

NO. 29887

IN THE INTERMEDIATE COURT OF APPEALS OF  
THE STATE OF HAWAII

COUNTY OF HAWAII, a municipal corporation,	)	CIVIL NO. 05-1-181K
	)	CIVIL NO. 05-1-015K
	)	
Plaintiff-Appellee,	)	APPEAL FROM SUPPLEMENTAL FINAL
	)	JUDGMENTS
vs.	)	(filed May 14, 2009)
	)	
ROBERT NIGEL RICHARDS, TRUSTEE	)	THIRD CIRCUIT COURT
UNDER THE MARILY SUE WILSON	)	
TRUST; MILES HUGH WILSON, <i>et al.</i> ,	)	Honorable Ronald Ibarra, Judge
	)	
Defendants,	)	
	)	
and	)	
	)	
C&J COUPE FAMILY LIMITED	)	
PARTNERSHIP;	)	
	)	
Defendants-Appellants,	)	
	)	
	)	

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**THIRD PARTY DEFENDANT-APPELLEE 1250 OCEANSIDE PARTNERS'**  
**ANSWERING BRIEF**

**CERTIFICATE OF SERVICE**

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PARTNERSHIP;	)
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**THIRD PARTY DEFENDANT-APPELLEE 1250 OCEANSIDE PARTNERS'**  
**ANSWERING BRIEF**

COMES NOW, Third Party Defendant-Appellee 1250 Oceanside Partners ("Oceanside"), by and through its counsel Meheula & Devens, LLP, hereby submits its Answering Brief as follows:

I. STATEMENT OF THE CASE

A. Introduction.

This appeal stems from the County's condemnation of a small segment of a much larger parcel of land owned by several parties as tenants in common, including Defendant-Appellant and Third-Party Plaintiff-Appellant C & J Coupe Family Limited Partnership ("Coupes" or

“Appellant”) for the purpose of constructing a bypass highway makai of the Mamalahoa Highway (“Bypass”).

This brief addresses the question of whether the trial court on remand sufficiently examined the evidence regarding the County Council’s passage of Resolution 31-03 before rejecting the Coupes pretext claim.<sup>1</sup> First, none of the parties in this case, including Mr. Coupe himself, disputes the public need to build the Bypass in order to alleviate unacceptable and unsafe traffic conditions and the trial court concluded as such in Supplemental FOF ¶¶13-14:

*“[T]he Court finds that traffic studies and plans found that an arterial highway in the area of the Bypass Highway would relieve unacceptable traffic congestion of the Mamalahoa Highway.*

*(Test. of Nancy Burns (7/10/07a.m., p. 31); Exhibit J-245 (General Plan), J-380 (1998 State of Hawaii Department of Transportation Long Range Plan), J-135 (1999 Bypass Environmental Study), and P-7 (2005 General Plan)” and “[T]he Court finds even without completion of Ali’i Highway, having the Bypass Highway will reduce traffic volume on the Mamalahoa Highway, improve traffic operations in the area and reduce infrastructure costs at other locations. (Test. of Warren Yamamoto (7/17/07p.m., p. 40-41); Exhibit D-71 (June 1997 M&E Pacific TIAR).”*

See also R:CV05-1-015K at Doc. 1112 at 10883-10885, 10887-10892 (Supp. FOF ¶¶2-9, ¶¶12-16, ¶¶19-22; Supp. COL ¶¶13); Id. at Doc. 01031 at 8700-8701 (FOF ¶¶6-9)<sup>2</sup>; Id. at Doc. 01059 at 9520; D-127, PDF at 1440.

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<sup>1</sup> Oceanside incorporates by reference Plaintiff-Appellee County of Hawaii’s (“County”) Answering Brief filed 1/22/10 not explicitly repeated herein.

<sup>2</sup> R:CV05-1-015K Doc. 01059 at 9514; D-2, PDF at 20. *Hawai’i Belt Road Holualoa to Papa Preliminary Engineering Report (June 1979) at III-3*, (State of Hawaii Department of Transportation concluded that a highway to bypass the Mamalahoa Highway would be beneficial because the Mamalahoa 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); Id. at Doc. 01060 at 9524; P-6, PDF at 165. *Kona Regional Plan (1982)* (“traffic counts [on

Second, on remand, the trial court found that the evidence does not support the Coupes contention that Resolution 31-03 and Civil No. 05-1-015K (“Condemnation 2”) was driven to comply with the Development Agreement. R:CV05-1-015K Doc. 1112 at 10888 (Supp. FOF ¶19) (“19. *The Coupes contend that Condemnation 2, like Condemnation 1, was driven by the County’s desire to comply with its obligations under the Development Agreement. No evidence supporting this contention was presented at trial, and the Court finds passage of Resolution No. 31-03 (Condemnation 2) evidences the County’s desire to get the Bypass built for public purpose.*”)

