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S.C. NO. 27351

IN THE SUPREME COURT OF THE STATE OF HAWAII

COUNTY OF KAUA'I BY ITS COUNTY ATTORNEY LANI D.H. NAKAZAWA; Plaintiff-Appellee, vs. BRYAN J. BAPTISTE, MAYOR, COUNTY OF KAUA'I, et al., Defendants-Appellees, and GORDON G. SMITH, et al., Intervenors-Appellants.	CIVIL NO. 04-1-0272 (Declaratory Judgment) APPEAL FROM FINAL JUDGMENT (filed May 20, 2005) FIFTH CIRCUIT COURT HONORABLE George Masuoka, Judge

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REPLY BRIEF FOR THE APPELLANTS

APPENDIX "10"

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CONSTITUTIONS, RULES AND STATUTES

CHARTERS AND ORDINANCES

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REPLY BRIEF FOR THE APPELLANTS

In an effort to thwart the democratically expressed will of the people of the County of Kauai, the County Attorney asks this Court to set three new precedents, any of which would be breathtaking in scope.

First, the County Attorney seeks to dispense completely with established standing requirements. The County Attorney does not suggest a merely *relaxed* inquiry into whether the plaintiff was injured; rather, this Court is asked to *eliminate* it altogether. In this case the plaintiff admits it has not been injured or even threatened with injury, and instead suggests a rule by which claims of "public importance" and an "inherent" right to sue substitute for actual injury. The County Attorney asks the Court to exercise nothing less than advisory jurisdiction.

Second, the County Attorney asks this Court to read into the term "counties" a prohibition on the counties choosing how they exercise their property tax authority. The purpose of the 1978 constitutional amendment was to insure the property tax authority was exercised locally, not to dictate how local authority was implemented. *Gardens at West Maui Vacation Club v. County of Maui*, 90 Haw. 334, 340, 978 P.2d 772, 779 (1999). Article VIII, section 3 contains no express or implied limitation on the counties' exercise of property tax power, and this Court held counties "may act as they see fit." *State* ex rel. *Anzai v. City & County of Honolulu*, 99 Haw. 508, 517, 57 P.3d 433, 442 (2002).

Finally, the County Attorney argues the process by which the Charter was amended is irrelevant, claiming an existing Charter provision can supersede a Charter amendment, when the applicable rule of construction is exactly opposite.

These radical propositions do not withstand scrutiny.

I. "INHERENT STANDING" AND CLAIMS OF "PUBLIC IMPORTANCE" ARE NOT SUBSTITUTES FOR ACTUAL INJURY

The Answering Brief makes explicit a position the County Attorney had only hinted at previously. It advocates for an entirely new standing rule: county attorneys have the "inherent" right to bring lawsuits regardless of injury. County Attorney's Answering Brief ("Br.") at 27.[1] The

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1. The County Attorney's brief cites authorities out of context and in at least one instance quotes inaccurately a portion of the Kauai Code, asserting it establishes only two classes of property. Br. at 13 (citing Kauai, Haw., Rev. Ord. § 5A-8.1(c)(1) and (2)). The text quoted, however, is not

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County Attorney asks this Court to abandon the jurisdictional threshold that a plaintiff's standing "is measured by a three part 'injury in fact' test," the first requirement of which is that the plaintiff "has suffered an actual or threatened injury as a result of the defendant's wrongful conduct. . . ." *State* ex rel. *Bronster v. Yoshina*, 84 Haw. 179, 184-85, 932 P.2d 316, 321-22 (1997). The County Attorney does not merely suggest a *lower* standard, but proposes *elimination* of the threshold entirely by "presuming" injury. Br. 27.

The injury threshold exists to test whether parties instituting a case have a sufficient personal stake to insure they are not seeking to "vindicate their own value preferences." *Hawaii's Thousand Friends v. Anderson*, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989) ("proper forum for the vindication of value preferences is in the legislature . . . not the judiciary"). "Presumed" and "inherent" injury, and stand-alone claims of "public importance" are not substitutes for actual injury sufficient to insure the judicial process is not being manipulated to obtain advisory opinions. These dangers have manifested in this case: the circuit court's judgment – the result of a lawsuit with defective standing and jurisdictional foundations – undercuts the public's confidence in their elected officials, the electoral process, and the courts.

