CAAP-17-0000816

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

In the Matter of the Appeal of

KAHEAWA WIND POWER, LLC,

Taxpayer-Appellant.

Case Nos. TX 14-1-0266 and consolidated case TX 16-1-0272, TX 14-1-0267 and consolidated case TX 16-1-0273, and 1 TX 16-1-0275, 1 TX 15-1-0238, 1 TX 16-1-0328
(Other Civil Action)

Consolidated Case Nos. CAAP 17-0000816, CAAP 17-0000817, CAAP-17-0000818, CAAP-17-0000819, CAAP-17-0000820

CAAP-17-0000816 - APPEAL FROM **1)** ORDER GRANTING TAXPAYER-APPELLANT KAHEAWA WIND POWER LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED SEPTEMBER 1, 2016, FILED APRIL 25, 2017, **2)** ORDER DENYING APPELLEE COUNTY OF MAUI'S MOTION FOR SUMMARY JUDGMENT AND FOR DISMISSAL OF TAXPAYER-APPELLANT KAHEAWA WIND POWER LLC'S TAX APPEALS FILED NOVEMBER 12, 2014 AND FEBRUARY 3, 2014, FILED FEBRUARY 3, 2017, FILED MAY 15, 2017, and **3)** STIPULATION FOR ENTRY OF JUDGMENT; FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000817 - **APPEAL** FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000818 - **APPEAL** FROM **1)** ORDER GRANTING TAXPAYER-APPELLANT AUWAHI WIND ENERGY LLC'S AUGUST 31, 2016 MOTION FOR SUMMARY JUDGMENT FILED APRIL 26, 2017, **2)** ORDER DENYING APPELLEE COUNTY OF MAUI'S FEBRUARY 3, 2017 MOTION FOR SUMMARY JUDGMENT ET SEQ., FILED MAY 14, 2017; AND STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000819 - **APPEAL** FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000820 - **APPEAL** FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

Tax Appeal Court, State of Hawai'i
Judge: Honorable Gary W.B. Chang

APPELLANT/TAX-APPELLEE COUNTY OF MAUI'S **REPLY APPELLATE BRIEF**; CERTIFICATE OF SERVICE

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APPELLANT/TAX-APPELLEE COUNTY OF MAUI'S REPLY APPELLATE BRIEF

Tax-Appellant/Appellee COUNTY OF MAUI submits its Reply Appellate Brief pursuant to Haw. Rev. Stat. § 641-1(a) and Hawai'i Rules of Appellate Procedure, Rule 4.1.

I. SUMMARY OF REPLY POSITION AND ARGUMENTS

It is the County of Maui's position in this case that the dozens of **327 ft. to 428 ft. tall wind turbine generators** which populate both KAHEAWA WIND POWER, LLC'S, KAHEAWA WIND POWER II, LLC'S ("KAHEWA") and AUWAHI WIND ENERGY LLC'S ("AUWAHI") respective leasehold interest at Kaheawa Pastures and Ulupalakua Ranch, and which are used in the generation and distribution of commercial power, are *improvements* for purposes of real property assessment and valuation appraisal.[1] Maui County's real property tax code defines what constitutes "'property' or 'real property'" for purposes of taxation and makes this abundantly clear. Maui County Code § 3.48.005 was promulgated and amended pursuant to the counties of Hawai'i's indisputably *exclusive* constitutional authority over "all functions, powers and duties relating to the taxation of real property." See, Hawai'i State Constitution, Article VIII, Section 3.

Sifting through of the all noise and distraction KAHEAWA and AUWAHI make in their Answering Briefs, their positions are distilled as follows:

[1] KAHEAWA'S assertion that the *Statement of the Case* in the County's Opening Appellate Brief is somehow a "problem" by referring to its leased property as "improved with" the wind turbines reflects the kind of pointless and misdirected semantic arguments with which both KAHEAWA'S and AUWAHI'S Answering Briefs are replete. The County's disagreement with KAHEAWA as to the character of the wind turbines as accessions to realty is not a "problem," rather it is the issue to be addressed in this appeal. Moreover, the very EIS report for Zond Pacific, Inc. which KAHEAWA complains about as somehow having no bearing in in this case was introduced into evidence by KAHEAWA with its own Motion for Partial Summary Judgment. See, CAAP 17-0000816, JEFS Dkt. 34 and PDF pp. 75, et seq.

1) The constitutional grant of authority over the real property tax function to the counties is limited by some undefined phantom pre-emptive power to tax personal property reserved to the state;

2) Pursuant to demonstrably limited common law holdings from the State of Ohio, the decision in Kaheawa Wind Power, LLC v. County of Maui, 135 Hawai'i 202, 135 Hawai'i 632 (2014), and/or by state statute, the wind turbines are and/or have been determined to be *de jure* personal property which may not be accessions to realty;

3) The wind turbines should be entitled to a real property tax exemption pursuant to federal and state income and capital goods tax policies which cannot be shown to have any preemptive authority over the counties of Hawai'i constitutional function; and finally

4) The apparent position that appraisal concepts and principals for defining and identifying real property have no place in the county's tax code, and/or presumably the assessor's identification, assessment, and valuation appraisal of KAHEAWA'S and AUWAHI'S leased real property for purposes of tax.

These untenable positions and arguments are dealt in sequence below.