Finally, the trial court found and concluded that Condemnation 2 was not initiated to confer a private benefit in favor of Oceanside but rather to obtain the Bypass for the broader public purpose. *Id.* (Supp. FOF ¶20) (“*The Coupes contend that construction of the Bypass Highway was necessary to provide access to Hokulia. Oceanside already had public access to the Mamalahoa Highway through Haleki’i Street. The Bypass Highway, which bisects Hokulia and connects with other public roads at both ends beyond the Hokulia property, does provide*

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Mamalahoa 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.); *Id.* at Doc. 01057 at 9480; J-245, PDF at 2120. 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 Napo’opo’o.); *Id.* at Doc. 01059 at 9520; D-138, PDF at 1493. *Parson Brinckerhoff Quade and Douglas, Inc., Traffic Impact Study (1995), p.10* (the bypass “will result in a beneficial reduction of traffic volumes on Mamalahoa Highway.”); *Id.* at Doc. 01057 at 9487 J-380, PDF at 3861-3869. *Hawai’i Long Range Land Transportation Plan Final Report (May 1998) pp. 24-32* (recognized the need, based on traffic safety considerations, for the Hokuli’a bypass); *Id.* at Doc. 01057 at 9475; J-135, PDF at 1440. *Mamalahoa Bypass Road Final EIS (1999)*; (“The fundamental public enhancement provided by the proposed project [Mamalahoa bypass] will be its contribution to helping relieve the congested regional transportation system.”; *Id.* at Doc. 01060 at 9524; P-7, PDF at 579-580. 2005 Hawaii County Council General Plan (Ordinance 05-25) adopted the Mamalahoa bypass.

*improved access to Hokulia for development of a luxury subdivision, but that does not negate the County Council's predominant purpose of enacting Resolution 31-03 to obtain the Bypass Highway for broader public purpose.*"); R:CV05-1-015K Doc. 1112 at 10891 (Supp. COL ¶13) (*"The Court concludes that the use (Bypass) was not of a predominantly private character. The Bypass is a much needed road for the public's benefit. A number of studies and plans prepared by the County and State of Hawaii determined a public need long before the County and Oceanside entered into the Development Agreement."*)

B. History of the Case.

In January 1996, the County Council approved Ordinances 96-7 and 96-8 that primarily concerned change of zoning for the Hokuli'a project. Both ordinances provided, as conditions of approval, that Oceanside was to construct a bypass highway between Keauhou and Captain Cook. 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. R:CV05-1-015K Doc. 01057 at 9471; J-45, PDF at 363, 397 (Exhibits "B" and "C") (*"In lieu of the applicant obtaining or acquiring ownership or control of any segment of the Mamalahoa Highway Bypass, the requirement shall be deemed fulfilled upon the county's formal initiation of condemnation action(s) for such segments and an agreement has been entered into between the applicant and the county providing for the applicant's reimbursement to the county for the acquisition of the lands condemned."*) The ordinances also required Oceanside to dedicate the completed Bypass to the County. *Id.* (*"All roadway improvements stated in Condition L of this Ordinance shall be dedicated to the County of Hawaii."*)

On April 20, 1998, the County Council passed Resolution 244-98 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. R:CV05-1-015K Doc. 01057 at 9471, 9484; J-45, PDF at 466 (Exhibit “I”); Id. at Doc. 01057 at 9484; J-314, PDF at 2650. ¶11(a) of the Development Agreement addressed potential use of the County’s power of condemnation. Id. 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. R:CV05-1-15K Doc. 01031 at 8705 (FOF ¶30).

Starting in 1997, Oceanside and the County engaged in negotiations with the Coupes to obtain the right-of-way needed to construct the Bypass through their property. R:CV05-1-015K Doc. 01057 at 9476; J-142. However, despite lengthy negotiations, Oceanside and the County were unable to reach an agreement with the Coupes and they eventually reached an impasse in 2000. R:CV05-1-015K Doc. 01057 at 9476-9489; J-294, PDF at 2543; J-437, PDF at 4056; J-142, PDF at 1465; J-143, PDF at 1485; J-313, PDF at 2646; Frye Depo. 2/16/06 TR at 318, PDF at 1448.

On May 23, 2000, Oceanside asked the County to commence condemnation proceedings relating to the Coupes’ lands. R:CV05-1-015K Doc. 01031 at 8713 (FOF ¶61).

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. R:CV05-1-015K Doc. 01057 at 9480; J-231, PDF at 2068.

On October 9, 2000, the County filed a condemnation complaint against the Coupes in Civil No. 00-1-181K. R:CV05-1-015K Doc. 01057 at 9480; J-232, PDF at 2074. 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. The trial court determined in its September 27, 2007 decision 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. R:CV05-1-015K Doc. 01031 at 8713-8718 (FOF ¶¶62, ¶¶75-¶¶84); R:CV05-1-015K Doc. 01032 at 8748-8749 (1stAmd.Judg. ¶I.A).

