NO. 28945

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

CITY AND COUNTY OF HONOLULU, a municipal corporation of the State of Hawaii, Plaintiff-Appellee, Cross-Appellee, vs. JAMES M. SHERMAN, also known as James Malcolm Sherman, and AKIKO S. SHERMAN, also known as Akiko Sakiyama Sherman, as Trustees under that certain unrecorded James M. Sherman and Akiko S. Sherman Revocable Trust dated May 2, 1989, JAN CAMILLE BELLINGER, Trustee under the Jan Camille Bellinger Revocable Living Trust, under that certain unrecorded Trust Agreement dated November 23, 1993, CLARENCE K. LEE, as Trustee of and for the Clarence K. Lee Revocable Trust under that certain unrecorded Trust Agreement dated January 28, 1992, as amended; MYRNA P. CHUN-HOON, Successor Trustee under that certain unrecorded Revocable Trust of Albert C.K. Chun-Hoon dated October 11, 1984, as amended, and MYRNA P. CHUN-HOON, Trustee under that certain unrecorded Revocable Trust of Myrna P. Chun-Hoon, dated October 11, 1984, as amended; GEORGE B. GARIS, also known as George Benjamin Garis, as Trustee under that certain unrecorded George B. Garis Revocable Trust dated November 28, 1989, as amended; CHINH TRONG LE; KAREN WILSON ROSA; ELIZABETH W. TAKAHASHI, Trustee of the Elizabeth W. Takahashi Revocable Living Trust under that certain unrecorded Trust Agreement dated July 14, 1993, STUART EDWIN GROSS, as Trustee under that certain unrecorded Trust Agreement known as The Stuart E. Gross Trust dated February 19, 1985, and MARCIA KURZWEIL GROSS, as Trustee under that certain	) CIVIL NO. 03-1-0963)) APPEAL FROM THE)) 1) FINAL JUDGMENT, filed on December) 11, 2007)) 2) FINDINGS OF FACT, CONCLUSIONS) OF LAW AND ORDER GRANTING IN) PART AND DENYING IN PART) DEFENDANT FIRST UNITED) METHODIST CHURCH'S MOTION FOR) PARTIAL SUMMARY JUDGMENT ON) THE ISSUE OF LESSEE) QUALIFICATIONS, FILED SEPTEMBER 7,) 2006, filed on December 26, 2006)) CROSS-APPEAL FROM THE)) 1) FINAL JUDGMENT, filed on December) 11, 1007)) 2) FINDINGS OF FACT, CONCLUSIONS) OF LAW AND ORDER GRANTING IN) PART AND DENYING IN PART) DEFENDANT FIRST UNITED) METHODIST CHURCH'S MOTION FOR) PARTIAL SUMMARY JUDGMENT ON) THE ISSUE OF LESSEE) QUALIFICATIONS, FILED SEPTEMBER 7,) 2006, filed on December 26, 2006)) 3) ORDER GRANTING IN PART AND) DENYING IN PART DEFENDANT FIRST) UNITED METHODIST CHURCH'S) MOTION FOR AN ORDER DETERMINING) AMOUNT OF DAMAGES INCURRED BY) MOVANTS PURSUANT TO HAWAII) REVISED STATUES § 101-27, filed on) March 28, 2007)

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) FIRST CIRCUIT COURT

) HONORABLE VICTORIA S. MARKS Judge

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Defendants-Appellants, Cross-Appellees,

and

FIRST UNITED METHODIST CHURCH, a Hawaii non-profit corporation,

Defendant-Appellee, Cross-Appellant,

and

JOHN DOE 1-200; MARY DOE 1-200; DOE PARTNERSHIP 1-100; DOE CORPORATION 1-100; DOE NON-PROFIT CORPORATION 1-100; DOE ENTITY 1-100,

Defendants.

