No. 29887

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

COUNTY OF HAWAI'I, 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, Judge

PLAINTIFF-APPELLEE COUNTY OF HAWAI'I'S ANSWERING BRIEF

STATEMENT OF RELATED CASES

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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

COUNTY OF HAWAI'I, 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, Judge

PLAINTIFF-APPELLEE COUNTY OF HAWAI'I'S ANSWERING BRIEF

COMES NOW, Plaintiff-Appellee County of Hawai'i ("County"), by and through its undersigned counsel, hereby submits its Answering Brief[1] as follows:

I. STATEMENT OF THE CASE

A. Introduction.

This case involved the condemnation of land owned by several parties, including Defendant-Appellant C & J Coupe Family Limited Partnership ("Coupes") for the purpose of constructing a bypass highway makai of the Māmalahoa Highway. The condemned property is a

[1] Furthermore, the County incorporates and adopts as part of its Answering Brief the Statement of the Case, Standard of Review and Arguments in Third-Party Defendant-Appellee 1250 Oceanside Partners' aka Hōkūli'a ("Oceanside") Answering Brief.

portion of the property that runs entirely from the makai side of the Māmalahoa Highway down to the ocean. (Record on Appeal ("R.O.A."), Trial Exh. D–107 (May 2000, Site Map (Māmalahoa Highway Bypass Road)).[2])

This is the second appeal by Coupes concerning the condemnation of land for the completion of the Māmalahoa Bypass.

In the first appeal, this Court remanded the following two issues for the trial court to consider: (1) whether the County Council's asserted public purpose in adopting Resolution 31-03 (Condemnation 2) was pre-textual; and (2) a determination of the amount of statutory damages under HRS § 101-27 payable to the Coupes in defending against the condemnation in Civil No. 00-1-0181K (Condemnation 1). *County of Hawai'i v. C&J Coupe Family Ltd. Partnership*, 119 Hawai'i 352, 390, 198 P.3d 615, 653 (2008).

Upon review of the issues on remand, the trial court determined that the public purpose was not pre-textual. May 14, 2009, Supplemental Findings of Fact and Conclusions of Law and Order to First Amended Findings of Fact, Conclusions of Law, and Order filed September 27, 2007 as to Condemnation 2 filed in Civil No. 05-1-015K ("Condemnation 2 Supp.FOF or COL," COL ¶¶ 13 and 16 (R.O.A., 05-1-015K, Volume 34, Document 1110, hereinafter referenced as "V.34/1110"). Also, the trial court disallowed certain claims for damages relating to prejudgment interest, and attorneys' fees for the preparation and litigation of Coupes' Motion for Statutory Damages Not Previously Claimed pursuant to HRS § 101-27. May 14, 2009, Supplemental Findings of Fact and Conclusions of Law and Order to First Amended Findings of Fact, Conclusions of Law, and Order filed September 27, 2007 Regarding Motion of [Coupe]'s for Statutory Damages Pursuant to [HRS] § 101-27, filed October 11, 2007 ("Condemnation 1

[2] The non-jury trial commenced on July 9, 2007. The trial judge assigned separate letters to each party for exhibits: J was Joint Exhibits, R was for Coupes, D was for Oceanside, and P was for the County. Hereinafter, any reference to these exhibits will be as Exh. J, R, D or P.

Supp.FOF or COL"), COL ¶33 (R.O.A., 00-1-0181K, V.47/059); and May 14, 2009, Order Granting [Coupe]'s Motion for Statutory Damages Not Previously Claimed Pursuant to [HRS] § 101-27 ("Condemnation 1 Order") (R.O.A., 00-1-0181K, V.47/0592).

B. History of the Case.

The trial court correctly found that a highway to bypass the Māmalahoa Highway will serve the public interest by alleviating unacceptable and unsafe traffic conditions. This finding is supported by several studies, and no credible evidence to the contrary was offered by Coupes.[3] Condemnation 2 Supp. FOF ¶¶2-9. (R.O.A.,05-1-015K, V.34/1110); 1stAmd.FOF ¶¶6-9 (R.O.A., 00-1-181K, Vol. 41/00507, and 05-1-015K, V.27/01031).[4]

Oceanside is the developer of the project known as "Hōkūli'a," sited on a 1550-acre parcel of land extending from the ocean to almost the Māmalahoa Highway. Hōkūli'a's site straddles the boundaries of North and South Kona, County of Hawai'i. Exh. J-45 (Development

[3] Charles Coupe also had knowledge of the need for the Māmalahoa Bypass. Exh. D-3 (Sept. 1980, Environmental Impact Assessment, Residential, Onouli and Keōpuka, Onouli Residential Subdivision, prepared for Hubert F. Richards, where Mr. Charles Coupe assisting father-in-law (ownership interest page 1); page 4, SOT DOT presently studying a 1000 ft wide highway realignment corridor that passes through the project site (Map 14 Regional Circulation), Map 18 Alternative Subdivision Plan shows proposed Hawai'i Belt Road (150 ft ROW, at approx. 1150 elevation).

[4] *See Hawai'i Belt Road Holualoa to Papa Preliminary Engineering Report (June 1979) at III-3,* Exh. D-2 (State of Hawai'i Department of Transportation concluded that a highway to bypass the Māmalahoa Highway would be beneficial because the Māmalahoa Highway did not conform to the desired level of service criteria due to the inadequate physical elements of the existing highway, high accident rates, anticipated higher traffic volume and congestion, and the need for a route continuously around the island); *Kona Regional Plan (1982),* Exh. P-6 ("traffic counts [on Māmalahoa Highway] show the traffic to be equal to or exceeding the roadway design capacity which is an undesirable traffic condition. . . . [resulting in] heavy burden on the roadway network, increasing both travel time and inconvenience," and a community survey conducted in connection with the report indicated that the deteriorating traffic condition was viewed as a major problem by a third of the sample group.); *1989 Hawaii County Council General Plan (Ordinance 89-142)* (adopted the 1979 State bypass highway and identified as desirable the construction of a roadway from Keauhou to Nāpō'opo'o.) , Exh. J-245; *Parson Brinckerhoff Quade and Douglas, Inc., Traffic Impact Study (1995), p.10;* Exh. D-138 (the bypass "will result in a beneficial reduction of traffic volumes on Māmalahoa Highway."); *Hawai'i Long Range Land Transportation Plan Final Report (May 1998) pp. 24-32;* Exh. J-380 (recognized the need, based on traffic safety considerations, for the Hōkūli'a bypass); *Māmalahoa Bypass Road Final EIS (1999);* Exh. J-135 ("The fundamental public enhancement provided by the proposed project [Māmalahoa bypass] will be its contribution to helping relieve the congested regional transportation system." ; *2005 Hawai'i County Council General Plan (Ordinance 05-25)* adopted the Māmalahoa bypass, Exh. P-7

Agreement, (Exh. A-project map)). The Coupes' property is located contiguous south to Hōkūli'a. Exh. D-107 (5/00, Site Map (Māmalahoa Highway Bypass Road)).