II. CITATIONS TO POINTS ON APPEAL

Both KAHEAWA and AUWAHI have objected that the four (4) Points on Appeal in the County's Opening Brief do not cite to the record. The County's Opening Appellate Brief at **Sections II., D., i and ii** contain the record references and citations relevant to the County's *Points on Appeal A and B.* It must be noted here that the Tax Appeal Court's conclusion and ruling that any policy making authority is excluded from the counties of Hawai'i's constitutional real property tax obligations were made *sua sponte* at the dispositive motions hearing on **February 13, 2017**, and was not presented anywhere in KAHEWAW'S or AUWAHI'S briefs

below.[2] As to *Points on Appeal C and D*, there was no specific ruling(s) made by the Tax Appeal Court. Rather, these are unstated and necessary assumptions that the wind turbines are *de jure* "personal property" for tax purposes, which the Tax Appeal Court had to have made in order to draw its expressed conclusions and rulings.[3] While no court in Hawai'i or in any other jurisdiction have made any such finding or ruling in this regard, the County did address these assumptions in its briefs below, in part at the hearing, and also made relevant record references and citations in **Sections II, D., i and ii** of its Opening Appellate Brief.

In response to both KAHEAWA'S and AUWAHI'S objections, the County nevertheless makes the specific citations to its four identified points on appeal as follows:

A. The conclusion that Article VIII, Section 3 of the Hawai'i State Constitution reserved to the state some policy making function, power, and/or duty as related to the taxation of real property and did not transfer that policy making authority to the counties of Hawai'i is in error. The Tax Appeal drew this erroneous conclusion at CAAP 17-0000816, JEFS Dkt. 13 and PDF pp. 35-42.

B. The conclusion that Article VIII, Section 3 of the Hawai'i State Constitution restricts the counties of Hawai'i from defining and/or identifying any type of property which may become assessable accessions to realty for purposes of real property taxation is in error. *Ibid*. This erroneous conclusion follows from the Tax Appeal Courts' expressed conclusion above. The County addressed this conclusion at CAAP 17-0000816, JEFS Dkt. 13 and PDF pp. 25-26.

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[2] Appellees cannot be said to have been prejudiced by the County not making objections to legal conclusions not contained in their briefs below, and drawn by the Tax Appeal Court for the very first time concurrently with making its ruling(s) at the hearing. Likewise, it would not be fair to expect the Appellant to have objected at the time the *sua sponte* conclusions were made.

[3] The County also should not be penalized for not making objections at the February 13, 2007 dispositive motions hearing to the *unstated* erroneous assumptions made by the Tax Appeal Court.

C. The Kaheawa decision does not hold that wind turbine generators are exclusively personal property which may not become assessable accessions to the underlying realty on which they are constructed and affixed. Rather, both the Tax Appeal Court and the Intermediate Court of Appeals only held the wind turbine generators were not real property *under the prior definition of the Maui County Code*. The County addressed these unstated assumptions by the Tax Appeal Court at CAAP 17-0000816, JEFS Dkt. 68 and PDF pp. 14-16 and 33-34; *see also*, CAAP 17-0000816, JEFS Dkt. 13 and PDF pp. 25-26.

D. There is no traditional common law, statutory, and/or constitutional definition of "personal property" in the jurisdiction of Hawai'i which precludes any type of property from potentially becoming an accession to realty pursuant to *appraisal concepts of use, utility, and value*. The County addresses these unstated assumptions by the Tax Appeal Court at CAAP 17-0000816, JEFS Dkt. 68 and PDF pp. 33-34 and 41-43; *see also*, JEFS Dkt. 13 and PDF pp. 25-26.

Otherwise, the standard on appeal for both review of a motion for summary judgment and for interpretation of a statute or code provision is *de novo* review, so the Supreme Court of Hawai'i's appellate review is not limited to any identified points of error.[4] Rather, this Honorable

[4] "We review the Tax Appeal Court's grant of summary judgment *de novo*. Kaheawa, 135 Hawai'i at 206, 347 P.3d at 636 (citing Kamikawa v. Lynden, 89 Hawai'i 51, 54, 968 P.2d 653, 656 (1998). "The interpretation of a statute is a question of law reviewable de novo." *See*, Kincaid v. Board of Review of City and County of Honolulu, 106 Hawai'i 318, 320, 104 P.3d 905, 908 (2004) (Emphasis original). "[T]he meaning of a statute is a question of law that this court reviews *de* novo." Furukawa v. Honolulu Zoological Soc., 85 Hawai'i 7, 12, 936 P.2d 643, 648 (1997)(citing Ross v. Stouffer Hotel Co. (Hawai'i), Ltd., 76 Hawai'i 454, 460, 879 P.2d 1037, 1043 (1994).

> When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is obtained primarily from the language contained in the statute itself. Where the language of a statute is plain and unambiguous, our only duty is to give effect to the statute's plain and obvious meaning. Further, in interpreting a statute, we give the words their common

Court may decide the issues without reference to any legal conclusion or assumption made by the Tax Appeal Court, and as if the case is being heard for the first time. As also referenced in the County's Opening Appellate Brief, the Tax Appeal Court expressly made not findings of fact. Therefore, the only questions before this Honorable Court are questions of law.