A. Plaintiff Asserted Defendants' Claims

The County Attorney advocates for an "inherent" right, because she failed to allege and prove actual or threatened injury. The Advisory Complaint and the Post-Enactment Complaint, for example, fail to allege the plaintiff suffered injury. R. Vol. 1 at 1-8, 59. The County Attorney's brief ignores this omission, repeating the allegation made in the court below that Article XXXI affected the prerogatives of the defendants.[2] Alleging only the defendants were injured is not sufficient. Litigants must assert and prove their own injuries, not the injuries of others. *Mottl v. Miyahira*, 95 Haw. 381, 389, 23 P.3d 716, 724 (1994) (parties must have *personal stake* in outcome);

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what section 5A-8.1 actually says. The correct text of this section is attached as App. 10, and identifies eight classes, not two. The Kauai County Attorney misquoting Kauai laws suggests care be exercised before relying upon these citations.

2. Br. 9, 22. In their separate Answering Brief, however, the Mayor, the Finance Director, and the County Council expressly disclaimed interest in the outcome of the case, acknowledging they will abide by whatever decision this Court makes and implement Article XXXI. *See* Mayor's Br. 2. *See also* Br. 22 (acknowledging "the legal duties of the Kaua'i County Officials to implement the Charter Amendment, regardless of its validity").

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Sierra Club v. Hawaii Tourism Auth., 100 Haw. 242, 250, 59 P.3d 877, 885 (2002) (plaintiff must establish own standing).

B. The Injury Requirement Is Not Discarded Whenever A Plaintiff Claims Its Case Is Of "Public Importance"

The County Attorney suggests *Bronster* and *Mottl* held the injury requirement is dispensed with in cases where the plaintiff asserts the issue is one of "public importance." Br. 28-29. But in both *Bronster* and *Mottl* the plaintiffs demonstrated personal injury. In *Bronster*, this Court noted the plaintiff attorney general was injured, because she brought the action on behalf of the governor as the *plaintiff*. *Bronster*, 84 Haw. at 185, 932 P.2d at 322. This is an entirely different situation than the County Attorney suing the mayor and council as *defendants*. Unlike the attorney general in *Bronster*, the County Attorney cannot be said to be acting on the mayor's or council's behalf since neither authorized this suit. Doing so would constitute an admission the plaintiff and the defendants are not truly adversarial and would destroy jurisdiction under section 632-1, which requires an "actual controversy."[3]

Similarly, in *Mottl*, the plaintiff alleged injury by air pollution and odor. *Mottl,* 95 Haw. at 394, 23 P.3d at 729. This Court did note that standing barriers may be lower in

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3. The County Attorney asserts her status merits an "inherent" exception to the ethical rules, permitting representation of both the plaintiff and the defendants simultaneously in the same case. Br. at 24-25 (citing *Chun v. Bd. of Trustees of the Emp. Retirement Sys.*, 87 Haw. 152, 952 P.2d 1215 (1998); *State v. Klattenhoff*, 71 Haw. 598, 801 P.2d 548 (1990)). Neither of these cases support the County Attorney's conclusion. In *Chun*, this Court rejected a blanket rule, noting "[w]e have never held, however, that [a government attorney] is relieved of all obligations to conform her conduct to the [rules of professional conduct] which are applicable to all lawyers licensed to practice in the courts of this state." *Chun*, 87 Haw. at 174, 952 P.2d at 1237. *Klattenhoff* also is distinguishable. In that case, the defendant was convicted and appealed, asserting the state attorney general's office was prohibited from prosecuting him because a different section of the attorney general's office had earlier represented him in an unrelated civil matter. The Court held there was no violation of the rules because the attorney general prosecuting Klattenhoff "did not know that the separately located litigation and administrative division of the AG's office had been representing [him] in two unrelated civil actions." *Id.* at 601, 801 P.2d at 549. Here, by contrast, County Attorney Lani D.H. Nakazawa simultaneously appeared as counsel for the plaintiff, R. Vol. 4, at 299, while representing the defendants. R. Vol. 4, at 304. Deputy County Attorney Waiyee Carmen Wong also appeared as counsel of record for the plaintiff, R. Vol. 1 at 1,9 (App. 2), and for the defendants. R. Vol. 3 at 178-82 (App. 4). Dual representation was not raised to disqualify the County Attorney, only to show there is no "actual controversy" between the plaintiff and the defendants since they were represented simultaneously by the same lawyers. Op. Br. 16.

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environmental and native rights cases, but pointedly did not eliminate the injury requirement as suggested by the County Attorney. In any event, the present case involves neither issue.

