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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

OPENING BRIEF OF APPELLANTS

APPENDICES "1"-"9"

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Commonwealth v. Clark, 7 Watts & Serg. 127, (Pa. 1844) 29

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Gardens at West Maui Vacation Club v. County of Maui, 90 Haw. 334, 978 P.2d 772 (1999) 12, 27, 30

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O'Connor v. Diocese of Honolulu, 77 Haw. 383, 885 P.2d 361 (1994) 16

Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n,
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Kauai Charter art. XXIV, § 24.01(B) 32

OTHER AUTHORITIES

The American College Dictionary 276 (1953) 29

Allison Schaefers, *Home Prices Jump on Neighbor Islands*,
Honolulu Star-Bulletin, Sep. 2, 2005 7

Anthony Sommer, *Kauai Officials Slam Property Tax Ballot Bill,*
Honolulu Star-Bulletin, Oct. 15, 2004. 8

Associated Press, *Mainlanders Pinch Housing*, Honolulu Star-Bulletin, Sep. 6, 2005 7

Joseph Heller, *Cath-22* (1961) 22

Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*,
61 St. John's L. Rev. 399, 408 (1987) 27

Tara Godvin, *Appeal Seeks to Overturn Ruling Against Kauai Tax Cuts*,
Associated Press, June 10, 2005. 10

Christoper N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L. Q. 865, 994-96 (1994) 23

Webster's New Collegiate Dictionary 258 (1980) 29

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I.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. A Collusive Lawsuit Lies At The Heart Of This Case

This lawsuit is the continuation of politics by other means. The County Attorney sued the County's Mayor, the County's Finance Director, and the entire County Council to invalidate an article of the Kauai charter they collectively and vehemently oppose.[1]

In November 2004, Article XXXI of the Kauai Charter was adopted by a nearly two-to-one margin. Article XXXI establishes the County policy that resident homeowners should be equitably protected in times of rising real estate values and government costs. In 2005, the median value of Kauai homes soared to $700,000, the budget for County spending reached a record $123 million, and property taxes hit $67 million, an increase of nearly 20% in one year. These stunning rises are ongoing.

The authority to tax real property has been delegated to the counties by the Hawaii Constitution, and after many attempts to convince their elected officials to bring meaningful real property tax relief and limit record spending, the people of Kauai County exercised their home rule right to decide this issue themselves. Article XXXI restores property taxes to 1998 levels for owner-occupied homes of residents who have owned their properties since 1998 or before. For homeowners who purchased after 1998, taxes are based on the value at which their property was assessed when purchased. Future tax increases for all resident homeowners cannot exceed 2% per year. Under Article XXXI, resident homeowners are not at the mercy of an unpredictable and volatile housing market and are able to plan their property tax liability from year-to-year, and to budget accordingly.

During the run-up to Article XXXI's enactment, every Kauai official came out publicly against the measure, with the Mayor and the County Council leading the charge. Seven council members purchased a newspaper ad encouraging citizens to "Vote 'NO' on the Real Property Tax Charter Amendment." The County Attorney filed a "petition" seeking "the Court's clarification

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1. The Plaintiff is the County Attorney, purportedly on behalf of the County of Kauai. The Defendants are the Mayor, the Finance Director, and the entire County Council (collectively "Officials"). The Appellants in this case are four Kauai homeowners and taxpayers who intervened ("Intervenors" or "Homeowners").

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on legal issues surrounding the proposed Charter amendment," because "the people of Kaua'i need to know whether this amendment is legal and valid." The Officials' opposition was so marked one newspaper reported, "Mayor Bryan Baptiste and each member of the Kauai County Council took turns yesterday bludgeoning the property tax reform measure on the Nov. 2 ballot."

Despite the official "bludgeoning," the people of Kauai County overwhelmingly rejected the Officials' calls, and Article XXXI was approved by an overwhelming margin. But after a decisive political defeat, instead of accepting the decision of the people of Kauai County and implementing Article XXXI, the Officials went to court again. Against themselves.

The Kauai County Attorney sued the Mayor, the County Finance Director, and the Kauai County Council. The County Attorney sought a declaration that Article XXXI was *ultra vires* as beyond the power of the people of the County, and an injunction preventing the Officials from implementing it, even though they had taken no steps to do so. The County Attorney claimed Article XXXI was *ultra vires* because the county council has a monopoly on exercise of the property tax authority delegated by the Hawaii Constitution, and the County itself has no such authority. The County Attorney also asserted it was a "disguised" initiative or referendum ordinance, but did not specify which.

Four local homeowners intervened in the Officials-against-themselves lawsuit, asking the circuit court to dismiss the collusive case. When the circuit court denied their motion to dismiss, the homeowners remained in the case since, as a practical matter, they had no choice other than to put up the best defense of Article XXXI they could muster against the combined forces of the Officials, the County Attorney's office, and the private counsel hired by the Officials with $100,000 of public money to prosecute the County Attorney's lawsuit.

On the County Attorney's motion for summary judgment, the circuit court invalidated Article XXXI, holding that the Hawaii Constitution delegated real property tax authority exclusively to county councils, and that Article XXXI – although it was proposed, certified, and enacted as an amendment to the Kauai Charter in accordance with the Charter's amendment procedures – was, in fact, a disguised ordinance by initiative or referendum.

This appeal does not concern the merits of Article XXXI or whether it is the optimum method for the County to bring Kauai homeowners property tax relief that all parties agree is desperately needed. Rather, this appeal goes to the more fundamental issue of who is entitled under

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Hawaii's home rule Constitution to consider the issue: whether the county council has a monopoly, or whether pursuant to the Constitution the power is shared with the people of the counties, acting through their charters.

2. Questions Presented

This appeal presents three fundamental questions of law:

1. May the County Attorney invoke the court's jurisdiction to sue the Mayor, the Finance Director, and the County Council seeking a declaratory judgment regarding the validity of Article XXXI when there is no actual controversy or dispute between them? Did intervention by the homeowners contesting justiciability create justiciability?

2. Do the county councils have the exclusive authority to exercise real property tax authority? This question has two components. First, whether laches bars the County Attorney from claiming after an election that the voters had no power to consider the measure. The County Attorney failed to pursue appropriate and available pre-election remedies and instead encouraged the people "to vot[e] on this important measure." Second, when the people of Hawaii delegated the authority to tax real property to "the counties," did they leave it to the counties to determine for themselves as a matter of local governance how to exercise that authority, or did they require counties to exercise that authority exclusively by county *councils*? Put simply, does the term "the counties" in Haw. Const. art. VIII, § 3 really mean "county councils?"

3. Was it proper for the circuit court to determine without any factual record that an amendment to a county charter that was proposed, certified, and enacted pursuant to the charter amendment process set forth in the charter was "intended" by the people of the County to be a disguised ordinance enacted by initiative?

3. Relief Sought On Appeal

The circuit court should be reversed, and the collusive lawsuit dismissed for lack of jurisdiction. It is not necessary for the Court to review the circuit court's judgment on the Constitutional question, or the question of "intent" if it concludes the County Attorney improperly sued the Mayor and the County Council; jurisdictional defects render a judgment void *ab initio*. Should the Court deem it necessary to reach those issues, the circuit court should be reversed.

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B. PROCEEDINGS IN THE COURT BELOW

This is an appeal from a final judgment denying the Intervenors' motion to dismiss and granting summary judgment in favor of the plaintiff County Attorney.

1. The County Attorney Sought An Advisory Opinion

Pursuant to the amendment procedures in the Kauai Charter, ordinary Kauai citizens submitted a proposed Charter amendment regarding residential real property taxes. Record on Appeal ("R.") Vol. 1, at 8, 11-12 (attached as App. 1). The County Clerk verified the petition contained a sufficient number of signatures to be submitted to Kauai voters at the next general election in November 2004. R. Vol. 1, at 11-12.

On October 25, 2004, the County Attorney as counsel for "Petitioner County of Kaua'i," filed a Complaint For Declaratory Relief entitled "*IN RE Proposed Kaua'i Charter Amendment*" ("Advisory Complaint"). R. Vol. 1, at 1-8 (attached as App. 2). The Advisory Complaint named no parties as either plaintiffs or defendants, and sought only a declaratory judgment that "the proposed Charter Amendment is invalid." *Id.* at 7. The counsel of record were the County Attorney Lani D.H. Nakazawa and Deputy County Attorney Carmen Wong. *Id.* at 1. The Advisory Complaint alleged subject matter jurisdiction pursuant to Haw. Rev. Stat. §§ 603-21.5, 603-23, and 632-1. *Id.* at 2. The Advisory Complaint did not allege a present actual controversy between adversarial *parties*. Instead, it alleged a theoretical future controversy of *laws*: "[a]n actual controversy exists *between the proposed Charter Amendment language and the Kaua'i County Charter and the Kaua'i County Code*." R. Vol. 1, at 5 (¶ 17) (emphasis added).

The County Attorney claimed the proposed Charter amendment was invalid for three reasons: (1) the Hawaii Constitution "delegates the real property tax function to the counties," which means the "county councils;" (2) the proposed "Amendment to the Charter of the County of Kauai" was in fact a "disguised" initiative ordinance; and (3) the proposed Charter provision was void for vagueness. *Id.* at 5-6. On November 2, 2004, the people of Kauai County enacted the Charter amendment as Article XXXI. R. Vol. 1, at 55.