On October 10, 2000, the trial court issued an Order Putting Plaintiff in Possession in Civil No. 00-1-181K. R:CV05-1-015K Doc. 01031 at 8714 (FOF ¶¶65).

On February 21, 2002, the County issued final subdivision approval for the Bypass that identified the specific Coupe parcel needed for County approved plans for the Bypass as comprising an area of 3.348 Acres. R:CV05-1-015K Doc. 01059 at 9519; D-119, PDF at 1438; R:CV05-1-015K Doc. 01058 at 9511; R-420, PDF at 687.

On July 11, 2002, the Court heard oral arguments regarding amending its granting of Oceanside's motion for partial summary judgment on the public purpose issue. The trial court expressed its concerns with the "validity of fair share and delegation portions of the Development Agreement." R:CV00-1-181K Doc. 00063 at 842 (Exhibit "A" 7/11/02 Trial Transcript).

On September 4, 2002, the trial court issued its order reversing its decision and denying Oceanside partial summary judgment as to the Coupes' sixth and seventh

affirmative defenses (no public necessity and pretext) on the basis that there is a genuine issue of material fact as to public purpose. R:CV00-1-181K Doc. 00056 at 725.

On December 11, 2002, the Court entered an order in Civil No. 00-1-181K staying the order of possession until final judgment. R:CV00-1-181K Doc. 00079 at 1352. 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 certain sections of the Development Agreement. *Id.*; R:CV 05-1-015K Doc. 01031 at 8714-8716 (FOF ¶¶65-72).

On January 23, 2003, the County Council adopted Resolution No. 31-03, authorizing the County to initiate a second eminent domain proceeding for condemnation of the Coupes' property for the Bypass. R:CV05-1-015K Doc. 01057 at 9480; J-241, PDF at 2098. Unlike Resolution 266-00, 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." R:CV05-1-015K Doc. 01031 at 8718-8719 (FOF ¶86). 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. 05-1-15K. R:CV05-1-015K Doc. 01057 at 9480; J-242. Resolution 31-03 and the January 2005 Complaint both attached a survey that identified the specific parcel to be obtained comprising an area of 3.348 acres. R:CV05-1-015K Doc. 01031 at 8718-8721 (FOF ¶85-¶102).<sup>3</sup>

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<sup>3</sup> 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,

On February 7, 2005, before the Coupes were served with the Complaint in Civil No. 05-1-15K, the Coupes filed a Motion to Dismiss or in the Alternative to Consolidate. R:CV05-1-015K Doc. 00702 at 15.

On March 31, 2005, the Court entered its order consolidating Civil No. 00-1-181K and Civil No. 05-1-15K. R:CV05-1-015K Doc. 01031 at 8719 (FOF ¶88).

On November 9, 2006, the trial court issued its order denying Coupes' motion for partial summary judgment regarding pretext. R:CV05-1-015K Doc. 00793 at 2791.

On February 12, 2007, the Coupes filed their Counterclaim to the County's first amended complaint in Civil No. 05-1-015K in which they asserted that "by attempting to sanitize the resolution underlying the second condemnation complaint and the second condemnation complaint itself of all references to Oceanside and the Development Agreement, the County attempts to hide Oceanside's true role in directing this condemnation action for its private benefit." R:CV05-1-015K Doc. 00870 at 3930 (¶31).

On August 23, 2007, the Coupes filed their proposed findings of fact and conclusions of law. R:CV05-1-015K Doc. 01019 at 8400-8401

On September 27, 2007, the trial court filed its first amended findings of fact and conclusions of law wherein it concluded that there was no pretext for Condemnation 2.<sup>4</sup>

R:CV05-1-015K Doc. 01031 at 8697. The trial court found and concluded:<sup>5</sup>

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before proceeding further in what became Civil No. 05-1-015K. 7/16/07pm TR at 51-52 (Test. of G. Takase).

<sup>4</sup> The trial court never found that the Bypass was for Oceanside's private benefit. Rather, 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 because the decision to condemn was improperly delegated to Oceanside in the Development Agreement. R:CV05-1-015K Doc. 01031 at 8736-8737 (COL ¶78-¶80). Thus, once Resolution 31-03 directed condemnation independent from the Development Agreement, the trial court determined there was proper public purpose. R:CV05-1-015K Doc. 01031 at 8697 (COL ¶¶93, 99, 101, 102).

