SCWC-14-0000828

COUNTY OF KAUAI, Respondents/Plaintiffs-Appellees,

vs.

HANALEI RIVER HOLDINS, LTD., a Cook Islands corporation, et al., Petitioners/Defendants-Appellants,

*APPLICATION FOR WRIT OF CERTIORARI
IN THE SUPREME COURT

*Originally filed in CAAP-14-0000828 on July 10, 2016

(See Attached)

CAAP-14-0000828

IN THE SUPREME COURT OF APPEALS OF THE STATE OF HAWAII

COUNTY OF KAUAI, Plaintiffs/Appellees Respondents, vs. HANALEI RIVER HOLDINGS, LTD, a Cook Islands corporation, et al. Defendants/Appellants Petitioners.	Civil No: 11-1-0098 (Condemnation) APPEAL FROM JUDGEMENT ENTERED ON April 25, 2014 FIFTH CIRCUIT COURT HONORABLE Judge KATHLEEN N.A. WATANABE

APPLICATION FOR WRIT OF CERTIORARI IN THE SUPREME COURT

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APPLICATION FOR WRIT OF CERTIORARI IN THE SUPREME COURT

I. APPLICATION FOR WRIT OF CERTIORARI

Petitioners-Defendants-Appellants Hanalei River Holdings, LTD and Michael G. Sheehan ("Petitioners") request this Court issue a writ of *certiorari* to review the Intermediate Court of Appeals ("ICA") opinion of March 31, 2016. Dkt 194.

This is an eminent domain case. To expand an adjacent public park, the County of Kauai condemned 3 parcels of privately-owned land, Parcels 49, 33, and 34. Petitioners own Parcel 49. They use Parcel 49 together with a fourth parcel, Area 51, as a boat yard. In eminent domain, when separate parcels are used together, the jury determines whether they are part of a "larger parcel," and the owner is entitled to severance damages when a portion of the larger parcel is taken. To make that determination, the jury looks at three factors: unity of use, title, and contiguity. Known as the "three unities," these factors ask whether two parcels are used together, share a common owner, and are near to each other. Because they used Area 51 pursuant to an easement, Petitioners believed they were entitled to have the jury determine whether the County's taking of Parcel 49 impacted their use of Area 51.

The circuit court, however, prohibited the jury from considering these factors, and granted summary judgment to the County. The ICA affirmed solely because Parcel 49 and Area 51 are separated by Parcels 33 and 34, and do not touch. The ICA established a bright-line legal rule that for a condemnee to show the taken parcel is part of a larger parcel, the parcels must be physicially contiguious. The ICA's ruling resulted from a misreading of this Court's opinion in

City and County of Honolulu v. Bonded Inv., Co., 54 Hawaii 523, 511 P.2d 163 (1973). The ICA erroneously concluded that in order to meet the physical unities prong of the three unities test for severance damages, the properties must actually abut. This restriction is not contained with *Bonded Investment* and is contrary to the weight of decisions in other jurisdictions.

Second, the ICA erroneously concluded that statutory interest begins accruing on a "conditional" estimate of just compensation only *after* the condemnee demonstrates a legal entitlement to the funds. The ICA decision is contrary to this Court's decision in *City and County of Honolulu v. Market Place, LTD.*, 55 Hawaii 226, 517 P.2d 7 (1973).

Lastly, the ICA erroneously concluded that a condemnor may withdraw and reduce its estimate of just compensation deposited with the court at any time prior to disbursement to the landowner. This unsound holding will essentially mean that all estimates of just compensation are conditional.

Petitioners respectfully request that this Court exercise its discretion under Haw.R.App.P 40.1 to correct the ICA's grave errors of law.

II. QUESTIONS PRESENTED

QUESTION NO. 1.: Must two parcels physically abut in order for the jury to consider whether they are part of a larger parcel?

QUESTION NO. 2: Where there are multiple properties being condemned from different owners, does statutory interest on a conditional deposit only accrue after each condemnee establishes an entitlement to its portion of the deposit?

