



KA NU HOU



FROM THE CHAIR

APRIL 2010

This year, we will have semi-annual editions of the Real Property and Financial Services Section of the HSBA (April and October). Our featured author is Mark Kaetsu, the recipient of our 2009 Real Property and Financial Services Section Garland Award.

I am pleased to announce the officers for this year:

- Vice Chair – Grace Kido
- Treasurer – Diane Praywell
- Secretary – Michele Shinn

This year, to expand on the educational programs, we have started brown bag sessions which we invite you to attend. We started with a brown bag session in January featuring Frank Upham. We are planning two additional sessions on June 18 and October 15. If you have suggestions for topics for these sessions or would like to help plan them, please contact one of our seminar committee members (Cindy Ching, Grace Kido, Greg Kugle and Diane Praywell).

Our plans for continuing legal education include the annual Legislative Update (July) and we are exploring having the Litigation Update in November. The revised Conveyance Manual will be presented at the HSBA Convention in September. Lastly, we are also looking at a possible session by Michael Rubin on ethical issues for real property lawyers (date and time to be determined but we are targeting a 3 hour session).

We would also like to expand on the website and add materials of interest to our section members. Many thanks to Nancy Grekin who continues to keep the website up to date. If you have ideas or want to help with the website, please contact our website committee members (Nathan Natori and Kyle Sakumoto).

If you would like to get involved in the section, board

meetings are held monthly at noon on the third Friday on the each month except August and December, at the office of Carlsmith Ball (mahalo to Rodd Yano for arranging this) and all members are invited to attend. For the months in which we have brown bag sessions, the locations may change to accommodate a larger group.

Aloha,
Cindy Ching, Chair

June Brown Bag Session

Friday, June 18, 2010 at 12 noon

HSBA Conference Room

Kali Watson will speak on the legal framework for dealing with DHHL lands.

(Board Meeting to follow)

Next Board Meetings:

May 21 - Carlsmith Office

June 18 - HSBA Conference Room

July 16 - Carlsmith Office



In this issue:

Condemning Paradise: A takings analysis in light of County of Hawaii v. Coupe, by Mark Kaetsu, a law student at the William S. Richardson School of Law.



“Save the Date” - The Gifford Lecture at the

University of Hawaii Law School will feature Professor Kevin Gray. The Lecture is tentatively set for Wednesday, November 3, 2010 at the William S. Richardson Law School Moot Courtroom. More details to follow



Condemning Paradise: A takings analysis in light of County of Hawaii v. Coupe

by *Mark Kaetsu*

I. INTRODUCTION

Eminent domain proceedings touch upon one of the most fundamental rights of American citizens: the right to own property. In order to justify such a taking, the government must articulate a valid public purpose. As an extension of the people, the Legislature is generally given deference by courts regarding such takings. Provided that the condemnation is “rationally related to a conceivable public purpose,”¹ courts will not disturb the decision of the Legislature to condemn private property. This is the prevailing view held by the courts today.²

However, in County of Hawaii v. Coupe, 2008 WL 5352948 (Haw. 2008), the Hawaii Supreme Court broke from precedent by remanding a case that, by objective review, should have satisfied the rational basis standard. In doing so, the Court established a conflicting precedent and undermined the deference owed to government bodies in eminent domain proceedings. In this paper, I will argue that: (1) the Hawaii Supreme Court erred by failing to apply the rational basis test to the county’s alleged public purpose; (2) the county’s desire to construct a public highway is a legitimate public purpose; and (3) in any event, the landowners’ argument should have been dismissed anyway, because the record did not support his argument for pretext.

II. FUNDAMENTALS OF PUBLIC USE IN EMINENT DOMAIN

The right of eminent domain is an inherent power of the sovereign,³ and is justified by the understanding that such a taking is for the primary benefit of the people.⁴ Accordingly, the government’s power of eminent domain is constrained by the Fifth Amendment of the Constitution, which provides that “a taking of property must be for a ‘public use’ and accompanied by ‘just compensation’” in order to be valid.⁵ Although it has avoided a categorical definition, “public use” can generally be described as a benefit provided to the public that could not ordinarily be obtained without government assistance.⁶

It is ultimately left to the courts to determine what constitutes a “public use.”⁷ However, in reaching this determination, courts are guided by a strong sense of deference to the Legislature.⁸ The Supreme Court has reasoned that without such judicial restraint, courts would inappropriately be given the power to invalidate legislation based on their own personal views.⁹ The Supreme Court has decided that such authority is beyond the courts’ power, and that the legislatures are in a better position to determine which “public purpose” justifies a taking.¹⁰ Consequently, courts are reluctant to disturb a legislative finding of public use “unless the use is palpably without reasonable foundation.”¹¹

Generally, as long as the taking will be “of great advantage to the community,”¹² and the public is the “primary and paramount beneficiary” it is considered a taking for a public purpose.¹³ This is so even if a private benefit also accrues, provided that it is merely incidental to the public purpose.¹⁴ Similarly, just because property taken by eminent domain may be transferred initially to a private beneficiary does not automatically warrant the conclusion that the taking is for a private purpose.¹⁵ However, if it is shown that the primary purpose of the taking is private, the mere fact that the public may derive an incidental benefit will not justify the exercise of eminent domain.¹⁶ In such instances, the public benefit “cannot be speculative or marginal but must be clear and significant,” in order to pass judicial scrutiny.¹⁷

Furthermore, it is not even necessary that “the entire community, nor even any conceivable portion, should directly enjoy or participate in an improvement in order to constitute a public use.”¹⁸ Courts have come to embrace a broader interpretation of “public use” which is loosely defined as virtually any project that confers a benefit, utility, or advantage to the public.¹⁹ Examples include: urban renewal, maintaining the public shoreline, controlling sewage, providing necessary public parking, and expanding public parks.²⁰

In summary, it is accepted that the legislatures are owed significant deference by the courts, such that a taking will be invalidated only if it is without reasonable foundation. Furthermore, the definition of “public use” has been liberally construed by courts, such that any taking that is of “great advantage to the community” will generally be upheld. It is against this background

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that I will conduct my examination of County of Hawaii v. Coupe, where the Hawaii Supreme Court was unable to find that the construction of a public bypass highway served a legitimate public purpose.

III. COUNTY OF HAWAII V. COUPE

In 1998, Oceanside Partners entered into a Development Agreement with the County of Hawaii to construct a bypass highway in the vicinity of Keauhou and Captain Cook, on the Kona side of the Big Island of Hawaii.²¹ The Development Agreement arose as a condition to a zoning change requested by Oceanside.²² Oceanside Partners wished to develop the Hokuli'a subdivision between North and South Kona.²³ The zoning at the time did not allow for the planned development. Since 1982, the county had recognized that the existing Mamalahoa Highway was "inadequate to handle the volume of traffic" in the area.²⁴ In recognition of the County's need for a bypass highway, Oceanside offered to build the highway as part of the Development Agreement. In return, the County agreed to change the zoning for the Hokuli'a development project.²⁵ The County accepted Oceanside's proposal, rezoned the Hokuli'a subdivision, and passed a resolution memorializing the Development Agreement with Oceanside for the construction of the bypass highway.²⁶

Oceanside initially attempted to purchase the highway property directly from the landowners.²⁷ Unfortunately, they were unable to reach an agreement, and the County passed a resolution condemning the land pursuant to the Development Agreement.²⁸ The landowners challenged the condemnation, arguing that it was not for a valid public purpose.²⁹ During the trial, the County initiated a second condemnation proceeding against the landowners.³⁰ In its second action, the County did not reference the Development Agreement, but focused instead on the "regional benefit for the public purpose and use" which the bypass highway would bring.³¹

Both condemnation actions were consolidated into a single bench trial.³² The trial court held that the first condemnation was invalid because it had "illegally delegated [the county's] power of condemnation, through the Development Agreement, to a private party."³³ However, the court upheld the second condemnation, stating that it was for a valid public purpose.³⁴ The landowners then successfully appealed their case to the Hawaii Supreme Court.³⁵

On appeal, the landowners maintained the argument that the condemnation was not for a public purpose, but was a mere pretext to convey a private benefit to Oceanside.³⁶ Specifically, they argued that the trial court should have looked beyond the County Resolution No. 31-03, which authorized the condemnation, to see whether or not such a public purpose existed, rather than simply taking the Resolution at face value.³⁷ In a narrow 3-2 decision, the Hawaii Supreme Court reversed the trial court and remanded the case, holding that the trial court had not fully considered the landowners' pretext argument.³⁸