C. The County Attorney Does Not Possess "Inherent" Right To Sue

Next, the County Attorney argues that any case brought pursuant to Haw. Rev. Stat. § 603-23 does not require an injury, but that a "lesser threshold" applies. Br. 28. In reality, however, the County Attorney does not argue for a lesser threshold, but for *no threshold at all*. Br. 26-27 (section 603-23 is a "statutory right"); Br. 27 ("inherent" right to challenge laws).

As explained in the Opening Brief, section 603-23 is a jurisdictional grant, not a legislative abrogation of the injury requirement whenever a county attorney is the plaintiff. The distinction between jurisdiction and standing is critical. In *Bronster*, this Court held only that section 603-23 provided the court with jurisdiction to issue relief, but pointedly required the plaintiff attorney general to demonstrate standing without reference to the statute. *Bronster*, 84 Haw. at 185, 932 P.2d at 322.

The County Attorney argues that unless this Court validates the procedure utilized in this case, the defendants are without remedies and would have been "forced" to implement a law they "believed" was of "uncertain validity." Br. 22, 28.[4] This argument is unpersuasive for three reasons. First, civil lawsuits are not meant to settle questions of "uncertain validity," they remedy actual or threatened injury. *Hawaii's Thousand Friends*, 70 Haw. at 284, 768 P.2d at 1299 ("We abhor the use of courtrooms as political forums to vindicate individual value preferences."). Second, the County Attorney fails to acknowledge the alternatives available to the defendants if they believed the mere enactment of Article XXXI forced them to violate the law. *See* Op. Br. 23. Finally, the defendants would not have been "forced" to implement Article XXXI if they had resolved their claims before the election. The public's present confusion and uncertainty about whether their votes counted is a direct result of the failure to actively pursue these claims before the vote.

D. Intervention Cannot "Cure" Lack Of Injury

The County Attorney argues that intervention by four local homeowners remedied the lack of "actual controversy" evidenced by dual representation of the plaintiff and the defendants. Br. 25-26. This argument, however, fails to explain how the homeowners satisfied the *plaintiff's*

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4. However, the defendants have disclaimed interest in the outcome of the case. Mayor's Br. 1-2.

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injury requirement, and the County Attorney's brief simply ignores that issue. As *Bronster* demonstrated, injury and "actual controversy" are separate requirements, so intervention could not "cure" the fundamental defect of lack of standing. *Bronster*, 84 Haw. at 185, 932 P.2d at 322 (plaintiff must show standing as well as subject matter jurisdiction).

II. THE CONSTITUTION GRANTS GREATER POWER TO LOCAL VOTERS AND DOES NOT BAR SELF-GOVERNMENT BY CHARTER

A. Counties "May Act As They See Fit," Because The Hawaii Constitution Does Not Dictate How Property Tax Authority Is Exercised

By the plainest of language, the Hawaii Constitution was amended by the people of Hawaii to delegate the power to impose property taxes "exclusively" to "the counties," placing no limits on how the counties exercise the authority. Haw. Const. art. VIII, § 3. This Court has acknowledged this unambiguous language. *Gardens at West Maui*, 90 Haw. at 340, 978 P.2d at 779 (section 3 is "express" and "manifest"). In *Anzai*, 99 Haw. at 517, 57 P.3d at 442, the Court held the delegation is unconditional and transfers to the counties the discretion to determine how to exercise the power:

> Under the terms of this constitution and with regard to the power to tax real property, it is the counties – and not the State – that have been declared supreme. ***To the extent that the counties, in exercising their exclusive power to tax real property do not run afoul of the federal or state constitutions, they may act as they see fit.***

Id. (emphasis added). The County Attorney's argument, however, avoids the bedrock canon of construction that plain constitutional language must be respected. Br. 6-8. Instead, she claims the term "counties" *excludes* both the county itself and the people of the county, and means "only county councils." Br. 7. But the constitution does not say "county councils," it says "counties." That term, commonly understood, means the counties generally, not exclusively local municipal officials or the bodies on which they serve. *See Anzai*, 99 Haw. at 510, 57 P.3d at 436 (discussing "counties" not "councils"); *Gardens at West Maui*, 90 Haw. at 341, 978 P.2d at 779 (no discussion of "county councils" having exclusive real property tax power).

And whatever might be included within its meaning, the term "county" certainly cannot be read explicitly to *exclude* the people of the county from self-government, a power expressly reserved to the people in their Charter. *See* Haw. Const. art. I, § 1; Kauai Charter art. I,

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§ 1.01; Kauai Charter art. XXIV, § 24.01.[5] Home rule principles require that any ambiguity in the term "county" be resolved in favor of a broad reading to validate the right of the people of the county to frame and adopt their own Charter. Haw. Const. art. VIII, § 2.

