

EMINENT DOMAIN

# *State of Hawaii*

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## **2006 Legislative “Public Use” Update:**

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**No Kelo Reaction.** Despite having at least four proposals before it during the 2006 session, the Hawaii Legislature failed to enact any response to the U.S. Supreme Court’s decision in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). Hawaii thus remains one of the few jurisdictions that has not enacted any legislation curtailing “economic development” takings, or addressing public use standards after *Kelo*.

## **Eminent Domain Power Generally:**

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**Hawaii’s Takings Clause.** The Hawaii Constitution provides: “Private property shall not be taken or damaged for public use without just compensation.” Haw. Const. art. I, § 20.

**Attribute Of Sovereignty.** Eminent domain is an inherent power of the sovereign, and requires no affirmative recognition. *In re Pa Pelekane*, 21 Haw. 175 (1912); *Bishop v. Mahiko*, 35 Haw. 608 (1940).

**Chapter 101.** Originally enacted in 1896, chapter 101 of the Hawaii Revised Statutes is the source for substantive eminent domain law and procedures in Hawaii courts, and codifies the state’s affirmative power to take: “Private property may be taken for public use.” Haw. Rev. Stat. § 101-2. Eminent domain laws are construed liberally in favor of the property owner, and against the condemnor. *Marks v. Ackerman*, 39 Haw.

53 (1951). The government’s power to assess property owners for improvements of an existing street is the power of taxation, not an exercise of eminent domain. *McCandless v. City & County of Honolulu*, 24 Haw. 524 (1918).

**Royal History.** The power to take or damage private property for public use upon payment of compensation has its source, in part, in the ancient ability of Hawaii’s kings to seize land at will. Under Hawaii’s feudal system of land tenure that existed before 1848, private property was not recognized, and all land was owned by the King by right of conquest, and held subject to the King’s sovereignty. Possession of land was at the pleasure of the monarch, even though the Bill of Rights of 1839 provided “nothing whatever shall be taken from any individual, except by express provision of the law.” *In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715 (1864). The King exercised eminent domain-type powers through the chiefs. *In re Pa Pelekane*, 21 Haw. 175 (1912). The “Great *Mahele*” (land division) of 1848 resulted in the recognition of private real property, and the laws of the Kingdom of Hawaii also recognized limitations on the sovereign’s power to take. *Id.* The Constitution of 1852, for example, provided that property could not be taken or appropriated for public use by the King, unless “reasonable compensation” was provided.

**Takings Landmarks.** Hawaii’s eminent domain laws and intense regulatory climate have resulted in several landmark decisions of national importance in condemnation and regulatory takings law. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) upheld the Hawaii Land Reform Act against a public use challenge under the Fifth Amendment’s Takings Clause, ruling that the legislature has nearly untouchable discretion to define the public use of property taken, a holding narrowly reaffirmed in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). A challenge to Hawaii’s attempt to control consumer gasoline prices was rejected by the Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), striking down the “failure to substantially advance a legitimate state interest” test as a regulatory takings standard. The Court’s modern understanding of property as a fundamental constitutional right can be traced to *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the decision rejecting the federal government’s attempt to open a private marina in Hawaii to public recreational boating without first condemning and paying just compensation.

## **Who Is Eligible To Condemn?**

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**State.** The State of Hawaii, including state agencies, may take private property for public use. Haw. Rev. Stat. § 101-2; *Bishop v. Mahiko*, 35 Haw. 608 (1940).

**Counties.** The counties (except the County of Kalawao) are also delegated eminent domain power and may exercise it “when it is in the public interest to do so.”

Haw. Rev. Stat. § 46-1.5(6); Haw. Rev. Stat. § 101-13. Counties may take private property for a broad range of public uses, including roads, waterworks, police and fire stations, and “other public uses within the purview of section 101-2.” Haw. Rev. Stat. § 46-1. County agencies, including boards of water supplies, also are delegated the power of eminent domain. Haw. Rev. Stat. § 101-1; Haw. Rev. Stat. § 101-2.

**Utilities.** Also delegated limited powers: public utilities, telephone companies, and common carriers. Haw. Rev. Stat. § 101-4; *King v. Oahu Railway & Land Co.*, 11 Haw. 717 (1899).

**Irrigation Companies.** Irrigation companies are delegated limited powers of eminent domain to condemn rights-of-way for irrigation infrastructure on a single island, subject to several conditions, including approval by the Public Utilities Commission. Haw. Rev. Stat. § 101-41, 101-42, 101-43.

**Residential Leaseholders.** Residential leaseholders also have a *de facto* ability to condemn and take the fee interests of their lessors under the Hawaii Land Reform Act by petitioning the State to begin eminent domain proceedings in the name of the State. Haw. Rev. Stat. § 516-23; *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

**Condominium Takings Repealed.** With the 2005 repeal of Honolulu Revised Ordinances chapter 33, Honolulu condominium owners no longer possess the ability to petition the City & County of Honolulu to condemn fee interests. *Matsuda v. City & County of Honolulu*, 378 F. Supp. 2d 1249 (D. Haw. 2005).

