SCWC-19-0000776

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MAUNALUA BAY BEACH OHANA 28, a Hawaii Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawaii Non-Profit Corporation, MAUNALUA BAY BEACH OHANA 38, a Hawaii Non-Profit Corporation, individually and on behalf of all others similarly situated,

Petitioner/Plaintiffs-Appellants,

vs.

STATE OF HAWAI'I,

Respondent/Defendant-Appellee.

CAAP-19-0000776
(Inverse Condemnation)

APPLICATION FOR WRIT OF CERTIORARI TO REVIEW (1) JUDGMENT ON APPEAL BY ASSOCIATE JUDGE HIRAOKA, FILED APRIL 15, 2024; (2) OPINION OF THE COURT BY ASSOCIATE JUDGE HIRAOKA, FILED MARCH 18, 2024

INTERMEDIATE COURT OF APPEALS

Hon. Keith J. Hiraoka,
Presiding Judge

Hon. Karen Nakasone,
Associate Judge

Hon. Sonja McCullen,
Associate Judge

PETITIONER/PLAINTIFF/APPELLANTS' REPLY IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

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PETITIONER/PLAINTIFF/APPELLANTS' REPLY IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

This decades-long action restored ownership of oceanfront land to property owners statewide. Act 73 took previously accreted lands and declared them public lands. After the Ohanas sued and prevailed on their constitutional takings claim, the State—chastened, and fearing hundreds of millions of dollars in liability—repealed Act 73. Although the State estimated that "perhaps hundreds of millions of dollars" of just compensation would be owed statewide, the trial court awarded zero dollars for nine years' taking of over 70,000 square feet of the Ohanas' oceanfront land. The ICA affirmed. And although the Ohanas vindicated the constitutional rights of oceanfront property owners statewide and forced the State to repeal its unconstitutional law, the ICA affirmed the trial court's denial of attorneys' fees, ignoring Article I Section 20's abrogation of the State's sovereign immunity and reasoning that the private attorney general doctrine did not apply because, among other things, the Ohanas vindicated "private, not public interests." *Maunalua II*, 154 Hawai'i 144, 154, 547 P.3d 1174, 1184 (2024).

These grave errors require correction by this Court.

I. The ICA grievously erred in affirming the circuit court's award of zero dollars in just compensation.

Where, as here, the State completely divested the Ohanas of their ownership of more than 70,000 square feet of oceanfront land for nine years, just compensation of zero dollars cannot be squared with the constitutional requirement to compensate property owners when private property is taken *or damaged* for public use. Haw. Const. art. I, § 20 ("Private property shall not be taken **or damaged** for public use without just compensation.") (emphasis added). Takings—even temporary ones—require just compensation. *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 316 (1987) ("Invalidation of the ordinance without payment of fair value for the use of the property during such period would be a constitutionally insufficient remedy.")

Here, the finding of zero dollars in just compensation was based on several fatally flawed findings of fact, including that there was "no reasonable possibility" of any development and "no economic use" for the beach reserve lots or the makai land. These findings ignored the inherent and undeniable economic value in owning oceanfront land—value that was taken from the Ohanas for nine years. Even setting aside the circuit court's credibility determinations, there was

substantial record evidence of sound just compensation methodology—none of which supported a finding of zero dollars.

First, the Ohanas presented evidence of the State's own methodology for calculating annual market rentals for the non-exclusive use of fast land and submerged land. ROA267 at D-13, P-31, P-32. Although the circuit court determined that the State's Kaneohe Bay methodology "was not intended to and does not replicate fair market value," SCWC Dkt. 11 ("Resp. Br.") at 4, that is exactly what it was intended to and did do, during the period of the taking. The State was literally appraising and selling rights to non-exclusive use of property comparable to (but less than) the non-exclusive uses accorded to the Ohanas during the period of the taking. ROA267 at D-13, p. 4 (describing the State's process for calculating annual rents of easements under the shoreline encroachment methodology, recommending that where easement values are "very low" a minimum nuisance value of $500 be charged); *id.*, P-31 (DLNR appraisal report of fair market value of a Kaneohe seawall and filled land easement for total land area of 2,243 square feet, determining annual market rent of $4,200); *id.*, P-32 (appraisal report to assist DLNR in leasing conservation-zoned pier easements that offer "no independent value," estimating market annual lease rent at $1,456 or an amount equal to $83 per square foot of encumbered state submerged land). Second, the record reflects tax assessed values and real property tax bills for the Ohanas' beach reserve lots, which are adjacent to the makai land. ROA210:19 at FOF125-19 ($100 - $300 tax assessed values and $300 annual real property tax bills); ROA267 at D-14 – D19 (tax assessments).