B. The 1978 Amendment Was Intended Only To Delegate Property Tax Authority From The State To The Counties, Not To Dictate County Governance

Once untethered from the plain language of article VIII, section 3, the County Attorney insists that the 1978 amendment was meant to protect local officials from the people. The County Attorney's argument rests on a profound misunderstanding of the nature of the delegation.[6] When the people of Hawaii amended the Constitution in 1978, they did not merely command the Legislature to delegate its property tax authority to the counties. Rather, the amendment was a revocation by the people of the authority they formerly delegated to the Legislature, followed by a delegation from the people directly to the counties. "The proceedings of the 1978 constitutional convention also reveal that the purpose of the amendment was to place the burden of the real property taxation system at the county level." *Gardens at West Maui*, 90 Haw. at 341, 978 P.2d at 779. There is absolutely no express or implied constitutional preference for how the counties exercised that authority, or anything suggesting it was designed to insulate county officials from their constituents by an exclusive delegation to county councils. *Cf. id.* ("Article VIII, section 3 was expressly and manifestly designed to transfer to the counties broad powers of real property

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5. The County Attorney's brief mischaracterizes the Appellants' argument, wrongly asserting the Appellants claim the Charter Amendment was an usurpation by "individual voters" of the county council's power. Br. 7. This is a "straw" argument. The Appellants do not assert "counties" means "individual voters." To the contrary, the Appellants' argue the term "county" plainly means political subdivisions and *does not prohibit* self-government.

6. The County Attorney argues the 1978 amendment could only delegate legislative authority, and since the state legislature exercised property tax authority pre-1978, only the county legislature may now exercise the power. Br. 16-18 ("The Power to Tax Real Property Is Delegated by the State and Is No Greater than the Power Held by the State"). This argument is based on the incorrect assumption the 1978 delegation was from the state legislature, not the people of Hawaii. It was not. *Anzai*, 99 Haw. at 517, 57 P.3d at 442 ("Rather, *the people of Hawai'i*, through their constitution, have conferred upon the counties the exclusive power to tax real property.") (emphasis added). Notably absent from this section of the County Attorney's Brief are any citations to Hawaii authorities. Instead, the Brief relies upon a legal encyclopedia, a treatise passage not describing Hawaii's system, and cases from other jurisdictions. Br. 16-18.

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taxation."); *Anzai*, 99 Haw. at 517, 57 P.3d at 442 (counties may "act as they see fit"). There is also no secondary material supporting the view that the people required counties to implement the property tax authority in any particular fashion. All of the sources noted by the County Attorney reflect only the concern that the tax power be exercised at the local – not state – level, because the state was not as responsive to the needs of local property owners. Br. 10-11.[7] These references reveal nothing dictating how the counties implement the power. Article VIII, section 3 is a grant of unconditional authority, not limited authority as in section 2.[8] *Anzai*, 99 Haw. at 517, 57 P.3d at 442. The 1978 amendment, therefore, delegated property tax power to the counties and left it up to the county charters to determine how it is exercised.

III. A CHARTER AMENDMENT CANNOT VIOLATE THE CHARTER

To salvage the judgment in this case, the County Attorney argues the Charter Amendment "violated" Article XXII's limitations on initiative ordinances, and in the process asks this Court to ignore the Article XXIV Charter amendment procedure and the uncontested fact the procedure was followed. Br. 1, 5.

A. The Charter Amendment Process And The Language Of Article XXXI Determine Its Character

The procedure by which Article XXXI was incorporated into the Charter is dispositive and must be respected. *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269, 275 (Neb. 1986). In that case, the plaintiff claimed a voter-approved constitutional amendment was in fact an initiative statute. *Id.* at 274. The court disagreed:

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7. The County Attorney's argument that "county governments" excludes the people reveals a telling misconception of the nature of the Hawaii Constitution's system of democracy. There is no distinction between the people of Kauai, the "county," and the "county government," because the people are sovereign. Haw. Const. art. I, § 1; Kauai Charter art. I, § 101.

8. *Cf. Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989) (delegation of limited zoning power to counties under Haw. Const. art. VIII, § 2; counties required to exercise power within state guidelines). In an effort to apply this holding to the case at bar, the County Attorney analogizes "taxation and budgeting" to "zoning and land use development." Br. 15. The analogy fails because that case involved the delegation of limited power under section 2 which limits county authority on matters of "statewide concern" such as zoning, not an unconditional delegation under section 3 on a matter of local concern such as property taxes.

