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V. ISHIHARA, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; VIC H. HENRY; AND PETER A. BAGATELOS, Plaintiffs, vs. COUNTY OF MAUI; MAUI COUNTY COUNCIL; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; AND DOE ENTITIES 1-10, Defendants.	CIVIL NO. 13-1-0848 (2) (Other Civil Action) **COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW; ORDER GRANTING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON COUNTS V, VI, VII AND VIII OF THE SECOND AMENDED COMPLAINT FILED AUGUST 12, 2016, FILED ON DECEMBER 1, 2016; and DENYING DEFENDANTS COUNTY OF MAUI AND THE MAUI COUNTY COUNCIL'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT V OF PLAINTIFFS' SECOND AMENDED COMPLAINT FILED 2016-08-12, FILED ON DECEMBER 12, 2016; CERTIFICATE OF SERVICE**

**COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW;
ORDER GRANTING PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY
JUDGMENT ON COUNTS V, VI, VII AND VIII
OF THE SECOND AMENDED COMPLAINT FILED AUGUST 12, 2016,
FILED ON DECEMBER 1, 2016, and DENYING DEFENDANTS COUNTY OF MAUI
AND THE MAUI COUNTY COUNCIL'S MOTION FOR PARTIAL SUMMARY
JUDGMENT AS TO COUNT V OF PLAINTIFFS' SECOND AMENDED
COMPLAINT FILED 2016-08-12, FILED ON DECEMBER 12, 2016**

EXHIBIT 1

Having considered the evidence presented with the motions and other briefs, and all arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. If any of the following findings of fact are deemed conclusions of law, they shall be construed as such.

A. Factual Background

2. ORV and ORVN are associations of timeshare owners of the Westin Ka'anapali Ocean Resort Villas and the Westin Ka'anapali Ocean Resort North Villas, respectively, acting by and through their board of directors. Declaration of Shawn O'Brien ("O'Brien Decl.") ¶ 2, attached to Plaintiffs' Motion for Partial Summary Judgment on Count V (Illegality) of the Second Amended Complaint Filed August 12, 2016, filed on December 1, 2016 ("Plaintiffs' MPSJ Count V").

3. For years 2006, 2007, and 2008, the County assessed all of ORV's land and buildings under a single Tax Map Key ("TMK") parcel number, TMK parcel 4-4-014-003-0000 ("Master Parcel 3-0000"). O'Brien Decl. ¶ 9; Exhibit A to Plaintiffs' MPSJ Count V (Defendant County of Maui's Responses to Plaintiffs' First Request for Admissions to Defendant County of Maui, dated October 31, 2016) at No. 1.

4. The County admits that it "assessed the property for all years prior to calendar year 2009 as a single parcel, and that the land and buildings . . . operated by Plaintiffs was [sic] not taxed as condominium property despite having been subject to condominium property regime." Plaintiffs' Exhibit A at No. 1; id. at No. 3 (admitting that for years 2006, 2007, and 2008, the County understood Master Parcel 3-0000 to be subject to a declaration of condominium property regime).

5. For years 2006, 2007, and 2008, the County assessed and taxed the land and buildings within Master Parcel 3-0000 as follows:

	2006	2007	2008
Building Value	$129,254,700.00	$141,379,100.00	$154,708,800.00
Land Value	$21,503,300.00	$21,503,300	$21,503,300.00
Tax Rate	$14.00	$14.00	$14.00
Total Tax	**$2,110,612.00**	**$2,280,353.60**	**$2,466,969.40**

O'Brien Decl. at Exhibit AA, at COM RPTax AA 000146, -000147, and -000148.

6. Similarly, for year 2008, the County sent to ORVN a single real property notice of assessment for all land and buildings within TMK parcel 4-4-014-004-0000 ("Master Parcel 4-0000"). See Plaintiffs' Exhibit A at No. 6.

7. The County admits that, "for all years prior to calendar year 2009," the County assessed the property comprising Master Parcel 4-0000 "as a single parcel, and that the land and buildings . . . operated by Plaintiffs was [sic] not taxed as condominium property despite having been subject to condominium property regime." Plaintiffs' Exhibit A at No. 6; id. at No. 4 (admitting that for year 2008, the County understood Master Parcel 4-0000 to be subject to a declaration of condominium property regime).

8. For year 2008, the County assessed and taxed the land and buildings within Master Parcel 4-0000 as follows:

Building Value	$146,620,200.00
Land Value	$17,737,200.00
Tax Rate	$8.20
Total Tax	**$1,347,730.68**

Plaintiffs' Exhibit AA at COM RPTax AA 000149.

9. The County admits that ORV and ORVN timely paid all the taxes related to those assessments. See Plaintiffs' Exhibit A at Nos. 9 and 11.

10. The County maintains that it assesses the values of condominium buildings under

construction based on costs; condominiums "are generally valued as partially complete—land is assessed at market value as though vacant, and buildings under construction will be valued at costs x % of completion." See Exhibit B to Plaintiffs' MPSJ Count V (Defendant County of Maui's Responses to Plaintiff Ocean Resort Villas Vacation Owners Association's First Request for Answers to Interrogatories to Defendant County of Maui, dated October 31, 2016), at No. 2.

11. The County maintains that "[w]hen the condominium building is finished, the land and individual units in the building are then supposed to be moved onto the assessment rolls as condominium property." Plaintiffs' Exhibit B at No. 2.

12. When "condominium projects are under construction and unsold, the [County] may value the partially complete projects using the cost approach on the master [parcel]," but once the construction is complete the County "then changes to the market value approach and assesses each unit individually." Plaintiffs' Exhibit B at No. 21.

13. The County took the position that, with the completion of ORV and ORVN's buildings, the County could have assessed (though it did not) each *individual* condominium subparcel within Master Parcel 3-0000 for years 2006, 2007, and 2008, and within Master Parcel 4-0000 for year 2008, using the *market* approach, rather than assessing the Master Parcels using the cost approach. Plaintiffs' Exhibit B at No.2.

14. The County maintains, without actual evidence, that it did not do so because it had an administrative "backlog" in entering the individual condominium subparcels into its system and, for that process, the County considered ORV and ORVN to be low in the "backlog priority." Plaintiffs' Exhibit B at No. 2 (because ORV and ORVN were "single owners/taxpayers of collective CPR [condominium property regime] unit TMKs, they fell behind to individual CPR units and subdivision parcels subject to individual ownership, mortgages, and financing requirements in the

backlog priority.").

15. On December 7, 2009, Maui's mayor signed into law Ordinance No. 3703 (2009), amending Maui County Code ("MCC") section 3.48.305 to add a requirement that "[w]hen property is subdivided into condominium units, each unit . . . and its appertaining common interest shall be: . . . [d]eemed a parcel and assessed separately from other units." (Underlining in original, indicating added text).

16. Ordinance No. 3703 (2009) provided for explicit retroactivity only to July 1, 2009. See Ordinance No. 3703 (2009).

17. For year 2009, having moved the individual condominium subparcels onto the assessment list, the County for the first time began issuing separate assessment notices for the ORV and ORVN condominium parcels (that is, the subparcels within the Master Parcels) individually, and using the market approach to building valuation rather than the cost approach. O'Brien Decl. ¶ 9; Exhibit C to Plaintiffs' MPSJ Count V (Transcript of Deposition of Marcy Martin of November 16, 2016) at 55:7 to 57:9.

18. This methodology resulted in significantly higher total assessments. ORV and ORVN appealed the assessments for years 2009 and 2010. Plaintiffs' Exhibit C at 55:7 to 57:9.

19. The parties resolved those appeals through settlement. O'Brien Decl. ¶ 9; Plaintiffs' Exhibit C at 53:21 to 55:11.

20. On August 19, 2013, Plaintiffs initiated the instant lawsuit challenging, on equal protection grounds, Defendants' creation of a separate real property tax classification for timeshares and the associated tax rates, and asserting due process and statutory claims of violation of Hawai'i's open meeting laws, set out in Hawai'i Revised Statutes ("HRS") chapter 92 ("Sunshine Law.").

21. Plaintiffs filed their First Amended Complaint on August 28, 2014, and the Court set

trial for September 12, 2016.

22. Plaintiffs' original claims, and those in their First Amended Complaint, did not challenge the County's real property assessments for any year.

23. On September 21, 2015, less than a month before the scheduled trial in this case, the County filed a counterclaim against ORV and ORVN in Plaintiffs' related Sunshine Law litigation against the County in Civil No. 15-1-0435(1) (the "2015 Sunshine Law case"), seeking to set off an alleged "tax windfall" from the 2006, 2007, and 2008 assessments against an anticipated award of damages in Plaintiffs' favor in that case. Exhibit K to Plaintiffs' MPSJ Count V.

24. The County had never issued any amended assessments for ORV or ORVN for those years, or any tax invoices for the amounts at issue in the County's Counterclaim. See Exhibit L to Plaintiffs' MPSJ Count V.

25. In that Counterclaim, the County alleged:

> 26. Both ORV and ORV NORTH were subject to assessment and levy of real property taxes in all years prior to the 2009 tax year, ***based on the aggregate of assessed market values*** of all individual condominium apartments which were included for timeshare use in ORV and ORV NORTHS' respective timeshare plans for those years.
>
> 27. In all tax years prior to 2009, neither ORV or [sic] ORV NORTH were assessed and levied real property taxes, ***based on the aggregate of assessed market values*** of all individual condominium apartments which were included for timeshare use in ORV and ORV NORTHS' respective timeshare plans for those years.
>
> 28. The COUNTY is entitled to a set-off against any damages claimed by ORV and ORV NORTH in this lawsuit, by the amounts of real property tax which ORV and ORV NORTH ***should have paid*** in each tax year prior to 2009, in amounts to be determined prior to trial.

Plaintiffs' Exhibit K.

26. The grounds asserted by the County to its Counterclaim rested upon the assertion that it had based the 2006, 2007, and 2008 assessments for the Master Parcels on the cost

approach to valuation rather than the market approach and not that the condominium units had been omitted from the tax rolls. Plaintiffs' Exhibit K.

27. The Counterclaim did not cite any provision of the MCC, or any other authority, that would allow the County to reassess the real property under a different methodology or to increase previous assessments, and specifically did not allege that the individual condominium units had been "omitted." Plaintiffs' Exhibit K.

28. The Honorable Rhonda I. L. Loo dismissed the Counterclaim filed by the County on March 3, 2016, holding that allowing a Counterclaim in setoff would circumvent the regulatory process. Plaintiffs' Exhibit L.[1]

29. The County admits that the failure of the set-off claim in the 2015 Sunshine Law case led it to issue amended assessments of ORV's and ORVN's properties for 2006, 2007, and 2008. See Defendants County of Maui's and Maui County Council's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Count VI (First Amendment) of the Second Amended Complaint filed August 12, 2016, filed January 19, 2017 ("Count VI Opposition") at 8 ("[A]fter the repeated arguments and positions taken by Plaintiffs against the County's ***efforts to defray their anticipated damages claims, the County would have been remiss by not issuing the***

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[1] Upon Plaintiffs' motion, see Declaration of Robert G. Klein, attached to Plaintiffs' MPSJ Count V, ¶ 17, the Court takes judicial notice of Plaintiffs' Exhibits K and L pursuant to Rule 201 of the Hawai'i Rules of Evidence. Under that rule, judicial notice may be taken of facts "either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Where, as here, a document is a matter of public record and its significance bears on the instant matter, it is appropriate for judicial notice. See Kaho'ohanohano v. State, 114 Hawai'i 302, 328, 162 P.3d 696, 722 (2007). "The most frequent use of judicial notice of ascertainable facts is in noticing the content of court records." State v. Akana, 68 Haw. 164, 165, 706 P.2d 1300, 1302 (1985), superseded by statute on other grounds as stated in State v. Perry, 93 Hawai'i 189, 198 n.15, 998 P.2d 70, 79 n.15 (Ct. App. 2000) (citing Wright & Graham, 21 Federal Practice & Procedure: Evidence § 5121 (1977)).

assessments of Plaintiffs' omitted property.") (emphasis added).

30. On or about May 24, 2016, two months after Judge Loo dismissed the Counterclaim in setoff, on the virtual eve of discovery cut-off in this case, and shortly before trial would have commenced, the County sent ORV and ORVN amended notices of property assessment—**1,114 in total**—for Master Parcel 3-0000 and its individual condominium subparcels 3-0001 to 3-0283 for years 2006, 2007, and 2008, and for Master Parcel 4-0000 and its individual condominium subparcels 4-0001 to 4-0275 for year 2008 (collectively, the "Amended Assessments"). O'Brien Decl. ¶ 10 and Plaintiffs' Exhibit AA at COM RPTax AA 000146, -000147, -000148, -000149 through -000152, and -000999.[2]

31. Tax invoice summaries in the amount of **$6,879,447.79** for ORV and **$3,849,070.70** for ORVN accompanied the Amended Assessment —for a total of **$10,728,518.49** in additional taxes—**due no later than June 23, 2016 (30 days)**. O'Brien Decl. ¶ 11 and Plaintiffs' Exhibit BB.

32. The Amended Assessments for Master Parcels 3-0000 and 4-0000 show the original, and substantial, valuation for land and buildings, and the original, and substantial, taxes billed and paid in full. Plaintiffs' Exhibit AA.

33. The Amended Assessments for the Master Parcels also show the new, amended valuations for land and buildings as zero, and the amended taxes as zero, for a net change of a negative tax due for each year. Plaintiffs' Exhibit AA.

34. The Amended Assessment for each of the Master Parcels states: "REASON: Departmental Revision[,] Unreturned or Omitted Property MCC 3.48.165Appeal deadline to the

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[2] Plaintiffs' Exhibit AA consists of only the Amended Assessments for the Master Parcels and for subparcels 3-0001 and 4-0001 for each year as representative of the remaining Amended Assessments for the remaining subparcels, totaling over a thousand pages. The record, however, includes all of the Amended Assessments, which Plaintiffs filed as Exhibit O to Plaintiffs' MPSJ Count V.

Board of Review is 30 days from the date of this notice. A $75 filing fee is required for the Board of Review." Plaintiffs' Exhibit AA (spacing in original).

35. Each Amended Assessment also stated: "NOTES: MOVED TO CPR'S." Plaintiffs' Exhibit AA.

36. The Amended Assessments for the Master Parcels cited only the omitted property provision, MCC section 3.48.165, as the sole reason for the ***removal*** of the Master Parcels. Plaintiffs' Exhibit AA.

37. Conversely, the Amended Assessments for the condominium subparcels, Parcels 3-0001 to 3-0283 and 4-0001 to 4-0275, all show original land and building valuations and taxes of zero but substantial amended valuations for land and buildings and substantial associated taxes. Plaintiffs' Exhibit AA at COM RPTax AA 000150 through -000152 and -000999.

