

IN THE SUPREME COURT OF THE STATE OF HAWAII

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ALVAREZ FAMILY TRUST; SERGIO S. ALVAREZ
AND MARGARET J. ALVAREZ,
Petitioners/Plaintiffs-Appellants

vs.

ASSOCIATION OF APARTMENT OWNERS
OF THE KAA NAPALI ALII,
Respondent/Defendant-Appellee

and

JOHN DOES 1-100; JANE DOES 1-100;
DOE PARTNERSHIPS 1-100; DOE CORPORATIONS 1-100;
AND DOE ENTITIES 1-100, Defendants

NO. 27695

CERTIORARI TO THE INTERMEDIATE COURT OF APPEAL
(CIV. NO. 05-1-0013)

DECEMBER 11, 2009

MOON, C.J., NAKAYAMA, ACOBA, AND DUFFY, JJ.,
AND CIRCUIT JUDGE NISHIMURA, ASSIGNED BY REASON OF VACANCY

OPINIONS OF THE COURT

Petitioners/Plaintiffs-Appellants Alvarez Family Trust, Sergio S. Alvarez and Margaret J. Alvarez (Petitioners) brought an action in the circuit court of the second circuit (the court)¹ claiming (1) that a vote taken by the Board of Directors (the Board) of Respondent/Defendant-Appellee Association of Apartment

¹ The Honorable Joseph E. Cardoza presided.

Owners of the Kaanapali Alii (Respondent or the Association) at a January 30, 2004 meeting, did not validly "approve," pursuant to Henry M. Robert, III, et al., Robert's Rules of Order, Newly Revised (10th ed. 2000) (Robert's or Robert's Rules of Order) and the voting requirement set forth in the Association's "Restatement of By-Laws" (the By-Laws), a "pricing policy" setting the price at which the Association would sell its leased fee interests to its members, and (2) that the Association, in realizing a profit in its sales of leased fee interests pursuant to the said pricing policy, violated, inter alia, the prohibition in the By-Laws on "conduct[ing] an active business for profit" and exceeded the powers conferred upon the Association by Hawai'i Revised Statutes (HRS) chapter 514C (1993 & Supp. 2004). In its December 14, 2005 final judgment, the court granted summary judgment in favor of Respondent and against Petitioners. Petitioners filed an application for writ of certiorari (Application) on February 17, 2009 in this court, seeking review of the judgment of the Intermediate Court of Appeals (the ICA), filed on December 3, 2008, pursuant to its November 21, 2008 Summary Disposition Order (SDO)² affirming the court's final judgment. See Alvarez Family Trust v. Ass'n of Apt. Owners of the Kaanapali Alii, No. 27695, 2008 WL 4958487 at *3 (App. Nov. 21, 2008).

² The SDO was filed by Presiding Judge Corinne K.A. Watanabe and Associate Judges Craig H. Nakamura and Alexa D.M. Fujise.

PART I: VALIDITY OF THE VOTE ON THE PRICING POLICY
(By: Acoba, J., with whom all justices concur)

It is concluded unanimously that (a) the By-Laws, which state that "action by a majority of directors present at any meeting" constitutes "action by the Board," require that directors abstaining from a vote be counted as present for purposes of determining whether a majority of the Board directors "present" at a meeting have acted, pursuant to Robert's Rules of Order as mandated by HRS § 514A-82(a)(16) (Supp. 2003),³ and (b) inasmuch as when the Board voted on the pricing policy at the January 30, 2004 meeting, of seven directors present at the meeting, two abstained and only three voted in favor, the pricing policy was not validly adopted.

A.

1.

Petitioners are leasehold owners of an apartment at the Kaanapali Alii condominium on the island of Maui. The Association is governed by the By-Laws and the "Restatement of Declaration of Horizontal Property Regime of Kaanapali Alii" (the Declaration).

The By-Laws state that "[t]he affairs of the Association shall be governed by a Board of Directors composed of seven (7) persons." As to the Board's meetings, Article IV, Section 9 of the By-Laws states that "[a]t all meetings of the

³ HRS § 514A-82(a)(16) states that "[a]ll association and board of directors meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order."

Board of Directors a majority of the total number of directors shall constitute a quorum^[4] for the transaction of business, and action by a majority of the directors present at any meeting at which a quorum is present shall constitute action by the Board." (Emphasis added.) Article IV, Section 11 of the By-Laws provides that "[n]o director shall vote or cast a proxy vote at any Board meeting on any matter in which he or she has a conflict of interest." (Emphases added.) Additionally, as stated supra, HRS § 514A-82(a)(16) states that "[a]ll association and board of directors meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order."

At a July 23, 2003 meeting of the Board, Bob Gordon (Gordon), the Board's President, informed the Board that the Hawaii Omori Corporation/Royal Kaanapali Joint Venture (the Lessor), the owner of the remaining leased fee interests at Kaanapali Alii, was planning to sell its interests. The Board voted unanimously to establish a committee, chaired by Bill Fontana (Fontana), a former Board President, to "obtain the lease to fee interests on behalf of the individual unit owners who have

⁴ According to Robert's, "a quorum in an assembly is the number of voting members [] who must be present in order that business can be legally transacted. The quorum refers to the number of such members present, not to the number actually voting on a particular question." Robert's Rules of Order § 40 at 334.

Article IV, Section 9 of the By-Laws defines a quorum for the transaction of business at all meetings of the Board as "a majority of the total number of directors." Because Article IV, Section 1 of the By-Laws requires that the Board be composed of seven directors, a quorum under the Association's By-Laws is a majority of seven, or four directors.

not purchased their fee interests.”⁵ At some point, Fontana formed Nohea Kai, LLC, which submitted its own offer to the Lessor to purchase the leased fee interests. Apparently, Gordon and another Board member were “considering becoming investor-members in Nohea Kai, LLC.”

Subsequently, at an October 17, 2003 meeting, it appeared that the Board voted on whether to allow Nohea Kai, LLC to purchase the leased fee interests, or to acquire the leased fee interests itself.⁶ Gordon and the other Board member “recused” themselves from this vote due to their “conflict.” At the October 17, 2003 meeting, “the Board, excluding the two

⁵ Unless otherwise indicated, quotes are from the Application and briefs of the parties.

⁶ HRS chapter 514C provides Associations of Apartment Owners with a “right of first refusal” to purchase “the leased fee interest in land under a condominium project” from the seller. HRS § 514C-2 (1993) provides that

[w]hen the leased fee interest in land under a condominium project or cooperative project or any part thereof is to be sold to any party other than the association of owners or the cooperative housing corporation, the seller shall first provide the board of directors of the association of owners or the cooperative housing corporation with written notice delivered or mailed by registered or certified mail, return receipt requested, postage prepaid, to any two of the president, vice-president, or managing agent (if any), of its intent to sell that interest, together with a complete and correct copy of the purchaser's written offer, which offer shall contain the full and complete terms thereof. The association of owners or cooperative housing corporation shall have a right of first refusal to purchase that leased fee interest for the same price as is contained in the written purchase offer.

(Emphasis added.)

HRS § 514C-6(a) (1993) entitled “Powers of association of apartment owners and cooperative housing corporation,” states in relevant part that “[t]he association of owners or cooperative housing corporation may purchase the leased fee interest in the land; provided that at least seventy-five per cent of the condominium unit lessees or cooperative unit lessees approve of the purchase.”

conflicted Board members, unanimously approved a motion to seek the approval of owners to authorize the Association to acquire leased fee interests on behalf of the Association as a whole."

Pursuant to this decision, on November 3, 2003, a letter was sent on behalf of the Association to the owners (including Petitioners) of Kaanapali Alii, informing them that the Board sought to exercise the Association's right of first refusal to purchase the remaining leased fee interests at Kaanapali Alii. The letter contained a proposed amendment to the Declaration (Declaration Amendment) that had been submitted to the Board so as to "allow the Board to exercise the right of first refusal[.]"

In pertinent part, the Declaration Amendment contained the following language:

(b) Authority Pursuant to Chapter 514C, [HRS].

Notwithstanding any other provision contained in the Declaration or the By-Laws to the contrary and in addition to any other powers set forth herein or elsewhere therein, the Board of Directors shall have the power set forth in Chapter 514C, [HRS], to purchase or otherwise acquire, own, improve, use, and deal in and with the Leased Fee Interest or any or all undivided interests therein pursuant to a right of first refusal or a voluntary sale[.]

. . . .

(c) Administration of Interests Acquired by Association. In the event that the Association acquires all or any portion of the interests of the Lessor, the Board shall be empowered to take all such action as it deems necessary or appropriate to administer the interest(s) so acquired, including but not limited to setting, arbitrating, and collecting lease rents, and selling and/or conveying all or any portion of such interest(s) upon such terms and conditions, including but not limited to price, as the Board deems appropriate under the circumstances, by such conveyance instruments as the Board deems appropriate.

(Emphases added.)

