

Dear Ocean Resort Timeshare owners (and any other interested parties) -

Various county agencies, to include the Real Property Assessment Division, the Maui County Council, the Mayor's Office, and the Department of Corporation have received your many communications regarding phone calls, e-Mails, and the tax bill you received from your vacation owners association at the Westin Ka'anapali Ocean Resort Villas, related to and regarding an amended real property tax assessment which the County of Maui has sent to your vacation owners associations. The County of Maui has also become aware of a Facebook ad you may have seen, and robo-calls you may have received as related to the assessment.

We do not know if you are aware that your vacation owners timeshare associations have brought two lawsuits against the County of Maui as related to past real property taxes assessed by the Real Property Assessment Division. Your vacation owners timeshare associations have alleged and are seeking purported damages of \$30 million, purportedly on behalf of their members as the purported difference in taxes previously assessed from at least 2005 to the present in one of those lawsuits. The assessment was made by the Real Property Assessment Division of the Department of Finance, not the Maui County Council. The assessment is only as to the Ocean Resort Villas and Ocean Resort Villas North timeshare associations.

Given that there is pending litigation indirectly related to the matters about which you have apparently called and/or written to express concern, and given your vacation owners associations are represented by counsel, the County of Maui respectfully directs you to that counsel for answers to your questions, comments, and concerns. Their contact number is on the letterhead of the first correspondence attached hereto.

That being said, your concerns are certainly appreciated by the County of Maui. Therefore, we feel it appropriate to send to you the attached correspondences, which are not confidential and which may answer and address the questions, comments, and concerns you have had for the Real Property Assessment Division, the Maui County Council, the Mayor's Office, and the Department of Corporation Counsel. The bottom line is, your vacation owners associations have taken the position the county was required to re-assess the back taxes, in lieu of pursuing the amounts as claims in the lawsuits which your associations already had on file. *See*, Plaintiffs/Counterclaim Defendants Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association's Motion to Dismiss Defendant County of Maui's Counterclaim for Set-Off and/or Damages, et seq., filed November 30, 2015, attached hereto.

Otherwise, as the assessments have been appealed to the Board of Review, we again state it would be more appropriate for you to please direct any further questions, comments, or concerns you may have regarding the pending assessments to your vacation owners association and/or its lawyers.

Mahalo,

Dept. of the Corporation Counsel  
County of Maui

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# MCCORRISTON MILLER MUKAI MACKINNON LLP

ATTORNEYS AT LAW

June 9, 2016

**VIA FACSIMILE (808-270-7884) and  
FIRST CLASS MAIL**

Real Property Assessment Division  
Department of Finance  
County of Maui  
70 E. Kaahumanu Ave., Suite A-16  
Kahului, Maui, Hawai'i 96732-2196

Attn: Scott Teruya, Administrator

Dear Mr. Teruya:

This firm represents Ocean Resort Villas Vacation Owners Association (“ORV”) and Ocean Resort Villas North Vacation Owners Association (“ORVN”) in its on-going litigation against the County related to the timeshare tax classification and the timeshare millage rate, *Ocean Resort Villas Vacation Owners Ass’n et al. v. County of Maui, et al.*, Civil No. 13-1-0848(2) (PTC) (“Lawsuit”), as well as in all matters related to the amended assessments recently issued by your office.

With regard to the amended assessments, we are in receipt of the following related to ORV sent by Brian Bilberry, deputy corporation counsel, on May 27, 2016:

- A. Amended Assessments for 2006, 2007 and 2008 for parcels 440140030001 – 440140030283 (dated May 24, 2016); and
- B. Amended Assessments for 2006, 2007 and 2008 for parcel 440140030000 (dated May 18, 2016).

We are in receipt of the following related to ORVN sent by Brian Bilberry, deputy corporation counsel, on May 27, 2016:

- A. Amended Assessments for 2008 for parcels 440140040001 – 440140040275 (dated May 24, 2016); and
- B. Amended Assessments for 2008 for parcel 440140040000 (dated May 18, 2016).

With the amended tax assessments, the County of Maui seeks an additional **\$10,728,518.49** in tax for tax years eight and ten years past, just three months before trial is scheduled to begin in the Lawsuit and where the time to appeal and pay under protest is 30 days. This is patently unfair to our clients, who are not budgeted for this immense new tax, and other taxpayers may also be outraged to discover that the County of Maui believes it has the power to

Real Property Assessment Division  
Department of Finance  
County of Maui  
June 9, 2016  
Page 2

reach back eight to ten years to reassess the same property from which it has already timely received all taxes that the County of Maui then imposed on their property.

The amended assessments, which are without bases for issuance, are the culmination of a complete misuse of government resources all in an impermissible effort to gain leverage in ongoing litigation. This is evident not only from the timing of the issuance of the amended assessments, but in light of discussions with representatives of ORV and ORVN in 2009 wherein you and others in the Real Property Assessment Division admitted that the County was aware that it opted not to assess ORV on market data in 2006, 2007 and 2008, or ORVN in 2008, and that the County had chosen to change the assessment method for the tax year commencing July 1, 2009. As the County knows, it is now reassessing the very same land and the very same buildings it assessed in the original assessments issued some eight to ten years ago. The County has no authority to now simply subdivide the larger TMKs into smaller TMKs, for the purpose of re-evaluating the land and buildings; and its effort to do so violates the due process rights of ORV and ORVN. These strong-arm tactics are beneath the County of Maui and are patently unfair to our clients and indeed any property owner on Maui.

Further, the Lawsuit asserts constitutional challenges that are fundamental to the viability of the amended assessments. Given this and the impending trial date, ORV and ORVN request that the County immediately withdraw all amended assessments, and stand down on any effort to assess and/or collect additional taxes from ORV and ORVN for past tax years until the constitutional challenges are resolved. In the interim, the parties would agree to reserve all rights to assess/collect additional taxes for tax years 2006, 2007, and 2008; and to challenge the County's right to do so.

Alternatively, if the County insists on pursuing the amended assessments, ORV and ORVN will vigorously defend their rights against the County's impermissible actions and are confident they will prevail against what is plainly retribution for the Lawsuit. When they do so, ORV and ORVN will seek to recover all fees and costs incurred in that effort.

