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NO. CAAP 18-0000578

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; VIC H. HENRY; AND PETER A. BAGATELOS,	)))))))	CIVIL NO. 13-1-0848(2) (PTC) (Other Civil Action) APPELLANT COUNTY OF MAUI'S AND MAUI COUNTY COUNCIL'S NOTICE OF APPEAL FROM **1)** ORDER CERTIFYING FOR

[CAPTION CONTINUED ON NEXT PAGE]

PLAINTIFFS/APPELLEES' RESPONSE TO AMICUS
CURIAE BRIEF OF TAX FOUNDATION OF HAWAI‘I

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Plaintiffs/Appellees,	)	INTERLOCUTORY APPEAL THE
	)	FINDINGS OF FACT CONCLUSIONS
vs.	)	OF LAW; [ILLEGALITY] ORDER,
	)	FILED MARCH 23, 2018, PURSUANT
COUNTY OF MAUI; MAUI COUNTY COUNCIL; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; AND DOE ENTITIES 1-10,	)	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
Defendants/Appellants.	)	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 SECOND AMENDED
	)	COMPLAINT FILED ON AUGUST 12,
	)	2016
	)	
	)	Second Circuit Court
	)	Judge: The Honorable Peter T. Cahill

NO. CAAP 18-0000578

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; VIC H. HENRY; AND PETER A. BAGATELOS, Plaintiffs/Appellees, vs. COUNTY OF MAUI; MAUI COUNTY COUNCIL; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; AND DOE ENTITIES 1-10, Defendants/Appellants.	CIVIL NO. 13-1-0848(2) (PTC) (Other Civil Action) APPELLANT 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 SECOND AMENDED COMPLAINT FILED ON AUGUST 12, 2016 Second Circuit Court Judge: The Honorable Peter T. Cahill

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PLAINTIFFS/APPELLEES' RESPONSE TO AMICUS
CURIAE BRIEF OF TAX FOUNDATION OF HAWAI'I

Pursuant to the Court's January 16, 2019, Order ("Order re Amicus Brief," Dkt. 219), Plaintiffs/Appellees Ocean Resort Villas Vacation Owners Association, Ocean Resort Villas North Vacation Owners Association, Vic H. Henry, and Peter A. Bagatelos (collectively, "ORV/N"), through their undersigned attorneys, respectfully submit their response to the Amicus Curiae Brief of Tax Foundation of Hawai'i ("TFH"), filed January 16, 2019 ("TFH Brief," Dkt. 221).[1]

I. INTRODUCTION

The TFH Brief addresses three issues in this appeal. First, TFH argues, correctly, that the circuit court had and properly exercised jurisdiction over ORV/N's claim challenging the legality of Ordinance No. 3227, which created Maui's Timeshare real property tax classification, and ORV/N's claims challenging the legality and constitutionality of the County's May 24, 2016, amended assessments of ORV/N's properties ("Amended Assessments").[2] While TFH's ultimate conclusion is correct, its analysis fails to acknowledge authority demonstrating that ORV/N were not required to challenge Ordinance No. 3227—a legislative act—through administrative appeals of their real property assessments. That same authority disproves TFH's related, albeit unsupported and contradictory, assertion that damages are not available in this case because ORV/N failed to avail themselves of administrative remedies.

Second, TFH argues, incorrectly, that the Timeshare real property tax classification should be upheld because the County can create real property tax classifications for any reason whatsoever. This argument does not acknowledge the circuit court's analysis, and thus ignores

[1] Citations to the record are generally in the format of "Dkt. __:__." "Dkt." refers to the Judiciary Electronic Filing System ("JEFS") docket for the present appeal; the number before the colon refers to the docket number, and the number(s) after the colon refers to the electronic page(s) in the PDF viewer of the docket. "AA Order" refers to 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, 2016, Filed on December 1, 2016, etc., filed on August 9, 2017 (Dkt. 10). "Illegality Order" refers to the Court's Findings of Fact, Conclusions of Law; Order Granting Plaintiffs' Motion for Partial Summary Judgment Re: Illegality of the Timeshare Real Property Tax Classification, Filed December 19, 2017, etc., filed March 23, 2018 (Dkt. 11).

[2] "County" refers collectively to Defendants/Appellants County of Maui and the Maui County Council.

the existing structure of the Maui County Code's ("MCC") property tax classification system and controlling law interpreting that system. TFH instead relies on the mistaken assumption that tax classifications, on the one hand, and tax exemptions and credits, on the other hand, serve identical functions and are subject to identical constraints. TFH's argument also fails to recognize that the admitted purpose of the Timeshare real property tax classification—to "equalize" State-imposed Transient Accommodations Tax ("TAT") burdens on timeshares as compared to hotels—exceeds the County's limited taxing authority and is preempted by State law.

