SCWC-14-0000828

IN THE SUPREME COURT OF THE STATE OF HAWAII

COUNTY OF KAUAI, Respondent/Plaintiff-Appellee, vs. HANALEI RIVER HOLDINGS, LTD., a Cook Islands corporation, *et al*., Petitioners/Defendants-Appellants.	ON APPLICATION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS ICA Opinion: March 31, 2016 ICA Judgment: May 11, 2016 Circuit Court (Fifth Circuit) Civil No. 11-1-0098 Hon. Kathleen N.A. Watanabe Final Judgment: April 25, 2014

BRIEF AMICI CURIAE OF OWNERS' COUNSEL OF AMERICA AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

APPENDICES 1 — 2

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

Constitutions, Statutes, and Rules

TABLE OF AUTHORITIES—Continued

Page

Other Authorities

IDENTITY AND INTEREST OF AMICI

Amici Curiae Owners' Counsel of America (OCA) and the National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) file this brief to help the court understand that the *per se* rule adopted by the Intermediate Court of Appeals requiring that parcels abut, is both wrong under *City and Cnty. of Honolulu v. Bonded Investment Co., Ltd.*, 54 Haw. 523, 511 P.2d 163 (1973), and contrary to the great weight of authority nationwide. If left unreviewed, the ICA's opinion will have grave and immediate consequences for amici and those they serve. Each amici brings a unique perspective to this case.

A. Owners' Counsel of America

Owners' Counsel of America is an invitation-only national network of experienced eminent domain and property rights attorneys. They have joined to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. OCA admits only one member from each state. Undersigned counsel is the Hawaii member of OCA. Since its founding, OCA has sought to use its members' combined knowledge and experience as a resource in the defense of private property ownership, and OCA member attorneys have been involved in landmark property law and takings cases in the U.S. Supreme Court,[1] and nearly every jurisdiction nationwide, including this court.[2] OCA members have also authored and edited

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[1] *See, e.g.*, *Koontz v. St. Johns River Water Mgmt Dist.*, 133 S. Ct. 2586 (2013); *Ark. Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 560 U.S. 702 (2010); *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles Cnty.*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

[2] *See, e.g.*, *Kellberg v. Yuen*, 135 Haw. 236, 349 P.3d 343 (2015); *Kauai Springs, Inc. v. Planning Comm'n of Kauai*, 133 Haw. 141, 324 P.3d 951 (2014); *Kellberg v. Yuen*, 131 Haw. 513, 319 P.3d 432 (2014); *Cnty. of Hawaii v. C&J Coupe Family, Ltd. P'ship*, 124 Haw. 281, 242

treatises, books, and scholarly articles on property and eminent domain law, including the Hawaii chapter in the American Bar Association's book, The Law of Eminent Domain—A Fifty State Survey (2012).[3] OCA is interested in a fair, reasoned, and even-handed application of condemnation principles in our nation's courts, and believes that its national perspective on eminent domain law will aid this court in resolution of the issues presented by the Application.

B. NFIB Small Business Legal Center

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a non-profit, non-partisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents 325,000 member businesses nationwide, including over 1,000 in Hawaii. Its

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P.3d 1136, *cert. denied*, 132 S. Ct. 249 (2010); *Cnty. of Hawaii v. C&J Coupe Family Ltd. P'ship*, 120 Haw. 400, 208 P.3d 713 (2009); *Cnty. of Hawaii v. C&J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008); *Maui Tomorrow v. State*, 110 Haw. 234, 131 P.3d 517 (2006); *Leslie v. Cnty. of Hawaii*, 109 Haw. 384, 126 P.3d 1071 (2006); *Kaiser Hawaii Kai Dev. Co. v. City & Cnty. of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989); *Sandy Beach Defense Fund v. City & Cnty. of Honolulu*, 70 Haw. 361, 773 P.2d 250 (1989); *In re Estate of Campbell*, 130 Haw. 183, 307 P.3d 163 (Ct. App. 2013); *Leone v. Cnty. of Maui*, 128 Haw. 183, 284 P.3d 956 (Ct. App. 2012).