2. The County Attorney Amended The Form, Not The Substance, Of The Advisory Complaint By Naming The Mayor, The Finance Director, And The County Council As "Defendants"

After Article XXXI was enacted, the County Attorney amended the Advisory Complaint and recaptioned the case to its current form, with the County Attorney named as the

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plaintiff, purportedly on behalf of the County of Kauai ("Post-Enactment Complaint"). R. Vol. 1, at 53-64 (attached as App. 3). The County Attorney named the Mayor of Kauai, the Finance Director, and the entire County Council *as the defendants*. *Id.* The Post-Enactment Complaint asserted the same basis for jurisdiction as the Advisory Complaint, and contained the same three claims for relief. *Id.* In addition to the declaratory relief sought in the Advisory Complaint, the Post-Enactment Complaint also sought to enjoin the Mayor, the Finance Director, and the Council from "taking any action to give effect to the invalid Charter Amendment." *Id.* at 60.

3. Homeowners Intervened And Sought Jurisdictional Dismissal

Four Kauai homeowners moved to intervene and concurrently filed a motion to dismiss the Advisory Complaint. R. Vol. 1, at 65-73 (motion to intervene); R. Vol. 1, at 114-121 (motion to dismiss). The circuit court denied the motion to dismiss as premature since it had not yet permitted intervention. R. Vol. 2, at 76-78. The court subsequently permitted intervention on a limited basis. R. Vol. 2, at 298 – 299.[2] On December 30, 2004, the County Attorney moved for summary judgment. R. Vol. 2, at 92-297. On January 20, 2005, the Intervenors moved to dismiss the Post-Enactment Complaint. R. Vol. 3, at 1-32.

4. Defendants "Answered" By Confessing Judgment

On February 8, 2005, the Mayor, the Finance Director and the County Council "by and through [their] attorney, Deputy County Attorney WAIYEE CARMEN WONG,"[3] filed their Answer to the County Attorney's Post-Enactment Complaint. R. Vol. 3, at 178-182 (attached as App. 4). Not surprisingly, their Answer did not deny a single allegation of the complaint and virtually confessed judgment. *Id.* at 179 (merely requesting the court "declare judgment on the validity of the Charter Amendment or invalidity thereof in accordance with the Hawai'i State Constitution").

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2. The County Attorney's office represented both the plaintiff and the defendants on these motions, as it did during the entirety of this litigation. *See, e.g.*, R. Vol. 2, at 76-78 (order denying motion to dismiss) and R. Vol. 2, at 298-299 (order granting motion to intervene).

3. Waiyee Carmen Wong is the same Deputy County Attorney *who appeared as a counsel of record for the plaintiff* County of Kauai when it moved for summary judgment on the Advisory Complaint. R. Vol. 1, at 1, 9.

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5. The Circuit Court Assumed Jurisdiction And Invalidated Article XXXI

On March 4, 2005, the circuit court denied the Intervenors' Motion to Dismiss the Post-Enactment Complaint. The court held:

> Hawai'i Revised Statute §603-23 gives the Court subject matter jurisdiction in this case. This Court further finds that the instant case is not a challenge to the election process. This matter concerns the legality of the enacted Charter Amendment, not with the process of getting the Charter Amendment passed. Therefore, the Court has jurisdiction to consider the matter. This Court further finds that this is a case in controversy.

R. Vol. 3, at 188-189 (Attached as App. 5).

The circuit court denied the County Attorney's request for an injunction, but on March 18, 2005, granted the County Attorney's Motion for Summary Judgment on two of its three claims for relief. R. Vol. 3, at 209-211 (attached as App. 6). The circuit court found "for the [plaintiff] on Counts I and II, that the Charter Amendment violated Article VIII, Section 3 of the Hawaii State Constitution and that the Charter Amendment violated the Kauai County Charter. The Court found that it did not need to rule on Count III. This ruling disposed of all claims in the First Amended Complaint." R. Vol. 3, at 235. The court entered Final Judgment on May 20, 2005, R. Vol. 3, at 233-238, and subsequently amended the judgment to correct a clerical error. R. Vol. 4, at 226-228. The Notice of Appeal was timely filed on June 9, 2005. R. Vol. 3, at 260-277.

C. STATEMENT OF FACTS

1. The People Of Hawaii Delegated Real Property Tax And Other Home Rule Powers To "The Counties"

Before 1978, real property was taxed by the State, and property owners received their assessments and tax bills from the State Department of Taxation. *See State* ex rel. *Anzai v. City & County of Honolulu*, 99 Haw. 508, 511, 57 P.3d 433, 436 (2002) "Home rule" was a major concern of the 1978 Constitutional Convention, and in the resulting amendments to the Hawaii Constitution, the people added several provisions delegating authority for local matters to the counties. These amendments direct the counties to govern themselves and frame, adopt, and amend their internal grievance by charter. Among those delegated powers was the power to tax real property. Article VIII, section 3 of the Hawaii Constitution was amended to delegate the real property taxation authority from the state exclusively to "the counties."

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> 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 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.

Haw. Const. art. VIII, § 3 (emphasis added).[4]

2. Kauai Is Experiencing Record Tax Increases

Kauai property taxes have increased on average 125% since 1998, and approximately 18% in the last year.[5] The tax increases have been felt most intensely by long-time homeowners, particularly those who have no intention of selling and who realize no benefit from a hyperactive real estate market unless they consider selling their homesteads and leaving Hawaii for more affordable locales. Soaring property taxes, coupled with the inability to accurately project future tax bills threaten homeowners on fixed incomes, many of whom teeter on the brink of being taxed out of their homes.

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4. Article VIII, section 3 is not a mere legislative delegation of authority, but as a constitutional provision, it is a delegation of power from the people of Hawaii. *See Blair v. Harris*, 98 Haw. 176, 182-83, 45 P.3d 798, 803-04 (2002) (Acoba, J., concurring in part and dissenting in part) ("[T]he constitution does not derive its force from the convention which framed, but from the people who ratified it.").

5. *See* County of Kauai Dep't of Taxation, *County of Kauai Real Property Tax Valuation for Fiscal Year 1998-99*. Fueled by retiring mainland baby boomers flush with cash and sensing a dwindling supply of a slice of paradise and by speculators willing to pay top dollar, the price of homes across Hawaii has soared from merely exorbitant, to astronomical. *See, e.g.*, Associated Press, *Mainlanders Pinch Housing*, Honolulu Star-Bulletin, Sep. 6, 2005 ("A survey says that one-fifth of Maui and Kauai owners are mainland residents."). This continuing trend has hit especially hard on Kauai, where the median home price as of September 2005 is $700,000. Allison Schaefers, *Home Prices Jump on Neighbor Islands*, Honolulu Star-Bulletin, Sep. 2, 2005 ("The median prices for both single-family homes and condominiums on Kauai increased in July, with home prices rising 44.4 percent to a median of $700,000 and condo prices moving upward by 18.8 percent to $440,000."). Newspaper articles containing facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" are judicially noticable. Haw. R. Evid. 201(b). *See, e.g.*, In re *Pioneer Mill Co.*, 53 Haw. 496, 497 n.1, 497 P.2d 549, 550 n.1 (1972).

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3. The County Brought Real Property Tax Relief By Adding Article XXXI To The Charter

Pursuant to the authority delegated to the counties by the Constitution, in November 2004, the people of Kauai County, after years of attempting to convince their elected representatives to curb spending and to provide real property tax relief, exercised their home rule right to self-government by adding Article XXXI to the Kauai Charter. Article XXXI was a genuinely local effort. The homeowners who researched and drafted the language, circulated the petitions, and submitted the measure to the County Clerk are Kauai residents and property taxpayers.

Under Article XXXI, property taxes for owner-occupied homes are capped at 1998-1999 amounts for taxpayers who purchased their homes in 1998 or earlier, and capped at the amount paid in the year of purchase for homes purchased after 1998. Article XXXI also caps tax increases to 2% per year. The complete text of Article XXXI is attached as App. 1. Article XXXI brings a measure of certainty and predictability to residential real property taxes, as homeowners will know from year-to-year their maximum tax liability, and county officials will know how much tax revenue to expect from resident homeowners. Purchasers of homes will also be able to plan their future tax liability at the time of purchase and factor it into their buying decision. Article XXXI is a statement of County policy; it does not authorize or repeal the levy of property taxes. To many Kauai homeowners, Article XXXI may make the difference between losing their homes or keeping them.

4. Officials Refused To Implement Article XXXI, And Instead Sued Each Other To Invalidate It

The Mayor and the members of the County Council vigorously opposed Article XXXI, and actively campaigned against it before its enactment. "Mayor Bryan Baptiste and each member of the Kauai County Council took turns yesterday bludgeoning the property tax reform measure on the Nov. 2 ballot." Anthony Sommer, *Kauai Officials Slam Property Tax Ballot Bill,* Honolulu Star-Bulletin, Oct. 15, 2004. Before the vote, seven council members bought a newspaper ad announcing their opposition:

> We don't always agree . . .
> but there's one thing we're UNANIMOUS about:
> **Vote "NO" on the Real Property Tax Charter Amendment.**

R. Vol. 2, at 59 (emphasis original) (attached as App. 7). On October 25, 2004, the County Attorney filed the Advisory Complaint. R. Vol. 1, at 1-8.

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The County Attorney and the Mayor's office issued a joint press release the next day. The contacts listed on the press release are Carmen Wong, the Deputy County Attorney who filed the Advisory Complaint, and the Mayor's Administrative Assistant.

