CONCURRING OPINION BY RAMIL, J.,
IN WHICH ACOBA, J., JOINS

I agree with the majority in affirming the trial court's judgment. Majority opinion at 4. However, I feel compelled to write separately because I disagree with the majority's reasoning on two points. First, I believe that Wailea Resort Company (WRC) owns express easements, rather than implied easements. Second, I disagree with the majority's conclusion that "WRC's offer . . . did not fully and completely resolve the Association's claims." Majority opinion at 56-57. In my view, WRC's offer was a valid HRCP Rule 68 offer. However, as I explain below, the dispositive issue, with respect to WRC's offer of judgment and post-trial motion for cost, is whether the judgment finally obtained by the Association is more favorable than the offer. Based on the "analytical" approach I set forth below, I respond in the affirmative. Accordingly, the trial court did not err in denying WRC's motion for costs. With respect to the remaining issues not discussed herein, I agree with the majority's conclusions.

I. CREATION OF EXPRESS OR IMPLIED DRAINAGE EASEMENTS

I agree with the majority insofar as it affirms the trial court's conclusion that both WRC and the County own easements in the drainage pipes and are, therefore, responsible for the maintenance and repair of the easements. I also agree with the majority's upholding of the trial court's order allocating WRC's costs of maintaining and repairing the easements

based on its responsibilities as owner of the easements. Nonetheless, I believe that the easements in this case are more properly characterized as construction of express easements, rather than creation by implied easements.

A. WRC's Easements

WDC's petition for designation of easements, which was approved by the land court on July 8, 1977, expressly and specifically reserves easements 62 and 63 -- which are at the intake of the drainage system -- and easement 61 -- which is at the outfall of the drainage system -- for drainage purposes. Moreover, WDC not only reserved the right "to designate and grant easements over, under, and across [Wailea Elua] for . . . storm sewers" in its Declaration of Horizontal Property Regime Under Chapter 514, Hawai‘i Revised Statutes, but also expressly designated such easements for drainage purposes in its apartment deeds with the individual apartment owners.

Although the trial court concluded that WRC owns implied easements in the drainage systems, the easements in this case are more properly characterized as construction of express easements, rather than creation by implied easements. An express easement is distinguished from an implied easement inasmuch as the latter is "[o]ne which the law imposes by inferring the parties to a transaction intended that result, although they did not express it. . . . One not expressed by parties in writing but arises out of existence of certain facts implied from the

transaction."[1] Black's Law Dictionary 510 (6th ed. 1990). Generally, an express easement is created by the language in a written instrument; whereas an implied easement stems from other factors, such as original unity of ownership and whether the easement is "apparent," "permanent," and "important for the enjoyment" of the dominant estate. See Neary v. Martin, 57 Haw. 577, 580, 561 P.2d 1281, 1283-84 (1977); Tanaka v. Mitsunaga, 43 Haw. 119 (1959); Thompson on Real Property § 60.03(a) at 405-06, § 60.03(b)(4) at 426-30 (Thomas ed., 1994 & Supp. 2000); Powell on Real Property § 34.08 at 79-99 (Wolf ed., 2000). To the extent that intent is a factor in creation of an easement,[2] intent determined primarily by examining express language of a written instrument creates an "express" easement, while intent generally inferred from other sources establishes an "implied" easement. Thompson on Real Property § 60.03(a)(1) describes express easements similarly:

> Persons in possession of property may create express easements by grant, for a consideration or by gift, transferring away the right or rights represented by the easement to another. . . . The person creating the easement

[1] The difference between an "express" and "implied" easement is emphasized by the definition of "express": "Declared in terms; set forth in words. . . . Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct." Black's Law Dictionary 580 (6th ed. 1990).

[2] For instance, recognition of an express easement in Hawai'i requires compliance with the land registration statute, which is premised on preserving the integrity of titles, rather than implementing parties' intent. See HRS § 501-82 (1993 & Supp. 1998); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114 n.8, 839 P.2d 10, 27 n.8 (1992) (citing cases). Another example where intent may not be the only consideration is implying an easement by necessity. See Powell on Real Property § 34.07 at 70-71 (question as to whether such easements are products of public policy or inferences as to parties' intent).

> must intend to create such an interest and observe the proper formalities in the local jurisdiction for transferring property by grant or by devise.

Id. at 405.

Here, WDC demonstrated in writing its intent to create easements through express language of a grant, which specifically asked for recognition of "Easement 61, affecting Lot 78 [Wailea Elua], for drainage, landscaping, pedestrian access, recreational and building setback purposes[; and] Easement[s] 62 and 63, affecting Lot 78, for drainage purposes." In addition, such grant was registered with the land court in accordance with HRS § 501-82 (1993 & Supp. 1998). See Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114 n.8, 839 P.2d 10, 27 n.8 (1992) (citations omitted).