[3] *See also* Michael M. Berger, Taking Sides on Takings Issues (Am. Bar Ass'n 2002) (chapter on *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U.J.L. & Policy 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 Loy. L.A.L. Rev. 685 (1986); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn. Cent. Transp. Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, *Eminent Domain Use and Abuse: Kelo in Context* (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 Alb. Gov't L. Rev. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006).

membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business. To fulfill its role as the voice for small business which champions small businesses in the courts, the NFIB Legal Center frequently files amicus briefs in cases that impact small businesses, including cases in Hawaii.[4] Because small business owners typically invest substantial assets into acquisition of property for their entrepreneurial endeavors—often including their personal savings—it is imperative to ensure that their property rights and their right to be treated equally, are guaranteed meaningful protections. NFIB Legal Center is concerned that Hawaii's small businesses—whose operations may, by necessity, be on several parcels—will be denied the opportunity to have a jury evaluate whether the two parcels are part of a unified whole when their property and businesses are condemned.

ISSUES PRESENTED

Amici will address the first Question Presented by the Application: Must two parcels physically abut in order for the jury to consider whether they are part of a larger parcel?

SUMMARY OF ARGUMENT

Two parcels need not abut in order for an eminent domain jury to consider whether they are components of a larger parent tract. This court endorsed the national majority rule when it held that separate *use*, and not separate *location*, is the "factor [which] is controlling here on the question of whether [the three lots in that case] constituted one tract of land." *Id.* at 527, 511 P.2d at 166 ("It is clear to us that the owners not only by choice and design had separated the use of Lot 65 from Lots 59 and 60 . . ."). The overwhelming weight of authority nationwide similarly rejects *per se* rules, and is in accord with *Bonded Investment*'s approach.

[4] *See, e.g.*, Brief Amicus Curiae of National Federation of Independent Business Small Business Legal Center, *In re BCI Coca-Cola Bottling Co. of L.A.*, No. CAAP-14-0001135 (Haw. Ct. App. Apr. 28, 2015). Examples of NFIB Small Business Legal Center's amicus participation in property and takings cases include: *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Ark. Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 560 U.S. 702 (2010).

The ICA, however, concluded that Petitioners "cannot satisfy the physical unity requirement" because the two parcels Petitioners claim to use together are separated by two others. *Cnty of Kauai v. Hanalei River Holdings, Ltd.*, No. CAAP-14-0000828, slip op. at 31; 2016 Haw. App. LEXIS 224, at *10 (2016) (Petitioners' Parcel 49 "is not adjacent to [Petitioners'] 'Area 51.'"). The court established a bright-line requirement never before seen in Hawaii law, concluding that two parcels claimed by a property owner to be parts of a larger parcel must "abut one another." *Id*., slip op. at 32, 2016 Haw. App. LEXIS at *10 ("we reject Sheehan's argument that under *Bonded Inv. II* there is no requirement that all of the pertinent lots abut one another"). Unless this court corrects this ruling, the physical contiguity requirement adopted by the ICA is precedential, and will be applied by the lower courts to the detriment of property owners, by depriving them of their right to have a jury consider all evidence of the economic damages caused by a taking.

Determination of just compensation and damages is not one-size-fits-all, but requires legal rules that accommodate the facts specific to each case. For example, in *State* ex rel. *Symms v. Nelson Sand & Gravel*, 468 P.2d 306 (Idaho 1970), the court recognized that the condemnation of a gravel pit resulted in severance damages to the owner's gravel processing plant. After all, the owner no longer had use for a plant to process gravel, because after his pit was condemned, he no longer had any gravel to process. The ICA would have cut off that inquiry, however, merely because the processing plant was located four and a half miles away. *Id.* at 309. Categorical rules ignore the facts in each case, and emphasize the efficiency of summary judgment over the reality that property owners very often use separate parcels of land as a single economic unit. But if an intervening river doesn't prohibit the jury determining that the condemnation of one parcel damaged another, then neither should being separated by Parcels 33 and 34. *See Town of Jupiter v. Alexander*, 747 So.2d 395 (Fla. Dist. Ct. App. 1998) (parcels separated by Loxahatchee River). If seventeen nautical miles of open ocean aren't a categorical bar, neither are the few yards in the case at bar. *See Baetjer v. United States*, 143 F.2d 391, 395 (1st Cir.) (condemnation on island of Vieques caused severance damages to parcels on Puerto Rico), *cert. denied*, 323 U.S. 772 (1944).

We are in the midst of the Honolulu rail, the largest transportation project in Hawaii's history, in which the condemnation of private property is an essential component. The court must ensure that the governing law correctly guides the lower courts, and protects the rights of property owners who are entitled to just compensation—"the full and perfect equivalent" of the proper-

ty taken. *See United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938). Condemnors must also provide damages under article I, section 20 of the Hawaii Constitution, including severance damages to the remaining property when only a portion is taken. *See Terr. v. Honolulu Plantation Co*. 34 Haw. 859 (Terr. 1939) (severance damages mandated by Hawaii Constitution).