The Māmalahoa Bypass is makai of the existing Kuakini and Māmalahoa Highway. Exh. D-71 (June 1997 M & E Pacific Traffic Analysis for an Environmental Impact Statement for the New Highway, North and South Kona, Hawai`i). It is proposed to be five miles when completed. Exh. D-71 (June 1997 M & E Pacific Traffic Analysis for an Environmental Impact Statement for the New Highway, North and South Kona, Hawai`i). At its northern terminus, the highway would be from Ali'i Highway in Keauhou, North Kona; and its southern terminus would be at the Māmalahoa/Nāpō`opo`o Road intersection. Exh. J-45 (Development Agreement, Exh. H) and D-71 (June 1997 M & E Pacific Traffic Analysis for an Environmental Impact Statement for the New Highway, North and South Kona, Hawai`i). The Māmalahoa Bypass will be initially built as a two-lane highway but will have sufficient right-of-way to expand to four lanes in the future. Exh. D-71 (June 1997 M & E Pacific Traffic Analysis for an Environmental Impact Statement for the New Highway, North and South Kona, Hawai`i). It will be built to State Highway Design Standards. Test. of Nancy Burns (Trial Transcript ("TT") 7/10/07 a.m., at pp. 60-61, 71-72 and 84-85); Exh. J-45 (Development Agreement, ¶13.a. and Exhibit M). The alignment of the Māmalahoa Bypass, with a northern terminus at Ali'i Highway rather than at Kuakini Highway, was preferred and selected by the County is consistent with the General Plans that have been adopted by the County. Test. of Nancy Burns (TT 7/10/97 a.m., pp. 10-19, and TT 7/16/07 a.m., pp. 36-37), William Moore (TT 7/12/07 a.m., p. 63) and Donna Kiyosaki (TT 7/17/07 a.m., p. 9) (Exh. J-251 (August 25, 1997 letter from Donna Kiyosaki to Robert Stuit regarding 11 % maximum grade acceptable for Nāpō'opo'o terminus); J-45 (Development Agreement, Exh. H)); Deposition of Stephen K. Yamashiro, pp. 52-53; Exh. P-3 (1971 Facilities

Maps, Hawai'i County General Plan, Exhibit "D"), J-245 (November 14, 1989 General Plan Facilities Map Ordinance 89-142), and P-7 (Hawai'i General Plan 2005). There is no evidence of any secret deals, back room dealings or favoritism.

The Māmalahoa Bypass is a major arterial between Kailua and Kealakekua. Test. of William Moore (TT 7/10/07 a.m., pp. 72-73); Exh. P-9 (Māmalahoa Bypass Highway Regional Roadway Network).

Pursuant to the Development Agreement, Oceanside "shall post a bond in favor of the County to assure that the infrastructure improvements for the Bypass Highway . . . will be constructed." Exh. J-45 (Development Agreement, ¶13.b.(2)). Over 2 miles, starting from the Ali'i Highway northern terminus, of the Māmalahoa Bypass has been built, and Oceanside has delivered a dedication deed to the County pursuant to ¶14 of the Development Agreement. Test. of Gerald Takase (TT 7/16/07, p. 62); Exh. J-45 (Development Agreement).

1. <u>Prior Proceedings to First Appeal</u>.

In January 1996, the County Council approved Ordinances 96-7 and 96-8 that primarily concerned change of zoning for the Hōkūli'a project. Both ordinances provided, as conditions of approval, that Oceanside was to construct a bypass highway between Keauhou and Captain Cook ("Bypass"). The Bypass would need to cross lands owned by many landowners. As a result, the ordinances anticipated that the County might need to use its eminent domain power in connection with the construction of the Bypass. Exh. J-45 (Exhs. B and C).

On April 20, 1998, the County Council passed Resolution 244-98 (Condemnation 1) that adopted a Development Agreement between the County and Oceanside that addressed compliance with the conditions of approval in Ordinances 96-7 and 96-8. Exh. J-45; J-314. ¶11(a) of the Development Agreement addressed potential use of the County's power of

condemnation.[5] Exh. J-45. As interpreted by the trial court, the Development Agreement provided that, at Oceanside's request, the County was to condemn rights-of-way which Oceanside was unable to acquire through private negotiations. 1st Amd.FOF ¶30(R.O.A., 00-1-181K, V.41/00507, and 05-1-015K, V.27/01031)

Starting in 1997, Oceanside and the County engaged in negotiations with the Coupes to obtain right-of-way needed to construct the Bypass through their property. Exh. J-142. However, despite lengthy negotiations, Oceanside and the County were unable reach an agreement with the Coupes and they eventually reached an impasse in 2000. Exhs. J-294; J-437; J-142; J-143; J-313; Test. Takase (7/16/07 p.m., p. 21); Frye Depo. p. 318 (R.O.A., 00-1-181K, V.39/0011, and 05-1-015K, V.26/0011).

On May 23, 2000, Oceanside asked the County to commence condemnation proceedings relating to the Coupes' lands. 1stAmd.FOF ¶61 (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031).

On July 26, 2000, the County Council adopted Resolution No. 266-00 that authorized the County to initiate eminent domain proceedings, pursuant to the Development Agreement, for the condemnation of the Coupes' property to be used for the Bypass, and whereat Charles Coupe did not object to public purpose.[6] Exh. J-231.

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[5] The trial court did not find that the Development Agreement attempted to relieve Oceanside of an obligation to acquire property for the Bypass. (R.O.A., 00-1-181K, V.41/00507 and 05-1-15K, V.27/01031.) As noted earlier, Ordinances 96-7 and 96-8 established conditions of approval, as opposed to obligations. Furthermore, the two ordinances anticipated that the County might need to use its eminent domain power in connection with the construction of the Bypass.

[6] Exh. J-244 (7/26/00 Council Transcripts concerning the bypass highway between the vicinity of Keauhou and Captain Cook, p. 131 (Curtis Tyler, p.131, discussed Exh. J-12, Charles Coupe's written transmittal facsimile to Councilmember Pisicchio, where he was not objecting to public use and admitting not conceptually opposed to acquisition, tacitly admitting to public purpose and that's why council focused discussion on trying to settle with Coupe instead of whether there was a public purpose for the bypass)).

On October 9, 2000, the County filed a condemnation complaint against the Coupes in Civil No. 00-1-181K. Exh. J-232. (R.O.A., Civ. 00-1-181K, V.1/00001) Resolution No. 266-00 and the October 2000 Complaint attached a survey that identified the specific parcel to be obtained comprising an area of 2.9 acres. *Id.* The trial court determined in 2007 that the County Council passed Resolution No. 266-00 in order to comply with the Development Agreement, pursuant to which Oceanside gave the County a directive to commence such condemnation proceedings. The trial court determined that compliance by the County with an existing contractual commitment to condemn was not a proper public purpose for a condemnation, and thus dismissed the condemnation action commenced pursuant to Resolution 266-00. 1stAmd.FOF ¶62, 75-84 (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031); 1stAmd.Judg. ¶I.A (R.O.A., 00-1-181K, V.41/00508 and 05-1-015K, V.27/01032).[7]

On October 10, 2000, the trial court issued an Order Putting Plaintiff in Possession in Civil No. 00-1-181K. 1stAmd.FOF ¶65 (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031). (R.O.A., 00-1-181K, V.1/00004.)

[7] Although the County did not appeal this finding, the County and Oceanside vigorously argued at trial that the County Council made the final decision in Resolution 266-00 on whether and if so what property to condemn in part because the definition of "County" in the Development Agreement (§2h) excluded the County Council and thus promises made by the County did not affect the Council's ultimate power of condemnation consistent with the holding in *Richardson v. City and County of Honolulu*, 76 Hawai'i 46, 58, 868 P.2d 1193, 1205 (1994). In addition, *Township of West Orange v. 769 Associates, L.L.C.*, 172 N.J. 564, 575-76, 800 A.2d 86, 92-93 (2002) correctly held that a county agreement with a developer to condemn does not constitute an improper delegation of condemnation powers where government made the initial decision to condemn for public use. *See* Oceanside Trial Memorandum at pp. 5-12. (R.O.A., 00-1-181K, V.39/00480 and 05-1-15K, V.27/01003.)

On February 21, 2002, the County issued final subdivision approval for the Bypass that identified the specific Coupe parcel needed for the Bypass as comprising an area of 3.348 Acres. Exh. D-119; Exh. R-420.