**No Others.** Only government entities can take property, and objection to development by adjacent property owner and property developer is not a “taking” as they have no power to condemn. *Western Sunview Properties, LLC v. Federman*, 338 F. Supp. 2d 1106 (D. Haw. 2004).

## **What Can Be Condemned?**

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**Private Property Broadly Defined.** The property that may be condemned is defined very broadly. Property that may be taken includes “all real estate,” “structures,” “improvements,” franchises or appurtenances, water, water rights, and “easements of every nature.” Haw. Rev. Stat. § 101-6; *State v. Robinson*, 50 Haw. 501, 443 P.2d 140 (1968). Fee simple or any lesser estate may be taken. Haw. Rev. Stat. § 101-5. Rights of access to an existing public highway is “property.” *Territory v. Arneson*, 44 Haw. 343, 354 P.2d 981 (1960). Excess property may also be taken in connection with the property necessary for public use. Haw. Rev. Stat. § 101-2.

**Taken Or Damaged.** The 1968 amendments to the Hawaii Constitution added the term “or damaged” to article I, section 20. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973). This language was added to broaden the range of compensable property interests. *Id.* Prior to the amendment, an owner whose property was merely consequentially damaged by the primary taking had no recourse. *Widemann v. Thurston*, 7 Haw. 470 (1888). The “damage” provision eliminated this anomaly, and broadened the class of owners whom the condemnor must indemnify when its use of property elsewhere results in damage, the cost of which all society should bear. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973).

**Property Devoted To Public Use.** Property already devoted to public use may also be taken by the State or a county, with limitations. Haw. Rev. Stat. § 101-7; Haw. Rev. Stat. § 101-52. These sections require that the State or a county own the land, not simply that the use to which it is currently put is in some way beneficial to the public. *City & County of Honolulu v. F.E. Trotter, Inc.*, 70 Haw. 18, 757 P.2d 647 (1988).

**Public Property.** “Public property” may be taken. “Public property” is defined as property owned by the State or a county (but not federal property), but does not include “public lands” as defined in Haw. Rev. Stat. § 171-2. These lands include pre-annexation Crown or government land, submerged lands, Hawaiian Homes lands, land owned by the Hawaii Community Development Authority, or the Aloha Tower property. Haw. Rev. Stat. § 171-2. A common carrier cannot condemn land under navigable waters. *King v. Oahu Railway & Land Co.*, 11 Haw. 717 (1899). When property is already appropriated to a public use, in order to be taken, the use proposed must be “more necessary” than the existing public use. Haw. Rev. Stat. § 101-53.

**Personal Property.** Private personal property may be taken, when done so in connection with the taking of real property. Haw. Rev. Stat. § 101-71.

**Residential Leaseholds.** The Hawaii Land Reform Act, Haw. Rev. Stat. ch. 516, provides for the specific condemnation of residential leaseholds by the State, and conveyance of the lease to the leaseholder.

## **Condemnation Proceedings:**

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### **How Initiated?**

**State.** Condemnation by the State is prosecuted by the Attorney General, in the name of the State. Haw. Rev. Stat. § 101-14. To initiate condemnation, the head of a department directs the AG to bring suit. *Id.*

**Counties.** In takings by counties, the County is the plaintiff, and sues in its own name and on its own behalf. Haw. Rev. Stat. § 101-14. The decision to take private property is made by the county or city council, and is authorized by resolution. In the City and County of Honolulu, the proposed resolution must be published in the newspaper at least three days before final action. In other counties, the resolution must be published at least one day before final action. Haw. Rev. Stat. § 101-13. County condemnations are also governed by the procedures in chapter 101. Haw. Rev. Stat. § 46-62; *City & County of Honolulu v. Ing*, 100 Haw. 182, 58 P.3d 1229 (2002).

**When Taken.** Property is deemed to be “taken,” and the right to compensation accrues, as of the date of the summons. *City & County of Honolulu v. Bd. of Water Supply*, 36 Haw. 348 (1943). However, precondemnation announcements of a project may move the taking date backwards, if the condemnor is committed to the project. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973).

### **The Proceedings:**

**Circuit Court.** Eminent domain proceedings are initiated by complaint in Circuit Court, the state court of general jurisdiction. Haw. Rev. Stat. § 101-10. As in other civil cases, a condemnation case is commenced by filing a complaint and issuance of a summons. Haw. Rev. Stat. § 101-15. Circuit courts may determine any issue in the case in advance of other issues. Haw. Rev. Stat. § 101-10. For the most part, the procedures in eminent domain cases are the same as other civil matters. Haw. Rev. Stat. § 101-11.

