public use grounds where property was to be taken for use as a Costco store); and 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F.Supp. 2d 1123, 1130 (C.D. Cal. 2001) (holding, inter alia, that prevention of future blight was not a legitimate public use).

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Kelo majority and Justice Kennedy opined that there may be circumstances where a more stringent level of scrutiny would be required, however, stopped short of suggesting what those circumstances might be. Because they were unwilling to examine the appellants' pretext defense in the face of a taking premised on an economic development plan, it would seem illogical to expect them to be willing to examine the appellants' pretext defense in this case, where the taking is based on a classic public purpose. In sum, although I agree with the majority that Kelo does not "'foreclose' the possibility of successful pretext defenses," Coupe Majority Opinion at 59 n.31, I do not believe that this case presents a situation where it is necessary to closely scrutinize the motives of the City Council in Condemnation 2 inasmuch as the stated public purpose of the taking -- a public bypass road -- will undoubtably benefit the public and the taking is rationally related to that public use.

In justifying its consideration of the appellants' pretext argument, the Coupe majority states that "the [trial] court's conclusion that Condemnation 2's public purpose was valid[] because the Resolution upon which it was based omitted reference to the [d]evelopment [a]greement and was passed by a slightly altered [Hawai'i County Council] may have elevated form over substance[,]" Coupe Majority Opinion at 67 (citation omitted), and that the trial court "did not expressly consider the question of whether the taking 'clearly and palpably of a

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private character.'" Id. at 69-70 (citation omitted). More specifically, the majority states:

[I]t is not discernible that the [trial] court based its determination of public purpose on anything more than the fact that "County Resolution No. 31-03 states that the proposed construction and use of the [Bypass] would provide a public benefit to the County of Hawaii" and that "the [Hawai'i County Council] determined that there was a public purpose in County Resolution [No.] 31-03." The [trial] court did not state that [a]ppellant failed to make a clear showing that the use was of a predominantly private character, or indicate any recognition that despite any ostensible private benefit to Oceanside, the actual purpose was a valid public use.

Id. at 69 (emphases omitted) (some brackets in original and some added). Based on the foregoing, the majority orders that the case be "remanded for an express determination by the [trial] court of whether the asserted public purpose was pretextual."

Id. at 85. I cannot agree with the majority, but assuming arguendo that the appellants' contention squarely raises the issue whether Condemnation 2 "is clearly and palpably of a private character," Ajimine, 39 Haw. at 550, the record indicates -- contrary to the majority's assertion -- that the trial court did, in fact, seriously consider whether the County's stated public purpose to build a bypass road to alleviate traffic concerns was a mere pretext for the actual purpose to bestow a private benefit. The majority concludes that "it is unclear from the entirety of the [trial] court's findings and conclusions regarding Condemnation 2 whether the court did in fact consider and reject [a]ppellant's pretext argument." Coupe Majority Opinion at 65 (emphasis added). Such statement seems to indicate

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that the majority's position is based solely on the trial court's findings and conclusions. However, it is axiomatic that, on appeal, this court should not limit itself to the four corners of the trial court's FOFs and COLs, but also look to the record. See, e.g., State v. Magoon, 75 Haw. 164, 180, 858 P.2d 712, 722 (1993) (stating that a review of the entire record on appeal from land court decision was appropriate because "[t]o determine otherwise would unduly restrict the appellate court's authority of review to the four corners of the decree and thus lead to absurd and unjust results"). In so doing, the record in this case demonstrates, as discussed infra, that the pretext defense was considered and rejected by the trial court, notwithstanding the fact that the trial court did not specifically use the words "pretext" or "pretextual" in its FOFs and COLs.

As previously discussed, the Kelo Majority recognized that a taking would not be allowed "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." Kelo, 545 U.S. at 478 (emphasis added). Although the Kelo Court did not define or provide any guidance as to what constitutes "mere pretext," the United States District Court for the Eastern District of New York -- based on its reading of Berman, Midkiff, and Kelo -- "define[d] the boundaries of the public use requirement" as follows:

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[A] taking fails the public use requirement if and only if the uses offered to justify it are "palpably without reasonable foundation," *Midkiff*, [467 U.S.] at 241, such as if (1) the "sole purpose" of the taking is to transfer property to a private party, *Kelo*, [545 U.S.] at 477; *Midkiff*, [467 U.S.] at 245, or (2) the asserted purpose of the taking is a "mere pretext" for an actual purpose to bestow a private benefit, *Kelo*, [545 U.S.] at 478.

