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CAAP-18-0000578
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CAAP-18-0000578

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAIʻI

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-Appellees,

vs.

COUNTY OF MAUI; MAUI COUNTY COUNCIL,

Defendants-Appellants.

Civil No. 13-1-0848 (2)
(Other Civil Action)

Circuit Court of the Second Circuit, State of Hawaiʻi

Judge : Hon. Peter T. Cahill

MOTION OF TAX FOUNDATION OF HAWAIʻI FOR LEAVE TO FILE AMICUS CURIAE BRIEF

EXHIBIT "1"

CERTIFICATE OF SERVICE

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MOTION OF TAX FOUNDATION OF HAWAIʻI
FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Tax Foundation of Hawaiʻi (the "Foundation"), hereby moves this Court, pursuant to Rules 27 and 28(g) of the Hawaiʻi Rules of Appellate Procedure, for leave to appear as *amicus curiae* and to file a brief, in the form attached hereto as Exhibit "1."

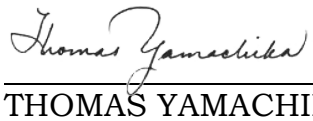
The Foundation is a non-partisan, non-political 501(c)(3) organization whose mission is to educate taxpayers and lawmakers on taxation and public finance. We educate and encourage the efficient and effective use of public funds (our tax dollars) to operate government and deliver public services. To do that, we track changes in tax law and how taxpayer dollars are used. Our work is published and distributed as widely as possible and free of charge. A well-informed public (and this includes lawmakers) that understands the impact of our tax system can more effectively participate in pressing for greater government efficiency and accountability.

The Foundation seeks to submit the attached brief to present a non-partisan perspective on the issues raised. The Foundation is not adopting the position of either of the parties. The Foundation agrees that Maui County had authority to enact a separate classification for Time Share property but supports the Taxpayer's positions on the court's jurisdiction and on the County's abhorrent retaliatory assessment.

No part of this Motion or the proposed brief was authored by any party to this appeal, and no party or its counsel contributed money that was intended to fund preparing or submitting the brief.

For the above reasons, the Foundation respectfully requests that this Court grant its motion to submit a brief *amicus curiae* and set a schedule for its filing.

DATED: Honolulu, Hawai‘i, December 3, 2018.



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Counsel for Movant

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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-Appellees, vs. COUNTY OF MAUI; MAUI COUNTY COUNCIL, Defendants-Appellants.	Civil No. 13-1-0848 (2) (Other Civil Action) Circuit Court of the Second Circuit, State of Hawaiʻi Judge : Hon. Peter T. Cahill

AMICUS CURIAE BRIEF OF TAX FOUNDATION OF HAWAIʻI

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AMICUS CURIAE BRIEF OF TAX FOUNDATION OF HAWAIʻI

Pursuant to this Court's Order Granting Motion for Leave to File *Amicus Curiae* Brief in Support of Appellants, and Rule 28(g) of the Hawaiʻi Rules of Appellate Procedure, the Tax Foundation of Hawaiʻi ("Foundation") submits this brief respectfully urging this Court to reverse the judgment of the Circuit Court of the Second Circuit as to the validity of the Time Share property tax classification but otherwise to affirm its judgment.

I. IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Foundation is a non-partisan, non-political IRC § 501(c)(3) organization whose mission is to educate taxpayers and lawmakers on taxation and public finance. We educate and encourage the efficient and effective use of public funds (our tax dollars) to operate government and deliver public services. To do that, we track changes in tax law and how taxpayer dollars are used. Our work is published and distributed as widely as possible and free of charge. A well-informed public (and this includes lawmakers) that understands the impact of our tax system can more effectively participate in pressing for greater government efficiency and accountability.

Over the years, the Foundation has also functioned as a taxpayer watchdog organization, on many occasions scrutinizing and then calling out the government's legislative proposals to make its own job easier at the expense of taxpayer rights and protections. This case, to the Foundation, presents an example of a county government abusing the taxing power conferred upon it by the people of Hawaiʻi.