III. REPLY ARGUMENTS

A. THE CONSTITUTIONAL GRANT AND DUTIES TRANSFERRED TO THE COUNTIES OF HAWAI'I INCLUDE TO "DEFINE," AND "ASSESS," REAL PROPERTY, AND "COVERED *THE WHOLE SUBJECT OF PROPERTY TAXATION POWER* AND EMBRACED *THE ENTIRE LAW IN THAT REGARD*"

KAHEAWA and AUWAHI maintain that the constitutional grant of authority over the real property tax function to the counties is limited by some undefined phantom pre-emptive power to tax "personal property" reserved to the state. Contrary to this erroneous premise, the general grant of complete authority to the counties of Hawai'i over the functions and obligations related to real property taxation has already been expressly recognized and confirmed by the Supreme Court:

> In 1980, article VII, section 2 (sic) transferred ***all*** property tax functions to the counties. *See* Comm. of the Whole Rep. No. 7, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 1008 (1980). HRS § 246A–2 thereafter reaffirmed that transfer, effective July 1, 1981. *See* HRS § 246A–2. ***Neither provision limited or restricted the counties' taxing authority***. ***The constitutional and legislative acts covered the whole subject of property taxation power and embraced the entire law in that regard***.

See, Gardens at West Maui Vacation Owners Vacation Club v. County of Maui, 90 Hawai'i 334, 341, 978 P.2d 772, 779 (1999). (Emphasis added). As expressly noted in *Committee of the*

> meaning, unless there is something in the statute requiring a different interpretation.

Furukawa v. Honolulu Zoological Society, 85 Hawai'i at 12, 936 P.2d 643 at 648 (quoting Iddings v. Mee–Lee, 82 Hawai'i 1, 6–7, 919 P.2d 263, 268–69 (1996) (citations and footnote omitted)).

Whole Report No. 7, the language of the amendment to Article VIII, Section 3 was broadened "in order to clarify the standing committee's ***intent to grant all taxing powers relating to real property to the counties***[.]" *See*, CAAP-17-0000816, JEFS Dkt. 36 and PDF pp. 86-87 (excerpted *Proceedings of the Constitutional Convention of Hawai'i 1978*, pp. 1008-1009) (Emphasis added). In light of this unambiguous grant of full authority and responsibility, KAHEAWA'S and AUWAHI'S argument that the intent in the broadened language was only to make sure the transfer included the power to set exemptions is erroneous on its face.

As already demonstrated in the County's Opening Appellate Brief, it is equally irrefutable that as recognized by the Committee on Local Government at the 1978 Constitutional Convention, the taxing authority granted to the counties would have to include, "basic policies ***defining real property***, [and] setting the ***basis of assessment***," not exclusively.[5] *See*, CAAP-17-0000816, JEFS Dkt. 36 and PDF p. 79-80. It otherwise is difficult to fathom how the counties could exercise their exclusive "functions, powers and duties relating to the taxation of real property" without that power being inclusive of the power to <u>define and determine what constitutes assessable</u> "'property' or 'real property'" as provided for in the Maui County Code. *See*, MCC § 3.48.005.

Contrary to Appellants' absurd argument, and contrary to the conclusions and apparent assumptions made by the Tax Appeal Court, the Maui County Code is not *ultra vires* or unconstitutional as somehow allegedly "re-defining" "personal property" by "labeling" it "real property." Even as specifically identifying "wind energy conversion property . . . , including . . . windmill, wind turbine, [and] tower," under the code this property only becomes an accession

[5] The Committee on Local Government also expressly recognize the grant would have to include "assessing all real property in the State that is subject to the payment of real property taxes, and for levying and collecting all such taxes, and adjudicating appeals," as well as "utilizing the real property tax as an instrument of land use und economic policy." *See*, CAAP-17-0000816, JEFS Dkt. 36 and PDF pp. 79-80.

to the realty based on its use, value to the land, and/or its utility "to convert wind energy to a form of usable energy[.]" The provision does not somehow "convert" personal property into real property. Rather, the provision recognizes and defines property which may become an accession to the realty based on its use, utility and value to the underlying realty. This is neither *ultra vires* or an unconstitutional provision for defining real property.[6]

Likewise, the constitutional function relating to real property tax has to include, and requires the County's assessor(s) to determine what property is subject to assessment for purposes of valuation and tax. This assessment has to include determining what property constitutes accessions to realty, and is based on independent judgments which include determining use, utility, and value pursuant to professional appraisal standards for purposes of valuation and tax.[7] It is difficult to imagine how the counties of Hawai'i are to exercise their duties for real property tax if it were otherwise, and for example, if property could be pre-emptively excluded from assessment simply by labeling it *de jure* "personal property." The "constitutional" arguments Appellants seek to make here would effectively impose non-existent

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[6] Kaheawa even awkwardly acknowledges on page 27 of its Answering Brief that, "[m]oreover, Kaheawa does not dispute the general proposition that personal property can be converted into real property." *See*, SCAP 17-0000816, JEFS Dkt. 12 and PDF p. 36.

[7] *See*, People of State of New York v. Weaver, 100 U.S. 539, 545, 25 L. Ed. 705 (1879) ("An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two processes listing the persons, property, . . . to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. . . . Taxation by valuation cannot be apportioned without it.') (citing *Cooley, Taxation,* 258, 259; *Burroughs, Taxation,* p. 198, sect. 94.); *see also*, Cty. of Westchester v. Town of Harrison, 201 Misc. 211, 114 N.Y.S.2d 492 (Sup. Ct. 1951) (Assessors have duty to fix fair and full market value on realty and, if it is exempt, to so assess it, to fix fair and full value of that portion of realty located in various taxing districts, and to indicate that such portions are liable for the special district taxes.); *see also*, Everett v. Adamson, 106 Wash. 355, 357, 180 P. 144, 145 (1919) ("The power to levy special assessments for public improvements, according to the benefits, is delegated to the local authorities, but is wholly derived from the sovereign taxing power, and could assuredly be exercised in the first instance by it.

constitutional and/or legal limitations on the County's and its assessors' obligation and ability to define, identify, and value property for purposes of taxation.

