No. 29887

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

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**BRIEF FOR THE APPELLANT REPLYING TO ANSWERING BRIEF OF APPELLEE 1250 OCEANSIDE PARTNERS**

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## BRIEF FOR THE APPELLANT REPLYING TO ANSWERING BRIEF OF APPELLEE 1250 OCEANSIDE PARTNERS

This appeal is not about a road. It is about preserving the courts' role in insuring that a taking is not pretextual. This reply brief addresses three issues.

1. Neither the circuit court in its Supplemental Findings of Fact and Conclusions of Law, nor Oceanside nor County in their Answering Briefs, answer the first question this Court posed on remand, whether "any or all of the same provisions in the [Development] Agreement that led the court to invalidate Condemnation 1 . . . [were] still in effect and underlay Condemnation 2[?]" *County of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 383, 198 P.3d 615, 646 (2008). *See also id.* at 383 n.35, 198 P.3d at 646 n.35 (were "the invalidated condemnation and impact fee provisions . . . still in effect at the time Condemnation 2 was instituted[?]"). The answer is yes: the provisions in the Development Agreement which the circuit court found illegal when it invalidated Condemnation 1 – the delegation of condemnation power and the "fair share" requirement – were not invalidated by the circuit court until 2007. They were both believed to be in effect in 2003 when County adopted Resolution 31-03, and in 2005 when County instituted Condemnation 2. Until the circuit court held these provisions illegal in 2007, County and Oceanside argued they were valid.

As long as a Development Agreement that illegally delegates the sovereign power of eminent domain from County to Oceanside has not been invalidated or otherwise repudiated, any exercise of the eminent domain power is invalid. Until the Development Agreement is cancelled or invalidated, no taking is free from its taint. Neither County nor Oceanside offer any coherent alternative to insure the eminent domain process is protected from the threat of private purchase and that will allow for meaningful judicial review.

2. Aside from the illegal Development Agreement, County had no means, intent, or comprehensive plan consistent with *Kelo v. City of New London*, 545 U.S. 469, 483 n.12 (2005) and *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) to acquire the necessary property to build a bypass. All it had was a professed "need," some preexisting studies, a general plan which shows two traffic corridors elsewhere and in radically different alignments, and the County-Oceanside Development Agreement. None of these qualify as the required preexisting plan which could provide assurances that Resolution 31-03 was not the product of ulterior motives.

3. Finally, neither the circuit court's supplemental findings, nor the Answering Briefs respond to this Court's second question on remand: did "other conditions exist[] such that the private character predominated[?]" *Coupe*, 119 Haw. at 383, 198 P.3d at 646. Instead of addressing this

question, the circuit court merely opined that the record contains "no evidence." The circuit court's failure to address the overwhelming objective evidence of private benefit and pretext, coupled with the factual errors which permeate its foundational findings, show that its conclusions are clearly erroneous and should be vacated.

## I. PROTECTING MEANINGFUL JUDICIAL REVIEW

Unable to articulate anything undercutting the argument that the Public Use clauses of the U.S. and Hawaii Constitutions forbid takings until a contract delegating government's eminent domain discretion to a private party has been affirmatively rescinded or finally declared invalid, Oceanside and County essentially ignore it: Oceanside's brief devotes but a single page to the issue, while County apparently concedes it by not addressing it at all except to incorporate Oceanside's brief by reference. County Br. at 1 & n.1.

### A. Focusing Review Where It Will Be Most Effective

In *Coupe*, this Court held that County's "actual reason" and "motive" underlying Resolution 31-03 are the critical points of inquiry. *Coupe*, 119 Haw. at 380, 198 P.3d at 643. Oceanside asserts that "[e]stablishing a bright line rule invalidating any taking when certain circumstances are present . . . takes away any judicial inquiry into the facts and circumstances of each particular case." Oceanside Br. at 22. Not so. A bright line rule prohibiting takings while a delegation agreement is effective does not eliminate judicial inquiry, but rather focuses it where it will be the most productive. Because the government understands what it must not say to avoid revealing the private influence – especially where, as here, as a result of ongoing litigation it has an express blueprint – any inquiry into legislators' motives would in all likelihood be pointless. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (governments are presumed to employ staffers who can craft a record).