In a section entitled "Recommendation of the [Board,]"

the letter stated that "[i]f the Association does not purchase the remaining leased fee interests, another buyer . . . might increase prices beyond the level that would be set by the Association to produce a reasonable profit to the Association."

(Emphasis added.) Additionally, the letter stated that "[t]here is the potential for the Association to make a 'profit' on the sale of the leased fee interests to the remaining lessees."

(Emphasis added.) Article IV, Section 10(O) of the By-Laws provides that "[n]othing herein contained shall be construed to give the Board of Directors authority to conduct an active business for profit on behalf of the owners, or any of them, or the Association."

Petitioners do not dispute that by "January 20, 2004, owners representing more than 75% of the common interest had voted in favor of the exercise of the right of first refusal. In this total, 54 of the 68 lessees or 79% of the lessees voted in favor of the exercise of the right of first refusal." Among those voting in favor of the Declaration Amendment were Petitioners.

At a January 20, 2004 meeting, Board member Peter Mazula (Mazula) "reported on the leased fee conversion. He indicated that the Declaration amendment to allow the Association to exercise its right of first refusal had been approved by owners holding more than 75% of the common interest, the ballot tally had been verified and the amendment was being recorded."

Mazula then moved to allow the Association to exercise its right of first refusal. The Board voted on this motion, and the "[m]otion [was] unanimously approved."

Subsequently, at the subject January 30, 2004 meeting, Mazula "reported that the owners had approved the right of first refusal Declaration Amendment and that the Board had exercised the right of first refusal to purchase the remaining 68 leased fee interests from [the Lessor] at a purchase price of \$5,975,000." The Board voted unanimously to approve a Borrowing Resolution to authorize the Board "to borrow the sum of up to \$6.2 million plus such additional amounts as the Board determines are necessary to effectuate the acquisition of the leased fee interest in Kaanapali Alii[.]" The Board then "discussed pricing and funding policies for leased fee resales to the leasehold owners." During the discussion, Mazula "noted that the Association intends to pass through to the purchasing leasehold owners all of its transaction and carrying costs, including any increases in interest expense due to interest rate resets under the loan." As to pricing of leased fee interests, Mazula made the following motion at the meeting:

The Board shall make the leased fees available for sale to leasehold owners at a market reference price equivalent to the prices at which the leased fees were being sold to individual leasehold owners by [the Lessor], adjusted to reflect common interest differences and to bring them current as of the date the Association's bulk purchase closes. The initial base prices shall be escalated 5% each

year thereafter. Adoption of this pricing policy⁷ is conditioned upon a review for reasonableness by an independent real estate appraiser. The Association shall also charge each purchasing leasehold owner a ratable share of the Association's transaction costs, carrying costs and other leased fee conversion costs incurred through the date of sale.

(Emphasis added.)

On this motion regarding the pricing policy, Gordon and two other directors voted "for" it, two directors voted "against," and two directors "abstain[ed]." In other words, out of the seven directors who were present at the meeting, five voted, with three voting in favor, and two voting against, the pricing policy. The two Directors who abstained from voting did so due to conflicts of interest "as leasehold owners."⁸ The Board then deemed the pricing policy "approved."

2.

On January 11, 2005, Petitioners brought suit against Respondent, seeking (1) "[a] declaration that their fee interest be sold to them at the cost at which it was acquired[,]"; (2) "[j]ust compensation including special, general, and punitive damages[,]"; (3) "[a]n award of attorneys' fees, costs, and interest[,]"; (4) "[c]ompensation for all lease rent paid to the Association before the fee is conveyed to [Petitioners,]" and

⁷ Petitioners do not identify the specific terms of the Association's "pricing policy" that they are challenging. However, because they argue that "all seven Board members were present at the January 2004 Board meeting at which the voting took place on the pricing policy[,]"; it is assumed that they are referring to the pricing policy discussed above in the motion voted on by the Board.

⁸ There does not appear to be any further explanation as to why these directors abstained, and Petitioners do not argue that the abstentions were invalid.

(5) "[s]uch other and further relief as may be ordered by the [c]ourt."

On June 23, 2005, Petitioners filed a motion for partial summary judgment (partial summary judgment motion). In their partial summary judgment motion, Petitioners sought (1) "to obtain a declaration that three members voting in favor of a pricing policy does not establish the majority required of the seven-member [Association] Board[,]"⁹ and (2) "an order by summary judgment prohibiting the [Association] from making a profit from the sale of the fee interest to [Petitioners'] leasehold apartment at the Kaanapali Alii under HRS [chapter] 514A, HRS [chapter] 514C, the [Association's] governing documents, the non-profit corporation act (HRS [chapter] 414D) and under the common law."

On August 25, 2005, Respondent filed its motion for summary judgment. In its motion for summary judgment, Respondent argued that (1) "[b]ased on the undisputed material facts, the [c]ourt should hold that the Association's sale of the remaining leased fee interests under its pricing policy was not a violation of [HRS c]hapter 514C[,]" (2) that "[t]he pricing policy was approved by the Board by vote of the majority of the members in attendance[,]" and (3) that Petitioners "are estopped from

⁹ Petitioners appeared to seek partial summary judgment because they believed that there was a genuine issue of material fact as to the vote on the pricing policy. As discussed infra, however, no genuine issue of material fact exists as to the vote, and thus, summary judgment on this matter is appropriate.

complaining about the pricing policy because they also voted in favor of the Board's authority to set the sale prices on the leased fee interests."

On September 8, 2005, the court issued an Order Denying Petitioners' Motion for Partial Summary Judgment (First Order). In its First Order, the court adopted verbatim the list of "undisputed material facts" set forth by Respondent in its memorandum in opposition to Petitioners' partial summary judgment motion, filed on July 25, 2005, stating that

[b]ased upon the undisputed material facts and the law[,] . . . partial summary judgment is hereby granted in favor of [Respondent] and against [Petitioners] as follows:

1. [HRS] § 514C-22(d) and Part II of Chapter 514C, HRS, are not applicable to the Association's exercise of its right of first refusal under HRS § 514C-2 and Part I of Chapter 514C;
2. The pricing policy for the sale of the leased fee interests does not violate Chapter 514C, the amended Declaration or the By-Laws;
3. The Amended Declaration, By-Laws, and HRS § 414D-19, do not prohibit the Association from possibly generating a profit in the sale of the leased fee interests to the lessees;
4. Nothing in Chapter 514C, nor in HRS §§ 514C-2 or -6 or HRS § 514C-22(d), prohibits the Association from possibly generating a profit in the sale of the leased fee interests to the lessees; and
5. [Petitioners] voted in favor of the amendment to the Declaration, and thus, are estopped from challenging the Association's exercise of the right of first refusal and the adoption of its current pricing policy as authorized by the amended Declaration and as approved by the Board.

On October 20, 2005, the court issued an Order Granting Respondent's Motion for Summary Judgment on the Association's Exercise of its Statutory Authority Under HRS § 514C-2 and its Authority to Set the Sale Prices of the Leased Fee Interests

(Second Order). In relevant part, the court stated that summary judgment was granted in favor of Respondent and against Petitioners on all of Petitioners' cases. The court determined that the Second Order "resolves any and all issues and claims alleged by [Petitioners] . . . on the formation and adoption of the [p]ricing [p]olicy." On December 8, 2005, the court issued an Order Granting Respondent's Motion for the Award of Attorney's Fees and Costs (Third Order), because Respondent was the "prevailing party." On December 14, 2005, the court "entered its final judgment . . . , finding in favor of Respondent and against Petitioners as to all claims in the amount \$15,839.68."

3.

On appeal the ICA affirmed the court's judgment. Alvarez, 2008 WL 4958487, at *3. As recounted by Petitioners, the ICA held "that the Kaanapali Alii Board validly approved the pricing policy, that neither the Association's By-Laws nor HRS [c]hapter 514C prevent making a profit on the purchase of the fee interests, and that the [court] did not abuse its discretion in awarding attorneys' fees and costs[.]"

B.

Petitioners list the following questions in their Application:

- [1]. Whether the ICA erred by determining that the [Board] validly approved the pricing policy.
- [2]. Whether the ICA erred by determining that neither [Respondent's] By-laws nor HRS [c]hapter 514C prevent making a profit on the purchase of the fee interests.
- [3]. Whether the ICA erred by determining that [the court] did not abuse its discretion in awarding attorneys'

fees and costs to [Respondent].

On February 20, 2009, Respondent filed a memorandum in opposition (Response). On March 6, 2009, Petitioners filed a "Reply to [Respondent's] Response to Petitioners' Application" ("Reply"). However, nothing in Hawai'i Rules of Appellate Procedure (HRAP) Rule 40.1 permits a party to file a "Reply."¹⁰ Although HRAP Rule 40.1(i) allows a party to "move in the supreme court for permission to file a supplemental brief," Petitioners did not do so as required by the rule. Thus, Petitioners' "Reply" is not considered in this opinion.

C.

