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IN THE TAX APPEAL COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

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THOMAS J. O'KEEFE, Trustee,		)	
		)	
Appellant,		)	
vs.		)	CASE NO.
		)	TX 16-1-0011
CITY & COUNTY OF HONOLULU,		)	
		)	
Appellee,		)	
<hr/>		)	
SCHUYLER E. & MARILYN J. COLE,		)	
		)	
Appellant,		)	
vs.		)	CASE NO.
		)	TX 16-1-0012
CITY & COUNTY OF HONOLULU,		)	
		)	
Appellee.		)	
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TRANSCRIPT OF PROCEEDINGS  
before the Honorable GARY W. B. CHANG, Judge,  
presiding on Monday, October 17, 2016.  
(Taxpayer-Appellants' Motion for Summary Judgment)

APPEARANCES:

RAY K. KAMIKAWA, Esq.	For the Taxpayer-Appellant
NATHANIEL A. HIGA, Esq.	
ROBERT M. KOHN, Esq.	For the City and County of
SUSAN A. BENDER, Esq.	Honolulu
Deputies Corporation Counsel	

REPORTED BY  
PHYLLIS K. TSUKAYAMA, CSR-355  
OFFICIAL COURT REPORTER  
STATE OF HAWAI'I

1 Monday, October 17, 2016

3:01 PM

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3 THE CLERK: On the motions calendar, calling  
4 consolidated cases 16-1-0011 for Taxpayer-Appellants'  
5 motion for summary judgment.

6 Counsel and parties, please state your  
7 appearances.

8 MR. KAMIKAWA: Good afternoon, Your Honor.  
9 Ray Kamikawa for Schuyler Cole and Marilyn Cole. With me  
10 at counsel's table is Nathaniel Higa.

11 MR. KOHN: Good afternoon, Your Honor. Robert  
12 Kohn and Susan Bender for the City and County of Honolulu.

13 THE COURT: Okay, good afternoon. Please have  
14 a seat. We're here for the hearing on motion for summary  
15 judgment by the taxpayer and some joinders. So I  
16 understand, Mr. Kamikawa, your clients are asserting four  
17 bases for the motion; correct?

18 MR. KAMIKAWA: That is correct, Your Honor.

19 THE COURT: Okay. I think in order for the  
20 appellate record to be as clear as possible, why don't we  
21 follow the progression that you followed in your motion and  
22 let's address the issues one at a time. So let's start  
23 with the illegality first.

24 MR. KAMIKAWA: Yes, Your Honor.

25 As far as the illegality, the taxpayer's

1 position is that under the ordinances at issue, 8-7.1 and  
2 following, there are classifications that are permitted  
3 under the ordinance. So long as they are related to the  
4 highest considerations of highest and best use, that is  
5 under Section 8-7.1, Subsection (C) of paragraph 1, and  
6 Subsection (C)(2), which also refers to influences of  
7 highest and best use in accordance with the general plan  
8 and zoning ordinances.

9 Now, taxpayer's position, Your Honor, is that  
10 the enactment of Residential cap A does not comport with  
11 the requirement that classifications be set up in  
12 accordance with their highest and best use or in accordance  
13 with considerations of zoning or land use considerations.  
14 Rather, the Residential A classification in fact departs  
15 from those mandates in setting up different  
16 classifications.

17 Residential A, instead of adhering to those  
18 standards, sets out a -- a category which refers to  
19 residential use where there is no home ownership exemption  
20 and where the value of the property is assessed at a  
21 million dollars or more, and then imposes a different tax  
22 rate to that category. The taxpayer's argument is that  
23 that Residential A category is not a proper classification  
24 under the ordinances prescribing classifications based upon  
25 highest and best use.

1 THE COURT: What is the Residential A  
2 classification based on?

3 MR. KAMIKAWA: The fact that an individual or  
4 entity does not have a homeowner's exemption and that its  
5 appraised value is a million dollars or more and it is  
6 classified as residential.

7 THE COURT: Okay. Mr. Kohn?

8 MR. KOHN: Thank you, Your Honor.

9 One general point and one specific point about  
10 the ordinance. The general point is in the United States  
11 federally and by the states, there's probably tens or  
12 hundreds and thousands of statutes. And Cole has not  
13 offered a single example of a statute making itself  
14 illegal.

15 So the general, primary point is that that's  
16 not how you go about looking at a statute, that it could  
17 make its -- when a statute is illegal, it's because of  
18 another authority outside of the statute, not the itself.  
19 The Court has plenty of tools to reconcile language within  
20 the statute or ordinance. That point was made in the  
21 opposition and I won't belabor it.

22 Now, the second point relates to just a bit of  
23 playing with the word "use" in the -- in the arguments  
24 presented in the motion and the memorandum and in the reply  
25 memorandum. But the Res A ordinance and the Maui case,

1 which is the only one we're really talking about, never  
2 used the word "use" by itself. Res A talks about the  
3 highest and best use, which is a term of art that's related  
4 to profitability.

5 And the Maui code, the Maui provision, is the  
6 condominium provision and talks about actual use. So the  
7 Maui Supreme Court when it's talking about the Maui code  
8 provision is within that condominium talking about the  
9 actual use.

10 And there's a big difference between actual  
11 use and highest and best use. They may be the same or they  
12 may not be, but they're two different terms. As far as I  
13 know, actual use is not a term of art, it's just something  
14 that the courts and lawyers understand it's how the  
15 property is actually used. The highest and best use is a  
16 bit more technical and is sometimes defined by courts and  
17 even there's an HRS statute that gives a definition for it,  
18 too.

