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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

COUNTY OF HAWAI'I, a municipal corporation, Plaintiff, vs. ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; C&J COUPÉ FAMILY LIMITED PARTNERSHIP; MILES HUGH WILSON; et al., Defendants.	CIVIL NO. 00-1-0181K CIVIL NO. 05-1-015K (Kona) (Condemnation) (Consolidated) **NOTICE OF SUBMISSION OF DEFENDANT C&J COUPÉ FAMILY LIMITED PARTNERSHIP'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CIVIL NO. 05-1-015K; EXHIBIT "A"; CERTIFICATE OF SERVICE** TRIAL: July 9, 2007 JUDGE: The Honorable Ronald Ibarra

NOTICE OF SUBMISSION OF DEFENDANT C&J COUPÉ FAMILY LIMITED PARTNERSHIP'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CIVIL NO. 05-1-015K

Pursuant to Court instruction, Defendant C&J Coupé Family Limited Partnership submits their Proposed Findings of Fact and Conclusions of Law in Civil No. 05-1-015K, attached hereto as Exhibit "A".

DATED: Honolulu, Hawaii, March 20, 2009.

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PROPOSED SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CIVIL NO. 05-1-015K

Civil No. 05-1-015K (Condemnation 2) is before the Court on remand from the Hawaii Supreme Court's opinion and order in *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008), and subsequent judgment on appeal (Jan. 21, 2009).

Exhibit A

The Supreme Court vacated this Court's First Amended Findings of Fact and Conclusions of Law (Sep. 27, 2007) and First Amended Final Judgment (Sep. 27, 2007), as they pertain to Condemnation 2. The Supreme Court ordered:

> Pursuant to the opinion of the Supreme Court of the State of Hawai'i entered on December 24, 2008, (1) the automatic denial of statutory damages pursuant to Hawai'i Rules of Appellate Procedure Rule 4(a)(3), requested by C&J Coupe Family Limited Partnership (Appellant) pursuant to Hawai'i Revised Statutes § 101-27 in Civil No. 001-1018K (Condemnation 1) is vacated; (2) the conclusion of the Circuit Court of the Third Circuit (the court) that the condemnation proceedings in Civil No. 05-1-015K (Condemnation 2) were not abated by Condemnation 1 is affirmed; and (3) the judgment of the court entered on September 27, 2007 as to Condemnation 2 is vacated; and the case is remanded for further proceedings consistent with the opinion.

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

PROPOSED FINDINGS OF FACT

If it shall be deemed that any Finding of Fact should have been set forth as Conclusions of Law, then they shall be deemed as such.

1. 1250 Oceanside Partners (Oceanside) has sought land use entitlements from the County

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1. To the extent they are relevant to pretext, the Court's Findings of Fact and Conclusions of Law regarding the 101-27 issue are incorporated by reference herein.

of Hawaii (County) for its luxury golf course real estate development project, formerly known as Villages at Hokukano, now known as Hokulia.. FOF 12.

2. Oceanside was initially a limited partnership between Lyle Anderson, the Arizona real estate developer, and a Japan Air Lines subsidiary. Anderson has subsequently acquired 100% of the ownership interest in Oceanside. J-151; *Test. of L. Anderson*, 7/26/07 (21:1-18).

3. During the late 1980's and early 1990's, Oceanside, or its predecessor entities, acquired over 1250 acres of land makai of Mamalahoa Highway in Kona. J-45.

4. In the early 1990's, Anderson acquired approximately 660 acres at Keopuka, from various Richards Family entities. J-287. Keopuka is located south of the Onouli Keopuka property, which is sandwiched between Hokuli'a and Keopuka. *Test of N. Burns*, 7/10/07 (106:2 – 107:15).

5. On June 28, 1994, Oceanside obtained a change of zoning for the Hokulia project by way of Ord. No. 94-73. J-24. The project's zoning was amended by subsequent Ord. No. 96-8. J-354.

6. Ord. No. 94-73 required Oceanside to acquire and build the bypass highway at its own expense without County assistance that as a condition of zoning. J-24 at ¶ L.

7. County and Oceanside attempted to amend this ordinance's requirement by resolution, No. 244-98. R-450 at 28 (Planning Director Goldstein testifying that the DA "allows also that in lieu of Oceanside actually acquiring the right-of-way, that the County would agree to condemn for the purposes of this road.").

8. Ord. No. 94-73 required two corridors through Oceanside's property, one for the bypass,

the other for the Alii Drive Extension. J-24; R-77 (Councilmember Childs stating that the bypass ran "essentially the same as the State corridor"); R-89 (councilmembers considering then rejecting referencing a development agreement in Ord. No. 94-73)(emphasis added); *Test. of D. Kiyosaki*, 7/17/07 (52:24-53:13); *Test. of V. Goldstein*, 7/23/07 (26:11-22); R-450. County's policy was for two corridors through Oceanside's property. *Test. of V. Goldstein*, 7/23/07 (26:11-22). The General Plan Public Facilities map confirms this policy. J-245; *Test of D. Kiyosaki*, 7/12/07 (46:22-24).

9. The State of Hawaii Department of Transportation (SDOT) has planned for a roadway which bypasses the Mamalahoa Highway in the Villages of Kealakekua and Captain Cook. J-74. It, along with the Alii Drive Extension, are also denoted on the 1989 County General Plan Public Facilities Map. J-245. First Amended Findings of Fact and Conclusions of Law, filed September 27, 2007 ("FOF" or "COL") 8-9.

10. The planned roads, i.e. the SDOT bypass and Alii Drive Extension, would equate to two roads through the Hokulia project. *Id.* J-24 at Ex. "C". *Test. of D. Kiyosaki,* 7/17/07 (46:22-24); *Test. of V. Goldstein*, 7/23/07 (26:19-22); *Test. of R. Frye*, 7/25/07; R-78 at 10 (46:25-47:12); R-450 at 28.

11. Traffic studies show that the Mamalahoa Highway was at 80% capacity in the Kealakekua and Captain Cook areas and that improvements to that highway would significantly increase traffic flow through area. J-78; J-377 at 2336 ("the improvement measures identified in this report could increase peak roadway capacity on localized segments by as much as 600 to 800 vehicles per hour . . . ."); J-178.

12. Per Ord. No. 94-73, Ex. C, the southern terminus of the bypass highway was in the

vicinity of Napoopoo Road and the northern terminus was at Kuakini Highway, near Higashihara Park. J-24. Oceanside was also required, prior to Final Subdivision Approval, to demonstrate that it owned or controlled the right of way for the bypass highway. J-24 at ¶ L.

13. On December 15, 1995, a councilmember asked Mr. R. Frye, if "under this bill [Ord. No. 96-8], you folks are going to build that road, right? The bypass road?" Frye responded, "Yes." D-61 at 2340.