II. STATEMENT OF FACTS

Maui County enacted in 2004 a new Time Share property classification, effective in 2006, that was much more expensive for impacted taxpayers.[1] The Maui County Council's Budget & Finance Committee attempted to explain the rationale for the new rate in its Committee Report 04-187 at the time:

> Your Committee recognized that the application of the HRS Chapter 237D is different for Hotel and Resort properties and Time Share properties. The TAT for Time Share properties is 7.25 percent of the unit's fair market rental value. Under HRS Section 237D-1, "fair market rental value means an amount equal to one-half the gross daily maintenance fees that are paid by the owner … " The TAT for Hotel and Resort properties is 7.25 percent of the gross rental proceeds. With the application of these formulas, Time Share properties generate considerably less TAT revenue per unit than Hotel and Resort properties do.[2]

At the time, state statutes provided that the counties would be paid 44.8% of transient accommodations tax ("TAT") collected; Maui was to receive 22.8% of that amount, or 10.2144% of all TAT collections. HRS § 237D-6.5(b)(3) (2004). This was so until 2013, when the counties' share was changed to a fixed amount. Act 161, sec. 2, SLH 2013. Since then, the counties' allocation of the TAT has been amended by Act 174, SLH 2014, and Act 223, SLH 2016, and continues to be a fixed amount.

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[1] Maui Ord. No. 3227 (2004).

[2] Court's Findings of Fact, Conclusions of Law; Order Granting Plaintiffs' Motion for Partial Summary Judgment Re: Illegality of the Timeshare Real Property Tax Classification, Filed December 19, 2017, and Denying as Moot Plaintiffs' Motion for Partial Summary Judgment, Based on Use, as to Count I (Equal Protection) of the Second Amended Complaint Filed August 12, 2016, Filed September 29, 2017 (Mar. 23, 2018), Record on Appeal, Dkt. No. 108, PDF p. 935. (hereinafter "3/18 FFCL"), Finding of Fact ("FOF") ¶ 6.

Some timeshare projects in Kaanapali were unhappy about the new classification, and in 2013, Plaintiffs sued in Circuit Court on Maui asking the court to declare that the Time Share classification was invalid.[3]

Maui's attorneys and tax assessors then noticed that for the years 2006, 2007, and 2008, they had assessed the master parcels, such as the land and buildings on the whole condominium project, as opposed to individual time share interests (typically, ownership of a certain unit for a week per year).[4] Furthermore, the property was assessed using cost data, which is typically used when projects are being constructed, rather than market data.[5] Although the Plaintiffs fully paid the taxes assessed to the master parcels,[6] the county, claiming a right to offset, set up a counterclaim in the lawsuit for $10 million in additional property tax owed for 2006, 2007, and 2008.[7]

Plaintiffs moved to have the counterclaim dismissed for failure to follow assessment procedures, and the court agreed.[8] As a result, the county issued amended property tax assessments to every timeshare unit owner in the projects, stating that "after the repeated arguments and positions taken by Plaintiffs against the County's efforts to defray their anticipated damages

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[3] 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 206-08-12, Filed on December 12, 2016 (Aug. 9, 2017), Record on Appeal, Dkt. No. 86, PDF p. 552 (hereinafter "8/17 FFCL"), FOF ¶ 20.
[4] 8/17 FFCL, supra note 3, FOF ¶¶ 3-11.
[5] 8/17 FFCL, supra note 3, FOF ¶¶ 12-14.
[6] 8/17 FFCL, supra note 3, FOF ¶ 9.
[7] 8/17 FFCL, supra note 3, FOF ¶¶ 23-27.
[8] 8/17 FFCL, supra note 3, FOF ¶ 28.

claims, the County would have been remiss by not issuing the assessments of Plaintiffs' omitted property."[9] The total of the amended assessments was $10.7 million, due and payable in 30 days.[10] That sum included a credit for the real property taxes paid on the master parcels.[11]

Plaintiffs paid the assessments and appealed; the filing fees for the 1,111 appeals totaled $83,325.[12] The appeals were heard by the Maui Board of Review, which upheld all of the assessments; Plaintiffs further appealed to the Tax Appeal Court, resulting in additional filing fees of $111,400.[13] Plaintiffs had to raise their $10+ million through special assessments,[14] which, unlike maintenance fees charged by non-timeshare condominium associations,[15] are GET taxable.[16]

Word of the massive assessments got out, and other people were concerned.[17] "You don't have to worry," county officials said, in effect. "We only assessed these folks retroactively because they were making a huge and questionable claim against the county and they didn't pay their fair share of tax in prior years."[18]

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[9] 8/17 FFCL, supra note 3, FOF ¶ 29.
[10] 8/17 FFCL, supra note 3, FOF ¶ 31.
[11] 8/17 FFCL, supra note 3, FOF ¶ 45.
[12] 8/17 FFCL, supra note 3, FOF ¶ 59.
[13] 8/17 FFCL, supra note 3, FOF ¶ 71.
[14] 8/17 FFCL, supra note 3, FOF ¶ 72.
[15] HRS § 237-24.3(2).
[16] Act 181, SLH 1980 (uncodified).
[17] 8/17 FFCL, supra note 3, FOF ¶ 89.
[18] 8/17 FFCL, supra note 3, FOF ¶¶ 92-95.

