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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,

Plaintiffs/Appellees,

v.

COUNTY OF MAUI and MAUI COUNTY COUNCIL,

Defendants/Appellants.

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

(Other Civil Action)

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

Second Circuit Court

Judge: Honorable Peter T. Cahill

DEFENDANTS/APPELLANTS
COUNTY OF MAUI'S AND MAUI COUNTY
COUNCIL'S RESPONSE TO PETITIONERS PLAINTIFFS
APPELLEES' APPLICATION FOR TRANSFER OF THE
APPEAL TO THE SUPREME COURT

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DEFENDANTS/APPELLANTS COUNTY OF MAUI'S AND MAUI COUNTY COUNCIL'S RESPONSE TO PETITIONERS PLAINTIFFS/ APPELLEES' APPLICATION FOR TRANSFER OF THE APPEAL TO THE SUPREME COURT

I. INTRODUCTION

Defendants/Appellants COUNTY OF MAUI and MAUI COUNTY COUNCIL (the "County") join in the request for transfer made in *Petitioners Plaintiffs/Appellees' Application for Transfer of the Appeal to the Supreme Court* ("Application"), filed January 28, 2019, but not on the grounds proferred in the Application. The grounds stated in the Application are pinched and misleading. The County maintains that transfer of this interlocutory appeal is appropriate to address imperative questions and novel legal issues arising out of the Second Circuit Court's flagrant jurisdictional overreach, and unconstitutional encroachment into Maui County's constitutionally delegated and enabled legislative and administrative "functions, powers, and duties relating to the taxation of real property" pursuant to Article VIII, Section 3 of the Hawai'i State Constitution.

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

Having already opposed the County's initial transfer request [*See*, SCAP No. 18-0000578, Docket No. 56] on purely procedural and technical grounds, and understanding that the County's Application would be refiled, Petitioner Plaintiffs/Appellees' current Application is little more than an obvious attempt to put a pre-emptive and misleading spin on **1)** the circuit court's dramatic and unconstitutional overreach to void an otherwise constitutional, rationally based 14-year old real property tax code classification, and **2)** the circuit court's improper summary disposition of factual questions and matters pertaining to the County of Maui's issuance of omitted condominium valuation assessments, by inappropriately ignoring and/or mischaracterizing unrefuted witness testimony and undisputed facts proferred by the County.

II. SUMMARY OF UNDERLYING LAWSUIT AND CLAIMS

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

[1] Plaintiffs/Appellees OCEAN RESORT VILLAS VACATION OWNERS ASSOCATION and OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION are a community of timeshare owners who initiated this lawsuit on August 19, 2013, filed a First Amended Complaint on August 28, 2014, and a Second Amended Complaint on August 12, 2016. Plaintiffs/Appellees VIC H. HENRY and PETER A. BAGETELOS are respectively two members of the timeshare associations, purportedly identified as "representatives" of the more than 27,000 other timeshare members/owners.

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

property tax appeal, holding that "a 'rational, sensible, and practicable interpretation' of HRS § 232-17 [*Appeals from Boards of Review*] must, of necessity, mandate that its appellate procedures be followed to the exclusion of those in HRS § 91-14(a).").

Depsite these irreparable jurisdictional defects, and despite their claims to 12-14 years of tax refunds being indisputably time-barred, the circuit court below improperly adjudicated Plaintiffs' lawsuit below, after inappropriately asserting general subject matter jurisdication over Plaintiffs' tax dispute and their time-barred claims for tax refunds.

The lawsuit baselessly alleges that Maui County's general real property tax classification for "Timeshare" violates the equal protection and due process clauses of the United States and Hawai'i Constitutions. Yet, the circuit court failed and/or refused to address the constitutional contentions raised, and instead ruled that the Maui County Code's "Timeshare" classification was "illegal." This claim of "illegality" is <u>not</u> pled in Plaintiffs' Complaint, or in either of Plaintiffs' two amended complaints. Moreover, the circuit court's ruling of "illegality" is otherwise based on an demonstrably absurd interpretation of the Maui County Code, and expressed references to prohibitions in the Hawai'i Revised Statutes and Hawai'i State Constitution *which do not exist and are a complete fiction*. The circuit court also ruled that Plaintiffs are entitled to prove at a jury trial the amount(s) of their claims to tax refunds for each annual assessment year dating back to 2006, mischaracterizing the alleged amounts of refunds sought as "damages." As noted, this conclusion ignores both the exclusive jurisdiction of the Tax Appeal Court, as well as the statute of limitations for annual tax appeals and claims to refunds.

Additionally, the circuit court wrongly ruled and inappropriately found that as a matter of law the County of Maui's issuance of valuation assessments for omitted condominium property owned by Plaintiffs, the omission of which was discovered in the investigation of Plaintiffs' lawsuit claims, violated the Maui County Code and was "retaliatory." This was despite Plaintiffs themselves having placed the omitted condominium valuation assessments in issue by filing their lawsuit seeking retroactive tax refunds for the annual assessment years in question. This was also despite Plaintiffs' own arguments that the omitted condominium property valuation assessments were required pursuant to the Maui County Code, *before* the County could seek to set-off Plaintiffs' untimely claims for $30-$34 million in retroactive tax refunds with the taxes owed on the omitted property.

