No. 28822

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

COUNTY OF HAWAII, a municipal corporation, Plaintiff-Appellee, vs. C&J COUPE FAMILY LIMITED PARTNERSHIP, Defendant-Appellant, and ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; MILES HUGH WILSON, *et al.*, Defendants.	CIVIL NO. 05-1-015K (Kona) (Condemnation) APPEAL FROM FIRST AMENDED FINAL JUDGMENT (filed September 27, 2007) THIRD CIRCUIT COURT Honorable Ronald Ibarra, Judge
COUNTY OF HAWAII, a municipal corporation, Plaintiff-Appellee, vs. ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; C&J COUPE FAMILY LIMITED PARTNERSHIP; MILES HUGH WILSON, *et al.*, Defendants-Appellants.	CIVIL NO. 00-1-181K (Kona) (Condemnation) APPEAL FROM THE DENIAL OF THE POST-JUDGMENT MOTION OF DEFENDANT C&J COUPE FAMILY LIMITED PARTNERSHIP FOR STATUTORY DAMAGES PURSUANT TO HAW. REV. STAT. § 101-27 (FILED OCT. 11, 2007) THIRD CIRCUIT COURT Honorable Ronald Ibarra, Judge

FILED
2008 APR -9 PM 4:22

OPENING BRIEF FOR THE APPELLANT

APPENDICES "1"-"6"

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I.
STATEMENT OF THE CASE

A. NATURE OF THE CASE

1. The County Of Hawaii Has Become A Serial Taker

The government may not serially abuse eminent domain – its "most awesome grant of power"[1] – and avoid the statutory obligation to make property owners whole when a taking fails by forcing the property owner concurrently to defend two condemnation actions to take the same property.

This appeal seeks confirmation of three fundamental principles:

First, the government bears the risk that its attempts to condemn property fail. When an eminent domain lawsuit is discontinued "for any cause," the government has an absolute obligation under Haw. Rev. Stat. § 101-27 (1993) to make the property owner whole.

Second, the same plaintiff may not concurrently prosecute more than one eminent domain lawsuit to take the same property from the same owner. Any subsequently-filed condemnation lawsuits instituted while another remains pending is abated and must be dismissed for lack of subject matter jurisdiction. *Matsushita v. Container Home Supply*, 6 Haw. App. 439, 446, 726 P.2d 273, 278 (1986) ("where the party is the same in a pending suit, and the cause is the same and the relief is the same, a good plea in abatement lies"); *Shelton Engineering Contractors, Ltd. v. Hawaiian Pac. Indust. Inc.*, 51 Haw. 242, 249, 456 P.2d 222, 226 (1969) (abatement is jurisdictional and dismissal the only remedy).

Third, a court has an obligation under the Public Use Clause of the U.S. Constitution's Fifth Amendment, and article I, section 20 of the Hawaii Constitution to treat allegations of private purpose seriously and examine the record for evidence of pretext or predominant private use, particularly when, as here, the court has already invalidated for lack of public use an earlier attempt to take the same property.

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1. *City of Oakland v. Oakland Raiders*, 220 Cal. Rptr. 153, 155 (Cal. Ct. App. 1985). *See also Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952) ("The power of eminent domain, next to that of conscription of man power for war, is the most awesome grant of power under the law of the land."); *Harrison Redev. Agency v. DeRose*, 942 A.2d 59, 85 (N.J. Super. 2008) ("The power to condemn property 'involves the exercise of one of the most awesome powers of government.'") (quoting *City of Atlantic City v. Cynwyd Invs.*, 689 A.2d 712, 712 (N.J. 1997)).

a. The County/Oceanside Development Agreement Spawned The First Condemnation Action

In 2000, Plaintiff-Appellee the County of Hawaii (County) instituted Civil No. 00-1-0181K, an eminent domain lawsuit in the Circuit Court of the Third Circuit, to take the property of Defendant-Appellant C & J Coupe Family Limited Partnership (Richards Family). County sought to take the Richards Family's property to turn over to 1250 Oceanside Partners (Oceanside), the developer of the hyperluxury Hokulia project, to relieve it of its preexisting obligation to acquire and build an access road for Hokulia (the Hokulia access road). Two years earlier in a Development Agreement, County delegated to Oceanside the "sole discretion" to require County to condemn private property for the road.

The condemnation was laced with problems. It was not for public use as required by the Hawaii and U.S. Constitutions because the claimed public benefit was a pretext to hide the fact that the taking was primarily for Oceanside's private benefit. The condemnation action was instituted to avoid County liability for breaching the Development Agreement. The Development Agreement which required the condemnation was also illegal, because among other reasons it delegated County's eminent domain power to a private party, Oceanside, and created a scheme in which the costs for the Hokulia road construction could be assessed to South Kona property owners who sought rezoning of their land. These objections were subsequently confirmed when after trial in July 2007, the circuit court invalidated the attempted taking for lack of public use, and struck the assessment. Record on Appeal (R.) Vol. 27, at 01031 (First Amended Findings of Fact, Conclusions of Law, and Order (Sep. 27, 2007) (FOF/COL) Order ¶ 22, at 47, attached as Appendix (App.) 1) ("The condemnation and 'fair share' assessment provisions in the Development Agremeent are illgal.").

b. The Second Condemnation Action

In 2005, however, while the Richards Family's objections in Civil No. 00-1-0181K were still being considered by the circuit court, without dismissing or amending that action, County filed a *second* eminent domain Complaint to condemn the same Richards Family's property for the very same Hokulia access road that County was already attempting to condemn. This new action, Civil No. 05-1-015K, was instituted by County even though it continued to prosecute Civil No. 00-1-0181K. Because this second condemnation action was identical to the still-pending first case in all

material respects, and was a transparent effort by County to hide the problems in Civil No. 00-1-0181K, the Richards Family objected: the circuit court lacked subject matter jurisdiction to concurrently consider more than one action to condemn the Richard Family's property. The circuit court, however, refused to abate the second condemnation action. Instead, County's two eminent domain lawsuits were consolidated for trial, and the Richards Family was forced to defend concurrently against two ongoing attempts to take its property.

c. First Condemnation Invalidated, Second Upheld

After a nonjury trial in which County repeatedly refused to amend Civil No. 00-1-0181K and maintained it could prosecute both condemnation actions at the same time, the circuit court invalidated the condemnation in Civil No. 00-1-0181K, holding it was void and the taking was not for public use, but for Oceanside's private benefit. The court also held that County illegally delegated its eminent domain power to Oceanside in the Development Agreement. No appeal was taken from that judgment, which is now final.

However, the circuit court also determined that County's second, concurrent condemnation lawsuit, Civil No. 05-1-015K, was not abated because the two actions were not the same cause, even though they were both instituted by County to seize the Richards Family's property for Hokulia's access road. The circuit court did not consider whether the second taking was pretextual and accepted County's resolution without looking behind it for its context, and held that the taking in Civil No. 05-1-015K was for public use, even though it has just struck down the first condemnation action as pretextual.

d. Statutory Damages Denied In First Condemnation

In a post-judgment motion filed on October 11, 2007 in Civil No. 00-1-0181K, the Richards Family sought statutory damages pursuant to § 101-27 because although County improperly forced the Richards Family to litigate that case, County did not succeed in taking the property in that case. The statute provides "if, for any cause, the property concerned is not finally taken for public use," the property owner "shall be entitled, in such proceedings, to recover from the plaintiff" all damages including attorney's fees and costs of restoring the land. Haw. Rev. Stat. § 101-27 (1993). County disclaimed liability. Even though the property was admittedly not taken in Civil No. 00-1-0181K, County asserted the property was "finally taken" in Civil No. 05-1-015K so the statute was not applicable. After briefing and argument, the circuit court did not dispose of the motion by

January 9, 2008, and the motion was deemed denied by operation of Haw. R. App. P 4(a)(3), which requires that the circuit court have disposed of the motion within 90 days.

e. The Appeals

These are consolidated appeals from (1) the circuit court's denial of § 101-27 damages in Civil No. 00-1-018K, and (2) from the final judgment in Civil No. 05-1-015K.[2] "Eminent domain is an intrusive power, and the potential for its abuse is boundless,"[3] and property owners cannot be forced to concurrently defend multiple eminent domain lawsuits by the same condemnor to take the same property so that the government can avoid its statutory obligation to make property owners whole when an attempted condemnation fails. County's actions in these cases are stark illustrations of the damages wrought when eminent domain power is wielded carelessly and in bad faith.