The ICA held as to the first question and in regard to Gordon's alleged conflict of interest in voting on the pricing

¹⁰ HRAP Rule 40.1, entitled "Application for Writ of Certiorari in the Supreme Court," states in pertinent part:

(a) Application; When Filed. No later than 90 days after filing of the [ICA's] judgment on appeal or dismissal order, any party may apply in writing to the supreme court for a writ of certiorari.

. . . .
(e) Response; form. Within 15 days after the filing of an application for a writ of certiorari, any other party to the case may, but need not, file and serve a brief written response containing a statement of reasons why the application should not be accepted.

. . . .
(i) Review by supreme court after acceptance of application for a writ for certiorari. If the supreme court accepts the application for a writ of certiorari, the case shall be decided on the record and the briefs previously filed. The supreme court may limit the question on review, may request supplemental briefs, and may set the case for oral argument. Within 10 days after the acceptance of the application for a writ of certiorari, a party may move in the supreme court for permission to file a supplemental brief. The court may impose restrictions as to length and filing of such brief and any response thereto.

(Boldfaced font in original.)

policy that (1) "[t]he By-Laws of the Association prohibit voting by a director with a conflict of interest[,]” (2) “[a] ‘[c]onflict of interest . . . means an issue in which a director has a direct personal or pecuniary interest not common to other members of the association[,]’ [HRS] § 514B-125[(f)] (2006 [Repl.])[,]”¹¹ (3) “Gordon’s conflict . . . arose only insofar as he was involved with the entity that offered to purchase the leased-free [sic] interests from the condominium’s developer, (4) “[o]nce the Association and the Board voted, with Gordon recused, to exercise that right to purchase the leased-fee interests, Gordon’s interest in that entity was no longer in conflict with the Association’s interests[,]” (5) “Gordon properly participated in the later, pricing-policy vote.” Alvarez, 2008 WL 4958487, at *1 (first ellipses in original) (footnote omitted).

The ICA held as to the first question and in regard to the Board vote that (1) “[t]he By-Laws require Board action to be approved by a majority of directors present at a meeting with a quorum[,]” (2) “HRS § 514A-82[(a)](16) (Supp. 2003) required that board meetings conform to Robert’s Rules of Order[,]” (3) “Robert’s Rules of Order [§ 44 at] 387 [] excludes ‘blanks or

¹¹ Although this section of the HRS quoted by Petitioners and the ICA did not exist at the time of the Board’s vote, it does not affect Petitioners’ argument. The phrase “conflict of interest” is defined as “[a] real or seeming incompatibility between one’s private interests and one’s . . . fiduciary duties.” Black’s Law Dictionary 319 (8th ed. 2004). This court has determined that the definition established by the Legislature in HRS § 514B-125(f) is “consistent with the general definition found in Black’s Law Dictionary.” Taniguchi v. Ass’n of Apt. Owners of King Manor, Inc., 114 Hawai’i 37, 51 n.18, 155 P.3d 1138, 1152 n.18 (2007).

abstentions' when calculating a majority[,]” (4) “[b]ecause two directors ‘abstained,’ their votes were correctly not counted in tallying the vote of three in favor and two against the [p]ricing [p]olicy[,]” (5) “[t]hus, the [p]ricing [p]olicy passed by proper majority.” Id. (emphasis added).¹²

As to Petitioners' first question, they argue that the circumstances of this vote “present genuine issues of material fact that should have prevented summary judgment in favor of [] Respondent.” It is axiomatic that “a circuit court’s grant or denial of summary judgment [is reviewed] de novo.” Bremer v. Weeks, 104 Hawai‘i 43, 51, 85 P.3d 150, 158 (2004) (quoting Hawaii Cmty. Fed. Credit Union v. Keka, 94 Hawai‘i 213, 221, 11 P.3d 1, 9 (2000)). Therefore, the court’s grant of summary judgment in favor of Respondent is reviewed de novo to determine if it was appropriate.

D.

Initially, it should be noted that because of Gordon’s potential involvement with Nohea Kai, LLC, Petitioners argued that Gordon had a conflict of interest and should not have voted on the pricing policy at the January 30, 2004 meeting. However, Petitioners have presented no evidence that when Gordon voted in favor of the pricing policy, which set the prices at which the

¹² The ICA held as to the second question that “[n]either the Association’s By-Laws nor HRS [c]hapter 514C prevent making a profit on the purchase of the fee interests.” Alvarez, 2008 WL 4958487, at *1. As to the third question regarding attorney’s fees and costs, the ICA held that the court “did not abuse its discretion in awarding attorney’s fees and costs to the Association.” Id. at *2.

Association would sell the leased fee interests, "[a] real or seeming incompatibility [existed] between [Gordon's] private interests and [his] . . . fiduciary duties." Black's Law Dictionary at 319. At that time, Nohea Kai, LLC was no longer involved in the purchase of the leased fee interests.

Petitioners do not establish that Gordon at that point had a "direct personal or pecuniary interest not common to other members of the [A]ssociation." HRS § 514B-125(f). Therefore, based on the evidence in the record, Gordon did not have a conflict of interest when he voted in favor of the pricing policy at the January 30, 2004 meeting.

E.

As noted before, with regard to the pricing policy vote, HRS § 514A-82(a)(16) states that "the bylaws shall provide for at least the following: . . . [a]ll association and board of directors meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order." In compliance with subsection (a)(16), Article III, Section 9 of the By-Laws provides that "[a]ll meetings of the Association and the Board of Directors shall be conducted in accordance with the most current edition of Robert's Rules of Order, Newly Revised." To reiterate, the ICA determined that the votes of the two directors who abstained "were correctly not counted in tallying the vote of three in favor and two against the [p]ricing [p]olicy." Alvarez, 2008 WL 4958487, at *1.

The ICA looked to Robert's Rules of Order § 44 at 387, entitled "Majority Vote-the Basic Requirement," ("the Majority Vote Section") in its determination that "blanks or abstentions" are excluded "when calculating a majority." The relevant portion of that section states that abstentions are not counted in the vote of a simple majority:

[T]he basic requirement for approval of an action or choice by a deliberative assembly, except where a rule provides otherwise, is a *majority vote*. The word *majority* means "more than half"; and when the term *majority vote* is used without qualification--as in the case of the basic requirement--it means more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting at which a quorum [] is present.

Id. (italics in original) (emphasis added). In other words, when an assembly has adopted this "majority vote" requirement, blank ballots or abstentions are not counted in determining whether a majority has approved the measure.

However, as Petitioners point out, Article IV, Section 9 of the By-Laws does not use the term "majority vote"¹³ unqualifiedly. Instead, the term "action by a majority" (i.e., "majority vote") is modified by the phrase "of the directors present." This qualification is significant, as evidenced by the section in Robert's Rules of Order entitled "Modifications of Usual Bases for Decision" ("the Modification Section"). Robert's Rules of Order § 44 at 389. The relevant portion of that section

¹³ Although Article IV, Section 9 uses the term "action by a majority," rather than the term "majority vote," as used in Robert's, both parties assume that the "vote" is an "action" as used in Article IV, Section 9.

states that the "majority vote" requirement of a simple majority can be modified by requiring that action be taken by a majority of the members present:

By modifying the concepts of a majority vote and a two-thirds vote, other bases for determining a voting result can be defined and are sometimes prescribed by rule. Two elements enter into the definition of such bases for decision: (1) the proportion that must concur--as a majority, two thirds, three fourths, etc.; 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 (assuming there are no illegal voters), but (b) can be specified by rule as the number of members present, the total membership, or some other grouping.

Id. (italics in original) (emphases added). In other words, the "majority vote" requirement can be altered to require a majority of the "number of members present" ("members present" requirement) such as the one set forth in Article IV, Section 9 of the By-Laws. A quorum was present, and therefore, pursuant to the "members present" requirement in Article IV, Section 9 of the By-Laws, "action by the Board" required "action [i.e., a vote] by a majority of the directors present at [the] meeting." (Emphasis added.) As the Modification Section in Robert's Rules of Order states, this requirement is different from the "majority vote" requirement which requires a "majority . . . of members present and voting." (Emphasis added.)

The Modification Section goes on to state that abstentions, when a majority is calculated based on the number of voters present, "have the same effect as a negative vote":

Voting requirements based on the number of members present-- a majority of those present, two thirds of those present, etc.--while possible, are generally undesirable. Since an abstention in such cases has the same effect as a negative vote, these bases deny members the right to maintain a

neutral position by abstaining. For the same reason, members present who fail to vote through indifference rather than through deliberate neutrality may affect the result negatively. When such a vote is required, however, the chair must count those present immediately after the affirmative vote is taken, before any change can take place in attendance[.]”

Robert's Rules of Order § 44 at 390 (emphasis added).

Petitioners argue that under this “members present” requirement, because seven members of the Board were present, “four votes in favor of the pricing policy were necessary to constitute a majority of the seven Board members present, the two abstaining members’ votes counted as ‘no’ votes, and when properly tallied there were four votes against the pricing policy and only three votes in favor of it.” As a result, according to Petitioners, “the pricing policy did not pass.”

