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SCAP NO. 18-0000578

IN THE SUPREME COURT 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]

ANSWERING BRIEF

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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

SCAP NO. 18-0000578

IN THE SUPREME COURT 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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County of Maui Budget and Finance Committee Report 04-78 3

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ANSWERING BRIEF

Pursuant to Rule 28(c) of the Hawai‘i Rules of Appellate Procedure ("HRAP"), Plaintiffs/Appellees Ocean Resort Villas Vacation Owners Association ("ORV"), Ocean Resort Villas North Vacation Owners Association ("ORVN"), Vic H. Henry, and Peter A. Bagatelos (collectively, "ORV/N"), through their undersigned attorneys, respectfully submit their Answering Brief in response to the County of Maui and Maui County Council's ("Council") (collectively, the "County") late-filed amended Opening Brief, filed December 25, 2018.

I. INTRODUCTION

This appeal arises from County actions exceeding its authority, first in creating a real property tax classification in violation of the Maui County Code ("MCC"), and then in retaliating against ORV/N for initiating litigation to challenge that classification and associated tax rates.

More specifically, despite the fact that the MCC classifies real property based on property uses and despite controlling Hawai‘i Supreme Court precedent holding that for real property tax purposes use of hotel and timeshare properties is the same, in 2004 the Council removed timeshares from the Hotel and Resort real property tax classification and established a separate real property tax classification for timeshares. The Council's official purpose for creating the new classification had nothing to do with differences in property use. Instead, the Council sought to "equalize" what it characterized as a disparity in the State's statutory formula for Transient Accommodations Taxes ("TAT") collected by the State from timeshares as compared to hotels, to increase the amount of TAT that the County received. The circuit court held that the MCC permits the Council to create classifications based only on differences in real property use, and that the purpose of equalizing burdens from TAT—a State-imposed excise tax—exceeds the County's authority under the MCC and Hawai‘i Constitution.

This appeal also involves the County's blatant retaliation against ORV/N for suing the County for its illegal real property tax classification and associated tax rates. In 2015, the County filed a counterclaim in setoff against ORV/N in a related Sunshine Law case, claiming that for years 2006, 2007, and 2008, it theoretically could have assessed ORV/N's properties using a different assessment methodology, which would have resulted in far more taxes than were actually levied. The County claimed it was entitled, through set off, to the amount of taxes ORV/N would have been required to pay seven to nine years prior had the County used this assessment methodology. ORV/N successfully moved to dismiss the counterclaim on the basis

that there was no related tax obligation, as the County had never issued assessments or bills for the amounts it claimed, and therefore there could be no claim for set off. Shortly after that dismissal, the County issued amended assessments for ORV/N's properties for 2006, 2007, and 2008, plus tax bills for $10,728,518.49 in additional taxes due within 30 days. The circuit court held these amended assessments violated various MCC provisions, violated controlling case law, and were void. Based in part on the County's own admissions that the purpose of the amended assessments was to set off an anticipated damages award in this case, the circuit court also held the amended assessments violated ORV/N's First Amendment and due process rights, entitling them to damages under 42 U.S.C. § 1983.

The circuit court's orders were correct and should be affirmed.

II. STATEMENT OF THE CASE

A. Creation of the Timeshare Real Property Tax Classification

Prior to 1997, some timeshares in Maui were classified as Apartment, while others were classified as Hotel/Resort ("Hotel"). To eliminate the resulting "disproportionate [real property] tax burdens," the County in 1997 passed an ordinance to include all timeshares in the Hotel classification. Gardens at W. Maui Vacation Club v. Cty. of Maui, 90 Hawai'i 334, 342, 978 P.2d 772, 780 (1999). The Supreme Court upheld the ordinance, agreeing with the County that timeshares and hotels are like uses, warranting inclusion of all timeshares within the Hotel classification. It held that timeshare owners "put the units to use much like transient hotel guests, resulting in intensive use of the property," so the Hotel classification "legitimately applies to properties whose actual use is transient or short-term, regardless of whether the units are used personally." 90 Hawai'i at 343, 978 P.2d at 781 (emphasis added); see also id. at 344, 978 P.2d at 782. Gardens thus confirmed as a matter of law that for purposes of real property taxation, the actual use of timeshares and hotels is the same.

From 1997 to 2005, all timeshares in Maui County were, in fact, included in the Hotel real property tax classification. See Illegality Order FOF ¶ 2.[1] However, on October 6, 2004, the

[1] "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), related to the illegality of the timeshare real property tax classification. "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 August 9, 2017 (Dkt. 10) related to the

County's Budget and Finance ("B&F") Committee transmitted Draft Bill 76 (2004) to the Council, proposing the creation of a new real property tax classification for timeshares in fiscal year 2006. See Dkt. 104:182-85 (Ordinance No. 3227). B&F Committee Report 04-187 reported the bill's transmission and the Committee's official recommendation for creating the Timeshare real property tax classification. See Illegality Order FOF ¶ 5; Dkt. 104:270-74 (B&F Committee Report 04-187). Committee Report 04-187 cited no difference in the use of timeshares as compared to hotels. See Illegality Order FOF ¶ 6; Dkt. 104:270-74. To the contrary, presuming that because hotel and timeshare uses are the same, their TAT burdens should also be the same, the Committee's concern was the difference in statutory formulas for TAT collected from timeshares as compared to hotels, which resulted in the generation of less TAT from timeshares:

> Your Committee notes that the draft bill removes Time Share properties from the Hotel and Resort real property tax classification, and establishes a new classification for Time Share properties. The Council will consider real property tax rates for this new classification during the Fiscal Year 2006 budget session. Your Committee further notes that Time Share properties are transient units subject to a time share plan under Section 514E-1, Hawaii Revised Statutes (HRS).
>
> Your Committee recognized that the application of the [TAT] HRS Chapter 237D is different for Hotel and Resort properties and Time Share properties. The TAT for Time Share properties is 7.25 percent of the unit's fair market rental value. Under HRS Section 237D-1, "fair market rental value means an amount equal to one-half the gross daily maintenance fees that are paid by the owner . . . ." The TAT for Hotel and Resort properties is 7.25 percent of the gross rental proceeds. With the application of these formulas, Time Share properties generate considerably less TAT revenue per unit than Hotel and Resort properties do.

Dkt. 104:271-72 (emphases added); see also Illegality Order FOF ¶ 6.[2]

The Council passed the bill on November 19, 2004, and the resulting Ordinance No. 3227 became effective on January 1, 2005. See Dkt. 104:182-85; Illegality Order FOF ¶ 7.

B. The County's Judicial Admissions Concerning the Timeshare Real Property Tax

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amended assessments. Citations to the record are otherwise 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.

[2] The County does not cite the official report, but quotes B&F Committee Report 04-78, OB at 8, which nevertheless confirms that the purpose of the Timeshare classification was to address a perceived disparity in TAT resulting from statutory TAT formulas. See Dkt. 102:157.

Classification

In this litigation, the County has admitted that, in establishing the Timeshare real property tax classification, the County "sought to remedy a tax disparity that the Hawai'i Legislature created by taxing Hotels and Timeshares, both transient accommodations, differently." Illegality Order FOF ¶ 13 (citing Dkt. 104:389, Dkt. 106:43). The County admitted, more specifically, that its purpose in establishing the Timeshare real property tax classification was to remedy a perceived disparity in State-imposed TAT assessments. Id. FOF ¶ 14 (citing Dkt. 104:389, Dkt. 106:43). Therefore, as the County admitted, after it created the Timeshare classification, it set the Timeshare tax rate higher than the Hotel tax rate to remedy what it characterized as an unfair disparity in TAT burdens "as between these two subcategories of the visitor industry." Id. FOF ¶ 18 (citing Dkt. 104:297-98). The County also admitted that the purpose of the classification was to address a "disparity among two classes of corporate taxpaying entities [i.e., timeshares and hotels] within a commercial industry." Id. FOF ¶ 17 (citing Dkt. 104:297-98); see also id. FOF ¶ 15 (citing Dkt. 104:283); COL ¶¶ 20-22 (citing Dkt. 104:297-98, 270-74). In its appeal, the County challenges none of these findings or conclusions.

C. Tax History of the ORV/N Properties

ORV/N are non-corporate associations of timeshare owners of the Westin Ka'anapali Ocean Resort Villas and the Westin Ka'anapali Ocean Resort Villas North. AA Order FOF ¶ 2.

For years 2006, 2007, and 2008, the County assessed all ORV's land and buildings under a single master parcel number, Tax Map Key ("TMK") 4-4-014-003-0000 ("Master Parcel 3-0000"). AA Order FOF ¶ 3; Dkt. 78:306, 430. Similarly, for year 2008, the County assessed all ORVN's land and buildings under a single master parcel number, TMK 4-4-014-004-0000 ("Master Parcel 4-0000").[3] See AA Order FOF ¶ 6; Dkt. 78:307. The County admits that, for these years, it assessed and taxed all ORV's and ORVN's real property as master parcels, even though each master parcel was subject to a condominium property regime ("CPR"), so that the County could have separately assessed and taxed each condominium unit, or subparcel. AA Order FOF ¶¶ 4, 7; Dkt. 78:306, 307, 318-19. The County admits that ORV and ORVN timely paid all taxes related to those assessments. AA Order FOF ¶ 9; Dkt. 78:307-08.