2. Questions Presented

a. Civil No. 00-1-0181K

Damages For Discontinued Condemnation - Haw. Rev. Stat. § 101-27. May the government forever avoid its obligation under Haw. Rev. Stat. § 101-27 to pay damages for discontinued or failed takings by instituting serial condemnation actions?

b. Civil No. 05-1-015K

Subject Matter Jurisdiction – Abatement. Is an eminent domain action abated – and the circuit court deprived of subject matter jurisdiction – when the court is already considering another, earlier-filed eminent domain action, instituted by the same plaintiff, in the same court, against the same defendants, for the same relief?

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2. Although these appeals arise from separate actions and from two separate cases, and were noticed separately, the Clerk ministerially consolidated the appeals, depriving the Richards Family of the time to which it is entitled in the appeal of Civil No. 05-1-015K, and the page limits associated with each appeal.

3. *Southwestern Illinois Dev. Auth. v. National City Env'l, L.L.C.*, 710 N.E.2d 896, 904 (Ill. Ct. App. 1999), *aff'd*, 768 N.E.2d 1 (Ill.), *cert. denied*, 537 U.S. 880 (2002).

Proof of Public Use And Private Benefit.[4] Does a circuit court have any duty under the U.S. and Hawaii Constitutions to examine the record to determine whether the government's proffered public purpose supporting a taking is a pretext hiding a predominantly private benefit, or may it simply take the government's word?

3. **Relief Sought On Appeal**

a. **Haw. Rev. Stat. § 101-27 Damages:** The denial of the post-judgment Motion of Defendant C& J Coupe Family Limited Partnership for Statutory Damages Pursuant to Haw. Rev. Stat. § 101-27 (filed Oct. 11, 2007) should be vacated, and the issue remanded for an award of damages.

b. **Abatement:** The circuit court's September 27, 2007 First Amended Final Judgment in Civil No. 05-1-015K should be vacated, and the case dismissed or abated for lack of subject matter jurisdiction. Circuit courts do not possess jurisdiction to concurrently consider more than one lawsuit seeking the same relief.

c. **Pretext And Private Benefit:** If this Court does not dismiss Civil No. 05-1-015K for lack of subject matter jurisdiction, the First Amended Final Judgment should be reversed, and the case remanded to consider whether County's claim that the taking was for public use is valid, or was a pretext to hide the predominant private benefit to Oceanside.

B. STATEMENT OF FACTS AND PROCEEDINGS IN THE COURT BELOW

The facts of these consolidated cases are complex and are intertwined with the proceedings in the court below, since County instituted and maintained two concurrent eminent domain lawsuits seeking the same relief.

1. County/Oceanside Development Agreement

In 1994 and again in 1996, Oceanside, the developer of the luxury Hokulia project in Kona, agreed with County that as a condition of rezoning ordinances, Oceanside would construct a road to connect its property to Mamalahoa Highway. The construction of the Hokulia access road was to be at Oceanside's expense, and Oceanside had the obligation to acquire the private property necessary to do so. R. Vol. 27, at 01031 (FOF/COL) ¶ 20-31.

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4. If the Court determines the circuit court's judgment is void because it lacked subject matter jurisdiction, this question need not be addressed.

However, on April 1, 1998, County and Oceanside entered into a Development Agreement in which County, by way of resolution, attempted to relieve Oceanside, among other things, of its preexisting obligation under the rezoning ordinances to acquire property for and build, at its sole expense, its access road. The attempted amendment of the rezoning ordinances by resolution provided that if any landowner along the path of the road refused to sell its land to Oceanside, County's power of eminent domain would, upon Oceanside's demand, be used to forcibly acquire the parcel. R. Vol. 27, at 01031 (FOF/COL ¶ 34).

2. Oceanside Given The "Sole And Absolute Discretion" To Condemn

The County-Oceanside Development Agreement provides that Oceanside, not County, would have the "sole and absolute discretion" that the Richard's Family's property is needed, that "COUNTY shall be required to use its condemnation powers to acquire" the property, and that after "OCEANSIDE's tender of a requirement of condemnation by letter to the COUNTY, the COUNTY shall within thirty (30) days begin to immediately and expeditiously exercise the same pursuant to HRS Chapter 101." R. Vol. 26, DO56, at J-45 (p. 11) (1998 County/Oceanside Development Agreement, attached as App. 2). Under paragraph 10 of the Development Agreement, County has no discretion not to take the property as Oceanside commanded:

> OCEANSIDE shall attempt to negotiate a purchase price with any and all Persons. Should OCEANSIDE and any Person be unable to negotiate a mutually agreeable purchase price, then OCEANSIDE shall provide [a list of appraisers, from which the landowner much choose one appraiser and accept the price established by the appraiser]. Should OCEANSIDE and the Person be unable to select an Appraiser, or if the Person and OCEANSIDE cannot decide on a price recommended by mutually selected Appraiser, then upon written request to the Mayor, the *COUNTY shall be required to use its condemnation powers* to acquire the Segment(s) from the Person pursuant to Paragraph (11).

Id. at p. 10 (emphasis added). *See also* R. Vol. 27, at 01031 (FOF/COL ¶ 54-57 ("Under the Development Agreement, Oceanside identified the property to be condemned and directed [] County to condemn."). The Development Agreement provides that in the event that a landowner does not desire to "voluntarily" sell its property to Oceanside, then Oceanside is also entitled "in its sole discretion" to compel County to take the property by eminent domain:

> Notwithstanding Paragraph (10.b), if the Person fails to participate in negotiations with Oceanside for the purchase of Segment(s) of the Right-of-Way from the Person despite OCEANSIDE's good faith attempts to negotiate, then OCEANSIDE may, *in its sole discretion*, submit a letter to the Mayor to have the COUNTY utilize its condemnation powers. Upon receipt of the written request, the *COUNTY shall be required to use its condemnation powers* to acquire the Segment(s) from the Person pursuant to Paragraph (11).

R. Vol. 26, DO56, at J-45 (p. 11) (emphasis added). Section 11 of the Development Agreement expressly sets forth Oceanside's power to dictate the terms of the taking:

> Should the Person fail to participate in negotiations with OCEANSIDE . . . *the condemnation powers of the COUNTY shall be required for the acquisition* of the Segment(s).
>
> a. Upon OCEANSIDE's tender of a requirement of condemnation by letter to the COUNTY, the COUNTY *shall within thirty (30) days begin to immediately and expeditiously exercise the same pursuant to HRS Chapter 101*. OCEANSIDE's tender of such requirement of condemnation to the COUNTY shall constitute a "formal initiation of condemnation action" as that term is used in Condition L(2) of Ordinance 96-8 and Condition M(2) of Ordinance 96-7 and shall relieve OCEANSIDE of all further liability or obligation to purchase Segment(s) of the Right-of-Way from such Person.

Id. (emphasis added). The Development Agreement also provides in the "sole and absolute discretion" of Oceanside, eminent domain is to be used to take property within 45 days of Oceanside's command, and Oceanside is to pay all costs associated with any condemnation, including compensation to owners whose property Oceanside takes:

> The COUNTY shall submit to OCEANSIDE a written request for payment of any and all reasonable costs and expenses incurred by the COUNTY for the acquisition of the condemned land in conjunction with the COUNTY'S exercise of its condemnation powers when *OCEANSIDE has determined in its sole and absolute discretion* that there is a need for possession or in the event that a Court orders payment for the acquired land. Within forty-five (45) days of written notice from the COUNTY, OCEANSIDE shall reimburse the COUNTY for any and all reasonable costs and expenses incurred by the COUNTY for the acquisition of the

> condemned land in conjunction with the COUNTY's exercise of its condemnation powers.

Id. (emphasis added).

The Development Agreement also expressly gave Oceanside the ability to determine the location of the Hokulia access road, and what property to take:

> OCEANSIDE shall:
> . . .
>
> (2) *Determine the final Right-of-Way for the alignment of the entire Bypass Highway*, including intersection areas.

R. Vol. 26, DO56, at J-45 (p. 13) (emphasis added). Finally, Oceanside, not the County, is to build the Bypass Highway:

> OCEANSIDE shall construct the Bypass Highway to the standards set forth in Exhibit "M" by the Department of Public Works for Alii Highway with such modifications as may be deemed necessary by the County Department of Public Works and by OCEANSIDE.