Respondent argues that such an interpretation creates a conflict between Article IV, Section 11 of the By-Laws, and Robert's Rules of Order. As stated before, Article IV, Section 11 of the By-Laws, entitled “Conflicts of Interest,” states that “[n]o director shall vote or cast a proxy vote at any Board meeting on any matter in which he or she has a conflict of interest. A majority of the directors . . . shall determine the existence or nonexistence of such a conflict.”¹⁴ (Emphasis

¹⁴ HRS chapter 514A and the By-Laws treat conflicts of interest in an identical manner. HRS § 514A-82(a)(13) (Supp. 2004) states that “[a] director shall not cast a proxy vote at any board meeting, nor shall a director vote at any board meeting on any issue in which the director has a conflict of interest[.]” (Emphasis added.) Additionally, HRS § 514A-82(b)(5) (Supp. 2004) states that “[a] director who has a conflict of interest on any issue before the board shall disclose the nature of the conflict of interest prior to a vote on that issue at the board meeting, and the minutes of the meeting shall record the fact that a disclosure was made.”

HRS chapter 514A does not provide guidance on how to treat the
(continued...)

added).

Respondent asserts that because the two members who abstained did so due to conflicts of interest, they must be excluded from calculating a majority pursuant to Article IV, Section 11 of the By-Laws. According to Respondent, "[i]f an abstention¹⁵ is counted as a 'no' vote, a conflicted board member would effectively be voting 'no' on the motion[,]" which "would mean that the Board member would effectively caste [sic] a vote in direct conflict of the Governing Documents." Therefore, Respondent argued, "excluding the abstaining members, the

¹⁴(...continued)

presence of an interested director in a "members present" voting requirement. As to board meetings, HRS § 514A-83.1(a) (1993) states that

[a]ll meetings of the board of directors, other than executive sessions, shall be open to all members of the association, and association members who are not on the board of directors may participate in any deliberation or discussion, other than executive sessions, unless a majority of a quorum of the board of directors votes otherwise.

This provision, however, relates only to whether meetings of the board of directors are open to members of the association, and does not address voting requirements in regard to board actions such as the one at issue in this case.

¹⁵ Robert's Rules of Order does not appear to define the terms "abstain" or "abstention." Based on the context in which Robert's Rules of Order uses those terms, however, it appears that to abstain means "to not vote." For example, in a section discussing the vote of a board's presiding officer, or chair, Robert's states that "the chair protects his impartial position by exercising his voting right only when his vote would affect the outcome, in which case he can either vote and thereby change the result, or he can abstain. If he abstains, he simply announces the result with no mention of his own vote." Robert's Rules of Order § 4 at 50-51. Similarly, Robert's states that "[a]lthough it is the duty of every member who has an opinion on a question to express it by his vote, he can abstain, since he cannot be compelled to vote." Id. § 45 at 394. Likewise, in discussing the procedure to be followed in a "roll-call vote," Robert's states that "[e]ach member, as his name is called, responds in the affirmative or negative If he does not wish to vote, he answers *present* (or *abstain*)." Id. at 407 (italics in original).

Black's Law Dictionary defines "abstain" as "[t]o voluntarily refrain from doing something, such as voting in a deliberative assembly[,]" and "abstention" as "[t]he act of withholding or keeping back (something of oneself); esp., the withholding of a vote." Black's Law Dictionary at 8.

remaining five voting directors approved the formulation and the adoption of the pricing policy in compliance with the By-Laws and the approval of the owners."

Respondent argued that in this "conflict" between Robert's Rules of Order and the By-Laws, the By-Laws control. Robert's Rules of Order confirms this:

When a society or assembly has adopted a particular parliamentary manual--such as this book--as its authority, the rules contained in that manual are binding upon it in all cases where they are not inconsistent with the bylaws (or constitution) or any special rules of order of the body, or any provisions of local, state, or national law applying to the particular type of organization.

Robert's Rules of Order § 2 at 16 (emphasis added). However, contrary to Respondent's argument, there is no conflict in this instance between the By-Laws and Robert's Rules of Order.

To reiterate, Article IV, Section 11 of the By-Laws states that "no director shall vote" on a matter in which the director has a conflict of interest. (Emphasis added). A "vote" is the "expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication." Black's Law Dictionary at 1606. To "abstain" is to "voluntarily refrain from doing something, such as voting in a deliberative assembly." Id. at 8 (emphasis added). Similarly, "abstention" is "[t]he act of withholding or keeping back (something or oneself); esp., the withholding of a vote." Id.

While Robert's Rules of Order § 44 at 390 states that in the context of a "members present" requirement, an abstention "has the same effect as a negative vote" (emphasis added), it

does not say that an abstention in such cases is a "no" vote, as Respondent argues. Instead, the Modification Section of Robert's Rules of Order indicates that in a "members present" requirement, an abstention has the same effect as a negative vote because the presence of the person abstaining is taken into account when the vote is tallied. See id. § 45 at 407 (stating that if a member "does not wish to vote, he answers *present* (or *abstain*)" (italics in original)). In such cases, the presence of the person abstaining affects the number of votes that are required to obtain a majority, irrespective of the fact that he or she is not voting. However, having "the same effect as a negative vote" does not mean that the director is actually casting a vote in contravention of Article IV, Section 11 of the By-Laws.

In this case, it is undisputed that all seven directors of the Board were present at the pricing policy meeting. During the vote on the pricing policy, two directors abstained, which means they "voluntarily refrained," or withheld, their votes. To do otherwise would have violated Article IV, Section 11 of the By-Laws. As mandated by the By-Laws' "members present" requirement, however, the presence of the two conflicted Board directors should have been included in the calculation of whether a majority of the directors present voted in favor of the pricing policy. Respondent's position would require this court to interpret Article IV, Section 9 as a "majority vote" requirement, giving it the effect of a "present and voting" provision. To do

so would ignore the plain language of the By-Laws, which requires "action by a majority of the directors present."

In sum, as authorized by the Modification Section in Robert's, in Article IV, Section 9 of the By-Laws, the Association adopted a "members present" requirement for the Board to act. In this "members present" requirement, the presence of members at a meeting is taken into account when calculating a majority. Because Article IV, Section 9 of the By-Laws requires "[a]ll meetings of the Association and the Board of Directors shall be conducted in accordance with the most current edition of Robert's Rules of Order, Newly Revised," a majority of the seven directors present at the January 30, 2004 meeting, or four directors, was required to vote in favor of the pricing policy in order for it to pass. Inasmuch as only three directors voted in favor of the pricing policy, the policy did not validly pass.

F.

1.

This conclusion is consistent with this court's decision in Hawaii Electric Light Co. v. Dep't of Land & Natural Res., 102 Hawai'i 257, 263, 75 P.3d 160, 166 (2003), cited by Petitioners in support of their argument. In Hawaii Electric, this court examined whether a vote by the Board of Land and Natural Resources (BLNR) constituted a BLNR action within the meaning of its governing statute, HRS 171-5 (1993). Id. at 262, 75 P.3d at 165. That statute stated that "any action taken by

the [BLNR] shall be by simple majority of the members of the [BLNR]. Four members of the [BLNR] shall constitute a quorum to do business." Id.

As required by statute, the BLNR consisted of six members, all of whom attended the meeting at which the vote on whether to deny a power company's application to expand a power generating station took place. Id. at 263, 75 P.3d at 166. One of the BLNR members "recused" himself due to a conflict of interest because he owned stock in the parent company of the power company. Id. Of the five members who voted, "[t]he [BLNR] voted three to two in favor of . . . denying the application." Id. The intervenors argued that "so long as a quorum [was] present, a majority of the members voting may render a binding decision of the [BLNR]." Id. at 267, 75 P.3d at 170 (emphasis added). Additionally, they argued that "the recusal of one of the [BLNR] members [could] be likened to a temporary resignation, thus reducing the total number of [BLNR] members." Id. at 268, 75 P.3d at 171 (emphasis added).

As to the BLNR member who did not vote, this court stated that it had previously, in Lymer v. Kumalae, 29 Haw. 392 (Terr. 1926), "extensively reviewed case law regarding majority voting and abstentions, and held that a majority of the board is a majority of the members of the board 'as constituted by law[,] irrespective of the number of members present at the time of the vote.'" Hawaii Electric, 102 Hawai'i at 268, 75 P.3d at 171

(brackets in original) (internal citation omitted). It was noted that "[s]imilarly, a number of courts have held that an abstention, disqualification, or sickness does not reduce the total number of members on a board in terms of voting requirements." Id. at 269, 75 P.3d at 172. Thus, this court "reaffirm[ed] Lymer, and h[e]ld that, unless otherwise prescribed, the total number of members on a board is not reduced by an abstention, resignation, or vacancy." Id. (emphasis added.) Ultimately, this court determined that because the BLNR's vote was less than a majority, it did "not amount to [BLNR] action." Id. at 270, 75 P.3d at 173.