19 So if I may, Your Honor, just to clarify the  
20 point I have two visuals I would like to provide the Court.  
21 It's really just a page. But the first one is to put the  
22 Honolulu provision next to the Maui provision to show the  
23 difference in the language between the two since that seems  
24 to be the -- the case that's we're both turning on. So  
25 with permission from the Court, I would like to have the

1 Court consider that as a visual.

2 Providing a copy to counsel.

3 And the other is just the footnote 3 in the  
4 Gardens case, which has the actual use provision. So  
5 they're actually related to each other, those two handouts.

6 THE COURT: All right.

7 MR. KOHN: So the first one is the two  
8 provisions side by side.

9 THE COURT: By the way, when you use the term  
10 Res A, can you explain, spell that for the record?

11 MR. KOHN: Yeah. Res A is just a shorthand  
12 way of saying Residential A, and A is capital A, upper  
13 case.

14 THE COURT: And Res is spelled?

15 MR. KOHN: R-e-s.

16 THE COURT: And, Mr. Kamikawa, when you say  
17 Residential cap A, can you explain for the record what that  
18 means?

19 MR. KAMIKAWA: Residential cap A?

20 THE COURT: Cap A. You used that phrase to  
21 describe the Residential A classification.

22 MR. KAMIKAWA: Yes, referring to the alphabet  
23 A being capitalized as stated in the ordinance itself.

24 THE COURT: All right, thank you.

25 MR. KOHN: The second one is just an excerpt,

1 it's actually two-sided, Your Honor. It's footnote 3 that  
2 I'm pointing to and it's actually quoted on the first  
3 handout that I gave. And it's quoting from the Maui code  
4 and it has the provision, talks about actual use in terms  
5 of condominiums.

6 The reason for these handouts, Your Honor, is  
7 because a lot of the discussion in the briefing and today  
8 is about use.

9 THE COURT: Let's cut to the chase. Why don't  
10 you address the question of how is it that this Residential  
11 A classification complies with the requirement that  
12 property be taxed based on its highest and best use?

13 MR. KOHN: It says upon consideration of  
14 highest and best use in -- in -- parenthetically, but in  
15 commas. So but it says it shall be looking at the whole  
16 provision, it shall be classified, comma, upon  
17 consideration of its highest and best use, into the  
18 following classes. And it lists Res and it lists Res A.  
19 And it would ironic, to say the least, if the City Council  
20 is saying to classify into these classes if it meant that  
21 it was illegal to classify into those classes.

22 THE COURT: Well, when I look at your  
23 description of the overall scheme, we have nine  
24 classifications here in Honolulu. And most of the titles  
25 for the classification by common understanding appeared to

1 be variable uses of the property. Affordable rental,  
2 apartment, commercialized home use, commercialized  
3 residential, homeowner, homestead, residential and  
4 residential investor. So they all seem to describe a  
5 different type of use vis-a-vis the other classifications.

6 Now the City has adopted Residential A as a  
7 classification. So what -- what -- how is it that  
8 Residential A is based on a use that is different from the  
9 other eight?

10 MR. KOHN: Well, it excludes home exemption.  
11 Maui has four residential classifications, one is home  
12 exemption. And it seems to me once you're allowed, and  
13 they don't challenge it, the validity of a classification  
14 based on home exemption, then you can have another  
15 classification that says we're not talking about home  
16 exemption here.

17 I think most states have a classification or  
18 -- or some provision relating to home provision -- home  
19 exemption. And so -- so the very first part of Res A says  
20 we're excluding home exemption. So if it's home exemption,  
21 then you're not in Res A. Res A has -- has a different  
22 scope.

23 THE COURT: All right. How is home exemption  
24 a matter of usage? What usage are you getting at when the  
25 City uses home exemption as a distinguishing use from

1 residential?

2 MR. KOHN: Well, I don't accept the premise,  
3 Your Honor, that the -- the ordinance says that all the  
4 classifications have to have a -- a use, just in quotation  
5 marks the word "use" has to have a different use. What it  
6 says is upon consideration of the highest and best use into  
7 the following. And it could it be that one fits into more  
8 than one classification. And if it's possible and there's  
9 one that has a highest and best use that's greater than the  
10 other, then you go with that one. There's even a provision  
11 about that.

12 But I don't read the statute as -- it's really  
13 the -- as you said, let's cut to the chase. I don't see  
14 the statute, the ordinance saying that none of these  
15 classes here may -- they all must be used differently,  
16 which is what the Court said and that's in the arguments of  
17 opposing counsel, too. I don't see that the ordinance says  
18 that.

19 THE COURT: And any particular justification  
20 or reason for your analysis?

21 MR. KOHN: The words of the ordinance because  
22 nowhere does it say although the briefing is full of the  
23 word "use" all by itself, that's not the way it appears in  
24 the ordinance. It says shall be classified -- and then I  
25 would say looking at the ordinance, there's a clause in

1 there -- upon consideration of highest and best use.

2 So mindful of highest and best use, but the main clause is  
3 shall be classified into the following classes. So that's  
4 basically what the ordinance says.

5 THE COURT: Do you have any legal authority to  
6 support your analysis that a classification is not required  
7 to be based upon the highest and best use of the subject  
8 property?

9 MR. KOHN: Well, it's not always applicable,  
10 Your Honor, if the profitability element isn't there.

11 THE COURT: You either have authority or you  
12 do not. My question was simple. Do you have any legal  
13 authority to support your analysis that a classification  
14 need not be based on the highest and best use of the  
15 property?