R. Vol. 26, DO56, at J-45 (p. 12).

3. Condemnation #1: Civil No. 00-1-0181K

In 1999, Oceanside unilaterally withdrew its demands to acquire the Richards Family's land and directed County, pursuant to the terms of the Development Agreement, "'immediately and expeditiously exercise' condemnation proceedings" in a letter identified as a "formal initiation of condemnation action" from Oceanside to County. R. Vol. 29, at 01058, R-322.

In 2000, the County Council adopted a resolution of taking which further revealed the delegation of power to Oceanside:

> WHEREAS, the development agreement provides that if one of the owners across whose property the bypass highway is planned to traverse fails to mutually agree with Oceanside with respect to the purchase price or "the terms of the purchase," *the condemnation powers of the County of Hawaii shall be used* to acquire that particular segment with Oceanside reimbursing the County of Hawaii for any costs to acquire.

R. Vol. 1, at 00001 (County of Hawaii Resolution No. 266-00 (2000), attached as App. 3).

Relying on this Resolution, County instituted Civil No. 00-1-0181K, a condemnation action against the Richards Family (Condemnation #1). R. Vol. 1, and 00001 (Complaint, *County of Hawaii vs. Robert Nigel Richards, et al.*, Civ. No. 00-1-0181K (filed Oct. 9, 2000), attached as App. 4). As the Resolution plainly revealed, County instituted the lawsuit to comply with its contractual obligations to Oceanside. *See* R. Vol. 27, at 01031 (FOF/COL ¶ 35) ("at the time the parties entered into the agreement, the County intended to condemn any private property that Oceanside has determined, in its sole and absolute discretion, as necessary for the construction").

4. Condemnation #1 Appears In Jeopardy

The Richards Family objected to Condemnation #1, asserting, among other things, that County illegally delegated its power of eminent domain to Oceanside, that the claimed public use was a pretext, and the taking was not for a public use or purpose. Nor was it an exercise of County's independent discretion. Additionally, the Development Agreement attempted to shift Oceanside's obligation to pay for its road to third parties, whether or not their land was being taken. The Richards Family counterclaimed against County, and Oceanside was joined as a third-party defendant. R. Vol. 27, 01031 (FOF/COL ¶ 3).

On September 5, 2002, the circuit court *sua sponte* reversed a prior order granting summary judgment in favor of County on the issue of public use, then denied County's request for reconsideration. R. Vol. 3, at 00056, 00061. On December 11, 2002, the circuit court stayed its earlier order allowing County to take possession of the Richards Family's property, and possession of the property was returned to the Richards Family, and Oceanside's construction activity was halted in its tracks. R. Vol. 27, 01031 (FOF/COL ¶ 71). Thereafter, Oceanside sought to remove Judge Ibarra from considering the case. R. Vol. 10, at 00126, 00127. On April 10, 2003, the Hawaii Supreme Court rejected Oceanside's petition for a writ of mandamus to remove Judge Ibarra. *County of Hawaii v. Richards, et al.*, Sup. Ct. No. 25747 (Apr. 10, 2003).

Condemnation #1 looked to be in jeopardy. When the Condemnation #1 Complaint was filed in 2000, there was little legal authority providing guidance about when a proffered public purpose was unconstitutional pretext. However, in a series of cases after Condemnation #1 was filed, courts nationwide addressed the issue and provided a concrete methodology for analyzing the issue. For example, in a landmark case relied on by a later U.S. Supreme Court decision, a federal court in California invalidated under the Fifth Amendment's Public Use Clause an attempt to take

property for the benefit of a private party. *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001). That case set forth standards for measuring when to look beyond the government's claims of public use, and established standards for determining pretext.[5] On the heels of *99 Cents Only*, the same court struck down an attempted taking as pretextual in *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002). This was not limited to California courts. *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003).

Further, on July 30, 2004, the Michigan Supreme Court in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), overruled a well-known thirty year old precedent that gave municipal governments nearly unfettered discretion in eminent domain to define public use, *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). *Hathcock* set forth a detailed analysis of when the government's claim of public use would not withstand scrutiny under a state constitution's public use clause. Shortly thereafter, on September 28, 2004, the U.S. Supreme Court agreed to review *Kelo v. City of New London*, a widely-followed case that dealt with pretext and public use under the Fifth Amendment, and in December 2004, the Richards Family filed a brief amicus curiae in *Kelo*.[6]

5. Condemnation #2: Civil No. 05-1-015K

Perhaps sensing that its assumptions about the ground rules were wrong and were being clarified for the worse, and only one month after the attempt to remove Judge Ibarra was rebuffed by the Hawaii Supreme Court, County adopted *another* resolution of taking to condemn the Richards Family's property. R. Vol. 1, at 00701 (County of Hawaii Resolution No. 31-03 (2003),

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5. These standards were subsequently confirmed by the U.S. Supreme Court in *Kelo v. City of New London*, 545 U.S. 469 (2005).

6. *See* Patricia E. Salkin, et al., *The Friends of the Court: The Role of Amicus Curiae in* Kelo v. City of New London, EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 172 (Dwight Merriam, et al. eds, ABA Section of State and Gov't Law 2006) ("The brief submitted on behalf of Nigel Richards and his family described how the county and the developer of a Pebble Beach-style project entered into a development agreement whereby the developer would pay the condemnation cost for a portion of the Richards' property to build a road to the new development. The Richards family was not a part of the development agreement and had no opportunity to comment on it before it was executed.") (footnotes omitted).

attached as App. 5). This resolution – like the earlier Resolution No. 266-00 – sought the property for the Hokulia access road, but – unlike the earlier resolution – ignored County's ongoing Development Agreement obligations by simply omitting any reference to the Development Agreement and Oceanside. *Id.*

County waited almost two more years before making the problem worse. In 2005, it filed another condemnation action in the Third Circuit, Civil No. 05-1-015K ("Condemnation #2) which in all material respects was the same as the already-pending Condemnation #1. R. Vol. 1, at 00701 (Complaint, *County of Hawaii v. Robert Nigel Richards, et al.*, Civil No. 05-1-015K (filed Jan. 28, 2005), attached as App. 6). County did not amend Condemnation #1, as it could have:

> In all proceedings under this part the court shall have power *at any stage of the proceeding to allow amendment in form or substance in any complaint*, citation, summons, process, answer, motion, order, verdict, judgment, or other proceeding, including amendment in the description of the lands sought to be condemned, whenever the amendment will not impair the substantial rights of any party.

Haw. Rev. Stat. § 101-19 (1993) (emphasis added). County did not immediately serve the second Complaint upon the Richards Family, which was left to hear about the new action in the newspaper.

Because a circuit court is without power to simultaneously entertain two lawsuits seeking the same relief between the same parties, on March 31, 2005, the Richards Family moved to dismiss Condemnation #2 for lack of subject matter jurisdiction because the second suit was abated. R. Vol. 1, at 00702. *Matsushita v. Container Home Supply*, 6 Haw. App. 439, 446, 726 P.2d 273, 278 (1986) ("where the party is the same in a pending suit, and the cause is the same and the relief is the same, a good plea in abatement lies."). Abatement deprives the court of subject matter jurisdiction over the second lawsuit. *Shelton Engineering Contractors, Ltd. v. Hawaiian Pac. Indust. Inc.*, 51 Haw. 242, 249, 456 P.2d 222, 226 (1969) (abatement of a subsequent suit could only be cured by dismissal).

6. No Abatement of Condemnation #2 And Landowners Forced To Concurrently Defend Two Eminent Domain Lawsuits

The circuit court denied the motion to dismiss, and consolidated Condemnation #1 and #2 for trial pursuant to Haw. R. Civ. P. 42(a). R. Vol. 1, at 00707. The Richards Family repeatedly raised the jurisdictional abatement issue over the course of the litigation, in closing

arguments, and when proposing findings and conclusions. The circuit court, however, denied all motions to dismiss Condemnation #2. The Richards Family was therefore forced to simultaneously litigate two concurrent attempts to take its property. Despite the circuit court's repeated requests, County declined to elect either Condemnation #1 or #2, and prosecuted both.

In July 2007, the two condemnation actions were tried jointly, with County relying on *both* Complaints. R. Vol. 26, at 01006 – R. Vol. 27 at 01018. At trial, the Richards Family again moved to dismiss for lack of subject matter jurisdiction. Transcript of Proceedings, July 20, 2007 (page 62, line 6).[7]

7. Condemnation #1 Invalidated, But Condemnation #2 Upheld

On September 27, 2007, the circuit court held that Condemnation #1 was invalid because, *inter alia*, County delegated its power of eminent domain to Oceanside in the Development Agreement. R. Vol. 27, at 01031 (FOF/COL ¶¶ 60-69). The circuit court ordered

> The Condemnation in invalid. Judgment is hereby ordered to be entered in favor of [the Richards Family] and against County of Hawaii, because County Resolution 266-00 illegally delegated its power of condemnation, through the Development Agreement, to a private party, 1250 Oceanside Partners, and therefore did not have proper public purpose.