Very truly yours,

MCCORRISTON MILLER MUKAI MACKINNON LLP



Robert G. Klein

cc: The Honorable Alan Arakawa  
Mayor of the County of Maui

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ALAN M. ARAKAWA  
Mayor



PATRICK K. WONG  
Corporation Counsel

EDWARD S. KUSHI  
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DEPARTMENT OF THE CORPORATION COUNSEL  
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WAILUKU, MAUI, HAWAII 96793  
EMAIL: CORPCOUN@MAUICOUNTY.GOV  
TELEPHONE: (808) 270-7740  
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June 14, 2016

**Via e-Mail followed by U.S. Mail**

Robert Klein, Esq.  
Lisa Cataldo, Esq.  
Marguerite Nozaki, Esq.  
Five Waterfront Plaza, 4<sup>th</sup> Floor  
500 Ala Moana Boulevard  
Honolulu, Hawai'i 96813

Re: Westin Ka'anapali Ocean Resort Villas Vacation Owners Association

Counsel:

Your June 9, 2016 letter to the attention of Scott Teruya with the County of Maui's Real Property Assessment Division has been forwarded to this office. This letter responds. Please find attached for your convenient reference:

- 1) The 2015-11-30 excerpt from Plaintiffs/Counterclaim Defendants Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association's Motion to Dismiss Defendant County of Maui's Counterclaim for Set-Off and/or Damages Filed on November 30, 2015 ("Plaintiffs' Motion to Dismiss");
- 2) The 2015-12-29 excerpt from Transcript of Proceedings; and
- 3) The 2016-03-03 Order Granting Plaintiffs/Counterclaim Defendants Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association's Motion to Dismiss Defendant County of Maui's Counterclaim for Set-Off and/or Damages Filed on November 30, 2015 ("Order of Dismissal").

You will undoubtedly recall that Plaintiffs' Motion to Dismiss, drafted by your office to preclude the County from asserting unassessed taxes on omitted real property by counterclaim in set-off and damages in Civil No. 15-1-0435(1), specifically stated:

Robert Klein, Esq.  
Lisa Cataldo, Esq.  
Marguerite Nozaki, Esq.  
June 14, 2016  
Page 2

As the County's claims involve the Plaintiff Associations' tax liability, specifically, that the Plaintiff Associations owe the County additional real property taxes for years prior to 2009, it is required to employ the procedures set forth in the Code, ***starting with issuance of an amended notice of assessment to the Plaintiff Associations.*** (Emphasis added).

You will also undoubtedly recall that at the hearing on the Motion to Dismiss, your office specifically argued to preclude the County from asserting unassessed taxes on omitted real property by counterclaim in set-off and damages in Civil No. 15-1-0435(1), as follows:

Regarding the County's failure to exhaust administrative remedies, the Maui County Code provides that the real property tax appeals are (Inaudible) one of the first instances for the County board review. The Maui County Code further sets forth a detailed process by which the County makes its assessments, issues its assessments, as well as the process to appeal those assessments. ***This process applies to retroactive assessments as well.***

\* \* \* \* \*

When the city does if and when the city does, the plaintiffs will appeal the tax assessments for retroactive assessments. And that will go before the County Board of Review. Should the County Board of Review enter a decision and our clients don't prevail, ***we'll likely appeal it to the Tax Court.*** That is neither here nor there. And this Court does not have jurisdiction over those issues. (Emphasis added).

You will also undoubtedly recall in the Order of Dismissal, drafted by your office to preclude the County from asserting unassessed taxes on omitted real property by counterclaim in set-off and damages in Civil No. 15-1-0435(1), specifically stated:

***Plaintiffs argue that the Maui County Code and the Hawaii Revised Statutes provide the process for retroactive assessment and taxation,*** and that this Court lacks subject matter jurisdiction over such claims until administrative and Tax Appeal Court remedies have been exhausted. The Court agrees.

\* \* \* \* \*

In light of the above positions repeatedly stated by your office regarding the County's legal prerogative to assess real property omitted from assessment in the years 2006, 2007, and 2008, your letter, demands, and threats are unavailing.

If you have argument or any further comment to make regarding matters you believe are pending litigation, please direct them to this office. If you have argument to

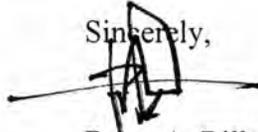
Robert Klein, Esq.  
Lisa Cataldo, Esq.  
Marguerite Nozaki, Esq.  
June 14, 2016  
Page 3

make regarding threats of further litigation, please direct them to this office, and not representatives of the Real Property Tax Division, or the Mayor's office. Any matters which you claim are, or will be pending in litigation should not be addressed to parties you know to be represented by counsel in those matters.

Finally, your proposal for the County to withdraw the amended assessments, and/or "stand down" collection of taxes pending resolution of alleged constitutional issues and Sunshine Law violations your clients have perpetuated since 2013, notably without reasonable or substantial evidentiary basis, is declined.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian A. Bilberry", is written over a horizontal line.

Brian A. Bilberry  
Deputy Corporation Counsel

Attachments

cc Joe Tanaka (via e-Mail)

MCCORRISTON MILLER MUKAI MACKINNON LLP

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2<sup>ND</sup> CIRCUIT COURT  
STATE OF HAWAII  
FILED  
EX OFFICIO  
2015 NOV 09 PM 3:35

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Attorneys for Plaintiffs  
OCEAN RESORT VILLAS VACATION  
OWNERS ASSOCIATION; OCEAN RESORT  
VILLAS NORTH VACATION OWNERS  
ASSOCIATION; VIC H. HENRY; and PETER A.  
BAGATELOS  
and Counterclaim Defendants  
OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION and  
OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

|   |   |                                  |
|---|---|----------------------------------|
| OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; VIC H. HENRY; AND PETER A. BAGATELOS, | ) | CIVIL NO. 15-1-0435(1)           |
|   | ) | (Other Civil Action)             |
|   | ) |                                  |
|   | ) | PLAINTIFFS/COUNTERCLAIM          |
|   | ) | DEFENDANTS OCEAN RESORT          |
|   | ) | VILLAS VACATION OWNERS           |
|   | ) | ASSOCIATION AND OCEAN RESORT     |
|   | ) | VILLAS NORTH VACATION OWNERS     |
| Plaintiffs,   | ) | ASSOCIATION'S MOTION TO DISMISS  |
|   | ) | DEFENDANT COUNTY OF MAUI'S       |
|   | ) | COUNTERCLAIM FOR SET-OFF         |
|   | ) | AND/OR DAMAGES AGAINST OCEAN     |
|   | ) | RESORT VILLAS VACATION OWNERS    |
|   | ) | ASSOCIATION and OCEAN RESORT     |
|   | ) | VILLAS NORTH VACATION OWNERS     |
|   | ) | ASSOCIATION, FILED SEPTEMBER 21, |
|   | ) | 2015; MEMORANDUM IN SUPPORT OF   |
|   | ) | MOTION; NOTICE OF HEARING        |

vs.