Resolution 31-03 was adopted and Condemnation 2 was instituted while the Development Agreement was still in effect. As the court would determine in 2007, Condemnation 1 was *per se* illegal because the Development Agreement delegated County's eminent domain power to Oceanside. But in 2003, the Agreement had not been invalidated or repudiated. Thus, the overwhelming risk that the Development Agreement continued to control County's actions when it adopted Resolution 31-03 – despite the language of the Resolution which conspicuously avoided the words "Development Agreement" – was simply too great. Instead of a futile inquiry, a *per se* rule

looks to objective evidence of the circumstances surrounding the adoption of Resolution 31-03 and asks whether there were sufficient assurances that Condemnation 2 was the result of an independent process free of the fatal private benefit that tainted Condemnation 1. The undisputed factual circumstances surrounding County's adoption of Resolution 31-03, its institution of Condemnation 2 nearly two years later, and its actions since then, bear out that ulterior motive was not a mere theoretical possibility, but a palpable reality. Neither Oceanside nor County debate that a *per se* rule would protect County's eminent domain power from an admittedly illegal agreement which delegated the power to a private party.

### B. Protecting Judicial And Legislative Roles

Oceanside also makes an argument rejected by this Court's earlier opinion. It claims a bright line rule would "infringe on the legislature's discretion to make public use determinations." Oceanside Br. at 21. This Court already held that while a legislative determination is afforded due deference, "our case law supports the proposition that a court can look behind the government's stated public purpose." *Coupe*, 119 Haw. at 375, 198 P.3d at 639. The Court reserved to the judiciary the central role of insuring the professed purpose for which property is being taken is the actual reason, while preserving the legislature's prerogative to make the broad legislative determination of "what uses will benefit the public and what land is necessary to facilitate those uses." *Id.* at 374, 198 P.3d at 637.

### C. A Bright Line Rule Prevents Future Abuse

Oceanside also asserts that *per se* rules have "not been adopted by the Hawaii courts or in any other jurisdiction." Oceanside Br. at 21. Oceanside, however, fails to acknowledge that the anti-delegation rule adopted by this Court and others is a *per se* rule of invalidity, and that any taking instituted pursuant to an agreement delegating the eminent domain power is illegal, even if the taking might have public benefits. *See Coupe*, 119 Haw. at 381 & n.34, 198 P.3d at 644 & n.34 (delegation is an independent basis to invalidate a taking). The rule that any taking instituted while such an agreement is in effect – even if County has not admitted that the agreement is motivating it as it did in Condemnation 1 – is supported by the same rationale. This Court is the final arbiter of Hawaii law and is not bound by the rules that other jurisdictions may or may not follow. *See, e.g., State v. Beltran*, 116 Haw. 146, 158, 172 P.3d 458, 470 (2007). Whether or not other factual circumstances beyond the cases at bar should lead to the application of a *per se* prohibition may be left to those

other cases, since the situation presented by the present cases are only likely to recur if the Court does not adopt the rule. This Court has never hesitated to announce rules of law to prevent future abuse even though the case before it may appear to be a relatively unique situation. *See, e.g., Sierra Club v. State Dep't of Transp.*, 120 Haw. 181, 206, 202 P.3d 1226, 1251 (2009) (statute adopted to benefit a single entity ruled not a "general law").

## II. "NEED" IS NOT A COMPREHENSIVE AND INDEPENDENT PLAN: COUNTY AND OCEANSIDE ADMIT THEIR ONLY PLAN IS THE DEVELOPMENT AGREEMENT

Rather than dealing with the issue on remand – County's "actual reason" for Condemnation 2 and the validity of the Development Agreement – Oceanside and County spend most of their efforts focusing on the obvious: that another road somewhere in Kona may have public benefits. *See, e.g.*, Oceanside Br. at 2. However, that is not the issue in Condemnation 2.

### A. Reason And Motive, Not "Need" Or Benefit

First, whether a taking could have public benefits is not the standard for measuring whether County's purpose is public. As this Court noted, the test under the U.S. and Hawaii Constitutions is not "use," it is the taking's *purpose*. *See, e.g., Coupe*, 119 Haw. at 374, 198 P.3d at 637 ("This court has interpreted the 'public use' clause to authorize takings for 'public purposes.'"). This Court instructed the circuit court on remand to examine whether "other conditions existed such that the private character predominated." *Coupe*, 119 Haw. at 383, 198 P.3d at 646. The circuit court had instructions to "evaluate [the] veracity" of the asserted public use and look for the "actual reason" for the taking, by reviewing the "circumstances of the approval process" with an objective eye for indications the basic legitimacy of the process was compromised. *Coupe*, 119 Haw. at 379, 198 P.3d at 642. The circuit court, however, did not heed these instructions, and it is not clear from the Supplemental Findings of Fact and Conclusions of Law whether it undertook this or any other examination. Instead, it focused solely on the already-resolved issue of whether County could have concluded a bypass was "a much needed road for the public's benefit." R:CV05-1-015K Doc. 1110 at 10891 (Supp. COL 13).