Even if there were some phantom vestige or remnant of legal authority reserved to the state allegedly limiting the counties of Hawai'i's real property taxation powers, which has not remotely been shown to be the case here, the amendments contained in Article VIII, Section 3 would have repealed any such law by clear implication. *Cf.* Gardens at West Maui, 90 Hawai'i at 334, 978 P.2d at 772 ("Because this section [Article VIII, Section 3] and [HRS] §246A-2 cover the whole subject of the counties' real property taxation power and embrace the entire law on the matter, ***§248-2, by limiting Maui county's real property taxation powers, is in conflict and is repealed by implication***."). (Emphasis added). As this Honorable Court has already clearly ruled in Gardens at West Maui, Article VIII, Section 3 left nothing with respect to property taxation to the state.

Finally, neither KAHEAWA or AUWAHI have shown that the state has actually annually assessed and taxed their dozens of wind turbines as "personal property," pursuant to the state's alleged reservation unto itself to do so under the Hawai'i State Constitution.

B. THERE IS NO COMMON LAW RULE, STATUTORY PRINCIPLE OR DEFINITION IN HAWAI'I WHICH WOULD EXCLUDE WIND TURBINES FROM BECOMING ACCESSIONS TO REALTY AS POWER GENERATING APPARATUS, MACHINERY AND EQUIPMENT USED IN CONNECTION WITH GENERATION AND DISTRIBUTION OF POWER

i. APPELLANTS' ARGUMENT THAT SOME COMMON LAW OR STATUTORY DISTINCTION IN HAWAI'I AND/OR ARTICLE VIII, SECTION 3 OF THE HAWAI'I CONSTITUTION RESERVED TAXATION OF PERSONAL PROPERTY TO THE STATE IS ERRONEOUS AND A COMPLETE RED HERRING

Contrary to Appellants' repeatedly misguided assertions, there is no common law in Hawai'i, or statutory prohibition which reserves to the state any authority to tax personal property, or which precludes wind turbines used for power generation from being determined as accessions to realty and assessed. As already noted in the County's Opening Appellate Brief at footnote 4, Appellants' continued reliance on Smith v. Smith, 56 Haw. 295, 535 P.2d. 1109 (1975) and Kahinu, et al. v. Aea, 6 Haw. 68 (1872) for this purported *de jure* common law distinction is simply misguided. Smith held nothing more than that as "an incorporeal hereditament" incident to an estate in land, rent already due but unpaid is personal property. Smith, 56 Haw. at 303, 535 P.2d at 1116. Apart from being more than a hundred years old at the time Article VIII, Section 3 of the Hawai'i Constitution was enacted, Kahinu held nothing more than that a custom of "natives" in former times to remove houses from one piece of property to another *does not warrant the conclusion that a house is personal property*. The holding in Kahinu is not only irrelevant to the enactment of Article VIII, Section 3, it cuts directly against KAHEAWA'S other central argument that the alleged removability of its wind turbines makes them personal property.

Likewise, there is nothing in Hawai'i Revised Statutes § 246-l which appears to codify any *de jure* common law distinction of personal property *as reserved for taxation by the state*. The County's Opening Appellate Brief has already expressly addressed this point. *See*, CAAP

17-1-0000816, JEFS Dkt. 68 and PDF 32-33. Otherwise, KAHEAWA'S attempt to argue at pp. 16-18 of its Answering Brief that the legislative intent of HRS § 246-l [am L **1967**, c 120, § 1] to distinguish personal property from real property can be inferred from the Tax Appeal Court's and Intermediate Court of Appeal's interpretation of the MCC § 3.48.005 **in 2014** is truly bizarre logic, and bootstrapping. *See*, CAAP 17-1-0000816, JEFS Dkt. 12 and PDF 25-27. It is equally unclear how the similarity in language between HRS § 246-l and MCC § 3.48.00 reflects a reservation to the state of any authority to tax personal property.

It is otherwise also unclear how KAHEAWA'S oblique and fleeting reference to a "Personal Property Tax Act (Sp. S. L. **1933**, Act 9)," without any context whatsoever or even any reference to the text of the act, supports its position as to any reservation to the state under the amendment to Article VIII, Section 3 of the Hawai'i State Constitution to assess and tax personal property in Hawai'i. Nor do KAHEAWA or AUWAHI identify any law contemporaneous with the 1978 amendment, or current law which would permit the state to do so. Without more, the oblique reference to Sp. S.L. 1933, Act 9 appears as nothing more than a pointless citation to a long obsolete and irrelevant territorial law. Any reliance KAHEAWA or AUWAHI place in the citation certainly does not evidence the intent of the 1978 constitutional amendment.

ii. THE KAHEAWA DECISION DOES NOT HOLD WIND TURBINES ARE PERSONAL PROPERTY, OR SUPPORT ANY RESERVATION TO THE STATE TO TAX PERSONAL PROPERTY

The decision in Kaheawa Wind Power, LLC v. County of Maui, 135 Hawai'i 202, 135 Hawai'i 632 (2014) did not hold Wind Turbines are "personal property." The County's Opening Appellate Brief already addresses the Kaheawa decision in detail. *See*, CAAP 17-1-0000816, JEFS Dkt. 68 and PDF pp. 14-16 and 33-34. Rather, the decision held that the wind turbines were not fixtures *under the prior definition of the Maui County Code*. Id. The decision did not

hold that under some immutable common law principle the turbines were as a matter of law personal property. Nor does it seem that it could without the legislature having provided an expressed exemption. *See*, footnote 7, supra.