**Defendants/Intervenors.** The owner or owners of the property are the defendants. Haw. Rev. Stat. § 101-19. Any occupant or person having claim to the property may intervene. Haw. Rev. Stat. § 101-21. When the State or a county is taking fee simple title and the State or county has a tax lien on the property, tax officials need not be joined, but may intervene. Haw. Rev. Stat. § 101-35. A person who purchases the property during the pendency of the condemnation is bound by the result, and loses the right to object to the issuance of a new certificate of title by the Land Court. *In re Ward*, 31 Haw. 781 (1931). A person who does not own property being taken has no taxpayer standing to challenge the condemnation. *Wilson v. Stainback*, 39 Haw. 67 (1951).

**Procedure.** Notice of the complaint is generally accomplished in the same manner as other civil cases. Haw. Rev. Stat. § 101-20. In addition to the pleading requirements of Haw. R. Civ. P. 8, the complaint must contain (1) a statement of the use to which the property is to be put, (2) a description of the property, (2) a notation of whether the condemnor is taking the whole parcel or only a portion, and (4) a map of the property. Haw. Rev. Stat. § 101-16. The complaint and other pleadings may be amended if the amendment will not “impair the substantial rights” of the parties. Haw. Rev. Stat. § 101-19. When the property has changed by natural forces since the time of the filing of

the complaint and the change has not affected the market value – covered by the ocean, for example – no amendment is necessary. *State v. Martin*, 54 Haw. 167, 504 P.2d 1223 (1973).

**Calendar Preference.** Eminent domain cases have calendar preference over all other civil actions, and the courts have a statutory obligation to hear and decide condemnation actions “quickly.” Haw. Rev. Stat. § 101-9. As of July 2006, appeals of condemnation actions are made to the Intermediate Court of Appeals, with discretionary review by the Hawaii Supreme Court. Challenges to public use are entitled to immediate trial, and as-of-right interlocutory appeal. Haw. Rev. Stat. § 101-34.

**Land Reform Act Takings.** With the exception of any special procedural predicates in Haw. Rev. Stat. ch. 516, the condemnation procedures contained in Chapter 101 apply to takings of residential leaseholds. *City & County of Honolulu v. Ing*, 100 Haw. 182, 58 P.3d 1229 (2002)

**Burden And Order.** The condemnor bears the burden of proof, and presents evidence of valuation first. *State v. Heirs of Kapahi*, 48 Haw. 101, 395 P.2d 932 (1964).

**Liberal Admissibility Rules.** The Hawaii Rules of Evidence are applicable in eminent domain actions. Haw. Rev. Stat. § 101-12. The Hawaii Supreme Court favors liberal admissibility rules in eminent domain. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973). Any evidence that will “aid the jury” in determining the fair market value of the taken property is admissible. *City & County of Honolulu v. International Air Service Co.*, 63 Haw. 322, 628 P.2d 192 (1981). The only limitation is evidence that is too “speculative.” *Id.* Or if the probative value is outweighed by the possible prejudice to the jury. *Id.* The trial judge has considerable discretion in determining when evidence is too speculative or prejudicial to allow the jury to hear it. *State v. Martin*, 54 Haw. 167, 504 P.2d 1223 (1973).

### **Possession And Passage Of Title:**

**Vesting Title.** Title vests in the plaintiff only after all payments required by the final judgment have been made and the court issues a final order of condemnation. Haw. Rev. Stat. § 101-26. A certified copy of the final order of condemnation is filed in the Bureau of Conveyances. *Id.* A taking of property is a “sale,” albeit a forced one, and the condemnor obtains status of a bona fide purchaser for value. The property owner is treated as the “seller.” *City & County of Honolulu v. A.S. Clarke, Inc.*, 60 Haw. 40, 587 P.2d 294 (1978).

**Immediate Possession.** There are two alternative procedures for the plaintiff to secure immediate possession of the property.

**State And Counties.** The first alternative is only available if the State or a county is the plaintiff. Any time after the “commencement of the action” (the filing of the complaint), the plaintiff may file an *ex parte* motion for an order of immediate possession. The motion must show the right of the plaintiff to maintain the action, the public use to which the property will be put, and the estimated compensation and damages for the taking. Haw. Rev. Stat. § 101-29. The plaintiff must deposit the estimated compensation with the clerk of the court. Haw. Rev. Stat. § 101-30. The property owner must also be personally served with summons, or process served by publication, or other means to insure actual notice. *Id.* The order putting plaintiff in possession becomes effective ten days after personal service of the order on the property owners in actual possession of the property, unless within that time the court vacates or modifies the order, or delays the effective date. *Id.*; *City & County of Honolulu v. Bishop Trust Co.*, 49 Haw. 494, 421 P.2d 300 (1966). There is no right of interlocutory appeal from an order denying a motion to vacate an order of immediate possession. *City & County of Honolulu v. Hapai*, 44 Haw. 7, 352 P.2d 333 (1959).