The circuit court ruled that the supplemental assessments were all void because the county didn't follow proper assessment procedure and that it wasn't lawful for the county to reach back for so many years. The court found that the county retaliated against Plaintiffs for suing, which violated many of Plaintiffs' constitutional rights. Thus, Plaintiffs were entitled to damages and attorneys' fees under federal civil rights law.[19]

And, for good measure, the court ruled the Time Share property tax classification on Maui invalid since inception, on the ground that it violated Maui County Code § 3.48.305. The court stated that Plaintiffs incurred damages in the amount of real property taxes they actually paid in excess of what they would have paid under the prior classification.[20] Maui County then, after some procedural steps necessary to perfect this appeal, brought the case here.

III. STANDARD OF REVIEW

A. SUBJECT MATTER JURISDICTION

Whether a court possesses subject matter jurisdiction is a question of law reviewable *de novo*. *Kinkaid v. Board of Review of the City and County of Honolulu,* 106 Haw. 318, 320, 104 P.3d 905, 907 (2004).

B. SUMMARY JUDGMENT

A grant or denial of summary judgment is reviewed *de novo*, using the same standard applied by the circuit court: a court may enter judgment where

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[19] 8/17 FFCL, supra note 3, Conclusions of Law.
[20] 3/18 FFCL, supra note 2, FOF ¶ 22.

there is no genuine issue of material fact and the prevailing party is entitled to judgment as a matter of law. *State ex rel. Anzai v. City & County of Honolulu,* 99 Haw. 508, 57 P.3d 433, 440 (2002). When interpreting municipal ordinances, the same rules of construction that apply to state statutes are used, and the interpretation is a question of law renewable *de novo. Weinberg v. City & County of Honolulu,* 82 Haw. 317, 322, 922 P.2d 371, 376 (1996).

IV. ARGUMENT

A. THE SECOND CIRCUIT COURT SHOULD BE ALLOWED TO RETAIN JURISDICTION.

1. Tax Controversies Normally Must be Determined by Specialized Tribunals, but Circuit Court Jurisdiction Has Been Recognized.

The court's first obligation is to ensure that it has subject matter jurisdiction to decide the issues presented. *Public Access Shoreline Hawaii v. Hawaii County Planning Commission,* 79 Haw. 425, 431, 903 P.2d 1246, 1252 (1995), *cert. denied,* 517 U.S. 1163 (1996). Subject matter jurisdiction may not be waived and can be challenged at any time. *Captain Andy's Sailing, Inc. v. Department of Land and Natural Resources,* 113 Haw. 184, 193-94, 150 P.3d 833, 842-43 (2006); *Bush v. Hawaiian Homes Commission,* 76 Haw. 128, 133, 870 P.2d 1272, 1277 (1974).

Statutes and ordinances relating to tax appeals have established specialized procedures for contesting tax assessments and specialized bodies such as the Boards of Review and the Tax Appeal Court. *See, e.g.,* HRS chapter 232; Maui County Code § 3.48.625, 3.48.645, 3.48.650. It has been held that these specific procedures using these tax-specific bodies can supplant more

general procedures such as Administrative Procedure Act appeals to the circuit courts under HRS § 91-14. *Kinkaid*, 104 P.3d at 911-12; *Aetna Life Insurance Co. v. Park,* 5 Haw. App. 122, 124-25, 678 P.2d 1104, 1106 (1984) .