This brief makes two points. *First*, the three unities are not inflexible, as the ICA concluded. There is no need for parcels to touch. The ICA's ruling is contrary to both *Bonded Investment* and the overwhelming majority of other courts nationwide. *Second*, having been published, the ICA's opinion is precedent. If left unreviewed by this court, the ICA's erroneous larger parcel analysis will be applied in future eminent domain actions; if this court rejects certiorari, it should nevertheless ensure the ICA ruling has no precedential effect.

ARGUMENT

I. PARCELS NEED NOT ABUT TO BE CONSIDERED BY THE JURY AS PART OF A LARGER UNIFIED TRACT

This portion of our brief focuses on the first Question Presented in Petitioners' application: must two parcels abut in order for the jury in an eminent domain case to consider whether they are part of a single, larger parcel? The answer—contrary to the ICA's conclusion—is a resounding no.

A. *Bonded Investments*: Unified Use, Not Rigid Rules

The ICA correctly recognized the "three unities" test for determining when condemnation of one parcel has damaged another. *Hanalei River Holdings*, slip op. at 18, 2016 Haw. App. LEXIS at *30. Just compensation and damages are determined by the jury. *M & R Inv. Co. v. State*, 744 P.2d 531, 535 (Nev. 1987) ("Under the prevailing rule, identification of the larger tract is an issue of fact to be decided by the trier of fact.") (citing *United States v. 8.41 Acres of Land*, 680 F.2d 388 (5th Cir. 1982)). To determine whether the owner is entitled to severance damages, juries and appraisers look at unity of use, title, and contiguity, and ask: are the two properties *used* by the owner as an integrated whole, does the condemnee or a related owner have *rights* in the other parcel, and are the parcels *close* to each other?

The three unities test is applied holistically—the critical question after all, is whether the parcels are part of a larger tract or unified whole—with no single element being dispositive. 8A Robert C. Byrne & Jenean Taranto, Nichols on Eminent Domain § G16.02(2)(a) (Rev. 3d ed. 2015) ("It is important to note that the presence or absence of any or all of these factors is not absolutely determinative. They are merely working rules adopted to do justice to the owner(s) of

the remainder."). The addition of "damages" to the Hawaii Takings Clause in 1968 was to broaden the range of compensable property interests. *City and Cnty. of Honolulu v. Market Place, Ltd.*, 55 Haw. 226, 517 P.2d 7 (1973). Thus, "in partial taking cases, no rigid rules can be prescribed. The facts and circumstances of each case must be considered to determine the applicable formula." *See Terr. v. Adelmeyer*, 45 Haw. 144, 154, 363 P.2d 979, 985 (1961). This is consistent with this court's favoring of liberal admissibility rules in eminent domain. *Market Place*, 55 Haw. at 230, 517 P.2d at 12-13. Any nonspeculative evidence that will aid the jury in determining fair market value is admissible. *City and Cnty. of Honolulu v. International Air Service Co.*, 63 Haw. 322, 628 P.2d 192 (1981).

But the ICA rejected this approach in favor of a formalistic rule, concluding that because Parcel 49 did not abut Area 51, the jury could not consider whether the two together were the larger parcel, used jointly by Petitioners as a boat yard:

> 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.

Hanalei River Holdings, slip op. at 19, 2016 Haw. App. LEXIS 224, at *31 (footnote omitted). The ICA asserted this rigid test was established by this Court in *Bonded Investment*, which, in the ICA's view, meant "that all of the pertinent lots abut one another." *Id.*, slip op. at 20, 2016 Haw. App. LEXIS 224, at *32.

A careful reading of *Bonded Investment* compels a much different analysis, focused on joint use, not proximity. Bonded owned three lots: Lot 59, as well as the lots on either side of that parcel, Lots 65 and 60. Thus, as this court held, "[t]here is no question the three lots *could* comprise one tract of land." *Id.* at 524, 511 P.2d at 164 (emphasis added). The city condemned all three, and Bonded asserted that all three together should be considered the larger parcel. *Id.* ("The basic issue to be decided here is whether Lots 65, 59 and 60 comprise one parcel or tract of land."). Bonded, however, didn't use all three parcels together: it was underway with a condo project on Lots 59 and 60, and had plans for a separate condo project on Lot 65. *Id.* at 527, 511 P.2d at 166 ("It is clear to us that the owners not only by choice and design had separated the use of Lot 65 from Lots 59 and 60."). The court concluded that separate *uses*—and not whether the parcels touched—"*is controlling* here on the question of whether Lots 65, 59 and 60 constituted one tract of land." *Id.* (emphasis added) (footnote omitted). Because Bonded used Lot 65 sepa-

rately from the other two, only Lots 59 and 60 could be treated as a single larger parcel. The court set out the test that the ICA should have applied here:

> The owners having thus separated the use of Lot 65 from other lots, it could no longer be said that there was such "connection, or relation of adaptation, convenience, and actual and permanent use between them, as to make the enjoyment of the parcel taken, reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used."

Id. (quoting *Peck v. Superior Short Line Ry. Co*., 31 N.W. 217, 218 (Minn. 1887)). *See also Barnes v. N.C. State Highway Comm'n*, 109 S.E.2d 219 (N.C. 1959); *City of Menlo Park v. Artino*, 311 P.2d 135 (Cal. App. 1957). Thus, the lack of physical contiguity between Area 51 and Petitioners' Parcel 49 should have been merely a factor for the jury to consider, and not automatically fatal to their larger parcel claim.

The ICA, however, read *Bonded Investments* differently. It rejected Petitioners' argument the parcels need not abut, concluding "[t]his is a clear misreading" of the decision:

> [T]he Hawaii Supreme Court expressly noted that of the three parcels at issue in that case (all of which 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.

Hanalei River Holdings, slip op. at 19, 2016 Haw. App. LEXIS 224, at *10 ("Finally, we reject Sheehan's argument that under *Bonded Inv. II* there is no requirement that all of the pertinent lots abut one another.") (citing *Bonded Investment*, 54 Haw. at 524, 527, 511 P.2d at 164, 166). Of course, when parcels touch they will more likely be treated as a single tract. 8A Robert C. Byrne & Jenean Taranto, Nichols on Eminent Domain § G16.02(c) (Rev. 3d ed. 2015) ("Physical contiguity merely *strengthens* a case for establishing a parent tract rather than determining the parent tract itself.") (emphasis added). But the converse does not follow, and the mere lack of contiguity is not, by itself, fatal. The ICA's inductive generalization led it to wrongly conclude that because the two parcels in *Bonded Investment* touched, that parcels *must* touch.[5]

[5] This is the "converse fallacy of accident" because it makes a hasty generalization in deriving a general rule from a single instance. *See generally*, Ruggero J. Aldisert, *Winning on Appeal* § 14.06[2][c] (1992).

B. Most Courts Reject The ICA's "Must Touch" Rule

This court's *Bonded Investment* analysis—that the three unities must be considered together, that no one factor is determinative, and that unified use is the focus—is in accord with the overwhelming weight of authority in a majority of jurisdictions nationwide. Several courts expressly reject the ICA's rule, concluding that the fact the condemned parcel and the remaining property do not adjoin or abut is no bar to severance damages.[6] Contrasting the ICA's rigid rule, most courts consider the three unities a flexible standard. For example, in *Am. Sav. & Loan Assoc. v. Cnty. of Marin*, 653 F.2d 364 (9th Cir. 1981), the court held the three unities factors "are not absolutely inflexible[,]" but rather, "are working rules courts have adopted to do substantial justice in eminent domain proceedings." *Id.* at 369 (citing *United States v. Miller*, 317 U.S. 369, 375-76 (1943); *United States v. 429.59 Acres*, 612 F.2d 459, 463-64 (9th Cir. 1980)). *See also Barnes v. N.C. State Highway Comm'n*, 109 S.E.2d 219, 224-25 (N.C. 1959) ("The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential.").

Some courts, like *Bonded Investment*, emphasize use. *See, e.g., Doolittle v. Everett*, 786 P.2d 253, 259 (Wash. 1990) ("[T]he factor most often applied by courts in determining whether land is a single tract is unity of use[.]"). Others note that physical contiguity is the *least* important of the three factors. *See Div. of Admin., State Dep't of Transp. v. Jirik*, 471 So. 2d 549, 552 (Fla. Dist. Ct. App. 1985) ("[U]nity of use is generally given the greater emphasis. . . .