### B. Purported Need Is Not The *Euclid/Kelo* Plan

Second, a claim of "need" is not the comprehensive plan envisioned by the majority opinion in *Kelo v. City of New London*, 545 U.S. 469 (2005) when it relied upon *Village of Euclid v. Ambler*

*Realty Co.*, 272 U.S. 365 (1926) to validate the taking. If a taking is part of a "comprehensive," "integrated," and a "carefully considered" plan, *see Kelo*, 545 U.S. at 474, 483-84, then the professed reasons for the taking are less likely pretextual. Conversely, the lack of such a plan leads to an inference of pretext. County has repeatedly admitted – most recently in oral arguments before this Court in October 2008 – that it did not have any such plan, nor did it have the means to acquire property to construct a road. Oceanside and County rely on a number of *studies* to support their contention of "need," but these studies should not be conflated with the required *Euclid/Kelo* plan. At best they serve as background for only one segment of a comprehensive plan, the transportation segment. Some of these studies even show corridors that do not bisect the Coupes' property. *See, e.g.*, R:CV05-1-015K Doc. 01057 at 9471, J-33, PDF at 242-49 (maps).

Note also that a professed "need" is not ability, and neither Oceanside nor County acknowledge the fact that County admits it could never build any road on its own. No reasonable assurance of future public use is an independent basis to reject a taking. *See, e.g., Cincinnati v. Vester*, 281 U.S. 439, 448 (1930) ("[P]rivate property could not be taken for some independent and undisclosed public use."); *City & County of San Francisco v. Ross*, 279 P.2d 529, 532 (Cal. 1955) (en banc) (agreement lacked controls over the use of the property and "[s]uch controls are designed to assure that use of the property condemned will be in the public interest."); *Mayor of the City of Vicksburg v. Thomas*, 645 So.2d 940, 943 (Miss. 1994) (property may only be condemned for transfer to "private parties subject to conditions to insure that the proposed public use will continue to be served."). County also did not have the funds to acquire any property, or to build a road. R:CV05-1-015K Doc. T0008, 07/16/07 TR at 4:13-16 (Test. of Gerald Takase); *id.* at 4:17-19 (same). Inability to fund a project is evidence of no reasonable assurance of future public use. *See, e.g, County of Campbell v. BIF, Inc.*, No. 2003-CA-002318-MR (Ct. App. Ky. Mar. 25, 2005). Consequently, County did not own the right of way over any Kona property where its general plan denoted a desire for two future parallel traffic corridors.

### C. The Hokulia Bypass Does Not Conform To The General Plan

The circuit court concluded the proposed bypass was in conformity with County's general plan. R:CV05-1-015K Doc. 1110 at 10887 (Supp. FOFs 17 & 18); *id.* at Doc. 01031 at 8721 (FOF 101). This is plain error, and undermines all of its conclusions and findings because it reflects that the circuit court made no effort to look below the surface of Oceanside's and County's representations. The general plan does not reflect the single Hokulia bypass, but shows two roadways

which roughly parallel the shoreline and follow the contour of the land. *See* R:CV05-1-015K Doc. 01057 at 9480, J-245, PDF at 2120-22, (public facilities map); *id.* at Doc. T0025, 07/17/07 TR at 46:22-24 (Test. of Donna Kiyosaki)). The circuit court even acknowledged this in both its 2007 and 2009 findings. *See id.* at Doc. 01031 at 8701 (FOF 8); *id.* at Doc. 1110 at 10884 (Supp. FOF 5). Further, Oceanside's initial rezoning, Ordinance 94-73, recognized the two corridors and required that they each bisect the Hokulia project. *Id.* at Doc. 01057 at 9470, J-24 (Exs. B & C), PDF at 166-67; *see also id.* at Doc. T0027, 07/23/07 TR at 26:11-22 (Test. of Virginia Goldstein); *id.* at Doc. T0028, 07/25/07 TR at 46:25-47:12 (Test. of Richard Frye); *id.* at Doc. 01058 at 9495, R-78, PDF at 97 ("project does not adhere to General Plan"); *id.* at 9512, R-450, PDF at 966.

However, Oceanside's bypass results in a deletion of one roadway and alters the route of the other, resulting in a single bypass (which strikes diagonally across the two general plan corridors) which instead of paralleling the shoreline, cuts from nearly sea level to nearly 2,000 feet.[1] *See* R:CV05-1-015K Doc. 01057 at 9471, J-45, PDF at 465 (Oceanside's proposed bypass alignment). The general plan was not amended at any relevant time to accommodate the Hokulia bypass deviation.[2] In addition to creating a more steeply graded road contrary to the general plan, the single bypass in Resolution 31-03 would result in only one traffic corridor, *essentially halving the area's planned capacity.* Additionally, the new alignment had the effect of ameliorating Kamehameha Schools' opposition to Hokulia, and saved Oceanside millions in construction costs.