QUESTION NO. 3: Does Haw.Rev.Stat. §101-19 enable a condemnor to withdraw a portion of its estimate of just compensation after deposit with the Court and after taking possession of the property?

III. STATEMENT OF PRIOR PROCEEDINGS

The complaint herein was filed on May 31, 2011. DKT# 48, pages 8-41. A first amended complaint was filed on April 18, 2012. DKT# 48, pages 78-98. On April 30, 2012, the County acknowledged that it deposited $5.89 million with the Clerk of the Court representing its estimate of just compensation. DKT# 48, pages 103-104. On May 3, 2012, the Court executed the *ex parte* order placing the County in possession of the subject property. DKT# 48, pages 120-121.

On March 11, 2013, Defendants-Appellants-Petitioners filed their application for payment of estimated compensation. DKT# 52, pages 44-58. On April 2, 2013, the County opposed their application (DKT# 52, pages 62-85) and filed its "motion to withdraw portion of deposit" (DKT# 52, pages 86-93). On April 10, 2013, the County and Defendants-Appellants executed a stipulation allowing withdrawal of $4.86 million after entering into an "Agreement Regarding Withdrawal of Deposit." DKT# 52, pages 128-131. Defendants-Appellants did not waive their objection to the County's motion to withdraw portion of deposit.

The Agreement required Defendant-Appellant Sheehan to agree to indemnify the County regarding release of the portion of the estimate of just compensation to Defendant-Appellant HRHL. On May 3, 2013, the Order granting the County's motion to withdraw portion of deposit was filed. DKT# 52, pages 157-158.

On August 13, 2013, the County moved for partial summary judgment against Defendants-Appellants on the matter of severance damages. DKT# 54, pages 132-294. The findings of fact, conclusions of law and order granting the County's motion for partial summary judgment was filed on October 3, 2013. DKT# 56, pages 305-318.

Trial commenced on November 4, 2013. The Special Verdict form was filed on November 8, 2013. DKT# 58, pages 342-342. Petitioners were awarded an additional $940,000.00 in compensation over and above the reduced estimate of just compensation for the condemned parcels.

On November 18, 2013, the County filed its motion re: blight of summons damages. DKT# 58, pages 357-367. The order granting the County's motion re: blight of summons damages was filed on January 16, 2014. DKT# 60, pages 12-13.

Final Judgment, final order of condemnation, notice of entry of judgment and notice of entry of final order of condemnation were filed on April 25, 2014.

On March 31, 2016, the ICA issued its Opinion affirming in part, vacating in part and remanding to the circuit court. DKT# 194. On May 11, 2016, the ICA filed its Judgment on Appeal. DKT# 216. On June 8, 2016, Petitioners requested an extension of time to file their writ of certiorari. DKT# 218. The request was granted. DKT# 221. This application timely followed.

IV. SHORT STATEMENT OF THE CASE

Petitioner Sheehan was denied severance damages for an adjacent lot ("Area 51") which he essentially controlled. The Respondent County of Kauai ("County") did not dispute the condemned parcels and Area 51 were integral to and all previously used as a boatyard owned, operated and controlled by Petitioner Sheehan.[1] Parcels 33 and 34 owned by Petitioner Hanalei River Holdings, LTD ("HRH") were sandwiched between Petitioner Sheehan's lot (49)[2] and Area 51. Petitioners' expert valuator had concluded the Area 51 suffered severance damages as a result of the County condemning Parcels 33 and 34, and Lot 49. Petitioners also sought blight of summons damages because the County's deposit of estimate of just compensation was conditional. Although the County deposited its estimate of just compensation with the court,[3] it was allowed to withdraw approximately 20% *after* it took possession of the subject properties and *after* Petitioners moved to release those funds. The County was allowed to do so despite having not claimed error or clerical mistake with its initial deposit of just compensation.

