

COUNCIL OF THE COUNTY OF MAUI
POLICY COMMITTEE

April 15, 2011

Committee
Report No. _____

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Policy Committee, having met on March 22, 2011, makes reference to County Communication No. 11-30, from Council Chair Danny A. Mateo, regarding litigation matters.

By correspondence dated March 10, 2011, the Department of the Corporation Counsel requested an opportunity to discuss the status of Richard Certo, et al. v. County of Maui, et al., Civil No. 09-1-0438(1). Attached to the request is a copy of the First Amended Complaint.

Your Committee notes that the complaint alleges that the County failed to pay Mr. Certo, and other similarly situated persons, interest or actual earnings realized on the overpayment of real property taxes.

A Deputy Corporation Counsel provided an overview of the case and requested the opportunity to discuss the matter in an executive meeting, closed to the public.

Your Committee voted to convene an executive meeting, closed to the public, to consult with legal counsel pursuant to Section 92-5(a)(4), Hawaii Revised Statutes.

Following the executive meeting, your Committee reconvened in regular session. Based on the information received and the recommendation of the Department of the Corporation Counsel, your Committee voted 7-0 to recommend filing of the correspondence from the Department of the Corporation Counsel. Committee Chair Hokama, Vice-Chair Carroll, and members Baisa, Cochran, Couch, Victorino, and White voted "aye". Committee members Mateo and Pontanilla were excused.

Your Policy Committee **RECOMMENDS** that the correspondence dated March 10, 2011, from the Department of the Corporation Counsel, attached hereto, be FILED.

COUNCIL OF THE COUNTY OF MAUI
POLICY COMMITTEE

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**Committee
Report No.** _____

This report is submitted in accordance with Rule 8 of the Rules of the Council.



G. RIKI HOKAMA, Chair

pol:cr:11001(9)aa:cmn

ALAN ARAKAWA
Mayor



PATRICK WONG
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
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OFFICE OF THE
CORPORATION COUNSEL

'11 MAR 10 P 3:06

March 10, 2011

MEMO TO: Honorable G. Riki Hokama, Policy Committee Chair
County of Maui

F R O M: Richard B. Rost, Deputy Corporation Counsel

Handwritten signature of Richard B. Rost in black ink.

SUBJECT: Richard Certo, et al. v. County of Maui, et al.,
Civil No. 09-1-0438(1)

Our Department respectfully requests the opportunity to provide the Policy Committee with important status information regarding the above referenced matter. Executive session will likely be necessary to discuss confidential legal matters.

This matter is time sensitive based upon court imposed deadlines that will likely require action by the County within the next 30 days.

Thank you for your anticipated assistance on this matter.

FILED

2009 SEP 28 PM 2: 34

Of Counsel:

PAUL JOHNSON PARK & NILES
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J. KAYA, CLERK
SECOND CIRCUIT COURT
STATE OF HAWAII

RECEIVED
CORPORATE COUNSEL
SEP 28 PM 2:57

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Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

RICHARD CERTO, individually and on
behalf of all others similarly situated,

Plaintiff,

vs.

COUNTY OF MAUI and KALBERT
YOUNG, Director of the Department of
Finance, County of Maui,

Defendants.

) CIVIL NO. 09-1-0438(1)
) (Other Civil Action)
)

) FIRST AMENDED COMPLAINT FOR
) DAMAGES, ACCOUNTING AND
) INJUNCTIVE RELIEF; SUMMONS
)

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

Clerk, Second Circuit Court

FIRST AMENDED COMPLAINT FOR DAMAGES, ACCOUNTING AND INJUNCTIVE
RELIEF

RICHARD CERTO, individually, and on behalf of all persons similarly situated, for his First Amended Complaint against the above-named Defendants, alleges as follows:

PARTIES

1. Plaintiff Richard Certo is a resident of the County of Santa Cruz, State of California.
2. Plaintiff is the owner in fee simple of real property located at 4401 Lower Honoapiilani Road, Lahaina, County of Maui, State of Hawai`i, and bearing Tax Map Key Number: 3-010-009-0025 (the "Subject Property").
3. Defendant County of Maui (the "County") is a political subdivision of the State of Hawai`i which, through its Director of Finance, is responsible for the assessment and collection of real property taxes levied upon real property within its jurisdiction.
4. Defendant Kalbert Young ("Defendant Young") is sued in his capacity as the Director of the Department of Finance, County of Maui, State of Hawai`i. At all times relevant to this action, Defendant Young was responsible for enforcing and overseeing implementation of the County's policies and practices with respect to the appropriation and use of real property taxes paid, pending appeal, and was acting under color of State law.

