No. 29887

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

COUNTY OF HAWAII, a municipal corporation, Plaintiff-Appellee, vs. ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; MILES HUGH WILSON, *et al.*, Defendants, and C&J COUPE FAMILY LIMITED PARTNERSHIP, Defendant-Appellant.	CIVIL NO. 00-1-0181K CIVIL NO. 05-1-015K (Kona) (Condemnation) (Consolidated) APPEAL FROM SUPPLEMENTAL FINAL JUDGMENTS (entered May 14, 2009) THIRD CIRCUIT COURT Honorable Ronald Ibarra

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BRIEF FOR THE APPELLANT REPLYING TO ANSWERING BRIEF OF PLAINTIFF-APPELLEE COUNTY OF HAWAII

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BRIEF FOR THE APPELLANT REPLYING TO ANSWERING BRIEF OF PLAINTIFF-APPELLEE COUNTY OF HAWAII

As detailed in both the Opening Brief for the Appellant ("Opening Brief") and the Brief for the Appellant Replying to Answering Brief of Appellee 1250 Oceanside Partners ("Reply to Oceanside"), both of which are adopted and incorporated herein by reference, County's[1] attempt at a second condemnation (Condemnation 2) fails because, *inter alia*:

(1) It was instituted before County's Development Agreement with Oceanside was either declared void or rescinded;

(2) It was instituted while County's necessary discretion in exercising the sovereign power of eminent domain was unconstitutionally constrained by the threat of either breaching its obligations under the Development Agreement or liability for damages under Haw. Rev. Stat. § 101-27, both of which County sought to avoid;

(3) Aside from the illegal Development Agreement, County had no means, intent, or *Euclid*-compliant comprehensive plan[2] to acquire a right-of-way to build a Mamalahoa Bypass;

(4) Even if the Development Agreement was *Euclid*-complaint, it could not serve as the necessary plan because it is both illegal and unenforceable; and

(5) In any event, the trial court's finding of "no evidence" supporting pretext is clearly erroneous as a matter of law; indeed, evidence of pretext is legion and supports a finding of the same.

However, not only does County fail to address and counter the fatal Development Agreement-driven pretext of its attempted Condemnation 2, but it also fails to directly address or persuasively counter the issues raised in these appeals regarding the Coupes' entitlement to

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[1] Plaintiff-Appellee County of Hawaii will be referred to as "County," Appellant C&J Coupe Family Limited Partnership as the "Coupes," and Appellee 1250 Oceanside Partners *aka* Hokulia as "Oceanside." Moreover, this Brief will continue to refer to Civil No. 00-1-181K as "Condemnation 1" and Civil No. 05-1-015K as "Condemnation 2," as in the Court's opinion in the prior appeal. *See County of Hawaii v. C&J Coupe Family Ltd. P'ship* (*Coupe I*), 119 Haw. 352, 356, 198 P.3d 615, 619 (2008).

[2] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Indeed, even the *Kelo* Court paid homage to *Euclid* on this point. *See Kelo v. City of New London*, 545 U.S. 469, 483 n.12 (2005).

statutorily-prescribed damages and the trial court's clear error in failing to recognize appreciation in property value over a five (5) year period. This Reply Brief addresses these issues and explains why County's arguments are unavailing.

In Condemnation 1, the issues on appeal involve the proper scope of Haw. Rev. Stat. § 101-27 (1993), namely, whether (i) the cost of funds encumbered to successfully defeat County's illegal Condemnation 1, and (ii) post-trial fees and costs incurred in litigating and successfully obtaining section 101-27 damages are recoverable as "all such damage" under section 101-27. Both of these are answered in the affirmative, and the lower court was wrong, as a matter of law, when it concluded otherwise.

