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SCAP NO. 18-0000578

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, VIC H. HENRY, and PETER A. BAGATELOS,	)	CIVIL NO. No. 13-1-0848(2) (PTC) (Other Civil Action)
	)	CAAP-18-0000578
	)	APPELLANT COUNTY OF MAUI'S AND MAUI COUNTY COUNCIL'S

[CAPTION CONTINUED ON NEXT PAGE]

PETITIONERS PLAINTIFFS/APPELLEES' APPLICATION
FOR TRANSFER OF THE APPEAL TO THE SUPREME COURT

CERTIFICATE OF SERVICE

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Plaintiffs/Appellees,	)	NOTICE OF APPEAL FROM **1)** ORDER
	)	CERTIFYING FOR INTERLOCUTORY
vs.	)	APPEAL THE FINDINGS OF FACT
	)	CONCLUSIONS OF LAW;
COUNTY OF MAUI and MAUI COUNTY COUNCIL,	)	[ILLEGALITY] ORDER, FILED MARCH
	)	23, 2018, PURSUANT TO HAWAI‘I
	)	REVISED STATUTES SECTION 641-1(b)
Defendants/Appellants.	)	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: Honorable Peter T. Cahill
_____	)	

SCAP NO. 18-0000578

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI‘I

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, VIC H. HENRY, and PETER A. BAGATELOS, Plaintiffs/Appellees, vs. COUNTY OF MAUI and MAUI COUNTY COUNCIL, Defendants/Appellants.	CIVIL NO. No. 13-1-0848(2) (PTC) (Other Civil Action) CAAP-18-0000578 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: Honorable Peter T. Cahill

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PETITIONERS PLAINTIFFS/APPELLEES' APPLICATION
FOR TRANSFER OF THE APPEAL TO THE SUPREME COURT

I. REQUEST FOR TRANSFER

Pursuant to Rule 40.2 of the Hawai'i Rules of Appellate Procedure ("HRAP"), Petitioners Ocean Resort Villas Vacation Owners Association; Ocean Resort Villas North Vacation Owners Association (collectively, "ORV/N"); Vic H. Henry; and Peter A. Bagatelos (collectively, "Petitioners")—Plaintiffs below and Appellees in the pending appeal in this matter—apply to this Court to transfer the above-captioned appeal from the Intermediate Court of Appeals to this Court.[1]

Defendants/Appellants County of Maui and the Maui County Council (collectively, the "County") appeal two orders, each qualifying for transfer under Hawai'i Revised Statutes ("HRS") subsection 602-58(a).

First, the County appeals the circuit court's order granting partial summary judgment on ORV/N's claim challenging the County's creation of a separate real property tax classification for timeshares. The circuit court held the classification violated the Maui County Code ("MCC") because it was not based on any difference in real property use as required by the applicable ordinance, but rather a difference in the statutory formulas for the calculation of the Transient Accommodations Tax ("TAT"), a State-imposed excise tax, collected from timeshares as compared to hotels. Consequently, the County also exceeded its power under article VIII, section 3 of the Hawai'i Constitution, which limits the County's taxation power to real property

[1] On August 10, 2018, the County filed its application to transfer this appeal to the Supreme Court. ORV/N opposed that application solely on the basis that it was premature because the County filed the application before the record on appeal had been filed, and thus violated HRAP Rule 40.2(a)(2). The County withdrew its application before the Court issued any related order. In its amended Opening Brief, filed December 25, 2018, the County states its intent to file an application to transfer but as of the time of this filing it has not done so.

taxes. The circuit court thus held the County ordinance "invalid on the grounds that it was invalidly enacted," within the meaning of HRS subsection 602-58(a)(2)(B), qualifying the appeal for mandatory transfer under that subsection.

Second, the County appeals the order granting partial summary judgment on ORV/N's claims challenging the County's issuance of amended real property assessments in 2016 for ORV/N's properties for the years 2006, 2007, and 2008 (the "Amended Assessments"). The circuit court concluded that the County's issuance of the Amended Assessments, along with tax invoices for additional taxes totaling more than $10.7 million to be paid within 30 days was prohibited by specific provisions of the MCC and controlling Supreme Court precedent. The circuit court also held—based in large part on the County's explicit admissions—that the County issued the Amended Assessments outside the County's normal procedures, specifically in response to the litigation, and for the purpose of creating a $10.7+ million tax liability for use as an offset against a damages award in this litigation. The circuit court thus concluded that the County's conduct in targeting ORV/N for such adverse action was unconstitutional, as it violated ORV/N's constitutional rights to petition the courts for redress and their rights to substantive and procedural due process. Because the circuit court held the County's actions violated the Hawai‘i and United States constitutions, and given the County's continuing insistence that its conduct was proper, the appeal is of "fundamental importance," making it appropriate for mandatory transfer under HRS subsection 602-58(a)(1).