FACTUAL ALLEGATIONS

5. In or about March 2007, Plaintiff received notice of the assessed value of the Subject Property for the fiscal year July 1, 2007 through June 30, 2008 (the "Assessment").
6. Plaintiff believed the Assessment overvalued the Subject Property.
7. On or before March 21, 2007, Plaintiff timely filed an appeal of the Assessment for the Subject Property with the Board of Review of the County of Maui (the

“Board of Review”) pursuant to Hawai’i Revised Statutes (“HRS”) § 246-46 and Maui County Code (“MCC”) § 3.48.595.

8. To avoid penalties during the pendency of the appeal, Plaintiff made two payments of real property taxes based on the challenged Assessment in the principal amount of \$5,479.24 on August 16, 2007 and \$5,479.24 on February 14, 2008.

9. On or about July 2, 2008, the Board of Review issued its decision to lower the Assessment and adjust the tax for the Subject Property downward by \$1,528.48 (“Plaintiff’s Overpayment”).

10. At all times relevant herein, Plaintiff is informed and believes that it is and has been the policy and practice of the County to: (a) deposit and invest disputed real property tax payments in various instruments, funds, commercial paper, certificates of deposit, and brokerage accounts, all of which earn a blended rate of return equal to the average rate of return on County investments, and (b) retain all of the earnings on the disputed real property tax payments rather than to return or pay out to taxpayers the earnings on the portion of the taxpayers’ disputed real property tax payments which exceeded the amount of their tax liability as ultimately determined or established as a result of their appeals. (The portions of the disputed real property tax payments made by taxpayers which exceed the amount of taxpayers’ liability as ultimately determined or established as a result of their Board of Review appeals are hereinafter referred to as the “Overpayments”.)

11. Plaintiff is informed and believes that consistent with the policy and practice described above, the County invested and earned interest and/or other returns on the Overpayments during the period it had possession and control of the Overpayments, including Plaintiff’s Overpayment, without paying said interest and/or other returns to the taxpayers who

paid said Overpayments, including Plaintiff. Plaintiff is further informed and believes that the County also invested and earned interest and/or other returns on the interest and/or other returns earned on the Overpayments, again without paying said interest and/or other returns to the taxpayers who paid said Overpayments.

12. On or about October 8, 2008, Defendants, in accordance with the policy and practice described above, mailed to Plaintiff's mortgage lender, CitiMortgage, Inc., a refund of Plaintiff's Overpayment in the amount of \$1,528.48, which sum did not include interest or other earnings realized by the County with respect to Plaintiff's Overpayment. On or about October 23, 2008, CitiMortgage, Inc. remitted to Plaintiff the refund sum of \$1,528.48.

13. MCC § 3.48.670(B) requires that the tax paid upon the assessment in dispute, and in excess of what is admitted by the taxpayer, be held by the Director of Finance in a special deposit during the pendency of an appeal to the Board of Review. MCC § 3.48.670(B) further requires the Director to repay the appealing taxpayer out of the special deposit, the amount of tax paid and held by the Board of Review, but ultimately determined to have been excessive or nontaxable.

14. Although MCC § 3.48.670(B) makes no explicit reference to the payment of interest on the amount of taxes refunded to a taxpayer who prevails in whole or in part on an appeal to the Board of Review, the Hawai'i Supreme Court, in Hawaiian Land Co. v. Kamaka, 56 Haw. 655, 547 P.2d 581 (1976) ("the Kamaka case"), held, with respect to the identical scheme reflected in MCC § 3.48.670(B), as stated in the predecessor statute, HRS § 232-24, with regard to tax appeals to the state Board of Review, that any actual earnings received by Defendants on Overpayments, together with any returns that have accrued on said earnings, belong and must be paid to the taxpayers who made the Overpayments.

15. Defendants neglected, failed and refused to pay Plaintiff interest or any sum representing the actual earnings derived by Defendants, through their use and/or investment of Plaintiff's Overpayment. Defendants have also neglected, failed and refused to pay Plaintiff any returns that have accrued on said interest or on said actual earnings derived by Defendants.