> **OFFICE OF THE MAYOR / KAUA'I COUNTY COUNCIL**
> **News Release**
> For Immediate Release: October 25, 2004
>
> **County to seek ruling on legality of Charter amendment**
> Study of legal issues has been ongoing
>
> LIHUE – County of Kaua'i officials announced today they intend to seek a ruling from the Fifth circuit court regarding whether the proposed 'Ohana Kaua'i Charter amendment is constitutional.
>
> In a joint statement, Mayor Bryan Baptiste, Council Chair Bill "Kaipo" Asing and the Council stated, "We agree that property tax relief is necessary. However, ***we have serious concerns about the legality of the proposed Charter amendment. We recently learned of potential legal problems with the amendment. As public officials, we have the obligation and duty to obtain a judicial determination on the constitutionality of the amendment***. We each took an oath to uphold the State Constitution and State law, and that is why ***we need to know whether the proposed amendment is legal***."
>
> . . .
>
> ***The petition requests the Court's clarification on legal issues surrounding the proposed Charter amendment***, such as whether it conflicts with the Hawai'i State Constitution, Article VIII, Section 3 and the Hawai'i Revised Statutes, Section 50-15, and the Charter, which reserve taxing power to the legislative bodies of the State and County.
>
> The Mayor and the Council said that whether you are for or against the adoption of the proposed amendment, the people of Kaua'i need to know whether this amendment is legal and valid. Today's filing of the court petition ***should not discourage the electorate from voting on this important measure***. . . .

R. Vol. 2, at 40-41 (emphasis added) (attached as App. 8). On November 2, 2004, the County enacted Article XXXI. When asked why he was challenging its validity rather than implementing it,

> [Baptiste] said he can't do that, because *challenging the measure is one of his official duties as mayor*.
>
> In county matters where legal questions arise, residents expect him to further examine the issues, Baptiste said.

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> "The mayor cannot unilaterally and outside of his authority determine whether an issue meets all legal requirements," Baptiste said in a statement. "It is the mayor's fiduciary responsibility to confirm issues of legality."

R. Vol. 2, at 43 (emphasis added) (attached as App. 9). The reasons advanced by the Officials for seeking to invalidate Article XXXI are transparent, for the record reveals that even after the County passed it, the Officials remained intensely opposed to Article XXXI, and that the court was being positioned to shield the Officials from having to take action violating their deeply-held political beliefs that the issue of property taxes is simply too important to be trusted to the people who pay them:

> It is also inappropriate to leave tax decisions up to those who "don't have the financial picture of the whole government," [County Councilman Daryl] Kaneshiro said. "All you got to do is get some conservative people come into play and say, 'Look . . . we don't want to pay taxes anymore. We have made a decision. We want to rely solely on the state and the federal government to support us," he said.

Tara Godvin, *Appeal Seeks to Overturn Ruling Against Kauai Tax Cuts*, Associated Press, June 10, 2005.

After enactment of Article XXXI, the County Attorney altered the form of the Advisory Complaint, but changed little substance. The Post-Enactment Complaint asserted the same legal claims and the same basis for jurisdiction. R. Vol. 1, at 53-64. There are only three differences of any note between the two complaints. First, the County Attorney changed the caption from "In re Proposed Kaua'i Charter Amendment" and added the names of the Mayor, the Finance Director, and the County Council as "defendants." *Id.* at 53-55. Second, in addition to a declaration of invalidity, the County Attorney sought to enjoin the "defendants" from "taking any action to give effect to the invalid Charter Amendment." *Id.* at 60. As in the Advisory Complaint, the County Attorney claimed that article VIII, section 3 of the Hawaii Constitution delegates the real property taxation power exclusively to county *councils*, and that Article XXXI is a "disguised" initiative ordinance, not a Charter provision. *Id.* at 58-59. Third, instead of the "controversy of laws" alleged in the Advisory Complaint, the County Attorney asserted that "[a]n actual controversy has arisen and presently exists between the County and defendants Mayor, Finance Director and Council. The interest in controversy are direct and substantial." *Id.* at 58 (Post-Enactment Complaint ¶ 25 (App. 3).

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As there was literally no party actually defending Article XXXI or the people of the County, four homeowners were compelled to intervene to seek dismissal of the collusive case. R. Vol. 3, at 1. The circuit court denied the motion to dismiss, holding that there was an actual controversy between the County Attorney and the Mayor, the Finance Director and the County Council, and that jurisdiction was proper under Haw. Rev. Stat. § 603-23. R. Vol. 3, at 188-189.

The circuit court subsequently refused to enjoin the Officials, but granted summary judgment to the County Attorney and declared Article XXXI invalid. The circuit court determined that the Hawaii Constitution delegates real property taxation power to county councils *exclusively*. R. Vol. 3, at 209-211 (App. 6). The court also held that as a matter of law that Article XXXI of the Kauai Charter, which was proposed, certified, and enacted properly under the Charter amendment procedures of the Kauai Charter (a process which was followed without objection), is not a Charter provision, but rather a disguised initiative ordinance "authorizing or repealing the levy of taxes," and therefore violates the Charter's prohibition on enacting such ordinances by initiative.[6] This appeal followed.

II.
STATEMENT OF POINTS OF ERROR

A. ERROR 1: JUSTICIABILITY

This case is not justiciable; the circuit court erred in denying the Intervenors' motion to dismiss for lack of jurisdiction. The errors by the circuit court are in the Record at R. Vol. 2, at 76-78 and R. Vol. 3, at 187-189. Appellants objected to the error. R. Vol. 3, at 1.

B. ERROR 2: "THE COUNTIES" DOES NOT MEAN "COUNTY COUNCILS"

Article VIII, section 3 of the Hawaii Constitution delegates the real property taxation authority from the people of Hawaii to "the counties" and not exclusively to county councils. The circuit court erred in entering summary judgment in favor of the County Attorney on the grounds that the delegation was exclusively to the county councils. The error by the circuit court is in the Record

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6. The people of Kauai have been living with the uncertainty resulting from the County Attorney's and Officials' collusive lawsuit for nearly a year, and the homeowners respectfully suggest that this Court follow the procedures used in *Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989), when the Court resolved similar uncertainties expeditiously by issuing a order resolving the case, followed later by the opinion of the Court.

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at R. Vol. 3, at 209-211, 233-238. Appellants objected to the error. R. Vol. 2, at 358-401; R. Vol. 3, at 220-232.

C. ERROR 3: AMENDING THE COUNTY CHARTER IS NOT ENACTING AN ORDINANCE BY INITIATIVE OR REFERENDUM

The circuit court erred in determining on a motion for summary judgment that Kauai Charter art. XXXI is a disguised ordinance enacted by initiative or referendum regarding the levy or repeal of taxes. The error is in the Record at R. Vol. 3, at 209-211, 233-238. Appellants objected to the error. R. Vol. 2, at 358-401; R. Vol. 3, at 220-232.

III.
STANDARD OF REVIEW

A. JUSTICIABILITY AND SUBJECT MATTER JURISDICTION – *DE NOVO*

The circuit court's denial of the Intervenors' motion to dismiss is reviewed *de novo*. *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 79 Haw. 425, 434, 903 P.2d 1246, 1255 (1995) (standing reviewed *de novo*). Jurisdictional issues in declaratory judgment actions are also reviewed *de novo*. *Ko'olau Agr. Co., Ltd. v. Comm'n of Water Resource Mgm't*, 83 Haw. 484, 489, 927 P.2d 1367, 1372 (1996).

B. CONSTITUTIONAL INTERPRETATION – *DE NOVO*

The meaning of Haw. Const. art. VIII, § 3 is a question of law reviewed *de novo*. "We answer questions of constitutional law by exercising our own independent constitutional judgment based on the facts of the case. Thus, we review questions of constitutional law under the right/wrong standard." *State v. Mallan,* 86 Haw. 440, 443, 950 P.2d 178, 181 (1998) (cited in *Gardens at West Maui Vacation Club v. County of Maui*, 90 Haw. 334, 340, 978 P.2d 772, 779 (1999)). The Constitutional text should be followed because it derives it power from the authority of the people whose intent is found "in the instrument itself." *Blair v. Harris*, 98 Haw. 176, 178-79, 45 P.3d 798, 800-801 (2002).

C. "DISGUISED" INITIATIVE OR REFERENDUM – *DE NOVO*

The circuit court accepted the County Attorney's contention that Article XXXI of the Kauai Charter is in fact a disguised ordinance enacted by initiative or referendum. Courts should not lightly overturn county charters that have been voted upon by the people. "[W]e are to be guided

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by the cardinal principle of judicial review that constitutional amendments ratified by the electorate will be upheld unless they can be shown to be invalid beyond a reasonable doubt. . . . The burden of showing this invalidity is upon the party challenging the results of the election. And "[e]very reasonable presumption is to be indulged in favor of a constitutional amendment which the people have adopted at a general election." *Kahalekai v. Doi*, 60 Haw. 324, 331, 590 P.2d 543, 549 (1979). The grant of summary judgment to the County Attorney is reviewed *de novo*, using the same standard as the circuit court. *State* ex rel. *Anzai v. City & County of Honolulu*, 99 Haw. 508, 515, 57 P.3d 433, 440 (2002).

IV.
ARGUMENT

This appeal does not concern the merits of Article XXXI. Rather, this appeal involves more fundamental issues regarding whether government officials who are reluctant to implement a duly enacted law may manufacture a lawsuit to invalidate it. This appeal also concerns the Hawaii Constitution's core definitions of "county" and home rule, and the delegation of authority on matters of local interest from the people of Hawaii to the counties.

If the Court determines the County Attorney did not properly invoke jurisdiction by bringing a lawsuit against friendly Officials, the Court need not address the remaining issues. *Wong v. Wong*, 79 Haw. 26, 29, 897 P.2d 953, 956 (1995) (trial court's judgment without subject matter jurisdiction is void; questions about subject matter jurisdiction may be raised at any stage of the case) (citing *Bush v. Hawaiian Homes Comm'n*, 76 Haw. 128, 133, 870 P.2d 1272, 1277 (1994)).