HRS § 632-1, the declaratory judgment statute on which Plaintiffs premised circuit court jurisdiction in their original and first amended complaints, forbids declaratory judgments in tax controversies. *Grace Business Development Corporation v. Kamikawa,* 92 Haw. 608, 613 n.5, 994 P.2d 540, 545 n.5 (2000). Because this statute is based on the comparable federal Declaratory Judgment Act, the circuit court read *Hawaii Insurers Council v. Lingle,* 117 Haw. 454, 463, 184 P.3d 769, 778 (Ct. App.), *rev'd,* 120 Haw. 51, 201 P.3d 564 (2008), as saying that jurisdiction is allowed when the lawsuit is not attempting to keep the government from assessing and collecting taxes, so there is no bar when the taxes in question already have been paid. Federal authorities support this reading. *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293, 301 (1943) (stating that a state refund suit "affords an adequate remedy to the taxpayer and, at the same time, leaves undisturbed the state's administration of its taxes"); Note, The Tax Injunction Act and Suits for Monetary Relief, 46 U. Chi. L. Rev. 736, 746 (1979) ("The legislative history of the Tax Injunction Act does not … demonstrate a congressional intention to remove from the federal courts all suits *involving* state or local tax administration, but only those that permitted the taxpayer to adjudicate the lawfulness of a levy prior to payment").

In addition, our supreme court has recognized that the circuit courts have jurisdiction to hear tax appeals "to a limited extent." *Kinkaid*, 104 P.3d at 909 n.8; *In re Simpson Manor, Inc.,* 57 Haw. 1, 3, 548 P.2d 246, 248 (1976) (noting a First Circuit Court case in 1969 that had taken equity jurisdiction).

Thus, the Foundation urges that the circuit court here retain jurisdiction although tax controversies in court are usually handled by Tax Appeal Court.

2. Relegation of Plaintiffs' Civil Rights Claim to Tax Appeal Court Would Violate Federal Law.

Plaintiffs have pled and, according to the circuit court, have proved a claim under 42 U.S.C. § 1983 for deprivation of federal constitutional rights under color of state law. State courts may exercise jurisdiction over claims brought under that statute, *Haywood v. Drown,* 556 U.S. 729, 731 (2009), and the circuit courts have done so, for example in *Hac v. University of Hawaii,* 102 Haw. 92, 73 P.3d 46, 51 (2003). The Tax Appeal Court normally does not hear such cases because its jurisdiction "is limited to the amount of valuation or taxes, as the case may be, in dispute," HRS § 232-13, so it can adjust the taxes due and it can declare taxes invalid or illegal, but it is not able to award damages, attorney's fees, or similar relief under 42 U.S.C. § 1988. Requiring the circuit court to dismiss the case or transfer it to the Tax Appeal Court that has no ability to award damages would frustrate federal policy and run afoul of the federal Supremacy Clause. *Haywood*, 556 U.S. at 736-37 ("The State's policy, whatever its merits, is contrary to Congress' judgment that *all* persons who violate federal rights while acting under color of state law shall be held liable for

damages"); *Howlett v. Rose,* 496 U.S. 356, 380 (1990). The circuit court, therefore, must be allowed to retain jurisdiction over the 42 U.S.C. § 1983 claim.

3. Sound Judicial Administration Justifies Allowing the Circuit Court to Retain Jurisdiction Assuming Proper Tax Procedures Are Complied With.

Given the five years of work that already has been done in the circuit court, sound judicial administration favors allowing that court to retain jurisdiction over all claims as opposed to splitting Plaintiffs' causes of action between different courts, with the new courts to start from scratch. *See Jordan v. Hamada,* 64 Haw. 446, 452, 643 P.2d 70, 72 (1982) (sound judicial policy justifies the rule that a court first acquiring jurisdiction over a cause retains its power over it, to the exclusion of any court of coordinate jurisdiction, until the first court's action is terminated); *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 725-26 (1966) (discussing federal pendent jurisdiction as justified by judicial economy, convenience and fairness to litigants).

At the same time, however, the circuit court's ability to award relief in a tax dispute under state law must be subject to the procedural requirements for such controversies. *Aetna Life Insurance Co. v. Park,* 5 Haw. App. 122, 124-25, 678 P.2d 1104, 1106 (1984), held that the circuit court was without jurisdiction to order a refund of insurance premium taxes alleged to be unconstitutional if no appeal was properly perfected and the taxes were not paid under protest. *Captain Andy's Sailing, Inc. v. Department of Land and Natural Resources,* 113 Haw. 184, 195, 150 P.3d 833, 844 (2006), held that when proper procedural requirements are not followed, even unconstitutionally exacted fees can become

lawful government realizations. The circuit court found that "Plaintiffs' original claims, and those in their first Amended Complaint, did not challenge the County's real property assessments for any year."[21] Allowing the circuit court to, in effect, order a refund of those taxes as damages would subvert the prescribed tax appeal processes and would raise genuine concerns about catastrophic revenue loss to the County. *See In re Smart,* 54 Haw. 250, 253, 505 P.2d 1179, 1181 (1973) (holding that the real property tax statutes[22] "provide a system for the assessment of property taxes, the setting of rates by the counties and the billing of such taxes to the property owner," and that appeals not within the system "would subvert the real property taxation scheme").