A. The Majority

The majority relied heavily on Kelo v. City of New London in reaching its decision. The majority began by reaffirming the principle that a government cannot condemn private property for the sole purpose of transferring title to a different private owner.³⁹ Of particular interest to the majority was the Kelo Court's statement that: "[n]or would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit. . . ."⁴⁰ The majority interpreted this to mean that under certain circumstances, the Kelo majority would be able to investigate the veracity of an alleged public purpose in the face of an allegation of pretext.⁴¹ The majority focused on this mention of "pretext" to infer that an affirmative showing of pretext could supersede the prima facie acceptance traditionally owed to a government's stated public purpose.⁴²

Guided by these conclusions, the majority proceeded to modify the traditional takings standard, requiring a thorough examination of the evidence whenever a pretext argument is raised. The majority drew a distinction between accepting the facial validity of the county's asserted public purpose and the determination of whether or not that purpose was pretextual.⁴³ While acknowledging that the taking was for a "valid public purpose,"⁴⁴ the majority focused instead on the question of whether there was evidence that the trial court actually considered and rejected the landowners' pretext argument.⁴⁵ Relying on the

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principle that the “issue of public use is a judicial question,”⁴⁶ the majority rejected the argument that a legislative finding of public use should be accepted at face value.⁴⁷ As a result, the majority disagreed with the trial court’s ruling, holding that it was unclear whether the trial court had actually considered factors beyond the passage and language of Resolution 31-03 in determining the validity of the stated public purpose.⁴⁸ The majority held that this was insufficient to show the trial court had satisfactorily decided the pretext issue, as it did not look beyond the face of Resolution 31-03.⁴⁹ Consequently, the majority remanded the case, holding that the trial court had “erred in declining to expressly examine the pretext issue in Condemnation 2.”⁵⁰

B. The Dissent

The dissent agreed with the trial court that the taking was for a public purpose. Accordingly, it argued that the majority’s holding was a radical departure from the accepted rational basis test. The dissent believed that both Coupe and the majority had misinterpreted Kelo as justifying the notion that a legislature’s motive for condemning should be scrutinized under a harsher standard than the traditional rational basis test.⁵¹ Unlike the majority, the dissent interpreted the Kelo holding as affirming the rational-basis test in public purposes cases.⁵² In particular, the dissent argued that the majority in Kelo specifically declined to discuss whether “a more stringent standard of review than that announced in Berman and Midkiff might be appropriate.”⁵³

Citing extensively to case law, the dissent repeatedly emphasized the amount of deference inherent in the rational basis test.

*“[T]he right to declare what shall be deemed a public use is vested in the legislature; . . . [and thus] the questions as it presents itself to the courts is whether the legislature might reasonably have considered the use public, not whether the use is public. **This rule rests on the presumption that a use is public if the legislature has declared it to be such.** The strength of that presumption is gauged by the high regard which the courts have for a declaration of public use by the legislature as a decision of a coordinate department of the government on a matter within its knowledge and duty.”⁵⁴*

Under the dissent’s interpretation, the only pertinent inquiry is “whether the legislature rationally could have believed that the [statute] would promote its objective.”⁵⁵ Additionally, “[i]n making this inquiry, a court will not look for empirical data in support of the [legislation],” but will “only seek to determine whether any reasonable justification can be conceived to uphold the [County’s] enactment.”⁵⁶ Furthermore, **“those challenging the legislative judgment must convince the court that the legislative facts on which the [statute] is apparently based could not reasonably be conceived to be true by the governmental decision maker.”⁵⁷**

Under this standard, the dissent found ample support for upholding the trial court’s decision. The dissent pointed to Resolution 31-03, and its findings that the current Mamalahoa Highway was inadequate to handle traffic needs, that the Kona Regional Plan had long since identified this problem, and that it was for the public use and purpose that the highway should be built,⁵⁸ as evidence that “the County’s stated public purpose determination was, indeed, reasonable.”⁵⁹ Accordingly, the dissent argued that:

[I]nasmuch as this court’s inquiry under a rational basis test “seeks only to determine whether any reasonable justification can be found for the legislative enactment,”⁶⁰ and the construction of a bypass road is a reasonable justification for the use of eminent domain, I would hold that the trial court correctly concluded that “County Resolution 31-03 is valid.”⁶¹

Furthermore, the dissent pointed to the fact that the landowners had failed to meet their burden of rebutting the prima facie acceptance of validity owed to legislative determinations. The dissent drew attention to the fact that despite the month-long trial with accompanying testimony and exhibits, the appellant was unable to provide any evidentiary support to its claim that Condemnation 2 provided a “predominantly private benefit to Oceanside.”⁶² Accordingly, because the record lacked any evidence that the public purpose might be pretextual, the dissent argued that the appellants had failed to rebut the presumption in

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favor of the legislature.⁶³

Finally, the dissent argued that even though it was not required, the trial court still considered whether the County's stated public purpose was pretextual.⁶⁴ Even though the words "pretext" or "pretextual" were not specifically used by the trial court, the dissent argued that it was evident from the record that the pretext defense was considered and rejected.⁶⁵ The dissent pointed to the findings of fact, in which the trial court found that "the County had – since 1979 - 'recognized a need for a road to bypass Mamalahoa Highway,'"⁶⁶ and that it was "based on Oceanside's awareness of the public need for a bypass road," that it proposed to build the road in exchange for change in zoning.⁶⁷ Additionally, the trial court specifically held that Condemnation 2 stood "independently from the [d]evelopment [a]greement, and that there [was] sufficient attenuation between the [d]evelopment [a]greement previously mentioned and [Resolution No. 31-03]."⁶⁸ Consequently, the dissent argued, the trial court's conclusions, (1) that Condemnation 2 stood independently from the development agreement and (2) that there was a public purpose in County Resolution 31-03, are evidence that the trial court had considered and rejected the landowners' "actual purpose" contention; i.e. that the stated public purpose was pretextual.⁶⁹ Essentially, the dissent reasoned, as the trial court concluded that Condemnation 2 stood independent of the development agreement, it is logical to assume that the trial court also believed that the development agreement was not Condemnation 2's actual purpose.⁷⁰

The dissent also noted that simply because Oceanside received a private benefit from Condemnation 2 did not necessitate the conclusion that the county's public purpose was automatically pretextual.⁷¹ Likewise, even if private benefit had occurred, the dissent pointed out that all that was constitutionally required was a showing that "the [state] rationally could have believed that that [taking] would promote its objective."⁷²

Because Resolution 31-03 was rationally related to a public purpose, and because the landowners failed to present evidence to the contrary, the dissent concluded that the majority's remand was inappropriate. A remand, the dissent felt, would unfairly provide the landowners with a second opportunity to prove their claim that the taking was designed to benefit Oceanside.⁷³ According to the dissent, the Hawaii Supreme Court should have affirmed the trial court's decision and approved the condemnation.⁷⁴

IV. THE COUNTY'S DEMONSTRATION OF A VALID PUBLIC USE

The dissent's argument was heavily based on the deference owed by courts to the legislatures, represented by the rational basis standard which courts traditionally apply. Under a rational basis takings analysis, a court should not overturn a legislative finding of public use unless the evidence shows that the legislature could not have had any rational basis for making such a decision.⁷⁵

A. The Rational Basis Standard

Precedent has established that the legislature is owed substantial deference by the courts regarding the determination of what constitutes a public use. Courts still have the authority to review a legislature's determination of public use; however, its role is "an extremely narrow one."⁷⁶ Generally, courts owe legislatures deference regarding a public use determination "until it is shown to involve an impossibility,"⁷⁷ or the "use [is] palpably without reasonable foundation."⁷⁸ This is because our judicial system has decided that legislatures are in a better position to determine which public purposes justify a taking.⁷⁹ As the Hawaii Supreme Court has previously held, "*When the Legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in the federal courts.*"⁸⁰ As a result, a legislature's finding of public use is entitled to "prima facie acceptance of . . . correctness,"⁸¹ which can be rebutted only by showing that the use is "clearly and palpably of a private character."⁸² Accordingly, the burden is on those challenging the public use to convince the court that "the legislative facts on which the [statute] is apparently based could not reasonably be conceived to be true by the governmental decision maker."⁸³

These principles have evolved into a standard that will not disturb a legislative determination as long as it is "rationally

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related to a conceivable public purpose.”⁸⁴ Accordingly, a court will only seek to determine whether the state legislature “rationally could have believed that the Act would promote its objective,”⁸⁵ and not whether the Act *actually succeeded* in accomplishing its objective. Furthermore, “[i]n making this inquiry, a court will not look for empirical data in support of the statute. It will only seek to determine whether any reasonable justification can be conceived to uphold the legislative enactment.”⁸⁶ Accordingly, “courts are bound by the legislature’s public use determination unless such use is clearly and palpably of a private character.”⁸⁷ As long as the taking, when “viewed objectively . . . bears at least a rational relationship to several well-established categories of public uses,” it constitutes a “complete defense to a public-use challenge”⁸⁸