II. RELEVANT FACTS AND PRIOR PROCEEDINGS

Following is a brief summary of the factual and procedural background leading to the issuance of both the Illegality and AA Orders, which is relevant to the applicable analysis for transfer.

A. The County Passes Ordinance No. 3227 to Create a Separate Real Property Tax Classification for Timeshares.

From 1997 to 2005, all timeshares in the County of Maui were included in the Hotel/Resort ("Hotel") real property tax classification. See Illegality Order FOF ¶ 2.[2]

On October 6, 2004, the Maui County Council's Budget and Finance ("B&F") Committee transmitted to the entire council Draft Bill 76 (2004), which proposed to amend MCC section 3.48.305 to create a new Timeshare real property tax classification and remove timeshares from the Hotel classification. Dkt. 104:182-85 (Ordinance No. 3227).

B&F Committee Report 04-187 reported the bill's transmission and recommended the creation of the Timeshare real property tax classification. See Illegality Order FOF ¶ 5; Dkt. 104:270-74 (B&F Committee Report 04-187). B&F Committee Report 04-187 cited no difference in the uses of hotels and timeshares, but focused solely on the difference in the statutory TAT formulas for hotels and timeshares:

> 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.

[2] "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). "AA Order" refers to the Court's Findings of Fact, Conclusions of Law; Order Granting Plaintiffs' Motions for Partial Summary Judgment on Counts V, VI, VII, and VIII of the Second Amended Complaint Filed August 12, 2016, Filed on December 1, 2016, etc., filed on August 9, 2017 (Dkt. 10). 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.

Dkt. 104:270-74 (B&F Committee Report 04-187) (emphasis added). The Council passed the bill, and the resulting Ordinance No. 3227 became effective on January 1, 2005. See Dkt. 104:182-85; Illegality Order FOF ¶ 7.

The County admitted that, after it created the Timeshare real property tax classification, it then set the Timeshare real property tax rate higher than the Hotel rate to "remedy" "what was perceived as an unfair disparity in [TAT] burdens as between these two subcategories of the visitor industry . . . ." Illegality Order FOF ¶ 18 (citing Dkt. 104:297-98).

B. ORV/ORVN Challenge the Timeshare Real Property Tax Classification.

Petitioners filed this lawsuit on August 19, 2013, asserting an equal protection claim (Count I) based on the County's creation of the Timeshare real property tax classification and a Sunshine Law claim (Count II) in connection with the Council's deliberations of tax rates. Dkt. 52:15-30. ORV/N filed a First Amended Complaint on August 28, 2014, Dkt. 52:951-66, adding more recent Sunshine Law and related due process claims (Counts III and IV).

C. The County Responds by Asserting a Counterclaim in Setoff in a Related Case for Taxes the County "Could Have" Assessed Years Earlier.

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 an alleged "tax windfall" resulting from the 2006, 2007, and 2008 assessments of ORV/N's properties against an anticipated damages award. AA Order FOF ¶¶ 23-26; Dkt. 78:223-30. In the counterclaim, the County did not allege that ORV/N had failed to pay any real property tax bill and did not allege that any property had been omitted from the original assessments. See Dkt. 78:223-30. Instead, the County alleged that, while it originally assessed ORV/N's two master parcels using the cost approach to valuation, it could have assessed the master parcels on the "aggregate of assessed market values" of all the condominium units (that is, the subparcels

within the master parcels) and that, had it done so, the original 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 prescribed in the MCC. See Dkt. 78:223-30; AA Order FOF ¶¶ 25-27. 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. 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. The Honorable Rhonda I. L. Loo agreed and dismissed the counterclaim on March 3, 2016. See Dkt. 78:232-34; AA Order FOF ¶ 28.

D. In Response to the Dismissal of the Setoff Counterclaim, the County Issues 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 the two ORV/N master parcels and their individual condominium units (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 negated the original assessed values for the master parcels and the associated tax liabilities. AA Order FOF ¶¶ 32, 33; Dkt. 78:256-59. Conversely, the Amended Assessments for the condominium units all show 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.

