CAAP-11-0000828

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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

DEFENDANTS-APPELLANTS' OPENING BRIEF

APPENDIX

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

DEFENDANTS-APPELLANTS' OPENING BRIEF

I. CONCISE STATEMENT OF THE CASE

A. BACKGROUND

This is an appeal from a condemnation case. In 2011, Plaintiff-Appellee County of Kauai ("County") sought to condemn three parcels of land situated along the bank of the Hanalei River mauka of Weke Road owned by Defendants-Appellants Hanalei River Holdings, Ltd. and Michael G. Sheehan ("Defendants-Appellants"). These parcels were formerly part of the boatyard owned by Mr. Sheehan. His boatyard permits were revoked by the Planning Commission on May 11, 2010. The circuit court affirmed the revocation on May 27, 2011.[1] The County filed this condemnation action four (4) days after the circuit court's affirmance.

While the County claimed the condemnation proceeding was merely for park expansion, in an ironic twist in the summer of 2013, it filed an application for an SMA Use Permit to allow commercial tour boat operators to operate from park space. These are the same sort of operations permitted by the aforementioned boatyard permits revoked by the County. Whether these commercial boat operators will utilize parts of Mr. Sheehan's former boatyard appears a foregone conclusion, especially since the property was built to accommodate commercial boat operators.

Defendants-Appellants challenge the trial court on three issues: 1) the trial court's order allowing the County to reduce its estimate of just compensation **after** Defendants-Appellants filed their application for payment of estimate of just compensation (Record on

[1] On October 17, 2014, this Court affirmed the revocation. CAAP-11-0000601. A writ for certiorari review is pending before the Hawaii Supreme Court.

Appeal "RA", Volume 3, pages 157-158), 2) the trial court's order granting partial summary judgment (on severance damages) in favor of the County (RA, Vol. 5, pages 305-318), and 3) the trial court's order re: blight of summons damages (accepting the County's calculations instead of Defendants-Appellants' calculations) (RA, Vol. 7, pages 12-13). The trial court also denied Defendants-Appellants' motion for reconsideration of its order re: blight of summons damages. (RA, Vol. 7, pages 38-39)

With respect to the first issue, the trial court should not have permitted the County to unilaterally withdraw approximately 20% of the estimate of just compensation after the Defendants-Appellants filed their application for payment. (RA, Vol. 3, pages 44-58) The federal authorities cited by the County were irrelevant and misplaced. (RA, Vol. 3, pages 62-85) There were no clerical errors, calculation mistakes or confusion concerning the identity property owners which could have otherwise served as a basis for reducing the estimate of the amount of just compensation.

With respect to the second issue concerning summary judgment, the trial court clearly erred because the County failed to demonstrate that there were no disputed issues of material fact concerning the three (3) unities test. In support of its motion the County only offered documents. It failed to offer any admissible testimony from percipient witness to otherwise explain the significance of those records. Moreover, Defendant-Appellant Sheehan's declaration was sufficient to create disputed issues of material fact regarding the three unities.

Lastly with respect to the blight of summons calculations, the trial court erred in adopting the County's mathematical calculations. (RA, Vol. 7, pages 12-13) The deposit was not unconditional; rather the Agreement Regarding Withdrawal of Deposit (RA, Vol. 6, pages 363-365) required Mr. Sheehan to indemnify the Court for any monies released to Defendants Hanalei River Holding, LTD., ("HRHL") a Cook Islands company. Accordingly, contrary to the trial court's order blight of summons damages continued to accrue irrespective of the deposit of the estimate of just compensation.

B. UNDERLYING PROCEEDINGS

The complaint herein was filed on May 31, 2011. ("RA", Vol. 1, pages 8-41) A first amended complaint was filed on April 18, 2012. (RA, Vol. 1, 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. (RA, Vol. 1, pages 103-104) On May 4, 2012, an

ex parte order placing the County in possession of the subject property was entered. (RA, Vol. 1, pages 120-136) Defendant-Appellant Sheehan answered the first amended complaint on September 25, 2012. (RA, Vol. 2, pages 250-252)