38. The Amended Assessments for the subparcels state: "REASON: Departmental Revision[,] Unreturned or Omitted Property MCC 3.48.165Appeal deadline to the Board of Review is 30 days from the date of this notice. A $75 filing fee is required for the Board of Review." Plaintiffs' Exhibit AA at COM RPTax AA 000150 through -000152 and -000999 (spacing in original).

39. Scott Teruya, at all relevant times the Administrator of the County's Real Property Assessment Division, signed each Amended Assessment. Plaintiffs' Exhibit AA.

40. The Administrator of the County's Real Property Assessment Division has the authority to administer those sections of the MCC related to real property tax assessments. Plaintiffs' Exhibit C at 154:23 to 156:23 (Marcy Martin testifying that Scott Teruya, the Administrator for the Real Property Assessment Division, had authority to authorize the Amended Assessments, as indicated by his signature on all of them), Plaintiffs' Exhibit H (Transcript of

Deposition of Scott Teruya of November 17, 2016) at 55:16-18, 59:22 to 60:1, and 76:1-11 (testifying as to his authority).

41. The letters transmitting the Amended Assessments and tax invoice summaries are unsigned and give no explanation for their issuance or timing. Plaintiffs' Exhibit BB.

42. Rather than directing questions to the Real Property Assessment Division, the transmittals state: "For questions call Maui County Department of Corporation Counsel at (808) 270-7740." Plaintiffs' Exhibit BB.

43. The Amended Assessments impose no penalty, Plaintiffs' Exhibit AA, and the County has not alleged that Plaintiffs in any way prevented the County from assessing the individual ORV condominium subparcels in 2006, 2007, or 2008, or the ORVN condominium subparcels in 2008.

44. Concurrent with issuing the Amended Assessments for the subparcels, the County removed the Master Parcels from the respective assessment lists. Plaintiffs' Exhibit B at Nos. 6 and 11 (stating that the master parcels were "taken off the assessment roll and not assessed").

45. The County also "reversed" ORV and ORVN's tax payments for the previous assessments of the Master Parcels but, rather than refunding those payments with interest to ORV and ORVN, the County ***credited*** those payments, **without interest**, to the taxes invoiced for the Amended Assessments for the subparcels. See Exhibit N to Plaintiffs' MPSJ Count V.

46. These actions constitute admissions by the County that the Master Parcels and their subparcels comprise the same land and buildings; it is an acknowledgement that had the County not removed the Master Parcels and credited related tax payments, it would have assessed and taxed the same land and buildings twice.

47. The undisputed facts show that, in fact, prior to the issuance of the Amended Assessments, Martin raised this concern to Teruya, noting that the County could be obligated to refund the previous payments that totaled $8,205,665.68, plus interest.[3] Exhibit N to Plaintiffs' MPSJ Count V, at 2.

48. Martin stated that "taxes will have to be removed from the master parcels 440140030000 and 440140040000," and that the removal would result in refunds of the previously-paid taxes. Plaintiffs' Exhibit N, at 2.

49. Martin also asked: "Based upon the Certo decision (unjust enrichment), can we reapply the refunds to the new tax map keys? Or, do we have to issue the refunds, pay interest and the tax payer can pay the new amounts due within 30 days?" Plaintiffs' Exhibit N, at 2.

50. The special, detailed plan for issuing the Amended Assessments, indisputably shown in Plaintiffs' Exhibit N, establishes that the County issued the Amended Assessments outside the regular course of its assessment and taxation function.

51. In contrast to the MCC provisions for appeals of assessments issued in the normal course, the County allowed no time between the issuance of the Amended Assessments and the imposition of the related taxes. Thus, the County failed to allow Plaintiffs the ability to challenge the Amended Assessments before the additional taxes totaling **$ 10,728,518.49** became due. Cf. MCC §§ 3.48.130, 3.48.595, 3.48.195.

52. Ultimately, by crediting the prior tax payments to the subparcels, the County avoided issuing refunds, and paying eight to ten years of interest on the more than $10.8 million that it credited to ORV and ORVN. See Plaintiffs' Exhibit C at 135:6 to 137:12; Plaintiffs' Exhibit N.

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[3]Although Exhibit N indicates a total of $10,869,908.14, that total appears to be in error, as the figures total $8,205,665.68.

53. The County's use of the phrase "***Amended*** Assessment" also constitutes an admission that it simply changed the original assessments of the same property, as there can be no amendment to something that previously did not exist.

54. There is no evidence, disputed or undisputed, that the County issued the Amended Assessments in the normal course of its real property taxation function.

55. There is no evidence that the County would have issued the Amended Assessments absent Plaintiffs' lawsuit against Defendant. The undisputed evidence shows that the County issued the Amended Assessment only because Plaintiffs brought suit and continued to aggressively pursue their rights in court.

B. Procedural Background

56. After the County issued the Amended Assessments, Plaintiffs promptly filed a motion in the instant case for leave to amend their complaint to add related claims.

57. The Court granted the motion, allowing the parties to serve written discovery and take additional depositions related specifically to the new claims, and setting a deadline for filing dispositive motions on the new claims. Order Granting Motion for Leave to File Second Amended Complaint, Filed July 11, 2016, filed August 9, 2016.

58. On August 12, 2016, Plaintiffs filed their Second Amended Complaint, adding claims alleging illegality of the Amended Assessments (Count V); violation of the First Amendment to the United States Constitution and Article I, Section 4 of the Hawai'i Constitution (Count VI); violation of Plaintiffs' rights to substantive and procedural due process under the Fourteenth Amendment to the United States Constitution and Article I, Section 5 of the Hawai'i Constitution (Count VII); and damages and attorneys' fees under 42 U.S.C. § 1983.

59. For purposes of preserving Plaintiffs' rights and precluding any claimed

delinquency or further adverse action by the County, **ORV and ORVN paid the $10,728,518.49** in additional taxes under protest and appealed the Amended Assessments to the Maui County Real Property Tax Review Board. For each of the 1,111 appeals, ORV and ORVN paid a $75 filing fee, for a total of **$83,325.00**. O'Brien Decl. ¶ 12; Plaintiffs' Exhibit A at Nos. 10 and 12 (admitting Plaintiffs paid all taxes associated with the Amended Assessments).

60. In response to an email advising that ORV and ORVN had paid the $10,728,518.49 invoiced for the Amended Assessments, **Mark Walker, Deputy Finance Director of the County, stated: "cha ching."** Exhibit M to Plaintiffs' MPSJ Count V (emphasis added), Plaintiffs' Exhibit C at 64:2-3 (identifying Mark Walker), 159:15 to 160:3.

61. On August 24, 2016, ***after*** ORV and ORVN paid the $10,728,518.49 invoiced for the Amended Assessments, the County filed its Answer to the Second Amended Complaint, and also filed a Counterclaim asserting a claim in setoff:

> 19. In the years prior to the 2009 tax year, the COUNTY OF MAUI was unable to and did not assess the condominium property used for ORV and ORV NORTH's timeshare operations, including identification and assessment of the number of units designated by individual tax map key within the respective timeshare plans of ORV and ORV NORTH.
>
> 20. Both ORV and ORV NORTH were subject to assessment and levy of real property taxes in the years 2006, 2007, and 2008, based on the aggregate of assessed market values of all individual condominium apartments which were included for timeshare use in ORV and ORV NORTH's respective timeshare plans for those years.
>
> 21. In the tax years 2006, 2007, and 2008, neither ORV nor ORV NORTH were assessed and levied real property taxes, based on the aggregate of assessed market values of all individual condominium apartments which were included for timeshare use in ORV and ORV NORTH's respective timeshare plans for those years.
>
> 22. The COUNTY is entitled to a set-off against any damages claimed by ORV and ORV NORTH in this lawsuit, by the amounts of real property tax which ORV and ORV NORTH should have paid in each tax year prior to 2009, in amounts to be determined prior to trial.

Counterclaim Against Plaintiffs Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association, filed August 24, 2016; see also Plaintiffs' Reply in Support of Motion for Partial Summary Judgment on Count VI (First Amendment) of the Second Amended Complaint Filed August 12, 2107, filed January 24, 2017, at 2 n.1.

62. The County's Counterclaim failed to acknowledge that ORV and ORVN had already paid the taxes the County had invoiced for the Amended Assessments or even the original assessments for the relevant years.

63. ORV and ORVN moved for judgment on the pleadings, arguing that because each had already paid the taxes associated with the Amended Assessments, there could be no debt or other obligation to offset. Plaintiffs/Counterclaim Defendants Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association's Motion for Judgment on the Pleadings as to All Claims in Defendant/Counterclaimant County of Maui's Counterclaim Against Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association, filed October 31, 2016.

64. The Court granted the motion, finding that no factual or legal basis existed for the Counterclaim demanding a setoff because the taxes allegedly owed were already paid. Order Granting Plaintiffs/Counterclaim Defendants Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association's Motion for Judgment on the Pleadings as to All Claims in Defendant/Counterclaimant County of Maui's Counterclaim Against Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association, Filed October 31, 2016, filed March 8, 2016.

65. At the time the County filed the Counterclaim, ORV and ORVN owed no real property tax obligation, contested or otherwise, to the County for years 2006, 2007, or 2008.

66. On December 21, 2016, the Tax Review Board heard Plaintiffs' appeals of the Amended Assessments. Defendants' Exhibits T1, T2, T3 and T4 to Defendant County of Maui's and Maui County Council's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Count V (Illegality) of the Second Amended Complaint filed August 12, 2016, filed January 19, 2017 ("Count V Opposition").

67. Brian Bilberry, counsel for the County of Maui and County Council in this case, represented the County, along with another deputy corporation counsel and Marcy Martin, in all of the tax appeals before the Tax Review Board. Defendants' Exhibits T1, T2, T3 and T4.

68. The Tax Review Board issued its Findings of Fact, Conclusions of Law, Decisions and Orders, dated January 17, 2017. Defendants' Exhibits T1, T2, T3 and T4.

69. The County failed to present any evidence that ORV or ORVN had any opportunity to review, comment upon, or provide input into the Findings of Fact, Conclusions of Law, Decisions and Orders.

70. Although the Tax Review Board expressly acknowledged its jurisdictional restrictions, preventing it from determining constitutional challenges to a County action, or declaring an assessment to be "illegal or void," the Tax Review Board nevertheless concluded that the County properly reassessed the properties as omitted property, and sustained the Amended Assessments. Defendants' Exhibits T1, T2, T3 and T4.

71. ORV and ORVN have represented to the Court and the County does not dispute this fact, that on February 16, 2017, they filed with the Tax Appeal Court ("TAC") 1,114 Notices of Appeal of the County of Maui Tax Review Board's Findings of Fact, Conclusions of Law,

Decisions and Orders, dated January 17, 2017, and paid $111,400.00 in appeal fees, which Plaintiffs now seek as damages under their 42 U.S.C. § 1983 claim.

72. ORV and ORVN have also represented to the Court that, to collect from their owners the amounts needed to pay the taxes related to the Amended Assessments, ORV and ORVN issued special assessments, themselves taxable events under Hawai'i law, that required ORV and ORVN to pay general excise taxes in an amount to be determined.

C. Relevant Discovery

73. When asked in an interrogatory to "[e]xplain why the County issued the ORV Amended Tax Assessments," the County—in a response verified by Marcy Martin, the designated County Representative, under penalty of perjury—answered:

> RESPONSE: The taxpaying entities which brought this lawsuit have essentially admitted to historically having garnered enormous tax windfalls in prior calendar years. Despite knowingly and repeatedly garnering these enormous tax windfalls, ***the taxpaying entities elected to sue the COUNTY for even more in back taxes in the amount of $30 million dollars***. The COUNTY moved in a related lawsuit (brought by the same taxpayer in this suit) to seek a set-off against the $30 million dollars the taxpaying entities in this suit further claim they are entitled to. ***The COUNTY attempted to assert the amount of the tax windfalls garnered by the taxpaying entities in prior years as a set-off to the purported $30 million dollar claim. The taxpaying entities opposed and thwarted that effort, arguing that if the COUNTY wanted to seek the set-off, the COUNTY was required to re-assess the taxpaying entities for the amounts sought.***

Plaintiffs' Exhibit B at No. 7 (emphasis added).

74. In a response to a request for admission, verified by the designated County Representative Marcy Martin under penalty of perjury, the County admitted that "[w]ithin the last 10 years, the County has never issued cover letters with assessments and/or amended tax assessments directing inquiries to be made to the County of Maui Department of the Corporation Counsel," but added:

> The COUNTY also admits this request to the extent that the COUNTY ***has never been compelled to amend assessments after being sued by taxpaying entities which have***

> ***admitted historically to having garnered enormous tax windfalls*** in prior calendar years, and ***despite knowingly and repeatedly garnering these enormous tax windfalls elected to sue the COUNTY for even more in back taxes in the amount of $30 million dollars.*** Moreover, the COUNTY has never been ***baselessly accused in a lawsuit of retaliating against tax paying entities seeking to further exploit their enriched pecuniary positions after having garnered these enormous tax windfalls.***

Plaintiffs' Exhibit A at No. 18.

75. When asked in an interrogatory to "[i]dentify all Persons involved in the decision to issue the [Amended Assessments]," the County responded, inter alia, ***by invoking the attorney-client privilege***:

> RESPONSE: The COUNTY ***OBJECTS to this interrogatory to the extent is seeks any attorney client privileged communications.***
>
> Without waiving the OBJECTION the COUNTY responds Scott Teruya and Marcy Martin were involved, ***having been made aware of and after review of [Plaintiffs'] position and arguments that an amended assessment was required.***

Exhibit B at Nos. 8 and 12 (emphases added).

76. When asked what "position" of ORV and ORVN led her to conclude that an amended assessment was required, Marcy Martin, the senior Property Technical Officer for the Real Property Assessment Division who verified the interrogatory responses, testified under oath: "***the valuations needed to be correct because of the litigation.***" Exhibit C at 86:6 to 87:5 (emphasis added).

77. Martin explained that "[i]f there were a judgment in the litigation, if our assessments are being scrutinized by the legal system, they needed to be correct." Exhibit C at 87:11-16.

78. In the interrogatories, when asked to describe the circumstances leading the County to decide that the Master Parcels needed to be reassessed, the County again invoked the attorney-client privilege, but stated: "multiple and ongoing informational discussions were had

subsequent to the COUNTY attempting to bring the set-off claim based on the amount of the tax windfall garnered by the taxpayers who have sued the COUNTY." Exhibit B at Nos. 16 and 17 (emphasis added) (adding: "The dates of the discussions are not known, but they were had with Marcy Martin and Scott Teruya.").

79. The undisputed evidence, including the County's discovery responses, establish that the County issued the Amended Assessments because of the litigation, and in response to ORV and ORVN's opposition to the Counterclaim in setoff in the 2015 Sunshine Law case.