**All Plaintiffs.** The other alternative is available to all plaintiffs. After the summons has been served, the court may issue an order of immediate possession after notice to the property owner. Haw. Rev. Stat. § 101-28. The plaintiff’s motion must contain a statement of the need for immediate possession, and a statement of the amount of estimated compensation and damages. If the plaintiff is not the State or a county, the court may require additional money to be deposited with the clerk, or a bond to issue to secure the final award of compensation. *Id.*

**Deposit Required.** Under both alternatives, the plaintiff must deposit estimated compensation and damages with the clerk of the court before any order of immediate possession is issued. Haw. Rev. Stat. § 101-30.

**Possession Pending Appeal.** If the plaintiff is not already in possession of the property through one of the methods set forth above, then after the circuit court judgment, the plaintiff may be put in possession pending appeal upon deposit of the compensation and damages awarded. Haw. Rev. Stat. § 101-32. If the plaintiff appeals, the deposit is held by the clerk, and interest is awarded to any final judgment at 5% per year. If the property owner appeals, it has the right to withdraw the deposit if it abandons all defenses except the sufficiency of the monetary award (public use and necessity, for example).

**Entry Prior To Taking.** Prior to a taking, the condemnor may enter the property in order to make a survey, and is not liable for trespass, except for actual damage to the property. Haw. Rev. Stat. § 101-8.

## **Challenging The Condemnation:**

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### **Public Use:**

**Public Purpose Not Use.** The inquiry under the public use clause of article I, section 20 is whether a taking is designed to further a “legitimate government [*i.e.*, public] *purpose*.” *Housing Finance & Dev. Corp. v. Castle*, 79 Haw. 64, 898 P.2d 576 (1992) (emphasis added).

**Rational Relationship.** The power of eminent domain must be rationally related to a public objective. *City & County of Honolulu v. F.E. Trotter, Inc.*, 70 Haw. 18, 757 P.2d 647 (1988). A legislative declaration of public use creates a judicial presumption of public use. *Hawaii Hous. Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 88 (1985). Legislative promulgation of specific findings and declarations of public use is prima facie evidence of their correctness. *Hawaii Hous. Auth. v. Ajimine*, 39 Haw. 543 (1952). Courts are bound by the legislature’s public use determination unless the use is clearly and palpably of a private character. *State v. Anderson*, 56 Haw. 566, 545 P.2 1175 (1976). This does not mean that the decision of the legislature is conclusive, however, and the public use question is judicial in nature and is decided on the facts and circumstances of each case. *Hawaii Hous. Auth. v. Ajimine*, 39 Haw. 543 (1952). The inquiry to be made is whether the legislature might reasonably consider the use public and whether it rationally could have believed that application of condemnation power would accomplish the public use goal. *Hawaii Hous. Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 88 (1985).

**No Rule On “Economic Development” Takings.** No Hawaii court has yet resolved the question of whether a taking from one private owner and turning it over to another is for public use if it is only supported by claims that the transfer of property may result in economic development as in *Kelo v. City of New London*, 125 S. Ct. 2655 (2005). While the government enjoys fairly` broad power to define the public purposes supporting a taking under the Hawaii Constitution, the Hawaii Supreme Court has not determined the outer limits of that authority. *Hawaii Hous. Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 88 (1985). Thus, it remains unsettled whether the Hawaii courts would apply the *Kelo* standard, or adopt a more balanced public use test as in *County of Wayne v. Hathcock*, 684 N.W.2d (Mich. 2004).

**State May Provide More Protection.** When applying the Hawaii Constitution, Hawaii courts may interpret it to afford greater protection than provided by the U.S. Constitution. *Hawaii Hous. Auth. v. Lyman*, 68 Haw. 55, 704 P.2d 88 (1985). The Hawaii Supreme Court expressly has not accepted the U.S. Supreme Court’s rationale that the legislature’s eminent domain power is “coterminous” with the police power, as held in *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

**State Not Limited By County Uses.** The State is not required to conform the uses for which property is taken to county land use plans. *Kunimoto v. Kawakami*, 56 Haw. 582, 545 P.2d 684 (1976). Article VIII, section 6 of the Hawaii Constitution and Haw. Rev. Stat. § 50-51 are the state supremacy provisions. *Save Sunset Beach Coalition v. City & County of Honolulu*, 102 Haw. 465, 78 P.3d 1 (2003). On matters of statewide interest, state law governs over local. *Stallard v. Consolidated Maui, Inc.*, 103 Haw. 468, 83 P.3d 731 (2004).

**Particular Uses.** Slum clearance and blight abatement are public purposes supporting a taking. *Hawaii Hous. Auth. v. Ajimine*, 39 Haw. 543 (1952). Temporarily leasing property taken for a public park to a private entity does not defeat the public purpose for the taking. *City & County of Honolulu v. Bishop Trust Co.*, 49 Haw. 494, 421 P.2d 300 (1966).

