

In The  
**Supreme Court of the United States**

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C & J COUPE FAMILY  
LIMITED PARTNERSHIP,

*Petitioner,*

v.

COUNTY OF HAWAII,  
1250 OCEANSIDE PARTNERS,

*Respondents.*

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**On Petition For A Writ Of Certiorari  
To The Supreme Court Of Hawai'i**

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**BRIEF OF RESPONDENTS IN OPPOSITION  
TO PETITION FOR A WRIT OF CERTIORARI**

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## **COUNTERSTATEMENT OF QUESTION PRESENTED**

Whether Petitioner has presented compelling reasons to grant the Petition, where the Hawai'i Supreme Court's Opinion affirming the State Circuit Court's application of the *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005) analytical framework, in the condemnation of land for the construction of a regional public highway, does not conflict with a decision of this Court nor does it implicate an important federal question that has not been settled by this Court that would require this Court to create a new standard of scrutiny.

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## **BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI**

Respondents County of Hawai'i ("County") and 1250 Oceanside Partners ("Oceanside") respectfully oppose the Petition for a Writ of Certiorari ("Pet.") to review the Judgment of the Hawai'i Supreme Court, issued on March 1, 2011, reproduced in the appendix to the Petition ("Pet.App.") at 84-86. The Hawai'i Supreme Court opinions are reported in 124 Hawai'i 281, 242 P.3d 1136 (2010) ("Coupe II") and 119 Hawai'i 352, 198 P.3d 615 (2008) ("Coupe I"), reproduced at Pet.App. 1-83 and Pet.App. 103-242. The trial court's First Amended Findings of Fact ("FOF"), Conclusions of Law ("COL"), and Order (filed September 27, 2007) (App. 1-62) is unreported.

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### **STATEMENT OF THE CASE**

This case 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 Petitioner C & J Coupe Family Limited Partnership ("Petitioner" or "Coupes") for the purpose of constructing a public bypass highway makai of the Māmalahoa Highway ("Bypass") to alleviate unacceptable and unsafe traffic conditions in the south Kona region.

This brief addresses the question of whether the state trial court on remand sufficiently examined the evidence regarding the County Council's passage of

Resolution No. 31-03 before rejecting the Coupes' pretext claim. First, none of the parties in this case, including the Petitioner, disputes the public need to build the Bypass in order to alleviate unacceptable and unsafe traffic conditions. Pet.App. 90-98, 101 (Supp. FOF ¶¶2-9, ¶¶12-16, ¶¶19-22; Supp. COL ¶13); App. 5-6 (FOF ¶¶6-9). Second, on remand, the trial court found that the evidence does not support the Coupes' contention that Resolution No. 31-03 and Civil No. 05-1-015K ("Condemnation 2") were driven to comply with the Development Agreement. Pet.App. 96-97 (Supp. FOF ¶19). Finally, 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. Pet.App. 97, 101 (Supp. FOF ¶20; Supp. COL ¶13).

### **I. History of the Case**

Petitioner is an owner of an approximately 300-acre plot of land in Onouli, Hawai'i which runs from the ocean up to the Māmalahoa Highway.

1250 Oceanside Partners ("Oceanside") is the developer of the residential subdivision project known as Hōkūli'a, located in Kona, Hawai'i. Pet.App. 109. The project is located on a 1550-acre parcel of land which also extends from the ocean to Māmalahoa Highway. The Petitioner's property is contiguous to the southern border of Hōkūli'a. *Id.*

From 1979, the County (and State) of Hawai'i had undertaken a number of studies and plans which

determined the public need for a roadway to bypass the Māmalahoa Highway. They stated, among other things, that the existing Māmalahoa Highway did not conform to the desired service level criteria, had inadequate physical elements, high accident rates, undesirable traffic conditions, and would not be able to handle the projected volume of traffic in that area. Pet.App. 90-93. Accordingly, the studies concluded that "the fundamental public enhancement provided by the proposed project [Bypass] will be its contribution to helping relieve the congested regional transportation system" – which the Kona community had identified as a major problem. *Id.* During numerous community and public meetings through the Planning Commission, Planning Committee and County Council, the public expressed their support for a bypass highway. Pet.App. 95.

