DISSENTING OPINION BY ACOBA, J., REGARDING ESTOPPEL, WITH WHOM DUFFY, J., JOINS

I respectfully dissent to affirming the judgment of the court. The court s estoppel ruling should not bar us from enforcing this court s determination that the pricing policy was not validly adopted on any or all of the following four grounds: (1) the validity of the vote was a central and determinative issue on appeal to the Intermediate Court of Appeals (the ICA) and in this court, (2) the validity of the vote was raised and fully briefed in the circuit court of the second circuit (the court) and on appeal, (3) it was plain error for the court to rule that Petitioners/Plaintiffs-Appellants Alvarez Family Trust, Sergio S. Alvarez and Margaret J. Alvarez (Petitioners) are estopped from challenging the validity of the vote under Hawai i Revised Statutes (HRS) § 514A-82(a)(16) (Supp. 2003), and (4) estoppel is an equitable principle, and cannot be used to prevent Petitioners from arguing that the vote was illegal and void.

I.

First, this court must address the court s estoppel conclusion in order to reach a correct, complete, and fair result in this case. As other courts have wisely stated,

> [w]hen an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, [an appellate court] may consider and resolve that implicit issue. To put it another way, if [an appellate court] must resolve a legal issue that was not raised below in order to reach a legal issue that was raised, [it] will do so.

Gross v. State Med. Bd. of Ohio, No. 08AP-437, 2008 WL 5381948, at *2 (Ohio App. 10 Dist. Dec. 23, 2008) (emphasis added); see also State v. Kramer, 668 N.W.2d 32, 35 n.1 (Minn. App. 2003) (Generally, we do not address issues not raised below[, but b]ecause we cannot address [defendant s] challenge to the sufficiency of the evidence without first addressing the burden shouldered by each party, we must, for the purposes of our analysis, reach the merits of this argument.);Kustura v. Dep t of Labor & Indus., 175 P.3d 1117, 1128 n.35 (Wash. App. Div. 1 2008) (We note that while it was raised below, the workers did not raise this specific issue on appeal . . . [b]ut we will consider it because it is necessary to reach a proper decision. (Emphasis added.)).

Similarly, in Belvedere Condominium Unit Owners Ass n v. R.E. Roark Cos., Inc., 617 N.E.2d 1075 (Ohio 1993), the condominium association argued that the developer breached its fiduciary duty by fail[ing] to disclose material facts regarding the lease between the two parties. Id. at 1083. The association argued that the Belvedere court should not decide the issue of whether developers owed a fiduciary duty to condominium owners associations because it was not expressly briefed or argued in the courts below. The [condominium association] would have [the Belvedere court] assume that there is such a duty and go on to decide whether [the developer] breached that duty. Id. at 1079. The Belvedere court disagreed, holding that in order to

reach the issue of breach, it first had to determine if a duty existed, stating that

> [a]s a general rule, this court will not consider arguments that were not raised in the courts below. The waiver doctrine, however, is not absolute. When an issue of law that was not argued below is implicit in another issue that was argued and is presented by an appeal, we may consider and resolve that implicit issue. To put it another way, if we must resolve a legal issue that was not raised below in order to reach a legal issue that was raised, we will do so.

Id. (emphases added) (citations omitted).

Based on the foregoing rationale, because the legal question of whether Petitioners are estopped from challenging the vote as invalid must be addressed in order to reach the central issue on appeal of whether the pricing policy was validly adopted, it is necessary for this court to resolve the estoppel issue in order to reach a proper decision.

II.

Second, although the estoppel issue was not expressly listed as an error, it was implicit[ly] raised, see Gross, 2008 WL 5381948, at *2, inasmuch as the voting issue was fully briefed by the parties and decided by the ICA.[1] The majority argues that, because Petitioners did not specifically identify or challenge the [court s] conclusion regarding estoppel[,]

[1] According to the estoppel majority [hereafter, the majority], fully briefing an issue on the merits that was subsequently decided by the ICA did not relieve Petitioners of their burden to challenge the conclusion of law regarding estoppel[,] and that because Petitioners did not expressly raise the estoppel issue, it was not raised as a matter of judicial fact or by necessary implication. Majority on estoppel at 33-44 n.21 (emphasis in original). However, as discussed infra, Petitioners did challenge the conclusion of law regarding estoppel because they properly challenged the validity of the vote. Furthermore, it was raised by necessary implication because, as discussed in Gross, Kramer, Kustura, and Belvedere, this court must address the estoppel issue in order to reach the voting issue.

majority on estoppel at 33 (emphasis in original), we (the majority in Part II) are bound by the unchallenged conclusion of law that Petitioners are estopped from challenging the pricing policy vote[,] id. at 52. However, as a matter of fact, Petitioners did challenge that conclusion inasmuch as they objected to the validity of the vote, the very issue which the court concluded Petitioners were estopped from presenting.

A.

One of Petitioners central arguments on appeal was that the pricing policy vote was invalid. By necessary implication, then, Petitioners challenged the court s ruling that they were estopped from disputing that vote. Undeniably, (1) Respondent/Defendant-Appellee Association of Apartment Owners of the Kaanapali Alii (Respondent or the Association) and the ICA addressed this question, (2) neither stated that Petitioners were precluded from raising that argument, (3) Petitioners do not challenge the authority of the Board of the Association (the Board) to adopt a pricing policy, but argue only that the vote was invalid, and (4) Respondent and the ICA did not contend Petitioners were precluded from appealing the invalidity of the vote. In fact, Respondent s apparent view of the court s estoppel ruling was that estoppel did not extend to the vote itself.[2] Respondent believed that Petitioners were estopped from

[2] In a footnote, Respondent stated that,

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challenging the Board s authority . . . to adopt the pricing policy, but Respondent didnot assert that Petitioners were prevented from arguing the vote itself was erroneous.[3]

The ICA also decided the legality of the vote without objecting that Petitioners had failed to raise the estoppel order.[4] The court s determination that Petitioners were

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> as the [court] held, [Petitioners] are estopped from (1) questioning or challenging the Board s authority to exercise the right of first refusal and to adopt the pricing policy, powers granted by the owners and [Petitioners] themselves; (2) asserting that [Respondent s] possession of the remaining leased fee interest was not for [Respondent] as a whole; (3) asserting that the purchase was not under 514C-2, but was instead under 514C-22; (4) objecting to or complaining about how the right of first refusal arose given their vote approving the exercise on the right of first refusal; and (5) arguing that the Board did not have the authority to establish a pricing policy.

(Emphasis added.)

[3] The majority argues that the dissent erroneously suggests that it was Respondent s burden to assert that Petitioners were estopped from challenging the validity of the vote[.] Majority on estoppel at 34 n.21. However, the majority mischaracterizes the statements, supra, regarding Respondent s view of the estoppel ruling and fails to cite to where this dissent discusses a purported burden on Respondent to assert an estoppel argument. Indeed, the majority cannot, because nowhere is it suggest[ed] that Respondent failed to meet such a legal burden. As is clear from the discussion, supra, the issue is not whether Respondent met a burden, but whether it believed that the effect of the court s ruling was to estop Petitioners from challenging the validity of the vote. Obviously, Respondent did not believe that this was the case.

[4] The majority also argues that

> the ICA did not have an obligation to object to or point out, much less address, Petitioner s failure to raise the issue of estoppel, especially in light of the fact that it affirmed the [court s] separate and distinct conclusion that the vote was valid which rendered it unnecessary to address the [court s] conclusion regarding estoppel.

Majority on estoppel at 34 n.21.

This analysis is flawed for two reasons. First, contrary to the majority s argument, the court did not provide any conclusion regarding the validity of the vote that is separate and distinct from the court s conclusion regarding estoppel. Second, as discussed infra, the ICA s decision indicates that it determined that Petitioners were not estopped from

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estopped from challenging . . . the adoption of its current pricing policy was as a matter of judicial fact joined on appeal inasmuch as Petitioners challenged the vote, Respondent responded, and the ICA decided that issue.

Additionally, the only conclusion rendered by the court in regard to the vote was that Petitioners were estopped from challenging it, and thus, by challenging the validity of the vote, Petitioners challenged this conclusion. In their partial summary judgment motion, Petitioners claimed (1) that the pricing policy violated HRS chapter 514C, the Amended Declaration, and the By-Laws because it allowed the Association to realize a profit on the sales of leased fee interests, and (2) that a majority of the Board did not vote to adopt the pricing policy. The court stated five conclusions in its order denying Petitioners partial summary judgment motion. The court s first four conclusions clearly addressed whether the pricing policy itself, by allowing the Association to make a profit on the sales of leased fee interests, violated statutory law, the Amended Declaration, or the By-Laws.

