Electronically Filed
Intermediate Court of Appeals
CAAP-18-0000578
25-DEC-2018
06:33 PM

CAAP NO. 18-0000578

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, VIC H. HENRY, and PETER A. BAGATELOS,

Plaintiffs/Appellees,

v.

COUNTY OF MAUI and MAUI COUNTY COUNCIL,

Defendants/Appellants.

Civil No. 13-1-0848(2) (PTC)

(Other Civil Action)

DEFENDANTS/APPELLANTS COUNTY OF MAUI'S AND MAUI COUNTY COUNCIL'S NOTICE OF APPEAL FROM **1)** ORDER CERTIFYING FOR INTERLOCUTORY APPEAL THE FINDINGS OF FACT CONCLUSIONS OF LAW; [ILLEGALITY] ORDER, FILED MARCH 23, 2018, PURSUANT TO HAWAI'I REVISED STATUTES SECTION 641-1(b) AND STAYING PROCEEDINGS UNDER HAWAI'I RULES OF CIVIL PROCEDURE RULE 62(d) AND (e), **2)** ORDER CERTIFYING FOR INTERLOCUTORY APPEAL COUNTS V, VI, VII, AND VIII OF THE SECOND AMENDED COMPLAINT, FILED AUGUST 12, 2016, PURSUANT TO HAWAI'I RULES OF CIVIL PROCEDURE RULE 54(b), AND STAYING PROCEEDINGS UNDER HAWAI'I RULES OF CIVIL PROCEDURE RULE 62(d) AND (e), and **3)** FINAL JUDGMENT ON COUNTS V, VI, VII, AND VIII OF THE SECONDED AMENDED COMPLAINT FILED ON AUGUST 12, 2016

Second Circuit Court

Judge: Honorable Peter T. Cahill

DEFENDANTS/APPELLANTS
COUNTY OF MAUI'S AND MAUI COUNTY
COUNCIL'S OPENING APPELLATE BRIEF

STATEMENT OF RELATED CASES; EXHIBITS A, B, C and D

APPENDICES 1 through 5

CERTIFICATE OF SERVICE

Department of the Corporation Counsel 205

PATRICK K. WONG 5878
Corporation Counsel
BRIAN A. BILBERRY 7260
Deputy Corporation Counsel
County of Maui
200 S. High Street
Wailuku, Hawaii 96793
Telephone: (808) 270-7741
Facsimile: (808) 270-7152
Attorneys for Defendants/Appellants
COUNTY OF MAUI and
MAUI COUNTY COUNCIL

TABLE OF CONTENTS

I. SUMMARY 1
II. STATEMENT OF THE CASE 3
A. PLAINTIFFS' COMPLAINTS AND CLAIMS IN THE UNDERYING CASE 3
B. RELATED SECOND CIRCUIT COURT CASE *CIVIL NO. 15-1-0435(1)(RILL)* 5
C. RELEVANT BACKGROUND 7
I. THE TIMESHARE RESORT 7
II. COUNTY ORDINANCE NO. 3227 8
III. PLAINTIFFS' OMITTED CONDOMINIUM PROPERTY 9
D. LEGAL DIPSUTES, FINDINGS AND RULINGS IN CASE BELOW 12
I. DISPUTED SUBJECT MATTER JURISDICTION 12
II. THE CIRCUIT COURT'S FIRST FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS 14
III. THE CIRCUIT COURT'S SECOND FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS 16
IV. ANTICIPATED FURTHER PROCEEDINGS 18
E. INTERLOCUTORY ORDERS AND APPEAL 19
F. RELATED TAX APPEAL COURT *CASE NO. 1TX 17-1-0225 AND CONSOLIDATED CASES 1T.X. 17-1-0491 THROUGH 1T.X. 17-1-0773, 1T.X. -1-0226, 1T.X. 17-1-0774 THROUGH 1T.X. 17-1-1056, 1T.X. 17-1-0227, 1T.X. 17-1-1057 THROUGH 1T.X. 17-1-1339, AND 1T.X. 17-1-0228 THROUGH 1T.X. 17-1-0490* 21
III. STATEMENT OF POINTS OF ERROR 21
IV. STANDARD OF REVIEW 23
V. AGUMENT ON APPEAL 26
A. THE SECOND CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION TO ADJUDICATE THIS CASE 26
B. THE RULING BELOW THAT THE "TIMESHARE" CLASSIFICATION IS "ILLEGAL" EXCEEDED THE CIRCUIT COURT'S CONSTITUTIONAL AUTHORITY AND IMPROPERLY INTRUDED ON THE COUNTY'S LEGISLATIVE FUNCTION 27
C. THE RULING BELOW THAT A CLASSIFICATION FOR "TIMESHARE" CAN ONLY BE ESTABLISHED BASED ON ACTUAL USE IS WRONG 28
D. THE RULING BELOW THAT PLAINTIFFS ARE ENTITLED TO TAX REFUNDS AS "DAMAGES" IS WRONG 29
E. THE FINDING AND RULING BELOW THAT THE COUNTY RETALIATATED AGAINST PLAINTIFFS AND THAT THE OMITTED ASSESSMENTS ARE ILLEGAL ARE CLEARLY ERRONEOUS AND WRONG 30
F. THE ORDER BELOW TO THE COUNTY TO REFUND OMITTED TAXES, AND REIMBURSE APPEAL FEES TO PLAINTIFFS WAS AN ABUSE OF DISCRETION 34
G. THE AWARD OF ATTORNEYS' FEES AND COST TO PLAINTIFFS BELOW WAS AN ABUSE OF DISCRETION 34
VI. CONCLUSION 35

TABLE OF AUTHORITIES

Cases

Amantiad v. Odum, 90 Hawai'i 152, 997 P.2d 160 (1999) 23

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 25, 31

Anselmo v. Mull, 2013 WL 5817560 (2013) 32

Canalez v. Bob's Appliance Serv. Center, Inc., 89 Hawai'i 292,
972 P.2d 295 (1999) 34, 35

Casumpang v. ILWU Local 142, 108 Haw. 411, 121 P.3d 391 (2005) 24

Cigolini Associates v. Borough of Fairview, 208 N.J. Super 654,
506 A.2d 811 (1986) 33

Coll v. McCarthy, 72 Haw. 20, 804 P.2d 881 (1991) 35

Eastman v. McGowan, 86 Hawai'i 21, 946 P.2d 1317 (1997) 35

Frank v. Government of Virgin Islands, 2012 WL 611373 (2012) 25

Fourmost, Inc. v. Parsippany-Troy Hill Tp., 11 N.J. Tax 57 (1990) 33

Furukawa v. Honolulu Zoological Soc., 85 Hawai'i 7, 936 P.2d 643 (1997) 24

Gardens at West Maui Vacation Club v. County of Maui,
90 Hawai'i 334, 978 P.2d 772 (1999) 28

Housing Fin. & Dev. Corp. v. Castle, 79 Hawai'i 64, 898 P.2d 576 (1995) 27

Hunter v. County. of Sacramento, 652 F.3d 1225 (9th Cir. 2011) 32

Iddings v. Mee–Lee, 82 Hawai'i 1, 919 P.2d 263 (1996) 25

In re Attorney's Fees of Mohr, 97 Haw. 1, 32 P.3d 647 (2001) 34

In re Pacific Marine & Supply Co., Ltd., 55 Haw. 572, 524 P.2d 890 (1974) 28

Jones v. Williams, 297 F.3d 930 (9th Cir. 2002) 32

Kaheawa Wind Power, LLC v. County of Maui,
135 Hawai'i 202, 347 P.3d 632 (2014) 25, 34

Kamikawa v. Lynden, 89 Hawai‘i 51, 968 P.2d 653 (1998) 25

Kealoha v. Cty. of Hawaii, 74 Haw. 308, 844 P.2d 670 (1993) 24

Kincaid v. Bd. of Review of Review of City & Cty. of Honolulu,
106 Hawai'i 318,104 P.3d 905 (2004) 1, 5, 23, 24, 26

Korean Buddhist Dae Won Sa Temple of Hawai'i v.
Concerned Citizens of Palolo, 107 Hawai'i 371,
114 P.3d 113 (2005)..... 23, 27

Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., 6 Haw. App. 431,
726 P.2d 268 (1986)..... 34

Lester v. Rapp, 85 Hawai’i 238, 942 P.2d 502 (1997) 23

Lewis v. Dep't of Revenue, 10 Or. Tax 128 (1985)..... 33

Monell v. Department of Social Services, 436 U.S. 685 (1978) 32

ln re Pacific Marine & Supply Co., Ltd., 55 Haw. 572,
524 P.2d 890 (1974).....

Ross v. Stouffer Hotel Co. (Hawai‘i), Ltd., 76 Hawai‘i 454, 460,
879 P.2d 1037 (1994)..... 24

Schlegel v. Life Ins. Co. of N. Am., 269 F.Supp.2d 612 (E.D. Pa. 2003)..... 25

Schwam v. Township of Cedar Grove, 228 N.J. Super 522,
550 A.2d 502 (1988).....

Smothers v. Renander, 2 Haw.App. 400, 633 P.2d 556 (1981)..... 34

Stores v. Bowers, 358 U.S. 522, 79 S.Ct. 437 (1959).....

Trevino v. Gates, 99 F.3d 911 (9th Cir. 1996)..... 32

United States v. O'Brien, 391 U.S. 367, 88 S.Ct 1673,
20 L.Ed.2d 672 (1968).....

Webb v. Sloan, 330 F.3d 1158 (9th Cir. 1996) 32

Wohlschlegel v. Uhlmann-Kihei, Inc., 4 Haw.App. 123, 135,
662 P.2d 505 (1983)..... 34

Young v. Planning Comm'n of County of Kaua'i,
89 Hawai'i 400, 974 P.2d 40 (1999) 25

Constitution, Statutes, and Rules

Hawai'i State Constitution, Article VIII, Section 3 28

42 U.S.C. §1983 ..... 32, 33

Ninth Circuit Jury Instruction No. 9.8 33

Standing Committee Report No. 42,
Proceedings of the Constitutional Convention 1978 42

Committee of the Whole Report No. 7
Proceedings of the Constitutional Convention 1978 28

Hawai'i Revised Statutes § 232-11 26

Hawai'i Revised Statutes § 232-15 ..... 1, 5, 29

Hawai'i Revised Statutes § 232-16 ..... 1, 5, 26

Hawai'i Revised Statutes § 232-17 ..... 1, 5, 26, 29

Hawai'i Revised Statutes § 514-3 7

Hawai'i Revised Statutes § 514A-6 7

Hawai'i Revised Statutes § 514B-4 7

Hawai'i Rules of Civil Procedure, Rule 56 ..... 25, 31

Codes and Ordinances

Maui County Code § 3.48.130 4

Maui County Code § 3.48.185 4

Maui County Code § 3.48.305 ..... 4, 28, 29

Maui County Code § 3.48.595 ..... 1, 4, 5, 29

Maui County Code § 3.48.605 ..... 1, 4, 29

Maui County Code § 3.48.620 4

Maui County Code § 3.48.625 4

Maui County Code § 3.48.670 12

Maui County Ordinance No. 3227 (2004) 8

Revised Ordinances of Honolulu §8-7.1(c)(2) 28, 29

County of Maui Budget and Finance Committee
Report No. 04-78 ..... 8, 9

County of Maui Budget and Finance Committee
Report No. 05-63 8

OPENING APPELLATE BRIEF

Defendants/Appellants COUNTY OF MAUI and MAUI COUNTY COUNCIL (the "County") submit this Opening Appellate Brief pursuant to the Hawai'i Rules of Appellate Procedure, Rule 28.