### **Prodecure To Challenge Public Use:**

**Immediate Trial, Appeal.** The property owner may challenge public use in the answer, or return of the order to show cause on immediate possession. Haw. Rev. Stat. § 101-43. The property owner's challenge to public use of the property may be set for immediate trial, regardless of the case's calendar position. *Id.* A landowner has the right to contest public use, including whether procedural prerequisites have been met. *City & County of Honolulu v. Ing*, 100 Haw. 182, 58 P.3d 1229 (2002); The circuit court holds an evidentiary hearing on the issue. *Id.* The term "trial" includes disposition by means of summary judgment. *Housing Finance & Dev. Corp. v. Castle*, 79 Haw. 64, 898 P.2d 576 (1992). An as-of-right interlocutory appeal lies from the circuit court's decision on this issue. *City & County of Honolulu v. Ing*, 100 Haw. 182, 58 P.3d 1229 (2002); *Housing Finance & Dev. Corp. v. Castle*, 79 Haw. 64, 898 P.2d 576 (1995). The appeal is given docket preference by the Intermediate Court of Appeals. Haw. Rev. Stat. § 101-34. There is no right of interlocutory appeal from an order denying a motion to vacate an order of immediate possession. *City & County of Honolulu v. Hapai*, 44 Haw. 7, 352 P.2d 333 (1959).

**Timing.** Challenges to public use must be made within 10 days after the service of an order granting immediate possession, or the issue is deemed to be waived. Haw. Rev. Stat. § 101-34.

**Abandonment.** Withdrawal of the deposit of estimated compensation by the property owner is an abandonment of all defenses it may have, except the sufficiency of the compensation or damage award. Haw. Rev. Stat. § 101-31.

**No Jury.** Public use issues are determined by the court, not a jury. Haw. Rev. Stat. § 101-34.

## **Inverse Condemnation And Regulatory Takings:**

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**Inverse Condemnation.** Hawaii courts recognize claims for inverse condemnation, although it is not labeled as such. *Ward v. City & County of Honolulu*, 31 Haw. 787 (1931). At least one case has held that the common law inverse condemnation remedy is not available if there is a legislative scheme providing for a procedure to obtain compensation. *Herring v. Gulick*, 5 Haw. 57 (1883). It has not been decided whether an inverse condemnation claim must be made in the course of the condemnation, or may be brought as a separate action. *Id.* The statute requiring the condemnor pay damages upon abandonment of an eminent domain action (Haw. Rev. Stat. § 101-27) is not legislative authorization for an inverse condemnation claim. *Helela v. State*, 49 Haw. 365, 418 P.2d (1966).

**Regulatory Taking.** The Hawaii Supreme Court has never formally recognized a cause of action for regulatory taking. *Austin v. City & County of Honolulu*, 840 F.2d 678 (9th Cir. 1988). The court has in *dicta* assumed the claims are valid. *See, e.g., Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 79 Haw. 425, 903 P.2d 1246 (regulatory taking occurs when government's application of a law to a particular landowner denies all economically beneficial use of property without providing compensation), *cert. denied*, 517 U.S. 1163 (1995); *Hasegawa v. Maui Pineapple Co.*, 52 Haw. 327, 475 P.2d 679 (1970) (when regulation goes too far, it will be recognized as a taking requiring compensation). However, when the court addressed the issue directly in *Allen v. City & County of Honolulu*, 58 Haw, 432, 571 P.2d 328 (1977), it held that the only remedy available in a regulatory takings challenge was invalidation of the unconstitutional law. The court adopted the then-valid California rule of *Agins v. City of Tiburon*, 598 P.2d 25 (Cal. 1979), that damages are not available for either permanent or temporary regulatory takings. *Id.* at 438, 571 P.2d at 331.

**First English.** The rule in *Allen* is of doubtful constitutionality. California's limitation of the remedy for regulatory takings to invalidation was rejected as inconsistent with the Takings Clause by *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). In the time since *First English*, the Hawaii Supreme Court has not revisited the issue, and may not need to, because the Fifth Amendment may require a state to provide a compensation remedy, even if it has not explicitly done so. *See, e.g., Carson Harbor Village, Ltd. v. City of Carson*, 353 F.3d 824 (9th Cir. 2004) (regulatory takings claim not ripe since property owner had not sought compensation via state procedures, and had not shown that such procedures were unavailable).