14. Ord. No. 96-8 also appended the reimbursement agreement from Ord. No. 94-73 to the requirement to provide a landscape buffer. J-354 at L. Oceanside consultants and County personnel have attempted to interpret or construe this provision contrarily to the plain meaning and construction of the provision. *Test. of W. Moore*, 7/11/07 (64:17-24), 7/12/07 (19:24-20:16).

15. On April 1, 1998, County and Oceanside entered into a Development Agreement ("DA"), purportedly pursuant to Haw. Rev. Stat. 46-121 in order to facilitate the entitlement process for Oceanside's project now known as Hokulia. FOF 20; J-45.

16. The DA, adopted by Resolution 244-98, includes provisions regarding condemnation and reimbursement. First, the DA provided that should any landowner refuse to sell their land to Oceanside, the County's power of eminent domain would be used to acquire the parcel. J-45 at ¶¶ 10, 11, 12; cf. J-24 (Ord. No. 94-73 which placed the onus on Oceanside to acquire the right of way for the bypass). Second, County would reimburse Oceanside for construction costs of the bypass highway through the "fair share" assessments levied on neighboring landowners. J-45 at ¶ 15.

17. The County-Oceanside Development Agreement, as more specifically set forth in Conclusions of Law 60 through 80 of the First Amended Findings of Fact and Conclusions of Law and the Supreme Court's opinion, *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008), illegally delegated County's power of eminent domain to Oceanside.

18. In sum, the Development Agreement provided that Oceanside, not County, would have the "sole and absolute" discretion that the Richard's Family's property is needed, that "COUNTY shall be required to use its condemnation powers to acquire" the property, and that after "OCEANSIDE's tender of a requirement of condemnation by letter to the COUNTY, the COUNTY shall within thirty (30) days begin to immediately and expeditiously exercise the same pursuant to HRS Chapter 101." FOF 32-26; J-45 at 10, section 10.b. In the event that a landowner does not desire to "voluntarily" sell its property to Oceanside, then Oceanside is also entitled "in its sole discretion" to compel County to take the property by eminent domain. FOF 32-36; J-45 at 11, section 10.c. Section 11 expressly sets forth Oceanside's power to dictate the terms of the taking. J-45 at 11. The Development Agreement also provides that Oceanside, not County, pay for the taking and that in the "sole and absolute discretion" of Oceanside, eminent domain is to be used to take property. FOF 35; J-45 at 11, section 11.b. The Development Agreement also expressly gives Oceanside the ability to determine the location of the road, and the property to take. FOF 34; J-45 at 13, section 13(b)(2). Finally, Oceanside, not the County, is to build the road. J-45 at 12, section 13(a).

19. Oceanside's consultant team met to develop a "Wish List" for a meeting with Mayor

Yamashiro. J-209. The Wish List identified the priorities of Oceanside to get the bypass complete, including shifting the alignment, obtaining condemnation commitment and crafting reimbursement scheme. J-187.

20. Under Ord. No. 94-73, Oceanside's obligation to obtain the right of way for the bypass was relieved upon County initiation of condemnation action. J-24. The Wish List included condemnation as a pressing need because relieving Oceanside of the obligation to obtain the right of way did not get Oceanside the road it required. *Test. of R. Frye*, 7/25/07 (92:21-93:13).

21. Oceanside's consultant, Bill Moore, drafted a letter for the Deputy County Engineer's signature denoting the Department of Public Works preference for the new alignment. J-25; *Test. of W. Moore*, 7/9/07 (74:20-22). At trial, County officials testified that DPW reviews are technical ones, not planning ones. *Test. of D. Kiyosaki*, 7/17/07 (37:18-39:10).

22. County enacted Ord. No. 96-8 with the identical language proposed by Oceanside. *Compare* J-77 and J-354.

23. Oceanside threatened its neighbors who lived along the bypass corridor with condemnation, should they fail to negotiate with Oceanside for the purchase of a Right of Way for its road. FOF 19. Before the DA was adopted, on August 13, 1997, Oceanside's attorney, John R. Dwyer, wrote to Clifford Miller, an attorney for Kona Trust, complaining about John Michael White's (Kona Trust representative), statement that Bishop Estate prefers a particular alignment for the bypass. Dwyer continued: "If we can not agree (and we have been at it for months now) I feel that the County will have to

proceed with condemnation." FOF 19; J-91. These threats continued after the DA. FOF 52; J-87; J-93; J-94; J-95; J-96; J-97; J-98; J-99.

24. Before the DA was adopted, Oceanside weighed the costs vs. benefits of acquisition by purchase and condemnation. R-226.

25. Oceanside's investors were concerned with the construction of the bypass being a condition of approval on the zone change when Oceanside did not own or control the property along the bypass corridor. FOF 24; J-201; J-204; *Test. of L. Anderson*, 7/26/07 (24:6-27:25). Oceanside's investors wanted assurances of condemnation before committing to investment in the project. FOF 24; J-272; R-215.

26. County understood that Oceanside's financing structure required the ability to condemn in the event a landowner would not sell. *FOF 28; t. of G. Takase*, 7/16/07 (13:21-16:10).

27. Contemporaneously with the drafting of the DA, Oceanside considered the DA condemnation provision to require the County to condemn the land for the bypass. FOF 27; -203; J-214.

28. On October 22, 1997, Mr. Frye sent a letter to Mr. Takeda of Japan Air Lines. Frye stated that the proposed Development Agreement was designed to "require" the County to condemn right-of-way lands:

> As we have discussed there may be a need for the County to condemn certain properties along the ... by-pass route.... The Mayor has said that he would condemn properties that we were not able to acquire. **Our proposed Development Agreement, if approved as currently structured, requires the County to condemn parcels we are not able to acquire.** Prior to the approval of the Development Agreement we will need to rely on the Mayor's verbal commitment to condemn.... I know of no reason that the mayor would change his mind about condemnation.

FOF 56; (emphasis added, underscoring in original).

29. On November 17, 1997, Mr. Frye wrote to Phil Schneider, a former practicing land use attorney in Arizona and Anderson's Chief Operating Officer and main interface with the investors and lenders, further demonstrating that Oceanside believed it would be acquiring the power of eminent domain, and could guarantee to its investors that the County would exercise the power to take property:

> Under the conditions of our zoning ...**we are required to own or control the parcels**. We are relieved of this requirement if the County initiates Condemnation. **In our proposed Development Agreement (DA) with the County there is a provision requiring the County to condemn** where we have not been able to successfully negotiate a purchase. **I would think an investor would be comfortable that purchasing the necessary right-of-way will no longer be an issue if the County approves the DA.**
>
> . . . .
>
> The investor's concern regarding not being able to purchase the right-of-way segments after the County has agreed to the DA seems misplaced. **Should the County breach the agreement and not condemn the would be potentially liable for the projects failure. I can't imagine they would ever take such a risk.**
>
> The only grounds I know of for a property owner to stop a condemnation is if there is **not a valid public purpose for the taking**.

FOF 27; J-203 (emphasis added).