Respondent argued that Petitioners' reliance on Hawaii Electric is "misplaced," because in that case "this court evaluated the voting procedure for a legislatively created political body which is held accountable to the general public-- not to a private homeowners association of owner-members." (Emphases in original.) According to Respondent, Hawaii Electric "applied a rule of strict statutory construction, not the liberal standard, intended to further the goals of self-governance by a legislatively created body that would weigh issues affecting the general public." (Emphasis in original.) Additionally, Respondent claimed that "the statute at issue also did not include a conflict of interest provision prohibiting interested members from voting." In its Response, Respondent further argues that the issue in Hawaii Electric "was not whether an abstention

constituted a 'no' vote." Respondent states that Hawaii Electric "did not modify, limit, or abrogate the common law rule as to the voting requirements for public administrative or legislative bodies, other than the BLNR, or to other public or private organizations, entities, and associations."

Respondent's attempt to distinguish Hawaii Electric on the basis that the statute at issue in that case "did not include a conflict of interest provision prohibiting interested members from voting" is unavailing. While HRS § 171-5 does not contain a conflict provision, this court in Hawaii Electric "observe[d] that HRS § 84-14(a)(1) (1993) states that 'no employee shall take any official action directly affecting a business or other undertaking in which he [or she] has a substantial financial interest.'" 102 Hawai'i at 265 n.17, 75 P.3d at 168 n.17. Indeed, as discussed supra, one of the BLNR members in Hawaii Electric recused himself from voting, and this court specifically addressed the issue of whether his recusal affected the requisite majority required for the BLNR to act.

Despite Respondent's attempt to distinguish Hawaii Electric as involving a "political body," the statute at issue there, similar to Article IV, Section 9 of the By-Laws in this case, modified the "majority vote" requirement that action by a majority of the members present and voting constitutes action by the assembly in question. It was decided that because the statute required a "simple majority of the members of the board,"

the "majority vote" requirement was inapplicable. Id. at 267, 75 P.3d at 170. Likewise, if the Association had intended that action could be taken by a majority of the directors present and voting, rather than by a majority of the directors present, it could have expressly stated as much. See id. at 268, 75 P.3d at 171 ("If the legislature had intended that action could be taken by a majority of the members present and voting rather than by a 'simple majority of the members of the board' then the statute could have expressly provided for that alternative." (Emphasis in original.)).

2.

In support of its argument that "conflicted Board members are not counted as present for purposes of voting," Respondent cites to several cases, all of which involve "political bod[ies]," including Ballenger v. Door County, 388 N.W.2d 624 (Wis. Ct. App. 1986).¹⁶ In Ballenger, a county zoning board voted on an ordinance amendment pursuant to a voting

¹⁶ Respondent also cites to Garner v. Mountainside Board of Adjustments, 515 A.2d 280 (N.J. Super Ct. Law Div. 1986). In Garner, which involved a "members present" requirement, the New Jersey Superior Court held that members who were present at a meeting, but were disqualified from voting because they did not attend an earlier meeting, were not "present" for purposes of calculating a majority. Id. at 285. Garner, however, did not discuss Robert's Rules of Order or indicate whether it applied to the decision in that case. Thus, like Ballenger, it offers no guidance on the issue in this case. In addition, Respondent relies on Meixell v. Hellerton Borough Council, 88 A.2d 594 (Pa. 1952) (voting requirement was "a majority of the entire membership of council"), Alamo Heights v. Gerety, 264 S.W.2d 778 (Tex. Civ. App. 1954) (voting requirement was three-fourths of the members), and DiCarlo v. Clermont County Board, No. CA2003-09-077, 2003 Ohio App. LEXIS 5103 (Ohio Ct. App. 2003) (no voting requirement indicated), in support of its argument. The voting requirements in these cases, however, did not involve a "members present" requirement, nor did they discuss whether Robert's Rules of Order applied.

requirement in the Wisconsin Statutes which stated that "[a]ll questions shall be determined by a majority of the supervisors who are present unless otherwise provided."¹⁷ Id. at 629. At the meeting at which the vote took place, twenty members attended, with ten voting in favor of the ordinance amendment, nine voting against, and one abstaining due to a conflict of interest. Id.

In Ballenger, the Wisconsin Court of Appeals held that "when a board member is required by law to abstain from voting, this member is not present for calculating the number of votes required for the passage of legislation." Id. In reaching this conclusion, the Ballenger court looked to Robert's Rules of Order because, "[a]lthough not mandatory authority regarding the interpretation of a Wisconsin statute, . . . Rule 33 of the Door County Rules of Order (DCRO) states that Robert's Rules of Order is to apply to situations not covered by the DCRO or the Wisconsin statutes." Id. at 629 n.6. That court then quoted from the 1981 edition of "Robert's Rules of Order, at § 43," noting that it provided in relevant part that a "[m]ajority vote . . . means more than half of the votes cast by persons legally entitled to vote, excluding blanks or abstentions, at a regular or properly called meeting at which a quorum . . . is present."¹⁸

¹⁷ The "unless otherwise provided" language was not implicated in this decision.

¹⁸ Section 43 of the most recent edition of Robert's Rules of Order, published in 2000, deals with "Rules Governing Debate." The language in Ballenger quoting section 43 of the 1981 edition is identical to that in section 44 of the 2000 edition. Thus, it appears that the Ballenger court was citing to the "majority vote" requirement, which, at the time of the 1981

(continued...)

Id. at 629 n.7 (ellipses in original).

As noted supra, this section of Robert's Rules of Order was the authority relied on by the ICA in this case for its conclusion that "'blanks or abstentions' [are excluded] when calculating a majority." Alvarez, 2008 WL 4958487, at *1. Like the ICA, however, the Ballenger court did not address the section in Robert's dealing with modified voting requirements.¹⁹ Unlike Ballenger, Robert's Rules of Order is binding authority on the meetings of the Board. HRS § 514A-82(a)(16). As already discussed, Robert's Rules of Order differentiates between the counting of abstentions in a "majority vote" requirement and the counting of abstentions in a "members present" requirement. Because Ballenger did not address the Modification Section in Robert's Rules of Order, it is not persuasive here.

On the other hand, other courts have held that where the "majority vote" requirement has been modified by some form of the "members present" requirement, present members who do not vote affect the calculation of a majority. See, e.g., Mann v. Hous. Auth. of City of Paterson, 89 A.2d 725, 726 (N.J. Super. Ct. Law Div. 1952); Livesey v. Borough of Secaucus, 97 A. 950, 951 (N.J. 1916). In Mann, the statutory voting requirement

¹⁸(...continued)
edition, was located in section 43.

¹⁹ Indeed, because the Wisconsin Court of Appeals was relying on the 1981 edition of Robert's Rules of Order, it is not certain that the 1981 edition contained the provision related to the "members present" requirement for voting.

stated that "[a]ction may be taken by the authority upon the affirmative vote of the majority but not less than three, of the commissioners present, unless in any case the by-laws of the authority shall require a larger number." 89 A.2d at 726 (quotation marks omitted). Six commissioners attended a meeting to vote on a resolution and the result of the vote was "3 in the affirmative [and] 3 abstained^[20] from voting." Id. at 727 (quotation marks omitted). The Mann court held that an abstention "is not an expression of the choice or preference of the voter. As six commissioners were present at the meeting, passage of the resolutions clearly required four affirmative votes. But three were recorded, so the resolutions failed of legal passage and are, therefore, wholly invalid." Id. at 729.

In Livesey, the New Jersey Supreme Court did not expressly state the applicable voting requirement, but it appears to have been a "members present" requirement. See 97 A. at 951. The facts provided by the court in Livesey "[w]ith respect to the majority vote . . . were that the borough council consisted of six members all of whom were present; that three voted for confirmation, two were opposed to confirmation, and one was excused from voting because of interest." Id. The New Jersey Supreme Court held that the confirmation did not validly pass because "a majority vote of those present means what it says, notwithstanding some do not participate in the vote." Id. The

²⁰ No reason was given in Mann for the abstentions.

decisions in Mann and Livesey are consistent with this court's decision in Hawaii Electric, cited by Petitioners in support of their argument.

In light of the foregoing analysis, summary judgment should have been entered in favor of Petitioners on the pricing policy vote.

PART II: ESTOPPEL

(By: Moon, C.J., with whom Nakayama, J. and Substitute Justice Nishimura, join)

Notwithstanding the foregoing discussion and holding in Part I, supra, we are obligated to affirm the judgment of the circuit court because, as discussed more fully infra, Petitioners failed to challenge a basis for the circuit court's denial of Petitioners' partial summary judgment motion, i.e., that Petitioners were estopped from challenging the adoption of the pricing policy. As quoted above, the circuit court, in its order denying Petitioners' partial summary judgment motion, concluded, inter alia, that:

2. The pricing policy for the sale of the leased fee interests does not violate Chapter 514C, the amended Declaration or the By-Laws; [and]

. . . ;

5. [Petitioners] voted in favor of the amendment to the [d]eclaration, and[,] thus, [were] estopped from challenging the Association's exercise of the right of first refusal and the adoption of its current pricing policy as authorized by the amended [d]eclaration and as approved by the Board [of Directors].