When real property on Maui is subject to a CPR, completion of the buildings may affect the

[3] Certificates of occupancy for ORVN's buildings were issued in 2006 and 2007, later than those for ORV's buildings, issued in 2003 through 2005. See OB at 7 n.10.

property's assessment in two ways. The County maintains that, when "condominium projects are under construction and unsold, the [County] may value the partially complete projects using the cost approach on the master [parcel]." AA Order FOF ¶ 12; Dkt. 78:318-19. Under the cost approach, "land is assessed at market value as though vacant," and buildings under construction are "valued at costs x % of completion." AA Order FOF ¶ 10; Dkt. 78:315. "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." AA Order FOF ¶ 11; Dkt. 78:315 (emphases added). The County then also changes "to the market value approach [for valuation] and assesses each unit individually." AA Order FOF ¶ 12; Dkt. 78:318-19.

The County's position in this litigation has been that, although the County assessed the Master Parcels using the cost approach for years 2006, 2007, and 2008, the County could have assessed (though it did not) each individual condominium unit, or subparcel, within the Master Parcels using the market approach to valuation. AA Order FOF ¶ 13; Dkt. 78:315. In an interrogatory response, the County admitted that its failure to assess the individual condominium units in those years was not an oversight; it claimed instead that it had an administrative "backlog" in entering individual condominium units into its system and, for that process, the County considered ORV/N to be low in the "backlog priority." AA Order FOF ¶ 14; Dkt. 78:315.

On December 7, 2009, Maui's mayor signed into law Ordinance No. 3703 (2009), amending MCC section 3.48.305 to add a requirement that "[w]hen property is subdivided into condominium units, each unit . . . and its appertaining common interest shall be: . . . [d]eemed a parcel and assessed separately from other units." (underlining in original, indicating added text) (available at https://www.mauicounty.gov/DocumentCenter/View/10615/Ord-3703). The ordinance was retroactive only to July 1, 2009. See id.; see also AA Order FOF ¶¶ 15, 16.

For year 2009, having moved the condominium units onto the assessment rolls, the County for the first time issued separate assessment notices for ORV/N's condominium units, and used the market approach to building valuation rather than the cost approach. AA Order FOF ¶ 17; Dkt. 78:430, 329-31. This methodology resulted in significantly higher total valuations, and ORV/N appealed the assessments for years 2009 and 2010. AA Order FOF ¶ 18; Dkt. 78:329-31. The parties subsequently settled these appeals. AA Order FOF ¶ 19; Dkt. 78:327-29, 430. By virtue of these negotiations, the County was admittedly aware that it had not individually assessed the condominium units for 2006-2008 and, in fact, Scott Teruya, Administrator of the County's Real

Property Assessment Division ("RPAD"), and others in RPAD advised ORV/N's counsel that ORV/N had "received the benefit" of not being assessed using the market approach for their condominium units before 2009, demonstrating that the County considered the original assessments to be final. AA Order FOF ¶¶ 96-113 (citing Dkt. 78:307, 386-98; Dkt. 84:516-32, 536-43, 547-57, 563-64).

D. ORV/N's Challenge to the Timeshare Real Property Tax Classification

On August 19, 2013, ORV/N initiated this lawsuit challenging the County's creation of the Timeshare real property tax classification on equal protection grounds, asserting related Sunshine Law claims, and demanding a jury trial. Dkt. 52:15-30. ORV/N filed a First Amended Complaint on August 28, 2014, Dkt. 52:951-66, adding a Sunshine Law and due process claims.

E. The County's Assertion of a Setoff Claim in the 2015 Sunshine Law Case

On September 21, 2015, the County filed a counterclaim against ORV/N in a separate Sunshine Law case, Civil No. 15-1-0435(1) (the "2015 Sunshine Law case"), seeking to set off the alleged "tax windfall" resulting from the 2006, 2007, and 2008 assessments against an anticipated damages award in this lawsuit. AA Order FOF ¶¶ 23-26; Dkt. 78:223-30.[4] The counterclaim did not allege that ORV/N had failed to pay any real property tax bill or that any property had been omitted from the original assessments. See Dkt. 78:223-30. Instead, the County alleged that it could have assessed the Master Parcels on the "aggregate of assessed market values" of the condominium units, rather than on cost, and that had it done so, the Master Parcel assessments and the resulting tax obligations would have been greater. See Dkt. 78:229; AA Order FOF ¶ 25. The County cited no legal authority for its claim or any authority allowing it to collect taxes without first issuing assessments and tax bills as the MCC requires. See Dkt. 78:223-30; AA Order FOF ¶¶ 25-27. ORV/N successfully moved to dismiss the counterclaim, arguing that the County failed to comply with the MCC procedures for creating a legally-enforceable tax obligation over which the Court could exercise jurisdiction, and allowing a counterclaim in setoff would circumvent the regulatory process. See Dkt. 87:232-34; Dkt. 82:110-11 (ORV/N's Reply to County's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment on Count V); AA Order FOF ¶ 28. Judge Rhonda I. L. Loo

[4] The Opening Brief at 5 and the County's Statement of Related Cases incorrectly state that the 2015 Sunshine Law case made "identical" claims challenging the Timeshare real property tax classification. That lawsuit asserted only a separate Sunshine Law violation related to the Council-set 2016 tax rates, and a related due process claim. See Dkt. 60:305-08.

dismissed the counterclaim on March 3, 2016. See Dkt. 78:232-34; AA Order FOF ¶ 28.

F. The County's Issuance of the Amended Assessments

Soon thereafter, on May 24, 2016 (on the virtual eve of discovery cut-off in this case and shortly before trial), the County sent to ORV/N amended notices of property assessment—1,114 in total—for Master Parcel 3-0000 and its individual condominium units 3-0001 to 3-0283 for years 2006, 2007, and 2008, and for Master Parcel 4-0000 and its individual condominium units 4-0001 to 4-0275 for year 2008 (collectively, the "Amended Assessments"). AA Order FOF ¶ 30; see also Dkt. 78:256-63 (representative Amended Assessments). The County also sent tax bill summaries in the amount of $6,879,447.79 for ORV and $3,849,070.70 for ORVN, **for a total of $10,728,518.49 due within 30 days**. AA Order FOF ¶ 31; Dkt. 78:265-68 (bill summaries).

The Amended Assessments for Master Parcels 3-0000 and 4-0000 showed the original, and substantial, valuation for land and buildings, and the original, and substantial, taxes billed and paid in full. AA Order FOF ¶ 32; Dkt. 78:256-59. They also showed the new, amended valuations for the Master Parcel land and buildings as zero, and the amended taxes as zero, for a net change of a negative tax due for each year. AA Order FOF ¶ 33; Dkt. 78:256-59. Conversely, the Amended Assessments for the condominium units, subparcels 3-0001 to 3-0283 and 4-0001 to 4-0275, all showed original land and building valuations and taxes of zero, but substantial amended valuations for land and buildings and substantial associated taxes. AA Order FOF ¶ 37; Dkt. 78:260-63.

Each of the Amended Assessments stated: "REASON: Departmental Revision[,] Unreturned or Omitted Property MCC 3.48.165 Appeal deadline to the Board of Review is 30 days from the date of this notice. A $75 filing fee is required for the Board of Review." AA Order FOF ¶¶ 34, 35, 38; Dkt. 78:256-59, 260-63.

Although each of the Amended Assessments was signed by Administrator Teruya, the transmittal letters and tax bill summaries were unsigned, gave no explanation for their issuance or timing, and rather than directing questions to RPAD, stated: "For questions call Maui County Department of Corporation Counsel at (808) 270-7740." AA Order FOF ¶¶ 39-42; Dkt. 78:265-68.[5]

The County also "reversed" ORV/N's tax payments for the original Master Parcel assessments but, rather than refunding those amounts, the County credited those payments, without

[5] The County has consistently argued that it was "compelled" to issue the Amended Assessments in response to ORV/N's position on the counterclaim, thus admitting that, absent the litigation, the County would not have issued them. Dkt. 78:309; OB at 2 (The County "was compelled by Plaintiffs' posturing to avail itself of applicable code provisions and procedures.").

interest, to the taxes associated with the Amended Assessments for the condominium units. AA Order FOF ¶ 45; Dkt. 78:238-41. The circuit court later found that these actions were an admission that the Master Parcels and the units comprise the same real property; had the County not reversed the assessments and tax payments for the Master Parcels, the County would have assessed and taxed the same land and buildings twice. AA Order FOF ¶ 46.

Solely for purposes of preserving their rights and precluding any claimed delinquency or further adverse action by the County given the County's imposition of a 30-day payment requirement, ORV/N timely paid the additional taxes under protest and appealed the Amended Assessments for the condominium units to the Maui County Real Property Tax Board of Review. ORV/N paid a $75 filing fee for 1,111 appeals, for a total of $83,325. See AA Order FOF ¶¶ 58-59; Dkt. 78:253-54 (Declaration of ORV/N representative).