COUNTY OF MAUI; MAUI COUNTY COUNCIL; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; AND DOE ENTITIES 1-10,

taxpayer aggrieved by a County board of review final decision may file an appeal for judicial review to the tax appeal court pursuant to sections 91-12 and 91-14 of the Hawaii Revised Statutes.” *Id.*

Accordingly, all matters involving real property tax are determined first at an administrative level – *i.e.*, an assessment, and an appeal to the board of review as necessary – and then by an appeal to the Circuit Court sitting as the tax appeal court. By design of the tax code and the Maui County Charter, unless assessments issued, the board of review determined an appeal in the first instance, and further appeal was sought in the tax appeal court, this Court does not have any jurisdiction to entertain the County’s claim for tax liability.

Here, the County asserts that prior to 2009 it incorrectly calculated the Plaintiff Associations’ real property tax liability on a cost-approach to valuation; and should have assessed the Plaintiff Associations’ tax liability on a market-value approach to valuation. *See* Counterclaim at ¶ 23. As such, the County claims, it is entitled to a “set-off” against any damages by the amounts of real property taxes the Plaintiff Associations “should have paid in each tax year prior to 2009, in amounts to be determined prior to trial.” *Id.* at ¶ 28.

As the County’s claims involve the Plaintiff Associations’ tax liability, specifically, that the Plaintiff Associations owe the County additional real property taxes for years prior to 2009, it is required to employ the procedures set forth in the Code, starting with issuance of an amended notice of assessment to the Plaintiff Associations. Any amended assessment would not have merit and in any instance Plaintiff Associations would appeal such an amended assessment. When, as would be inevitable, a dispute arises regarding such assessment, there is an

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property tax assessment shall first obtain a decision from an administrative body established by county ordinance, prior to appealing to the tax appeal court, if county ordinance requires a taxpayer to do so.

administrative procedure that the Code established, which includes an appeal to the board of review; and should that not resolve the issue, an appeal to the tax appeals court. In no event are those issues within the purview of this Court.

Accordingly, the County's Counterclaim should be dismissed because the tax appeals court has exclusive jurisdiction over matters involving tax liability disputes, and the County's Counterclaim is an impermissible attempt to retroactively tax the Plaintiff Associations without first exhausting the administrative process required by statute and ordinance.<sup>2</sup> See *Kona Old Haw. Trails Grp.*, 69 Haw. 81, 734 P.2d 161 (holding that the circuit court lacked jurisdiction where the plaintiff appealed directly from the county planning director's issuance of a special management area minor permit, because the director's action was not "a final decision or order in a contested case" and the Hawai'i County Charter provided that all appeals of director's decision would go to the board of appeals, which would conduct a hearing.").

**B. Count II of the County's Counterclaim Should Be Dismissed Because "Damages" is Not an Independent Cause of Action.**

"Damages" is a form of relief and *not* an independent, separate cause of action. Although relating to punitive damages, the following cases are instructive: *Fisher v. Grove Farm Co.*, 123 Hawai'i 82, 119, 230 P.3d 382, 419 (App. 2009) ("Punitive damages are a remedy."); *Ross v. Stouffer Hotel Co.*, 76 Hawai'i 454, 466, 879 P.2d 1037, 1049 (1994) ("[A] claim for punitive damages is not an independent tort, but is purely incidental to a separate cause of action."); *Kang v. Harrington*, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978) ("An award of punitive damages is purely incidental to the cause of action."); *Masaki v. Gen. Motors Corp.*, 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) ("[A] claim for punitive damages is not an independent tort, but is purely incidental to a separate cause of action."); *Hale v. Hawaii Publs., Inc.*, 468 F. Supp. 2d 1210,

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<sup>2</sup> It is questionable whether the County can retroactively tax the Plaintiff Associations for years prior to 2009. See *Kaheawa Wind Power, LLC v. Cnty. of Maui*, 135 Hawai'i 202, 347 P.3d 632 (2014) (recognizing that there "may be circumstances in which retroactive tax assessments may violate constitutional rights" based on "the nature of the tax and the circumstances in which it is laid.") (quoting *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 40, n.23 (1990)).

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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
STATE OF HAWAII

|                              |   |                        |
|------------------------------|---|------------------------|
| Ocean Resort Villas Vacation | ) |                        |
| Owners Association, et al.,  | ) |                        |
|                              | ) |                        |
| Plaintiffs,                  | ) |                        |
|                              | ) |                        |
| vs.                          | ) | CIVIL NO: 15-1-0435(1) |
|                              | ) |                        |
| County of Maui, et al.,      | ) |                        |
|                              | ) |                        |
| Defendants.                  | ) |                        |
| _____                        | ) |                        |

TRANSCRIPT OF ELECTRONICALLY-RECORDED PROCEEDINGS

had before the Honorable Rhonda I.L. Loo, Circuit Court  
Judge presiding, on Tuesday, December 29, 2015, in the  
above-entitled matter: Motions to Dismiss; Motion for  
Protective Order.

TRANSCRIBED BY: Cammie Gillett, RPR  
Official Court Reporter, State of Hawaii  
Hawaii Certified Shorthand Reporter #438

1 to say, oh, we're not actually requesting damages.

2 So it is about the fees. It is about the fees the  
3 individual owners are paying, Your Honor. And, in fact, they  
4 identified two of those individual owners as plaintiffs in this  
5 case as, quote, representative of the 26,000 members of the  
6 associations. And that would be Mr. Vic Henry and Mr. Peter  
7 Vitalous (Phonetic). So this is the same case. They have just  
8 artfully omitted alleging certain things so they can make the  
9 arguments they're making today against this third-party claim.  
10 Thank you, Your Honor.

11 THE COURT: Okay. I'd like to go on to Ocean Resort's  
12 motion to dismiss the counterclaim.

13 Ms. Nozaki.

14 MS. NOZAKI: Your Honor, the County's counterclaim  
15 should be dismissed because the County has failed to exhaust  
16 administrative remedies. Also, this Court lacks subject matter  
17 jurisdiction because exclusive jurisdiction rests with the tax  
18 appeal court.

19 Regarding the County's failure to exhaust  
20 administrative remedies, the Maui County Code provides that the  
21 real property tax appeals are (Inaudible) one of the first  
22 instances for the County board review. The Maui County Code  
23 further sets forth a detailed process by which the County makes  
24 its assessments, issues its assessments, as well as the process  
25 to appeal those assessments. This process applies to

1 retroactive assessments as well.

2 In the second instance, the tax appeal Court has  
3 exclusive jurisdiction over any appeals from the County Board  
4 of Review's decisions. This is all set forth in statute and  
5 Maui County Code.