Finally, the appeal of Condemnation 2 places in issue the trial court's failure to consider the indisputable and obvious appreciation in property value between 2000 and 2005 when it determined the fair market value of the property sought therein was $162,204.83. The court's failure was perhaps predicated on its erroneous finding that County's appraiser, whom the trial court deemed credible, had opined that the 2.9 acres of the Coupes' property appraised as of October 9, 2000 had the same value as the 3.348 acres appraised as of January 28, 2005. *See* R:CV05-1-015K Doc. 01031 at 8722 (FOF 111). However, this was clear error, as even County, in its Answering brief, admits that its appraiser, Robert Bloom, appraised the property at $140,500 in 2000 (which the trial court determined was the fair market value of the 2.9 acres sought in Condemnation 1, *see id.* at 8723 (FOF 121)) but appraised it at the significantly appreciated value of $345,000 in 2005. County Br. at 10; R:CV05-1-015K Doc. 01060 at 9524, P-12, PDF at 856-982. These facts are undisputed, and the trial court's finding to the contrary is plain error in need of correction, regardless of the outcome of the Condemnation 2 appeal, as this figure will serve as either: (i) a basis for just compensation and blight, should Condemnation 2 be affirmed, or (ii) a factor in determining temporary taking and section 101-27 damages, should the matter be reversed.

I. CONDEMNATION 1: SECTION 101-27 DAMAGES

County argues for a limited application of Haw. Rev. Stat. § 101-27, despite its clear instruction that a landowner who prevails in a condemnation action brought by the government "**shall** be entitled . . . to recover from the plaintiff **all such damage as may have been sustained by the defendant by reason of the bringing of the proceedings**[.]" Haw. Rev. Stat. § 101-27 (1993); *see also Coupe I*, 119 Haw. at 367-68, 198 P.3d at 630-31. If this broad mandate is to be

construed liberally in favor of landowners and strictly against condemning authorities, which it must,[3] then neither County nor the trial court can be allowed to improperly restrict the Coupes' right to recover their damages in full and be made whole in the aftermath of the illegal Condemnation 1. *See, e.g., Tabieros v. Clark Equip. Co.*, 85 Haw. 336, 389, 944 P.2d 1279, 1332 (1997) (proper measure of damages is that which is necessary to make party whole); *Foley v. Parlier*, 68 S.W.3d 870, 884 (Tex. Civ. App. 2002) (same).

A. Section 101-27 Damages Include the Cost of Encumbered Funds

The trial court's conclusion that the Coupes are not entitled to recover the cost of their encumbered funds as a component of their damages under Haw. Rev. Stat. § 101-27 is wrong as a matter of law.

1. County Did Not Contest the Coupes' Calculations, Proposed Rate, or Entitlement To Such Funds

First, as the trial court found, County waived any objection on this issue.[4] The trial court concluded, *inter alia*:

- "The Coupe Family seeks damages in the form of interest at 10% from the date of payment of each invoice issued by its attorneys." R:CV00-1-0181K Doc. 0591 at 14914 (Supp. FOF 36).
- "County contests neither the calculation of interest nor the applicable rate." *Id.* (Supp. FOF 37).
- "County has also never argued in this Court that interest is not properly awardable as damages under section 101-27." *Id.* at 14915 (Supp. FOF 38).
- "County has waived any and all arguments and any new evidence that it did not previously raise[.]" *Id.* at 14916 (Supp. COL 7).

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[3] *See Coupe I,* 119 Haw. at 366, 198 P.3d at 629 ("[E]minent domain statutes are to be construed liberally in favor of the landowner.") (citing *Marks v. Ackerman*, 39 Haw. 53, 58-59 (Terr. 1951) ("[Eminent domain] provisions should be construed liberally in favor of the landowner as to remedy . . . [and] strictly against the condemnor[.]")).

[4] County has not appealed any of the trial court's findings or conclusions, which are therefore binding on this Court for purposes of review. *See Kahoohanohano v. Dep't of Human Services*, 117 Haw. 262, 267,178 P.3d 538, 543 (2008) (findings not challenged on appeal are binding on reviewing courts). Moreover, County's claim that its objections cannot be waived is without merit. *See* County Br. at 29.

As such, the trial court's inquiry should have ended here,[5] and it should have entered an award in the Coupes' favor to account for the loss of use of their funds.

2. Lost Time-Value Of Encumbered Funds Is Compensable

The Coupes incurred substantial legal fees and other expenses in defending against Condemnation 1 for the better part of a decade, ultimately prevailing in defeating the illegal condemnation. In fact, the trial court found, and County did not appeal,[6] that the Coupes had suffered damages totaling over $1.6 million in the form of attorneys' fees, costs, and general excise tax incurred related to the defense of Condemnation 1 and, therefore, awarded the same pursuant to Haw. Rev. Stat. § 101-27. *See* R:CV00-1-0181K Doc. 0591 at 14912, 19-22 (Supp. FOF 17; Supp. COLs 21, 24-31; Order); *id.* at Doc. 0592 at 14934 (Additional Damages Order); *id.* at Doc. 0593 at 14937-38 (Supp. Final Judgment).