16 MR. KOHN: Legal authority as to this  
17 ordinance, this particular ordinance?

18 THE COURT: Yes.

19 MR. KOHN: As to this particular ordinance,  
20 just the authority of the ordinance itself.

21 THE COURT: Okay, so there is none. I take  
22 your answer as in the negative. Thank you.

23 Mr. Kamikawa, any response?

24 MR. KAMIKAWA: Thank you, Your Honor.

25 The fact that there's a home exemption has no

1 relation to highest and best use or zoning or -- or the  
2 land use provisions. The fact that a property is appraised  
3 at a million dollars or more does not bear a relation to  
4 highest and best use or zoning or land use.

5                   And I'm puzzled by the argument that the  
6 County is making that somehow the statute is internally  
7 somehow illegal within itself that somehow there's nothing  
8 to complain about. If there's ambiguity or any doubt about  
9 the legality of the statute, that falls on the County. And  
10 -- and the Court is aware that the general rule for  
11 interpretation of taxing statutes, and this is the law in  
12 Hawai'i, and the Court is aware the taxing statutes are to  
13 be strictly construed against the government.

14                   THE COURT: But do you have any legal authority  
15 to support the proposition that each classification must be  
16 based on the highest and best use or principles of the  
17 highest and best use?

18                   MR. KAMIKAWA: Your Honor, I point to the  
19 ordinance itself, which is -- which is clear to the  
20 taxpayer.

21                   THE COURT: Okay. Then let's take turns. And  
22 we'll start with you, Mr. Kohn. What language in  
23 particular in the audience -- in the ordinance do you rely  
24 upon to say that the -- the classification need not be  
25 based upon the highest and best use of the property?

1           MR. KOHN: Well, there is a qualification to  
2 the highest and best use because it's possible that it  
3 could fit into more than one classification. And so  
4 there's a provision unless it -- otherwise unless it falls  
5 into another classification. So that's one recognition  
6 that a property could -- could fall into more than one --

7           THE COURT: Well, bear in mind, Mr. Kohn, what  
8 the argument is here. The argument from the taxpayer, as I  
9 understand it, is they're saying this Residential A  
10 classification is invalid because it is not based on use,  
11 it is based only on status or -- or ownership of the  
12 property. It's not based on use. So maybe you can point  
13 the Court to some legal authority that says a  
14 classification need not be based on use.

15           MR. KOHN: Well, the way the question is posed  
16 by the Court is using language that's similar to the way in  
17 the briefing presented by the taxpayer. And I -- the  
18 County's position is that the ordinance doesn't say based  
19 on use. It says upon consideration of highest and best  
20 use. I don't think we can treat those two phrases as  
21 equivalent because when -- and they go ahead and they're  
22 analyzing the Gardens case, again they use the word "use."  
23 But they're using it as a shorthand in the Gardens case,  
24 it's for actual use.

25           So the word "use" by itself isn't an operative

1 term either in this Res A ordinance or the Gardens case.  
2 It's a term that's created by the taxpayer in this case to  
3 kind of blur the difference between those two. The zoning  
4 is also part of the classification, Your Honor.

5 THE COURT: So what you're talking about is  
6 the language of the ordinance, is that 8-7.1(c)(1)?

7 MR. KOHN: Yes. Yes.

8 THE COURT: So what you're saying is that  
9 ordinance, when it talks about classification, it is  
10 referring to the choice of classifications between 1  
11 through 9 or A through I?

12 MR. KOHN: It appears so, Your Honor.

13 THE COURT: That's what you're talking about?  
14 And what you're -- I'm trying to gather what you're trying  
15 to say. So what you're trying to say is that language in  
16 the ordinance does not require the City, in establishing  
17 the nine classifications, to have the nine of them based  
18 upon highest and best use. They can establish any criteria  
19 they want but once you start applying and start putting a  
20 particular piece of property into a classification, that  
21 assignment of a classification must be based on the highest  
22 and best use?

23 MR. KOHN: I didn't articulate it that way,  
24 Your Honor, but I don't object to the way the Court has put  
25 it.

1 THE COURT: Well, I don't want to put words in  
2 the City's mouth.

3 MR. KOHN: Right.

4 THE COURT: So I want you to articulate  
5 exactly what you mean. I'm trying you to interpret what  
6 you're saying and, based on the issue, you seem to be  
7 talking a little differently. So I'm trying to understand  
8 what it is that you're trying to say.

9 MR. KOHN: Okay. So just as a thought  
10 experiment, Your Honor, what if the ordinance said real  
11 property should be classified into the following classes  
12 and then it listed and A through I. Let's say it said  
13 that. So then it would be clear that the City Council  
14 intended that real property would be put into one of those  
15 classes.

16 So I think the arguments on this tax appeal  
17 from -- from the taxpayer and the Court's questioning is  
18 that that parenthetical language between with the comma,  
19 upon consideration of the highest and best use, somehow  
20 overrides the -- the -- the County's ordinance that -- that  
21 says quite expressly that all real property will be put  
22 into one of these classes. So I think that's what they say  
23 and that's what they want.

24 And if they didn't think by their words,  
25 including upon consideration of highest and best use, then

1 they should have rewritten the ordinance or used different  
2 language. But it seems clear that the -- the -- the  
3 legislators, the City Council intended that all real  
4 property be put into one of those uses. And then to say  
5 well, it says that but it can't be put it into Res A  
6 because that's not a -- a different highest and best use  
7 from residential. It's -- it's -- it's reading too much  
8 into the words there because it's -- the very plain reading  
9 is that all property gets classified into those classes.