V. BRIEF ARGUMENT

A. THE ICA ERRONEOUSLY MISAPPLIED THE PHYSICAL UNITY TEST

The ICA wrongly concluded that Petitioner Sheehan could not meet the physical unity prong of the three-unities test under *City and County of Honolulu v. Bonded Investment Co., Ltd.*, 54 Hawaii 523, 511 P.2d 163 (1973).[4] The ICA rejected Petitioner Sheehan's

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[1] "The Court should also take judicial notice in *County of Kauai v. Sheehan, et al.*, Civil No. 11-1-0206 that the County alleged at paragraph 3 of the Complaint that

> Defendant Michael G. Sheehan ("Sheehan") owns and operates a boatyard, known as the Hanalei River Boatyard ("HRBY") **on his property**, identified as Tax Map Key Nos. (4) 5-5-01:33, 34, and 49 ("Property")."

DKT# 56, pages 32. (Emphasis added) The County was judicially estopped from denying Petitioner Sheehan owned Area 51 or that the properties were collectively used as a boatyard.

[2] Parcels 33 and 34, along with Lot 49 were the condemned properties. Area 51 was not being condemned by the County, and physically abutted Parcel 34.

[3] Petitioner Sheehan challenged the County's estimate of just compensation as being "stale as a matter of law [which] did not in good faith represent the reasonable fair market value of the property." DKT# 50, page 77.

[4] The ICA did not reach any other basis purportedly relied upon by the trial court in granting summary judgment on severance damages. ICA Opinion at 20.

argument[5] that physical unity could be met even if the properties did not actually border each other.[6] Instead it erroneously held that the parcel being condemned must actually physically abut the parcel for which severance damages are sought in order to meet the "physical unity" prong.

> In support of its motion for partial summary judgment, the County also submitted, *inter alia*, maps from the Sheehan Defendants' appraisal, showing the relative location of the Subject Properties and "Area 51," which reveal the Parcel 49 does not abut "Area 51." **Thus, the only condemned parcel owned by Sheehan, Parcel 49, is not adjacent to "Area 51," because Parcels 33 and 34, both owned by HRH, lie in between. Sheehan therefore cannot satisfy the physical unity requirement**.

Opinion at page 19 (emphasis added). According to the ICA, since Petitioner Sheehan's condemned Parcel 49 did not physically abut Area 51, he was not entitled to severance damages as a matter of law. The ICA's decision is a complete misread of *Bonded Investment* and further ignores persuasive decisions in other jurisdictions.

This Court in *Bonded Investment*, citing Haw.Rev.Stat. §101-23, adopted the "three-unities" test for determining when severance damages are appropriate.

> "[T]he test generally used by courts to determine whether a parcel to be acquired by eminent domain proceeding is a part of a larger tract of land to entitle owners to severance damages is that there must be unity of title, physical unity and unity of use of the parcel taken and parcel left."

Id., 54 Hawaii at 525, 511 P.2d at 165.

There is nothing within the *Bonded Investment* opinion to support the ICA's conclusion that physical unity meant the parcels must actually touch each other. Indeed, authority cited in *Bonded Investment*, *e.g.*, *Barnes v. N. C. State Highway Commission*, 250 N.C. 378, 383, 109 S.E.2d 219, 224 (1959),[7] made it clear that establishing physical unity was not a bright line, all or nothing, abut or not abut test. Those authorities suggest that unity of use is the most important factor when considering severance damages.

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[5] In light of the County's prior acknowledgement that Petitioner Sheehan controlled Area 51 and that all of the properties, Lots 49, 33, 34 and Area 51 were utilized as a boatyard, Petitioner Sheehan's countervailing declaration was unnecessary.

[6] Finally we reject Sheehan's argument that under Bonded Inv. II there is no requirement that all of the pertinent lots abut one another. This is a clear misreading of Bonded Inv. II as the Hawai'i Supreme Court expressly noted that of the three parcels at issue in that case (which all satisfied the unity of title requirement), two were contiguous, and one of the two contiguous parcels adjoined the third, thus all three could comprise one tract of land. ICA Opinion at 20.