**Hawaii Law Defines Property.** Property rights recognized by Hawaii law – even though these rights may not be recognized as property elsewhere – are constitutional “property” that may not be damaged or overregulated without payment of just

compensation. *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1991). While the government may not be estopped from regulating property, its assurances can rise to the level of “property” that may not be interfered with without exercising condemnation. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

### **Just Compensation/Valuation Issues:**

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**Fair Market Value.** Just compensation should approximate the value which a free market would attach to the taken property. *City & County of Honolulu v. International Air Service Co.*, 63 Haw. 322, 628 P.2d 192 (1981). It measures market value, not the value of the property to the owner. *United States v. Honolulu Plantation Co.*, 122 F. 581 (9th Cir. 1903). Just compensation and damages are assessed for the property and any improvements taken or damaged. Haw. Rev. Stat. § 101-23. Just compensation and damages are assessed as of the date of summons, and the actual value on that date is how compensation is measured. Haw. Rev. Stat. § 101-24; *City & County of Honolulu v. Bd. of Water Supply*, 36 Haw. 348 (1943); *City & County of Honolulu v. Chun*, 54 Haw. 441, 506 P.2d 770 (1973). Appreciation and improvements to property after the date of summons are not calculated into the determination of just compensation. Haw. Rev. Stat. § 101-24. However, improvements undertaken after the date of the summons which are necessary to restore the remaining property to its previously available use are compensable. *City & County of Honolulu v. Chun*, 54 Haw. 441, 506 P.2d 770 (1973).

**Highest And Best Use.** Fair market value is not limited to the value for the use the property is put to at the time of the taking, but includes the potential use – in other words, its “highest and best use” – to which the property may be put. *State v. Dillingham Corp.*, 60 Haw. 393, 591 P.2d 1049 (1979); *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973). Highest and best use is determined by considering the uses to which the property may be put in the reasonably near future. *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57, *cert. denied*, 419 U.S. 872 (1973). This includes the reasonable probability of rezoning. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973). Evidence of matters which would be considered by a prospective purchaser which may enhance or depreciate the value of the property is admissible. *Territory v. Adelmeyer*, 45 Haw. 144, 363 P.2d 979 (1961).

**Undivided Fee Rule.** The proper method of determining just compensation for property which is held subject to several interests is to value it as an unencumbered estate, with allocation of fair market value made thereafter among the various interests. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973). Agreements between lessor and lessee regarding division of compensation in the event of

condemnation are generally enforceable. *Territory v. Arneson*, 44 Haw. 343, 354 P.2d 981 (1960).

**Severance Damages.** In partial takings, there are no set rules for determining compensation and damages. *Territory v. Adelmeyer*, 45 Haw. 144, 363 P.2d 979 (1961). Payment for damage to the remaining parcel is mandated by the constitution. *Territory v. Honolulu Plantation Co.*, 34 Haw. 859 (1939). Generally, severance damages are calculated by determining damage to the remainder, offset by any special benefit to the remainder. Haw. Rev. Stat. § 101-23. Special benefits to the remainder parcel is not limited to access, but may include anything that will add to the convenience, accessibility, use and value of the property provided it is not shared by nonabutting property. *Territory v. Mendonca*, 46 Haw. 83, 375 P.2d 6 (1962). For example, severance of the property may increase the chance of rezoning to a more intense use. *State v. Midkiff*, 55 Haw. 190, 516 P.2d 1250 (1973). Severance damages are calculated as of the date of the summons. *City & County of Honolulu v. Chun*, 54 Haw. 441, 506 P.2d 770 (1973).

**Severance Rule For Road Improvements.** In cases of takings to widen or realign public roads, the owner is entitled to “full compensation for the property actually taken,” and any special benefits to the remainder are not considered unless they exceed severance damages. In other words, special benefit to the remainder may only be offset against severance damages, and not against the just compensation for the property taken. Haw. Rev. Stat. § 101-23; *Territory v. Adelmeyer*, 45 Haw. 144, 363 P.2d 979 (1961). The condemnor bears the burden of establishing special benefits. *Territory v. Mendonca*, 46 Haw. 83, 375 P.2d 6 (1962). Whether a taking of property for a road is a “realignment” of an existing road, or a taking for a new road is a question of law for the court to determine. *State v. Midkiff*, 55 Haw. 190, 516 P.2d 1250 (1973).

**Interest.** Interest at 5% per year is due from the date of the order of possession until final payment is made. Haw. Rev. Stat. §§ 101-33, 101-25.

**Owner Testimony.** The testimony of the owner of the property is admissible to show value. *Territory v. Adelmeyer*, 45 Haw. 144, 363 P.2d 979 (1961). However, an officer of a corporate owner of property may not testify about value unless the officer is also qualified as an expert. *City & County of Honolulu v. International Air Service Co.*, 63 Haw. 322, 628 P.2d 192 (1981).

**Expert Testimony.** Expert opinion regarding value is liberally admissible, as is the evidence forming the basis for the expert’s opinion. *State v. Kunimoto*, 62 Haw. 502, 617 P.2d 93 (1980).

**Tax Appeals An Admission Of Value.** The valuation of the property claimed by a property owner in property tax appeals is admissible, and if the taxpayer has appealed a property tax assessment, the taxpayer’s claim of value in that procedure “shall be admissible” in the eminent domain action as an admission of fair market value on the date of the assessment. Haw. Rev. Stat. § 101-12.