In 1944, the Supreme Court of the Territory of Hawai‘i noted that an easement may be created by either an express grant or implication by prescription. The court then distinguished the two by explaining that the former "is by special permission of the owner of the fee. The grant itself is the best evidence of title and it derives no strength from time or occupation." Lalakea v. Hawaiian Irrigation Co., 36 Haw. 692, 706 (1944) (quotation and internal quotation marks omitted). In contrast, the latter "is by use and occupation for the [statutorily established] period . . . . Such use and occupation are substituted for the grant. In other words, they give rise to the presumption that a grant existed, since lost or destroyed by time or accident." Id. (citations omitted).

Even earlier and more instructive are the observations of the Supreme Court of the Republic of Hawai‘i in 1893. In the context of ways of necessity, the court distinguished creation by grant, prescription, and implication:

> Ways are commonly said to be created by grant, by prescription or by necessity. But these distinctions related to the mode of their proof rather than to the mode of their creation. It would be more correct to say that ways are created by express grant, by presumed grant and by implied grant——or reservation, as the case may be. In every instance the way is created by grant, or reservation, the difference being merely in the mode of proof. The question as to what is granted or reserved is a question of intention to be shown by competent evidence. In the case of an express grant the intention is proved generally by the terms of the instrument alone. In the case of a presumed grant it is proved by an adverse user for twenty years. In the case of an implied grant it is proved by all the circumstances of the case, and especially by the condition of the property at the time of the conveyance.

Kalaukoa v. Keawe, 9 Haw. 191, 192-93 (1893).

Here, WRC and the County assert that there is no express language specifying a grant of drainage easement for the pipes themselves. The Kalaukoa court, however, explained the proper interpretation of an express grant with respect to location and width:

> The same rules which apply to the existence of a way apply equally to its location, direction, width and the purposes for which it may be used. The question is merely one of intention, to be proved by competent evidence.
>
> If the way is created by an express grant, which defines its location, direction, width and uses, the only evidence is to be found in the grant itself; but if the grant merely provides for the existence of the way, with no provision as to its location, width and uses, these must be ascertained by other evidence, such as the condition or character of the lands and the uses made of them, or the acts or acquiescence of the parties.

Id.

Likewise, Thompson on Real Property § 60.03(a)(7) points out that in interpreting an express grant, intent of the parties is paramount:

> [A]ny words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, providing the language is sufficiently definite and certain in its terms. Neither words of limitation, nor words of inheritance, nor technical terminology are necessary to create an easement. If the language of the grant is free from ambiguity, it is not the subject of interpretation, and no resort to extrinsic facts and circumstances may be made to modify the clear terms of the grant. To determine whether an easement is the intention of the parties, courts will examine the language of the grant, the circumstances surrounding its creation and the property involved, with construction in favor of the grantee.

Id. at 415 (quotations, citations, and internal quotation marks omitted). See also Los Angeles v. Howard, 244 Cal. App. 2d 538, 543, 53 Cal. Rptr. 274, 277 (1966) ("The extent of a servitude is determined by the terms of the grant, . . . and the extent of an easement is a question of interpretation. Where an easement is founded upon a grant, . . . only those interests expressed in the grant and those necessarily incident thereto pass from the owner of the fee."); Powell on Real Property § 34.12[2] at 185-89 (describing the flexibility given to the courts in construing grants of express easements).

In Isenberg v. Woitchek, 356 P.2d 904 (Colo. 1960), an express grant of easement for right of way described only the place of entry and exit, without detailing the width or exact course across the servient estate. The Colorado Supreme Court explained, "The rule is that vagueness of description does not go to the existence or validity of an easement. While an extreme case of vagueness could result in a holding that no easement was granted, the present factual situation does not produce such result." Id. at 907. Rather, the court clarified that the lack

of express location does not invalidate an express grant of easement:

> It is a settled rule that where there is no express easement agreement with respect to the location of a way granted but not located, the practical location and user of a reasonable way by the grantor or owner of the servient estate, sufficiently locates the way, which will be deemed to be that which was intended by the grant.

Id. (quotation and internal quotation marks omitted).

Similarly, the language granting the easements here is not that of a "careful conveyancer [who avoids the] risks of borderline language." Powell on Real Property § 34.04 at 32. Although an express grant of easement should "specify carefully the acts on the servient land which are thereby privileged," id. at 32-33, this does not mean that an express easement requires the most extensive and exhaustive description. In interpreting express easements, Thompson on Real Property § 60.03(a)(7) observes that "[s]o long as the words make clear the intention to create an easement, the law does not require perfection in its description." Id. at 415. See also Murdock v. Ward, 477 S.E.2d 835, 836 (Ga. 1996) ("[T]he law does not require perfection in the legal description of an easement.").

Although WDC's easements include the inflow and outflow of the drainage systems, without specifying that such easements include the drainage pipes themselves, it is clear from the express language that they are included. To hold easements only at the ends of the drainage systems would be a hypertechnical and nonsensical reading of the express grant of drainage easements. In fact, easements 61, 62, and 63, which are expressly for

drainage, would be useless if they did not include the drainage pipes. Thus, WRC, as WDC's successor in interest with respect to the golf course, holds express easements in the entire drainage systems -- from inflow to outflow.