6 Here, the County attempts to circumvent the process as  
7 set forth in statute, as well as its own (Inaudible) by filing  
8 a counterclaim (Inaudible) set off, which the County should not  
9 be permitted to do. The County has, in its opposition, not  
10 cited to any cases that supports the position that it may do  
11 so.

12 With respect to its damages claim, damage is a form of  
13 relief. And it's not a separate independent cause of action.  
14 As demonstrated by the various cases cited in our papers, the  
15 County has, in opposition, not cited to any case permitting  
16 damages to be asserted as an independent cause of action.

17 Thank you, Your Honor.

18 THE COURT: Mr. Bilberry.

19 MR. BILBERRY: Yes. Thank you, Your Honor.

20 My reading of the applicable rules that Ms. Nozaki  
21 cites that talks about tax appeals -- and that's appeals being  
22 made by a taxpayer. The County is not making a tax appeal.  
23 It's alleging that they're entitled -- it's entitled to a  
24 set-off because these are taxes that the association has got a  
25 big break on in the past because they weren't properly assessed

1 third-party complaint to make it more acceptable.

2 Ultimately, it will never be acceptable to them. But  
3 at least to meet that standard. If there's a problem with  
4 that, we can certainly include the language from those owners  
5 handbooks that I just read in the complaint.

6 Thank you, Your Honor.

7 THE COURT: Ms. Nozaki, as far as anything you want to  
8 respond to.

9 MS. NOZAKI: Yes. Thank you, Your Honor.

10 Your Honor, I'm not sure how clear plaintiffs can  
11 be(Inaudible). This case is not about tax assessments and not  
12 about challenges to tax assessments. It's about challenging  
13 the procedure by which the tax rate was set. Again, Your  
14 Honor, the County continues to (Inaudible) the two cases. I  
15 won't get into that any further because I think I've beaten a  
16 dead horse.

17 The plaintiffs here did not have to go through the  
18 County Board of Review or the Tax Appeal Court. The issues  
19 here are constitutional. And while the Tax Appeal Court may  
20 address certain constitution issues, these constitution issues  
21 have nothing to do with the amount assessed. And, in fact, the  
22 County has not assessed for these years prior to 2009 that it  
23 alleges in its counterclaim.

24 When the city does -- if and when the city does, the  
25 plaintiffs will appeal the tax assessments for retroactive

1 assessments. And that will go before the County Board of  
2 Review. Should the County Board of Review enter a decision and  
3 our clients don't prevail, we'll likely appeal it to the Tax  
4 Court. That is neither here nor there. And this Court does  
5 not have jurisdiction over those issues.

6 And, again, Your Honor, the plaintiffs have requested  
7 damages relief, but it has also requested declaratory relief.  
8 And I think that the County crosses over that and focuses on  
9 the damages issue so that it can bring in all this irrelevant  
10 and unrelated evidence, which belongs in the 2013 case.

11 For those reasons, Your Honor, the plaintiffs -- the  
12 association requests that you grant its motion to dismiss the  
13 counterclaim.

14 THE COURT: Mr. Bilberry, anything further in response?

15 MR. BILBERRY: Just, Your Honor, I don't see how the  
16 damages claims they're going to make are irrelevant. That's  
17 why they brought the lawsuit, Your Honor. They didn't bring a  
18 lawsuit just to, you know, have a declaration. They're asking  
19 for damages. And we're entitled to say we're not the cause of  
20 those damages, as SVO Pacific is and the association is. And I  
21 guess that was the other motion.

22 But, yeah, damages are clearly, clearly what the suit  
23 is about.

24 THE COURT: And then lastly, the protective order.  
25 Ms. Nozaki.

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 CORPORATION COUNSEL FILED  
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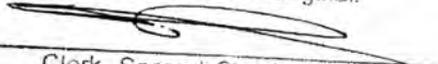
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 nozaki@m4law.com

M. FERNANDEZ KAHAKAUWILA, CLERK  
 SECOND CIRCUIT COURT  
 STATE OF HAWAII

Attorneys for Plaintiffs  
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 OWNERS ASSOCIATION; OCEAN RESORT  
 VILLAS NORTH VACATION OWNERS  
 ASSOCIATION; VIC H. HENRY; and PETER A.  
 BAGATELOS  
 and Counterclaim Defendants  
 OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION and  
 OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT  
 STATE OF HAWAII

|   |   |  |
|---|---|--|
| OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; VIC H. HENRY; and PETER A. BAGATELOS, | ) | CIVIL NO. 15-1-0435 (1)                  |
|   | ) | (Other Civil Action)                     |
| Plaintiffs,   | ) | ORDER GRANTING                           |
| vs.   | ) | PLAINTIFFS/COUNTERCLAIM                  |
|   | ) | DEFENDANTS OCEAN RESORT VILLAS           |
|   | ) | VACATION OWNERS ASSOCIATION              |
|   | ) | AND OCEAN RESORT VILLAS NORTH            |
|   | ) | VACATION OWNERS ASSOCIATION'S            |
|   | ) | MOTION TO DISMISS DEFENDANT              |
|   | ) | COUNTY OF MAUI'S COUNTERCLAIM            |
| COUNTY OF MAUI; MAUI COUNTY COUNCIL; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; and DOE ENTITIES 1-10,   | ) | FOR SET-OFF AND/OR DAMAGES FILED         |
|   | ) | ON NOVEMBER 30, 2015                     |
| Defendants.   | ) | <b>Hearing:</b>                          |
|   | ) | <b>Date:</b> December 29, 2015           |
|   | ) | <b>Time:</b> 8:15 a.m.                   |
|   | ) | <b>Judge:</b> Honorable Rhonda I. L. Loo |
|   | ) | No Trial Date Set                        |

I hereby certify that this is a full, true and correct copy of the Original.  
  
 Clerk, Second Circuit Court

ORDER GRANTING PLAINTIFFS/COUNTERCLAIM DEFENDANTS  
OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION AND  
OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION'S  
MOTION TO DISMISS DEFENDANT COUNTY OF MAUI'S COUNTERCLAIM  
FOR SET-OFF AND/OR DAMAGES FILED ON NOVEMBER 30, 2015

Plaintiffs/Counterclaim Defendants Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association's ("Associations") Motion to Dismiss Defendant County of Maui's Counterclaim for Set-Off and/or Damages came on for hearing before the Honorable Rhonda I. L. Loo on December 29, 2015, at 8:15 a.m. Marguerite S. Nozaki, Esq. appeared on behalf of Associations and Deputy Corporation Counsel Brian A. Bilberry, Esq. appeared on behalf of Counterclaimant County of Maui (the "County").