B. Highways as a recognized “public use”

It has long been established that government takings for highways are a valid public use.⁸⁹ This comes intuitively, as highways are generally constructed with the intention of improving public transportation, and primarily benefit the general public. Even the U.S. Supreme Court has held that “condemning property to build a highway, even for noncommercial use, is a taking for a ‘public use’ under the Takings Clause of the Fifth Amendment.”⁹⁰

These principles find ample support in case law. In Rogren v. Corwin, the Supreme Court of Michigan upheld the taking of property for the laying out of a highway. In doing so, it held “[t]hat private property may be constitutionally taken for public highways cannot be doubted, and is not denied.”⁹¹ Likewise, in Rindge Co. v Los Angeles County, the U.S. Supreme Court approved the taking of property to build two highways, holding, “that a taking of property for a highways is a taking for public use has been universally recognized, from time immemorial.”⁹² In Rodgers Development Company v. Town of Tilton, landowners contested the taking of property to construct two roads to accommodate a new supermarket.⁹³ In rejecting the landowners’ argument, the Supreme Court of New Hampshire held that “[i]t is well settled that ‘whenever property is taken for a highway, it is for the public use.’”⁹⁴ Additionally, in City of Novi v. Robert Adell Children’s Funded Trust, the Supreme Court of Michigan upheld the condemning of private land to construct a spur road to help relieve traffic congestion. In explaining its decision, the Court stated that, “where the public body establishes a road, pays for it out of public funds, and retains control, management, and responsibility for its repair, the Michigan Constitution allows private land to be condemned for the project”⁹⁵ Accordingly, it is firmly established that the taking of private property to construct a public highway has enjoyed a long history of approval from the courts.

C. The County’s taking of property to construct the bypass highway should have been upheld under the rational basis test

Based on these principles and holdings, an application of the rational basis test should have resulted in an approval of the county’s condemnation. First, under the rational basis test, a taking should be upheld so long as it is “rationally related to a conceivable public purpose.”⁹⁶ As stated above, a court “will only seek to determine whether any reasonable justification can be conceived to uphold the legislative enactment.”⁹⁷ Here, under facts presented in Coupe, there is ample evidence to substantiate the County’s determination of public use.

In its Findings of Facts (FOFs) the trial court entered a number of “unchallenged findings,” including:

6. *By 1979, the County recognized a need for a road to bypass the Mamalahoa Highway due to projected inadequacies of [the] existing highway, high accident rates, higher anticipated traffic volume and congestion, and the need for a route continuously around the island in a 1979 study conducted by the Hawai’i Department of Transportation entitled Hawaii Belt Road Holualoa to Papa Preliminary Engineering Report.*
7. In 1982, the Kona Regional Plan had identified traffic problems along the Mamalahoa Highway, and determined that the traffic was equal to or exceeded the roadway design capacity. The County also found that the rapid increase in traffic placed a heavy burden on the roadway network, and increased both travel time and inconvenience.
8. In response, the County adopted the proposed 1979 State Bypass Highway and Alii Drive Extension on the 1989 County General Plan Public Facilities Map.

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9. The County further conducted the following studies:
 - a. The 1989 Hawai'i County Council General Plan adopted the 1979 State Bypass Highway and the Alii Highway
 - b. The 1993 study by Parson, Brickerhoff, Quake and Douglas found that a bypass highway would be sufficient to relieve all existing and projected future regional congestion on Mamalahoa Highway.
 - c. 1998 study prepared for the Hawaii Department of Transportation, entitled *Hawaii's Long Range Land Transportation Plan Final Report*, recognized the need for the Mamalahoa Bypass Highway based on traffic safety considerations.
 - d. 1998 study prepared for the State of Hawaii Department of Transportation recognized the need, based on traffic safety considerations, for the Mamalahoa Bypass Highway.⁹⁸

The above findings clearly establish that there was a recognized, long-standing need for a bypass highway in the region. This need had been repeatedly documented in reports from as far back as 1979, with supporting recommendations in 1982, 1989, 1993, and 1998. The underlying problems that the bypass highway was intended to fix were "traffic volume and congestion" and "traffic safety considerations." Additionally, the relief of traffic congestion would be of primary benefit to the public.

These were the conclusions reached by the Hawaii Supreme Court in Coupe when it stated that, "it appears that Appellee [the County] presented sufficient *prima facie* evidence of public purpose under a rational relationship test."⁹⁹ The majority itself even admitted that:

Under our precedents and Kelo, it appears that the stated public purpose in this case on its face comports with the public use requirements of both the Hawai'i and United States constitutions. . . . Moreover, the public purpose of the Bypass is evident from its nature as a public road, consistent with the land use plans.¹⁰⁰

Accordingly, it is difficult to see how the majority held that the County's decision to condemn private property for a much-needed highway failed to "rationally relate to a conceivable public purpose." Not only is the construction of a public highway a "conceivable" public purpose; it is a well-documented and court-approved public purpose. Courts have repeatedly held highways to be a legitimate public purpose.¹⁰¹ Furthermore, without "look[ing] for empirical data,"¹⁰² the evidence presented in the record also demonstrates that the County's decision to condemn the property was "rationally related" to the construction of the bypass highway. Indeed, the entire reason behind the condemning of the property was to construct the bypass highway. This was the conclusion reached by the dissent in Coupe when it stated:

Contrary to the majority's position, I believe that it was not necessary for the trial court to look beyond the face of Resolution 31-03 because the construction of a bypass road that would, unquestionably, benefit the public is a valid public purpose to which Condemnation 2 is rationally related. Consequently, inasmuch as this court's inquiry under a rational basis test "seeks only to determine whether any reasonable justification can be found for the legislative enactment," and the construction of a bypass road is a reasonable justification for the use of eminent domain, I would hold that the trial court correctly concluded that "County Resolution 31-03 is valid."¹⁰³

V. COUPE'S PRETEXT ARGUMENT

Although the majority conceded that it appeared that the state's public purpose satisfied traditional public use requirements, it still remanded the case because it was unsatisfied with the trial court's consideration of the landowner's pretext argument.¹⁰⁴ Despite the *prima facie* deference owed to legislative determinations, the majority argued that such findings "need not be taken at face value where there is evidence that the stated purpose might be pretextual."¹⁰⁵ In reaching this conclusion, the majority relied heavily on Kelo v. City of New London, where it was held:

Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual

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purpose was to bestow a private benefit The trial court judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case.¹⁰⁶

The majority interpreted this statement to mean that, “under the appropriate circumstances, the Kelo majority would review the asserted public purpose of a taking to evaluate its veracity in the face of a pretext challenge.”¹⁰⁷ Based on this observation, the majority held that because there was insufficient evidence to show that the trial court had “expressly consider[ed] the question of whether the taking was ‘clearly and palpably of a private character,’”¹⁰⁸ it had failed its duty under Kelo to “review the asserted public purpose . . . to evaluate its veracity”¹⁰⁹ However, in doing so, the majority may have misinterpreted the holding of Kelo, consequently applying a more rigorous standard of review than the case law requires.

A. What constitutes pretext?

While courts are required to give substantial deference to legislatures under the rational basis standard, they are not completely prevented from reviewing a legislative finding of public use.¹¹⁰ One of the principles of eminent domain is that if the dominant purpose or use of the taking is private, a mere incidental benefit to the public will not justify the taking.¹¹¹ Accordingly, “[n]o judicial deference is required . . . where the ostensible public use is demonstrably pretextual.”¹¹² Generally, in order to support a finding of pretext, courts have based their conclusions on a number of factors, such as: lack of evidence to support the alleged public purpose; evidence supporting the alleged pretextual claim; lack of a comprehensive development plan for the condemned property; and evidence of inconsistencies between the alleged public purpose and the actual effects of the taking.

B. Cases Analysis

The elements of pretext are not clearly defined. Courts have yet to articulate a bright-line rule for showing pretext. However, an examination of cases involving pretext provides a useful insight into which factors courts have considered significant in determining pretext.

