No. 28822

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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| COUNTY OF HAWAII, a municipal corporation,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>C&J COUPE FAMILY LIMITED PARTNERSHIP,<br><br>Defendant-Appellant,<br><br>and<br><br>ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; MILES HUGH WILSON, *et al.*,<br><br>Defendants. | CIVIL NO. 05-1-015K<br>(Kona) (Condemnation)<br><br>APPEAL FROM FIRST AMENDED FINAL JUDGMENT<br>(filed September 27, 2007)<br><br>THIRD CIRCUIT COURT<br><br>Honorable Ronald Ibarra, Judge |
| COUNTY OF HAWAII, a municipal corporation,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; C&J COUPE FAMILY LIMITED PARTNERSHIP; MILES HUGH WILSON, *et al.*,<br><br>Defendants-Appellants. | CIVIL NO. 00-1-181K<br>(Kona) (Condemnation)<br><br>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)<br><br>THIRD CIRCUIT COURT<br><br>Honorable Ronald Ibarra, Judge |

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**REPLY BRIEF FOR THE APPELLANT**

**APPENDICES "7" – "11"**

**CERTIFICATE OF SERVICE**

KENNETH R. KUPCHAK 1085-0
ROBERT H. THOMAS 4610-0
MARK M. MURAKAMI 7342-0
CHRISTI-ANNE H. KUDO CHOCK 8893-0

DAMON KEY LEONG KUPCHAK HASTERT
1600 Pauahi Tower
1003 Bishop Street
Honolulu, Hawaii 96813
**www.hawaiilawyer.com**
Telephone: (808) 531-8031
Facsimile: (808) 533-2242

Attorneys for Defendant-Appellant
C & J COUPE FAMILY LIMITED
PARTNERSHIP

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## REPLY BRIEF FOR THE APPELLANT

The County of Hawaii asks this Court to validate a remarkable assertion: County may immunize itself from its statutory duty to make a property owner whole after a failed condemnation simply by instituting another taking before the first is completed. If the second condemnation action also runs into trouble, file another. And so on. Eventually, County argues, we will win. Resistance is futile.

To reach this result, County would have the Court: (1) ignore the plain language and intent of Haw. Rev. Stat. § 101-27 (1993), (2) rewrite Hawaii Supreme Court precedent on what constitutes a different "cause" for purposes of abatement and whether that doctrine is jurisdictional,[1] and (3) ignore the *Kelo* opinion of Justice Kennedy, and the other cases which require a deeper examination of government's proffered reasons for taking property.

The U.S. Supreme Court once characterized eminent domain as a barometer of "political ethics," meaning that government's integrity can be determined by how it wields the condemnation power against its own citizens. *See United States v. Cors*, 337 U.S. 325, 332 (1949). By that measure, County's treatment of the Richards Family in these cases comes up horribly short:

1. It delegated its eminent domain power to a private entity in a contract. R. Vol. 27, at 01031 (First Amended Findings of Fact, Conclusions of Law, and Order (Sep. 27, 2007) Order ¶ 35 (App. 1 to Opening Brief) ("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").

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1. *See Shelton Engineering Contractors, Ltd. v. Hawaiian Pac. Indust. Inc.*, 51 Haw. 242, 249, 456 P.2d 222, 226 (1969) (abatement is jurisdictional); *Matsushita v. Container Home Supply*, 6 Haw. App. 439, 446, 726 P.2d 273, 278 (1986) (abatement may be raised *sua sponte* or on appeal). County's brief cites authorities out of context, suggesting great care be exercised before relying upon them. For example, in at least one instance County's brief sets forth a *dissenting* opinion as authority without informing the Court it is a dissenting opinion. *See, e.g.*, County's Answering Brief ("County Br.") at 17 (citing *Bockweg v. Anderson*, 428 S.E.2d 157, 166 (N.C. 1993) (Meyer, J., dissenting)). County also relies on an *unpublished* decision from a state *trial court*. County Br. at 16 (citing *Saracino v. Hartford Financial Services Group, Inc.*, ___ A.2d ___, 2007 WL 5145671 (Conn. Super. Ct. 2007)). County also cites obvious *dicta* as case holdings. *See, e.g.*, County Br. at 17 (citing *Kehr v. Kehr*, 114 N.W.2d 26, 28 (Neb. 1962) (second case was abated, but court suggested, without analysis, that consolidation might also be available)).