- The public purpose of the Bypass is traffic alleviation and safety and is evidenced by numerous studies recognizing the long-standing need for a roadway to bypass the Mamalahoa Highway. R:CV05-1-015K Doc. 01031 at 8700-8701 (FOF ¶¶6-9);
- County Resolution 31-03 authorized Condemnation 2 and provides that the Bypass will provide a regional benefit for a public purpose and use that will benefit the County of Hawaii. Id. at 8719-8720 (FOF ¶¶91, ¶94, ¶¶97-98);
- The County Council determined that Condemnation 2 is valid because there was public purpose, there is no reference to the Development Agreement in Resolution 31-03 nor Civil 05-1-015K, and there was a new and different County Council passing Resolution 31-03. Id. at 8719-8721 (FOF ¶92, COL ¶¶98-102);
- The Bypass was to be built to State Highway Design Standards and not county standards. Id. at 8721 (FOF ¶100); and
- For Condemnation 2, the County's Department of Public Works had the final determination of the Bypass alignment and it preferred and selected the northern terminus at Ali'i Highway consistent with the General Plans adopted by the County. Id. at 8721 (FOF ¶¶101-102).

On October 26, 2007, the Coupes filed their notice of appeal for Condemnation 2 on the following grounds:

- The trial court lacked subject matter jurisdiction over Condemnation 2 because of abatement; and
- The trial court erred when it concluded that Condemnation 2 was for public use and not pretextual. R:CV05-1-015K Doc. 01040 at 9226.

On April 9, 2008, the Coupes filed their opening brief with regard to the pretext issue for Condemnation 2, arguing that the trial court should have looked beyond the face of Resolution 31-03 when analyzing their pretext claims. County of Hawai'i v. C&J Coupe Family Ltd. P'ship, No. 28822. Specifically, the Coupes contend that the trial court failed to address the following arguments when it determined no pretext for Condemnation 2:

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<sup>5</sup> The trial court notes with respect to its findings of fact that "The headings are used for organization purposes only. The Court has considered the facts under each heading for all claims." R:CV05-1-015K Doc. 01031 at 8699.

- The asserted public use of alleviating traffic conditions is pretext hiding the predominantly private benefit of the Bypass access road to Oceanside. (p. 31); and
- Since both Condemnation 1 and 2 were based on the Development Agreement and Condemnation 1 was struck down for lack of public use, Condemnation 2 should similarly be struck down for lacking public use. (Id.).

On December 24, 2008, the Hawaii Supreme Court found that the County adequately provided *prima facie* evidence of the Bypass' public purpose, but determined that under the circumstances of this case, the trial court should have looked beyond the face of Resolution 31-03 to address the Coupes' pretext claims and remanded the issue back to the trial court with instructions to fully consider all the arguments and evidence provided by the landowner allegedly showing pretext. County of Hawaii v. C&J Coupe Family Ltd. Partnership, 119 Haw. 352, 379, 198 P.3d 615, 642 (2008).

On January 22, 2009, the trial court held a status conference wherein it determined that there is sufficient evidence in the record for the Court to review and make a determination on the pretext issue. The Coupes did not object to the Court not accepting any new exhibits or evidence on the pretext issue. The trial court instructed the parties to simultaneously submit supplemental proposed FOFCOL on the pretext issue. 1/22/09 Minutes at 1, PDF at 79 (Court Minutes).

On March 20, 2009, the Coupes filed their proposed supplemental findings of fact and conclusions of law. R:CV05-1-015K Doc. 1095 at 10266-10293.

On May 14, 2009, the trial court issued its supplemental findings of fact and conclusions of law wherein it concluded that there was no pretext and Condemnation 2 was for a valid public purpose.<sup>6</sup> The trial court looked beyond the face of Resolution 31-03 and after addressing all of the Coupes' arguments regarding pretext, it specifically found/concluded:

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<sup>6</sup> The trial court notes in footnote 1 at page 2 that:

- A number of studies and plans generated long before the Development Agreement was made evidence the public need for the Bypass in order to relieve unacceptable traffic congestion. R:CV05-1-015K Doc. 1112 at 10883-10885, 10891 (FOF ¶¶2-9, COL ¶13);
- Resolution 31-03 authorizing Condemnation 2 was not based on the Development Agreement and the Coupes' arguments for no public purpose were heard at the public hearings and rejected by the County Council. Id. at 10885-10886 (FOF ¶10-¶12);
- Traffic studies and plans support the Court's determination that the Bypass would relieve unacceptable traffic congestion on the Mamalahoa Highway, improve traffic operations in the area and reduce infrastructure costs at other locations even if the Ali'i Highway is not yet completed. Id. at 10886-10887 (FOF ¶¶12-16);
- The Bypass alignment as set forth in Ordinances 96-7 and 96-8 with a northern terminus at Ali'i Highway is consistent with previous County plans and was preferred and selected by the County Department of Public Works. Id. at 10887 (FOF ¶¶17-18); and
- The Bypass provides improved access to Hokuli'a, but the predominant purpose of the Bypass was for the public purpose of providing an additional traffic corridor for those traveling through the Kona region. Id. at 10886-10887, 10891-10892 (FOF ¶¶13-16, ¶¶19-22, COL ¶¶13-16).