R. Vol. 27, at 01031 (FOF/COL Order ¶ 1, at 46-47).

However, the circuit court continued to reject the Richards Family's assertion that Condemnation #2 must be dismissed for lack of subject matter jurisdiction, and determined that the taking in Condemnation #2 was for public use. R. Vol. 27, at 01031. The circuit court's First Amended Judgments (Sep. 27, 2008), resolved all claims by all parties in both cases.

On October 26, 2007 in Condemnation #1, the Richards Family timely appealed the judgment in Condemnation #2. R. Vol. 29, at 01039. On October 11, 2007, the Richards Family requested § 101-27 damages because its property was not taken for public use in that case. When

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7. The Clerk of the circuit court has informed the parties that due to illness and surgery, the compilation of the Record on Appeal has not been completed. The parties are in the process of preparing a stipulation so the index to the Record is complete by the time the briefing schedule is closed. In the interim, references to materials that are part of the Record but are not yet indexed, will be referenced directly.

the Richards Family's post-judgment motion was deemed denied by operation of Haw. R. App. P. 4, the Richards Family separately appealed from that order.

II.
STATEMENT OF POINTS OF ERROR

A. ERROR 1: FAILURE TO AWARD MANDATORY STATUTORY DAMAGES

Because the Richards Family's property was not taken in Civil No. 00-1-0181K, the circuit court was required to award "all such damage as may have been sustained . . . by reason of the bringing of the [condemnation] proceedings . . . including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses." Haw. Rev. Stat. § 101-27 (1993). The error by the circuit court is in the Record. *See* Index of Record, which demonstrates that the circuit court did not dispose of the motion within 90 days of its filing, and was thus deemed denied pursuant to Haw. R. App. P. 4(a)(3) on or about January 9, 2008.

B. ERROR 2: SUBJECT MATTER JURISDICTION – ABATEMENT

County's second eminent domain action, Civil No. 05-1-015K, lacked subject matter jurisdiction, and the circuit court erred when it denied multiple motions to dismiss. The error by the circuit court is in the Record at R. Vol. 1, at 00707. Subject matter jurisdiction cannot be waived. *Amantiad v. Odum*, 90 Haw. 152, 159, 977 P.2d 160, 167 (1999) (lack of jurisdiction cannot be waived, and may be raised at any stage of a case).

C. ERROR 2: PUBLIC USE

The circuit court should not have rejected allegations of a pretextual taking or predominantly private purpose by looking only to the government's claims of public use.
The error by the circuit court is in the Record at R. Vol. 27, at 01031. Appellant objected to the error. R. Vol. 27, at 01019.

III.
STANDARD OF REVIEW

A. STATUTORY DAMAGES UNDER 101-27 – *DE NOVO*

Section 101-27 of the Hawaii Revised Statutes provides that when an eminent domain proceeding fails, and the property is "not finally taken for public use" in those proceedings, the property owner "shall be entitled" to be made whole:

> [I]f, for any cause, the property concerned is not finally taken for public use, a defendant who would have been entitled to compensation or damages had the property been finally taken, *shall* be entitled, in such proceedings, to recover from the plaintiff *all such damage* as may have been sustained by the defendant by reason of the bringing of the proceedings . . . *including* the defendant's *costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses*. . . .

Haw. Rev. Stat. § 101-27 (1993) (emphasis added). *See also Kahoohanohano v. Dep't of Human Services*, ___ Haw. ___, ___,178 P.3d 538, ___ (2008) (when a statute or regulation provides that government "shall" accomplish some act, the duty is mandatory); *Schefke v. Reliable Collection Agency, Ltd.*, 96 Haw. 408, 451-52, 32 P.3d 52, 95-96 (2001) (use of "shall" indicates mandatory award). Interpretation and application of a statute is a question of law reviewed *de novo*. *Kahoohanohano*, ___ Haw. at ___,178 P.3d at ___ (2008).

B. SUBJECT MATTER JURISDICTION AND ABATEMENT – *DE NOVO*

The circuit court's denial of motions to dismiss for lack of subject matter jurisdiction is reviewed *de novo*. *Tamashiro v. Dep't of Human Services*, 112 Haw. 388, 398, 146 P.3d 103, 113 (2006) (subject matter jurisdiction reviewed *de novo*). Subject matter jurisdiction is an "absolute necessity," and an appellate court may *sua sponte* "at any stage of the case" make its own determination of a circuit court's exercise of jurisdiction. *Waal v. Sakagi*, 27 Haw. 609, 613 (1923) (*sua sponte* reversing the trial court's order because "we feel that we cannot overlook the absence of jurisdiction"); *Casuga v. Blanco*, 99 Haw. 44, 49, 52 P.3d 298, 303 (2002) ("It is well-established . . . that lack of subject matter jurisdiction can never be waived by any party at any time."). *See also Amantiad v. Odum*, 90 Haw. 152, 159, 977 P.2d 160, 167 (1999) (lack of jurisdiction cannot be waived, and may be raised at any stage of a case). A circuit court judgment rendered without subject

matter jurisdiction is void; questions of subject matter jurisdiction may be raised at any stage of the case. *Wong v. Wong*, 79 Haw. 26, 29, 897 P.2d 953, 956 (1995) (citing *Bush v. Hawaiian Homes Comm'n*, 76 Haw. 128, 133, 870 P.2d 1272, 1277 (1994)).

A court lacks subject matter jurisdiction to consider two claims by the same plaintiff against the same defendant, and the second-filed case is abated. *Shelton Engineering*, 51 Haw. at 249, 456 P.2d at 226 (abatement deprives the court of subject matter jurisdiction over the second lawsuit, and can only be cured by dismissal); *Matsushita*, 6 Haw. App. at 446, 726 P.2d at 278 ("where the party is the same in a pending suit, and the cause is the same and the relief is the same, a good plea in abatement lies").

C. PRETEXT AND PUBLIC USE UNDER U.S. AND HAWAII CONSTITUTIONS – *DE NOVO*

Questions of constitutional law are reviewed *de novo*. *State v. Mallan*, 86 Haw. 440, 443, 950 P.2d 178, 181 (1998) ("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.").

IV.
ARGUMENT

Eminent domain – government's ability to seize private property against the will of its owner – has rightly been described as the "despotic power"[8] because it is so skewed in favor of the government, and because its potential for abuse is nearly limitless. On the other hand, private property is a fundamental constitutional right that must be respected. *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1992) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."). Because the right to possess and use private property is so fundamental, and eminent domain is such a intrusive power, government has a duty to wield the power carefully, and strictly within statutory and constitutional confines. The condemnation may not take place at all without authority of law. *Winger v. Aires*, 89 A.2d 521, 522 (Pa. 1952) ("It is to be emphasized, however, that the restriction in [the takings]

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8. *VanHorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (1795)

clause is not limited to the guarantee of just compensation. The condemnation may not take place at all without authority of law."). Consequently, it remains a bedrock principle that eminent domain statutes must be construed strictly against the government and liberally in favor of the property owner:

> The manifest legislative intent underlying the provisions [of our eminent domain code] is not only to insure due process of law for any taking of property before final judgment in an action of eminent domain but to give the landowner in possession a perfectly fair and adequate remedy for the full protection of his rights of property against any arbitrary and unjust appropriation under an existing order of possession. *To effectuate that intent, those provisions should be construed liberally in favor of the landowner as to remedy in so far as they are in harmony with the common-law principles and constitutional guarantees protecting private property. But they should be construed strictly against the condemnor as to right to enter the land of the landowner without his consent in so far as they are in derogation of such principles and guarantees.*

Marks v. Ackerman, 39 Haw. 53, 58-59 (1951) (emphasis added) (citation omitted). This is particularly important when eminent domain is exercised by a municipal government that possesses no independent sovereignty or inherent powers, only those delegated to it by the State. *See* Haw. Rev. Stat. § 46-1.5(6) (Supp. 2007) (counties "have the power to exercise the power of condemnation by eminent domain when it is in the public interest to do so"); *id.* § 46-61 (delegating counties the power of eminent domain); *id.* § 101-13 (requiring counties to adopt a resolution of taking prior to instituting a condemnation action).