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[6] *See, e.g., Baetjer v. United States*, 143 F.2d 391, 395 (1st Cir.) ("[T]racts physically separated from one another may constitute a 'single' tract if put to an integrated unitary use[.]"), *cert. denied*, 323 U.S. 772 (1944); *State v. Rittenhouse*, 634 A.2d 338, 343 (Del. 1993) ("[W]hen there is physical separation but unity of use can be demonstrated, a finding that a single tract existed is appropriate"); *M & R Inv. Co. v. State*, 744 P.2d 531, 534-35 (Nev. 1987) ("The parcels damaged need not be physically contiguous to those taken so long as the evidence discloses an actual and existing unity of use and purpose and an existing, lawful and utilized access between the parcels."); *Housing Auth. of Newark v. Norfolk Realty Co.*, 364 A.2d 1052, 1056 (N.J. 1976) ("The mere fact that the condemned parcel is physically separated from the remaining parcel does not foreclose a condemnee from recovering severance damages."); *Sauvageau v. Hjelle*, 213 N.W.2d 381, 389 (N.D. 1973) ("[T]racts physically separated from one another may constitute a 'single' tract if put to an integrated unitary use. . . . Integrated use, not physical contiguity, therefore, is the test."); *State* ex rel. *Road Comm'n v. Williams*, 452 P.2d 548, 549 (Utah 1969) ("[A]n award of severance damages to the remaining property is appropriate where two or more parcels of land, although not contiguous, are used as constituent parts of a single economic unit."); *see also City of Los Angeles v. Wolf*, 491 P.2d 813, 818-19 (Cal. 1971) (discussing general exceptions to the physical unity requirement).

[S]ome cases suggest that 'unity of use,' or integrated use and not physical contiguity is the test but that physical contiguity often has great bearing on the question of unity of use."). The leading eminent domain treatise (cited by this court in *Bonded Investment*), notes "the presence or absence of any or all of these factors *is not absolutely determinative*. They are merely working rules adopted to do justice to the owner(s) of the remainder." 8A Robert C. Byrne & Jenean Taranto, Nichols on Eminent Domain § G16.02(2)(a) (Rev. 3d ed. 2015). The treatise continues, "[c]ontiguity, in and of itself, is not usually conclusive. Rather, most cases, refer to the contiguity element in conjunction with the unity of use or unity of ownership components."[7]

C. Across The Road, Across A River, Or Across The Ocean

One of the classic illustrations of larger parcel and severance damages is a business located on one side of a street, whose parking lot is on the other. If the parking lot is condemned, the business owner is entitled to present evidence of the economic impact of the loss of her parking lot on her business, and it is a question for trial whether the separation of the parcels make it more or less likely that she uses them together. *See, e.g.*, *Barton v. City of Norwalk*, 135 A.3d 711, 725 (Conn. App. Ct. 2016) (condemnation of parking area resulted in inverse condemnation of building across the street because loss of parking substantially destroyed landowner's ability to operate his business on that property); *State v. Rittenhouse*, 634 A.2d 338, 343-45 (Del. 1993) (condemnation of parking lot resulted in taking of building across street, whose owner used parking lot to serve tenants of building). It would not have made sense in those examples to say that simply because a road separated the parcels and they did not abut, that the owners should have been barred from presenting evidence about how the loss of parking damaged the other parcel.

Indeed, there is nothing prohibiting an owner from claiming a very distant parcel has been severed and damaged by a taking, provided he can demonstrate he uses the two parcels for an integrated economic purpose. For example, in *Baetjer*, the First Circuit held the District Court "erred in ruling that the [property owner's] lands on Puerto Rico had not been severed in the legal sense from their lands on Vieques." *Id.* at 395.[8] The owners "took the position that their en-

[7] *Id.* (citing *United States v. 8.41 Acres of Land*, 680 F.2d 388 (5th Cir. 1982); *United States v. 5.00 Acres of Land*, 731 F.2d 1207 (5th Cir. 1982); *United States v. 6.90 Acres of Land*, 685 F.2d 1386 (5th Cir. 1982); *Town of Hillsborough v. Crabtree*, 547 S.E.2d 139 (La. App. 2002); *City of Winston-Salem v. Slate*, 647 S.E.2d 643 (N.C. App. 2007); *Dep't of Transp. v. Rowe*, 531 S.E.2d 836 (N.C. App. 2002)).

