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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 REPLY TO AMICUS CURIAE BRIEF
OF TAX FOUNDATION OF HAWAI'I

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REPLY TO AMICUS CURIAE BRIEF
OF TAX FOUNDATION OF HAWAI'I

I. SUMMARY

In reply to the Amicus Curiae Brief of the Tax Foundation of Hawai'i, and as further explained below, Defendants/Appellants COUNTY OF MAUI and MAUI COUNTY COUNCIL (the "County") dispute the circuit court's assertion and retention of general subject matter jurisdiction over the tax matters underlying this dispute. These tax disputes are the special and exclusive subject matter jurisdiction of the Tax Appeal Court. The County disputes the Amicus Curiae Brief's assertions that Plaintiffs' invocation of 42 U.S.C. § 1983 redeems the circuit court's improper assertion of jurisdiction over the tax disputes underlying this case. 42 U.S.C § 1983 is not an independent cause of action, *or* an independent basis for an assertion of general subject matter jurisdiction over matters exclusively within the special subject matter jurisdiction of the Tax Appeal Court. Plaintiffs claims under 42 U.S.C § 1983 are as a matter of law completely determined by their constitutional claims, which the Tax Appeal Court is otherwise fully empowered by statute to decide and rule on.

The County disputes the Amicus Curiae Brief's assertions that the County retaliated against the Plaintiffs for initiating this litigation when the County's Real Property Assessment Division issued retroactive assessments for Plaintiffs omitted timeshare condominium property. Facts and evidence of record which were *undisputed* below, but simply ignored by the circuit court, demonstrate conclusively that the retroactive assessments for Plaintiffs omitted condominium timeshare property would have issued regardless of Plaintiffs having initiated the underlying litigation. Moreover, facts and evidence of record which were *undisputed* below, but simply ignored by the circuit court, demonstrate conclusively that all omitted condominium property in Maui County has been treated equally under the law.

The Amicus Curiae Brief's assertion that this case "presents an example of a county government abusing the taxing power conferred upon it by the people of Hawai'i[,]" rests on enormous omissions of the record in this case. The Amicus Curiae Brief relies on pinched statements of fact, extracted from 75 pages of written findings and conclusions issued by the circuit court on August 9, 2017. That documnt itself issued more than 5 months after the circuit court's rulings were made on March 24, 2017, and is a result of a summary judgment procedure which was incomplete at best, and improper at worst.

The County does not disagree with the Amicus Curiae Brief's position that the Appellate Court should "reverse [the circuit court's] determinations that Maui's Timeshare classification was invalid." The circuit court's failure and/or refusal to rule on the constitutionality of the County's tax classification, and ruling instead to invalidate an otherwise constitutional law as "illegal," is an improper retraint on the County's exercise of its lawful and constitutional tax authority.

II. REPLY STATEMENT OF FACTS

A. THE TIMESHARE RESORT

As detailed in the County's Amended Opening Brief, Plaintiffs/Appellees' timeshare resort consists of *condominium units* subject to a timeshare plan. *See*, JEFS Dkt. 212, PDF 14-15. Certificates of Occupancy for the ORV Condominium at the timeshare resort demonstrate completion of the condominium units by **June 30, 2005**. Id. at footnote 10 (citing, JEFS Dkt. 78, PDF 797-806). Certificates of Occupancy for the ORV North Condominium at the timeshare resort demonstrate completion of the condominium units by **November 9, 2007**. Id. at footnote 10 (citing JEFS Dkt. 78, PDF 807-840). The Amicus Curiae Brief's suggestion at page 3 that the property was assessed "using cost data, which is typically used when projects are being constructed," is a misdirection. The Certificates of Occupancy for the timeshare projects demonstrated both were completed condominium construction at *all* times relevant to their assessment, valuation and taxation. This evidence was *undisputed* below.

As such, at all relevant times each condominium unit at the timeshare resort constituted 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.