2. It attempted to make the property owners whose property was taken pay for just compensation through a charge-back scheme that had no basis in law (the so-called "fair share" provision). *Id.*, Order ¶ 22, at 47 ("The condemnation and 'fair share' assessment provisions in the Development Agreement are illegal.").

3. It instituted an eminent domain suit that on its face lacked a public purpose. *Id.*, Order ¶ 1, at 46-47.

4. After the Richards Family pointed out the errors in the case and County's resulting obligation to make it whole under section 101-27, and after possession was revoked and construction was halted in its tracks, instead of dismissing and trying again, County crafted another resolution (this time redacting the blatant problems that plagued the first), and filed a second condemnation action.[2] This forced the Richards Family into a shell game in which it was left to guess which action County was prosecuting. Right up through closing arguments, County asserted it was prosecuting *both*.[3]

5. By its own admission, County continued to cloud the Richards Family's property with resolution #2 for three years so it could see how another unrelated case was resolved: "Deputy Corporation Counsel Gerald Takase testified that the three-year delay in filing this

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2. County has never revealed why it did not avoid the abatement issue entirely by simply dismissing Condemnation #1, as was its right to do. *See Territory* ex rel. *Choy v Damon*, 44 Haw. 557, 564, 356 P.2d 386, 390 (1960) ("There is no provision in our statute which requires a condemner to prosecute a condemnation proceeding to final judgment."). Given County's arguments in this appeal, in 2005 it was likely motivated by the same concerns, and believed a second suit without dismissing the existing one would maximize it chances of avoiding § 101-27 damages.

3. THE COURT: [T]here's several complaints having been filed, complaints and answer. Which is the - - so the record is clear, which is the pleading that is being tried on the issues before the Court?
. . .

MR. KAMELAMELA: Your Honor, for the County, it's the first complaint that's filed and the first amended complaint for the second suit.

R. Vol. 30 at T0016 (p. 1251).

complaint [Condemnation #2] was because the County wanted to resolve the *Kelly* case, Civil No. 00-1-0192K, before proceeding with what became Civil No. 05-1-015K." County Br. at 6 n.6.

6. At trial of County's two eminent domain lawsuits, the Richards Family had to simultaneously defend against two concurrent attempts to take its property. This was not merely academic as County suggests, and resulted in actual prejudice to the Richards Family's defenses by requiring it to muster double evidence. For example, it was forced to produce evidence proving that County's two resolutions were pretextual, and the appraiser who testified as to the value had to offer opinions about both the "2.90 Acres (more or less)" County sought in Condemnation #1, and the "3.348 Acres" it sought in Condemnation #2. *See* Appendices 7 and 8.

7. Then, after the circuit court invalidated the first condemnation for lack of public use,[4] County refused to comply with its statutory obligation to make the Richards Family whole for the damages it caused as a result of that case, because County claimed it "finally" took the property in the second case. County Br. at 10 ("On October 31, 2007, the County filed its Memorandum in Opposition to the Motion for Statutory Damages wherein it argued that HRS § 101-27 does not apply because the property was finally taken for public use where the [Richards Family was] awarded just compensation for the property [in Condemnation #2].").

8. It also asserted it did not need to make a proper deposit with the court in order to take possession of the property because even if Condemnation #2 were to be ruled invalid by this Court, County would simply bring *another* (third) eminent domain lawsuit. County Br. at 12 ("even if the Court's condemnation order in Civil No 05-1-15K is reversed on appeal, the County would not likely be required to physically restore the property because the County would simply file another condemnation action").

9. Finally, to support its arguments, County's Brief makes inconsistent and irreconcilable assertions: to avoid its section 101-27 obligation to make the Richards Family whole for failed Condemnation #1, County must argue the property in that case is the same as in

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4. Note 4 of County's Brief should be disregarded since it attempts to argue issues not appealed and not before this Court. County Br. at 4 n.4. The circuit court's conclusion that Condemnation #1 was not for public use or purpose is final and conclusive. *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" after appeals are exhausted).