[8] Vieques is an island located approximately ten miles from the main island of Puerto Rico. *Id.* at 393 n.1.

tire holdings, including those on the island of Puerto Rico as well as those remaining in their ownership on the island of Vieques, had been depreciated in value by the severance of the property condemned and that they were entitled to compensation for this depreciation." *Baetjer*, 143 F.2d at 393. The parcels at issue were separated by seventeen nautical miles of water, *id.* at 143 n.1, yet that was no impediment to the court concluding the taking of one damaged the other. The court rejected the government's argument "that no damages for severance can ever be allowed unless the property taken is physically contiguous to the property of the owner remaining after the taking." *Id*. at 393. The court held:

> Integrated use, not physical contiguity, therefore, is the test. Physical contiguity is important, however, in that it frequently has great bearing on the question of unity of use. Tracts physically separated from one another frequently, but we cannot say always, are not and cannot be operated as a unit, and the greater the distance between them the less is the possibility of unitary operation, but separation still remains an evidentiary, not an operative fact, that is, a subsidiary fact bearing upon but not necessarily determinative of the ultimate fact upon the answer to which the question at issue hinges.

Id. at 395 (footnote omitted). *Baetjer* is an example of a court properly recognizing the on-the-ground realities rather than adhering to rigid rules rendered impractical and unrealistic in application.

Similarly, *Town of Jupiter v. Alexander*, 747 So.2d 395 (Fla. Dist. Ct. App. 1998), involved two parcels: one fronting the Loxahatchee River, the other on Sawfish Bay Island in the river, separated by 500 yards of water. *Id*. at 396. Although the court affirmed the ruling in favor of the government on other grounds, it concluded "the trial court should have considered whether, as a matter of fact, in spite of the lack of physical contiguity, [the landowners' holdings] 'constituted a single, integrated, unitary tract.'" *Id*. at 401 (quoting *Baetjer*, 143 F.2d at 395). The only access to the island was by boat, and the main land parcel contained a boat dock for that purpose. *Id.* at 397. The court recognized that the taking of one parcel might have an impact on the other, and held that the lack of physical unity was not dispositive.

II. THE ICA OPINION SHOULD BE PARTIALLY DEPUBLISHED

A. This Court's Inherent Power To Guide Development Of The Law

This court has the inherent power to guide the development of the law. *See* Haw. Rev. Stat. § 602-5(a)(6) (conferring power on this Court "[t]o make and award such judgments, decrees, orders and mandates, . . . and do such other acts . . . as may be necessary . . . for the promotion of justice in matters pending before it."); *Haw. Pub. Emp. Rel. Bd. v. Haw. Stat. Teachers*

Ass'n, 55 Haw. 386, 393, 520 P.2d 422, 427 (1974) (Supreme Court has authority to reduce fines for civil contempt "if the promotion of justice could be better enhanced"). If Petitioners' application does not qualify for certiorari, this court's authority is appropriately exercised to ensure that the portions of the ICA's published opinion regarding larger parcel and severance damages will not be applied in other cases.[9] *See*, *e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001) (courts of appeals may decide which of their opinions will be deemed binding on themselves and courts below); Cal. R. Ct. 976(c)(2) (permitting California Supreme Court to depublish appellate opinions).

Although we do not have a rule like California's proscribing the procedure for partial or complete depublication, this court has the inherent authority to do so. *See Wong v. Takeuchi*, No. 20632, 1998 Haw. LEXIS 533 (Haw. May 20, 1998) (opinion withdrawn by order of this court pending reconsideration) (attached as Appendix 1); *State v. Alo*, No. 24154, 2003 Haw. App. LEXIS 117 (Haw. App. Apr. 14, 2003) (ordering depublication of appellate court order) (attached as Appendix 2). *See also Curley v. Wetzel*, 82 A.3d 418, 418 (Pa. 2013) (court should adopt rule allowing it to correct by depublication any published decisions of lower courts); *Spriggs Grp., P.C. v. Slivka*, 770 S.E.2d 392, 392-93 (S.C. 2015) (directing lower court to depublish opinion); *In re Kendall*, S. Ct. Misc. No. 2009-0025, 2012 V.I. Supreme LEXIS 20, at *4, 6 (V.I. 2012) (exercising "inherent power to depublish" opinion and directing clerk to forward copy of depublication order to "Westlaw, LexisNexis, and other pertinent legal research providers [requesting] that they honor the depublication of [the opinion] to the greatest extent practicable.").