On December 11, 2002, the Court entered an order in Civil No. 00-1-181K staying the order of possession until final judgment. Exh. D-126. (R.O.A., 00-1-181K, V.5/00079.) The trial court stayed the possession order on the grounds that there was a genuine issue of material fact as to public purpose related to the validity of the Development Agreement.[8] *Id.*

On February 5, 2003, the County Council adopted Resolution No. 31-03, authorizing the County to initiate a second eminent domain proceeding for condemnation (Condemnation 2) of the Coupes' property for the Bypass. Exh. J-241 (Resolution No. 31-03). Unlike Resolution 266-00 (Condemnation 1), this resolution did not reference the Development Agreement and instead the County Council determined that the Bypass will provide "a regional benefit for the public purpose and use which will benefit the County." *Id.* Also, the trial court found that by 2003, the "County realized that the Bypass required more land than Civil No. 00-1-181K and County Resolution 266-00 was attempting to condemn." 1stAmd.FOF ¶86. (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031.) Therefore, Resolution 31-03 sought a 3.348-acre parcel as compared to the 2.9-acre parcel sought in Resolution 266-00.

On January 28, 2005, the County filed its second condemnation action against the Coupes in Civil No. 05-1-015K. Exh. J-242. Resolution 31-03 and the January 2005 Complaint both

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[8] *See* 1stAmd.FOF ¶¶65-72 (R.O.A., 00-1-181K, V.41/00507 and 05-1-15K, V.27/01031); *See also* 7/11/02 transcript (R.O.A., 00-1-181K, V.6/T0002); 9/5/02 Order Amending Order Granting County of Hawai'i's Motion for Partial Summary Judgment as to Defendants/Counterclaimants' Sixth and Seventh Affirmative Defenses and First Claim for Relief Asserted in the Answer and Counterclaim Filed January 24, 2001 (R.O.A., 00-1-181K, V.3/00056); 12/10/02 transcript (R.O.A., 00-1-181K, V.6/T0003); and 12/11/02 Order Granting Defendants'/Counterclaimants' Motion to Vacate Order Putting Plaintiff in Possession, or in the Alternative for a Stay on the Order Putting Plaintiff in Possession Until Final Judgment Filed November 27, 2002 (R.O.A., 00-1-181K, V.5/00079).

attached a survey that identified the specific parcel to be obtained comprising an area of 3.348 acres. 1stAmd.FOF ¶85-¶102.[9] (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031.)

On February 7, 2005, before they were served with the Complaint in Civil No. 05-1-015K, the Coupes filed a Motion to Dismiss or in the Alternative to Consolidate. (R.O.A., 05-1-015K, V.2/00702.)

On March 31, 2005, the Court entered its order consolidating Civil No. 00-1-181K and Civil No. 05-1-015K. 1stAmd.FOF ¶88. (R.O.A., 05-1-015K, V.1/00702.)

The pleadings pending at the time of trial were:

(a) County's Complaint in Civil No. 00-1-181K filed on October 9, 2000, and First Amended Complaint in Civil No. 05-1-015K filed on January 11, 2007;

(b) Coupes' Second Amended Counterclaim and First Amended Third-Party Complaint in Civil No. 00-1-181K filed on December 7, 2005, and Counterclaim and Cross-Claim in Civil No. 05-1-015K filed on February 12, 2007, both of which included claims for abatement; and

(c) County, Coupes and Oceanside's answers to these pleadings.

The consolidated non-jury trial of Civil No. 00-1-181K and Civil No. 05-1-015K was held on July 9-12, 16-20, 23, 25-27, 30-31 and August 2, 2007 before the Honorable Ronald Ibarra.

At the trial, the expert appraisal witnesses presented opinions as to just compensation and severance damages.

[9] Deputy Corporation Counsel Gerald Takase testified that the three-year delay in filing this complaint was because the County wanted to resolve the *Kelly* case, Civil No. 00-1-0192K, before proceeding further in what became Civil No. 05-1-015K. Test. of Takase (7/16/07 p.m., p.51-52).

The County's expert appraisal witness, Robert G. Bloom, Jr., ("Bloom") testified that the value of the property taken in this eminent domain proceeding as being $140,500 as of October 9, 2000, and as being $345,000, as of January 28, 2005. Test. of Bloom (7/19/07 p.m., p. 58 ($140,500); Exh. P-11 (Appraisal Report by Bloom, as of October 9, 200); P-12 (Appraisal Report by Bloom, as of January 28, 2005). Bloom testified that Coupe's expert appraiser's opinion as to the Highest and Best Use for a one acre development (recognizing floodway and coastal zone management) is too speculative.[10] Test. of Bloom (7/19/07 p.m., pp. 5, 10, and 68.) Bloom also testified that there were no severance damages because of topographical similarities, no current plans for development, has current access to power utilities and roadway, and has an opportunity to have access from Bypass.[11] Test. of Bloom (7/19/07 p.m., pp. 15, and 78-79).

However, Coupe's expert appraisal witness Jan Medusky ("Medusky") calculated the value of the property to be taken as being $56,000 (Exh. R-413, his report as for 2000 - because Medusky's opinion of severance value is wrong on his assumptions and too speculative; actually

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[10] Medusky's, Coupe's Appraiser, 1 acre development is too speculative because of arduous task ahead for the Coupe to develop. Exh. R-453, **Uniform Appraisal Standards for Federal Land Acquisitions (2000), Conjectural and Speculative Evidence, page 45, ¶4,** "Elements affecting value that depend upon events or combinations of occurrence which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration." In addition, Medusky failed to do any meaningful investigation – not contact utility companies (HELCO, Water Department), not contact anyone in planning, and not contact LUC. Test. of Medusky (7/20/07 p.m., pp. 120-123. Exh. R-453, **Appraisal Standards for Federal Land Acquisitions (2000), page 83, ¶4**, "If an appraiser concludes a highest and best use that will require a rezoning of the property under appraisal, the appraisal report shall include a description of the investigation undertaken by the appraiser to determine that a probability of rezoning exists, the appraiser's analysis of the information gathered, and the factual support for the appraiser's conclusion."

[11] Medusky assumed future obligation to pay for road improvement without independent investigation (i.e., assumption based on statement from Kenneth Kupchak (Test. of Medusky (7/20/07 p.m., p. 126)) violative of **Scope of Work Rule, Scope of Work Acceptability, Uniform Standards of Professional Appraisal Practice and Advisory Opinions (July 1, 2006), page 13, last sentence,** Exh. R-451 that states "An appraiser must not allow the intended use of an assignment or a client's objective to cause the assignment results to be biased." Moreover, he assumed severance damages without being fully supported by the facts of this situation. Exh.R-453, **Uniform Appraisal Standards for Federal Land Acquisitions (2000), page 49, ¶2** ("Severance damage should never be assumed merely because there has been a partial acquisition, but must always be fully supported by the facts of each situation"). And, lastly, he ignored special benefits to Coupe's property, i.e., road and utility access to his properties, by merely stating that the Onouli's property will get the same kind of access as before the condemnation. Test. of Medusky (7/20/07 p.m., pp. 124-125).

even this 2000 value by Medusky may be too high. Exh. J-336, Medusky's Phase I Appraisal Work that indicates his use of a comparable Trans. No. Trans. No. 1, 01/01, and eventual Market Value calculation of $51,368 (i.e. 3.348 acres x $15,343 per acre (See Bates stamped A00147 and A00148)). Both at trial and in its subsequent pleadings, the County argued that if the Court determined that the testimony by Bloom of the value of the property to be taken is too high, the Court could utilize the testimony by Medusky of the value of the property to be taken.

On July 27, 2007, during oral argument on a Rule 50 motion for judgment, counsel for the Coupes argued that there are "substantial differences" between Civil No. 00-1-181K and Civil No. 05-1-015K. (Page 50 of the Supplemental R.O.A. ("SROA"), 00-1-181K, V.43/T0032, and 05-1-015K, V.30/T0032.)