(Emphases added.) In their briefs before the ICA and this court, Petitioners' arguments focused solely on the circuit court's rulings regarding (1) whether the pricing policy was validly approved, (2) whether Respondents were prevented from making a

profit on the leased fee interests, and (3) attorney's fees; nowhere in their briefs did Petitioners challenge or present any argument regarding the circuit court's conclusion that they were estopped from challenging the Association's adoption of its current pricing policy, which was a basis for the circuit court's ruling on the pricing policy issue. Indeed, Petitioners conceded during oral argument that they did not directly challenge the circuit court's conclusion regarding estoppel, but maintained that they did not do so because it was unclear which of the Board's actions Petitioners were estopped from challenging. In other words, the circuit court's conclusion was ambiguous. We disagree.

The circuit court's conclusion, as quoted above, clearly stated that Petitioners were "estopped from challenging [(1)] the Association's exercise of the right of first refusal and [(2)] the adoption of its current pricing policy." Id. (**emphases added**). Nevertheless, even assuming Petitioners are correct, an assertion of ambiguity in the circuit court's conclusion regarding estoppel requires a specific challenge to the alleged ambiguous conclusion by Petitioners. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2008).

HRAP Rule 28(b)(4)(C) states that an appellant must specifically set forth a concise statement of the points of error, including, inter alia, "the alleged error committed by the court" -- in this case, the allegedly ambiguous conclusion -- and

provide "either a quotation of the finding or conclusion urged as error or reference to appended findings and conclusions[.]"

"Points not presented in accordance with [HRAP Rule 28(b)(4)] will be disregarded." HRAP Rule 28(b)(4) (emphasis added). In the instant case, Petitioners did not specifically identify or challenge the circuit court's conclusion regarding estoppel in their briefs on direct appeal or in their application, as they conceded at oral argument. It is well-established in this jurisdiction 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. E & J Lounge Operating Co., Inc. v. Liquor Comm'n of the City & County of Honolulu, 118 Hawai'i 320, 347, 189 P.3d 432, 459 (2008); see also Ass'n of Apartment Owners of Newtown Meadows ex. rel. its Bd. of Dirs. v. Venture 15, Inc., 115 Hawai'i 232, 257, 167 P.3d 225, 250 (2007) (concluding that the appellant's contentions on application were "deemed waived" because they did not "assign as error" or "present any argument" regarding the circuit court's ruling). Inasmuch as the circuit court's estoppel ruling was not identified as error nor specifically argued by Petitioners, it cannot be considered by this court (unless noticed under the plain error doctrine, discussed more fully infra).²¹

²¹ The dissent argues that, "although the estoppel issue was not expressly listed as an error," dissenting op. at 3, such issue was -- "as a matter of judicial fact," id. at 6, and "[b]y necessary implication," id. at 4 -- joined on appeal "inasmuch as the voting issue was fully briefed by the parties and decided by the ICA." Id. at 3 (footnote omitted). In support of its position, the dissent references, inter alia, the facts that

(continued...)

It is also well-settled that all unchallenged conclusions by the circuit court are considered binding upon this court. Wong v. Cayetano, 111 Hawai'i 462, 479, 143 P.3d 1, 18 (2006) (citation omitted). Consequently, the circuit court's unchallenged conclusion that Petitioners were estopped from challenging the adoption of the pricing policy is binding on this court. Inasmuch as the circuit court's estoppel conclusion constituted a separate basis for its denial of Petitioners' partial motion for summary judgment, we are compelled by our rules and case law to affirm such ruling.

The dissent, however, contends that the estoppel ruling "must be addressed in order to reach the central issue on appeal of whether the pricing policy was validly adopted." Dissenting op. at 3. The dissent submits that, in this case, "the only conclusion rendered by the court in regard to the vote was that

²¹(...continued)

(1) "Respondent and the ICA did not contend Petitioners were precluded from appealing the invalidity of the vote"; (2) "Respondent did not assert that Petitioners were prevented from arguing the vote itself was erroneous"; and (3) the ICA "decided the legality of the vote without objecting that Petitioners had failed to raise the estoppel order." Id. at 4-5 (emphasis in original) (footnotes omitted).

Contrary to the dissent's view, fully briefing an issue on the merits that was subsequently decided by the ICA did not relieve the Petitioners of their burden to challenge the conclusion of law regarding estoppel. To the contrary, inasmuch as the Petitioners failed to "expressly raise" and/or argue the issue of estoppel, which the dissent acknowledges, they failed to meet their burden. Consequently, the issue of estoppel was not raised "as a matter of judicial fact" or "by necessary implication." Additionally, it was not the Respondent's burden to assert that Petitioners were estopped from challenging the validity of the vote -- as the dissent erroneously suggests -- and the ICA did not have an obligation to "object" to or point out, much less address, Petitioners' failure to raise the issue of estoppel, especially in light of the fact that it affirmed the circuit court's separate and distinct conclusion that the vote was valid which rendered it unnecessary to address the circuit court's conclusion regarding estoppel.

Petitioners were estopped from challenging it, and[,] thus, by challenging the validity of the vote, Petitioners challenged this conclusion." Id. at 6. More specifically, the dissent contends that "[t]he 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," id. (emphasis in original) and only one conclusion addressed the pricing policy vote. Id. at 7.

The dissent's reasoning is unavailing because, as previously indicated, the circuit court's denial of Petitioners' motion for partial summary judgment was based on two independent legal conclusions regarding the pricing policy vote. Specifically, the circuit court concluded that: (1) "the pricing policy for the sale of the leased fee interests [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. With respect to the court's conclusion that the pricing policy did not violate the By-Laws, such By-Laws included specific voting requirements which provided, inter alia, that no action may be taken by the Association's Board without a vote of a majority of the members present. In our 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. In other words, for the court to even reach the question whether the substantive provisions of the pricing policy itself were violative, the policy had to be validly adopted in the first instance via the voting requirements set forth in the By-Laws. As a result, such conclusion addressed the validity of the pricing policy vote, not merely "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," as the dissent contends. Dissenting op. at 6 (emphasis in original). Accordingly, the estoppel conclusion, in our view, constitutes a separate and independent ground for the circuit court's ruling which cannot be addressed by this court because the Petitioners failed to specifically challenge it.

The dissent additionally claims that

the ICA[']s rul[ing] 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 . . . 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."

Id. at 10 (emphases in original). We cannot agree.

First, as the dissent recognizes, the ICA agreed with the court regarding the validity of the vote itself and affirmed the court's denial of Petitioner's motion for summary judgment on that ground. Therefore, there was no need for the ICA to address the court's separate conclusion regarding estoppel.

Consequently, the ICA's "failure" to discuss the estoppel

conclusion, contrary to the dissent's argument, signals its apparent view that the such conclusion was separate and distinct from the conclusion regarding the validity of the vote.

Additionally, if the ICA had determined that Petitioners were not estopped from challenging the vote, such determination would have rendered the circuit court's estoppel conclusion erroneous. It cannot be assumed, based on the ICA's omission of estoppel, that the ICA: (1) determined that the court's estoppel conclusion was erroneous; (2) decided it was unnecessary to articulate such error; and, then, (3) based its discussion of the validity of the vote on its "silent" determination that the estoppel conclusion was erroneous. Such an assumption is contrary to the well-settled role of the appellate courts to articulate the errors upon which its discussion and holdings are based. Consequently, we cannot agree with the dissent that "the ICA['s] rul[ing] . . . confirms that [it] concluded that Petitioners were not estopped from challenging the validity of the vote." Id. (emphasis in original).

At oral argument, Petitioners contended that, notwithstanding their failure to challenge the circuit court's ruling on the issue of estoppel, this court should sua sponte address the issue based on the plain error doctrine.²² See HRAP Rule 28(b)(4) ("Points not presented in accordance with this

²² However, Petitioners did not present any argument regarding plain error in their application.

section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.") This court has previously stated that,

[i]n civil cases, the plain error rule is only invoked when "justice so requires." We have taken three factors into account in deciding whether our discretionary power to notice plain error ought to be exercised in civil cases: (1) whether consideration of the issue not raised at trial requires additional facts; (2) whether its resolution will affect the integrity of the trial court's findings of fact; and (3) whether the issue is of great public import.

Montalvo v. Lapez, 77 Hawai'i 282, 290, 884 P.2d 345, 353 (1994) (citing State v. Fox, 70 Haw. 46, 56 n.2, 760 P.2d 670, 676 n.2 (1988)) (other citations omitted).