At minimum, the circuit court should have awarded nominal damages. That is what Judge Mollway did in *Bridge Aina Lea LLC v. Land Use Commission* ("*Bridge Aina Lea*"), when, it struck one of plaintiff's experts and limited another, leaving it without the just compensation evidence it had hoped to present. Civ. No. 11-00414 SOM-KJM, 2018 WL 6705529, at *1 (D. Haw. Dec. 20, 2018).

And, the circuit court's alternative finding that any fair market rental value would be offset by the value of the Ohanas' continued, non-exclusive use of the land taken adds insult to injury. The diminution in rights suffered by the Ohanas when Act 73 rendered them mere guests rather than owners cannot be used to reduce the amount of just compensation. The State's claim that the Ohanas "could continue to use the makai lands as they always had" misses the point entirely—Act 73 deprived the Ohanas of the entire "bundle" of property rights that ownership confers. Beach

access does not offset loss of ownership. Similarly ludicrous is the argument that "by relieving [the Ohanas] of ownership of the makai lands, the State also relieved [them] of the potential liabilities of ownership." Resp. Br. at 6. Reduction of premises liability risk does not offset just compensation.

II. Sovereign Immunity Does Not Bar Private Attorney General Fees

The ICA held that the Ohanas' "claim [for attorneys' fees] is barred by sovereign immunity," because the Ohanas only prevailed on their claim for declaratory relief, and "no clear statutory waiver that could be extended to attorney's fees is present when the underlying claim is for declaratory and/or injunctive relief." *Maunalua II*, 154 Hawai'i at 152, 547 P.3d at 1182 (citing *Nelson*, *Gold Coast*, and *Kaleikini*). Wrong. The ICA and the State's myopic focus on the Ohanas' declaratory relief claim—and cases construing the right to attorneys' fees in that context—is a red herring. *Maunalua II*, 154 Hawai'i at 152, 547 P.3d at 1182 (citing *Nelson v. Hawaiian Homes Comm'n*, 130 Hawai'i 162, 307 P.3d 142 (2013), *Sierra Club v. Haw. Dep't of Transp.*, 120 Hawai'i 181, 202 P.3d 1226 (2009)), *Gold Coast Neighborhood Ass'n v. State*, 140 Hawai'i 437, 403 P.3d 214 (2017)), *Kaleikini v. Yoshioka*, 129 Hawai'i 454, 304 P.3d 252 (2013)); Resp. Br., 9 – 10 (likewise citing *Nelson*, *Sierra Club*, *Kaleikini*). The *Nelson*, *Kaleikini*, and *Gold Coast* plaintiffs sought declaratory and injunctive relief—not money damages. And "[w]here a party seeks **only** injunctive relief, the ability to sue the state does not stem from a **waiver** of sovereign immunity, but from the fact that sovereign immunity does not bar the suit in the first place." *Nelson*, 130 Hawai'i at 170, 307 P.3d at 150 (emphasis added) (citing *Sierra Club*). In other words, the statutory authorization for declaratory relief is not a **waiver** of sovereign immunity, but rather an **exception** to sovereign immunity (no waiver necessary). *Kaleikini*, 129 Hawai'i at 468, 304 P.3d at 266 (emphasis in original). Because those cases arise out of an **exception** to sovereign immunity, there could be no statutory **waiver** applicable to fees in those cases (and others seeking **only** injunctive relief). That is not the case here: Hawaii's Takings Clause—by its own force—abrogates state sovereign immunity by allowing suits for money damages against the State where there has been a taking or damage *to* property without just compensation. *See First English Evangelical Lutheran Church of Glendale v. L.A. Cty.*, 482 U.S. 304, 315–16, 316 n. 9 (1987).

The State contends that there must be a "clear relinquishment of the State's immunity." Resp. Br. at 9. There can be no clearer relinquishment of sovereign immunity. The Takings clause is self-executing. No additional, separate, or statutory waiver is necessary; the waiver of sovereign

immunity is found in the constitutional provision itself.[1] Hawaii's federal district court rejected similar arguments that sovereign immunity barred attorneys' fees in takings claims under state law in *Bridge Aina Lea*, 2018 WL 6705529, at *4 – 5 ("The Court is unpersuaded by the LUC's argument that the LUC is immune from as award of attorneys' fees under Hawai'i law," noting that the State cited no Hawai'i case law to support its claim that "Hawai'i courts have definitively stated that the State is immune from an award of attorneys' fees under the private-attorney-general doctrine.").