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challenging the validity of the vote, because had it determined that they were, the ICA would not have needed to address the merits of Petitioners argument. Had the ICA agreed with the court s only conclusion in regard to the vote, i.e., that Petitioners were estopped from challenging the validity of the vote, the ICA would have been obliged to express such agreement, because addressing the merits of Petitioners argument on the vote would have been unnecessary. In this case, however, the ICA did not agree with the court s conclusion, because it did address the merits of Petitioners argument.

In the court s fifth conclusion, it determined that Petitioners were estopped from challenging the Association s . . . adoption of its current pricing policy . . . as approved by the Board. The majority itself states that it is bound by the unchallenged conclusion of law that Petitioners are estopped from challenging the pricing policy vote. Majority on estoppel at 52 (emphases added). The estoppel issue thus is intertwined with the subject vote because (1) this is the only court conclusion that addressed the Board s vote, and (2) in that conclusion, the court concluded that Petitioners were estopped from challenging the vote.

The majority claims that this reasoning is unavailing because . . . the [] court s denial of Petitioners motion for partial summary judgment was based on two independent legal conclusions regarding the pricing policy vote. Id. at 35 (emphasis in original). According to the majority the two conclusions were: (1) the pricing policy . . . did not violate Chapter 514C, the amended Declaration, or the By-Laws; and (2) the Petitioners were estopped from challenging the adoption of the pricing policy. Id. (quotation marks and brackets omitted). The majority argues that [i]n [its] view, absent evidence to the contrary, the court s general conclusion that the pricing policy did not violate the By-Laws included the determination that the policy did not violate the voting requirements set forth in the By-Laws[,] id. at 35-36, because the pricing policy had to be

validly adopted in the first instance before the court could address whether the substantive provisions of the pricing policy itself were violative, id. at 36. This view ignores the plain language of the court s conclusions as well as the arguments made by the parties in their summary judgment motions.

First, it is evident that the court did not determine whether the vote was valid, because it decided in conclusion no. 5 that Petitioners were estopped from challenging the Association s . . . adoption of its current pricing policy[,] i.e., estopped from challenging the validity of the vote. Inasmuch as the court decided that Petitioners were estopped from challenging the validity of the vote, there was no logical or legal reason, within the context of the court s September 8, 2005 Order Denying Petitioners Motion for Partial Summary Judgment, for the court to rule on whether the pricing policy was validly adopted in the first instance[,] majority on estoppel at 36, as the majority claims.

Second, nothing in the court s second conclusion includes a determination that the vote was valid. Although it references the pricing policy for the sale of the leased fee interests[,] the second conclusion doesnot mention the vote taken on the pricing policy. Furthermore, the second conclusion states that the pricing policy did not violate HRS [c]hapter 514C, the [A]mended Declaration or the By-Laws[.] Neither HRS

chapter 514C, nor the Amended Declaration, have anything to do with voting requirements.

Third, although the By-Laws do establish voting requirements, Petitioners argued in their motion for partial summary judgment that substantively[,] the Board s pricing policy is illegal under HRS chapter 514C, the Amended Declaration, and the By-Laws because it allowed the Association to make a profit on the sales of leased fee interests. Similarly, in terms of the Association s ability to make a profit under the pricing policy, Respondent argued in its memorandum in opposition to Petitioners motion for partial summary judgment that the pricing policy does not conflict with . . . [the] By-Laws. Taken together, these arguments indicate that the court s second conclusion related to the fact that the pricing policy allowed the Association to realize a profit, not to the vote on the pricing policy.

Fourth, as noted supra, the ICA fully addressed the validity of the vote without ever mentioning the court s ruling on estoppel. Therefore, there is nothing in the ICA s Summary Disposition Order that evinces an apparent view, majority on estoppel at 37, that estoppel was separate from the voting issue. Nevertheless, the majority argues that the absence of any estoppel discussion by the ICA signals [the ICA s] apparent view that [the court s estoppel conclusion] was separate and distinct from the conclusion regarding the validity of the vote[.] Id.

To the contrary, the ICA ruled that the abstentions at the January 24, 2004 meeting should not be counted and that, as a result, the pricing policy was passed by a majority of the directors. This confirms that the ICA concluded that Petitioners were not estopped from challenging the validity of the vote, because had it concluded otherwise, there would have been no need for it to address the validity of the vote. Indeed, the ICA ruled that the [p]ricing [p]olicypassed by proper majority, Alvarez, 2008 WL 4958487, at *1 (emphasis added), proving its understanding that the validity of the vote was to be decided on appeal.

According to the majority, to assume[] that the ICA determined that the court s estoppel conclusion was erroneous but decided it was unnecessary to articulate such error is contrary to the well-settled role of courts to articulate the errors upon which its . . . holdings are based. Majority on estoppel at 37. However, the fact that the ICA failed to articulate the court s error on estoppel does not demonstrate that it believed the court s estoppel ruling was correct or incorrect. Neither party presented arguments that Petitioners were estopped from challenging the vote on appeal, and therefore, the ICA simply failed to address the issue. But, in addressing the merits of Petitioners argument as to the vote, the ICA clearly did not consider that Petitioners were estopped from raising the argument.

The majority also argues there was no need for the ICA to address the court s separate conclusion regarding estoppel because the ICA agreed with the court regarding the validity of the vote itself[.] Id. at 36. However, as discussed supra, the court did not render a conclusion on the validity of the vote itself, and thus, the ICA could not agree[] with the court on a non-existent conclusion. Consequently, neither the court s ruling itself, nor the ICA s failure to address the estoppel ruling, support the majority s argument that the voting issue and the estoppel issue are independent of one another.

B.

The majority cites Wong v. Cayetano, 111 Hawai i 462, 479, 143 P.3d 1, 18 (2006) for the proposition that all unchallenged conclusions of law are considered binding upon this court. Majority on estoppel at 34. ButWong is distinguishable inasmuch as the petitioners in that case challenged only the court s conclusion that their claim was barred byres judicata, where there were three separate and totally distinct bases upon which the petitioners claim was denied in the circuit court, none of which related to the res judicata claim, and none of which were challenged by the petitioners. See 111 Hawai i at 479-81, 143 P.3d at 18-20. Thus, this court concluded that the circuit court s judgment was supported by those separate and distinct grounds, despite any error in the res judicata conclusion. See id.

By contrast, as discussed more fully supra, in this case, the estoppel issue is not separate and distinct from Petitioners challenge to the validity of the vote, and, instead, must be reached in order to address the issue of whether the vote was validly counted. See discussion, supra. Furthermore, unlike in Wong, the ICA fully decided the very issue that Petitioners are supposedly estopped from asserting, thereby further placing the court s estoppel conclusion in issue.

In addition to relying on Wong for the proposition that unchallenged conclusions are binding on this court, the majority cites to E & J Lounge Operating Co. v. Liquor Commission of the City & County of Honolulu, 118 Hawai i 320, 347, 189 P.3d 432, 459 (2008), and Association of Apartment Owners of Newtown Meadows ex rel. its Board of Directors v. Venture 15, Inc., 115 Hawai i 232, 167 P.3d 225 (2007), in support of its argument that

> where a party does not raise specific issues on appeal to the ICA or on application to this court, the issues are deemed waived and need not be considered.

Majority on estoppel at 33. However, in E & J Lounge, this court applied that basic proposition in discussing certain issues that had been inexplicably raised by the ICA, but not by the parties or the circuit court. 118 Hawai i at 346-47, 189 P.3d at 458-59. Regarding the waived issue, this court stated that [t]his issue was not raised to the court or the ICA at any stage of the appeal. Nor was it presented to this court in the Application.

Moreover, it is inapposite to the disposition herein[.] Id. at 347 n.36, 189 P.3d at 459 n.36 (emphases added). This case is much different in that the estoppel issue was addressed by the court in its ruling, presented to the ICA by Respondent, and is directly related, and thus apposite, to the disposition herein, because it directly concerned one of Petitioners central arguments on appeal.