Condemnation #2. County Br. at 10. Yet, to support its claim that Condemnation #2 was not abated, County asserts the property taken there was different than Condemnation #1. County Br. at 16.

If County's actions in these cases are validated by this Court, that decision will provide nothing less than a blueprint for future eminent domain abuse.

## I. "FINALLY TAKEN" MEANS IN A SINGLE CONDEMNATION, NOT SEVERAL

County advances only one non-superficial argument against imposition of section 101-27 damages for its failure to take the Richards Family's property in Condemnation #1. It asserts the "finally taken" language in the statute means it must only make an owner whole if it is forever precluded from taking property. However, as shown in the Opening Brief, the plain language of section 101-27 and the intent of the legislature demonstrate that County has a duty to make property owners whole when a *single* takings lawsuit is not successful, even if it is tried together with another case. *See* Haw. Rev. Stat. § 101-27 (1993) (if, "for any cause," property not taken in condemnation "proceedings," owner is entitled to damages). *Cf. Temple City Redev. Agency v. Bayside Drive Ltd. P'ship*, 53 Cal. Rptr. 3d 728, 730-31 (Cal. Ct. App. 2007) (California statute providing that litigation expenses "shall" be awarded whenever a condemnation action is dismissed "for any reason" "means what it says"). County's theory that it only becomes liable for 101-27 damages after *County* determines it will not attempt more condemnations is not in accord with the Hawaii Supreme Court's holding in *Marks v. Ackerman*, 39 Haw. 53, 58 (1951) that eminent domain statutes were designed to protect property owners from "arbitrary and unjust appropriation," because section 101-27 cannot be read to encourage the government to avoid its duty to pay for failed actions by filing more condemnation lawsuits. *Id.* at 58-59 (eminent domain statutes "should be construed liberally in favor of the landowner," and "construed strictly against the condemnor"). *See also State v. Allison*, 365 S.W.2d 562, 566 (Mo. 1963) (en banc) (state's rule of civil procedure prohibiting successive condemnation actions against the same property "was very obviously enacted primarily to prevent the harassment of property owners by a condemnor who might choose to seek successive awards until, perchance, it might get one which it considered favorable. Such a practice is not to be

countenanced."). County's remaining arguments against its section 101-27 obligations were addressed in the Opening Brief,[5] or are based on incorrect facts[6] or on inapplicable cases.[7]

## II. CONDEMNATION #1 AND #2 SOUGHT THE "SAME RELIEF"

Abatement requires dismissal of the second action when two pending lawsuits involve (1) the same parties, (2) the same "cause," and (3) the same relief. *Shelton Engineering Contractors, Ltd. v. Hawaiian Pac. Indust. Inc.*, 51 Haw. 242, 249, 456 P.2d 222, 226 (1969). Here, there is no dispute that the first two elements are satisfied: the parties are the same, and the "cause" – eminent domain – is the same. To save Condemnation #2, County argues: (1) abatement is not jurisdictional and may be cured by consolidation, and (2) its two condemnations sought different relief because of the difference in the amount of property sought to be condemned, and because the two cases were premised on different resolutions.

The factual differences between County's two condemnations are not material.

First, the mere fact that Condemnation #1 sought "2.90 Acres (more or less)" and Condemnation #2 sought "3.348 Acres" did not make the relief County sought in the two cases different since in both cases it sought condemnation of property for a road from Hokulia to Mamalahoa Highway.