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

After later recognizing the perilous financial consequences and irreparable harm threatened to the County of Maui and its citizens by its patently improper and wrong rulings, the circuit court issued orders for this interlocutory appeal on June 25, 2018. The Court elected to forego entering a judgment for the 12-14 years of tax refunds claimed by Plainiffs pending this appeal. There is no question that pending appellate review, a judgment for 12-14 years of tax refunds would not only constitute a flagrant abuse of discretion, it would undermine each of Maui County's past annual budgets dating back to 2006, be destructive to Maui County's bond credit rating, and imperil the County's and its residents' future fiscal and financial security. *See*, JEFS Dkt. 110, PDF 686-688 & 689-691 (Declaration of Sananda K. Baz, and Declaration of Scott Teruya).

III. STATEMENT OF PRIOR PROCEEDINGS

A. Second Circuit Court Civil No. 13-1-0848(2)(PTC)

i. PLAINTIFFS' COMPLAINTS AND CLAIMS

Plaintiffs/Appellees OCEAN RESORT VILLAS VACATION OWNERS ASSOCATION ("ORV"), OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION ("ORV NORTH"), et. al. ("Plaintiffs" or "Appellees") are a community of timeshare owners who initiated the underlying lawsuit on August 19, 2013. *See*, JEFS Dkt. 52, PDF 15-30. Plaintiffs filed a First Amended Complaint on August 28, 2014. Id., PDF 951-968. A Second Amended Complaint was filed on August 12, 2016. *See*, JEFS Dkt. 74, PDF 268-291. Plaintiffs allege that Maui County Ordinance No. 3227 establishing the County's "Timeshare" real property tax classification in 2004,[3] and resolutions setting the tax rate for each subsequent

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

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

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

Nowhere in any of the three Complaints filed did the Plaintiffs plead or allege the "Timeshare" classification and/or rate were "illegal."

In the underlying lawsuit, Plaintiffs seek as much as $34 million of real property tax refunds for tax years dating back 12-14 years to 2006.[6] As specified on page 2 above, this is despite never having made timely annual tax appeals for those refunds to Maui County's Board of Review[7] or timely appeals to the Tax Appeal Court for those annual tax refunds.

Plaintiffs' misdirected and incorrect argument below was that because they are not contesting the valuation of their real property made by the County's Real Property Assessment Division, their claims do not come under the special and exclusive subject matter jurisdiction of

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

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

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

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

the Tax Appeal Court. Plaintiffs also apparently wrongly contend on this basis that they are not time-barred by the applicable annual limitations periods from seeking tax refunds for the past 12-14 years.

ii. THE CIRCUIT COURT'S TWO SETS OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

After making its erroneous rulings in this case, the circuit court belatedly issued two separate sets of factual findings, conclusions of law and orders on August 9, 2017 and March 23, 2018 disposing of Plaintiffs' "liability" claims in the underlying case. *See*, CAAP No. 18-0000578, JEFS Dkt. 10, and 11.[8] Both sets of findings and conclusions are essentially copied and wordsmithed from self-serving proposals submitted by Plaintiffs/Appellants. Both sets of findings and conclusions are procedurally infirm, and analytically outcome determinative.

The First FOF, COL, and Order wrongly asserts that the omitted condominium assessments did not fall under the omitted property provisions of § 3.48.165 of the Maui County Code code. *See*, JEFS Dkt. 10, PDF 42-43PDF 44. The COL wrongly assert the omitted condominium property retroactively assessed constituted property already assessed. Id., PDF 44-52. The FOF erroneously assert that the assessments were issued *only* because Plaintiffs filed a lawsuit, and conclude therefore that the assessments were *retaliatory* against Plaintiffs for filing their lawsuit. *See*, JEFS Dkt. 10, PDF 52-55. The FOF erreonously assert the omitted condominium assessments were issued at the direction of the County's counsel, simply because the Real Property Assessment Division conferred with its attorneys in the context of this lawsuit. *See*, JEFS Dkt. 10, PDF 19, 56, 71, 72. Also, despite acknowledging that there was no statute of limitations on omitted property assessments, the COL assert as a matter of law that the period of retroactivity—*eight to ten years*—is not modest." *See*, JEFS Dkt. 10, PDF 62. (Emphasis original). The circuit court conversely failed to recognize the immodesty of Plaintiffs' claims for $34,000,000.00 in retroactive tax refunds—dating back *twelve to fourteen years*, and despite those claims being time barred by statute.

The Second FOF, COL and Order specifically ruled:

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

[8] All "JEFS" citations are to the docket and record on appeal in CAAP No. 18-0000578.

See, JEFS Dkt. 11, PDF 13. (Emphasis added). The circuit court *did not* find that the County failed to consider actual use, as misstated in the Petitioner/Appellees' Application. Rather, the court's absurd conclusion was that the county legislature's consideration of anything other than *actual use* of real property in establishing a general tax classification made the classification "illegal." [9] The circuit court's untenable rationale for this ruling was further explained at the hearing prior to issuance of its written conclusions, as follows:

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

See, JEFS Dkt. 44, PDF 21 (Transcript of Proceedings, dated January 3, 2018). (Emphasis added). Remarkably, nowhere in the record are the county ordinances, state statutes, or constitutional provisions cited which purportedly "require[] only use be considered."

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

> I now understand what the plaintiff's argument has been from the beginning, which I failed to understand, and why the rational basis test does not apply to the motion on the illegality. It doesn't apply because you never get to a rational basis test if the law upon which the rational basis test would analyze the statute is illegal because the entity doesn't have the constitutional[,] statutory, or, in this case, the ordinance authority to do this. We don't get into equal protection.
>
> * * * * *

[9] Further to the point and by way of example, both the Maui County Code and Revised Ordinances of Honolulu contain provisions requiring consideration of "highest and best use," which is not "actual use." *See*, MCC § 3.48.305(A); *see also*, ROH § 8-7.1(c)(1).

