

Hawai'i State Constitution: 1978 Amendment to Article VIII, Section 3

TAXATION AND FINANCE

"Section 3. The taxing power shall be reserved to the State, except so much thereof as may be delegated by the legislature to the political subdivisions, and except that *all functions, powers and duties relating to the taxation of real property shall be exercised exclusively by the counties*, with the exception of the county of Kalawao. The legislature shall have the power to apportion state revenues among the several political subdivisions."

"The constitutional and legislative acts covered *the whole subject of property taxation power* and embraced *the entire law in that regard*." See, Gardens at West Maui Vacation Club v. County of Maui, 90 Hawai'i 334, 342, 978 P.2d 779, 780 (1999). (citing *Comm. of the Whole Rep. No. 7*, in 1 Proceedings of the Constitutional Convention of Hawai'i of 1978, at 1008 (1980)).

Ordinance No. 3227 passed on November 19, 2004, creating the general real property tax classification for "Timeshare"

- 1) Timeshares were receiving favorable tax treatment as compared to hotels;
- 2) Hotels were converting to timeshares for tax advantage;
- 3) Loss of hotel room inventory because of timeshare to hotel conversions;
- 4) Loss of jobs in the visitor industry because of hotel to timeshare conversions,
- 5) Shifting tax burdens onto local residents to pay for infrastructure increasingly impacted by the heavy use of timeshare property, and
- 6) Ensuring that the timeshare industry pay its fair share of taxes based on the indisputable impacts their growing numbers of visitors have on Maui County infrastructure, roads, and parks, *not exclusively*.

See, Budget & Finance Committee Meeting Minutes, April 15, 2004, April 26, 2004, and October 12, 2004, March 22, 2005, April 14, 2005, and April 25, 2005; *see also*, Committee Report No. 04-78 & Report No. 05-63.

Timeshare v. Hotel

Hawai'i Revised Statutes § 514E-1 defines "Time share Plan" as follows:

"[A]ny plan or program in which the use, occupancy, or possession of one or more time share units circulates among various persons for less than a sixty day period in any year, for any occupant. The term time share plan shall include both time share ownership plans and time share use plans, as follows:

- (1) "Time share ownership plan" means any arrangement whether by tenancy in common, sale, deed or by other means, whereby the purchaser receives an ownership interest and the right to use the property for a specific or discernible period by temporal division.
- (2) "Time share use plan" means *any* arrangement, excluding normal hotel operations, whether by membership agreement, lease, rental agreement, license, use agreement, security or other means, whereby the purchaser receives a right to use accommodations or facilities, or both, in a time share unit for a specific or discernible period by temporal division, but does not receive an ownership interest.

Supreme Court of Hawai'i Rulings Relevant to County of Maui's Taxation Authority

- “If the classification statute . . . is arguably tailored to serve the [county] policy, it is not arbitrary or capricious, and hence is constitutional under the equal protection clauses.” See, Gardens at West Maui Vacation Club v. County of Maui, 90 Hawai'i 334, 342, 978 P.2d 779, 780 (1999).
- “Under this ‘rational basis test,’ it is the court's function ‘only to seek to adduce *any state of facts that can reasonably sustain the classification statute . . . challenged[.]*’ Id. (Emphasis added).

Second Circuit Court Ruling on Appeal re *Ocean Resort Villas, et al. v. County of Maui, et al.*, Civil No. 13-1-0848(2)

- “Because the County created the Timeshare real property tax classification based on considerations other than any distinction in the actual use of timeshare and hotel property, the County violated MCC section 3.48.305, and the classification is therefore illegal and void from its inception.”
- “The point is that was not the sole reason why the County acted in separating out hotels from timeshare. And the County ordinance, as well as the statute and the Constitution of the State of Hawaii, which is the supreme law in the state, governing state actions -- except when its so preceded or preempted by federal laws -- requires only use be considered.”

Any discussion about “Transient Accommodation Tax” is not relevant to the Second Circuit Court’s ruling and the issue(s) now on appeal to the Supreme Court of Hawai’i.

No Limitation On General Real Property Tax Classifications to Only Actual Use

- There is no identifiable constitutional, statutory, or code provision restricting the classification of real property as based solely on actual use for assessment and tax purposes.
- The State of Hawai'i legislature found at the 1978 Constitutional Convention specifically found that the real property taxation power includes 1) *Basic policies defining real property*, 2) *formulation of basis policies*, and 3) *utiliz[ing] the real property tax as an instrument of land use and economic policy*. See, *Proceedings of the Constitutional Convention of Hawai'i 1978*, pp. 594-5.
- Both the County of Maui's and the City and County of Honolulu's ordinances provide for factors other than actual use to be considered. For example "highest and best use." See, MCC § 3.48.305(B); see also, ROH § 8-7.1(c)(2).
- Honolulu's ROH § 8-7.1(c)(1)(I) [Residential A] specifically provides that parcels improved with no more than 2 single-family units with an assessed value of \$1,000,000.00 or more (*not based on use*)
- The Tax Foundation of Hawai'i has argued in its amicus brief on appeal that "If the rule were that property tax could be based only on use, the property tax systems of all counties would be thrown into turmoil." Tax Foundation of Hawai'i is a non-partisan, non-political IRC § 501(c)(3) organization whose mission is to educate taxpayers and lawmakers on taxation and public finance.