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1. While Ordinances 96-7 & -8, in sections M(2) and L(2) respectively, delete reference to Exhibit "C," which established the bypass corridor, they also ambiguously alter the text of the ordinance to allow the North Terminus to be anywhere in the vicinity of Keauhou. *See* R:CV05-1-015K Doc. 01057 at 9471, J-45, PDF at 397-422 (Ord. 96-7); *id.* at 9485, J-354, PDF at 3190-3202 (Ord. 96-8). The Keauhou ahupua`a is large enough to allow any location of the North Terminus as Oceanside selects. No *ordinance* ever approves of the North Terminus called for in the Development Agreement's Exhibit "H." *See id.* at 9471, J-45, PDF at 465. Thus, again, the Development Agreement attempts to illegally amend an ordinance by way of a resolution.

2. Apparently sensitive to this concern, the circuit court compounded its error by suggesting that Ordinances 96-7 and 96-8 approved of a new alignment, consistent with the general plan. *See* R:CV05-1-015K Doc. 01031 at 8703 (FOF 15); *id.* at Doc. 1110 at 10887 (Supp. FOF 17). In fact, the general plan was not amended regarding the South Kona transportation corridors until *after* the Ordinances 96-7 & -8, the Development Agreement , Condemnation 1, Resolution 31-03, and the *Kelly* litigation extensive delay in filing Condemnation 2. If this were not enough, the February 2005 amendment of the General Plan admits that it is dependent upon the Development Agreement by, on page 13-14, specifically stating that the bypass is being built by Oceanside. *See id.* at Doc. 01060 at 9524, P-7, PDF at 579. There never was any attenuation between the Development Agreement and Condemnation 2.

### D. The Illegal Development Agreement Was The Only "Plan"

In an attempt to fit their facts into the *Kelo* majority's requirement for a comprehensive plan, Oceanside and County assert the Development Agreement was the "plan" –

> Lastly, on pages 32 to 35 of their Opening Brief, the Coupes argue that the County had no integrated plan to alleviate traffic apart from the Development Agreement. The Coupes ignore several important factors. *First, the Development Agreement (and the relevant Ordinances) clearly indicates the need for the regional roadway.*

County Br. at 28 (emphasis added). This argument fails for two reasons.

First, a private development agreement cannot serve as a *Euclid/Kelo* plan or a substitute for making public use determinations about what property to condemn. It is merely a contract between a developer and the local government in which the government agrees to not apply future land use regulations against the property for a period of time, and to the extent it purports to do more, it is *ultra vires* and void. *See* Haw. Rev. Stat. § 46-121 (2003).

Second, even if a development agreement could serve as a *Euclid/Kelo* plan, an *illegal and void* development agreement cannot. The Coupes sought a specific declaration that the entire Development Agreement was void and unenforceable. *See* Opening Br. at 2, 35-36, & 38.[3] The Development Agreement was illegal because its two foundational elements – the delegation of condemnation power and the "fair share" reimbursement provisions – were against public policy. As this Court held in *Miehlstein v. King Market Co.*, 24 Haw. 540 (Terr. 1918), "[a]ny contract by one acting in a public capacity, which restricts the free exercise of a discretion vested in him for the public good, is void." *Id.* at 544. Further, as noted in the Opening Brief, the Development Agreement was void because it attempts to amend the rezoning ordinances by way of resolution. Thus, because the entire Development Agreement was void (meaning that Oceanside was not obligated to acquire any property or construct its bypass), it cannot serve as the comprehensive plan envisioned by the *Kelo* majority. *See also infra* Section III(C)(3).

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3. A declaration that the Development Agreement is void may eliminate future challenges based upon the Development Agreement pretext.

## III. "NO EVIDENCE"

*"We've carried out [at the hearing on Resolution 31-03] our portion of the development agreement."* – County Council Member (*See* Oceanside Br. at 15)

The only conclusions which can be drawn from the circuit court's finding that the record contains "no evidence" of pretext is that the circuit court either did not look at the undisputed evidence of the circumstances surrounding the adoption of Resolution 31-03 and the institution of Condemnation 2, or that it simply did not understand what this Court tasked it to do on remand.