Needless to say, these suffered damages were substantial and very real, as the Coupes had been deprived of the use of these encumbered funds from the date of each incurred expense, beginning in 2000, until being reimbursed in 2009. Likewise, the cost of having been deprived of the use of these encumbered funds is also a measurable and very real damage suffered by the Coupes as a natural consequence of litigating Condemnation 1. County claims that no authority exists for recovering this lost time-value of money as a component of damages under Haw. Rev. Stat. § 101-27, but the well-established and well-reasoned policy in this jurisdiction generally favors awards to account for the loss of use of funds. *See, e.g., Lucas v. Liggett & Myers Tobacco Co.*, 51 Haw. 346, 348, 461 P.2d 140, 143 (1969) (such awards are "compensatory in nature" and are properly awarded "from the date of [injury] until the date judgment is satisfied."); *id.* ("There is no sound reason why a [party] should not be able to recover a loss in earnings of an asset which [the other party] converted.").

County's arguments are counterintuitive and ignore economic reality. By definition, being made whole is not and cannot constitute an "unjustified windfall," as County suggests.[7] Quite the

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[5] Courts should approve a party's request where no objection is made. *Wong v. Takeuchi*, 88 Haw. 46, 53, 961 P.2d 611, 618 (1998).

[6] Again, findings of the trial court not challenged on appeal are binding on reviewing courts. *See Kahoohanohano v. Dep't of Human Services*, 117 Haw. 262, 267,178 P.3d 538, 543 (2008).

[7] *See* County's Answering Brief at 30. Rather than a windfall, however, such an award would be merely compensatory, thereby placing the Coupes closer to where they would have been had the County never initiated Condemnation 1.

contrary, denying the Coupes an award equivalent to the value of the lost use of their funds, which the trial court determined were reasonable and necessary to defeat County's illegal taking in Condemnation 1, would render County the beneficiary of a windfall, as it will have been undeservedly relieved of its obligation under section 101-27 to make the Coupes whole. Governments, believing that they will be allowed to burden landowners with the cost of funds necessary to defend against illegal condemnations, might be tempted to overreach, as County did here. While the Coupes' injuries occurred over the span of nine (9) years,[8] illustrating the severity of their damages and perhaps providing further reason to compensate them for being deprived of their funds, the length of delay is not the critical focus under section 101-27. Instead, the focus must be on whether the Coupes have been damaged. The loss of use of funds is *per se* damage under section 101-27, and the Coupes are entitled to be made whole. The issue, then, is not a question of whether such a loss constitutes damages, but what that cost is. Here, where County did not contest the amount sought, applicable rate, calculation, or even the Coupes' entitlement to such damages, that issue is moot.[9]

3. Discretionary Measures Have No Place Within Mandatory Statutory Schemes

Finally, perhaps following the trial court's lead, County continues to conflate Haw. Rev. Stat. § 101-27 with the general prejudgment interest statute, Haw. Rev. Stat. § 636-16.[10] County argues "[b]ecause the Coupes have not alleged undue delay by the County as to the payment of attorneys' fees . . ., the trial court properly denied the Coupes' claim for prejudgment interest." County Br. at 31. However, the Coupes have always sought to recover the cost of their encumbered funds, or

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[8] *See* R:CV00-1-0181K Doc. 0591 at 14919 (Supp. COL 18) (nine years of litigation in Condemnation 1).

[9] In this case, the rate of ten percent (10%) was utilized, as the same had been used by the trial court in pricing its "blight" findings, and since "blight" and cost of funds encumbered are, perhaps, two sides of the same coin. And in any event, as noted, County neither appealed that 10% determination nor contested the Coupes' proposed applicable rate.

[10] County cites to *Liberty Mut. Ins. Co. v. Sentinel Ins. Co.*, 120 Haw. 329, 205 P.3d 594 (App. 2009), but even a cursory review reveals that case addressed recovery under Haw. Rev. Stat. § 636-16 and not § 101-27, which is applicable here.