In Newtown Meadows, the circuit court had issued orders granting summary judgment in favor of the appellees on the basis that the appellant s claim was barred by the applicable statute of limitations. 115 Hawai i at 257, 167 P.3d at 250. On appeal, however, the appellant failed to assign as error the circuit court sorders that granted the appellees motions for summary judgment on that basis. Id. (emphasis added). By contrast, Petitioners in this case have assigned error to the court s order granting summary judgment in favor of Respondent, which contained the court s estoppel conclusion. Assuming that the appellants in Newtown Meadows brought their claims after the time limit set forth by statute, no court would have had the power to hear their claims. In this case, the court s conclusion that Petitioners were estopped from bringing their claims was wrong, and, as discussed at length infra, estoppel cannot be used to make an invalid act valid.

Furthermore, the basis for the conclusions in Wong, E & J Lounge, and Newtown Meadows was Hawai i Rules of Appellate

Procedure (HRAP) Rule 28(b)(4). See E & J Lounge, 118 Hawai i at 347, 189 P.3d at 459 (citing HRAP Rule 28(b) for the proposition that [p]oints not presented in accordance with [HRAP Rule 28] will be disregarded, except that the appellate court, at its option, may notice a plain error not presented and Sprague v. Cal. Pac. Bankers & Ins. Ltd., 102 Hawai i 189, 195, 74 P.3d 12, 18 (2003) for the proposition that [i]t is within the appellate court s discretion whether to recognize points not presented in accordance with HRAP Rule 28(b)(4). (emphases added)); Newtown Meadows, 115 Hawai i at 257, 167 P.3d at 250 (citing to HRAP Rule 28(b)(7) for the proposition that [p]oints not argued may be deemed waived); Wong, 111 Hawai i at 479, 143 P.3d at 18 (citing Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 125, 839 P.2d 10, 31 (1992) (citing HRAP Rule 28(b)(4)(C) (1984))). As discussed infra, HRAP Rule 28(b)(4) specifically allows this court to address plain errors not presented, which includes errors of law.

III.

The anomalous result of the majority s reasoning is that a vote invalid under Robert s will be sustained. Despite agreeing that the pricing policy was not validly adopted[,] majority on validity of the vote at 3, the majority argues that HRS § 514A-82(a)(16) does not substantively govern the specific actions of the association or board of directors, but instead . . . requir[es] that certain provisions be included in an

association s by-laws[,] and, therefore, an association has lawfully complied with HRS § 514-82(a)(16) once it has placed a provision in its bylaws . . . that all association and board meetings shall be conducted in accordance with Roberts. Majority on estoppel at 47 (emphases omitted). That assertion completely undermines the directive in HRS § 514A-82 that association and board meetings be conducted in accordance with Robert s rendering that statute essentially meaningless.

A.

Respectfully, the majority s position is a patent misinterpretation of HRS § 514A-82(a)(16). The majority agrees that the ICA erred in holding that the Association s Board validly adopted the pricing policy vote and that summary judgment should have been granted in favor of Petitioners as to the pricing policy vote. Majority on estoppel at 52. Yet the majority contradictorily claims that compliance with HRS § 514A-82(a)(16) is not dependant upon the actions of the Board or whether the Board s action complied with the By-Laws as applied pursuant to Robert s . . . but only upon thecontents of the by-laws themselves. Id. at 47 (emphases added) (boldfaced emphasis omitted). This is because, according to the majority, HRS § 514A-82 deals only with the contents of association by-laws.

However, to interpret that language as meaning only that an association must place those words in its by-laws, and

not that the association shall also follow those by-laws, i.e., by conducting its meetings in accordance with the most current edition of Robert s (emphasis added), is to distort the plain meaning of HRS § 514A-82(a)(16). Requiring associations only to parrot the language of the statute, without actually conducting meetings in accordance with Robert s nullifies the statutory command. There can be no conceivable purpose in directing associations to adopt specific requirements in their by-laws, without mandating, as a matter of course, that the association also follow those requirements. Compliance with HRS § 514A-82(a)(16) is dependant upon whether the Board obeyed the direction in the By-Laws as applied to Robert s not on whether the association s By-Laws simply restated the language set forth in the statute without regard to whether meetings were held pursuant to the applicable provisions of Robert sor not.

B.

In relevant part, the Modification Section of Robert s states that [b]y modifying the concepts of a majority vote . . . , other bases for determining a voting result can be defined and are sometimes prescribed by rule. Robert s§ 44 at 389 (emphasis added). Section 44 addresses the bases for modifying a majority vote, stating that

> [t]wo elements enter into the definition of such bases for decision: (1) the proportion that must concur . . . ; and (2) the set of members to which the proportion applies--which (a) when not stated, is always the number of members *present and voting* . . . , but (b) can be specified by rule as the number of members present[.]

(Italics in original.) (Emphases added.) As Robert smakes clear, under section 44(2)(a), when not stated, the set of members to which the proportion applies . . . is always the number of members present and voting[.] Id. (emphasis added). But the Association s By-laws didstate the set of members to which the proportion applies as the number of memberspresent. Id. (emphasis added). Thus, as the majority on the validity of the vote supra makes clear, through Article IV, Section 9 of the By-Laws, the Association selected the method in section 44(2)(b), under which the set of members to which the proportion applies . . . can be specified by rule as the number of members present[.] (Emphasis added.)

In this manner, the Association prescribed by rule [an]other bas[i]s for determining a voting result by adopting a members present requirement. The Board, then, was mandated, by virtue of HRS § 514A-82(a)(16), to follow the provision that Robert ssets forth when such a members present requirement applies - that is, by counting the abstaining members as members present and giving abstentions the same effect as a negative vote[.] Id. at 390.

However, contrary to Robert sand the By-laws, and thus HRS § 514A-82(a)(16), the Board did not count abstaining members as present or assign such members abstentions a negative vote effect. To argue, as the majority does, that the By-Laws violation did not also constitute a violation of the statute, is

to ignore that it is HRS § 514A(a)(16) that commands the By-Laws to include the requirement that Robert sbe followed, and thus, to negate the public policy reflected on the face of HRS § 514A-82(a)(16) that association meetings be held in accordance with the relevant provisions in Robert s. HRS § 514A-82(a)(2) mandates that the by-laws prescribe how binding decisions are to be adopted. The By-Laws in this case indicated that the vote of a majority of directorspresent was necessary to take action. To reiterate, under the Modification Section of Robert s, this members present provision required that all abstaining members be counted as present and be given the same effect as a negative vote. Roberts § 44 at 389. As acknowledged by the majority on the validity of the vote, such a provision produces an entirely different result in this case from that reached by the ICA, because the vote on the pricing policy was invalid under both Robert sand the By-Laws.

The same distortion infects the majority s argument that [b]ecause the abstentions were not counted, . . . the pricing policy was approved by a majority of the directors present and voting, majority on estoppel at 49 (emphasis added), which the majority emphasize[s] isa voting method permitted under Robert s,] id. (emphasis added). But simply because a method of voting is described in Robert sdoes not mean that that method is the correct manner of voting in this case, i.e., the particular method specified in the Association s own By-Laws. As

reiterated supra, the Association s By-Laws adopted a members present provision, not a members present and voting provision. Under the majority s approach, any voting method would suffice to validate a Board s action, even one invalid under the Association s own By-laws. Only mischief and chaos can result from such an approach.

IV.

A.

Third, as Petitioners asserted at oral argument, the court s decision that Petitioners were estopped from raising the validity of the vote obviously raises plain error under HRAP Rule 28(b)(4). With regard to civil cases, this court recognized in Fujioka v. Kam, 55 Haw. 7, 9, 514 P.2d 568, 570 (1973), that the general rule that an appellate court should only reverse a judgment of a trial court on the legal theory presented by the appellant in the trial court . . . is not inflexible and . . . an appellate court may deviate and hear new legal arguments when justice requires. (Citations omitted.) (Emphases added.)

As for the standard to be applied, Fujioka, interpreting this court s earlier decisions, set forth a three-factor test, stating that in the exercise of this descretion [sic] an appellate court should determine [(1)] whether the consideration of the issue requires additional facts, [(2)] whether the resolution of the question will affect the integrity of the findings of fact of the trial court[,] and

[(3)] whether the question is of great public import. Id. (citations omitted); see also Okada Trucking Co. v. Bd. of Water Supply, 97 Hawai i 450, 458-59, 40 P.3d 73, 81-82 (2002) (reiterating the three factors); State v. Fox, 70 Haw. 46, 56 n.2, 760 P.2d 670, 676 n.2 (1988) (same); Earl M. Jorgensen Co. v. Mark Const., Inc., 56 Haw. 466, 476, 540 P.2d 978, 985 (1975) (applying the test to issue raised for the first time on appeal from summary judgment which had been adequately briefed and argued before this court as in this case (emphasis added)).