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> We hold that the *deciding factor* in determining whether a proposed initiative enactment is an amendment or a statute *is the manner in which the proposal is denominated* in the initiative petition submitted to the voters.

Id. (emphasis added). This reasoning applies equally to charter amendments regarding property taxes because the charter is the county's organic law on matters of local concern. *Kunimoto v. Kawakami*, 56 Haw. 582, 584 n.4, 545 P.2d 684, 686 n.4 (1976) (charter is organic law of county); *Haub v. Montgomery County*, 727 A.2d 369, 370 (Md. 1999) (home rule charter is local constitution). There is no dispute that Article XXXI was properly enacted in accordance with the Charter's amendment process. This is conclusive of its character as a Charter amendment. *See Omaha Nat'l Bank*, 389 N.W.2d at 275 (courts should not question the *form* an amendment takes). The reasons for the rule are threefold: (1) to prevent courts from fruitlessly inquiring into the intent of the voters, *id.* at 279; (2) to keep courts from "subverting" the amendment procedures, *id.* at 278; and (3) because the best evidence of intent is the language of the Charter amendment itself. *Id.* ("We hold that the intent of the voters adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative amendment itself."). The language of Article XXXI demonstrates conclusively the people's intent to amend the Charter:

Charter Amendment Question for the 2004 General Election

AMENDMENT TO THE CHARTER OF OF THE COUNTY OF KAUAI

"Shall the Kaua'i County Charter be amended by the addition of the new Article XXXI to read. . .

R. Vol. 1 at 8 (App. 1).

The County Attorney, however, asserts that in *Fasi v. City Council of the City & County of Honolulu*, 72 Haw. 513, 823 P.2d 742 (1992), this Court held courts may freely ignore the process and look to "the substance of the proposal rather than its name." Br. 12. This conclusion is not applicable to the case at bar. The issue in *Fasi* was whether an ordinance passed by the council nullified an existing charter provision. *Id.* at 518, 823 P.2d at 744. This Court invalidated the ordinance, because a charter supersedes conflicting ordinances. *Id.* This rationale is inapplicable when a charter amendment is claimed to violate or conflict with an existing charter provision, because an *amendment* to a charter cannot "violate" a charter. *See City & County of Denver v. New*

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York Trust Co., 229 U.S. 123, 144 (1913) (properly adopted charter amendment *supersedes* existing charter provisions with which it conflicts); *Omaha Nat'l Bank*, 389 N.W.2d at 275 (judicial branch does not have a "veto" over amendment process); *Answer of the Justices*, 377 N.E.2d 915, 916 n.2 (Mass. 1978) (constitutional amendment cannot be "unconstitutional"). Thus, any conflict must be resolved in favor of the amendment. *Kahalekai v. Doi*, 60 Haw. 324, 331, 590 P.2d 543, 549 (1979).

B. Article XXXI Frames Local Government

Every attempt should be made to read the Charter Amendment and Article XXII in harmony and avoid conflict. *In re Doe*, 96 Haw. 73, 81, 26 P.3d 562, 570 (2001) (court's duty to read laws to avoid conflict). This rule of construction prevents the inquiry the County Attorney urges in this case. Br. 12-13 (seeking review of Article XXXI's "substance" and asserting it "attempts to repeal" ordinances). The Charter Amendment neither "extends to" the budget, nor does it "authorize" or "repeal" the "levy" of taxes. The County Attorney argues the Charter Amendment is "affecting" the budget, Br. 6, and "implicates" the levy of taxes. Br. 14. The Kauai Charter, however, does not prohibit ordinances "affecting" or "considering" the budget, or "implicating" levies of taxes. The County Attorney does not acknowledge the narrow scope of Article XXII's limitation.

After Article XXXI was enacted, the council remained free to budget. No new classes of property were created,[9] and no new taxes were levied. Property taxes have not been repealed and will continue to be imposed and collected. Article XXXI is simply a frame of government amendment setting policies, guidelines, and limits, which must be implemented by ordinance.

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9. The inquiry the County Attorney urges is subject to rational basis review. The County Attorney argues the Charter Amendment draws distinctions between property owners. Br. 13 ("the Charter Amendment draws a new distinction between residents"). Such claims are reviewed by asking whether the distinction "rationally furthers a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (standard is "especially deferential in the context of classifications made by complex tax laws"). In *Nordlinger*, the United States Supreme Court held a similar distinction was rational because it may inhibit displacement of lower income families and prevent gentrification. *Id.* at 12. The Court also upheld the distinction because new owners have full information about future tax liability at the time of purchase and can decide not to buy, whereas an existing homeowner "already saddled with his purchase, does not have the option of deciding not to buy his home if taxes become prohibitively high. To meet his tax obligations, he might be forced to sell his home or to divert his income away from the purchase of food, clothing, and other necessities. In short, the State may decide that it is worse to have owned and lost, than never to have owned at all." *Id.* at 13.