"interest," pursuant to Haw. Rev. Stat. § 101-27, not section 636-16, as both the trial court and County admit.[11] As such, County's argument and the trial court's conclusion that there is no legal basis for such an award under section 101-27 "as there is [*sic*] no allegations of undue delay," besides creating an undue pleading requirement where none exists, is wrong as a matter of law.

The undue delay inquiry applies only where prejudgment interest is sought pursuant to Haw. Rev. Stat. § 636-16, not where a landowner seeks to be made whole under Haw. Rev. Stat. § 101-27.[12] While the former is left to the discretion of the trial court, the latter mandates recovery of "all such damage" sustained in a failed taking and requires a broad and liberal application insofar as landowners' remedies are concerned. *See Dejetley v. Kahoohalahala*, No. 29919, slip op. at 27 (Haw. Feb. 10, 2010) ("'[S]hall' indicates mandatory language.") (citing *Leslie v. Bd. of Appeals, County of Hawaii*, 109 Haw. 384, 393, 126 P.3d 1071, 1080 (2006)).

When a statute provides for mandatory relief, as in Haw. Rev. Stat. § 101-27, this Court has held that discretionary measures have no place, as such measures do not comport with the legislatively-enacted statutory scheme. *See Dejetley*, No. 29919, slip op. at 30-33. This makes sense, since, if discretionary measures were allowed in such instances, the mandatory nature of the statute would be rendered a nullity. *See id.*, slip op. at 33 ("Allowing for discretionary remedies . . . renders [mandatory language] a nullity."). Thus, Courts should reject such an interpretation of a mandatory statute. *See id.* ("Our rules of statutory construction require us to reject an interpretation of a statute that renders any part of the statutory language a nullity.") (citing *Potter v. Hawaii Newspaper Agency*, 89 Haw. 411, 422, 974 P.2d 51, 62-63 (1999)). Since section 101-27 contemplates mandatory recovery, discretionary remedies, like the prejudgment interest analysis under Haw. Rev. Stat. § 636-16, are irrelevant. Clearly, then, the trial court erred when it decided otherwise.

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[11] *See* County's Answering Brief at 29 (admitting the Coupes sought interest as "'damages' allowed under HRS § 101-27"); R:CV00-1-0181K Doc. 0591 at 14914-15, 21 (Supp. FOFs 36-38; Supp. COL 33) (noting the Coupes' request for such damages was made pursuant to Haw. Rev. Stat. § 101-27).

[12] In any event, assuming *arguendo* that section 636-16 applied, the nine years of delay evident on the face of the record in Condemnation 1 would surely qualify as "undue delay" in the issuance of judgment. *See, e.g., Ditto v. McCurdy*, 86 Haw. 93, 114, 947 P.2d 961, 982 (App. 1997), *rev'd in part on other grounds*, 86 Haw. 84, 947 P.2d 952 (1997); *Tri-S Corp. v. Western World Ins. Co.*, 110 Haw. 473, 498-99, 135 P.3d 82, 107-08 (2006).

Where a failed condemnation action causes a property owner the loss or encumbrance of funds, then section101-27 compels compensation to account for the same. If, instead, an innocent property owner must shoulder the burden of the loss of use of its funds expended in successfully defending against an illegal condemnation, the property owner could never truly be made whole under section 101-27, and the statute's legislative purpose could never be fulfilled.

B. Section 101-27 Damages Include the Fees and Costs Incurred In Seeking Damages

The trial court erred when it determined, as a matter of law, that the Coupes are not entitled to recover, as a component of their damages under section 101-27, those fees and costs incurred in seeking, litigating, and successfully obtaining section 101-27 damages. *See* R:CV00-1-0181K Doc. 0592 at 14932 ("WHEREFORE, there shall be no recovery for fees and expenses incurred in litigating the propriety of the fees to be awarded [under Haw. Rev. Stat. § 101-27.]").