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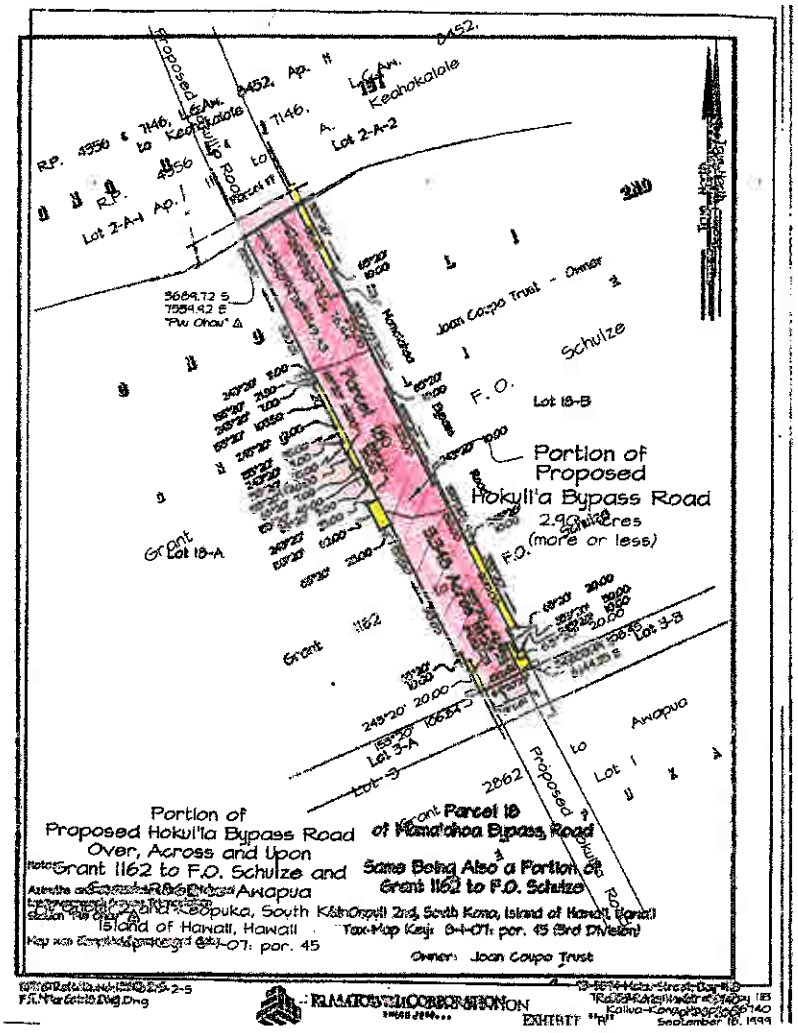
5. *See* Opening Brief at 19 n.10 (the 10-day limit only applies to jury demands). *See also Territory* ex rel. *Choy v. Damon*, 44 Haw. 557, 564, 356 P.2d 386, 391 (1960) ("Within ten days after the circuit court entered its order allowing the discontinuance as filed by the Territory, appellants filed their demand for jury trial in that court.").

6. *See, e.g.*, County Br. at 24 (arguing there was "one judgment" in these cases, when the circuit court entered separate judgments in each case); *id.* at 23 (arguing that § 101-27 does not apply when the property owners were not "restored with possession," when the circuit court vacated its order of possession in Condemnation #1 in 2002, and the Richards Family remained in possession until the circuit court gave County possession in Condemnation #2 in 2007).

7. *See, e.g.*, County Br. at 23 n. 14, which cites *State v. Davis*, 53 Haw. 582, 585, 499 P.2d 663, 666 (1972) for the proposition that § 101-27 indemnification only applies if the property is not taken for public use. True enough, but County implies that *Davis* held "finally taken" means after more than one eminent domain lawsuit, when that case held no such thing. First, *Davis* involved the question of whether attorney's fees and costs could be considered part of just compensation awarded to property owners. The court held no. *Id.* at 587, 499 P.2d at 687-88. Second, the case involved a single attempt to take property, which was successful, not a series of concurrent condemnation cases.

Overlaying the maps attached to the resolutions (Apps. 7 & 8) shows the property to be taken was substantially the same (the red portions show the 2.90 Acres (more or less), and the yellow show the excess resulting in 3.348 Acres:




*See* App. 9 (a full-size color overlay of Apps. 7 & 8). *See also State v. Allison*, 365 S.W.2d 562 (Mo. 1963) (en banc) (state rule prohibiting successive condemnation attempts against the "same property" does not mean that the takings must seek exactly the same parcels, but they should "comprise *substantially* the same property in order to come within this prohibition." *Id.* at 566 (emphasis original).[8]