A. THIS CASE IS NOT JUSTICIABLE

The confusion and uncertainty resulting from the judgment in this case is the best example of why this Court's standing jurisprudence requires that cases be prosecuted by and against parties with genuinely adversarial interests prior to judicial power being invoked to subject laws to review. Justiciability is a question of subject matter jurisdiction, and any judgment in a case that lacks justiciability is void. *See, e.g.*, *Amantiad v. Odum*, 90 Haw. 152, 159, 977 P.2d 160, 167 (1999) ("Questions regarding subject matter jurisdiction may be raised at any stage of a cause of action."); *Chun v. Employees' Retirement Sys.*, 73 Haw. 9, 14, 828 P.2d 260, 263 (1992) ("The 'lack of subject matter jurisdiction can never be waived by any party at any time.'") (citation omitted). The presence of an actual controversy is so critical this Court may dismiss *sua sponte*. *Casuga v.*

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Blanco, 99 Haw. 44, 49, 52 P.3d 298, 303 (Ct. App. Haw. 2002) (a party's failure to raise "lack-of-jurisdiction issue should not preclude an appellate court from sua sponte addressing the issue[.]").

1. The Post-Enactment Complaint Was Not Justiciable

After filing a poorly-masked request for an advisory opinion, the County Attorney shifted tactics after enactment of Article XXXI, suing the Officials as "defendants," but not changing the nature of the claims asserted. The Post-Enactment Complaint additionally claimed that "[a]n actual controversy has arisen and presently exists between the County and the defendants Mayor, Finance Director and Council. The interests in controversy are direct and substantial." R. Vol. 1, at 58. At best this is artful pleading, at worst a deliberate falsehood: these are the very same "defendants" who filed the Advisory Complaint, jointly issued a press release with the plaintiff County Attorney stating they had "serious doubts about the legality of the proposed Charter amendment," "took turns bludgeoning" Article XXXI in public hearings, bought a newspaper ad encouraging a "no" vote, and who were represented by the same Deputy County Attorney who earlier had represented them attacking Article XXXI in the Advisory Complaint.[7] The Record on appeal and the public record demonstrate unequivocally that the "defendants" were not actually adversarial to the lawsuit, but in fact supported it wholeheartedly. Nonetheless, the circuit court found "that this is a case in controversy." R. Vol. 3, at 189.

To succeed in this appeal, the County Attorney must convince this Court to ignore this patently transparent charade in which the County Attorney is not only the plaintiff, but the *lawyer* for the plaintiff, *and* the lawyer for the "defendants," none of whom actually disagree with the allegations of the County Attorney's complaint. The circuit court accepted the pretense, holding "this is a case in controversy" and that it had jurisdiction under Haw. Rev. Stat. § 603-23. R. Vol. 3, at 187-189. The circuit court is wrong.

a. There Is No "Actual Controversy" And The County Attorney, The Mayor, The Finance Director, and The County Council Are Not "Adversaries" Or "Contending Parties" With "Antagonistic Claims"

The County Attorney, the Mayor, the Finance Director, and the Council are not adversaries. There is no controversy among them. The Advisory Complaint and the Post-Enactment

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7. *Cf.* Haw. R. Civ. P. 11(b)(3), "allegations and other factual contentions [must] have evidentiary support . . . ."

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Complaint alleged jurisdiction pursuant to the Hawaii Declaratory Judgment statute, Haw. Rev. Stat. § 632-1 (2003), which grants circuit courts jurisdiction to issue declaratory judgments "[i]n cases of actual controversy." That statute does not permit advisory complaints:

> [r]elief by declaratory judgment may be granted in civil cases where an *actual controversy exists between contending parties*, or where the court is satisfied that *antagonistic claims* are present between the parties involved which indicate imminent and inevitable litigation, or where . . . there is a challenge or denial of the asserted relation, status, right, or privilege by an *adversary party* who also has or asserts a concrete interest therein . . . .

Id. (emphasis added). In the case at bar, it defies reality to suggest that the lawsuit by the County Attorney presents "antagonistic claims" against the Mayor and Council at whose pleasure the County Attorney serves, especially when the Mayor and Council agree with the County Attorney's claims.[8] Any argument they are antagonistic or adversarial gives the term "legal fiction" a whole new meaning, as the record in this case and the public record are consistent that the "defendants" were staunchly opposed to Article XXXI both before and after its enactment.

The collusive nature of this case is most readily seen by the fact that the "defendants" did not even attempt a lukewarm defense of Article XXXI. In their Answer, the Officials virtually confessed judgment. R. Vol. 3, at 178-182. In other words, they agree with the claim that Article XXXI is *ultra vires* and beyond the power of the County. *Cf. State of Hawaii* ex rel. *Bronster v. Yoshina*, 84 Haw. 179, 182, 932 P.2d 316, 319 (1997) (attorney general and election official actually disagreed). When both parties "were interested in establishing the constitutionality" of a statute, the Oregon Supreme Court held that the adverse interests were not represented. *Oregon Medical Ass'n. v. Rawls*, 276 Or. 1101, 1105, 557 P.2d 664, 666 (1976). *See also Auberry Union School Dist. v. Rafferty*, 226 Cal. App. 2d 599, 603, 38 Cal. Rptr. 223, 227 (1964) ("Where it is apparent that the defendant does not actually oppose the position taken by the plaintiff, there obviously can be no controversy and there is nothing to be determined by the court.").

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8. *See* Kauai Charter art. VIII, § 8.02 ("The county attorney shall be appointed and may be removed by the Mayor, with the approval of the council."). Additionally, it is the County Attorney's duty to represent the Council, not sue it. Kauai Charter art. VIII, § 8.04 ("The county attorney shall be the chief legal adviser and legal representative of all agencies, *including the council*, and of all officers and employees in matters relating to their official powers and duties, and he shall represent the county in all legal proceedings.") (emphasis added).

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Further revealing the lack of actual controversy between the plaintiff and the defendants is the fact that the County Attorney (1) instituted suit as the party-plaintiff; (2) simultaneously serves as counsel for the plaintiff; and (3) simultaneously serves as counsel for the defendant Officials. Thus, either the County Attorney is enmeshed in an insoluble conflict of interest, or there is no conflict resulting from simultaneously serving as counsel for both the plaintiff and the defendants because the parties are not directly adverse but share a singularity of purpose and interest. *See* Haw. R. Prof. Conduct 1.7(a) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to another client . . . ").[9] Dual representation of all parties by the County Attorney reveals that the plaintiff and the "defendants" are not adversaries, that no actual controversy existed, and that the Advisory Complaint and Post-Enactment Complaint are, stated bluntly, sham pleadings.[10]

b. County Lacks Standing Because It Was Not Injured In Fact

Not alleging an injury in fact, the County has no standing as the plaintiff. "Standing is concerned with whether the parties have the right to bring suit." *Sierra Club v. Hawaii Tourism Auth.*, 100 Haw. 242, 250, 59 P.3d 877, 885 (2002) (quoting *Mottl v. Miyahira*, 95 Haw. 381, 388, 23 P.3d 716, 723 (1994)). "A plaintiff without standing is not entitled to invoke a court's jurisdiction." *Sierra Club*, 100 Haw. at 250, 59 P.3d at 885. The burden is on the plaintiff to establish its standing before the court has subject matter jurisdiction. *Id.* at 250, 59 P.3d at 885

9. This conflict was not avoided by the County Attorney hiring private counsel to prosecute the case as co-counsel with a war chest of $100,000 of public money. First, the County Attorney remains the lead counsel for the plaintiff, and there is no evidence in the record showing an attempt to disclose and waive the conflict, withdraw, "wall off," or otherwise insulate the other attorneys in her office. *See* Haw. R. Prof. Conduct 1.10(d). Additionally, the County Attorney's office continues to appear for the purported "opposition." The fact that a *Deputy* County Attorney – and not the County Attorney herself – is listed as counsel for the defendants does not resolve the problems, since the entire County Attorney's office is tainted with the conflict. *Id.* The County Attorney cannot comply with the duty to zealously represent clients on *both* sides of the case, and cannot simultaneously zealously *prosecute* the claims while zealously trying to *defeat* them.

10. If there are any doubts as to whether the plaintiff and the defendants are truly adverse, this case could be remanded to the circuit court for a determination of that issue. *O'Connor v. Diocese of Honolulu*, 77 Haw. 383, 385, 885 P.2d 361, 363 (1994) (when considering a motion to dismiss, court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction).

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(citing *United Pub. Workers, Local 646 v. Brown*, 80 Haw. 376, 381, 910 P.2d 147, 152 (Ct. App. Haw. 1996)). Whether the plaintiff has standing

> is measured by a three part "injury in fact" test: (1) he or she ***has suffered an actual or threatened injury as a result of the defendant's wrongful conduct,*** (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for the plaintiff's injury.

State of Hawaii ex rel. *Bronster v. Yoshina*, 84 Haw. 179, 184-85, 932 P.2d 316, 321-22 (1997) (emphasis added) (quoting *Bush v. Watson*, 81 Haw. 474, 479, 918 P.2d 1130, 1135 (1996)).

The County Attorney has never articulated any injury in fact supposedly suffered by the County by the enactment of Article XXXI, and the Post-Enactment Complaint fails to allege the County suffered any harm.[11] Nor has it alleged that the Mayor, the Finance Director, or the County Council caused any harm to the County. "To have standing, a party must have a sufficient personal stake in the controversy, *at the initiation of the litigation*, to seek a judicial resolution of the controversy." *Madore v. Maine Land Use Regulation Comm'n*, 715 A.2d 157, 160 (Me. 1998) (emphasis added).