10 THE COURT: Okay. Mr. Kamikawa, what language  
11 in the ordinance requires Residential A as a classification  
12 to be established based upon highest and best use of  
13 property?

14 MR. KAMIKAWA: Your Honor, besides the  
15 reference by Mr. Kohn under Subsection (c)(1), I point the  
16 Court to Subsection (c)(2) in the ordinance and it states:  
17 In assigning real property to each of the general classes,  
18 the director shall -- this not mere directory, this is  
19 mandatory -- the director shall give major consideration to  
20 the districting established by the City in its general plan  
21 and zoning ordinance and such other factors which influence  
22 highest and best use.

23 There's nothing in the ordinance general plan  
24 for highest and best use considerations that say you can  
25 distinguish between Residential and Residential A under the

1 factors established by the County in defining Residential A  
2 property.

3 THE COURT: So in this challenge based on  
4 illegality, you are not challenging the validity of the  
5 ordinance itself, you're challenging its application that  
6 the nine -- for the purpose of the illegality challenge,  
7 you're assuming that all nine classifications are valid and  
8 the assignment of Residential A to your client's property  
9 is erroneous. Is that correct or not correct?

10 MR. KAMIKAWA: Not correct, Your Honor. Our  
11 argument, our position is that Residential A classification  
12 of itself is illegal under the considerations that I just  
13 read that the director must take into account in  
14 establishing classes for property tax purposes.

15 THE COURT: But do -- do Subsections (c)(2)  
16 and (c)(3) -- is it (c)(2) and (c)(3)?

17 MR. KAMIKAWA: (c)(1).

18 THE COURT: (c)(1) and (c)(2), do they talk  
19 about establishing the nine classifications or are they  
20 talking about assigning any subject property to one of the  
21 nine classifications?

22 MR. KAMIKAWA: No, I believe the ordinance  
23 permits the director to establish different classes of  
24 property subject to the property tax so long as it meets  
25 within the requirements of zoning and highest and best use.

1 And so you have different categories under zoning, Your  
2 Honor, for example, agricultural, preservation, public  
3 service, urban -- I'm sorry, residential, commercial,  
4 industrial. So within those categories, the County and the  
5 director is free to establish classes of property taxation,  
6 but not to go beyond those particular guidelines which the  
7 director is required to follow in establishing classes.

8 Our position is the director went too far  
9 afield in establishing the Residential A classification as  
10 a class of property.

11 THE COURT: Okay. Would you read the language  
12 that speaks to establishing this 8-7 as establishing the  
13 classifications as opposed to assigning a property to a  
14 classification?

15 MR. KAMIKAWA: I go back to Subsection (c) (1),  
16 Your Honor: Real property shall be classified, upon  
17 consideration of its highest and best use, into the  
18 following general classes unless it qualifies for a  
19 different class as defined in this section. And there we  
20 list properties described in A through I.

21 THE COURT: That doesn't speak to the director  
22 assigning a subject piece of -- specific piece of property  
23 to one of the nine classifications as opposed to  
24 establishing nine or more or less classifications?

25 MR. KAMIKAWA: I believe the director has,

1 based on this language, the discretion to establish classes  
2 of property subject to the property tax. And it is based  
3 on those classes then that the County Council then  
4 establishes rates by separate resolution for each of these  
5 classes of property.

6 THE COURT: But it says the real property  
7 shall be classified into the following general classes. So  
8 it's going to be -- it's assuming that the general classes  
9 are established already and real property must be  
10 classified into one of those nine?

11 MR. KAMIKAWA: Well, the way this -- the way  
12 it works when the County Council deliberates and  
13 establishes classes, for example, in Residential A under I,  
14 it added Residential A to these classes. And that's the  
15 whole basis for our complaint, Your Honor, is that they  
16 were not authorized under the requirements of highest and  
17 best use and zoning to establish Residential A as a  
18 separate class.

19 So the director is free to establish classes  
20 within there and it can add or subtract from those classes  
21 so long as it's within the boundaries set by the ordinance  
22 relating to highest and best use.

23 And if I may add, Your Honor?

24 THE COURT: Yes.

25 MR. KAMIKAWA: One cannot use the fact that

1 authority is given for the director to establish classes to  
2 arbitrarily ignore the requirements as to what constitutes  
3 a class by just adopting a statutory interpretation saying  
4 that the director has carte blanche to establish classes.  
5 Obviously from the reading of the statute and taking the  
6 context as the County's argument is, it doesn't -- it  
7 wouldn't make sense to interpret the statute that way.

8 THE COURT: Okay.

9 MR. KOHN: May I make one additional point,  
10 Your Honor?

11 THE COURT: I've heard enough. Let's go on to  
12 the commerce clause.

13 MR. KOHN: Thank you, Your Honor.

14 THE COURT: Does the commerce clause apply to  
15 taxation upon real property?

16 MR. KAMIKAWA: Yes, it does, Your Honor.

17 THE COURT: What case, what case provides  
18 that?

19 MR. KAMIKAWA: We point in our papers to  
20 *Camps*, the *Camps Newfoundland versus Harris County*.  
21 Newfoundland is spelled N-e-w-f-o-u-n-d-l-a-n-d, versus  
22 Harris, H-a-r-r-i-s, County, comma, Maine.