B. COUNTY ORDINANCE NO. 3227

The County's Amended Opening Appellate Brief also discusses the establishment of the County's general real property classification for "Timeshare." *See*, JEFS Dkt. 212, PDF 15-16. The Amicus Curiae Brief's focus on pages 2-3 on discussion of transient accommodations tax by the council is another misdirection. Along with the multiple reasons discussed by the Maui County Council members for establishing the separate tax classification and rate [Id. (*citing*, JEFS Dkt. 102, PDF 133-139, 140-147, 200-280, 281-431, 432-437, 438-473)], 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 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). This evidence was likewise *undisputed* below. The Amicus Curiae Brief, like the circuit court's findings and conclusions, simply ignores this relevant language in the committee reports.

C. ASSESSMENT AND TAX ON TIMESHARE CONDOMINIUMS

The Amicus Curiae Brief on page 4 also reflects a fundamental lack of understanding of the manner in which Plaintiffs' timeshare resort is assessed for purposes of real property taxation. The County's Real Property Assessment Division *does not* assess and tax individual timeshare interests in a condominium unit, or weekly intervals in a timeshare. It was *not disputed* below that after the County assesses and values each condominium unit at the timeshare resort, a bill for the aggregate total tax of the combined units is sent to the timeshare associations. The tax is paid by ORV and ORV NORTH as an aggregate of the taxes levied on all 1026 units at the timeshare resort. *See*, JEFS Dkt. 78, PDF 747-748 (Declaration of Property Technical Officer

Marcy Martin, at ¶¶ 3 and 4). The County's real property tax assessment notices for the condominium units operated for timeshare use are sent to the ORV and ORV NORTH timeshare plan manager. Id., at ¶ 5 *see also,* Hawai'i Revised Statutes, § 514E-3.[1]

Moreover, the timeshare associations *do not* pass an actual real property tax through to their members. Rather, the aggregate real property tax is allocated *as a common expense* to the tens of thousands of timeshare members, in the form of an assessment resembling *a regressive tax*. *See*, JEFS Dkt. 88, PDF 308-314 (Excerpted Deposition of Jonathan Ho, dated February 19, 2016). This assessment is not based on any deeded real property interest. Id. This evidence was likewise *undisputed* below.

D. RETROACTIVE ASSESSMENT OF PLAINTIFFS' OMITTED CONDOMINIUM PROPERTY

The facts, circumstances, and evidence related to the County's Real Property Assessment Division's **1)** discovery of Plaintiffs' omitted condominium property for annual assessment years 2006, 2007, and 2008 [tax years 2007, 2008, and 2009], **2)** addition of that property to the County's assessment rolls for those years and **3)** the issuance of the retroactive assessments for the omitted condominium property is discussed in detail in the County's Amended Opening Brief. *See*, JEFS Dkt. 212, PDF 16-19. The evidence below demonstrating that the County would have issued the retroactive assessments on Plaintiffs' omitted condominium property *regardless of Plaintiffs lawsuit*, was likewise undisputed, and simply ignored by the circuit court. Id.

Furthermore, the reason the timeshare condominiums had not been added to, and were omitted from the assessment lists for assessment years 2006, 2007, and 2008 [tax years 2007, 2008, and 2009] was explained by the County through Real Property Technical Officer Marcy Martin in written discovery responses:

> 2. For tax years ("TYs") 2006, 2007 and 2008, why did the County initially assess all the land and buildings within Ocean Resort Villas as a single Tax Map Key parcel 4-4-01-003-0000 ("Parcel 3-0000') rather than by individual units?
>
> RESPONSE: The COUNTY OF MAUI ("COUNTY") OBJECTS to this interrogatory to the extent it is vague and ambiguous and lacks foundation.

[1] 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.