I. SUMMARY

In the underlying lawsuit, Plaintiffs/Appellees[1] are asking for as much as $34 million dollars in real property tax refunds for assessment years dating back 12-14 years. The refunds are sought despite Plaintiffs as taxpayers having never made timely annual tax appeals to Maui County's Board of Review for each of the assessment years 2006, 2007, 2008, 2011, 2012, 2013, 2014, 2016, and 2017, as required by Maui County Code, and by Hawai'i Revised Statutes.[2] *See*, MCC §§ 3.48.595 and 3.48.605; *see also*, HRS §232-15. Plaintiffs as Tax Payers also failed to timely appeal their real property tax assessments within the required statutory limitations periods to the Tax Appeal Court, which has special and exclusive subect matter jurisdiction over claims for real property tax refunds. *See*, MCC §§3.48.595; *see also*, HRS §§232-16 and 232-17; *see also*, Kincaid, et al. v. Board of Review, 106 Hawai'i 318, 104 P.3d 905 (2004) (Precluding the circuit court's general subject matter jurisdiction over a real property tax appeal, holding that "a 'rational, sensible, and practicable interpretation' of HRS § 232-17 [*Appeals from Boards of Review*] must, of necessity, mandate that its appellate procedures be followed to the exclusion of those in HRS § 91-14(a).").

Depsite these jurisdictional defects and despite their claims to tax refunds being indisputably time-barred, the Second Circuit Court adjudicated Plaintiffs' lawsuit below,

---

[1] Plaintiffs/Appellees OCEAN RESORT VILLAS VACATION OWNERS ASSOCATION and OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION are a community of timeshare owners who initiated this lawsuit on August 19, 2013, filed a First Amended Complaint on August 28, 2014, and a Second Amended Complaint on August 12, 2014. Plaintiffs/Appellees VIC H. HENRY and PETER A. BAGETELOS are respectively two members of the timeshare associations, purportedly identified as "representatives" of the more than 27,000 other timeshare member/sowners.

[2] As taxpayers, the ORV Plaintiffs did appeal their 2009 and 2010 real property tax assessments to the Board of Review and Tax Appeal Court, but those appeals were settled before any decision by the Tax Appeal Court, and dismissed *with prejudice* pursuant to stipulation. Plaintiffs also made an appeal to the Board of Review for the assessment year 2015, but that appeal was withdrawn before any hearing and ruling, and no Tax Appeal Court case was initiated.

improperly asserting general subject matter jurisdication over Plaintiffs' tax dispute and their time-barred claims for tax refunds.

The lawsuit basely alleges that Maui County's general real property tax classification for "Timeshare" violates the equal protection and due process clauses of the United States and Hawai'i Constitutions. Yet, the Second Circuit Court avoided addressing the constitutional contentions raised, and instead ruled that the Maui County Code's "Timeshare" classification was "illegal," a claim not pled in Plaintiffs' Complaint, or either of two amended complaints. The Second Circuit Court also ruled that Plaintiffs are entitled to prove at a trial amount(s) of their claims to tax refunds for each annual assessment year dating back to 2006, mischaracterizing the alleged refund amounts sought as "damages." This conclusion ignores both the exclusive jurisdiction of the Tax Appeal Court, as well as the statute of limitations for annual tax appeals and claims to refunds.

Additionally, the Second Circuit Court inappropriately found and ruled that as a matter of law the County of Maui's assessment of omitted condonminium property owned by Plaintiffs, and discovered in the investigation of Plaintiffs' claims, was "retaliatory." This was despite Plaintiffs themselves placing the omitted taxes in issue by filing this lawsuit seeking refunds on the omitted property, and despite Plaintiffs' own arguments that a counterclaim by the County for the unpaid taxes was precluded in lieu of the County assessing the property pursuant to the Maui County Code.

In sum, the Second Circuit Court ignored the specific and exclusive jurisdiction of the Tax Appeal Court and allowed Plaintiffs to file and adjudicate time barred claims for 12-14 years tax refunds, in flagrant disregard of all applicable county code and state statutory tax procedures. At the same time, Defendant County of Maui was compelled by Plaintiffs' posturing to avail itself of applicable code provisions and procedures, and after doing so, the Second Circuit Court condemned the County's availing itself of this process as "relalitatory."

After later recognizing the perilous financial consequences and irreparable harm threatened to the County of Maui and its citizens by its substantive rulings, the Second Circuit Court issued orders for this interlocutory appeal on June 25, 2018. The Court elected to forgo entering a judgment for the 12-14 years of tax refunds claimed by Plainiffs pending this appeal. There is no question that pending appellate review, a judgment for 12-14 years of tax refunds would undermine Maui County's past annual budgets dating back to 2006, be destructive to

Maui County's bond credit rating, and imperil the County's and its residents' future fiscal and financial security. *See*, JEFS Dkt. 110, PDF 686-688 & 689-691 (Declaration of Sananda K. Baz, and Declaration of Scott Teruya).

This appeal contests, *not exclusively*: **1)** the Second Circuit Court's improper assertion of general subject matter jurisdiction over Plaintiffs' claims to real property tax refunds, which by law fall under the special and exclusive subject matter jurisdiction of the Tax Appeal Court; **2)** a declaration made by the Second Circuit Court purporting to void real property tax provisions of the Maui County Code as "illegal," contrary to the constitutional doctrine of Separation of Powers, and contrary to Maui County's real property tax code classification provisions; **3)** the Second Circuit Court's avoidance and failure to rule on the constitutionality of Maui County's general real property classification of "Timeshare," **4)** rulings by the Second Circuit Court which will result in entry of a judgment of up to $34 million in aggregate tax refunds as "damages" against the County for the past 12-14 years, despite Plaintiffs not having filed timely tax appeals for each prior assessment year to either the County's Board of Review or the Tax Appeal Court; and **5)** the Second Circuit Court's findings and ruling that omitted real property assessments made and issued by the County of Maui's Real Property Assessment Division in accordance with the Maui County Code were "illegal" and "retaliatory" against the Plaintiffs in this case, "unconstitutional," and a violation of 42 U.S.C. § 1983.

Subsequent to filing of this Opening Appellate Brief, Defendants/Appellants will be sumbitting an *Application for Transfer Case to the Supreme Court of Hawai'i*.

II. STATEMENT OF THE CASE

A. PLAINTIFFS' COMPLAINTS AND CLAIMS IN THE UNDERLYING CASE

Plaintiffs/Appellees OCEAN RESORT VILLAS VACATION OWNERS ASSOCATION ("ORV"), OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION ("ORV NORTH"), et. al. ("Plaintiffs" or "Appellees") are a community of timeshare owners who initiated the underlying lawsuit on August 19, 2013. *See*, JEFS Dkt. 52, PDF 15-30. Plaintiffs filed a First Amended Complaint on August 28, 2014. Id., PDF 951-968. A Second Amended Complaint was filed on August 12, 2016. *See*, JEFS Dkt. 74, PDF 268-291. Plaintiffs allege that Maui County Ordinance No. 3227 establishing the County's "Timeshare"

real property tax classification in 2004,[3] and resolutions setting the tax rate for each subsequent tax year through 2015 [assessment year 2014[4]] violated equal protection (Count I) and due process (Count II), and baselessly contend the Maui County Council violated Hawai'i Revised Statutes, Chapter 92 ("Sunshine Law") when the councilmembers deliberated to establish the classification and/or rates for "Timeshare" (Counts III and IV).[5]

In addition, the Second Amended Complaint further sought a declaration that omitted property valuation assessments issued in 2016 by the County for assessment years 2007, 2008, and 2009 [tax years 2008, 2009, and 2010] pending this litigation were illegal (Count V), and were retaliatory violations of Plaintiffs' 1st amendment free speech (Count VI), due process rights (Count VII), and violated 42 U.S.C. § 1983 (Count VIII). Nowhere in any of the three Complaints filed did the Plaintiffs plead or allege the "Timeshare" classification and/or rate were "illegal."

In the underlying lawsuit, Plaintiffs seek as much as $34 million of real property tax refunds for tax years dating back 12-14 years to 2006.[6] This is despite never having made timely annual tax appeals for those refunds to Maui County's Board of Review[7] for each of the assessment years 2006, 2007, 2008, 2011, 2012, 2013, 2014, 2016, and 2017, as required by Maui County Code, and by Hawai'i Revised Statutes.[8] *See*, MCC § 3.48.595 and § 3.48.605; *see*

---

[3] The "Timeshare" tax classification established in 2004 became effective in 2005.

[4] The Real Property Assessment Division of Maui County's Department of Finance issues annual property valuation assessments for tax purposes to the owners of each and every parcel of real property within the County. *See*, MCC § 3.48.130. The valuation for each property is then subject to a tax rate the following "tax year," which corresponds to the fiscal year beginning July 1st. *See*, MCC § 3.48.185. The applicable tax rate for any property depends upon which general classification established in the Maui County Code to which the assessed property is assigned. *See*, MCC § 3.48.305(A).

[5] The County moved for summary judgment on these claims *twice*, based on Plaintiffs' failure to identify a shred of evidence supporting the alleged Sunshine Law violation(s). *See*, JEFS Dkt. 54, PDF 956-1009 & JEFS Dkt. 76, PDF 352-486. Plaintiffs have consistently been unable to show any good faith or reasonable factual basis for the claims. *See*, JEFS Dkt. 56, PDF 678-875 & JEFS Dkt. 80, PDF 201-220. The the motions were denied, and the bogus claims inexplicably remain, never having been disposed of. *See*, JEFS Dkt. 86, PDF pp. 102-104.

[6] In response to written discovery requests served by the County, on July 7, 2015 Plaintiffs identified the tax refunds they claim for each assessment year dating back to 2005 as "damages." *See*, JEFS Dkt. 66, PDF pp. 428-432.

[7] The Board of Review is an administrative board enabled by code to hear initial appeals by taxpayers from their property valuation assessments. *See*, MCC § 3.48.620 and MCC § 3.48.625.

[8] As taxpayers, the Plaintiffs' predecessor development entity did appeal their 2009 and 2010 real

also, HRS § 232-15. It is also undisputed that as taxpayers, Plaintiffs did not appeal their real property tax assessments to the Tax Appeal Court within the required limitations period for any of the assessment years 2006, 2007, 2008, 2011, 2012, 2013, 2014, 2015, 2016, and 2017, as required by state statute. *See*, MCC § 3.48.595; *see also*, HRS § 232-16 and § 232-17.

Plaintiffs' misdirected argument below was that because they were not contesting the valuation assessments of their real property made by the County's Real Property Assessment Division, their claims do not come under the special and exclusive subject matter jurisdiction of the Tax Appeal Court. Plaintiffs also apparently wrongly contend on this basis that they are not time-barred by the applicable annual limitations periods from seeking tax refunds for the past 12-14 years.

B. RELATED SECOND CIRCUIT COURT CASE *CIVIL NO. 15-1-0435(1)(RILL)*

On August 28, 2014, Plaintiffs filed *a second separate lawsuit* in the Second Circuit Court, separately seeking tax refunds for assessment years 2015 and 2016 [tax years 2016 and 2017].[9] *See*, JEFS Dkt. 60, PDF 302-312. The second lawsuit made identical claims for denial of constitutional equal protection, due process, and Sunshine Law violations as related to the establishment of the "Timeshare" tax classification and/or rates. Id. In response the County filed an Answer, and a Counterclaim in set-off, based on the discovery in 2015 by the County's Real Property Assessment Division that Plaintiffs' timeshare condominium real property was omitted from valuation in 2006, 2007, and 2008. *See*, Section C., iii., *infra*.

The Plaintiffs moved in Civil No. 15-1-0435(1)(RILL) to dismiss the County's Counterclaim for set-off, et seq., arguing extensively that the Circuit Court "*lacked subject matter jurisdiction*," that the Hawai'i Revised Statutes and Maui County Code "*vests the board of review and tax appeal court with exclusive jurisdiction*," and "*the doctrine of exclusive*

---

property tax assessments to the Board of Review and Tax Appeal Court, but *those appeals were settled* before any decision by the Tax Appeal Court, and dismissed *with prejudice* pursuant to stipulation. Plaintiffs also made an appeal to the Board of Review for the assessment year 2015, but that appeal was withdrawn before any hearing and ruling, and no Tax Appeal Court case was initiated.