In 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F.Supp.2d 1123 (C.D. Cal. 2001), the United States District Court of Central California affirmed a landowner’s pretext argument, based on the overwhelming evidence in the record that showed that the taking was merely to appease a private party. In 99 Cents Only Stores, the plaintiff, 99 Cents Only Stores, owned a five-year lease of retail space in Lancaster’s “Power Center.”¹¹³ Shortly after 99 Cents Only Stores moved in, the neighboring tenant, Costco, notified Lancaster of its desire to expand.¹¹⁴ Despite the Power Center’s opinion that it would be more efficient for Costco to expand to the south, behind 99 Cents Only Stores,¹¹⁵ Costco “demanded that it be allowed to expand into the space being occupied by 99 Cents.”¹¹⁶ As Costco was an “anchor tenant,” Lancaster feared losing them, and, after failed negotiations with the Power Center, decided to acquire the retail property through a “friendly eminent domain proceeding.”¹¹⁷ Lancaster eventually resolved to condemn the property, “relocate 99 Cents, and then sell the property to Costco for the nominal price of \$1.00.”¹¹⁸ 99 Cents Only Stores responded by challenging the taking, seeking to enjoin the City, arguing that the condemnation was not for a valid public purpose.¹¹⁹

The Court affirmed 99 Cents Only Stores argument, holding that “the evidence is clear beyond dispute that Lancaster’s condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another.”¹²⁰ While the Court affirmed the principle of judicial deference to Lancaster’s findings under the rational basis test,¹²¹ it nonetheless held that “no judicial deference is required . . . where the ostensible public use is demonstrably pretextual.”¹²² In supporting its decision, the Court pointed to significant findings in the record that demonstrated Lancaster’s ulterior, private motives:

Lancaster itself admits that the *only* reason it enacted the Resolution of Necessity was to satisfy the private expansion demands of Costco. It is equally undisputed that Costco could have easily expanded within the Power Center onto adjacent property *without* displacing 99 Cents at all but refused to do so. Finally, by Lancaster’s own admissions, it was willing to go to any lengths—even so far as condemning commercially

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viable, unblighted real property—simply to keep Costco within the city’s boundaries. In short the *very reason* that Lancaster decided to condemn 99 Cents’ leasehold interest was to appease Costco. Such conduct amount to an unconstitutional taking for purely private purposes.¹²³

Lancaster countered by arguing that if not for the taking, Costco would have left, which would have resulted in a downturn in business and a “reestablishment of blight.”¹²⁴ The Court dismissed this argument, holding that the prevention of “future blight” was not a valid public use.¹²⁵ The Court held that Lancaster’s argument failed for two reasons: the first that, “[a]side from Lancaster’s bald assertions in its briefs, there is simply no evidence in the record to suggest that so-called ‘future blight’ was the actual reason underlying Lancaster’s condemnation efforts”¹²⁶ Second, “Lancaster can point to no authority—and the Court could find none—supporting its novel legal proposition that the prevention of ‘future blight’ is a legitimate public use”¹²⁷

A similar situation arose in Cottonwood Christian Center v. Cypress Redevelopment Agency. There, the city of Cypress attempted to develop a retail project on property owned by a church. Evidence later revealed that the primary purpose of the retail project was to place a Costco on the site.¹²⁸ The City initially asked the landowners if they wished to participate in the project; the landowners declined, stating that they were awaiting a zoning change so that they could build a church on the property instead.¹²⁹ Consequently, the City used its power of eminent domain to condemn the church property, finding that the creation of a Costco was “more consistent with the City’s plans.”¹³⁰ The church subsequently filed suit, seeking to “preliminarily enjoin the City’s condemnation actions.”¹³¹

The Court granted the church’s preliminary injunction, holding that the church had sufficiently shown that the City’s condemnation was not for a public use.¹³² In reaching its decision, the Court cited 99 Cents Only Stores, finding a “factual situation strikingly similar to the present case.”¹³³ In rejecting the City’s argument, the Court stated that “Defendant’s planning efforts here appear to consist of finding a potential landowner for property that they did not own, and then designing a development plan around that new user.”¹³⁴ Furthermore, evidence revealed that Costco could have located on adjacent property instead; further supporting the argument that the taking’s sole purpose was to “appease Costco.”¹³⁵ The Court ultimately denied the City’s motion to dismiss, and instead granted the church’s preliminary injunction and enjoined the City from condemning the property until a full trial could take place.¹³⁶

Likewise, in Aaron v. Target Corporation, the United States District Court of Eastern Missouri rejected the City’s alleged public use as pretextual, holding instead that the taking’s true purpose was to confer a private benefit on Target Corporation. In Aaron, Target leased the property on which it operated its Hampton Store.¹³⁷ However, Target was unhappy with this arrangement and threatened to shut down its Hampton location unless the City used its eminent domain powers to confer fee-simple ownership of the property to Target.¹³⁸ The landowners themselves were never made aware of these proceedings:

Target never offered to purchase the Properties from the plaintiffs, and the parties did not engage in any discussions regarding a possible sale. Neither the City nor the LCRA ever advised plaintiffs that the Properties were purportedly blighted, and never offered plaintiffs the opportunity to redevelop their own real estate. Without plaintiffs knowledge, Target and the City jointly prepared a redevelopment proposal for the Properties Target and the City commissioned . . . a “Qualification Analysis” . . . which concluded that the Properties were physically deteriorated, unsafe and dangerous, and thus “insanitary” and “blighted”¹³⁹

Consequently, the landowners never knew about Target’s plans and were never given a hearing to challenge the plan or voice their complaints.¹⁴⁰ Upon learning of the proceedings, the landowners filed a motion for temporary restraining order, to prevent the City from taking control of the property.¹⁴¹

The Court granted the landowner’s temporary restraining order, holding that there was a likelihood of success on the

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merits regarding the landowner's allegation that the taking was primarily for a private rather than public use.¹⁴² In supporting its decision, the Court pointed out that Target could have remained a tenant under the lease, continued to further negotiate the lease with the landowners, or attempted to purchase the property directly from the landowners.¹⁴³ The record revealed that:

Target decided to cease any negotiation with its landlord and instead approached a City alderman and threatened to abandon the Hampton Store. Target falsely told the alderman that it had been unable to reach an agreement with plaintiffs for the purchase of the Properties Target commissioned the Blighting Study which declared the Properties "blighted" The findings of blight rested in part on the condition of Target's personal property, and on the substandard condition of property Target itself was obligated to maintain Finally, Target and the City failed to notify plaintiffs of the . . . hearing . . . [before] Target's redevelopment proposal was approved and the state condemnation proceedings began.¹⁴⁴

Despite upholding the standard the "a taking need only be 'rationally related to a conceivable public purpose,'"¹⁴⁵ the Court also reaffirmed the notion that a taking would be invalidated if the purported public use was "merely pretext."¹⁴⁶ In issuing the restraining order, the Court held that evidence was sufficient to present "at least a serious question on the merits of [the City's] takings claim on public use grounds."¹⁴⁷

In 49 WB, LLC v. Village of Haverstraw, the Supreme Court of New York invalidated the Village's taking of a building, holding that the Village's alleged use was pretextual. In 49 WB, the Village of Haverstraw sought to condemn the Graziosi Building as part of its waterfront "public/private redevelopment project," a joint operation between the City and Ginsburg Development Company.¹⁴⁸ Among the tenants of the Graziosi Building was HOGAR, a non-profit organization that dealt with affordable housing and neighborhood preservation in the Village. HOGAR had unsuccessfully attempted to purchase the building in 1999.¹⁴⁹ In August of 2005, eleven days after 49 WB purchased the Graziosi Building, the Village held public hearing regarding the proposed condemnation of the Building.¹⁵⁰ The Village ultimately decided to condemn the building, justifying the taking with the following public purposes: HOGAR would be able to use it for a community outreach health center; the property would provide a "suitable location for HOGAR's offices;" and the site could be used to construct up to 16 affordable housing units.¹⁵¹ 49 WB subsequently filed suit for judicial review of the Village's determinations and findings.¹⁵²

The Court began by affirming that "a municipality's determination that property is needed for a public purpose is regarded as 'well-nigh conclusive,'"¹⁵³ and that consequently, "[a] legislature's finding that a property condemnation furthers a public use or purpose should not be affirmed unless it is 'without foundation' in the hearing record."¹⁵⁴ However, the Court also recognized that "[e]minent domain cannot be used as a mere pretext for conferring benefits upon purely private entities and persons."¹⁵⁵

Based on these principles and the record before it, the Court invalidated the Village's taking, finding that the Village's stated public purpose was pretextual.¹⁵⁶ First, regarding the Village's desire for HOGAR to establish a community health center, the Court pointed out that there was no evidence that indicated that HOGAR would be any more efficient at delivering a health center than the current owner, 49 WB.¹⁵⁷ Second, the Court also noted that HOGAR was a tenant in the Graziosi Building, and, as 49 WB had no intention of evicting them, the Building already served as a "suitable location for HOGAR's offices."¹⁵⁸ Furthermore, there was no evidence presented that indicated that any "public benefit" would result from having HOGAR as the owner of its office space, rather than as a tenant.¹⁵⁹ Finally, the Village's last justification, that it could support the construction of affordable housing, also failed. A closer examination revealed that when taken as part of the entire waterfront redevelopment project, the condemnation would actually result in fewer affordable housing units.¹⁶⁰ Accordingly, the Court found that the Village's justification was pretextual, and that:

The only rational conclusion that can be drawn is that the Village's true purpose for condemnation was to assist its waterfront developer in meeting the developer's private scattered-site affordable housing obligation and to reduce the costs to the developer. The condemnation solely benefits the private entities of Ginsburg

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and HOGAR.¹⁶¹

In sum, based on the cases discussed above, one can make a number of assumptions regarding whether a taking is pretextual. As 99 Cents Stores and Cottonwood have demonstrated, if a taking is made “merely to appease” a private entity, it will be struck down as pretextual. This can be inferred from the circumstances, especially where there is evidence that the actual condemned site is not essential to the “takings” purpose.¹⁶² Similarly, admissions by the county that its sole or primary purpose of its legislation is to benefit a private entity will also support a claim of pretext.¹⁶³

Additionally, and intuitively, where there is evidence of outright fraud and a lack of notice, a taking may be held to be pretextual as well, as demonstrated by Aaron v. Target Corporation. Factors to look for are: collusion between the legislature and a private entity that stands to benefit from the taking; an abrupt termination in negotiations between the landowner and the private entity; a failure to notify a landowner of the eminent domain proceedings; and allegations of public necessity that stem in part from the private entity’s own negligence or irresponsibility.¹⁶⁴

Furthermore, where the alleged justifications for the taking are inconsistent with the rational results of the taking, the taking may be held invalid, as in 49 WB, LLC. Factors to consider are whether the legislature has articulated “how or in what manner” the taking will benefit the public;¹⁶⁵ whether the taking is actually necessary to achieve the purported public benefit;¹⁶⁶ and whether the actual results of the taking will, in fact, produce a public benefit.¹⁶⁷

Conversely, courts have been quick to deny allegations of pretext that lack supporting facts in the record. In Carole Media LLC v. New Jersey Transit Corporation, 550 F.3d 302 (3d Cir. 2008), the Court denied an advertiser’s pretextual taking argument because he had failed to demonstrate that the NJ Transits stated public purposes were “palpably without reasonable foundation,” or that its sole purpose was to confer a private benefit.¹⁶⁸ Likewise, the Hawaii Supreme Court rejected a pretext claim in Hawaii Housing Authority v. Ajimine, noting that it was merely a “categorical denial,” without any supporting facts.¹⁶⁹ Similarly, in Franco v. National Capital Revitalization Corporation, the Court acknowledged that mere “allegations [that the taking was to confer a private benefit, and thus pretextual] may be too conclusory by themselves to survive a motion to strike.”¹⁷⁰ However, in Franco, the Court chose to remand the case nonetheless for “further consideration of [the landowner’s] pretext defense”¹⁷¹ because it found that Mr. Franco had actually made “many specific factual allegations to support [his] claim”¹⁷²

The issue of pretext has been thoroughly analyzed by the Second Circuit Court of Appeals in Goldstein v. Pataki, a case very similar to Coupe, where the Court of Appeals upheld the taking of private property for the construction of a sports arena, sixteen high-rise apartment towers, and several office towers.¹⁷³ Like Coupe and the other landowners in the present case, the landowners in Goldstein claimed that the Project “from its very inception,” had been driven by a desire to benefit the private developer.¹⁷⁴ Notably, in Goldstein, it was conceded by the plaintiffs themselves that the Project would serve several well-established public uses¹⁷⁵ In rejecting the landowner’s pretext argument, the Court in Goldstein held that:

[This] particular kind of ‘pretext’ claim the plaintiffs in this case advance bears an especially dubious jurisprudential pedigree: The plaintiffs have effectively acknowledged the Project’s rational relationship to numerous well-established public uses, but contend that it is constitutionally impermissible nonetheless because one or more of the government officials who approved it was actually-and improperly-motivated by a desire to confer a private benefit on [the developer] Allowing such a claim to go forward, *founded only on mere suspicion*, would add an unprecedented level of intrusion into the process.¹⁷⁶

The Court concluded that “where . . . a redevelopment plan is justified in reference to several classic public uses whose objective basis is not in doubt, we must continue to adhere to the Midkiff standard, . . . [that] the [constitutional requirement] is satisfied if . . . the . . . [state] *rationaly could have believed* that the [taking] would promote its objective.”¹⁷⁷

Based on the reasoning used in Goldstein, the landowners’ pretext argument in Coupe should have similarly failed. However, in declining to follow Goldstein, the majority in Coupe distinguished the case on the basis that it dealt with “an unprecedented level of intrusion into the process”¹⁷⁸ The majority also cited to the Goldstein decision where the court

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“explicitly ‘preserv[ed] the possibility that a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer *objective* scrutiny of the justification being offered is required.”¹⁷⁹ The Coupe majority justified its departure from Goldstein by determining that “Appellant in this case has not sought to probe in such an intrusive manner, but, as contemplated by Goldstein, questions ‘the basic legitimacy of the outcome,’ and seeks a ‘closer *objective* scrutiny of the justification being offered.”¹⁸⁰

The majority’s distinction from Goldstein is flawed in several respects. Simply because the Goldstein Court “preserved the possibility” of a future fact pattern that would warrant a “closer objective scrutiny” in no way implies that the situation in Coupe is such a fact pattern. When the court in Goldstein made that statement, it specifically envisioned a fact pattern that might “so greatly undermine the basic legitimacy of the outcome reached,”¹⁸¹ in order to justify greater scrutiny. However, when the majority in Coupe cited Goldstein, it merely found that “Appellant in this case . . . questions ‘the basic legitimacy of the outcome’ . . .”¹⁸² The distinction here, while subtle, is nonetheless significant. A reasonable interpretation of Goldstein implies that the court believed that while the circumstances of that case did not warrant discarding the traditional “rational basis” standard based on “mere suspicion,”¹⁸³ there might eventually arise a case in which the facts are so heavily indicative of a private benefit that it would justify abandoning the traditional standard. Such facts would have to indicate a conspiracy so blatant and egregious that it “undermine[s] the basic legitimacy of the outcome,”¹⁸⁴ and demonstrates that the entire condemnation proceedings are nothing but a farce.

Conversely, the language used by the Coupe majority is much more lenient. It merely requires that the challenger “question[] the ‘basic legitimacy of the outcome’”¹⁸⁵ Under this interpretation, it appears sufficient that a landowner simply raise the argument that the decision to condemn was improperly reached. It ignores the preceding requirement of facts that “so greatly undermine[]” the process.¹⁸⁶ By doing so, it essentially permits the situation that Goldstein specifically advised against: “[a]llowing claims to go forward [] founded only on mere suspicion”¹⁸⁷

Additionally, the Coupe majority distinguishes Goldstein on the grounds that the landowners in that case sought to “probe” in an overly “intrusive” manner.¹⁸⁸ Presumably, the majority was referring to the fact that the landowners in Goldstein hope that their pretext argument would help them “gain discovery into the process by which the ESDC approved [the] Project.”¹⁸⁹ However, beyond merely asserting that the landowners “ha[ve] not sought to probe in such an intrusive manner,”¹⁹⁰ the majority has failed to articulate how the landowners in this case seek relief that is any less intrusive. In its conclusion, the majority remanded the case for “an express determination by the court of whether the asserted public purpose was pretextual.”¹⁹¹ On remand, it is likely that in the process of determining “whether the asserted public purpose was pretextual,” that the trial court will “probe” into the process by which the County approved the project.

The Court in Goldstein was apparently concerned with protecting the integrity and discretion involved in the exercise of eminent domain. This is implied from the Goldstein Court’s reluctance to “require federal courts in all cases to give close scrutiny to the mechanics of a taking . . . as a means to gauge the purity of the motives of the various government officials who approved it.”¹⁹² When Goldstein spoke of “intrusive,” it arguably was referring to the interference with legislative determination in the absence of concrete allegations of pretext, supported by facts in the record. Accordingly, the Coupe majority’s distinction based on the differentiating levels of “intrusiveness” between the appellants in its case and the appellants in Goldstein is misplaced.

In sum, allegations of pretext should be dismissed by courts where there is no supporting evidence in the record. This should be understandable, given the overall legislative deference owed by the courts. While courts do have a role in reviewing a legislature’s judgment,¹⁹³ courts are obligated to give their findings substantial weight, and it is thus expected that a strong showing of evidence is required to overcome this weight and demonstrate pretext.