[7] *Bonded Investment*, 54 Hawaii at 525, 511 P.2d at 165.

> The general rule is that parcels of land must be contiguous in order to constitute them a single tract for severance damages and benefits. **But in exceptional cases, where there is an indivisible unity of use, owners have been permitted to include parcels in condemnation proceedings that are physically separate and to treat them as a unit**.
>
> * * *
>
> **As indicated above, the factor most often applied and controlling in determining whether land is a single tract is unity of use**.

Barnes, 250 N.C. at 384-385, 109 S.E.2d at 225 (emphasis added). The ICA proffers no justification whatsoever for its decision to disregard *Barnes*.

Other jurisdictions have likewise rejected the ICA's restrictive holding that properties must actually abut in order to meet the physical unity prong. *See Baetjer v. U.S.*, 143 F.2d 391, 395 (1st Cir. 1944)([T]racts physically separated from one another may constitute a 'single' tract if put to an integrated unitary use or even if the possibility of their being so combined in use 'in the reasonably near future[.]')(citations omitted); *City of Mishawaka, on Behalf of its Department Of Redevelopment v. Fred W. Bubb Funeral Chapel, Inc.*, 469 N.E.2d 757, 760 (Ind.App. 1984)(An examination of decisions in other jurisdictions reveals that while actual physical contiguity is ordinarily required for severance damages it is not essential. **A majority of states will award damages for the "severing" of separate parcels if there is unity of use**.)(citations omitted)(emphasis added); *State ex rel. Com'r of Dept. of Corrections v. Rittenhouse*, 621 A.2d 357, 361 (S.C. Del. 1992)("[W]here property taken is physically separate from another parcel allegedly damaged as a result of such taking, severance damages for a "partial taking" are permitted provided there is "functional unity" between the parcels. Such unity of use exists where the properties are so inseparably connected in their uses that the taking of one will permanently damage the other.)

California has also rejected the ICA's "abut" rule. *See, e.g., City of San Diego v. Neumann*, 6 Cal.4th 738, 747, 863 P.2d 725, 730 (1993)(A review of the case law reveals that our courts have not always insisted on strict application of the three unities in order to conclude that a "larger parcel" exists.)

> Our insistence on contiguity has been similarly flexible. … We relaxed the requirement in *City of Los Angeles v. Wolfe*, 6 Cal.3d 326, 99 Cal.Rptr. 21, 491 P.2d 813 (1971), and permitted severance damages despite the fact that the parcel taken was not physically contiguous with the remainder; we characterized the relationship between the two parcels, which was really one of interdependence of use, as "constructive" or "legal" contiguity. We stated: "**Exceptions have been**

> **recognized ... to the rule of strict physical contiguity w[h]ere the factual situation was found to warrant such an exception**." *Wolfe, supra*, 6 Cal.3d at p. 338, 99 Cal.Rptr. 21, 491 P.2d 813.)

Id. California courts agree with *Barnes* "and the majority of states" that unity of use is *the* important factor in determining contiguity. "**Unity of use if not the controlling factor is relevant**, however, and may be considered where the properties are not physically contiguous." *Wolfe*, 99 Cal.Rptr. at 27, 491 P.2d at 819 (emphasis added).