With regard to the first factor, i.e., the need for additional facts, such factor is based on the tenet that "an appellate court should not review an issue based upon an undeveloped factual record." Montalvo, 77 Hawai'i at 290-91, 884 P.2d at 353-54 (citation omitted). Here, the circuit court rendered its judgment on a motion for summary judgment. As a result, consideration of the estoppel issue does not "require additional facts." See Fujioka v. Kam, 55 Haw. 7, 514 P.2d 568 (1973); see also Earl M. Jorgensen Co. v. Mark Const., Inc., 56 Haw. 466, 540 P.2d 978 (1975). Thus, the first factor of the plain error test is met.

Second, we believe 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 and that several cases from this jurisdiction support our interpretation of the second factor. For example, in Montalvo,

this court reached the opposite conclusion as that set forth in In re Hawaiian Land Co., 53 Haw. 45, 487 P.2d 1070 (1971), and Jorgensen, concluding that "[t]he error here meets each of the three [plain error] factors" and explaining that, as to the second prong of the test, "[t]he error here . . . affects the integrity of the jury's findings." 77 Hawai'i at 290-91, 884 P.2d at 353-54 (emphasis added). Similarly, this court, in Shanghai Inv. Co., Inc. v. Alteka Co., Ltd., 92 Hawai'i 482, 993 P.2d 516 (2000), cited Montalvo and declined to notice plain error where "[t]he error . . . did not substantially affect the integrity of the jury's findings." Id. at 499-500, 993 P.2d at 533-34, overruled on other grounds by Blair v. Inq, 96 Hawai'i 327, 331 n.6, 31 P.3d 184, 188 n.6 (2001). Further, this court held, in Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 31 P.3d 901 (2001), that, "[b]ecause the effect of the Forgiveness Act is purely a question of law, the outcome of which will affect the integrity of the circuit court's findings of fact . . . we will exercise our discretion in addressing the matter." Id. at 396 n.12, 31 P.3d at 909 n.12 (emphases added); see also Hill v. Inouye, 90 Hawai'i 76, 82, 976 P.2d 390, 396 (1998) (recognizing plain error where, inter alia, the resolution of the issue "directly affects the family court's outcome in this case").

The dissent, however, takes a contrary position, arguing that, if the resolution of an issue would not affect the integrity of the findings of fact, then such factor weighs in

favor of plain error review. Dissenting op. at 22-23. The dissent claims that its interpretation is "supported by the history of the [plain error] test, which reveals that the second factor was intended to caution the appellate court against disturbing the integrity of the fact findings process." Id. at 21. In further support of its position, the dissent relies on Hawaiian Land Co. and Jorgensen. Dissenting op. at 22-26. As explained by the dissent, the Hawaiian Land court held that, because an "issue [did] not attack the integrity of the fact finding process," the court would consider such issue based on plain error. Hawaiian Land, 53 Haw. at 53, 487 P.2d at 1076. Similarly, this court, in Jorgensen, concluded that the second factor weighed in favor of addressing a newly raised issue based on plain error because "[t]he 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." Jorgensen, 56 Haw. at 476, 540 P.2d at 985. The dissent also cites more recent cases that apply the second factor in accordance with its interpretation, specifically: (1) Hong v. Kong, 5 Haw. App. 174, 177, 683 P.2d 833, 837 (1984), which relied on Jorgensen and Fujioka and declined to notice plain error because, inter alia, "consideration of the new issues [would] affect the integrity of the findings of fact"; and (2) Cabral v. McBryde Sugar Co., Ltd., 3 Haw. App. 223, 647 P.2d 1232 (1982), in which the court reasoned that plain error review was appropriate because, inter

alia, the resolution of the issue would not affect the integrity of the findings of fact. Id. at 226-27, 647 P.2d at 1234; dissenting op. at 34.

In light of such case law, it is evident that this court has inconsistently applied the second plain error factor. However, we believe it appropriate to leave the definitive interpretation to another day because, as discussed more fully below, the second factor does not apply in the context of this case.

It is well-settled that the circuit court does not try factual issues on a motion for summary judgment. Fujioka, 55 Haw. at 9, 514 P.2d at 570. Inasmuch as the case at bar is an appeal from a denial of a motion for partial summary judgment, the court did not try factual issues and, as a result, there are no material facts in issue. Consequently, there are no "findings of fact" whose "integrity" could be "affected" by the instant appeal and, thus, the second factor does not apply in the instant case. See Honda v. Board of Trustees of the Employees' Retirement System, 108 Hawai'i 212, 242 n.14, 118 P.3d 1155, 1185 n.14 (2005) (Levinson, J., dissenting with whom Moon, C.J., joined) (stating that, "inasmuch as [Jorgensen] and Fujioka involve appeals from orders granting summary judgment, there were no [findings of fact] in those cases and the second prong of the [plain error] test did not apply"). In sum, we conclude that, because the instant appeal is from an order denying a motion for

partial summary judgment, there are no material facts in issue that could be "affected" and, as such, the second plain error factor does not apply. We turn now to examine the third plain error factor.

Finally, with regard to the third factor, i.e., whether the issue of estoppel is one of "great public import," this court has determined that, in civil cases, an issue is of "great public import" for the purposes of plain error review only when such issue affects the public interest. For example, in Montalvo, we reviewed the issue whether the trial court erred in failing to properly instruct the jury on an essential element of the underlying cause of action based on plain error because it is in the public's interest for this court to "preserv[e] the integrity of our jury system" and, thus, the issue was one of "great public import." 77 Hawai'i at 291, 884 P.2d at 354. Additionally, this court, in Fujioka, implicitly recognized that the constitutionality of a statute was a matter of public interest when it addressed the appellant's argument regarding the unconstitutionality of a statute, even though such argument was raised for the first time on appeal, because the issue was "of great public import." Fujioka, 55 Haw. at 9, 514 P.2d at 570. Likewise, this court has invoked the doctrine of plain error to address whether federal law bars the state from using monies derived from the State's airport system to pay the Office of Hawaiian Affairs, stating that such issue was "a matter of great

public import." See Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 396 n.12, 31 P.3d 901, 909 n.12 (2001).

In the instant case, the issue whether Petitioners had the 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. More specifically, 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. Further, it is Petitioners' own failure to challenge the court's conclusion of law regarding estoppel that constrains us in our decision. Thus, contrary to the dissent's view, no other AOA community will be negatively impacted by our holding inasmuch as the estoppel issue is, as previously indicated, exclusive to the distinct facts and circumstances of the present case. As such, this court's holding will not "undermine[] the public policy in HRS chapter 514A" as to a "large number of AOA communities" (as the dissent contends) or have any effect on the "orderly and fair disposition of controversies in . . . [such] AOA communities." Dissenting op. at 38-39. The dissent further argues that "[t]he majority's estoppel ruling extends beyond the 'Petitioners' case[]" [because] HRS § 514A-82(a)(16) and Robert's apply not only in this case, but to all [AOAOs] and their governance." Id. at 38.

Thus, the dissent argues that the issue of estoppel is a matter of great public import because

[p]ermitting 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. . . . Thus, the majority's ruling calls into question the viability of all AOA bylaws, by sustaining a violation of HRS § 514A-82(a)(16).

Id. at 40 (emphasis in original). As discussed at length supra, we concluded that, upon critically examining the plain language of HRS § 514A-82(a)(16), the pricing policy vote did not violate such statute. Thus, our estoppel holding does not diminish the impact of HRS § 514A-82(a)(16) on the governance of all AOAOs or "supercede[]" all provisions in HRS § 514A-82, as the dissent contends. See id. at 40. Further, although we agree with the dissent that HRS § 514A-82(a)(16) and Robert's "apply to AOAOs and their governance," id. at 38, the critical facts in this case upon which our ultimate ruling is based, i.e., that the Petitioners failed to challenge an otherwise binding conclusion of law, are personal and individual to the Petitioners. Thus, it is evident that, despite the dissent's insistence that our "ruling calls into question the viability of all AOA bylaws," id. at 40, our estoppel holding is applicable only to the Petitioners -- not "all AOAOs and their governance." Consequently, the dissent's argument that the issue of estoppel is a matter of great public import is unavailing.

Moreover, Petitioners did not set forth any arguments in their application with regard to plain error nor did they provide any cogent reasons during oral argument for this court to exercise its discretion in invoking plain error to examine the issue of estoppel on the merits. Consequently, we decline to sua sponte invoke plain error under these circumstances.²³ Inasmuch as we are constrained by our rules and case law from addressing the court's conclusion that Petitioners were estopped from challenging the adoption of the pricing policy on the merits, we are obligated to affirm the judgment of the court.²⁴

Relying on the proposition that "[n]ot even estoppel can legalize or vitalize that which the law declares unlawful and void," dissenting op. at 43 (citation omitted), the dissent contends that "estoppel cannot be used [in this case] to prevent Petitioners from challenging a vote that was unlawful under a state statute [-- here, HRS § 514A-82(a)(16) --] because otherwise 'estoppel does what the public policy and the law has

²³ The dissent argues that this court should sua sponte invoke plain error because the circuit court's estoppel ruling "is wrong as a matter of law." Dissenting op. at 41. However, the correctness of the circuit court's ruling is the very issue the Petitioners failed to raise and this court is prevented from addressing. Thus, even if the circuit court's estoppel ruling was "wrong as a matter of law," we are bound by the standard for invoking plain error sua sponte. Having determined that the three factors, as discussed supra, do not weigh in favor of invoking plain error, any view as to the correctness or incorrectness of the circuit court's conclusion is irrelevant because, as also discussed supra, we are constrained by the unchallenged conclusion.