8. Indeed, County equated "2.9 0 Acres (more or less)" with "3.348 Acres" during closing (continued...)

The Hawaii cases show that for the second action to be considered different from the first, the relief sought must actually be legally and materially distinct. *See, e.g., Oahu Lumber & Building Co. v. Ah Yok*, 11 Haw. 416, 418 (1898) (case #1 was for ejectment which sought ruling on title, while case #2 was for summary possession, which sought possession for breach of lease); *Shelton Engineering*, 51 Haw. at 247-48, 456 P.2d at 225-26 (assumpsit action is different than an action to foreclose a mechanic's lien). Other jurisdictions are in accord. *See, e.g., Cumberland Farms, Inc. v. Town of Groton*, 719 A.2d 465, 476 (Conn. 1998) ("As indicated above, an administrative appeal [for denial of a variance] and an inverse condemnation action are distinct actions that raise distinct claims and seek distinct remedies.").[9] County's arguments in this appeal also differ from its original position where it admitted the cases involved the "same parties," the "same land," and the "same relief" –

> MR. KAMELAMELA: So this case alone, your Honor, doesn't really say that abatement should be appropriate under the kind of facts that we have here. We have the same party, that's true.
>
> THE COURT: Same land.
>
> MR. KAMELAMELA: Same land.
>
> THE COURT: Same relief.
>
> MR. KAMELAMELA: Same relief. But I think there's a difference only because we have now the legislative body itself.
>
> THE COURT: So why can't you add it to the first lawsuit?
>
> MR. KAMELAMELA: (No response.)

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8. (...continued)
argument. When asked by the court whether County could amend the Complaint in Condemnation #1, County replied: "In the first complaint it says 2.9 acres, more or less. So perhaps there's nothing to amend." R. Vol. 30, at T0021 (p. 1723).

9. Abatement is also known in some jurisdictions as the "pending prior action doctrine." "The pendency of a prior suit of the same character, between the same parties, brought to obtain the same end or object, is, at common law, good cause for abatement. It is so, because there cannot be any reason or necessity for bringing the second, and, therefore, it must be oppressive and vexatious." *Halpern v. Board of Educ.*, 495 A.2d 264 (Conn. 1985); *Cumberland Farms, Inc. v. Town of Groton*, 719 A.2d 465, 476 (Conn. 1998).

Transcript of Proceedings at 21, Civil No. 05-1-015K (Hearing on Defendant's Motion to Dismiss or in the Alternative to Consolidate with Civil No. 00-1-181K) (Mar. 2, 2005) (attached as App. 10).

Second, County's redaction of references to the Development Agreement in the resolution on which Condemnation #2 was based – a process over which it exercised 100% control -- did not make the relief sought by County in Condemnation #2 materially different from the relief in Condemnation #1.[10] County's acknowledged goal in both cases remained the taking of the Richards Family's property for Hokulia's road.

County also asserts that abatement is not jurisdictional, but its claim flies in the face of the holdings of the Hawaii Supreme Court and this Court in *Shelton Engineering*, 51 Haw. at 249, 456 P.2d at 226, and *Matsushita v. Container Home Supply*, 6 Haw. App. 439, 446, 726 P.2d 273, 278 (1986), that a court lacks subject matter jurisdiction over the second-filed suit and must dismiss. As a jurisdictional issue, it cannot be cured by procedural consolidation under Haw. R. Civ. P. 42. *See, e.g., Matsushita*, 6 Haw. App. at 446, 726 P.2d at 278 (this Court *sua sponte* abated the second-filed lawsuit and ordered it dismissed).[11]

## III. JUSTICE KENNEDY'S *KELO* OPINION SHOULD NOT BE DISREGARDED

Finally, County asks this Court to hold that government's pronouncements of its reasons for taking property are conclusive, and to invest it with virtually unassailable authority in an area of law in which it already exercises nearly absolute power. County minimizes the import

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10. Condemnation lawsuits are unlike any other form of civil proceeding, because the government is in nearly complete control of the facts and circumstances. *Torrance Unified School Dist. of Los Angeles County v. Alwag*, 302 P.2d 881, 883 (Cal. Ct. App. 1956) (condemnation actions are not like ordinary civil litigation because the defendant is not alleged to have committed some wrong). The government decides what property it wants. It alone drafts the resolution of taking, and decides what language to include and whether to exclude information that could damage its case. If County increased the area of land taken, it should be easy to see how it could also edit the resolution to sanitize it of references to the Development Agreement. It alone decides when to institute the lawsuit and when to serve the complaint on the landowner (as most readily illustrated by the fact that County waited for three years after it crafted the second resolution to institute Condemnation #2 because it "wanted to resolve the *Kelly* case" first, County Br. at 6 n.6, and the fact that even after the complaint was filed, County did not serve it upon the Richards Family who had to find out about it in the newspaper).