In light of the clear public need for a bypass highway, by 1996, the County Council approved ordinances that provided, as a condition of change of zoning for the Hōkūli'a project, that Oceanside was to construct a bypass highway between Keauhou and Nāpō'opo'o. App. 7-8 (FOF ¶¶13-16). The Bypass would need to cross lands owned by many landowners (including Petitioner and Oceanside), and, therefore, the ordinances anticipated that the County might need to use its eminent domain power in connection with the construction of the Bypass. App. 8 (FOF ¶¶17-18).

On April 1, 1998, the County and Oceanside signed a Development Agreement that addressed

compliance with the conditions of approval for Oceanside's Hōkūli'a project that obligated Oceanside to construct the Bypass. App. 9 (FOF ¶¶20-22). As interpreted by the trial court, the Development Agreement provided that, at Oceanside's request, the County was to condemn rights-of-ways which Oceanside was unable to acquire through private negotiations. App. 10 (FOF ¶30).

By 1998, Oceanside and the County had also engaged in negotiations with the Coupes to obtain the right-of-way needed to construct the Bypass through their property. App. 18 (FOF ¶52.c.). Despite lengthy negotiations, Oceanside and the County were unable to reach an agreement with the Coupes and they eventually reached an impasse in 2000. App. 20-21 (FOF ¶¶60-61).

On May 23, 2000, Oceanside asked the County to commence condemnation proceedings relating to the Coupes' lands. App. 21 (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. App. 21 (FOF ¶62).

On October 9, 2000, the County filed a condemnation complaint against the Coupes. App. 21 (FOF ¶62). 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. App. 27 (FOF ¶83). 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. App. 21, 25-84 (FOF ¶62, ¶¶75-84). The trial court determined that the condemnation provisions of the Development Agreement improperly delegates condemnation authority to a private party, and thus invalidates Resolution No. 266-00. App. 26 (COL ¶¶78-80).

On October 10, 2000, the trial court issued an Order Putting Plaintiff in Possession in Civil No. 00-1-181K. App. 22 (FOF ¶65).

On September 5, 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. App. 23 (FOF ¶69).

On December 11, 2002, the Court entered an order in Civil No. 00-1-181K staying the order of possession until final judgment. App. 24 (FOF ¶71). The trial court stayed the possession order on the grounds that there was a genuine issue of material fact as to public purpose related to the validity of the Development Agreement. App. 24 (FOF ¶72).

Concerned about the protracted litigation and uncertainty of Resolution No. 266-00 and the first condemnation, the County Council concluded that a second condemnation action was necessary in order to move forward with constructing the bypass highway, even if it required the County to condemn and pay for the property itself. Pet.App. 30, 34. Statements made by various County Council members at the public hearing on Resolution No. 31-03 evidenced their resolve to construct the Bypass “in the interest of the general public so that we [the community] have an alternative highway, because of the terrible traffic conditions in Kona.” Pet.App. 34. Even those who voted against the resolution agreed that the “need for the road is enormous, the people of Kona do need it.” Pet.App. 33-34.

Accordingly, on February 5, 2003, the County Council adopted Resolution No. 31-03 authorizing the County to initiate a second eminent domain proceeding for condemnation of a small portion of the Coupes’ property for the Bypass. App. 27 (FOF ¶85). Consistent with its earlier statements, the County Council determined that the Bypass will provide “a regional benefit for the public purpose and use which will benefit the County.” App. 28-29 (FOF ¶¶91-92). Since Resolution No. 31-03 was independent from and not based on the Development Agreement, it made no reference to the Development Agreement. *Id.*

On January 28, 2005, the County filed its second condemnation action against the Coupes in Civil No. 05-1-15K. App. 27 (FOF ¶85). 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 No. 266-00 was attempting to condemn.” App. 27 (FOF ¶86). Therefore, Resolution No. 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, as compared to the 2.9-acre parcel sought in Resolution No. 266-00. App. 27-30 (FOF ¶¶85-102).