30. Mr. Schneider received a letter from UBS, one of the financial institutions seeking investors for the project, noting:

> 1. Development Risk
>
> Acquisition of all twenty-five properties for the Highway Bypass prior to US $40MM equity financing is mandatory.

FOF 25; J-201, at OS-124115.

31. County initiated other condemnation suits at the demand of Oceanside. J-100. Oceanside's attorneys from the Dwyer firm appeared as counsel of record on pleadings in the other condemnation suits. FOF 55; D-116; J-223. Oceanside paid the landowner's compensation for County condemnation actions. J-105.

32. Oceanside's then-attorney, John Dwyer, Esq., threatened condemnation against landowners along the bypass, even before the DA was enacted. FOF 19; 52; J-90; J-91.

33. Mayor Yamashiro did not approve of the practice of threatening condemnation. *Depo. of S. Yamashiro*, 6/13/07 (87:25-88:11).

34. Oceanside funded the customary pre-condemnation title search and appraisal and funded the initial, albeit inadequate, deposit of compensation supporting the Order of Possession. *FOF 57; Test. of G. Takase*, 7/16/07 (46:2-47:7).

35. County could never afford to build the bypass road on its own. *Test. of Gerald Takase*, 7/16/07, Vol. II (4:13-4:16).

36. County would not have built the bypass road without the DA. *Test. of Gerald Takase*, 7/16/07, Vol. II (4:17-4:19).

37. County would not have allowed the rezoning of Hokulia without the bypass road. *Test. of Gerald Takase*, 7/16/07, Vol. II (4:20-4:23).

38. Oceanside paid for the consultant fees for the landowners who balked at the DA, including Kona Trust and Bishop. R-277; R-295.

39. The Richards Family, in good faith, advised County of their concerns about the condemnation, severance and fair share reimbursement provisions. County counsel found

their settlement position to be reasonable. *Test. of G. Takase,* 7/16/07, Vol. II; R-401 (5:8-10); *Test. of Gerald Takase*, 7/16/07, Vol. I (45:13-46:1). Other landowners, including Bishop, echoed the Richards Family's concerns about the DA. J-451; R-267; R-269; J-185; J-186.

40. In County's view, the Richards Family concerns were reasonable and could be accommodated. Their concerns were related to making the property work as one after the bisection of the property. *Test. of G. Takase,* 7/16/07, Vol. II (5:11-15); *Test. of C. Coupé*, 7/31/07 (30:5-20). County thought that all of the issues relating to the taking of the property raised by Lyle Babka, Esq. and Mr. C. Coupé were issues it "could live with." *Test. of Gerald Takase*, 7/16/07, Vol. II (5:3-5:7). Oceanside's counsel refused to conduct three-way negotiations with Mr. Coupé. *See generally Test. of G. Takase,* 7/16/07. County was willing to settle with the Coupée Family Limited Partnership, but Oceanside did not allow the settlement.

41. Oceanside anticipated that some owners may not want to sell their property too soon in Oceanside's entitlement process. J-205.

42. Oceanside's counsel Dwyer balked at negotiating with Mr. Coupé when County counsel suggested it. FOF 60; *Test. of G. Takase,* 7/16/07, Vol. II (6:20-7:5).

43. During negotiations with Oceanside, Mr. Coupé suggested that the two parties hire appraisers to assess severance damages. *Test. of C. Coupé*, 7/30/07 (78:16-20) (101:1-4) (97:8-10). Oceanside refused to participate. *Test of C. Coupé*, 7/31/07 (40:19-21).

44. Mr. Coupé never told Oceanside that he was authorized to speak on behalf of the other owners of Onouli. *Test. of C. Coupé*, 7/31/07 (42:16-25).

45. The DA attempted to change the event that relieved Oceanside of acquiring the bypass right of way parcels from the filing of a condemnation suit, *see* Ord. Nos. 94-73, 96-8, to the tender of a letter requesting "initiation of condemnation action." J-45 at ¶ 11. Planning Director Goldstein had no recollection of any discussion with Oceanside regarding this shift. *Test. of V. Goldstein*, 7/23/07 (35:21-36:13).

46. Oceanside told County to initiate "condemnation proceedings" against the Onouli property. R-322. This language belies Oceanside and County's new argument that Council retained discretion to not condemn after the DA was adopted. J-237.

47. The DA required Oceanside to make a proposal regarding an appraisal for the Onouli property. J-45 at ¶ 10.b. Mr. Coupé suggested same but Oceanside never responded. *Test of C. Coupé*, 7/31/07 (40:19-21).

48. In 2000, after instruction by Oceanside, County filed a complaint against Defendants to condemn 2.9 acres, more or less, of Defendants' property at Onouli. *County of Hawaii v. Richards*, Civil No. 00-1-181K (filed Oct. 9, 2000).

49. County instituted the lawsuit to comply with its contractual obligations to Oceanside.

50. County did not follow the usual condemnation procedure such as independent appraisal, survey and land agent. FOF 57. Instead, Oceanside determined the property to be taken, and the amount of compensation offered. FOF 62. *Test. of G. Takase*, 7/16/07 Vol. I (24:15-24:20).

51. County never obtained a survey for any of these condemnations. *Test. of Gerald Takase*, 7/16/07, Vol. I (46:9-46:11).

52. County never did its own title report for any of these condemnations. *Test. of Gerald*

Takase, 7/16/07, Vol. I (46:12-46:14).

53. County never did any of its own appraisals before any of these condemnations. *Test. of Gerald Takase*, 7/16/07, Vol. I (46:15-46:17).

54. The County did not hire an appraiser to appraise the property before filing Civ. No. 00-1-0181K. *Test. of Gerald Takase*, 7/16/07, Vol. II (31:7-31:8).

55. County's normal condemnation practice when it is a "county project" is to obtain a survey, a title report and an appraisal before a condemnation. *Test. of Gerald Takase*, 7/16/07, Vol. I (46:18-46:20).

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

57. Oceanside also paid the landowner's compensation for County condemnation actions, funded the customary pre-condemnation title search and appraisal, and provided the initial deposit of compensation supporting the Orders of Possession. (Exhibit J-105); *Test. of G. Takase*, 7/16/07.

58. The complaint in Condemnation 1 valued the property to be taken at $47,000, when County's expert was approximately three times higher. This Court determined the value of the 2.9 acres sought to be condemned in Condemnation 1 was $140,500. County deposited only $49,300.

59. The Richards Family objected to Condemnation 1, asserting, among other things, that County illegally delegated its power of eminent domain to Oceanside, that the claimed public use was a pretext, and the taking was not for a public use or purpose. COL 68. Nor was it an exercise of County's independent discretion. Additionally, the DA

attempted to shift Oceanside's obligation to pay for its road to third parties, whether or not their land was being taken. The Richards Family counterclaimed against County, and Oceanside was joined as a third-party defendant.

60. County obtained possession of the property and without documentation other than the DA, allowed Oceanside to enter the property and to undertake destructive activities involving, inter alia, blasting, without notice to or consent of the Richards Family. FOF 65; J-222; J-225; J-327. In the process, fences and water lines were destroyed.