80. Although the County repeatedly referred to ORV and ORVN receiving a tax "windfall" for years 2006, 2007, and 2008, it is undisputed that ORV and ORVN paid all real property taxes the County billed to them for those years, in amounts totaling more than $8.2 million. Plaintiffs' Exhibit A at Nos. 9 and 11; Exhibit N to Plaintiffs' MPSJ Count V, at 2.

81. In an email dated May 12, 2016, just days before the issuance of the Amended Assessments, Martin stated: "***[f]or the timeshare law suit*** we did omitted assessments in 06, 07 and 08 . . . ." Exhibit D to Plaintiffs' MPSJ Count V (emphasis added).

82. Moreover, on the same day the County issued the Amended Assessments, May 24, 2016, Martin requested two hours of overtime for the previous evening, stating "reason: ***Timeshare law suit rush*** to get 1,113 p38's done." Exhibit E to Plaintiffs' MPSJ Count V (emphasis added).

83. A "P38" is an amended assessment. Plaintiffs' Exhibit C at 128:9-18.

84. In an email dated September 6, 2016, with the subject line "Ocean Resort Villas – Appeals," Martin stated: "I have not spoken to their attorneys. I am ***taking orders from corp counsel.***" Exhibit F to Plaintiffs' MPSJ Count V (emphasis added).

85. A draft press release by the County, dated May 23, 2016, advised that the County would send amended tax assessments to ORV and ORVN, because they "had not been properly assessed for condominium units used in their respective timeshare plans, and did not pay the right amount of real property taxes for fiscal years 2006/2007, 2007/2008, and 2008/2009." Exhibit G to Plaintiffs' MPSJ Count V.

86. It continued: "as acknowledged by [ORV and ORVN], and as determined by the County of Maui's Real Property Tax Division ***and attorneys with County Corporation Counsel,*** for these years the two Timeshare Associations ***incorrectly paid property taxes*** based only on land and building costs." Id. (emphases added).

87. The draft press release indisputably acknowledges that that the County's attorney, the Department of the Corporation Counsel ("Corporation Counsel"), had been directly involved in the decision to issue the Amended Assessments and confirms that the County acted in direct response to the litigation, because the Real Property Assessment Division's procedure for issuing amended assessments generally does not involve Corporation Counsel. Exhibit H to Plaintiffs' MPSJ Count V (Transcript of Deposition of Scott Teruya of November 17, 2016) at 55:16-18, 59:22 to 60:1, and 76:1-11; Exhibit B at No. 26.

88. In fact, Teruya testified in his deposition that because "the matter" was in litigation, he only instructed Martin to issue the Amended Assessments after he spoke with corporation counsel and receiving directions. Exhibit H at 54:2-17.

89. After the County issued the Amended Assessments, raising a public outcry, County Councilmember Don Guzman, as an elected official. concerned about the actions of the Real Property Tax Office, sent an email to Scott Teruya, stating: "We are getting a ton of emails about [the Amended Assessments] and ***can't respond because of the lawsuit.***" The actions of the

Deputy Corporation Counsel acted as an impediment to the rights of the Plaintiffs to address real property tax issues directly with those responsible -Real Property Tax Division- as well as to seek redress from elected officials- council member Guzman. Exhibit I to Plaintiffs' MPSJ Count V.

90. Teruya responded by email to Councilmember Guzman: "***Contact Brian Billberry [sic], he has all the scoop***," confirming the Deputy Corporation Counsel direct involvement in issuing the Amended Assessment and the existing lawsuit. Exhibit I.

91. Had the Amended Assessments been issued in the normal course, and not because of the litigation, Teruya would have explained their issuance, or referred the inquiry to his staff, without any referral to the County's attorney. See Exhibit P to Plaintiffs' MPSJ Count V (County's Privilege Log, withholding communications between Corporation Counsel and Assessment Division staff regarding Amended Assessments).

92. The undisputed evidence further establishes the County's intent not merely to assess "omitted" property, but to retroactively reassess property that had already been assessed, all in an effort to collect substantial additional taxes in response to Plaintiffs' lawsuit. A letter from the ***Department of Corporation Counsel***—not the Real Property Assessment Division—to ORV and ORVN owners and the public, posted on the County Council's website under the link "Statement from the Corporation Counsel regarding 'retroactive tax assessments'" indisputably supports the relationship between the County's indented action and the lawsuit. See Exhibit Q to Reply in Support of Plaintiffs' Motion for Partial Summary Judgment as to Count VI (First Amendment) of the Second Amended Complaint Filed August 12, 2106, filed January 24, 2017.

93. The letter provides Corporation Counsel's actual explanation that Plaintiffs filed a tax-related lawsuit against the County "seeking purported damages of $30 million," and that the

"bottom line" is that the County issued the Amended Assessments ***because of*** Plaintiffs' position on the County's counterclaim in setoff in the 2015 Sunshine Law case. Exhibit Q ("The bottom line is, your vacation owners associations have taken the position the county was required to re-assess the back taxes, ***in lieu of pursuing the amounts as claims in the lawsuits which your associations already had on file***") (emphasis added).

94. The letter attaches ORV and ORVN's motion to dismiss the counterclaim in the 2015 Sunshine Law case. Exhibit Q.

95. The letter also states that the retroactive tax assessments are "only as to" Plaintiffs, and, ***because of the litigation, directs all questions to Plaintiffs' counsel.*** Exhibit Q.

96. The timing of the County's issuance of the Amended Assessments is relevant, as the County admits that it "knew, as of at least 2009," that for tax years 2006, 2007, and 2008 for ORV, and tax year 2008 for ORVN, that the County "had initially assessed [the Master Parcels] as a whole, and not the individual condominium units comprising [the Master Parcels], even though those units were officially registered as condominium units." Exhibit A at Nos. 7 and 8.

97. Yet, in 2009, the County failed to issue amended assessments for those prior years.

98. In 2009, during discussions with Kenneth Hoo, counsel for ORV and ORVN in their tax appeals for that year, Scott Teruya advised Hoo that the County knew that in the years prior to 2009 it had assessed ORV and ORVN's properties according to the cost approach, and that ORV and ORVN "received the benefit" of not being assessed under the market approach method used for condominiums before 2009. See Exhibit J to Plaintiffs' MPSJ Count V (Transcript of Deposition of Kenneth Hoo of November 7, 2016) at 5:20 to 6:9 and 9:13 to

17:15; Plaintiffs' Exhibit B at No. 5 (explaining that when condominium improvements are complete, the County changes to the market value approach and assesses each unit individually).

99. Gery Madriaga and Wesley Yoshioka also told Hoo that the County knew that for years prior to 2009, the County had used the cost approach rather than the market approach in assessing the ORV and ORVN properties, and ORV and ORVN received the benefit of the cost approach for those years. See Exhibit J1to Plaintiffs' Supplemental Brief in Support of Their Motions for Partial Summary Judgment on Counts V, VI, VII, and VIII filed December 1, 2016, filed February 23, 2017 ("Plaintiffs' Supp. Brief on Evidence"), at 22:2 to 25:15.

100. Wesley Yoshioka worked for the County's Real Property Tax Division for twenty-seven years, and retired in 2014. Exhibit R to Plaintiffs' Supp. Brief on Evidence (Transcript of Deposition of Wesley Yoshioka, taken February 8, 2017) at 13:11-21; 14:11-13.

101. Yoshioka appraised ORV's and ORVN's properties on one or two occasions. Plaintiffs' Exhibit R at 18:5 to 19:12.

102. Yoshioka recalled that an appraisal that he made of the ORV property had been the subject of a taxpayer appeal, requiring Yoshioka to deal with the McCorriston Miller Mukai MacKinnon law firm. Plaintiff's Exhibit R at 18:14-19.

103. Yoshioka knew Kenneth Hoo, an attorney with McCorriston Miller Mukai MacKinnon, and recalled speaking with him. Plaintiffs' Exhibit R at 28:15-19.

104. The evidence shows that ORV and ORVN appealed their real property tax assessments for 2009 and 2010. Plaintiffs' Exhibit T to Plaintiffs' Supp. Brief on Evidence; Declaration of Kenneth G.K. Hoo, attached to Plaintiffs' Supp. Brief on Evidence, ¶¶ 4, 6.

105. Gery Madriaga is the Assistant Administrator for the Real Property Assessment Division and has worked in the Real Property Assessment Division for more than twenty-eight

years. Plaintiffs' Exhibit S to Plaintiffs' Supp. Brief on Evidence (Transcript of Deposition of Gery Madriaga, taken February 9, 2017) at 22:6-18.

106. Madriaga has been the Assistant Administrator for between ten and fifteen years. Plaintiffs' Exhibit S at 23:12-19.

107. Madriaga prepared the assessment for ORV (identified in the transcript as "KOR") in 2006. Plaintiffs' Exhibit S at 37:13-22.

108. For that year, the Tax Map Section of the Real Property Assessment Division had not entered all the condominium units for ORV, even though the construction was complete. Plaintiffs' Exhibit S at 54:10 to 56:10.

109. An email dated November 19, 2010, bearing the subject line "SVO Pacific et al. v. County of Maui Real Property Tax Appeals for 2009 and 2010," contains a lengthy, detailed discussion by consultant The Hallstrom Group, Inc. specifically responding to questions concerning valuations "raised by Scott [Teruya] and Marcy [Martin]" in the context of negotiations concerning ORV's and ORVN's 2009-2010 tax appeals. Plaintiffs' Exhibit T to Plaintiffs' Supp. Brief on Evidence; Declaration of Kenneth G.K. Hoo, attached to Plaintiffs' Supp. Brief on Evidence, ¶¶ 4, 6.

110. This document is additional evidence that the County—and particularly Martin and Teruya, who only after discussion and direction from Corporation Counsel, made the decision to issue the Amended Assessments[4]—had actual knowledge that for years prior to 2009, the County had not assessed the individual subparcels within the ORV and ORVN Master Parcels. The document also shows that Martin and Teruya traveled to Honolulu in November

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[4] See Plaintiffs' Exhibit B at No. 8 (County's interrogatory response stating that Scott Teruya and Marcy Martin were involved in the decision to issue the Amended Assessments, "having been made aware of and after review of [Plaintiffs'] position and arguments that an amended assessment was required.").

2010 to meet with The Hallstrom Group representative, for the specific purpose of discussing the valuations for ORV and ORVN. Exhibit T (thanking Teruya and Martin "for taking the time to come to Honolulu last week," expressing appreciation for "the ongoing opportunity to discuss the [ORV and ORVN] properties, their valuations, and hear your questions").

111. As described in Plaintiffs' Exhibit T, the discussions in November 2010 included a new assessment methodology for future years, in part based on Teruya and Martin's concern that at some point "timeshare apartments could be voluntarily converted to whole unit condominiums." Plaintiffs' Exhibit T ("we are embracing a methodology that recognizes the requirements of the Maui County Code, such as the existing CPRs . . . We hope that we have conveyed that we are trying to assist the County in applying a rational methodology based on available data.").

112. There is no evidence that the County ever suggested that it intended to, or even could, issue amended assessments for 2006, 2007 and 2008 and, to the contrary, Teruya, Madriaga, and Yoshioka advised that ORV and ORVN had gotten the benefit of the cost approach for those years. Exhibit J1 at 5:20 to 6:9; 9:13 to 17:15; 22:2 to 25:15.

113. The Court finds that the statements by Teruya, Madriaga, and Yoshioka to Hoo unequivocally demonstrate that the County considered the original assessments to be final.

114. As Assistant Administrator, Madriaga maintained responsibility for all the day-to-day operations of the Real Property Assessment Division, Plaintiffs' Exhibit S at 28:17-21, yet he became never involved in any discussion, in 2010 or later, regarding amending assessments for ORV and ORVN for years 2006, 2007, or 2008. Plaintiffs' Exhibit S at 68:19 to 69:5.

115. The County had actual knowledge in mid-2015 that it had assessed only the Master Parcels for years 2006, 2007, and 2008, but even then it failed to issue Amended

Assessments. Instead, on September 21, 2015, it asserted a *counterclaim* in the related 2015 Sunshine Law case, seeking to set off the alleged "tax windfall" against a potential award of damages in Plaintiffs' favor in that case, without any citation to the MCC or allegation that any property had been omitted. Plaintiffs' Exhibit K.

116. The County's assertion of the Counterclaim in setoff in Plaintiffs' related 2015 Sunshine Law establish through undisputed evidence that the Amended Assessments occurred in response to the litigation, because the County issued the Amended Assessments only after the Counterclaim had been dismissed.

117. In the County's Supplemental Legal Memorandum in 1) Support of Defendants County of Maui's and Maui County Council's Motion for Partial Summary Judgment as to Count V of Plaintiffs' Second Amended Complaint filed 2016-08-12 and 2) Opposition to Plaintiffs' Motions for Partial Summary Judgment as to County [sic] V, VI, VII, and VIII of the Second Amended Complaint filed August 12, 2016, at pages 7-8, the County claimed: "Contrary to Plaintiffs' assertions, the retroactive assessments would have been issued for their omitted condominium apartment parcels regardless of their lawsuit having been filed, just as it had been done for every other condominium project on Maui for the assessment years in dispute here . . . ."

118. This argument is unsupported by any evidence in the record, including the County's written discovery responses and judicial admissions and constitutes mere argument.

119. Second, in support, the County cited only the Declaration of Marcy Martin attached to Defendants County of Maui's and the Maui County Council's Motion for Partial Summary Judgment as to Count V of Plaintiffs' Second Amended Complaint filed 2016-08-12,

filed on December 12, 2016 ("County's MPSJ Count V"), and Exhibit A attached to Exhibit F thereto.

120. Nothing in Martin's Declaration or Defendants' Exhibit A suggests that the County would have issued the Amended Assessments if Plaintiffs had not filed their lawsuit or that the County issued retroactive assessments for "every other condominium project on Maui for the assessment years" at issue.

121. Martin states only that Defendants' Exhibit A lists condominiums "omitted on the certified assessment list for the years stated, and subsequently added to the lists and taxed as separate condominium parcels"; Martin, makes no representation, at all about the ORV or ORVN properties, or even the Real Property Assessments Division's general procedures in this regard.

122. The County presented no evidence to show that it would have issued the Amended Assessments even absent Plaintiffs' lawsuit, and the evidence otherwise proves beyond dispute that, absent the litigation, the County would not have issued the Amended Assessments.

123. Moreover, Deputy Corporation Counsel, without a legal basis directed Martin, as the County's witness under Rule 30(b)(6) of the Hawai'i Rules of Civil Procedure ("HRCP"), to not answer when asked if Plaintiffs "had not sued the County of Maui, would the County of Maui not [have] issued amended tax assessments." Plaintiffs' Exhibit C at 95:4-7.