Next, the State claims that "this Court's precedent clearly demonstrates that fees under the private attorney general doctrine can **only** be awarded to a prevailing party" and concludes that the Ohanas cannot be the prevailing party for attorneys' fees purposes because they only prevailed on the declaratory relief claim and not the takings claim. Resp. Br., 9 – 10 (quoting *Sierra Club* and *Nelson*) (emphasis added). But—immediately after language quoted by the State—*Nelson* goes on to state:

> The prevailing party is the one who prevails on the disputed main issue … Even if the party does not prevail to the extent of his original contention, he will be deemed to be the successful party for the purpose of taxing costs and attorney's fees.

Nelson , 130 Hawai'i at 165, 307 P.3d at 145 (determining that "on balance" plaintiffs prevailed). Here, the Ohanas unquestionably prevailed on the disputed main issue of whether a constitutional taking occurred. Without winning that point, the Ohanas could not have obtained either declaratory relief or the right to just compensation. And, the Ohanas' victory forced the State to repeal Act 73, turning a statewide permanent and absolute taking of oceanfront land into a temporary taking. Accordingly, on balance, the Ohanas were the prevailing party for private attorney general fees purposes.

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[1] Moreover, this Court's precedent establishes that a separate waiver of sovereign immunity specifically as to attorneys' fees is unnecessary for claims brought under HRS § 661-1, as the Ohanas did. ROA1:7, Complaint, at ¶ 14 (citing both HRS § 661-1 and Haw. Const. art. I, § 20). *See Fought & Co., Inc. v. Steel Eng'g & Erection, Inc.*, 87 Hawai'i 37, 56, 951 P.2d 487, 506 (1998) (a further waiver of sovereign immunity is not necessary in order for HRS § 607–14 to apply to the state in matters in which, by virtue of the express waiver of sovereign immunity set forth in HRS § 661–1, has become a party); *Sierra Club v. Dep't of Transp. of State of Hawai'i*, 120 Hawai'i 181, 229, 202 P.3d 1226, 1274 (2009) (extending *Fought's* holding that a further waiver of sovereign immunity was not necessary in order for the private attorney general doctrine to apply to the state, by virtue of the express waivers of sovereign immunity set forth in HRS §§ 661–1(1) and 343–7).

Finally, the ICA grievously erred in holding that the Ohanas did not satisfy the criteria for an award of fees under the private attorney general doctrine, which allows attorneys' fees to plaintiffs who have "vindicated important public rights." This case is a textbook illustration of the three private attorney general doctrine factors. First, the case vindicated the constitutional rights of littoral owners across the State. More broadly, this case is of societal importance because all citizens have an interest in holding the government accountable for constitutional violations. This case also served the important public policy purpose of educating the State (and the Legislature in particular) on constitutional takings. As the State conceded in its testimony supporting the repeal of Act 73:

> It does not appear the Legislature was aware of the takings issue when it passed Act 73. If, going forward, the Legislature decides to take some or all accreted land, the Legislature would likely wish to consider all aspects of the issue.

ROA101:38 – 40 (February 3, 2012 testimony by the Department of the Attorney General) (*see also* SCWC Dkt.1, Application at n.2). This case is not—as the ICA held—a case of "private, rather than public interests." Second, fees under the private attorney general doctrine are necessary to incentivize private attorneys to take on public interest cases. The burdens of private enforcement over the past two decades have been significant, spanning two appeals and trial. Finally, although the ICA went too far in suggesting that "all the citizens of the state" must benefit in order for the third factor to be met, all Hawai'i citizens stand to benefit when the State is held to account, constitutional rights are enforced, and the Legislature is properly educated.

III. CONCLUSION

The Ohanas respectfully request that the Court grant certiorari, void the ICA's Opinion insofar as it included the errors described, and correct each of the errors described herein.

DATED: Honolulu, Hawai'i, July 23, 2024.

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I HEREBY CERTIFY that a true and correct copy of the foregoing document will be served on counsel of record indicated below through JEFS upon the filing hereof:

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