61. On September 5, 2002, this Court, *sua sponte,* reversed a prior order granting summary judgment in favor of County on the issue of public use, then denied County's request for reconsideration.

62. On December 11, 2002, this Court stayed its earlier order allowing County to take possession of the Richards Family's property. Despite this order, neither County nor Oceanside relinquished control of the property.

63. During the time, County was in possession of the property, it caused the property to be subdivided. *Test. of G. Takase*, Vol. I (53:23-53:24).

64. County never advised the Coupé Family about the involuntary subdivision of its property. *Test. of G. Takase*, Vol. I (54:3-54:19).

65. County admitted that its attorney knew of the statutory requirement to provide notice to the property owners prior to subdivision. *Test. of G. Takase*, Vol. I (54:10-54:12).

66. The map and survey attached to Resolution No. 31-03, denoting 3.348 acres, was dated April 6, 2001. J-242.

67. The exercise of dominion over the Coupé Family property was without authorization,

which, by order of this Court, was limited to 2.9 acres.

68. Thereafter, Oceanside sought to remove Judge Ibarra from considering the case. R. Vol. 10, at 00126, 00127. On April 10, 2003, the Hawaii Supreme Court rejected Oceanside's petition for a writ of mandamus to remove Judge Ibarra. *County of Hawaii v. Richards, et al.*, Sup. Ct. No. 25747 (Apr. 10, 2003).

69. In a series of cases after Condemnation 1 was filed, courts nationwide addressed the issue of impermissible private influence in condemnation and provided a concrete methodology for analyzing the issue. For example, in a landmark case relied on by a later U.S. Supreme Court decision, a federal court in California invalidated under the Fifth Amendment's Public Use Clause an attempt to take property for the benefit of a private party. *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001). That case set forth standards for measuring when to look beyond the government's claims of public use, and established standards for determining pretext. After *99 Cents Only*, the same court struck down an attempted taking as pretextual in *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). This was not limited to California courts. *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003).

70. On July 30, 2004, the Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), overruled a well-known thirty year old precedent that gave municipal governments nearly unfettered discretion in eminent domain to define public use, *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). *Hathcock* set forth a detailed analysis of when the government's claim of public use

would not withstand scrutiny under a state constitution's public use clause.

71. On September 28, 2004, the U.S. Supreme Court agreed to review *Kelo v. City of New London*, a widely-followed case that dealt with pretext and public use under the Fifth Amendment, and in December 2004, the Richards Family filed a brief amicus curiae in *Kelo*.

72. The Richards Family filed an amicus curiae brief in *Kelo*, urging the Court to adopt a standard to review pretext in condemnation cases. *See* Patricia E. Salkin, et al., *The Friends of the Court: The Role of Amicus Curiae in* Kelo v. City of New London, EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 172 (Dwight Merriam, et al. eds, ABA Section of State and Gov't Law 2006) ("The brief submitted on behalf of Nigel Richards and his family described how the county and the developer of a Pebble Beach-style project entered into a development agreement whereby the developer would pay the condemnation cost for a portion of the Richards' property to build a road to the new development. The Richards family was not a part of the development agreement and had no opportunity to comment on it before it was executed.") (footnotes omitted).

73. During the course of litigation of Condemnation 1, Oceanside required additional land for the bypass road, so when County adopted Resolution 31-03 the property to be taken went from 2.9 acres to 3.348 acres. *Test. of Gerald Takase*, 7/16/07, Vol. I (51:6-51:21).

74. County never amended Condemnation 1 to account for the additional land to be taken. *Test. of Gerald Takase*, 7/16/07, Vol. I (52:7-52:9).

75. County never advised the Richards Family or their counsel that the property description had changed. *Test. of Gerald Takase*, 7/16/07, Vol. I (52:10-52:14).

76. County never provided the Richards Family with notice, as required in Resolution No. 31-03. J-242; *Test. of Gerald Takase*, 7/16/07, Vol. I (52:10-52:25).

77. Only one month after the attempt to remove Judge Ibarra was rebuffed by the Hawaii Supreme Court, County adopted another resolution of taking to condemn the Richards Family's property. J 242. County of Hawaii Resolution No. 31-03 (2003). This resolution – like the earlier Resolution No. 266-00 – sought the property for the Hokulia access road, but – unlike the earlier resolution – omitted County's ongoing DA obligations by simply deleting any reference to the DA and Oceanside. *Id.* The property description was provided by Oceanside, which increased the area of land to be taken by approximately 1/2 acre to coincide with the land that Oceanside had selected and altered. County never verified the accuracy of the survey or the extent of alteration by Oceanside.

78. By its own admission, County continued to cloud the Richards Family's property with resolution #2 for three years so it could see how another unrelated case was resolved: "Deputy Corporation Counsel Gerald Takase testified that the three-year delay in filing this complaint [Condemnation #2] was because the County wanted to resolve the *Kelly* case, Civil No. 00-1-0192K, before proceeding with what became Civil No. 05-1-015K." Plaintiff-Appellee County of Hawaii's Answering Brief, *County of Hawaii v. C&J Coupe Family Ltd. P'ship,* at 6 n.6.

79. There is no evidence that County made any effort to negotiate an acquisition based upon the then-current value, or that it ever informed the Richards Family that County had authority to file a new condemnation action.

80. At Oceanside's demand, County filed three condemnation actions against property

owners on the bypass road route. *Test. of Gerald Takase*, 7/16/07, Vol. I (46:2-46:8).

81. In 2005, purportedly on the authority of Revolution No. 31-03, County filed a second complaint against Defendants to condemn 3.348 acres of Defendants' property at Onouli. *County of Hawaii v. Richards*, Civil No. 05-1-015K (Condemnation 2).

82. County did not dismiss or amend Condemnation 1. The County attorney responsible for Condemnation #2 said that it was his intent that if the second complaint survived, the County intended to dismiss the first lawsuit. *Test. of Gerald Takase*, 7/16/07, Vol. II (5:12-5:16).

83. As in Condemnation 1, in Condemnation 2, County did not follow the usual condemnation procedure such as independent appraisal, survery and land agent. Instead, Oceanside determined the property to be taken, and the amount of compensation offered.

84. Although County knew that land values had increased in the area over the years since the filing of Condemnation 1, it did not increase either the value of the compensation or make any effort to increase the deposit that it made and as required by law. County's expert testified that there had been a 239% appreciation between October 9, 2000 and January 28, 2005. P-11; P-12. In fact, when the Court-found value of $140,500 in 2000 for the 2.9 acres (to which Condemnation 1 was limited), is increased prorata to reflect the 3.348 acres to which Condemnation 2 was limited and this in turn is increased by the 239% appreciation (2000-2005), the value on January 28, 2005 is $387,669.54.