On August 2, 2007, during the closing argument, counsel for the Coupes again took the position that the 2.9-acre parcel prayed for in Civil No. 00-1-181K is substantially different (a twenty percent difference) from 3.348-acre parcel prayed for in Civil No. 05-1-015K. (Pages 78 and 79 of the S.R.O.A., 00-1-181K, V43/T0015, and 05-1-015K, V.30/T0015.) The Coupes have never retracted these statements.

On September 27, 2007, the trial court entered its First Amended Findings of Fact, Conclusions of Law and Order wherein it:

(1) denied the County's request for condemnation in Civil No. 00-1-181K on the grounds that "County Resolution 266-00 illegally delegated its power of condemnation, through the Development Agreement, to a private party; 1250 Oceanside Partners, and therefore did not have proper public purpose" (page 46); and

(2) granted the County's request for condemnation in Civil No. 05-1-015K on the grounds that "there was a valid public purpose in Civil No. 05-1-15K" (page 49) because

"County Resolution 31-03 did not refer to the Development Agreement" and "stands independently from the Development Agreement" (page 43-44) and "the final determination of the Māmalahoa Bypass Highway remained with the County of Hawai'i Department of Public Works (page 25)."[12] (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031.)

On September 27, 2007, the trial court also entered its First Amended Final Judgment ("First Amended Final Judgment"). (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031)

On October 11, 2007, the fourteenth day after the First Amended Final Judgment was entered, the Coupes filed their Motion for Statutory Damages Pursuant to HRS § 101-27 ("Motion for Statutory Damages") purportedly for attorneys' fees and costs expended on Civil No. 00-1-181K.[13] (R.O.A., 00-1-181K, V.41/00510, and 05-1-015K, V.28/01034.) On page 12 of the Motion for Statutory Damages, the Coupes asserted that Prejudgment interest (10% per annum fro date of each bill on the fees) are "damages" under HRS § 101-27. (R.O.A., 00-1-181K, V.41/00510, and 05-1-015K, V.28/01034.)

On October 26, 2007, the Coupes filed their Notice of Appeal in Civil No. 05-1-015K. (R.O.A., 00-1-181K, V.42/00515, and 05-1-015K, V.29/01039.)

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[12] The trial court never found that the Bypass was for Oceanside's private benefit. The trial court found that regardless of the significant public benefit to be derived from the Bypass, Resolution 266-00 was not supported by public purpose solely because the decision to condemn was improperly delegated to Oceanside in the Development Agreement. (R.O.A., 00-1-181K, V.41/00507, COL ¶¶ 78-80, and 05-1-015K, V.27/01031, COL ¶¶ 78-80.) Thus, once Resolution 31-03 directed condemnation independent from the Development Agreement, prior to the remand, the trial court determined there was proper public purpose. (R.O.A., 00-1-181K, V.41/00507, COL ¶¶ 93, 99, 101, 102, and 05-1-015K, V.27/01031, COL ¶¶ 93, 99, 101, 102.)

[13] The Motion for Statutory Damages sought over $2 million in fees and costs purportedly for Civil No. 00-1-181K but the motion and its supporting documents did not provide a means to determine whether the requested amounts were expended in Civil No. 05-1-015K or were expended in Civil No. 00-1-181K on issues other the improper delegation claim. Any award would be limited to reasonable attorneys' and costs paid by the Coupes to establish improper delegation of condemnation power in Civil No. 00-1-181K, and not for attorneys' fees and costs expended on other issues in Civil No. 00-1-181K and not for amounts expended in Civil No. 05-1-015K.

On October 31, 2007, the County filed its Memorandum in Opposition to the Motion for Statutory Damages wherein it argued that HRS § 101-27 does not apply because the property was finally taken for public use where the Coupes were awarded just compensation for the property. (R.O.A., 00-1-181K, V.42/00519, and 05-1-015K, V.29/01043.) The opposition memorandum argued that "[a]ward is limited to reasonable attorneys' [fees] and costs paid by the Coupes to establish the defense of improper delegation of condemnation power claim in the first case, that is Civil No. 00-1-181K." (R.O.A., 00-1-181K, V.42/00519, and 05-1-015K, V.29/01043.)

On December 3, 2007, the Court entered the Order Putting Plaintiff/Counterclaim Defendant County of Hawai'i In Possession Pending Appeal And Accounting For Amounts Deposited In Court ("Possession Order") pursuant to HRS § 101-32 wherein the amounts awarded in the First Amended Final Judgment were deposited into Court. The amounts deposited included just compensation, blight of summons damages and interest in Civil No. 05-1-015K and blight of summons damages and interest in Civil No. 00-1-181K. (R.O.A., 00-1-181K, V.41/00510, and 05-1-015K, V.28/01034.)

On December 6, 2007, the Coupes filed a Supplemental Memorandum in support of the Motion for Statutory Damages that primarily addressed their opposition to the Possession Order. (R.O.A., 00-1-181K, V.42/00527, and 05-1-015K, V.29/01049.)

On December 12, 2007, the Court requested supplemental briefs on when evidence of damages sought under HRS § 101-27 needed to be submitted to the Court. (S.R.O.A., 00-1-181K, V.43/T0033, and 05-1-015K, V.30/T0033.)

On December 14, 2007, the County filed its Supplemental Memorandum in opposition to the Motion for Statutory Damages wherein the County argued that the Coupes failed to take

steps to have that claim timely tried under HRS § 101-27. (R.O.A., 00-1-181K, V.42/00530, and 05-1-015K, V.29/01051.)

On December 19, 2007, the Coupes filed their Supplemental Reply Memorandum in support of their Motion for Statutory Damages wherein they argued that their Motion for Statutory Damages was timely filed because the Coupes' right to damages under HRS § 101-27 did not accrue until 30-days after final judgment where there is no appeal. (R.O.A., 00-1-181K, V.42/00531, and 05-1-015K, V.29/01052.)

On December 31, 2007, the Coupes filed a Motion to Vacate, or in the alternative to Stay Order Putting Plaintiffs in Possession ("Motion to Vacate Possession Order") wherein they argued that the Possession Order did not conform with HRS § 101-32 because it did not require a deposit for further damages that may be sustained if the property is not finally taken for public use. They also argued that they were entitled to a stay of the Possession Order on the grounds that the appellate courts may find that Civil No. 05-1-015K was abated by Civil No. 00-1-181K. (R.O.A., 00-1-181K, V.42/00532, and 05-1-015K, V.29/01053.)

On January 18, 2008, the County filed its memorandum in opposition to the Motion to Vacate Possession Order where it argued: (1) HRS § 101-32 does not require deposits for further damages (beyond amounts awarded for just compensation) but rather is within the discretion of the trial court; and (2) the trial court did not abuse its discretion because (a) even if the Court's condemnation order in Civil No. 05-1-015K is reversed on appeal, the County would not likely be required to physically restore the property because the County would simply file another condemnation action (on the grounds that the public necessity for the road, the best location and the physical needs for construction, maintenance and operation compel the County to acquire the property), and (b) the Coupes did not present any evidence that the County would not be in a

financial position to restore the property if ordered to do so. (R.O.A., 00-1-181K, V.42/00535, and 05-1-015K, V.29/01056.) The Coupes did not file a reply memorandum regarding the Motion to Vacate Possession Order.

On February 8, 2008, the Coupes filed their Notice of Appeal in Civil No. 00-1-181K of the denial of the Motion for Statutory Damages on the grounds that the trial court is deemed to have denied the motion by not ruling on it within 90 days pursuant to Haw. R. App. P 4(a)(3).[14] (S.R.O.A., 00-1-181K, V.43/00542, and 05-1-015K, V.30/01063.)