In its current Answering Brief, KAHEAWA quotes recitations by the Intermediate Court of Appeals in the Kaheawa decision of stipulations in a prior appeal, which are not applicable to this case by its own terms.[8] KAHEAWA repeatedly misleadingly invokes the prior factual stipulations as legal holdings. The tactic seeks to impose a rigid legal restriction on annual valuation and appraisal determinations which are not inflexible, but rather are based on property use, utility, and appraisal realities, additional facts learned, and in this instance a more comprehensive and useful view of the law which pertains to determining what characteristic property may be determined as accessions to realty in the State of Hawai'i.

The County's Opening Appellate Brief has already addressed the concerns and limitations presented by the Kaheawa decision's reliance on the demonstrably inapplicable holdings in Zangerle v. Repbulic of Steel Corp., 144 Ohio St. 529, 60 N.E.2d 170 (1945), as proffered to the appellate court by KAHEAWA in the previous appeal. *See*, CAAP 17-1-0000816, JEFS Dkt. 68 and PDF pp. 35-43. It is otherwise apparent that the analysis in the Kaheawa decision is lacking for failure to take a more comprehensive view of the common law as established in various other jurisdictions, and for its singular focus on the unique state of Ohio, which expressly assesses and taxes personal property by its constitution and pursuant to schedules provided in its statutes.

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[8] As the County pointed out in its Opening Appellate Brief, in this appeal, and in the underlying Tax Court Appeals, the parties have not stipulated to any facts, and the prior facts stipulated to are not a matter of record on this appeal. The Stipulation of Facts on record in the Kaheawa case, CAAP-12-0000728, specifically provided "[t]his Stipulation is made solely for purposes of the present action, and does not constitute an admission of any fact for any other purpose or with respect to any third party." *See*, CAAP-12-0000728 JEFS Dkt. 61 and PDF p. 70. Finally, AUWAHI was never a party to any stipulation of facts in any previous Tax Court Appeal.

As demonstrated in the County's Opening Appellate Brief, the Ohio Constitution is very different from the Hawai'i State Constitution as regards its express distinction of personal property from real property, *both of which are taxed in Ohio in either event*. *See*, CAAP 17-1-0000816, JEFS Dkt. 68 and PDF 35-43. It is also clear from Ohio's own unique common law tradition that this distinction relies most prominently on the fundamental difference between *agricultural* and *manufacturing* operations, equipment and machinery. Id. As reflected in the case law of multiple other jurisdictions, the commercial/industrial uses to which land may put is certainly not limited to agriculture and/or manufacturing.

iii. APPELLANTS' WIND FARMS ARE NOT MANUFACTURING OPERATIONS AND THE WIND TURBINES ARE NOT MANUFACTURING EQUIPMENT

Most notably, the unique siting and use(s) of land constituted by *power generation facilities*, refineries, and communications operations have been recognized by several other jurisdictions. The decisions expressly acknowledge that these facilities and operations are "ordinarily intended" to remain on land for the useful life of the power generating apparatus, machinery, and equipment. *See*, American Hydro Power Partners, L.P. v. City of Clifton, 12 N.J.Tax 264 (1991) (Finding that hydroelectric generation plant was “ordinarily intended” to be permanently affixed to property and was thus taxable as real property was sustained by the evidence, even though equipment could be removed and there had, at least at one time, been a market for used hydroelectric plant equipment); *see also*, Consolidated Edison Co. of New York v. City of New York, 80 Misc.2d 1065, 365 N.Y.S.2d 377 (N.Y. 1975) (Power-generating apparatus, machinery and equipment, whether movable or permanently affixed to realty, used in connection with generation and distribution of power and integral component part of unified system, are taxable as real property *per se* because they generate and distribute power); *see also*,

Chevron U.S.A, Inc. v. City of Perth Amboy, 9 N.J. Tax 205 (1987) (even though the property at the oil company's refinery could be removed without material injury to itself or to the real property to which it was affixed, the machinery, equipment and process units were "ordinarily intended" to be fixed permanently to real property and, therefore, the refinery was taxable as real property); *see also*, Guardian Energy, LLC v. County of Waseca, 868 N.W.2d 253 (Minn. 2015) (Ethanol plant tanks bolted to or sitting on concrete foundations were taxable real property, even though the tanks theoretically could be removed by detaching them from their foundation and then disassembling them by towing tanks away); *see also*, NYT Cable TV v. Audubon Borough, 9 N.J.Tax, 359 (N.Y. 1987) (250 foot-high cable television antenna tower on 13 foot reinforced concrete foundation "ordinarily intended" to be affixed permanently to realty held not be personal property regardless of what taxpayer actually intends); *see also*, T-Moblie Northeast, LLC v. DeBellis, 40 N.Y.S.3d 164, 143 A.D.3d 992, 2016 N.Y. Slip Op. 07031 (N.Y. 2016) (T-Mobile's 4-5 ft. rooftop antennas are "constructively annexed" to land, where placed and fitted to perform a special purpose necessary for the complete use of the freehold, and where lease condition permitting removal of equipment, or renewal of lease demonstrates intent to make equipment permanent for the term of the leasehold).