85. For reasons it has never explained, County did not serve the complaint in Condemnation 2. The Richards Family discovered the filing in a newspaper report, and brought immediate motions attacking County's failure to either dismiss Condemnation 1, or

amend it. These motions continued through closing argument. At trial, the Court frequently asked County which case was it proceeding on, but County refused to dismiss either case and maintained that it was proceeding on both.

86. County admitted that it would not have approved Oceanside's subdivision if Oceanside did not provide the road. *See* Tr. 12/10/2002 at 8-9; *Test of G. Takase*, 7/16/07, Vol. II (4:13-23). County acknowledges it could not have afforded to build the access road and "would not have done it without the [Development] agreement."

> [COURT:] If the development did not occur, would the County have built the road?
>
> [COUNSEL:] I think the County would have liked to build the road. Practically speaking, ***no, we could not afford to build the road.***
>
> [COURT:] And the County would not have built the road without the development at this time?
>
> [COUNSEL:] ***I think in most likelihood, no. It would not have had the resources. It would not have done it without the agreement.***

Id. at 8, ln. 9-18 (emphasis added). *Test of G. Takase*, 7/16/07, Vol. II (4:17-19).

87. Res. 266-00 explicitly sets forth that the reason for the condemnation of the Richards Family property was to fulfill County's obligations under the DA. J-231.

88. Whatever County's motivation was for entering into the DA with Oceanside, County's motivation for the taking of the Richards Family was to satisfy the DA. J-45; J-231.

89. County and Oceanside concurrent actions reflect their contemporaneous understanding and intent of the various provisions of the DA. J-11 (county must assess fair share), J-87, J-91, J-93, J-97; J-362 at 3332 (councilmember stating "we *will* assess fair share" and

"they would all be assessed") (emphasis added); R-450 at 31 (Goldstein testifying about the DA, "if the **County** approves new rezonings in the vicinity of Mamalahoa Highway, then the **County** would assess these new developments a fair share contribution ....") (emphasis added); R-450 at 47 (Frye testifying about the DA stating, "[o]ne of the provisions in this agreement is you heard the Planning Director talk about is the **County** agreeing to condemn any segments that we weren't able to negotiate the purchase of.") (emphasis added).

90. County received no separate consideration for entering into the DA. *Test. of G. Takase,* 7/16/07, Vol. I (18:6-19:6); P-17; R-450; R-451; R-144 at OS-2004060 (Frye testifying before planning commission hearing on amendment to Ord. No. 94-73 and stating that Oceanside would "have to build all of the highway"). County's lead counsel for the DA was aware of no consideration for the DA separate from the bypass highway. *Test. of G. Takase,* 7/16/07, Vol I (19:6).

91. The DA provided County the same benefits it was entitled to under the rezoning ordinances. *Test. of V. Goldstein*, 7/23/07 (49:22-25).

92. The DA enactment, nor the recording of the DA, did not provide the neighboring landowners of the prospect of the condemnation provisions or fair share allocations of the DA.

93. County did not have funds to build the bypass road, would not have built it on its own and would not allow the rezoning of Oceanside's property without the bypass. *Test. of G. Takase,* 7/16/07, Vol. II (4:17-19).

94. Oceanside planned to absorb the cost of the bypass construction through lot sales, not the

reimbursement provision of the DA. *Test. of R. Frye*, 7/25/07 (7:15-8:11).

95. The DA does not explicitly set forth any release of any claim for disproportionate exaction under the zoning ordinances. J-45.

96. Oceanside projected that it would use only 38% of the bypass highway, but acknowledged that this would cut "against public purpose." R-235.

97. Oceanside was always willing to fund the entire bypass highway. R-432; R-77 at OS-2003644 (Frye testifying before Council, "we would like to design and provide the construction plans and acquire the right-of-way for the entire length so that we are all assured, including us, that there will be a road complete in this area.").

98. This Court held in Condemnation 1 that County delegated its eminent domain power to a private entity in a contract. R. Vol. 27, at 01031 (First Amended Findings of Fact, Conclusions of Law, and Order (Sep. 27, 2007) Order ¶ 35 (App. 1 to Opening Brief) ("at the time the parties entered into the agreement, the County intended to condemn any private property that Oceanside has determined, in its sole and absolute discretion, as necessary for the construction").

99. This Court also invalidated County and Oceanside's attempt to make the property owners whose property was taken pay for just compensation through a charge-back scheme that had no basis in law (the so-called "fair share" provision). *Id.*, Order ¶ 22, at 47 ("The condemnation and 'fair share' assessment provisions in the Development Agreement are illegal.").

100. Despite the determination of illegality of portions of the DA, County has continued to maintain that the DA requirements that Oceanside reimburse it for the acquisition

expense in the second condemnation and that Oceanside has a continuing obligation to build and convey the entire highway to it remain valid and enforceable. County never offered any evidence that it had appropriated the money necessary for the acquisition or construction of a road on the Richards Family property, let alone for the entire highway.

101. County has repeatedly admitted that it did not have the means to acquire or build the highway, that it would not have done so if Oceanside had not undertaken to acquire and build the highway.

102. Oceanside, not County, owns most of the balance of the highway.

103. Oceanside, not County, has constructed phase one of the highway.

104. This Court held that Condemnation 1 lacked a public use and purpose and invalidated it because County's power of eminent domain was delegated to Oceanside in the Development Agreement. *Id.*, Order ¶ 1, at 46-47.

105. This Court's judgment in Condemnation 1 was not appealed by County or Oceanside, and is a final and conclusive judgment. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

106. After this Court invalidated the first condemnation for lack of public use, County refused to comply with its statutory obligation to make the Richards Family whole for the damages it caused as a result of that case, arguing it "finally" took the property in the second case. Plaintiff-Appellee County of Hawaii's Answering Brief, *County of Hawaii v. C&J Coupe Family Ltd. P'ship,* at 10 ("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 [Richards Family was] awarded just compensation for the property [in Condemnation #2]."). The Hawaii Supreme Court rejected that argument in *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

107. County also asserted it did not need to make an additional deposit with the court in order to take possession of the property because even if Condemnation 2 were to be ruled invalid, County would simply bring *another* (third) eminent domain lawsuit. Plaintiff-Appellee County of Hawaii's Answering Brief, *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, at 12 ("even if the [Circuit] Court's condemnation order in Civil No 05-1-15K 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").

PROPOSED CONCLUSIONS OF LAW

If it should be determined that any of these Conclusions of Law should have been set forth as a Finding of Fact, then they shall be deemed as such.

CONDEMNATION ONLY FOR PUBLIC USE

1. The Fifth Amendment to the U.S. Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

2. The Hawaii Constitution provides greater protection to property owners: "Private property shall not be taken or damaged for public use without just compensation." Haw. Const. art. I, § 20.

3. Only government entities and entities delegated the power of eminent domain by state law can take property. *Western Sunview Properties, LLC v. Federman*, 338 F. Supp. 2d 1106 (D. Haw. 2004) (objection to development by adjacent property owner and property

developer is not a "taking" as they have no power to condemn).