Additionally, ORV/N sought and were granted leave to file their Second Amended Complaint to add the following claims (the "Amended Assessment claims"):

- Count V—Declaratory judgment as to the illegality of the Amended Assessments;
- Count VI—Violation of the First Amendment to the United States Constitution and article I, section 4 of the Hawai'i Constitution arising from the County's issuance of the Amended Assessments in retaliation for ORV/N's initiation of their lawsuit;
- Count VII—Violation of the due process clauses of the United States and Hawai'i Constitutions, arising from the County's issuance of the Amended Assessments; and
- Count VIII—Violations of the United States Constitution actionable under 42 U.S.C. § 1983 arising from County's issuance of the Amended Assessments.

Dkt. 74:268-89. As discovery had closed, Second Circuit Court Judge Peter T. Cahill set deadlines for discovery and subsequent dispositive motions on the new claims. Dkt. 74:250-53.

With its Answer to the Second Amended Complaint, the County filed another counterclaim in setoff, based on the very same, already rejected theory (i.e., that the 2006-2008 assessments of the Master Parcels could have been based on the "aggregate of assessed market values" of the units). Although the counterclaim acknowledged the Amended Assessments, it failed to acknowledge that ORV/N had already paid the billed amounts, AA Order FOF ¶¶ 61-62; Dkt. 74:555-59, even though the County admitted those payments in its Answer. Dkt. 74:550 ¶ 42. As with its previously rejected counterclaim, the County cited no legal authority and did not allege that any property had been "omitted" from the 2006-2008 assessment lists.

See Dkt. 74:555-59. Subsequently, the circuit court dismissed the counterclaim as legally baseless, as ORV/N owed no related tax obligation. AA Order FOF ¶¶ 61-65.

G. The Circuit Court's Resolution of the Claims at Issue

On August 9, 2017, the circuit court entered its AA Order (Dkt. 10). The AA Order found in favor of ORV/N and against the County on the merits of Counts V-VIII and ordered the County to refund to ORV/N all tax payments associated with the Amended Assessments and the appeal fees to the Board of Review. See AA Order at 74. The circuit court subsequently fully resolved all remaining issues of damages, attorneys' fees, and costs in its January 23, 2018, damages order (Dkt. 108:549-50) and its May 30, 2018, attorneys' fees order (Dkt. 110:788-90). These three orders thus completely disposed of the Amended Assessment claims.

On March 23, 2018, the circuit court entered the Illegality Order (Dkt. 11), concluding that the Timeshare real property tax classification was illegal and void, but leaving unresolved the amount of damages. The circuit court certified the Illegality Order for interlocutory appeal pursuant to HRS section 641-1(b). See Dkt. 2.

The circuit court also expressly directed entry of final judgment as to the fully-resolved Amended Assessment claims to permit appeal under Rule 54(b) of the Hawai'i Rules of Civil Procedure. See Dkts. 3 and 4.

III. THE COUNTY'S OPENING BRIEF DOES NOT COMPLY WITH HRAP 28(b)(4)(C)

HRAP Rule 28(b)(4)(C) requires that "when a point [of error] involves a finding or conclusion," the point of error "shall . . . include" "either a quotation of the finding or conclusion urged as error or reference to appended findings and conclusions." "If a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid." Taylor-Rice v. State, 91 Hawai'i 60, 65, 979 P.2d 1086, 1091 (1999) (citation omitted); see also MPM Hawaiian, Inc. v. Amigos, Inc., 63 Haw. 485, 486, 630 P.2d 1075, 1077 (1981) (per curiam) (Findings of fact "are presumed to be correct, and appellant bears the burden of pointing out specifically where they are erroneous.").

In the AA Order, the circuit court made 146 findings of fact and 225 conclusions of law. In the Illegality Order, the circuit court made 22 findings of fact and 37 conclusions of law. These include facts and conclusions that cannot reasonably be disputed, such as quotations from documents and legal standards. In its Points of Error, however, the County does not identify, much less challenge, any specific findings or conclusions, but simply makes broad, nonspecific

references to the circuit court's findings of fact and conclusions of law generally. See Opening Brief ("OB") at 22-23. Even in its argument section, the County challenges only three specific findings of fact, see OB at 31, and does not refer to any specific conclusions.

Instead, the County's Points of Error perfunctorily challenge all of the findings and conclusions generally. This "shotgun" approach improperly attempts to shift to ORV/N and this Court the burden of searching through the orders and the record to determine the relevance of the County's arguments. Given the County's failure to challenge specific facts and conclusions, the Court may, and should, refuse to consider the County's arguments. See Doe v. Roe, 5 Haw. App. 558, 574, 705 P.2d 535, 547 (1985) (condemning the "shotgun" approach and refusing to search record to locate information to which appellant should have directed court).[6]

IV. ARGUMENT

A. The Circuit Court Had Jurisdiction Over All ORV/N's Claims.

The circuit court properly exercised jurisdiction over all the claims below. The County's faith in its argument to the contrary is belied by the fact that, as the County acknowledges, it never filed a motion to dismiss or for judgment on the pleadings based on an alleged lack of jurisdiction, and only raised the argument almost three years into the litigation. See OB at 12, 22 (citing Dkt. 66:85, the County's motion for summary judgment filed July 1, 2016, as the County's first objection as to jurisdiction). Although the County conflates the jurisdictional considerations underlying the Illegality Order and the AA Order, see OB at 26-27, they warrant separate analysis.

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 jurisdiction over ORV/N's challenge to Ordinance No. 3227 because that challenge did not involve appeals of real property assessments.

The County's jurisdictional challenge explicitly rests on two fundamentally incorrect assertions: (1) there is "no identifiable constitutional provision, statute or code provision pursuant to which the Circuit Court could have asserted general subject matter jurisdiction" in

[6] The Amicus Curiae Brief of the Tax Foundation of Hawai'i, filed January 16, 2019, raises issues that were not raised in the Opening Brief, in violation of the Intermediate Court of Appeals' order permitting Tax Foundation of Hawai'i to file an amicus brief. As those issues are not properly before the Court, ORV/N do not address them here. Should the Court be inclined to consider those issues, ORV/N request leave to file a supplemental brief discussing those issues.

this case; and (2) the Tax Appeal Court ("TAC") had "exclusive jurisdiction." OB at 27.

To the contrary, 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). The TAC, by contrast, "is a statewide court of limited jurisdiction, hearing and deciding, without a jury, direct appeals from tax assessors' assessments or decisions made by the Board of Review in the applicable district." Lewis v. Kawafuchi, 108 Hawai'i 69, 73, 116 P.3d 711, 715 (App. 2005) (emphases added) (quoted in AA Order COL ¶ 8).

The County appears to argue that, to challenge the Council's legislative act of creating the Timeshare real property tax classification, ORV/N were required to first administratively "appeal" their "assessments" to the County's Board of Review, then to the TAC. OB at 26-27. ORV/N's challenge to Ordinance No. 3227 was not an appeal, and certainly not an appeal of an administrative real property assessment; it was a challenge to the County Council's legislative act of establishing the Timeshare real property tax classification, and to the legality of the ordinance itself. ORV/N were therefore not required to appeal any assessment through administrative procedures.

Under the MCC, only a taxpayer "aggrieved by an assessment" may appeal to the County's Board of Review. MCC § 3.48.605 (emphasis added), § 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. Annually, "[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.; see 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."). 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 claim did not involve an appeal of an assessment.

Further, had ORV/N attempted to challenge Ordinance No. 3227 through an 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" when an appeal has been taken. MCC § 3.48.625(A); see also In re Taxes Maui Agric. Co., 34 Haw. 515, 553 (Haw. Terr. 1938) (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); 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, generally composed of lay people, AA Order COL ¶ 34, would have had no power to decide the question 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).

Moreover, ORV/N could 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); 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, pursuant to HRS § 232-11, the TAC has "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.");[7] MCC § 3.48.595 ("In the case of a real property tax appeal, a taxpayer shall first appeal to the County board of review, pursuant to [HRS] section 232-16.").

Hawai'i appellate courts have also historically distinguished challenges to the legality of a tax, which may be raised initially 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 construction or alleged violations of law, courts have jurisdiction, and a taxpayer is not required to appeal to the assessor under statute); Hilo Sugar Co. v. Tucker, 8 Haw. 148, 150 (Haw. Kingdom 1890) (Court's role was not to review assessor's judgment as to 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; assessment "was unauthorized and invalid," and "made without power on the part of the assessor to make it and was therefore subject to a collateral attack"); In re Taxes Maui Agr. Co., 34 Haw. at 551 (string citing cases observing "the necessity of resort to the courts where the validity of *ad valorem* property tax assessment was involved"); 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).

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

The County does not cite—much less attempt to analyze and distinguish—any of these cases in its Opening Brief. In fact, the County does not cite any cases that support its theory. Instead, the County erroneously relies on Kinkaid v. Board of Review, 106 Hawai‘i 318, 319, 104 P.3d 905, 906, as amended (Nov. 10, 2004). OB at 26. Kinkaid is inapposite for three reasons: (1) it did involve appeals of assessments; (2) it did not involve a challenge to the legality of a real property tax classification or ordinance; and (3) at issue was whether a taxpayer could appeal a tax review board's decision on assessments to the circuit court under Hawaii's Administrative Procedure Act, HRS chapter 91 ("HAPA"), which is not at issue here.