> *Well, there may be a rational basis.* But *if you don't have the power to do it, you can't do it from the beginning.*
>
> * * * * *
>
> Technically, just so we got a record, the motion on *the equal protection is simply denied* because I guess it's -- I'm not sure if the word is moot in this particular case. But simply because...
>
> MR. KLEIN: So the legality is granted?
>
> THE COURT: The legality is granted.
>
> *I'm denying the equal protection* because I think it's the one falls into the other, and that can be incorporated into the conclusions of law, is that the Court finds *there's no need to decide -- or get into an equal protection analysis* because the first portion was granted.

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

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

iii. ANTICIPATED FURTHER PROCEEDINGS ON "DAMAGES"

Finally, the circuit court below ultimately reached the conclusion that Plaintiffs' *prima facie* case entitles them to as much as $34,000,000.00, representing 12-14 years of *tax refunds* as "damages." *See*, JEFS Dkt. 44, PDF 23 and 26 (Transcript of Proceedings, dated January 3, 2018). The Court also ruled that Plaintiffs may be entitled to a jury trial to determine what amount(s) of 12-14 years of *tax refunds* they should be awarded as "damages."[10] Id. The Court simultaneously *sua sponte* vacated the January 8, 2018 trial date which had been set for this case.[11] Id. Alternatively to the trial, the circuit court invited Plaintiffs to file a dispositive motion on the amounts of purported "damages" claimed. *See*, Id., PDF p. 26.

After Plaintiffs failed to file the requested motion for over a period of 5 months, and with the Court not having re-scheduled the trial over that same period, on May 7, 2018 the County

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

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

filed its Motion for Summary Judgment on Plaintiffs' Claims for Tax Refunds, outlining the undisputed facts of Plaintiffs' failure to file appeals with the Board of Review and/or Tax Appeal Court within the mandatory limitations period for each year they sought tax refunds. *See*, JEFS Dkt. 110, PDF 381-444. Defendants also again contested the circuit court's subject matter jurisdiction to hear an appeal for tax refunds in the first instance. Id. The County's motion was summarily denied. *See*, JEFS Dkt. 110, PDF 816-817. This unopposed interlocutory appeal followed.

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

On August 28, 2014, Plaintiffs filed *a second separate lawsuit* in the Second Circuit Court, seeking tax refunds for assessment years 2015 and 2016 [tax years 2016 and 2017].[12] *See*, JEFS Dkt. 60, PDF 302-312. The second lawsuit made identical claims for denial of constitutional equal protection, due process, and Sunshine Law violations as related to the establishment of the "Timeshare" tax classification and/or rates. Id. In response the County filed an Answer, and a Counterclaim in set-off, based on the discovery in 2015 by the County's Real Property Assessment Division that Plaintiffs' condominium real property was omitted from valuation in 2006, 2007, and 2008. *See*, **Section III., C.**, *infra*.

The Plaintiffs moved in Civil No. 15-1-0435(1)(RILL) to dismiss the County's Counterclaim for set-off, et seq., arguing extensively that the Second Circuit Court "*lacked subject matter jurisdiction,*" that the Hawai'i Revised Statutes and Maui County Code "*vests the board of review and tax appeal court with exclusive jurisdiction,*" and "*the doctrine of exclusive jurisdiction precludes this [Circuit] Court from adjudicating matters involving tax disputes*." *See*, JEFS Dkt. 66, PDF 354-368. (excerpted Plaintiffs' Motion to Dismiss Defendant County of Maui's Counterclaim for Set-Off and/or Damages, et seq., filed in Civil No. 15-1-0435(1), Memorandum in Support of Motion) (citing Kincaid v. Bd. of Review of City & Cty. of Honolulu, 106 Hawai'i 318, 324,104 P.3d 905,911 (2004)).

Plaintiffs' counsel also specifically argued before the Second Circuit Court in Civil No.

[12] Rather than move to amend Civil No. 13-1-0848(2)(PTC) to add these claims for the subsequent tax years, Plaintiffs then attempted to consolidate Civil No. 15-1-0435(1)(RILL) with their original lawsuit. *See*, JEFS Dkt. 60, PDF 155-169. Consolidation was denied. *See*, JEFS Dkt. 60, PDF 584-584. Plaintiffs eventually dismissed Civil No. 15-1-0435(1)(RILL) *with prejudice*. *See*, JEFS Dkt. 201.

15-1-0435(1)(RILL) that:

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

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

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

After the Second Circuit Court's rulings in the underlying case here were made [Civil No. 13-1-0848(2)(PTC)], on January 23, 2017, Plaintiffs' filed a Stipulation for Dismissal in Civil No. 15-1-0435(1)(RILL) which expressly disposed of that case *with prejudice*. *See*, JEFS Dkt. 201.

C. DISPUTED SUBJECT MATTER JURISDICTION

While being compelled to respond and defend against Plaintiffs' lawsuit and claims, the County contested and did not waive objections and arguments to the Second Circuit Court's subject matter jurisdiction over the underlying tax claims and disputes. *See*, JEFS Dkt. 66, PDF 68-152 at 85; *see also*, JEFS Dkt. 66, PDF 267-380 at 273-276 & 278-279; *see also*, JEFS Dkt. 80, PDF 975-1095 at 985-992; *see also*, JEFS Dkt. 110, PDF 381-444 at 394-402.

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

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

On August 9, 2017, over the futher objections and arguments of the County,[13] the circuit court concluded in its First FOF, COL, and Order that it could assert general subject matter jurisdiction over Plaintiffs' tax appeal because the Tax Appeal Court does not empanel a jury."[14]

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[13] As directed by the circuit court the County filed its supplemental memorandum, again objecting to the circuit court's assertion of jurisdiction. *See*, JEFS Dkt. 84, PDF 662-670.