In addition, the grant of drainage easements, which include the drainpipes, fulfills the "fundamental intent" of the land court registration statute: "to preserve the integrity of titles." Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. Partnership, 75 Haw. 370, 391, 862 P.2d 1048, 1060 (1993). This court explained that "[t]he integrity of titles can only be preserved if anyone dealing with registered property is assured that the only rights or claims of which he need take notice are those which are registered in the prescribed manner." Id., 862 P.2d at 1061 (quoting Honolulu Mem'l Park, Inc. v. City and County of Honolulu, 50 Haw. 189, 193-94, 436 P.2d 207, 210 (1967)). Here, the express grant of easements for the inflow and outflow of the drainage system would provide reasonable notice to the public that such easements include the drainpipes connecting the intake and outflow of the system. After all, granting easements for drainage that do not include a practical method of draining water would be absurd.

Although the trial court's analysis concerning an implied easement is different from mine, the conclusion is the same: WRC owns easements in the drainage systems and is, therefore, responsible for the maintenance and repair of the

systems. "[I]t is . . . well established . . . that an owner of an easement has the right and the duty to keep it in repair." Levy v. Kimball, 50 Haw. 497, 498, 443 P.2d 142, 144 (1968) (citations omitted). Moreover, the original apartment deeds contain an express covenant to repair in favor of the condominium, which was assumed by WRC in the Purchase and Exchange Agreement.

Accordingly, the trial court did not err by granting the Association's motion for partial summary judgment.

II. MOTION FOR COSTS

The majority holds that the trial court did not err in denying WRC's motion for costs. Majority opinion at 56-57. I agree. However, I write separately to note that the majority erroneously grounds its holding on its mischaracterization of WRC's offer as an invalid offer. See id. In my view, WRC's offer was a valid HRCP Rule 68 offer, because it would have fully and completely resolved the Association's claims against WRC. Cf. majority opinion at 56-57 ("By its own terms, WRC's offer was not a valid HRCP Rule 68 offer because it did not fully and completely resolve the Association's claims."). However, the trial court properly denied WRC's motion, because the judgment finally obtained by the Association was more favorable than WRC's offer of judgment.

On April 29, 1997, subsequent to the summary judgment proceedings but before trial, WRC tendered an offer of judgment to the Association for $45,000, "inclusive of all costs incurred

to date, for all damages, past, present, and future, including all repair and maintenance costs[.]." WRC stated that its offer was tendered pursuant to HRCP Rule 68.[3] WRC further indicated that

> this offer of judgment is made to resolve the lawsuit without any admission by [WRC] that the Order Granting [the Association's] Motion for Partial Summary Judgment with respect to [WRC] . . . is correct, appropriate, or binding upon [WRC].

(Emphasis added.)

Relying on Crown Properties, Inc. v. Financial Sec. Life Ins. Co., 6 Haw. App. 105, 712 P.2d 504 (1985), the majority held that WRC's offer was not a valid HRCP Rule offer, because it did not fully and completely resolve the Association's claims. See majority opinion at 56-57. In Crown Properties, sublessor brought an action against sublessees for (1) a declaratory judgment terminating the sublease; (2) a writ of possession; and (3) a monetary judgment for occupancy of sublessor's property after termination of the sublease. 6 Haw. App. at 107, 712 P.2d

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[3] HRCP Rule 68 states in pertinent part:

> At any time more than 10 days before the trial begins, any party may serve upon any adverse party an offer of settlement or an offer to allow judgment to be taken against either party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall, in accordance with the agreement, enter an order of dismissal or a judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

(Emphasis added.)

at 506. Sublessees offered a sum of money to resolve the issue of past-due rent owed, but the offer did not address plaintiff sublessor's claims seeking a declaratory judgment and a writ of possession. Id. at 107, 110, 113-14, 712 P.2d at 506, 508, 510.[4] The ICA stated:

> To qualify as a Rule 68 offer, the offer must be such that a judgment in the words of the offer will fully and completely decide the claim or claims toward which the offer is directed.

Id. at 113, 712 P.2d at 510. The ICA went on to hold that the offer was "insufficient and incomplete" to qualify as a HRCP Rule 68 offer of judgment. Id. at 113, 712 P.2d at 510. The ICA reasoned that:

> A judgment requiring [the sublessees] to pay [sublessor] $265,000 inclusive of accrued costs and attorney fees would not decide and dispose of any portion or all of [sublessor's] claim against [the sublessees]. The continued existence of the sublease would still be in dispute. [Sublessees] would still be occupying the premises and incurring additional lease rent obligations. We would not know what specific obligations the $265,000 covers. Such a judgment would be no more than an advance payment pending a decision on the merits of the claim.
>
> Since the . . . offer was imprecise, it did not qualify as a Rule 68 or a non-Rule 68 offer of judgment, and its acceptance did not result in a binding agreement.

Id. at 113-14, 712 P.2d at 510 (emphasis added).

In light of Crown Properties, the majority in the instant case held that the WRC's offer is invalid because it

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[4] In Crown Properties, defendants' offer of judgment stated in relevant part:

> COME NOW, UNITED INDEPENDENT INSURANCE AGENCIES, INC. ("UIIA") and FINANCIAL SECURITY INSURANCE COMPANY, LTD. ("FSIC") pursuant to Rule 68 of the Hawai'i Rules of Civil Procedure and hereby offer a Judgment in favor of CROWN PROPERTIES, INC. ("CROWN") in the sum of $265,000 (TWO HUNDRED SIXTY FIVE THOUSAND AND 00/100 DOLLARS) inclusive of accrued costs and attorneys's [sic] fees.