124. In light of the County's written discovery responses and other evidence in the record, it is beyond dispute that the County issued the Amended Assessments because of Plaintiffs' lawsuit in the instant case and that, absent the lawsuit, the County would not have issued them.

125. In the County's reply brief in support of its own motion for partial summary judgment on Count V, the County argued that from January 1, 2000 to January 1, 2009, "there were as many as 34,615 transfers" of interest in timeshare intervals in ORV and ORVN condominium units. County's Reply Memorandum to Plaintiffs' Memorandum in Opposition to Defendants County of Maui's and Maui County Council's Motion for Partial Summary Judgment as to Count V of Plaintiffs' Second Amended Complaint filed 2016-08-12, filed January 24, 2017, at 2; Declaration of Marcy Martin, attached thereto, ¶ 2, and County's Exhibit W, attached thereto.

126. This evidence of a great number of transfers (more than 3,800 annually) establishes that a large number of ORV and ORVN's current owners, who have been required to bear part of the additional approximate $10.7 million tax burden of the Amended Assessments, did not even own any interest in the properties when the County issued the original assessments eight to ten years ago.

127. The undisputed evidence demonstrates that the Amended Assessments, if upheld, would force any current owner who purchased an ownership interest in ORV as long ago as 2006, or in ORVN as long ago as 2008, to carry a share of a new $10.7 million tax burden for a tax period in which he or she had no interest in the property, in addition to that member's share of the current tax for the current year.

D. Judicial Admissions

128. In its briefs, the County has plainly and repeatedly admitted that the County's "***demonstrated intent with the [Amended] Assessments was and is to set-off highly questionable and excessive damages claims pursued by Plaintiffs in this lawsuit.***" Count VI Opposition at 6 (capitalization altered, emphasis added); Defendants County of Maui's and Maui

County Council's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Count VII (Due Process) of the Second Amended Complaint filed August 12, 2016, filed January 19, 2017 ("Count VII Opposition") at 7 (same).

129. In opposing Plaintiffs' motion for partial summary judgment on Count VI, the County stated:

> The assessments of Plaintiffs' omitted condominium property, which Plaintiffs erroneously assert were motivated and designed to "retaliate" in response to their lawsuit, ***are a reasonable and fair assertion and pursuit of a set-off against damages claims in this delayed and protracted litigation, asserted by Plaintiffs as entitlement to in-excess of $30 million of alleged "tax refunds."*** There is nothing "illegal" or "invalid" about the County of Maui seeking to preserve its prerogative to prove the amounts of the omitted assessments in Plaintiffs' duplicative lawsuits. ***By opposing and vehemently arguing against these efforts, it was Plaintiffs who in fact precipitated the administrative process by which the assessments have now been made, and affirmed by the Board Review.***

Count VI Opposition at 1 (emphasis added); Count VII Opposition at 1-2; Defendants County of Maui's and Maui County Council's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Count VIII (42 U.S.C. § 1983) of the Second Amended Complaint filed August 12, 2016, filed January 19, 2017 ("Count VIII Opposition") at 1.

130. The County also stated: "To the extent the assessments of Plaintiffs' omitted condominium property can be said to be made in the context of, or 'in response' to this lawsuit, ***it is to set-off Plaintiffs' enormous and highly questionable claims to damages*** in-excess of $30 million dollars in tax refunds." Count VI Opposition at 6 (emphasis added); see also Count VII Opposition at 7 ("To the extent the [Amended Assessments] can be said to be made in the context of, or 'in response' to this lawsuit, it is to set-off Plaintiffs' enormous and highly questionable claims to damages in-excess of $30 million dollars in tax refunds.").

131. The County argued that, "after the repeated arguments and positions taken by

Plaintiffs against the County's ***efforts to defray their anticipated damages claims [by way of the counterclaim], the County would have been remiss by not issuing the assessments of Plaintiffs' omitted property,***" even though a minimum of eight years had passed since the original assessment and payments. Count VI Opposition at 8.

132. The County also argued that the Amended Assessments are "warranted" by the litigation:

> If any judgment were to issue in favor of Plaintiffs in this case, it is appropriate and necessary that the "tax refund" to which Plaintiffs claim entitlement be calculated as based on correctly assessed values. Plaintiffs have otherwise obtained a wind fall [sic] by not being correctly assessed for the tax years they themselves placed in issue. ***It cannot be ignored that Plaintiffs themselves put the amount of real property tax they paid for tax years 2007, 2008, and 2009 in issue by the liability and damages assertions and claims they make in this litigation. Having raised the issue of tax fairness, Plaintiffs cannot now be heard to complain about having to account for what they were legally obligated to pay in real property tax, but by omission were able to avoid paying for over ten years.***[5]

Count VI Opposition at 8 (emphasis added); see also Count V Opposition at 22-23, Count VII Opposition at 9-10.

133. The County argued that, by asserting their claims in a lawsuit challenging the timeshare tax classification, "Plaintiffs opened the door and ***exposed themselves to claims*** concurrent with the period for which the County seeks to set-off their highly questionable damages." Count VII Opposition at 6 (emphasis added).

134. The County argued: "There is nothing errant or retaliatory about the County of

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[5] Pursuant to MCC section 3.48.185, for real property tax purposes, "tax year" means "the fiscal year beginning July 1st of each calendar year and ending June 30th of the following calendar year." That section states: "Real property shall be assessed, and taxes shall be levied thereon, as of January 1st preceding each tax year upon the basis of valuations determined in the manner and at the time provided in this chapter." Accordingly, as the County clarified, the Amended Assessments were for the 2006, 2007, and 2008 assessment years.

Maui seeking to preserve its prerogative to prove the amounts of the omitted assessments in Plaintiffs' duplicative lawsuits ***to defray these exorbitant damages assertions.***" Count VIII Opposition at 1 (emphasis added).

135. The actions by the County constitute clear and unequivocal admissions that: 1) it issued the Amended Assessments because Plaintiffs challenged the counterclaim filed by the County in setoff in the 2015 Sunshine Law case; and 2) that the County asserted the counterclaim ultimately to set off potential losses in this case – damages that it never suffered because Plaintiffs paid all past taxes as well as new taxes imposed by the "Amended" Assessment.

136. The County admits that ORV and ORVN paid all taxes associated with the original assessments for the Master Parcels for 2006, 2007, and 2008 (Plaintiffs' Exhibit A at Nos. 9 and 11), and the County has not argued that ORV or ORVN ever failed to timely pay any County invoice for real property taxes.

137. Accordingly, prior to the County's issuance of the Amended Assessments, Plaintiffs owed the County no real property tax obligation that could be set off against their damages claims.

138. The evidence establishes that the County improperly issued the Amended Assessments ***to create a new tax obligation*** for the purpose of setting off the County's anticipated damages liability.

139. The County also retroactively changed its assessment methodology for years that had already been assessed (and for which the entire tax obligation had already been paid) to the market approach to create a new tax obligation that could offset the anticipated award of damages in Plaintiffs' favor.

140. The County's admission that it issued the Amended Assessments to create a new tax liability it could then use as a setoff in this litigation contradicts any argument that the County would have issued the Amended Assessments absent the litigation.

141. The County's admissions, along with all the other evidence in this case, show that actions within the Department of the Corporation Counsel in this case and in the 2015 Sunshine Law case, and not the County's Real Property Assessment Division, orchestrated the County's official decision to issue the Amended Assessments.

142. The evidence also proves that the County issued the Amended Assessments completely outside the scope of its normal procedures, and outside the real property tax assessment and collection procedures of the MCC.

143. The County issued the Amended Assessments not as part of its routine assessment and taxation function, but, viewing the facts in the light most favorable to the County, abused it taxation power to create a weapon —a new $10+ million tax obligation—against taxpayers with whom it was in litigation.

144. The parties have not disputed the authenticity or admissibility of any of the exhibits before the Court on the instant motions.

145. Based on the foregoing, there are no questions of material fact and summary judgment is appropriate as to all the motions at issue.

146. As a proximate result of the County's actions, ORV and ORVN have suffered damages in the amount of the taxes paid related to the Amended Assessments, their appeal fees to the Board of Review and the TAC, and such other damages to be proven at trial or further hearing.

CONCLUSIONS OF LAW

1. If any of the following conclusions of law are deemed findings of fact, they shall be construed as such.

E. Summary Judgment Standard

2. Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Haw. R. Civ. P. 56; see also Young v. Planning Comm'n of County of Kaua'i, 89 Hawai'i 400, 407, 974 P.2d 40, 47 (1999).

3. "[T]he moving party has the initial burden of identifying those portions of the record demonstrating the absence of a genuine issue of material fact and 'may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent.'" Young, 89 Hawai'i at 407, 974 P.2d at 47 (citation omitted).

4. Although on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [HRCP Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Young, 89 Hawai'i at 407, 974 P.2d at 47.

5. "A party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor is he [or she] entitled to a trial on the basis of a hope that he can produce some evidence at that time." Id. (citation, internal quotation marks omitted).

F. Jurisdiction

6. The County has argued that this Court lacks jurisdiction over the claims arising

from the Amended Assessments because HRS chapter 232 confers exclusive jurisdiction on the TAC, but the argument fails as a matter of law.

7. HRS section 232-13 explicitly limits the jurisdiction of the TAC, and it does not empower the TAC to empanel a jury:

> The jurisdiction of the tax appeal court ***is limited to the amount*** of valuation or taxes, as the case may be, in dispute as shown on the one hand by the amount claimed by the taxpayer or county and on the other hand by the amount of the assessment, or if increased by the board, or equivalent county administrative body, the assessment as so increased.

Emphasis added.

8. The TAC "is a court separate from the circuit courts of this state. It is a statewide court of ***limited*** jurisdiction, hearing and deciding, ***without a jury***, direct appeals from tax assessors' assessments or decisions made by the Board of Review in the applicable district." Lewis v. Kawafuchi, 108 Hawai'i 69, 73, 116 P.3d 711, 715 (App. 2005) (emphases added).

9. By contrast, Hawai'i circuit courts are courts of general jurisdiction, and their subject matter jurisdiction extends to all matters properly brought before them, ***unless precluded by constitution or statute***. State v. Kotis, 91 Hawai'i 319, 326 n.9, 984 P.2d 78, 85 n.9 (1999) (emphasis added).

i. This Court Has Jurisdiction Over Plaintiffs' Claims, Which Challenge the *Legality* of the Amended Assessments, Not Their *Amount*.

10. Given the express limitation on the TAC's jurisdiction to the "***amount*** of valuation or taxes," the TAC does not have exclusive jurisdiction over Plaintiffs' claims in this case, which specifically challenge the ***legality*** of the Amended Assessments, not their ***amount***.

11. As a threshold matter, the statutes do not confer exclusive jurisdiction on the TAC over all tax disputes.

12. In Matter of Simpson Manor, Inc., 57 Haw. 1, 548 P.2d 246 (1976) the taxpayer appealed an excise tax assessment to the TAC but refused to prepay the tax despite a statutory requirement for prepayment before an appeal. The refusal to prepay resulted in the dismissal of the appeal by the TAC. 57 Haw. at 3, 548 P.2d at 247.

13. The taxpayer appealed the dismissal on the basis that the prepayment requirement was unconstitutional. The Supreme Court held that because the taxpayer had other avenues for relief no due process violation had occurred. The Supreme Court noted that: "[a] major weakness in the posture of taxpayer's appeal is taxpayer's failure to seek a hearing in the courts of general jurisdiction, the circuit court. . . . [T]axpayer has failed to point to any statute which clearly prevents the circuit court from hearing taxpayer's case prior to payment." Id.

14. Moreover, the taxpayer cited no "statute or case law which gives the [TAC] and the district boards of review exclusive original jurisdiction of all tax disputes." Id. (emphasis added).

15. The County has not cited, and the Court has not identified, any statute or case law that gives the boards of review and TAC original and exclusive jurisdiction over all tax disputes, especially those raising questions of a constitutional dimension.

16. At the hearing, the County argued that Plaintiffs had to seek a refund of taxes in the TAC, citing HRS section 40-35. That statute is inapplicable here, because it applies only to disputed payments made to the State of Hawai'i.

17. While a challenge to valuation may be restricted to an administrative board of review process, a challenge to the legality of a tax is not. See In re Smart, 54 Haw. 250, 505

P.2d 1179 (1973) (where taxpayer challenged "the valuation placed upon the real property by the tax assessor rather than the legality of the assessment," the statute governing appeals to the board of review applied exclusively, distinguishing Wilson v. Kunewa, 29 Haw. 555 (Haw. Terr. 1927), in which the taxpayer claimed the property was "wrongfully and illegally taxed," and thus was not restricted to board of review appeal).

18. The ICA has cited Smart as evidencing the "survival of the common law distinction . . . between tax disputes challenging the ***amount*** of the tax or assessment, and tax disputes challenging the basic ***validity*** of the tax." Grace Bus. Dev. Corp. v. Kamikawa, 92 Hawai'i 659, 668, 994 P.2d 591, 600 (Ct. App. 1999), rev'd on other grounds, 92 Hawai'i 608, 994 P.2d 540 (2000).

19. This common law distinction is illustrated in Hill v. Yee Chan & Co., 31 Haw. 809 (Haw. Terr. 1931), where the Court held the taxpayer was not required to appeal a reassessment of property, made under the omitted property statute, to the divisional board of equalization; the taxpayer challenged the *validity* of the reassessment on grounds that the property had not omitted, so the reassessment "was unauthorized and invalid," and the Court held the assessment "was therefore subject to a collateral attack" in court. 31 Haw. at 813 (citing Hilo Sugar Co. v. Tucker, 8 Haw. 148, 151 (Haw. Kingdom 1890)).

20. Similarly, in Hilo Sugar, the Court held that where a tax is challenged not because it is excessive but because it is illegal, the challenge is properly brought in the court and not barred by failure to appeal to the tax board. 8 Haw. at 151 (the court has no duty to review the assessor's judgment in estimating values, "***but we may interfere where the assessment is illegal,*** and we think the one submitted to us is so . . . not so much because [it] was excessive, ***as because it was made at all . . . .***"

21. A party is not required to exhaust administrative remedies, and a circuit court is not deprived of subject matter jurisdiction, where the administrative body has no power to grant the requested relief, such as declaring a fee (or here, taxes) unconstitutional. See Hawaii Insurers Council v. Lingle, 120 Hawai'i 51, 71, 201 P.3d 564, 584 (2008) (circuit court was not divested of subject matter jurisdiction by plaintiffs' failure to exhaust administrative remedies; plaintiffs challenged the constitutionality of fees, and administrative board had no power to pass on constitutional questions).

22. Therefore, this Court concludes as a matter of law that it has original jurisdiction over claims asserted by Plaintiffs arising from the Amended Assessments.

23. Even if the TAC had concurrent jurisdiction over any of the issues here, that would not deprive this Court of jurisdiction or require it to relinquish jurisdiction.