[14] It is notable that notwithstanding this stated basis of the circuit court's improper retention of subject matter jurisdiction over the claims made in this case, the circuit court denied the parties a jury trial on the merits of the underlying case, and the circuit court expressly circumvented and

See, JEFS Dkt. 10, PDF 33 at ¶ 7, et seq. The circuit court also incorrectly concluded that the Tax Appeal Court was without jurisdiction to rule on the *legality* of the omitted condominium property assessments and county's tax code. Id., at ¶ 10, et seq. Finally, the circuit court ruled that "[b]ecause this Court asserted jurisdiction over the Amended Assessment claims *first*, it retains that jurisdiction until the conclusion of the case." *See*, JEFS Dkt. 10, PDF 36 at ¶ 25).

D. INTERLOCUTORY ORDERS AND APPEAL

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

> So I'll hear from you guys about Monday. But my inclination is at this point, there won't be a trial. And if either side requested 54(b) certification with the damages still out there, I probably would be inclined to grant it simply because I think this -- if it's affirmed, it ends the issue -- yeah, there's damages. *But is it likely to terminate the litigation? I think the answer is yes.*
>
> *If I'm wrong, I think that might also terminate*. Because then you got a proper ordinance. And my other ruling on the other portion on the implementation of the tax rate would be guided by whatever the Supreme Court decided on what the County could or couldn't do.
>
> * * * * *
>
> You know, I do think the issue -- let's put it this way. I don't want to be criticized by the appellate court. But I do think this is one where, even absent the damages, *it's so important for the County*.
>
> And, obviously, Mr. Bilberry, *I certainly would consider a motion to stay the effect of the Court's ruling*. Because *the ramifications of this extend beyond just the plaintiffs that are in the case*. So I would certainly consider that. *If you guys were able to stip to that, that would be nice*. But I certainly think given what I just ruled, it's something that has to be considered, including by the plaintiffs.
>
> Because you're not talking about just these two timeshares. Now we're talking -- as Mr. Bilberry said, now we got a third building out there, plus all the others out there. And that's a critical issue here.
>
> And also, it also means that the parties can sit down and now think about and talk about resolving this before anything official is done and put on the

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avoided making any ruling on the constitutionality of the County's general tax classification for "Timeshare."

> record. And I understand, people believe only their side is right. But *there's a pretty big risk here, probably several hundred million dollars. And the risks are huge.*

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

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

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

For reasons which seem apparent to the County, the circuit court's legal rulings are also of imperative importance to all of the counties of Hawai'i. For example, if the circuit court's rulings as to the restriction on real property classification to "actual use" are to be taken as correct rulings of law, the general classification scheme for real property tax purposes of every county in the state of Hawai'i would appear to be subject to comprehensive legal attack(s). Moreover, the rulings undermine well established constitutional standards, principles, and policy prerogatives upon which the county legislatures have enacted their tax code provisions.

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

On June 14, 2016, Plaintiffs as taxpayers appealed the omitted property assessments to the County Board of Review. *See*, JEFS Dkt. 78, PDF 1105 (Transmittal Memoranda from Kenneth G. K. Hoo, Esq.). After the Board of Review hearing and decision affirming the omitted

property assessments, on February 16, 2016, Plaintiffs as taxpayer-appellants filed 1,111 separate appeals to the Tax Appeal Court, one appeal for each of the omitted condominium unit properties at the resort.[15]

After the circuit court's rulings in the underlying case here were made [Civil No. 13-1-0848(2)(PTC)], on April 24, 2018, Plaintiffs' counsel requested the County stipulate to dismiss their consolidated Tax Appeal Court case(s) *without prejudice*. *See*, JEFS Dkt. 203. In lieu of dismissal, the parties agreed to stay the consolidated Tax Appeal Court cases pending this appeal. JEFFS Dkt. 204.

IV. STATEMENT OF RELEVANT BACKGROUND

A. THE TIMESHARE RESORT

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

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

[15] The 1,111 separate Tax Appeal Court cases were consolidated on April 16, 2018. *See*, JEFS Dkt. 202.

assessment notices for the condominium units operated for timeshare use are sent to the ORV and ORV NORTH timeshare plan manager. *See*, Hawai'i Revised Statutes, § 514E-3;[16] *see also*, *See*, Id., at ¶ 5.

B. COUNTY ORDINANCE NO. 3227

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

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

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

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

taxes *for County services they utilize and the economic impact they place on the surrounding community*." *See*, JEFS Dkt. 102, PDF 474-498. (Emphasis added). Budget and Finance Committee Report No. 04-78 also documented in part the COUNTY'S concern with hotel to timeshare conversions:

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

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

C. PLAINTIFFS' OMITTED CONDOMINIUM PROPERTY

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

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

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

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

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

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

Q. What did Marcy Martin tell you?
A. *She said that the property, the condominium units were omitted and that we would need to redo them or add them to the roll*.
Q. Did she put that in a written message to you, if you recall?
A. No, not to my knowledge.
Q. And then once you were made aware that these properties were omitted from the roll, did you ask her to do anything in conjunction with that? i.e., to make a report, do a study or anything?
A. Because the matter -- and *not only this case, all cases under litigation*, we could consult with Corporation Counsel.[17] (Emphasis added).
Mr. BILBERRY: Well, that's all you need to say. You conferred with your counsel.