Without waiving the OBJECTION, the County advises Plaintiffs that condominiums under construction are generally valued as partially complete - land is assessed at market value as though vacant, and buildings under construction will be valued at costs of completion. When the condominium building is finished, the land and individual units in the building are then supposed to be moved onto the assessment rolls as condominium property. From 2003 to 2007, scores of condominium properties were identified on the assessment rolls by their master TMK until the appraiser(s) in the Real Property Assessment Division were able to move the individual CPR [condominium property regime] units and parcels onto the rolls. Even after being moved onto the assessment rolls, multitudes of CPR units and subdivision parcels were being omitted during this time period because of the backlog.

In processing individual CPR units and subdivisions parcels onto the assessment rolls, the Real Property Assessment Division had to prioritize based on administrative realities related to the financing requirements, escrows, mortgages, and resales of individual CPR units and subdivision parcels. Because both ORV and ORV North were single owners/taxpayers of collective CPR unit TMKs, they fell behind to individual CPR units and subdivision parcels subject to individual ownership, mortgages, and financing requirements in the backlog priority.

3. For TY 2008, why did the County initially assess all the land and buildings within Ocean Resort Villas North as a single Tax Map Key parcel 4-4-014-0000 ("Parcel 4-0000') rather than by individual units?

RESPONSE: See, response no. 2 above.

See, JEFS Dkt. 78, PDF 945-948 (excerpted Defendants' Responses to Plaintiffs' First Requests for Answer to Interrogatories, dated 2016-10-31). The Intermediate Court of Appeals in Kaheawa Wind Power, LLC v. County of Maui, 135 Hawai'i 202, 212, 347 P.3d 632, 642 (2014), has already recognized testimony by Property Technical Officer Marcy Martin regarding the difficulties and back log the County faced during this same period.

Moreover, the evidence below identified these scores of parcels on the island of Maui which were subject to retroactive assessments as omitted condominium property. *See,* JEFS Dkt. 78, PDF 746-748 & 949-967 (Dec. Martin, at ¶ 9 and *Exhibit A*). The Amicus Curiae Brief's naked assumption and assertion on page 20 that Plaintiffs were subject to "selective retaliation" by issuance of the assessments for their omitted condominium property, completely ignores this evidence, which was likewise *undisputed* below. The omitted timeshare condominium assessments in reality treated Plaintiffs the same as every other condominium property as

completed construction in the same time period. Id.

The County's attempt to avoid issuing the retroactive assessments by assertion of a counterclaim in this litigation is also discussed in detail in the Amended Opening Brief. *See*, JEFS Dkt. 212, PDF 12-14. Because Plaintiffs had already placed these matters in litigation, the County attempted 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. Id. Plaintiffs and the circuit court rejected the County availing itself of the judicial process Plaintiffs initiated. Id. Plaintiffs expressly argued and the circuit court ruled the County was required to go through tax assessment procedure for the omitted assessments *before* it could seek to set-off Plaintiffs' own untimely claims for 12-14 years of tax refunds. Id. The Amicus Curiae Brief, like the circuit court's findings and conclusions on which it solely relies, conveniently fails to acknowledge any these essential facts and circumstances.

III. 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)). "Under the *de novo* or right/wrong standard, this court 'examine[s] the facts and answer[s] the question ***without being required to give any weight to the trial court's answer to it***.'" *See*, Gardens at W. Maui Vacation Club v. Cty. of Maui, 90 Haw. 334, 339, 978 P.2d 772, 777 (1999) (citing Gold v. Harrison, 88 Hawai'i 94, 100, 962 P.2d 353, 359 (1998) (citing Aickin v. Ocean View Inv. Co., Inc., 84 Hawai'i 447, 453, 935 P.2d 992, 998 (1997)). (Emphasis added).

"We answer questions of constitutional law ***by exercising our own independent constitutional judgment based on the facts of the case***. Thus, we review questions of constitutional law under the right/wrong standard." (citation omitted). *See*, Gardens at W. Maui Vacation Club, 90 Haw. at 339, 978 P.2d at 777 (citing to State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998). (Emphasis added).

"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).