On March 11, 2013, Defendants-Appellants filed their application for payment of estimated compensation. (RA, Vol. 3, pages 44-58) On April 2, 2013, the County filed its opposition to Defendants-Appellants' application. (RA, Vol. 3, pages 62-85) The County also filed its "motion to withdraw portion of deposit" on April 2. (RA, Vol. 3, pages 86-93) On April 5, 2013, Defendants-Appellants filed their reply to the County's opposition to Defendants-Appellants' application. (RA, Vol. 3, pages 119-127)

The County and Defendants-Appellants executed a stipulation allowing withdrawal of $4.86 million on April 10, 2013. (RA, Vol. 3, pages 128-131) On the same date the County and Defendants-Appellants entered into an "Agreement Regarding Withdrawal of Deposit. (RA, Vol. 6, pages 363-365) 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. An amended stipulation was filed on April 18, 2013. (RA, Vol. 3, pages 132-135) On April 22, 2013, Defendants-Appellants filed their opposition to the County's motion to withdraw portion of deposit. (RA, Vol. 3, pages 144-148) On April 29, 2013, the County filed its reply. (RA, Vol. 3, pages 149-156) On May 3, 2013, the Order granting the County's motion to withdraw portion of deposit was filed. (RA, Vol. 3, pages 157-158)

On August 13, 2013, the County moved for partial summary judgment against Defendants-Appellants on the matter of severance damages. (RA, Vol. 4, pages 132-294) Defendants-Appellants filed their opposition on September 3, 2013. (RA, Vol. 5, pages 25-36) The County filed its reply on September 5, 2013. (RA, Vol. 5, pages 70-97) The findings of fact, conclusions of law and order granting the County's motion for partial summary judgment was filed on October 3, 2013. (RA, Vol. 5, pages 305-318)

Trial began on November 4, 2013. The Special Verdict form was filed on November 8, 2013. (RA, Vol. 6, pages 342-342)

On November 18, 2013, the County filed its motion re: blight of summons damages. (RA, Vol. 6, pages 357-367) It attached the Agreement as Exhibit "A" to the declaration of counsel. (RA, Vol. 6, pages 363-365) On December 31, 2013, Defendants-

Appellants filed their position statement re: blight of summons damages. (RA, Vol. 6, pages 371-374) On January 3, 2014, the County filed its reply. (RA, Vol. 7, pages 7-11) The order granting the County's motion re: blight of summons damages was filed on January 16, 2014. (RA, Vol. 7, pages 12-13) Defendants-Appellants filed their motion for reconsideration of order re: granting the County's motion re: blight of summons damages was filed on January 24, 2014. (RA, Vol. 7, pages 14-24) The County filed its memorandum in opposition to Defendants-Appellants' motion for reconsideration on January 30, 2014. (RA, Vol. 7, pages 27-31) Defendants-Appellants filed their reply on February 6, 2014. (RA, Vol. 7, pages 32-35) The order denying Defendants-Appellants' motion for reconsideration was filed on February 20, 2014. (RA, Vol. 7, pages 38-39)

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. (RA, Vol. 7, pages 54-76) Defendants-Appellants timely filed their notice of appeal on May 15, 2014. (RA, Vol. 7, pages 81-96)

II. POINTS OF ERROR ON APPEAL

1. The trial court erred when it permitted the County to withdraw a portion of the estimate of just compensation after Defendants-Appellants applied for its release. (RA, Vol. 3, pages 157-158)

2. The trial court erred when it granted summary judgment in favor of the County on the issue of severance damages, conclusions of law 6, 7, 8, 9, 12 and 13 were clearly erroneous. (RA, Vol. 5, pages 305-318)

3. The trial court erred in its calculation of blight of summons damages. (RA, Vol. 7, pages 12-13)

III. STANDARDS OF REVIEW

1. **REDUCTION OF ESTIMATE OF JUST COMPENSATION**

Although Defendants-Appellants could find no case on point, the abuse of discretion standard of review should apply.

2. **SUMMARY JUDGMENT**

The granting or denying of a motion for summary judgment is reviewed *de novo*. *Sierra Club v. Department of Transp.*, 115 Hawaii 299, 312, 167 P.3d 292, 305 (2007).