**Blight Of Summons.** The plaintiff must also pay blight of summons damages for the delay from the date of the summons until final payment. *City & County of Honolulu v. Bd. of Water Supply*, 36 Haw. 348 (1943). The purpose is to put the owner in as good a position as it would have been had full compensation been paid contemporaneously with the taking. *In re Estate of Campbell*, 46 Haw. 475, 382 P.2d 920 (1963). Blight of summons damage is indemnification for the condemnor’s delay in paying the full cash equivalent to the property taken on the date of issuance of the summons. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973). These payments are owed as part of just compensation. *Territory v. Honolulu Plantation Co.*, 34 Haw. 859 (1939). Damages run until date of payment to the condemnee, even if the amount is earlier stipulated between the parties. *City & County of Honolulu v. Bishop Trust Co.*, 48 Haw. 444, 404 P.2d 373 (1965). Blight of summons damages are not compounded. *Hawaii Hous. Auth. v. Midkiff*, 69 Haw. 247, 739 P.2d 248 (1987).

**Rate In Cases Of Immediate Possession.** In cases where the State or a county is the condemnor and the procedure for immediate possession of the property under Haw. Rev. Stat. § 101-29 is invoked (*see* “Possession and Passage of Title – State and counties” *infra*), the rate for blight of summons damages is 5%. *Hawaii Hous. Auth. v. Midkiff*, 69 Haw. 247, 739 P.2d 248 (1987). In these cases, Chapter 101 provides only for payment of 5% interest from the date of the order of possession, and is silent regarding the rate for blight of summons damages. Haw. Rev. Stat. §§ 101-33 and 101-25. However, the rate to be used to calculate blight of summons damages is the same, since the provision regarding interest from the date of the order of possession is strongly indicative that the legislature contemplated 5%, not the prevailing commercial rate. *City & County of Honolulu v. Bonded Investment Co.*, 54 Haw. 385, 507 P.2d 1084 (1973). Because the court held that the condemnor must pay 5% – either as interest or blight of summons damages – there is no practical distinction between them, and there is no real significance of the date of the order of possession. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973).

**Rate For Blight Of Summons In Other Cases.** When there has not been an order of immediate possession in favor of the State or a county, the 5% rate is not applicable, and the rate for blight of summons damages is a question of fact. *Hawaii Hous. Auth. v. Midkiff*, 69 Haw. 247, 739 P.2d 248 (1987). The condemnee is entitled to offer evidence of the short-term market interest rates available during the period from the

date of the valuation to the date of judgment. *Id.* Any evidence that would aid the jury to determine the blight of summons rate of interest is admissible. *Id.*

**Comparable Sales.** The “market data” approach to fair market value measures value by sales of similar property. *City & County of Honolulu v. International Air Service Co.*, 63 Haw. 322, 628 P.2d 192 (1981). Evidence of comparable sales must be sufficiently near in time, must be located sufficiently near the property being valued, and sufficiently alike the taken property. *Id.*; *State v. Heirs of Kapahi*, 48 Haw. 101, 395 P.2d 932 (1964).

**Condemnation Blight.** Evidence of depreciation in value caused by a prospective taking once the condemnor is committed to the project is not admissible. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973).

**Enhancements And Scope Of The Project.** Enlargement of a project to take additional land is known as a “supplemental” taking and is compensable if outside the scope of the original project. *Territory v. American Security Bank*, 43 Haw. 167 (1959). However, when a project includes the taking of several parcels, but only one is taken first, the other owners should be not permitted to introduce evidence of increased value due to the project, if their parcels are within the scope of the original project. *Id.*; *State v. Heirs of Kapahi*, 48 Haw. 101, 395 P.2d 932 (1964).

**Threat Of Condemnation.** There are two ways to introduce evidence about the sale of nearby similar property sold under the threat of condemnation. It may be direct evidence of comparable sales, or introduced to support an expert’s valuation opinion. *State v. Heirs of Kapahi*, 48 Haw. 101, 395 P.2d 932 (1964). Such evidence is generally not admissible, since such sales are almost always the result of compromise, not true market forces, unless there is a sufficient showing that the sale was voluntary. *Honolulu Redev. Agency v. Pun Gun*, 49 Haw. 640, 426 P.2d 324 (1967). However, even that rule is not strictly applied since coercion or compromise is not inherent in eminent domain, and condemnation can be perceived as a “defense” against government “extortion.” *City & County of Honolulu v. International Air Service Co.*, 63 Haw. 322, 628 P.2d 192 (1981). Ultimately, the trial judge has broad discretion to admit evidence of value from nearby similar properties subject to condemnation, with weight of the evidence reserved for the jury. *Honolulu Redev. Agency v. Pun Gun*, 49 Haw. 640, 426 P.2d 324 (1967).