B. THE COUNTY OF MAUI HAD POWER TO CREATE PROPERTY CLASSIFICATIONS THAT DID NOT DEPEND UPON USE, INCLUDING THE "TIME SHARE" CLASSIFICATION HERE.

1. Maui County Code § 3.48.305 Does Not Invalidate the Time Share Classification.

The circuit court invalidated the "time share" classification for not being based on use of the realty, allegedly in violation of Maui County Code § 3.48.305.

Specifically, subsection (A) of § 3.48.305 states, "Except as otherwise provided in subsection 3.48.305(B), land and building shall be classified, upon consideration of the real property's highest and best use." In 2004, Maui Ord. No. 3227 (2004) added paragraph 5 to subsection (A) establishing the Time Share classification, and a definition in subsection (C) clearly defining Time

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[21] 8/17 FFCL, supra note 3, FOF ¶ 22.
[22] At the time, real property taxing authority had not yet been transferred to the counties.

Share as a unit occupied by transient tenants that is subject to a time share plan under state law.[23] There is nothing in § 3.48.305 that purports to restrict tax classifications to those based on use, and it explicitly provides exceptions.

Also, Maui County Code § 1.04.040(C) states, "If conflicting provisions be found in different sections of the same chapter, the provisions of the section which are enacted later in time shall prevail unless such construction be inconsistent with the meaning of such chapter." It would be illogical for a different rule to obtain when the allegedly conflicting provisions are found in the same section of the same chapter. Thus, the Time Share classification cannot be invalidated by preexisting provisions in Maui County Code § 3.48.305.

2. The Counties May Create Real Property Tax Classifications at Their Discretion, and All Have Classifications, Credits, or Exemptions Not Based on Property Use.

In *Gardens at West Maui Vacation Club v. County of Maui,* 90 Haw. 334, 978 P.2d 772 (1999), a timeshare association on Maui challenged a 1997 ordinance that applied Maui's "Hotel Resort" property classification to all units subject to a time share plan as defined in HRS § 514E-1. Against the argument that a now-repealed state statute required the counties to maintain a single rate of tax, our supreme court held that the constitutional amendment that gave the counties property taxation powers transferred "all real property taxation powers to the counties, including the option to classify real property in the discretion of

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[23] A few years later, any conceivable defect in the wording of the ordinance was cured by Maui Ord. No. 3766 (2010), which added paragraph 3 to subsection (B), the exceptions to classification by highest and best use, clarifying that a unit subject to a time share plan as defined in HRS § 514E-1 would be classified as "time share" independent of use.

the individual county," repealing the state statute by implication. 90 Haw. at 341, 978 P.2d at 779 (footnote omitted).

All tax systems classify taxpayers and assign different financial consequences depending on whether they meet those classifications. Credits, exemptions, and property classifications are three ways of accomplishing this; thus, this analysis treats them as the same. *See In re Pacific Marine & Supply Co.,* 55 Haw. 572, 580-81, 524 P.2d 890, 896-97 (1974) (analyzing the subcontract deduction in the General Excise Tax law under equal protection classification cases). The *Gardens at West Maui* appellants assailed the ordinance as making a classification based on ownership rather than use. The court stated that the classifications involved were indeed based on use. However, nothing in the opinion shows any reason why property tax classifications cannot be based on factors other than use. If the rule were that property tax could be based only on use, the property tax systems of all counties would be thrown into turmoil. For example, Maui's circuit breaker credit is based on personal income, and Honolulu has a similar credit.[24] Maui has an exemption for deployed military personnel, which has nothing to do with use because it is a full exemption even if the individual is deployed for part of the year.[25] All four counties exempt kuleana land; that exemption depends on whether its owner is a lineal descendant of the person or persons who received

[24] Rev. Ord. of Honolulu §§ 8-13.1 to .6; Maui County Code §§ 3.48.800 to .825.
[25] Maui County Code § 3.48.556.

its original title.[26] All four counties exempt disabled veterans,[27] persons affected with leprosy,[28] and persons with impaired sight or hearing or totally disabled,[29] which are not uses of the property but medical conditions of its owner.