In its Counterclaim, the County seeks damages and/or an offset against any damages incurred by the Plaintiffs. The County's basis for these claims is that the Plaintiffs underpaid taxes for certain periods due to incorrect tax assessments. Plaintiffs argue that the Maui County Code and the Hawaii Revised Statutes provide the process for retroactive assessment and taxation, and that this Court lacks subject matter jurisdiction over such claims until administrative and Tax Appeal Court remedies have been exhausted. The Court agrees.

If the Court were to allow the County to essentially do an amended tax assessment via counterclaim, it would circumvent the regulatory process outlined in the Maui County Code 3.48. The County's counterclaims related to underpaid taxes resulting from incorrect assessments are also dismissed.

The Court, having considered the Motion to Dismiss Counterclaim, arguments of counsel, the files and pleadings herein, and being fully apprised in the premises, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs/Counterclaim Defendants Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association's Motion to Dismiss the County's Counterclaim is GRANTED.

MAR - 2 2016

DATED: Wailuku, Hawai'i, \_\_\_\_\_.

\_\_\_\_\_  
JUDGE OF THE ABOVE-ENTITLED COURT

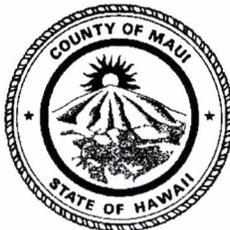
APPROVED AS TO FORM:

\_\_\_\_\_  
PATRICK K. WONG  
BRIAN A. BILBERRY  
KRISTIN K. TARNSTROM  
Attorneys for Defendants/Counterclaimant  
COUNTY OF MAUI and MAUI COUNTY COUNCIL

=====  
*Ocean Resort Villas Vacation Owners Association, et al. vs. County of Maui, et al.; Civil No. 15-1-0435 (1); ORDER GRANTING PLAINTIFFS/COUNTERCLAIM DEFENDANTS OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION AND OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION'S MOTION TO DISMISS DEFENDANT COUNTY OF MAUI'S COUNTERCLAIM FOR SET-OFF AND/OR DAMAGES AGAINST OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION and OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION FILED ON NOVEMBER 30, 2015*

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ALAN M. ARAKAWA  
Mayor



PATRICK K. WONG  
Corporation Counsel

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June 16, 2016

Via e-Mail followed by U.S. Mail

Robert Klein, Esq.  
Lisa Cataldo, Esq.  
Marguerite Nozaki, Esq.  
McCorriston Miller Mukai MacKinnon  
500 Ala Moana Boulevard  
Honolulu, Hawai'i 96813

Re: *Ocean Resort Villas Vacation Owners Association, et al. vs. County of Maui, et al.*  
*Civil No. 13-1-0848(2)*

Dear Counsel:

Please supplement *Interrogatory Response Nos. 1 and 2* to Defendant County of Maui's Second Request for Answers to Interrogatories and Second Request for Production of Documents to Plaintiffs Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association, Dated June 5, 2015, by **Friday, June 24, 2016**. For your convenience, the interrogatory and your client's original response are quoted here:

1. If OCEAN RESORT VILLAS is claiming any monetary amounts in this lawsuit as damages, attorneys' fees and costs, or any other economic or monetary loss please identify:
  - a. The dollar amount to date of each item claimed;
  - b. The specific factual basis of the amount claimed and the basis of any calculation supporting the amount;

ANSWER: Subject to and without waiving the foregoing General Responses and Objections, on behalf of its members, each Plaintiff claims that *each of their respective members is owed* the difference in what each member paid based on their classification in the "Timeshare" real property tax category from 2005 to the present, less what they would have paid had they been classified in the "Hotel/Resort" real property tax category from 2005 to the present, *in an amount to be proven at trial*. Furthermore, Plaintiffs

Robert Klein, Esq.  
Lisa Cataldo, Esq.  
Marguerite Nozaki, Esq.  
June 16, 2106  
Page 2

claim reasonable attorneys' fees and costs as provided under section 92-12 of the Hawaii Revised Statutes ("HRS"), and prejudgment and post-judgment interest as allowed by law in amounts to be proven at trial.

2. If OCEAN RESORT VILLAS NORTH is claiming any monetary amounts in this lawsuit as damages, attorneys' fees and costs, or any other economic or monetary loss please identify:

- a. The dollar amount to date of each item claimed;
- b. The specific factual basis of the amount claimed and the basis of any calculation supporting the amount.

ANSWER: See Answer to Interrogatory No. 1, above.

(Emphasis added).

Setting aside the fact that neither of the Vacation Owner's Association's respective members actually pay a real property tax assessed by the County, having failed to identify any expert opinion, testimony, and/or calculation of damages, your clients will not be permitted at trial to make any damages claims. Nevertheless, your client's identification of the purported amounts of damages alleged as "what each member paid based on their classification in the 'Timeshare' real property tax category from 2005 to the present, less what they would have paid had they been classified in the 'Hotel/Resort' real property tax category from 2005 to the present" is otherwise indisputably material to the constitutional allegations in your clients' Complaint that their members are being discriminated against, by having to pay a "disproportionate" share of real property taxes *as compared to the tax paid by the Hotel/Resort visitor*.

Your clients' failure to otherwise identify the amounts paid, and the differential that is being claimed on behalf of *each* of the members of the Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association will be dispositive of their constitutional claims (let alone your clients' inability to identify the amount of hotel/resort's real property taxes is allocated to similarly situated Hotel/Resort visitor).

That all being said, your prompt supplementation of the interrogatories above by identifying 1) the amount of tax paid by the individual members under the "Timeshare" classification, and 2) the amount of tax those same members would have paid had they been classified in the "Hotel/Resort real property tax category from 2005 to the present" is requested. The County and Council otherwise reserve all prerogatives to seek exclusion of your clients' purported damages claims at trial.

Your prompt attention to this matter will be appreciated.