4. The inquiry under the public use clause of the Fifth Amendment and article I, section 20 is whether a taking is designed to further a "legitimate government [i.e., public] purpose." *Housing Finance & Dev. Corp. v. Castle*, 79 Haw. 64, 898 P.2d 576 (1992); *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

5. Courts will not lightly disturb a determination of public use unless it is manifestly wrong. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008). In order to overcome the prima facie evidence of public use, a defendant must show that such use is clearly and palpably of a private character. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008); *State v. Anderson*, 56 Haw. 566, 545 P.2 1175 (1976).

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

PRETEXTUAL TAKINGS UNDER *KELO* AND *COUPE*

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

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

9. Additionally, County's pronouncements are not conclusive, and "both *Ajimine* and *Kelo* make it apparent that, although the government's stated public purpose is subject to prima facie acceptance, it need not be taken at face value where there is evidence that the stated purpose might be pretextual."*County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 381, 198 P.3d 615, 644 (2008). *See also City of Stockton v. Marina Towers LLC*, 2009 WL 352559 at *8 (Cal. Ct. App. Feb. 13, 2009) (court did not accept the city's litigation claim that the taking was part of a master redevelopment plan, but instead looked to the city's actual conduct; taking invalidated on public use grounds, holding the city's resolution of necessity which identified the purpose of the taking only as "the acquisition of additional land in conjunction with potential development" was so "nondescript [and] amorphous," and "so vague, uncertain and sweeping in scope that it failed to specific the 'public use' for City sought acquisition of the property").

10. A legislative act "should be determined by its 'substance and practical operation, rather than on its title, form or phraseology.'" *Sierra Club v. Dep't of Transportation*, No. 29035, slip op. at 30-31 (Haw., Mar. 16, 2009) ("DOT and Superferry argue that Act 2 is a general law that does not violate any provision of the Hawai'i Constitution. They argue that the correct test for a general law is whether it creates a rationally based classification and whether the law applies to all members of the class created. For the following

reasons, we agree with Sierra Club.").

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

12. "Public use" has been interpreted by the courts as "public purpose," thus making County's "actual reason" for Condemnation 2 the critical issue. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008). *See also Middleton Twp. v. Lands of Stone*, 939 A.2d 311, 447 (Pa. 2007) (court looks to the "real or fundamental purpose" behind a taking); Kelly, *The Public Use Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 Cornell L. Rev. 1, 14 (2006).

13. This is particularly critical since this Court invalidated Condemnation 1 for lack of public use or purpose, and that judgment is final. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008) (judgment in Condemnation 1 final); *See also* Kelly, *Pretextual Takings: Of Private Developers, Local Government, and Impermissible Favoritism* at 7 (forthcoming 2009), *available at* http://ssrn.com/abstract=1132429 ("Futility refers to a court's inability to prevent governmental actions that are based on impermissible motivations because of the government's ability to circumvent judicial scrutiny. For example, government officials can hide their actual motivations, including pretextual ones. Moreover, even if a court detects an impermissible motivation and invalidates a governmental action on that basis, officials may decided to take the same action without disclosing their actual motivation,

thereby circumventing the judicial test.").

PRETEXT DETERMINED BY FACTS OF CASE

14. The public use and pretext question is judicial in nature and there is no mechanical formula to be applied for whether a taking is for a public use or purpose, but is determined on a case-by-case basis. *Hawaii Hous. Auth. v. Ajimine*, 39 Haw. 543 (1952); *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

15. There is evidence of pretext in this case, because if there was no evidence of pretext, the Hawaii Supreme Court would not have remanded the case for further consideration. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008) (when "there is evidence that the asserted purpose is pretextual, courts should consider a landowner's defense of pretext."). *Cf. Kelo v. City of New London*, 545 U.S. 469 (2005) (no evidence presented at trial that taking was pretextual).

OBJECTIVE REASONABLE PERSON STANDARD AND CIRCUMSTANTIAL EVIDENCE

16. Whether Condemnation 2 was pretextual is measured by the reasonable person standard. *See In re Condemnation by the Redevelopment Authority of Lawrence County*, 962 A.2d 1257 (Pa. Commw. Ct. 2008) (a "blight" determination supporting a taking must be determined by reference to objective criteria and the reasonable person standard, and a court may not accept the government's claim that a property is blighted). *See also Middletown Township v. Lands of Stone*, 939 A.2d 331, 337 (Pa. 2007) (objective standard; taking ostensibly for farmland invalidated because it was a pretext to hide the "true purpose" of the taking for recreational purposes).

17. There will rarely be direct evidence of pretext, so the absence of an admission by County or Oceanside that Condemnation 2 was pretextual is not the end of the inquiry. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

18. The court may look to both direct and circumstantial evidence, including the motivation of County officials, and apply an objective standard. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) ("we may determine the city council's object from both direct and circumstantial evidence," which includes "the historical background of the decision under the challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body").

PRIVATE BENEFIT, COMPREHENSIVE PLAN, AND PRIVATE PARTY IDENTIFIED AT THE TIME OF TAKING

19. Pretext may be present in at least three situations: (1) when eminent domain is used to transfer the private property of one party to another private party where the magnitude of public benefits outweighs the private benefit; (2) when eminent domain is used for a one-to-one transfer of private property without a comprehensive, integrated, and carefully considered development plan; and (3) where a particular private party is identified before the taking. *Kelo v. City of New London*, 545 U.S. 469, 478 n.6 (2005); *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

PRETEXT MEASURED IN 2003

20. The time frame in which to evaluate County's motivation is the time it adopted Resolution 2, and its post-Resolution 2 actions, such as the possession of the property and

neighboring properties, cannot justify the condemnation after the fact. *City of Stockton v. Marina Towers LLC*, 2009 WL 352559 at *11-12 (Cal. Ct. App. Feb. 13, 2009) (court rejected the trial court's determination that city's construction of the project after the passage of the resolutions of necessity somehow validated the defects in the project description). *See also Middleton Twp. v. Lands of Stone*, 939 A.2d 311, 338 (Pa. 2007) ("This means that the government is not free to give mere lip service to its authorized purpose or to act precipitously and offer retroactive justification.").

CONDEMNATION 2 VIEWED IN LIGHT OF CONDEMNATION 1 AND DEVELOPMENT AGREEMENT

21. Thus, in the present case, the Court must look to the context of Condemnation 2 and the factual situation surrounding it, which includes the historical context of the taking, the specific series of events leading to Resolution 2 and Condemnation 2, and the legislative history including statements made by County officials – not just the text of Resolution 2 – to determine whether Condemnation 2 is for public use, or whether it was pretexual as the Hawaii Supreme Court instructed on remand. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

22. In *Kelo*, the Court took great pains to point out that the condemnation of individual parcels were part of an "integrated" and "carefully considered" development plan. *Kelo v. City of New London*, 545 U.S. 469, 474 (2005); *see also id.* at 483-84 ("Given the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review, it is appropriate for us, as it was in *Berman*, to

resolve the challenges of the individual owners, not on a piecemeal basis, but rather in light of the entire plan. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment."); *id.* at 487 ("Such a one-to-one transfer of property, executed outside the confines of an integrated development plan, is not presented in this case."). *See also Middleton Twp. v. Lands of Stone*, 939 A.2d 311, 339 (Pa. 2007) ("[P]recedent demonstrates that condemnations have been consistently upheld when the taking is orchestrated according to a carefully developed plan which effectuates the stated purpose. Anything less would make an empty shell of our public use requirements. It cannot be sufficient to merely wave the proper statutory language like a scepter under the nose of the property owner and demand that he forfeit his land for the sake of the public. Rather, there must be some substantial and rational proof by way of a intelligent plan that demonstrates informed judgment to prove that an authorized public purpose is the true goal of the taking.").