On June 12, 2009, the Coupes again appealed the trial court's decision on the basis that the trial court erred by finding Condemnation 2 to be valid because there was valid public purpose and no pretext.

On November 12, 2009, the Coupes filed their opening brief where they argued that Condemnation 2 was primarily motivated by factors other than to benefit the public because the County was interested in:

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

R:CV05-1-015K Doc. 1112 at 10882 (footnote 1).

- avoiding liability to Oceanside under the Development Agreement (pp. 2-4, 19, 20, 25, 26, 28, 32, 35)
- providing an alternative condemnation path since Condemnation 1 was “foundering” (pp. 3, 12, 19, 28-31)
- helping Oceanside including changing the alignment of the Bypass (p.2, 7-10, 31).

On December 21, 2009, the Supreme Court issued its order granting the application to transfer the case to the Supreme Court.

## II. STANDARD OF REVIEW

In reviewing the trial court’s determination that Condemnation 2 was valid because there was public purpose, an appellate court shall not set aside findings of fact unless clearly erroneous. HRCF Rule 52(a). A finding of fact is clearly erroneous when “despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed. A finding of fact is also clearly erroneous when the record lacks substantial evidence to support the finding.” Bremer v. Weeks, 104 Hawai’i 43, 51, 85 P.3d 150, 158 (2004). Substantial evidence is defined as “credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.” Id.

Findings of fact must include as much of the subsidiary facts as are necessary to disclose to the appellate court the steps by which the trial court reached its ultimate conclusion on each factual issue. Lopez v. Tavares, 51 Haw. 94, 451 P.2d 804, 805 (1969). A trial judge in his/her findings of fact is required to make brief, pertinent, definite findings, but it is not necessary to over elaborate or particularize those facts. Id. Further, it is not required that each finding of fact be substantiated by recitation of evidential matter. Id.

### III. ARGUMENT

#### A. The Trial Court Has Sufficiently Addressed All of the Coupes' Pretext Arguments and There is No Evidence Clearly Showing Pretext.

Hawaii Housing Authority v. Chiyo Ajimine, 39 Haw. 543, 546 (1952) stated the established rule that “the legislature’s determination of public purpose should be accorded great weight and given prima facie acceptance of its correctness, and the reviewing court should not overrule such a finding unless manifestly wrong.”; See also Township of West Orange v. 769 Associates, L.L.C., 172 N.J. 564, 571, 800 A.2d 86, 90 (2002) (A reviewing court will not upset a municipality's decision to use its eminent domain power “in the absence of an affirmative showing of fraud, bad faith or manifest abuse.”)

In the first appeal, this Court concluded that “under 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” and that “the [County] presented sufficient prima facie evidence of public purpose under a rational relationship test.” Coupe, 119 Haw. at 381, 198 P.3d at 644.

However, this Court also noted that the legislature’s determination of public purpose may not always be taken at face value and certain circumstances may require the reviewing court to consider whether a purported public purpose is pretextual. Id. In such instances, the party asserting the pretext defense has the burden of proving that the condemnation was “clearly and palpably of a private character and that the legislative facts on which the condemnation is apparently based *could not reasonably be conceived to be true* by the legislative body.” HFDC v. Castle, 79 Hawai’i 64, 86, 898 P.2d 576, 598 (1995) (emphasis in original). Here, the Coupes can satisfy their burden of proof only by clearly proving that the County’s “actual motivation” in Condemnation 2 was to provide a predominantly private benefit to Oceanside and not to benefit



the public by providing a public highway long needed to alleviate traffic congestion and serve the entire Kona community.

As noted above, the Coupes' opening brief argued that Condemnation 2 was primarily motivated by factors other than to benefit the public because the County was interested in:

- avoiding liability to Oceanside under the Development Agreement (pp. 2-4, 19, 20, 25, 26, 28, 32, 35)
- providing an alternative condemnation path since Condemnation 1 was "foundering" (pp. 3, 12, 19, 28-31)
- helping Oceanside including changing the alignment of the Bypass (p.2, 7-10, 31).

As set forth below, the trial court did address all of the Coupes' arguments and closely examined the evidence and circumstances surrounding the passage of Resolution 31-03, the determination of the bypass alignment, and the long-standing County and State of Hawaii bypass highway plans before rejecting the Coupes' pretext defense and finding Condemnation 2 was for a valid public purpose.

**1. County in adopting Resolution 31-03 was not primarily motivated to avoid liability to Oceanside.**

The opening brief at pages 25-26 incorrectly asserts that the "actual purpose" for adopting Resolution 31-03 was to avoid liability for breach of the Development Agreement. The trial court properly addressed this argument in its supplemental FOFCOLs and rejected it on the basis that the facts and circumstances surrounding Condemnation 2 evidences the County's independent desire to get the Bypass built for public purposes. R:CV05-1-015K Doc. 1112 at 10888 (Supp. FOF ¶19); *Id.* at Doc. 01057 at 9480; J-241, PDF at 2098; *Id.* at Doc. 01059 at 9520; D-127, PDF at 1440-1462.