Sincerely,



Brian A. Bilberry  
Deputy Corporation Counsel

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2ND CIRCUIT COURT  
STATE OF HAWAII  
FILED  
EX OFFICIO  
2015 NOV 30 PM 3: 35

P. NAKANO  
CLERK

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OCEAN RESORT VILLAS VACATION  
OWNERS ASSOCIATION; OCEAN RESORT  
VILLAS NORTH VACATION OWNERS  
ASSOCIATION; VIC H. HENRY; and PETER A.  
BAGATELOS  
and Counterclaim Defendants  
OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION and  
OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

|   |   |                                  |
|---|---|----------------------------------|
| OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; VIC H. HENRY; AND PETER A. BAGATELOS, | ) | CIVIL NO. 15-1-0435(1)           |
|   | ) | (Other Civil Action)             |
|   | ) |                                  |
|   | ) | PLAINTIFFS/COUNTERCLAIM          |
|   | ) | DEFENDANTS OCEAN RESORT          |
|   | ) | VILLAS VACATION OWNERS           |
|   | ) | ASSOCIATION AND OCEAN RESORT     |
|   | ) | VILLAS NORTH VACATION OWNERS     |
| Plaintiffs,   | ) | ASSOCIATION'S MOTION TO DISMISS  |
|   | ) | DEFENDANT COUNTY OF MAUI'S       |
|   | ) | COUNTERCLAIM FOR SET-OFF         |
| vs.   | ) | AND/OR DAMAGES AGAINST OCEAN     |
|   | ) | RESORT VILLAS VACATION OWNERS    |
| COUNTY OF MAUI; MAUI COUNTY COUNCIL; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; AND DOE ENTITIES 1-10,   | ) | ASSOCIATION and OCEAN RESORT     |
|   | ) | VILLAS NORTH VACATION OWNERS     |
|   | ) | ASSOCIATION, FILED SEPTEMBER 21, |
|   | ) | 2015; MEMORANDUM IN SUPPORT OF   |
|   | ) | MOTION; NOTICE OF HEARING        |

Defendants. ) MOTION; CERTIFICATE OF SERVICE  
 )  
 )  
 )  
 ) **Hearing:**  
 ) **Date:** December 29, 2015  
 ) **Time:** 8:15 a.m.  
 ) **Judge:** Honorable Rhonda I. L. Loo  
 )  
 ) No Trial Date Set

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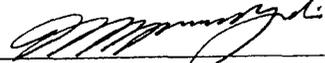
**PLAINTIFFS/COUNTERCLAIM DEFENDANTS OCEAN RESORT VILLAS  
 VACATION OWNERS ASSOCIATION AND OCEAN RESORT VILLAS  
 NORTH VACATION OWNERS ASSOCIATION’S MOTION TO DISMISS  
 DEFENDANT COUNTY OF MAUI’S COUNTERCLAIM FOR SET-OFF  
 AND/OR DAMAGES AGAINST OCEAN RESORT VILLAS VACATION  
 OWNERS ASSOCIATION and OCEAN RESORT VILLAS NORTH  
 VACATION OWNERS ASSOCIATION, FILED SEPTEMBER 21, 2015**

Plaintiffs/Counterclaim Defendants Ocean Resort Villas Vacation Owners Association (“ORV”) and Ocean Resort Villas North Vacation Owners Association (“ORVN”) (collectively, the “Associations”), by and through their attorneys, McCorriston Miller Mukai MacKinnon LLP, respectfully move this Court for an order dismissing Defendant/Counterclaimant County of Maui’s (the “County”) Counterclaim For Set-Off and/or Damages Against Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association, filed on September 21, 2015 (“Counterclaim”).

Dismissal is warranted because: (1) this Court lacks subject matter jurisdiction because the County has failed to exhaust administrative remedies and the tax code vests the board of review and tax appeal court with exclusive jurisdiction over appeals of contested tax liability; and (2) “Damages” is a form of relief, not a separate cause of action.

This Motion is based upon Rules 7 and 12(b) of the Hawai'i Rules of Civil Procedure and Rule 7 of the Rules of the Circuit Courts of the State of Hawai'i, the memorandum in support of the Motion, and the records and files herein.

DATED: Honolulu, Hawai'i, November 30, 2015.



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ROBERT G. KLEIN  
LISA W. CATALDO  
MARGUERITE S. NOZAKI

Attorneys for Plaintiffs  
OCEAN RESORT VILLAS VACATION  
OWNERS ASSOCIATION, OCEAN RESORT  
VILLAS NORTH VACATION OWNERS  
ASSOCIATION, VIC H. HENRY, and PETER A.  
BAGATELOS  
and Counterclaim Defendants  
OCEAN RESORT VILLAS VACATION  
OWNERS ASSOCIATION and OCEAN RESORT  
VILLAS NORTH VACATION OWNERS  
ASSOCIATION

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAI'I

OCEAN RESORT VILLAS VACATION ) CIVIL NO. 15-1-0435(1)  
OWNERS ASSOCIATION, a domestic ) (Other Civil Action)  
nonprofit corporation; OCEAN RESORT )  
VILLAS NORTH VACATION OWNERS ) MEMORANDUM IN SUPPORT OF  
ASSOCIATION, a domestic nonprofit ) MOTION  
corporation; VIC H. HENRY; AND PETER A. )  
BAGATELOS, )  
)  
Plaintiffs, )  
)  
vs. )  
)  
COUNTY OF MAUI; MAUI COUNTY )  
COUNCIL; JOHN DOES 1-10; JANE DOES )  
1-10; DOE PARTNERSHIPS 1-10; DOE )  
CORPORATIONS 1-10; DOE )  
GOVERNMENTAL ENTITIES 1-10; AND )  
DOE ENTITIES 1-10, )  
)  
Defendants. )  
)  
\_\_\_\_\_ )

**MEMORANDUM IN SUPPORT OF MOTION**

**I. INTRODUCTION**

As alleged in the Complaint, Plaintiffs alleged that members of Defendant Maui County Council (“Council”) engaged in impermissible communications and thereby deprived Plaintiffs of their ability to fully and fairly participate in the democratic process related to setting the tax rate for timeshares. Plaintiffs Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association (the “Plaintiff Associations”) sued the Council and Defendant County of Maui (“County”) for violation of Hawaii Revised Statutes (“HRS”) section 92-1 (*i.e.*, the Sunshine Law) in the fiscal year 2016 Budget and Finance Session, and violation of Due Process clause of the U.S. and Hawai‘i Constitutions.

On September 21, 2015, the Council and County filed an Answer; and the County filed a two-count Counterclaim for Set-Off and/or Damages Against Ocean Resort Villas Vacation Owners Association and Ocean Resort Villas North Vacation Owners Association (“Counterclaim”). In the Counterclaim, the County asserted Plaintiff Associations owed additional taxes to the County for years prior to 2009 because the County miscalculated the Plaintiff Associations’ tax liability for those years.

Even assuming the allegations as true, the County’s Counterclaim must be dismissed because: (1) this Court lacks subject matter jurisdiction because the County has failed to exhaust administrative remedies and the tax code vests the board of review and tax appeal court with exclusive jurisdiction over appeals of contested tax liability; and (2) “Damages” is a form of relief, not a separate cause of action.

## **II. ALLEGATIONS IN THE COMPLAINT**

On August 12, 2015, Plaintiff Associations filed a Complaint and asserted: Count I (Violation of Sunshine Law – FY 2016 Budget and Finance Session) and Count II (Violation of Due Process Clauses of U.S. and Hawai‘i Constitutions). *See generally*, Complaint.