CONDEMNATION OUTSIDE OF INTEGRATED DEVELOPMENT PLAN RAISES SUSPICION

23. A "one-to-one transfer of property, executed outside the confines of an integrated development plan . . . would certainly raise a suspicion that a private purpose was afoot." *Kelo v. City of New London*, 545 U.S. 469, 478 n.6 (2005) (citing *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001)).

24. In Condemnation 1, this Court held that the attempted taking of the Richards Family's property was not for public use or for a public purpose, because, inter alia, in Resolution 266-00, County expressly stated that the taking was compelled by the DA.

THE ILLEGAL DEVELOPMENT AGREEMENT WAS THE ONLY "PLAN" COUNTY HAD

25. In Condemnation 1, this Court held that in the DA, County unmistakably attempted to delegate its police and eminent domain powers to Oceanside, a private party. COL 69-80. Consequently, the Court ruled the DA is void, and County's attempts to take the Richards Family's property in Condemnation 1 is was void. Contrary to County and Oceanside's contention, the illegality of the condemnation and fair share provisions in the DA invalidated the entire DA. As noted by Robert Stuit, the primary purpose for the DA was the reimbursement of Oceanside by way of the "fair share" provisions, which have been declared illegal. J-56.

26. County had no discretion to refuse Oceanside's directive, to institute Condemnation 1 as it had already promised to comply. FOF 27; J-203. Indeed, County would be liable to Oceanside if it "impede[s] OCEANSIDE in carrying out the transactions contemplated" in the Development Agreement. J-45 at 22, ¶ 31.

27. County has never explained why Condemnation 2 was necessary when Condemnation 1 remained pending. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 360, 198 P.3d 615, 623 (2008) (The Hawaii Supreme Court only noted that County adopted the second resolution of taking "[f]or unstated reasons.").

28. The only explanation County has for the three-year delay between Resolution 2 and the filing of the complaint in Condemnation 2 is "Deputy Corporation Counsel Gerald Takase testified that the three-year delay in filing this complaint [Condemnation #2] was because the County wanted to resolve the *Kelly* case, Civil No. 00-1-0192K, before

proceeding with what became Civil No. 05-1-015K." Plaintiff-Appellee County of Hawaii's Answering Brief, *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, at 6 n.6.

29. Condemnation 2 was a further part of the DA's condemnation scheme, which included Condemnation 1 and *County of Hawaii v. Pearne*, Civil No.00-1-006K, a case in which Oceanside's lawyer served as County's attorney.

CONDEMNATION 2 SAME AS CONDEMNATION 1

30. Condemnation 2 is the same as Condemnation 1 in all material respects: the plaintiff is the same (County), the defendant-landowners are the same (the Richards Family), the property attempted to be taken is substantially the same (the Onouli property), for the same reason (the bypass) as Condemnation 1. County admitted that the property it attempts to take in Civil No. 00-1-018K is "more or less" the same property it attempts to take in Civil No. 05-1-015K. While the property is not the exact same metes and bounds for purposes of abatement, *see County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008), the property to be taken in Condemnation 2 was substantially the same property to be taken in Condemnation 1.

31. The only difference between Condemnation 1 and Condemnation 2 is that Resolution 2 did not mention the DA. The absence of reference to the DA in Resolution 2 is not dispositive or conclusive. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

32. There is no evidence whatsoever that Condemnation 2 was executed pursuant to a "carefully considered development plan." *Kelo v. City of New London*, 545 U.S. 469, 478 (2005). Prior to its DA with Oceanside, County had no plans or ability to take the

property, and has not pointed to any evidence of a comprehensive development plan of which Condemnation 2 was allegedly a part of.

33. Instead, the only evidence is that Condemnation 2 was – like Condemnation 1 – instituted to fulfill County's obligations under the DA, and to avoid liability for breach. The circumstances of the approval process for Condemnation 2 have undermined the basic legitimacy of Condemnation 2, and the Court does not owe it the usual deference. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008). County had no independent plan to take the Richards Family's property, and it did not follow its usual condemnation procedures:

(1) As in Condemnation 1, the property description was provided by Oceanside, which increased the area of land to be taken by approximately 1/2 acre to coincide with the land that Oceanside had selected and altered. County never verified the accuracy of the survey or the extent of alteration by Oceanside.

(2) There is no evidence that County made any effort to negotiate an acquisition based upon the then-current value, or that it ever informed the Richards Family that County had authority to file a new condemnation action.

(3) County did not dismiss or amend Condemnation 1.

(4) As in Condemnation 1, in Condemnation 2, County did not follow the usual condemnation procedure such as independent appraisal, survey and land agent. Instead, Oceanside determined the property to be taken, and the amount of compensation offered.

(5) Although County knew that land values had increased in the area over the years since the filing of Condemnation 1, it did not increase either the value of the compensation or make any effort to increase the deposit that it made and as

required by law in Condemnation 1. The complaint in Condemnation 2 listed the same value used five years before in Condemnation 1, $47,000.

PRIVATE PARTY PLAINLY IDENTIFIED – OCEANSIDE

34. Additionally, the identity of the private party benefitting from Condemnation 2 – Oceanside – was known at the time the County Council adopted Resolution 2, and at the time County instituted Condemnation 2. *Kelo v. City of New London*, 545 U.S. 469, 478 n.6 (2005) (if identity of the benefitted party ***not*** known at the time of the taking, courts owe deference to the government's claim of public use).

RICHARDS FAMILY HAS OVERCOME PRIMA FACIE PUBLIC USE – CONDEMNATION 2 WAS PRETEXTUAL

35. The evidence in the record demonstrates the Richards Family has carried its burden to overcome the prima facie evidence of public use in Condemnation 2, and that County's assertion Condemnation 2 was for public use is manifestly wrong. Condemnation 2 is clearly and palpably of a private character. *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

36. To determine otherwise in the face of overwhelming evidence that Condemnation 2 was instituted only to correct real and perceived the errors in Condemnation 1 and to avoid breach of the DA (like Condemnation 1) would be to render this Court's role in judicial review of claims of public use a nullity, and futile. County could hide every one of the defects the Court found determinative in Condemnation 1 which resulted in its invalidation, simply by repeating its conduct and motivation in Condemnation 2 without disclosing it. *See* Kelly, *Pretextual Takings: Of Private Developers, Local Government,*

and Impermissible Favoritism at 7 (forthcoming 2009), *available at* http://ssrn.com/abstract=1132429 ("even if a court detects an impermissible motivation and invalidates a governmental action on that basis, officials may decided to take the same action without disclosing their actual motivation, thereby circumventing the judicial test").