24. Subject matter jurisdiction "depends upon the state of affairs existing at the time it is invoked; once having attached, it is not lost by subsequent events but is retained by a court until fully exhausted by the entry of a final judgment." State v. Villados, 55 Haw. 394, 396-97, 520 P.2d 427, 430 (1974) (citations omitted).

25. Because this Court asserted jurisdiction over the Amended Assessment claims first, it retains that jurisdiction until the conclusion of the case.

26. "[A] court which has acquired jurisdiction over a cause retains its power over the same to the exclusion of any court of coordinate jurisdiction until the court renders a final judgment in the case or until the action is terminated by the parties." Jordan v. Hamada, 64 Haw. 446, 452, 643 P.2d 70, 72 (1982); accord In Matter of Kaelemakule, 32 Haw. 731, 733 (Terr. 1933) ("When "two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first

acquires jurisdiction . . . retains its jurisdiction and may dispose of the whole controversy, and no court of coordinate power is at liberty to interfere with its action.").

27. "[C]ircuit courts are courts of general jurisdiction in this State, and therefore the presumption is in favor of retention rather than divestiture of jurisdiction." Villados, 55 Haw. at 397, 520 P.2d at 430 (adding that the "divestiture of jurisdiction is a serious matter," requiring that any law in favor of such divestment "must be clear and unambiguous," as jurisdiction "is not a light bulb which can be turned off or on during the course of the trial").

28. It is also necessary to the fair adjudication of Plaintiffs' claims that the Court retain jurisdiction, because the facts underlying the original claims, such as Defendants' pattern of animosity against Plaintiffs, over which this Court has long exercised jurisdiction, also support the constitutional claims arising from the more recent Amended Assessments.

29. The Court's voluntary relinquishment of jurisdiction would also be a waste of judicial resources and unduly prejudicial to all the parties, as it would potentially render irrelevant nine months of intensive discovery and motions practice.

30. The County raised its jurisdictional argument, affirmatively moving for dismissal of Count V, in its Count V Opposition, in violation of the Court's Order Granting Motion for Leave to File Second Amended Complaint, filed July 11, 2016, filed August 9, 2016, ¶ 7 (setting deadline for "[a]ny dispositive motions pertaining only to the New Allegations and Claims").

31. Made in this fashion, the County's motion also violates the requirements of HRCP Rule 7(b).

32. In its Findings of Fact, Conclusions of Law, Decisions and Orders, dated January 17, 2017, the County of Maui Tax Review Board purported to conclude that ORV and ORVN's properties had been properly reassessed, see, e.g. County's Exhibit T1 at Decision and

Order ¶ 4, but the Tax Review Board has no power to determine a purely constitutional challenge to a County action, nor to determine or declare an assessment "illegal or void." MCC § 3.48.625(B).

33. Forcing Plaintiffs to adjudicate their claims in the context of an appeal from a decision of the Tax Review Board—where the Tax Review Board had no authority to decide any of the questions at issue but nevertheless purported to do so upon findings of fact and conclusions of law drafted and submitted by Corporation Counsel while at the same time providing legal counsel to same Board —would subject Plaintiffs' claims to an implied standard of review deferential to the Tax Review Board and the County, resulting in prejudice to Plaintiffs.

34. The Board of Review is generally composed of lay people, as MCC section 3.48.620 requires only that Board of Review members be "citizens of the State and, at the time of appointment, residents of the County for at least three years."

35. Accordingly, the Board of Review's Findings of Fact, Conclusions of Law, Decisions and Orders, dated January 17, 2017, are not binding on this Court, are not persuasive, and otherwise have no force or effect on the Court's findings or conclusions in this case.

ii. This Court is Obligated to Exercise Jurisdiction Over Plaintiffs' Claims by Virtue of Their Jury Demand.

36. This Court has subject matter jurisdiction over Plaintiffs' claims because of the nature of those claims, but Plaintiffs' right to a jury trial establishes a separate reason for this Court's exercise of jurisdiction.

37. Plaintiffs have a constitutionally-guaranteed right to trial by jury in this case.

38. Article I, section 13 of the Hawai'i Constitution states: "In suits at common law

where the value in controversy shall exceed five thousand dollars, the right of trial by jury shall be preserved." See also HRS § 635-13 (where Constitution or statute gives a right of trial by jury "the case shall be tried with a jury"); Haw. R. Civ. P. 38 (accord).

39. "Common law" in this context includes "suits in which legal rights" are determined, "in contradistinction to those where equitable rights alone" are recognized. Mehau v. Reed, 76 Hawai'i 101, 111, 869 P.2d 1320, 1330 (1994).

40. The TAC has no authority to convene a jury. Lewis, 108 Hawai'i at 73, 116 P.3d at 715 (The TAC is a "court of limited jurisdiction, hearing and deciding, *without a jury*, direct appeals from tax assessors' assessments or decisions made by the Board of Review . . . .") (emphasis added).

41. Accordingly, given the jury demand, the Court has properly retained and exercised jurisdiction.

iii. Hawaii's Declaratory Judgment Statute Does Not Deprive this Court of Jurisdiction.

42. At the hearing on the instant motions, for the first time, the County argued that Plaintiffs are seeking declaratory relief as to Count V, and that declaratory judgments are barred "in any controversy with respect to taxes" under HRS section 632-1 and HRCP Rule 57.

43. HRS section 632-1(a) states: "In cases of actual controversy, courts of record, within the scope of their respective jurisdictions, shall have power to make binding adjudications of right, ***whether or not consequential relief is, or at the time could be, claimed***, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for; provided that declaratory relief may not be obtained in any district court, or in any controversy with respect to taxes, or in any case where a divorce or

annulment of marriage is sought." Emphasis added.

44. Declaratory judgment therefore "gives a means by which rights and obligations may be adjudicated in cases involving an actual controversy ***that has not reached the stage at which either party may seek a coercive remedy*** . . . ." 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d § 2751 (4th ed.) (emphasis added); see also Seattle Audubon Soc. v. Moseley, 80 F.3d 1401, 1405 (9th Cir. 1996) (same).

45. The Hawai'i Legislature amended HRS section 632-1 to mirror the exception in the federal Declaratory Judgment Act, 28 U.S.C. § 2201, that prohibits declaratory relief in tax matters so as to "permit the government to assess and collect taxes alleged to be due it without judicial interference." Hawaii Insurers Council v. Lingle, 117 Hawai'i 454, 463, 184 P.3d 769, 778 (Ct. App.), as amended (Apr. 15, 2008), aff'd in part, rev'd in part on other grounds, 120 Hawai'i 51, 201 P.3d 564 (2008) (citing 1972 Haw. Sess. L. Act 89, § 1 at 338, Ingham v. Hubbell, 462 F. Supp. 59, 64 (S.D. Iowa 1978)).

46. The tax exception to the federal Declaratory Judgment Act "was intended to preserve tax determinations[,] assessments and collections and to free such determinations from judicial interference ***apart from the statutory review system***." Dietrich v. Alexander, 427 F. Supp. 135, 137 (E.D. Pa. 1977) (quoting in part S .Rep. No. 1240, 74th Cong., 1st Sess. 11 (1939-1 Cum. Bull. (Part 2) 651, 657)) (emphasis added).

47. The Declaratory Judgment Act was therefore not intended to bar actions "where the litigation did not threaten to deny anticipated tax revenues to the Government." Church of Scientology of Celebrity Ctr., Los Angeles v. Egger, 539 F. Supp. 491, 494 (D.D.C. 1982) (quoting E. Ky. Welfare Rights Org. v. Simon, 506 F.2d 1278, 1284 (D.C. Cir. 1974)).

48. "Thus, the purpose of the tax exception to the Declaratory Judgment Act . . . is to

prevent the disruption which would occur to the federal revenue gathering processes if these processes were subject to judicial interference ***prior*** to the actual determination, assessment and collection of tax liabilities." Dietrich, 427 F. Supp. at 137-38 (emphasis added).

49. The Declaratory Judgment Act is intended "to prevent disputes over the right to tax or the merits of an assessment from being heard in the district court unless the tax has first been paid." Rodriguez v. United States, 629 F.Supp. 333, 341 (N.D. Ill. 1986) (citing Egger, 539 F. Supp. at 494) (adding that suits that do not thwart those goals are permissible under the act).

50. Accordingly, in Hawaii Insurers Council, the court held that, where the plaintiffs were "not attempting to keep the State of Hawai'i from assessing and collecting taxes," the circuit court had properly exercised jurisdiction. 117 Hawai'i at 463, 184 P.3d at 778 (analyzing HRS section 632-1 and HRCP Rule 57 collectively).

51. HRS section 632-1's prohibition on declaratory judgment "with respect to taxes" therefore has no application where the taxpayers have already paid the taxes and seek a "coercive remedy" by way of a refund. Cf. Church of Scientology of Haw. v. United States, 485 F.2d 313, 316 (9th Cir. 1973) (proscription of the Declaratory Judgments Act as to tax matters, 28 U.S.C. § 2201, had no application where taxpayer sought refund of taxes unlawfully assessed and paid); Udey v. I.R.S., 534 F. Supp. 219, 221 (W.D. Ark. 1982) (dismissing declaratory judgment action, holding that court has no power to prevent Internal Revenue Service from proceeding to collect the taxes assessed; instead, taxpayer's proper remedy is to pay tax and then bring an action to recoup it); Warren v. United States, 874 F.2d 280, 282 (5th Cir. 1989) (finding no jurisdiction over declaratory judgment action regarding taxes, because plaintiff taxpayers did "not pray for a refund of the [tax] penalty," and "plaintiffs plainly deny that this is a suit for a refund.").

52. Moreover, the prohibition against declaratory relief in tax actions "does not apply to [a] procedural challenge." Cunningham v. United States, 165 B.R. 599, 605 (N.D. Tex. 1993) (holding that "[s]ince Plaintiffs are challenging the procedure by which the assessment was made, and are not challenging the underlying merits of the assessment, the Court has jurisdiction over their Declaratory Judgment request") (citing Rodriguez, 629 F.Supp. at 341, Yannicelli v. Nash, 354 F. Supp. 143, 151 (D.N.J. 1972)).

53. As ORV and ORVN have already paid the taxes associated with the Amended Assessments, and seek a refund of those payments on the basis that the County's issuance of the Amended Assessments violated the Constitution, the law, the tax exceptions to HRS section 632-1 and HRCP Rule 57 are inapplicable, and this Court has jurisdiction over all Plaintiffs' claims.

G. Illegality (Count V)

i. The MCC Provisions

54. MCC section 3.48.135 requires the County, on or before April 19 preceding the tax year, to prepare an assessment list, identifying all real property, and stating separate valuations for buildings and other real property (here, land).

55. That section also requires that taxes be collected in accordance with the assessment list with specific, limited exceptions:

> On or before April 19 preceding the tax year, the director shall have prepared from the records of taxable properties a list in duplicate of all assessments made, which list shall be signed and sworn to by the person preparing it. The assessment list shall identify the property assessed by its tax key and shall set forth the general class of the property established in accordance with section 3.48.305, the valuation of buildings and the valuation of all other real property, exclusive of buildings; the amount of exemption allowed on buildings and the amount of exemption allowed on all other real property, exclusive of the buildings; and the net taxable value of the buildings and the net taxable value of all other real property, exclusive of the buildings. ***The assessment list shall be the lists in accordance with which taxes shall be collected, subject only to change made by any court or other tribunal having jurisdiction, where appeals***

> ***from assessments have been duly taken and prosecuted to final determination, and subject to section 3.48.070.***

MCC section 3.48.135 (emphasis added).

56. Under MCC section 3.48.135, once finalized, the assessment lists remain final and conclusively determines the taxes to be collected for a given year except where an appeal is taken and a court or other tribunal's order on appeal becomes final.

57. MCC section 3.48.140 (Changes in assessment lists) likewise prohibits changes to the assessments on the lists, with limited exceptions:

> Except as specifically provided in this chapter, no changes in, additions to, or deductions from the real property tax assessments on the assessment lists prepared as provided in section 3.48.135 shall be made except to add thereto property or assessments which may have been omitted therefrom, or to deduct therefrom adjustments on account of duplicate assessments and clerical errors, such as transposition in figures, typographical errors and errors in calculation.

58. MCC section 3.48.165.A (Assessment of unreturned or omitted property), provides in pertinent part:

> [I]f for any other reason any real property has been omitted from the assessment lists for any year or years, the director shall add to the lists the omitted property. Notice of the action shall be given the owner, if known, within ten days after the assessment or addition, by mailing the same addressed to him at his last known place of residence.

Emphasis added.

59. MCC section 3.48.165.B requires the Director to impose a penalty on omitted property except where the failure to assess or tax the property was ***not*** caused by the taxpayer.

60. MCC section 3.48.235 provides that every tax due on real property creates a lien.

61. While the MCC does not limit the time within which the County may assess omitted property, **MCC section 3.48.235 limits tax liens to six years.**

62. MCC section 3.48.250 permits non-judicial foreclosure.

ii. The Amended Assessments are *Ultra Vires* and Void Because They Amend Previous Assessments of the Same Land and Buildings in Violation of the MCC.

63. Because the County has admitted that it had assessed all ORV's land and buildings for 2006, 2007, and 2008, and that all ORVN's land and buildings had been assessed for 2008, the MCC's omitted property provision, MCC section 3.48.165.A, is inapplicable. The ordinance does not permit the County to amend the original assessments or add new assessments for the same, previously-assessed real property.

64. MCC sections 3.48.135 and 3.48.140 also prohibit the County from amending previously issued assessments in this way and from adding new assessments for the same, previously-assessed property.

65. The County's theory is not that any real property—land or buildings—were omitted from the assessment lists for the relevant years, but that the ***TMK subparcels*** were "omitted" from the assessment lists. See Plaintiffs' Exhibit A at Nos. 13 and 14 (stating that "for all years prior to calendar year 2009, parcels 440140030001 through 440140030283" and "parcels 440140040001 through 440140040275" "were omitted" from the tax rolls).

66. The MCC, however, governs assessment of real property, that is, land and buildings, see MCC § 3.48.135, not TMK numbers.

67. MCC section 3.48.165.A allows the addition of an assessment "if for any other reason any real property has been omitted." See also MCC § 3.48.005 (defining "real property" as "land and appurtenances thereof," with no reference whatsoever to TMK numbers).

68. TMK numbers are merely the County's own identifiers for parcels of land; they do not themselves constitute property. Cf. MCC § 3.48.135.

69. The County argues that condominiums are themselves taxable "real property" *independent of* the land and improvements comprising them, see Count V Opposition at 16, but that theory is incorrect as a matter of law.

70. Condominiums are a form of real property ownership. See HRS § 514A-3 ("'Condominium' *means the ownership* of single units, with common elements, located on the property within the condominium property regime.") (emphasis added).