VI. NONE OF THE ELEMENTS OF PRETEXT ARE PRESENT IN COUPE

Applying these holdings to the situation in Coupe, the Court should have found the landowner’s pretext argument unsubstantiated, and dismissed the claim. None of the elements mentioned above were present in the County’s condemnation for the Mamalahoa bypass highway. There is no evidence that the County initiated condemnation proceedings “merely to appease” a

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private entity. While it is true that Oceanside Development stands to benefit, in that it will receive a zoning change in return for building the highway,¹⁹⁴ it is also true that an incidental private benefit cannot invalidate an otherwise legitimate taking.¹⁹⁵ Oceanside's private benefit is incidental to the primary purpose of the taking, which is the construction of public highway to alleviate the traffic problems in the area. The construction of a public highway has long been established to constitute a valid "public use,"¹⁹⁶ which is further bolstered in this case by the fact that the County had recognized the need for a bypass highway long before entering into an agreement with Oceanside. Furthermore, there is no evidence to support the argument that the County initiated the highway project to "appease" Oceanside. There is no indication that Oceanside possessed any kind of leverage over the County, or that the County needed Oceanside to develop the Hokuli'a subdivision, as contrasted to the situations in 99 Cents Only Stores and Aaron, where the cities were desperate to prevent Costco from moving.

Moreover, Coupe does not argue that the County has committed fraud or deprived him of notice of the condemnation proceedings. The record reveals that County has been open and transparent in its attempts to acquire the property. Indeed, the record shows that "[s]tarting in 1997, Oceanside and [the County] [had] engaged in negotiations with [Coupe] to obtain the right-of-way needed to construct the Bypass," and that they continually negotiated until "eventually reach[ing] an impasse in 2000."¹⁹⁷ Even after condemnation proceedings were initiated, Coupe has never alleged that he was deprived of notice of the proceedings or misled in any way.

Neither is the taking of Coupe's property inconsistent with the alleged public purpose the taking strives to accomplish. The property held by Coupe and the other landowners is unquestionably to be used by the County to construct the bypass highway. Nowhere in the record is there any indication that the condemned property is to be used otherwise. While it is true that Oceanside stands to benefit by receiving a zoning change for its Hokuli'a properties, "[a] taking does not lose its public character merely because there may exist in the operation some feature of private gain, for if the public good is enhanced it is immaterial that a private interest may also be benefited."¹⁹⁸ Accordingly, as the primary purpose of the taking is to provide the Kona region with a new bypass highway, Oceanside's zoning change is merely incidental, and does not invalidate the taking.

Furthermore, it appears that Coupe merely alleged an element of pretext, without producing evidence in support. As the dissent pointed out:

Notwithstanding the month-long trial and the voluminous transcripts of testimony and exhibits presented, the appellants nevertheless rely on the naked assertion that 'Condemnation 2 provided a 'predominantly private benefit to Oceanside,' which is clearly not evidence[d]. Inasmuch as the majority and the appellants have failed to point to any evidence that the public purpose of Condemnation 2 (construction of a bypass road) might have been pretextual and that the actual purpose of Condemnation 2 was to bestow a private benefit on Oceanside, they have likewise failed to rebut the presumption in favor of the legislature.¹⁹⁹

Instead of requiring that the landowner's allegations be supported by facts, the majority apparently accepted the allegations without question, and proceeded to find fault with the trial court for not properly analyzing the pretext argument.²⁰⁰ All that the landowners submitted was that "the [court] should not have stopped at Resolution 31-03, but should have followed the roadmap to analyzing the claims of pretext,"²⁰¹ without providing any facts in the record to support this claim. Based on this statement alone, the majority immediately overruled the County's *prima facie* entitlement of acceptance, evidenced by its statement that "it is unclear from the entirety of the court's findings and conclusions regarding Condemnation 2 whether the court did in fact consider and reject Appellant's pretext argument."²⁰²

In doing so, the majority inappropriately shifted the burden of proof from the landowners to the County. As mentioned earlier, the burden is on those challenging the condemnation to "convince the court that the legislative facts on which the [statute] is apparently based could not reasonably be conceived to be true by the governmental decision maker."²⁰³ The landowners in this instance merely raised the claim that the taking was pretextual.²⁰⁴ Accordingly, it is questionable whether this by itself shows that the taking is "clearly and palpably of a private character."²⁰⁵

Finally, there is little support for the majority's decision to ignore the Goldstein holding. As discussed above, the majority's distinction was largely illusory and had the effect of perpetuating the exact harm Goldstein was intended to prevent.

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Consequently, in addition to the absence of factors found in preceding pretext cases, the holding in Coupe is also undermined by the factually similar decision in Goldstein, which has no evident basis for being distinguished.

VII. CONCLUSION

In remanding the case, the majority in Coupe effectively sanctioned a new, modified rational basis standard. By disregarding precedent and expressly directing the trial court to look beyond the face of Resolution 31-03, despite a lack of factual evidence supporting a claim of pretext, the majority has undermined one of the key principles of eminent domain. Judicial deference to the legislature's findings plays a critical role in determining the validity of a taking. It is this deference that has prompted the courts to require that a purported public use first be proven "manifestly wrong,"²⁰⁶ to "involve an impossibility,"²⁰⁷ be "palpably without reasonable foundation,"²⁰⁸ or be "clearly and palpably of a private character,"²⁰⁹ before it will challenge the legislature's findings. The majority's holding in Coupe seemingly eliminates this "*prima facie* acceptance of correctness"²¹⁰ owed to legislative findings.

An overview of relevant case law in this area should leave no doubt that the taking in Coupe was valid. Highways have repeatedly been held to be "classic" public uses. As a result, the County's exercise of eminent domain was "rationally related to a conceivable public purpose."²¹¹ The fact that the majority acknowledged this makes the outcome even more difficult to accept.²¹² Furthermore, because the landowners produced nothing more than a mere assertion of pretext, their argument should fail, since such a claim should not be entertained unless proven to be "demonstrably pretextual"²¹³ by "specific factual allegations."²¹⁴

Instead of following established case law, the majority apparently relied on isolated statements regarding pretextual takings to justify remanding the case. While prior cases have left open the *possibility* that a pretext defense may be eventually challenged²¹⁵ the majority apparently used this to presume that Coupe presented such a situation. Additionally, in justifying the remand, the majority cited to Ajimine, where it was held that the legislature's *prima facie* acceptance may be disregarded "where there is evidence that the stated purpose might be pretextual."²¹⁶ However, the majority's actions are inconsistent with that case's holding. The landowners in Coupe had not presented evidence to support their claim; rather, they merely "asserted [that] the public purpose was a pretext . . . to hide the predominantly private benefit . . . to Oceanside."²¹⁷ The majority went on to hold that the trial court had not clearly "consider[ed] and reject[ed] Appellant's pretext argument."²¹⁸ However, the point of Ajimine was that a trial court is not required to entertain such a pretext argument where the challenger has failed to put forth anything beyond mere allegations of a pretextual taking.

By remanding the case, the majority has effectively raised the bar for future eminent domain proceedings in Hawaii. Under Coupe, landowners may now challenge a government taking merely by asserting a claim of pretext, without having to surmount the traditional hurdle of proving unreasonableness with supporting facts. In practical terms, this implies that local governments will have greater difficulty in condemning private property for public uses, since landowners will have fewer obstacles to bringing such actions to the courts. On a more philosophical level, this holding stands for a retreat from the traditional deference owed to legislatures by courts, and a blurring of the line that has historically separated the functions of the legislative and judicial branches.

Hawaii courts now have the authority to justify the imposition of their own opinions as to the appropriateness of a taking. Anytime a trial judge feels that a government taking should be invalidated, he now has the precedent to remand the case as long as there is a mere allegation of pretext. This represents a radical departure from the accepted boundaries of the courts. Legislatures are in the best position to determine how the public will be best served, and their decisions regarding the condemnation of property should be respected accordingly. It is not within the power of the courts to spontaneously pass judgment on the legitimacy of such findings. Rather, the courts' proper function is to defer to the legislatures in such matters, and only in the face of substantial evidence of private benefit should it scrutinize legislative findings for pretext.

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¹Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241 (1984).

²See, Id. at 241; Housing Finance and Development Corporation v. Castle, 898 P.2d 576, 595 (Haw. 1995); Kelo v. City of New London, 545 U.S. 469, 480 (2005).

³26 Am. Jur. 2d *Eminent Domain* § 3 (citing Township of West Orange v. 769 Associates, L.L.C., 800 A.2d 86 (2002)).

⁴Id. (citing U.S. Const. art. I, § 19; Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006)).

⁵10 A.L.R. Fed. 2d 407, § 2 (citing 26 Am. Jur. 2d *Eminent Domain* § 44).

⁶26 Am. Jur. 2d *Eminent Domain* § 46 (citing Carolina Tel. & Tel. Co. v. McLeod, 364 S.E.2d 399 (Ga. Ct. App. 1988)).

⁷10 A.L.R. Fed. 2d 407 § 6 (citing City of Cincinnati v. Vester, 281 U.S. 439 (1930)).

⁸10 A.L.R. Fed. 2d 407 § 7 (citing Kelo v. City of New London, Connecticut, 545 U.S. 469 (2005)).