[9] Rather than move to amend Civil No. 13-1-0848(2)(PTC) to add these claims for the subsequent tax years, Plaintiffs then attempted to consolidate Civil No. 15-1-0435(1)(RILL) with their original lawsuit. *See*, JEFS Dkt. 60, PDF 155-169. Consolidation was denied. *See*, JEFS Dkt. 60, PDF 584-584. Plaintiffs' eventually dismissed Civil No. 15-1-0435(1)(RILL) *with prejudice*. *See*, Statement of Related Cases, **Exhibit A**.

jurisdiction precludes this [Circuit] Court from adjudicating matters involving tax disputes." *See*, JEFS Dkt. 66, PDF 354-368. (exerpted Plaintiffs' Motion to Dismiss Defendant County of Maui's Counterclaim for Set-Off and/or Damages, et seq., filed in Civil No. 15-1-0435(1), Memorandum in Support of Motion) (citing Kincaid v. Bd. of Review of Review of City & Cty. of Honolulu, 106 Hawai'i 318, 324,104 P.3d 905,911 (2004)).

Plaintiffs' counsel also specifically argued before the Circuit Court in Civil No. 15-1-0435(1)(RILL) that:

> *[T]his court lack[s] subject jurisdiction because exclusive jurisdiction rest with the tax appeal court.*
>
> Regarding the County's failure to exhaust administrative remedies, the Maui County Code provides that the real property tax appeals are (inaudiable) one of the first instances for the County board review. The Maui County Code further sets forth a detailed process by which the County makes its assessments, issues its assessments, *as well as the process to appeal those assessments. This process applies to retroactive assessment as well.*
>
> * * * * *
>
> When the [county] does -- if and when the [county] does, the plaintiffs will appeal the tax assessments for retroactive assessments. And *that will go before the County Board of Review*. Should the County Board of Review enter a decision and our clients don't prevail, *we'll likely appeal it to the Tax Court*. That is neither here nor there. And *this Court does not have jurisdiction over those issues*.

See, JEFS Dkt. 66, PDF 369-373 (excerpted Transcript of Proceedings, dated December 29, 2015 in Civil No. 15-1-0435(1)(RILL)). (Emphasis added). On March 3, 2016, the Order Granting Plaintiffs/Counterclaim Defendants' Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association's Motion to Dismiss Defendant County of Maui's Counterclaim for Set-Off and/or Damages Filed November 30, 2015 was entered in Civil No. 15-1-0435(1)(RILL). *See*, JEFS Dkt. 66, PDF 374-376. The dismissal order in Civil No. 15-1-0435(1)(RILL) *drafted by Plaintiffs/Appellees' counsel* specifically provided:

> Plaintiffs argue that the Maui County Code and the Hawai'i Revised Statutes provide the process for retroactive assessment and taxation, and that this Court lacks subject matter jurisdiction over such claims until administrative and Tax Appeal Court remedies have been exhausted. The Court agrees. Id., PDF 375.

After the Second Circuit Court's rulings in the underlying case here were made [Civil No. 13-1-0848(2)(PTC)], on January 23, 2017, Plaintiffs' filed a Stipulation for Dismissal in Civil

No. 15-1-0435(1)(RILL) which expressly disposed of that case *with prejudice*. *See*, Statement of Related Cases, **Exhibit A**.

C. RELEVANT BACKGROUND

i. THE TIMESHARE RESORT

The Westin Ka'anapali Ocean Resort Villas ("timeshare resort") consists of l02l-6 condominium units, in 8 different buildings spread across 26 acres[,] located at 170 Kai Ala Drive, Lahaina, Maui, Hawai'i 96761. The condominium units are subject to timeshare plans, used for transient occupation by the two Plaintiff associations combined approximate 27,000 owners/members. Plaintiffs' timeshare resort was established as condominium property by respective Declarations of Condominium Property Regimes dated August 24, 2001 and April 25, 2005.[10] *See*, JEFS Dkt. 78, PDF 791. The creation of condominiums at the Resort divided the land and improvements on the Property into separately owned apartments units and common elements.

As such, each condominium unit at the timeshare resort constitutes a separate parcel of real estate, assigned its own tax map key. *See*, Hawai'i Revised Statutes §§ 514B-4 and 514A-6, *infra*; *See*, JEFS Dkt. 78, PDF 841-846 & 942-944 (excerpted Deposition of Kenneth Hoo, *Depo. Exhibit 2 and Exhibit E*). By law each condominium unit shall be assessed and taxed individually. *See*, Hawai'i Revised Statutes, §§ 514B-4 and 514A-6. To be assessed as separate condominium units, the market approach using sales comparisons of similar units must be used. *See*, JEFS Dkt. 78, PDF 747-748 (Declaration of Property Technical Officer Marcy Martin, at ¶ 3). The assessment of real property at the timeshare resort for tax purposes is therefore based on the valuations of the *separate condominium units*. Id., at ¶ 4. The tax is paid by ORV and ORV NORTH as an aggregate of the taxes levied on all 1026 units. Id. The County's real property tax assessment notices for the condominium units operated for timeshare use are sent to the ORV

[10] Certificates of Occupancy for the ORV Condominium at the Resort were issued for the Kahakai building (Building A) on September 3, 2003, the Halekipa building in 2003, the Makani Kai building (Building B) on May 27, 2005, and the Ahelani building (Building C) on June 30, 2005. *See*, JEFS Dkt. 78, PDF 797-806. Certificates of Occupancy were issued for the ORV NORTH Condominium at the Resort were issued for Building 5 on December 22, 2006, for Building 6 on June 27, 2007, for Building 7 on November 7, 2007, and Building 8 on November 9, 2007. *See*, JEFS Dkt. 78, PDF 807-840.

and ORV NORTH timeshare plan manager. *See*, Hawai'i Revised Statutes, § 514E-3;[11] *see also*, *See*, Id., at ¶ 5.

ii. COUNTY ORDINANCE NO. 3227

The COUNTY'S general real property classification for "Timeshare" was established by Ordinance No. 3227 on November 19, 2004. *See*, JEFS Dkt. 102, PDF 130-132 (Ordiance No. 3227). The classification became effective January 1, 2005. Id.

The Maui County Council's Budget and Finance ("B&F") Committee Meeting Minutes for the dates April 15, 2004, April 26, 2004, and October 12, 2004 contain some of the Maui County Council members' discussions leading up to the establishment of the "Timeshare" classification. *See*, JEFS Dkt. 102, PDF 133-139, 140-147, 200-280. The B&F Meeting Minutes for the dates March 22, 2005, April 14, 2005, and April 25, 2005 contain the discussions leading up to and establishment of the inaugural "Timeshare" tax rate. *See*, JEFS Dkt. 102, PDF 281-431, 432-437, 438-473. The combined minutes reflect the Maui County Council's concerns with **1)** the favorable tax treatment timeshares were receiving as compared to hotels in the visitor industry, **2)** hotels converting to timeshares to take advantage of this favorable tax treatment, **3)** loss of hotel room inventory because of potential hotel to timeshare conversions, **4)** loss of employment in the visitor industry because of potential hotel to timeshare conversions, **5)** shifting burdens onto residents to pay for infrastructure increasingly impacted by the heavy use of timeshare property, and **6)** ensuring that the timeshare industry pay its fair share of taxes based on indisputable impacts their visitors have on Maui County, *not exclusively*. Id.

The Budget and Finance Committee Report No. 04-78 stated a policy and purpose underlying Ordinance No. 3227 as "creating a new real property tax rate classification for timeshare units in order to collect a more equitable share of taxes *for services used by owners of timeshare units*." *See*, JEFS Dkt.102, PDF 148-199. (Emphasis added). Budget and Finance Committee Report No. 05-63 states a policy and purpose underlying Ordinance No. 3227 "to address the need for owners and occupants of time share units to pay a more equitable share of taxes *for County services they utilize and the economic impact they place on the surrounding*

[11] Hawai'i Revised Statutes § 514E-3 [*Taxation*] (a) The plan manager, if any, shall collect and pay real property and transient accommodations taxes due on the time share units or occupants under the plan manager's authority as the agent of the owners of the individual units or temporal divisions thereof.

community." *See*, JEFS Dkt. 102, PDF 474-498. (Emphasis added). Budget and Finance Committee Report No. 04-78 also documented in part the COUNTY'S concern with hotel to timeshare conversions:

> Your Committee expressed *concern regarding the conversion of hotel units to timeshare units* and its impact on the TAT revenues.

See, JEFS Dkt.102, PDF 157. (Emphasis added).

iii. PLAINTIFFS' OMITTED CONDOMINIUM PROPERTY

For annual assessment years 2006, 2007, and 2008 [tax years 2007, 2008, and 2009], the condominium real property used by the Plaintiff ORV for timeshare operations was not assessed, *despite having been under condominium property regime for each of these calendar years*. *See*, JEFS Dkt. 78, PDF 746-748 (Dec. Martin, at ¶6); JEFS Dkt. 78, PDF 841-846 & 942-944 & (Hoo Depo., pp. 26-28, and excerpted *Exhibit 2*). Likewise, in assessment year 2008 [tax year 2009], the condominium real property used by Plaintiff ORV NORTH for timeshare operations was not assessed, *despite have been condominium property regime for this calendar year*. Id.

The timeshare resort condominium units were added to the assessment lists, and assessed as condominium property by the COUNTY for the first time in assessment year 2009 [tax year 2010]. *See*, JEFS Dkt. 78, PDF pp. 841-846 & 942-944. (Hoo Depo., at pp. 26-28 and *Exhibit 2*). Prior to this, the condominium units at the timeshare resort had not been added to, and did not appear on the COUNTY's assessment lists for assessment years 2006, 2007, and 2008 [tax years 2007, 2008, and 2009]. *See*, JEFS Dkt. 78, PDF pp. 746-748 (Dec. Martin, at ¶ 8). The omitted property assessments were discovered in or around mid-year 2015 by Real Property Technical Officer Marcy Martin, who researched the tax history of Plaintiffs' timeshare real property to assist with preparation of the County's defense(s) to this lawsuit. Ms. Martin specifically testified:

> Q. Why did you speak with Mr. Madriaga in 2015 regarding why the CPRs [condominium property regimes] were omitted?
> A. I discovered that they were omitted.
> Q. When?
> Mid 2015.
> Mr. BILBERRY: Just so we're clear, Counsel, you're asking her when she discovered?
> Ms. CATALDO: Yes.

Mr. BILBERRY: Okay.
Ms. CATALDO: Yes.
Mr. BILBERRY: And I'm sorry, when she discovered they were omitted?
Ms. CATALDO: Yes.
Mr. Bilberry: Okay.
By Ms. CATALDO:
Q. And how did your discovery that they were omitted come about in mid 2015?
A. I was doing a complete tax history for ORV and ORV North?
Q. Why?
Mr. BILBERRY: To the extent that it involves communications with your counsel, I'm instructing you not to testify. But you can tell her otherwise why you were doing that?
The WITNESS: Because of litigation.

See, JEFS Dkt. 78, PDF pp. 968-971. (excerpted 2016-11-16 Deposition of Marcy Martin).

After being advised by Ms. Martin of the discovery, Real Property Assessment Division Administrator Scott Teruya consulted with counsel, *because he was aware of pending litigation with the taxpayers as Plaintiffs in this case*. Specifically, Mr. Teruya testified:

Q. What did Marcy Martin tell you?
A. *She said that the property, the condominium units were omitted and that we would need to redo them or add them to the roll*.
Q. Did she put that in a written message to you, if you recall?
A. No, not to my knowledge.
Q. And then once you were made aware that these properties were omitted from the roll, did you ask her to do anything in conjunction with that? i.e., to make a report, do a study or anything?
A. Because the matter -- and *not only this case, all cases under litigation*, we could consult with Corporation Counsel.[12] (Emphasis added).
Mr. BILBERRY: Well, that's all you need to say. You conferred with your counsel.

See, JEFS Dkt. 78, PDF 367. (excerpted Deposition of Scott Teruya, dated November 17, 2016). (Emphasis added). Mr. Teruya further testified:

By Mr. KLEIN:

[12] The Circuit Court erroneously interpreted this testimony into a finding that Corporation Counsel directed Scott Teruya to issue the amended assessments. JEFS Dkt. 10, PDF 19 at ¶ 88. The finding is clearly erroneous where the record demonstrates that in fact, the County filed a Counterclaim in lieu of issuing the amended assessments, and only after Plaintiffs insisted on dismissing the counterclaim arguing the assessments required the administrative process, leaving the county with no option, were the assessments pursued by the RPAD.