The circuit court's Supplemental Findings of Fact and Conclusions of Law (May 14, 2009) certainly do not reflect in a "clear, specific and complete" manner required by Haw. R. Civ. P. 52(a) that it undertook the required examination of the record. *Scott v. Contractors License Bd.*, 2 Haw. App. 92, 93-96, 626 P.2d 199, 200-02 (1981). If the circuit court "closely examined the evidence and circumstances surrounding the passage of Resolution 31-03" as asserted by Oceanside, *see* Oceanside Br. at 14, the court had a duty to set forth its rationale in a way that is "sufficiently comprehensive" to allow the appellate court to review its "basis for the decision" and "whether [it is] supported by the evidence." *Shannon v. Murphy*, 49 Haw. 661, 668, 426 P.2d 816, 820 (1967). However, the Supplemental Findings of Fact and Conclusions of Law reflect that the circuit court merely made cursory conclusions, and did not address the evidence that County's stated purpose was not its actual purpose. As in its first review, the circuit court did not look beyond Resolution 31-03, and despite this Court's express remand order and the Coupes' counterclaim seeking a declaratory judgment on this specific issue, did not address whether the Development Agreement was in effect.

### A. Avoiding Development Agreement Breach: "Should the County breach the agreement and not condemn the [sic] would be potentially liable for the projects [sic] failure. I can't imagine they would ever take such a risk"

Oceanside claims that Resolution 31-03 and Condemnation 2 were not "primarily" motivated by the threat of lawsuit for breach of the Development Agreement were County to fail to condemn as it promised it would. *See* Oceanside Br. at 15 ("While a *side benefit* to the County for initiating Condemnation 2 may have been not to breach the Development Agreement . . .") (emphasis added). Oceanside asserts there was no threat of breach of the Development Agreement. *See id.* at 14-15 ("[T]he 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[.]"). *See also* County Br. at 25 (County mirrors the circuit court's "no evidence" conclusion, and asserts

"there is no evidence that the County passed Resolution 31-03 either to avoid liability to Oceanside or to the Coupes[.]"). However, these assertions are contradicted by the undisputed evidence that Oceanside was confident the threat of breach of the Development Agreement was enough to keep County in line: "[s]hould the County breach the agreement and not condemn the [sic] would be potentially liable for the projects [sic] failure. I can't imagine they would ever take such a risk." R:CV05-1-015K Doc. 01057 at 9478, J-203, PDF at 1961; *see also id.* at Doc. 01031 at 8705 (FOF 27).[4] County didn't take the risk, and adopted Resolution 31-03.

Further, both Oceanside and County admit that Condemnation 2 was delayed to wait for the *Kelly* case to be resolved. Oceanside Br. at 7 n.3; County Br. at 9 n.9. This admission expressly ties the Development Agreement to Condemnation because resolving the *Kelly* case – which involved only Oceanside's Hokulia entitlements – concerned only Oceanside and whether Hokulia could be developed. The only connection between the resolution of the *Kelly* case and Condemnation 2 is the Development Agreement, and neither Oceanside nor County explain why the *Kelly* case is otherwise relevant, if as they claim, Condemnation 2 was an independent act.

**B. Saving Private Purpose**

Critically, County now acknowledges its motive for Condemnation 2 was to "save" Condemnation 1 from failing:

> And third, recognizing the potential of a failed Condemnation 1 (because the trial court had earlier stayed the order of possession until final judgment on the grounds that there was a genuine issue of material fact as to public purpose related to the validity of the Development Agreement), the County filed Condemnation 2.

County Br. at 25-26. *See also* Oceanside Br. at 16-17 ("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 action was necessary to 'get this [Bypass] road moving.'"). Until the Answering Brief, County has never disclosed its rationale for

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4. Oceanside also asserts that since it was already obligated to build a road under Ordinances 96-7 and 96-8 as a condition of rezoning Hokulia, there was no threat. This is not correct. Oceanside was not obligated to build a road as a result of the Ordinances, but only as a condition of rezoning. In other words, if Oceanside in its sole discretion wanted to go forward with the Hokulia project, it had to build a road. But it was under no obligation to go forward with Hokulia. Only the Development Agreement committed it to build. *Cf.* Oceanside Br. at 15-16. Oceanside has never repudiated or waived its rights under the Development Agreement to pursue County for breach. Indeed, as determined by the circuit court in Condemnation 1, Oceanside utilized the threat of condemnation to acquire most of the right-of-way.

prosecuting two concurrent condemnation lawsuits to take the same property. *See Coupe*, 119 Haw. at 360, 198 P.3d at 623 (noting that County adopted the second resolution of taking only "[f]or unstated reasons[.]"). These admissions are critical for several reasons.