⁹10 A.L.R. Fed. 2d 407 § 7 (citing U.S. ex rel. Tenn. Valley Authority v. Welch, 327 U.S. 546 (1946)).

¹⁰Midkiff, 467 U.S. at 244.

¹¹10 A.L.R. Fed. 2d 407 § 7 (citing U.S. v. Gettysburg Electric R. Co. 160 U.S. 668 (1896)).

¹²26 Am. Jur. 2d *Eminent Domain* § 46 (citing Kelo v. City of New London, 843 A.2d 500 (Conn. 2005)).

¹³26 Am. Jur. 2d *Eminent Domain* § 48 (citing Township of West Orange v. 769 Associates, L.L.C., 800 A.2d 86 (N.J. 2002)).

¹⁴26 Am. Jur. 2d *Eminent Domain* § 48 (citing Gober v. Stubbs, 682 So.2d 430 (Ala. 1996))

¹⁵Midkiff, 457 U.S. at 243-44.

¹⁶26 Am. Jur. 2d *Eminent Domain* § 49 (citing Brannen v. Bulloch County, 387 S.E.2d 395 (Ga. Ct. App. 1989); City of Statesville v. Roth, 336 S.E.2d 142 (N.C. Ct. App. 1985)).

¹⁷26 Am. Jur. 2d *Eminent Domain* § 49 (citing Tolksdorf v. Griffith, 626 N.W.2d 163 (Mich. 2001)).

¹⁸Rindge Co. v. Los Angeles County, 262 U.S. 700, 707 (1923).

¹⁹49 WB, LLC v. Village of Haverstraw, 44 A.D.3d 226, 235 (N.Y. App. Div. 2007).

²⁰Id. at 236-37.

²¹County of Hawaii v. Coupe, 2008 WL 5352948, at *2 (Haw. 2008)

²²Id.

²³Id.

²⁴Id. at *41. Evidence was introduced at trial that indicated that the County had recognized the need for a bypass road from as early as 1979.

²⁵Id. at *46.

²⁶Id. at *2.

²⁷Id. at *4.

²⁸Id.

²⁹Id.

³⁰Id. at *5.

³¹Id.

³²Id.

³³Id. at *6.

³⁴Id. at *6.

³⁵Id. at *6.

³⁶Id. at *20.

³⁷Id.

³⁸Id. at *35.

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³⁹Id. at *25.

⁴⁰Id.

⁴¹Id.

⁴²Id. at *26.

⁴³Id.

⁴⁴Id.

⁴⁵Id. at *27.

⁴⁶Id. at 29.

⁴⁷Id.

⁴⁸Id. at *33.

⁴⁹Id. at *34.

⁵⁰Id. at *35.

⁵¹Id. at *36.

⁵²Id. at *37.

⁵³Id. at *38.

⁵⁴Id. at *39 (citing Hawaii Housing Authority v. Ajimine 39 Haw. 543, 549-50, 1952 WL 7381 (Haw. Terr. 1952))(emphasis in the original).

⁵⁵Coupe at *40.

⁵⁶Id. at *41 (citing Housing Finance and Development Corporation v. Castle, 898 P.2d 576, 598 (Haw. 1995)).

⁵⁷Coupe at *40 (citing HFDC, 898 P.2d at 598)(emphasis in the original).

⁵⁸Coupe at *41.

⁵⁹Id. at *42.

⁶⁰Id. (citing State v. Mallan, 950 P.2d 178, 184 (Haw. 1998)).

⁶¹Coupe at *42.

⁶²Id.

⁶³Id.

⁶⁴Id. at *44.

⁶⁵Id.

⁶⁶Id. at *47.

⁶⁷Id.

⁶⁸Id.

⁶⁹Id. at *48.

⁷⁰Id.

⁷¹Id.

⁷²Id. at *49.

⁷³Id.

⁷⁴Id. at *50.

⁷⁵HFDC, 898 P.2d at 595.

⁷⁶Midkiff, 467 U.S. at 240 (citing Berman v. Parker, 348 U.S. 26, 32 (1954)).

⁷⁷Midkiff, 467 U.S. at 240 (citing Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

Midkiff, 467 U.S. at 240 (citing Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

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⁷⁸Midkiff, 467 U.S. at 240 (citing United States v. Gettysburg Electric R. Co., 160 U.S. 668, 680 (1896)).

⁷⁹Midkiff, 467 U.S. at 244.

⁸⁰HFDC, 898 P.2d at 595 (emphasis in the original); *see also* Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corporation, 771 F.2d 44, 46 (2d Cir. 1985).

⁸¹Ajimine, 1952 WL 7381, *3.

⁸²HFDC, 898 P.2d at 597.

⁸³Id. at 598.

⁸⁴Midkiff, 467 U.S. at 241; HFDC, 898 P.2d at 95; 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F.Supp.2d 1123, 1129 (C.D. Cal. 2001); Goldstein v. Pataki, 516 F.3d 50, 60 (2d Cir. 2008).

⁸⁵HFDC, 898 P.2d at 595.

⁸⁶Id. at 598.

⁸⁷Id. at 597; *see also* 99 Cents Only Stores, 237 F.Supp.2d at 1129 (citing Richardson v. City & County of Honolulu, 124 F.3d 1150, 1158 (9th Cir. 1997)).

⁸⁸Goldstein, 516 F.3d at 58.

⁸⁹26 Am. Jur. 2d *Eminent Domain* § 67 (citing Green v. High Ridge Ass'n, Inc., 695 A.2d 125 (Md. 1997); Township of West Orange v. 769 Associates, LLC, 800 A.2d 86 (N.J.2002), Rodgers Development Co. v. Town of Tilton, 781 A.2d 1029 (N.H. 2001)).

⁹⁰10 A.L.R. Fed. 2d 407 § 13.

⁹¹Rogren v. Corwin, 147 N.W. 517, 519 (Mich. 1914)

⁹²Rindge Co., 262 U.S. at 706.

⁹³Rodgers Development Company, 781 A.2d at 1031.

⁹⁴Id. at 1034 (citing Crosby v. Hanover, 36 N.H. 404, 420 (1858)).

⁹⁵City of Novi v. Robert Adell Children's Funded Trust, 701 N.W.2d 144, 151 (Mich. 2005)

⁹⁶99 Cents Only Stores, 237 F.Supp.2d at 1129 (citing Midkiff, 467 U.S. at 241).

⁹⁷HFDC, 898 P.2d at 598 (emphasis in the original).

⁹⁸Coupe at *46 (emphasis in the original).

⁹⁹Id. at *26.

¹⁰⁰Id.

¹⁰¹*See*, 26 Am. Jur. 2d *Eminent Domain* § 67; Rogren, 262 U.S. 700; Rindge Co., 147 N.W. 517; Rodgers Development Company, 781 A.2d 1029; City of Novi, 701 N.W.2d 144.

¹⁰²HFDC, 898 P.2d at 598.

¹⁰³Coupe at *42 (citing State v. Mallan, 950 P.2d 178, 184 (Haw. 1998)).

¹⁰⁴Id. at *27

¹⁰⁵Id. at *26 (citing Ajimine, 1952 WL 7381 at *3).

¹⁰⁶Coupe at *25 (citing Kelo, 545 U.S. at 477-78).

¹⁰⁷Coupe at *25.

¹⁰⁸Id. at *28 (citing Ajimine, 1952 WL 7381 at *3).

¹⁰⁹Coupe at *25.

¹¹⁰99 Cents Only Stores, 237 F.Supp.2d at 1129 (citing Midkiff, 467 U.S. at 240).

¹¹¹26 Am. Jur. 2d *Eminent Domain* § 49 (citing Brannan v. Bulloch County, 387 S.E.2d 395 (1989)).

¹¹²99 Cents Only Stores, 237 F.Supp.2d at 1129 (citing Armendariz v. Penman, 75 F.3d 1311, 1321 (9th Cir. 1996)).

¹¹³99 Cents Only Stores, 237 F.Supp.2d at 1126.

¹¹⁴Id.

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115 Id.

116 Id.

117 Id.

118 Id.

119 Id. at 1127.

120 Id. at 1129.

121 Id. (citing Richardson v. City & County of Honolulu, 124 F.3d 1150, 1158 (9th Cir. 1997)).

122 99 Cents Only Stores, 237 F.Supp.2d at 1129.

123 Id.

124 Id.

125 Id. at 1130.

126 Id.

127 Id.

128 Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F.Supp.2d 1203, 1214 (C.D. Cal. 2002).