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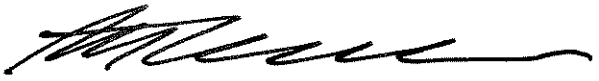
CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Opening Brief for Appellants, the judgment should be reversed. The First Amended Complaint for Declaratory Relief should be dismissed or summary judgment in favor of the County Attorney reversed.

DATED: Honolulu, Hawaii, December 12, 2005.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT



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performance of all such acts, matters, or things as are required to be done by this chapter in respect to the assessment of the real property he represents in his fiduciary capacity, and he shall be liable as such fiduciary for the payment of taxes thereon up to the amount of the available property held by him in such capacity, but he shall not be personally liable. He may retain, out of the money or other property which he may hold or which may come to him in his fiduciary capacity, so much as may be necessary to pay the taxes or to recoup himself for the payment thereof, or he may recover the amount thereof paid by him from the beneficiary to whom the property shall have been distributed. (Ord. No. 394, July 1, 1981)

Sec. 5A-7.5 Assessment Of Property Of Unknown Owners.

The taxable property of persons unknown, or some of whom are unknown, shall be assessed to "unknown owners", or to named persons and "unknown owners", as the case may be. The taxable property of persons not having record title thereto on January 1 preceding the tax year for which the assessment is made, or some of whom did not have record title thereto on January 1 preceding the tax year for which the assessment is made, may be assessed to "unknown owners", or to named persons and "unknown owners", as the case may be. Such property may be levied upon for unpaid taxes. (Ord. No. 394, July 1, 1981)

ARTICLE 8. VALUATION, IN GENERAL

Sec. 5A-8.1 Valuation; Considerations In Fixing.

(a) The director shall cause the fair market value of all taxable real property to be determined and annually assessed by the market data and cost approaches to value using appropriate systematic methods suitable for mass valuation of properties for taxation purposes, so selected and applied to obtain, as far as possible, uniform and equalized assessments throughout the county; provided that land dedicated pursuant to Secs. 5A-9.1, 5A-9.2 or 5A-9.4 shall be assessed according to those respective sections, and provided further that native forest land and land unusable or unsuitable for any agricultural use shall not be assessed; and provided further that public utilities shall be subject to taxation pursuant to Sec. 5A-8.3. In making such determination and assessment, the director shall separately value and assess, within each class established in accordance with subsection (c) of this section: (1) buildings, and (2) all other real property, exclusive of buildings.

(b) So far as practicable, records shall be compiled and kept which shall show the methods established by or under the authority of the director, for the determination of values.

(c) (1) The land shall be classified into the following general classes:

(A) Single Family Residential
(B) Apartment

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(C) Hotel and Resort
(D) Commercial
(E) Industrial
(F) Agricultural
(G) Conservation
(H) Homestead

(2) The director shall assign land to one of the general classes according to its highest and best use, giving major consideration to the districting established by the land use commission pursuant to Chapter 205, H.R.S., the districting established by Kauai county in its general plan and zoning ordinance, use classifications established in the general plan of the State, and such other factors which influence highest and best use, except that parcels which are used for no other purpose than as the owner's principal residence shall be classified as "Homestead" without regard to their respective highest and best use, provided that the owner has applied for and been granted a home exemption according to Section 5A-11.4. The "Homestead" class shall also include parcels used as the owner's principal residence which are being assessed according to their agricultural use as provided in Sec. 5A-9.1, provided that the owner has been granted a home exemption and that no portion of the parcel be used for a purpose other than the owner's principal residence and agriculture. The agricultural use shall be limited to the cultivation of crops, pasturing of animals, and cultivation of aquaculture products, and uses which directly support the agricultural activity such as windbreaks, access roads, irrigation ditches and sheltering of farm machinery. Uses which are primarily commercial or industrial in nature, such as importing, selling, refining or distributing agricultural products, shall not qualify for the Homestead class. The residentially-used portions of agricultural land shall be assessed according to their value in residential use.

(3) When property is subdivided into condominium units, each unit shall be classified upon consideration of its actual use into one of the general classes in the same manner as land.

(4) "Homestead" shall mean properties which are used exclusively as the owner's principal residence. Uses which shall not qualify as "Homestead" include but are not limited to the following:

(A) Land which is used for commercial, income producing purposes, except as provided for in paragraph (2).