6 Haw. App. at 109, 712 P.2d at 507.

"excluded the Association's claim for declaratory judgment seeking to establish ownership of the drainpipes, reserving to WRC the right to further challenge the trial court's order granting the Association's motion for partial summary judgment on the issue of who owned the drain pipes." Majority opinion at 56. The majority's reliance on Crown Properties is misplaced.

Although WRC's offer excluded any admission as to the propriety of the trial court's granting of the Association's Motion for Summary Judgment, as between the Association and WRC, such offer was "sufficient and complete." Acceptance of the terms of WRC's offer effectively "resolves [the Association's] lawsuit" against WRC, because the implicit purpose of WRC's offer is to serve as consideration for the Association's release of its right to hold WRC liable for "all damages, past, present, and future, including all repair and maintenance costs." In other words, although WRC is not admitting that the trial court is correct in granting the Association's motion for partial summary judgment, acceptance of the terms of the offer, in effect, completely disposes of all of the Association's past, present, and future claims against WRC.[5]

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[5] Crown Properties is distinguishable from the instant case in that the offer involved in Crown Properties, as the ICA correctly indicated, was "imprecise," because acceptance of its terms "would not decide and dispose any portion or all of [sublessor's] claim against [the sublessees]." Id. at 113-14, 712 P.2d 510. This is due to the broad language employed by the drafters of the offer which failed to specify what portion of sublessor's claim the offer was intended to address. In contrast, the offer involved in the instant case was "precise" enough for the purpose of a Rule 68 analysis. WRC's offer sought to release itself from all liabilities arising from "all damages, past, present, and future," regardless of whether WRC owned the easements or not. Whereas the offer in Crown Properties was written in general terms without indicating which claim or claims the offer was meant to address, the offer in (continued...)

Having determined that the offer, by its own terms, would have fully and completely resolved the Association's claims, I now turn to the more crucial issue: Was the judgment finally obtained by the Association (offeree) more favorable than the offer? By utilizing the analytical approach that I set forth below, I conclude that the judgment obtained by the Association is more favorable than the $45,000 offer of judgment made by WRC, such that WRC is not entitled to costs incurred after the making of its December 30, 1997 offer.

This court has not addressed the proper approach in determining whether "the judgment finally obtained by the offeree is not more favorable than the offer," particularly where the offer or judgment includes nonmonetary relief, for purposes of HRCP Rule 68. Thus, I take this opportunity to do so.

In interpreting HRCP Rule 68, this court has examined the treatment of the Federal Rules of Civil Procedure Rule 68, which is identical. See Canalez v. Bob's Appliance Service Center, Inc., 89 Hawai'i 292, 308, 972 P.2d 295, 311, amended by, 1999 Haw. LEXIS 99 (Haw. Feb. 22, 1999); Collins v. South Seas Jeep Eagle, 87 Hawai'i 86, 88-90, 952 P.2d 374, 376-78 (1997). Thus, "the interpretation of [Rule 68] by federal courts is highly persuasive." Canalez, 89 Hawai'i at 306, 972 P.2d at 309 (quoting Shaw v. North American Title Co., 76 Hawai'i 323, 326, 876 P.2d 1291, 1294 (1994) (citations omitted)) (internal

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[5](...continued)
the instant case expressly provided that it was meant to relieve WRC of all liabilities, past, present, and future.

quotation marks omitted).

This court has explained that the rule was "intended to encourage settlements and avoid protracted litigation." Collins, 87 Hawai'i at 88, 952 P.2d at 376 (quoting 12 Charles Alan Wright et al., Federal Practice and Procedure: Civil 2d § 3001 (2d ed. 1997)) (internal quotation marks omitted).

Of course, deciding whether the judgment is more favorable than the offer in a case where both the judgment and offer are for money, is not complicated. In that situation, the trial court can readily compare the two amounts. Another simple scenario is where all of the elements of either the offer or the judgment are included in the other. There, the court can effortlessly determine whether the offer or judgment is more favorable by ignoring the common elements.[6] See 12 Wright § 3006.1 at 122 (citing cases); 13 James Wm. Moore et al., Moore's Federal Practice § 68.07 at 38-39 (3d ed. 2000).

But there are other cases where the comparison is not so simple. Determining whether the offer or judgment is more favorable becomes "intrinsically more difficult where one or both involves nonmonetary relief. In particular, it is difficult to compare monetary relief with nonmonetary relief . . . ." Wright § 3006.1 at 127. Justice Brennan described this problem more concretely: "[I]f a plaintiff recovers less money than was offered before trial but obtains potentially far-reaching

[6] A judgment that is identical to the Rule 68 offer is not more favorable. Thus, Rule 68 applies. Such case may occur in dealing with either monetary or equitable relief. See 12 Wright § 3006.1 at 123 (citing cases).

injunctive or declaratory relief, it is altogether unclear how the Court intends judges to go about quantifying the 'value' of the plaintiff's success." Marek v. Chesny, 473 U.S. 1, 32 (1985) (Brennan, J., dissenting).