Thus, County's attempt to avoid its strict statutory obligation to make the Richards Family whole under § 101-27 after Condemnation #1 was invalidated, and its decision to pile on a second eminent domain lawsuit without dismissing or amending the first, cannot be viewed as merely an academic or technical blunder, but as a bad faith abuse of power, which had real impacts on real people. A recent decision reminded that property owners whose land is subject to condemnation have due process rights that must be respected inviolate:

> Although we have been called upon the resolve several rather abstract issues arising under our laws and constitution, we undertake that responsibility mindful that these cases, in a very tangible way, involve a real community, and the real people who live, work and own property there.

Harrison Redev. Agency v. DeRose, 942 A.2d 59, 63 (N.J. Super. 2008).

In the cases at bar, County abandoned these limitations, and in its zeal to avoid liability for breaching the Development Agreement and to insulate itself from § 101-27, lost sight of the fundamental principle that the Richards Family did nothing wrong except own property coveted by Oceanside for its Hokulia access road. *Torrance Unified School Dist. of Los Angeles County v. Alwag*, 302 P.2d 881, 883 (Cal. Ct. App. 1956) (an action to take private property is not of the same nature as ordinary civil litigation; there is no defendant alleged to have perpetrated some wrong upon the plaintiff). The government may not immunize itself from its absolute statutory obligation to make property owners whole after a condemnation action fails by instituting *another* eminent domain action. Government, not property owners, must bear the risk of condemnation shortcomings. But instead of following the law and respecting the rights of its citizens, County simply instituted a second condemnation action in a brazen display of government might. In addition, a circuit court lacks subject matter jurisdiction to consider two concurrent condemnations, and an eminent domain lawsuit filed in the same court, by the same plaintiff, on the same cause, against the same defendant, instituted while an earlier case remains pending must be dismissed.

A. COUNTY CANNOT AVOID ITS STATUTORY OBLIGATIONS TO INDEMNIFY PROPERTY OWNERS FOR A DEFECTIVE CONDEMNATION BY INSTITUTING MORE CONDEMNATIONS

1. Section 101-27 Is Unambiguous: Government Bears The Risk Of Eminent Domain Failures

While no amount of money damages can adequately compensate a property owner for suffering for more than seven years under the cloud of illegal government action, the Hawaii Legislature has provided some measure of economic justice by requiring that landowners subject to an unsuccessful exercise of eminent domain be made whole. Property owners forced to defend an eminent domain "proceeding" in which their property is not finally taken for public use are entitled to indemnification:

> **§ 101-27 Defendant allowed damages upon abandonment or dismissal of proceedings.** Whenever any *proceedings* instituted under this part are abandoned or discontinued before reaching a final judgment, or *if, for any cause, the property concerned is not finally taken for public use*, a defendant who would have been entitled to compensation or damages had the property been finally taken, *shall*

> *be entitled, in such proceedings, to recover from the plaintiff all such damage as may have been sustained by the defendant by reason of the bringing of the proceedings* and the possession by the plaintiff of the property concerned if the possession has been awarded including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses; and the possession of the property concerned shall be restored to the defendant entitled thereto. Issues of fact arising in connection with any claim for such damage shall be tried by the court without a jury unless a trial by jury is demanded by either party, pursuant to the rules of court, within ten days from the date of the entry of an order or judgment allowing the discontinuance of the proceedings, or dismissing the proceedings or denying the right of the plaintiff to take the property concerned for public use. In the event judgment is entered in favor of the defendant and against the plaintiff, any moneys which have been paid, and any additional security which has been furnished, by the plaintiff to the clerk of the court under sections 101-28 and 101-29, shall be applied or enforced toward the satisfaction of the judgment. In the case of the State or a county, if the moneys so paid to the clerk of the court are insufficient, then the balance of such judgment shall be paid from any moneys available or appropriated for the acquisition of the property concerned, or if that is insufficient then the same shall be paid from the general fund of the State or county, as the case may be.

Haw. Rev. Stat. § 101-27 (1993) (emphasis added). *See also Leslie v. Bd. of Appeals, County of Hawaii*, 109 Haw. 384, 126 P.3d 1071 (2006) ("shall" indicates mandatory language); *Schefke v. Reliable Collection Agency, Ltd.*, 96 Haw. 408, 451-52, 32 P.3d 52, 95-96 (2001) (use of "shall" indicates mandatory award).

This issue is straightforward: because the Richards Family's property was "not finally taken for public use" in the Civil No. 00-1-0181K proceeding because the circuit court struck down the condemnation, the circuit court should have ordered County to make the Richards Family whole.[9]

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9. "Damages" are designed to place litigants in a position they occupied as if no harm had occurred. *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 434 (5th Cir. 1962) ("damages are designed to place [the injured] in a position substantially equivalent" to that position occupied had no harm occurred). *See also Foley v. Parlier*, 68 S.W.3d 870, 884 (Tex. Civ. App. 2002) (proper measure of damages for breach of contract is that which is necessary to make party whole). Section 101-27 damages are distinct from compensation awarded when a condemnor successfully takes property. *See* Haw. Rev. Stat. § 101-27 (1993); *State v. Davis*, 53 Haw. 582, 585, 499 P.2d 663, 667 (1972) (§ 101-27 indemnification only applies when the taking fails or is abandoned, and

The circuit court's judgment in Condemnation #1 was not appealed and is final for all purposes, including § 101-27. *State* ex rel. *Attorney General v. Kapahi's Heirs*, 50 Haw. 237, 239, 437 P.2d 321, 323 (1968) (judgment in eminent domain action is "final" for purposes of chapter 101 after appeals are exhausted). The conclusion that the Richards Family is entitled to damages is simple enough if one adheres to the plain text of § 101-27, which requires that if property in an eminent domain "proceeding" is "not finally taken for public use," the landowner forced to defend the condemnation proceeding "*shall be entitled*" to recover "*all such damage as may have been sustained* by the defendant *by reason of the bringing of the proceedings*." Haw. Rev. Stat. § 101-27 (1993) (emphasis added). Making a property owner whole is so critical the Legislature provided the opportunity for a separate jury trial on the issue, if requested. *Id.*[10]

2. "Proceeding" Means A Single Eminent Domain Action, Not Many

In the circuit court, County claimed the phrase "not *finally* taken for public use" in eminent domain "proceedings" in § 101-27 means that the property is "not taken" not only the discrete condemnation lawsuit at issue, but also includes any subsequent condemnation attempts brought, now or in the future. However, the plain language of § 101-27 does not contain any

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is separate from compensation awarded when property is successfully taken). In other words, the Richards Family is entitled to be restored to the position it would have been in had County not instituted Civil No. 00-1-0181K

10. County asserted in the circuit court that § 101-27's 10-day limitation for requesting a jury trial is also applicable to the motion for damages itself. It isn't. The statute plainly limits the ten-day period only to jury demands:

> Issues of fact arising in connection with any claim for such damage shall be tried by the court without a jury unless a *trial by jury is demanded by either party, pursuant to the rules of court, within ten days* from the date of the entry of an order or judgment allowing the discontinuance of the proceedings, or dismissing the proceedings or denying the right of the plaintiff to take the property concerned for public use.

Haw. Rev. Stat. §101-27 (1993) (emphasis added). Because the statute is otherwise silent regarding the timing of a request for damages, the request is governed by Rule 54 of the Rules of Civil Procedure which provides "[u]nless otherwise provided by statute or order of the court, the motion [for costs and fees] must be filed and served no later than *14 days* after entry of an appealable order or judgment . . . ." Haw. R. Civ. P. 54(d)(2)(B) (emphasis added). Section 101-27 does not "otherwise provide."

reference to the bizarre and bad faith procedure of filing more than one concurrent eminent domain proceeding seeking the same relief, and the plain statutory language must be respected. *See Peterson v. Hawaii Elec. Light Co.*, 85 Haw. 322, 328, 944 P.2d 1265, 1270-1271 (1997) (the fundamental starting point for statutory interpretation is the language of the statute itself). Section 101-27 was designed to prevent, among other things, the government strategy of "expensing" property owners into submission with repeated eminent domain lawsuits to drain their coffers. The statute plainly places the risk of getting it wrong on the condemnor, not property owners, and treats each condemnation lawsuit separately. Section 101-27 refers to "proceedings," which means a single eminent domain lawsuit, not several. *See, e.g., State v. Davis*, 53 Haw. 582, 585, 499 P.2d 663, 667 (1972) (under § 101-27, judgment in "*an* eminent domain proceeding" is not to be deemed in favor of the landowner unless the property is not finally taken for public use) (emphasis added). Other parts of the eminent domain law, Haw. Rev. Stat. ch. 101, also use the term "proceedings," and plainly mean a single condemnation action. For example, § 101-13, the statute that governs county condemnations, provides:

> Whenever any county deems it advisable or necessary to exercise the right of eminent domain in the furtherance of any governmental power, the *proceedings* may be instituted as provided in section 101-24 after the governing authority (county council, or other governing board in the case of an independent board having control of its own funds) of the county has authorized *such suit* by resolution duly passed, or adopted and approved, as the case may be.