129 Id.

130 Id.

131 Id. at 1215.

132 Id. at 1229.

133 Id.

134 Id. at 1229-30.

135 Id. at 1230 (citing 99 Cents Stores, 237 F.Supp.2d at 1129).

136 Cottonwood, 218 F.Supp.2d at 1232

137 Aaron v. Target Corporation, 269 F.Supp.2d 1162, 1166 (E.D. MO 2003)

138 Id. at 1167.

139 Id. at 1167-68

140 Id. at 1168

141 Id. at 1169

142 Id. at 1174

143 Id. at 1175

144 Id. at 1174-75

145 Id. at 1176 (citing Midkiff, 467 U.S. at 241)

146 Aaron, 269 F.Supp.2d at 1177 (citing Cottonwood, 218 F.Supp.2d at 1229)

147 Aaron, 269 F.Supp.2d at 1177

148 49 WB, LLC v. Village of Haverstraw, 44 A.D.3d 226, 229 (N.Y. App. Div. 2007)

140 Id.

150 Id. at 230

151 Id. at 240

152 Id. at 231

153 Id. at 235

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154 Id. at 236

155 Id. at 238

156 Id. at 243

157 Id. at 240

158 Id.

159 Id. at 241

160 Id. at 242

161 Id. at 243

162 See 99 Cents Only Stores, 237 F.Supp.2d 1123 (2001) and Cottonwood, 218 F.Supp.2d 1203 (2002), where it was found in both cases that Costco would have easily relocated to an adjacent parcel.

163 99 Cents Only Stores, 237 F.Supp.2d at 1129

164 Aaron, 269 F.Supp.2d at 1174-75

165 49 WB, 44 A.D.3d at 240

166 Id. at 241

167 Id. at 242

168 Carole Media, at 311

169 Ajimine, 1952 WL 7381 at *1

170 Franco v. National Capital Revitalization Corporation, 930 A.2d 160, 170 (D.C. 2007).

171 Id. at 176

172 Id. at 170. The Court found that Franco had placed these factual allegations under his “Counterclaims” subsection, which the trial court subsequently struck; as Franco did not contest this decision to strike, the trial court never had the opportunity to review his factual allegations support his pretext argument.

173 Goldstein v. Pataki, 516 F.3d 50, 53 (2d Cir. 2008)

174 Id. at 54

175 Id. at 55

176 Id. at 62 (emphasis added)

177 Id. at 63 (emphasis in the original)(citing Midkiff. 467 U.S. at 242)

178 Coupe at *31

179 Id. (citing Goldstein, 516 F.3d at 63)

180 Coupe at *31

181 Id. (emphasis added)

182 Id.

183 Goldstein, 516 F.3d at 62

184 Id. at 63

185 Coupe at *31

186 Goldstein, 516 F.3d at 63

187 Id. at 62

188 Coupe at *31

189 Goldstein, 516 F.3d at 62

190 Coupe at *31

191 Id. at 35

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¹⁹²Goldstein, 516 F.3d at 62

¹⁹³99 Cents Only Stores, 237 F.Supp.2d at 1129 (citing Midkiff, 467 U.S. at 240)

¹⁹⁴Coupe at *2

¹⁹⁵26 Am. Jur. 2d *Eminent Domain* § 48

¹⁹⁶See, 26 Am. Jur. 2d *Eminent Domain* § 67; Rogren, 262 U.S. 700; Rindge Co., 147 N.W. 517; Rodgers Development Company, 781 A.2d 1029; City of Novi, 701 N.W.2d 144

¹⁹⁷Coupe at *4

¹⁹⁸26 Am. Jur. 2d *Eminent Domain* § 48 (citing Gober v. Stubbs, 682 So.2d 430 (Ala. 1996); City of Jamestown v. Leever's Supermarkets, Inc., 552 N.W.2d 365 (N.D. 1996))

¹⁹⁹Coupe at *42

²⁰⁰Id. at *28

²⁰¹Id. at *27

²⁰²Id.

²⁰³HFDC, 898 P.2d at 598

²⁰⁴Coupe at *26

²⁰⁵Id. (citing Ajimine, 1952 WL 7381 at *3)

²⁰⁶Ajimine, 1952 WL 7381 at *3

²⁰⁷Midkiff, 467 U.S. at 240

²⁰⁸Id. at 241

²⁰⁹HFDC, 898 P.2d at 597

²¹⁰Ajimine, 1952 WL 7381 at *3 (citing Doran v. Phila. Housing Authority et al., 200 Atl. 834, 840

²¹¹Midkiff (p 11)

²¹²Coupe (p 28) “Under our precedents and Kelo, it appears that the stated public purpose in this case on its face comports with the public use requirements of both the Hawai’I and United States constitutions Moreover, the public purpose of the Bypass is evident from its nature as a public road, consistent with the land use plans.”

²¹³99 Cents Only Stores, 237 F.Supp.2d at 1129

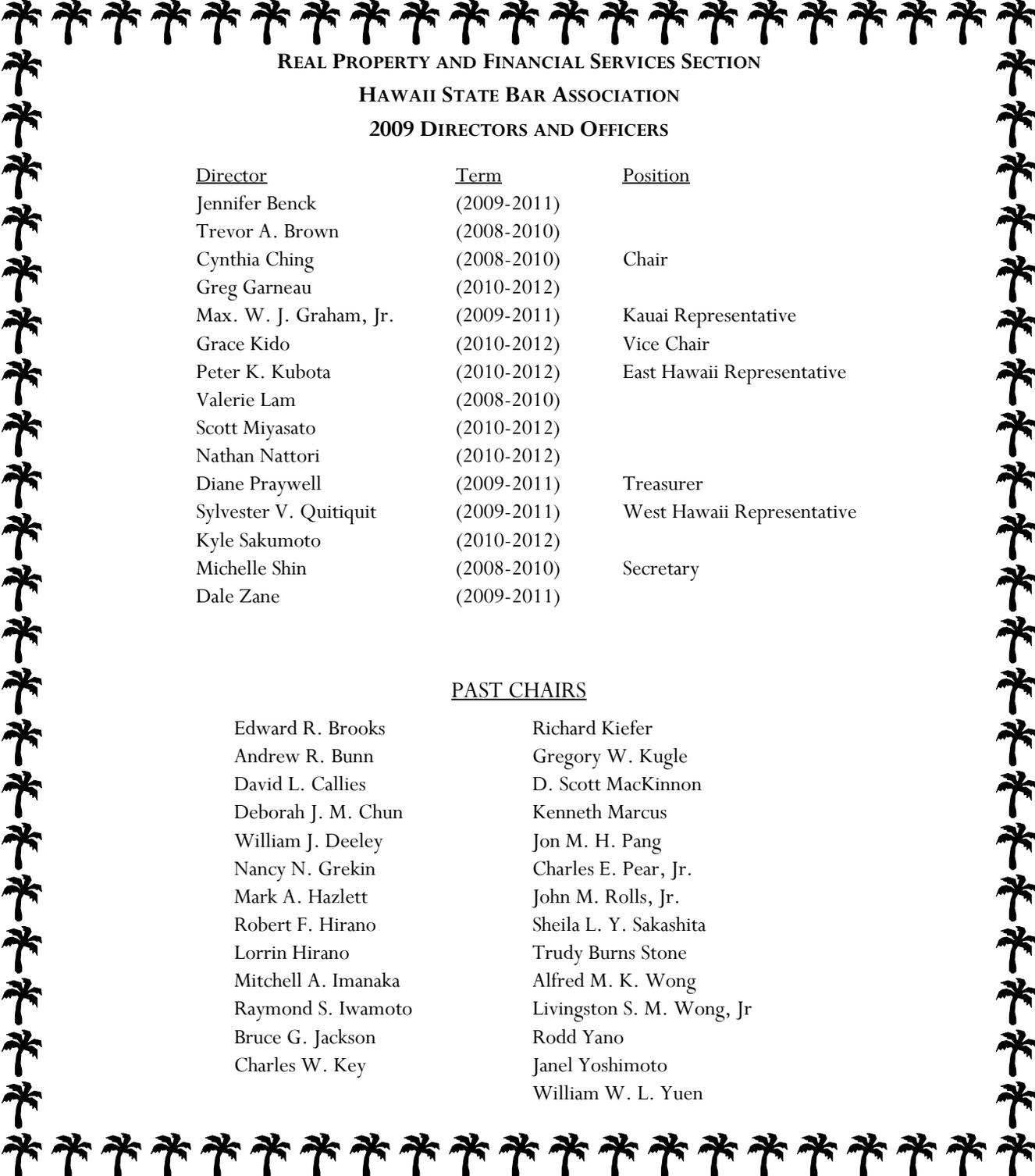
²¹⁴Franco, 930 A.2d at 170

²¹⁵See, Kelo, 545 U.S. at 477-78; Franco, 930 A.2d at 169; Goldstein, 516 F.3d at 62

²¹⁶Coupe at *26 (citing Ajimine, 1952 WL 7381 at *3)

²¹⁷Coupe at *26

²¹⁸Id. at *27


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