Third, TFH correctly argues that the circuit court properly concluded that the Amended Assessments violated various provisions of the MCC, and that the Amended Assessments violated ORV/N's rights to free speech and to substantive and procedural due process.

II. MOTION TO STRIKE

ORV/N move the Court to strike, or alternatively to disregard, two sections of the TFH Brief that address issues not raised in the County's Opening Brief.

In its Order re Amicus Brief, the Court permitted TFH to file an amicus curiae brief, but expressly limited the permissible content of any such brief to "the issues raised in the County's opening brief." Dkt. 219:2. The Court's express limitation presumably arose from ORV/N's objection to the inclusion in TFH's proposed amicus brief of arguments on issues not raised in the County's Statement of Points of Error. See Dkt. 196:4-5.

When the Court issued its Order re Amicus Brief, the County's original and amended Opening Briefs had already been filed. See Dkt. 198, Dkt. 212. However, in direct contravention of the Order re Amicus Brief, and less than three hours after entry of the Order, TFH filed its brief, Dkt. 221, which with only minor exceptions is identical to its proposed brief, and includes the same arguments to which ORV/N had objected. Therefore, the TFH Brief not only violates the Order re Amicus Brief, it also attempts improperly to expand the Court's review. See Lance Camper Mfg. Corp. v. Republic Indem. Co. of Am., 90 Cal. App. 4th 1151, 1161 n.6 (2001) (declining to address arguments in an amicus brief, stating: "Amicus Curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.").

ORV/N thus hereby move to strike, or alternatively to disregard, the following sections:

- Section IV.B.3, which discusses the application of the rational basis test to the

Timeshare real property tax classification. See TFH Brief at 14-15. The circuit court below expressly concluded that, because "the Timeshare real property tax classification violates the MCC and is thus illegal and void," the circuit court "need not conduct a rational basis analysis, and therefore Plaintiffs' Motion for Partial Summary Judgment, Based on Use, as to Count I (Equal Protection) of the Second Amended Complaint Filed August 12, 2016, filed September 29, 2017, is moot." Illegality Order COL ¶ 37. The County's Opening Brief does not challenge that conclusion or make any related argument.

- Section IV.C.1, which addresses the circuit court's alternative ruling that the Amended Assessments were void by operation of laches. See TFH Brief at 15-17; AA Order COL ¶¶ 194-200. The County's Opening Brief makes no related argument.

Because these issues were not raised in the Opening Brief, ORV/N do not address them here. Should the Court be inclined to consider these issues, however, ORV/N respectfully request leave to file a supplemental brief to address them.

III. ANALYSIS

A. TFH Correctly Argues that the Circuit Court Had and Properly Exercised Jurisdiction.

TFH correctly concludes that the circuit court had and properly exercised jurisdiction over all ORV/N's claims. TFH notes that "[s]tatutes and ordinances relating to tax appeals have established specialized procedures for contesting tax assessments and specialized bodies such as Boards of Review and the Tax Appeal Court ["TAC"]." TFH Brief at 7 (emphasis added). TFH consequently suggests that while the circuit court had jurisdiction over all ORV/N's claims, it also had discretion not to exercise that jurisdiction because "tax controversies in court are usually handled by [the TAC]." TFH Brief at 8. TFH's analysis is therefore incomplete as it does not consider the nature of ORV/N's claims or the jurisdictional limitations of the Board of Review and the TAC.

1. The Circuit Court Had Jurisdiction Over ORV/N's Challenge to Ordinance No. 3227—a Legislative, Rather than an Administrative, Act.

The circuit court had original jurisdiction over ORV/N's challenge to Ordinance No. 3227 because the claim challenged a legislative act, not an administrative assessment, and the jurisdiction of the Board of Review and the TAC is limited to appeals of assessments.

Under the MCC, a taxpayer "aggrieved by an assessment" may appeal to the County's Board of Review. MCC § 3.48.605 (emphasis added); see also id. § 3.48.595. For real property

tax purposes, an "assessment" describes the purely administrative function of calculating the value of property—the tax base—on which a later tax rate is levied. Every year "[o]n or before March 15th preceding the tax year," the County's Finance Director must "give notice of the assessment for the tax year." MCC § 3.48.130. The notice of assessment consists of "the valuation placed upon buildings, and the valuation placed upon all other real property, exclusive of buildings, . . . the exemption, if any, . . . and the net taxable value of the buildings and the net taxable value of all other real property, exclusive of the buildings." Id. The contents of the notice are therefore the "assessment" from which an appeal may be taken. Accordingly, assessments are administered by the Finance Department, while tax classifications and rates are enacted by ordinance passed by the Council. See MCC chapter 3.48, article X.