On March 13, 2008, the trial court entered its order denying the Motion to Vacate Possession Order on the grounds that: (1) the motion was untimely under HRCP Rule 59; (2) even if the motion was timely under HRCP Rule 62, no additional amount is needed to cover any further damage in the event that this issue is reversed on appeal because the County can file another condemnation action; and (3) there is no dispute that the County would have the financial ability to pay any additional damages. (S.R.O.A., 00-1-181K, V.43/00548, and 05-1-015K, V.30/01069.)

On March 31, 2008, the Coupes filed, with the Intermediate Court of Appeals, a Motion to Vacate Order Putting Plaintiff/Counterclaim Defendant County of Hawai'i in Possession Pending Appeal and Accounting for Amounts Deposited in Court filed December 3, 2007 ("Appellate Motion to Vacate Possession Order"). The Coupes primarily argued that the trial court committed error by dismissing the abatement claim.

On April 7, 2008, the County filed their opposition memorandum to the Appellate Motion to Vacate Possession Order wherein the County argued that the motion does not address

[14] On April 9, 2008, Judge Ibarra wrote a letter to all counsel that stated: " The Court writes to inform counsel of the reason for its 'no action' regarding the above motion since the file date of the notice of appeal (February 8, 2008). This is not to inform counsel of its agreement or disagreement of the merits for the appeal, but the mere fact that when an appeal is filed, a trial court may not act until the appellate court acts on the appeal."

the basis of trial court's decision dismissing the abatement claims. The County also argued that consolidation of the lawsuits defeats any abatement claim.

On April 21, 2008, the Intermediate Court of Appeals denied the Appellate Motion to Vacate Possession Order without prejudice to the parties further addressing these issues in their respective briefs.

2. Current Appeal.

Coupes have filed Notices of Appeal on several matters, including whether the asserted public interest was pre-textual. However, Coupe's current appeal on the issue of just compensation is untimely and should barred because the trial on this issue was completed, not appealed and it was not one of the issues remanded back to the trial court by this Court's December 24, 2008, decision in *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*, 119 Hawai'i 352, 198 P.3d 615.

a. Prior Court Decision.

In its December 24, 2008, decision, this Court remanded only the following two issues for the trial court to consider: (1) whether the County Council's asserted public purpose in adopting Resolution 31-03 was pre-textual; and (2) a determination of the amount of statutory damages under HRS § 101-27 payable to the Coupes in defending against the condemnation in Civil No. 00-1-0181K. *Id.*, 119 Hawai'i at 390, 198 P.3d at 653. This Court did not remand to the trial court any issues relating to just compensation.

b. Trial Court's Decision and Second Appeal.

1) Pretext Ruling.

On May 14, 2009, the trial court filed its Supplemental Findings of Fact and Conclusions of Law and Order to First Amended Findings of Fact, Conclusions of Law and Order filed

September 27, 2007 as to Condemnation 2 filed in Civil No. 05-1-015K, where the trial court determined that the condemnation was valid and finding no pretext. Condemnation 2 Supp.COL ¶¶13-16 (R.O.A., 05-1-015K, V.34/1110). In footnote 2 of the Supp.COL, the trial court states:

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

(R.O.A., 05-1-015K, V.34/1110.)

The trial court found, for Civ. No. 05-1-015K, that there was a long-standing, clearly demonstrated public need and purpose for the Bypass by concluding that after duly noticed public hearings and deliberations, the County Council rejected the Coupes' arguments of no public purpose[-] instead finding a public purpose (Condemnation 2 Supp.FOF ¶10 (R.O.A., 05-1-015K, V.34/1110)); that traffic studies and plans found that an arterial highway in the area of the Bypass Highway would relieve unacceptable traffic congestion on the Māmalahoa Highway (Condemnation 2 Supp.FOF ¶13 (R.O.A., 05-1-015K, V.34/1110)); that no credible evidence was presented that indicated that the County Council intended that Oceanside, as opposed to the public, would predominantly benefit from Resolution No. 31-03 (Condemnation 2 Supp.FOF ¶16 (R.O.A., 05-1-015K, V.34/1110)); that the alignment of the Māmalahoa Bypass, with a

northern terminus at Ali'i Highway rather than at Kuakini Highway, was preferred and selected by the County and is consistent with the General Plans that have been adopted by the County (Condemnation 2 Supp.FOF ¶18 (R.O.A., 05-1-015K, V.34/1110)); that there was no evidence that Condemnation 2, like Condemnation 1, was driven by the County's desire to comply with its obligations under the Development Agreement, and the passage of Resolution No. 31-03 (Condemnation 2) evidences the County's desires to get the Bypass built for public purposes (Condemnation 2 Supp.FOF ¶19 (R.O.A., 05-1-015K, V.34/1110)); that Oceanside already had public access to the Māmalahoa Highway through Haleki'i Street; that the Bypass Highway, which bisects Hōkūli'a and connects with other public roads at both ends beyond the Hōkūli'a property, does provide improved access to Hōkūli'a for development of a luxury subdivision, but that does not negate the County Council's predominant purpose by enacting Resolution No. 31-03 to obtain the Bypass Highway for broader public purpose, consisting of an additional traffic corridor for those traveling through the region (as opposed to those traveling to and from Hōkūli'a) (Condemnation 2 Supp.FOF ¶20 (R.O.A., 05-1-015K, V.34/1110)); and notwithstanding the Court finding that Condemnation 1 was invalid because the County unlawfully delegated its condemnation power to Oceanside, the County's predominant purpose in entering the Development Agreement with Oceanside as referred in Condemnation 1 is the construction of the Bypass for public use (Condemnation 2 Supp.FOF ¶22 (R.O.A., 05-1-015K, V.34/1110)).

In the Supp.COL, the trial court concluded that "that the use (Bypass) was not a predominately private character. The Bypass is a much needed road for the public's benefit." Condemnation 2 Supp.COL ¶13 (R.O.A., 05-1-015K, V.34/1110). It further concluded "that the government's stated public purpose is not "irrational" with "only incidental or pretextual" public

purpose benefits." Condemnation 2 Supp.COL ¶14 (R.O.A., 05-1-015K, V.34/1110). Furthermore, the trial court concluded that "[D]espite any ostensible private benefit to Oceanside the actual purpose of Condemnation 2 was for a valid public use." Condemnation 2 Supp.COL ¶15 (R.O.A., 05-1-015K, V.34/1110).

2) Ruling on Damages.

On May 14, 2009, the trial court determined that "there is no legal nor factual basis for the $276,762.41 in prejudgment interest sought as damages under HRS § 101-27 as there is no allegations of undue delay by [the] County." Condemnation 1 Supp.COL ¶33 (R.O.A., 00-1-0181K, V.47/059.)

On May 14, 2009, the trial court also again determined that there is "no legal or factual basis for such an award [of prejudgment interest] . . . as there is no allegations of undue delay by [the] County." Condemnation 1 Order (R.O.A., 00-1-0181K, V.47/0592). In addition, the trial court excluded $75,384 sought for the preparation of billing records for the Coupes' fee petition and/or preparation of the Coupes' fee petition pursuant to *Hawai'i Ventures, LLC v. Otaka*, 116 Hawai'i 465, 173 P.3d 1122 (2007). Condemnation 1 Order (R.O.A., 00-1-0181K, V.47/0592.) In excluding those billing fees, the trial court has noted, on pages 3 and 4, that upon the County's objections, filed March 20, 2009,[15] in the amount of $5,259.75, the Coupes did not address or otherwise defend against the specific objection by the County. Condemnation 1 Order (R.O.A., 00-1-0181K, V.47/0592.)

[15]County's Opposition to [Coupe]'s Motion for Statutory Damages Not Previously Claimed Pursuant to [HRS] § 101-27 filed March 20, 2009. (R.O.A., 00-1-0181K, V.46/0578.)