DEFENDANT-APPELLEE, CROSS-APPELLANT
FIRST UNITED METHODIST CHURCH'S
OPENING BRIEF ON CROSS-APPEAL

APENDICES "A" – " J "

and

CERTIFICATE OF SERVICE

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DEFENDANT-APPELLEE, CROSS-APPELLANT
FIRST UNITED METHODIST CHURCH'S
OPENING BRIEF ON CROSS-APPEAL

Defendant-Appellee, Cross-Appellant FIRST UNITED METHODIST CHURCH ("First Church"), timely submits its Opening Brief regarding its cross-appeal. This Opening Brief is filed pursuant to Hawaii Rules of Appellate Procedure ("HRAP") Rules 25, 28(b) and 32 and is based on the Record on Appeal ("the Record," cited as "R").

I. STATEMENT OF THE CASE

A. The Issues in this Cross-Appeal

This is the second appeal of this leasehold condominium conversion case. This appeal arises out of an attempted condemnation by Plaintiff-Appellee, Cross-Appellant CITY AND COUNTY OF HONOLULU ("City") pursuant to now-repealed Revised Ordinances of Honolulu ("ROH") Ch. 38,[1] which provides for conversion through eminent domain of land underlying multi-family residential condominiums, cooperatives, and planned unit developments. On remand from the Hawaii Supreme Court, the trial court again determined that there were an insufficient number of qualified Lessees and units to maintain the condemnation.

Two issues are presented in this cross-appeal. The first concerns whether the trial court erred in failing to disqualify Lessees who owned other fee simple residential property which they conveyed into single-member limited liability companies ("LLCs") for the purpose of claiming they qualified under ROH Ch. 38. As to this issue, First Church requests that this Court reverse the trial court in part and rule that the Lessees were disqualified.

The second issue involves the failure of the trial court to award First Church its fees and costs which were incurred by First Church in the previous appeal of this case. First Church

[1] A copy of ROH Ch. 38 is attached as Appendix "A."

requested such fees under Hawaii Revised Statutes ("HRS") § 101-27, which provides that a condemnee shall be entitled to be awarded "all such damage as may have been sustained . . . by the bringing of the proceedings . . . including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses." The trial court mistakenly determined it did not have authority to award such fees, because that was a matter for the appellate courts. First Church requests either that this Court remand the case and direct the trial court to award First Church these fees and costs; or alternatively, that this Court itself determine that First Church is entitled to these fees and costs pursuant to the statute.

B. The History and Disposition of the Proceedings, and Facts Material to the Points on Appeal.

The City's Complaint was filed on May 8, 2003. (R. Vol. 1 at.1-163.) First Church filed its Answer and Counterclaim on June 10, 2004. (R.Vol. 1 at 319-43.)

On September 21, 2004, the trial court entered a Judgment Pursuant to Haw. R. Civ. P. 54(b) in favor of First Church and against the City and Defendant-Appellants, Cross-Appellees JAMES M. SHERMAN, et al. (singularly and collectively, "Lessees"). (R. Vol. 22 at 50-56.) The Lessees appealed. (R. Vol. 22 at 176-201.) The City cross-appealed. (R. Vol. 22 at 256-76.) First Church cross-appealed. (R. Vol. 22 at 300-17.)

On February 28, 2006, the Hawaii Supreme Court issued its opinion in *City and County of Honolulu v. Sherman*, 110 Hawai'i 39, 129 P.3d 542 (2006), vacating in part the trial court's judgment.[2] The Court remanded the case for further proceedings to determine whether there are sufficient qualified units for conversion to fee simple, and, if so, to consider evidence of the fair market value of the leased fee interest being acquired. 110 Hawai'i at 77, 129 P.3d at 580.

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[2] The opinion was corrected on March 22, 2006.

ROH Ch. 38, *inter alia*, requires Lessees to meet all the following requirements:

1. They must be bona fide residents of the City and County of Honolulu. ROH § 38-2.4(a)(2).

2. They must be owner-occupants of their units. ROH § 38-2.4(1). This means that the condominium unit, "simultaneous to the individual's ownership, serves as the individual's principal place of residence for a period of not less than one year immediately prior to application for conversion, as well as during the period pending legal proceedings to acquire the fee." ROH § 38-1.2.