Here, ORV/N's challenge to the Timeshare real property tax classification did not contest the valuation, exemptions, or net taxable valuation of any property, so the claims did not involve an appeal of an assessment. Cf. In re Taxes Maui Agr. Co., 34 Haw. 515, 536 (1938) (For purposes of real property taxation, "the words 'assess' and 'assessment' have reference to valuation and not to a tax.") (decided under prior law); Maile Sky Court Co. v. City & Cty. of Honolulu, 85 Hawai'i 36, 40, 936 P.2d 672, 676, as amended (May 6, 1997) ("An assessment of real property . . . is an official estimate of the value of real property for the purpose of forming the basis upon which the amount of the tax is to be computed.").

Had ORV/N attempted to challenge the Council's legislative act of creating the Timeshare real property tax classification through an administrative "appeal" of "assessments," the Board of Review would have had no jurisdiction over the claim. The Board of Review has power only to hear "disputes between the director and any taxpayer in all cases in which appeals have been duly taken." MCC § 3.48.625.A; see also In re Taxes Maui Agric. Co., 34 Haw. at 553 (jurisdiction of boards of review is limited to disputes between the assessor and the taxpayer, and "[u]nless a dispute exists between the assessor and the taxpayer the . . . board is without jurisdiction") (emphasis added); Hawai'i Revised Statutes ("HRS") § 232-7 (boards of review are limited to "hear[ing] informally all disputes between the assessor and any taxpayer in all cases in which appeals have been duly taken."). Moreover, the Board of Review would have had no power to decide the questions raised, as it is a "merely administrative bod[y]" with no authority to decide questions of legality or constitutionality. In re Taxes Maui Agric. Co., 34 Haw. at 543-44; see also MCC §§ 3.48.625.B; 3.48.655.C; Alaka'i Na Keiki, Inc. v. Matayoshi,

127 Hawai‘i 263, 276, 277 P.3d 988, 1001 (2012) (“[T]he question as to the constitutionality of a statute is . . . vested in the judiciary.”) (emphasis added).

Where an administrative body has no power to grant the requested relief, such as by declaring a law unconstitutional, a party is not required to exhaust administrative remedies, and a circuit court is not deprived of subject matter jurisdiction to decide the case. See Haw. Insurers Council v. Lingle, 120 Hawai‘i 51, 71, 201 P.3d 564, 584 (2008) (circuit court was not divested of subject matter jurisdiction by plaintiffs’ failure to exhaust administrative remedies; plaintiffs challenged the constitutionality of fees, which administrative board had no power to decide).

ORV/N could also not have brought their challenge to the Timeshare real property tax classification directly to the TAC. The TAC has authority to decide questions of law, including constitutional questions, but only as to those cases that come within its jurisdiction, i.e., appeals of assessments and decisions on assessments made by boards of review. See HRS §§ 232-11, 232-16, 232-17; Rules of the Tax Appeal Court Rule 2(a)(1)-(3). The TAC “is a statewide court of limited jurisdiction, hearing and deciding, without a jury, direct appeals from tax assessors’ assessments or decisions made by the Board of Review in the applicable district.” Lewis v. Kawafuchi, 108 Hawai‘i 69, 73, 116 P.3d 711, 715 (App. 2005) (emphasis added) (quoted in AA Order COL ¶ 8); see also Alford v. City & Cty. of Honolulu, 109 Hawai‘i 14, 21, 122 P.3d 809, 816 (2005) (The TAC “is not a circuit court established by HRS § 603-2,” but “a court of record having statewide jurisdiction to hear and determine, without a jury, appeals from tax assessments or from decisions on such assessments made by the state boards of review.”).[3] By contrast, circuit courts are courts of general jurisdiction, and their subject matter jurisdiction extends to all matters properly brought before them unless precluded by constitution or statute. State v. Kotis, 91 Hawai‘i 319, 326 n.9, 984 P.2d 78, 85 n.9 (1999) (emphasis added) (cited in AA Order COL ¶ 9).

Like the County’s Opening Brief, the TFH Brief does not acknowledge the many Hawai‘i appellate court opinions distinguishing challenges to the legality of a tax, which may be raised in a court of original jurisdiction, from challenges to the amount of a valuation or tax, which may not. See McBryde v. Kala, 6 Haw. 529, 530 (Haw. Kingdom 1884) (in cases involving statutory

[3] The TAC also has jurisdiction over actions to recover tax payments to the State under protest, HRS § 40-35, but neither the statutes nor the MCC contain a parallel provision for recovery of tax payments to the counties under protest. See AA Order COL ¶ 16.