*Goldstein v. Pataki*, 488 F. Supp. 2d 254, 278, 286 (E.D.N.Y. 2007) [hereinafter, *Goldstein I*], judgment affirmed by, 516 F.3d 50 (2d Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2964 (2008) (emphases added). The *Goldstein I* court held that the plaintiffs therein did not "allege facts sufficient to render plausible their claim that the [taking] serves no public use at all" inasmuch as:

Nowhere in the [a]mended [c]omplaint or their briefs d[id] the p[l]aintiffs sufficiently allege any purpose to confer a private benefit. In other words, [the p]laintiffs attempt to satisfy the "mere pretext" test solely by alleging that the purported purposes of the [taking] are dubious, but *Kelo* requires them to allege that the "actual purpose" of the Project is "to bestow a private benefit" on [the defendant]. [545 U.S.] at 478, . . . . In fact, Justice Kennedy, analogizing to Equal Protection jurisprudence, would require "a clear showing [that a taking] is intended to favor a particular private party" before the taking is ruled unconstitutional. *Id.* at 491[.]

488 F. Supp. 2d at 287-88 (emphasis added).

In the instant case, none of the parties assert that "the 'sole purpose' of the taking [was] to transfer property to a private party"; thus, the relevant inquiry is whether "the asserted purpose of the taking[, i.e., to build a bypass road,] is a 'mere pretext' for an actual purpose to bestow a private benefit." 488 F. Supp. 2d at 286 (citations omitted). As previously stated, there is no question that the bypass road in this case would serve a public purpose. Thus, the ultimate

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question before this court -- as it was before the trial court -- is whether the County's decision to condemn the subject property for the construction of a public bypass road was a mere pretext for its actual purpose to bestow a private benefit on Oceanside.

Here, a jury-waived trial on Condemnation 1 and Condemnation 2 was conducted from July 9, 2007 to August 2, 2007. Over the course of the month-long trial, the parties presented extensive evidence and arguments regarding, inter alia, the "actual purpose" of the taking. Specifically, the appellees argued that there was a long-standing need for a bypass road to serve the community, which was a valid public purpose, and that the construction of the bypass road was the "actual purpose" of Condemnation 2 (as well as the relevant portion of the development agreement). Additionally, during closing arguments, the appellees emphasized that "[t]here [was] clear evidence. . . [o]f public purpose, but there [was] no clear evidence of pretext." Conversely, the appellants argued that the asserted public purpose in building the bypass road was "a sham and [was] hiding what [was] really going on." In essence, the appellants contended that the actual purpose of Condemnation 2 was to bestow a private benefit on Oceanside and that the County was taking the subject property "not to save the road," but to comply with its "obligation under the development agreement." In support of their actual purpose contention, the appellants proffered evidence that Oceanside (1) had the sole discretion to determine



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the roadway and (2) changed the bypass's northern terminus from mauka at Kuakini Highway to makai at Ali'i Highway to benefit Oceanside. Moreover, the appellants argued, in closing, that the evidence submitted at trial suggested that the County's studies indicating the need for the road, as well as the decision to choose the Ali'i terminus over the Kuakini terminus, were flawed.

The trial court ultimately entered the following relevant unchallenged findings of fact (FOFs), relating to both Condemnation 1 and Condemnation 2:

**County's Need**

6. By 1979, the County recognized a need for a road to bypass the Māmalahoa Highway due to the projected inadequacies of existing highway, high accident rates, higher anticipated traffic volume and congestion, and the need for a route continuously around the island in a 1979 study conducted by the Hawai'i Department of Transportation entitled *Hawaii Belt Road Holualoa to Papa Preliminary Engineering Report*.
7. In 1982, the Kona Regional Plan had identified traffic problems along the Māmalahoa Highway, and determined that the traffic was equal to or exceeded the roadway design capacity. The County also found that the rapid increase in traffic placed a heavy burden on the roadway network, and increased both travel time and inconvenience.
8. In response, the County adopted the proposed 1979 State Bypass Highway and Alii Drive Extension on the 1989 County General Plan Public Facilities Map.
9. The County further conducted the following studies:
  - a. The 1989 Hawai'i County Council General Plan adopted the 1979 State Bypass Highway and the Alii Highway
  - b. The 1993 study by Parson, Brickerhoff, Quake and Douglas found that a bypass highway would be sufficient to relieve all existing and projected future regional congestion on Māmalahoa Highway.
  - c. A 1998 study prepared for the Hawaii Department of Transportation, entitled *Hawaii's Long Range Land Transportation Plan Final Report*, recognized the need for the Māmalahoa Bypass Highway based on traffic safety considerations.