3. **BLIGHT OF SUMMONS DAMAGES**

Blight of summons damages awards are reviewed under the "abuse of discretion" standard. *Housing Finance and Development Corp. v. Ferguson*, 91 Hawaii 81, 979 P.2d 1107 (1999)(citations omitted).

IV. ARGUMENT

A. The trial court abused its discretion by permitting the County to withdraw a portion of the estimate of just compensation

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. (RA, Vol. 1, pages 103-104) Shortly thereafter, it forcibly seized the property. On March 11, 2013, Defendants-Appellants filed their application for payment of estimated compensation. (RA, Vol. 3, pages 44-58) The hearing on the release application was scheduled for April 10, 2013.[2]

In the interim on April 2, 2013, the County unexpectedly moved to withdraw a portion of the deposit of its estimate of just compensation. (RA: Vol. 3, pages 86-93) The County claimed that it had a second "updated" appraisal for the subject property which was $1.03 million dollars less. (RA: Vol. 3, page 92) The hearing was set for May 1, 2013.

In support of its motion, the County argued that *City and County of Honolulu v. Bonded Inv., Co.*, 507 P.2d 1084, 511 P.2d 163 (1973) was "directly on point and supports [its] entitlement to withdraw the excess money deposited with the Court." (Memorandum at page 2)(RA: Vol. 3, page 89) However, *Bonded Investment* does not support the County's argument that it can unilaterally withdraw a portion of its estimate of just compensation already deposited with the Court.[3]

Indeed, *Bonded Investment* simply held that condemnee is required to repay the condemnor the "excess deposit" if a jury's ultimate award is less than the amount the condemnor's estimate of just compensation released to the condemnee. The Supreme Court held that the condemnor was entitled to a return of the excess with interest.

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[2] Only after the Defendants-Appellants agreed to the County's conditions set forth in the Agreement were those funds ($4.86 million) released to the Defendants-Appellants. The clerk of the court retained the disputed $1.03 million subject to further court order.

[3] In fact none of the cases cited by the County (including the four in its reply brief) support its position.

> [T]he City is entitled to a restitution of the total excess deposit made for parcel 63 with interest at the rate of 5% per annum from the date of withdrawal of such excess deposit.

Id. at 1091. *Bonded Investment* does not stand for the proposition that the condemnor can unilaterally reduce the amount of the deposit of its estimate of just compensation already deposited with the clerk of the court.

That is not to say that the condemnor could never reduce the amount of its estimate of just compensation. Indeed, the federal cases cited by the County in its reply brief contain several examples. Where the amount of the condemnor's estimate of just compensation is the result of a clerical error, the condemnor is allowed to make the appropriate correction. Where there is a dispute amongst condemnees as to respective ownership of the property, the condemnor is entitled to withhold a portion of the estimate of just compensation. None of those circumstances were present in this case.

Likewise, after deposit of the estimate of just compensation with the clerk of the court but before seizure of the property condemned **and/or** application by the condemnee for disbursement of the funds, the condemnor should have the right to reduce the amount of its estimate of just compensation. In those situations the condemnee cannot claim reliance on the amount or that the condemnor should be estopped from changing the amount of the deposit.

At the May 1, 2013 hearing, counsel for the County articulated the real reason underlying its motion – because "it's our money and we can."

> There's no interest, and **it is the County's money**. So the County is entitled to withdraw the money. … But **it's the County's money**. It was only -- it was deposited only as an estimate of just compensation. Now that we have a more accurate analysis[4] of what the market value is of the condemned property, **the County should be entitled to withdraw the money**.[5]

(Transcript of the May 1, 2013 hearing, page 7, lines 7-19). In fact, according to the County, it has the unlimited right to withdraw any portion of the amount of its estimate just compensation

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[4] Is this is a concession that the County's initial analysis was inaccurate? If so, the County failed to provide any authorities which place the burden for inaccuracies upon the condemnee. If the County had any concerns regarding the accuracy of its estimate, it should not have taken possession of the property.

[5] "[T]he County has an absolute right to withdraw the money[.]" (Transcript of the May 1, 2013 hearing, pages 25-26, lines 25-1)

even after it has taken possession of the subject property and the funds have been disbursed to the condemnee.