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

By Mr. KLEIN:

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

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

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

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

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

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

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

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

The omitted assessments for Plaintiffs' condominium property for assessment years 2006, 2007, and 2008 [tax years 2007, 2008, and 2009] therefore issued from the Real Property Assessmnt Division on May 24, 2016, in lieu of its Counterclaim for set-off, as part of the administrative process Plaintiffs had previously argued in Civil No. 15-1-0435(1)(RILL) was mandatory. *See*, JEFS Dkt. 78, PDF 1091-1104 (2016-05-24 Transmittals c/o SVO Association Management). The omitted taxes amounted to $10,728,518.49 in potential set-off[18] of unpaid real property taxes for tax years 2007, 2008, and 2009, against Plaintiffs' untimely claims for up to $30-34 million in tax refunds. Id.

V. STATEMENT OF POINTS OF ERROR

Defendants/Appellants maintain on this interlocutory appeal that:

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

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.

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.

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

4) The Second Circuit Court's ruling that Plaintiffs are entitled to as much as $34,000,000.00 of tax refunds in the aggregate for combined assessment years dating back 12-14 years to 2006 despite Plaintiffs as taxpayers having not appealed their assessments within the required statutory period for each assessment year was/is wrong, is an abuse of discretion, threatens imminent and irreparable harm to Maui County's bond credit rating, and imperils the fiscal security of Maui County and its residents.

5) The Second Circuit Court's findings and ruling that omitted real property assessments made by the County of Maui's Real Property Assessment Division were "illegal" and "retaliatory" against the Plaintiffs in this case, and therefore "unconstitutional" were/are clearly erroneous and wrong.

6) The Second Circuit Court's order for a refund to Plaintiffs of omitted taxes *pending an appeal in Tax Appeal Court*, and for appeal fees paid to the Board of Review was/is an abuse of discretion.

7) The Second Circuit Court's *carte blanche* award to Plaintiffs of $455,749.56 in attorneys' fees and $18,177.43, without any evidence or indication of having reviewed Plaintiffs' attorneys' billings was an abuse of discretion.

VI. STATUTORY QUALIFICATIONS FOR TRANSFER

Haw. Rev. Stat. § 602-58 provides for two forms of transfer: mandatory and discretionary. This case is warranted and/or eligible for transfer independently under either criteria for transfer. Either is sufficient for this Court to grant this application.

A. Question(s) of Imperative or Fundamental Public Importance

For "question[s] of imperative or fundamental public importance[,]" this Court "*shall* grant an application to transfer any case within the jurisdiction of the intermediate court to the supreme court(.]" Haw. Rev. Stat. § 602-58(a) and (1). (Emphasis added). This is a mandatory basis for transfer. At least three questions of imperative and fundamental public importance arise in this appeal. Taken not necessarily in order of importance, one question addresses the constitutional and statutory authority of the counties of Hawai'i to *identify and classify real property*. Several imperative questions and concerns are also raised by the circuit court's improper assertion and retention of general subject matter jurisdiction over this tax dispute.

Perhaps the most imperative question for the County in this case arises out of the circuit court's rulings that Plaintiffs may be entitled to a jury trial and/or otherwise a determination by motion on amounts of "damages" as 12-14 years of tax refunds - a mischaracterization of indisputably untimely and barred claims for tax refunds which are otherwise indisputably barred by the applicable statute of limitations.

i. THE COUNTIES OF HAWAI'I'S CONSTITUTIONAL REAL PROPERTY TAXATION AUTHORITY

Article VIII, Section 3 of the Hawai'i State Constitution was an amendment to the Hawai'i State Constitution made at the 1978 Constitutional Convention of Hawai'i, and provides as follows:

> The taxing power shall be reserved to the State, except so much thereof as may be delegated by the legislature to the political subdivisions, and except that ***all functions, powers and duties relating to the taxation of real property shall all be exercised exclusively by the counties***, with the exception of the county of Kalawao. The legislature shall have the power to apportion state revenues among the several political subdivisions. (Emphasis added).

Standing Committee Report No. 42, issued by the Committee on Local Government at the 1978 Constitutional Convention, specifically found:

> Your Committee finds that the question of a centralized real property tax program versus a decentralized system has been discussed many times over the past several years. Advocates of decentralization of the taxing power argue that it enhances the "home rule" concept, whereby the counties would be more directly involved in decisions affecting the real property tax, which is their major source of revenue.
>
> * * * * *
>
> Presently, under Hawai'i Revised Statutes, the State is responsible for assessing all real property in the State that is subject to the payment of real property taxes, and for levying and collecting all such taxes, and adjudicating appeals. ***Basic policies defining real property***, setting the basis of assessment, determining the manner in which rates are set, setting exemptions and describing the appeals process are the responsibility of the state lawmakers.
>
> * * * * *
>
> ***A general grant*** of the taxing powers to the counties *would include*: a) assessment of property, b) ***adjudication of appeals*** . . . e) ***formulation of basic policies***.
>
> * * * * *
>
> Your committee finds that the two major considerations against transferring real property functions are: . . . (2) that ***the State may utilize the real property tax as an instrument of land use und economic policy***. For instance, land more heavily

> taxed than buildings in certain classes of property encourages construction and full utilization of the land in these classes. ***The potency of the real property tax as a policy tool, although not directly measurable, is undeniable***.

See, JEFS Dkt. 78, PDF 749-776 at 768-7 (excerpted Proceedings of the Constitutional Convention of 1978, Standing Committee Report No. 42). (Emphasis added).