First, County and Oceanside have now admitted what was obvious from the circumstances, but had never been acknowledged: that in 2003 and thereafter, Condemnation 1 was in serious trouble. Now, rather than intuiting Oceanside's and County's motives from the fact that they lost possession of the property, had construction halted in its tracks, failed in the attempt to remove Judge Ibarra, and shortly thereafter adopted Resolution 31-03, we have their express acknowledgment of motive.

Second, the admission that Condemnation 2 was filed because Condemnation 1 was failing destroys Oceanside's and County's claim that Condemnation 2 was independent of Condemnation 1. Since they now admit Condemnation 2 was tied to Condemnation 1 (which was failing because of the Development Agreement taint, among other reasons), this admission expressly ties the Development Agreement and Condemnation 1 to Condemnation 2. That alone is enough to invalidate Condemnation 2.

Third, even if saving County from breach of the Development Agreement was only a "side benefit" as Oceanside claims, *see* Oceanside Br. at 15, an unrevealed side benefit is sufficient to show that County's professed reason for Condemnation 2 was not its actual reason, since the side benefit was never advanced as a reason for Condemnation 2. Also, as a matter of law, it is never a valid public purpose for County to institute a taking simply to "save" a failing case. The proper procedure in such circumstances is for County to first resolve the failing case via voluntary dismissal or judgment, pay damages under Haw. Rev. Stat. § 101-27 (1993), and cure the defects which resulted in the failure. Only after all of these steps are taken can a subsequent condemnation be objectively independent.[5]

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5. Oceanside's only response regarding County's avoidance of liability under Haw. Rev. Stat. § 101-27 (1993) is the erroneous claim that the issue was not raised below. Oceanside Br. at 16 & n.7. It was. In the proposed findings of fact and conclusions of law submitted to the circuit court, the Coupes urged the court to view Condemnation 2 in light of Condemnation 1 and the Development Agreement. *See* Exhibit "A" to Notice of Submission of Defendant C&J Coupe Family Limited Partnership's Proposed Findings of Fact and Conclusions of Law in Civil No. 05-1-015K at 29-30 (Mar. 20, 2009) ("the Court must look to the context of Condemnation 2 and the factual situation surrounding it, which includes the historical context of the taking, the specific series of events leading to Resolution [31-03] and Condemnation 2, and the legislative (continued...)

Finally, County's failure to follow its normal condemnation practice, including the lack of stand alone appraisal, an independent title search (County's use of Oceanside's title search resulted in the wrong party being named), and deposit in Condemnation 2, which simply transferred the same items from Condemnation 1, demonstrates County's total and absolute reliance upon Oceanside and the lack of attenuation between the two cases. *See* R:CV05-1-015K Doc. T0007, 07/16/07 TR at 46:9-20 (Test. of G. Takase). Significantly, County also totally relied upon Oceanside's Development Agreement promise to cover all costs by not appropriating any funds for this second condemnation. *See id.* at Doc. 1095 at 10271 (Proposed FOF 57); *id.* at Doc. 01057 at 9474, J-105, PDF at 1181.[6] Moreover, Condemnation 1 sought to take 2.9 acres, but even though Condemnation 2 was for approximately 1/2 acre more, County subdivided while in possession under the Condemnation 1 possession order without notice to the Coupes – not 2.9 acres, but the *larger* acreage. The date of the subdivision was a month before the circuit court reconsidered the order of possession in Condemnation 1, and nearly a year before adoption of Resolution 31-03. *See* Oceanside Br. at 6; County Br. at 8.

### C. Ignored Or Erroneous Evidence Of Private Benefit And Lack Of Attenuation

Finally, the circuit court's reliance upon myriad erroneous factual conclusions in determining that Resolution 31-03 was attenuated from the Development Agreement and Condemnation 1 is an independent basis for reversal. In addition to the factual errors noted elsewhere, including the erroneous finding of general plan consistency, the following highlight these errors.

#### 1. DPW Technical Review Does Not Diminish The Illegal Delegation To Oceanside To Target The Coupes' Property

Relying on a review by the Department of Public Works (DPW), the circuit court erroneously concluded that County had not illegally delegated to Oceanside the power to select the Coupes'

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5. (...continued)
history including statements made by County officials – not just the text of Resolution [31-03] – to determine whether Condemnation 2 is for public use, or whether it was pretextual as the Hawaii Supreme Court instructed on remand."). R:CV05-1-015K Doc. 1095 at 10287 (Proposed COL 21).