Although this Court is not governed by the same Article III standing restrictions that restrain the federal courts, the County Attorney cannot stage a show trial simply because the Officials believe that their continuing dislike of Article XXXI is a matter "of great public concern," or their

11. The only "harms" alleged in the complaint impact the *defendants*: "Because the Charter Amendment *attempts to usurp the taxing power of the Council,* the Charter Amendment is invalid." R. Vol. 1 at 59 (Post-Enactment Complaint ¶ 29) (emphasis added). Nor is it "injury in fact" merely to believe that laws may be in conflict. *See id.* at 58 ("An actual controversy exists between the Charter Amendment and the Kaua'i County Charter and the Kaua'i County Code because the Charter Amendment language is in direct conflict with the Kaua'i County Charter and the Kaua'i County Code."). In the run-up to the vote, the Officials made policy arguments and claimed the County would be harmed because Article XXXI would cause it to lose revenue, could affect the County's credit rating, and may result in the loss of government services and jobs. The Post-Enactment Complaint does not contain any such allegations, which therefore are not part of the record of this case and cannot be considered. In any event, the people of Kauai overwhelmingly rejected these claims, and "the people are presumed to know what they want, to have understood the proposition submitted to them in all of its implications, and by their approval vote to have determined that [the] amendment is for the public good and expresses the free opinion of a sovereign people." *Kahalekai v. Doi*, 60 Haw. 324, 331, 590 P.2d 543, 549 (1979) (regarding constitutional amendments).

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"needs of justice" require it. *See Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Haw. 192, 204, 891 P.2d 279, 291 (1995) (federal justiciability requirements are not applicable in Hawaii courts).[12]

c. Section 603-23 Does Not Give The County Attorney Standing

The circuit court exercised jurisdiction pursuant to Haw. Rev. Stat. § 603-23, which provides:

> The circuit courts shall have power to enjoin or prohibit any ***violation*** of the laws of the State, or of the ordinances of the various counties, upon application of the attorney general, the director of commerce and consumer affairs, or the various county attorneys, corporation counsels, or prosecuting attorneys, even if a criminal penalty is provided for violation of the laws or ordinances. Nothing herein limits the powers elsewhere conferred on circuit courts.

Haw. Rev. Stat. § 603-23 (2004) (emphasis added). This statute is a grant of jurisdiction to the courts, and "does not confer authorization upon any of the public officers therein enumerated to seek an injunction. *That authority must be found elsewhere.*" *Marsland v. Pang*, 5 Haw. App. 463, 486, 701 P.2d 175, 192 (1985) (emphasis added). In other words, section 603-23 is a statute granting the court jurisdiction if a county attorney has a *separate and independent* basis to claim that a "violation

12. In *Aged Hawaiians*, this Court did not dispose of justiciability requirements as argued by the County Attorney. *See* Plaintiff-Appellee County of Kaua'i by its County Attorney Lani D.H. Nakazawa's Memorandum in Opposition to Intervenors-Appellants Motion for Stay During the Pendency of the Appeal, filed 8/10/05 (filed Aug. 18, 2005) at 7-8 ("County Attorney's Opposition to Stay") (asserting that in matters of "great public importance" this Court permits declaratory judgments without regard to justiciability). *Aged Hawaiians*, however, does not support that proposition. In that case, this Court merely held that *lack of finality* and the *failure to exhaust administrative remedies* would not bar a declaratory judgment action, and that a plaintiff could bring an action under the administrative procedures act, or an original action for declaratory judgment, *provided the plaintiff suffered an injury*. The Court pointedly did not dispose of the justiciability requirement for a plaintiff that is not injured simply because it may claim the matter is "of great public concern." *Aged Hawaiians*, 78 Haw. at 205, 891 P.2d at 291. Nor does *Life of the Land v. Land Use Comm'n,* 63 Haw. 166, 176, 623 P.2d 431, 439 (1981) hold that standing requirements are tossed aside whenever the "needs of justice require." In *Life of the Land*, this Court only held that standing requirements would not be rigidly applied where "[o]ne whose legitimate interest *is in fact injured* by illegal action of an agency or officer should have standing because justice requires that he should have a chance to show the action that hurt his interest is illegal." *Id.* at 174 n.8, 623 P.2d at 439 n.8 (emphasis added). *Cf. City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 69, 24 Cal Rptr. 3d 72, 93 (2005) ("An otherwise nonjusticiable action may not be entertained simply because it involves issues of public concern.").

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of the laws" has occurred. Alone, section 603-23 does not authorize the county attorneys to bring suits, or seek declarations or injunctions. *See, e.g.*, *Bronster*, 84 Haw. at 183, 932 P.2d at 320 (court had jurisdiction under § 603-21.5); *State* ex rel. *Minami v. Andrews*, 65 Haw. 289, 289, 651 P.2d 472, 475 (1982) (defendant operated an unlicensed schools in violation of licensing laws; court had jurisdiction to hear attorney general's action for injunction).

Nonetheless, this case is not ripe for review under any of the jurisdictional statutes invoked in the Post-Enactment Complaint because the defendants did nothing after the enactment of Article XXXI to implement it, and its mere enactment was not a "violation of the law" contemplated by section 603-23, or by section 603-21.5 (the general jurisdiction statute). *See City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 66, 24 Cal Rptr. 3d 72, 90 (2005) (claim not ripe when city seeks "judicial guidance" on constitutionality of a law that is not implemented). The County Attorney's complaint asked the court to abstractly review Article XXXI, and sought guidance from the circuit court, not a decision on the law after competing analyses are forged in the context of an adversary proceeding. The circuit court's failure to enjoin the defendants even though it declared Article XXXI unconstitutional as beyond the County's power further reveals this fundamental jurisdictional flaw. Because the defendants had not made any effort to implement Article XXXI, the circuit court rightly concluded that there was nothing – and no one – to enjoin. The Mayor admitted publicly that he only would implement the law after the circuit court informed him first whether it was constitutional:

> Mayor Bryan J. Baptiste said yesterday his administration is ready to respond to any decision a state judge may make on the county's challenge of the constitutionality of [Article XXXI].
>
> During a meeting with the media in his office at the Lihu'e Civic Center, Baptiste said he will implement [Article XXXI] *if* state Judge George Masuoka declares it constitutional.

R. Vol. 2, at 42 (emphasis added). In the absence of a genuine dispute, advising the Mayor whether one of Kauai's laws is valid is tasked to the County Attorney, not the circuit court. The courts exist to resolve actual disputes between adversarial parties, not to provide Kauai Officials with legal counsel.[13]

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13. Statutes conferring advisory jurisdiction clearly state so. Compare section 603-23 with Haw. Rev. Stat. § 37D-10 (2004), which provides:

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2. Intervention To Contest Justiciability Does Not Create Justiciability

The County Attorney argued that these fundamental jurisdictional defects were cured by the intervention of the homeowners.[14] However, intervention to dismiss the Post-Enactment Complaint for lack of justiciability did not create justiciability.

There is recent authority dismissing a collusive lawsuit brought by government officials dissatisfied with an election result, holding that intervention by third parties did not cure the inherent justiciability defect. *City of Santa Monica v. Stewart*, 126 Cal. App. 4th 43, 24 Cal Rptr. 3d 72 (2005) involved facts remarkably similar to the case at bar. In *Stewart*, the City of Santa Monica filed an action for declaratory relief against its own City Clerk because of the Clerk's refusal to implement a voter-approved tax relief measure, the "Taxpayer Protection Amendment of 2000." *Id.* at 52-53, 24 Cal. Rptr. at 79-80. Like the Officials in the present case, the Clerk acted on advice from the City Attorney who questioned the constitutionality of the measure. *Id.* City Council members had campaigned "vigorously against its passage." *Id.* at 52, 24 Cal. Rptr. at 79. A city resident intervened and moved to dismiss the case "as a collusive, non-justiciable action, and as a misuse of taxpayer funds for private purposes." *Id.* at 53, 24 Cal. Rptr. at 80. *The trial court dismissed the action as nonjusticiable*, and the court of appeals affirmed:

> Santa Monica's ***steadfast opposition*** to the enactment and implementation of the Initiative, the ***tepid nature*** of its allegations seeking to enforce the measure and seeking a judicial declaration as to whether the Initiative "is or is not

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> ***The director may petition the circuit court of the first circuit for an opinion as to the validity of any financing or related agreement entered into pursuant to this chapter***. The petition shall constitute a civil proceeding for purposes of section 603-21.5(a)(3), and the circuit court of the first circuit shall have exclusive and original jurisdiction to receive and determine the question presented in the petition, ***irrespective of an actual controversy or dispute regarding the agreement or its validity***. . . .

Haw. Rev. Stat. § 37D-10 (2004) (emphasis added). In the absence of such legislative authorization, justiciability rules require a present controversy between truly adversarial parties.

14. *See* County Attorney's Opposition to Stay at 7 ("But even if this Court were to find that at the outset, this case was not adversarial, the presence and active participation of Appellants as Intervenors make them genuine adversaries in this case.") (citing 13 Wright & Miller, Federal Practice & Procedure § 3530 (2d ed.)).

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> unconstitutional," [raises] significant doubt Santa Monica is a "party with a ***true incentive*** . . . to present arguments supporting the [Initiative's] validity."

Id. at 60, 24 Cal. Rptr. at 85-86 (emphasis added) (citations omitted).

The rationale in *Stewart* is applicable to the case at bar. Neither the Mayor, the Finance Director, nor the County Council demonstrated a "true incentive . . . to present arguments supporting [Article XXXI]'s validity," and instead have attacked Article XXXI at every opportunity, joining the arguments of the County Attorney in their pleadings. *See, e.g.*, R. Vol. 1, at 145-148 (joining plaintiff's opposition to intervention); R. Vol. 3, at 173-77 (joining plaintiff's opposition to appearance of amicus supporting Intervenors); R. Vol. 3, at 178-182 (answering plaintiff's complaint by confessing judgment). The *Stewart* court rejected Santa Monica's assertion that intervention by the citizens who proposed the tax relief measure cured the fatal problem of nonjusticiability:

> Finally, Santa Monica and the City Clerk assert that [resident]'s intervention obviated concerns about the justiciability of this action. We do not agree. First, Santa Monica and the Clerk ignore the fact that [the resident] sought to intervene solely to dismiss the action as a nonjusticiable controversy. Although [he] opposed Santa Monica's summary judgment motion which defended the legality of the Initiative, its opposition was submitted over its objection and only because the trial court ordered it to do so. More fundamentally, even if [his] participation in the action on the merits obviates the problem of standing, Santa Monica has not overcome the impediment to adjudication of the related, and equally important, problem of ripeness.