Jurisdictional Problems with Circuit Court Rulings and Orders

- The timeshares are asking for as much as \$34 million dollars in real property tax refunds *for assessment years dating back 12-14 years*, despite having never made timely annual tax appeals to Maui County's Board of Review *and the Tax Appeal Court* for each of the assessment years 2006, 2007, 2008, 2011, 2012, 2013, 2014, 2016, and 2017, as required by Maui County Code, and by Hawai'i Revised Statutes. *See*, MCC §§ 3.48.595 and 3.48.605; *see also*, HRS §§ 232-15; 232-16, 232-17; *see also*, HRS §§232-16 and 232-17;
- The timeshares improperly brought their claims for tax refunds in the Second Circuit Court. The *Tax Appeal Court* is the "Court of record" for all real property tax appeals, and has exclusive and special subject matter jurisdiction over all real property tax appeals. *See*, HRS §§ 232-11, 232-16, & 232-17; *see also*, Kincaid, et al. v. Board of Review, 106 Hawai'i 318, 104 P.3d 905 (2004) (Precluding the circuit court's general subject matter jurisdiction over a real property tax appeal, holding that "a 'rational, sensible, and practicable interpretation' of HRS § 232-17 [*Appeals from Boards of Review*] must, of necessity, mandate that its appellate procedures be followed[.]")
- The Tax Foundation of Hawai'i has argued in its amicus brief on appeal that "Allowing the circuit court to, in effect, order a refund of those taxes as damages would subvert the prescribed tax appeal processes and would raise genuine concerns about catastrophic revenue loss to the County."

Kincaid, et al. v. Board of Review (2002)

The Supreme Court of Hawai'i in Kincaid, et al. v. Board of Review, 106 Haw. 318, 324-325, 104 P.3d 905, 911-912 (2004) was unambiguous about the *exclusive jurisdiction of the Tax Appeal Court* over real property tax appeals:

“The balance of interests would be compromised significantly were we to recognize the circuit court's competing jurisdiction to hear tax appeals under HRS § 91-14. In as much as [the Hawai'i Administrative Procedure Act] does not predicate an aggrieved person's right to judicial review upon the pre-payment of any disputed monies, the taxpayer's pursuit of redress under that statute *would deprive the State and counties of any meaningful opportunity to secure their financial position during the pendency of an appeal*. The resulting peril to the government's fiscal security convinces us that a "rational, sensible, and practicable interpretation" of HRS § 232-17 must, of necessity, mandate that its appellate procedures be followed[.]”

Ocean Resort Timeshare Real Property Tax Facts

- The owner of a timeshare at the Ocean Resort Villas does not pay a real property tax. The owner of the week long timeshare interval pays a common interest assessment imposed by the timeshare associations;
- In 2015, the owner of a **\$71,653.10** week long timeshare interval was estimated to pay **\$366.59** *annually* in common interest assessment for real property tax.
- Total revenue from real property taxes collected from all timeshares on Maui in 2018 was **\$34,777,567.00**;
- If all timeshares on Maui had been assessed as “hotel” in 2018, the revenue loss to the County of Maui for that year would have been **\$13,631,181.00**, or **-39%** of the revenues collected from timeshares.

2006, 2007 & 2008 Retroactive Assessment and Tax (Fiscal/Tax Years 2007, 2008 & 2009)

- In 2015, in preparation for the defense of the timeshares' lawsuit, the Real Property Assessment Division discovered that the condominium real property used by the timeshares for resort operations was *omitted from the tax rolls and not assessed, despite that real property having been condominium property regime for these calendar years*,
- After the County of Maui asserted a claim in the lawsuit for an offset against the timeshares impermissible claim \$34 million dollar retroactive tax refunds, the timeshare argued that the Real Property Assessment Division was required to assess them for the \$10 million in omitted taxes, *before any offset could be claimed*. The Second Circuit Court, Judge Rhonda I.L. Loo, agreed and dismissed the County of Maui's claim for the offset.
- The assessment for the omitted \$10 million in omitted taxes was made in May 2016.

2006, 2007 & 2008 Retroactive Assessment on Appeal to Supreme Court of Hawai'i

- Second Circuit Court Judge Peter Cahill, ruled that the 2016 omitted assessments were “retaliatory.”
- Under the law, a finding of retaliatory assessment and tax would require that the assessment was made *because the timeshares filed a lawsuit in exercise of their constitutionally protected rights. See, Soranno’s v. Gasco, 874 F.2d 1314 (9th Cir. 1989).*
- In this case, the omitted assessment were *discovered* because of the lawsuit, and the record otherwise clearly demonstrates they were issued only after the timeshares argued that the County was required to assess and tax them before it could seek a justified offset to their untimely claims for 12-14 years of tax refunds.
- The Court erroneously concluded that the Ocean Resort timeshare was “specifically targeted” for retroactive assessments.”
- The documentary evidence presented to and ignored by the Court demonstrates that any and all condominium properties discovered to have been missing from the assessment rolls for the same assessment periods were consistently added to the assessment list retroactively assessed, *not just the Ocean Resort Villas.*
- The omitted assessments would have issued even in the absence of the lawsuit. *See, Soranno’s, supra.*