71. Although the County has sole authority under the Hawai'i Constitution to *tax* real property, that authority does not permit the County to arbitrarily *define* real property in a way that conflicts with the MCC, the Hawai'i Constitution, and the common and accepted understanding of the phrase.

72. Adding parcel suffixes to a TMK master parcel that the County included on the assessment list (and taxed accordingly) did not add new land or buildings; it simply changed the Tax Assessor's own identifier for that property.

73. The MCC expressly prohibits changes to assessments already on the list, except in limited circumstances that do not exist here. See MCC §§ 3.48.135 and 3.48.140.

74. Moreover, nothing in the MCC, and particularly not the omitted property provision, permits the removal of any assessment—such as the assessments of the Master Parcels—from the assessment list, and MCC section 3.48.140 prohibits "deductions," without exception.

75. Hill v. Yee Chan & Co., 31 Haw. 809 (Haw. Terr. 1931) is controlling.

76. Hill stands for the proposition that omitted property laws authorize assessors to assess only property that has escaped taxation completely, but such laws do not authorize revaluation or additional valuation of **the same property** after an assessment. 31 Haw. at 812.

77. In Hill, the Court held that while the omitted property provision "authorizes the

assessor to assess at any time property ***omitted*** from the return, ***it does not authorize any revaluation or additional valuation . . . in the case of property which has been once returned and once assessed.***" Id. (emphasis added).

78. In its briefs, the County did not cite Hill, and made no effort to distinguish it.

79. "The rule approved by the great weight of authority in this country is that the power to assess 'omitted property' does not carry with it the power to revalue property already assessed." Hunt v. Dist. of Columbia, 108 F.2d 10, 12 (D.C. Cir. 1939) (string citing supporting cases and holding: "It is not the policy of the law to favor reassessments. Unless the taxing statute expressly provides for a reassessment, such action is void."); see also Capital Props. v. State, 749 A.2d 1069, 1085 (R.I. 1999) (string citing cases for the proposition that the term "omitted property" as applied in tax statutes means property that the tax assessor has not assessed at all and does not mean property that the tax assessor has undervalued); Chicago Gravel Co. v. Rosewell, 455 N.E.2d 120, 122 (Ill. App. Ct. 1983) ("[P]roperty which has been assessed, and upon which taxes have been levied and paid in their entirety, even though the assessment through mistake was too low, may not be reassessed in a subsequent year as omitted."); In re W. Side Prop. Assocs., 13 P.3d 168, 173 (Utah 2000) (string citing cases for the proposition that "if an improvement is shown on the tax assessment notice, reassessment of the improvement is prohibited"); Dresden v. Bridge, 38 A. 545, 546 (Me. 1897) ("It is omission, and not erroneous judgment, that the statute provides for. The omission may be supplied by the supplemental assessment; the erroneous judgment cannot be corrected in that way.").

80. In an analogous case involving condominium conversion, Bachelor Gulch Operating Co., LLC v. Board of County Commissioners of Eagle County, 316 P.3d 43 (Colo. App. 2013), the court held Colorado's omitted property statute did not allow the taxing authority

to reassess a property that, after the original assessment, was divided into condominium subparcels. 316 P.3d at 48-49 (holding that if a subparcel "is deemed to have existed as of the assessment date, ***albeit only as part of the parent parcel***, then it ***was appraised as part of that parent parcel and was not 'omitted.'*** . . . Nor was it a property the non-inclusion of which was an error that needed to be corrected.").

81. Where a taxing authority attempts to "reassess" purported "omitted property" in retaliation for the taxpayer's initiation of litigation, the authority's action is inherently illegitimate. Capital Props., Inc. v. City of Providence, 843 A.2d 456, 462 (R.I. 2004) (where, after court decision adverse to city in condemnation action, city attempted to improperly reassess taxpayer's properties using omitted property provision, court held city's actions were illegitimate, thus warranting award of statutory costs and attorneys' fees to taxpayer; "when the tax authorities act out of improper or discriminatory motives, the legitimacy of the revaluation process ends.").

82. The Court concludes as a matter of law that finality of real property tax assessments is necessary from a public policy perspective, as taxpayers otherwise could never have confidence that they have satisfied their tax obligation for any previous years, and potential buyers could never have confidence that a purchased property would not later be burdened by a hefty "amended assessment" for some year long before their purchase.

83. The evidence submitted by the County of the volume of transfers of ORV and ORVN property interests (more than 3,800 annually) highlights and demonstrates the necessity of a public policy favoring finality in taxation because, if the County can retroactively reassess already-assessed real property to change the valuation and impose additional taxes, even many years later as it argues it can here, property owners can never have confidence that they have

satisfied their tax obligation for any previous years. Potential buyers can never have confidence that a purchased property will not later be burdened by a hefty "amended assessment" for some year long before their purchase.

The Court also concludes as a matter of law that the retroactive assessment that the County imposed would frustrate the public policy of a property owner's right to freely transfer his or her interest in their property. In addition the actions of the County would have a potential consequence of clouding titles to property.

84. The court in Anchorage Independent School District v. Stephens, 370 P.2d 531 (Alaska 1962) addressed these concerns in holding that, "where the power to tax had been exercised by the [taxing authority] and concurred in by the taxpayer, a point of finality had been reached. The [taxing authority] no longer had the authority to go back and create an additional obligation for the taxpayer by increasing the assessed valuation of the property." 370 P.2d at 533 ("This rule is reasonably required from the necessity of having a stable system of taxation prevail throughout the taxing area, and to avoid uncertainty as to a taxpayer's financial obligations to the District and as to the status of his property with respect to tax liens.").

85. In a supplemental brief, further explaining its theory that TMK parcels, rather than land and buildings, are taxable, the County argued for the first time that the Master Parcels and subparcels were not the "same real property" because "[w]ith the establishment and completion of the ORV condominium regime prior to assessment years 2006, 2007, and 2008, and the ORV NORTH condominium regime prior to assessment year 2008, ***as a matter of law no 'master parcel' existed at time the real property was assessed for these years.***" Supplemental Memorandum in 1) Support of Defendants County of Maui's and Maui County Council's Motion for Partial Summary Judgment as to Count V of Plaintiffs' Second Amended Complaint Filed 2016-08-12 and 2)

Opposition to Plaintiffs' Motions for Partial Summary Judgment as to Count V, VI, VII, and VIII of the Second Amended Complaint Filed August 12, 2016, filed February 23, 2017, at 2 (emphasis added).

86. The County further argued that "any residual of a 'master parcel' was completely eliminated by the respective ORV and ORV NORTH Declarations, subdivided and apportioned as common interest and real estate appurtenant to the separately created individual condominium apartment parcels." Id.

87. The County therefore argues that at the time it issued the original assessments of the Master Parcels in 2006, 2007, and 2008, those Master Parcels ***did not legally exist***.

88. A tax assessment of real property, however it is defined, that does not legally exist is necessarily void as a matter of law.

89. Under the County's reasoning that TMKs, and not the associated underlying real property, is taxable, the County could not have assessed or taxed the Master Parcels in 2006, 2007, and 2008, making the original assessments illegal and void, and the County would have been obligated to refund to ORV and ORVN their payments totaling $10,869,908.14 associated with those assessments, plus interest over those last ten years.

90. That the County did not refund those payments with interest, but instead credited those payments to the subparcels, without legal authority to employ such a procedure, belies the County's argument.

91. Under the MCC, only real property is taxable; while the County may use tax map key numbers to identify real property, those numbers alone do not constitute real property.

92. All the real property comprising ORV's and ORVN's condominium subparcels—land, buildings, and other appurtenances—was subsumed in, and assessed and taxed as part of,

the Master Parcels for years 2006, 2007, and 2008.

93. The County relies upon MCC section 3.48.305, requiring that "[w]hen property is subdivided into condominium units, each unit . . . shall be: . . . [d]eemed a parcel and assessed separately from other units," Count V Opposition at 17, **but that subsection was signed into law on December 7, 2009, and made explicitly retroactive only to July 1, 2009.** See Ordinance No. 3703 (2009).

94. To the extent the County relies on HRS sections 541B-4 and -6 as requiring condominiums to be separately assessed, the County has otherwise argued strenuously here and in other cases that Article VIII, section 3 of the Hawai'i Constitution transferred to the counties "all functions, powers and duties relating to the taxation of real property," thus granting the counties the *exclusive* right to levy real property taxes. See, e.g., Gardens at W. Maui Vacation Club v. Cty. of Maui, 90 Hawai'i 334, 341, 978 P.2d 772, 779 (1999).

95. Regardless, even if State or County law had required the County to separately assess individual subparcels in 2006, 2007, and 2008, the County admits it knowingly failed to do so.

96. The law, construed as it must be in Plaintiffs' favor, more forcefully prohibits the County from reassessing previously-assessed property, and creates no exception when the County fails to comply with the law in its original assessments. See In re Fasi, 63 Haw. 624, 629, 634 P.2d 98, 103 (1981) (the rule of strict construction applies in tax cases and doubt as to the construction of a tax statute is resolved in favor of the taxpayer).

97. Even if the County had violated a law in failing to separately assess individual subparcels in 2006, 2007, and 2008, such a violation would not permit the County to violate the law a second time, years later, by reassessing that same property.

98. The issuance of the Amended Assessments by the County violated the MCC because the condominium subparcels were not omitted property for years 2006, 2007, and 2008 within the meaning of MCC section 3.48.165.A.

99. The County's issuance of the Amended Assessments also violated MCC sections 3.48.135 and 3.48.140 that prohibited the County from retroactively changing the valuation methodology from the cost approach to the market approach so as to increase the total assessed value of the very same land and buildings it previously assessed and taxed. MCC §§ 3.48.135; 3.48.140.

100. The Court concludes as a matter of law that no provisions of the MCC authorized the issuance of the Amended Assessments by the County.

101. The Court does not conclude that the County can never amend a previously-issued assessment, or that it cannot add actual omitted property to a final assessment list, but holds only that under the facts of this case, the County violated the MCC in issuing the Amended Assessments.

102. As the County issued the Amended Assessments in violation of law, its actions are thus void as a matter of law.

103. The Court concludes as a matter of law that because of the illegal and unconstitutional actions by the County ORV and ORVN are entitled to a refund of all real property taxes related to the Amended Assessments, with interest, and to a return of their appeal fees to the Board of Review.

104. MCC section 3.48.670 states: "[I]nterest at a rate based on the average rate of return earned on County investments during the previous fiscal year, rounded down to the nearest one-hundredth of a per cent, shall be paid to the appealing taxpayer who has made

payment unless otherwise agreed to by the appealing taxpayer and the director."

105. MCC section 3.48.665 states: "In the event of an appeal by a taxpayer to the board of review, if the appeal is compromised, or sustained as to fifty per cent or more of the valuation in dispute, the costs deposited shall be returned to appellant."

iii. Plaintiffs Are Not Judicially Estopped from Contesting the Amended Assessments' Legality.

106. Plaintiffs are not judicially estopped from contesting the legality of the Amended Assessments.

107. In the 2015 Sunshine Law case before Judge Loo, Plaintiffs argued that the court had no jurisdiction over the County's theoretical claim in setoff because the County failed to follow any procedure under the MCC. Plaintiffs' Exhibit L at 6 ("By design of the tax code and the Maui County Charter, unless assessments issued, the board of review determined an appeal in the first instance, and further appeal was sought in the tax appeal court, this Court does not have any jurisdiction to entertain the County's claim for tax liability.").

108. Judge Loo agreed, holding that "[i]f the Court were to allow the County to essentially do an amended tax assessment via counterclaim, it would circumvent the regulatory process outlined in the Maui County Code 3.48." Exhibit N to County's MPSJ Count V at 2.

109. Plaintiffs have not taken the position that this Court has no jurisdiction over Plaintiffs' claims, or that the County's issuance of the Amended Assessments under the facts of this case would be a valid exercise of the County's taxing authority under the MCC.

H. First Amendment (Count VI)

i. Standards

110. Governmental action "designed to retaliate against and chill political expression

strikes at the heart of the First Amendment." Soranno's Gasco v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989) (quoting Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986)).

111. The First Amendment guarantees to every person a protected interest in commenting on the actions of governments and their officials. Soranno's Gasco, 874 F.2d at 1314 (citing N.Y. Times v. Sullivan, 376 U.S. 254, 269-70 (1964); McKinley v. City of Eloy, 705 F.2d 1110, 1113 (9th Cir. 1983)).

112. Subsumed under the First Amendment is the right of access to the courts to petition the government for redress of grievances. Soranno's Gasco, 874 F.2d at 1314 (citing Cal. Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 510 (1972); Harrison v. Springdale Water & Sewer Comm'n, 780 F.2d 1422, 1427-28 (8th Cir. 1986)); see also Van Deelen v. Johnson, 497 F.3d 1151, 1156 (10th Cir. 2007) ("a private citizen exercises a constitutionally protected First Amendment right anytime he or she petitions the government for redress").

113. When an aggrieved party establishes that a government entity made an adverse decision ***because of*** the plaintiffs' exercise of constitutionally protected rights, "they have established a first amendment violation." Soranno's Gasco, 874 F.2d at 1314 (citing Gibson, 781 F.2d at 1338).

114. "[A] plaintiff alleging retaliation for the exercise of constitutionally protected rights must initially show that the protected conduct was a 'substantial' or 'motivating' factor in the defendant's decision," at which point "the burden shifts to the defendant to establish that it would have reached the same decision even in the absence of the protected conduct." Soranno's Gasco, 874 F.2d at 1314 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84, 287 (1977)); accord CarePartners LLC v. Lashway, 545 F.3d 867, 877 (9th Cir. 2008).

115. In determining motivation, a court can properly consider the "timing and nature"

of the adverse action. See Soranno's Gasco, 874 F.2d at 1316 ("timing and nature" of license suspension were "suspicious," suggesting the defendants' chosen course of action was designed to maximize harm to plaintiff).

116. Moreover, the fact that the defendant *could* lawfully have taken the action is irrelevant; the governmental entity must establish that it *would* have taken the action in the absence of the protected activity. Soranno's Gasco, 874 F.2d at 1316 (emphases added).

117. In interpreting and applying the free speech provision of the Hawai'i Constitution, Hawai'i courts consider the case law established under the First Amendment to the United States Constitution. In re Hawai'i Gov't Emps. Ass'n, AFSCME, Local 152, 116 Hawai'i 73, 84, 170 P.3d 324, 335 (2007).

i. The County Violated Plaintiffs' Rights to Petition the Courts for Redress of Grievances, Protected by the First Amendment to the United States Constitution and Article 1, Section 4 of the Hawai'i Constitution.

118. The evidence, including the numerous threats and demands in the pleadings filed in this case by the County, establishes without dispute that it did not issue the Amended Assessments in the course of its regular real property assessment and taxation function but as a litigation stratagem and tactic designed to obtain an otherwise unauthorized financial and practical advantage.