> THE COURT: Okay. Ms. Fazio, just one question I would like you to respond to, the concerned stated which Mr. Wilson -- as to what would preclude the County from having another appraisal done and saying it comes in lower and coming back before the Court again.
> MS. FAZIO: Actually, your Honor, nothing would preclude the County from doing that[.]

(Transcript of the May 1, 2013 hearing, page 26, lines 3-9)

On May 1, 2013, the trial court granted the County's motion to withdraw a portion of the deposit of its estimate of just compensation. (RA: Vol. 3, pages 157-158)

The trial court ignored that the County sought to reduce the amount of the estimate of just compensation by $1.03 million **after** it had forcibly seized the property and the Defendants-Appellants had applied for the release of the funds. Under these circumstances, the County should be estopped from reducing the amount of the estimate of just compensation. Promissory estoppel applies to the Counties. *See, Ravelo by Revelo v. Hawaii County,* 66 Hawaii 194, 199, 658 P.2d 883, 887 (1983)(We rest our conclusion on promissory estoppel, the essence of which is detrimental reliance on a promise).[6]

Defendants-Appellants relied in the initial $5.89 million estimate of just compensation when they applied for its release. In doing so, Defendants-Appellants waived all of their defenses to the condemnation action. Haw.Rev.Stat. §101-31. One of the reasons for

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[6] The County should be estopped from withdrawing any proceeds based upon its "revised" appraisal. The Court will recall that Defendants vigorously argued in their motion to vacate the *ex parte* motion putting Plaintiff in possession that the appraisal was stale.

> The County's appraisal was seven (7) months old when the complaint was filed. It contends that the lag is irrelevant. Since it has the burden of establishing that its appraisal is a good faith estimate of the fair market value of the property, where is an affidavit or declaration from its appraiser that in fact the seven month lag was immaterial? Where is an affidavit or declaration that the value of the property had not significantly changed over the interim half a year? The answer is nowhere. The County is asking the Court to presume, guess as it were, that the value of the property had not appreciated in what was then an improving real estate market. The burden is on the County to objectively establish value, not ask the Court to guess it.

The Court to reject all of Defendants' arguments. Defendants-Appellants' Reply to the County's Opposition to their Application for Payment of Estimated Compensation at page 4. (RA: Vol. 3, pages 122)

depositing an estimate of just compensation is to induce the condemnee to accept it and thus waive defenses to the proceeding.

The County's other claims – "there 5 are lots of other projects that the County has that it wants to pursue, and the money right now is sitting in Court. There's no interest, and it is the County's money"[7] – are irrelevant. The amount of the estimate of just compensation cannot be withdrawn to fund other County "projects". It is based solely on the estimated value of the property and once deposited permits the County to seize the property being condemned. Here no one forced the County's hand and *made* it seize the property. The County chose to do so and should not be allowed to keep the bargain (immediate possession of the property and waiver of the Plaintiff's defenses to the condemnation action) while reducing 20% of the consideration ($1,030,000.00).

The trial court should have held the County to its initial estimate of just compensation and ordered those funds released to the Defendants-Appellants. It abused its discretion by allowing the County to withdraw a portion of the deposit after Defendants-Appellants applied for its release.

B. The trial court erred in granting partial summary judgment in favor of the County on the issue of severance damages

A condemnee is entitled to severance damages where

> "the property sought to be condemned constitutes only a portion of a larger tract, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff shall also be assessed, ...[.]"

Bonded Investment, 54 Hawaii at 524-525, 511 P.2d at 164-165 (1973)(*citing* Haw.Rev.Stat. §101-23). In this case Defendant Sheehan sought severance damages for a parcel of land adjacent to condemned lot 34.[8]

In response the County moved for summary judgment that Defendant Sheehan was not entitled to severance damages as a matter of law. (RA: Vol. 4, pages 132-294) The County argued that there was no unity of title, physical unity or unity of use. In support of its motion, the County offered only the declaration of counsel James Mee who attached various

[7] Transcript of the May 1, 2013 hearing, page 7, lines 4-8.