In Kinkaid, property owners had appealed their assessments to the tax review board and then had appealed the board's decision to the TAC pursuant to HRS section 232-17. They then filed a second notice of appeal, this time in the circuit court pursuant to HAPA, HRS section 91-14(a), providing for review of final decisions and orders of agencies in contested cases. The circuit court dismissed that second appeal for lack of jurisdiction, and the appellants appealed the dismissal. 106 Hawai‘i at 320, 104 P.3d at 907. Resolving the conflict between HRS sections 232-17 and 91-14(a), the Court held that the agency-specific procedure prescribed in the tax appeal statute precluded judicial review under the more general HAPA statute. Id. at 323, 104 P.3d at 910. The Court's analysis addressed only jurisdiction over appeals of "disputed tax assessments initially heard by the boards of review." Id. at 324, 104 P.3d at 911. The Court also did not, as the County implies, hold that the TAC has "exclusive jurisdiction" over all cases involving real property taxation. See OB at 26. In fact, the Court specifically noted without comment the circuit court's observation below that the TAC "does not have exclusive jurisdiction on all tax matters generally." 106 Hawai‘i at 320 n.3, 104 P.3d at 907 n.3.

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

In the AA Order, the Circuit Court made 48 conclusions of law demonstrating its jurisdiction over the Amended Assessment claims. See AA Order COL ¶¶ 6-53. The County's Point of Error 1 appears perfunctorily to challenge all of them generally, see OB at 22, but its related argument fails to address any specific conclusion, and offers no argument or authority to dispute any conclusion other than the general arguments discussed above. See OB at 26-27. The Court may, and should, refuse to consider the County's argument. See Doe, 5 Haw. App. at 574, 705 P.2d at 547 (condemning the "shotgun" approach and refusing to search the record to locate information to which appellant should have directed court).

Regardless, the circuit court's conclusions were correct. 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 in the Amended Assessment claims, that fact would not require the circuit court to relinquish jurisdiction, including because the circuit court had exercised jurisdiction first. 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 they had demanded. COL ¶¶ 36-41.

The County does not dispute—or even acknowledge—any of these specific conclusions, see OB at 26-27, and has not carried its burden to demonstrate that the conclusions were wrong.

B. The Circuit Court's Rulings Did Not Violate Separation of Powers.

For the first time, the County argues in its Opening Brief that the circuit court's conclusion that the Timeshare real property tax classification is illegal "is contrary to the constitutional doctrine of the Separation of Powers and interferes with the [County's] constitutional 'functions, powers, and duties' to identify, define, classify, and assess real property for purposes of taxation." OB at 22. The County cites nothing in the record to show that it raised this argument below, and thus preserved this issue for appeal. Accordingly, the Court need not consider Point of Error 2. "As a general rule, if a party does not raise an argument [at the circuit court level], that argument will be deemed to have been waived on appeal." Hawaii Ventures, LLC v. Otaka, Inc., 114 Hawai'i 438, 500, 164 P.3d 696, 758 (2007) (citing, *inter alia*, HRAP Rule 28(b)(4)(iii) (2007) and HRS § 641-2 (Supp. 2006)).

Regardless, the theory is meritless. There can be no doubt that the judiciary is empowered to review statutes and ordinances challenged as unconstitutional or illegal. The separation of powers doctrine prohibits any one of the three coequal branches of government from exercising powers that "from their essential nature, do not fall within its division of governmental functions." Haw. Insurers Council, 120 Hawai'i at 69, 201 P.3d at 582. But the "quintessential power of the judiciary is the power to make *final* determinations of questions of

law and this power is nondelegable power resting exclusively with the judiciary." Alakaʻi Na Keiki, 127 Hawaiʻi at 278-79, 277 P.3d at 1003-04 (citation omitted). The legality of legislation "is a legal question originally cognizable in the circuit court." HOH Corp. v. Motor Vehicle Indus. Licensing Bd., 69 Haw. 135, 143, 736 P.2d 1271, 1276 (1987).

The County's arguments as to this point of error are also wrong.[8] The County states: "The Circuit Court's allusion to the Hawaiʻi State Constitution, and to the [HRS] as imposing" the limitation that real property tax classifications be based on use "without citing to any provision within those enabling provisions is another concerning abuse of discretion." OB at 27-28. In the Illegality Order, the circuit court did not conclude that the Constitution or statutes impose such a restriction. It instead concluded that the County imposed such a restriction on itself: "[u]nder the MCC, the County is authorized to create real property tax classifications based only on differences in the use of real property." COL ¶ 11 (first emphasis added); see also COL ¶¶ 23, 35 (accord). Independently, the circuit court concluded that the Hawaiʻi Constitution reserves all taxing powers to the State, with the sole exception of real property taxing power, which the Constitution assigns to the counties, COL ¶ 10, and that the County therefore exceeded the Constitutional limits of its power by seeking to remedy a perceived disparity under the State's TAT scheme. COL ¶ 24.

The County argues: "[A]s a proferred [sic] legal conclusion for the Circuit Court's 'voiding' the general classification for 'Timeshare' in Maui County's tax code as 'illegal,' . . . the rational [sic] appears as a thinly veiled unconstitutional intrusion into the County's real property tax authority and legislative function." OB at 28. The County then selectively quotes Gardens' recitation of the rational basis test for the equal protection analysis, see OB at 28 (quoting Gardens, 90 Hawaiʻi at 342, 978 P.2d at 780), but Gardens did not involve any question of the court's power to review the basic legality of legislation. In fact—illustrating the fatal flaw in the County's analysis—the Supreme Court in Gardens did examine the validity and constitutionality of the real property tax ordinance at issue, and the opinion does not suggest that the County ever questioned the Court's authority to do so.

[8] Again, in support of this point of error, the County does not challenge any specific conclusion, but perfunctorily challenges the Illegality Order in its entirety. OB at 22, 28-29.

C. 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*.

In the Illegality Order, the circuit court concluded:

> 11. Under the MCC, the County is authorized to create real property tax classifications based **only** on differences in the use of real property.
>
> 12. MCC chapter 3.48 establishes real property tax classifications that are based on the use of real property. See MCC § 3.48.305.A; Gardens at West Maui, 90 Hawai'i at 337, 978 P.2d at 775 (for the purpose of real property taxation, the County of Maui "classifies real property into . . . classifications based on use.").
>
> 13. Likewise, MCC section 3.48.305.B requires that assignments to these classifications depend upon how property is **used**.
>
> . . .
>
> 15. The County may consider only the actual use of real property when creating a real property tax classification; it has no authority under the MCC to consider anything else.

The circuit court then concluded that the County did not create the Timeshare real property tax classification based on a difference in property use, but to equalize a perceived disparity in TAT burdens borne by timeshares and hotels. Illegality Order COL ¶¶ 17-24. The circuit court held that, because that classification was not based on differences in property use, including as evidenced by the MCC's definition of "Timeshare," COL ¶¶ 25-34, the County violated MCC section 3.48.305, and the classification was illegal and void from its inception. COL ¶ 35. In support of Point of Error 3, the Opening Brief does not explicitly challenge any of the Illegality Order's findings or conclusions. See OB at 22, 28-29.

The Opening Brief concedes that the Timeshare real property tax classification is not based on differences in the uses of timeshare property and hotel property. The County appears to focus instead on the circuit court's employment of the phrase "actual use" in COL ¶ 15, in which it held that the County "may consider only the actual use of real property when creating a real property tax classification." The County argues that "[t]he 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)] to illogically void the general classification for "Timeshare" contained in the code [*see,* MCC §§3.48.305(A)(4)]." OB at 28-29 (brackets in original).

Although the County's argument is unclear, COL ¶ 15 as well as the related conclusions

clearly relate to creation of classifications, not assignment to classifications. Although the MCC uses the phrase "actual use" to distinguish "highest and best use" in assigning properties to the preexisting classifications, that phrase is not a term of art. It simply means uses that are "real" and "exist in fact," Webster's Encyclopedic Unabridged Dictionary at 15 (1994 ed.) (defining "actual"). The plain meaning of COL ¶ 15, in the context of the conclusions above it, is that in creating classifications, the County may only consider differences in the uses of property that are real and exist in fact. The County has not shown any error in the circuit court's related conclusions, has not demonstrated that the existing classification scheme is based on any considerations other than real property use, and has not pointed to any authority that would permit the County to create real property tax classifications on any consideration other than use.

1. The MCC Does Not Permit the County to Classify Real Property Based on Considerations Other than Use.

Under the MCC, the sole legitimate purpose for a real property tax classification is to classify real property based on use. MCC section 3.48.305(A) establishes general real property tax classifications based upon distinct property uses, and MCC sections 3.48.305(B) and (C) require assignment to these classifications based on a property's use.