> Q. I asked you what instructions you gave Marcy Martin. And I don't really want to know what you talked with your attorney about, but I do want to know what you told her to do and when you asked her to do it.
> A. *I approved the property to be reassessed because of its being omitted.*
> Q. And what you testimony was is it's one of many parcels that were in your backlog, correct?
> A. *Whatever is brought to our attention, we will process, yes.*
>
> * * * * *
>
> Q. And why this particular or these particular properties? Why were they given that treatment or concern?
> Mr. BILBERY: Asked and answered.
> By Mr. KLEIN:
> Q. You can answer.
> A. *It was omitted.*
> Q. What do you mean by "omitted?"
> A. *It was not on the assessment roll.*

See, JEFS Dkt. 84, PDF 627-628. (Emphasis added). Mr. Teruya further testified:

> Q. And so your testimony, to be clear, is that the first time you found out that my clients' property had been omitted from the assessment list was when you heard it from Ms. Martin in 2015; is that correct?
> A. *Correct.*

See, JEFS Dkt. 84, PDF 626-634 at 630. (Emphasis added).

As Mr. Teruya testified, the practice of Maui County's Real Property Assessment Division of assessing previously omitted condominium property was demonstrated by documentary evidence reflecting numerous condominium properties on the island of Maui which were subject to retroactive assessments. *See*, JEFS Dkt. 78, PDF 746-748 & 949-967 (Dec. Martin, at ¶ 9 and *Exhibit A*). Because Plaintiffs had already placed this matter in litigation, however, the County elected to bring a counterclaim in set-off against the Plaintiffs in Civil No. 15-1-0435(1)(RILL), *in lieu of* assessing Plaintiffs' omitted condominium property.

The Plaintiffs, their counsel, and the Second Circuit Court, however, apparently failed and/or refused to appreciate that the filing of the Counterclaim for set-off avoided the issuance of in-excess of $10 million dollars in omitted property valuation assessments. Rather, as noted above, Plaintiffs vehemently argued to dismiss the Counterclaim, expressly arguing that the County *was legally required* to assess the omitted property *if* Defendants wanted to seek the set-off in this litigation. *See*, JEFS Dkt. 66, PDF 66, PDF 354-368 & 369-373 (excerpted

Plaintiffs' Motion to Dismiss Counterclaim & Transcript of Proceedings, dated Decmber 29, 2015).

The omitted assessments for Plaintiffs' condominium property for assessment years 2006, 2007, and 2008 [tax years 2007, 2008, and 2009] therefore issued from the Real Property Assessmnt Division on May 24, 2016, in lieu of its Counterclaim for set-off, as part of the administrative process Plaintiffs had previously argued in Civil No. 15-1-0435(1)(RILL) was mandatory. *See*, JEFS Dkt. 78, PDF 1091-1104 (2016-05-24 Transmittals c/o SVO Association Management). The omitted taxes amounted to $10,728,518.49 in potential set-off[13] of unpaid real property taxes for tax years 2007, 2008, and 2009, against Plaintiffs' untimely claims for up to $30-34 million in tax refunds. Id.

D. LEGAL DISPUTES, FINDINGS AND RULINGS IN THE CASE BELOW

i. DISPUTED SUBJECT MATTER JURISDICTION

While being compelled to respond and defend against Plaintiffs' lawsuit and claims, the County contested and did not waive objections and arguments to the Second Circuit Court's subject matter jurisdiction over the underlying tax claims and disputes. The objections and arguments were made in multiple pleadings and motions in the underlying action. On July 1, 2016, Defendants moved for summary judgment on Counts 1 and 2 of Plaintiffs' Complaint pursuant to the rational basis test constitutional standard, in addition to contesting the Second Circuit Court's lack of subject matter jurisdiction over tax disputes. *See*, JEFS Dkt. 66, PDF 68-152 at 85. Defendants' motion was denied.[14] On July 12, 2016, Defendants also contested the Second Circuit Court's subject matter jurisdiction over the omitted property assessments in opposition to Plaintiffs' Motion for Leave to File Second Amended Complaint. *See*, JEFS Dkt. 66, PDF 267-380 at 273-276 & 278-279. On December 12, 2016, Defendants again disputed the

[13] Pursuant to Maui County Code § 3.48.670 the taxes would have been held in an interest bearing litigated account pending Plaintiffs as taxpayers' appeal to the Board of Review and any subsequent appeal to the Tax Appeal Court.

[14] The Order Denying Defendant County of Maui's Motion for Summary Judgment as to Counts 1 and 2 of Plaintiffs' First Amended Complaint Filed July 1, 2015, was inadvertently omitted when the motion was originally denied, and therefore was submitted by the County in anticipation of this interlocutory appeal. The Circuit Court would not sign the County's proposed order [*See*, JEFS Dkt. 110, PDF 794-795], but did sign an alternatively proposed order submitted by Plaintiffs on May 31, 2018. *See*, JEFS Dkt. 110, PDF 796-797.

Second Circuit Court's subject matter jurisdiction over tax disputes in connection with cross-summary judgment motions on the omitted property assessments. *See*, JEFS Dkt. 80, PDF 975-1095 at 985-992. On **May 7, 2018**, Defendants again raised and disputed the Second Circuit Court's subject matter jurisdiction over the claims for tax refunds by the Plaintiffs. *See*, JEFS Dkt. 110, PDF 381-444 at 394-402. The motion was summarily denied. *See*, JEFS Dkt. 110, PDF 816-817.

On **January 26, 2017**, the Second Circuit Court issued its Sua Sponte Order, expressing it own concerns and directing the parties to submit legal memoranda "[o]n the issue of this Court's jurisdiction to hear the issues related to real property taxes[.]" *See*, JEFS Dkt. 84, PDF 37-40. In its Sua Sponte Order the Circuit Court specifically stated:

> On the issue of this Court's jurisdiction to hear the issues related to real property taxes, it is noted that the Constitution of the State of Hawai'i preserves any party's right to a trial by jury. One or more part[ies] in this case has requested jury trial. Once it has been demanded, the jury demand applies to all unless a mutual waiver has been agreed upon.
>
> The statute creating a "TAX COURT" states that the Tax Court shall decide all issues of fact and law. HRS § 232-13. The statute does not authorize the Tax Court to empanel a jury for any purpose or to decide those issues that a party would otherwise have a right to be determined by a jury. Although the statutes creating the Tax Court discuss a party's ability to raise "constitutional issues," the statute appears to be devoid of a mechanism whereby a person's right to trial by jury on those issues is preserved. HRS § 232-15. In addition, the precise question that the Tax Court has jurisdiction to decide is set forth in HRS § 232-13. The parties may address: 1) whether the Court's view of the statutes and law is accurate; 2) if accurate discuss how does such a view comport[] with each party's rights; and, 3) assuming this court exercises jurisdictions what if any impact does that have on the current status of any pending tax appeal, and how should this Court handle those issues. Id., PDF 39.

On August 9, 2017, over the futher objections and arguments of the County,[15] the Circuit Court concluded in its First FOF, COL, and Order that it could assert subject matter jurisdiction over Plaintiffs' tax appeal from the omitted assessments because "HRS section § 232-13 explicitly limits the jurisdiction of the [Tax Appeal Court], and it does not empower the [Tax Appeal Court] to empanel a jury."[16] *See*, JEFS Dkt. 10, PDF 33 at ¶ 7, et seq. The Circuit Court

[15] As directed by the Circuit Court the County filed its supplemental memorandum, again objecting again to the Circuit Court's assertion of jurisdiction. *See*, JEFS Dkt. 84, PDF 662-670.
[16] It is notable that notwithstanding this stated basis of the Circuit Court's improper retention of

also concluded that "[g]iven the express limitation on the [Tax Appeal Court's] jurisdiction to the '*amount* of valuation or taxes,' the [Tax Appeal Court] does not have exclusive jurisdiction over Plaintiffs' claims in this case, which specifically challenge the *legality* of the Amended Assessments, not their *amount*. Id., at ¶ 10, et seq. The Circuit Court also concluded "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." Id., at ¶ 21 (citing to Hawaii Insurers Council v. Lingle, 120 Hawai'i 51, 71, 201 P.3d 564, 584 (2008).

Finally, the Circuit Court ruled that "[b]ecause this Court asserted jurisdiction over the Amended Assessment claims *first*, it retains that jurisdiction until the conclusion of the case." *See*, JEFS Dkt. 10, PDF 36 at ¶ 25).

ii. THE CIRCUIT COURT'S FIRST FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Plaintiffs first filed separate dispositive Motions as to each of the four new counts in the Second Amended Complaint (Counts V ["Illegality"], VI ["First Amendment"], VII ["Due Process"], and VIII ["42 U.S.C. § 1983"]) on December 1, 2016. *See*, JEFS Dkt. 78, PDF 103-272, 273-449, 450-628 & 629-711. Essentially, the Plaintiffs argued the issuance of the omitted assessments was illegal and retaliatory, that they would not have issued *but for* Plaintiffs having filed their lawsuit, and that the County's Real Property Assessment Division's consultations with its attorneys in the context of this litigation before issuing the assessments was/is evidence proving retaliation. The County opposed Plaintiffs' Motions,[17] arguing the legality of the omitted assessments, and additionally proffering undisputed documentary and testimonial facts demonstrating that as with every other condominium property previously omitted from the County's tax rolls, the Real Property Assessment Division would have issued the assessments regardless of whether Plaintiffs lawsuit had been filed. *See*, JEFS Dkt. 84, PDF 626-634 (excerpted Teruya Depo., dated November 17, 2016); *see also*, JEFS Dkt. 84, PDF 574-575; *see also*, JEFS Dkt. 78, PDF 746-748 & 949-967 (Dec. Martin, at ¶ 9 and *Exhibit A*); *see also*, JEFS Dkt. 78, PDF 367 (excerpted Teruya Depo., dated November 17, 2016) (proferred by

---

subject matter jurisdiction over the claims made in this case, the Circuit Court denied the parties a jury trial on the merits of the underlying case, and the Court expressly circumvented and avoided making any ruling on the constitutionality of the County's general tax classification for "Timeshare."

[17] *See*, JEFS Dkt. 80, PDF 941-958, 959-974, 975-1095 & JEFS Dkt. 82, PDF 84-91.

Plaintiffs).

The County also filed a Motion for Summary Judgment as to Count V of the Second Amended Complaint on December 12, 2016. *See*, JEFS Dkt. 78, PDF 717-1115 & JEFS Dkt. 80, PDF 869-907. The County made the Circuit Court in the underlying action aware of Plaintiffs' argument made in Civil No. 15-1-0435(1)(RILL); i.e., that the omitted property assessments and exhaustion of an administrative appeal were mandatory if the County sought to set off Plaintiffs' $30-34 million claim for time-barred tax refunds. *See*, JEFS Dkt. 78, PDF 728-731; *see also*, JEFS Dkt. 66, PDF 354-376.

On August 9, 2017, the 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, 20116, 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 was filed (the "Court's First FOF, COL, and Order"), disposing of all claims newly raised in the Second Amended Complaint. *See*, JEFS Dkt. 10.

The First FOF, COL, and Order ruled that the omitted property assessments were "illegal," making vague and confusing allusions to violations and conflicts with the Maui County Code. *See*, JEFS Dkt. 10, PDF 42-43. The Court also concluded that the omitted assessments violated the code because they purportedly did not fall under the omitted property provisions of § 3.48.165 of the code. Id., PDF 44. The Court's erroneous assumption was that the omitted condominium property retroactively assessed constituted property already assessed. Id., PDF 44-52.