23 THE COURT: And Camps is spelled?

24 MR. KAMIKAWA: C-a-m-p-s.

25 THE COURT: Thank you.

1                   MR. KAMIKAWA: There, Your Honor, the real  
2 property tax scheme adopted by the Harris County in the  
3 state of Maine provided an exemption to camp -- vacation  
4 camp operations, which solicited and patronized local  
5 residents, but did not afford the same exemption to camps  
6 providing vacation camp activities and services to  
7 nonresidents. And in that case, the commerce clause was  
8 held by the United States Supreme Court to apply to give  
9 the Camps Newfoundland standing to complain that the  
10 property tax scheme violated the commerce clause on  
11 discrimination grounds.

12                   THE COURT: That was real property tax?

13                   MR. KAMIKAWA: Yes, Your Honor. And the court  
14 found that interstate commerce was involved with respect to  
15 the property tax because it found that we look to the  
16 property involved and it found that the commerce clause was  
17 in play because the camp, whether it's a nonprofit -- and  
18 involved in Camps Newfoundland, Your Honor, was a nonprofit  
19 entity as well. So that case also stands for the  
20 proposition that you need not have a for-profit entity, a  
21 nonprofit entity would also have standing to complain about  
22 discrimination in interstate commerce as well. And the  
23 court found that interstate commerce was implicated because  
24 this camp operation bought and sold goods in interstate  
25 commerce.

1           And building on from there, Your Honor, we can  
2 see that if homeowners rent properties that also implicates  
3 commerce. The purchase and sale of your home as an  
4 investment is also an activity involving commerce. And the  
5 fact that you rent to tourists, to other individuals  
6 outside the state also implicates transportation of persons  
7 and property.

8           I'm extrapolating from the case at this point,  
9 Your Honor, but to answer your question, yes, the *Camps*  
10 *Newfoundland* case is the one we cited for that proposition  
11 and it stands four-square, is our position, for the  
12 property tax being subject to jurisdiction under the  
13 commerce clause.

14           THE COURT: Is it the argument of the  
15 taxpayers that the subject ordinance constitutes what's  
16 being referred to in the paper as economic protectionism?

17           MR. KAMIKAWA: Yes, we do, Your Honor.  
18 Besides the legislative history cited in our papers, you  
19 know, there was a front page article in Sunday's  
20 Star-Advertiser where it was reported that Mayor Caldwell  
21 in a forum between the Mayor and, excuse me, Your Honor,  
22 and his -- and his opponent discussed the Residential A  
23 issue. And the Mayor was quoted as saying about the  
24 Residential A classification that, quote, "there is some  
25 fairness about raising the tax on those who don't live

1 here." And then he goes on to say at the end of that  
2 quote, "and live offshore."

3 So we're not talking about straight comments,  
4 we're not talking about comments about people who just are  
5 saying things without basis. This is deliberate. This is  
6 a political debate which I presume some thought was given  
7 to. And this is in addition to the statements when the  
8 bill was -- was being considered by the County Council.

9 THE COURT: Okay.

10 MR. KAMIKAWA: In addition to the letter by  
11 the budget director.

12 THE COURT: Mr. Kohn, economic protectionism?

13 MR. KOHN: Yes. I would argue that you can't  
14 show it by what the Mayor said after the fact and you can't  
15 show it by a letter that was submitted by an individual to  
16 the City Council and you can't show it by the comments of a  
17 Council member.

18 There are four cases in the reply that we  
19 didn't have a chance to reply to, but I could go through  
20 them one by one. But they're all distinguishable and I  
21 think the general principles there and it appears in other  
22 cases and in the op, that when you're talking about the  
23 commerce clause and you want to show the -- the  
24 protectionism, you want to show the illegal motive, it's  
25 got to appear either on its express terms, which is like

1 the Hawai'i liquor case, or you can go as far as the  
2 committee report, which is the Council acting as a group.  
3 But you can't go to individual comments.

4 THE COURT: Okay. What about your position  
5 with respect -- and I might be getting ahead of ourselves,  
6 but the equal protection analysis you offered? And you  
7 said one rational basis for Res A might be to maintain the  
8 affordability of rental properties on page 19 of your  
9 memorandum in support. So how is it that this provision  
10 Res A is going to maintain affordable rental properties?

11 MR. KOHN: Because the cost is generally --  
12 the -- if the -- if the property is taxed at a higher rate,  
13 the increased tax will probably be passed on to the tenant  
14 through a higher rent. And so to say that properties a  
15 million dollars or less, that's the majority of rental  
16 properties that the County might think are important to  
17 regulate so that there's enough affordable rentals.  
18 Somewhere you have to draw a line and they think maybe it's  
19 less important to worry about what the rent is paid for --  
20 on properties that are worth more than a million dollars.

21 THE COURT: In the record there are comments  
22 by various individuals expressing concern about foreign  
23 money coming to Hawai'i, a lot of foreign money coming to  
24 Hawai'i that might be driving up prices. And when rent --  
25 when property values go up, typically rents follow upwards.

1 Is that a concern in your rational basis of maintaining  
2 affordable rental properties, is that a factor to consider?

3 MR. KOHN: Well, they -- we are talking about  
4 the equal protection clause and rational basis now and not  
5 the commerce clause, but I think you indicated that when  
6 you said we may be getting ahead of ourselves.

7 So if we're talking rational basis, I would  
8 deny the implication that it's the responsibility of the  
9 County to come up with the rational basis. The County  
10 could just pass a law, could have no committee reports,  
11 could have no discussions, could have no individual  
12 comments whatsoever, and I think the court and the person  
13 challenging it have to really defeat any possible rational  
14 basis.