construction or alleged violations of law, courts have jurisdiction, and a taxpayer is not required to appeal to the assessor pursuant to statute); Hilo Sugar Co. v. Tucker, 8 Haw. 148, 150 (Haw. Kingdom 1890) (Court's role was not to review assessor's judgment in estimating values, "but we may interfere where the assessment is illegal, and we think the one submitted to us is so . . . not so much because the assessment . . . was excessive, as because it was made at all."); Shaw v. Booth, 14 Haw. 117, 119 (Haw. Terr. 1902) ("questions of judgment and fact are for the assessors and the specially constituted tax courts and questions of constitutionality, construction, procedure and applicable principles of law are for the regular courts"); Hill v. Yee Chan & Co., 31 Haw. 809, 812 (Haw. Terr. 1931) (collateral attack of assessment in court, rather than appeal to administrative board, was proper where taxpayer challenged validity of assessment rather than amount); In re Smart, 54 Haw. 250, 505 P.2d 1179 (1973) (statute governing appeals to board of review applied exclusively to taxpayer challenge because challenge was to valuation of assessment, not legality); Grace Bus. Dev. Corp. v. Kamikawa, 92 Hawai'i 659, 668, 994 P.2d 591, 600 (App. 1999) (citing In re Smart as evidencing the "survival of the common law distinction . . . between tax disputes challenging the amount of the tax or assessment, and tax disputes challenging the basic validity of the tax") (emphasis added), rev'd in part on other grounds, 92 Hawai'i 608, 994 P.2d 540 (2000). By disregarding this distinction and the circuit court's reliance on such cases, see AA Order COL ¶¶ 10-22, TFH's argument ignores the basis for the circuit court's proper exercise of jurisdiction.

2. The Circuit Court Had Jurisdiction Over ORV/N's Challenge to the Amended Assessments.

In its AA Order, the circuit court concluded that HRS section 232-13 explicitly limits the jurisdiction of the TAC and does not empower the TAC to empanel a jury, and that circuit courts are courts of general jurisdiction, with jurisdiction over all matters unless precluded by constitution or statute. AA Order COL ¶¶ 7-9.

The circuit court expressly concluded that the TAC did not have exclusive jurisdiction over ORV/N's challenge to the Amended Assessments because the challenge was not to their amount, but to their legality. AA Order COL ¶¶ 10-22. Citing well-established authority, the circuit court concluded that even if the TAC had concurrent jurisdiction over any of the issues related to the Amended Assessment claims, that would not require the circuit court to relinquish jurisdiction, including because the circuit court had exercised jurisdiction first. Id. COL ¶¶ 23-29. The circuit court also concluded that it was obligated to exercise jurisdiction because of

ORV/N's right to a jury trial, which it had demanded. Id. COL ¶¶ 36-41.

TFH's analysis does not address these conclusions or the cited authorities, conceding that they are correct.

3. The Circuit Court Correctly Ruled that ORV/N Are Entitled to Damages.

Notwithstanding its argument that the circuit court had jurisdiction over ORV/N's claims, TFH appears to argue, inconsistently, that "procedural requirements" for administrative appeals constrain the circuit court in awarding damages resulting from Ordinance No. 3227. TFH Brief at 10. TFH argues that "[a]llowing" the circuit court to award damages based on the differing tax rates "would subvert the prescribed tax appeal processes." TFH Brief at 10 (emphasis added). As demonstrated above, those processes relate strictly to appeals of administrative assessments and do not govern challenges to legislative acts.

TFH cites In re Smart, 54 Haw. at 252, 505 P.2d at 1181 for the proposition that real property tax "appeals not within the system would subvert the real property tax scheme." TFH Brief at 10. In re Smart, however, involved jurisdiction over an appeal of an assessment, not a challenge to a legislative act. Moreover, in that case (which predated the transfer of real property taxation power to the counties), the Court held that "a taxpayer may recover allegedly 'illegal' real property taxes paid under protest by suing successfully under HRS § 40-35," governing actions to recover tax payments to the State under protest. 54 Haw. at 252, 505 P.2d at 1181 (citing Wilson v. Kunewa, 29 Haw. 555 (1927)). The Court distinguished the case before it, holding: "where Taxpayer's suit contests the valuation placed upon the real property by the tax assessor rather than the legality of the assessment, we are of the opinion that the [administrative appeals procedure] applies exclusively." Id. (emphasis added). The Court thus held that "[i]f appeals from valuations are to be taken, it is essential to the integrity of the process that they be commenced under [the administrative appeals procedure]." Id. (emphasis added). In re Smart thus demonstrates that: (1) the administrative appeals procedures are inapplicable here, and (2) those procedures do not constrain the circuit court's jurisdiction, or restrict damages, in any way.

Likewise, Captain Andy's Sailing, Inc. v. Department of Land & Natural Resources, 113 Hawai'i 184, 150 P.3d 833 (2006), cited in the TFH Brief at 10, is also inapposite. There, the Court held that the plaintiff had a remedy for unlawful fees exacted by the State under HRS section 40-35. The Court held, however, that the plaintiff's claim for recovery was barred

because he had not brought suit within the limitations period set by that same statute. 113 Hawai‘i at 195, 150 P.3d at 844. Captain Andy's does not remotely support TFH's apparent theory that a limitations period in a statute or ordinance can bar damages even when that statute or ordinance is inapplicable to the claim.