[8] The report prepared by Defendants-Appellants' expert Paul Cool at page 4 shows the configuration of parcels 49, 33, and 34, and Area 51 and contained his valuation of severance damages for the adjacent properties. (RA: Vol. 4, page 155)

records and documents. He later attached certified copies of documents in support of partial summary judgment. (RA: Vol. 4, pages 295-317)

The County submitted no declarations, affidavits or deposition testimony of any percipient witnesses regarding the force and effect of any of those documents. There was no declaration from Patsy Sheehan, the fee owner of Area 51 stating that the easement had expired or was otherwise revoked. The County simply argued that the documents alone demonstrated that it was entitled to judgment as a matter of law on the issue of severance damages.

The County's fallback was that because Defendants-Appellants did not disclose properties which they "owned", they are estopped from claiming severance damages. (RA: Vol. 4, pages 143-146)

Defendants-Appellants pointed out in their opposition that the County did not dispute the fact that the adjacent parcel will experience severance damages and Defendant-Appellant Sheehan still owned an easement allowing him ownership and control over the adjacent parcel. (RA: Vol. 5, pages 25-26) Defendant-Appellant Sheehan further pointed out that the County failed to offer and deposition, declaration or affidavit testimony in support of its argument. (RA: Vol. 5, page 26) The County's failure to support its argument with any admissible testimony supporting its interpretation of the pertinent records was sufficient to kill this motion.

Putting aside the County's failure to proffer admissible evidence in support of its motion, Defendants-Appellants noted that the County failed to establish as a matter of law that the subject easement had been vacated or that the parcel owner had evicted Defendant-Appellant Sheehan from occupation, use or control. (RA: Vol. 5, pages 27-29) His then uncontroverted declaration also demonstrated that he has unities of title and use, and physical unity.[9] (RA: Vol. 5, page 35)

With respect to the County's estoppel argument, Defendant-Appellant Sheehan responded as follows:

> The fact of the matter is that the Grant of Easement is a mailer of public record. Sheehan hid nothing. Moreover, had Sheehan responded that he "owned" the property as a result of the Grant of Easement, nothing would have changed. **The County neither asked Sheehan in deposition nor in an interrogatory whether**

[9] Defendants-Appellees submitted the original Sheehan declaration on March 24, 2014. (RA: Vol. 7, pages 40-42)

> **or not he would he seeking severance damages**. Likewise, **Sheehan never advised the County that he would not seek severance damages**.

(RA: Vol. 5, page 29)(emphasis added)

> The County always knew he owned area 51.
>
> "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")."

(Emphasis added) (RA: Vol. 5, pages 32) His boatyard included parcels 33, 34, 49 as well as 51.

Defendant-Appellant Sheehan also attached his declaration stating that he had received a TMK for area 51, relevant and material portions of his boatyard were located on area 51, and the easement had never been canceled. (RA: Vol. 5, page 35) His declaration was more than sufficient to raise a disputed issue of material fact.

The County's reply was filed on September 15, 2013. (RA: Vol. 5, pages 70-97) It argued that the facts as set forth in the Sheehan declaration were not accurate.[10] Indeed, the County essentially disputed the facts as set forth by Defendant-Appellant Sheehan. Clearly, by arguing the "facts" the County failed to establish that there were no disputed issues of material fact.

Accordingly conclusions of law of fact 6, 7, 8, 9, and 12[11] which were based upon disputed facts (as contradicted by the Defendant-Appellant Sheehan declaration) were clearly

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[10] The Dominador Bucasas declaration demonstrates that there were disputed issues of material fact. His declaration was filed in response to Defendant-Appellant Sheehan's declaration. The trial court cannot make credibility determinations and weigh the conflicting declarations, which unfortunately, it did.

[11] 6. Further, there is no physical unity or unity of use because HRHL's Parcels 33 and 34 are located in between Defendant Michael Sheehan's Parcel 49 and Area 51 and thus there is no contiguity between Parcel 49 and Area 51 in which Defendant Michael Sheehan is asserting a right to severance damages.

7. Area 51 was encumbered by an easement allowing Defendant Michael Sheehan to use the area for a boat baseyard. An easement, however, is not equivalent to title to Area 51. Further, Defendant Sheehan could not have a title interest in Area 51, because it is an unsubdivided portion of Lot 127. See *Whitlow v. Jennings*, 40 Hawaii 523 (1954)(title to unsubdivided land cannot be conveyed).

erroneous. Conclusion of law 13 (estoppel) is also clearly erroneous. The Defendants-Appellants never claimed nor otherwise responded to discovery that they were waiving their right to severance damages. Estoppel does not apply.