119. The undisputed evidence including the many admissions by the County proves that it issued the Amended Assessments because of, and specifically in response to the litigation, and that absent the lawsuit and Plaintiff's exercise of their rights no such adverse tax action would have been taken.

120. The admissions made by the County in its briefs binds it, and the Court may

properly consider them in deciding the instant motions. Lee v. Puamana Cmty. Ass'n, 109 Hawai'i 561, 573, 128 P.3d 874, 886 (2006) (A judicial admission is "a formal statement, either by a party or his or her attorney, in the course of a judicial proceeding that removes an admitted fact from the field of controversy.").

121. A First Amendment retaliation claim does not require Plaintiffs to prove that the County intended to retaliate or act with animus; Plaintiffs need only prove that the County issued the Amended Assessments "because of" the litigation, which is a valid exercise of Plaintiffs' constitutionally protected rights. Soranno's Gasco, 874 F.2d at 1314.

122. As specifically and repeatedly admitted by the County, it issued the Amended Assessments as a means of offsetting an anticipated damages award against it in the litigation with Plaintiffs, and thus "because of" the litigation, within the meaning of the test in Soranno's Gasco.

123. The County's assertions of the counterclaim in the 2015 Sunshine Law case, seeking to set off the amounts of alleged tax "windfalls" from which Plaintiffs allegedly "benefitted" in previous years, in the absence of any tax obligation under the MCC, see Plaintiffs' Exhibit B at No. 7, had no basis in law.

124. Setoff is a doctrine that allows a court to offset mutual ***debts***. See Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Hawai'i 286, 306, 141 P.3d 459, 479 (2006) (The equitable doctrine of setoff requires that "the demands of mutually indebted parties be set off against each other and that only the balance be recovered in a judicial proceeding by one party against the other.").

125. The County's premise for the counterclaim, that ORV and ORVN were "legally obligated to pay" taxes in the absence of County assessments and tax bills for those amounts,

Count VI Opposition at 8, is legally baseless and constitutes as a matter of law a gross abuse of a governmental entity's lawful taxing authority.

126. Plaintiffs were "legally obligated to pay" real property taxes only in the amount established by County-issued tax bills, in turn based on the County-issued assessments, and the County has no authority to collect taxes except in accordance with assessment lists. See, e.g., MCC § 3.48.135.

127. At the time the County filed the counterclaim in the 2015 Sunshine Law case, Plaintiffs owed no tax obligation for any prior tax years that could be set off against any damage award, as Plaintiffs timely and fully paid all originally-billed real property taxes for years 2006, 2007, and 2008, as the County also admits. Plaintiffs' Exhibit A at Nos. 9 and 11.

128. The County, including Corporation Counsel, has no legal authority to assess, bill, or collect any real property taxes in any way other than in accordance with the MCC. See MCC § 3.48.030 ("The ***director*** shall collect all taxes under this chapter ***according to the assessments***....") (emphasis added); MCC § 3.48.135 ("The assessment list shall be the lists in accordance with which taxes shall be collected, subject only to change made by any court or other tribunal having jurisdiction...."); see also Hawkins v. Far S. CDC, Inc., 1 N.E.3d 1216, 1220 (Ill. App. 2016) ("The obligation of citizens to pay taxes is purely a statutory creation, and taxes can be levied, assessed and collected only in the manner expressly spelled out by statute.").

129. The County's assertion of its counterclaim for setoff in this case constituted a legally baseless action because no tax obligation or debt existed that could be set off against any damages award against the County because ORV and ORVN had already paid the taxes associated with the Amended Assessments. Order Granting Plaintiffs/Counterclaim Defendants Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation

Owners Association's Motion for Judgment on the Pleadings as to All Claims in Defendant/Counterclaimant County of Maui's Counterclaim Against Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association, Filed October 31, 2016, filed March 8, 2017.

130. The County's effort to collect additional taxes through legally baseless counterclaims in set-off, outside any authority granted by the MCC, violated the MCC and independently constituted a violation of Plaintiffs' protected speech rights under both the United States and Hawai'i Constitutions.

131. The County's assertion of the counterclaims is additional evidence that the County issued the Amended Assessments "because of" the lawsuit, and for the purpose of mitigating its anticipated damages in the instant case, as it otherwise admits.

132. The effort to establish this set-off claim, and the County's admission that the failure of the set-off claim led to the Amended Assessments, proves that the County would not have issued the Amended Assessments absent Plaintiffs' lawsuit.

133. The Court concludes as a matter of law that the position of the County that it had the legal authority to issue the Amended Assessments, and that such action did not constitute a violation of Plaintiffs' rights to petition the courts, see, e.g., Count VI Opposition at 1, is erroneous.

134. The issuance of the Amended Assessments by the County violated Plaintiffs' rights to petition the courts for redress of grievances, protected by the First Amendment to the United States Constitution and Article 1, Section 4 of the Hawai'i Constitution.

135. The Amended Assessments are void as a matter of law.

136. ORV and ORVN are entitled to a refund of all real property taxes related to the

Amended Assessments, with interest, and a return of their appeal fees to the Board of Review.

137. Based on the violation of Plaintiffs' rights under the First Amendment to the United States Constitution by the County, Plaintiffs are also entitled to damages, pursuant to 42 U.S.C. § 1983, in the amount of their appeal fees to the TAC and such other damages that may be proven at a later date.

I. Due Process (Count VII)

i. The Amended Assessments Were So Harsh and Oppressive as to Violate Plaintiffs' Substantive Due Process Rights.

138. "Retroactivity is not favored in the law," Alford v. City & Cnty. of Honolulu, 109 Hawai'i 14, 28, 122 P.3d 809, 823 (2005), because of the "unfairness of imposing new burdens on persons after the fact." Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994).

139. Due process "includes a substantive component that guards against arbitrary and capricious government action." DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC, 134 Hawai'i 187, 219, 339 P.3d 685, 717 (2014) (quoting In re Herrick, 82 Hawai'i 329, 349, 922 P.2d 942, 962 (1996)).

140. The standard for analyzing if a retroactive tax satisfies due process is whether, in light of "the nature of the tax and the circumstances in which it is laid," the law is "so harsh and oppressive as to transgress the constitutional limitation." Kaheawa Wind Power, LLC v. County of Maui (In re Kaheawa Wind Power, LLC), 135 Hawai'i 202, 214, 347 P.3d 632, 644 (Ct. App. 2014), (quoting McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, 496 U.S. 18, 40 n.23 (1990)); accord Gardens at W. Maui Vacation Club v. Cnty. of Maui, 90 Hawai'i 334, 344, 978 P.2d 772, 782 (1999).

141. Even when a retroactive tax assessment is permitted by law and not otherwise

unconstitutional, the circumstances of its issuance may still give rise to a substantive due process violation. Kaheawa Wind Power, 135 Hawai'i at 213, 347 P.3d at 643 ("there may be circumstances in which retroactive tax assessments may violate constitutional rights.)"

142. Quoting federal and state precedent, the Court in Kaheawa Wind Power held that the retroactive assessment of a tax does not necessarily deny due process to the taxpayer, "though ***beyond some temporal point the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation,' depending on 'the nature of the tax and the circumstances in which it is laid.***'" Id. at 214, 347 P.3d at 644 (quoting McKesson, 496 U.S. at 40 n.23 and In re Tax Appeal of Cnty. of Maui v. KM Haw. Inc., 81 Hawai'i 248, 257 n.12, 915 P.2d 1349, 1358 n.12 (1999)) (emphasis added).

143. The Court in Gardens at West Maui relied upon United States v. Carlton, 512 U.S. 26 (1994), that "set forth two primary factors to be considered when determining whether retroactive taxation violates the due process clause": (1) whether the legislature's purpose in enacting the legislation was "illegitimate or arbitrary," and (2) "whether the legislature acted promptly and established 'only a modest period of retroactivity.'" Gardens at West Maui, 90 Hawai'i at 344, 978 P.2d at 782 (quoting Carlton, 512 U.S. at 32).

144. The facts here warrant close review, as they do not involve legislative acts, as indicated in the test recited by Gardens at West Maui, but instead involve administrative acts.

145. Carlton and other retroactive taxation cases concerned legislative acts, which generally are subject to public scrutiny and debate, and require a public vote by publicly-accountable officials.

146. Administrative acts, such as the County's issuance of the Amended Assessments, are not subject to such public processes, and are therefore more likely to be taken for

impermissible reasons, and under circumstances that render them impermissibly harsh and oppressive.

a. The County's Purpose in Issuing the Amended Assessments was Illegitimate.

147. The first factor of the due process test examines the government's purpose, and focuses on whether that purpose was "illegitimate or arbitrary," or the product of an "improper motive." Carlton, 512 U.S. at 32.

148. This factor addresses the problem that government entities may "be tempted" to take an action retroactively "as a means of retribution against unpopular groups or individuals." Landgraf, 511 U.S. at 266.

149. Illegitimate or arbitrary retroactivity exists when it "targets" specific taxpayers. See Carlton, 512 U.S. at 32; E. Enters. v. Apfel, 524 U.S. 498, 549 (1998) (Kennedy, J., concurring in judgment and dissenting in part) ("Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them. Both stability of investment and confidence in the constitutional system, then, are secured by due process restrictions against severe retroactive legislation.").

150. This is a particular concern where the acting governmental entity is a party in litigation with the taxpayer. See Ubel v. State, 547 N.W.2d 366, 372 (Minn. 1996) ("For the State, a party, to change the substantive law governing disposition of the action in a manner designed to assure an outcome favorable to the State and to make that change applicable retroactively only to the pending action . . . suggests that the legislature acted with an improper motive—targeting the plaintiffs because they objected to the unlawful exaction of a surcharge.").

151. Here the County's purpose in issuing the Amended Assessments was illegitimate, as the County admits it issued the Amended Assessments in response to Plaintiffs' lawsuit in an effort to offset its anticipated damages. See, e.g., Count VII Opposition at 7 (arguing that the County's "demonstrated intent" in issuing the Amended Assessments "was and is" "to set-off Plaintiffs' . . . claims to damages.") (capitalization altered).

152. The County also specifically targeted Plaintiffs for adverse action. Exhibit Q (letter from ***Corporation Counsel*** to the public, advising that the retroactive amended assessments were in response to the lawsuit and limited only to Plaintiffs' properties).

153. The County thus issued the Amended Assessments not as part of its routine taxation function, but as a weapon specifically against Plaintiffs and specifically because of the litigation, and therefore in violation of Plaintiffs' rights to substantive due process under the Hawai'i and United States Constitutions.

b. The Period of Retroactivity Was Not "Modest."

154. The second due process factor requires the Court to examine whether the authority acted "promptly" so that the period of retroactivity is "modest." Carlton, 512 U.S. at 32; see also Wash. Nat'l Arena Ltd. P'ship v. Treasurer, Prince George's Cnty., 410 A.2d 1060, 1064 n.3 (Md. 1980) ("Generally, cases upholding the constitutionality of retroactive tax legislation have involved relatively short periods of unanticipated retroactivity.") (citing United States v. Hudson, 299 U.S. 498, 500-01 (1937)) (retroactive period of thirty-five days).

155. In Carlton, the Court recognized that the "practicalities of producing national legislation" sometimes caused *legislation* to apply retroactively, which could withstand constitutional scrutiny if the period of retroactivity is "limited." 512 U.S. at 33.

156. The Court in Carlton held a period of retroactivity of "only slightly greater than one year" to be permissible, 512 U.S. at 33, although in a concurring opinion Justice O'Connor wrote that a "period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions." Id. at 38.

157. Similarly, the Hawai'i Supreme Court in Gardens at West Maui held that a period of legislative retroactivity of "slightly over six months" was reasonable. 90 Hawai'i at 344, 978 P.2d at 782; cf. Commonwealth Edison Co. v. Will Cnty. Collector, 749 N.E.2d 964, 975 (Ill. 2001) (legislative amendment's period of retroactivity was modest, as it went back "only six weeks from the amendments' effective date.").

158. By contrast, in Washington National, the court invalidated a tax on the basis that it had a retroactive reach of up to eight years: "To give [the statute] the retrospective application urged by [the county] would be to hold that a legislature, "after it set one rate of tax upon certain transactions, could then, as long as eight years after the taxable transactions were fully completed under the old rate, reach back and substantially increase that tax on those same transactions," and it consequently would violate due process. 410 A.2d at 1069.

159. The court in Washington National held that the cases upholding the constitutionality of retroactive tax legislation "have not involved periods even approaching the eight years in the present case." Id. at 1064 n.3.

160. Likewise, in Comptroller of the Treasury v. Glenn L. Martin Co., 140 A.2d 288, 300 (Md. 1958), the court held a statute seeking to tax transactions completed three to six years earlier violated the due process clauses of the state and federal Constitutions.

161. The Court concludes as a matter of law that the period of retroactivity—**eight to ten years**—is not modest.

162. The retroactivity was also not merely the accidental result of the timing of legislation's passage, as it was in the cases above.

163. The extended period of retroactivity resulted in the County abusing its taxation power to retroactively tax and reassess properties because it sought to gain an advantage in litigation.

164. In contrast to Kaheawa Wind Power, where the only resulting harm the taxpayer claimed was "surprise," 135 Hawai'i at 214, 347 P.3d at 644, the extended period of retroactivity here resulted in substantial prejudice well in excess of $10 million after the taxpayer had already paid many millions in taxes. Then, to compound the illegality of its actions, the County failed to reimburse taxes previously paid by Plaintiffs with interest but instead issued a credit. This procedure failed to benefit the Plaintiffs/taxpayer but enormously benefit the County. See Exhibit M to Plaintiffs' MPSJ Count V, referencing the windfall of tax payments by the County as "cha ching."

165. Plaintiffs have been prejudiced by the magnitude of new taxes and the short thirty-day deadline for payment, they are prejudiced because many of the current ORV and ORVN owners, who must now bear part of the additional tax burden, owned no interest in the properties when the County issued the original assessments. See, e.g., Declaration of Marcy Martin, filed in support of County's Reply Memorandum to Plaintiffs' Memorandum in Opposition to Defendants County of Maui's and Maui County Council's Motion for Partial Summary Judgment as to Count V of Plaintiffs' Second Amended Complaint filed 2016-08-12, filed January 24, 2017 (stating that from January 1, 2000 to January 1, 2009, "there were as many 34,615 transfers of deeded property interest involving timeshare intervals" in ORV and ORVN").

166. The County did not act "promptly" after it became aware of the facts that it based the Amended Assessments upon. The County admitted it knew in 2006, 2007, and 2008 that it assessed the Master Parcels rather than the individual units, and also admitted it knew of these facts in 2009, when it assessed the individual units for the first time.