3) Subsequent Proceedings.

Also on May 14, 2009, the trial court filed its Supplemental Final Judgment in Civil No. 05-1-015K, which found in favor of the County. (R.O.A., 05-1-015K, V.34/1114.) A Notice of Entry of Judgment/Order was filed on May 15, 2009. (R.O.A., 05-1-015K, V.34/1115.)

On June 12, 2009, Coupe filed its notice of appeal wherein it raised for the first time that the anticipated issues on appeal will include just compensation and inverse condemnation. (R.O.A., 05-1-015K, V.35/1128; R.O.A., 05-1-015K, V.35/1127, respectively).

On June 19, 2009, the trial court filed its Order Denying [Coupe's] Motion to Alter Judgment in Civil No. 05-1-015K, where the trial court found that the issue of just compensation "was not raised on appeal and there was no mathematical error." (R.O.A., 05-1-015K, V.35/1131.)

On July 1, 2009, Coupe filed its Notice of Appeal and Civil Appeal Docketing Statement wherein it again states that the anticipated issues on appeal will include just compensation and inverse condemnation. (R.O.A., 05-1-015K, V.35/1136 - 1137.)

On July 28, 2009, the Court entered the Order Putting County In Possession Pending Appeal And Accounting For Amounts Deposited In Court ("Possession Order") pursuant to HRS § 101-32 wherein the amounts awarded in the Supplemental Final Judgment were deposited into Court. The amounts deposited included just compensation, blight of summons damages and post judgment interest in Civil No. 05-1-015K, and damages pursuant to HRS § 101-27, blight of summons damages and post judgment interest in Civil No. 00-1-181K. (R.O.A., 00-1-181K, V.48/062, and 05-1-015K, V.35/1144.)

On August 3, 2009, Judgment was filed in favor of the County. (R.O.A., 05-1-015K, V.35/1146.) Notice of Entry of Judgment was filed on August 10, 2009. (R.O.A., 05-1-015K, V.35/1151.)

After the County deposited sufficient funds to the trial court, on August 5, 2009, the Court entered an Order to Release Funds to counsel for the Coupes in the amount of $1,754,127.29 for Civil No. 00-1-181K. (R.O.A., 00-1-0181K, V.48/0627; and 05-1-015K, V.35/1149.)

II. STANDARD OF REVIEW

A. Remand Issues – Does not Reopen Case on Other Issues.

Upon remand on specific issues from this Court, the trial court was not given authority to adjudicate all issues that were raised or could have been raised in the original pleadings in this case. "When a reviewing court remands a matter with specific instructions, the trial court is powerless to undertake any proceedings beyond those specified therein." *Standard Management, Inc. v. Kekona*, 99 Hawai'i 125, 137, 53 P.3d 264, 276 (2001) (citation omitted). In addition, "[r]emand for a specific act does not reopen the entire case; the lower tribunal only has the authority to carry out the appellate court's mandate." *Id.* (citation omitted).

B. Statutory Damages – Abuse of Discretion.

The applicable standard of review for the reasonableness of an allowance or award of attorney's fees and costs where authorized is abuse of discretion. *Booker v. Midpac Lumber Co., Ltd.*, 65 Haw. 166, 171, 649 P.2d 376, 379-380 (1982). "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." *Ariyoshi v. HPERB,* 5 Haw.App. 533, 542, 704 P.2d 917, 925 (1985), citing *Berry v. Chaplin,* 74 Cal.App.2d 669, 169 P.2d 453, 456 (1946).

There is no abuse of discretion where a court denies prejudgment interest for a failure to show undue delay. *Liberty Mutual Insurance Co. v. Sentinel Insurance Co., Ltd.*, 120 Hawai'i 329, 205 P.3d 594 (2009).

C. Pretext for Public Use Claim – Clearly Erroneous.

Coupes argue that there should be a *Per Se* Pretext Rule, and that the circuit court "accepted at face value County's stated purpose in Resolution 31-03, and ignored the overwhelming evidence of County's actual purpose, and the private benefit to Oceanside," Coupes' Opening Brief, filed November 12, 2009, at 1. The County submits that these arguments turn on two issues. First, whether the Coupes have proven that the trial court in fact ignored the Coupes' pretextual allegations which should be reviewed by the clearly erroneous standard based on the findings of fact by the trial court. *Bhatka v. County of Maui*, 109 Hawai'i 198, 208, 124 P.3d 943, 953 (2005) Second, whether the record lacks substantial evidence to support the finding that there was valid public purpose in Civil No. 05-1-015K, which also should be reviewed by the clearly erroneous standard. *Leslie v. Estate of Tavares,* 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999) (quoting *State v. Kotis,* 91 Hawai'i 319, 328, 984 P.2d 78, 87 (1999): "An FOF is also clearly erroneous when the record lacks substantial evidence to support the finding. We have defined substantial evidence as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." (internal quotation marks and citations omitted.)

III. ARGUMENT

A. Trial Court Properly Found No Pretext

1. Pretext Analysis.[16]

The applicable public purpose test is "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Hawai'i Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329-2330 (1984); *Hawaii Housing Authority v. Lyman*, 68 Haw. 55, 68, 704 P.2d 888 (1985) (reaffirmed a minimum rationality standard of review to be applied in evaluating legislative findings of public use); *Kelo v. City of New London*, 545 U.S. 469, 487, 125 S.Ct. 2655, 2667 (2005) ("Alternatively, petitioners maintain that for takings of this kind we should require a 'reasonable certainty' that the expected public benefits will actually accrue. Such a rule, however, would represent an even greater departure from our precedent. '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-no less than debates over the wisdom of other kinds of socioeconomic legislation-are not to be carried out in the federal courts.'")

The inquiry under the public use clause of the Fifth Amendment of the U.S. Constitution and Article 1, §20, of the Hawai'i Constitution is whether a taking is designed to further a "legitimate government purpose." *Hawaii Housing Authority v. Castle*, 65 Haw. 465, 653 P.2d 781 (1982); *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 119 Hawai'i 352, 198 P.3d 615.

Courts will not lightly disturb the legislature's determination of public use unless it is manifestly wrong. *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 119 Hawai'i 352,

[16] The trial court sets out the Analysis in Condemnation 2 Supp.COL ¶¶ 1-12 (R.O.A., 00-1-0181K, V.47/0590, and 05-1-015K, V.34/1110).

198 P.3d 615. In order to overcome the prima facie evidence of public use, a defendant must show that such use is clearly and palpably of a private character. *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 119 Hawai'i 352, 198 P.3d 615; *State v. Anderson*, 56 Haw. 566, 545 P.2d 1175 (1976).

However, "the single fact that a project is a road does not per se make it a public road." *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 119 Hawai'i at 380, 198 P.3d at 643. A municipal government such as County cannot take property "under the mere pretext of public purpose, when its actual purpose was to bestow a private benefit." *Kelo v. City of New London*, 545 U.S. at 478; *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 119 Hawai'i 352, 198 P.3d 615.

Additionally, County's pronouncements are not conclusive, and "both *Ajime* and *Kelo* make it apparent that, although the government's stated public purpose is subject to prima facie acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual." *County of Hawai'i v. C&J Coupe Family Ltd. P'ship*, 119 Hawai'i at 381, 198 P.3d at 644.

Eminent domain cannot be used for the actual purpose of "conferring a private benefit on a particular private party." *Kelo v. City of New London*, 545 U.S. at 477 (citing *Hawai'i Housing Authority v. Midkiff*, 467 U.S. at 245). Generally, courts are bound by the legislature's public use determination unless the use is clearly and palpably of a private character. *State v. Anderson*, 56 Haw. 566, 545 P.2d 1175. However, the public use question is still one that remains judicial in nature. *Hawai'i Housing Authority v. Ajimine*, 39 Haw. 543 (Haw. Terr. 1952).