Because of these problems in comparing offers and judgments where nonpecuniary relief is involved, there is "no widely accepted objective method" and "no sharply articulated approach has emerged in the cases to date." Moore § 68.07[3] at 41 (citation omitted). Instead, "it seems fair to say that judges deal with these problems on a case-by-case basis." Id.; see also Wright § 3006.1 at 128 ("Probably no clear rules can guide that decision [where nonmonetary elements are involved].").

But the difficulty of comparing an offer and judgment that include nonmonetary elements does not mean that Rule 68 should not be applied to such cases. Indeed, the language of the rule is mandatory, not discretionary. No exceptions are described.[7] In addition, the rule's application to cases in equity furthers its underlying objective. "Despite the uncertainties of nonpecuniary comparison, Rule 68 offers cause both parties to focus on what settlement terms would be acceptable to them." Thomas L. Cubbage III, Note, "Federal Rule

[7] The drafters of Rule 68 appear to have focused only on the easier case where the offer and judgment could be quickly and accurately compared: generally where two monetary figures are involved. The Fifth Circuit Court of Appeals noted that "Rule 68 is a mandatory rule designed to operate automatically by a comparison of two clearly defined figures." Johnston v. Penrod Drilling Co., 803 F.2d 867, 870 (5th Cir. 1986); see also Thomas L. Cubbage III, Note, "Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread," 70 Tex. L. Rev. 465, 475 (1991) (describing failure of drafters to consider whether benefits of application of Rule 68 to equitable relief outweigh difficulties).

68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread," 70 Tex. L. Rev. 465, 474 (1991).

For these reasons, federal courts have overwhelmingly applied Rule 68 to cases dealing with equitable relief. See, e.g., Liberty Mut. Ins. Co. v. EEOC, 691 F.2d 438, 442 (9th Cir. 1982) (considering offer of judgment consenting to an injunction against disclosure of information); Domanski v. Funtime, Inc., 149 F.R.D. 556, 558 (N.D. Ohio 1993) ("[P]ermanent injunctive relief, though admittedly difficult to quantify, adds considerable value to the 'judgment finally obtained' by [plaintiff] when compared to the judgment offered by [defendant]."); Lish v. Harper's Magazine Found., 148 F.R.D. 516, 520 (S.D.N.Y. 1993) (considering judgment's grant of authorial right to control publication and judicial determination of copyright violation); Lightfoot v. Walker, 619 F. Supp. 1481, 1485-86 (S.D. Ill. 1985) (considering offer of judgment consenting to prison health care reform); Association for Retarded Citizens v. Olson, 561 F. Supp. 495, 499 (D.N.D. 1982), modified on other grounds, 713 F.2d 1384 (8th Cir. 1983) (considering offer of judgment consenting to state mental health facility reform); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607, 610-11 (E.D.N.Y. 1974) (considering offer of judgment promising to cease alleged patent infringement). But see Real v. The Continental Group, Inc., 653 F. Supp. 736, 739 (N.D. Cal. 1987) ("The imprecision in making such an evaluation for the purposes of the Marek comparison persuades me that,

without more direction, the better course is to compare monetary awards only."); Gay v. Waiters' & Dairy Lunchmen's Union Local, No. 30, 86 F.R.D. 500 (N.D. Cal. 1980) (holding that Rule 68 should not be applied to class action suit because threat of making class representative liable would create unacceptable conflict of interests between representative and class). As the United States District Court for the District of Massachusetts observed, "Financial compensation . . . is not the 'be all and end all.'" Chestnut Hill Gulf, Inc. v. Cumberland Farms, Inc., 749 F. Supp. 331, 333 (D. Mass. 1990), aff'd in part and rev'd in part on other grounds, 940 F.2d 744 (1st Cir. 1991) (considering benefits from judgement's retention of franchises for three years).

Thus, given both the necessity and difficulty of considering non-pecuniary aspects for purposes of Rule 68, the court must establish a framework to minimize, if not eliminate, Justice Brennan's concern:

> Although courts must . . . evaluate the "value" of nonpecuniary relief before deciding whether the "judgment" was "more favorable than the offer" within the meaning of Rule 68, the uncertainty in making such assessments surely will add pressures on a plaintiff to settle his suit even if by doing so he abandons an opportunity to obtain potentially far-reaching nonmonetary relief -- a discouraging incentive entirely at odds with Congress' intent.

Marek, 473 U.S. at 33 n. 48 (citations omitted).