Although the circuit court discussed In re Smart and various other cases distinguishing tax disputes between assessors and taxpayers over the amount of the assessment, and tax disputes challenging the basic validity of a tax, AA Order COL ¶¶ 6-27, TFH does not address the circuit court's conclusions as to those cases. Other than citing the inapposite cases above, TFH presents no legal theory by which the inapplicable administrative appeals process for assessments could restrict damages based on a challenge to an ordinance. Because ORV/N challenged only the legality of Ordinance No. 3227 and resulting tax rates, ORV/N were not required to appeal any assessments. Their claim was not subject to the administrative appeal processes in the MCC or HRS chapter 232, and thus was not subject to related limitations periods. It necessarily follows that, when the provisions for administrative remedies are irrelevant to a party's claim, those provisions cannot restrict the party's entitlement to damages.

While TFH expresses a concern over "revenue loss," TFH Brief at 10, the County has had ample opportunity to mitigate a potential damages award since ORV/N initiated their challenge to Ordinance No. 3227 more than five years ago. Recognizing the merit of the challenge, the County admittedly attempted to mitigate a damages award by asserting counterclaims in setoff for taxes it had never invoiced, in turn based on assessments it had never made. AA Order FOF ¶¶ 23-28, 61-65. Rather than subsequently setting identical Timeshare and Hotel rates until the case's resolution, however, the County has continued to set Timeshare rates far higher than Hotel rates. See County Resolution No. 18-83 (setting 2018 rates at $15.41 for Timeshare and $9.37 for Hotel) (available at https://www.mauicounty.gov/DocumentCenter/View/112816/ 2018-Tax-Rate). The County has knowingly increased the damages at issue here.

B. The Circuit Court's Conclusion that the County Must Classify Real Property Based Only on Use Was a Correct Interpretation of the MCC and *Gardens.*

TFH also argues that there is no restriction, at all, on the County's ability to create real property tax classifications, so the circuit court erred in concluding that the County may only create real property tax classifications based on differences in property use. TFH Brief at 14. However, TFH does not address any of the circuit court's related legal conclusions, compare

TFH Brief 11-14 with Illegality Order COL ¶¶ 11-17, 25-35, and therefore does not demonstrate error. Regardless, TFH's related analysis is wrong as a matter of law.

1. The MCC *Does* Classify Real Property Based on Differences in Use.

TFH's argument that "[t]here is nothing in [MCC section] 3.48.305 that purports to restrict tax classifications to those based on use," TFH Brief at 11, ignores the plain language of MCC section 3.48.305 and its fundamental structure (at least as it existed before the addition of the Timeshare real property tax classification), and fails to acknowledge the significance of the Supreme Court's controlling holding that the fundamental structure is based on real property use.

MCC section 3.48.305.A establishes general real property tax classifications based upon distinct property uses: "land and building shall be classified, upon consideration of the real property's highest and best use, into the following general classes." MCC sections 3.48.305.B and C require assignment to these classifications based on the property's use. This is not only readily apparent by reading those provisions, it is a matter of controlling law.

The Supreme Court interpreted the MCC real property tax provisions in Gardens at West Maui Vacation Club v. County of Maui, holding: "The County of Maui classifies real property into nine classifications based on use for the purpose of real property taxation." 90 Hawai'i 334, 337, 978 P.2d 772, 775 (1999) (emphasis added). Moreover, in Gardens, the appellants argued that the ordinance at issue, which required all timeshares to be classified as Hotel, impermissibly classified properties based on "ownership" rather than "use." 90 Hawai'i at 342, 978 P.2d at 780. The Court did not hold or imply that the County could properly classify based on ownership; it instead examined the respective property uses: "Multiple owners subject to a time share plan, although vested with ownership rights in their time slots, put the units to use much like transient hotel guests, resulting in intensive use of the property." 90 Hawai'i at 343, 978 P.2d at 781. The Hotel classification "thus legitimately applies to properties whose actual use is transient or short-term, regardless of whether the units are used personally." Id.; see also id. at 344, 978 P.2d at 782 (the Hotel classification "is intended to apply to properties whose actual use is transient or short-term even though the owners may use the units personally").[4, 5]

[4] In Gardens, the County successfully argued that, given their like uses, timeshares must be classified as Hotel to eliminate disproportionate tax burdens resulting from the inclusion of some timeshares in the Apartment classification and others in the Hotel classification.