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 interest, to the taxes associated with the Amended Assessments for the condominium units, AA Order FOF ¶ 45; Dkt. 78:238-41, leaving a balance of $10,728,518.49 in additional taxes.

Solely for purposes of preserving their rights and precluding any claimed delinquency or further adverse action by the County, 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. For each of the 1,111 appeals, ORV/N paid a $75 filing fee, for a total of $83,325. See AA Order FOF ¶¶ 58-59; Dkt. 78:253-54 (Declaration of ORV/N representative).

E. ORV/N Amend Their Complaint to Add the Amended Assessment Claims.

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.

See Dkt. 74:268-89.[3]

[3] 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

F. The Circuit Court Grants Partial Summary Judgment on the Amended Assessment Claims.

On August 9, 2017, the circuit court, the Honorable Peter T. Cahill presiding, entered its order disposing of the Amended Assessment claims. See Court's Findings of Fact, Conclusions of Law; Order Granting Plaintiffs' Motions for Partial Summary Judgment on Counts V, VI, VII, and VIII of the Second Amended Complaint Filed August 12, 2016, Filed on December 1, 2016; and Denying Defendants County of Maui and the Maui County Council's Motion for Partial Summary Judgment as to Count V of Plaintiff' Second Amended Complaint filed 2016-08-12, filed on December 12, 2016 ("AA Order," Dkt. 10).

The circuit court held that the Amended Assessments violated the MCC because (i) no real property was omitted from the tax assessment lists for years 2006, 2007, and 2008 within the meaning of the MCC's omitted property provision; and (2) the MCC prohibited the County from retroactively changing its valuation methodology to increase the total assessed value of the very same land and buildings it previously assessed and taxed; and (3) the MCC prohibited the County from collecting taxes other than in accordance with the final assessment list for any year. Id. COL ¶¶ 54-99. The circuit court further concluded that nothing in the MCC authorized the County's issuance of the Amended Assessments. Id. COL ¶ 100.

The circuit court also held that the undisputed evidence—including the County's numerous admissions—proved that the County "issued the Amended Assessments completely outside the scope of its normal procedures, and outside the real property assessment and collection procedures of the MCC." Id. FOF ¶ 142. It further held that the County "abused it[s]

FOF ¶¶ 61-62; Dkt. 74:555-59, even though it admitted those payments in its Answer. Dkt. 74:550 ¶ 42. As with its previously rejected counterclaim, the County cited no legal authority for the claim and did not allege that any property had been "omitted" from the 2006-2008 assessment lists. See Dkt. 74:555-59. The circuit court dismissed the counterclaim as legally baseless, as ORV/N owed no related tax obligation. AA Order FOF ¶¶ 61-65.

taxation power to create a weapon—a new $10+ million tax obligation—against taxpayers with whom it was in litigation." AA Order FOF ¶ 143.

The circuit court thus concluded that the County's issuance of the Amended Assessments violated ORV/N's First Amendment right to petition the court for redress of grievances. AA Order COL ¶ 134; see also COL ¶¶ 110-133. "[T]he undisputed evidence including the many admissions by the County proves that it issued the Amended Assessments because of and specifically in response to the litigation, and that absent the lawsuit and Plaintiffs' exercise of their rights no such adverse tax action would have been taken." Id. COL ¶ 119; see also id. COL ¶ 113 (quoting Soranno's Gasco v. Morgan, 874 F.2d 1310, 1314 (9th Cir. 1989) ("When an aggrieved party establishes that a government entity made an adverse decision because of the plaintiffs' exercise of constitutionally protected rights, 'they have established a first amendment violation.'").

The circuit court also held that the Amended Assessments violated ORV/N's rights to substantive and procedural due process. AA Order COL¶¶ 138-93.

As a result of the County's violations of ORV/N's rights under the United States Constitution, which resulted from the County's official action, the circuit court held that ORV/N were entitled to damages, attorneys' fees, and costs under 42 U.S.C. § 1983. AA Order COL ¶¶ 202-25. The court ordered the County to refund to ORV/N all tax payments associated with the Amended Assessments and the appeal fees ORV/N paid to the Board of Review. AA Order at 74.

The circuit court then fully resolved all remaining issues of damages, attorneys' fees, and costs in its January 23, 2018, order awarding damages[4] and its May 30, 2018 order awarding attorneys' fees.[5] These three orders thus completely disposed of the Amended Assessment claims.