Before describing my proposed approach, I note the flaw of an alternative method -- "pure quantification." Some scholars have suggested that courts should attempt to quantify, usually in monetary terms, all equitable relief. See, e.g., Roy D. Simon,

Jr., "The New Meaning of Rule 68: Marek v. Chensy and Beyond," 14 N.Y.U. Rev. L. & Soc. Change 475, 486-87 (1986); Julie M. Cheslik, Note, "The Proposed Amendment to Federal Rule of Civil Procedure 68: Toughening the Sanctions," 70 Iowa L. Rev. 237, 264 (1984). But, though comparing monetary values is easy, monetizing the nonmonetary relief is difficult. The necessary valuation is fraught with oft-hidden subjectivity and assumptions. See generally Robert H. Frank, "Why is Cost-Benefit Analysis So Controversial?" 29 J. Legal Stud. 913 (2000) (detailing valuation problems); see also Stephen G. Breyer et al., Administrative Law and Regulatory Policy 181 (4th ed. 1999) (questioning valuation and appropriateness of willingness to pay).

Though mathematical in form, the pure quantification method is not mathematical in accuracy. Quantifying that which defies quantification is a prickly problem. For example, placing a monetary value on the "required immediate alleviation of overcrowded conditions at the central [mental health] institutions," Association for Retarded Citizens, 561 F. Supp. at 498, is formidable -- if not impossible. It is difficult not only to define such subjective terms as "immediate," "alleviate," and "overcrowded,"[8] but also to value to the plaintiff in monetary

[8] The "analytical" approach that I propose this court to adopt would adequately address this issue by examining at least three relevant factors with respect to both the offer and judgment: (1) timeliness; (2) comprehensiveness; and (3) specificity.

terms such benefits. Indeed, as noted above, even Justice Brennan questioned the ability -- or even capability -- of courts "quantifying the 'value' of the plaintiff's [equitable relief]." Marek, 473 U.S. at 32. The additional problem with pure quantification is that it provides a false sense of accuracy. Though dollar amounts are easy to compare, they are meaningless if not based on sound judgment. The pure quantification values everything -- from safer working condition for a single factory worker to a permanent injunction against polluting the ocean -- on the single metric of aggregated private willingness to pay. Preciseness must not be confused with accuracy.

In the different, yet instructive, context of cost-benefit analysis (CBA), Professor Cass Sunstein reveals not only the problems with pure quantification with respect to Rule 68, but also alludes to the better approach:

> The real problem with any form of conventional CBA is that it is obtuse. CBA is obtuse because it tries to measure diverse social goods along the same metric. Suppose, for example, that we are told that the "cost" of a certain occupational safety regulation is $1 million, and that the "benefit" is $1.2 million. To make a sensible evaluation, we need to know a great deal more. To what do these numbers refer? Do they include greater unemployment, higher inflation, and the scaled-back production of important goods? Do they mean more poverty? At least in principle, it would be much better to have a highly disaggregated system for assessing the qualitatively different effects of regulatory impositions. People should be allowed to see those diverse effects for themselves and to make judgments based on an understanding of the qualitative differences. If all of the relevant goods are aligned along a single metric, they become less visible, or perhaps invisible.

Cass R. Sunstein, "Incommensurability and Valuation in Law," 92 Mich. L. Rev. 779, 841 (1994).

A superior alternative to the pure quantification method -- which this court ought to adopt -- is the "analytical" approach:

> Rather than trying to quantify nonpecuniary relief, courts applying the analytical method would analyze all of the elements of offers and judgments, including monetary and nonmonetary awards. Judges would identify and weigh strengths and weaknesses of the offers and final judgments. An analytical approach would prompt courts to view situations more holistically and to articulate their comparisons more comprehensively.

Cubbage at 482 (citations omitted). Many federal courts have already employed such approach to some extent. See, e.g., Spencer v. General Electric Co., 894 F.2d 651 (4th Cir. 1990); Garrity v. Sununu, 752 F.2d 727 (1st Cir. 1984); Lightfoot, 619 F. Supp. at 1481; Association for Retarded Citizens, 561 F. Supp. at 495. This analysis should not be unduly difficult because the judges would already be familiar with the contents and merits of the judgment they themselves have issued.[9]

Specifically, in evaluating the favorableness of equitable relief, courts should consider the following three factors, in addition to any other factors the court deems relevant:

1. Timeliness
2. Comprehensiveness
3. Specificity

See Marek, 473 U.S. at 1 (timeliness); Garrity, 752 F.2d at 731 (timeliness and specificity); Association for Retarded Citizens,

[9]Although some may fear that the trial court judges will be predisposed to believe that their final judgments are more favorable than the offers, such fear should be alleviated by requiring the judges to consider explicitly the three factors, discussed infra.

561 F. Supp. at 498 (comprehensiveness); Lightfoot, 619 F. Supp. at 1486 (comprehensiveness); see also Cubbage at 496-99.

First, courts should consider timeliness of relief. In Marek, the United States Supreme Court pointed out that civil rights plaintiffs would benefit from settlements encouraged by Rule 68 because "settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation." Marek, 473 U.S. at 10.