The other relevant standards of review pertaining to **1)** factual findings by the circuit court as clearly erroneous, **2)** conclusion of law by the circuit court not binding upon and freely revewable by the appellate courts, **3)** the abuse of discretion standard, and **4)** the *de novo* standard for review of a grant of summary judgment, not exclusively, are all also detailed in the County's Amended Opening Appellate Brief. *See*, JEFS 212, PDF 330-333.

IV. REPLY ARGUMENT TO AMICUS CURIAE BRIEF

A. THE CIRCUIT COURT'S ASSERTION AND RETENTION OF GENERAL SUBJECT MATTER JURISDICTION OVER THIS MATTER WITHIN THE SPECIAL AND EXCLUSIVE JURISDICTION OF THE TAX APPEAL COURT WAS/IS IMPROPER

"[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).

The Amicus Curiae Brief on pages 7-8 argues and "urges," erroneously, that the special subject matter jurisdiction of the Tax Appeal Court is discretionary. It is not. The Amicus Curaie Brief's reliance on a footnote in Kincaid, et al. v. Board of Review, 106 Haw. 318, 104 P.3d 905 (2004) suggesting circuit courts *may* have jurisdiction to hear *excise tax* disputes where prepayment may cause the taxpayer irreparable harm, is not remotely germane to this case. Kincaid was unequivocal in its holding that the tax appeal procedures provided by Hawai'i Revised Statutes Chapter 232 precluded judicial review pursuant to Chapter 91. The Court in Kincaid was unequivocal "that [the] balance of interest would be compromised significantly were we to recognize the circuit court's

competing jurisdiction to hear tax appeals under HRS § 91-14." Id., 106 Haw. at 325, 104 P.3d at 912. This was held to be the case precisely because Chapter 91 *does not* predicate an aggrieved person's right to judicial review upon the prepayment of disputed monies. Id. Morever, it is made clear in Kincaid as a matter of statutory interpretation that the more specific statute providing that tax appeals shall lie to the tax appeal court prevailed over more general statute governing judicial review of contested proceedings before government agencies generally. Id., 106 Haw. at 324, 104 P.3d at 911.

i THE TAX APPEAL COURT IS EMPOWERED TO HEAR FEDERAL CONSTITUTIONAL CLAIMS

The Amicus Curaie Brief's assertion that "relegation" of Plaintiffs civil rights claim to Tax Appeal Court as somehow violating federal law, equally has no basis in law. It also ignores the express powers of the Tax Appeal Court to "to decide *all questions of fact* and *all questions of law, including constitutional questions*[.]" *See*, HRS §232-11. (Emphasis added). Moreover, the appeal before the Tax Appeal Court "shall bring up for determination all questions of fact and all questions of law, including constitutional questions involved in the appeal." *See*, HRS §232-17. There is nothing in the law which divest the Tax Appeal Court of jurisdiction simply because Plaintiffs assert their constitutional or civil rights have been violated.

ii. 42 U.S.C. § 1983 IS NOT AN INDEPENDENT CAUSE OF ACTION FOR DAMAGES OR FOR ESTABLISHING GENERAL SUBJECT MATTER JURISDICTION

Likewise, beyond the Amicus Curiae Brief's "urging," there is nothing about a 42 U.S.C. § 1983 claim which would divest the Tax Appeal Court of jurisdiction to hear and decide the claim. First, 42 U.S.C. §1983 is not itself a source of substantive rights. "[42 U.S.C.] §1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *See*, Graham v. Connor, 490 U.S. 386, 393-4, 109 S.Ct. 1865, 1870 (1989) (citing Baker v. McCollan, 443 U.S. 137, 144, n. 3. 99 S.Ct. 2689, 2694, n. 3. L.Ed. 2d 433 (1979); *see also*, Albright v. Oliver, 510 U.S. 266, 271, 114 S. Ct. 807, 811, 127 L. Ed. 2d 114 (1994) ("The first step in any such claim is to identify the specific constitutional right allegedly infringed."). In light of this, where the substantive constitional claim does not divest the Tax Appeal Court of jurisdiction it is difficult to fathom the Amicus Curiae Breif's assertion that the dependent claim does.