The Committee on Local Government's submission of proposed specific language to Article VIII, Section 3 of the Hawai'i State Constitution, was submitted to the Committee of the Whole by way of Standing Committee Report No. 42. ld. The Committee of the Whole in its Committee of the Whole Report No. 7, revised the proposed amendment to its present form, reflected in Article VIII, Section 3 of the Constitution, commenting as follows:

> Your Committee changed this amendment to include the phrase "***all functions, powers and duties*** relating to the taxation of real property" in order to clarify the standing committee's ***intent to grant all taxing powers relating to real property to the counties***[.]"[19]
>
> Your Committee rejected an amendment to return this section to its original language which rest all taxing powers with the State.

See, JEFS Dkt. 78, PDF 775-776. (Emphasis added).

Notwithstanding this unambiguous constitutional grant of *full* authority, the circuit court in the underlying case here incorrectly [circumscribed] the County's real property tax authority, obliquely holding that:

> In this case, the County of Maui is not the sovereign, and it doesn't have any power unless it is explicitly granted to it, and it cannot implicitly enforce the explicit powers. And that's where I think the distinction here lies. And that's why the problem with the ordinance.

See, JEFS Dkt. 44, PDF 21 (Transcript of Proceedings, dated January 3, 2018, pp. 20-21).

The circuit court further concluded that "***the County ordinance***, ***as well as the statute*** and ***the Constitution of the State of Hawaii***, which is the supreme law in the state, governing state actions -- except when its so preceded or preempted by federal laws -- ***requires only [actual] use***

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[19] See also, Gardens at West Maui Vacation Club, 90 Hawai'i at 341, 978 P.2d at 779 ("The constitutional and legislative acts covered ***the whole subject of property taxation power*** and embraced ***the entire law in that regard.***") (citing *Comm. of the Whole Rep. No. 7*, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 1008 (1980)). (Emphasis added).

be considered" for purposes of classifying real property. Id. (Emphasis added).

First, there is nothing *at all* in the Hawai'i State Constitution, state statutes, or the Maui County Code which imposes such a limitation as to "actual use" on the County's establishment of general classifications of real property for purposes of assessment and taxation. Rather, the circuit court's incorrect conclusion about the exclusive consideration of "actual use" for classifying real property ignores, *not exclusively*, the expressed intention of the 1978 Constitutional Convention to make a general grant of full authority to the counties of Hawai'i to "formulat[e] basic policies" for "defining real property," *not exclusively*. The official committee reports from the 1978 Constitutional Convention demonstrate this authority also includes, but is not limited to "utiliz[ing] the real property tax as an instrument of land use und economic policy." Id. Clearly, the policy functions and prerogatives for which the counties have been constitutionally enabled to utilize the real property tax authorizes and in fact requires considerations beyond "actual use" of property be considered for purposes of classification.

Moreover, the circuit court's elevation of "actual use," to the exclusion of all other considerations for establishing classifications of real property, incorrectly interprets a specific Maui County Code provision pertaining to condominium units [*see,* MCC §3.48.305(C)(2)(a)(v)][20] to illogically void the general classification for "Timeshare" contained in the code [*see,* MCC §§3.48.305(A)(4)]. This flawed logic would undo virtually every other general class of real property contained in the code. This erroneous analysis would not only undo Maui County's tax code, but also similar provisions in the Revised Ordinances of Honolulu, for example. Both of the respective codes also provide for consideration of "highest and best use," an appraisal concept necessary for the counties' ability to accurately assess, and assign real property to any given general classification for tax purposes. *See,* MCC § 3.48.305(B); *see also,* ROH § 8-7.1(c)(2).

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

ii. SUBJECT MATTER JURISDICTION

"The existence of jurisdiction is a question of law that we review *de novo* under the right/wrong standard." Korean Buddhist Dae Won Sa Temple of Hawai'i v. Concerned Citizens of Palolo, 107 Hawai'i 371, 380, 114 P.3d 113, 122 (2005) (citing Amantiad v. Odum, 90 Hawai'i 152, 158, 997 P.2d 160, 166 (1999) (quoting Lester v. Rapp, 85 Hawai'i 238, 241, 942 P.2d 502, 505 (1997)). "[J]urisdiction is 'the base requirement for any court resolving a dispute because without jurisdiction, the court has no authority to consider the case.'" Id. (citing Housing Fin. & Dev. Corp. v. Castle, 79 Hawai'i at 76, 898 P.2d at 588). Further:

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

Id., 107 Hawai'i 380-1, 114 P.3d at 122-3. On this basis the Supreme Court of Hawai'i need not even embroil itself in the flagrant jurisdictional overreach, and improper, incorrect legal rulings made by the circuit court in this case. The circuit court should be ordered to vacate the judgment and all orders entered below, and be directed to dismiss the case in its entirety. Plaintiffs as taxpayers still have their remedies in Tax Appeal Court, where they currently have a case raising the same claims and issues they raise here below, and which is only stayed pending this appeal. *See*, **Section III., E.**, *supra*.

The circuit court's improper assertion of jurisdiction over Plaintiffs' tax dispute otherwise ignores both the subject matter jurisdiction of the Tax Appeal Court, and the counties of Hawai'i's constitutional authority to determine how tax appeals are to be initiated, adjudicated, and resolved.[21] The adjudication of the underlying tax dispute, and the exclusive subject matter jurisdiction of the Tax Appeal Court are provided for in both the Maui County Code and Hawai'i Revised Statutes.

Both the Maui County Code and Hawai'i Revised Statutes specifically provide for tax appeals to the Board of Review, the timing of tax appeals,[22] the grounds of appeal, and further

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[21] For reasons which are apparent, the counties' constitutional authority pursuant to Article VIII, Section 3 has to include codifying procedures for the adjudication of real property tax appeals, *and* setting periods of limitations for those appeals.