(B) Land which is used for residential rental purposes whether for long term or short term.

(d) Whenever land has been divided into lots or parcels as provided by law, each such lot or parcel shall be separately assessed.

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(e) A building shall be assessed only if such building is 20% or more complete as of the January 1st assessment date. Any building less than 20% complete as of the January 1st assessment date shall not thereafter be assessed for that tax year under any provisions of this Chapter. To determine whether a building is 20% or more complete, the assessor shall conduct a site inspection, or obtain written documentation from the contractor, or both. The director shall adopt rules pursuant to Chapter 91, Hawaii Revised Statutes, to establish the method for determining whether a building is 20% or more complete and for determining the value of a building under construction which is 20% or more complete.

In determining the value of buildings, consideration shall be given to any additions, alterations, remodeling, modifications, or other new construction, improvement, or repair work undertaken upon or made to existing buildings as the same may result in a higher assessable valuation of the buildings, provided, however, that, any increases in value resulting from any additions, alterations, modifications or other new construction, improvement or repair work to buildings undertaken or made by the owner-occupant thereof pursuant to the requirements of any urban redevelopment, rehabilitation or conservation project under the provisions of Part II, Chapter 53, H.R.S., shall not increase the assessable valuation of any building for a period of seven (7) assessment years.

It is further provided that the owner-occupant shall file with the director in the manner and place which the director may designate, a statement of the details of the improvements certified by the Mayor or any governmental official designated by him and approved by the Council, that the additions, alterations, modifications, or other new construction, improvement or repair work to the buildings were made and satisfactorily comply with the particular urban redevelopment, rehabilitation or conservation act provision.

(f) Assessment of real property subject to a time share plan.

(1) Subject to subparagraph (6) of this subsection (f), the assessed value of each time share unit operating under a time share plan shall be the combined value of the individual time share interests contained in the time share plan.

(2) In assessing real property subject to a time share plan, the director shall look first to the resale market for time share interests.

If by January 1 of each year the director is unable to determine the assessed value of real property subject to a time share plan by looking to the resale market for time share interests, an average price for the time share interests which have been conveyed shall be calculated in accordance with subparagraph (3) of this subsection (f), and the average price shall be multiplied by the total

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number of time share interests in the time share unit to determine the assessed value of the unit.

(3) If there is an adequate number of typical resales of time share interests at fair market value to provide a basis for arriving at value conclusions, the provisions of subparagraph (4) of this subsection (f) shall apply. If there is an inadequate number of typical resales of time share interests at fair market value to provide a basis for arriving at value conclusions, then the director shall deduct from the purchase price received by the registered developer in an arm's length transaction "intangible costs" of the time share plan. For purposes of this subsection (f) only, "intangible costs" for real property subject to a time share plan shall include the value of personal property, atypical sales and marketing costs, and costs to provide purchase money financing.

No later than December 31 of any year, the registered developer or plan manager of a time share plan may file with the director either 1) a statement prepared by a certified public accountant certifying the percentage of the purchase price that represents intangible costs of the time share plan, or 2) documentation sufficient to establish the percentage of the purchase price received by the registered developer or plan manager that represents intangible costs of the time share plan.

If the registered developer or plan manager does not file the described statement or documentation by December 31 of any year, "intangible costs" of the time share plan shall be presumed to be fifty percent (50%) of the purchase price received by the registered developer or plan manager; provided that this presumption shall be rebuttable by the registered developer, the plan manager, or any person owning a time share interest under the time share plan. Further, the director may rebut any asserted intangible costs in excess of fifty percent (50%) of the purchase price received by the registered developer or plan manager.

The director shall protect the confidentiality of any proprietary information, trade secrets, or confidential commercial or financial information to the extent permitted by law.

(4) If there is an adequate number of typical resales of time share interests at fair market value to provide a basis for arriving at value conclusions, then for such resales the director shall deduct from the purchase price received by the seller in an arm's length transaction the value of personal property, if any, and atypical sales and marketing costs, if any. Neither the document filing provisions nor the fifty percent rebuttable presumption described in subparagraph (3) of

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this subsection (f) shall apply when the director considers the resale value of time share interests.

(5) The provisions of this subsection (f) shall apply to real property subject to either fee or leasehold time share interests.