Stewart, 126 Cal. App. 4th at 62-63, 24 Cal. Rptr. at 87-88.

The only factual difference between *Stewart* and the present case is that in *Stewart*, the trial court *dismissed* the case for lack of jurisdiction, while in the present case, the trial court failed to do so. The question is what were the homeowners supposed to do once the circuit court refused to dismiss: remain as parties and challenge the collusive allegations on the merits but risk that this action might be deemed to create justiciability, or abandon the litigation to the collusive parties, allow them to secure their advisory opinion, and then attempt to somehow collaterally attack the judgment since the homeowners continued to believe the law supported their claim that the Post-Enactment Complaint was not justiciable? Consequently, after the circuit court denied their motion to dismiss, the homeowners had no practical choice but to remain and contest on the merits.

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Any rule that permits government officials to concoct a friendly lawsuit forcing others to intervene would allow officials to lure their citizens into a situation straight out of *Catch-22*: if the citizen did not intervene, the advisory case would go forward without justiciability arguments being raised, with the danger that subsequent objection would be rejected as too late or waived; if the citizen did intervene and raised the *lack* of standing, then the very act of intervention would be deemed to *create* standing:

> There was only one catch, and that was Catch-22, which specified that a concern for one's safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and he would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to, but if he didn't want to, he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.
>
> "That's some catch, that Catch-22," he observed.
>
> "It's the best there is," Doc Daneeka agreed.

Joseph Heller, *Catch-22* (1961). Heller's archetypal absurd conundrum should not be codified in this Court's justiciability jurisprudence.

The circuit court's decision that the Post-Enactment Complaint was justiciable is reviewed *de novo*, meaning this Court views the situation from the position of the circuit court, but is able to freely review its conclusion. Therefore, the Intervenors' subsequent participation cannot be considered when reviewing whether the motion to dismiss should have been granted because the circuit court did not know during its consideration of the Intervenors' motion to dismiss that the Intervenors would remain in the case if the motion was denied. Intervention by four Kauai homeowners pointing out jurisdictional defects in a collusive suit should not be used against them, and once the circuit court denied their motion to dismiss, the homeowners had no practical alternative but to remain since they had already preserved their objection for appeal. Any contrary rule would encourage filing collusive lawsuits in order to "smoke out" defendants, with no assurance that those who might come forward would have sufficient motivation or resources to provide a genuine adversary for the collusive parties.

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3. Reversing The Judgment And Dismissing The Case Will Not Leave Officials Without Remedies

Government officials are not without remedies when faced with a law they do not want to implement if they believe it is invalid or *ultra vires*. The Mayor, the Finance Director, or the members of the County Council might have brought suit as plaintiffs and challenged the law. *See, e.g., County of Kauai; Kaua'i County Council; Bill "Kaipo" Asing, James Kunane Tokioka, Jay Furfaro, Shaylene Iseri-Carvalho, Daryl W. Kaneshiro, Mel Rapozo, Joann A. Yukimura, and Peter A. Nakamura in their Official Capacities v. Office of Information Practices, State of Hawai'i; and Leslie H. Kondo, Director of the Office of Information Practices, in his Official Capacity*, Fifth Circuit, Civ. No. 05-1-00-88 (Complaint for Declaratory Relief filed Jun. 17, 2005) ("This is an action to have this Court declare the orders of the Office of Information Practices, State of Hawai'i and its Director, Leslie H. Kondo, in Case No. INVES 2005-0126-06 are invalid.").

Officials could have waited until a third party with standing instituted a case *against* the County; the County and the County Attorney should have been vigorously defending a lawsuit, not vigorously prosecuting it. *See, e.g., Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989) (City, represented by the Corporation Counsel, defended initiative against third party challenge despite the fact that City officials were sympathetic to the challenger's legal position). *See also Nordlinger v. Hahn*, 505 U.S. 1, 7-8 (1992) (taxpayer who did not benefit from tax relief measure sued the tax assessor).

Or the officials could have simply refused to implement the law and defended their inaction *when and if* a third arty filed suit. *See, e.g.,*Christoper N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L. Q. 865, 994-96 (1994) (official could refuse to execute law).

But the County Attorney and the Officials in the present case did not avail themselves of these alternatives. Instead, in a raw exercise of power they manufactured this case, hired private counsel to prosecute it, and allocated $100,000 of public money to the effort. The case's highly convoluted posture suggests it was intended to provide the Officials with insulation from the public scrutiny that surely would have followed had the Officials attacked Article XXXI directly. *Cf. Nordlinger v. Hahn*, 505 U.S. 1 (1992) (state officials supported and did not attack the citizen-

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enacted tax relief measure, Proposition 13; the State of California, the California Attorney General, the California Governor, and the entire California Senate filed briefs supporting the measure).

B. THE HAWAII CONSTITUTION DELEGATES REAL PROPERTY TAX AUTHORITY TO "THE COUNTIES" NOT "COUNTY COUNCILS," AND THE CONSTITUTION DOES NOT PRECLUDE A COUNTY FROM RESTRUCTURING ITS PROPERTY TAX SYSTEM DIRECTLY BY CHARTER

The Officials claim that the people of the County of Kauai were without the legal power to amend their Charter to enact Article XXXI, which is therefore *ultra vires*. In article VIII, section 3 of the Hawaii Constitution, the people of Hawaii delegated the real property tax authority to "the counties."

> all functions, powers and duties relating to the taxation of real property shall be exercised exclusively by ***the counties***.

Haw. Const. art. VIII, § 3 (emphasis added). The County Attorney asserted that a passing reference in a committee report shows the people's intent to delegate real property taxation power exclusively to "county councils." This argument fails for several reasons. First, it is barred by laches as the claim the ballot question was *ultra vires* should have been raised and resolved before the election, not after. Second, this Court's rules of Constitutional construction instruct that if the text of the Constitution is not ambiguous, it is error to examine secondary and tertiary sources to search for "intent." The term "the counties" unambiguously means "political subdivisions," not "county councils." Third, even if the Constitution delegated the authority to the county councils, there is no indication that the delegation was meant to be exclusive, and that the people of the county could not exercise their home rule power also.

1. Officials' Claim That The County Had No Authority To Enact Kauai Charter Article XXXI Is Barred By Laches

The Advisory Complaint asserted Article XXXI was *ultra vires* and beyond the delegated authority of the Hawaii Constitution. The County Attorney did not properly challenge Article XXXI prior to the election. Laches therefore bars the attempt to mount a post-election challenge. "The general rule is that if there has been opportunity to correct any *irregularities in the election process or in the ballot* prior to the election itself, plaintiffs will not, in the absence of fraud or major misconduct, be heard to complain of them afterwards." *Lewis v. Cayetano*, 72 Haw. 499, 503, 823 P.2d 738, 741 (1992) (emphasis added) (citing *Thirty Voters v. Doi*, 61 Haw. 179, 181, 599

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P.2d 286, 288 (1979)). An assertion that a proposal on the ballot is beyond the power of the voters to decide is an irregularity "in the election process or in the ballot."

In *Lewis*, this Court held that any challenge to correct errors in "the form of the ballot" must be brought before an election, not after. *Lewis*, 72 Haw. at 503, 823 P.2d at 741. The policy behind this rule is to force challengers who have doubts to actively pursue their claims before effort is wasted on a meaningless election, and to dissuade them from "hedging their bets"on the outcome:

> We apply the doctrine of laches in cases such as this and *Thirty Voters v. Doi* because efficient use of public resources demand we not allow persons to gamble on the outcome of the election contest then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process.
>
> *Merely notifying election officials of irregularities is not sufficient*. When it appears that the alleged irregularities will not be corrected by election officials, *plaintiffs have an obligation to file an action* in "the circuit courts [which] have the power to *prevent use of a ballot not in conformity with the law and to compel officials to prepare and distribute proper ballots*. When opportunity exists to bring such action prior to the election and plaintiffs fail to do so, they will not be heard to complain afterwards.

Id. at 503-504, 823 P.2d at 741 (emphasis added) (citing *Johnston v. Ing*, 50 Haw. 379, 382, 441 P.2d 138, 140 (1968)). In *Lewis*, one of the plaintiffs asserted that the county clerk should not have combined two proposed charter amendments on the ballot. The clerk had combined the two proposed charter amendments because he "recogniz[ed] the two proposals were contradictory." *Lewis*, 72 Haw. at 501, 823 P.2d at 740. One of the plaintiffs apprised the state's chief elections officer of his concerns by letter, but did not seek relief in the courts until after the election. *Id.*

Similarly, in the case at bar, neither the County Attorney nor the Officials notified the County Clerk or state election officials of the asserted ballot irregularity: their claim that Article XXXI was beyond the power of the voter and not a Charter amendment but a "disguised" initiative

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ordinance and therefore did not belong on the ballot.[15] The County Attorney and the Officials did not try to stop the election, but instead *encouraged the people to vote*:

> The Mayor and the Council said that whether you are for or against the adoption of the proposed amendment, the people of Kaua'i need to know whether this amendment is legal and valid. ***Today's filing of the court petition should not discourage the electorate from voting on this important measure.***

R. Vol. 2, at 40-41 (emphasis added) (App. 8). Public statements confirm that the Advisory Complaint was not an effort to remove the supposedly *ultra vires* question from the ballot:

> Contrary to what critics have said, *county attorneys didn't file the county's court challenge just days before the Nov. 2 general election to* ***upset the election process***, Baptiste said.
>
> Based on research by consulting attorneys and a review of case law, "it was concluded" that the constitutional questions posed by the then-proposed charter amendment should be ***subject to the court's scrutiny*** prior to the (Nov. 2) election, [Deputy County Attorney Waiyee Carmen] Wong said in a statement.