16. Plaintiff is informed and believes and thereupon alleges that Defendants neglected, failed and refused to pay to taxpayers who were and are similarly situated to Plaintiff (that is, successful Board of Review real property tax appellants), interest or any sum representing the actual earnings derived by Defendants, through their use and/or investment of said taxpayers' Overpayments, as well as any returns that have accrued on said interest or on said actual earnings derived by Defendants.

17. As a result of the foregoing, the County has been unjustly enriched by having retained the earnings and fruits upon investment of the Overpayments. Plaintiff and members of the Class he seeks to represent (as defined below) have been injured in such amounts as shall be proven at trial.

CLASS ACTION ALLEGATIONS

18. Plaintiff brings this action on his own behalf, individually, and, pursuant to Rule 23 of the Hawai'i Rules of Civil Procedure, on behalf of all others similarly situated.

19. Plaintiff represents a Class of real property owners who appealed their real property tax assessments and/or classifications to the Board of Review from June 12, 2003 to the present, whose appeals were resolved in whole or in part in the taxpayers/owners/appellants favor, whether by judgment, order, stipulation, settlement, consent decree or other resolution, and who were not paid interest, actual earnings realized by Defendants, or returns that accrued on said interest or said earnings on the Overpayments of real property tax (the "Class").

20. The Class is so numerous that joinder of all members is impracticable.

21. There are questions of law and fact common to and between the members of the Class. The questions of law and fact common to the Class include, but are not limited to:

a. Each Class member appealed his/her/its real property tax assessment during the period of June 12, 2003 to the present;

b. Each Class member's appeal was resolved in whole or in part in his/her/its favor, whether by judgment, order, stipulation, settlement, consent decree or other resolution;

c. Each Class member paid real property taxes based on the assessment and/or classification, one or both of which were challenged through the appeal;

d. By virtue of the resolution of the appeal, the amount paid by each Class member to the County exceeded the taxes that were actually due; and

e. Defendants failed to pay interest or other actual earnings realized by Defendants on the amount of the Overpayments of real property taxes paid by Class members pending appeal, and failed to pay returns that have accrued on said interest or said earnings realized by Defendants.

22. Plaintiff's claims are typical of the claims of the Class as a whole.

23. Plaintiff will adequately and fairly protect the interests of the Class.

24. A class action is appropriate in this case for one or more of the following reasons:

a. The damages suffered by the Class members are small compared to the burden and expense of prosecuting individual actions;

b. Defendants have acted and/or refused to act on grounds generally applicable to the Class, making final injunctive relief or declaratory relief with respect to the Class as a whole appropriate, as set forth below; and

c. Questions of law and fact common to the Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

FIRST CLAIM FOR RELIEF
(Violations of Maui County Code § 3.48.670(B))

25. Plaintiff realleges and incorporates by reference the allegations contained in Paragraphs 1 through 24 above.

26. The conduct of Defendants as alleged herein violated and continues to violate MCC § 3.48.670(B), as construed and augmented by the Kamaka case.

27. The violation of MCC § 3.48.670(B) has caused and, unless enjoined, will continue to cause, pecuniary injury to Plaintiff and the Class in such amounts as shall be proven at trial.

28. By virtue of the foregoing, Plaintiff and the Class are entitled to general damages in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF
(Assumpsit)

29. Plaintiff realleges and incorporates by reference the allegations contained in Paragraphs 1 through 28 above.

30. Pursuant to the Hawai'i Supreme Court's holding in the Kamaka case, an implied contract was created between the County, on the one hand, and Plaintiff and the members of the Class, on the other hand, upon payment by Plaintiff and the members of the

Class of real property taxes which were ultimately determined or agreed by the Board of Review to be in excess of the amount for which Plaintiff and the members of the Class were ultimately liable.

31. The implied contract required Defendants to pay the taxpayers who appealed their assessments and/or classifications the Overpayments plus interest and actual earnings on the amount of real property tax that was in excess of the amount for which the taxpayers were ultimately liable.

32. Defendants breached the implied contracts with Plaintiff and the members of the Class by failing to pay the interest and actual earnings on the amount of real property taxes that Plaintiff and the members of the Class overpaid as determined by the resolution of their appeals. Defendants also breached the implied contracts with Plaintiff and the members of the Class by failing to pay returns that have accrued on said interest or on said earnings derived by Defendants.