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- d. A 1998 study prepared for the State of Hawaii Department of Transportation recognized the need, based on traffic safety considerations, for the Māmalahoa Bypass Highway.

. . . . .

**Oceanside's Proposal**

13. Recognizing the County's need for new roads, Oceanside proposed to build the bypass highway in exchange for a change of zoning for the Hokulia development project. County Ordinance Number 94-73 accepted Oceanside's proposal, and change the zoning for the Hokulia project while requiring Oceanside to acquire and build the bypass highway at its own expense.

(Some emphases in original and some added.) (Citations to exhibit numbers and testimony omitted.) Additionally, with regard to the public purpose of Condemnation 2, the trial court made the following relevant unchallenged FOFs:

100. The [bypass road] was to be built to [s]tate [h]ighway [d]esign standards.
101. The alignment of the [bypass highway], with a northern terminus at Alii Highway was preferred and selected by the County of Hawai'i's Department of Public Works, and is consistent with the General Plans that have been adopted by the County.
102. In County Resolution No. 31-03, the final determination of the [bypass road] remained with the County of Hawai'i Department of Public Works.

(Emphases added.) (Citations to exhibit numbers and testimony omitted.) In essence, the trial court found that the County had -- since 1979 -- "recognized a need for a road to bypass Māmalahoa Highway." Additionally, the trial court found that, based upon Oceanside's awareness of the public need for a bypass road, it proposed to build the road in exchange for a change in zoning.

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With regard to Condemnation 1, the trial court also determined that Condemnation 1 had "County Resolution [No.] 266-00 as its basis for public purpose,"<sup>5</sup> and that "County Resolution [No.] 266-00 states that it is necessary for public use and purpose to construct the Māmalahoa Bypass Highway pursuant to the [d]evelopment [a]greement." Public purpose, if any, would be within that [d]evelopment [a]greement." (Emphasis added.) Based on such findings, the trial court concluded, inter alia, that "the language within the [d]evelopment [a]greement [made] it unmistakably clear that the County improperly delegated condemnation authority to Oceanside." Inasmuch as the trial

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<sup>5</sup> Condemnation 1 refers to Civil No. 00-1-181K and is based upon Resolution No. 266-00, adopted on July 26, 2000, which provided in relevant part:

Whereas, Oceanside plans to develop the above-mentioned properties into an agricultural lot community and its components, including a lodge, golf course, golf club house and coastline park; and

Whereas, pursuant to Resolution No. 244-95 dated April 1, 1998, Oceanside and the [County] entered into a development agreement, the terms and conditions of which will require Oceanside to provide certain public and other improvements, including the design, construction[,] and development of a road intended to bypass Māmalahoa Highway in the approximate vicinity between Keauhou and Captain Cook, Kona; said road being planned to consist of two lanes and a sufficient right-of-way for expansion to four lanes; and

Whereas, the bypass highway has been determined by the [County] as providing a regional public purpose which will benefit the County of Hawai'i; and

Whereas, the [D]evelopment [A]greement provides that if on of the owners across whose property the [Bypass] is planned to traverse fails to mutually agree with Oceanside with respect to the purchase price or "terms of the purchase," the condemnation powers of [the County] shall be used to acquire that particular segment with Oceanside reimbursing [the County] for any costs to acquire.

As discussed in the majority's opinion, Coupe Majority's Opinion at 68 n.35, the trial court concluded that Condemnation 1 was "invalid because it improperly delegate[d] condemnation authority to a private party."

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court determined that Condemnation 1 illegally delegated condemnation authority to Oceanside, it never reached the issue in Condemnation 1 whether the construction of the bypass road was a valid public purpose nor whether it was a mere pretext for the actual purpose to bestow a private benefit on Oceanside.