15 There's a misquote really, it appears twice in  
16 the reply brief, saying the City takes a position, the  
17 County has taken the position that the -- the purpose of.  
18 And what you just read it doesn't say that, it said one  
19 possible -- one possible basis might be. But it's not the  
20 County's responsibility to prove or to show or to show that  
21 the City Council articulated or acted upon a rational  
22 basis. It comes after the fact.

23 THE COURT: Well, we have various individuals  
24 in the City, high-ranking individuals, who are talking  
25 about foreign money, nonresident money coming here and

1 affecting our property values. Is the Court supposed to  
2 disregard all of that?

3 MR. KOHN: County's position is yes, Your  
4 Honor.

5 THE COURT: Okay. The Court is not going to  
6 be -- the Court has to give some weight to that information.  
7 It was present at the time of the adoption of the ordinance  
8 in question. And it just seems to be tied into the  
9 Residential A classification. And I think the City's effort  
10 to divorce itself from that factor, foreign money coming to  
11 Hawai'i affecting residents, residential values and rental  
12 values, I think would be a denial of an obvious factor.

13 MR. KOHN: Well, there's nothing to show that  
14 any of those comments were the -- were the opinions of the  
15 majority who voted for the ordinance.

16 THE COURT: Okay. Where is the record  
17 regarding why the majority adopted this provision?

18 MR. KOHN: I don't think there is and I don't  
19 think there has to be.

20 THE COURT: Then why can't the Court rely on  
21 the statements that were offered in the record?

22 MR. KOHN: Well, plenty of courts, and I think  
23 going all the way up to the Supreme Court, have said you  
24 can't show an improper motive of a legislative body by  
25 looking to a particular instance of an individual. Even if

1 a person sponsors a bill or votes on the bill, that's not  
2 for commerce clause. And I think that's where we're  
3 starting from, for commerce clause you can't consider those  
4 things, you can't go that deep into -- into the legislative  
5 history so that if one person makes one remark, that's  
6 somehow attributed to the legislative body.

7 THE COURT: But you have your opportunity to  
8 rebut that with evidence and you come forth with none other  
9 than an argument. How is the Court supposed to validate  
10 the City's position without evidence of what the purpose is  
11 if it is not to punish nonresident owners?

12 MR. KOHN: The County's position is that's --  
13 it's an improper inquiry. The County doesn't have to  
14 articulate any rationale, good or bad rationale, it could  
15 just pass the ordinance and that would be enough. And it's  
16 the Court's job if faced with a constitutional challenge  
17 and it's the burden really on the person challenging the  
18 constitutionality.

19 If we're talking about equal protection -- we  
20 seem to be talking about both at once -- but if we're  
21 talking about rational basis and equal protection, it's  
22 really the taxpayer's responsibility to rebut any possible  
23 rational basis. And the fact that there's one that looks  
24 bad and one that looks good, if there's -- if you're at the  
25 rational basis level and if there is a rational basis, then

1 that's enough, that's the end of the inquiry.

2 THE COURT: Well, the commerce clause talks  
3 about giving an advantage to local business, the corollary  
4 being a disadvantage to nonlocal business. Here we're  
5 talking about property owners. And maybe I should ask at  
6 this juncture: Can a nonresident owner ever qualify for a  
7 home exemption?

8 MR. KOHN: By definition it has to be a  
9 primary residence.

10 THE COURT: So what's the answer to my  
11 question? No, they would never qualify?

12 MR. KOHN: For home exemption?

13 THE COURT: Yes.

14 MR. KOHN: They would never qualify.

15 THE COURT: So the effect of this ordinance is  
16 to set up a classification between some residents, the ones  
17 who qualify for home exemption, and all others, including  
18 all nonresidents and some residents. Yes?

19 MR. KOHN: Res A applies equally to Hawai'i  
20 residents and nonresidents, expressly excludes people with  
21 a home exemption. But the legality of a home exemption is  
22 upheld everywhere.

23 THE COURT: Well, let's say that I don't want  
24 to say residents and nonresidents, so what I'll say is all  
25 people who vote in Hawai'i elections qualify for a certain

1 privilege. Isn't that just a disguise for saying, well,  
2 we're going to treat people who live here differently from  
3 people who don't live here because people who don't live  
4 here, we're not saying it by name, but they can't vote in  
5 Hawai'i elections.

6 MR. KOHN: That's why I called it in the  
7 opposition the elephant in the room because although  
8 counsel didn't articulate it that way, but counsel or Cole  
9 is attacking Res A because it excludes anyone with a home  
10 exemption. So he's importing that distinction which, as  
11 the Court has just articulated, is a distinction between a  
12 Hawai'i resident and a Hawai'i nonresident. But the  
13 challenge has been defeated everywhere all over the country  
14 for many decades that you can't give that kind of privilege  
15 to a -- to a resident of the state.

16 And I guess the simple answer if we're talking  
17 about the commerce clause is that it's a balance so it's  
18 not sort of an absolute thing. So it's -- it's the -- the  
19 positive and the negative, and the home exemption obviously  
20 is a discrimination against people who don't have a home  
21 exemption, but all legislation does that. But, on balance,  
22 there's enough positive to allow it constitutionally.

23 THE COURT: Okay. Maybe this is what you were  
24 getting at when you were talking about the *Bacchus* case,  
25 B-a-c-c-h-u-s, *Bacchus Imports versus Dias*. That was a

1 commerce clause case, yes?