Haw. Rev. Stat. § 101-13 (1993) (emphasis added). Note that the statute treats "the proceedings" as a single suit by later use of the term "such suit," meaning "one." *See also id.* § 101-12 (rules of evidence apply to eminent domain "proceedings"); *id.* § 101-14 ("Any county may institute proceedings in the name and on behalf of the county for the condemnation of property within the county . . ."); *id.* § 101-18 ("Whenever two or more parcels of real property, or different interests in the same parcel of real property or improvements on real property or personal property in connection therewith, are to be acquired by *eminent domain proceedings* by two or more governmental agencies . . .") (emphasis added); *id.* § 101-19 ("In all *proceedings* under this part the court shall have the power at any stage of the *proceeding* to allow amendments in form or substance in any complaint . . .") (emphasis added). The terms "proceedings" and "not finally taken for public use"

in § 101-27 must be read the same way. Haw. Rev. Stat. § 1-16 (1993) ("Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another."). *See also Kahoohanohano v. Dep't of Human Services*, ___ Haw. ___, ___,178 P.3d 538, ___ (2008) (same).

Even if the term "finally taken" is deemed ambiguous and the Court may thus go beyond the plain text of the § 101-27, the legislative history of that section contains no indication whatsoever that the Legislature intended the government would be liable for damages only if it were *never* able to take the property over the course of multiple eminent domain proceedings. Instead, the report in the 1937 Territorial House Journal only contemplates a *single* eminent domain proceeding:

> If the court, after decision of *the case*, finds that the defendant is entitled to additional compensation, the defendant recovers interest on this additional amount from the date of entry of judgment to the date of final payment. After *the proceedings* are dismissed or abandoned by the plaintiff, the money theretofore deposited in court and paid to the defendant is to be used first to reimburse the defendant for his damages, costs and expenses (to be determined by the court or by a referee) and then judgment is to be entered against the defendant for the excess.

1937 Haw. House J. 1243 (emphasis added).

3. The Legislature Did Not Enable Serial Eminent Domain Abuse

County may have the ability to repeatedly try to condemn the Richards Family's property if earlier attempts fail, but it cannot do so without consequence, and it certainly cannot force the property owner to bear the economic and personal costs of repeatedly being the target of failed condemnation attempts. A contrary rule would actively encourage government to engage in endless attempts to seize land without regard to whether it does so properly or not. There would be no downside if County could avoid liability under § 101-27 by doing what it did here – file another case without dismissing the first. While property owners might may be able to defend themselves against endless "do-overs" by the government if the government must pay damages when it gets it wrong, there is no property owner with deep enough pockets to resist repeated attempts if it – and not the government – had to bear the risk of government's errors. In eminent domain, government, not innocent property owners, bears the risk that government gets it wrong:

> At one time, certain instrumentalities possessing the power of eminent domain were abusing the privilege by bringing successive actions to condemn parcels of land with no intention of prosecuting to a conclusion. Thereby they "expensed" the property owner into submission to whatever terms should be offered. To defeat this practice, the Legislature provided that the condemner should stand the expense of litigation begun and then abandoned.

Torrance Unified School Dist. of Los Angeles County v. Alwag, 302 P.2d 881, 882 (Cal. Ct. App. 1956).

Interpreting the term "finally taken" to mean anything beyond a single, discrete eminent domain lawsuit would transform that statute from one designed to *remedy* eminent domain abuse into one that *encourages* it, a plainly unintended and absurd result. *Cf. Coon v. City and County of Honolulu*, 98 Haw. 233, 250, 47 P.3d 348, 365 (2002) (rules of statutory construction require rejection of interpretation of a statute that renders any part of the statutory language a nullity).

The utter wrongness of County's argument is illustrated by its potential bizarre impacts on innocent property owners: County asserted that § 101-27 enables it to keep filing eminent domain actions against innocent property owners without any consequences whatsoever until it finally succeeds or fails. In other words, according to County, § 101-27 only requires it to make a property owner whole if County is prohibited from *ever* taking the property. Under that standard, damages could almost *never* be awarded, for who knows whether County, having lost the first, second, third, or twentieth attempt to take property, might eventually get it right in the future? Indeed, County advanced that very argument in the circuit court, claiming that because it would (it claimed) eventually be successful in taking the Richards Family's property, it could not be held liable under § 101-27 for its failure to do so in Condemnation #1. R. Vol. 27, at 01056. As limitations on the fundamental right to property, eminent domain statutes are strictly construed against the condemnor, and in favor of innocent owners who have done absolutely nothing wrong except own land government (or, in this case, Oceanside) covets. *Marks v. Ackerman*, 39 Haw. 53 (1951). *See also Torrance Unified School Dist.*, 302 P.2d at 883 (an action to take private property is not of the same nature as ordinary civil litigation; there is no defendant alleged to have perpetrated some wrong upon the plaintiff).

We can safely presume that in enacting statutes such as § 101-27, the Legislature did not intend to be an enabler of dysfunctional and abusive government conduct. The Legislature surely could not have intended in § 101-27 to *encourage* local governments to become serial takers and keep pressing forward in repeated condemnation lawsuits without consequence, until they finally win one, or the property owner is bankrupted.

4. Rule 42 Consolidation Did Not Relieve County Of Its § 101-27 Obligation

The circuit court's consolidation of the two condemnation actions did not relieve County of its § 101-27 obligation to make the Richards Family whole after the court denied County relief in Condemnation #1. In other words, even though the circuit court held that County could take the Richards Family's property in Condemnation #2 does not mean that it was "finally taken for public use" for purposes of § 101-27.

The circuit court consolidated the cases pursuant to Haw. R. Civ. P. 42(a), which allows consolidation for convenience, and does not merge two separate lawsuits into one:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Haw. R. Civ. P. 42(a); *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another"). By any metric of how "success" in litigation is defined, County did not take the Richards Family's property in Civil No. 00-1-0181K, and that the circuit court's conclusion in that case that the Richards Family was absolutely and utterly successful is unassailable, since the court's final judgment in Civil No. 00-1-0181K has not been appealed. A *failed* condemnation does not morph into a *successful* condemnation just because a subsequent attempt (or in this instance, a concurrent attempt) seeking the same relief happens to work. All that is important for purposes of § 101-27 is that County did not acquire the property it sought to condemn in Civil No. 00-1-0181K.

The circuit court should have awarded the Richards Family damages within 90 days of its request, and the issue should be remanded for calculation of the damages.

B. CIRCUIT COURTS LACK JURISDICTION TO SIMULTANEOUSLY CONSIDER TWO EMINENT DOMAIN ACTIONS AGAINST THE SAME OWNER FOR THE SAME RELIEF

1. Two Eminent Domain Actions Seeking The Same Relief Cannot Be Pending In The Same Court At The Same Time

To succeed in this appeal, County must convince this Court to accept a patently transparent charade: that Condemnation #1 and Condemnation #2 were different causes, even though the court was the same, the parties were the same, and the relief was the same (property for the same Hokulia access road; the only differences in the legal description of the Richards Family's property in Condemnation #1 and Condemnation #2 were minor, at best).