Of these, the exemptions for disabled veterans, leprosy sufferers, and those with impaired sight or hearing or totally disabled can be traced back to comparable exemptions under the state real property tax code before the 1978 Constitutional Convention transferred the real property taxing power to the counties. HRS §§ 246-29, -30, -31 (2012) (now repealed). This is significant because our constitution mandated that the rates, classifications, and exemptions in force at the time would be continued for eleven years. Haw. Const. art. XVIII, sec. 6. Our constitution, therefore, specifically approved those classifications; yet, as mentioned earlier, they all depend on medical conditions, not the use of property. A holding that property tax classifications can only depend on property use cannot be correct.

3. Counties' Classifications of Real Property Are Constitutional If Any Rational Basis Can Be Conceived to Support Them.

The Time Share property tax classification also has been attacked as being unconstitutional. When a classification is alleged to be unconstitutional, strict

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[26] Hawai'i County Code § 19-89.5; Rev. Ord. of Honolulu § 8-10.32; Kaua'i County Code § 5A-11.29; Maui County Code § 3.48.554.
[27] Hawai'i County Code § 19-73; Rev. Ord. of Honolulu § 8-10.6; Kaua'i County Code § 5A-11.6; Maui County Code § 3.48.475.
[28] Hawai'i County Code § 19-74; Rev. Ord. of Honolulu § 8-10.7; Kaua'i County Code § 5A-11.7; Maui County Code § 3.48.480.
[29] Hawai'i County Code § 19-75; Rev. Ord. of Honolulu § 8-10.8; Kaua'i County Code § 5A-11.8; Maui County Code § 3.48.485.

scrutiny applies if either a suspect class or fundamental right is involved; otherwise, the rational basis standard traditionally applies. *State v. Nakata,* 76 Haw. 360, 379, 878 P.2d 699, 718 (1994). When rational basis applies, the court "will only seek to determine whether any reasonable set of facts can be conceived" to uphold the law. *Daoang v. Department of Education,* 63 Haw. 501, 504-05, 630 P.2d 629, 631 (1981); *In re Pacific Marine & Supply Co.,* 55 Haw. 572, 581, 524 P.2d 890, 897 (1974). A legislative choice "may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 315 (1993). Here, no suspect class was involved, so rational basis review is appropriate. The ordinance creating the Time Share classification was, according to the available committee report, based on different treatment of timeshares and hotels under the TAT law. The TAT is of course a state tax but at the time the ordinance was enacted, and for nine years afterward, Maui County was entitled to roughly 10% of that tax. The classification had a rational basis.

For these reasons, the Time Share classification is constitutional and should not be invalidated.

C. THE RETALIATORY ASSESSMENTS ARE INVALID AND HAVE DEPRIVED THE TAXPAYERS OF CONSTITUTIONAL RIGHTS.

1. This Court Previously Held that the County Is Allowed to Assess Omitted Property at Any Time, So Laches Is Not a Proper Defense.

Kaheawa Wind Power LLC v. County of Maui, 135 Haw. 202, 347 P.3d 632 (Ct. App. 2014) ("*Kaheawa Wind Power I*"[30]), *cert. denied,* No. SCWC-12-0000728 (Haw. Feb. 19, 2015), noted that the Maui County Code provides no time limit within which the county must make "omitted property" assessments. In that case, Maui County in 2010 issued amended assessments for 2007, 2008, and 2009. The lease on which the assessment was based was signed in 2005, and this Court held that the assessments were valid and the date on which the County discovered the lease was not material. *Id.* at 212-13, 347 P.3d at 642-43. However, this Court noted that "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 Corp. v. Division of Alcoholic Beverages and Tobacco,* 496 U.S. 18, 40 n.23 (1990), and *County of Maui v. KM Hawaii Inc.*, 81 Haw. 248, 257 n.12, 915 P.2d 1349, 1358 n.12 (1999)).