B.

1.

Here, with regard to the first plain error factor, as in Fujioka, the trial court rendered its judgment on a motion for summary judgment[, and t]hus, . . . the resolution of the [estoppel] issue does not require additional facts. See 55 Haw. at 9, 514 P.2d at 570. Thus, as the majority concedes, the first factor of the plain error test is met. Majority on estoppel at 38.

2.

As for the second factor, inasmuch as the court s judgment was based on a motion for summary judgment, there were not any findings of fact in the traditional sense in this case, and thus, there are no findings whose integrity could be affected by an appellate resolution of the estoppel issue. Hence, the second factor weighs in favor of review. This

conclusion is supported by the history of the test, which reveals that the second factor was intended to caution the appellate court against disturbing the integrity of the fact finding process.

The majority disagrees, averring that the second factor of the plain error test weighs against plain error review if the resolution of an issue would not affect the integrity of the findings of fact[.] Id. (emphases in original). Although asserting that several cases . . . support [the majority s] interpretation of the second factor[,] id., the majority concedes that cases in this jurisdiction, including the case in which the rule originated, In re Hawaiian Land Co., 53 Haw. 45, 53, 487 P.2d 1070, 1076 (1971), have applied the second factor in a manner contrary to the majority s view, and thus, the majority concludes that it is evident that this court has inconsistently applied the second plain error factor[,] majority on estoppel at 41. However, the majority believe[s] it appropriate to leave the definitive interpretation to another day because . . . the second factor does not apply in the context of this case. Id. (emphasis in original).

Based on a comprehensive review of the development and application of the rule in this jurisdiction, I must respectfully disagree with the majority inasmuch as (1) our courts have consistently applied the second factor as favoring appellate review where such review does not disturb the integrity of the

court s factual findings, (2) the four cases[5] cited by the majority that have applied the second factor differently have applied it in a manner totally divorced from its original purpose and, thus, present an aberration, and (3) under our case law, the second factor weighs in favor of review in the summary judgment context because, in such cases, the concern first expressed in Hawaiian Land Co., that the appellate court should be hesitant to affect the integrity of the fact finding process, 53 Haw. at 53, 487 P.2d at 1076, is absent.

a.

The plain error test originated in Hawaiian Land Co. In that case, this court set forth the factors for the first time, along with the rationale supporting each factor. This court believed that the foremost consideration was whether appellate review would attack the integrity of the fact finding process, id., i.e., whether such review would disturb the fact finding process that had occurred in the trial court, such as by requiring a new trial. In setting out what has now become the second factor, this court stated that

> [s]everal factors should be considered before exercising the discretion to hear new issues. Perhaps foremost is whether the issue goes to the integrity of the fact finding process. For example, in Kawamoto v. Yasutake, 49 Haw. 42, 410 P.2d 976 (1966)[,] we would not consider an argument on its merits first raised on appeal because the defendant ragued

[5] Despite the majority s claim, there are actually only three cases in which the second factor is applied contrary to its original meaning, as Hill v. Inouye, 90 Hawai i 76, 976 P.2d 390 (1998), does not refer to the affect on the findings of fact, but on the outcome, which does not conflict with the original meaning of the second factor. Whether an error negatively impacted the outcome of a case is always a consideration that weighs in favor of plain error review, as it does in the instant case.

> [sic] prejudicial error emanating from a voir dire question to the jury panel. If the argument were well founded then a whole new trial would be required.

Id. (emphases added).

Unmistakably then, this court believed that it should exercise restraint where review would dismantle the entire fact finding process. Applying the newly formulated test to the facts of that case, it was concluded that

> [a]ll of the above criteria dictate that the interpretation of [HRS] Section 232-3(1) should be considered. Both parties presented extensive evidence and vigorously argued what they felt was the proper valuation of the property thereby fully developing the factual basis. This issue does not attack the integrity of the fact finding process, but only whether the findings justify lowering the assessment. Moreover, as it has been noted above, the parties were required to and did submit supplemental briefs and this issue has been fully and ably argued. Thus, we will consider [HRS] Section 232-3(1).

Id. (emphases added). Hence, in Hawaiian Land Co., review was appropriate because the facts were fully developed, and the appellate analysis would only involve application of HRS § 232-3(1) to the findings that had already been made. The appellate court would not need to engage in any fact finding, nor remand for further factual determinations, and thus, the integrity of the fact finding process was not disturbed. That analysis promotes judicial economy, and recognizes that, generally, the proper role of the appellate court is to decide legal issues on a fully developed record, without disturbing the role of the trier of fact in the fact finding process.[6]

[6] Following Hawaiian Land Co., this court in Akamine & Sons, Ltd. v. Hawaii National Bank, Honolulu, 54 Haw. 107, 115, 503 P.2d 424, 429 (1972), interpreting the integrity of the fact finding process factor, held that where the issue in question does not go to the integrity of the fact finding

(continued...)

Subsequently, in Fujioka, although this court slightly reformulated the test as it was expressed in the previous cases, it continued to apply the second factor in the same manner. In that case, the defendants, on appeal from the circuit court s grant of summary judgment, for the first time attacked the constitutionality of [a] statute limiting the liability of contractors and engineers. 55 Haw. at 9, 514 P.2d at 569-70. The Fujioka court determined that the second factor was not a matter of concern in that case, inasmuch as there were no findings of fact, concluding that

> [h]ere, the trial court rendered its judgment on a motion for summary judgment. Thus, there is no material fact in issue and the resolution of the constitutional issue does not require additional facts. Further, we believe that the constitutionality of the statute is of great public import,

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[6](...continued)
process, we should be less hesitant to reverse a trial court judgment based on theory of law or arguments which may not have been argued before the trial court. (Emphasis added.) Thus, Akamine properly recognized that an issue of law, which does not affect the integrity of the fact finding process that occurred in the trial court, is an issue appropriate for appellate review.

The next case to apply the test was Greene v. Texeira, 54 Haw. 231, 235, 505 P.2d 1169, 1172 (1973), wherein this court formulated the test as

> three factors which should be considered before allowing a decision on an issue not raised in the opining [sic] brief: (1) whether the issue goes to the integrity of the fact finding process; (2) to what extent an error may have been correctable if properly raised; and (3) whether the issue involves questions of fact that were not but could have been fully developed in the trial court. . . . If none of these factors are present, it is well within our discretion to hear new legal arguments, especially if it involves a question of great public import.

(Emphases added.) As to what impact this court s review would have on the fact finding process, this court stated that [o]verruling [of the precedent at issue] by this court merely rendered trial of one issue, that concerning decedent s excess earnings, superfluous. Id. (emphases added). Thus, the Greene court apparently believed its review would only impact the fact finding process minimally, inasmuch as it only rendered the trial of a single issue superfluous.

> and therefore we will consider the issue, though it was raised for the first time before this court.

Id. at 9-10, 514 P.2d at 570 (emphases added). Manifestly, this court determined that the fact that on a summary judgment record, resolution of the question would not disturb any findings of the court, and, accordingly, no additional fact finding would be necessary, weighed in favor of this court s review, consistent with Hawaiian Land Co., Greene, and Akamine.

Two years after Fujioka, in Jorgensen, the test was again applied to an issue raised for the first time on appeal from a motion for summary judgment. In Jorgensen, the defendant, a construction company, argued that a limitation of liability clause in a contract should have been voided because of the failure of the plaintiff to perform its part of the bargain. 56 Haw. at 475, 540 P.2d at 985. This court decided to address the issue, inter alia, because, pursuant to the second factor, such consideration would not affect the integrity of any findings of fact[,] stating that

> [w]e have before us an appeal from a summary judgment. On a motion for summary judgment, the trial court does not try factual issues; rather, it determines whether there are any such issues to be tried. The consideration of this issue raised for the first time on appeal will not affect the integrity of any findings of fact of the trial court. No additional facts are necessary to a determination by this court of this issue.

Id. at 476, 540 P.2d at 985 (citations omitted) (emphases added).