The Circuit Court also erroneously found as a matter of undisputed fact that the assessments were issued *only* because Plaintiffs filed a lawsuit, and therefore that the assessments were *retaliatory* against Plaintiffs for filing their lawsuit. *See*, JEFS Dkt. 10, PDF 52-55. The Circuit Court also erronouesly found as evidence of retaliation that the assessments were issued at the direction of the County's counsel, because the Real Property Assessment Division conferred with its attorneys in the context of this lawsuit. *See*, JEFS Dkt. 10, PDF 19, 56, 71, 72. Moreover, the Court concluded that the County and/or its counsel somehow made judicial admissions that the assessments were "retaliatory." *See*, JEFS Dkt. 10, PDF 25, 66.

Also, despite acknowledging that there was no statute of limitations on omitted assessments, the Court "concluded as a matter of law that the period of retroactivity—*eight to ten years*—is not modest." *See*, JEFS Dkt. 10, PDF 62. (Emphasis original). The Court conversely failed to recognize the immodesty of Plaintiffs' claims for $34,000,000.00 in retroactive tax refunds—dating back *twelve to fourteen years*, and despite those claims being time barred by statute.

Based on its conclusions that the omitted assessments violated the Maui County Code, and based on its factual findings and rulings that the assessmenta were "retaliatory," the Circuit Court ruled that Plaintiffs were entitled to summary judgment on Counts V ["Illegality"], VI ["First Amendment"], VII ["Due Process"], and VIII ["42 U.S.C. § 1983"] as a matter of law. Yet at the same time, the Court also concluded that the County's attempt to set-off Plaitniffs by *a counterclaim* (without assessing for the omitted property) was "legally baseless and constitutes as a matter of law a gross abuse of a governmental entity's lawful taxing authority." *See*, JEFS Dkt., PDF 56.

Based on these findings and rulings the County was ordered to refund the $10,728,518.49 in omitted taxes Plaintiffs, and reimburse $83,325.00 in appeal fees paid by Plaintiffs's to the County's Board of Review. *See*, JEFS Dkt. 10, PDF 51. Plaintiffs were also awarded attorneyes' fees in the amount of $455,749.56 and $18,177.43 in costs. *See*, JEFS Dkt. 110, PDF 778-790.[18]

iii. THE CIRCUIT COURT'S SECOND FINDINGS OF FACT CONCLUSIONS OF LAW, AND ORDER

Plaintiffs subsequently filed two addition dispositive motions on September 29, 2017 and December 19, 2017, seeking to void the COUNTY's "Timeshare" tax classification as a matter of law.[19] The motions pertained to Count I (equal protection), and argued that the "Timeshare" classification was "illegal," a claim which is not pled or alleged anywhere in any of the three Complaints. Essentially, the Plaintiffs speciously argued that 1) "timeshare" and "hotel" use of

[18] Plaintiffs also make a claims for damages in amounts which the timeshare associations purport to have paid the state as general excise taxes levied against a special assessment the associations levied on their timeshare owners to pay the omitted taxes.

[19] Plaintiffs' **1)** Motion for Partial Summary Judgment, Based on Use, as to Equal Protection, et al. was filed on September 29, 2017 [*See*, JEFS Dkt. 88, PDF 52-179], and **2)** Motion for Partial Summary Judgment re Illegality of the Timeshare Real Property Tax Classification was filed on December 19, 2017. *See*, JEFS Dkt. 104, PDF 160-345.

property *are identical as a matter of law*, and/or alternatively, 2) the record in this case demonstrated the Maui County Council considered factors other than differences in "actual use" of timeshare and hotel property when the classification was established in 2004, and that therefore, 3) the County's general real property classification for "Timeshare" was/is "illegal" at its inception. The County opposed the Motions. *See*, JEFS Dkt. 102, PDF 73-534. The response to these misdirecting arguments which were made in circuit court are delineated further below in Subsection V., C.

On March 23, 2018, the Court's Findings of Fact, Conclusions of Law; Order Granting Plaintiff Ocean Resort Villas Vacation Owners Association; Ocean Resort Villas North Vacation Owners Association; Vic H. Henry; and Peter A. Bagatelos' Motion for Partial Summary Judgment re: Illegality of the Timeshare Real Property Tax Classification (the "Court's Second FOF, COL, and Order"), filed December 19, 2017, specifically ruled:

> Because the County created the Timeshare real property tax classification based *on considerations other than any distinction in the actual use* of timeshare and hotel property, the County violated MCC section 3.48.305, and the classification is therefore illegal and void from its inception.

See, JEFS Dkt. 11, PDF 13. (Emphasis added).

The Court's erroneous rationale for this ruling was further explained at the hearing prior to its written order as follows:

> In this case, the County of Maui is not the sovereign, and it doesn't have any power unless it is explicitly granted to it, and it cannot implicitly enforce the explicit powers. And that's where I think the distinction here lies. And that's why the problem with the ordinance. It's not only – because in some instances, there are -- although it's not in the ordinances itself, it's in the other information -- is that the County -- or at least one person on the County Council may have considered use.
>
> The point is *that was not the sole reason why the County acted in separating out hotels from timeshare*. And *the County ordinance*, as well as *the statute* and *the Constitution of the State of Hawaii*, which is the supreme law in the state, governing state actions -- except when its so preceded or preempted by federal laws -- *requires only use be considered*.

See, JEFS Dkt. 44, PDF 21 (Transcript of Proceedings, dated January 3, 2018). (Emphasis added).

It is notable and important that the Second Circuit Court did not address the Plaintiffs' constitutional equal protection and due process claims as to the general "Timeshare" classification, and moreover, expressly DENIED Plaintiffs' request for a dispositive ruling on these claims:

> I now understand what the plaintiff's argument has been from the beginning, which I failed to understand, and why the rational basis test does not apply to the motion on the illegality. It doesn't apply because you never get to a rational basis test if the law upon which the rational basis test would analyze the statute is illegal because the entity doesn't have the constitutional[,] statutory, or, in this case, the ordinance authority to do this. We don't get into equal protection.
>
> * * * * *
>
> *Well, there may be a rational basis.* But *if you don't have the power to do it, you can't do it from the beginning.*
>
> * * * * *
>
> Technically, just so we got a record, the motion on *the equal protection is simply denied* because I guess it's -- I'm not sure if the word is moot in this particular case. But simply because...
>
> MR. KLEIN: So the legality is granted?
>
> THE COURT: The legality is granted.
>
> *I'm denying the equal protection* because I think it's the one falls into the other, and that can be incorporated into the conclusions of law, is that the Court finds *there's no need to decide -- or get into an equal protection analysis* because the first portion was granted.

See, JEFS Dkt. 44, PDF 19-25. (Emphasis added).

The County filed a Motion for Reconsideration, asking the Court to reconsider its patently wrong legal conclusions. *See*, JEFS Dkt. 110, PDF 15-113. The Motion for Reconsideration was summarily denied. Id., PDF 785-787.

iv. ANTICIPATED FURTHER PROCEEDINGS ON "DAMAGES"

Finally, the Second Circuit Court ultimately reached the conclusion that Plaintiffs' prima facie case entitles them to as much as $34,000,000.00, representing 12-14 years of *tax refunds* as "damages." *See*, JEFS Dkt. 44, PDF 23 and 26 (Transcript of Proceedings, dated January 3, 2018). The Court also ruled that Plaintiffs may be entitled to a jury trial to determine what

amount(s) of 12-14 years of *tax refunds* they should be awarded as "damages."[20] Id. The Court simultaneously *sua sponte* vacated the January 8, 2018 trial date which had been set for this case.[21] Id. Alternatively to the trial, the Circuit Court invited Plaintiffs to file a dispositive motion on the amounts of purported "damages" claimed. *See*, Id., PDF p. 26.

After Plaintiffs failed to file the requested motion for over a period of 5 months, and with the Court not having re-scheduled the trial over that same period, on May 7, 2018 the County filed its Motion for Summary Judgment on Plaintiffs' Claims for Tax Refunds, outlining the undisputed facts of Plaintiffs' failure to file appeals with the Board of Review and/or Tax Appeal Court within the mandatory limitations period for each year they sought tax refunds. *See*, JEFS Dkt. 110, PDF 381-444. Defendants also again contested the Circuit Court's subject matter jurisdiction to hear an appeal for tax refunds in the first instance. Id. The County's motion was summarily denied. *See*, JEFS Dkt. 110, PDF 816-817. This unopposed interlocutory appeal followed.

E. INTERLOCUTORY ORDERS AND APPEAL

Apparently recognizing the grave implications raised by its substantive rulings in the underlying case, and the perilous fiscal and financial consequences for the County of Maui, the Second Circuit Court invited the parties to stipulate to an interlocutory appeal, while staying the "damages" trial:

> So I'll hear from you guys about Monday. But my inclination is at this point, there won't be a trial. And if either side requested 54(b) certification with the damages still out there, I probably would be inclined to grant it simply because I think this -- if it's affirmed, it ends the issue -- yeah, there's damages. *But is it likely to terminate the litigation? I think the answer is yes.*
>
> *If I'm wrong, I think that might also terminate*. Because then you got a proper ordinance. And my other ruling on the other portion on the implementation of the tax rate would be guided by whatever the Supreme Court decided on what the County could or couldn't do.
>
> * * * * *
>
> You know, I do think the issue -- let's put it this way. I don't want to be

[20] The Plaintiffs and the Court appear to mischaracterize this tax dispute as having the elements and prima facie case of a tort claim.

[21] Trial was been continued in this case from February 17, 2015, to September 28, 2015, to September 12, 2016, to May 11, 2017, to September 11, 2017, and to January 8, 2018, at which time the trial date was vacated sua sponte 5 days before it was to commence and never reset.

> criticized by the appellate court. But I do think this is one where, even absent the damages, *it's so important for the County*.
>
> And, obviously, Mr. Bilberry, *I certainly would consider a motion to stay the effect of the Court's ruling*. Because *the ramifications of this extend beyond just the plaintiffs that are in the case*. So I would certainly consider that. *If you guys were able to stip to that, that would be nice*. But I certainly think given what I just ruled, it's something that has to be considered, including by the plaintiffs.
>
> Because you're not talking about just these two timeshares. Now we're talking -- as Mr. Bilberry said, now we got a third building out there, plus all the others out there. And that's a critical issue here.
>
> And also, it also means that the parties can sit down and now think about and talk about resolving this before anything official is done and put on the record. And I understand, people believe only their side is right. But *there's a pretty big risk here, probably several hundred million dollars. And the risks are huge.*

See, JEFS Dkt. 44, PDF 24 & 27-28. (Emphasis added).

On April 9, 2018, the County filed its Motion for Certification of Issue(s) for Interlocutory Appellate Review Pursuant to Hawai'i Revised Statutes § 641-1 and/or alternatively for Entry of Judgment Pursuant to Hawai'i Rules of Civil Procedure Rule 54(b), and to Stay Proceedings Pending Appeal. *See*, JEFS Dkt. 110, PDF 114-339. On June 25, 2018, the Circuit Court entered two separate orders for this interlocutory appeal and stayed the underlying case. Both of the certification orders were drafted by Plaintiffs' counsel. *See*, JEFS Dkt. 2 and 3. Subsequently on July 2, 2018, the Court entered a separate Final Judgment pursuant to Rule 54(b), as to Counts V, VI, VII, and VIII of the Second Amended Complaint. *See*, JEFS Dkt. 4.

There is no question that pending appellate review, proceeding in the underlying case toward a judgment against the County for 12-14 years of tax refunds as "damages" will undo previously enacted annual budgets, imperil and destroy Maui County's bond credit rating, and cause irreparable and irreversible harm to the fiscal and financial security of Maui County and its residents. *See*, JEFS Dkt. 110, PDF 686-688 & 689-691 (Declaration of Sananda K. Baz, and Declaration of Scott Teruya).

For reasons which seem apparent to the County, the Circuit Court's legal rulings are also of imperative importance to all of the counties of Hawai'i. For example, if the Circuit Court's rulings as to the restriction on real property classification to "actual use" are to be taken as

correct rulings of law, the general classification scheme for real property tax purposes of every county in the state of Hawai'i would appear to be subject to comprehensive legal attack(s).[22] Moreover, the rulings undermine well established constitutional standards, principles, and policy prerogatives upon which the county legislatures have enacted their tax code provisions.