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. App. 28 (FOF ¶88).

On March 31, 2005, the Court entered its order consolidating Civil No. 00-1-181K (“Condemnation 1”) and Civil No. 05-1-15K (“Condemnation 2”). App. 28 (FOF ¶88).

On September 27, 2007, the trial court provided its first amended findings of fact and conclusions of law wherein it addressed the Coupes’ arguments regarding pretext and concluded that there was no pretext for Condemnation 2. App. 1-62. The trial court never found that the Bypass was for Oceanside’s private benefit. Rather, it found that regardless of the significant public benefit to be derived from the Bypass, Resolution No. 266-00 for Condemnation 1 was not supported by public purpose because the decision to condemn was improperly delegated to Oceanside in the Development Agreement. App. 49 (COL ¶¶78-80). Thus, once Resolution No. 31-03 for

Condemnation 2 directed condemnation independent from the Development Agreement, the trial court determined there was proper public purpose. App. 51-53 (COL ¶¶93, 99, 101, 102). The trial court examined the Coupes' pretext arguments and addressed them as follows:

- 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 Māmalahoa Highway, App. 5-6 (FOF ¶¶6-9);
- County Resolution [No.] 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 Hawai'i, App. 28-29 (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 [No.] 31-03 nor Civil [No.] 05-1-015K, and there was a new and different County Council passing Resolution [No.] 31-03, App. 92, 52-53 (FOF ¶92, COL ¶¶98-102);
- The Bypass was to be built to State Highway Design Standards and not county standards, App. 30 (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, App. 30 (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.

Pet.App. 107.

On December 24, 2008, the Hawai‘i 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 No. 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. Pet.App. 177-179, 203.

On May 14, 2009, the trial court issued its findings of fact and conclusions of law wherein it concluded that there was no pretext and Condemnation 2 was for a valid public purpose. The trial court looked beyond the face of Resolution No. 31-03 and

after addressing all of the Coupes' arguments regarding pretext, it specifically found/concluded:

- A number of studies and plans generated long before the Development Agreement was made evidences the public need for the Bypass in order to relieve unacceptable traffic congestion, Pet.App. 90-93, 101 (Supp.FOF ¶¶2-9, Supp.COL ¶13);
- Resolution [No.] 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, Pet.App. 93-94 (Supp.FOF ¶¶10-12);
- Traffic studies and plans support the Court's determination that the Bypass would relieve unacceptable traffic congestion on the Māmalahoa Highway, improve traffic operations in the area and reduce infrastructure costs at other locations even if the Ali'i Highway is not yet completed, Pet.App. 94-95 (Supp.FOF ¶¶12-16);
- The Bypass alignment as set forth in Ordinances [No.] 96-7 and [No.] 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, Pet.App. 96 (Supp.FOF ¶¶17-18); and
- The Bypass provides improved access to Hōkūli'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, Pet.App. 94-98, 101-102 (Supp.FOF ¶¶13-16, ¶¶19-22, Supp.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. Pet.App. 21-22. They argued:

- The adoption of a *per se* pretext rule because the "government will rarely acknowledge that it is acting for a forbidden reason," Pet.App. 23-27;
- Condemnation 2 was not materially different from Condemnation 1 and at the time Resolution [No.] 31-03 was passed, its actual purpose was to avoid liability to Oceanside for breach of the Development Agreement and to the Coupes for HRS § 101-27 damages, Pet.App. 29;
- Only Oceanside received an overwhelming benefit from the Bypass since its completion was necessary for the Hōkūli'a project and the County had no means or intention to build the Bypass apart from the Development Agreement, Pet.App. 29; and
- The County had no comprehensive plan apart from the Development Agreement showing how it would build the Bypass, that it had the ability to acquire the rights-of-ways and that it deliberately developed such a plan prior to Resolution [No.] 31-03, Pet.App. 29.