Based upon the record before the trial court, the motion should have been denied.

C. The trial court abused its discretion in calculating blight of summons damages

On November 18, 2013, the County filed its motion re: blight of summons. (RA: Vol. 6, pages 357-367. The trial court ultimately agreed[12] with the County's calculations as follows:

> The first time period:[13] The first lime period comprises 347 days. As to this period, blight damages should be calculated according to the way in which the jury apportioned its just compensation verdict: $2,030,000 for Parcel 33, $3,016,000 for Parcel 34 and $754,000 for Parcel 49.
>
> Thus, the blight damages measured at 5% interest for Parcel 33 would be $96,494.52, for Parcel 34 would be $143,363.29 and for Parcel 49 would be $35,840.82.

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8. Defendants Michael Sheehan and HRHL argue that under the terms of the Baseyard Easement, Defendant Michael Sheehan is entitled to have the fee interest in Area 51 conveyed to him at the time Area 51 is a separate lot of record. All of the evidence before the Court as submitted in this motion, however, leads to the conclusion that Area 51 is not a separate lot of record.

9. In order to have a conveyance of title of Area 51 to Defendant Michael Sheehan, the Baseyard's Easement also requires that there must have been County approval of an application to "extend, modify or amend the existing Permits authorizing the operation of a 'boat base yard' within the area encompassed by this easement ... ," (Baseyard Easement at 3.) These permits have been revoked and are not presently in effect.

12. The Court hereby finds and concludes that Defendants Michael Sheehan and HRHL have not met the test for being able to claim severance damages as to Area 51 set forth in Bonded Investment, nor have they demonstrated in their filing in connection with this motion that there is any genuine issue of material fact that would preclude granting of summary judgment in favor of the County on this issue.

13. As an alternative and independent grounds for granting the motion, Defendants Michael Sheehan and HRHL have also not asserted any claim for severance damages in this condemnation, and, in fact, have stated in pleadings filed with this Court and in responses to discovery that they are only seeking compensation for the property being taken in the condemnation. At this late date, the Court concludes that Defendants Michael Sheehan and HRHL are estopped from claiming severance damages as to Area 51. *Roxas v. Marcos*, 89 Hawaii 91, 124, 969 P.2d 1209, 1242 (1998).

[12] Order granting the County's motion re: blight of summons. (RA: Vol. 7, pages 12-13)

[13] From May 31, 2011 (the date of summons) until May 4, 2012 (the date the County deposited estimated just compensation of $5.89 million pursuant to the Order putting the County into possession) measured at 5% simple interest/year on the jury verdict of $5.8 million.

> The second time period:[14] The number of days which comprise this period is presently unknown and is dependent upon when the County pays the $940,000 additional just compensation to Defendants.
>
> With regard to this second period, the calculation of blight damages measured at 5% interest must be made according to the following differences between the parties' agreement regarding apportionment of the $4.86 million deposit and the jury verdict of $5.8 million, namely $300,000 for Parcel 33, $566,000 for Parcel 34 and $74,000 for Parcel 49. See Agreement Regarding Withdrawal Of Deposit, attached hereto as Exhibit "A."[15]
>
> As to the second time period, the blight damages through November 18, 2013 measured at 5% interest for Parcel 33 would be $8,342.47 (with per diem damages thereafter measured at $41.10/day), for Parcel 34 would be $15,739.45 (with per diem damages thereafter measured at $77.53/day) and for Parcel 49 would be $2,057.81 (with per diem damages thereafter measured at $10.14/day).

(RA: Vol. 6, page 360)

Defendants-Appellants **agreed** with the County regarding calculation of blight of summons damages with respect to **the $940,000.00 amount** (the difference between the $4.86 million and the $5.8 million jury verdict).[16] However, they disagree with the County that the deposit of its estimate of just compensation stopped the running of interest because it was not unconditional. *See*, *City and County of Honolulu v. Market Place, LTD.*, 55 Hawaii 226, 517 P.2d 7 (1973).