2. **No Pretextual Taking.**

In the instant case, the condemnation of property to build a public roadway is a clear public purpose comporting with both the Hawai'i and United States Constitution. *See* HRS §46-61 (Eminent Domain – county has the power to take private property for the purpose of establishing, laying out, extending and widening streets and other public highways).

The government's stated public purpose for its taking is subject to *prima facie* acceptance unless there is sufficient evidence showing that the stated public purpose is pretextual. *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*, 119 Hawai'i at 381, 198 P.3d at 644. Evidence must be offered showing that the stated public purpose is pretextual and the use is clearly and palpably of a private character. *Id.* (internal citation omitted). The legislature's determination of public use is subject to "prima facie acceptance," unless the presumption is rebutted by evidence showing the use is clearly and palpably of a private nature. *Id.* (internal citation omitted).

The Coupes in their Opening Brief, at pages 23 and 25 to 31, assert that Resolution 31-03 was an attempt to avoid liability to Oceanside and to the Coupes for 101-27 Damages. These arguments are incorrect for several reasons. First, there is no evidence that the County passed Resolution 31-03 either to avoid liability to Oceanside or to the Coupes; the County's intent has always been to construct an arterial highway in the area of the Bypass Highway. Second, it seems illogical to argue that the County attempted to avoid liability to Oceanside, when only Oceanside would have benefited should the County stop condemnation proceedings because the County's inaction may have relieved Oceanside of any obligation to complete the Bypass Highway. And third, recognizing the potential of a failed Condemnation 1 (because the trial court had earlier stayed the order of possession until final judgment on the grounds that there was

a genuine issue of material fact as to public purpose related to the validity of the Development Agreement), the County filed Condemnation 2.

The Opening Brief at pages 23 and 31 to 35 urges this Court to overrule the trial court by finding that the overwhelming benefit from Condemnation 2 would be to Oceanside. The Coupes, however, have failed to provide evidence sufficient to rebut the presumption in favor of the legislature's determination of public use.

There is overwhelming evidence that the use of the Bypass was predominately for the public's benefit. There is no evidence that there is only incidental or pretextual public benefit from the Bypass. In fact, the Coupes provided testimony to the County Council on Resolution 31-03 that "[w]e recognize the need for the road; and it's not our intention to deprive the public of that highway; but we see some serious shortfalls in terms of this [acquisition] agreement" (Exh. D-127). Presented with no credible evidence that the Bypass will provide only incidental public benefit, the trial court properly found public purpose by relying upon the several government studies that recognized the long-standing public need for the Bypass based on traffic capacity and safety considerations. Condemnation 2 Supp.FOF ¶¶2-9, 16 (R.O.A., 00-1-0181K, V.47/0590 and 05-1-015K, V.34/1110); 1stAmd.FOF ¶¶6-9. (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031.) Hence, the County Council's adoption of Resolution No. 31-03 was rationally related to the need for the Bypass Highway and the County Council's asserted public purpose underlying Condemnation 2 was not pretextual.

On this second appeal, the Coupes have not disputed the finding of public benefit from the Bypass at Condemnation 2 Supp.FOF ¶¶6-9. (R.O.A., 00-1-181K, V.47/0590 and 05-1-015K, V.34/1110.) Instead, the opening brief at pages 31 to 35 has argued that the Development

Agreement have "continued to guide County's actions, and provided an overwhelming private benefit to Oceanside."

At trial, the Coupes' private benefit arguments were: (1) the County changed the Bypass's northern terminus from mauka at Kuakini Highway to makai at Ali'i Highway to benefit Oceanside to the detriment of the County; and (2) Oceanside (and not the County) determined the alignment of the Bypass. Condemnation 2 Supp.FOF ¶¶17-18 (R.O.A., 00-1-0181K, V.47/0590 and 05-1-015K, V.34/1110.) The trial court did not fail to analyze these private benefit allegations. The trial court specifically found that the "alignment of the Māmalahoa Bypass Highway, with a northern terminus at Ali'i Highway was preferred and selected by the County of Hawaii's Department of Public Works, and is consistent with the General Plans that have been adopted by the County" and in "County Resolution Number 31-03, the final determination of the Māmalahoa Bypass Highway remained with the County of Hawai'i Department of Public Works." Condemnation 2 Supp.FOF ¶¶17-18. (R.O.A., 00-1-0181K, V.47/0590 and 05-1-015K, V.34/1110); 1stAmd.FOF ¶101 and ¶102. (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031.) Moreover, the trial court specially considered whether "the use is clearly and palpably of a private character" and found that it was not. Condemnation 2 Supp.COL ¶¶5 and 13. (R.O.A., 00-1-0181K, V.47/0590 and 05-1-015K, V.34/1110.); 1stAmd.COL ¶98 and ¶101. (R.O.A., 00-1-181K, V.41/00507 and 05-1-015K, V.27/01031.) The Coupes offer no proof that the trial court improperly excluded private benefit evidence or failed to consider evidence relating to those topics.

The Coupes further argue on page 31 and 32 of their Opening Brief that Oceanside will benefit from the Bypass because the Hōkūli'a could not open the project without acquiring, completing, and conveying the road. However, Hōkūli'a already has two access points into the

subdivision. Condemnation 2 Supp.FOF ¶20. (R.O.A., 00-1-0181K, V.47/0590 and 05-1-015K, V.34/1110.)

Moreover, on page 32 of their Opening Brief, the Coupes argue that since the County has no assurance that Oceanside or its lenders would be viable at the time of performance, the County receives no benefit. This argument is incorrect while analyzing the pretext issue for a couple of reasons. First, in Condemnation 1, the trial court determined that the condemnation provision in the Development Agreement is invalid, but that the other portions, such as, the requirement for Oceanside to secure a performance bond to complete the Bypass and eventual dedication of the Bypass to the County, are still valid. And second, this does not vitiate the trial court's determination of public use or purpose.

Lastly, on pages 32 to 35 of their Opening Brief, the Coupes argue that the County had no integrated plan to alleviate traffic apart from the Development Agreement. The Coupes ignore several important factors. First, the Development Agreement (and the relevant Ordinances) clearly indicates the need for the regional roadway. Second, the trial court did not strike down the entire Development Agreement for Condemnation 1; the trial court determined that the condemnation and the share fair provisions were invalid. And third, Resolution 31-03 specifically found public purpose, separate from the infirmed portions of the Development Agreement in Condemnation 1.

At the end of the day, the Coupes have failed to acknowledge that the trial court determined, with overwhelming factual support, that there was long-standing, clearly demonstrated public need and purpose for the Bypass. Instead, the Coupes point out only that the County insisted that Oceanside build the bypass highway as a condition of moving forward with its project. The Coupes then rely on this isolated fact to assert that the public benefit to be

derived from the highway was thereby somehow rendered merely "pretextual." The fact that Oceanside thereafter needed to build the highway in order to move forward with its project, does not convert the long-desired and much-needed public highway into a predominantly private benefit. The Bypass remains what it will in fact be: a public highway long needed to serve the Kona communities.

B. No Prejudgment Interest and Expenses for Billing Statements.

The Coupes argue that the County failed to raise various challenges to the billing earlier. However, the County has always used the same standard in reviewing the billings by counsel for the Coupe to determine the reasonableness of the fees and costs being requested. The question of reasonableness cannot be waived because it's part and parcel of the law under which the Coupes seek to recover fees.