F. TAX APPEAL COURT *CASE NO. 1TX 17-1-0225 AND CONSOLIDATED CASES 1T.X. 17-1-0491 THROUGH 1T.X. 17-1-0773, 1T.X. -1-0226, 1T.X. 17-1-0774 THROUGH 1T.X. 17-1-1056, 1T.X. 17-1-0227, 1T.X. 17-1-1057 THROUGH 1T.X. 17-1-1339, AND 1T.X. 17-1-0228 THROUGH 1T.X. 17-1-0490*

On June 14, 2016, Plaintiffs as taxpayers appealed the omitted property assessments to the County Board of Review. *See*, JEFS Dkt. 78, PDF 1105 (Transmittal Memoranda from Kenneth G. K. Hoo, Esq.). After the Board of Review hearing and decision affirming the omitted property assessments, on February 16, 2016, Plaintiffs as taxpayer-appellants filed 1,111 separate appeals to the Tax Appeal Court, one appeal for each of the omitted condominium unit properties at the resort.[23]

After the Second Circuit Court's rulings in the underlying case here were made [Civil No. 13-1-0848(2)(PTC)], on April 24, 2018, Plaintiffs' counsel requested the County stipulate to dismiss their consolidated Tax Appeal Court case(s) *without prejudice*. *See*, Statement of Related Cases, **Exhibit C** (e-Mail from Robert Klein, dated April 24, 2018, 2018). In lieu of dismissal, the parties agreed to stay the consolidated Tax Appeal Court cases pending this appeal. Id., **Exhibit D**).

III. STATEMENT OF POINTS OF ERROR

Defendants/Appellants maintain on this interlocutory appeal that:

1) The Second Circuit Court's assertion of subject matter jurisdiction over the claims raised in the underlying lawsuit was/is improper, ignores the special and exclusive subject matter jurisdiction of the Tax Appeal Court, and undermines Maui County's constitutional authority to adjudicate real property tax appeals. The Tax Appeal Court has exclusive subject matter jurisdiction over the real property tax matters and disputes raised in the underlying lawsuit as a

[22] Further to the example, both the Maui County Code and Revised Ordinances of Honolulu contain a provisions requiring consideration of "highest and best use," in assigning any property to a general classification, which is clearly not "actual use."

[23] The 1,111 separate Tax Appeal Court cases were consolidated on April 16, 2018. *See*, Statement of Related Cases, **Exhibit B**.

matter of law. The Circuit Court's wrong conclusions in support of its improper assertion of assertion of jurisdiction over this dispute occur at JEFS Dkt. 86, PDF 583-593. *See*, **Appendix 1** (1ST FOF & COL). The County objected to the Circuit Court's jurisdiction at JEFS Dkt. 66, PDF 68-152 at 85, PDF 267-380 at 273-276 & 278-279, Dkt. 80, PDF 975-1095 at 985-992, Dkt. 84, PDF 662-670 & Dkt. 110, PDF 381-444 at 394-402.

2) The Second Circuit Court's declaratory ruling and voiding as "illegal" duly enacted property tax code provisions establishing the County's "Timeshare" general real property tax classification was/is contrary to the constitutional doctrine of the Separation of Powers and interferes with the County of Maui's constitutional "functions, powers, and duties" to identify, define, classify, and assess real property for purposes of taxation, land use policy, and economic policy. The Circuit Court's improper declaration voiding the relevant county code provision(s) as "illegal" was made at at JEFS Dkt. 44, PDF 19-25 & Dkt. 108, PDF 935-949. *See*, **Appendices 2 and 3** (excerpted Transcript of Proceedings, dated January 3, 2018 & 2nd FOF & COL). The County opposed the improper declaration at JEFS Dkt. 102, PDF 73-534 & Dkt. 110, PDF 15-113 & 372-380.

3) The Second Circuit Court's conclusion that the general classification of "Timeshare" for real property tax purposes may only be established upon the sole consideration of "actual use" of property was/is wrong and undermines the entire structure of general classification and application of Maui County's real property tax code. The Circuit Court's legal conclusion was made at JEFS Dkt. 44, PDF 19-25 & Dkt.108, PDF 935-949. *See*, **Appendices 2 and 3**. The County opposed the legal conclusion at JEFS Dkt. 102, PDF 73-534 & Dkt. 110, PDF 15-113 & 372-380.

4) The Second Circuit Court's ruling that Plaintiffs are entitled to as much as $34,000,000.00 of tax refunds in the aggregate for combined assessment years dating back 12-14 years to 2006 despite Plaintiffs as taxpayers having not appealed their assessments within the required statutory period for each assessment year was/is wrong, is an abuse of discretion, threatens imminent and irreparable harm to Maui County's bond credit rating, and imperils the fiscal security of Maui County and its residents. The Circuit Court's wrong ruling was made at at JEFS Dkt. 44 PDF 23 and 26. *See*, **Appendix 2** (excerpted Transcrip of Proceedings, dated January 3, 2018). The County opposed the ruling at JEFS Dkt. 110, PDF 114-339, 381-444 & 670-772.

5) The Second Circuit Court's findings and ruling that omitted real property assessments made by the County of Maui's Real Property Assessment Division were "illegal" and "retaliatory" against the Plaintiffs in this case, and therefore "unconstitutional" were/are clearly erroneous and wrong. The Circuit Court's erroneous findings and wrong ruling were made at at JEFS Dkt. 86, PDF 552-626 at 593-624. *See*, **Appendix 1** (1st FOF & COL). The County opposed the improper ruling(s) at JEFS Dkt. 80, PDF 975-1095, Dkt. 84 PDF 567-648 & 662-670; *see also*, JEFS Dkt. 78, PDF 717-1115 & Dkt. 80, PDF 12-17, 869-907 & Dkt. 82, PDF 204-538 & 13-63.[24]

6) The Second Circuit Court's order for a refund to Plaintiffs of omitted taxes *pending an appeal in Tax Appeal Court*, and for appeal fees paid to the Board of Review was/is an abuse of discretion. The Circuit Court's ruling was made at at JEFS Dkt. 86, PDF 625. *See*, **Appendix 1** (1st FOF & COL). The County opposed the ruling at JEFS Dkt. 80, PDF 975-1095, Dkt. 84, PDF 567-648 & 662-670; *see also*, JEFS Dkt. 78, PDF 717-1115 & Dkt. 80, PDF 12-17, 869-907 & Dkt. 82, PDF 204-538 & 13-63.

7) The Second Circuit Court's *carte blanche* award to Plaintiffs of $455,749.56 in attorneys' fees and $18,177.43, without any evidence or indication of having reviewed Plaintiffs' attorneys' billings was an abuse of discretion. The Circuit Court's ruling was made at at JEFS Dkt. 34, PDF 6-7 & JEFS Dkt. 110, PDF 788-790. *See*, **Appendices 4 and 5** (excerpted Transcript of Proceedings, dated April 20, 2018 & Order). The County opposed the ruling at JEFS Dkt. 88, PDF 180-329 & 330-346.

IV. STANDARDS OF REVIEW

"Whether a court possesses subject matter jurisdiction is a question of law reviewable *de novo*." *See*, Kincaid, 106 Haw. at 320, 104 P.3d at 907. "The existence of jurisdiction is a question of law that we review *de novo* under the right/wrong standard." *See*, Korean Buddhist Dae Won Sa Temple of Hawai'i v. Concerned Citizens of Palolo, 107 Hawai'i 371, 380, 114 P.3d 113, 122 (2005) (citing Amantiad v. Odum, 90 Hawai'i 152, 158, 997 P.2d 160, 166 (1999) (quoting Lester v. Rapp, 85 Hawai'i 238, 241, 942 P.2d 502, 505 (1997)). This standard of

[24] The County also objected to the proposed findings and conclusions submitted by Plaintiffs' counsel, and opposed the Court making any findings of facts on a Motion for Summary Judgment on any ground. *See*, JEFS Dkt. 86, PDF 412-448; *see also*, JEFS Dkt. 86, PDF 466-517; *see also*, JEFS Dkt. 108, PDF 592-595.

review over the lower court's determination of subject matter jurisdiction is applicable to **Point of Error No. 1**.

"The interpretation of a statute is a question of law reviewable *de novo*." *See*, Kincaid v. Board of Review of City and County of Honolulu, 106 Hawai'i 318, 320, 104 P.3d 905, 908 (2004) (Emphasis original). "[T]he meaning of a statute is a question of law that this court reviews *de* novo." Furukawa v. Honolulu Zoological Soc., 85 Hawai'i 7, 12, 936 P.2d 643, 648 (1997) (citing Ross v. Stouffer Hotel Co. (Hawai'i), Ltd., 76 Hawai'i 454, 460, 879 P.2d 1037, 1043 (1994).

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

Furukawa v. Honolulu Zoological Society, 85 Hawai'i at 12, 936 P.2d 643 at 648 (quoting Iddings v. Mee–Lee, 82 Hawai'i 1, 6–7, 919 P.2d 263, 268–69 (1996) (citations and footnote omitted)). This standard of review over the lower court's interpretation of the Hawa'i State Constitution, Hawai'i Revised Statutes, and the Maui County Code is applicable to **Points of Error Nos. 1, 2, 3, and 5**.

"In this jurisdiction, a trial court's [findings of fact (FOFs)] are subject to the clearly erroneous standard of review. An FOF is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been committed." *See*, Casumpang v. ILWU Local 142, 108 Haw. 411, 419, 121 P.3d 391, 399 (2005). "[A] COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are dependant upon the facts and circumstances of each individual case." *See*, Casumpang, 108 Haw. at 419, 121 P.3d at 399. These standards of review over the lower court's factual findings and conclusion of law are applicable to **Point on Appeal No. 5**.

"A [conclusion of law (COL)] is not binding upon an appellate court and is freely reviewable for its correctness. This court ordinarily reviews COLs under the right/wrong

standard." *See*, Casumpang, 108 Haw. at 419, 121 P.3d at 399. This standard of review over the Circuit Court's legal conclusions is applicable to **Points on Appeal Nos. 1, 2, 3, 4, and 6**.

"[U]nder the abuse of discretion standard, . . the trial court may not be reversed by an appellate court unless the trial court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant. Under that standard different trial judges may, on the same facts, arrive at opposite rulings without any of them being reversible on appeal. *See*, Kealoha v. Cty. of Hawaii, 74 Haw. 308, 318, 844 P.2d 670, 675 (1993). This standard of review over the Circuit Court's rulings and decision(s) is applicale to **Points on Appeal Nos. 2, 4, 6 and 7**.

"We review the Tax Appeal Court's grant of summary judgment *de novo*." *See*, Kaheawa, 135 Hawai'i 202, 206, 347 P.3d 632, 636 (citing Kamikawa v. Lynden, 89 Hawai'i 51, 54, 968 P.2d 653, 656 (1998). 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. *See*, 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). "[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).

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. (Emphasis added). "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." Young, 89 Hawai'i at 407,974 P.2d at 47 (citation, internal quotation marks omitted).

"If the parties file cross-motions for summary judgment, a court 'must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the summary judgment standard.'" Frank v. Government of Virgin

Islands, 2012 WL 611373 *4 (2012) (citing Schlegel v. Life Ins. Co. of N. Am., 269 F.Supp.2d 612, 615 n.1 (E.D.Pa.2003), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.")). (Emphasis added).

V. ARGUMENT ON APPEAL

A. THE SECOND CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION TO ADJUDICATE THIS CASE

The exclusive jurisdiction of the Tax Appeal Court over real property tax appeals and disputes for property tax refunds is hardly debatable. Hawai'i Revised Statutes provides in relevant part:

> §232-11 Court of record; general duties, powers, seal. The *tax appeal court shall hear and determine appeals* as provided *in section 232-16* or 232-17. It shall be *a court of record*; have *jurisdiction throughout the State* with respect to matters within its jurisdiction; and *shall have the power and authority* in the manner provided in section 232-13, *to decide all questions of fact and all questions of law, including constitutional questions, involved in any such matters, without the intervention of a jury*. The court may meet at such times during the year and at such places from time to time as shall be deemed advisable to carry out its work. The court, *with the approval of the supreme court, shall adopt* and *use*, and with such approval may change from time to time, *an official seal*. (Emphasis added).