The ICA's decision to hold as a matter of law that the "physical unity" prong of the three-unities test can only be met where the condemned parcel is adjacent to, and abutting the parcel for which severance damages are sought is plain error, unsupported by *Bonded Investment*, and contrary to the aforementioned authorities. The ICA's decision to affirm the trial court's order granting summary judgment in favor of the County on the issue of severance damages should be reversed and remanded for a jury determination on severance damages.[8]

B. THE ICA ERRONEOUSLY CALCULATED BLIGHT OF SUMMONS DAMAGES

According to the ICA's reading of *City and County of Honolulu v. Market Place, LTD.*, 55 Hawaii 226, 517 P.2d 7 (1973), unless and until there is a final judicial determination as to who is ultimately entitled to receive a deposit of just compensation, blight of summons interest will not accrue as a matter of law. According to the ICA, only after such a judicial determination is made does the issue of "conditionality" of the deposit arise, *i.e.*, is the deposit conditional (interest is not stopped from accruing) or unconditional (interest does not accrue). Although the deposit was found to be conditional in this case, the ICA held that interest shall be taxed *only* between the date the Petitioners established they were entitled to the deposit and the date the County agreed to release it. This is not the law.

The ICA's recitation of the mechanics behind awarding blight of summons damages is correct. There are two relevant periods for assessing blight of summons damages (where the condemnor takes possession of the property). First, as noted by the ICA, "for the period between the date of summons and the date of an unconditional deposit of estimated just compensation" interest accrues at 5% per annum on the total amount of the final award of just

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[8] Petitioners note that the County is estopped from disputing that Petitioner Sheehan operated a commercial boatyard on the condemned parcels as well as Area 51 (fn. 2, *supra*), and that the parties "do not dispute that Sheehan has a purported easement on "Area 51" to operate a boat baseyard (to the extent permitted by the County)[.]" ICA Opinion at pages 18-19.

compensation. ICA Opinion at 21. Second, from the date of an unconditional deposit of just compensation until payment of the final award, interest accrues at 5% per annum on the amount that the final award of just compensation exceeds an unconditional deposit of estimated just compensation. *Id*. *See*, Haw.Rev.Stat. §101-33 and *Market Place*, 55 Hawaii 235-37, 517 P.2d 15-17. If, however, the deposit of estimated just compensation is conditional (and the condemnor takes possession of the property), there is only one relevant period: between the date of summons until payment of the final award where interest accrues at 5% per annum on the amount of the final award.

Using this formula, for the first time period Petitioners claimed they were entitled to interest accruing at 5% per annum on the entire final award from the date of summons (May 11, 2011) to the date the County agreed to conditionally release the estimate of just compensation (April 10, 2013). With respect to the second time period, they sought interest accruing at 5% per annum $940,000.00, the difference between the final award and the conditional deposit of just compensation released to them from April 10, 2013, until paid in full.[9]

There was no question that the County's deposit of its estimate of just compensation was conditional, a point which the ICA recognized.

> [T]he County consented to the release of the [estimate of just compensation] [], only after the County and Sheehan reached the Agreement Regarding Withdrawal of Deposit, in which Sheehan, *inter alia*, agreed to **indemnify the County for any amount paid to HRH that exceeded the jury verdict. The County's requirement of an assurance that it could recover any excess payment made to HRH further delayed payment to the Sheehan Defendants, and this constituted a condition places upon the deposit of estimated just compensation**.

ICA Opinion at page 26 (emphasis added).[10] That should have been it; no unconditional deposit, no tolling of interest. *Market Place*, 55 Hawaii at 239, 517 P.2d at 17 ("[O]nly if such a payment is truly unconditional will it stop the running of interest as blight of summons damages on [t]he amount of the deposit."). The interest sought by Petitioners for the first time period should have been awarded in full.

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[9] Petitioners received the appropriate blight of summons damages for the second time period. That is not part of this appeal.

[10] The ICA's heading stated as follows: C. Blight of Summons Damages (Conditional Deposit).

However, the ICA held that conditionality is subordinate to entitlement. In other words, contrary to *Market Place*,[11] interest will not accrue on a conditional estimate of just compensation until the condemnee proves he or she is entitled to the compensation. There is nothing in Ch. 101 that mandates the condemnee to prove entitlement in order for interest to accrue on a conditional deposit. There is nothing in the Statute which even requires the condemnee to move for release of a deposit of just compensation. Yet according to the ICA, if a condemnee delayed or otherwise did not seek release of the conditional deposit of just compensation, interest does not accrue. That is just bizarre.