Second, courts should examine whether the relief provides a remedy for all primary issues raised. In Association for Retarded Citizens, the court compared the offer with the final judgment and found that the former failed to meet the needs of four "critical areas." 561 F. Supp. at 498. See also Lightfoot, 619 F. Supp. at 1486 (finding that offer failed to include "essential" elements). Thus, the courts should undertake a side-by-side comparison of the material elements of both the offer and the judgment. Although this court should reject the pure quantification approach as described above, this does not mean that my proposed approach precludes per se the use of quantification in helping courts evaluate equitable relief that is susceptible to easy and accurate monetization. Quantification is one tool to be used by the courts -- not the only tool. Thus, the courts are not required to (1) place a monetary value on all equitable relief or (2) compare only such monetary values in making its Rule 68 determination. See, e.g., Domanski, 149 F.R.D. at 558 ("This Court finds that the judgment obtained by

Domanski was more favorable than Funtime's offer because it included permanent injunctive relief that was not in the offer, which only provided for a monetary judgment. This permanent injunctive relief, though admittedly difficult to quantify, adds considerable value to the 'judgment finally obtained' by Domanski when compared to the judgment offered by Funtime."). For example, an offer of reinstatement to a job for one year can be readily valuated by examining the annual salary and any additional benefits. But, if the court determines that there are nonpecuniary benefits to reinstatement, it should consider them. The analytical, as opposed to the pure quantitative, approach provides the necessary flexibility for the courts to faithfully apply Rule 68 in fulfilling its purposes: encouraging settlements and avoid protracted litigation without unfairly chilling a plaintiff's ability to pursue his or her claims in court. See Marek, 473 U.S. at 33 n.48; Chestnut Hill Gulf, Inc., 749 F. Supp. at 333; Collins, 87 Hawai'i at 88, 952 P.2d at 376. Whereas the pure quantification approach restrains the courts due to its rigid requirement of applying quantification in all cases, the analytical approach frees the courts to use quantification in only those cases that make sense.

Third, the courts should consider the specificity of the offer. A vague offer impedes the plaintiff in ascertaining the actual benefits. In fact, open-ended terms may even nullify the purported benefits. In Collins, we emphasized the significance of specificity:

> When a defending party chooses to couch its settlement offer in terms of a Rule 68 offer of judgment, it is taking advantage of certain tactical advantages not available to the normal offeror. . . . Unlike the offeree of an ordinary contract, the Rule 68 offeree is bound by an offer of judgment whether it is accepted or not. Because of the difficulty of the choice that an offer of judgment requires a claimant to make, it is essential that he be able to discern with certainty what the precise terms of the offer are. When an offer of judgment uses terms of art, a claimant must be allowed to make his acceptance decision based on the interpretation those terms are commonly given. To allow a Rule 68 offeror to inject ambiguities into its offer after the fact would be tantamount to requiring the offeree to guess what meaning a court will give to the terms of that offer before deciding whether to accept it or not.

87 Hawai‘i at 90, 952 P.2d at 378 (quoting Said v. Virginia Commonwealth Univ., 130 F.R.D. 60, 63 (E.D. Va. 1990)). Given this danger, the ICA criticized an offer for its imprecision and lack of specificity. See Crown Properties, 6 Haw. App. at 114, 712 P.2d at 510; see also Garrity, 752 F.2d at 732 (agreeing with trial court that motion for costs should be rejected because, inter alia, offer was too "indefinite and ambiguous"). In interpreting ambiguous terms of an offer, courts should not only construe them against the defendant who drafted the offer, see Collins, 87 Hawai‘i at 90, 952 P.2d at 378 (quoting Wright § 3002), but may also consider whether the defendant made the offer in good faith, see Garrity, 752 F.2d at 733 ("Such footdragging [by defendants] would tend to weaken the credibility of the offer, since its value depended on how much defendants could be relied upon to develop and implement an effective plan."); Cubbage at 500 (discussing defendant's cooperativeness). As a result, offers of judgment, as well as final judgments, should be as specific as possible.

The defendant bears the burden in demonstrating that the offer of judgment is more favorable than the judgment. Admittedly, the wording of the rule indicates that the cost-shifting consequence applies unless the judgment is more favorable, thereby suggesting that the plaintiff bears the burden. Nevertheless, Wright § 3006.1 points out that:

> Rule 68 is actually a tool for defendant to use, and defendant alone determines the provisions of the offer. Since defendant has drafted those provisions, the courts generally interpret the offer against defendant. Consistent with that, the burden should be on defendant to demonstrate that those provisions are in fact more favorable than what plaintiff obtained by judgment.

Id. at 128-29. Similarly, we have observed that "[b]ecause of the special considerations in a Rule 68 offer, 'courts may be particularly prone to interpret the language of a Rule 68 offer against the defendant that drafted it.'" Collins, 87 Hawai'i at 90, 952 P.2d at 378 (quoting Wright § 3002). In other words, where it is not clear that the objectives of the rule -- promoting settlements and avoiding protracted litigation, see id. at 88, 952 P.2d at 376 -- will be satisfied, trial courts should not grant a defendant's motion for costs,[10] see Cubbage at 503 (citing Simon at 486 (arguing that when court

[10] Indeed, Cubbage recommends that the plaintiff be given the benefit of the doubt:

> Any plaintiff faced with an offer of judgment runs a risk in rejecting it, and such a plaintiff must decide what to do based on a prediction of the outcome at trial. When the offer contains nonpecuniary features, however, the plaintiff must also estimate how the court will evaluate those features. If the offer and the later judgment turn out, on the basis of analysis -- alike in effect if not identical in elements -- the plaintiff should be given some credit for having made good estimates and a reasonable choice.