Furthermore, as the trial court correctly concluded, the Coupes did not provide any evidence showing either that Oceanside would sue the County if Condemnation 1 failed and the

County elected not to initiate another condemnation action, or that the County Council believed that it was liable under the Development Agreement to initiate another condemnation suit if Condemnation 1 failed. *Id.* at Doc. 1112 at 10888 (Supp. FOF ¶19) (“19. *The Coupes contend that Condemnation 2, like Condemnation 1, was driven by the County’s desire to comply with its obligations under the Development Agreement. No evidence supporting this contention was presented at trial, and the Court finds passage of Resolution No. 31-03 (Condemnation 2) evidences the County’s desire to get the Bypass built for public purpose.*”).

While a side benefit to the County for initiating Condemnation 2 may have been not to breach the Development Agreement, the Coupes have provided no evidence that this was the County’s primary motivation. In fact, the trial court cites to the 1/7/03 public hearing discussing Resolution 31-03, where a council member stated with regard to the County’s obligations that “We’ve carried out our portion of the development agreement. I think that we don’t need to carry out any further parts of this. The ball should be in Hokuli’a or Oceanside 1250’s court and they should be taking care of these costs [of condemnation].” (Emphasis added). R:CV05-1-015K Doc. 01059 at 9520; D-127, PDF at 1460. See also *Id.* (Council member stating “I’ll be supporting the resolution. We need to get this road moving.”). Such statements made by the council members explaining their voting for/against Resolution 31-03 evidence that their primary purpose for authorizing Condemnation 2 was to expedite getting the Bypass built by Oceanside and not to avoid liability under the Development Agreement.

One of the Coupe sub-arguments is that only the Development Agreement obligated Oceanside to build the Bypass and if the Development Agreement is invalid then there is no obligation to build the Bypass and no public purpose for Condemnation 2 because the County cannot build the roadway on its own. Coupe Opening Brief at pp. 23-28, 31-35; R:CV05-1-

015K Doc. 1095 at 10294 (COL ¶¶43-44). This is incorrect. It is an undisputed fact that Oceanside is obligated to build and dedicate the Bypass under Ordinances 96-7 and 96-8 as a condition of rezoning the project. R:CV05-1-015K Doc. 01057 at 9471; J-45, PDF 363, 397 (Exhibits “B” and “C”). As the Coupes have pointed out, when asked by a councilmember in December, 1995 if “under this bill [Ordinance 96-8], you folks [Oceanside] are going to build that road, right? The bypass road?”, Mr. Frye answered “Yes.” R:CV05-1-015K Doc. 01059 at 9516; D-61, PDF at 740-745. This was before the Development Agreement was executed between Oceanside and the County.

Another Coupe sub-argument is that the Development Agreement tainted Condemnation 2. However, the trial court rejected this argument in Supplemental FOF ¶22: *“Notwithstanding the Court finding that Condemnation 1 was invalid because the County unlawfully delegated its condemnation power to Oceanside, the County’s predominant purpose in entering into the Development Agreement with Oceanside as referred in Condemnation 1 is the construction of the Bypass for public use.”*<sup>7</sup> Id. at Doc. 1112 at 10889.

**2. County litigated two condemnation actions because it wanted to insure that the Bypass would be built by Oceanside to benefit the public.**

There were concerns about the validity of Condemnation 1 during the period immediately preceding the passage of Resolution 31-03 and the County Council concluded at that time that a second condemnation was necessary to “get this [Bypass] road moving.” R:CV05-1-015K Doc. 01059 at 9520; D-127, PDF at 1460. Revealingly, at the public hearing on Resolution 31-03, the

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<sup>7</sup> The opening brief argued that the County initiated Condemnation 2 to avoid liability to the Coupes under HRS § 101-27 (pp. 2, 3, 25). However, the Coupes did not make this argument below and regardless there is no evidence that supports this contention or vitiates the trial court’s overall conclusion in Supplemental COL ¶16: *“The County Council’s adoption of Resolution 31-03 was rationally related to the need for the Bypass Highway and the County Council’s asserted public purpose and supported by the circumstances beyond the face of the resolution was not pretextual.”* R:CV05-1-015K Doc. 1112 at 10892.

council members stated that they would move forward with the Bypass even if it required that “the County condemn and pay for some of the property in order to get this [Bypass] road done in the interest of the general public so that we have an alternative highway.” Id. In fact, Mr. Coupe himself admitted to the County Council at that same hearing that “we recognize that the roadway has to go through at some point” and “we understand that it [the Bypass] is a need for the public.” R:CV05-1-015K Doc. 01059 at 9520; D-127, PDF at 1443. Thus, the public purpose of the Bypass was not disputed at the time of Resolution 31-03 passage and the candid statements by the council members at the public hearing for Resolution 31-03 clearly show the County Council’s actual motivation was to get the Bypass built for the general public’s benefit. Id.