6. *See also* R:CV05-1-015K Doc. T0007, 07/16/07 TR at 24:15-20 (Test. of G. Takase); *id.* at 52:7-25; *id.* at 53:23-24; *id.* at 54:3-19; *id.* at Doc. T0008, 07/16/07 TR at 4:13-23 (Test. of G. Takase); *id.* at 31:7-8; *id.* at Doc. 01057 at 9480, J-242, PDF at 2103-16; *id.* at Doc. T0003, 12/10/02 TR at 8-9; *id.* at Doc. 1095 at 10270-77 (Proposed FOFs 50-55, 63-66, 74-76, & 81-86).

property for condemnation because County made the ultimate determination. *Id.* at 8721 (FOF 102). This is wrong. First, review by DPW is technical, and not a substantive planning review. *See id.* at Doc. T0025, 07/17/07 TR at 37:18-39:10 (Test. of Donna Kiyosaki). Second, the circuit court's conclusion is contrary to the specific language of the rezoning ordinances and the Development Agreement. *See* R:CV05-1-015K Doc. 01031 at 8706 (FOF 34). The DPW letter relied upon by the circuit court was drafted by Oceanside's consultant. *See id.* at Doc. 01057 at 9471, J-25, PDF at 170-73; *id.* at Doc. T0016, 07/09/07 TR at 74:20-22 (Test. of William Moore). Under the rezonings and the Development Agreement, Oceanside had the right to select the alignment and target the Coupes' property. *Id.* at Doc. 01031 at 8706 (FOFs 34 & 35); *id.* at Doc. 01057 at 9471, J-45, PDF at 341, § 13(b)(2). Indeed, Oceanside, not County, conducted the surveys. *Id.* at Doc. T0007, 07/16/07 TR at 46:9-11 (Test. of G. Takase). The very survey metes and bounds and map for the 3.348 acres, attached to Resolution 31-03 are dated April 6, 2001, were produced by Oceanside's surveyor, and were used to obtain its illegal subdivision under Condemnation 1. *See id.* at Doc. 01057 at 9480, J-242, PDF at 2103-16. This was almost two years before the adoption of Resolution 31-03, but serves as yet another link between the Development Agreement and Condemnation 2. *See id.* at Doc. T0007, 07/16/07 TR at 51:6-21 (Test. of G. Takase).

**2. Oceanside Had No Access For the Hokulia Project**

Contrary to all evidence, the circuit court relied upon an erroneous finding that Oceanside had sufficient access for its Hokulia project. *See* R:CV05-1-015K Doc. 1110 at 10888 (Supp. FOF 20); *see also* Oceanside Br. at 19. However, every witnesses was in agreement: Oceanside could not obtain its rezoning to build Hokulia, which was proposing a density of in excess of 1,500 units, because it had insufficient access for its proposed project. County acknowledges that "Oceanside thereafter needed to build the highway in order to move forward with its project[.]" County Br. at 29; *see also* R:CV05-1-015K Doc. 01031 at 8702-04 (FOFs 13, 17, 22 & 23). The circuit court apparently confused the fact that the while over 1,250 acres of Oceanside's project did touch a public road, its requested rezoning could not be accommodated by the existing road system. This is not to say that the then existing road system was at capacity. It was not. It was at 80% capacity, and traffic improvements along Mamalahoa Highway would significantly increase traffic flow through the area. *See id.* at Doc. 01057 at 9473, J-78, PDF at 769-84; *id.* at 9477, J-178, PDF at 1700-01; *id.* at 9486, J-377, PDF at 3703. Here again, Oceanside's needs predominated over public needs, because it was

Oceanside's need for a rezoning that would add hundreds of residential units to the system that required the construction of the bypass so Oceanside would have sufficient access without burdening the existing traffic net. The rezonings precluded both the issuance of any final subdivision approval before Oceanside demonstrated that it owned and controlled the corridor, as well as any occupancy until the road was built. Even before the Development Agreement, Oceanside was obligated to acquire the right-of-way and build the road, *if* it wanted to utilize the new zoning density, and County was not obligated to assist in any way.