R. Vol. 2, at 43 (emphasis added). But the County Attorney did not "subject to the court's scrutiny" the proposed Charter amendment, and *Lewis* requires that challengers who claim the form of the ballot is erroneous "upset the election process" by actively pursuing judicial review by filing a proper case. Merely seeking an advisory opinion, doing nothing about it, then encouraging what is presently claimed to be an *ultra vires* vote is not actively pursuing available pre-election rights. *Lewis* requires a lawsuit designed to stop the supposedly invalid election.

2. Rules Of Constitutional Construction Mandate The Examination Of The Unambiguous Text

In a democratic system, the Court's role is to examine the constitutional text, and if it is clear and unambiguous, to construe the words as written. *Blair v. Harris*, 98 Haw. 176, 178-79, 45 P.3d 798, 800-801 (2002) (text should be followed because constitutions derive their power and authority from the people, whose intent is found "*in the instrument itself*") (emphasis added). The framers of the Hawaii Constitution – the people of Hawaii who ratified it – approved the express

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15. *Cf. State of Hawaii* ex rel. *Bronster v. Yoshina*, 84 Haw. 179, 186, 932 P.2d 316, 323 (1997) (decision to wait was not a gamble on the outcome of the election because vote would not resolve the question of whether the vote was procedurally correct). In the case at bar, timely stopping the vote would resolve the question.

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language of section 3, not committee reports. Special deference is owed to the Constitutional text, which is not a legislative pronouncement or statute writ large. *See* Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 St. John's L. Rev. 399, 408 (1987) ("But it is a [state] constitution we are expounding, and its commands are therefore entitled to the particular deference that courts are obliged to accord matters of constitutional magnitude.").

The circuit court concluded that the Hawaii Constitution delegates the real property taxation power exclusively to "county councils." Article VIII, however, does not contain the words "county councils," but plainly delegates real property tax power simply to "the counties" as political subdivisions, leaving it up to the respective county charters how that power is exercised:

> 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 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.

Haw. Const. art. VIII, § 3 (emphasis added). *See also Gardens at West Maui Vacation Club v. County of Maui*, 90 Haw. 334, 340, 978 P.2d 772, 779 (1999) (language of article VIII, section 3 is "plain"). In *Blair v. Harris*, 98 Haw. 176, 178, 45 P.3d 798, 800 (2002), this Court held it was erroneous the circuit court to look "primarily to its perception of the intent of the framers of [the Hawaii Constitution] and of the voters who ratified it." The Court further held "that the circuit court . . . failed to give effect to all of the words of [the Constitution]." *Id.* at 179, 45 P.3d at 801.

Adding language to the Constitution that is not in the text is particularly damaging. Had the framers of article VIII intended that "county councils" were being delegated the exclusive authority "relating the taxation of real property," it would have been a very simple matter for the people to have just said so.[16] The circuit court wrongly relied upon a few references in a committee

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16. Legal drafters know how to specify delegations of power to government entities and agencies when they mean to do so. For example, see the Coastal Zone Management Act, Haw. Rev. Stat. § 205A-22 where the authority to administer the Act is delegated to each county's:

> *county planning commission*, except in counties where the county planning commission is advisory only, in which case 'authority' means the *county council* or such body as the council may by ordinance designate.

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report to support its conclusion, but sources such as committee reports should not be examined unless there is an ambiguity in the constitutional text. *Blair*, 98 Haw. at 179, 45 P.3d at 801. In the absence of ambiguity, the express language in the constitution must be applied as it reads. *In re Janklow*, 530 N.W.2d 367, 370 (S.D. 1995). *See also Malyon v. Pierce County*, 935 P.2d 1272, 1281-82 (Wash. 1997) (appropriate state constitutional analysis begins with the text and, for most purposes, should end there as well).

The people of Hawaii approved the text of Article VIII of the Hawaii Constitution, not a committee report.

a. "The Counties" Means "Political Subdivisions, Not "County Councils"

The plain and unambiguous meaning of "the counties" in Article VIII, section 3 is "political subdivisions," not "county councils." Home rule means that when the people of Hawaii in their Constitution unconditionally delegate a power to "the counties," it is up to the counties – not the state or the "county councils"– to exercise the power through their charters in any way they choose.[17] The people of the counties may allocate such delegated powers between themselves and their elected representatives without limitation.

The Kauai Charter defines "the county" as "the people of the county of Kauai." *See* Kauai Charter art. I, § 1.01 ("The people of the county of Kauai are and shall continue to be a body politic and corporate in perpetuity under the name of 'county of Kauai,' referred to hereinafter as the

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Haw. Rev. Stat. § 205A-22 (2001) (emphasis added).

17. The County Attorney asserts that because taxation power is delegated to the counties by the state, and "taxing power at the State level is limited to the legislative body, such limit must also apply with respect to Kaua'i County's taxing authority." County Attorney's Opposition to Stay at 9. This argument fundamentally misunderstands the nature of the Constitutional delegation of power in Haw. Const. art. VIII, § 3 which is not delegated from the legislature. In section 3, the counties do not receive the real property tax authority from the state legislature or "the state." The power is delegated from the people directly to "the counties." In the 1978 amendments, the people delegated certain tax powers to the legislature to delegate to the "political subdivisions," while the real property tax power was simply delegated directly to "the counties" by the people. Haw. Const. art. VIII, § 3. *See State* ex rel. *Anzai v. City & County of Honolulu*, 99 Haw. 508, 510-11, 57 P.3d 433, 435-36 (2002). The people are sovereign, and unless expressly stated, all constitutional delegations of power come from the people. *See* Haw. Const. art. I, § 1 ("All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.").

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'county.'"). The Kauai Charter contains no prohibition against measures such as Article XXXI, and does not bar the people of the County from exercising self-government with respect to questions of real property tax policy. *See* Kauai Charter art. XXIV (the charter may be amended by the people, with no limitation on the provisions that may be amended).

b. The Plain Meaning Of "Counties" Is "Political Subdivisions"

The ordinary meaning of the term "counties" is not "county councils."

> In construing our constitution, we must give words their ordinary meaning. "'[T]he settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them.'" This well-established rule for construction of state constitutions requires that we look to the plain language of the constitution, rather than "any . . . abstruse meaning in the words employed." . . . The rule of plain language construction is even more crucial when construing constitutions than it is for interpreting statutes, for, when ascertaining the intent of the drafters, it is also the intent of the people ratifying the constitution that must be found.
>
> For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, *the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any . . . abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding,* and ratified the instrument in the belief that that was the sense designed to be conveyed.

Blair v. Harris, 98 Haw. 176, 182-83, 45 P.3d 798, 803-04 (2002) (Acoba, J., concurring in part and dissenting in part) (emphasis original) (citations omitted). This is a well-established principle. *See, e.g., Commonwealth v. Clark*, 7 Watts & Serg. 127, 133 (Pa. 1844) ("A constitution is not to receive a technical construction, like a common-law instrument or a statute. It is to be interpreted to carry out the great principles of the government, not to defeat them[.]"). The ordinary meaning of the word "county" is "the political unit next below the State in the U.S. . . . the inhabitants of a county." *The American College Dictionary* 276 (1953). A dictionary roughly contemporary to the 1978 amendment of Haw. Const. art. VIII defines "county" as "the people of a county . . . the largest territorial division for local government within a state of the U.S." *Webster's New Collegiate Dictionary* 258 (1980). *See also Taomae v. Lingle*, No. 26962 slip op. at 25-26 (Haw., Sep. 1, 2005) (noting the "plain and unambiguous language of articles III and XVIII").

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c. Other Portions Of Article VIII Show That "Counties" Means "Political Subdivisions"

Even if the circuit court determined that a term in article VIII is ambiguous, the court should have examined the term's use in other parts of the Constitution before relying upon outside sources. *Blair*, 98 Haw. at 178-79, 45 P.3d at 800-801. If the circuit court believed the term "the counties" in section 3 was ambiguous, for clarification it needed only to examine sections 1 and 2 of the same article, where it is made clear that the term "the counties" refers to "political subdivisions" not "county councils." Section 1 states:

> The legislature shall create ***counties***, and may create ***other political subdivisions*** within the State, and provide for the government thereof. Each ***political subdivision*** shall have and exercise such powers as shall be conferred under general laws.

Haw. Const. art. VIII, § 1 (emphasis added). Section 2 similarly provides:

> Each ***political subdivision*** shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. . . Charter provisions with respect to a ***political subdivision's*** executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

Haw. Const. art. VIII, § 2 (emphasis added). It is plain that the term "counties" in Article VIII means just that: the counties are political subdivisions, not "county councils" because county councils do not "frame and adopt a charter," the *county itself* does.

Instead of relying upon this plain and unambiguous Constitutional language, the circuit court erroneously preferred the imprecise language found deep within a standing committee report. The circuit court held that this inexact reference to "county councils" in a committee report is more significant than the actual constitutional text. Because the plain language of the constitution is not ambiguous, the circuit court should never have introduced ambiguity by relying upon a few words in a committee report. *See, e.g., Associated Press v. Board of Educ.*, 804 P.2d 876 (Mont. 1991) (textual ambiguity is a prerequisite for examination of convention records).