See also, HRS §232-16 [*Appeal to tax appeal court*] ("An appeal to the tax appeal court is properly commenced by filing, *on or before the date fixed by law* for the taking of the appeal")[;] *see also*, §232-17 [*Appeals from boards of review to tax appeal court*] ("An appeal *shall lie to the tax appeal court from* the decision of a state board of review, or *equivalent administrative body established by county ordinance*. . . . The appeal *shall bring up for determination all questions of fact* and *all questions of law*, including constitutional questions involved in the appeal."). (Emphasis added).

The Supreme Court of Hawai'i in Kincaid, et al. v. Board of Review, 106 Haw. 318, 324-325, 104 P.3d 905, 911-912 (2004) was been unambiguous about the exclusive jurisdiction of the Tax Appeal Court over real property tax appeals:

> The *balance of interests would be compromised significantly were we to recognize the circuit court's competing jurisdiction to hear tax appeals* under HRS § 91-14. In as much as [the Hawai'i Administrative Procedure Act] does not

> predicate an aggrieved person's right to judicial review upon the pre-payment of any disputed monies, the taxpayer's pursuit of redress under that statute would deprive the State and counties of any meaningful opportunity to secure their financial position during the pendency of an appeal. The *resulting peril to the government's fiscal security* convinces us that *a "rational, sensible, and practicable interpretation" of HRS § 232-17 must, of necessity, mandate that its appellate procedures be followed* to the exclusion of those in HRS § 91-14(a).

"[J]urisdiction is 'the base requirement for any court resolving a dispute because without jurisdiction, the court has no authority to consider the case.'" *See*, Korean Buddhist Dae Won Sa Temple of Hawai'i, 107 Hawai'i at 380, 114 P.3d at 122 (citing Housing Fin. & Dev. Corp. v. Castle, 79 Hawai'i at 76, 898 P.2d at 588). (Emphasis added). Further:

> Questions regarding subject matter jurisdiction may be raised at any stage of a cause of action. When reviewing a case where the circuit court lacked subject matter jurisdiction, the appellate court retains jurisdiction, not on the merits, but for the purpose of correcting the error in jurisdiction. *A judgment rendered by a circuit court without subject matter jurisdiction is void*.

Id., 107 Hawai'i 380-1, 114 P.3d at 122-3. (Emphasis added).

In light of the fact that there is also simply no identifiable constitutional provision, statute, or code provision pursuant to which the Circuit Court could have asserted general subject matter jurisdiction over an area of law specifically carved out by statute and recognized by this Court as the exclusive jurisdiction of the Tax Appeal Court, the Circuit Court's assertion(s) of jurisdiction in this case is a flagrant abuse of discretion.

This error in jurisdiction can only be remedied by voiding the Final Judgment entered in this case [JEFS Dkt. 110, PDF 822-823], remanding this matter back to the Circuit Court with instructions to withdraw all of its findings of fact and conclusions of law, and orders, and directing the Circuit Court to dismiss this matter without prejudice.

B. THE RULING BELOW THAT THE "TIMESHARE" CLASSIFICATION IS "ILLEGAL" EXCEEDED THE CIRCUIT COURT'S CONSTITUTIONAL AUTHORITY AND IMPROPERLY INTRUDED ON THE COUNTY'S LEGISLATIVE FUNCTION

Contrary to what the Circuit Court concluded, there is nothing in the state constitution, nothing in any state statute, and nothing in any county code provisision restricting the County's establishment of general classifications for real property to "actual use." The Circuit Court's allusion to the Hawai'i State Constitution, and to the Hawai'i Revised Statutes as imposing such a limitation without citing to *any* provision within those enabling provisions is another

concerning abuse of discretion. Moreover, as a proferred legal conclusion for the Circuit Court's "voiding" the general classification for "Timeshare" in Maui County's tax code as "illegal," and its failure and/or refusal to rule on the constitutionality of the "Timeshare" classification, the rational appears as a thinly vieled unconstitutional intrusion into the County's real property tax authority and legislative function. *See*, Gardens at West Maui Vacation Club v. County of Maui, 90 Hawai'i 334, 342, 978 P.2d 772, 780 (1999) ("it is the court's function only to seek to adduce any state of facts that can reasonably sustain the classification statute . . . challenged.") (citing In re Pacific Marine & Supply Co., Ltd., 55 Haw. 572, 581, 524 P.2d 890, 896 (1974)).

This Court has already recognized that in 1978, Article VIII, Section 3 of the Hawai'i State Constitution was amended in 1978 to make a general grant of authority; of plenary constitutional power over the real property tax function to the counties of Hawai'i. *See*, Gardens at West Maui Vacation Club v. County of Maui, 90 Hawai'i at 341, 978 P.2d at 779 ("The constitutional and legislative acts covered *the whole subject of property taxation power* and embraced *the entire law in that regard.*") (citing *Comm. of the Whole Rep. No. 7*, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 1008 (1980)). (Emphasis added). This authority has to include "defining real property, setting the basis of assessment, determining the manner in which rates are set, setting exemptions and describing the appeals process[.]" *See*, JEFS Dkt. 78, PDF 749-776 at 768 (excerpted Proceedings of the Constitutional Convention of 1978, Standing Committee Report No. 42).

C. THE RULING BELOW THAT A CLASSIFICATION FOR "TIMESHARE" CAN ONLY BE ESTABLISHED BASED ON ACTUAL USE IS WRONG

The Circuit Court's elevation of "actual use," to the exclusion of all other considerations for establishing classifications of real property, otherwise wrongly interprets a specific Maui County Code provision pertaining to condominium units [*see*, MCC §3.48.305(C)(2)(a)(v)][25] to illogically void the general classification for "Timeshare" contained in the code [*see*, MCC

[25] MCC § 3.48.305(C)(2)(a)(v) provides for the consideration of "actual use" as pertains to condominium units, *but not* as the sole factor for establishing general real property tax classifications, or for assigning any identified condominium units to one of the general classifications. As a matter of logic, the Circuit Court's flawed conclusions become apparent with the understanding that *not all timeshares are condominium units*. The Revised Ordinances of Honolulu contain similar provisions regarding consideration of "actual use" as pertains to condominium units. *See*, ROH § 8-7.1(c)(3).

§§3.48.305(A)(4)]. This flawed logic would undo virtually every other general class of real property contained in the code. This wrong and bizzare interpretation would not only undo Maui County's tax code, but also similar provisions in the Revised Ordinances of Honolulu, for example. Both of the respective codes also provide for consideration of "highest and best use," an appraisal concept necessary for the counties' ability to accurately assess, and assign real property to any given general classification for tax purposes. *See*, MCC § 3.48.305(B); *see also*, ROH § 8-7.1(c)(2).

D. THE RULING BELOW THAT PLAINTIFFS ARE ENTITLED TO TAX REFUNDS AS "DAMAGES" IS WRONG

The Plaintiffs and the Court appear to mischaracterize this tax dispute as having the elements and prima facie case of a tort claim. Tax refunds are <u>not</u> damages, and not subject to a jury determination. Rather, as recognized in <u>Kincaid</u> tax refunds are amounts of "diputed monies," not compensatory or consequential amounts of damages caused by the tortious conduct of a third-party. The ruling by the Circuit Court that Plaintiffs are entitled to a jury trial to prove the amounts of tax refunds they claim is another clear abuse of discretion. It is a mischaracterization which ignores Plaintiffs failure for 12-14 years to follow the proper tax procedures for preserving and pursuing the untimely claims for $30-34 million in tax refunds they now audaciously make.

Maui County Code § 3.48.595 provides in relevant part that "a taxpayer ***<u>shall</u> first appeal to the <u>County</u> board of review***, pursuant to *section 232-16, Hawaii Revised Statutes*. Appeals to the County board of review ***<u>shall</u>*** be on grounds as provided in sections 3.48.605.A, 3.48.605.B, 3.48.605.C, 3.48.605.D, and *3.48.605.E*. Appeals to the County board of review ***<u>shall</u> be filed on or before April 9*** preceding the tax year." Hawai'i Revised Statutes also provides in relevant part for the mandatory appeal to the counties' boards of review, <u>and</u> the requirement and timing of an appeal to the Tax Appeal Court as follows:

> §232-15 [*Appeal to board of review*]. . . . The notice of appeal must be lodged *with the assessor on or before the date fixed by law for the taking of the appeal*.
>
> * * * * *
>
> §232-17 [*Appeals from boards of review to tax appeal court*]. . . An appeal to the tax appeal court is properly commenced by the filing, by the taxpayer, or the county, or the director of taxation, of *a written notice of appeal in the office of the tax appeal court within thirty days after the filing of the decision* of the state board of review, or equivalent county administrative body[.] (Emphasis added).

Under the Maui County Code and the Hawai'i Revised Statutes, Plaintiffs as taxpayers were required to appeal their assessments and make any claims for tax refunds to the Board of Review within 30 days of their annual notice of assessment, and in no event later than the date of April 9th, preceding the tax year following the assessment. Following any adverse decision from the Board of Review, Plaintiffs as taxpayers were required to appeal to the Tax Appeal Court within 30 days to preserve any claim of entitlement to tax refunds. Having failed to timely file and complete the appeals for any of the assessment years from 2006 to the present, Plaintiffs are barred by the statutory limitations periods provided in both the Maui County Code and Hawai'i Revised Statutes from seeking any refunds in this Circuit Court case.

E. THE FINDING(S) AND RULING BELOW THAT THE COUNTY RETALIATATED AGAINST PLAINTIFFS AND THAT THE OMITTED ASSESSMENTS ARE ILLEGAL ARE CLEARLY ERRONEOUS AND WRONG

The entire premise of the Circuit Court's findings and conclusions that the County and/or its counsel retaliated against Plaintiffs is illogical and conclusory. While it can be concluded that *but for* Plaintiffs' lawsuit the County may not have *discovered* the omitted property valuation assessments, it does not follow that the assessments were issued *only because the lawsuit was filed*. Moreover, the County's effort to properly avail itself of administrative process which the Plaintiffs and the Circuit Court argued was "mandatory" to preserve its claim (*but which processes Plaintiffs themselves failed to follow by filing their untimely lawsuit(s) for tax refunds*), can hardly be considered "retaliatory." Furthermore, the omitted assessments were issued only *after* the Plaintiffs thwarted the County's efforts to set-off Plaintiffs' untimely claims for tax refunds *without issuing the assessments*. The Circuit Court's myriad of erroneous factual findings and conclusions appear to avoid these salient facts and circumstances.

The only way the Circuit Court could otherwise have concluded there was no genuine issue in dispute in this case, would have been to disregard and/or ignore apparent conflicting facts. Of particular concern on this appeal are the erroneous findings by the Circuit Court that the "retaliation" is evidenced and/or proven by the County's attorneys' involvement and consulations with thier clients in the context of this litigation. For example, the deposition testimony of Real Property Technical Officer Marcy Martin that she was only instructed by the County's counsel not to speak directly with Plaintiffs' counsel about the underlying lawsuit, was baselessly misconstrued as somehow *evidence* of retaliation. *See*, JEFS Dkt. 78, PDF 160 (excerpted Martin

Depo., dated November 16, 2016); *Cf.* JEFS Dkt. 10, PDF 18 at ¶ 84 (excerpted Court's 1st FOF & COL). Likewise, the Circuit Court also erroneously found that corporation counsel's similarly reasonable and appropriate directions to County officers pertaining to communications with timeshare owners *about this matter in litigation*, was somehow undisputed evidence of retaliation. *See*, JEFS Dkt. 10, PDF 19-20 at ¶ 89.

An equally egregious example of the erroneous factual findings and conclusions made by the Circuit Court are its complete misconstruction of Administrator Scott Teruya's expressed practice of consulting with the County's counsel about *any* matter(s) in litigation, as somehow conclusory evidence that counsel directed the omitted assessments go forward in order to retaliate for this lawsuit. *See*, JEFS Dkt. 78, PDF 367. (excerpted Deposition of Scott Teruya, dated November 17, 2016); *Cf.* JEFS Dkt. 10, PDF 19 at ¶ 88.