To reiterate, the cases wherein this court first introduced the standard expressly held that the goal of the appellate court is not to disturb the integrity of the fact-

finding process, a role traditionally assigned to the trial court. Thus, as in Fujioka and Jorgensen, in this case, on appeal from a summary judgment motion, the first two factors weigh in favor of plain error review, inasmuch as [n]o additional facts are necessary and consideration . . . will not affect the integrity of any findings of fact[.] See id.; see also Cabral v. McBryde Sugar Co., 3 Haw. App. 223, 226-27, 647 P.2d 1232, 1234 (1982) (addressing issue of whether the defendant was strictly liable for damages, raised for the first time on appeal, because resolution of the issue by this court would not affect the integrity of the findings of fact).

b.

Despite the above precedent, the majority argues to the contrary,[7] citing to Montalvo v. Lapez, 77 Hawai i 282, 884 P.2d 345 (1994), Shanghai Investment Co. v. Alteka Co., 92 Hawai i 482, 993 P.2d 516 (2000), overruled on other grounds by Blair v. Ing, 96 Hawai i 327, 31 P.3d 184 (2001), Office of Hawaiian Affairs v. State, 96 Hawai i 388, 31 P.3d 901 (2001) [hereinafter OHA], and Hill, in support of its position. See majority on estoppel at 38-39. The four cases cited by the majority

[7] The majority s application of its version of the second factor to the instant case demonstrates the fallacy in its reasoning. Here, as the majority concedes, the issue is purely one of law, which can be decided based on a factual record that is undisputed, without disturbing the fact finding process. Such review is consonant with the proper role of appellate courts to decide issues of law, and not to meddle with the court s findings, making review in this case particularly appropriate. To say that instead it would be appropriate for this court to review if facts were disputed, thus requiring this court to delve into factual issues or attack findings of fact made below defies logic and is contrary to the appropriately limited role of appellate courts.

inexplicably departed from the correct application of the second factor, but in subsequent numerous cases, the second factor has been correctly applied as it had been in the numerous preceding cases.

As to Montalvo, the defendants argued for the first time on appeal that the trial court had erred in failing to instruct the jury on the definition of legal cause, because their entire case hinged on what injury was legally caused by the accident. 77 Hawaii at 291, 884 P.2d at 354. The second factor was said to weigh in favor of plain error review because

> [t]he error . . . affect[ed] the integrity of the jury s findings. [8] Id.

Similarly, in Shanghai Investment, the plaintiff argued for the first time on appeal that the court had erred in allowing the defendant to make prejudicial statements during closing argument. 92 Hawai i at 498, 993 P.2d at 532. This court decline[d] to notice plain error as to this issue because the trial court s refusal to preclude [the defendant s] counsel s commentary . . . did not substantially affect the

[8] Thus, it is incorrect to say, as the majority does, that in [Montalvo], this court reached the opposite conclusion as that set forth in Hawaiian Land [Co.] and Jorgensen, majority on estoppel at 38-39, inasmuch as Montalvo was concerned with whether the error had affected the integrity, or more aptly, the accuracy, of the jury s findings. Because it appeared that the court s error may have led the jury toinaccurate conclusions, this court determined that review was appropriate. As discussed more fully infra note 10, this is a type of harmless error analysis. Thus, it is not oppos[ed] to Hawaiian Land Co., inasmuch as Hawaiian Land Co. was concerned with whether appellate review would attack the fact finding process that was engaged in by the court below, not whether the error itself might have caused the jury to reach an incorrect result.

integrity of the jury s findings. Id. at 499-500, 993 P.2d at 533-34.

Notably, Montalvo applied the second factor in a completely novel manner, contrary to twenty years of prior established precedent, without stating any rationale for such a departure, and without acknowledging that every single prior case had applied the factor in a way that was entirely inconsistent with the approach taken in Montalvo. This court s application of the second factor in Montalvo and Shanghai Investment,[9] which in both cases was done without any analysis or support, represented an anomalous departure from earlier cases. In fact, both cases appeared to be concerned with whether the outcome of the case had been affected by the trial court s error, a consideration markedly different from the original purpose behind the second factor as set forth in Hawaiian Land Co.[10] Therefore, in relying

[9] It should be noted that neither case involved an appeal from summary judgment.

[10] The majority s position reflects that offormer Justice Levinson s dissent in Honda v. Board of Trustees of the Employees Retirement System of the State, 108 Hawai i 212, 242 n.14, 118 P.3d 1155, 1183 n.14 (2005) (Levinson, J., dissenting, joined by Moon, C.J.), which stated that this court has inconsistently applied the second [] factor. In accord with Montalvo and Shanghai Investment, Justice Levinson believed that the second factor should be directed toward whether the error itself negatively impacted the court s findings because it would be illogical to notice plain error that would not affect the integrity of the trial court s [findings of fact], inasmuch as such error would be harmless. Id. (emphasis added).

But the harmless error test is not concerned with whether the error affected findings of fact. To the contrary, where the trial court erred in making a factual finding, generally the appellate court will affirm, unless such error had an affect on the outcome. See, e.g., Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai i 214, 243, 948 P.2d 1055, 1084 (1997) (holding that even when a trial court abuses its discretion in a civil trial by giving the jury an inappropriate remedial instruction, we will nevertheless affirm the jury s verdict when it appears from the record as a whole that it is not reasonably likely that an outcome more favorable to the defendant would have

(continued...)

on Montalvo and Shanghai Investment, the majority s interpretation of the second factor rests on an unexplained and usupported departure from precedent, for which the majority itself offers no supporting rationale.

The majority also relies on OHA, in which the Office of Hawaiian Affairs (OHA) sought a share of the revenue that the State derived from its operation of airport lands held in trust by the State for the benefit of native Hawaiians. 96 Hawai i at 389, 31 P.3d at 902. The circuit court granted summary judgment in favor of OHA, and, on appeal, the State argued for the first time that a federal law bar[red] the State from using monies derived from the State s airport system to pay OHA. Id. at 396, 31 P.3d at 909. In a footnote, this court stated that [b]ecause the effect of the [federal law] is purely a question of law, the

[10](...continued)
resulted absent the error);Wright v. Wright, 1 Haw. App. 581, 584, 623 P.2d 97, 100 (1981) (While we agree that . . . the finding . . . is clearly erroneous, we do not think that reversal is required. Erroneous findings of fact that are unnecessary to support the decision and judgment of the trial court are not grounds for reversal.). Thus, Justice Levinson s statement of harmless error was incorrect.

However, it is useful to view the application of the second factor in Montalvo and Shanghai Investment, as well as Hill, as a form of harmless error analysis, inasmuch as in those cases, the question could be properly stated as whether the error potentially impacted the outcome in the case and thus, was not harmless. While whether the error is harmless may be an appropriate consideration in determining whether to review for plain error, it is a totally separate and distinct consideration from that embodied in the second factor, as it was originally set forth in Hawaiian Land Co., and has been affirmed many times since. The second factor does not focus on whether the error was harmless, but is concerned with preserving the proper role of an appellate court, to exercise restraint in determining whether to disturb a trial court s findings of fact. Thus, while the consideration of harmless error in the aforementioned cases was not necessarily inapposite to the determination of whether plain error should be noticed, it did not represent a sound application of the second factor.

outcome of which will affect the integrity of the circuit court s findings of fact, and is a matter of great public import, we will exercise our discretion in addressing the matter. Id. at 396 n.12, 31 P.3d at 909 n.12 (emphasis added) (citing Fujioka, 55 Haw. at 9, 514 P.2d at 570).

Despite OHA s reference to the circuit court s findings of fact, nowhere in the remainder of the opinion are any findings by the circuit court discussed. Indeed, because OHA involved an appeal from the circuit court s grant of summary judgment, it is not clear whether the circuit court made any findings. Thus, this court s application of the test inOHA offers no ascertainable standard or guidance on how to apply the factors in this case. Furthermore, like Fujioka and Jorgensen, OHA involved an appeal from the circuit court s grant of summary judgment in which this court, applying the test, reviewed an argument raised for the first time under the plain error doctrine.