Likewise, it is simply not reasonable or even plausible to conclude that the dozens of 327 ft. to 428 ft. tall wind turbine generators which populate both KAHEAWA'S and AUWAHI'S respective leasehold possessions at Kaheawa Pastures and Ulupalakua Ranch were not intended to have a level of permanency as part of their *power generating and distribution facilities*.

iv. APPRAISAL OF POWER GENERATING AND DISTRIBUTION PLANTS

Appraisals of power generating and distribution plants as improvements to real property for assessment and tax is otherwise certainly nothing unique or new. *See*, Pub. Serv. Co. of New

Hampshire v. Town of Ashland, 117 N.H. 635, 638, 377 A.2d 124, 125 (1977) ("There are five approaches to valuation potentially applicable to utility property: original cost less depreciation; reproduction cost less depreciation; comparable sales; capitalized earnings; and the cost of alternative facilities capable of delivering equivalent energy."); *see also*, Long Island Lighting Co. v. Assessor for Town of Brookhaven, 202 A.D.2d 32, 616 N.Y.S.2d 375 (1994) (Nuclear power plant was "specialty property" that was to be assessed for tax purposes using reproduction-cost-new-less-depreciation method; plant was unique and specially built for purpose of generating electricity, there was no market for sale of nuclear power stations, and improvement of parcel with plant was appropriate improvement, reasonably expected to be replaced.); *see also*, Niagara Mohawk Power Corp. v. Town of Bethlehem Assessor, 225 A.D.2d 841, 639 N.Y.S.2d 492 (1996) ("Specialty property," including utility's electrical generating plant, had to be assessed using reproduction cost new less depreciation method of assessment.); *see also*, Fayetteville Express Pipeline, LLC v. Arkansas Pub. Serv. Comm'n, 2017 Ark. App. 557, 533 S.W.3d 106 (2017) (In determining the fair market value of utilities and carriers, the applicable statute authorizes the Public Service Commission's Tax Division to use various cost approaches such as the original cost less depreciation and the replacement cost less depreciation.).

C. THE SUPREME COURT OF HAWAI'I HAS AUTHORITY TO HEAR ALL QUESTIONS OF LAW, MIXED LAW AND FACT, AND TO CORRECT ERRORS OF ALL LOWER COURTS

Another misdirection Appellants attempt is the incorrect proposition that the County is seeking to "re-litigate" matters already decided by the Tax Appeal Court and the Intermediate Court of Appeals. The County is not seeking to have any prior tax appeals or judgments reopened.[9] Rather, with respect to the Kaheawa decision only, the County is requesting the

[9] The County specifically withdrew consolidated appeals CAAP 16-0000740 and CAAP 16-

Supreme Court of Hawai'i review and re-consider the limited and questionable proposition that the dozens of 327 ft. to 428 ft. tall wind turbine generators which populate both KAHEAWA'S and AUWAHI'S respective leasehold interest at Kaheawa Pastures and Ulapalakua Ranch cannot be assessed as *improvements* to the realty.

As is explained in the County's Opening Appellate Brief, the proposition that the massive wind turbines as power generation apparatuses are somehow not improvements because they are allegedly removable, and/or because they do not serve some vague and indeterminate "general inherent utility" of land is of limited value in analyzing the factual circumstances underlying these tax appeals. *See*, CAAP 17-1-0000816, JEFS Dkt. 68 and PDF 41-46. As noted in **Section II., B., iii.** above, and in **footnote 9** below, several other jurisdictions have refuted the notion that removability negates the characteristic of power and energy apparatuses, machinery and equipment as improvements. Moreover, KAHEAWA and AUWAHI have failed to identify any other decisions apart from Kaheawa, across any other jurisdiction which even mentions the concept of "general inherent utility" of land in the context of legal analysis.

To the extent Appellants suggest these issues have already been decided and cannot be revisited by this Honorable Court, they are clearly incorrect. The Supreme Court of Hawai'i has recognized that "[w]e have been charged with 'the general superintendence of all courts of inferior jurisdiction' of the State of Hawaii. HRS § 602–4. Concomitantly, we have been endowed with authority 'to ***prevent and correct errors*** and abuses therein where no other remedy is expressly provided by law.'" State v. Fields, 67 Haw. 268, 276, 686 P.2d 1379, 1386 (1984). (Emphasis added). Hawai'i Revised Statutes 602-4 [*Superintendence of Inferior Courts*] provides:

0000741, and refunded KAHEAWA taxes as pertaining to the relevant tax years. Obviously, the intent is not now to seek to re-open those appeals here, as they could have been pursued in their own right, or consolidated with this appeal.

> "The supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."
>
> Moreover, Hawai'i Revised Statutes 602-5 [*Jurisdiction and power; filing*] provides
>
> "(a) Except as otherwise provided, the supreme court shall have jurisdiction and powers as follows:
>
> > (1) To hear and determine all questions of law, or of mixed law and fact, which are properly brought before it . . . . by transfer as provided in this chapter[.]