However, with regard to Condemnation 2, the trial court determined that the public purpose was "that the proposed construction [of the bypass road] would provide public benefit to the County of Hawai'i." Additionally, the trial court concluded that Condemnation 2, which did not refer to the development agreement, "[stood] independently from the [d]evelopment [a]greement, and that there [was] sufficient attenuation between the [d]evelopment [a]greement previously mentioned and [Resolution No. 31-03]." Inasmuch as Condemnation 2 stood independently from the development agreement, the trial court declared that "[t]he County Council determined that there was a public purpose in County Resolution 31-03," and, thus, Condemnation 2 was "valid." Accordingly, the trial court concluded that Condemnation 2 was "validly supported by public purpose[.]" In so concluding, the trial court rejected the appellants' actual purpose contention, i.e., that Oceanside's sole discretion in changing the bypass' northern terminus from Kuakini to Ali'i indicated that the actual purpose of Condemnation 2 was to bestow a private benefit on Oceanside. Such rejection is explicitly demonstrated in the trial court's

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findings that (1) "[t]he alignment of the [bypass highway], with a northern terminus at Ali'i Highway[,] was preferred and selected by the County" and (2) "the final determination of the [bypass road] remained with the County." In other words, contrary to the majority's opinion, the trial court considered and rejected the private benefit evidence proffered by the appellants, and, therefore, determined the stated public purpose was not pretextual.

Thus, the FOFs and COLs demonstrate -- contrary to the majority's assertion -- that the trial court did, in fact, examine whether Condemnation 2 was "clearly and palpably of a private character," Ajimine, 39 Haw. at 550, and determined that the stated public purpose in Resolution No. 31-03, i.e., to build a bypass road, was not "only incidental" or a mere "pretextual public benefit[]" to hide the predominantly private benefit of the bypass road to Oceanside. Moreover, the majority's conclusion that the trial court "erred in declining to expressly examine the pretext issue in Condemnation 2," Coupe Majority Opinion at 84, appears to rest on the fact that the trial court did not, as previously indicated, use the specific word "pretext" or "pretextual" in its written decision. However, the trial court specifically concluded that "there [was] sufficient attenuation between the [d]evelopment [a]greement previously mentioned and [Resolution No. 31-03]." (Emphasis added.) Logically, inasmuch as the trial court concluded that

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Condemnation 2 was "sufficient[ly] attenuat[ed]" from the development agreement, it follows that the trial court also believed that the development agreement was not the "actual purpose" of Condemnation 2.<sup>6</sup>

The majority seems troubled by the fact that Oceanside received a benefit from Condemnation 2 (i.e., the zoning change and access to its property via the bypass road). However, the fact that Oceanside received a private benefit from Condemnation 2 does not automatically dictate that the undisputed public purpose of the bypass road was a mere pretext. In this regard, the following statement by the United States Court of Appeals for the Second Circuit is instructive:

We do not read Kelo's reference to "pretext" as demanding, as the appellants would apparently have it, a full judicial inquiry into the subjective motivation of every official who supported the [taking], an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-power concerns. Beyond being conclusory, the claim that the "decision to take Plaintiffs' properties serves only one purpose" defies both logic and experience. "Legislative decisions to invoke the

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<sup>6</sup> The majority's analysis seemingly centers in part around its belief that "it is not apparent from the record 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, or whether other conditions existed such that the private character predominated." Couple Majority Opinion at 67-68 (footnote omitted). As stated above, the trial court determined that Condemnation 1 illegally delegated condemnation authority to Oceanside, and never reached the issue in Condemnation 1 whether the construction of the bypass road was a valid public purpose nor whether it was a mere pretext for the actual purpose. Indeed, as indicated by the majority, "courts generally speak of illegal delegation and public purpose as two distinct considerations. Either illegal delegation, or lack of a valid public purpose, will invalidate a taking." Id. at 64 n.34 (emphasis omitted). Moreover, during closing arguments at trial, the appellants maintained that "the delegation issue . . . [stood] apart from the public purpose." Thus, I fail to see how the issue of illegal delegation relates to whether "the asserted purpose of the taking is a 'mere pretext' for an actual purpose to bestow a private benefit," Goldstein I, 488 F. Supp. 2d at 286 (quoting Kelo, 545 U.S. at 478).