1. This Court Has Awarded Such Fees and Costs Under Section 101-27

Rather than directly addressing the Coupes' arguments in favor of entitlement to such fees and costs under section 101-27, County appears to merely reiterate the trial court's erroneous conclusion without much more. However, it is undisputed that the Coupes necessarily incurred additional legal fees and costs in seeking to recover the damages they were and are owed under section 101-27 due to Condemnation 1's failure. It is also indisputable that this very Court held that such additional fees and costs are properly recoverable as damages that "have been sustained by the defendant by reason of the bringing of the proceedings." *County of Hawaii v. C&J Coupe Family Ltd. P'ship* (*Coupe II*), 120 Haw. 400, 208 P.3d 713 (2009) (awarding section 101-27 damages on appeal for the Coupes' efforts to obtain such damages from trial court). This Court reasoned:

> By its plain language, HRS § 101-27 appears to provide a sufficient basis for the award of damages in the form of costs and attorney's fees sustained as a result of [the Coupes'] appeal of the automatic denial of fees in Condemnation 1. The statutory language "all such damage . . . sustained . . . by reason of the bringing of the proceedings[,]" on its face would appear to encompass what [the Coupes] seek[] herein. Due to the court's failure to timely rule on the issues, [the Coupes were] denied the HRS § 101-27 reimbursements [they were] owed by the County by virtue of [the Coupes'] success in Condemnation 1, and thereby appealed to this court in order to recover the damages owed. **Had the County not brought the unsuccessful proceedings in Condemnation 1, [the Coupes] would never have had cause to move for fees and to subsequently**

> **appeal. Therefore, the "damage" sustained by [the Coupes] in seeking the fees and costs owed and in appealing the denial of such fees and costs, was part of the damage resulting from the County having brought the unsuccessful proceedings in Condemnation 1**. Consequently, under HRS § 101-27, the County should be held liable for "such damage."

Id. at 404-05, 208 P.3d at 717-718 (emphasis added). Whether under principles of *res judicata*, law of the case, or *stare decisis*, the foregoing makes absolutely clear that fees and costs incurred in seeking, litigating, and successfully obtaining section 101-27 damages are well-within the scope of Haw. Rev. Stat. § 101-27, and the trial court wrongly concluded otherwise.

2. *Otaka* Is Inapposite

To be sure, County's confusion on the issue may have been prompted by the trial court's misapplication below of a recent, but nonetheless inapplicable, opinion of this Court. In denying the Coupes recovery of their fees and expenses incurred in litigating the propriety of section 101-27 damages, the trial court did so "pursuant to *Hawaii Ventures, LLC v. Otaka, Inc.*, 116 Haw. 465, 173 P.3d 1122 (2007)[.]" R:CV00-1-0181K Doc. 0592 at 14932-33.[13]

However, contrary to the trial court's conclusion, *Otaka* does not stand for the proposition that fees and other expenses incurred in litigating the propriety of section 101-27 damages are not recoverable, and reliance on that case is misplaced. Even County's slanted description of *Otaka* in its Answering Brief illustrates it is easily distinguished from the matters at hand. *See* County's Answering Brief at 31. *Otaka* involved a foreclosure proceeding in which a court-appointed receiver sought to recover her fees and costs on appeal; the "fees" in question in *Otaka* were those of the receiver herself, not of a third party. *Otaka* did not involve eminent domain, and it did not involve a damages analysis under Haw. Rev. Stat. § 101-27. Plainly then, *Otaka* has no bearing here.

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[13] The trial court also noted it was denying such fees and costs "as objected to by Plaintiff County[.]" R:CV00-1-0181K Doc. 0592 at 14933. However, a review of the record shows that County never objected to the Coupes' entitlement to such fees and costs. Instead, County merely argued below that the fees and costs requested by the Coupes associated with drafting their motions for section 101-27 damages were "excessive." *See id.* at Doc. 0578 at 14388-90; *id.* at Doc. 0592 at 14926-28. County may have sought a reduction of the award, but not a complete bar. As such, the trial court should not have *sua sponte* gone beyond County's argument and made an objection on its behalf. *See Otaka*, 114 Haw. at 491, 164 P.3d at 749 (courts should not "fashion an objection for a complaining party" where one is not made).

Instead, and as this Court held less than a year ago, "the 'damage' sustained by [the Coupes] in seeking the fees and costs owed . . . was part of the damage resulting from the County having brought the unsuccessful proceedings in Condemnation 1," and "[c]onsequently, under HRS § 101-27, the County should be held liable for 'such damage.'" *Coupe II,* 120 Haw. at 404-05, 208 P.3d at 717-718.