In addition to the plain language of the ordinance, the Supreme Court has confirmed that the MCC classifies real property into tax classifications based on use, and that it does so regardless of whether assignment to the classifications is based on actual use or highest and best use. The Supreme Court interpreted the MCC real property tax provisions in Gardens and held: "The County of Maui classifies real property into nine classifications based on use for the purpose of real property taxation." 90 Hawai'i at 337, 978 P.2d at 775 (emphasis added); see also Maui County Ordinance No. 2130 (1992) (listing in 3.48.305(C) for condominium units property "uses," i.e., "residential use," "apartment use," "hotel resort use," etc.). Although the Illegality Order relied in part on Gardens, COL ¶¶ 12-14, the County's argument on this point of error does not acknowledge Gardens or challenge the related conclusions.

Moreover, in Gardens, the appellants argued that the ordinance at issue, which required all timeshares to be classified as Hotel, ending the practice of classifying some as Apartment and some 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 uses of the property: "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").[9, 10]

2. Any Argument that Classifications Need Not Be Based on Differences in the Use of Property Is Without Merit.

Although it is unclear, if the County argues that interpreting the MCC to require that classifications be based on real differences in use would "undo virtually every other general class of real property contained in the code," OB at 29, the County ignores the foundational structure of the MCC's real property tax provisions and the relevant holding in Gardens. 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) ("Powell"). Classifications 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 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 taxation classification depends upon the physical and functional characteristics of the property itself). Indeed, the County has presented no evidence that any other county—or state—has adopted a separate real property tax classification for timeshares.

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[9] The County should be estopped from arguing that timeshares should not be classified as Hotel, because in Gardens, it successfully argued that, given their like uses, timeshare units must be classified as Hotels. See Roxas v. Marcos, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1998) (judicial estoppel prohibits parties from taking positions inconsistent with those in prior suits).

[10] 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 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).

The County also notes, without explanation, that the phrase "highest and best use" as used in MCC section 3.48.305(B) is an "appraisal concept." OB at 29. This is immaterial; section 3.48.305(B) explicitly requires the County to consider factors that influence "highest and best use" "[i]n assigning land to one of the general classes." Emphasis added. It is perfectly logical that highest and best use would determine assignment to a use classification.

In any event, 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 classification not based on a difference in use is void.

3. The County Cannot Create Classifications that Exceed the County's Limited Powers Under the Hawai'i Constitution and Are Preempted by State Statutes.

Even assuming the County could classify real property based on considerations other than the use of real property (and it cannot), 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 the circuit court held, and the County admits, the County created the Timeshare real property tax classification in an effort to equalize what it characterized as a "disparity" in TAT burdens as between timeshares and hotels. Illegality Order FOF ¶¶ 6, 8-18, COL ¶¶ 18-24. The Court also concluded, therefore, that the County "exceeded its power under article VIII, section 3 of the Hawai'i Constitution, which limits the County's taxation power to real property taxes." COL ¶ 24. The County does not address any of these findings or conclusions.

With the sole 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 sole 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 active involvement from the counties in defining or collecting TAT. Defining and collecting TAT is strictly a State function, and the County thus has no power to collect TAT, regardless of its label.

Real property taxes and TAT are distinct taxes. A real property tax is an *ad valorem* tax, which taxes property "according to its value." Powell § 10B.06[a]. TAT is an excise tax. See

Travelocity.com, L.P. v. Dir. of Taxation, 135 Hawai‘i 88, 122, 346 P.3d 157, 191 (2015); 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). TAT and real property taxes are thus distinct in their nature, purpose, and application.

Here, the County created the Timeshare real property tax classification to allow it to set real property tax rates for timeshares significantly higher than those for hotels 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.[11] As state creations, municipal corporations "may exercise only those powers which have been delegated to them." State v. Medeiros, 89 Hawai‘i 361, 365, 973 P.2d 736, 740 (1999). It is immaterial that the County imposes this *de facto* TAT under the guise of a real property tax. The nature of a tax "is not determined by the label given to it but by its operating incidence." Id. at 366, 973 P.2d at 741. The County therefore exceeded its limited powers under article VIII, section 3 of the Hawai‘i Constitution. Illegality Order COL ¶ 24.

The classification is also preempted by statute because its purpose conflicts with State law and intrudes upon a comprehensive State taxation program. 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 Travelocity.com opinion, this Court conclusively established the following: 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 to be distributed 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

[11] For example, for 2012, the Timeshare real property tax rate per thousand dollars of value was $15.00 compared to $9.00 for Hotel; for 2013, the Timeshare rate was $15.50 compared to $9.15 for Hotel; and for 2014, the Timeshare rate was $15.55 compared to $9.40 for Hotel. See Dkt. 64:212-14, 215-17, and 218-20 respectively.

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, the classification is specifically intended to allow the County to collect additional TAT (without distribution 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 the visitor industry to discourage timeshares; and to increase TAT burdens "contrary to the intent of the legislature that correlated [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 because it conflicted with, and was thus preempted by, Hawai‘i law); Citizens Utils. Co. v. Cty. of Kauai, 72 Haw. 285, 288, 814 P.2d 398, 400 (1991) (rule concerning functions of statewide interest is that "if the counties are not given specific authority to take over the function, the counties cannot thwart the State from performing its duty"). The County's purpose in creating the Timeshare real property tax classification intrudes upon the State's exclusive TAT scheme, and conflicts directly with the clear intent of the State Legislature that TAT be applied uniformly throughout the State.

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

The County argues, incorrectly, that even though ORV/N challenged the ordinance creating the Timeshare classification, the circuit court was precluded from awarding damages because ORV/N did not appeal its assessments for each year. See OB at 22, Point of Error 4 (arguing that the circuit court's ruling that ORV/N are entitled to tax refunds or damages from as far back as 2006 "despite . . . having not appealed their assessments within the required statutory period for each assessment year was/is wrong").

The County does not challenge any specific findings or conclusions, and does not challenge the Illegality Order's FOF ¶ 22, holding that because the Timeshare real property tax classification is illegal and the associated rates are void, ORV/N "have incurred damages in the amount of the real property taxes they actually paid in excess of what they would have paid had timeshares been included in the Hotel real property tax classification."[12] Instead, the County

[12] In fact, rather than ever challenging the propriety of damages, the County admits that it asserted the counterclaim in the Sunshine Law case "as a setoff against [the] damages claims" in this case. See AA Order FOF ¶ 129 (citing Dkt. 80:960). The County then later asserted a counterclaim in this case, for the same amounts and based on the same theory, though failing to recite that ORV/N had already paid the $10.7+ million tax bill that accompanied the Amended Assessments. See id. FOF ¶¶ 61-65.

challenges the circuit court's oral observation that damages remain at issue, made at the January 3, 2018, hearing on the dispositive motion, see OB at 22, and the County admits it did not oppose the propriety of a damages award until April 9, 2018, when it moved to certify the Illegality Order for interlocutory appeal. See id. (citing Dkt. 110:114-339 as County's first opposition to the ruling). The County did not timely raise its argument, and it thus waived it.

Regardless, the argument is wrong. Because ORV/N challenged only the legality of the ordinance and resulting rates, ORV/N were not required to appeal any assessments. Their claims are not governed by the time limitations for appeals of assessments in the MCC or HRS chapter 232, so those provisions cannot restrict ORV/N's entitlement to damages.

Relying on MCC sections 3.48.595 and 3.48.605 and various sections of HRS chapter 232, the County erroneously argues:

> 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 an 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 [MCC and HRS] from seeking any refunds. . . .

OB at 30 (emphasis added). The MCC and HRS sections alluded to relate to appeals of real property tax assessments filed in the Board of Review and the TAC. As discussed in detail in section IV.A.1 *supra*, ORV/N's challenge to Ordinance No. 3227 does not contest any valuation or any assessment. Rather, the question is whether the County violated MCC section 3.48.305 when it passed legislation creating the Timeshare real property tax classification. If it did, the classification is illegal. If the classification is illegal, the associated tax rates are collectively, inherently invalid and void.

ORV/N's challenge to Ordinance No. 3227 was therefore not barred by any Board of Review or TAC filing deadlines. A party is not required to exhaust administrative remedies where the administrative body has no power to grant the requested relief. See Hawaii Insurers Council, 120 Hawai'i at 71, 201 P.3d at 584. When the provisions for administrative remedies are irrelevant to a party's claim, it necessarily follows that those provisions cannot restrict the party's entitlement to damages. The County cites no authority to the contrary.

While the County seeks to strengthen its position by now insisting that ORV/N seek "tax

refunds" rather than damages, the County's turn of phrase does not apply to this case. See OB at 29. Refunds are not governed by MCC chapter 3.48 article XI ("Appeals"), which contains the provisions the County argues are controlling here. Instead, "refunds" are governed by MCC section 3.48.215 ("Adjustments and refunds") in article IV ("Taxation and Payments"), and that section provides for refunds only for "adjustments on account of duplicate assessments and clerical errors, such as transposition in figures, typographical errors and errors in calculations." MCC § 3.48.215(A)(1) and (2) (emphases added). ORV/N do not seek a refund within the meaning of that section. Conversely, damages are not awarded, as the County argues, only in tort cases. See OB at 29. "Damages" simply means "[m]oney claimed by, or ordered to be paid to, a person as compensation for loss or injury." Black's Law Dictionary (10th ed. 2014).