Second, Haywood v. Drown, 556 U.S. 729, 129 S.Ct. 2108 (2009), relied upon by the Amicus Curiae Brief, says nothing at all in support of the bizzare proposition that the Tax Appeal Court is divested of its special and exclusive subject matter jurisdiction over Plaintiffs' tax disputes simply because Plaintffs have asserted a claim pursuant to 42 U.S.C. §1983. Rather, Haywood v. Drown maintains the concurrent jurisdiction of federal and state courts to hear violations of federal rights. Id., 556 U.S. at 734-5, 129 S.Ct. at 2114. This of course, does even beg the proposition the Amicus Curiae Brief erroneously and misleadingly cites to Haywood for.

B. THE APPELLATE COURT(S) MAY OTHERWISE CORRECT THE CIRCUIT'S IMPROPER RESTRAINT ON THE COUNTY'S LAWFUL EXERCISE OF ITS CONSTITUTIONAL TAX AUTHORITY

As implicitly recognized in the Amicus Curiae Brief, the circuit court's invalidation of Maui County's tax classification provisions in lieu of determining their constitutionality was improper. *Cf*. McCray v. United States, 195 U.S. 27, 56, 24 S.Ct. 769, 76, 49 L.Ed. 78 (1904) ("The decisions of this court from the beginning lend no support whatsoever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted.").

As noted above, this Court "answers questions of constitutional law ***by exercising our own independent constitutional judgment based on the facts of the case***." (citation omitted). *See*, Gardens at W. Maui Vacation Club, 90 Haw. at 339, 978 P.2d at 777 (citing to State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998). (Emphasis added). There is simply no reason, as Plaintiffs have previously urged, for the appellate court here to not review and rule on the constitutionality of the County's real property tax classification for "Timeshare."

C. THE RULING AND FINDING BELOW THAT THE OMITTED ASSESSMENTS ARE ILLEGAL AND THAT THE COUNTY RETALIATATED AGAINST PLAINTIFFS ARE RESPECTIVELY WRONG AND CLEARLY ERRONEOUS

The Amicus Curiae Brief asserts on page 17 that the "retroactive assessments violated Maui ordinance because the property was not omitted and no other exceptions apply." This appears in part based on the Tax Foundation of Hawai'i's fundamental misunderstanding that timeshare owners are being taxed on their deeded interval interest in a condominium unit, which as demonstrated above, is simply wrong. As noted above, the County's Real Property Assessment Division assesses condominium units at the timeshare resort, not weekly intervals.

i. CONDOMINIUM PROPERTY IS SEPARATELY ASSESSED BY LAW

The separate legal existence of condominiums as taxable real property is beyond any dispute:

> "Condominium" means real estate, portions of which are designated for separate ownership and the remainder of which is designated for common ownership solely by the owners of those portions. *See*, Hawai'i Revised Statutes, § 514B-3 [*Definitions*]. [L 2004, c 164, pt of §2]
>
> "Condominium" means the ownership of single units, with common elements, located on the property within the condominium property regime. *See*, Hawai'i Revised Statutes, § 514A-3 [*Definitions*]. [L 2007, c 244, pt of §2].
>
> (a) Each unit that has been created, together with its appurtenant interest in the common elements, constitutes, for all purposes, a separate parcel of real estate. . . . (b) If there is any unit owner other than a developer, each unit shall be separately taxed and assessed[.] . . . Property taxes assessed by the State or any county shall be assessed collected on the individual units and not on the property as a whole. Without limitation of the foregoing, each unit and its appurtenant common interest shall be deemed to be a 'parcel' and shall be subject to separate assessment and taxation for all types of taxes authorized by law, including, but not limited to, special assessments. *See*, Hawai'i Revised Statutes, §514B-4 [*Separate titles and taxation*]. [L 2004, c 164, pt of §2].
>
> Property taxes assessed by a county shall be assessed on and collected on the individual apartments and not on the property as a whole. Without limitation of the foregoing, each apartment and the common interest appertaining thereto shall be deemed to be a 'parcel' and shall be subject to separate assessment and taxation for all types of taxes authorized by law, including, but not limited to, special assessments. *See*, Hawai'i Revised Statutes, §514A-6 [*Separate taxation*]. [L 2007, c 244, pt of §2].
>
> Whenever land has been divided into lots or parcels as provided by law, each such lot or parcel shall be separately assessed. *See*, Maui County Code, § 348.310 [*Assessment of lots and parcels*]; *see also* Maui County Code, §3.48.305(C)(2) (b) ("When property is subdivided into condominium units, . . . 2. Each unit and its appertaining common interest shall be: b. Deemed a parcel and assessed separately from other units.); *see also*, Hawai'i Revised Statutes, §514B-6 [*Supplemental county rules governing a condominium property regime*.]