II. CONDEMNATION II: ERROR IN 2005 VALUATION AND LACK OF APPRECIATION

There is no evidence in the record to support the trial court's finding, conclusion, and judgment regarding the value of the Coupes' property in Condemnation 2,[14] which is clearly erroneous and must be set aside or corrected.

A. Trial Court's Compounding Errors Require Correction

There are at least two (2) errors that compounded the trial court's failure. First, the court incorrectly found that County's appraiser – whom the circuit court found to be credible – determined the value of the Coupes' land had not appreciated between Condemnation 1 and Condemnation 2. *See* R:CV05-1-015K Doc. 01031 at 8722 (FOF 111) ("County's appraiser, Robert Bloom, estimated the fair market value of the Property to be taken at $140,500 in Civil No. 00-1-181K and Civil No. 05-1-15K."). However, the evidence in the record clearly shows that County's appraiser **did** find significant appreciation in land value between 2000 and 2005. *Compare id.* at Doc. 01060 at 9524, P-11, PDF at 734-855 *and id.*, P-12, PDF at 856-982 (County's appraiser's reports showing appreciation of roughly 239% during that time). Second, while the court, in determining the value of the Coupes' property as of January 28, 2005 (filing of Condemnation 2), seems to have adjusted, albeit without explanation, the property's value in order to account for the increase in acreage sought between the two condemnations,[15] the court failed to account for any appreciation in land value that had occurred since October 9, 2000 (filing of Condemnation 1). Even County admits these errors. *See* County's Answering Brief at 10 & 33 (admitting Robert Bloom appraised the property at

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[14] *See* R:CV05-1-015K Doc. 01031 at 8724 & 8742 (FOFs 123 & 126; COL 114); *id.* at Doc. 1114 at 10923 (Supp. Final Judgment at 2).

[15] 2.9 acres were sought in Condemnation 1, while 3.348 acres were sought in Condemnation 2. *See* R:CV05-1-015K Doc. 01031 at 8726 (COL 11). This increase in acreage appears to correspond mathematically to the trial court's increase from Condemnation 1 value ($140,500.00) to Condemnation 2 value ($162,204.83). *See id.* at 8723-24 (FOFs 121 & 123).

$345,000, not $140,500, as of January 28, 2005). There being absolutely no evidence in the record to support the trial court's conclusion as to the value of the Coupes' property in Condemnation 2, and in light of the trial court's compounding clear errors, this Court should correct the same or instruct the trial court to do so on remand.

B. This Court May Properly Address the Valuation and Appreciation Errors

Rather than acknowledging the need to correct the trial court's clear errors, which undoubtedly may have constitutional implications, County argues the Coupes are "untimely" with their request to correct these errors. County's Answering Brief at 16. However, County's contention is wrong for at least three reasons.

First, the Coupes' prior appeal in *Coupe I* sufficiently preserved the issue by raising as error the pretextual nature of the taking in Condemnation 2.[16] Importantly, the valuation issue was thereby likewise raised, albeit tacitly, since, should the Coupes ultimately prevail on the issue of pretext, it will be appropriate to consider the value of the property, which may serve as a factor in determining a portion of the damages recoverable under Haw. Rev. Stat. § 101-27.

Second, even if the Coupes had not raised the valuation issue in the prior appeal, this Court, in *Coupe I*, vacated the trial court's entire previous judgment in Condemnation 2, including its findings and conclusions as to value and just compensation in that case. *See Coupe I*, 119 Haw. at 389-90, 198 P.3d at 652-53 ("[T]he trial court's September 27, 2007 Judgment in Condemnation 2 is **vacated**.") (emphasis added). As a result, insofar as Condemnation 2 is concerned, the parties were returned to their respective prejudgment positions, and the trial court's prior judgment in Condemnation 2 was nullified, losing any and all preclusive effect. *See, e.g., Smith v. Meemic Ins. Co.*, 776 N.W.2d 408, 410 (Mich. Ct. App. 2009) ("It is well settled that judgments that have been set aside are nullities."); *Eastin v. Dial*, 288 S.W.3d 491, 498-99 (Tex. App. 2009) ("When a judgment is vacated, 'it is entirely destroyed, and the rights of the parties are left as if no such judgment had ever been entered.'") (citation omitted); *In re K.S.*, 850 N.E.2d 335, 345 (Ill. App. Ct. 2006) ("A vacated judgment is nullified, canceled, and void."). Thus, in order to properly raise the valuation and/or just compensation issue in the present appeal of Condemnation 2, all that was required of the Coupes was that they preserve the issue by objecting below, which they did. *See*

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[16] The Coupes prevailed on the pretext issue in *Coupe I*, and jurisdiction was once again vested in the trial court for further consideration.