33. By virtue of the foregoing, Plaintiff and the Class are entitled to damages in amounts to be proven at trial.

**THIRD CLAIM FOR RELIEF
(Conversion)**

34. Plaintiff realleges and incorporates by reference the allegations contained in Paragraphs 1 through 33 above.

35. Plaintiff and the Class have the right to possess, and must be repaid by Defendants, a sum representing the interest and actual earnings derived through use and/or investment of the amount of real property tax that Plaintiff and the members of the Class overpaid. Plaintiff and the Class also have the right to possess, and must be repaid by Defendants, a sum representing the returns that have accrued on said interest and on said actual

earnings derived by the Defendants upon the Defendants' retention and investment of said interest and said earnings.

36. Defendants have exercised dominion and control over the interest and actual earnings derived through use and/or investment of the amount of real property tax that Plaintiff and the members of the Class overpaid. Defendants have exercised dominion and control over the returns that have accrued and are accruing on the retained interest and earnings.

37. Defendants' failure to pay interest, actual earnings and the returns accrued on interest and earnings to Plaintiff and the members of the Class has deprived Plaintiff and the Class members of possession and use of their property. Said failure and deprivation is a wrongful taking.

38. By virtue of the foregoing, Plaintiff and the Class are entitled to general damages in an amount to be proven at trial.

FOURTH CLAIM FOR RELIEF
(Unjust Enrichment)

39. Plaintiff realleges and incorporates by reference the allegations contained in paragraphs 1 through 38, above.

40. The County has been unjustly enriched through the retention and/or use of the interest and actual earnings on the amount of real property tax that Plaintiff and the members of the Class overpaid during the pendency of Plaintiff's and Class members' appeals. The County has also been unjustly enriched by the unauthorized retention and/or use of the returns that have accrued on said interest and said actual earnings.

41. Plaintiff and the Class are entitled to judgment disgorging the County's interest or actual earnings on the amount of real property tax that Plaintiff and the members of the Class overpaid and disgorging the returns that have accrued on said interest and earnings,

ordering that such benefit be delivered to Plaintiff and the Class in the form of money damages as allowed by law.

FIFTH CLAIM FOR RELIEF
(Violations of 42 U.S.C. § 1983)

42. Plaintiff realleges and incorporates by reference the allegations contained in Paragraphs 1 through 41, above.

43. Title 42, Section 1983 of the United States Code states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

44. The Fifth Amendment to the United States Constitution provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

45. The Fourteenth Amendment to the United States Constitution provides in relevant part that “[n]o state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law”

46. Pursuant to MCC § 3.48.670(B), as construed and augmented by the Kamaka case, Plaintiff and the Class have a protected property interest in the interest and actual earnings on the amount of real property tax that Plaintiff and the members of the Class overpaid, within the meaning of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

47. Defendants' failure to pay interest and actual earnings on the amount of real property tax that Plaintiff and the Class overpaid, as well as returns that have accrued on said interest and actual earnings, constitutes an unconstitutional taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

48. By virtue of the foregoing, Plaintiff and the Class have been injured in such amounts as shall be proven at trial.

SIXTH CLAIM FOR RELIEF
(Breach of Fiduciary Duty)

49. Plaintiff realleges and incorporates by reference the allegations contained in Paragraphs 1 through 48, above.

50. The County assumed a fiduciary duty to Plaintiff and the members of the Class by accepting payment of real property taxes from them pending appeal.

51. The County breached said duty by appropriating the amounts of real property tax which exceeded the amount for which Plaintiff and the members of the Class were ultimately liable, during the pendency of their appeals, and subsequently failing to pay them interest or actual earnings on said amounts. The County further breached said duty by failing to pay Plaintiff and members of the Class the returns that have accrued on said interest and said earnings.

52. By virtue of the foregoing, Plaintiff and the members of the Class are entitled to damages in an amount to be proven at trial.

SEVENTH CLAIM FOR RELIEF
(Injunctive Relief)

53. Plaintiff realleges and incorporates by reference the allegations contained in Paragraphs 1 through 52 above.

54. Defendants' violations are ongoing and continue to damage Plaintiff and the Class.

55. Injunctive relief is necessary to restrain Defendants from continuing their violations, as described above.

56. Plaintiff and the Class are therefore entitled to injunctive relief prohibiting Defendants from continuing their violations of MCC § 3.48.670(B), as construed and augmented by the Kamaka case.