If the ICA decision is permitted to stand, condemnors would be able to circumvent paying any interest required by Haw.Rev.Stat. §101-33. All a condemnor would have to do is deposit a conditional estimate of just compensation, raise an issue on entitlement, sit back and let the condemnees fight it out, and all the while interest is tolled. Once the court sorts out the issue of entitlement, the condemnor releases the conditional deposit without any interest penalty.

The ICA holding on blight of summons damages should be reversed, and Petitioners should be allowed interest on $4.86 million from the date of summons to the date the County agreed to release the conditional deposit at 5% per annum.

C. THE ICA WRONGLY PERMITTED REVISION OF THE DEPOSIT

In a nutshell, the ICA held that

> the court in an eminent domain proceeding may permit a governmental entity to withdraw a portion of the estimated just compensation deposit that has not been disbursed to the landowner when the governmental entity, acting in good faith, seeks to adjust the estimate to accurately reflect the value of the property on the date of summons and the adjustment will not impair the substantial rights of any party in interest.

ICA Opinion at page 15. Notwithstanding its citation to Haw.Rev.Stat. §101-19 and 'persuasive' federal case law, the ICA's conclusion defeats the statutory framework behind Haw.Rev.Stat. §§ 101-29 to 101-31. If allowed to stand, the ICA's decision will create new substantive rights for condemnors wholly outside the contours of the statute. These new rights will create much mischief and uncertainty – is an estimate of just compensation real or simply a teaser? Moreover, if condemnors are free to seek post-deposit and post-possession withdrawals of

[11] Only if the deposit of the estimate of just compensation is "truly unconditional" will it "stop the running of the interest as blight of summons damages on the amount of the deposit." *Id*.

deposits of estimated just compensation, all deposits will be conditional as a matter of law. As such, interest will never toll defeating the entire purpose of behind depositing an estimate of just compensation with the trial court.

The ICA's manipulation of Haw.Rev.Stat. §101-19 as the basis for its decision is bizarre. Although it acknowledged that "the estimate of just compensation is not part of the pleadings [,but] is part of separate procedure under HRS § 101-29 for immediate possession of the condemned property"[12], the ICA nevertheless erroneously concluded that a condemnor is allowed to withdraw a portion of the deposit of just compensation because §101-19

> "authorize[s] the circuit court to allow amendments 'in form or substance' of processes, motions or other proceedings, as long as the amendment will not impair the substantial rights of any party in interest.'"

Opinion at 13.

Haw.Rev.Stat. §101-19 permits amendments of filings generally. An estimate of just compensation requested, prepared and paid for by the condemnor is simply not the sort of 'filing' the Legislature considered within the scope of Haw.Rev.Stat. §101-19. This is not a situation where the condemnor lacked reliable information and misidentified the property owners which required amending the complaint to ensure good title and/or that the proceeds from the condemnation were paid to the proper party. An estimate is simply a property appraisal, which an appraiser would not prepare absent having all of the required information.

The ICA, however, concluded that the only **after** distribution to the condemnee ("the court in an eminent domain proceeding may permit a governmental entity to withdraw a portion of the estimated just compensation deposit that has not been disbursed to the landowner") is the condemnor precluded from seeking revision (withdrawal) of the deposit. Petitioners certainly agree that once payment has been disbursed, the condemnor would be estopped from seeking return of any of the deposit of just compensation. However, the ICA's arbitrary trigger point ignores the sworn representations the condemnor is required to make under Haw.Rev.Stat. §101-19 in order to take possession of the property.

Until the condemnor moves to take possession of the property being condemned, the condemnor makes no representations concerning the deposit of just compensation. Likewise, the condemnee has no interest in or rights to it because he or she remains in full possession of the property. At that point, the deposit of just compensation is analogous to an unaccepted offer.

[12] Opinion at page 13, footnote 9.