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power to condemn are by their nature political accommodations of competing concerns." Brody v. Vill. of Port Chester, 434 F.3d 121, 136 (2d Cir. 2005). And as Justice Scalia observed in words, if anything, more pertinent in this case:

[W]hile it is possible to discern the objective "purpose" of a statute (*i.e.*, the public good at which its provisions appear to be directed) . . . discerning the subjective motivation of [a legislative body] is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. . . . To look for the sole purpose of even a single legislator is probably to look for something that does not exist.

Edwards v. Aguillard, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting) (emphasis in original). Thus, while "a legislature may juggle many policy considerations in deciding whether to condemn private property," the task of a . . . court reviewing the constitutionality of such a taking should be one of "patrolling the borders" of this decision, viewed objectively, not second-guessing every detail in search of some illicit improper motivation. See Brody, 434 F.3d at 135.

We reach this conclusion preserving the possibility that a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer objective scrutiny of the justification being offered is required. In this area, "hypothetical cases . . . can be confronted if and when they arise." Kelo, 545 U.S. at 487; see also id. at 487 n.19. But we hold today that where, as here, a redevelopment plan is justified in reference to several classic public uses whose objective basis is not in doubt, we must continue to adhere to the Midkiff standard, *i.e.*, that the [taking]:

may not be successful in achieving its intended goals. But "whether in fact the [taking] will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] rationally could have believed that the [taking] would promote its objective."

Midkiff, 467 U.S. at 242.

Goldstein II, 516 F.3d at 63-64 (some brackets in original and some added) (some citations omitted).

Like the court in Goldstein II, I would hold that inasmuch as the bypass road in this case is a classic public use

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(recognized in the Kona Regional Plan) "whose objective basis is not in doubt," there was no need for a "full judicial inquiry into the subjective motivation of every official who supported the [taking]," id. at 63, which inquiry would be "fraught with conceptual and practical difficulties." Id. The unchallenged FOFs indicate that the County initiated Condemnation 2 to build a bypass road and that the bypass road served a public purpose. The County may well have had other motivations; however, such motivations, if any, fall outside the scope of a judicial public use inquiry inasmuch as "the power of eminent domain is merely the means to the end . . . . Once the object[, i.e., the public purpose,] is within the authority of [the government], the means by which it will be attained is also for [the government] to determine." Midkiff, 467 U.S. at 240 (ellipsis in original) (citation omitted).

In sum, the record reflects that the appellants, over the course of the month-long trial, had ample opportunity to prove that the County's "actual motivation" in condemning the subject property was to provide a private benefit to Oceanside. As reflected in the trial court's FOFs and COLs, they did not do so. Thus, the appellants have failed to meet their burden of showing that Condemnation 2 was "clearly and palpably of a private character," Ajimine, 39 Haw. at 550, and that "the legislative facts on which [Resolution No. 31-03] is . . . based could not reasonably be conceived to be true by the [County]."



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HFDC, 79 Hawai'i at 86, 898 P.2d at 598 (original emphasis omitted). The majority's remand of this case to the trial court improperly provides the appellants with a second bite at the apple to make "a clear showing [that the taking was] intended to favor [Oceanside]." Kelo, 545 U.S. at 491 (Kennedy, J., concurring). Consequently, I would hold that the trial court, having amply considered the appellants' "pretext" defense, correctly determined that Condemnation 2 served a valid public purpose.

**2. Rationally Furthers the Public Purpose**

Having determined that Condemnation 2 constituted a valid public purpose, I turn next to the issue whether Condemnation 2 rationally furthered such purpose. As stated in Resolution No. 31-03, the public purpose of Condemnation 2 was to build a bypass road. The County also determined that the land sought to be condemned was needed for the construction of such road. Inasmuch as this court will not "second-guess the [government]'s determinations as to what lands its needs to acquire in order to effectuate the project," Kelo, 545 U.S. at 488, I would hold that Condemnation 2 rationally furthered the public purpose of building a bypass road.


**II. CONCLUSION**

Based on the foregoing, I would conclude that the trial court correctly determined that Condemnation 2 was for a valid public purpose and rationally furthered such purpose.

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Consequently, I would affirm the trial court's September 27, 2007 first amended final judgment on the issue of the public purpose of Condemnation 2.

  
*Steven H. Levinson*