### 3. No New Consideration Supported The Development Agreement

The circuit court suggested that County received two items of consideration, both of which are illusory. *See* R:CV05-1-015K Doc. 01031 at 8728 (COL 22). The circuit court's conclusions offer no analysis of the many itemizations of failed consideration introduced by the Coupes. *See id.* at Doc. T0007, 07/16/07 TR at 18:6-19:6 (Test. of G. Takase); *id.* at Doc. 01060 at 9525, P-17, PDF at 1046-47; *id.* at Doc. 01058 at 9512, R-450 & R-451, PDF at 966-67; *id.* at 9498, R-144, PDF at 167; *id.* at Doc. T0027, 07/23/07 TR at 49:22-25 (Test. of V. Goldstein). As noted, under the rezonings, if Oceanside desired to subdivide and occupy its project, then it and not County was required to acquire and build the road. The choice was Oceanside's. The Development Agreement did not change this. In examining an end point, the trial court suggests that under the Development Agreement, Oceanside had to build within five years from start of construction, but it neglects to examine that the start time remained totally discretionary. Oceanside would not have started and could not have financed the project or even acquired the right-of-way, without the illegal condemnation on demand delegation. *See id.* at Doc. 01031 at 8704-05 (FOFs 24-31). If Oceanside chose not to (or could not) acquire and build the project, County's only remedy is to deny issuance of every final subdivision permit for Hokulia and to preclude occupancy. These measures may seem draconian to a party investing tens of millions of dollars up front before it can obtain a return, but Oceanside drafted the language, in both the ordinances and in the Development Agreement. And this trumps County's position that Oceanside would suffer no harm if County breached the Development Agreement by not condemning.

The circuit court also concluded that consent to conditions of approval, including the bypass exaction, might serve as some portion of the consideration. This also begs the question. Nowhere in the Development Agreement is there such a consent, assuming that one might be able to determine

the parameters of this consent in the first place. *See id.* at Doc. 01057 at 9471, J-45, PDF at 327-533. As noted, Oceanside was already obligated to acquire and build if it desired to use the rezoning. If there were illegal exactions in the rezonings, perhaps even unconstitutional ones, this resolution-adopted Development Agreement could not serve as a consent to them. Nor would Oceanside be deemed to have waived such claims. Waivers must be clear and are strictly construed. *See, e.g., Anderson v. Anderson*, 59 Haw. 575, 587, 585 P.2d 938, 945 (1978) (waiver must be intentional and "must be clearly made to appear.") (citation omitted).[7]

Certain conditions were imposed upon Oceanside's rezoning by ordinance. *See id.* at Doc. 01031 at 8704 (FOFs 22-25). Yet the Development Agreement, which is only approved by Resolution, attempts to modify those conditions. *See id.* at 8704-10 (FOFs 26-51). For instance, Oceanside may be relieved *pro tanto* of its obligation to "own or control" the right-of-way upon the "commencement" of a condemnation. The Development Agreement attempts to shift this relief trigger earlier to the sending of a demand to condemn. There are other attempted amendments of the rezoning ordinances. *Compare id.* at Doc. 01057 at 9471, J-45, PDF at 327-533 *and id.* at 9470, J-24, PDF at 128-169. Consideration must be material. *See, e.g., Epp v. Epp*, 80 Haw. 79, 89, 905 P.2d 54, 64 (Haw. Ct. App. 1995). No manner of consideration can support an illegal, void agreement, especially one that violates public policy.

If Oceanside was already obligated to acquire and build the bypass before the Development Agreement, *see* Oceanside Br. at 16 & 18, the road cannot, for purposes of this litigation, constitute consideration for the Development Agreement. By Oceanside's own admission as noted in the Opening Brief, condemnation on demand and fair share reimbursement were the foundational considerations for its promises. *See also id.* at Doc. 01057 at 9478, J-187, PDF at 1729-30 ("wish list").

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7. County also suggests, indirectly and illogically, that a bond required by the Development Agreement is sufficient consideration for the failure of the two cardinal considerations of the same. *See* County Br. at 28. Again, even without the Development Agreement, a bond is required upon subdivision to insure that infrastructure is completed. *See* Hawaii County Code § 23-83. This provision adds no new consideration. Even if it did, the bond is only for construction and not for acquisition of the right-of-way. And if Oceanside would fail to pay the annual bond premium or increase the bond amount due to the passage of time, inflation and other influences, it would also fail in its purpose.

## IV. CONCLUSION

Rather than remand Condemnation 2 for a third try, this Court may reverse the judgment by (1) adopting a *per se* rule that any condemnation initiated prior to the renunciation of the Development Agreement, or its being finally declared void, is invalid; (2) concluding that the potential for exposure to liability to either Oceanside for breach, or the Coupes for section 101-27 damages, was a sufficient restriction on County's eminent domain discretion that its independent judgment cannot be assured; (3) concluding that there was no comprehensive plan apart from the Development Agreement to assure the County was exercising its independent discretion; (4) concluding that even if the Development Agreement was otherwise *Euclid/Kelo*-compliant, it cannot serve as a comprehensive plan because it is both illegal and unenforceable; or (5) concluding that the record is sufficient to determine that County's stated purpose in Commendation 2 was a pretext because there was no attenuation between the Development Agreement and Condemnation 2, or that Oceanside, not County, was the predominant benefactor.

Otherwise, the case must be again remanded for the circuit court to face the facts in the record which support the above conclusions.

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Respectfully submitted,

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