G. The Circuit Court Grants Partial Summary Judgment on the Timeshare Real Property Tax Classification Claim.

On March 23, 2018, the circuit court entered its order concluding that the Timeshare real property tax classification was illegal and thus void on two grounds. See Illegality Order. First, the County exceeded its power under the MCC, because the County did not create the Timeshare real property tax classification based on any difference in property use, which is the sole permissible basis for a classification under the MCC. Id. COL ¶¶ 9-37. Second, because it created the Timeshare real property tax classification to address a perceived disparity in TAT assessments as between hotels and timeshares, 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. Id. COL ¶¶ 18-21, 24. The Illegality Order held the classification to be illegal and the related tax rates void, but did not resolve the amount of damages.

[4] Order Granting in Part and Deferring in Part Plaintiffs' Motion Re Damages Related to Count VIII (42 U.S.C. § 1983) of the Second Amended Complaint Filed August 12, 2016, Filed on September 22, 2017 (Dkt. 108:549-50).

[5] Order Granting (1) Plaintiffs' Motion for Further Hearing on Plaintiffs' Request for Fees and Costs Relating to Count VIII of the Second Amended Complaint Filed August 12, 2016, Filed March 6, 2018; and (2) Plaintiffs' Motion Re Damages Related to Count VIII (42 U.S.C. § 1983) of the Second Amended Complaint Filed August 12, 2016, Filed September 22, 2017 Regarding Attorneys' Fees and Costs (Dkt. 110:788-90).

H. The Circuit Court Issues Orders Allowing Appeal.

The circuit court certified the Illegality Order for interlocutory appeal pursuant to HRS section 641-1(b). See Dkt. 2.[6]

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 Dkt. 3 and Dkt 4.[7]

III. THE COUNTY'S POINTS OF ERROR

The County filed its amended Opening Brief on December 25, 2018. The County's points of error relevant to this Application, as stated in the Opening Brief, are:

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

[6] Order Certifying for Interlocutory Appeal the Findings of Fact, Conclusions of Law; [Illegality] Order, Filed March 23, 2018, Pursuant to [HRS] Section 641(b) and Staying Proceedings Under Hawai‘i Rules of Civil Procedure Rule 62(d) and (e), filed June 25, 2018.

[7] 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), filed June 25, 2018; Final Judgment on Counts V, VI, VII, and VIII of the Second Amended Complaint, filed July 2, 2018.

the legal conclusion at JEFS Dkt. 102, PDF 73-534 & Dkt. 110, PDF 15-113 & 372-380.

. . .

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

Defendants/Appellants County of Maui's and Maui County Council's Opening Appellate Brief, as amended December 25, 2018 (Dkt. 212:29-30).

IV. ANALYSIS

This appeal meets the qualifications for transfer to the Supreme Court, set out in HRS section 602-58, in two respects. First, the appeal involves the circuit court's conclusion that a county ordinance, Ordinance No. 3227, was enacted in violation of the MCC and was unconstitutional. Second, the appeal presents a question of fundamental importance, in that the County has not only blatantly abused its power of taxation against taxpayers with whom it is in litigation, it continues to insist that its actions were proper.

HRS section §602-58 states in pertinent part:

(a) The supreme court, in the manner and within the time provided by the rules of court, shall grant an application to transfer any case within the jurisdiction of the intermediate appellate court to the supreme court upon the grounds that the case involves:

(1) A question of imperative or fundamental public importance;

(2) An appeal from a decision of any court or agency when appeals are allowed by law:

. . .

> (B) Determining a state statute, county ordinance, or agency rule to be invalid on the grounds that it was invalidly enacted or is unconstitutional, on its face or as applied, under either the constitution of the State or the United States . . . .

A. Transfer Is Proper Under HRS § 602-58(a)(2)(B).

Transfer of the County's appeal to the Supreme Court is proper under HRS subsection 602-58(a)(2)(B). In the Illegality Order, the circuit court held Ordinance No. 3227, which established the Timeshare real property tax classification, was enacted in violation of the MCC, because the classification was not based on any difference in property use, as required by the MCC, but on differences in the State-created formulas for collecting TAT on hotels as compared to timeshares. Illegality Order COL ¶¶ 9-23, 25-37. The court also concluded that in passing Ordinance No. 3227, 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. Id. COL ¶ 24. The County is challenging the circuit court's invalidation of the Timeshare real property tax classification in its Points of Error 2 and 3. Accordingly, the appeal involves an appeal from a circuit court decision "[d]etermining a . . . county ordinance . . . to be invalid on the grounds that it was invalidly enacted or is unconstitutional," and thus this appeal fits squarely within the scope of HRS subsection 602-58(a)(2)(B), requiring mandatory transfer.