The Coupes assert in their opening brief at pages 32-35 that there is no evidence showing that Resolution 31-03 was a part of a carefully considered and integrated plan to alleviate traffic apart from the Development Agreement. The Coupes also assert that a condemnation outside of an integrated development plan raises a presumption of improper motive and the trial court must invalidate unless it finds that the County had an existing plan, the ability to implement that plan and thoroughly deliberated Resolution 31-03 before its passage. Id.

The trial court has addressed and rejected this argument on the basis that there was a long-standing need for the Bypass and there already existed a number of studies and plans prepared by the County and State of Hawaii for a bypass highway long before the County and Oceanside entered into the Development Agreement. R:CV05-1-015K Doc. 1112 at 10883-10885, 10891 (Supp. FOF ¶¶2-8; Supp. COL ¶13). Moreover, the County’s plans for a bypass highway were known to Mr. Coupe early-on and he accommodated for a 1000ft right of way for a bypass highway to pass through the Coupes property in his 1980 proposed development plan. R:CV05-1-015K Doc. 01059 at 9514; D-3, PDF at 70-72 (“The State of Hawaii, Department of

Transportation is presently studying a 1000 ft. wide highway re-alignment corridor that passes through the project site” and “The project developer also owns land adjacent to the makai (west) boundary of the project site, down to the coastline, and is willing to provide the required right of way through this area, if plans for the new Belt Highway become more definite in the future.”). Thus, a bypass highway in the south Kona region has been a part of the County and State of Hawaii’s plans since 1979 and the Bypass is consistent with those plans. R:CV05-1-015K Doc. 1110 at 10886-10891 (Supp. FOF ¶12, ¶17-¶18; Supp. COL ¶13).

The County was able to implement its plan to construct the Bypass when it enacted Ordinances 96-7 and 96-8 requiring Oceanside to construct the Bypass as a condition of rezoning for the Hokuli’a project. R:CV05-1-015K Doc. 01057 at 9471; J-45, PDF at 363, 397 (Exhibits “B” and “C”). These ordinances created Oceanside’s obligation to build and dedicate the Bypass and preceded the Development Agreement in time. Importantly, Ordinances 96-7 and 96-8 remain in effect even if the Development Agreement is deemed invalid and are not superseded by the Development Agreement.

Contrary to Coupes’ allegation that Resolution 31-03 was passed without due deliberations, the evidence clearly shows that the public hearings on Resolution 31-03 were duly noticed, that Mr. Coupe attended the public hearing and was given the opportunity to fully present his position on Resolution 31-03, and that the County Council addressed and rejected Mr. Coupe’s arguments of no public purpose. R:CV05-1-015K Doc. 1112 at 10885 (Supp. FOF ¶10) (*“After duly noticed public hearings and deliberations, the County Council rejected the Coupes’ arguments of no public purpose; instead finding a public purpose.”*); *Id.* at Doc. 01059 at 9520; D-127, PDF at 1440. While Mr. Coupe stated his concerns with the fair share and condemnation provisions of the Development Agreement, he acknowledged more than once that there is a

recognized need for the Bypass and it is a public benefit. R:CV 05-1-015K Doc. 01059 at 9520; D-127, PDF at 1443, 1452.

The County Council understood that any obligations under the Development Agreement were satisfied by initiating Condemnation 1 but that since the trial court indicated that it may invalidate Condemnation 1, they should take a different course of action independent of the Development Agreement to condemn the Bypass segment of the Coupes' property in order to get the Bypass built. R:CV 05-1-015K Doc. 01059 at 9520; D-127, PDF at 1457-1460. Clearly, the County Council's primary motivation for authorizing Condemnation 2 was getting the Bypass built, Id. (Councilmember Leithead-Todd stating "if it requires that the County condemn and pay for some of the property in order to get this road done in the interest of the general public so that we have an alternative highway, because of the terrible traffic conditions in Kona; I think that we need to do this, and that we need to show our resolve in getting this road built."), and the trial court found in its Supplemental FOF ¶11 that their motive was recorded in the text of Resolution 31-03: *"It is necessary for the public use and purpose, to wit: the construction and development of a road intended to bypass Mamalahoa Highway..., [and] to acquire and condemn a portion of that certain private property."* R:CV05-1-015K Doc. 1112 at 10885 (FOF ¶11).