It is neither inappropriate, or unreasonable under the facts of these consolidated appeals for the County to ask that this Honorable Court review and reconsider the implausible proposition maintained in the Kaheawa decision that because they are *theoretically* removable, the dozens of 327 ft. to 428 ft. tall wind turbine generators which populate both KAHEAWA'S and AUWAHI'S respective leasehold interest at Kaheawa Pastures and Ulapalakua Ranch cannot be assessed as *improvements* to the realty.[10] Likewise, where no other jurisdiction in the United States appears to have taken cognizance of the concept that land has some undefined "general

[10] In addition to the cases cited above on power generation facilities, oil and gas refineries, and communications operations, the County's Opening Appellate Brief cites the Court to similar holdings related to other uses of land and the "ordinarily intended" permanency of the operations and equipment. *See*, King Ridge, Inc. v. Town of Sutton, 115 N.H. 294, 340 A.2d 106 (N.H. 1975) (Ski lifts are taxable as "real estate" in their entirety as functional units where land was specially cleared and graded for downhill skiing, and the exclusive use of the lift is intimately intertwined with the primary use of the land itself); *see also*, National Food Corp. v. Aurora County Board of Commissioners, 537 N.W.2d 564 (S.D. 1995) (Scale, grain dryer, scalper, grain tanks, and propane tank used in large pullet-raising and egg-laying facilities were "structures" not excluded from real property taxes, where removal of equipment would have materially limited or restricted use of buildings) and (Even though water and propane tanks were themselves deemed "structures," in view of evidence that tanks were attached to concrete slabs by bolts they were part of the real property and taxable as such); *see also*, Cherry Bowl, Inc. v. Property Tax Appeal Board, 100 Ill.App.3d (Ill. 1981) (pinsetters and lanes installed in building primarily for that purpose, with useful life of 20 to 50 years considered as permanent fixtures and improvements to land for purposes of taxation); *see also*, Kings Entertainment Co. v. Limbach, 63 Ohio St.3d 369, 588 N.E.2d 777 (Ohio 1992) (Structural steel, aluminum rails and concrete piers and foundations used in construction of rides in amusement park constituted 'structures' and 'improvements' on the land within definition of 'real property'").

inherent utility" beyond the use to which the land is put, it is not inappropriate or unreasonable for the County to request this Honorable Court review, correct, and prevent what appears to be an error committed when the Kaheawa court adopted this fictional concept proffered by KAHEAWA as the cross-appellee in that prior appeal.

The County really has no other option but to seek review of the questionable analysis regarding "general inherent utility" of land made in the Kaheawa decision, if it is to prevent the error from compromising the County's assessment obligations in the future, and compounding legal claims in ongoing tax appeals.

D. THERE IS NOTHING IN EITHER FEDERAL OR STATE POLICY WHICH PRE-EMPTS THE COUNTIES OF HAWAI'I'S CONSTITUTIONAL FUNCTIONS, POWERS, AND DUTIES AS RELATED TO THE TAXATION OF REAL PROPERTY

Appellants are also inappropriately asking this Court(s) to grant them an exemption from real property tax assessments and tax where *neither the federal government, the state, or county legislature has done so*. Neither the federal government,[11] state government,[12] or county have

[11] Otherwise, KAHEAWA'S reference to 26 U.S.C. § 48(a)(3) is at best unclear, and alternatively yet another misdirection. The language of this provision of the IRS Code defines "Energy Property" as solar and geothermal, and nowhere mentions wind energy property. Likewise, while 26 U.S.C. § 168(e)(3)(B)(vi) of the code refers to "wind energy" as pertaining to property referred to in § 48(a)(3) it is unclear how the depreciation methods for "5-year property" as provided for in § 168(e)(3)(B)(vi) establishes KAHEAWA'S and AUWAHI'S 327 ft. to 428 ft. wind turbines are *de jure* personal property. Finally, it has to be noted that § 48(a)(3) pertains to equipment used "to heat or cool (or provide hot water for use in) a structure," "illuminate the inside of a structure," and "qualified small wind energy property," none of which KAHEAWA'S or AUWAHI'S energy generating plants have been shown to qualify as.

[12] As to HRS § 235-110.7, the provisions apparently relate to any capital goods *at the time of purchase and/or import* into the State, a *transaction* triggering a GET tax obligation. Haw. Rev. Stat. §235-100.7(e)(2). Moreover, the tax credit which KAHEAWA erroneously argues constitutes a determination that the wind turbines and towers are not taxable realty is applicable for only one year. That would be the first taxable year the property is purchased or imported into the state, and placed into service. Id. There is nothing in Chapter 235 which inclusively or exclusively defines "personal property," or remotely suggests that once that property is placed in service it might not become an accession to realty as an improvement to the land. In fact, the language from § 235-110.7(e), apparently recognizes that "tangible personal property" may be an integral part of a building or structure.

determined that wind turbine generators used for generation and distribution of commercial power are entitled to an exemption *from real property tax*.

Otherwise, contrary to Appellants' assertions, like both the federal and state governments, the County of Maui promotes the development and proliferation of alternative energy resources, and provides tax exemptions for alternative energy improvements. As reflected in the Maui County Code, "'[a]lternative energy improvements' means any construction or addition, alteration, modification, improvement, or repair work undertaken upon or made to any building." *See*, Maui County Code § 3.48.520. "Alternative energy improvements" expressly does not include "alternative energy production or energy byproducts transferred, marketed, or sold on a commercial basis[.]" Id. Neither KAHEAWA or AUWAHI have otherwise demonstrated that their dozens of 327 ft. to 428 ft. tall wind turbines or their power generating plants receive or qualify for any such exemption under any law; either federal, state, or county.

Appellants' invitation to this Honorable Court to void a constitutional county tax code provision, which reflects a legitimate government purpose, and which was enacted pursuant to the counties of Hawai'i's irrefutable constitutional authority, is essentially inviting the Court to take on and make a policy decision which neither the state or the county have elected to implement.