As for the scope of statutory damages permitted under HRS § 101-27, a defendant may be awarded costs of court, a reasonable amount of attorneys' fees, and other reasonable expenses. *County of Hawai'i v. C & J Coupe Family Ltd. Partnership,* 119 Hawai'i 352, 367-8, 198 P.3d 615, 630-31 (2008). Any statutory damages awarded pursuant to HRS § 101-27, however, must be strictly related to a defendant's expenses in defending the initial condemnation. *Id.,* 119 Hawai'i at 368, 198 P.3d at 631; *State v. Davis*, 53 Haw. 582, 499 P.2d 663 (1972). The burden is on the attorney seeking fees to lay the appropriate foundation. *See, e.g., Sharp v. Hui Wahine*, 49 Haw. 241, 413 P.2d 242 (1966).

1. Prejudgment Interest are Not Recoverable.

When the Coupes initially filed its Motion for Statutory Damages, it argued that Prejudgment interest are "damages" allowed under HRS § 101-27 without much elaboration or

rationale. The County always opposed any damages except those that may be reasonable under HRS § 101-27.

HRS § 636-16 allows prejudgment interest in civil cases "provided that the earliest commencement date in cases arising in tort, may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred." *See Tri-S Corp. v. Western World Ins. Co.,* 110 Hawai'i 473, 498, 135 P.3d 82, 107 (2006) (award of prejudgment interest in a breach of contract case). Pre-judgment interest may be awarded under HRS § 636-16 in the court's discretion "when the issuance of judgment is greatly delayed for any reason." *Id.* In the instant case, Coupes has not asserted that there has been any lengthy delay in the issuance of the judgment of attorneys' fees or costs.

The Coupes now argue in its Opening Brief, on pages 40 and 42 to 44, that the Prejudgment interest is the cost of encumbered funds allowed under HRS § 101-27. The Coupes do not cite any case or statutory authority that the cost of encumbered funds relating to attorneys' fees or costs as prejudgment interest is allowed in an eminent domain case and recoverable as damages under either HRS § 101-27 or HRS § 636-16. Neither has Coupes explained a rational basis to allow such an award based on the final attorneys' fee award where the billing for the attorneys' work was done over a nine year period. Otherwise, allowing such an award would be an unjustified windfall.

The Coupes also argue in its Opening Brief, on pages 42 and 43 that the County waived objections to its claim for prejudgment interest for its initial Motion for Statutory Damages. Still, on remand, this Court has instructed the trial court that it should "determine whether the fees claimed by [the Coupes Family] are related to Condemnation 1 and are reasonable under relevant standards." *County of Hawai'i v. C&J Coupe Family Ltd. P'ship,* 119 Hawai'i at 368,

198 P.3d at 631. Because the Coupes have not alleged undue delay by the County as to the payment of attorneys' fees, either in its pleadings or initial filing of its Motion for Statutory Damages or proved it, the trial court properly denied the Coupes' claim for prejudgment interest.

2. No Fees for Preparation and Litigation of Fee Motion.

Generally, there shall be no recovery for fees and expenses incurred in litigating the propriety of the fees to be awarded pursuant to *Hawai'i Ventures, LLC v. Otaka*, 116 Hawai'i 465, 173 P.3d 1122 (2007). In that case, the Court held that 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. *Id.*, 116 Hawai'i at 476, 173 P.3d at 1133. Hence, the trial court properly excluded the $75,384 sought for the preparation of billing records for the Coupes' fee petition and/or preparation of the Coupes' fee petition.

Moreover, in excluding those billing fees, the trial court noted that upon the County's objections, filed March 20, 2009, in the amount of $5,259.75, the Coupes did not address or otherwise defend against the specific objection by the County. There, the County did not receive sufficient itemization and verification of the fees and costs for Coupe's request for attorneys' fees and costs for filing its Responses. Without the itemized and verified bill of fees and costs, the County is unable to reasonably provide objections to Coupe's additional requests for Statutory Damages. Still, the burden is on attorney seeking fees to lay the appropriate foundation. *See, e.g., Sharp v. Hui Wahine*, 49 Haw. 241, 413 P.2d 242 (1966).

C. No Additional Just Compensation

Coupe asserts that the trial court miscalculated the 2005 valuation of the property sought to be taken; and thus, Coupe seeks to amend the trial court's Supplemental Final Judgment filed

May 14, 2009, to "correct" the just compensation and blight amounts in Civ. No. 05-1-015K (Condemnation 2), pursuant to HRCP Rules 59(e) and 60.

The Coupe's assertion is incorrect on two grounds. First, Coupe's contention is untimely because it reargued the issue of just compensation after the trial on this issue was completed and it was not one of the issues remanded back to the trial court this Court's December 24, 2008, decision in *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*, 119 Hawai'i 352, 198 P.3d 615 (2008). And second, there was no error committed by this Court.

1. Issue of Just Compensation was not Remanded to Trial Court.

Coupe had an opportunity to file a Notice of Appeal on the issue of just compensation prior to the Supreme Court's December 24, 2008 decision. To raise the issue of this Court's alleged mistake is too late.

This Court remanded only two issues for this Court to consider. First, whether the County Council's asserted public purpose in adopting Resolution 31-03 was pretextual. And second, the amount of statutory damages under HRS § 101-27 that Coupe is entitled in defending against the condemnation in Civil No. 00-1-0181K. This Court did not remand any issue to the trial court concerning just compensation. Hence, Coupe's appeal to recalculate damages relating to just compensation is untimely and the trial on the merits of the case has been closed.

2. Just Compensation Amount Appropriate.

Assuming that there may be an alleged miscalculation, the general aim of a proceeding in eminent domain is to arrive at the amount of just compensation which as nearly as possible approximates the value which a free market would attach to taken property. Any evidence which would aid the Trier of fact in this determination should be considered. *City and County of Honolulu v. International Air Serv. Co.*, 63 Haw. 322, 628 P.2d 192 (1981).

Fair market value for a parcel of property means the amount of money which a purchaser willing but nor obligated to buy the property would pay to an owner willing but not obligated to sell it, taking into consideration all uses to which the property was adapted and might in reason be applied. *Hawaii Housing Authority v. Rodgrigues*, 43 Haw. 195 (1959). In determining market value not only the use to which a parcel of property is actually devoted should be considered but also its potential use. *Territory by Sharpless v. Adelmeyer*, 45 Haw. 144, 363 P.2d 979 (1961). The general plan of the County is also a factor to be considered as it may affect potential buyers and sellers. *State ex.rel. Att'y Gen. v. Pioneer Mill Co.*, 64 Haw 168, 637 P.2d 1131 (1981).

When one portion of single parcel of land is condemned and another portion of same parcel is not condemned, owners of single parcel are entitled not only to just compensation for portion condemned but also severance damages, if any, accruing to portion not condemned, by reason of separation of condemned portion from the single parcel owned prior to the subdivision caused by the condemnation. HRS § 101-23; *see also City and County of Honolulu v. Bonded Inv. Co.*, 54 Haw. 523, 511 P. 2d 163 (1973).

In the event a benefit accrues to the property not sought to be condemned by reason of its severance from the portion sought to be condemned the owner of the property shall be allowed no damages for severance, but if the benefit is less than the amount so assessed as damages then the owner of the property shall be awarded damages for severance. HRS § 101-23.

In the instant case, the lower court properly found that there is no severance damage (which Coupe is not challenging) and the just compensation is $140,500. At the trial, based on the testimonies of Bloom and Medusky, the range of potential value of the property was from $56,000 (Medusky) and $345,000 (Bloom). There is nothing improper of this Court finally

deciding on a value of $140,500 (which is between the ranges testified to by Medusky and Bloom).

IV. CONCLUSION

For the reasons stated above, we respectfully request that this Court affirm the Supplemental Final Judgments.

Dated: Hilo, Hawai'i, January 21, 2010.

COUNTY OF HAWAI`I,
Plaintiff-Appellee

By _____
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Its Attorney