[22] MCC § 3.48.595 provides "[a]ppeals to the County board of review ***shall be filed on or***

appeal to the Tax Appeal Court. *See*, MCC §3.48.595; see also, HRS §232-15, § 232-16 and § 232-17. Moreover, appeals to the County board of review ***shall*** be on grounds as provided in sections MCC § 3.48.605(A), 3.48.605(B), 3.48.605(C), 3.48.605(D), and ***3.48.605(E)***. These grounds include both *constitutionality* and *legality*. Id. The circuit court's assertion of competing jurisdiction based on its ruling that the Tax Appeal Court's subject matter jurisdiction is purportedly limited to only the amount of an assessment is wrong. Hawai'i Revised Statutes HRS § 232-13 and § 232-15 very clearly provide for the Tax Appeal Court's authority to review *de novo* both constitutional questions, and all questions regarding the legality of assessments.

The Supreme Court of Hawai'i in Kincaid, et al. v. Board of Review, 106 Hawai'i 318, 104 P.3d 905 (2004) has already also upheld the Tax Appeal Court's exclusive subject matter jurisdiction over tax appeals, for reasons which are equally paramount in this case:

> The ***balance of interests would be compromised significantly*** were we to recognize the circuit court's competing jurisdiction to hear tax appeals under HRS § 91-14. In as much as [the Hawai'i Administrative Procedure Act] does not predicate an aggrieved person's right to judicial review upon the pre-payment of any disputed monies, the taxpayer's pursuit of redress under that statute would deprive the State and counties of any meaningful opportunity to secure their financial position during the pendency of an appeal. The ***resulting peril to the government's fiscal security*** convinces us that ***a "rational, sensible, and practicable interpretation" of HRS § 232-17 must, of necessity, mandate that its appellate procedures be followed*** to the exclusion of those in HRS § 91-14(a).

While the underlying case does not involve the Plaintiffs' as taxpayer's failure to make a prepayment of taxes pending a tax appeal, the same resulting peril to the County's fiscal security results where *the Plaintiffs as taxpayers failed to make timely appeals* in the first instance as required by the Maui County Code, and now seek tax refunds dating back 12-14 years. This is because failing timely appeals for each assessment year, the monies paid in taxes by Plaintiffs as taxpayers for each year would have been deposited into the County's general fund for its budget, rather than having been held in a litigated account pending a timely appeal. As such, the money has already been spent as part of the County's annual operating budget for each prior fiscal year. *See*, JEFS Dkt. 110, PDF 686-688 & 689-691 (Declaration of Sananda K. Baz and Declaration of Scott Teruya).

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before April 9 preceding the tax year." (Emphasis added). *See also*, HRS § 232-15 ("The notice of appeal must be lodged with the assessor on or before the date fixed by law for the taking of the appeal.").

iii. TAX REFUNDS AS "DAMAGES"

The circuit court's misconstruction of Plaintiffs' tax appeal as a *prima facie* case for consequential or compensatory "damages" is the most imperative and urgent question requiring consideration by this Honorable Court. While there is no right to a jury trial in Tax Appeal Court, this is apparently at least in part because claims for tax refunds are not *prima facie* claims for "damages." In addition to the provisions of the Maui County Code requiring prepayment of taxes for an appeal, the Hawai'i Revised Statutes recognize this and expressly provide for how tax refund claims are to be appealed and adjudicated. If it were otherwise, the purported claim of right to a jury trial which the circuit court asserts supports its jurisdiction over this dispute, would allow any taxpayer to simply ignore and avoid the process of adjudication for tax refund claims outlined by code and statute.

Likewise, the peril to the County's fiscal and financial security by allowing the limitations periods for tax appeals to be ignored so parties can seek tax refunds mischaracterized as "damages" is also obvious. It would precipitate innumerable probable claims for millions of dollars in refunds not secured in litigated accounts, and for monies already spent pursuant to past operating budgets. This would in turn undo previously enacted annual budgets, destroying the County's bond credit rating and imperiling the County's fiscal and financial future. *See*, JEFS Dkt. 110, PDF 686-688 & 689-691 (Declaration of Sananda K. Baz and Declaration of Scott Teruya).

The constitutional, jurisdictional, and procedural questions related to the underlying tax dispute here are of paramount importance to the continued and proper fiscal functioning of the counties of Hawai'i as the authorities for real property tax, as well as the security of their future fiscal and financial operations. It is therefore critical that the Supreme Court of Hawai'i address these imperative constitutional, jurisdictional, and legal questions and issues.

B. QUESTIONS OF FIRST IMPRESSION OR NOVEL LEGAL QUESTION

This case also qualifies for transfer based on a second, discretionary basis. This Court "may grant an application to transfer any case within the jurisdiction of the intermediate appellate court to the supreme court" if it involves a "question of first impression or a novel legal question[.]" Haw. Rev. Stat. § 602-58(b)(1).

The imperative issues discussed above also raise questions both of first impression and novel in scope. Of particular concern is the circuit court's failure to rule on the constitutionality of the County's general "Timeshare" classification, and instead its improper encroachment into the County's constitutional authority by purporting to void the classification as "illegal." The effect of this encroachment is contrary to the constitutional separation of powers, specifically as pertains to the *general and exclusive constitutional grant* given to the counties for *full authority* over the taxation of real property. *Cf.* Gardens at West Maui Vacation Club v. County of Maui, 90 Hawai'i at 342, 978 P.2d at 780 ("Under this 'rational basis test,' it is the court's function '***only*** to seek to adduce any state of facts that can reasonably sustain the classification statute . . challenged[.]'"). (Emphasis added). By simply voiding the County's "Timeshare" classification as "illegal," the circuit court followed Plaintiffs' invitation to erroneously grant the relief they requested, but on a claim which is nowhere pled in any of the three Complaints filed in this case, and which uses an illogical and completely specious interpretation of the Maui County Code in order to avoid constitutional analysis.