Cubbage at 253.

cannot readily make comparison between relief offered and relief obtained, Rule 68 should not apply if defendant cannot prove that offer was more favorable than judgment), and John P. Woods, "For Every Weapon, A Counterweapon: The Revival of Rule 68," 14 Fordham Urb. L.J. 283, 296 (1986) (asserting that if meaningful comparison is impossible, fairness requires finding that judgment exceeds offer)).

The courts should also allow the plaintiff to demonstrate the favorableness of the judgment over the offer. In Chestnut Hill Gulf, Inc., the United States District Court for the District of Massachusetts considered the fact that plaintiff's "belief that [defendants] had acted improperly was vindicated by the jury's finding of bad faith." 749 F. Supp. at 333. Thus, the court concluded that "Rule 68 was not intended to preclude parties from having their day in court where more could be gained from litigating a matter than from accepting a settlement." Id. Of course, this does not mean that trial courts must take the plaintiff's purported valuation at face value. Instead, it should assist the courts in more accurately comparing the offer and judgment.

Finally, trial courts should explain their decisions by detailing their analyses of these factors. In this way, trial courts should identify the factors considered and describe their subsequent evaluations, in addition to specifying any assumptions made. Such guideline is rooted in the principle of transparency, which leads to three benefits. First, the parties involved will

better understand courts' decisions. Second, a clear statement promotes disciplined and objective decision-making. Third, it facilitates review on appeal by allowing the appellate courts to more easily identify an abuse of discretion.

Here, WRC's offer of judgment was completely monetary: $45,000. In contrast, the final judgment included both monetary and equitable elements. The monetary aspect totaled $17,684.57 -- $16,644.53 for the 54" drainage system and $1,040.04 for the 24" drainage system. The equitable aspect was the declaratory judgment by the court that WRC is an owner of the easements and, accordingly, has a duty to maintain the easements in the future. With respect to this element, I apply the analytical approach delineated above to determine whether the trial court abused its discretion in denying WRC's motion for costs.

First, timeliness of relief is not a major factor here because there are no significant interim damages accruing between the time that the offer was made and the judgment was ordered.

Second, a side-by-side comparison of the offer and the judgment reveals that the latter is significantly more comprehensive in redressing the Association's grievances. While the offer roundaboutly rejects ownership of easements, the judgment expressly declares WRC's ownership. WRC posits that the "declaratory judgment of the percentage of liability has no independent significance" other than liability for repair and maintenance costs. But this is not so. For example, an owner of

an easement not only has the duty to keep it in repair, but also is liable in damages for injuries caused by failure to keep the easement in repair. See Levy v. Kimball, 50 Haw. 497, 498-99, 443 P.2d 142, 144 (1968) (cases cited); Thompson on Real Property § 60.05(b) at 464. Thus, WRC's offer of judgment is not as comprehensive as the final judgment. Moreover, the offer covers only a one-time repair, while the judgment requires a perpetual obligation of WRC to repair. In addition, this is a case where quantification -- as one tool, rather than the only tool -- may help in evaluating the equitable relief of the judgment. WRC claims that because it is responsible only for "permanent repair" amounting to $17,684.57, such "permanent" repair would discharge its duty to maintain its easements. But permanence of a drainage pipe is different from perpetuity of an easement.[11] In other words, the declaratory judgment by the court that WRC is an owner of the easements and, accordingly, has a duty to maintain the easements in the future will likely be more favorable than a one-time payment of $45,000. In fact, this one incident of rupture on the 54" drainage pipe cost about one-third of the amount offered by WRC for both systems. Future ruptures are inevitable. Moreover, the purportedly "permanent" repair does not account for risks posed by unexpected -- though unavoidable -- events, such

[11] Although there is evidence that the "permanent" repairs to the drainage systems would extend their "life equivalent to the life of a concrete structure," Exhibit J-121, which appears to be a substantial amount of time; this remains far different from easements, which are interests in land lasting in perpetuity, see S. Utsunomiya Enters. v. Moomuku Country Club, 75 Haw. 480, 502, 866 P.2d 956, 963 (1994).

as ground shifting and natural disasters. Thus, the comparison between the offer and the judgment indicates that the latter is more comprehensive than the former.

Third, the offer and judgment are sufficiently specific to ascertain their benefits.

Thus, WRC, as the defendant, has failed to bear its burden that the offer of judgment is more favorable than the judgment. As a result, though the trial court neglected to provide a clear explanation of its decision, its denial of WRC's motion for costs is not an abuse of discretion.

III. CONCLUSION

Based on the foregoing, I would hold that the trial court did not err: (1) in ruling that both WRC and the County own easements in the drainage pipes and are, therefore, responsible for the maintenance and repair of the easements and (2) in denying WRC's motion for costs pursuant to HRCP Rule 68. I disagree with the majority's conclusions that (1) WRC owns implied easements and (2) WRC's offer was incomplete. I believe that WRC's offer was complete and valid, but it was still less favorable than the judgment. In all other respects, I agree with the majority.