To the extent the County argues that awarding damages will result in "irreparable harm" to its finances, OB at 22, the argument falls flat given the substantial financial impact the County's violation has forced upon ORV/N members. Moreover, the County has had ample opportunity to mitigate a potential damages award since ORV/N filed their original complaint challenging the Timeshare real property tax classification and rates on August 19, 2013—more than five years ago. Admittedly recognizing the challenge's merit, the County tried to mitigate a damages award by asserting meritless setoff claims for taxes it had never billed, in turn based on assessments it had never made. Yet, rather than make Timeshare and Hotel tax rates equal until the case's resolution, the County has continued to set Timeshare rates far higher than Hotel rates. See, e.g., 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). ORV/N should not bear the financial burden of the County's failure to comply with the law and to conduct its business rationally in the face of meritorious claims.

E. The Findings and Conclusions that the County Violated ORV/N's Speech and Due Process Rights by Issuing the Amended Assessments Are Correct.

Without even acknowledging the nature of ORV/N's claims arising from the Amended Assessments, the County argues, in a scattershot approach and without citing any legal authority whatsoever, that all of the circuit court's 146 Findings of Fact and 225 Conclusions of Law in the AA Order "were/are clearly erroneous and wrong." OB at 23, 30-31. Those findings and conclusions held, in sum, that the Amended Assessments were *ultra vires* because (i) they amended previous assessments of the same real property the County had already assessed (and for which it had billed taxes that ORV/N had timely paid in full), in violation of the MCC and

controlling Hawai‘i case law, and (ii) the MCC's "omitted property" provision was inapplicable because all the real property at issue had already been assessed. AA Order COL ¶¶ 54-105. They also concluded that the County's issuance of the Amended Assessments violated ORV/N's free speech rights, COL ¶¶ 110-37, and substantive and procedural due process rights, COL ¶¶ 138-93, and ORV/N were entitled to damages pursuant to 42 U.S.C. § 1983. COL ¶¶ 202-25.

Despite the breadth of the challenge as stated in Point of Error 5, OB at 23, the County's argument specifically addresses only three findings of fact: AA Order FOF ¶¶ 84, 88, and 89. OB at 31. Findings of fact by the trial court "are presumptively correct and will not be set aside unless clearly erroneous. An appellant's mere challenge of a finding does not cast the onus of justifying it on this court. The party seeking to overthrow findings has the burden of pointing out specifically wherein the findings are clearly erroneous." Campbell v. DePonte, 57 Haw. 510, 512-13, 559 P.2d 739, 741 (1977). The County has not carried its burden to show error.[13]

1. The Circuit Court Correctly Found that the County Would Not Have Issued the Amended Assessments Absent the Litigation, and the County Thus Violated ORV/N's First Amendment Rights.

Findings of Fact ¶¶ 84, 88, and 89 all relate to ORV/N's First Amendment claim. A plaintiff establishes a First Amendment violation when it "establishes that a government entity made an adverse decision ***because of*** the plaintiff's exercise of constitutionally protected rights." AA Order COL ¶ 113 (quoting Sorrano's Gasco v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989)). When a plaintiff shows that the protected conduct—here, resort to the courts—was a motivating factor in the defendant's adverse decision, the burden shifts to the defendant to show that it would have taken the adverse action even in the absence of the protected conduct. Id. COL ¶¶ 113-16 (citing Sorrano's Gasco, 874 F.2d 1310, 1314).

The County argues that it was "illogical" for the circuit court to conclude that, had ORV/N not filed their lawsuit, the County would not have issued the Amended Assessments. OB at 30. But the circuit court based its ultimate findings and conclusions, AA Order FOF ¶¶ 122, 142-43, COL ¶¶ 118-37, on a host of undisputed facts and admissions that the County does not even acknowledge, much less challenge, in its Opening Brief, including:

[13] The County cites its objections to ORV/N's proposed findings of fact and conclusions of law as to both the AA Order and the Illegality Order, see OB at 23 n.24, but the circuit court struck those objections from the record for several reasons, Dkt. 86:449-465, 547-49, Dkt. 108:617-29, Dkt. 110:791-93, and the County has not appealed those orders. Accordingly, the County's citation to and reliance on those stricken objections is improper.

- In a response to an interrogatory asking the County to "[e]xplain why the County issued the . . . Amended Tax Assessments," the County stated:

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

FOF ¶ 73 (citing Dkt. 78:316, and noting that the response was verified under penalty of perjury by the County's designated representative, Marcy Martin).[14]

- In its briefs, the County admitted that the dismissal of the setoff counterclaim prompted it to issue the Amended Assessments. FOF ¶ 29 (quoting, inter alia, Dkt. 80:967, stating that, given ORV/N's positions "against the County's ***efforts to defray their anticipated damages claims, the County would have been remiss by not issuing"*** the Amended Assessments).

- When it filed the counterclaim in setoff in the Sunshine Law case, the County did not cite the MCC's "omitted property" provision (which the County cited as the sole legal authority for its later-issued Amended Assessments) but claimed only that it could have used a different assessment method for the Master Parcels in 2006-2008. FOF ¶¶ 23-27 (citing Dkt. 78:402-09).

- The County created a "special, detailed plan" for issuing the Amended Assessments, establishing that the County issued them outside of the regular course of its assessment function. FOF ¶ 50 (citing Dkt. 78:417-20).

- In an email, Marcy Martin, RPAD's senior Property Technical Officer (Dkt. 78:323), stated, "***[f]or the timeshare lawsuit*** we did omitted assessments in 06, 07, and 08" and requested overtime, giving as the reason, "***Timeshare law suit rush***" to get the Amended Assessments

[14] Setoff is a doctrine that allows a court to offset mutual debts. AA Order COL ¶ 124. The County's counterclaim theory, that ORV/N were "legally obligated to pay" taxes absent County assessments and tax bills for those amounts, is legally baseless, as the circuit court correctly concluded. ORV/N were "legally obligated to pay" only the real property tax amount of County-issued bills, in turn based on County-issued assessments. The County cannot collect taxes except in compliance with MCC procedures. COL ¶¶ 125-26 (citing MCC § 3.48.135).

done. FOF ¶¶ 81-83 (citing Dkt. 78:355, 357, 341).

- Although Administrator Teruya testified that RPAD's procedures generally do not involve Corporation Counsel, FOF ¶ 87 (citing Dkt. 78:369-70, 320), in a response to an interrogatory asking the County to identify all persons involved in the decision to issue the Amended assessments, the County invoked the attorney-client privilege, but responded that Teruya and Martin were involved, "having been made aware of and after review of [ORV/N's] position and arguments that an amended assessment was required." FOF ¶ 75 (citing Dkt. 78:316, 317), see also FOF ¶¶ 76-77 (citing Dkt. 78:335, 336).

- When asked in an interrogatory to describe the circumstances leading the County to decide that the Master Parcels should be reassessed, the County again invoked the attorney-client privilege, but stated: "multiple and ongoing informational discussions were had ***subsequent to the COUNTY attempting to bring the set-off claim based on the amount of the tax windfall garnered by the taxpayers who have sued the COUNTY***." FOF ¶ 78 (citing Dkt. 78:317-18).

- In its verified responses to requests for admissions, the County admitted that it had not in the last ten years issued letters directing inquiries about assessments to Corporation Counsel (as it had in the Amended Assessments' cover letters), but stated that, until this case, the County has never "***been compelled to amend assessments after being sued*** by taxpaying entities which have admitted historically to having garnered enormous tax windfalls in prior calendar years, and despite knowingly and repeatedly garnering these enormous tax windfalls ***elected to sue the COUNTY*** for even more in back taxes." FOF ¶ 74 (citing Dkt. 78:309).

- In a draft press release, the County announced its intent to issue the amended assessments because for 2006-2008 ORV/N had "incorrectly paid property taxes," as determined by RPAD "and attorneys with the County Corporation Counsel." FOF ¶¶ 85-87 (quoting Dkt. 78:182-83).

- A letter by Department of Corporation Counsel (not RPAD) to ORV/N members and the public explains as the "bottom line" that the County issued the Amended Assessments because of ORV/N's position on the County's counterclaim in setoff in the 2015 Sunshine Law case. FOF ¶¶ 92-93 (citing Dkt. 82:153) ("The bottom line is, your vacation owners associations have taken the position the county was required to re-assess the back taxes, ***in lieu of pursuing the amounts as claims in the lawsuits which your associations already had on file***").

- This letter states that the retroactive tax assessments are "***only as to***" ORV/N and directs all questions to ORV/N's counsel in the litigation. FOF ¶ 95 (citing Dkt. 82:153).

- In its memoranda, the County repeatedly admitted that the County's "***demonstrated intent with the [Amended] Assessments was and is to set-off highly questionable and excessive damages claims pursued by Plaintiffs in this lawsuit.***" FOF ¶ 128 (citing Dkt. 80:965, 948); see also FOF ¶ 129 (citing Dkt. 80:960, 942-43; Dkt. 82:85); FOF ¶ 130 (noting the County's admission that "[t]o the extent the [Amended Assessments] can be said to be made . . . 'in response' to this lawsuit, ***it is to set-off Plaintiffs' enormous and highly questionable claims to damages*** . . . .") (citing Dkt. 80:965, 948); FOF ¶¶ 131-34 (accord).
- In response to an email advising that ORV/N had paid the $10,728,518.49 invoiced for the Amended Assessments, Mark Walker, the County's Deputy Finance Director, summarized the County's motivation for its actions by stating: "**cha ching**." FOF ¶ 60 (citing Dkt. 78:415).