11. As noted in the Opening Brief at 30, consolidation exposed the Richards Family to the very harms – vexatious litigation, and continuous uncertainty as to which case County was prosecuting – that abatement is supposed to avoid.

of the opinion of Justice Anthony Kennedy (the U.S. Supreme Court's swing vote[12]) in *Kelo*, which stated that courts should take allegations of pretext "seriously" and look beyond government's self-serving pronouncements of why it is taking property. While deference to legislative determinations may be deserved when government is acting transparently, it makes no sense simply to take County's word that the resolution supporting Condemnation #2 is a genuine statement of its reasons when the context in which it arose is examined.

In Condemnation #2, the circuit court did not look beyond County's Resolution 31-03 to conclude that the taking satisfied both the federal and Hawaii public use requirements. R. Vol. 27, at 01031 (FOF/COL ¶ 93). County's claim that the circuit court considered – but rejected – evidence of pretext is belied by the court's Findings of Fact and Conclusions of Law in Condemnation #2 which are devoid of any reference to evidence regarding public use beyond the fact the second resolution does not use the words "Development Agreement," and the resolution was approved by a county council comprised of different members. Yet, County was still the County and the Development Agreement's obligations, and the spectre that Oceanside would hold County in breach of the contract if it did not condemn still hung over County's head when it approved the second resolution. *See* R. Vol. 29, at 1057 (J-203) (memo from R.T. "Dick" Frye to Phil Schneider (Nov. 17, 1997) (attached as App. 11). The circuit court was required to do more than simply accept County's assertions at face value, and it should have considered evidence the resolution in Condemnation #2 simply hid the pretext better, especially since the court invalidated the attempted taking in Condemnation #1.

## IV. CONCLUSION

For the foregoing reasons, and the reasons in the Opening Brief, the order denying the Richards Family's motion for damages pursuant to Haw. Rev. Stat. § 101-27 (1993) in Civil No. 00-1-181K should be vacated and the case remanded for an award of "all such damage as may have been

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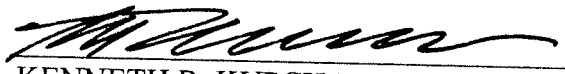
12. *See* Adam Cohen, *Anthony Kennedy Is Ready for His Close Up*, N.Y. Times (Apr. 3, 2006) <http://www.nytimes.com/2006/04/03/opinion/03mon4.html> ("these days, the law is pretty much what Justice Kennedy says it is . . . [t]hat means that until [the Court's] membership changes again, he is likely often, although certainly not always, to have the final word . . ."); Bill Mears, *Justice Kennedy works on his swing*, CNN.com (Sep. 29, 2006) <http://www.cnn.com/2006/LAW/09/25/scotus.kennedy/index.html> ("Kennedy, a moderate-conservative, is in the eyes of many legal scholars the court's new power broker. . . 'The basic principle is, it's Justice Kennedy's world and you just live in it,' said Thomas Goldstein, a private attorney who practices regularly before the Supreme Court, speaking tongue-in-cheek.").

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." Haw. Rev. Stat. § 101-27 (1993). *See, e.g., Territory* ex rel. *Choy v. Damon*, 44 Haw. 557, 564, 356 P.2d 386, 391 (1960) (case remanded to circuit court for damage award after state discontinued condemnation). 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 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 of evidence of pretext and taking for a predominantly private purpose.

DATED: Honolulu, Hawaii, June 2, 2008.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT



KENNETH R. KUPCHAK
ROBERT H. THOMAS
MARK M. MURAKAMI
CHRISTI-ANNE H. KUDO CHOCK

Attorneys for Defendant-Appellant
C & J COUPE FAMILY LIMITED
PARTNERSHIP