R:CV05-1-015K Doc. 1095 at 10276 & 10295-96 (Proposed FOF 85; Proposed COL 49); *id.* at Doc. 1117 at 10930-44 (Motion to Alter Judgment).

Third, regardless of the foregoing, this Court may *sua sponte* notice and consider points of plain error where substantial rights may be affected, even if not properly raised on appeal or preserved below. *See State v. Schroeder*, 76 Haw. 517, 532, 880 P.2d 192, 207 (1994) *overruled on other grounds by State v. Maugaotega*, 115 Haw. 432, 168 P.3d 562 (2007) ("[W]here plain error has been committed and substantial rights have been affected thereby, the error may be noticed even though it was not brought to the attention of the trial court. Moreover, although points of error not raised on appeal in accordance with Hawaii Rules of Appellate Procedure (HRAP) 28(b)(4) (1993) will ordinarily be disregarded, this court, at its option, may notice a plain error not presented.") (citations omitted).[17] Moreover, an appellate court may modify a lower court's calculations where the record clearly supports entitlement to a different amount. *See, e.g., SGM P'Ship v. Nelson*, 5 Haw. App. 526, 705 P.2d 49 (1985). Here, the trial court's failure to account for appreciation in value of the property between 2000 and 2005 is wholly unsupported by the evidence and constitutes plain error in need of correction. Moreover, substantial rights will be affected by the court's error under any outcome in Condemnation 2, as the property's value may serve as a factor in determining temporary taking and section 101-27 damages, should the Coupes prevail in defeating the condemnation, or a basis for just compensation and blight, should the condemnation be affirmed.

Therefore, County's arguments are unpersuasive, and this Court should address the trial court's plain error in failing to adjust for appreciation in determining the value of the Coupes' property in Condemnation 2 and ensure that the same is corrected.

III. CONCLUSION

County has not squarely addressed any issue in these appeals. With respect to the issue of pretext, five paths for reversal and one default path for remand have been outlined in the Coupes' Reply to Oceanside, which has been incorporated herein. There is no legitimate path for affirmance at this stage of the proceedings.

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[17] Relatedly, and in any event, this Court possesses the inherent power to take any and all steps necessary for the promotion of justice in matters pending before it. *See* Haw. Rev. Stat. § 602-5(a)(6) (Supp. 2009); *see, e.g., Honda v. Bd. of Trustees of the Employees' Ret. Sys. of the State of Hawaii*, 108 Haw. 212, 118 P.3d 1155 (2005) (the Hawaii Supreme Court, under its inherent power and in order to promote justice, vacated the lower court's judgment on grounds not raised by the Appellant at the trial level).

With respect to damages for the failed taking in Condemnation 1, as found by the trial court and not appealed by County, County never objected to the Coupes' entitlement to the cost of funds legitimately encumbered (as determined and awarded by the trial court) in defense of County's illegal condemnation. This cost, or loss of use, constitutes mandatory, *per se* damage under Haw. Rev. Stat. § 101-27. Similarly, this Court has previously awarded the Coupes section 101-27 damages in the form of fees and costs attributable to their post-trial efforts to obtain such damages. Both are recoverable components of damages under Haw. Rev. Stat. § 101-27, requiring reversal of the trial court's denial of the same.

Finally, with respect to Condemnation 2, at least two (2) clear errors relied upon by the trial court require that its findings regarding the property's value be reversed, or, at least, vacated with instructions to ensure correction. First, the trial court relied upon an erroneous starting value for the property, using a 2000, not 2005, appraisal. Then, besides completely missing this over-$200,000 shortfall, the court, while applying a size adjustment equivalent to the increase in acreage of the 2005 parcel sought compared to the 2000 parcel, erroneously neglected to adjust for any appreciation whatsoever. Every valuation expert at trial testified that substantial appreciation had occurred in Kona between 2000 and 2005. No witness testified that there was **no** appreciation during this time-frame.

As such, the Coupes respectfully request that this Court grant the relief sought in these appeals.

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Respectfully submitted,

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