As to Hill, in that case the family court refused to grant a temporary restraining order (TRO) after applying HRS § 586-4, which requires a showing of recent acts of abuse rather than HRS § 586-3, which does not require such a showing. 90 Hawai i at 77, 976 P.2d at 391. The plaintiff argued for the first time on appeal that the family court improperly required her to show recent acts of abuse. Id. at 82, 976 P.2d at 396. This court decided to address the issue because (1) additional

facts [were] not required . . . [,] [(2)] our discussion . . . directly affects the family court s outcome in this case, and [(3) of] the importance of petitions for protection from domestic abuse[.] Id. (emphasis added).

The majority s reliance on Hill is plainly incorrect, inasmuch as Hill actually supports review for plain error in the instant case. Assuming, arguendo, that Hill s point (2) is an interpretation of the second factor, it means that the plain error doctrine should be applied if this court s discussion will

> directly affect[] the [court s] outcome in this case. Id.

Clearly, this court s discussion of the Board s vote will have a direct effect on the outcome of this case, because, as noted in the majority on the validity of the vote, summary judgment should have been granted in favor of Petitioners. Thus, assuming that Hill s interpretation of the second factor is correct, the second factor weighs in favor of plain error review.

In sum, the cases cited by the majority represent an unexplained departure from the fundamental purpose of the rule as set forth in Hawaiian Land Co. and expressed in Fujioka. The majority does not attempt to offer any rationale to support its conclusion that the interpretation of the factor as it was applied in only a few cases is the better rule, as opposed to the numerous cases that have followed the original application of the standard.

c.

Furthermore, contrary to the majority s claim regarding this court s inconsistent[] appl[ication] of the second factor, this court, along with the ICA, and even other courts, has in fact consistently applied the second factor, as it was set forth in Hawaiian Land Co. See, e.g., Paul v. Dep t of Transp., State of Hawai i, 115 Hawai i 416, 428, 168 P.3d 546, 558 (2007) (concluding that the first two factors were met, but the third was not, stating that [the petitioner s] argument . . . does not necessitate any additional fact-finding on this court s part, and our resolution of it will not affect the integrity of the findings of fact of the [circuit] court, [b]ut neither is the question of great public import (internal quotation marks and citation omitted)); State v. Hicks, 113 Hawai i 60, 74-75, 148 P.3d 493, 507-08 (2006) (concluding that [a]lthough this court s consideration of the constitutionality of the sexual assault statutes would not (1) require additional facts or (2) affect the integrity of any factual findings of the trial court, declining review because we have considered the constitutionality of HRS § 707-700 on the grounds of vagueness or overbreadth in the past); In re Waikoloa Sanitary Sewer Co., 109 Hawai i 263, 276, 125 P.3d 484, 497 (2005) (concluding that [r]esolution of [the a]ppellant s miscalculation issue for the first time on appeal would compromise the integrity of the Commission s previously rendered findings and therefore weighs against this court's

recognition of plain error);Ass n of Apartment Owners of Wailea Elua v. Wailea Resort Co., 100 Hawai i 97, 107-08, 58 P.3d 608, 618-19 (2002) (citing Fujioka as demanding consideration of whether the resolution of the question will affect the integrity of the findings of fact of the trial court and declining to review because [u]nlikeFujioka, full consideration of the [issue] raised by [the appellant] in this appeal will require additional facts, as illustrated by the fact that [the appellant] itself relied on evidence adduced [subsequent to summary judgment] to present its argument on appeal);Birmingham v. Fodor s Travel Publ ns, Inc., 73 Haw. 359, 372 n.7, 833 P.2d 70, 77 n.7 (1992) (concluding that [b]ecause the determination of the strict liability claim requires no additional facts, the trial court rendered no findings of fact, and the issue is one of first impression in this jurisdiction, we would be justified in addressing this issue on appeal even if it had not been raised in the court below);Jorgensen, 56 Haw. at 475-76, 540 P.2d at 985; Fujioka, 55 Haw. at 9, 514 P.2d at 570; Greene, 54 Haw. at 235, 505 P.2d at 1172; Akamine, 54 Haw. at 115, 503 P.2d at 429; Right to Know Comm. v. City Council, City & County of Honolulu, 117 Hawai i 1, 14, 175 P.3d 111, 124 (App. 2007) (noticing plain error because the [p]laintiffs request . . . calls for no additional facts[, r]esolving this question will not affect the integrity of the findings of fact of the circuit court, and the question is of great public import);State v. Kapela, 82 Hawai i 381, 392, 922

P.2d 994, 1005 (App. 1996) (concluding that [b]ecause the determination of [the d]efendant s challenge to the constitutionality of HRS § 709-906 does not involve any material factual issue, and the constitutionality of the statute against domestic violence is of great public import, we will consider [the d]efendant s claim even though it was raised for the first time before this court);Hong v. Kong, 5 Haw. App. 174, 177, 683 P.2d 833, 837 (1984) (Here, consideration of the new issue will affect the integrity of the findings of fact . . . . The new issue, furthermore, is of no great public import. Consequently, we exercise our discretion and decline to consider the issue); Cabral, 3 Haw. App. at 226-27, 647 P.2d at 1234 (stating that

[i]n deciding whether justice requires otherwise, we are required to determine whether consideration of the issue requires additional facts, whether the resolution of the question will affect the integrity of the findings of fact, and whether the question is of great public import[,] and that [i]n this case we answer the questions no, no, and yes, respectively, and hold that justice requires us to consider the strict liability issue (citation omitted)); Scheid v. State Bd. of Tax Comm rs, 560 N.E.2d 1283, 1285-86 (Ind. Tax 1990) (citing Hawaiian Land Co. as stating that [p]erhaps foremost is whether the issue goes to the integrity of the fact finding process[,] and declining to review the issue, inter alia, because [i]t is the integrity of

the process by which these facts were found, rather than the facts themselves, with which this court is concerned).

Opposed to the majority s claim, then, the overwhelming weight of authority, both past and recent, has interpreted the second factor consistently with the principles originally set forth in Hawaiian Land Co., and, thus, the four cases cited by the majority which interpret it differently are an inexplicable aberration.

d.

In spite of the majority s belie[f] as to the second factor of the plain error test noted above, the majority ultimately concludes that the second factordoes not apply in the context of this case. Majority on estoppel at 41 (emphasis in original). The majority relies on Justice Levinson s dissent in Honda, in which Justice Levinson ruminated at length on this court s application of the second factor. See Honda, 108 Hawai i at 242, 118 P.3d at 1183 (Levinson, J., dissenting, joined by Moon, C.J.). Justice Levinson claimed that Jorgensen and Fujioka involved appeals from orders granting summary judgment, there were no [findings] in those cases and the second prong of the Fujioka test did not apply. Id.

However, Justice Levinson in Honda and the majority in this case ignore the fact that neither *Jorgensen* nor *Fujioka* held that the second factor did not apply. Instead, in both cases, this court determined that the second factor weighed in favor of

plain error review precisely because they involved motions for summary judgment. In Jorgensen, this court decided to hear an issue raised for the first time on appeal, inter alia, because the case involved an appeal from a summary judgment, and [t]he consideration of th[e] issue . . . [would] not affect the integrity of any findings of fact of the trial court . 56 Haw. at 476, 540 P.2d at 985 (emphasis added). Similarly, Fujioka, in applying the plain error test and addressing an issue not raised in the trial court, noted that the trial court rendered its judgment on a motion for summary judgment[,] and [t]hus, there [was] no material fact in issue and the resolution of the [] issue d[id] not require additional facts. 55 Haw. at 9, 514 P.2d at 570 (emphasis added).

Like Jorgensen and Fujioka, this case involves an appeal from a summary judgment ruling. Therefore, contrary to the majority s assertion that the second factor is inapplicable, by applying the policy behind the second factor set forth in Hawaiian Land Co., and reiterated in Jorgensen and Fujiokoa, as well as numerous subsequent cases, it is apparent that the second factor weighs in favor of plain error review in this case, because, in the summary judgment context, appellate review does not attack the integrity of the fact finding process, Hawaiian Land Co., 53 Haw. at 53, 487 P.2d at 1076, or affect the integrity of the findings of fact of the trial court, Fujioka, 55 Haw. at 9, 514 P.2d at 570.

3.

a.

As for the third factor, the legislature has dictated that Robert s should apply to condominium association voting requirements. Consequently, the court s estoppel conclusion was wrong inasmuch as Petitioners cannot be estopped from challenging a vote that was unlawful, merely because they agreed that the Board had authority to set the pricing policy. In this case, the Board s vote, under HRS § 514A-82(a)(16), the By-Laws, and Robert s did not in fact authorize the current pricing policy, but rejected its adoption. Therefore, by disputing the improper vote, Petitioners were not challenging the Board s authority, but in fact upholding it, by enforcing the requirement in the By-Laws, as applied under HRS § 514A-82(a)(16), that a majority of the Board members present vote in favor of the policy.