E. APPRAISAL CONCEPTS AND PRINCIPLES ARE COMPLETELY RELEVANT TO DEFINING AND IDENTIFYING REALTY FOR ASSESSMENT, AND VALUATION APPRAISAL FOR TAX PURPOSES

At long last, KAHEAWA'S ongoing attempts to discredit and attack the County's proffered expert appraiser R.J. Kirchner for making certain legal assumptions, do not refute the appraisal opinions and conclusions Mr. Kirchner has drawn as to the utility and extraordinary

value KAHEAWA'S and AUWAHI'S wind turbines give to the underlying realty. Mr. Kirchner was not retained by the County to offer legal opinions, and his report was not presented to answer any questions of law. Nevertheless, appraisers routinely have to make legal assumptions when making assessment determinations for any underlying realty, to include *highest and best use*,[13] for example.

While Mr. Kirchner may have admittedly been incorrect in certain of his legal assumptions, none of those assumptions were essential, and do not degrade or erode his central underlying opinions and conclusions regarding the wind turbines as accessions to the underlying realty for purposes of appraisal and valuation. Moreover, Mr. Kirchner need not have prepared, and was not asked to prepare an actual valuation appraisal of the realty in question for purposes of this tax appeal. This is in part because the Appellants have not disputed the County assessors' actual values, but rather, only the assessment and appraisal of the wind turbines as included in those values.

Otherwise, notwithstanding all of KAHEAWA'S efforts to discredit Mr. Kirchner, the Tax Appeal Court did in fact find his opinions relevant:

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[13] Notably, a 2015 rental appraisal for KAHEAWA WIND POWER, LLC'S leasehold interest at Kaheawa Pastures prepared by Medusky & Co. specifically recognizes "[t]he land is improved with 20 wind power turbines," and the "Improvements" on the property to include a "2,730 sq. ft steel warehouse with 756 sq. ft. office enclosure built in 2007 and ***20 wind power turbines***." *See*, CAAP 17-0000816 JEFS Dkt. 38 and PDF pp. 40 and 48 (September 2015 Appraisal Report, at p. 4). (Emphasis added). Moreover, for purposes of valuation Medusky & Co. note in their appraisal report that:

> The existing wind farm use is legally permissible, physically possible and financially feasible ***as the improvements contribute to overall property value***. Therefore, the Highest and Best Use of the subject property, As Improved, is for continued wind farm use.

Id. at PDF p. 61. (Emphasis added).

> So ***the Court agrees that (sic) Mr. Kirshner's opinions about certain kinds of equipment adding value to the property***, that issue is not reached because of the threshold question of whether the counties have the power to legislate policy by redefining the term "real property."

See, CAAP 17-0000816, JEFS Dkt. 13 and PDF pp. 41-2. (Emphasis added).

VI. CONCLUSION

The County incorporates here the conclusion and relief requested in its Opening Appellate Brief, and further request this Honorable Court recognize that as apparatus, machinery, and/or equipment supporting power generation facilities, KAHEAWA'S and AUWAHI'S 327 ft. to 428 ft. wind turbines are not personal property, and are assessable as improvements to land under the Maui County Code. To the extent that the Court determines the decision in Kaheawa may need to be corrected to draw this conclusion, the County respectfully request the Court do so at its discretion.

DATED: Wailuku, Maui, Hawaii, August 6, 2018.

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SCAP-17-0000816

IN THE SUPREME COURT OF STATE OF HAWAII

In The Matter of the Appeal of

KAHEAWA WIND POWER, LLC.

Taxpayer-Appellant.

Case Nos. TX 14-1-0266 and consolidated cases TX 16-1-0272, TX 14-1-0267 and TX 14-1-0267 and consolidated case 1 TX 16-1-0273, and TX 16-1-0275, 1 TX 15-1-0238, 1 TX 16-1-0328 (Other Civil Action)

Consolidated Case Nos. CAAP 17-0000816, CAAP 17-0000817, CAAP-17-0000818, CAAP-17-0000819, CAAP-17-0000820

CAAP-17-000816 – APPEAL FROM **1)** ORDER GRANTING TAXPAYER-APPELLANT KAHEAWA WIND POWER LLC'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED SEPTEMBER 1, 2016, FILED APRIL 25, 2017, **2)** ORDER DENYING APPELLEE COUNTY OF MAUI'S MOTION FOR SUMMARY JUDGMENT AND FOR DISMISSAL OF TAXPAYER-APPELLANT KAHEAWA WIND POWER LLC'S TAX APPEAL FILED NOVEMBER 12, 2014 AND FEBRUARY 3, 2014, FILED FEBRUARY 3, 2017, FILED MAY 15, 2017 and **3)** STIPULATION FOR ENTRY OF JUDGMENT; FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-000817 – APPEAL FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-000818 – APPEAL FROM 1) ORDER GRANTING TAXPAYER-APPELLANT AUWAHI WIND ENERGY LLC'S AUGUST 31, 2016 MOTION FOR SUMMARY JUDGMENT FILED APRIL 26, 2017, 2) ORDER DENYING APPELLEE COUNTY OF MAUI'S FEBRUARY 3, 2017 MOTION FOR SUMMARY JUDGMENT ET SEQ., FILED MAY 14, 2017; AND STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000819 – APPEAL FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

CAAP-17-0000820 – APPEAL FROM STIPULATED FINAL JUDGMENT FILED OCTOBER 4, 2017

Tax Appeal Court, State of Hawaii
Judge: Honorable Gary W.B. Chang

CERTIFICATE OF SERVICE

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Title: In the Matter of the Tax Appeal of Kaheawa Wind Power LLC, Taxpayer-Appellant
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Case Type: Appeal
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