The taxation of condominium units as individual property and separate real estate is not unique to Hawai'i. *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 (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 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."

Fourmost, Inc., 11 N.J. Tax at 62 (citing Cigolini, 208 N.J. Super at 665).

"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." 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). The Oregon Tax Court cited to Oregon Revised Statutes, which has a provision similar in substance to Hawai'i's statutes and Maui's Code treating condominium units as separate real property for assessment and tax:

> Each unit with its allocation of undivided interest in the common elements shall be considered a parcel of real property, whether leased or in fee simple, subject to separate assessment and taxation by any taxing unit in like manner as other parcels of real property.

See, Oregon Revised Statute, §94.285, renumbered §100.555 in 1989.

ii. THE MAUI COUNTY CODE AND COMMON LAW UNAMBIGUOUSLY PROVIDE FOR ADDING OMITTED REAL PROPERTY TO THE ASSESSMENT LIST AND FOR RETROACTIVE ASSESSMENT AND TAX

The Maui County Code specifically provides for changes in tax assessments and the assessment lists for omitted property:

> 3.48.140 Changes in assessment lists.
>
> Except as specifically provided in this chapter, no changes in, additions to, or deductions from the real property tax assessments on the assessment lists

prepared as provided in section 3.48.135 shall be made ***except to add thereto property or assessments which may have been omitted therefrom***, or ***to deduct therefrom adjustments on account of duplicate assessments*** and clerical errors, such as transposition in figures, typographical errors and errors in calculation. (Ord. 1076 § 3 (part), 1980: prior code§ 6-1.20).

3.48.165 Assessment of unreturned or omitted property.

A. . . . Likewise, if for any other reason any real property has been omitted from the assessment lists for any year or years, the director shall add to the lists the omitted property. (Ord. 1076 § 3 (part), 1980: prior code§ 6-1.33).[2]

Moreover, as recognized by the Intermediate Court of Appeals, pursuant to Maui Code "the County [is] authorized to retroactively assess [ ] Property." *See*, Kaheawa Wind Power, LLC v. County of Maui, 135 Hawai'i 202, 213, 348 P.3d 632, 643 (2014). The Court in Kaheawa expressly held:

> First, even assuming there was some time limit implied in MCC § 3.48.165(A), MCC § 3.48.145 explicitly states that an assessment is not illegal or invalid because it "was not completed within the time required by law[.]" Therefore, the date on which the County "discovered" the Property's non-exempt status is not material under the provisions of the MCC. Second, Kaheawa fails to cite authority that supports its position that a mandatory duty to add omitted property to assessment lists thereby creates a time limit under which delinquent actions are deemed illegal or void.
>
> * * * * *
>
> Based on our reading of the relevant MCC provisions, the County was authorized to retroactively assess the Property and there is no time limit delineated in the MCC in which the County must add omitted property to assessment lists.