Plaintiffs otherwise offered little to nothing in the underlying case to support their erroneous assertions that the Maui County Council's purposes in establishing the "Timeshare" classification were 'illegitimate," other than false assumptions and conclusory allegations that 1) the establishment of the general "Timeshare" real property tax classification was based on an "illegitimate governmental purpose" to impose a transient accommodation tax "disguised" as a property tax, and 2) therefore the rational basis test either fails and/or is inapplicable to the Court's constitutional analysis.[23]

In addition, this case presents a question of first impression as to whether condominium units which escaped assessment in 2006, 2007, and 2008 can be assessed as omitted property,

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[23] This approach is improper as a matter of longstanding constitutional law. *See*, United States v. O'Brien, 391 U.S. 367,383, 88 S.Ct 1673, 1682, 20 L.Ed.2d 672 (1968) (courts "will not strike down an otherwise constitutional statute on the basis of ***an alleged illicit legislative motive***.") and McCray v. United States, 195 U.S. 27, 56, 24 S.Ct. 769, 76, 49 L.Ed. 78 (1904) ("The decisions of this court from the beginning lend no support whatsoever to the assumption that the judiciary may restrain the exercise of lawful power ***on the assumption that a wrongful purpose or motive*** has caused the power to be exerted."); *see also*, ln re Pacific Marine & Supply Co., Ltd., 55 Haw. 572, 582, 524 P.2d 890, 897 (1974) ("[i]l is not within our role to evaluate the wisdom of such state policy, ***but only to discover that some policy does exist***.") (citing Allied Stores v. Bowers, 358 U.S. 522, 528, 79 S.Ct. 437 (1959)), not exclusively. (Emphases added).

after being discovered and legally added to the County's tax assessments rolls for those relevant periods. Maui County Code §3.48.305(C)(2)(b), not exclusively, specifically provides "[w]hen property is subdivided into condominium units, . . . Each unit and its appertaining common interest ***shall*** be . . . deemed a parcel and assessed separately from other units." Other jurisdictions have addressed this legal question.[24] No reported case in Hawai'i appears to address the issue directly.[25]

Finally, the circuit court's ruling that Plaintiffs' *prima facie* case may entitle them to either a jury trial, or a proffer of evidence by motion to prove indisputably time-barred claims to 12-14 years of real property tax refunds as consequential or compensatory "damages" is certainly novel.

VII. CONCLUSION

There can be little doubt that the jurisdictional, constitutional, and legal questions raised in this case present questions of imperative importance to the County and its citizens, and also matters of first impression and novel questions. If transfer is granted, the COUNTY also respectfully requests that this Court schedule oral argument as soon as possible after the briefing

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[24] *See*, Schwam v. Township of Cedar Grove, 228 N.J. Super 522, 527, 550 A.2d 502, 504 (1988) (Tax assessor properly valued condominium units as separate entities upon conversion from apartments to condominiums, . . . despite a claim that purchaser's property was singled out for selective or spot assessment in violation of constitutional prohibitions) (citing Cigolini Associates v. Borough of Fairview, 208 N.J. Super 654, 664, 506 A.2d 811, 816 (1986) ("The expression 'converting a building to a condominium' . . . can mean a change in the legal form of ownership *or it can mean a change in the use of the building*.") (Emphasis added); *see also* Fourmost, Inc. v. Parsippany-Troy Hill Tp., 11 N.J. Tax 57, 62 (1990)("The change in legal status to condominium ownership requires that the units be individually assessed. It is this change that imposes the requirement of a change in the assessment. To ignore the change in legal form of ownership and its effect on the market value of each unit in favor of apportioning the old assessment on the property among the units "would contravene the policy of this State to place condominium owners on the same legal basis, insofar as consistent with special problems of condominiums, as other owners of real property.") (citing Cigolini, 208 N.J. Super at 665); *see also*, Lewis v. Dep't of Revenue, 10 Or. Tax 128, 130 (1985), aff'd sub nom. Lewis v. State, Dep't of Revenue, 302 Or. 289, 728 P.2d 1378 (1986)("By voluntarily subjecting the property to the unit ownership laws, the plaintiffs, of necessity, have required the units to be individually assessed and taxed. The fact that the entire complex is operated as a motel cannot override this statute.").

[25] The Intermediate Court of Appeals in Kaheawa Wind Power, LLC v. County of Maui, 135 Hawai'i 202, 347 P.3d 632 (2014) has otherwise already held that retroactive tax assessments for omitted property is otherwise not unconstitutional.

is completed. Only this Court can provide a prompt and final ruling on these important issues.

In considering this appeal, the Supreme Court may as a preliminary matter determine the circuit court lacked subject matter jurisdiction over the underlying tax case, vacate the judgment and all orders entered below, and direct the circuit court to dismiss the case in its entirety, without any need to embroil itself in the flagrant jurisdictional overreach and patently erroneous and incorrect legal rulings made by the circuit court in this case. Plaintiffs as taxpayers still have their remedies in Tax Appeal Court, where they currently have a case raising the same claims and issues they raise here below, and which is only stayed pending this appeal. *See*, **Section III., E.**, above.

DATED: Wailuku, Maui, Hawaii, February 4, 2019.

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