In *Market Place* the City and County made two deposits of estimates of just compensation. With respect to the first deposit, an unconditional deposit by the City and County for the use and benefit of the condemnee, the Court concluded that "it appears that there is no obligation on the part of the condemnor to pay interest **to the extent that it makes an**

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[14] From April 29, 2013 (the date of entry of the Order Granting the County's Motion to Withdraw Portion of Deposit) until the date the County pays Defendants $940,000, which is the difference between $4.86 million and the jury verdict.

[15] This is the same Agreement whereby Defendant-Appellant Sheehan was required to agree to indemnify the County for any funds released to Defendant-Appellant HRHL before the County would agree to release the estimate of just compensation. Clearly, the deposit of estimate of just compensation was not unconditional.

[16] Per diem interest of $128.77 amounted to i) Lot 33 $41.10 per day, ii) Lot 34 $77.53 per day, and iii) Lot 49 $10.14 per day. Although the County did not tender payment on the $940,000.00 on the January 8, 2014 hearing date, Defendants acknowledge that its final payment when made included all interest due and payable on that date.

unconditional deposit[17] of estimated just compensation with the clerk of the court." *Id*. 55 Hawaii at 235-240, 517 P.2d 16-17. (Emphasis added). The second payment of just compensation came after the jury verdict but prior to entry of judgment. It was accompanied by a

"motion to approve the same **with the following restriction on distribution**:

> Plaintiff hereby consents to a court order of distribution of the additional deposit, provided that such order **contain such protective measures to insure the return of any monies not lawfully due the distributees** together with such additional interest, damages or charges for wrongful withdrawal of funds to which distributees may not be entitled."

Id. (emphasis added). The Court concluded that due to the contingent nature of the second deposit, the amount of the deposit was not conditional. Accordingly, because the deposit was conditional, the condemnee would be entitled to interest which continued to accrued on that amount (even though it had been deposited with the clerk of the court as just compensation).

Market Place is directly on point. Here the County required Defendant-Appellant Sheehan to indemnify it for funds (from the estimate of just compensation deposited with the clerk of the court) released to Defendant-Appellant HRHL.

> **In the event that the eventual just compensation determined at trial in the condemnation action for Parcels 34 and 35[18] is less than the amounts set forth in Section I** and as may be further allowed by the Court in Section 2 above (the "Shortfall"), then, if after written demand by the County upon HRHL for return of the Shortfall together with interest at the rate of 5% per annum under HRS § 101-31 (as interpreted by the Hawaii Supreme Court in *City and County of Honolulu v. Bonded Investment*, 54 Haw. 385 (1973)), HRHL either refuses to return the Shortfall (together with applicable interest) to the County, or fails to return the Shortfall (together with applicable interest) within thirty (30) days after the date of the written demand, **Sheehan will pay to the County, by certified or cashier's check, the amount of the Shortfall together with interest as may be applicable under HRS § 101-29**, within ten (10) days after receiving written demand for payment of the same from the County.

Agreement Regarding Withdrawal of Deposit ("Agreement") at paragraph 3. (Emphasis added) (RA: Vol. 6, pages 364-365) The County acknowledged that the Agreement was entered into to permit Defendant Appellant Sheehan to withdraw the estimate of just compensation.

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[17] "As [Haw.Rev.Stat. §101-30] suggests, only if such a payment is truly unconditional will it stop the running of interest as blight of summons damages on the amount of the deposit." *Id*. And that is the key; the deposit must be unconditional to stop the running of interest.

[18] These two parcel were owned by Defendant-Appellant HRHL.

> The **County and Sheehan are entering into this Agreement in order to allow Sheehan to withdraw a portion or all of the present estimate of just compensation, upon the terms and conditions set forth in this Agreement**, and further to address the concerns of the County regarding overpayment of the deposit to HRHL.

Agreement, paragraph 8 of the recitals. (Emphasis added) (RA: Vol. 6, page 364)

As a matter of law the County's estimate of just compensation was not unconditional, but conditioned upon the terms and conditions set forth in the Agreement[19] which required one condemnee (Sheehan) to indemnify the condemnor (County) for payment made to a second condemnee (HRHL). As such, interest continued to run notwithstanding the condemnor had made a deposit of its estimate of just compensation.