Kaheawa, 135 Hawai'i at 213, 348 P.3d at 643. *cf*. Jet Black, LLC v. Rout County Board of County Commissioners, 165 P.3d 744, 750 (2006) ("common area parcels may be proportionately assessed to and with the ownership parcels to the extent they contribute to the value of the ownership parcels, could be taxed as previously omitted property. . . . Because

[2] *See also,* MCC 3.48.170 [*Reassessments*]. Any property assessed to a person or persons who did not have the record title upon January 1st preceding the tax year in which the assessment was made, may be, and in any case where the attempted assessment of property is void or so defective as to create no real property tax lien on the property and the taxes have not been fully collected, the property shall be assessed as omitted property in the manner provided in Section 3.48.035. (Ord. 1076 § 3 (part), 1980: prior code§ 6-1.34)

the common area was not captured on the tax rolls prior to 2002, we conclude that it was not error to add through the [Special Notice of Valuation].").

The argument made by Plaintiffs below, adopted by the circuit court, and here mimicked by the Amicus Curiae Brief that assessment of Plaintiffs' omitted condominium property was assessment of "property already assessed" facilely ignores the legal existence and bundle of rights which combined constitute the legal status of assessable and taxable real property.

iii. UNDISPUTED FACTS AND EVIDENCE BELOW DEMONSTRATES THE COUNTY'S REAL PROPERTY ASSESSMENT DIVISION HAS HISTORICALLY TREATED ALL OMITTED CONDOMINIUM PROPERTY EQUALLY UNDER THE LAW

As noted above, the Amicus Curiae Brief's repeated assertions that the omitted assessments were "selective retailiation against a taxpayer for petitioning the government to resolve a tax controversy," ignores or is completely unaware of the undisputed evidence presented to the circuit court below.

It warrants directing this Court to that evidence again here. Maui County's Real Property Assessment Division's assessment of scores of previously omitted condominium property was demonstrated by testimonial and documentary evidence identifying the multitude of condominium parcels on the island of Maui which were also subject to retroactive assessment. *See*, JEFS Dkt. 78, PDF 746-748 & 949-967 (Dec. Martin, at ¶ 9 and *Exhibit A*). Similarly to the Plaintiffs' timeshare condominium property, and for the same period from 2003 to 2007, these condominium properties were identified on the assessment rolls by their master TMK until the appraiser(s) in the Real Property Assessment Division were able to move the individual CPR [condominium property regime] units and parcels onto the rolls. *See*, JEFS Dkt. 78, PDF 945-948. Even after being moved onto the assessment rolls, multitudes of these CPR units and subdivision parcels were being omitted during this time period because of the backlog. Id. The Intermediate Court of Appeals in Kaheawa has already recognized testimony by Property Technical Officer Marcy Martin regarding the difficulties and back log the County faced during this same period. *See*, Kaheawa, 135 Hawai'i at 212, 348 P.3d at 642.

iv. UNDISPUTED FACTS AND EVIDENCE BELOW DEMONSTRATE PLAINTIFFS' TIMESHARE CONDOMINIUMS WOULD HAVE BEEN RETROACTIVELY ASSESSED REGARDLESS OF PLAINTIFFS' LITIGATION

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.
>
> * * * * *
>
> 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.*

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

By Mr. KLEIN:
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*. Id., PDF 626-634 at 630

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

Combined with the rest, this undisputed testimonial evidence clearly meets the showing endorsed by the Amicus Curiae Brief "by a preponderance of the evidence that the [County] would have taken the same action [issuing the omitted condominium property assessments] even in the absence of the protected conduct." See, Amicus Curiae Brief at page 20 (citing Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

V. CONCLUSION

The Amicus Curiae Brief is of relative and limited value on this appeal. Beyond reliance on the questionable findings and conclusions of the circuit court, it has failed to familiarize itself with the copious record, and documentary and testimonial evidence underlyng this appeal.

DATED: Wailuku, Maui, Hawaii, February 15, 2019.

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