Two factors weigh in favor of partial depublication. First, as noted above, the ICA's "must touch" rule is wrong. As a published opinion, it is precedential and will send other cases

[9] The ICA first concluded that Petitioners had not met their burden of controverting the County's maps, which "reveal[ed] that Parcel 49 does not abut 'Area 51.'" *Hanalei River Holdings*, slip op. at 19, 2016 Haw. App. LEXIS 224, at *10. Opposing summary judgment, Petitioners submitted an unsigned declaration asserting they used the two parcels together, and only filed an executed declaration months after the circuit court entered judgment in the County's favor. *Id.*, slip op. at 19 n.14, 2016 Haw. App. LEXIS 224, at *10 n.14. Thus, the ICA' larger parcel ruling might be considered dicta because it was not essential to the ICA affirming the circuit court's grant of summary judgment. However, the ICA's larger parcel analysis may be viewed as controlling or authoritative, because rather than simply affirming due to Petitioners' failure under Rule 56, the opinion both addressed the physical unity factor, and stressed that Petitioners' argument was "a *clear misreading*" of *Bonded Investment*. *Id.*, slip op. at 19, 2016 Haw. App. LEXIS 224, at *10 (emphasis added).

down the wrong road. The second is related: the ICA may have not have been able to fully analyze the larger parcel issue because the briefs provided little argument on the subject. In the Opening Brief, for example, Petitioners argued only that the County did not dispute that the adjacent parcel would experience severance damages. Op. Br. at 8-9. In its Answering Brief, the County avoided the issue, and neither analyzed *Bonded Investment*, nor noted other authority. *See* Ans. Br. at 18-19. It merely argued that Petitioners' claim was "absurd" considering that his lot "is not even physically contiguous." But the brief did not reference authority to support that argument, or any which contradicted Petitioners' claim that his parcel need not be adjacent to Area 51. *See id.* at 20. In their Reply, Petitioners correctly noted, "there is no requirement that the lots actually abut one another." Reply Br. at 6. However, the remainder of that section of the brief focuses on factual contentions, rather than on matters of governing law.

This court's authority to ensure the law is correct is especially important in light of the ongoing Honolulu rail project. Because of that undertaking—Hawaii's most ambitious public project, ever—the circuit courts will be considering more eminent domain cases than they have since the days of the Land Reform Act, and the acquisition of private property for the H-1 Freeway. The lower courts and the parties in rail takings will look to the published reports for guidance, and it is therefore vitally important to get it right.

B. Arbitrary Rules Should Not Make Eminent Domain Harder Than It Already Is For Property Owners

Finally, we ask the court remember that eminent domain is an extraordinary proceeding, and not typical civil litigation. After all, "defendants" in these cases only find themselves sued because they own property the government says it needs. They've done nothing wrong—breached no duty, nor repudiated a promise—yet they are hauled into court. There is little they can do to stop the government from seizing their property, even if it has been owned by a family for generations, as is often the case. They can object to a taking, but only by mustering extraordinary proof. *Cnty. of Hawaii v. C & J Coupe Family Ltd. P'ship*, 119 Haw. 352, 198 P.3d 615 (2008) (courts owe "substantial deference" to a condemnor's asserted reasons for a taking). They can be thrown off their property *ex parte*, immediately upon the filing of the complaint and with little notice, regardless of the consequences to their homes or businesses. *See* Haw. Rev. Stat. §§ 101-28, 101-29 (providing for orders of immediate possession). Even *before* the government exercises eminent domain, it can force entry to property to conduct surveys, and owners have no remedy for trespass. *Id*. § 101-8.

The only measure of justice in most eminent domain cases is the award of just compensation and damages, so a property owner's right to present evidence to a jury must be zealously protected by the courts. *See*, *e.g.*, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999) (jury's role in regulatory takings cases); *Market Place*, 55 Haw. at 242, 517 P.2d at 19 (liberal admission rules in eminent domain). But even then, real justice can be elusive. Consequential business losses are generally not compensable in eminent domain. *See United States v. Powelson*, 319 U.S. 266, 281 (1943) ("There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment.").[10]

Even if a property owner successfully proves the government's offer of just compensation and damages was inadequate, making an owner truly whole is impossible: the owner may retain appraisers and lawyers to challenge the taking or the amount of just compensation and damages which the condemnor offers, but absent unusual circumstances, she must bear her own costs. *See State v. Davis*, 53 Haw. 582, 587, 499 P.2d 663, 667 (1972) ("Haw. Const. art. I, § 18 [renumbered as art. I, § 20] does not embrace attorneys' fees and expenses, including expert witness' fees within the meaning of 'just compensation'"). Thus, even though the purpose of the constitutional imperatives are to ensure that property owners receive the "full and perfect equivalent," and all damages when their property is pressed into public service, owners such as Petitioners who retain counsel and pursue their rights will, by definition, be undercompensated, even if they prevail and the jury awards them 100% of what they seek. Because every dollar they must spend on lawyers and appraisers is a dollar less they get for their property.[11]

Inflexible rules and summary judgment should not make it even harder than it already is for property owners to obtain justice in our courts. If left standing, the ICA's larger parcel ruling

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[10] Compensation for severance damages is required because the owner is entitled to compensation for the "full and perfect equivalent" of the taken property, *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1893), and severance damages covers the loss in value to the owner's remaining property caused by the separation of the taken portion. *See* Haw. Rev. Stat. § 101-23.