This evidence—particularly the County's own admissions—show beyond any doubt that RPAD issued the Amended Assessments not in its normal course of operations, but to create a new tax obligation in excess of $10 million for the purpose of setting off the County's anticipated damages liability. See FOF ¶¶ 142-43. The County's weaponization of its taxation power against taxpayers in litigation is the very sort of abuse of governmental power against which the First Amendment is intended to protect.

In response to the circuit court's numerous findings, the County challenges only three specific findings, all related to the involvement of the Corporation Counsel in the issuance of the Amended Assessments. The County argues that the circuit court in FOF ¶ 84 "misconstrued" Martin's deposition testimony, OB at 30-31, but that finding merely quotes an email: "In an email dated September 6, 2016, with the subject line 'Ocean Resort Villas – Appeals,' Martin stated: 'I have not spoken to their attorneys. I am ***taking orders from corp counsel***.'" FOF ¶ 84 (quoting Dkt. 78:359). The County does not suggest how the finding could be false, and points to no finding or conclusion "construing" Martin's meaning. It is immaterial whether Martin's meaning was that she was taking various orders from Corporation Counsel, or merely following his order not to talk with counsel for ORV/N. Either way, it shows Corporation Counsel's significant involvement in the issuance of the Amended Assessments, which is compelling evidence that RPAD did not issue them in the normal course of its operations, see FOF ¶¶ 140-43, but specifically in response to the litigation, as it otherwise admits.

Second, the County argues that the circuit court "completely misconstrued" Teruya's testimony about his practice of consulting with the County's counsel about "*any* matter(s) in

litigation" as "conclusory evidence that counsel directed the omitted assessments go forward in order to retaliate for this lawsuit." OB at 31 (citing FOF ¶ 88). Finding of Fact ¶ 88 merely states: "In fact, Teruya testified in his deposition that because 'the matter' was in litigation, he only instructed Martin to issue the Amended Assessments after he spoke with corporation counsel." FOF ¶ 88. The finding does not "construe" the testimony, but again, regardless of how it is understood, it supports the findings that Corporation Counsel was heavily involved in the issuance of the Amended Assessments, and that RPAD did not issue them in the regular course of its operations. The County's argument also disproves its own point, as ORV/N's original assessments for 2006, 2008, and 2009 were not part of the original "matter in litigation," which challenged only the actions of the Council, not of RPAD.

Third, the County argues that FOF ¶ 89 "erroneously found that corporation counsel's . . . directions to County officers pertaining to communications with timeshare owners *about this matter in litigation*, was somehow undisputed evidence of retaliation." FOF ¶ 89 makes no finding of retaliation. Based on a councilmember's complaint to Teruya that the councilmember could not respond to public complaints about the Amended Assessments because of the lawsuit, FOF ¶ 89 finds that Deputy Corporation Counsel had impeded ORV/N's right to address real property tax issues with RPAD and elected officials. Also significant is that in response, Teruya, RPAD's Administrator, did not explain the issuance of the Amended Assessments to the councilmember, but referred him to Deputy Corporation Council ("he has all the scoop"). FOF ¶ 90 (citing Dkt. 78:204-05). Again, the Amended Assessments were not part of the litigation at the time of this June 26, 2016, email exchange, as ORV/N had not yet moved to amend their complaint to add the related claims. See Dkt. 66:174.

The County also argues that, in concluding that ORV/N were specifically targeted for amended assessments, the circuit court "ignored" testimony 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." OB at 31 (emphasis added); see also OB at 14. The County cites Martin's declaration, but in that declaration, "Martin states only that Defendant's Exhibit A lists condominiums 'omitted on the certified assessment list for the years stated, and subsequently added to the list and taxed as separate condominium parcels.'" FOF ¶ 121 (quoting Dkt. 78:748). The declaration makes no representation at all about amended (or even retroactive) assessments, or RPAD's procedures, or about ORV/N's properties

specifically. FOF ¶¶ 117-22. Also supporting the conclusion that the County specifically targeted ORV/N for adverse action, the circuit court cited the County's own admissions and the letter from Department of Corporation Counsel to the public, advising that the Amended Assessments were in response to the lawsuit, and limited to ORV/N's properties. COL ¶¶ 151-53 (citing Dkt. 82:153). The County does not acknowledge these admissions or the letter.

The County argues that, while it could be concluded that the County "discovered the omitted property valuations assessments [sic]" because of the litigation, it "does not follow" that the County issued the Amended Assessments because of the litigation. OB at 30. But even in the Opening Brief, the County states that Martin made her "discovery" while scouring ORV/N's tax history "to assist with preparation of the County's defense(s) to this lawsuit," OB at 9, which at the time did not involve assessments or any RPAD action. This admission alone proves that the County would not have taken the adverse action in the absence of the protected conduct. Cf. Sorrano's Gasco, 874 F.2d at 1314. Moreover, any belated suggestion that the County's previous failure to assess the condominium units in 2007, 2008, and 2009 was a mere oversight, and that RPAD would otherwise have issued the Amended Assessments at some unspecified point in time, is contradicted by the County's admissions that: (1) it had not timely transferred the condominium units to the assessment rolls for 2006, 2007, and 2008 because of a "backlog" and, for that process, the County considered ORV/N to be a low priority, FOF ¶ 14 (citing Dkt. 78:315); and (2) by 2009—seven years before it issued the Amended Assessments—the County knew that for years 2006, 2007, and 2008, the County had not assessed the individual condominium units comprising the Master Parcels, FOF ¶ 96 (citing Dkt. 78:128), yet the County did not issue the Amended Assessments until after the County's counterclaim was dismissed in 2016. The suggestion is also disproved by the fact that Teruya and Martin were both heavily involved in the 2009 and 2010 negotiations to resolve ORV/N's appeals of their assessed valuations for 2009 and 2010—the first years the condominium units were individually assessed—and Teruya and others in RPAD had conveyed to ORV/N's counsel that ORV/N had gotten the benefit of the earlier assessments, "unequivocally demonstrat[ing] that the County considered the original assessments to be final." FOF ¶¶ 96-113.

The County's argument should also be summarily rejected because, although the County bore the burden to demonstrate that it would have issued the Amended Assessments even absent the litigation, the County's attorney improperly refused to allow testimony on this issue. When

Martin was asked in her deposition whether the County would have issued the Amended Assessments had ORV/N not sued the County, Deputy Corporation Counsel, with no legal basis, instructed her not to answer. FOF ¶ 123 (citing Dkt. 78:338).

Regardless, as the circuit court held, the County's "***admission*** that it issued the Amended Assessments to create a new tax liability that it could then use as a setoff in this litigation contradicts any argument that the County would have issued the Amended Assessments absent the litigation." FOF ¶ 140 (emphasis added); see also FOF ¶¶ 138-39, 141-43.

In fact, in its Opening Brief, the County affirms its admission that RPAD did not issue the Amended Assessments as part of its normal operations, but rather in direct response to the dismissal of the setoff counterclaim in the Sunshine Law case. See OB at 11 ("Because [ORV/N] had already placed this matter in litigation, however, the County elected to bring a counterclaim in set-off" against ORV/N in the Sunshine Law case "in lieu of assessing [ORV/N's] omitted condominium property.") (emphasis added); OB at 30 ("[T]he omitted assessments were issued only after [ORV/N] thwarted the County's efforts to set-off Plaintiffs' untimely tax claims for tax refunds without issuing the assessments.") (emphasis added); OB at 2 (The County "was compelled by Plaintiffs' posturing to avail itself of applicable code provisions and procedures.") (emphasis added); OB at 10 n.12 (accord).

Given the overwhelming undisputed evidence that the County issued the Amended Assessments because of the lawsuit, and would not otherwise have issued them, no genuine issue as to this fact remained, and summary judgment as to the First Amendment claim was proper.

2. The Circuit Court Correctly Concluded that ORV/N Were Entitled to Damages Under 42 U.S.C. § 1983.

Completely disregarding the circuit court's findings and conclusions as to the 42 U.S.C. § 1983 claim, the County argues that ORV/N "have not demonstrated as a matter of undisputed fact a long-standing custom or practice resulting in repeated deprivations." OB at 32. The circuit court explicitly concluded that ORV/N were not required to establish a "longstanding practice or custom," because they had "established that the actions taken by the County were indeed its action[s]." AA Order COL ¶ 218 (citing Webb v. Sloan, 330 F.3d 1159, 1164 (9th Cir. 2003) for the proposition that the "official policy" requirement was intended to distinguish acts of the municipality from the acts of its employees). The County does not challenge any of the related conclusions, COL ¶¶ 202-25, does not acknowledge the authorities cited, and does not argue that the Amended Assessments were not official acts of the County. See OB at 32.