The circuit court accepted County's pretense, holding that the causes were different because of "sufficient attenuation" between County's two resolutions. R. Vol. 26, at 01031. The circuit court is wrong, and its plainest jurisdictional error was to allow two eminent domain actions by the Same plaintiff, against the same defendant, for the same relief, to proceed simultaneously in the same court. Under the doctrine of abatement, a court is without power to consider two lawsuits between the same parties seeking the same relief at the same time. *Matsushita v. Container Home Supply*, 6 Haw. App. 439, 446, 726 P.2d 273, 278 (1986) (abatement requires dismissal of suit #2 when the party in suit #2 is the same as in suit #1, and the cause is the same, and the relief sought is the same); *Shelton Engineering Contractors, Ltd. v. Hawaiian Pacific Indus. Inc.*, 51 Haw. 242, 249, 456 P.2d 222, 226 (1969) (abatement remedy is jurisdictional dismissal). As this Court held in *Matsushita*, when it raised abatement *sua sponte*:

> Our supreme court has stated that where the party is the same in a pending suit, and the cause is the same and the relief is the same, a good plea in abatement lies. The common law plea in abatement has been abolished by Rule 7(c), HRCP (1981). However, abatement as a defense may be raised by a motion for dismissal.
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> Upon remand of this case, we direct that Matsushita dismiss Civil No. 85-0015(1) and proceed with this case.

Matsushita, 6 Haw. App. at 446, 726 P.2d at 278 (citing *Shelton Engineering*, 51 Haw. at 249, 456 P.2d at 226 ("The Hawaii cases clearly indicate that where the party is the same in a pending suit,

and the cause is the same and the relief is the same, a good plea in abatement lies."); *Yee Hop v. Nakuina*, 25 Haw. 205 (1919); *Oahu Lumber & Building Co. v. Ah Yok*, 11 Haw. 416 (1898)).

This is hardly new territory, and abatement is a straightforward application of black-letter law:

> Where a claim involves the same subject matter and parties as a previously filed action, so that the same facts and issues are presented, resolution should occur through the prior action, and a second suit should be dismissed. It is fundamental that a plaintiff is not authorized simply to ignore a prior action and bring a second, independent action on the same state of fact while the original action is pending.

1 AM. JUR. 2d *Abatement* § 6, at 89 (2005). Because Condemnation #2 was instituted by County while Condemnation #1 was still pending, the circuit court should have dismissed Condemnation #2 immediately.

2. Abatement Trumps A Second Condemnation To Counter Deficiencies Raised By Landowner In The First Condemnation

There is a dearth of reported cases abating serial eminent domain actions because the same condemnor already is seeking the same relief from the same owner in the same court. This lack of reported authority perhaps stems from the fact that County's strategy of piling on multiple eminent domain lawsuits is so patently wrong and so outside the acceptable and constitutional limitations of government conduct, that no other government either locally or nationally has had the audacity to attempt it.

There exists, however, one reported case where the court held that a second eminent domain suit filed to correct government's errors in an earlier-filed eminent domain suit should have been abated and dismissed by the trial court. *City of Ocala v. Red Oak Farm*, 636 So. 2d 97 (Fla. Dist. Ct. App. 1994). In that case, the city instituted an eminent domain action which was dismissed by the trial court on procedural grounds. *Id.* at 97. The city appealed, and while the appeal was pending – like County in the case at bar – the city filed a second eminent domain proceeding to take the same land as the first case. Like County in the instant case, the City of Ocala claimed that the two actions were "separate and distinct because they proceeded differently in the second action . . . [since] the new action was *filed to correct the deficiencies that [the property owner] had*

raised in the first action." *Id.* (emphasis added). The court of appeals disagreed, holding that the second eminent domain action was abated, and should have been dismissed:

> [T]he actions are the same. There is no doubt that the parties are the same, the land is the same, the trial court is the same, and the resulting taking of the parcel is the same as the action presently pending before this court. The failure to abate the second action was a departure from the essential requirements of law.

Id.

Similarly, in *Maxey v. Redevelopment Authority of Racine*, 288 N.W.2d 794, 803 (Wis. 1980) the court abated an eminent domain action because the court was already considering the landowner's earlier-filed claim for inverse condemnation for the same property:

> It is apparent if as we hold herein that the inverse action should have proceeded that the court was without authority to proceed on the direct condemnation action brought by the Redevelopment Authority of the City of Racine, which action is the subject of the appeal in Case No. 78-689. Because both the Circuit Court and the Condemnation Commission were *without jurisdiction in that case, the appeal is dismissed and the cause remanded with directions to vacate the findings of the Circuit Court and of the Condemnation Commission.*

Id. (emphasis added). "Inverse condemnation" is a cause of action that is substantially similar to an affirmative exercise of eminent domain, the difference being that in an inverse condemnation action, the landowner is the plaintiff, and seeks compensation when the government has not acknowledged the taking. *See, e.g., Allen v. City and County of Honolulu*, 58 Haw. 432, 438-39, 571 P.2d 328, 331 (1977).

3. When Two Lawsuits Seek The Same Relief, The "Cause" Is The Same

There are three elements which must be shown to abate a later-filed case: an already-pending action with (1) the same parties, (2) the same "cause," and (3) the same relief. *Shelton Engineering*, 51 Haw. at 249, 456 P.2d at 226. In the case at bar, there is no dispute that when Condemnation #2 was filed, the circuit court was already considering Condemnation #1, which involved the same parties, County, the Richards Family, and Oceanside. There is also no dispute that

both cases sought the same relief, taking of the Richards Family's property for the Hokulia access road.[11]

Thus, the only issue is whether Condemnation #1 and Condemnation #2 were the same "cause." The circuit court determined that the "cause" in Condemnation #2 was sufficiently different than in Condemnation #1 because Resolution 266-00 (App. 3) was different than Resolution 31-03 (App. 5).[12] However, the Hawaii Supreme Court long ago recognized that for the "cause" to be different for purposes of abatement, it must seek different relief upon a different cause of action. For example, in *Oahu Lumber & Building Co. v. Ah Yok*, 11 Haw. 416 (1898), the court held that the pendency of a prior ejectment action did not abate a later-filed action for summary possession, "since the causes of action are different." *Id.* at 418. The court held that a plea in abatement "should show distinctly that the causes of action are the same." *Id.* at 419. In the case at bar, the causes of action – condemnation – are precisely the same, and County seeks to take essentially the same Richards Family property in Condemnation #2 that it was already trying to take in Condemnation #1. Further, County's goal was the same in both cases: take property for Hokulia's access road. *See State* ex rel. *Dunger v. Mummert*, 871 S.W.2d 609, 611 (Mo. Ct. App. 1994) (circuit court was "without jurisdiction" to try a subsequent suit where a prior suit was pending and "[t]he object and purpose of the two actions and the principles of law relied upon [were] . . . the same"). The circuit court's jurisdictional error in this case is most plainly revealed by comparing County's Complaints in the two cases. The two Complaints (R. Vol. 1 at 00001 and R. Vol. 1, at

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11. Note that were the condemnations filed in separate courts by different condemnors, the second case might not be abated. *See, e.g., Alabama Power Co. v. Gulf Power Co.*, 283 F. 606, 608 (M.D. Ala. 1922) (separate eminent domain actions in state and federal court were not abated). That is not the situation in the case at bar, however, and is a far cry from the same plaintiff instituting a nearly identical condemnation action in the same court, as County did here.

12. The only other difference between Condemnation #1 and Condemnation #2 was the legal description of the metes and bounds of the Richards Family property sought by County. In Condemnation #2, County expanded the width of the taking slightly. This is an immaterial distinction. Condemnation complaints are often amended after filing to slightly alter the description of the property. Haw. Rev. Stat. § 101-19 (1993) ("In all proceedings under this part the court shall have power at any stage of the proceeding to allow amendment in form or substance in any complaint . . . or other proceeding, *including amendment in the description of the lands sought to be condemned* . . . .") (emphasis added).

00701) are nearly identical, with the exception that the Condemnation #2 Complaint is sanitized of any express reference to the Development Agreement, and thus, as in *Red Oak Farm*, it is plain that Condemnation #2 was filed to correct the "deficiencies" in Condemnation #1. *Compare* App. 4 *with* App. 6.

Because the cause in Condemnation #2 was the same as the already-pending Condemnation #1, the later-filed action should have been abated and dismissed for lack of subject matter jurisdiction.