²⁴ In light of our conclusion that we are obligated to affirm the court's final judgment, we need not consider the remaining issues whether (1) the Association was prevented from making a profit on the sale of its leased fee interests and (2) the circuit court abused its discretion in awarding attorneys' fees and costs to Respondent.

forbidden.'" Id. at 48 (citing Tobacco By-Products & Chemical Corp. v. W. Dark Fired Tobacco Growers Ass'n, 133 S.W.2d 723, 726 (Ky. App. 1939)). In attempting to support its position that the pricing policy vote was unlawful under HRS § 514A-82(a)(16), the dissent first declares that the entirety of HRS § 514A-82 "is intended to apply to the '[c]ontents of bylaws'" (with which we agree) and, second, claims that subpart (a)(16) of the statute "dictates that Robert's applies" to all association meetings. Dissenting op. at 47. The dissent then reasons that, "[i]n accordance with the By-Laws that adopted a 'members present' provision, the vote was invalid under the Modification Section of Robert's," id., which then leads it to conclude that, "therefore, [the vote was] also invalid under HRS § 514A-82." Id. Thus, in the dissent's view, "[c]ompliance with HRS § 514A-82(a)(16) is depend[en]t 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[.]" Id. at 16. Based on its position that the vote violated HRS § 514A-82(a)(16), the dissent argues that "to confirm the invalid vote by the Board would contravene the policy embodied in HRS § 514A-82(a)(16)." Id. at 45 (citation omitted). However, we are unpersuaded by the dissent's arguments because, as discussed below, the dissent misinterprets the plain language of HRS § 514A-82(a)(16).

The plain language of HRS § 514A-82(a)(16) provided that "[t]he bylaws shall provide for at least the following . . . [that all association and board of directors meetings shall be conducted in accordance with the most current edition of Robert's Rules of Order." (Emphasis added). A strict reading of such plain language reveals that the statute governs only the content of the by-laws by requiring that certain provisions be included in an association's by-laws. Thus, the only "policy embodied" in HRS § 514A-82 is that association by-laws must, at minimum, contain all of the provisions enumerated therein. As such, an association has lawfully complied with HRS § 514A-82(a)(16) once it has placed a provision in its bylaws that states that "all association and board meetings shall be conducted in accordance with Robert's." In other words, compliance with HRS § 514A-82(a)(16) is not dependent upon whether the Board "obeyed the direction in the By-Laws as applied pursuant to Robert's," id. at 16, as the dissent contends, but only upon whether the **contents** of the by-laws themselves meet the minimum statutory requirements. Such proposition is supported by the fact that, as acknowledged by the dissent, HRS § 514A-82 is entitled "Contents of Bylaws."

Here, the By-Laws of the Association in the instant case contained the requisite provision and, thus, clearly complied with the statute. Thus, once compliance with the statutory requirement is established (as it has been here), 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 meeting in accordance with Robert's is unnecessary. Accordingly, the dissent's argument that the pricing policy vote was "unlawful" because it violated HRS § 514A-82(a)(16) is plainly wrong. In any event and as discussed more fully infra, the pricing policy vote at issue in this case was conducted "in accordance with . . . Robert's."

As demonstrated by the lengthy discussion in Part I of this opinion, Robert's contains a number of options with respect to voting. See Part I at 17-19 (discussing the voting options set forth in Robert's Rules, including a majority of "members present," a simple majority, and a majority of members present and voting). Of the options available under Robert's, the Association's By-Laws in the instant case establish that action can be taken only by a majority of members present. See Part I at 18. The pricing policy vote, however, was not conducted in accordance with the voting method opted for in the Association's By-Laws. Thus, the vote was invalid because it violated the By-Laws. Nevertheless, as previously stated, the pricing policy vote was conducted in accordance with Robert's. As the dissent recognizes, the Modification Section of Robert's explicitly permits the voting method utilized by the Board, i.e., "approval of an action or choice" by a "majority of directors present and

voting," i.e., a basic majority of directors. See Robert's § 44(2)(a) at 389.

Here, as previously indicated, the pricing policy was approved by three out of five non-abstaining directors, and the two abstaining directors were not counted in the pricing policy vote. See Part I at 20. Because the abstentions were not counted, they did not affect the voting and, as a result, the pricing policy was approved by a majority of the directors present and voting, which we emphasize is a voting method permitted under Robert's. Thus, the pricing policy vote complied with section 44(2)(a) of the Modification Section of Robert's, even though the vote did not comply with the "members present" voting method opted for in the By-Laws. Accordingly, (1) although the pricing policy vote violated the Association's By-laws, the By-laws themselves complied with HRS § 514A-82(a)(16) and, (2) because the voting method utilized by the Board is explicitly permitted in Robert's, it cannot be said -- as the dissent maintains -- that the pricing policy vote was unlawful under HRS § 514A-82 such that estoppel cannot be applied.

In support of its position that the application of estoppel will frustrate the policy in HRS § 514A-82(a)(16), the dissent cites the following three cases: (1) Commissioner of Banks v. Cosmopolitan Trust Co., 148 N.E. 609 (Mass. 1925); (2) Appon v. Belle Isle Corp., 46 A.2d 749 (Del. 1946); and

(3) Tobacco By-Products & Chemical Corp., 133 S.W.2d at 726.

Dissenting op. at 43-46. As discussed below, each of these cases is distinguishable from the instant case.

In Commissioner of Banks, the board of directors of a corporation violated a distinct "prohibition of statute" when it unlawfully issued an increase in its capital stock; however, the shareholders acquiesced to such increase. Commissioner of Banks, 148 N.E. at 613. As indicated by the dissent in the instant case, the Supreme Court of Massachusetts, in considering the issue whether estoppel could prevent the shareholders from challenging the increase in stock, held that "[a]cquiescence cannot clothe with legality a positively illegal act . . . [and o]ne cannot ordinarily be estopped to assert the direct violation of a decisive prohibition of statute." Id. at 614.

Consequently, the court did not apply estoppel to prohibit the shareholders from contesting the illegal increase in stock. Id. Similarly, the Supreme Court of Delaware, in Appon, held that estoppel did not preclude the complainants' attack of an agreement because such agreement "violated Section 18 of the General Corporation Law of Delaware." Appon, 46 A.2d at 760-61. Ultimately, the court "set aside the agreement." Id. at 761.

Likewise, the Kentucky Court of Appeals, in Tobacco By-Products, held that estoppel should not have been applied by the trial court to deny appellant recovery because the agreement in question violated Section 214 of the Kentucky state constitution.

Tobacco By-Products, 133 S.W. at 726. In its reasoning, the court stated 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." Id.

In each of these cases, there was a clear violation of a constitutional or statutory provision such that, if estoppel had been applied to permit such violations, public policy would have been frustrated. In contrast, there was no violation of a statute or constitutional provision of law in the instant case. The dissent claims that such cases are analogous to the instant case because, "like those cases, the application of estoppel in this case" will "allow[] the Board to violate HRS § 514A-82(a)(16)" and "frustrate the public policy establishing uniform governing procedures for AOAOs in HRS chapter 514A." Dissenting op. at 48. As discussed supra, the pricing policy vote did not violate HRS § 514A-82(a)(16) and, based on the facts and circumstances of the case, no other provision of HRS Chapter 514A is implicated. Thus, we fail to see how the "application of estoppel in this case" would "allow[] the Board to violate HRS § 514A-82(a)(16)" or "frustrate" the policy embodied in Chapter 514A. Id.

Based on the foregoing, the use of estoppel in the present case would not "do what the public policy and the law has forbidden," id. at 48, and, as such, the dissent's argument lacks merit.

VIII. CONCLUSION

Based on the foregoing, we unanimously conclude that the ICA erred in holding that the Association's Board validly adopted the pricing policy vote and that summary judgment should have been entered in favor of Petitioners as to the pricing policy vote. However, notwithstanding such conclusion, we (the majority in Part II) are bound by the unchallenged conclusion of law that Petitioners are estopped from challenging the pricing policy vote. Consequently, the majority affirms the judgment of the circuit court.

Terrance M. Revere (Rebecca A. Szucs, with him on the application) of Motooka Yamamoto & Revere, for petitioner/plaintiffs-appellants, on the application

Matt A. Tsukazaki (of Li & Tsukazaki), for respondent/defendant-appellee, on the response