To be candid with the Court Defendants themselves initially miscalculated the blight of summons damages. (RA: Vol. 6, pages 371-374) However, at the January 8, 2014 hearing, Defendants-Appellants cleared up their miscalculation and were very clear in arguing that due to the conditional nature of the County's deposit of its estimate of just compensation, interest continued to accrue on the full amount of the ultimate judgment ($5.8 million) from the date of the summons (May 31, 2011) through the date (April 10, 2013) the County stipulated to permit Defendants-Appellants to withdraw the reduced estimate of just compensation ($4.86 million).

> If you look at page 2, and this is Paragraph A, the County says -- the County and Sheehan are entering in to this agreement in order to allow Sheehan to withdraw a portion or all of the present estimate of just compensation upon the

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[19] Curiously the County claims that the Agreement was entered into to "assist" Sheehan.

> In this case, your Honor, not only did the County not impose any limitation, the County assisted the defendants in withdrawing the money by entering in to that agreement which was attached as Exhibit A to the County's motion today.

January 8, 2014 transcript at page 6. How the County can claim that it did "not impose any limitation" is truly bizarre. The true reason for the strict and onerous condition was spelled out in paragraph 6 of the Recital section.

> **The County further expressed its concern** that if a portion of the deposit was paid to HRHL, and the amount of just compensation due to HRHL was eventually determined to be less than the amount paid to HRHL, **it might be difficult or impossible to recover the amount of overpayment to HRHL because of its status as a Cook Islands corporation**.

(Emphasis added). This had nothing to do with helping Sheehan and everything to do with covering the County's back.

> terms and conditions set forth in the agreement and, further, to address the concerns of the County regarding overpayment of the deposit to Hanalei River Holdings, Ltd.
>
> And you remember that Mr. Sheehan had to agree that, if the jury verdict was less than the 4.86 million, Hanalei River Holdings got more money, because they're a Cook Island company, he would pay that money back. That was the agreement.
>
> Your Honor, that's not unconditional. That's a huge condition, and that's a condition that the County required Mr. Sheehan and Hanalei River Holdings to enter in to before the money could be released.

January 8, 2014 transcript, pages 9-10.

> But for this stipulation, they would not agree to release the funds and, in fact, if my recollection serves me correctly, when we came before you, that was one of the issues that the Court even raised because it was an unusual circumstance having a nonlocal or non-Hawaii entity owning property. That was the County's condition.

January 8, 2014 transcript, page 11.

> These are the two important dates. And if you use those dates, your Honor, between 5/31/2011 to 4/10/2013, that's 697 days. The per diem on the 5.8 million is 754.52, and that equals 539,479.08.

January 8, 2014 transcript, page 12.

> So for the 940,000 the jury verdict, it's 4/10/13; and if you take it today -- and again, it's 41 for Lot 33; Lot 34, is 77.53; and Lot 49, is 10.14, if you take this to today, which is 273 days, total is 35,154, and 12 cents, and you add that to the 539,479, and the grand total owed is 574,633.29.

January 8, 2014 transcript, page 13. The trial court acknowledged that it understood and followed Defendants-Appellants' argument at the hearing.[20]

Notwithstanding the plain language of the Agreement, the trial court found the County's deposit to be unconditional.

> The Court is in agreement with the County's position, that the deposit by the County was unconditional. And, therefore, that stops the calculations as of May 4th, 2012.

January 8, 2014 transcript, page 20.

The trial court abused its discretion when it granted the County's motion and adopting its calculations for blight of summons damages.

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[20] THE COURT: And while Ms. Fazio did say that this appears to be enough to make anyone's head spin, I actually follow what you've argued, and I've followed what Ms. Fazio has argued. January 8, 2014 transcript, page 19.

V. CONCLUSION

Based upon the foregoing, Defendants-Appellants respectfully request that this Court reverse the trial court and vacate the three subject orders. Defendants-Appellants request that this Court remand this matter for a determination on severance damages and enter judgment on blight of summons damages consistent with Defendants-Appellants' calculations.

DATED: Honolulu, Hawaii, December 22, 2014.

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RICHARD E. WILSON

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