**Capitalization Of Income.** The development or income stream approach to valuation is also admissible for properties when the evidence shows there is a “realistic” chance of being more intensely developed. *City & County of Honolulu v. Bishop Trust Co.*, 48 Haw. 444, 404 P.2d 373 (1965). Conversely, this method of valuation may be considered too speculative to be admitted if the development of the property is merely in the “planning stage.” *City & County of Honolulu v. Bonded Investment Co.*, 54 Haw.

385, 507 P.2d 1084 (1973). If a foundation is laid that a potential use is reasonably probable, the jury is entitled to hear it and give it the appropriate weight. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973).

**Development Costs.** The costs of developing or subdividing property and anticipated profits are not separately compensable, but evidence of such is admissible to show enhancement of value. *City & County of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973). Anticipated profits may too uncertain and conjectural to be considered as a separately compensable property interest. *State v. Chang*, 50 Haw. 195, 436 P.2d 3 (1967). Evidence of such may be admitted, however, to show enhancement of the fair market value of the property. *City & County of Honolulu v. Bonded Investment Co.*, 54 Haw. 385, 507 P.2d 1084 (1973).

**Jury Determines Compensation And Damages.** The value of the property taken, just compensation, and damages are determined by a jury. *Territory v. Adelmeyer*, 45 Haw. 144, 363 P.2d 979 (1961). Expert opinion is advisory only, and the jury is not bound to accept it; the jury may exercise its own judgment, based on the law and the facts of the case. *Territory v. Arneson*, 44 Haw. 343, 354 P.2d 981 (1960). A jury's verdict will not be overturned unless it can be shown it is the product of passion or prejudice, or so excessive as to shock the conscience. *Id.*

**Judgment, Final Order Of Condemnation, And Interest:**

**Time Of Payment.** The plaintiff has two years from final judgment to pay just compensation and damages. Haw. Rev. Stat. § 101-25. Failure to pay within this time means "all rights" obtained by the judgment are lost. *Id.* Final judgment means the judgment entered after appeal, if any. *State v. Heirs of Kapahi*, 50 Haw. 237, 437 P.2d 321 (1968).

**Deposit And Notice.** Compensation is deposited with the clerk of the court, and the plaintiff has thirty days to notify the property owners of their right to the funds in accordance with the court's order. Haw. Rev. Stat. § 101-25. Failure to notify entitles the property owner to 5% per year interest until the notice is mailed or payment is received from the clerk. *Id.* If the plaintiff does not deposit the compensation and damages within 30 days of the final judgment, interest is added at 5% per year. Haw. Rev. Stat. § 101-25.

**Property Tax Lien.** Any property tax liens are paid out of the deposit. Haw. Rev. Stat. § 101-37.

**Final Order.** Upon payment, the court issues a final order of condemnation. Haw. Rev. Stat. § 101-26.

**Deficiency And Excess Judgments.** If the verdict on compensation and damages exceeds the estimated deposit, the court issues a deficiency judgment. Haw. Rev. Stat. § 101-31. If the judgment is less than the deposit, the plaintiff is entitled to restitution of the excess withdrawn, plus 5% interest from the date of the withdrawal. *City & County of Honolulu v. Bonded Investment Co.*, 54 Haw. 385, 507 P.2d 1084 (1973).

### **Discontinuance Or Abandonment:**

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**Fees And Costs.** If a condemnation action is abandoned or dismissed before final judgment, or if the property is not finally taken for public use, the property owner is entitled to recover all damages caused by the condemnation, including court costs, reasonable attorney's fees, and reasonable expenses. Haw. Rev. Stat. § 101-27. The property owner is also entitled to recover possession. *Id.* This section does not authorize an inverse condemnation claim. *Helela v. State*, 49 Haw. 365, 418 P.2d (1966).

**Jury Question.** Issues of damages stemming from abandonment or dismissal may be determined by a jury, if either party demands it within ten days from the entry of an order or judgment determining the action has been abandoned, or dismissing the case. Haw. Rev. Stat. § 101-27. If the property owner is awarded damages, the award may be paid out of the deposit, if any. *Id.*

### **Attorneys Fees and Litigation Costs:**

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**Not Recoverable.** Attorney's fees and costs of litigation are not generally recoverable in condemnation actions. *State v. Davis*, 53 Haw. 582, 499 P.2d 663 (1972). If the condemnor acts in bad faith, fees may be recovered. *State v. Pioneer Mill Co.*, 64 Haw. 168, 637 P.2d 1131 (1981). However, in condemnations under the Hawaii Land Reform Act, if eminent domain proceedings are not instituted within one year of a property's designation for acquisition, the owners are entitled to out-of-pocket expenses and attorney's fees, from either the State or the lessee on whose behalf the acquisition was designated. Haw. Rev. Stat. § 516-23.