B. Transfer Is Proper Under HRS § 602-58(a)(1).

Transfer is also mandated because the appeal is one of "fundamental importance" within the meaning of HRS section 602-58(a)(1). In the AA Order, the circuit court held the County's actions with regard to its counterclaim and the subsequent Amended Assessments were abuses of the County's real property taxation power and violated not only the MCC and Supreme Court precedent, but the Hawai'i and United States constitutions. See AA Order generally.

Significantly, the County has consistently argued that its assertion of the counterclaim in the Sunshine Law case and its subsequent issuance of the Amended Assessments were proper exercises of its taxation power. For example, when asked in an interrogatory in this case to "[e]xplain why the County issued the ORV Amended Tax Assessments," the County—in a response verified under penalty of perjury—answered:

> 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***.

AA Order FOF ¶ 73 (quoting Dkt. 78:316).

Similarly, in a response to a request for admission, the County admitted that within the last 10 years, the County had never issued cover letters with assessments or amended tax assessments directing inquiries to the County of Maui Department of the Corporation Counsel (as it had with the Amended Assessments), but added:

> The COUNTY also admits this request to the extent that 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 in the amount of $30 million dollars***. Moreover, the COUNTY has never been ***baselessly accused in a lawsuit of retaliating against tax paying entities seeking to further exploit their enriched pecuniary positions after having garnered these enormous tax windfalls***.

AA Order FOF ¶ 74 (quoting Dkt. 78:309).

In its briefs, the County has plainly and 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." AA Order FOF ¶ 128 (quoting Dkt. 80:965). Similarly, in opposing ORV/N's motion for partial summary judgment on Count VI, the County stated:

> The assessments of Plaintiffs' omitted condominium property, which Plaintiffs erroneously assert were motivated and designed to "retaliate" in response to their lawsuit, are a reasonable and fair assertion and pursuit of a set-off against damages claims in this delayed and protracted litigation, asserted by Plaintiffs as entitlement to in-excess of $30 million of alleged "tax refunds." ***There is nothing "illegal" or "invalid" about the County of Maui seeking to preserve its prerogative to prove the amounts of the omitted assessments in Plaintiffs' duplicative lawsuits. By opposing and vehemently arguing against these efforts, it was Plaintiffs who in fact precipitated the administrative process by which the assessments have now been made, and affirmed by the Board Review***.

AA Order FOF ¶ 129 (quoting Dkt. 80:960) (emphases altered).

Plainly, the County believes, unapologetically and without reservation, that it may properly use its taxation power as a weapon against taxpayers with whom it is in litigation. As Point of Error 5 in its Opening Brief, the County asserts that the circuit court's "findings and rulings that omitted real property assessments made by the County of Maui's Real Property Assessment Division were "illegal" and "retaliatory" against the Plaintiffs in this case, and therefore "unconstitutional" were/are clearly erroneous and wrong." See Dkt. 212:30.

This appeal thus requires examination of the limits of the County's real property taxing power under the MCC and the United States and Hawai‘i constitutions in the face of the County's insistence that it may properly use that power to gain an advantage in litigation with taxpayers. For this reason, the appeal is one of "fundamental importance" within the meaning of HRS section 602-58(a)(1).

V. CONCLUSION

Transfer is warranted, and Petitioners request that the Court transfer the appeal to the Supreme Court under HRS subsection 602-58(a)(2)(B), HRS subsection 602-58(a)(1), or both.

DATED: Honolulu, Hawai‘i, January 28, 2019.

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

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAIʻI

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, VIC H. HENRY, and PETER A. BAGATELOS, Plaintiffs/Appellees, vs. COUNTY OF MAUI and MAUI COUNTY COUNCIL, Defendants/Appellants.	CIVIL NO. No. 13-1-0848(2) (PTC) (Other Civil Action) CAAP-18-0000578 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 HAWAIʻI REVISED STATUTES SECTION 641-1(b) AND STAYING PROCEEDINGS UNDER HAWAIʻI 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 HAWAIʻI RULES OF CIVIL PROCEDURE RULE 54(b), AND STAYING PROCEEDINGS UNDER HAWAIʻI 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: 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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