The circuit court's error is highlighted by realizing there is no requirement in the Hawaii Constitution that the counties govern via councils on matters of local concern. For example, Hawaii does not permit statewide initiative and referendum, but the counties are free to enact or repeal county laws with direct democracy. On local matters – and real property taxation is the

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"localist" of local concerns – Hawaii's home rule constitution allows the counties to decide how to implement the delegated power. *See* Haw. Const. art. VIII, § 2 (on matters of local concern, county laws supercede conflicting state law); *Gardens at West Maui Vacation Club v. County of Maui*, 90 Haw. 334, 340, 978 P.2d 772, 779 (1999) (county real property tax law supercedes state statute). The counties are free to frame and adopt their "own self-government." Article VIII, section 3 does not require the counties to have a county council. The people of Hawaii were not concerned with how the counties implemented the delegations of authority on local matters when they amended the Constitution in1978; it was simply a question of passing such authority from the state to the counties.[18] The Kauai County Council is a creation of the Kauai Charter, not article VIII of the Hawaii Constitution.

3. Within The County, The Delegation Of Property Tax Authority Is Not Exclusive

Even if it is determined that the committee report is controlling and county councils are specifically included within the delegation of property tax authority to the counties, there is no indication whatsoever that this authority was delegated to county councils *exclusively*. "Article VIII, section 3 was expressly and manifestly *designed to transfer to the counties broad powers* of real property taxation. It provides that 'all functions, powers and duties relating to the taxation of real property shall be exercised exclusively by the counties.'" *Gardens at West Maui Vacation Club v. County of Maui*, 90 Haw. 334, 340, 978 P.2d 772, 779 (1999) (emphasis added). Nothing in the

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18. However, even if the committee report is considered, it actually undercuts the circuit court's conclusion that the report's use of the term "government" means the county council. Standing Committee Report No. 42 *reprinted in* 1 *Proceedings of the Constitutional Convention of 1978* 595 (1980). In that report, the framers were concerned with the allocation of the real property taxation power between the state and counties, not how the counties would exercise the delegated authority. A careful reading of the report shows that the power was delegated to "county governments." Under Hawaii's home rule system and the Kauai Charter, the people of Kauai are the "county government." *See* Kauai Charter art. I, § 1.01 ("The people of the county of Kauai are and shall continue to be a body politic and corporate in perpetuity under the name of 'county of Kauai,' referred to hereinafter as the 'county.'"). The Officials' argument, and the circuit court's conclusion create an artificial distinction between the people of the County, the County, and the government. *Id.* Further reading shows the reason for proposing the delegation was so that property taxation would be "more responsive" to local "constituents." 1 *Proceedings of the Constitutional Convention of 1978* 1008-1009 (1980). Officials cannot be "more responsive" to constituents than the constituents themselves, and Article XXXI is therefore completely consistent with the intent of Haw. Const. art. VIII.

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committee reports suggests that "broad" delegation of the power to the county councils was intended to preclude the people of the counties also exercising the power.

The circuit court's conclusion that the county council has a real property tax power *monopoly* is therefore a philosophical judgment not a legal one. The County Attorney's lawsuit reflects the belief that certain decisions are simply too sensitive to be trusted to the people. However, the law should not lightly usurp the right of the people of the County to govern themselves. Any doubt should be resolved in favor of the right of the people of the County to "frame and adopt" their own Charter for their "own self-government." Haw. Const. art. VIII, § 2.

C. ARTICLE XXXI IS NOT AN ORDINANCE ENACTED BY INITIATIVE OR REFERENDUM

The circuit court wrongly concluded as a matter of law that Kauai Charter Article XXXI is, in fact, a disguised initiative ordinance "authorizing or repealing the levy of taxes." *See* Kauai Charter art. XXII, § 22.02.

1. Claiming A Ballot Measure Is A Prohibited Initiative Not A Charter Amendment Challenges The Form Of The Ballot

A claim that a ballot proposal is a prohibited "initiative ordinance" and not a "Charter amendment" is a challenge to the form of the ballot. For the reasons set forth earlier, any such challenge must have been actively prosecuted prior to the election. *Lewis*, 72 Haw. at 503, 823 P.2d at 741. Laches therefore bars assertion of the claim post-enactment, particularly by parties who actively encouraged the people to vote. The County Attorney cannot now claim that it was an ordinance after "gambl[ing] on the outcome of the election contest then challeng[ing] it when dissatisfied with the results . . . ." *Id.* at 503-504, 823 P.2d at 741.

2. A Charter Amendment Is Not An Initiative Ordinance

A provision in the Kauai Charter is not an ordinance enacted by initiative or referendum merely because it was added to the charter by the people. Initiative is "the power of voters to propose ordinances." Kauai Charter art. XXII, § 22.01(A). Referendum is the "power of the voters to approve or reject ordinances." Id. § 22.01(b). Amending the Kauai Charter by the people is accomplished by following the procedures in Kauai Charter art. XXIV, § 24.01(B). Enacting an ordinance by initiative is accomplished pursuant to the procedures specified in Kauai Charter art. XXII. The procedures are different: for example, initiative proposals require the

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signatures of 20% of "the number of *eligible voters* in the last general election," while Charter amendments require signatures of "*five percent* (5%) of the *voters registered* in the last general election." Initiative proposals must undergo an elaborate pre-election process. *See* Kauai Charter art. XXII, §§ 22.05, 22.06. Charter amendments simply go to the people for approval or rejection.

The circuit court wrongly determined without any evidence in the record that the "intent" of the people of the County was to disguise an ordinance as a Charter provision. *See Lum Yip Kee, Ltd. v. City & County of Honolulu*, 70 Haw. 179, 187,767 P.2d 815, 820 (1989) ("courts will not and cannot inquire into motives of members of a municipal governing body or other zoning authority where the validity of zoning plans or laws is under consideration"). With virtually no factual record before it but the language of Article XXXI, the circuit court should not have substituted its judgment about what the people of the County intended for the actual judgment of the people expressed in Article XXXI.[19] *Cf. Credit Assoc. of Maui, Ltd. v. Leong*, 56 Haw. 104, 106, 529 P.2d 198, 199 (1975) (Declaring judgment "null and void" when trial court granted summary judgment and decided the case "on [a] sparse factual foundation . . . [p]roper judicial administration requires a more substantial factual foundation for the determination" of "this case of such extreme importance[.]"). The court should have limited its examination to the text of Article XXXI, and rejected the County Attorney's arguments about what the people may have intended since they were not supported by any evidence. Charters are the organic documents of the counties – their "constitutions" – and are the product of the people, not ordinary legislation such as ordinances, and the courts should not lightly abrogate them.

> [W]e are to be guided by the cardinal principle of judicial review that constitutional amendments ratified by the electorate will be upheld unless they can be shown to be invalid beyond a reasonable doubt. . . . The burden of showing this invalidity is upon the party challenging the results of the election. And "[e]very reasonable presumption is to be indulged in favor of a constitutional amendment which the people have adopted at a general election."

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19. The problem is highlighted by the County Attorney's difficulty determining whether Article XXXI was a prohibited "initiative" or "referendum." R. Vol. 1, at 162 ("the Charter Amendment is actually either an initiative or referendum disguised as a Charter Amendment"). The circuit court did not decide either, simply entering judgment in favor of the County Attorney "on Count II (Violation of Article XXII of the Kauai County Charter) of the First Amended Complaint for Declaratory Relief, filed November 10, 2004." R. Vol. 3, at 210.

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Kahalekai v. Doi, 60 Haw. 324, 331, 590 P.2d 543, 549 (1979) (citing *Keenan v. Price*, 68 Idaho 423, 195 P.2d 662 (1948); *City of Raton v. Sproule*, 78 N.M. 138, 429 P.2d 336 (1967); *City of Glendale v. Buchanan*, 578 P.2d 221, 224 (Colo.1978)). *See also Citizens for Equitable and Responsible Government v. County of Hawai'i*, No. 25614, slip op. at 9 (Haw., July 22, 2005) ("The interpretation of a charter is similar to the interpretation of statute.").

3. Article XXXI Does Not Repeal Or Levy A Tax

The Kauai Charter does not extend the initiative or referendum power to "any ordinance authorizing or repealing the levy of taxes." Kauai Charter art. XXII, § 22.02. Even if Article XXXI is deemed to be an ordinance enacted by initiative, it does not violate the Charter's proscription on such because it neither repeals nor levies a tax. It simply establishes a ceiling amount over which taxes for certain real property may not go, and a maximum increase per year. It does not establish a new tax or withdraw an existing tax. Article XXXI sets county policy to give resident homeowners equitable protection against increases in market or assesed values, and increases in government spending, either of which may result in increased property taxes. *See* App. 1. Property taxes will continue to be imposed and collected, within the limits established by Article XXXI.[20]

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20. To the extent Article XXXI is deemed to repeal or levy a tax, it is irreconcilable conflict with art. XXII, § 22.02, and repeals that section by implication. *See Gardens at West Maui Vacation Club v. County of Maui*, 90 Haw. 334, 340, 978 P.2d 772, 779 (1999) (law enacted later in time that covers the whole subject of the earlier law works an implied repeal of the earlier). Also, since Article XXXI consists of two parts – the statement of equitable policy and the limits – a determination that the limit is an initiative ordinance does not impact the statement of policy.

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V.
CONCLUSION

For the foregoing reasons, the judgment of the circuit court should be reversed. The First Amended Complaint for Declaratory Relief should be dismissed. In the alternative, summary judgment in favor of the County Attorney should be reversed.

DATED: Honolulu, Hawaii, September 16, 2005.

Respectfully submitted,

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