On September 21, 2015, Defendants filed their Answer. On the same day, Defendant County filed: (1) a Counterclaim against the Plaintiff Associations, (2) Third-Party Complaint against the Plaintiff Associations, their Boards, SVO Pacific, Inc. and SVO, Inc., and (3) a Motion to Dismiss the Council as a party to this lawsuit.

In its Counterclaim, the County asserts two claims: (i) Set-Off (Count I); and (ii) Damages (Count II). The County claims it is entitled to a “set-off” against any damages Plaintiff Associations may be awarded because, the County alleges, the Plaintiff Associations were “assessed by a costs approach to valuation,” as opposed to an assessment “based on the

aggregate of assessed market values of all individual condominium apartments[.]”

Counterclaim, ¶¶ 20, 27. In addition, the County claims that it is entitled to “damages for any amounts of real property tax which [the Plaintiff Associations] should have been assessed in the tax years prior to 2009 which is over and above any damages claimed by and potentially awarded to [the Plaintiff Associations] in this lawsuit[.]” *Id.*, ¶ 30.

As such, the County claims that Plaintiff Associations underpaid their real property taxes for the years prior to the 2009 tax year, and the County should either be awarded damages or allowed an offset against any damages this Court may award to Plaintiff Associations in this lawsuit.

### **III. STANDARD OF REVIEW**

Dismissal of a claim is appropriate when the complaint fails to state a claim upon which relief can be granted. Hawai‘i Rules of Civil Procedure 12(b)(6) (providing that every defense to a claim for relief - including the failure to state a claim upon which relief may be granted - “in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim” may be made by motion). Dismissal for failure to state a claim is proper if the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Midkiff v. Castle & Cooke, Inc.*, 45 Haw. 409, 414, 368 P.2d 887, 890 (1962). In reviewing a motion to dismiss, the court deems all allegations in the complaint as true, *Au v. Au*, 63 Hawai‘i 210, 214, 626 P.2d 173, 177 (1981), but the court is not required to accept a plaintiff’s conclusory allegations about the legal effect of the events alleged. *See Marsland v. Pang*, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985). While a complaint attacked by a Rule 12(b)(6) motion to dismiss “does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action

will not do.” *Pavsek v. Sandvold*, 127 Hawai‘i 390, 403, 279 P.3d 55, 68 (Ct. App. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

#### IV. DISCUSSION

##### A. This Court Lacks Jurisdiction Over the Counterclaim and Therefore it Should Be Dismissed.

The County’s Counterclaim should be dismissed because this Court lacks jurisdiction because the County failed to exhaust administrative remedies and the doctrine of exclusive jurisdiction precludes this Court from adjudicating matters involving tax disputes, which are properly before the tax appeal court. *See Kona Old Hawaiian Trails Grp. v. Lyman*, 69 Hawai‘i 81, 92-93, 734 P.2d 161, 168 (1987) (noting that courts developed the principal doctrine, exhaustion of administrative remedies, to “enable the question of timing of requests for judicial intervention in the administrative process to be answered[.]”) (Brackets omitted). “Exhaustion...comes into play where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course.” *Id.* at 93, 734 P.2d at 168 (internal citations omitted). Thus, a party cannot seek judicial review without first utilizing the applicable and mandatory administrative remedies (*i.e.* exhaustion). Even assuming the County exhausts its administrative remedies, there is yet another bar to the County’s Counterclaim - the doctrine of exclusive jurisdiction. Because the tax code establishes the tax appeal court as the court of appeal for disputed tax assessments initially heard by the boards of review, the tax appeal court has exclusive jurisdiction over the claims asserted by the County in its Counterclaim. *See Kinkaid v. Bd. of Review of City & Cty. of Honolulu*, 106 Hawai‘i 318, 324, 104 P.3d 905, 911 (2004)

Within the context of this case, the applicable mandatory administrative body for all matters involving real property tax is the board of review in the first instance, and then the tax

appeal court in the second, but in no event does this Court have purview over the County's claims asserted in its Counterclaim.

The Hawai'i tax code transfers real property taxation powers to the counties. *See* Hawai'i Revised Statutes ("HRS") § 246A-2 ("The functions, powers, duties, and authority heretofore exercised by the department of taxation relating to the taxation of real property shall be exercised by the respective counties[.]"). Statute requires that a person aggrieved by an assessment may file an appeal with the board of review and then, as necessary, with the tax appeal court. *See* HRS § 246-20 ("Any person aggrieved by the additional assessment for any year may appeal from such assessment in the manner provided in the case of real property tax appeals."); *see also* HRS § 246-46 ("Any taxpayer . . . aggrieved by an assessment . . . may appeal from the assessment or from such refusal to a board of review or the tax appeal court.").

The Maui County Code ("MCC" or the "Code") similarly provides: "[i]n the case of a real property tax appeal, a taxpayer shall first appeal to the County board of review." MCC § 3.48.595. The Code also sets forth the process through which the County exercises its taxing authority. That process includes, generally: (1) assessment of the real property; (2) issuance of a notice of assessment to the property owner; and (3) payment by the property owner. *See generally*, MCC Articles I, III, and IV (§§ 3.48.010, 3.48.130, 3.48.195). The Code also establishes the process for a taxpayer to appeal an assessment. MCC § 3.48.595 provides: "In the case of a real property tax appeal, a taxpayer shall first appeal to the County board of review pursuant to section 232-16, Hawaii Revised Statutes."<sup>1</sup> That section goes on to state: "[a]ny

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<sup>1</sup> HRS section 232-16 provides in pertinent part:

A taxpayer or county may appeal directly to the tax appeal court without appealing to a state board of review or any equivalent administrative body established by county ordinance; provided that a taxpayer appealing a real

taxpayer aggrieved by a County board of review final decision may file an appeal for judicial review to the tax appeal court pursuant to sections 91-12 and 91-14 of the Hawaii Revised Statutes.” *Id.*

Accordingly, all matters involving real property tax are determined first at an administrative level – *i.e.*, an assessment, and an appeal to the board of review as necessary – and then by an appeal to the Circuit Court sitting as the tax appeal court. By design of the tax code and the Maui County Charter, unless assessments issued, the board of review determined an appeal in the first instance, and further appeal was sought in the tax appeal court, this Court does not have any jurisdiction to entertain the County’s claim for tax liability.

Here, the County asserts that prior to 2009 it incorrectly calculated the Plaintiff Associations’ real property tax liability on a cost-approach to valuation; and should have assessed the Plaintiff Associations’ tax liability on a market-value approach to valuation. *See* Counterclaim at ¶ 23. As such, the County claims, it is entitled to a “set-off” against any damages by the amounts of real property taxes the Plaintiff Associations “should have paid in each tax year prior to 2009, in amounts to be determined prior to trial.” *Id.* at ¶ 28.