On November 10, 2010, the Hawai'i Supreme Court affirmed the Circuit Court's holding and concluded that Condemnation 2 was not pretextual. Pet.App. 82. The Hawai'i Supreme Court, after closely reviewing each of Coupes' pretext contentions, found:

- The adoption of a *per se* pretext rule is not warranted because it would "threaten the established rule of deference given to the findings and declarations of the government in these cases" and "a bright line rule would deprive courts of the judicial function recognized in *Coupe I*," Pet.App. 26;
- There was no evidence that complying with the Development Agreement predominated over the public purpose of building the Bypass, or that the prevailing reason for approving Resolution [No.] 31-03 was to avoid liability to Oceanside for breach of the Development Agreement and to the Coupes for HRS § 101-27 damages, Pet.App. 32-37;
- The evidence establishes that the Bypass was a public highway that satisfied the broad public use of alleviating traffic congestion in the Kona area, and the fact that it allowed Oceanside to develop its property does not detract from or destroy the public character of the Bypass or render the condemnation invalid, Pet.App. 37-45; and
- The County had a comprehensive and integrated plan prior to and apart from the Development Agreement showing how it would

build the Bypass, that it had the ability to acquire the right of ways and that it deliberately developed such a plan prior to approving Resolution [No.] 31-03, Pet.App. 49-55.

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#### **REASONS FOR DENYING THE PETITION**

In requesting that this Court grant certiorari, the Petitioner attempts to manufacture a compelling interest where none exists, and ignores the obvious existence of adequate state and federal case law supporting the Hawai'i Supreme Court's decisions.

In *Coupe II*, the Hawai'i Supreme Court reviewed the State Circuit Court's application of the analytical framework set forth in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005), and affirmed the Circuit Court's decision that the County's condemnation of land for the construction of a regional public highway indeed had a public purpose and was not a pretextual taking solely for the benefit of Oceanside. Unsatisfied with the outcome, Petitioner now seeks to shoehorn what is clearly a findings of fact review into an assertion that the Court adopt new review standards for public takings which undermine well-established federal and state case precedent. That they seek to do so in a case where the decision below properly applied the analytical framework set forth in *Kelo* to reach the correct decision only underscores the inappropriateness of this Court's review.

The decisions below do not conflict with the decision of this Court nor do they implicate a federal

question that has not been decided by this Court. Accordingly, the Coupes have not carried their burden of demonstrating any “compelling reasons” for the Petition to be granted.

### **I. A *Per Se* Pretextual Rule Is Contradictory to Any Precedent**

There is no split among the lower courts on the applicability of a rational-basis standard of review for public takings cases, and Petitioners do not even attempt to suggest one. Instead, they suggest that this Court should “firmly establish” Justice Kennedy’s concurring opinion in *Kelo* by creating new *per se* invalidity or heightened scrutiny standards for pretext claims which have not been adopted by this Court, the lower courts, or any state courts.

The inquiry under the public use clause of the Fifth Amendment of the U.S. Constitution and Article 1, § 20, of the Hawai‘i Constitution is whether a taking is designed to further a “legitimate government purpose.” *Hawai‘i Housing Authority v. Castle*, 65 Haw. 465, 653 P.2d 781 (1982); *County of Hawai‘i v. C & J Coupe Family Ltd. Partnership*, 119 Hawai‘i 352, 198 P.3d 615 (2008). Accordingly, “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.” *Hawai‘i Housing Auth. v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 2329-2330 (1984); *Hawai‘i Housing Authority v. Lyman*, 68 Haw.