[5] See also Stallard v. Consol. Maui, Inc., 103 Hawai'i 468, 474 n.18, 83 P.3d 731, 737 n.18 (2004) (holding that "time sharing and transient vacation rental use are identical uses of

Maui's real property tax is indisputably an *ad valorem* tax, which taxes property "according to its value." 1-10B Powell on Real Property § 10B.06[a] (2016). Classification therefore must rest on the "characteristics and use of the property." O'Neil v. Conejos Cty. Bd. of Comm'rs, 395 P.3d 1185, 1191 (Colo. App. 2017); see also Mathias v. Dep't of Revenue, 817 P.2d 272, 278 (Or. 1991) (*en banc*) (for *ad valorem* tax purposes, real property classifications "must be based on inherent, qualitative, genuine, rational differences between the classes of property to be accorded different treatment," so a classification including properties with four or more lots but excluding those with three or fewer lots was unconstitutional, as properties were not of "inherently different kinds or uses"); Opinion of the Justices, 584 A.2d 1342, 1345 (N.H. 1990) (constitutionality of a property tax classification depends upon the physical and functional characteristics of the property); Philadelphia, B. & W. R. Co. v. Mayor of Wilmington, 57 A.2d 759, 765 (Del. Ch. 1948) (real property tax classifications may withstand scrutiny if based on "inherent differences in [property's] nature or character, and even in its use").

Even if the County has authority to restructure its real property tax scheme, it has not done so. The existing scheme does classify based on use, and a single classification not based on a difference in use is not only void under the MCC, it is inherently arbitrary. See State v. Bloss, 62 Haw. 147, 153, 613 P.2d 354, 359 (1980); Bd. of Tax Comm'rs v. Town of St. John, 702 N.E.2d 1034, 1042 (Ind. 1998) (classification of property "cannot be arbitrary but rather must be based upon differences naturally inhering in the property").

2. Exemptions and Credits Are Not Real Property Tax Classifications.

TFH argues, incorrectly, that "all tax systems classify taxpayers and assign different financial consequences depending on whether they meet those classifications. Credits, exemptions, and property classifications are three ways of accomplishing this; thus, this analysis treats them the same." TFH Brief at 12 (emphases added). TFH's theory, for which it cites no authority, is wrong. Real property tax classifications must classify real property, not taxpayers. Opinion of the Justices, 697 A.2d 125, 128 (N.H. 1997) ("Distinctions in tax treatment must rest upon reasonable classifications of property, not upon classifications of taxpayers owning a common class of property."); State v. Mercer Cty. Bd. of Taxation, 193 A. 555, 556 (N.J. 1937)

land," so "time sharing and transient vacation rentals should be either permitted or prohibited [for zoning purposes] on an equal basis within an area deemed appropriate by the county") (emphasis added) (quoting Sen. Conf. Comm. Rep. No. 8-80, in 1980 Senate Journal, at 942).

(property may be classified by inherent characteristics or use, but a classification based on the persons who own property is unconstitutional).

Exemptions and credits may treat taxpayers differently based on special circumstances as matters of public policy, but exemptions and credits are not real property classifications for real property tax purposes. Maui's real property classification system is set out in MCC chapter 3.48, article VII (Valuations), but exemptions are set out in article IX (Exemptions). Article IX creates tax exemptions based on individual circumstances (*e.g.*, those with disabilities and deployed military members), but such exemptions do not affect the classification of the underlying real property, and do not create real property tax classifications based on individual circumstances. See generally MCC ch. 3.48 article IX. "The term 'exemption,' as applied to taxation, presupposes a liability and is properly applied only to a grant of immunity to persons or property which otherwise would have been liable to assessment." In re Yerian, 35 Haw. 855, 874 (Haw. Terr. 1941), aff'd sub nom. Yerian v. Territory of Haw., 130 F.2d 786 (9th Cir. 1942). Exemptions create such immunity from tax liability to "promote some proper object of public welfare or interest." Opinion of the Justices, 712 A.2d 1080, 1086 (N.H. 1998).

Likewise, the tax credit set out in MCC chapter 3.48, article XIII (Circuit Breaker Tax Credit) does not affect the classification of the underlying real property and does not create real property tax classifications based on individual circumstances. Instead, the credit's purpose is to limit the real property taxes of qualified homeowners "to a percentage of the total income of the household," providing financial relief to residents whose properties have significantly increased in value. MCC § 3.48.800. The County's ability to provide tax relief to qualified property owners through exemptions and credits does not allow the County to create real property tax classifications for purposes other than the use of real property. Were that not the case, there would be no need to set out classifications, exemptions, and credits in separate articles.

3. The County Cannot Create Classifications for Purposes that Violate the Limits of the County's Power Under the State Constitution and that Are Preempted by State Statutes.

TFH does not dispute that the Timeshare real property tax classification was based on differences in TAT formulas, but presumes, without citing any authority, that the County may use its real property taxing power to impose a *de facto* TAT.[6] See TFH Brief at 2-3. This

[6] In the context of its argument addressing the rational basis test, which ORV/N seek to strike as exceeding the scope of the Opening Brief, TFH argues that, although TAT is a State-

presumption is incorrect. Even if, for the sake of argument, the County could classify real property based on considerations other than the use of real property, it still could not do so in a way that violates the County's limited power under the Hawai'i Constitution and that is preempted by State law, as here.