As the County’s claims involve the Plaintiff Associations’ tax liability, specifically, that the Plaintiff Associations owe the County additional real property taxes for years prior to 2009, it is required to employ the procedures set forth in the Code, starting with issuance of an amended notice of assessment to the Plaintiff Associations. Any amended assessment would not have merit and in any instance Plaintiff Associations would appeal such an amended assessment. When, as would be inevitable, a dispute arises regarding such assessment, there is an

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property tax assessment shall first obtain a decision from an administrative body established by county ordinance, prior to appealing to the tax appeal court, if county ordinance requires a taxpayer to do so.

administrative procedure that the Code established, which includes an appeal to the board of review; and should that not resolve the issue, an appeal to the tax appeals court. In no event are those issues within the purview of this Court.

Accordingly, the County's Counterclaim should be dismissed because the tax appeals court has exclusive jurisdiction over matters involving tax liability disputes, and the County's Counterclaim is an impermissible attempt to retroactively tax the Plaintiff Associations without first exhausting the administrative process required by statute and ordinance.<sup>2</sup> See *Kona Old Haw. Trails Grp.*, 69 Haw. 81, 734 P.2d 161 (holding that the circuit court lacked jurisdiction where the plaintiff appealed directly from the county planning director's issuance of a special management area minor permit, because the director's action was not "a final decision or order in a contested case" and the Hawai'i County Charter provided that all appeals of director's decision would go to the board of appeals, which would conduct a hearing.").

**B. Count II of the County's Counterclaim Should Be Dismissed Because "Damages" is Not an Independent Cause of Action.**

"Damages" is a form of relief and *not* an independent, separate cause of action. Although relating to punitive damages, the following cases are instructive: *Fisher v. Grove Farm Co.*, 123 Hawai'i 82, 119, 230 P.3d 382, 419 (App. 2009) ("Punitive damages are a remedy."); *Ross v. Stouffer Hotel Co.*, 76 Hawai'i 454, 466, 879 P.2d 1037, 1049 (1994) ("[A] claim for punitive damages is not an independent tort, but is purely incidental to a separate cause of action."); *Kang v. Harrington*, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978) ("An award of punitive damages is purely incidental to the cause of action."); *Masaki v. Gen. Motors Corp.*, 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) ("[A] claim for punitive damages is not an independent tort, but is purely incidental to a separate cause of action."); *Hale v. Hawaii Publs., Inc.*, 468 F. Supp. 2d 1210,

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<sup>2</sup> It is questionable whether the County can retroactively tax the Plaintiff Associations for years prior to 2009. See *Kaheawa Wind Power, LLC v. Cnty. of Maui*, 135 Hawai'i 202, 347 P.3d 632 (2014) (recognizing that there "may be circumstances in which retroactive tax assessments may violate constitutional rights" based on "the nature of the tax and the circumstances in which it is laid.") (quoting *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 40, n.23 (1990)).

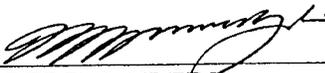
1233 (D. Haw. 2006) (granting the defendants' motion for summary judgment as to a separate claim for punitive damages, but noting that the plaintiff could seek punitive damages as part of her prayer for relief).

As "Damages" is a form of relief and not a separate cause of action, Count II in the County's Counterclaim should be summarily dismissed.

**V. CONCLUSION**

Based on the foregoing, Plaintiff Associations respectfully request that Defendant County's Counterclaim be dismissed in its entirety because: (1) this Court lacks jurisdiction over the County's claims where the County: (i) has not issued amended assessments to collect taxes from the Plaintiff Associations for the years prior to 2009; (ii) which Plaintiff Associations would appeal to the board of review because such amended assessments lack merit; and (iii) any appeal from the board of review rests not with this Court, but with the tax appeal court; and (2) "Damages" is a form of relief, not an independent cause of action.

DATED: Honolulu, Hawai'i, November 30, 2015.

  
\_\_\_\_\_  
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LISA W. CATALDO  
MARGUERITE S. NOZAKI

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ASSOCIATION, VIC H. HENRY, and PETER A.  
BAGATELOS  
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VILLAS NORTH VACATION OWNERS  
ASSOCIATION

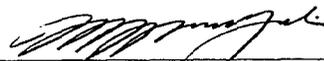


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1001 Bishop Street, Suite 1800  
Honolulu, Hawai'i 96813

Attorneys for Third-Party Defendants  
SVO PACIFIC, INC. and SVO, INC.

NOTICE IS HEREBY GIVEN that the above Motion shall come on for hearing before the Honorable Rhonda I. L. Loo, Judge of the above-entitled Court, in her courtroom at 2145 Main Street, Wailuku, Hawaii on December 29, 2015 at 8:15 a.m., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawai'i, November 30, 2015.

  
\_\_\_\_\_  
ROBERT G. KLEIN  
LISA W. CATALDO  
MARGUERITE S. NOZAKI

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OCEAN RESORT VILLAS VACATION  
OWNERS ASSOCIATION; OCEAN RESORT  
VILLAS NORTH VACATION OWNERS  
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IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

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| OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION, a domestic nonprofit corporation; VIC H. HENRY; AND PETER A. BAGATELOS, | ) | CIVIL NO. 15-1-0435 (1) |
|   | ) | (Other Civil Action)    |
|   | ) |                         |
|   | ) | CERTIFICATE OF SERVICE  |
|   | ) |                         |
|   | ) |                         |
| Plaintiffs,   | ) |                         |
|   | ) |                         |
| vs.   | ) |                         |
|   | ) |                         |
| COUNTY OF MAUI; MAUI COUNTY COUNCIL; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE GOVERNMENTAL ENTITIES 1-10; AND DOE ENTITIES 1-10,   | ) |                         |
|   | ) |                         |
|   | ) |                         |
| Defendants.   | ) |                         |
|   | ) |                         |

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing document were duly served upon the following parties as indicated below by electronically mailing (EM) and mailing (M) said copies, postage prepaid, first class in a United States post office in Honolulu, Hawai'i, on November 30, 2015, addressed as set forth below:

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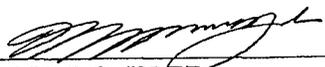
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DATED: Honolulu, Hawai'i, November 30, 2015.

  
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BAGATELOS  
and Counterclaim Defendants  
OCEAN RESORT VILLAS VACATION  
OWNERS ASSOCIATION and OCEAN RESORT  
VILLAS NORTH VACATION OWNERS  
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