3. They cannot rent out their units during the period they must be owner-occupants. "[T]he individual shall retain complete possessory control of the premises of the residential unit . . . An individual shall not be deemed to have complete possessory control of the premises if the individual rents, leases, or assigns the premises for any period of time to any other person in whose name legal title is not held." *Id.*

4. The Lessee or the Lessee's spouse cannot own fee simple land suitable for residential purposes within the City and County of Honolulu. ROH § 38-2.4(a)(4); *Amended Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion*, promulgated September 28, 2000 ("Rules"), §2-4(d).[3] A Lessee "is deemed to own lands, for the purpose of this paragraph, if the person, the person's spouse, or both the person and the person's spouse . . . own lands, including any interest, in a land trust, in the City and County of Honolulu. ROH § 38-2.4(a)(4). The wording of the ordinance shows that the City Council intended "ownership" to include situations other than when the lessee owns the property in his or her own individual name, including making reference to the use of a land trust. The City's Department of

[3] A copy of the Rules is attached as Appendix "B."

Community Services, which was responsible for administering ROH Ch. 38, has recognized this in its forms provided to applicants. Thus, the Department's "Notification to Applicants" states that "[y]ou are not permitted to own any fee simple property (including any interest whatsoever) suitable for residential purposes within the City and County of Honolulu at the time of application and throughout the implementation process." *See* Exhibit 30 to "Defendant First United Methodist Church's Memorandum in Opposition to Defendant Lessees' Motion for Partial Summary Judgment Filed on 4/29/04" (emphasis added) (R. 19, 1-226.)

Qualified Lessees for at least 25 units must be maintained in order for there to be a public purpose under ROH Ch. 38. *See* ROH § 38-2.2 ; *Sherman, supra,* 110 Hawai'i at 65-66, 129 P.3d at 568-69.

As a result of discovery, it became evident that many Lessees, and thus their units, did not in fact meet the qualification requirements of ROH Ch. 38. The Lessees and the City agreed to dismiss some of these units and Lessees (although not others). On August 15, 2006, the parties stipulated to the dismissal with prejudice of three units and their Lessees: (1) Unit 2101 (Robert G. Lees and Yuko Lees, as Trustees); (2) Unit 1801 (Deanna Lou Levy, as Trustee); and (3) Unit 1502 (Sayuri Taniguchi and Erica Taniguchi Dorman). (R. Vol. 23 at 319-22.) On September 5, 2006, the parties stipulated to the dismissal of prejudice of four more units and their Lessees: (1) Unit 2704 (Elizabeth Kehrer Anderson, as Trustee); (2) Unit 902 (Chinh Trong Le); (3) Unit 1205 (Mark Sperry and Mollie Sperry, as Trustees); and (4) Unit 1204 (John Philip Spierling). (R. Vol. 24 at 113-16.)

First Church moved for partial summary judgment on the issue of qualifications on September 7, 2006, asserting that, at most, there were only qualified Lessees for 21 units. First Church's motion demonstrated the following. At the time of remand by the Hawaii Supreme

Court there were 32 units. However, at the time of remand, 11 of those units were disqualified. Six units had been sold, reducing the total to 26 units:

1. Elisabeth Kehrer Anderson (Unit 2704) died on June 7, 2004. On April 27, 2005, her unit was sold for $570,000 and the lease assigned to Beau Robert Champion. (R. Vol. 25 at 1-305, Exhibits B, C and D.)

2. Chinh Trong Le (Unit 902) sold his unit on August 24, 2005 for $415,000, and the lease was assigned to Iris Lee Ebia. (R. Vol. 25 at 1-305, Exhibits E and F.)[4]

3. Robert G. Lees and Yuko Lees (Unit 2101) sold their unit on August 2, 2005 for $729,000, and the lease was assigned to Albert Peter DeBiasi. (R. Vol. 25 at 1-305, Exhibits G and H.)