Hawai'i has adopted the doctrine of *nullum tempus occurrit regi* – time does not run against the sovereign – meaning that laches and general statutes of

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[30] Kaheawa Wind Power LLC v. County of Maui, No. SCAP-17-0000816 (Haw. notice of appeal filed Nov. 3, 2017) ("Kaheawa Wind Power II"), is now pending before the Hawaii Supreme Court but does not involve issues germane to this appeal. The Foundation has filed an *amicus curiae* brief in that appeal.

limitation do not run against the government unless the legislature has expressly provided otherwise. *State v. Midkiff,* 49 Haw. 456, 485, 421 P.2d 550, 566 (1966); *Territory of Hawai'i v. Makaaa,* 43 Haw. 237, 239 (1959). The rationale for this rule is to preserve public rights, revenues, and property from injury or loss. *Stroudsburg Area School District v. R.K.R. Associates/Architects,* 417 Pa. Super. 85, 89, 611 A.2d 1276, 1278 (1992). Here, the circuit court held that the amended assessments were barred by laches.[31] The Hawai'i appellate courts have not yet decided whether *nullum tempus* applies to the counties. Some jurisdictions adopting the rule hold that it applies only to the state and not to municipal corporations. *See, e.g., Inhabitants of Topsham v. Blondell,* 82 Me. 152, 19 A. 93, 94 (1889); *Johnson v. Black,* 103 Va. 477, 49 S.E. 633, 638 (1905). Others have held that it applies to all governmental units, because there is no principled way to distinguish the state from the counties for this purpose. *Stroudsburg Area School District,* 417 Pa. Super. at 90, 611 A.2d at 1276; *Mountain View/Evergreen Improvement and Service District v. Brooks Water and Sewer District,* 896 P.2d 1355, 1359-60 (Wyo. 1995). To be consistent with the rule in *Kaheawa Wind Power I* that omitted property assessments can be made at any time, this Court may wish to hold that the doctrine does benefit the County and precludes a holding that laches barred the assessments.

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[31] 8/17 FFCL, supra note 3, COL ¶¶ 194-201.

2. The Retroactive Assessments Violated Maui Ordinance Because the Property Was Not Omitted and No Other Exceptions Apply.

Under the Maui property tax ordinances, the tax assessor is to prepare tax assessment lists by April 19 preceding the tax year. Maui County Code § 3.48.135. The lists so prepared are subject to change only by judgment of a court or other tribunal having jurisdiction, *id.,* to add assessments of omitted property, *id.* § 3.48.140, or to subtract adjustments due to clerical or mathematical errors, *id.*

In *Kaheawa Wind Power I*, this Court observed that State property newly leased to a tenant made the property taxable. The Court upheld a retroactive assessment against that property made in 2010 for the years 2007 through 2009 on the ground that it was omitted property. As here, the assessments were issued on "Amended Assessment" forms, but no tax was paid on the Kaheawa property before it was leased, because the State owned the fee simple. In sharp contrast, the property here was appraised and assessed, tax was fully paid on it, and the County credited such payment to the unit owners. It was not omitted from the assessment lists.

Even though real property is not "omitted," it can be reassessed in the same manner as omitted property, namely without time limitations, if it is (1) assessed to persons who do not have record title, or (2) if it is (a) improperly assessed so that no lien is created and (b) the taxes have not been fully collected. Maui County Code § 3.48.170. These requirements were not met because the taxes for 2006, 2007, and 2008 were assessed to Plaintiff associations, failing

requirement (1); and the associations fully paid the property tax assessed to the master parcels, failing requirement (2)(b).

To summarize, changes in the assessment lists are prohibited by Maui County Code § 3.48.135 unless they are actuated by a tribunal having jurisdiction, *id.*, are downward adjustments resulting from clerical or mathematical mistakes, *id.* § 3.48.140, are an assessment of omitted property, *id.,* or are authorized by § 3.48.170 (discussed in the previous paragraph). None of these exceptions are met here, so the amended assessments are not valid.

Kaheawa Wind Power I also considered the effect of Maui County Code § 3.48.145, which states that an assessment or related act will not be rendered invalid because it was not completed within the time required by law. That ordinance has no application here because the problem is not that the amended assessments were late. Rather, they are reassessments prohibited by Maui County Code § 3.48.135. If the rule were not so, there would never be finality to real property tax assessment because the County, perhaps claiming a faulty or outmoded assessment methodology, or perhaps a need for more revenue to fund worthy causes, could reassess any year at any time. The ordinances clearly contemplate finality in the assessment lists.

For these reasons, the 2006, 2007, and 2008 reassessments are invalid, and this Court should so hold.

3. The Retroactive Assessments Violated Constitutional Limitations.

The retroactive assessments are also invalid because they violate the constitutional limitations this Court referred to in *Kaheawa Wind Power I*.