2 MR. KOHN: Yes. And --

3 THE COURT: And that was a case where the  
4 United States Supreme Court overruled our Hawai'i Supreme  
5 Court and found that the exemption for the imposition of  
6 a general excise tax, exemption for *Okolehao*,  
7 O-k-o-l-e-h-a-o, was in violation of the commerce clause.  
8 So not universally that all courts will validate an  
9 exemption like that. We have a case right out of Hawai'i  
10 where the United States Supreme Court overruled the Hawai'i  
11 Supreme Court and said no, you can't give local business  
12 that kind of advantage.

13 MR. KOHN: Based on the language in the  
14 statute itself and the committee reports is how the Supreme  
15 Court reached that conclusion, not by going to -- if we're  
16 talking about the commerce clause, not by going deeper and  
17 looking at individual -- comments of individuals.

18 THE COURT: Well, I don't need to look at  
19 comments of individuals. I look at the ordinance and it  
20 talks about creating as one of the criteria a homeowners  
21 exemption, and you and I both know that a nonresident can't  
22 never qualify for a homeowners exemption. So the taxpayer  
23 is saying, hey, this is an improper classification and a  
24 violation of the commerce clause because you are giving an  
25 economic advantage to local people that nonlocal or

1 nonresident people cannot enjoy, and that's not  
2 constitutional.

3 MR. KOHN: Res A would apply to a Hawai'i  
4 resident who has a home exemption who has a second  
5 property. So it's not a discrimination against people from  
6 out of state per se. It -- the discrimination that's  
7 allowed based on home exemption, anyone could argue that  
8 it's unconstitutional because you're giving an advantage to  
9 the person who -- who gets a tax advantage by being a  
10 resident of the state. But it's always upheld, it's never  
11 found to violate any provision of the Constitution.

12 THE COURT: Why don't you share with me the  
13 rationale behind those courts that uphold these kinds of  
14 statutes or ordinances that give an economic advantage to a  
15 local person.

16 MR. KOHN: There are several cited in the  
17 opposition, Your Honor, but it often talks about the -- the  
18 stability of homeownership, which has been a -- a  
19 bipartisan political policy of the United States for many  
20 decades to promote homeownership and stability of  
21 neighborhoods and things like that. They just think it's a  
22 good thing for society to promote homeownership and to give  
23 benefits that help promote that.

24 THE COURT: Okay. So it would be not a  
25 violation of the commerce clause for Hawai'i to pass an

1 ordinance that says you can own property in Hawai'i unless  
2 you're Muslim. That would be okay in your mind?

3 MR. KOHN: That has nothing to do with this  
4 case, Your Honor. And no, it wouldn't --

5 THE COURT: A hypothetical. I'm testing your  
6 ideas. So you answer my question, please.

7 MR. KOHN: No, that would not be okay.

8 THE COURT: Why not?

9 MR. KOHN: Well, you had -- first of all,  
10 you're not -- if you're equal protection, you're not  
11 talking about --

12 THE COURT: No, we're talking about commerce  
13 clause. Would it be okay?

14 MR. KOHN: That -- that -- the exclusion based  
15 on Muslim is not upheld anywhere in any context. It would  
16 be a violation of the First Amendment to start with, which  
17 isn't at issue here.

18 THE COURT: Maybe you didn't hear my question.  
19 Commerce clause, I asked about commerce clause. Would it  
20 be a violation of the commerce clause?

21 MR. KOHN: I think it's clearly discriminatory  
22 on its face.

23 THE COURT: Okay. What if we changed it and  
24 said okay, you can own property here in Hawai'i as long as  
25 you're not from the mainland. Would that okay?

1 MR. KOHN: To --

2 THE COURT: Commerce clause.

3 MR. KOHN: Under the commerce clause is the  
4 question to bar property ownership except if you're a  
5 resident of the state? I think if we dug back in history  
6 we would find cases on that and that would be found to be a  
7 clear violation of the commerce clause to exclude  
8 out-of-state people from owning property.

9 THE COURT: Well, I heard anecdotally that in  
10 Japan, you're not allowed to own property unless you're a  
11 resident -- citizen of Japan. Is that your understanding  
12 as well?

13 MR. KOHN: I don't have a clear understanding  
14 but I think there are countries and island nations that  
15 limit ownership of a home to residents of that country.

16 THE COURT: Okay. Then let's say the  
17 ordinance says you can own property in Hawai'i only if you  
18 are a citizen of the state of Hawai'i. Would that be okay?

19 MR. KOHN: You mean a resident?

20 THE COURT: A citizen.

21 MR. KOHN: Well, one is a citizen of the  
22 United States.

23 THE COURT: A citizen of the state of Hawai'i.

24 MR. KOHN: Well, I understand that Americans  
25 can move from one state to another and they remain American

1 citizens but their residency changes. So but I think  
2 that's related to the question the Court posed previously,  
3 which is to bar homeownership to people who were -- to bar  
4 property ownership to people who were not residents of the  
5 state I think would violate the commerce clause.

6 THE COURT: Why?

7 MR. KOHN: Why would it?

8 THE COURT: Why?

9 MR. KOHN: It would be, on its terms, an  
10 invidious discrimination against out of state.

11 THE COURT: So it's okay if you disguise it,  
12 but if it's invidious, not okay. Commerce clause.

13 MR. KOHN: I don't think there's anything  
14 disguised with this ordinance, Your Honor. I think it's  
15 right there in its express terms that -- that Res A does  
16 not apply to anyone with a home exemption. So that's --  
17 that's not disguising, it's expressed, it's right there in  
18 the -- in the ordinance.

19 THE COURT: And where does it say if you're a  
20 nonresident, you cannot get -- you cannot -- what am I  
21 trying to say -- if you are a nonresident that you must  
22 have a Residential A classification for million-dollar  
23 properties? Where does it say that?