[11] Unfortunately, the ICA's opinion—should it remain binding on lower courts—will work further injustice, because any property owner wishing to challenge the rule would have to bear the costs of litigating through the appeals process, including very likely pursuing certiorari in this court.

will unnecessarily add to the burdens under which property owners on the target end of eminent domain already struggle.

CONCLUSION

This court should accept certiorari and vacate the ICA's opinion and judgment. Alternatively, should this court reject certiorari, it should partially depublish the ICA's opinion or otherwise render it nonprecedential.

DATED: Honolulu, Hawaii, July 29, 2016.

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Wong v. Takeuchi

Supreme Court of Hawaii

May 20, 1998, Decided

NO. 20632

Reporter

1998 Haw. LEXIS 533; 87 Haw. 320; 955 P.2d 593

EDMUND S.P. WONG, Plaintiff-Appellee Cross-Appellant, v. ROBERT M. TAKEUCHI and HARRY USHIJIMA, Defendants, and SANDRA OHARA, Defendant-Appellant Cross-Appellee

Notice: THIS OPINION WAS WITHDRAWN BY THE COURT.

Subsequent History: [*1] This opinion was withdrawn from the bound volume by order of the Supreme Court of Hawaii pending reconsideration.

Withdrawn by publisher, Reported at Wong v. Takeuchi, 88 Haw. 46, 961 P.2d 611, 1998 Haw. LEXIS 196 (Haw., 1998).

Prior History: Wong v. Takeuchi, 83 Haw. 94, 924 P.2d 588, 1996 Haw. App. LEXIS 94 (Haw. Ct. App., 1996).

State v. Alo

Intermediate Court of Appeals of Hawaii

April 14, 2003, Decided ; April 14, 2003, Filed

NO. 24154

Reporter

2003 Haw. App. LEXIS 117

STATE OF HAWAII, Plaintiff-Appellee, v. REVELATION ALO, Defendant-Appellant

Subsequent History: Appeal after remand at State v. Alo, 103 Haw. 313, 81 P.3d 1228, 2003 Haw. App. LEXIS 148 (Haw. Ct. App., Apr. 28, 2003)

Prior History: [*1] APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT. Cr. No. 00-1-0018.
State v. Alo, 2003 Haw. App. LEXIS 91 (Haw. Ct. App., Mar. 24, 2003)

Judges: By: Burns, C.J., Watanabe, and Lim, JJ.

ORDER DEPUBLISHING ORDER OF TEMPORARY REMAND

TO THE CIRCUIT COURT OF THE FIRST CIRCUIT

Per curiam. WHEREAS, on March 24, 2003, this court filed for publication in this appeal an Order of Temporary Remand to the Circuit Court of the First Circuit (order), which order was subsequently amended on March 25, 2003; and

WHEREAS, this court wishes to depublish the order, as amended;

IT IS HEREBY ORDERED that the order, as amended, is depublished. The clerk of the court shall promptly notify the applicable publishing companies and shall take all other appropriate steps to ensure that the Intermediate Court of Appeals' order is depublished.

DATED: Honolulu, Hawaii, April 14, 2003.

James A. Burns

Chief Judge

Corinne K.A. Watanabe

Associate Judge

John Lim

Associate Judge

SCWC-14-0000828

IN THE SUPREME COURT OF THE STATE OF HAWAII

COUNTY OF KAUAI, Respondent/Plaintiff-Appellee, vs. HANALEI RIVER HOLDINGS, LTD., a Cook Islands corporation, *et al*., Petitioners/Defendants-Appellants.	)	ON APPLICATION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS ICA Opinion: March 31, 2016 ICA Judgment: May 11, 2016 Circuit Court (Fifth Circuit) Civil No. 11-1-0098 Hon. Kathleen N.A. Watanabe Final Judgment: April 25, 2014

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing document was duly served upon the following individuals by the JEFS system:

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