37. The evidence in this case, adduced after a lengthy nonjury trial, clearly demonstrates that the attempted taking of the Richards Family's property in Condemnation 2 – like Condemnation 1 – was pretextual because it was the threat of breach of the DA that also was the primary purpose for County's institution of Condemnation 2. The ostensible purpose of providing traffic alleviation was a pretext to benefit a private entity, Oceanside, and the Court concludes that the predominant reason for the taking was an attempt to fulfill County's contractual obligation under the DA and avoid breach of the DA. *49 WB, LLC v. Village of Haverstraw*, 2007 N.Y. App. Div. LEXIS 7783 (N.Y. App. Div. 2007); *Kelo v. City of New London*, 545 U.S. 469 (2005).

38. Condemnation 2 was for the private benefit of Oceanside.

THE DEVELOPMENT AGREEMENT IS UNENFORCEABLE IN ITS ENTIRETY

39. This Court has already determined in Condemnation 1 that portions of the DA are void, including, inter alia, the "fair share" provision, and that judgment is final. County never received any consideration under the DA in the first instance to make it enforceable. The DA ran entirely in Oceanside's favor based upon the two foundation provisions, condemnation on demand and the imposition of an impact fee, leading to a "fair share reimbursement" to for Oceanside's double recovery of acquisition and construction costs,

which costs it was also passing on to the purchasers of Hokulia lots.

40. The Court did not address, however, whether the remainder of the DA survives.

41. Even the presence of a severance clause, in the light of the failure of its basic consideration and reason for being, can not and does not in this case, save the continued validity of the DA.

42. When the essence of a contractual agreement is improper or flawed, and the impropriety cannot be isolated to a distinct part of the agreement, the entire agreement is void. *See Keene v. Harling*, 61 Cal.2d 318, 321- 22 (Cal. 1964)(quoting *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 393 (Cal. 1888) ("[t]he good cannot be separated from the bad, or rather the bad enters into and permeates the whole contract, so that none of it can be said to be good[.]"). *See also Goo Wan Hoy v. McKeague*, 24 Haw 263, 266-67 (1918). This rule applies even when the contract contains and express severability clause. *See OCA, Inc. v. Starr*, 2009 U.S. Dist. LEXIS 8862 *15 (D. La. 2009).

43. As the DA is illegal, Oceanside has no obligation to complete the balance of the highway, or to convey the right-of-way to County.

44. As County has neither the right-of-way nor the funds to acquire the land or to pay for the construction of a highway thereon, and would not do so as a result thereof, there is no public "road" for which it claims to acquire the Richards Family's property and as such this attempt to acquire the property is but a sham perpetrated pursuant to the DA and as such, this attempted acquisition, like the first one has no public purpose.

STATUTORY DAMAGES

45. Because the Richards Family's property was not finally taken in Condemnation 2, it is

entitled to damages pursuant to Haw. Rev. Stat. § 101-27 (1993); *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008).

46. The damages to which the Richards Family is entitled include attorneys' fees, costs of court, and expenses, the cost of restoration of the property, as well as damage caused to the Richards Family's property interests including "interest at a reasonable rate on the money representing the value of the property from [the date of summons] until paid." COL 88; *Hawaii Hous. Auth. v. Midkiff*, 69 Haw. 247, 248 (1987).

47. As with blight and temporary takings, the Coupé Family has been damaged by the cloud over their property from and after the passage of Resolution No. 31-03, adopted February 5, 2003 until the date of this decision, based upon the fair market value of the property sought to be condemned, $387,669.54, at 10% per annum until paid.

[IN THE ALTERNATIVE – JUST COMPENSATION – COL's 48-51 only necessary if the Court finds Condemnation 2 not pretextual]

48. This Court determined that in Condemnation 1, the 2.9 acres which was the subject of that proceeding was valued at $140,500 on October 5, 2000. FOF 83, 84, 121.

49. For Condemnation 2, the fair market value of the land sought to be taken as of January 28, 2005, is $387,669.54, computed as follows:

a. The valuation of the 2.9 acres of property subject to Condemnation 1 was found to be $140,500. This needs to be adjusted for the size increase to 3.348 acres in Condemnation 2 by 115%, which equals $162,204.83. This, in turn, needs to be adjusted for appreciation.

b. County's appraiser Bloom provided valuations for October 9, 2000 and January

28, 2005, showing a 239% increase on a per acre basis between October 9, 2000 and January 28, 2005. P-11; P-12.

c. This increase yields a January 28, 2005 value of $387,669.54.

50. Medusky provided the only evidence as to the blight damages, and testified that a 10% per annum interest rate is reasonable. FOF 118. The blight damage percentage is set at 10% per annum, and computed from February 5, 2003, the date of Resolution No. 31-03 to January 28, 2005, and accrues until the date paid. FOF 124.

51. Blight damages, as set at the reasonable 10% rate per annum, and must be computed from January 28, 2005 until paid.

PROPOSED ORDER

IT IS HEREBY ORDERED that Civ. No. 05-1-015K is hereby dismissed with prejudice because Plaintiff County of Hawaii has not shown a public use to the taking of Defendants' property.

IT IS FURTHER ORDERED that the Development Agreement entered into between the County of Hawaii and 1250 Oceanside Partners is declared illegal and void.

IT IS FURTHER ORDERED that County and 1250 Oceanside Partners shall remove, at the time and manner of Defendant C&J Coupé Family Limited Partnership's choosing, shall remove such debris, construction materials, survey markers and other property from Onouli.

IT IS FURTHER ORDERED that County of Hawaii and 1250 Oceanside Partners shall restore the premises to the greatest extent possible to the condition of said premises

before they entered. This Court shall retain jurisdiction over the post-judgment relief to allow the parties opportunity for necessary court orders.

IT IS FURTHER ORDERED that Defendants are entitled to statutory damages, in addition to the award of temporary taking/blight at the rate of 10% per annum set forth in the Conclusions of Law, pursuant to Haw. Rev. Stat. 101-27. Defendant shall submit to the Court a memorandum with supporting exhibits showing its claimed damages. This Court retains jurisdiction to hear "[i]ssues of fact arising in connection with any claim for such damage shall be tried by the court without a jury unless a trial by jury is demanded by either party, pursuant to rules of court, within ten days from the date of entry of an order or judgment ...dismissing the proceedings." Haw. Rev. Stat. § 101-27 (1993).

DATED: Kealakekua, Hawaii _____.

_____
JUDGE OF THE ABOVE-ENTITLED COURT