55, 704 P.2d 888 (1985) (reaffirmed a minimum rationality standard of review to be applied in evaluating legislative findings of public use); *Kelo v. City of New London*, 545 U.S. at 487, 125 S.Ct. at 2667 (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts.”). Courts will not lightly disturb the legislature’s determination of public use unless it is manifestly wrong. *Id.*

However, when the defendant sufficiently alleges that the purported public purpose was pretext for the actual purpose of bestowing a private benefit, the court may look to the surrounding circumstances in order to determine the actual purpose of the taking. *County of Hawai‘i v. C & J Coupe Family Ltd. Partnership*, 119 Hawai‘i at 381, 198 P.3d at 644 (“[B]oth *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.”).

While *Kelo* and *Coupe I* support looking beyond government findings and declarations in deciding whether a stated public purpose is pretextual, “the issue of public use is [still] a judicial question and one of law to be decided on the facts and circumstances of each particular case.” *Coupe I*, 119 Haw. at 384, 198 P.3d at 647. Accordingly, the Hawai‘i Supreme Court’s

rejection of a *per se* invalidity rule in favor of applying the *Kelo* analytical framework is consistent with this Court and other lower court decisions. See, e.g., *County of Hawai'i v. C & J Coupe Family Ltd. Partnership*, 119 Hawai'i at 394-395, 198 P.3d at 657-658; *Hawai'i Housing Auth. v. Midkiff*, 467 U.S. at 241, 104 S.Ct. at 2329-2330; *Hawai'i Housing Authority v. Ajimine*, 39 Haw. 543 (Haw. Terr. 1952).

## **II. The Hawai'i Supreme Court Properly Applied *Kelo***

At every level of proceedings, Petitioner has contended that the Hawai'i courts have "failed to look at the undisputed evidence" and "blindly affirmed" the court's determinations that there was no evidence of pretext. Pet. 28; Pet.App. 31. Yet, Petitioner does not contend anywhere that the Hawai'i Supreme Court or the Circuit Court failed to follow *Kelo*, nor do they contend that their decisions conflict with relevant decisions of this Court. Instead, the Coupes' Petition merely asserts that the Hawai'i courts erred in the application of *Kelo* to the facts of the case rather than the analytical framework set forth in *Kelo*. Thus, the Coupes' Petition is merely a request for this Court to review the Hawai'i courts' decisions for erroneous factual findings or the misapplication of a properly stated rule of law, and, therefore, should not be granted.

Assuming for purposes of argument that this Court granted review of this case, it would likely

apply the same analytical framework as used by the Hawai'i Supreme Court and reach the same outcome.

Contrary to the Coupes' contentions, this case does not involve a "one-to-one" transfer of property, executed outside the confines of an integrated plan that has such an acute risk of impermissible favoritism that a presumption of invalidity is warranted. Pet. 1, 22-23.

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

Traffic studies and general plans dating back to 1979 recognized that there would be significant increased volume of traffic along Māmalahoa Highway, that the projected volume would exceed the capacity of the Māmalahoa Highway, and that there was significant public need for a bypass highway to reduce the traffic congestion along the Māmalahoa Highway and reduce accidents in the area. Pet.App. 41-43. Undoubtedly, there is substantial evidence supporting the public purpose for construction of the Bypass Highway.

Despite such overwhelming evidence in favor of public purpose, the Coupes assert that Resolution

No. 31-03 was "tainted" because it was commenced to avoid liability to Oceanside and to the Coupes for HRS § 101-27 Damages. Pet. 31, 36, 37. These arguments are incorrect for several reasons. First, there is no evidence that the County passed Resolution No. 31-03 either to avoid liability to Oceanside or to the Coupes; the County's intent has always been to construct an arterial highway in the area of the Bypass Highway. Second, it seems illogical to argue that the County attempted to avoid liability to Oceanside, when only Oceanside would have benefited should the County stop condemnation proceedings because the County's inaction may have relieved Oceanside of any obligation to complete the Bypass Highway. And third, recognizing the potential of a failed Condemnation 1 (because the trial court had earlier stayed the order of possession until final judgment on the grounds that there was a genuine issue of material fact as to public purpose related to the validity of the Development Agreement), the County filed Condemnation 2.