The County's argument that the circuit court "did not even understand [ORV/N's] claim under 42 U.S.C. § 1983," OB at 32-33, is simply wrong. As made clear by the transcript, Dkt. 176:77-82, the circuit court's concern was not the merits of the claim itself, but how properly to award damages and attorneys' fees. See Dkt. 176:78 (expressing concern that, as to the § 1983 claim, questions remained as to attorneys' fees) and Dkt. 176:82 ("I'm just trying to figure out, though, in terms of what this order is going to say at the end, besides just 'granted,' what besides attorney's fees, if anything, remains on the plaintiffs' damages claims").

The County's cryptic argument that "causation may very well also be in question," OB at 33, was not raised below and is meritless—there can be no question that the County's wrongful issuance of the Amended Assessments directly caused ORV/N's unnecessary payment of more than $10.7 million, plus appeal fees and general excise taxes.

3. The Circuit Court Correctly Concluded that the Amended Assessments Were Illegal and Void.

In a brief paragraph, again without citing any specific finding or conclusion, the County alleges that the circuit court's "many erroneously [sic] legal conclusions regarding [ORV/N's] real property having already been assessed prior to the [Amended Assessments] issuing" is "contradicted by Hawai'i law." OB at 33. The County cites no Hawai'i law. It instead cites summarily to MCC section 3.48.305, OB at 33, but that provision was amended only in 2009 to require that condominium units be separately assessed. The County does not challenge the AA Order's COL ¶ 93, which concluded that this MCC requirement did not govern the 2006-2008 assessments because the ordinance creating the requirement was made retroactive only to July 1, 2009. See also FOF ¶¶ 15-16; COL ¶¶ 94-96; Ordinance No. 3703 (2009).

The County also does not challenge the conclusions that, under MCC section 3.48.135, once an assessment list is finalized for any given year, taxes must be collected in accordance with that list, subject only to change made by a court or other tribunal. COL ¶¶ 54-56; see also COL ¶ 57 (MCC section 3.48.140 prohibits changes to assessment lists with only limited exceptions not relevant here). The County likewise does not challenge the conclusion that "[e]ven if the County had violated a law in failing to separately assess individual [units] in 2006, 2007, and 2008, such violation would not permit the County to violate the law a second time, years later, by reassessing that same property." COL ¶ 96.

The County does not address the conclusions concerning the omitted property provision itself, MCC section 3.48.165.A. That provision permits assessment of real property, for the first

time, when "any real property" has been omitted from the final assessment list. See COL ¶ 58. The County admitted that it had already assessed all ORV/N's real property for 2006, 2007, and 2008, so no real property was "omitted" from the assessment lists for those years. COL ¶ 64. The circuit court rejected the County's theory that the TMK units had been "omitted," because TMK numbers are merely identifiers of real property, not real property. COL ¶¶ 65-72.

Although the circuit court concluded that Hill, 31 Haw. 809, was controlling, COL ¶ 75, the County does not address the case. Hill held that omitted property laws authorize assessors only to assess property that has escaped taxation completely, but such laws do not authorize revaluation or additional valuation of the same property after assessment. COL ¶ 76 (citing Hill, 31 Haw. at 812); see also COL ¶¶ 77-81 (citing additional authority). Although the County cites a number of extrajurisdictional cases involving assessment of condominiums, OB at 33 n.26, none of those cases concern reassessment of previously assessed property.

4. The Circuit Court Correctly Concluded that the County Violated ORV/N's Due Process Rights by Issuing the Amended Assessments.

The circuit court conducted a detailed analysis ultimately to conclude that the Amended Assessments violated ORV/N's substantive and procedural due process rights. AA Order COL ¶¶ 138-93. The County does not challenge any of these conclusions. It instead argues only that the Intermediate Court of Appeals in Kaheawa Wind Power, LLC v. County of Maui, 135 Hawai'i 202, 347 P.3d 632 (App. 2014) "has otherwise already held that retroactive tax assessments for omitted property is [sic] otherwise not unconstitutional." OB at 34. But Kaheawa did not hold that retroactive taxes are never unconstitutional. It held that even when a retroactive tax assessment is permitted by law and not otherwise unconstitutional—conditions certainly not met here—the circumstances of its issuance may still give rise to a substantive due process violation. COL ¶ 141 (quoting Kaheawa, 135 Hawai'i at 213, 347 P.3d at 643). A retroactive tax violates due process if, in light of "the nature of the tax and the circumstances in which it is laid," the law is "so harsh and oppressive as to transgress the constitutional limitation." COL ¶ 140 (quoting Kaheawa, 135 Hawai'i at 214, 347 P.3d at 644). In determining whether retroactive taxation violates due process, courts consider two primary factors: (1) whether the legislature's purpose in enacting the legislation was "illegitimate or arbitrary," and (2) "whether the legislature acted promptly and established 'only a modest period of retroactivity.'" COL ¶ 143 (quoting Gardens, 90 Hawai'i at 344, 978 P.2d at 782).

Here, the circuit court concluded that the County's purpose in issuing the Amended

Assessments was illegitimate, COL ¶¶ 147-53, and the County does not contest any of the supporting conclusions. The circuit court also concluded that the eight-to-ten-year period of retroactivity was not modest. COL ¶¶ 154-68. The County challenges these conclusions as "inconsistent" with "allow[ing] ORV/N to bring claims for for [sic] 12-14 years of tax refunds indisputably barred by the statute of limitations." OB at 34. In other words, the County concedes the period is not modest, but maintains that ORV/N's claim for damages arising from the Timeshare real property tax classification should negate ORV/N's rights to due process as related to the Amended Assessments. This false equivalency is without merit and illustrates, again, the County's complete disregard for concepts of due process and the rule of law generally that gave rise to ORV/N's claims.

F. Having Held the Amended Assessments to Be Illegal and to Violate ORV/N's Constitutional Rights, the Circuit Court Properly Awarded Damages.

As Point of Error 6, the County incorrectly argues that because the circuit court had no jurisdiction over the Amended Assessment claims, it also had no jurisdiction to order the County to reimburse the associated taxes and Board of Review appeal fees. OB at 34. For the reasons stated in section IV.A.2 *supra*, and those in the AA Order, COL ¶¶ 6-41, the circuit court had jurisdiction. See also Felder v. Casey, 487 U.S. 131, 147 (1988) (exhaustion of administrative remedies is not prerequisite to action under 42 U.S.C. § 1983, in federal or state court). Moreover, the circuit court exercised jurisdiction over the Amended Assessment claims more than six months before the appeals to the TAC, see FOF ¶¶ 58, 71, so having asserted jurisdiction first, it retains that jurisdiction until the conclusion of the case. COL ¶ 25.

The County appears to contest the propriety of the circuit court's suggestion that ORV/N move to stay the TAC appeals. OB at 34 (citing AA Order at 74). It argues that there is "no legal authority empowering a Circuit Court asserting and exercising its general subject matter jurisdiction to interfere with the lawful process pending in another court of special jurisdiction." Id. (emphasis added). Although the argument is meritless and unsupported by any authority, the County waived this argument by stipulating to stay the TAC appeals. See Dkt. 204, OB at 21.

G. Because the County's Actions Violated 42 U.S.C. § 1983, the Circuit Court Properly Awarded Attorney's Fees and Costs Under 42 U.S.C § 1988.

Although it again challenges no specific findings or conclusions, OB at 23, 34-35, the County argues as Point of Error 7 that, for three reasons, the circuit court abused its discretion in awarding ORV/N its fees and costs based on the 42 U.S.C. § 1983 violations; all three are

wrong. First, contrary to the County's assertion, OB at 34, the circuit court did have jurisdiction over the Amended Assessment claims, so it had jurisdiction to award attorneys' fees and costs. See section IV.A.2, *supra,* and AA Order COL ¶¶ 6-41.

Second, contrary to the County's argument that "there is no statutory basis or any other authority for the award," OB at 35, the circuit court explicitly awarded fees and costs pursuant to 42 U.S.C. § 1988. See AA Order COL ¶ 224 (quoting 42 U.S.C. § 1988, allowing reasonable attorneys' fees to be awarded in any action to enforce a provision of § 1983), COL ¶ 225.

Third, there is no requirement that the circuit court "certify" that the claimed fees and costs are reasonable, as the County suggests. See OB at 35. The County cites In re Attorney's Fees of Mohr, 97 Hawai'i 1, 4, 32 P.3d 647, 650 (2001), but that case involved HRS section 802-5(b), governing compensation to court-appointed counsel for indigent criminals and allowing payment above statutory maximums when certified by the court. That the circuit court here reviewed the attorney's fees request is supported by the fact that at the December 15, 2017, hearing, the court deferred ruling on the request pending an adequate opportunity to review it. See Dkt. 178:64-65. In the transcript of the subsequent hearing, on which the County relies, OB at 23, the circuit court held the requested attorneys' fees were "supported in detail and documented by all the materials for the amounts requested, along with the reimbursement of costs." Dkt. 34:6-7; see also Haw. R. Evid. 303(c)(16) (A bill for services that has been paid "is presumed to . . . embody fair and reasonable charges for the itemized . . . services.").

V. CONCLUSION

Based on the foregoing, 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, April 5, 2019.

/s/ Lisa W. Cataldo
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SCAP NO. 18-0000578

IN THE SUPREME COURT 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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