Hence, to uphold HRS § 514A-82(a)(16), this court must notice the court s error on the estoppel issue. The court s mistake was one of law, inasmuch as the court incorrectly applied the estoppel doctrine, and foreclosed Petitioners from challenging an illegal action - a prohibited application of the estoppel principle. See discussion infra. The majority disagrees, concluding that Petitioners right to contest the validity of the Board s voting procedure does not constitute a matter of public interest because (1) such right is of a private nature and (2) the issue applies exclusively to the facts

and circumstances of Petitioners case. Majority on estoppel at 43. Additionally, the majority argues that the court s conclusion of law regarding estoppel was applicable exclusively to Petitioners because it was based upon their individual acquiescence to the amendment to the Declaration. Id.

b.

In Jorgensen, this court reviewed the issue because it was one of first impression in this jurisdiction, and call[ed] for the interpretation and elucidation of HRS [§] 490:2-719(2). 56 Haw. at 476, 540 P.2d at 985; see also Greene, 54 Haw. at 235, 505 P.2d at 1172 (The great importance to the public of a proper interpretation of Hawaii s Survival Statute is obvious.). Similarly, in this case, the proper interpretation of HRS § 514A-82(a)(16) is a matter of great public importance, one of first impression, and a matter upon which the majority agrees that the ICA gravely erred.

The majority s estoppel ruling extends beyond Petitioners case. HRS § 514A-82(a)(16) and Robert s apply not only in this case, but to all Associations of Apartment Owners and their governance. Allowing the resulting vote to stand conflicts with HRS § 514A-82(a)(16), and generally sanctions estoppel as an override of statutorily mandated voting procedures. The majority s holding prevents Association of Apartment Owners (AOAO) members from challenging the illegal action of an AOAO. As a result, estoppel undermines the public

policy in HRS chapter 514A of fostering the orderly and fair disposition of controversies in the large number of AOAO communities, in accordance with Robert s[11] See White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346, 350 (Fla. 1979) (Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization. (Citation omitted));Thanasoulis v. Winston Towers 200 Ass n, 542 A.2d 900, 903 (N.J. 1988) (One aspect of condominium ownership that distinguishes it from other types of property interests, however, is the role of the condominium association. . . . In essence, an association is responsible for the governance of the common areas and facilities . . . . It is a representative body that acts on behalf of the unit owners.); Levandusky v. One Fifth Ave. Apartment Corp., 553 N.E.2d 1317, 1320 (N.Y. 1990) (As courts and commentators have noted, the cooperative or condominium association is a quasi-government-a

[11] According to the majority, no other AOAO community will be negatively impacted by our holding as to the estoppel issue because it is exclusive to the distinct facts and circumstances of the present case. Majority on estoppel at 43 (emphasis in original). This is plainly wrong. Permitting the court s erroneous conclusion of law to stand in this case will frustrate the public policy in HRS chapter 514A regarding the efficacy of all AOAO by-laws.

For example, in Hill, this court reviewed the plaintiff s contention that the family court erred in applying a particular statute to the decision of issuing a TRO because of the importance of petitions for protection from domestic abuse[.] 90 Hawaii at 82, 976 P.2d at 396. In Hill, upholding the family court s erroneous application of the statute would have undermined the public policy of protecting victims from abuse. Similarly, and inconsistent with Hill, the majority permits the court s erroneous estoppel ruling to abrogate the public policy in favor of the ordered disposition of controversies as set forth in HRS chapter 514A.

little democratic sub society of necessity . . . . Like a municipal government, . . . governing boards [of AOAOs] are responsible for running the day-to-day affairs of the cooperative . . . . (Internal quotation marks and citation omitted.)).

Permitting the invalid pricing policy to remain uncorrected, means for all AOAOs (1) that HRS § 514A-82, Contents of bylaws, is superseded by the estoppel doctrine, and (2) HRS § 514A-82(a)(16) has little impact on the governance of AOAOs, inasmuch as, under the majority s formulation, AOAOs need only repeat the words of the statute in their by-laws, but not actually follow those provisions. Hence, although this court, in the majority on the validity of the vote, holds that the pricing policy was not validly adopted under the By-Laws, the majority completely undermines that holding by ignoring it in the majority s section on estoppel. Thus, the majority s ruling calls into question the viability of all AOAO bylaws, by sustaining a violation of HRS § 514A-82(a)(16).

C.

The error of rejecting plain error review is compounded since no prejudice would result to either side by noticing plain error. There is no prejudice to Respondent, inasmuch as Respondent had ample opportunity to assert estoppel against Petitioners on appeal, but it did not. As explained supra, Respondent in fact did not interpret the court s estoppel conclusion as preventing Petitioners from arguing that the vote

was unlawful. Petitioners represented at oral argument that they were also under the same impression, and did not believe they were precluded by the court s estoppel conclusion from arguing the validity of the Board s vote. Additionally, the voting question was already the subject of legal inquiry and research as presented and argued by the parties before the ICA and this court. See Ford v. United States, 533 A.2d 617, 624 (D.C. Cir. 1987); Hawaiian Land Co., 53 Haw. at 53, 487 P.2d at 1076 (reviewing the error for the first time on appeal because [b]oth parties presented extensive evidence and vigorously argued what they felt was the proper valuation of the property thereby fully developing the factual basis[,] and this issue has been fully and ably argued). For that reason it is incumbent upon this court to grant plain error review because all three prongs for such review are satisfied. See, e.g., Hawaiian Land Co., 53 Haw. at 53, 487 P.2d at 1076.

V.

Fourth, the court s estoppel ruling is wrong as a matter of law, because, although Petitioners agreed to the Board sauthority to establish the sales price for the properties, they cannot be legally precluded from appealing a vote that is violative of both the By-Laws and HRS § 514A-82(a)(16).[12] The court s and the ICA s holding to the contrary

[12] According to the majority, even if the [court s] estoppel ruling was wrong as a matter of law, . . . any view as to the correctness or incorrectness of the [court s] ruling is irrelevant because it is bound by (continued...)

left Petitioners at the mercy of a vote that is a nullity, as recognized by the majority.

A.

1.

Our precedent dictates that the equitable doctrine of estoppel cannot be used to prevent a party from challenging an illegal act. In Godoy v. Hawaii County, 44 Haw. 312, 354 P.2d 78 (1960), the plaintiff bus operator had agreed to an arrangement passed by the defendant Bus Control Committee, called the Mabuni Plan, and this court therefore concluded that he was estopped

> from maintaining that he was overcharged [under the plan] by the committee.

Id. at 318, 354 P.2d at 81. The plaintiff had taken advantage of a reduction in operating costs, and was in fact

> in favor of and urged the adoption of the Mabuni Plan[,] and therefore he was estopped from subsequently challenging the same plan.[13]

Id.

Godoy recognized that estoppel cannot make valid that which the [c]onstitution and laws of a state make absolutely

[12](...continued)
the standard for invoking plain error sua sponte. Majority on estoppel at 45 n.23. In this case, as discussed at length supra, the test weighs in favor of plain error review, and thus, the fact that the court s estoppel ruling was wrong as a matter of law is directly relevant, inasmuch as that is the decision this court should review for plain error.

[13] It could be argued that, under Godoy, Petitioners are estopped from challenging Respondent s vote setting the pricing policy because they were in favor of the amendment which allowed Respondent to set prices. However, Godoy is distinguishable in that the plaintiff had specifically urged the adoption of the very plan he then challenged, whereas Petitioners here never voted in favor of the particular pricing policy adopted.

invalid. Id. at 324, 354 P.2d at 84. In Godoy, this court concluded that this rule was not violated, as it does not cover the kind of situation we have in this case, where the purported illegality consists only of a lack of authority in the Bus Control Committee to fix the rate for parking fees. Id. (emphases added). However, Godoy declared that where instead the issue asserted is a violation of a decisive prohibition of statute[,] estoppel cannot be invoked. See id.

2.