### **3. County was not primarily motivated to help Oceanside.**

The trial court found and concluded that the Condemnation 2 was not initiated to confer a private benefit in favor of Oceanside but rather to obtain the Bypass for the broader public purpose. Id. (Supp. FOF ¶20) (*"The Coupes contend that construction of the Bypass Highway was necessary to provide access to Hokulia. Oceanside already had public access to the Mamalahoa Highway through Halekii Street. The Bypass Highway, which bisects Hokulia and connects with other public roads at both ends beyond the Hokulia property, does provide*

*improved access to Hokulia for development of a luxury subdivision, but that does not negate the County Council's predominant purpose of enacting Resolution 31-03 to obtain the Bypass Highway for broader public purpose.*"); R:CV05-1-015K Doc. 1112 at 10891 (Supp. COL ¶13) (*"The Court concludes that the use (Bypass) was not of a predominantly private character. The Bypass is a much needed road for the public's benefit. A number of studies and plans prepared by the County and State of Hawaii determined a public need long before the County and Oceanside entered into the Development Agreement."*)

The Coupe sub-argument that the change in alignment of the bypass where the northern terminus was changed from Kuakini Highway to Ali'i Highway was to benefit Oceanside was clearly rejected by the trial court in its Supplemental FOF ¶17 and ¶18 which state:

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

*19. The Coupes contend that the decision to shift the alignment from Kuakini Highway to the Ali'i Highway was made by 1250 Oceanside and adopted by the County after conducting limited and cursory review that did not emphasize planning aspects. Contrary to their assertion, the Court finds the alignment of the Mamalahoa Bypass, with a northern terminus at Ali'i Highway rather than Kuakini Highway, was preferred and selected by the County and is consistent with the General Plans that have been adopted by the County. (Test. of Nancy Burns (7/10/07a.m., pp.10-19, and 7/16/07a.m., pp.36-37), William Moore (7/12/07a.m., p.63) and Donna Kiyosaki (7/17/07a.m., p.9), Exhibits J-251 (August 25, 1997 letter from Donna Kiyosaki to Robert Stuit regarding 11% maximum grade acceptable for Napo'opo'o terminus); J-45 (Development Agreement, Exh. H); Deposition of Stephen K. Yamashiro, pp. 52-53; Exhibits P-3 (1971 Facilities Maps, Hawaii County General Plan, Exhibit "D"), J-245 (November 14, 1989 General Plan Facilities Map Ordinance 89-142)).*

See R:CV05-1-015K Doc. 1112 at 10887-10888 (Supp. FOF ¶¶17-18).

Thus, the trial court looking at the circumstances beyond the face of Resolution 31-03 concluded that the Coupes presented it with no evidence indicating that the private benefit of the

Bypass to Oceanside predominated and that the facts show that the actual purpose of Condemnation 2 was for a valid public purpose. *Id.* Doc. 1112 at 10891-10892 (Supp. COL ¶¶13-16).

B. Adopting a Bright-Line Rule Establishing Per Se Pretext Would Contradict Precedent.

The Coupes contend in their opening brief at page 20 that this Court should adopt a bright line rule that all takings commenced while a contract which delegates the power of eminent domain to a private party could be controlling are never valid. To adopt such a per se rule for takings under the public use clause has not been adopted by the Hawaii courts or in any other jurisdiction, would infringe on the legislature's discretion to make public use determinations and would clash with case precedent.

It is well settled law in Hawaii that the proper review is rational-basis. The Hawaii Supreme Court states:

“our own case law demonstrates that the **rational-basis test-identical to that laid out in the federal precedent-is the appropriate standard to be applied in this jurisdiction when determining whether a governmental taking has a public purpose under the public use clause of the Hawai'i Constitution, as well as the federal constitution.** Under such standard, the government's determination that a particular taking is for a public purpose will be upheld if it “rationally furthers a legitimate state interest.” *HFDC*, 79 Hawai'i at 86, 898 P.2d at 598. In other words, the legislature's “public use declaration should be upheld unless it is palpably without reasonable foundation.” (emphasis added).

*Coupe*, 119 Haw. at 394-395, 198 P.3d at 657-658; *See Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct 2321, 2329-2330 (1984) (“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.”).

While the Hawaii Supreme Court notes there are certain circumstances a court can look behind the government's stated public purpose, they also state that “courts will not lightly disturb



such a finding [of public use] and will not overrule it unless it is manifestly wrong.” Ajimine, 39 Haw. at 550. Clearly, the Hawaii Supreme Court refused to go so far as to establish a bright line rule invalidating any taking when certain circumstances are present and adopting such a rule would contradict state and federal precedent.

Establishing a bright line rule invalidating any taking when certain circumstances are present impedes on the legislature’s authority to determine public use and takes away any judicial inquiry into the facts and circumstances of each particular case. Id.

IV. CONCLUSION

For the reasons stated above, we respectfully request that this Court affirm the Third Circuit Court’s Supplemental Final Judgment.

Dated: Honolulu, Hawai‘i, **JAN 21 2010**.

A handwritten signature in black ink, appearing to read 'WILLIAM MEHEULA', written over a horizontal line.

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