4. Deanna Lou Levy (Unit 1801) sold her unit on May 23, 2006 for $710,000, and the lease was assigned to Gary and Patricia Casson. (R. Vol. 25 at 1-305, Exhibits I and J.)

5. Mark Sperry and Molly Sperry (Unit 1205) sold their unit on April 4, 2005 for $635,000, and the lease was assigned to Debra Leigh Foster. (R. Vol. 25 at 1-305, Exhibits K and L.)

6. John Philip Spierling (Unit 1204) died on June 17, 2004. On November 17, 2004, his unit was sold for $580,000 and the Lease assigned to Peter Matthew Sheehan (R. Vol. 25 at 1-305, Exhibits M, N and O.)

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[4]Le and Unit 902 were also disqualified because Le was a "tacker" who did not live in the unit 12 months before applying. *Hsiung v. City and County of Honolulu*, 109 Hawai'i at 172-74, 124 P.3d at 447-49. See "Defendant First United Methodist Church's Memorandum in Opposition to Defendant Lessees' Motion for Partial Summary Judgment Filed on April 29, 2004," filed on May 27, 2004, at 8-9, and Exhibits 28 and 29 attached thereto. (R. 19, 1-226.)

The Lessee of another unit, Erica Taniguchi Dorman (Unit 1502), had moved to England and rented out her unit, which reduced the total to 25 units. (R.Vol. 25 at 1-305, Exhibits P, Q and R.)

First Church argued that the Lessees of four other units were disqualified. First, Clarence K. Lee owns Unit 704. His spouse and co-applicant is Elsa Carl Lee. On April 27, 2005, Elsa Carl Lee and Mrs. Lee's daughter, Emily Gilpin Carl, acquired disqualifying fee simple residential property located at 607 Auwai Street, Kailua, Hawaii 96734. (R.Vol. 25 at 1-305, Exhibits S and T.) Mrs. Lee admitted in her deposition she owned the property. (R.Vol. 25 at 1-305, Exhibit U, Deposition of Elsa Lee at 17-18.)

Second, Wallace Lee Young and Ernestine Young owned Unit 503. Mrs. Young admitted during her deposition that they in fact had rented the property during the period they were required to be owner occupants ("Defendant First United Methodist Church's Reply Memorandum in Support of Motion for Partial Summary Judgment on the Issue of Lessee Qualifications," Exhibit 10, Deposition of Ernestine Young at 9-10, R. Vol. 27 at 1-83.)

Third, Ann Takako Yamamoto owned an interest in a 7 unit residential apartment building at the time she applied. (R.Vol. 25 at 1-305, Exhibit BB). Her application recited that she owned an 8.8% undivided interest in the apartment building.

Finally, Lawrence Reich and Andrea Hagin owned Unit 2001. Their Application is dated January 27, 2003, and their Affidavit is dated January 27, 2003 (for Reich) and January 28, 2003 (for Hagin). The Department received their Application on February 5, 2003 (R. 13 at 1-57, "Affidavit of Sally Cravalho re: Unit 2001").

Lawrence Reich owned a piece of disqualifying fee simple residential real estate, namely Apartment 3706 located in the One Archer Lane Condominium Project. (R. Vol. 25 at 1-305,

Exhibit X) By Warranty Deed dated December 18, 2002, and recorded on January 6, 2003, Mr. Reich conveyed the disqualifying property to an LLC named "Miele-LR Properties LLC." The DCCA information sheet on this LLC, among other things, notes that the LLC address is the Hagin-Reich Admiral Thomas apartment and that Reich is the sole member and agent. (R. Vol. 25 at 1-305, Memorandum in Support of Motion at 12.[5])