167. The County did not act "promptly" after it became aware of the facts that it based the Amended Assessments upon, because it knew the facts at the time it issued the original assessments, as well as when it **settled** the tax appeals for 2009 and 2010.

168. Although the MCC places no express limit on the period in when the County may assess omitted property, the Code does expressly limit tax liens to six years, indicating that the drafters found six years to be sufficient time for the County to take any necessary action to collect unpaid taxes. See MCC § 3.48.235.

169. The County also does not dispute that the imposition of more than $10.7 in *additional* taxes for previously-taxed property is a "significant tax burden."

170. Under the circumstances of this case, the imposition of more than $10.7 in additional taxes is so harsh and oppressive as to violate Plaintiffs' rights to substantive due process under both the Hawai'i and United States Constitutions.

171. The County's issuance of the Amended Assessments violated Plaintiffs' rights to substantive due process as guaranteed by both the Hawai'i and United States Constitutions.

172. Because they violate Plaintiffs' rights to substantive due process under the Hawai'i and United States Constitutions, the Amended Assessments are void as a matter of law.

ii. The County's Actions Violated Plaintiffs' Substantive Due Process Rights Because They Were Retaliatory.

173. A substantive due process violation may arise when the "government takes

negative action against an individual because of his exercise of rights guaranteed by the Constitution or federal laws." Friedl v. City of N.Y., 210 F.3d 79, 85 (2d Cir. 2000).

174. In such a case, a plaintiff "need not show that the retaliatory action was taken without basic procedural guarantees, since the retaliation is itself a substantive due process violation." Friedl, 210 F.3d at 86.

175. The County's issuance of the Amended Assessments constituted a negative action.

176. The County issued the Amended Assessments because of Plaintiffs' lawsuit, a valid exercise of their constitutional rights to petition the courts.

177. The County's issuance of the Amended Assessments violated Plaintiffs' rights to substantive due process under the United States and Hawai'i Constitutions

178. Because they violated Plaintiffs' rights to substantive due process under the Hawai'i and United States Constitutions, the Amended Assessments are void as a matter of law.

179. The efforts by the County to collect additional taxes through a claimed setoff, unrelated to any official assessment and outside any authority provided by the MCC, likewise occurred because of Plaintiffs' exercise of their right to petition the courts, and therefore also violated Plaintiffs' rights to substantive due process under the United States and Hawai'i Constitutions.

180. To the extent the County argued that its intent was not to retaliate, but to set off its damages, Count VII Opposition at 7, the argument fails as a matter of law because specific intent to retaliate is not required to prove a due process claim; all that is required is that the plaintiff show the negative action occurred as a result of the plaintiff's exercise of protected rights. Friedl, 210 F.3d at 85.

181. The admitted conduct of the County is a violation of Plaintiffs' substantive due process rights. The County admitted it used its power of taxation not in the regular course of taxation but—at best—specifically to limit its own damages in litigation by depriving the Plaintiff taxpayers of their property.

iii. The County's Issuance of the Amended Assessments Without Authority to Do So Violated Plaintiffs' Substantive Due Process Rights.

182. "[T]he exaction by a [government] of a tax which it is without power to impose is a taking of property without due process of law in violation of the Fourteenth Amendment." Frick v. Pa., 268 U.S. 473, 488-89 (1925).

183. As the County issued the Amended Assessments in violation of the MCC, that action inherently constitutes a violation of Plaintiffs' substantive due process rights under the United States and Hawai'i Constitutions.

184. Because they violate Plaintiffs' rights to substantive due process under the Hawai'i and United States Constitutions, the Amended Assessments are void as a matter of law.

185. Based on the foregoing violations of their rights to procedural due process, ORV and ORVN are entitled to a refund of all real property taxes related to the Amended Assessments, with interest, and a return of their appeal fees to the Board of Review.

186. Based on the County's violation of Plaintiffs' rights to substantive due process under the United States Constitution, Plaintiffs also are entitled to damages, pursuant to 42 U.S.C. § 1983, in the amount of their appeal fees to the TAC and such other damages that may be proven at a later date.

iv. The County's Actions Violated Plaintiffs' Procedural Due Process Rights.

187. "The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." Sandy Beach Def. Fund v. City Council of City & Cnty. of Honolulu, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989) (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)).

188. Procedural due process is flexible and calls for such procedural protections as the particular situation demands. Sandy Beach Defense Fund, 70 Haw. at 378, 773 P.2d at 261.

189. The circumstances here rendered any opportunity to be heard, whether by the Board of Review or the Court, meaningless with regard to the significant deprivation of property, because the County required Plaintiffs to pay $10,728,518.49 in additional property taxes plus $75 in filing fees for each of the 1,111 appeals (for a total of $83,325), within thirty days of the Amended Assessments, well before any board or court could reasonably have provided relief.

190. Given the timing and magnitude of the property deprivation in this case, the opportunity for post-deprivation relief did not satisfy constitutional requirements of procedural due process.

191. Because the Amended Assessments violated rights of Plaintiffs to procedural due process under the Hawai'i and United States Constitutions, they are void as a matter of law.

192. ORV and ORVN are entitled to a refund of all real property taxes related to the Amended Assessments, with interest, and a return of their appeal fees to the Board of Review that have already been paid and such other damages as may be proven.

193. Based on the County's violation of Plaintiffs' rights to procedural due process

under the United States Constitution, Plaintiffs also are entitled to damages, pursuant to 42 U.S.C. § 1983, in the amount of their appeal fees to the TAC already paid and such other damages that may be proven.

v. The Amended Assessments Are Alternatively Invalid by Operation of Laches.

194. Although the Court need not reach the question given its other conclusions, the County's issuance of the Amended Assessments was also barred by laches.

195. In an opinion issued before the completion of the briefings on the instant motions, the Supreme Court held that under Hawai'i law, laches is a defense not only to equitable claims, but to legal claims as well. Ass'n of Apartment Owners of Royal Aloha v. Certified Mgmt., Inc., 139 Hawai'i 229, 236, 386 P.3d 866, 873 (2016), as amended (Dec. 21, 2016) ("laches is a defense to legal and equitable claims alike").

196. Laches applies when a plaintiff unreasonably delays in bringing the action, thereby resulting in prejudice to the defendant. Royal Aloha, 139 Hawai'i at 234, 386 P.3d at 871.

197. Here, the taxing authority's delay in issuing the Amended Assessments was unreasonable because the County admits it knew at the time it assessed the properties in 2006, 2007, and 2008 that it was not assessing the individual units, and admits that it "knew, as of at least 2009," that for the previous years it assessed the Master Parcels as a whole, and not the individual condominium units comprising them. Exhibit A at Nos. 7 and 8.

198. The delay prejudiced Plaintiffs, including because current owners, who must bear the financial burden of the Amended Assessments, are not all the same owners who owned the interests at the time of the tax payments on the 2006, 2007, and 2008 assessments.

199. Although the Amended Assessments are invalid primarily because they violate the MCC and violate Plaintiffs' constitutional rights as concluded above, the efforts to collect these taxes by the County make them equally invalid based on laches.

200. By operation of laches, the Amended Assessments are void as a matter of law.

201. ORV and ORVN are entitled to a refund of all real property taxes related to the Amended Assessments, with interest, and a return of their appeal fees to the Board of Review.

J. Having Established that the County Violated Plaintiffs' Rights Under the United States Constitution, Plaintiffs Are Entitled to Damages Under 42 U.S.C. § 1983.

202. 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

203. To maintain a claim under § 1983, a plaintiff must show that (1) a person acting under color of state law (2) subjected him or her, or is threatening to subject him or her, to the deprivation of a right under the United States Constitution or other federal law. Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Hawai'i 192, 205, 891 P.2d 279, 292 (1995) (citation omitted); accord West v. Atkins, 487 U.S. 42, 48 (1988).

204. The United States Supreme Court in Monell v. Department of Social Services, 436 U.S. 658 (1978), held that municipalities and local governments are "persons" under § 1983.

205. "Local governing bodies . . . can be sued directly under § 1983 for monetary,

declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional, implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell, 436 U.S. at 690-91.

206. "Recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) (citing Monell).

207. The County's issuance of the Amended Assessments, issuance of real property tax invoices in the amount of more than $10.7 million, and acceptance of that amount in tax payments, were "officially sanctioned or ordered" acts.

208. The County has not disputed that the County's issuance of the Amended Assessments, issuance of real property tax invoices in the amount of more than $10.7 million, and acceptance of that amount in tax payments, were "officially sanctioned or ordered" acts.

209. Municipal liability may be imposed for even a single decision when that decision is made by a municipal policymaker. Pembaur, 475 U.S. at 480.

210. Municipal liability under § 1983 attaches where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. Pembaur, 475 U.S. at 481; see also id. at 484-85 (county could be liable for damages under § 1983 based on the decision of a county prosecutor to command deputy sheriffs forcibly to enter the petitioner's clinic to serve writs for the arrest of employees, as the prosecutor was acting as the final decisionmaker for the county).

211. A "policy" for purposes of § 1983 may concern only a single set of circumstances, as "a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations." Pembaur, 475 U.S. at 481.

212. "If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government 'policy' as that term is commonly understood." Pembaur, 475 U.S. at 481.

213. "More importantly, where action is directed by those who establish governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983." Pembaur, 475 U.S. at 481.

214. The decisions by the County to issue the Amended Assessments, issuance of real property tax invoices in the amount of more than $10.7 million, and acceptance of that amount in tax payments, were made by "authorized decisionmakers" but without oversight of elected or appointed persons answerable to the public and electorate. The Court notes the expressed concern by elected officials over the procedure taken by the Real Property Tax Division at the direction of counsel.

215. As the Administrator of the County's Real Property Assessment Division, Scott Teruya has authority to administer those sections of the MCC related to real property tax assessments and is an authorized decisionmaker with regard to assessments. See Plaintiffs' Exhibit C at 154:23 to 156:23 (Marcy Martin testifying that Scott Teruya, the Administrator for the Real Property Assessment Division, had authority to authorize the Amended Assessments, as indicated by his signature on all of them) and Plaintiffs' Exhibit H (Transcript of Deposition of Scott Teruya of November 17, 2016) at 55:16-18, 59:22 to 60:1, and 76:1-11 (testifying as to his authority).

216. As the Administrator of the County's Real Property Assessment Division, Scott Teruya had final decisionmaking authority with regard to the issuance of the Amended

Assessments.

217. Even if he made the decision to issue the Amended Assessments at the insistence of and directing demands of Corporation Counsel, Scott Teruya nevertheless had final decisionmaking authority with regard to the issuance of the Amended Assessments.

218. Plaintiffs have established that the actions taken by the County were indeed its action, and have no burden to establish that an employee committed a constitutional violation pursuant to a "longstanding practice or custom," as the County has argued. See Webb v. Sloan, 330 F.3d 1158, 1164 (9th Cir. 2003) (citing Pembaur, 475 U.S. at 479 for the proposition that "[t]he 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality").

219. As Plaintiffs have established as a matter of law that the issuance of the Amended Assessments by the County and related tax invoices and acceptance of tax payments were official acts of the County that violated Plaintiffs' First Amendment right to petition the government for redress of grievances, and their rights to substantive and procedural due process under the United States Constitution, Plaintiffs are entitled to damages, pursuant to 42 U.S.C. § 1983.

220. The County's constitutional violations are the direct cause of Plaintiffs' monetary damages beyond the taxes themselves and Tax Review Board appeal fees that are refundable pursuant to the MCC.

221. ORV and ORVN represented that as of February 16, 2017, they have paid a total of $111,400.00 in appeal fees to the TAC.

222. ORV and ORVN also represent that the special assessments issued to ORV and ORVN owners to collect the amount of the additional taxes for the Amended Assessments were

themselves taxable events under Hawai'i law, requiring ORV and ORVN to pay general excise taxes in an amount to be proven at a later date.

223. ORV and ORVN are entitled to their TAC appeal fees and damages under 42 U.S.C. § 1983. Plaintiffs may seek such additional amounts in damages that may be proven in due course.

224. 42 U.S.C. § 1988 states in pertinent part: "In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

225. Based upon the County's violations of 42 U.S.C. § 1983, Plaintiffs are also entitled to their reasonable attorneys' fees and costs, as authorized by 42 U.S.C. § 1988, associated with their claims challenging the Amended Assessments.

ORDER

IT IS HEREBY ORDERED ADJUDGED AND DECREED that the following motions, filed on December 1, 2016, are GRANTED in full: (1) Plaintiffs' Motion for Partial Summary Judgment on Count V (Illegality) of the First Amended Complaint, filed August 12, 2016; (2) Plaintiffs' Motion for Partial Summary Judgment on Count VI (First Amendment) of the First Amended Complaint, filed August 12, 2016; (3) Plaintiffs' Motion for Partial Summary Judgment on Count VII (Due Process) of the First Amended Complaint, filed August 12, 2016; and (4) Plaintiffs' Motion for Partial Summary Judgment on Count VIII (42 U.S.C. § 1983) of the First Amended Complaint, filed August 12, 2016.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Defendants County of Maui's and the Maui County Council's Motion for Partial Summary Judgment as to Count V of Plaintiffs' Second Amended Complaint filed 2016-08-12, filed on December 12, 2016 is

DENIED.

The County is ordered to refund to ORV and ORVN, within 30 days of the entry of this order, all tax payments associated with the Amended Assessments, totaling $10,728,518.49 ($6,879,447.79 to ORV and $3,849,070.70 to ORVN), with interest in accordance with MCC § 3.48.670;

The County is ordered to refund to ORV and ORVN, within 30 days of the entry of this order, their appeal fees to the Tax Review Board in the amount of $83,325.00;

As to 42 U.S.C. § 1983 damages, ORV and ORVN shall within 30 days of the entry of this order submit a separate motion supported by declarations or other evidence establishing the amount of their damages, including but not limited to, their TAC appeal fees and such other damages they claim they sustained. As part of this motion, Plaintiffs may also submit evidence of their reasonable attorneys' fees pursuant to 42 U.S.C. § 1988, and costs as otherwise permitted by law.

ORV and ORVN may move the TAC for a stay of the tax appeal proceedings, pending final resolution of the remaining claims in this case. See Solarana v. Indus. Elecs., Inc., 50 Haw. 22, 30, 428 P.2d 411, 417 (1967) (a stay is discretionary, and may properly be used to temporarily suspend proceedings in one suit pending conclusion of another related suit).

DATED: Wailuku, Hawai'i, AUG - 8 2017.

/S/ PETER T. CAHILL (SEAL)

JUDGE OF THE ABOVE-ENTITLED COURT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing document was duly served upon the following parties at their last known address by U.S. MAIL, postage pre-paid or by court jacket.

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Attorneys for Defendants Count of Maui and Maui County Council

DATED: Wailuku, Maui, Hawai'i, AUG - 9 2017

/sgd/ V. Ishihara
Clerk of the above-entitled Court