(6) No time share unit that is registered under a time share plan prior to January 1, 1997 shall be subject to the provisions of this subsection (f) until the first time share interest in such a time share unit is conveyed by the registered developer and recorded in Land Court or the Bureau of Conveyances, as the case may be. Such time share units shall continue to be assessed in the same manner as they were being assessed prior to the effective date of this ordinance. Real property that is registered under a time share plan on or after January 1, 1997 shall be subject to the provisions of this subsection (f) without regard to when the first time share interest is conveyed and recorded by the registered developer.

(7) Where appropriate and as required by the context in which they appear, words and phrases used in this subsection (f) including, but not limited to, "developer", "plan manager", "time share interest", "time share plan", and "time share unit" shall have the meanings ascribed to them by chapter 514E, Haw. Rev. Stat., as amended.

(8) The director may adopt rules pursuant to chapter 91, Haw. Rev. Stat., necessary for the purposes of implementing this subsection (f).

(g) Land leased or held under a revocable permit from the State of Hawaii. Any person who either leases land or holds land under a revocable permit from the State of Hawaii may have his land valued according to this subsection (g) if the requirements of this subsection (g) have been satisfied.

(1) The lessee or permit holder shall file a completed application with the director of finance by September 1 of any year, provided that for the 2000-2001 tax year, a completed application shall be filed by December 31, 1999. The director shall prescribe the form of the application. As part of the application, the lessee or permit holder shall provide:

(A) A legible plot plan or site plan that specifically describes the land area which is in agricultural use;

(B) A legible copy of the executed lease or revocable permit which includes information concerning the term or period of the lease or permit, and the consideration being paid to the State; and

(C) A description of the agricultural use that is occurring on the leased or permitted land.

(2) After receiving the application, the director shall prepare a findings of fact. If the director finds 1) that the applicant has satisfied the

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requirements of subparagraph (1) of this subsection (g), and 2) that agricultural use is occurring on the land which is the subject of the application, the director shall approve the application. If the director's finding is adverse to the applicant, the director shall disapprove the application.

(3) Lands described in applications which have been approved by the director shall be given the same agricultural use values as lands dedicated for ten years under Sec. 5A-9.1.

(4) Reporting requirements. Persons whose lands are being valued under this subsection (g) shall immediately file a report in a form prescribed by the director any time they wish to discontinue or have discontinued the agricultural use on any portion of the subject land.

Further, the director may at any time during the term or period of the lease or revocable permit require such persons to submit evidence that the land enjoys County Department of Water agricultural water rates, filed copies from the immediate preceding year of U.S. Internal Revenue Service Schedule F forms showing profit or loss from farming, filed copies of federal fuel tax exemption claims made pursuant to Sec. 6427(c) of the U.S. Internal Revenue Code, sales receipts generated from the activities listed under the definition of the term "agricultural use", and a valid, current, State general excise tax license, in order to verify that the land is in agricultural use.

The director may also, by administrative rule, require lessees or permit holders to submit such other additional information and documents as the director deems necessary to verify that the subject land is in agricultural use.

(5) As used in this paragraph (g), the term "agricultural use" shall have the meaning ascribed to it in Sec. 5A-9.1. (Ord. No. 394, July 1, 1981; Ord. No. 442, December 22, 1982; Ord. No. 464, August 6, 1984; Ord. No. 519, December 9, 1987; Ord. No. 541, May 18, 1988; Ord. No. 579, October 24, 1990; Ord. No. 582, December 27, 1990; Ord. No. 583, March 7, 1991; Ord. No. 596, November 21, 1991; Ord. No. 606, September 23, 1992; Ord. No. 713, November 22, 1996; Ord. No. 742, September 24, 1999; Ord. No. 755, November 30, 2000)

Sec. 5A-8.2 Water Tanks.

Any provision to the contrary notwithstanding, any tank or other storage receptacle required by any government agency to be constructed or installed on any taxable real property before water for home and farm use is supplied, and any other water tank, owned and used by a real property taxpayer for storing water solely for his own domestic use, shall be

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S.C. NO. 27351

IN THE SUPREME COURT OF THE STATE OF HAWAII

COUNTY OF KAUAI BY ITS COUNTY ATTORNEY LANI D.H. NAKAZAWA; Plaintiff-Appellee, vs. BRYAN J. BAPTISTE, MAYOR, COUNTY OF KAUAI, et al., Defendants-Appellees and GORDON G. SMITH, et al., Intervenors-Appellants.	CIVIL NO. 04-1-0124 (Declaratory Judgment) APPEAL FROM FINAL JUDGMENT (filed May 20, 2005) FIFTH CIRCUIT COURT Honorable George Masuoka, Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing document was duly served upon the following individuals by mailing said copy, postage prepaid, to their last known addresses as follows:

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