In *Gardens at West Maui v. County of Maui,* 90 Haw. 334, 344, 978 P.2d 772, 782 (1999), the plaintiffs argued that the retroactive nature of on ordinance that classified all timeshares as Hotel and Resort made it unconstitutional. Our supreme court looked to *United States v. Carlton,* 512 U.S. 26, 32 (1994), as stating that the primary factors to be considered when deciding the constitutionality of retroactive action are whether the purpose of the retroactive action was illegitimate or arbitrary, and whether only a modest period of retroactivity was established. *Gardens at West Maui*, 90 Haw. at 344, 978 P.2d at 782 (quoting *Carlton*, 512 U.S. at 32).

Although a "modest period of retroactivity" remains undefined, recent cases have upheld legislation going back several years. *Gillette Commercial Operations North America v. Department of Treasury,* 312 Mich. App. 394, 878 N.W.2d 891 (Ct. App. 2015), *leave to appeal denied,* 499 Mich. 960, 880 N.W.2d 230 (2016), *cert. denied,* 137 S. Ct. 2157 (2017), upheld a 2014 law effective retroactively to 2008, partly on the ground of preventing inordinate revenue loss. *Dot Foods, Inc. v. Department of Revenue,* 185 Wash. 2d 239, 372 P.3d 747 (2016), *cert. denied,* 137 S. Ct. 2156 (2017), upheld a 2010 statute changing the law retroactively 27 years to prevent the massive and debilitating loss of revenue that the Department said would otherwise result. These long periods of retroactivity were, arguably, themselves justified by a rational legislative purpose assuming the motive was proper. *Gardens at West Maui,* 90 Haw. at 344 n.14, 978 P.2d at 782 n.14 (quoting *Carlton*, 512 U.S. at 31); *see Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 16-17 (1976).

However, retroactive law or interpretations have been held to violate due process where the government acted with an improper motive. *Newsweek, Inc. v. Florida Department of Revenue,* 522 U.S. 442 (1998) (disapproving "bait and switch" tactic of holding out what appears to be a remedy to challenge taxes and then saying that no such remedy exists); *Reich v. Collins,* 513 U.S. 106 (1994) (similar). As shown in the next section, selective retaliation against a taxpayer for petitioning the government to resolve a tax controversy violates federal law and cannot be a proper motive. The circuit court did not err when it found the retroactive assessment of taxes to be unconstitutional as well.

4. A County that Back-Assesses Taxpayers to Retaliate Against a Lawsuit Deprives Those Taxpayers of Constitutional Rights.

In *Mt. Healthy School District Board of Education v. Doyle,* 429 U.S. 274 (1977), the Supreme Court held that a person states a cause of action under 42 U.S.C. § 1983 when the person shows that constitutionally protected conduct was a "substantial factor," or a "motivating factor," in an action taken by a defendant under color of law that damages the plaintiff, and the defendant then fails to show by a preponderance of the evidence that the defendant would have taken the same action even in absence of the protected conduct. *Id.* at 287. *Thaddeus-X v. Blatter,* 175 F.3d 378, 394 (6th Cir. 1999) (en banc), is one of many cases holding that access to the court system is a right protected by the First Amendment so governmental retaliation against one who exercises that right is impermissible. Thus, reassessment of Plaintiffs in retaliation for suing the county is a denial of First Amendment rights and is actionable under § 1983.

A § 1983 violation also can be established when a plaintiff shows that a municipality has selectively reassessed the plaintiff's realty, for that would be a denial of equal protection. *Corvetti v. Town of Lake Pleasant,* 146 A.D.3d 1118, 1124, 46 N.Y.S.3d 679, 686 (2017); *Resnick v. Town of Canaan,* 38 A.D.3d 949, 952-53, 832 N.Y.S.2d 102 (2007). Thus, reassessment of plaintiffs' properties while other similarly situated properties are not reassessed is actionable under § 1983 even if the reassessment is not retaliatory.

Either of these theories supports the circuit court's conclusions that the elements of a § 1983 claim have been established, and that the selective, retroactive reassessment of the Plaintiffs' realty was performed with an improper motive.

V. CONCLUSION

For these reasons, the Foundation supports the result below except for the determination that Maui's Time Share classification was invalid, and urges this Court to reverse on that issue but otherwise affirm the judgment and remand with proper directions.

DATED: Honolulu, Hawai'i, December ____, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document will be served on counsel of record indicated below through JEFS upon the filing hereof:

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