The County is not a sovereign entity, but a municipal corporation. As such, it is "solely the creation of the State" and "may exercise only those powers which have been delegated to [it]." State v. Medeiros, 89 Hawai'i 361, 365, 973 P.2d 736, 740 (1999); see also Haw. Const. art. VIII, § 1. The power to tax is inherent in the power of the State, as a sovereign, and the County has no inherent power to tax, see Ohio Oil Co. v. Conway, 281 U.S. 146, 159 (1930), and no implied power to tax. See S. St. Nominee Tr. v. Bd. of Assessors of Carlisle, 878 N.E.2d 931, 936 (Mass. App. 2007). Accordingly, the County has only the fiscal powers granted to it by the State, and the County cannot use even those powers in ways that conflict with State laws of general application. HRS § 50-15 ("[T]here is expressly reserved to the state legislature the power to enact all laws of general application throughout the State on matters of concern and interest and laws relating to the fiscal powers of the counties, and neither a charter nor ordinances adopted under a charter shall be in conflict therewith.").

With the exception of real property taxes, which it assigns to the counties, article VIII, section 3 of the Hawai'i Constitution explicitly reserves all taxing power to the State. The State thus has exclusive authority over TAT. See HRS chapter 237D. HRS section 237D-2 requires the State to collect TAT from transient accommodations based on a stated percentage of rental proceeds, and from timeshare occupants based on a stated percentage of fair market rental value. HRS § 237D-2(a), (c). Section 237D-6.5 establishes the priorities for TAT revenue uses so that the State first distributes funds for specific projects and then distributes stated amounts to the counties. HRS chapter 237D does not require or permit any involvement from the counties in assessing or collecting TAT. Moreover, TAT is an excise tax, not a property tax. See In re Grayco Land Escrow, 57 Haw. 436, 449, 559 P.2d 264, 273 (1977) (distinguishing real property tax, measured by property value, from excise tax, levied upon the "activity of doing business within the state" and measured by income from the activity). Assessing and collecting TAT is

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imposed tax, the Timeshare real property tax classification is permissible because "Maui County was entitled to roughly 10% of that tax," TFH Brief at 15, thus agreeing that the difference in the Timeshare and Hotel real property tax rates operates as a County-imposed TAT.

strictly a State function, and the County thus has no power to assess TAT, regardless of its label.

Here, the County created the Timeshare real property tax classification to allow it to set the real property tax rates for Timeshare above those for Hotel in order to "equalize" the respective TAT burdens imposed by the State. Illegality Order FOF ¶¶ 6, 8-18; COL ¶¶ 18-23. This differential operates as a TAT, which the County has no authority to impose. It is immaterial that the County imposes this *de facto* TAT under the guise of a real property tax. See Medeiros, 89 Hawai'i at 366, 973 P.2d at 741 (the nature of a tax is not determined by its label but by its operation). The County therefore exceeded the limited powers granted to it by the Hawai'i Constitution when it created the classification. Illegality Order COL ¶ 24.

The classification is also preempted because its purpose conflicts with State law and intrudes upon a comprehensive State taxation program designed to apply uniformly throughout the State. A municipal ordinance is preempted by state law "if (1) it covers the same subject matter embraced within a comprehensive state statutory scheme disclosing an express or implied intent to be exclusive and uniform throughout the state or (2) it conflicts with state law." Ruggles v. Yagong, 135 Hawai'i 411, 412, 353 P.3d 953, 954 (2015) (citation omitted).

In its opinion in Travelocity.com, L.P. v. Director of Taxation, 135 Hawai'i 88, 122, 346 P.3d 157, 191 (2015), the Supreme Court established conclusively that: TAT is a State-imposed tax; TAT applies to visitors, not real property; the TAT statutes determine the tax formulas and rates hotels and timeshares must pay; the TAT statutes determine the amount of TAT revenues the State must distribute to the counties; the Legislature intended the State's disbursement of TAT revenues to the counties to compensate for visitor burdens to county infrastructure; the Legislature intended to control TAT to minimize its impact; and TAT cannot be added to or imposed more than once on any transaction. 135 Hawai'i at 122-27, 346 P.3d at 191-96. The Timeshare real property tax classification directly conflicts with each of these principles. Among other things, it is specifically designed to allow the County to collect additional TAT (without any contribution to the State or other counties) under the guise of property taxes; to collect TAT from property owners, not occupants; to increase tax burdens to discourage timeshares; and to increase TAT burdens "contrary to the intent of the legislature that correlated the [TAT] to the [unit] use." Id. at 126, 346 P.3d at 195; cf. Ruggles, 135 Hawai'i at 418, 353 P.3d at 960 (initiative was invalid in its entirety because it conflicted with, and was thus preempted by, Hawai'i law). The Timeshare real property tax classification, and County's

purpose in creating it, conflict with and intrude upon the State's exclusive TAT scheme, and conflict directly with the clear intent of the State Legislature that TAT be assessed uniformly throughout the State.