In his deposition Reich admitted he formed and is the only member of Miele-LR Properties LLC. (*Id.*) He makes the decisions as to what the LLC does. (*Id.*) Its only purpose is to hold and rent real estate. (*Id.*) The LLC's only asset is the One Archer Lane property. (R. Vol. 25 at 1-305, Memorandum in Support of Motion at 13.) Rent paid by the renter in the unit goes into the LLC and then is distributed to Reich's checking account after paying expenses. (*Id.*) It has no plans to engage in any other activities than holding and renting the One Archer Lane property. (*Id.*)

At the time the property was transferred to the LLC, it was subject to a mortgage on which Mr. Reich personally was the borrower. (*Id.*) Reich never notified the lender of the transfer to the LLC. (*Id.*) The mortgage was paid off and released on September 21, 2004. (*Id.*) The funds that paid off the mortgage came entirely from another sale of residential property in Arroyo Grande, California, which Reich owned personally. (*Id.*)

Joyce Hagin also owned a piece of disqualifying fee simple residential real estate, namely Apartment 8 in the Makakilo Mala condominium project. By Limited Warranty Deed dated

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[5] First Church has belatedly discovered that some of its exhibits relating to Reich, including his deposition transcript, were not properly attached to the motion for summary judgment below and thus are not part of the record on appeal; however, the accuracy of the assertions made by First Church regarding Reich and his property ownership were not disputed by the other parties. In any event, the Court can independently reach the result that these Lessees and their unit are disqualified if it only considers Andrea Hagin's ownership of disqualifying fee simple residential property.

December 17, 2002, and recorded on January 6, 2003, Dr. Hagin transferred the property into an entity named "Rattin-Jah Property, LLC." (R.Vol 25 at 1-305, Exhibit Y).

In her deposition Hagin admitted that she formed Rattin-Jah Property, LLC and is the sole member. (R.Vol 25 at 1-305, Exhibit AA, Hagin Depo. at 14-15.) She formed the LLC because she wanted to buy her Admiral Thomas fee and could not because the Makakilo property was fee simple residential property which would prevent her from buying the fee. (R.Vol 25 at 1-305, Exhibit AA, Hagin Depo. at 16-17.) She transferred the property into the LLC based on advice of her attorney, Jim Case. There were no assets in the LLC other than the Makakilo property. (R.Vol 25 at 1-305, Exhibit AA, Hagin Depo. at 17.) The LLC did not do anything other than hold title to the Makakilo property. (R.Vol 25 at 1-305, Exhibit AA, Hagin Depo. at 18.)

At the time she transferred the Makakilo property into the LLC, it was subject to mortgages which she was individually the borrower (R.Vol 25 at 1-305, Exhibit AA, Hagin Depo. at 20).

On March 25, 2005, by "Apartment Deed (By Way of Exchange) (Direct Conveyance Pursuant to Exchange Agreement)" the LLC transferred the Makakilo property to Leon Warren Sims, II. (R.Vol 25 at 1-305, Exhibit Z). Dr. Hagin admitted that the LLC exchanged the Makakilo property for property located in Cave Creek, Arizona. (R.Vol 25 at 1-305, Exhibit AA, Hagin Depo., 26:13-18.) The exchange deed for the Cave Creek, Arizona property conveyed title not to the LLC, but to "Joyce A. Hagin, a married woman, as her sole and separate property." (R.Vol 25 at 1-305, Exhibit AA, Hagin Depo. at 26-27). Dr. Hagin also obtained a loan personally from USAA Federal Savings Bank to acquire part of the Arizona Property, because the lender would not make a loan to an entity such as an LLC. (R.Vol 25 at 1-305,

Exhibit AA, Hagin Depo. at 28.) She continues to be the borrower personally on the loan and continues to make the payments personally. (R.Vol 25 at 1-305, Exhibit AA, Hagin Depo. at 29.) On April 26, 2005, Dr. Hagin conveyed the Arizona property into Rattin-Jah Property, LLC.