24 MR. KOHN: If you're a -- we're -- we're only  
25 talking about taxation here, not whether you can own

1 property or not. So the question is where does it say that  
2 if you own a -- I'm sorry, Your Honor, if you could repeat  
3 the question?

4 THE COURT: I'm sorry, clumsy question. Where  
5 does it say that if you do -- if you are not a resident,  
6 not a resident of Hawai'i, that you must have a Res A  
7 classification for your property?

8 MR. KOHN: You mean in order to own it?

9 THE COURT: No, Residential A classification.

10 MR. KOHN: That's a tax classification so  
11 we're talking about the taxation on it --

12 THE COURT: Yes.

13 MR. KOHN: -- within the City and County of  
14 Honolulu, not in other counties?

15 THE COURT: Yes.

16 MR. KOHN: So you can -- anyone in the country  
17 or internationally can buy property here, we're talking  
18 about the tax on it. So when the Court's question was  
19 where does it say you can own a property based on this  
20 class or that, I don't think this is a tax classification,  
21 it doesn't go to your right to own the property.

22 THE COURT: I'm not asking about ownership.  
23 I'm talking about Residential A classification.

24 MR. KOHN: For tax purposes?

25 THE COURT: Yes.

1                   MR. KOHN: And the question is where does it  
2 say that --

3                   THE COURT: You have to be a nonresident to  
4 have a Residential A classification?

5                   MR. KOHN: I think it says the opposite, Your  
6 Honor. I think a Hawai'i resident could have a home  
7 exemption and another piece of property that's Res A, as  
8 Cole does, Cole himself. So five -- five -- in this tax  
9 appeal, there's maybe five different tax appeal numbers  
10 that relate to Cole. And he has -- he's admitted in  
11 discovery that he has a home exemption on a piece of  
12 property that's not at issue here, and that he has other  
13 properties.

14                   So he lives here, this is his state of  
15 residence, he has a home exemption on that. But these  
16 other pieces of property owned by the Hawai'i resident, the  
17 Honolulu resident pays a different tax rate.

18                   THE COURT: Okay. Where in the ordinance does  
19 it say that if you own a piece of property that is assessed  
20 at more than a million dollars and you are a nonresident,  
21 you will be a Residential A classification?

22                   MR. KOHN: Well, there's a definition of the  
23 Residential A in the ordinance and it expressly excludes  
24 anyone with a home exemption and it expressly applies only  
25 to property, million-dollar property, not under a

1 million-dollar property.

2 THE COURT: So what's the answer to my  
3 question?

4 MR. KOHN: Well, you asked where does it say.  
5 You want the letter, numbers in the -- in the ordinance?

6 THE COURT: Yes. Why don't you tell me where  
7 it says a nonresident cannot get -- I mean, a resident -- a  
8 nonresident who has a million-dollar property must have a  
9 Residential A classification?

10 MR. KOHN: Well, the first part is the home  
11 exemption, does not have a home exemption. That's B, it's  
12 I, number 1, capital B, does not have a home exemption,  
13 that's the first part, the home exemption. And the other  
14 part was, that's capital A, comes right before it, has an  
15 assessed value of \$1,000,000.00 or more. So those are  
16 criteria that are right in the definition of Res A.

17 THE COURT: Okay. Now, answer my question.

18 MR. KOHN: Well, the home exemption, I think  
19 we all understand that it's implicit because of how a home  
20 exemption is defined that if you're a nonresident of the  
21 City and County of Honolulu you cannot have a home  
22 exemption.

23 THE COURT: That's what I thought. But you  
24 said no, we're not being -- having any secrets here,  
25 everything is right out open -- in the open. But now

1 you've just told me it says no home exemption but really  
2 the effect is if you're a nonresident, you're going to be  
3 Residential A.

4 MR. KOHN: No. No, Your Honor. If you're a  
5 nonresident and you own a property that's worth \$500,000.00  
6 you're in Residential.

7 THE COURT: Did you hear my hypothetical? I  
8 didn't say anything about \$500,000.00. Why are you going  
9 there?

10 MR. KOHN: Well, because you said if you're a  
11 nonresident, you're going to be thrown into Res A. I don't  
12 think that's correct, Your Honor.

13 THE COURT: Excuse me for not saying every  
14 little detail. I was talking about nonresidents with  
15 million-dollar-plus properties. Why are you going to  
16 \$500,000.00?

17 MR. KOHN: Well, if you're talking about  
18 nonresidents with million dollars --

19 THE COURT: That's what I was talking about  
20 this whole time. Anything else?

21 MR. KOHN: Nothing else.

22 THE COURT: Motion for summary judgment  
23 granted. All joinders granted.

24 MR. KAMIKAWA: Thank you, Your Honor.

25 (Proceedings concluded at 4:02 PM.)

1 STATE OF HAWAI'I )  
2 CITY AND COUNTY OF HONOLULU )

3

4 I, PHYLLIS K. TSUKAYAMA, CSR-355, an Official  
5 Court Reporter for the First Circuit Court, State of  
6 Hawai'i, hereby certify that the foregoing comprises a  
7 full, true and correct transcription of my stenographic  
8 notes, taken in the above-entitled cause.

9

10 Dated this 20th day of October, 2016.

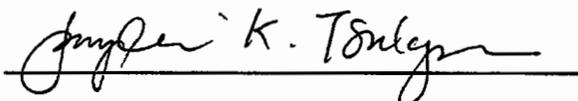
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PHYLLIS K. TSUKAYAMA, CSR-355

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