4. Subjecting Property Owners To Concurrent Condemnations Violates Due Process

The policies underlying the abatement doctrine – prevention of vexatious litigation, judicial economy, and to protect the courts from the possibility of inconsistent judgments – are heightened when government is exercising the power of eminent domain, the sovereign power to seize property, and the abatement doctrine has special resonance in condemnation because, as the Hawaii Supreme Court held in *Marks*, the exercises of the power must be reviewed strictly against the government and liberally in favor of the property owner. *Marks*, 39 Haw. at 58-59 ("To effectuate [the legislative intent to protect landowner's due process rights], those provisions should be construed liberally in favor of the landowner as to remedy in so far as they are in harmony with the common-law principles and constitutional guarantees protecting private property. But they should be construed strictly against the condemnor as to right to enter the land of the landowner without his consent in so far as they are in derogation of such principles and guarantees."). Property owners are entitled to due process in eminent domain proceedings. *Id.* ("The manifest legislative intent underlying the provisions [of eminent domain statutes] is not only to insure due process of law for any taking of property before final judgment in an action of eminent domain but to give the landowner in possession a perfectly fair and adequate remedy . . . ."). *See also Brody v. Vill. of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005) (government had obligation to inform landowner of short time frame to challenge blight designation in eminent domain); *Harrison Redev. Agency v. DeRose*, 942 A.2d 59 (N.J. Super. 2008) (same). Due process and fundamental fairness in eminent domain proceedings are absolute requirements, even if great difficulty for the government results. *See, e.g.*, *Divine v. Town of Nantucket*, 870 N.E.2d 591, 600 (Mass. 2007) (invalidating a 40-year old condemnation because landowner was not provided notice in 1968, and strict compliance with the

eminent domain statutes was required). Due process is violated when a property owner is forced to endure concurrent attempts to condemn the same land. If defending two concurrent condemnation attempts does not offend due process, how many would? Three? Five? Twenty?

County did not lack alternatives. It could have dismissed Condemnation #1, paid § 101-27 damages, and then filed Condemnation #2. It could have amended Condemnation #1, as the circuit court repeatedly invited it to do. *See* Haw. Rev. Stat. § 101-19 (1993) ("In all proceedings under this part the court shall have power at any stage of the proceeding to allow amendment in form or substance in any complaint . . . ."). But instead of availing itself of these opportunities, County opted to make the problem exponentially worse, and simply piled on another proceeding.

5. Consolidation Cannot Create Subject Matter Jurisdiction

Rather than dismiss Condemnation #2 for lack of jurisdiction, the circuit court consolidated it with Condemnation #1 for trial pursuant to Haw. R. Civ. P. 42(a). R. Vol. 1, at 00707. As noted *supra* at section IV.A.4, Rule 42(a) consolidation is for convenience and efficiency, and does not effect a merger of two lawsuits into one cause. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another"). Abatement is a matter of subject matter jurisdiction, *Shelton Engineering*, 51 Haw. at 249, 456 P.2d at 226, and cannot be waived by the parties or the court. Therefore, consolidation did not relieve County of the obligation to demonstrate subject matter jurisdiction in Condemnation #2, since consolidation does not obviate the need for the plaintiff to establish subject matter jurisdiction in both lawsuits. *See International Soc. for Krishna Consciousness, Inc. v. City of Los Angeles*, 611 F. Supp. 315, 316-20 (C.D. Cal. 1984) (consolidation did not create subject matter jurisdiction in second suit). The plaintiff has the burden of establishing subject matter jurisdiction in both suits even when consolidated, and each action must be analyzed independently when determining whether there is jurisdiction. 8 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 42.13[4][a], at 42-30 (3d ed. 2007). ("Nor are the courts permitted to treat the actions as merged when analyzing jurisdictional issues."). Accordingly, although it did not abate Condemnation #2, the circuit court continued to treat both cases as separate, eventually issuing separate Findings of Facts and Conclusions of Law in each case, and rendering separate judgments. R. Vol. 27, at 01031(App. 1).

Indeed, rather than curing the prejudice brought about by having to defend concurrent attempts to take its property, consolidation visited upon the Richards Family the very injuries – duplicative, vexatious litigation and never-ending uncertainty about which action County was prosecuting – application of the abatement doctrine is supposed to avoid. *See* 1 AM. JUR. 2d *Abatement* § 6, at 89-90 (2005) ("The purpose of the defense of abatement by reason of another action pending is to protect a party from harassment by having to defend several suits on the same cause of action at the same time.") (footnote omitted). The consolidated trial of these cases was trial by ambush at its worst: County steadfastly refused to elect to proceed on one Complaint or the other, and maintained that it could take the Richards Family's property in either Condemnation #1, or Condemnation #2, or both. Instead of electing Condemnation #1 or #2, amending Condemnation #1, or clarifying its position, County simply ignored the circuit court when it demanded that County elect one action or the other.[13]

If County prevails in this case and establishes the proposition that the way to address deficiencies in an eminent domain action is to institute *another* eminent domain case without dismissing the first, there will be end to the number of cases a government may file.

C. THE CIRCUIT COURT CANNOT MERELY ACCEPT THE GOVERNMENT'S WORD THAT A TAKING IS FOR PUBLIC USE[14]

Takings of private property – under both the U.S. Constitution's Public Use Clause, and article I, section 20 of the Hawaii Constitution – must be "for public use." U.S. Const. amend. V; Haw. Const. art. I, § 20. While courts should be deferential to the government's assertions of public use, *State v. Anderson*, 56 Haw. 566, 545 P.2d 1175 (1976), this does not mean that the decision of the legislature is conclusive, and the public use question is judicial in nature and is decided on the facts and circumstances of each case. *Hawaii Hous. Auth. v. Ajimine*, 39 Haw. 543 (1952). Courts are not "rubber stamps" to claims that a taking is for public use. *49 WB, LLC v. Vill. of Haverstraw*, 839 N.Y.S.2d 127, 135 (N.Y. App. Div. 2007); *Winger v. Aires*, 89 A.2d 521, 522

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13. As noted supra at note 7, as of the date of this brief, the circuit court clerk has not completed indexing the Record.

14. If this Court does not abate Condemnation #2, it will be required to address the federal issues.

(Pa. 1952) ("There is no authority under our form of government that is unlimited. The genius of our democracy springs from the bedrock foundation on which rests the proposition that office is held by no one whose orders, commands or directives are not subject to review."). As the Court held in *Kelo v. New London*, 545 U.S. 469, 477 (2005), "it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." The Court added, "[n]or would the [government] be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.* at 477-78 (footnotes omitted).

In Condemnation #2, the circuit court did not look beyond County's Resolution 31-03 to conclude that it satisfied both the federal and Hawaii public use requirements. R. Vol. 27, at 01031 (FOF/COL ¶ 93). It was required to do more and address the Richards Family's claim that the asserted public use was a pretext – as in Condemnation #1 – to hide the predominantly private benefit of the Hokulia access road to Oceanside. Especially since it struck down the attempted taking in Condemnation #1 for lack of public use.

This issue has been hotly debated since the U.S. Supreme Court's decision in *Kelo*, resulting in split courts nationwide; a decision affirming the circuit court if this Court deems it necessary to reach the issue – will further add to the split. *Compare Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007) (court must examine claims of pretext and cannot rely only on government's assertions that a taking is for public use) *with Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008) (court "need not go further" than government's claim). *See also MiPro Homes, LLC v. Mount Laurel Township*, 910 A.2d 617 (N.J. 2006) (per curiam), *cert. denied*, 128 S. Ct. 46 (2007) (same issue). The Second Circuit's *Goldstein* decision is the subject of recently-filed petition for certiorari. *See Goldstein v. Pataki*, No. 07-1247 (*petition for cert. filed* Mar. 31, 2008) (docket report available at http://www.supremecourtus.gov/docket/07-1247.htm).

In the case at bar, the circuit court should not have stopped at Resolution 31-03, but should have followed the roadmap to analyzing claims of pretext laid out by Justice Kennedy in his concurring opinion in *Kelo*:

> A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under

> the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

Kelo, 545 U.S. at 491 (Kennedy, J., concurring). Justice Kennedy added:

> A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose.

Id. See also 99 Cents Only Stores v. Lancaster Redev. Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001); *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203 (C.D. Cal. 2002); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003). It was error for the circuit court to not undertake this analysis in Condemnation #2.

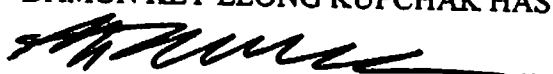
V.
CONCLUSION

For the foregoing reasons, the order denying the Richards Family's motion for damages pursuant to Haw. Rev. Stat. § 101-27 (1993) should be vacated and the case remanded for an award of damages. Additionally, the First Amended Final Judgment (Sep. 27, 2007) in Civil No. 05-1-015K should be vacated, and the case dismissed for lack of subject matter jurisdiction. Alternatively, if this Court determines that the circuit court had subject matter jurisdiction in Civil No. 05-1-015K, the First Amended Final Judgment in that case should be reversed and the case remanded to the circuit court for further consideration.

DATED: Honolulu, Hawaii, April 9, 2008.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT



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