The Coupes further urge this Court to overrule the other decisions by finding that the overwhelming benefit from Condemnation 2 would be to Oceanside. Pet. 18, 22. The Coupes, however, have failed to provide evidence sufficient to rebut the presumption in favor of the legislature's determination of public use. There is overwhelming evidence that the use of the Bypass was predominately for the public's benefit. There is no evidence that there is only incidental or pretextual public benefit from the Bypass. Presented

with no credible evidence that the Bypass will provide only incidental public benefit, the trial court properly found public purpose by relying upon the several government studies that recognized the long-standing public need for the Bypass based on traffic capacity and safety considerations. Pet.App. 90-93, 95 (Supp.FOF ¶¶2-9, 16). Hence, the County Council's adoption of Resolution No. 31-03 was rationally related to the need for the Bypass Highway and the County Council's asserted public purpose underlying Condemnation 2 was not pretextual.

In addition, the Coupes have not disputed the finding of public benefit from the Bypass at Condemnation 2. Pet.App. 90-93 (Supp.FOF ¶¶6-9). Instead, the Coupes have argued that the "Development Agreement's continuing cloud over the County's eminent domain discretion," and provided an "overwhelming private benefit" to Oceanside. Pet. 22, 36-37.

At trial, the Coupes' private benefit arguments were: (1) the County changed the Bypass's northern terminus from mauka at Kuakini Highway to makai at Ali'i Highway to benefit Oceanside to the detriment of the County; and (2) Oceanside (and not the County) determined the alignment of the Bypass. Pet.App. 96 (Supp.FOF ¶¶17-18). The trial court did not fail to analyze these private benefit allegations. The trial court specifically found that the "alignment of the Māmalahoa Bypass Highway, with a northern terminus at Ali'i Highway was preferred and selected by the County's Department of Public Works, and is

consistent with the General Plans that have been adopted by the County" and in "County Resolution [No.] 31-03, the final determination of the Māmalahoa Bypass Highway remained with the County of Hawai'i Department of Public Works." Pet.App. 96 (Supp.FOF ¶¶17-18). Moreover, the trial court specially considered whether "the use is clearly and palpably of a private character" and found that it was not. Pet.App. 99, 101 (Supp.COL ¶¶5, 13). The Coupes offer no proof that the trial court improperly excluded private benefit evidence or failed to consider evidence relating to those topics.

The Coupes have also argued that Oceanside will benefit from the Bypass because Hōkūli'a could not open the project without acquiring, completing, and conveying the road. However, Hōkūli'a already has two access points into the subdivision. Pet.App. 97 (Supp.FOF ¶20).

Lastly, the Coupes argue that the County had no integrated plan to alleviate traffic apart from the Development Agreement. Pet. 18, 22-24, 28. The Coupes ignore several important factors. First, the Development Agreement (and the relevant Ordinances) clearly indicates the need for the regional roadway. Second, the trial court did not strike down the entire Development Agreement for Condemnation 1; the trial court determined that the condemnation and the fair share provisions were invalid. And third, Resolution No. 31-03 specifically found public purpose, separate from the infirmed portions of the Development Agreement in Condemnation 1.

At the end of the day, the Coupes refuse to acknowledge that the Hawai'i courts properly applied the pretext analysis this Court set forth in *Kelo* and determined, with overwhelming factual support, that there was long-standing, clearly demonstrated public need and purpose for the Bypass. Unable to carry its burden of proof under the rational-basis standard of review, the Coupes assert, without any support and contrary to well-settled precedent, that this Court should heighten the standard of scrutiny for public takings to the point where certain types of takings are entirely disallowed (*per se* invalidity) or the burden is improperly shifted onto the government to prove the validity of the taking. Such a dramatic shift in takings law is unwarranted. The Bypass remains what it will in fact always be: a public highway long needed to serve the Kona communities.

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## CONCLUSION

The Coupes have not established any compelling reasons for this Court to grant the Petition. Therefore, the Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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