The rule that estoppel cannot make valid that which the . . . laws of a state make absolutely invalid[,] id. (internal quotation marks and citation omitted), was not applied in Godoy. Several other courts, however, have affirmed the proposition in Godoy that [n]ot even estoppel can legalize or vitalize that which the law declares unlawful and void, id. (citations omited), under circumstances where the proposition was applied.

For example, the Massachusetts Supreme Court in Commissioner of Banks v. Cosmopolitan Trust Co., 148 N.E. 609 (Mass. 1925), held that estoppel could not be used to give validity to shares of stock, where the corporation [was] absolutely without power to increase its capital stock, concluding that

> [a]cquiescence cannot clothe with legality a positively illegal act. One cannot ordinarily be estopped to assert the direct violation of a decisive prohibition of statute or the unenforceability of a contract contrary to law. When a corporation is absolutely without power to increase its

> capital stock, acquiescence cannot give validity to shares nor bind an apparent holder of such stock to the liabilities of a genuine stockholder.
>
> A distinction must be made between shares which the company had no power to issue and shares which the company had power to issue, although not in the manner in which, or upon the terms upon which, they have been issued. The holders of shares which the company has no power to issue, in truth had nothing at all, and are not contributors.

Id. at 614 (citations omitted) (emphases added). As in Commissioner of Banks, in this case, Petitioners acquiescence in the amendment to the By-Laws authorizing Respondent to set a pricing policy did not give validity to a vote that was absolutely void, inasmuch as the Board was without power to set a pricing policy absent a valid majority.

Similarly, in Appon v. Belle Isle Corp., 46 A.2d 749, 760 (Del. 1946), the Delaware Supreme Court addressed the question of whether the[] two defenses [of unclean hands and estoppel] . . . preclude the complainants from attacking the legality of the May 27 agreement on the ground that it violates Section 18 of the General Corporation Law of Delaware. That court concluded that those defenses could not preclude attack on the agreement as illegal, stating that

> [i]f the public policy of the state as it is incorporated in a statute will be frustrated by denying relief, based for instance on the defense of the clean hands doctrine, the court will not apply the doctrine. . . . The equitable rule that he who comes into equity must come with clean hands has no application where its enforcement would result in maintaining an act declared by statute to be void or against public policy. The same rule applies to estoppel.

Id. at 760 (citations omitted) (emphases added). According to that court, because the public policy of the State with respect to voting trusts was expressed in the statute, it must set aside

[the] agreement as violative of the statute, despite facts which would otherwise justify an estoppel :

> It would appear, therefore, that the public policy of the State of Delaware towards voting trusts is incorporated in Section 18 and this public policy would be frustrated in part if a court were to prevent a person otherwise having a proper standing to complain from asserting that a particular voting trust agreement violates Section 18 because . . . there are facts which would otherwise justify an estoppel. While it is evident that in such a situation the court is met with two conflicting policies, nevertheless, the courts resolve the conflict in favor of the public policy of the state as set forth in the statute and set aside an agreement in violation thereof.

Id. at 761 (emphases added). Thus, Appon concluded that because the complainants are attacking the legality of an agreement which violates the public policy of the state, as reflected by Section 18, they may not be prevented from asserting such illegality because of the existence of facts which would otherwise call for the application of . . . estoppel[,] and thereby held that the agreement of May 27 is a legal nullity[.] Id..

B.

Analogously, in this case, the legislature adopted a policy in HRS § 514A-82(a)(16) of requiring that AOAO by-laws apply Robert sto conduct meetings. Respondent itself opted in its By-Laws to adopt specific voting requirements. In this case, the vote is declared by statute [and the By-Laws] to be void. Thus, to confirm the invalid vote by the Board would contravene the policy embodied in HRS § 514A-82(a)(16). See also Tobacco By-Prods. & Chem. Corp. v. W. Dark Fired Tobacco Growers Ass n, 133 S.W.2d 723, 726 (Ky. App. 1939) (holding that a court may not

clothe with legality a contract that is absolutely illegal and void even by the application of the doctrine of equitable estoppel. If through the application of that doctrine courts can bring about a result expressly forbidden by constitution and statute on the ground of public policy, then estoppel does what public policy and the law has forbidden (emphasis added));State v. Nw. Magnesite Co., 182 P.2d 643, 656 (Wash. 1947) (It follows, from what we have said, that the promise or agreement of 1934 was not authorized by our statutes then in force, and was indeed contrary to the policy of those legislative enactments, and, hence, was illegal. The contract being illegal, the respondents may not invoke the doctrine of estoppel to enforce it. (Emphasis added.)).[14]

[14] American Jurisprudence has distilled the concept from the above-cited cases, explaining that

> certain considerations of public policy are properly invoked to prevent the application of the rule of estoppel. For example, an estoppel may not be raised against a state if the application thereof will result in impeding the administration of the government or prevent the exercise of the police power of the state. Estoppel cannot, any more than private contract, be the means of successfully avoiding the requirements of legislation enacted for the protection of a public interest. It does not operate to defeat positive law or public policy. Therefore, substantive rules based on public policy sometimes control the allowance or disallowance of estoppel. The courts must weigh the public interest frustrated by the estoppel against the equities of the case. Moreover, one cannot ordinarily be estopped to assert the direct violation of a decisive prohibition of statute or the unenforceability of a contract contrary to law.

28 Am. Jur. 2d Estoppel and Waiver § 32, at 462 (2000) (emphases added).

C.

The majority claims that there was no violation of a statute or constitutional provision of law in the instant case[,] majority on estoppel at 51, inasmuch as it cannot be said . . . that the pricing policy vote was unlawful under HRS § 514A-82, id. at 49, the pricing policy vote was conducted in accordance to Robert s, id. at 48, and the By-Laws themselves complied with HRS § 514A-82(a)(16), id. at 49. As discussed more fully supra, that argument is groundless, because HRS § 514A-82 is intended to apply to the [c]ontents of bylaws and HRS § 514A-82(a)(16) dictates that Robert sapplies. In accordance with the By-Laws that adopted a members present provision, the vote was invalid under the Modification Section of Robert s and therefore, also invalid under HRS § 514A-82. Hence, the majority is simply wrong in arguing that allowing the vote to stand would not frustrate the policy embodied in Chapter 514A. Id. Based on its reading of HRS § 514A-82(a)(16), the majority concludes that any further reference to HRS § 514A-82 -- specifically, subsection (a)(16), -- for the purpose of determining whether a board complied with its by-laws and conducted its meetings in accordance with Robert sis unnecessary. Id. at 46-47. To the contrary, it is because of the statutory requirement embodied in HRS § 514A-82(a)(16) that the By-Laws require that meetings be conducted in accordance with Robert s Thus, whether the Board s meeting in fact complied

with the By-Laws and Robert sis directly relevant to whether the Association complied with HRS § 514A-82(a)(16). It would be legally absurd to construe the statute as containing only empty requirements; instead, those requirements must in fact be applied. See County of Hawai i v. C & J Coupe Family Ltd. P ship, 119 Hawai i 352, 362, 198 P.3d 615, 625 (2008) (The canons of statutory construction [] require this court to construe statutes so as to avoid absurd results. (Internal quotation marks and citation omitted.))

For this reason, the majority s attempt to distinguish Commissioner of Banks, Appon, and Tobacco By-Products from the instant case on the basis that [i]n each of these cases, there was a clear violation of a constitutional or statutory provision[,] majority on estoppel at 51,is mistaken. As discussed above, by failing to apply the correct Robert s provision as dictated by the By-Laws, the Board violated HRS § 514A-82(a)(16). Thus, like those cases, the application of estoppel in this case, which allows the Board to violate HRS § 514A-82(a)(16), will frustrate the public policy establishing uniform governing procedures for AOAOs in HRS chapter 514A. In sum, estoppel cannot be used to prevent Petitioners from challenging a vote that was unlawful under a state statute, because otherwise estoppel does what the public policy and the law has forbidden. Tobacco By-Prods., 133 S.W.2d at 726.

VI.

For the foregoing reasons, the ICA s grave error as to the validity of the vote on the pricing policy should be reversed, the court s judgment vacated and the case remanded.[15]

[15] Inasmuch as I would vacate and remand the court s decision on the basis that the Board s vote did not validly adopt the pricing policy, I do not reach the questions of whether the pricing policy violates the By-Laws or HRS chapter 514C. Additionally, because summary judgment should have been entered in favor of Petitioners on the issue of the Board s vote, I would vacate and remand for a redetermination of the court saward of attorney s fees and costs.