Moreover, the Circuit Court simply ignored and/or disregarded the attestations made in both Ms. Martin's Declaration and Mr. Teruya's Deposition when it erroneously concluded that Plaintiffs were specifically targeted for retroactive assessments. *See,* JEFS Dkt. 10, PDF 60-61. Both Ms. Martin's statements and the documentary evidence she presented, and Mr. Teruya's testimony demonstrate that any time a condominium property has been discovered to have been omitted from the County's assessment rolls, they have consistently been added to the rolls and retroactively assessed. *See*, JEFS Dkt. 78, PDF pp. 746-748 & 949-967 (Dec. Martin, at ¶ 9 and *Exhibit A*); *see also*, JEFS Dkt. 84, PDF 627-628 (Teruya Depo.).

Rule 56(d) of the Hawai'i Rules of Civil Procedure does not otherwise even provide for the court *to weigh disputed evidence*, but rather, *only* to specify facts that appear without substantial controversy. This did not happen below. Rather the Circuit Court went way beyond identifying undisputed facts, clearly giving *weight to certain facts as evidence* to the exclusion of conflicting facts, as demonstrated by its misconstruction of Ms. Martin's and Mr. Teruya's testimony. The 1st FOF & COL are particularly egregious, repeatedly inferring conclusions from conflicting and incomplete factual assertions. The apparent assumption by the Court that their were not disputed factual issues for trial, and that the County "retaliated" against Plaintiffs as a matter of law is questionable on its face. Summary disposition on any of Plaintiffs claims was simply not warranted.

It cannot be overlooked that despite insisting that its jurisdiction rested soundly on the parties' entitlement to a jury trial, the Court clearly assumed the role of fact finder, effectively

conducting a bench trial on disputing motions. The procedure was clearly improper. *See*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.")). (Emphasis added). Moreover, "[i]f the parties file cross-motions for summary judgment, a court 'must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the summary judgment standard.'" Frank v. Government of Virgin Islands, 2012 WL 611373 *4 (2012) (citing Schlegel v. Life Ins. Co. ofN. Am., 269 F.Supp.2d 612,615 n.1 (E.D.Pa.2003). While granting Plaintiffs' motions *carte blanche*, the court summarily denied the County's motion for summary judgment, not bothering to make any real factual determination as to whether the facts presented therein were undisputed or not.

To the extent the Second Amended Complaint makes its claims of retaliation as a predicate to 42 U.S.C. §1983, the claims under this federal statute were also not appropriate for summary disposition. 42 U.S.C. §1983 is not itself a source of substantive rights. Rather, it provides a cause of action against an individual agent of government who, allegedly under color of state law, deprives another individual of federal constitutional rights. *See*, Anselmo v. Mull, 2013 WL 5817560, 6 (2013).

42 U.S.C. §1983 liability of a local governing body may attach when an employee committed a constitutional violation pursuant to a "longstanding practice or custom." Webb v. Sloan, 330 F.3d 1 158, 1 164 (9th Cir. 2003). The plaintiff must prove the existence of such a longstanding practice or policy as a matter of fact. Trevino v. Gates, 99 F.3d 911,920 (9th Cir. 1996) ("Normally, the question of whether a policy or custom exists would be a jury question."). A "custom or practice" must be so "persistent and widespread" that it constitutes a "permanent and well settled city policy." Id. at 918 (quoting Monell v. Department of Social Services, 436 U.S. 685, 691 (1978). The Ninth Circuit has also held that "a custom or practice can be supported by evidence of repeated Constitutional violations which went uninvestigated and for which the errant municipal officers went unpunished." Hunter v. County. of Sacramento, 652 F.3d 1225, 1233-36 (9th Cir. 2011).

Plaintiffs have not demonstrated as a matter of undisputed fact a long-standing custom or practice resulting in repeated deprivations, and it does not appear from the 1st FOF & COL the Court found any. In fact, the Circuit Court made it very clear on the record it did not even

understand Plaintiffs' claim under 42 U.S.C. § 1983, *but was granting the motion anyway*. *See*, JEFS Dkt. 176, PDF 77.

Otherwise, assuming arguendo that Plaintiffs were able to convince a fact finder or a jury that they have actually suffered some constitutional deprivation, causation may very well also be in question. Ninth Circuit Court Model Jury Instruction No. 9.8 [Causation], provides in relevant part:

> In order to establish that the [act[s]] [failure to act] of the defendant deprived the plaintiff[s] of [their] particular rights under [the United States Constitution] as explained in later instructions, the plaintiff must prove by a preponderance of the evidence that the [[act[s]l [failure to act]l [was] so closely related to the deprivation of the plaintiff's rights as to be *the moving force that caused the ultimate injury*. (Emphasis added).

In Jones v. Williams, 297 F.3d 930, 937 n.7 (9th Cir. 2002) the Ninth Circuit affirmed a defense verdict in a §1983 case in which the district judge gave the following "concurrent cause" instruction to address allegations of supervisory and group liability: "[M]any factors or things or the conduct of two or more persons can operate at the same time either independently or together to cause injury or damage and in such a case each may be a proximate cause."

The Circuit Court's many erroneously legal conclusions regarding Plaintiffs' real property already having been assessed prior to the omitted condominium property assessments issuing is also contradicted by Hawai'i law. Maui County Code §3.48.305(C)(2)(b), not exclusively, specifically provides "[w]hen property is subdivided into condominium units, . . . Each unit and its appertaining common interest ***shall*** be . . . deemed a parcel and assessed separately from other units." Other jurisdictions have addressed this legal question.[26] No reported case in Hawai'i appears to address the issue directly.

---

[26] *See*, Schwam v. Township of Cedar Grove, 228 N.J. Super 522, 527, 550 A.2d 502, 504 (1988) (Tax assessor properly valued condominium units as separate entities upon conversion from apartments to condominiums, . . . despite a claim that purchaser's property was singled out for selective or spot assessment in violation of constitutional prohibitions) (citing Cigolini Associates v. Borough of Fairview, 208 N.J. Super 654, 664, 506 A.2d 811, 816 (1986) ("The expression 'converting a building to a condominium' . . . can mean a change in the legal form of ownership or it can mean a change in the use of the building."); *see also* Fourmost, Inc. v. Parsippany-Troy Hill Tp., 11 N.J. Tax 57, 62 (1990)("The change in legal status to condominium ownership requires that the units be individually assessed. It is this change that imposes the requirement of a change in the assessment. To ignore the change in legal form of ownership and its effect on the market value of each unit in favor of apportioning the old assessment on the

The Intermediate Court of Appeals in Kaheawa Wind Power, LLC v. County of Maui, 135 Hawai'i 202, 347 P.3d 632 (2014) has otherwise already held that retroactive tax assessments for omitted property is otherwise not unconstitutional. Where as here, Plaintiffs have been allowed to bring claims for for 12-14 years of tax refunds indisputably barred by the statute of limitations, it would appear that the Circuit Court's finding that the omitted assessments going back 8-10 years as not modest presents an inconsistent and wrong legal conclusion.

F. THE ORDER BELOW TO THE COUNTY TO REFUND OMITTED TAXES, AND REIMBURSE APPEAL FEES TO PLAINTIFFS WAS AN ABUSE OF DISCRETION

Given the Circuit Court's lack of jurisdiction over the claims made in this case, its order directing the County to reimburse taxes collected and fees paid to the County's Board of Review as indisputably related to a case currently pending in Tax Appeal Court was a clear abuse of discretion. The Circuit Court was unquestionably aware of the Tax Appeal Court case. In its 1st FOF & COL it suggested the Plaintiffs take leave and stay the Tax Appeal Court case. *See*, JEFS Dkt. 10, PDF 74.

There is otherwise no legal authority empowering a Circuit Court asserting and excercising its general subject matter jurisdiction to interfere with the lawful process pending in another court of special and exclusive jurisdiction.

G. THE AWARD OF ATTORNEYS' FEES AND COST TO PLAINTIFFS BELOW WAS AN ABUSE OF DISCRETION

Given the Circuit Court's lack of subject matter over this tax dispute, and the improper disposition of this case on summary judgment, the award of attorneys pursuant to 42 U.S.C. §1983 was also an abuse of discretion. Otherwise, "the general rule in this jurisdiction is that attorney's fees and costs may not be awarded absent statute, agreement, stipulation, or precedent authorizing the allowance thereof." *See*, Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., 6 Haw. App. 431, 436, 726 P.2d 268, 271 (1986) (citing Wohlschlegel v. Uhlmann-Kihei, Inc., 4

---

property among the units "would contravene the policy of this State to place condominium owners on the same legal basis, insofar as consistent with special problems of condominiums, as other owners of real property.")(citing Cigolini, 208 N.J. Super at 665); *see also*, Lewis v. Dep't of Revenue, 10 Or. Tax 128, 130 (1985), aff'd sub nom. Lewis v. State, Dep't of Revenue, 302 Or. 289, 728 P.2d 1378 (1986)("By voluntarily subjecting the property to the unit ownership laws, the plaintiffs, of necessity, have required the units to be individually assessed and taxed. The fact that the entire complex is operated as a motel cannot override this statute.").

Haw.App. 123, 135, 662 P.2d 505, 513 (1983); Smothers v. Renander, 2 Haw.App. 400, 633 P.2d 556 (1981); Cuerva & Associates v. Wong, 1 Haw.App. 194, 616 P.2d 1017 (1980). This court generally reviews an award or denial of attorney's fees under the abuse of discretion standard. In re Attorney's Fees of Mohr, 97 Haw. 1, 5, 32 P.3d 647, 651 (2001) (citing Canalez v. Bob's Appliance Serv. Center, Inc., 89 Hawai‘i 292, 299, 972 P.2d 295, 302 (1999) (citing Eastman v. McGowan, 86 Hawai‘i 21, 27, 946 P.2d 1317, 1323 (1997); Coll v. McCarthy, 72 Haw. 20, 28, 804 P.2d 881, 887 (1991)). "Thus, the certifying court must exercise discretion in determining whether fees are reasonable." Id.

In re Attorney's Fees of Mohr, this court reviewed fees awarded pursuant to HRS § 802-5 [ ] and held that "requests for fees should be granted if the court certifies that the requesting attorney has met his or her burden to prove that the fees requested are for hours expended and that the hours expended were 'reasonable' for the services rendered." *See*, In re Attorney's Fees of Mohr, 97 Haw. 1, 5, 32 P.3d 647, 651 (2001).

The Circuit Court purported to award Plaintiffs' attorneys fees and costs as the "prevailing party," howerer, there is no statutory basis or any authority whatsoever for the award. This action is neither in tort or assumpsit. There is otherwise no provision in the Maui County Code or Hawai'i Revised Statutes awarding fees or cost to a taxpayer or the taxing authority in a dispute over taxes.

Moreoover, evening assuming (wrongly) the Circuit Court had authority to award fees and costs, there is no certification by the Circuit Court that the fees and cost are reasonable, or even any indication that the Circuit Court actually reviewed the massive billings presented by Plaintiffs. *See*, JEFS Dkt. 88, PDF 196-304. If the Circuit Court had reviewed the billings, it would have seen that a significant volume of the entries are for work or costs performed in Plaintiffs' Tax Appeal Court case, for one example. *See*, JEFS Dkt. 88, PDF 225-303 (highlighted in ORANGE). Clearly the Circuit's failure to exercise any discretion whatsoever in reviewing the billings, would constitution an additional abuse of discretion.

V. CONCLUSION

The Final Judgment below should be voided given the lack of jurisdiction by the Circuit Court. The several orders granting summary judgment as to Counts I, V, VI, VII, and VIII should be reversed by this Court. The Circuit Court should be ordered to dimiss this case in its entirety without prejudice.

DATED: Wailuku, Maui, Hawaii, December 24, 2018.

PATRICK K. WONG
Corporation Counsel
Attorneys for Defendants
/Appellants COUNTY OF MAUI
and MAUI COUNTY COUNCIL

By /s/ Brian A. Bilberry
BRIAN A. BILBERRY
Deputy Corporation Counsel