The condemnor would be free to increase or decrease the amount at its sole discretion prior to formally seeking possession of the property.

In order to seize the property, the condemnor must move pursuant to Haw.Rev.Stat. §101-29, and make the affirmative representation that it has deposited "[t]he sum of money estimated by the State or county to be just compensation or damages for the taking of the real property."[13] *See*, §101-29(3). In this case the Director of Finance, Wallace Rezentes, Jr. made such representation in his sworn declaration submitted in support of the County's ex parte motion for an order placing it in possession of the property.

> That, the just compensation for the taking of the real property described in the Complaint heretofore filed in this cause is estimated by the Plaintiff to be the sum of FIVE MILLION, EIGHT HUNDRED NINETY THOUSAND AND NO/IOO DOLLARS ($5,890,000.00), which sum has been paid by the Plaintiff to the Chief Clerk of the above-entitled Court for the benefit of the parties entitled thereto.

DKT# 48, page 104. Having accepted the Mr. Rezentes' sworn declaration that the amount of the deposit of just compensation ($5,890,000.00) is the amount "estimated by the [County]" for the 'taking of the real property" "for the benefit of the parties entitled thereto", the trial court entered the *ex parte* order placing the County in possession of the subject property. DKT# 48, pages 120-121. The County then seized the property from Petitioners.

At that point in time Petitioners no longer possessed the property and is entitled to apply for payment of the estimate of just compensation. Haw.Rev.Stat. §101-31. The ICA completely ignored and overlooked that the affirmations made by Mr. Rezentes regarding the deposit and inexplicably concluded that the Petitioner's rights to the estimate of just compensation 'vest' only after the funds are disbursed. That rule of law is irrational and again ignores the fact that not only has the condemnor taken possession of the property, but in doing so has asked the trial court to accept its representation that its deposit of just compensation is the estimated value of the property being taken.

In light of Haw.Rev.Stat. §101-29, estopping the condemnor from withdrawing any portion of its estimate of just compensation after it takes possession of the property can

[13] DKT# 48, pages 99-119 (County's *ex parte* motion for order placing it in possession.)

hardly be considered unfair. The ICA's conclusion that the condemnor can essentially bait and switch its estimate after taking possession is wholly unsound and unsupported by Chapter 101.[14]

The ICA further erroneously misread Haw.Rev.Stat. §101-31 (the court may order that the amount of the estimated compensation or damages stated in the motion and paid to the clerk of the court, **or any part thereof** . . . .") as providing the circuit court authority to permit the condemnor to withdraw part of its deposit. This provision has nothing whatsoever to do with reducing or withdrawing the estimate of just compensation. This provision allows the trial court to withhold funds due the condemnee for taxes and other similar encumbrances.

Lastly the ICA erroneously implies that allowing the condemnor to withdraw 20% of its estimate of just compensation did not impair the substantial rights of the Petitioners. On the contrary, Petitioners' substantial rights were impaired the moment the County seized the property on what can only be considered now as a bogus estimate, contrary to the representations made to the trial court pursuant to §101-29, thus precluding Petitioners from its use.

The Court should reverse the ICA, hold that once the condemnor possesses the property, it cannot reduce its estimate, and remand to the circuit court for a determination on the issues of damages to the Petitioners for loss of access to the $1.03 million withdrawn by the County.[15]

VI. CONCLUSION

For all the reasons stated herein and in the briefs filed in this case, Petitioners respectfully request and urge a writ of certiorari issue to the ICA, and that this Court reverse the ICA opinion and grant the relief requested herein.

DATED: Honolulu, Hawaii, July 10, 2016.

-S-
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[14] Petitioners contended below that the County's initial estimate of just compensation was stale. At the time the County disagreed, and urged the trial court to accept it estimate. Only after Petitioners applied for release of the estimate did the County do a 180 and submit a *new* estimate.
[15] Considering the jury's ultimate verdict – more than $1 million more than the revamped estimate of just compensation, the error was not harmless.