If, as TFH argues, the County is not constrained to create classifications based on use, but may consider any and all other County—and State—concerns in creating real property tax classifications, its exercise of those powers is inherently arbitrary. See Black's Law Dictionary (10th ed. 2014) (defining "arbitrary" as "[d]epending on individual discretion; . . . involving a determination made without consideration of or regard for . . . fixed rules, or procedures.").

C. The Findings and Conclusions that the County's Issuance of the Amended Assessments Violated ORV/N's Speech and Due Process Rights Are Correct.

The TFH Brief argues, correctly, that the provisions of the MCC prohibited the County from issuing the Amended Assessments, and that the County violated ORV/N's speech and due process rights when it issued the Amended Assessments.[7] In the discussion of due process, however, TFH cites two cases for the proposition that courts "have upheld legislation going back several years." TFH Brief at 19 (citing Gillette Commercial Operations N. Am. & Subsidiaries v. Dep't of Treasury, 878 N.W.2d 891, 907 (Mich. Ct. App. 2015); Dot Foods, Inc. v. State, Dep't of Revenue, 372 P.3d 747, 750 (Wash.), as amended (Apr. 28, 2016). Both cases are readily distinguishable. Neither concerned administrative actions, as here. Both instead

[7] In its Statement of Facts, see TFH Brief at 3-4, TFH incorrectly states that the County issued the Amended Assessments to "every timeshare unit owner" so as to assess individual timeshare interests. To the contrary, for years 2006, 2007, and 2008, the County assessed ORV/N's master parcels rather than their individual condominium units (subparcels). See AA Order FOF ¶ 11-13. The Amended Assessments purported to assess the individual condominium units, even though all the property comprising those units had already been assessed as master parcels. See id. The County also did not issue amended assessments to the timeshare unit owners, but issued amended assessments for every condominium unit to ORV/N, as associations. AA Order FOF ¶¶ 30-31; see also Dkt. 78:251-52 (declaration of ORV/N representative, explaining that the County issues assessments to ORV/N, who pay the taxes collectively and collect those amounts from members as part of their annual fees).

The TFH Brief also incorrectly states that the circuit court held the Amended Assessments "were all void because the county didn't follow proper assessment procedure." TFH Brief at 5. To the contrary, the circuit court held that because the County had already assessed all of ORV/N's real property for 2006, 2007, and 2008, the County was prohibited by specific provisions of the MCC from reassessing the property, and the "omitted property" provision the County cited as its authority was inapplicable. AA Order COL ¶¶ 54-102. In other words, there was no proper assessment procedure that would have allowed the County to amend the original assessments.

involved state legislation, which was subject to public scrutiny and debate, and which applied to a general group of taxpayers, not to a targeted group of taxpayers, as here. See AA Order COL ¶¶ 144-46. Neither involved imposition of a new tax; both involved entitlement to refunds. The legislation in Gillette retroactively rescinded the state's membership in a multistate tax compact, effectively extinguishing claims for tax refunds. The court considered that the legislation did not "reach back in time to assess a 'wholly new tax' on long-concluded transactions," but "clarifie[d] the method of apportioning the tax base for a previously enacted tax." 878 N.W.2d at 911. Dot Foods also involved a taxpayer's claim for refunds, based on a claimed exemption from state taxes, 372 P.3d at 749, and while the taxpayer claimed the period of retroactivity was 27 years, the court held the actual period of retroactivity, by operation of the statute, was four years. Id. at 751.

Otherwise, TFH's remaining arguments that the Amended Assessments are invalid and deprived ORV/N of constitutional rights are sound. See TFH Brief at 17-21.

IV. CONCLUSION

ORV/N respectfully request that this Court affirm the circuit court's AA Order and judgment in their entirety, and affirm the Illegality Order, remanding for the sole purpose of determining damages, and such other relief as may be appropriate and just.

DATED: Honolulu, Hawai'i, February 15, 2019.

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NO. CAAP 18-0000578

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI‘I

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; VIC H. HENRY; AND PETER A. BAGATELOS, Plaintiffs/Appellees, vs. COUNTY OF MAUI; MAUI COUNTY COUNCIL; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; AND DOE ENTITIES 1-10, Defendants/Appellants.	CIVIL NO. 13-1-0848(2) (PTC) (Other Civil Action) APPELLANT 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 SECOND AMENDED COMPLAINT FILED ON AUGUST 12, 2016 Second Circuit Court Judge: The Honorable Peter T. Cahill

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this date, a true and correct copy of the foregoing document was duly served upon the following persons through the Judiciary Electronic Filing and Service System (JEFS):

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