EIGHTH CLAIM FOR RELIEF
(Accounting)

57. Plaintiff realleges and incorporates by reference the allegations contained in Paragraphs 1 through 56 above.

58. Defendants have breached their fiduciary duty to hold and invest challenged overpayments for the benefit of Plaintiff and similarly situated taxpayers who are also members of the Class pending disposition of their respective appeals.

59. An accounting is required to fashion an adequate remedy for this breach of trust. As to each real property tax appeal from June 12, 2003 as alleged herein, the accounting should include, at a minimum:

- a. The amount of adjustment to the real property tax resulting from the appeal;
- b. The date the Board of Review rendered its decision which resulted in an adjustment of the tax;
- c. The amount of refund issued and/or credit extended to the taxpayer;

- d. The date that the refund was issued and/or date that credit was extended to the taxpayer;
- e. The amount of real property taxes paid by the taxpayer based on the assessment and/or classification challenged in the appeal;
- f. The date(s) of said real property tax payment(s) by the taxpayer; and
- g. The rate of return and amount of interest and earnings realized by Defendants upon Plaintiff's Overpayment and on said interest and earnings.

WHEREFORE, Plaintiff, individually, and on behalf of all those similarly situated, prays for relief as follows:

1. With respect to the First, Second, Third and Fifth Claims for Relief, Judgment awarding damages against Defendants and in favor of Plaintiff and all members of the Class, in amounts to be determined at trial;
2. With respect to the Fourth Claim for Relief, judgment against the County in favor of Plaintiff and all members of the Class for disgorgement as alleged in said Claim;
3. With respect to the Sixth Claim for Relief, judgment awarding damages against the Defendants in favor of Plaintiff and all members of the Class, in amounts to be determined at trial;
4. With respect to the Seventh Claim for Relief, temporary, preliminary and/or permanent injunctive relief against Defendants prohibiting them from continuing their violations of MCC§ 3.48.670(B);
5. With respect to the Eighth Claim for Relief, judgment requiring Defendants to provide an accounting of monies received from taxpayers in the nature of

Overpayments, the interest and earnings thereon, the refunds paid and credits extended by Defendants as described herein, and the interest and/or other returns accrued upon the interest and earnings on Overpayments wrongfully retained by Defendants;

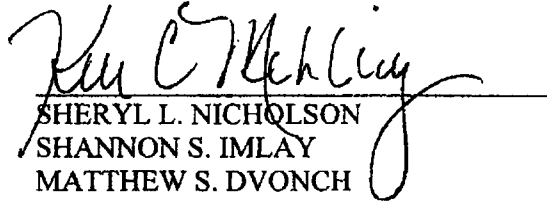
6. An award of Plaintiff's and the Class's costs and expenses, including their reasonable attorneys' fees, against Defendants;

7. Reimbursement to Plaintiff for his time and effort to bring forth these wrongdoings, in an amount to be determined at trial;

8. Prejudgment interest; and

9. Such further and additional relief as the Court deems appropriate and just.

DATED: Wailuku, Hawai'i, September ~~25~~²⁵, 2009.



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Attorneys for Plaintiff

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

RICHARD CERTO, individually and on)	CIVIL NO. 09-1-0438(1)
behalf of all others similarly situated,)	(Other Civil Action)
)	
Plaintiff,)	SUMMONS
)	
vs.)	
)	
COUNTY OF MAUI and KALBERT)	
YOUNG, Director of the Department of)	
Finance, County of Maui,)	
)	
Defendants.)	
)	

SUMMONS

STATE OF HAWAII

To the above-named Defendants:

YOU ARE HEREBY summoned and required to serve upon Paul Johnson Park & Niles, Attorneys at Law, a Law Corporation, whose address is 203 H.G.E.A. Building, 2145 Kaohu Street, Wailuku, Maui, Hawaii 96793, an answer to the First Amended Complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint attached hereto.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the above-entitled court permits, in writing on this summons, personal delivery during those hours.

A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Wailuku, Hawaii, SEP 28 2009.

/sgd/ J. KAYA (seal)

CLERK OF THE COURT