After a hearing on the motion, the trial court again determined that there were not a sufficient number of qualified lessees and units to maintain a condemnation under ROH Ch. 38, and entered summary judgment in favor of First Church. "Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Defendant First United Methodist Church's Motion for Partial Summary Judgment on the Issue of Lessee Qualifications, Filed September 7, 2006," filed on December 26 2006 ("Summary Judgment Order").[6] (R. Vol. 27 at 123-32.)

The trial court agreed with First Church's contentions about the Lees, the Youngs and Yamamoto, but, relevant to this cross-appeal, concluded that "Defendants LAWRENCE REICH and JOYCE A. HAGIN (Unit 2001) are qualified." Summary Judgment Order at 9.

The disqualification of the Lees, the Youngs and Yamamoto reduced the total to 22 units. As argued below, because Reich and Hagin are also disqualified, only 21 units remain.[7]

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[6] A copy of the Summary Judgment Order is attached as Appendix "C."

[7] Reich and Hagin subsequently sold their Admiral Thomas unit on April 5, 2007, to Sarah Watson Heath, and thus are now also disqualified for that reason. A certified copy of the Assignment of Apartment Lease is attached hereto as Appendix "D." The Court can take judicial notice of this sale which occurred after the determination of the trial court. Haw. R. Evid. 201; *Kaho'ohanohano v. State*, 114 Hawai'i 302, 328 and 329 n. 19, 162 P.3d 696, 722 and 723 n. 19 (2007) (appellate courts may take judicial notice of new developments not considered by the lower court). First Church realizes this may moot this portion of the cross-appeal, but neither the City nor the Lessees have taken action to dismiss these and other Lessees who subsequently sold their units. First Church is also appealing this point out of an abundance of caution in case the Lessees argue in their appeal that somehow the timing of a disqualification makes a difference. First Church asserts that Reich and Hagin have always been disqualified by virtue of their ownership, via their solely-owned and -controlled limited liability companies, of other fee simple residential property.

First Church subsequently moved for an award of damages pursuant to HRS § 101-27. "Defendant First United Methodist Church's Motion for an Order Determining Amount of Damages Incurred by Movants Pursuant to Haw. Rev. Stat. § 101-27." (R Vol. 27 at 137-266.) Among other things, First Church asked for the trial court to award it its fees and costs incurred on the first appeal of this case.

The motion was opposed by the City, which took the position that the trial court did not have the ability to award attorneys' fees and costs incurred by First Church in the first appeal. As the City stated in its memorandum in opposition to the motion:

> [t]he Circuit Court lacks jurisdiction to independently grant a request for attorneys' fees incurred on appeal. Rather, attorneys' fees incurred on appeal must be timely requested by the prevailing party, and considered and determined by the Hawaii Supreme Court pursuant to its jurisdiction and authority under HRAP Rule 39(d). No such request for attorneys' fees under HRAP Rule 39(d) was ever sought by the Church, which is not surprising given the lack for any statutory authority for the Church to request attorneys' fees after losing on appeal. . . .

"Plaintiff City and County of Honolulu's Memorandum in Opposition to Defendant First United Methodist Church's Motion for an Order Determining Amount of Damages Incurred by Movants Pursuant to Haw. Rev. Stat. 101-27, Filed on January 23, 2007," at 8-9. (R. Vol. 27 at 267-98.)

The trial court subsequently granted in part and denied in part First Church's motion. "Order Granting in Part and Denying in Part Defendant First United Methodist Church's Motion for an Order Determining Amount of Damages Incurred by Movants Pursuant to Hawai'i Revised Statutes § 101-27" ("Fees Order").[8] (R. Vol. 28 at 103-06.) Relevant to this cross-appeal, the trial court denied award of the fees and costs that were incurred by First Church in its first appeal. Fees Order at 2-3. *Id.*

[8] A copy of the Fees Order is attached as Appendix "E."

The trial court entered its Final Judgment on December 11, 2007.[9] (R. Vol. 28 at 131-40.) Lessees filed a timely notice of appeal on January 9, 2008. (R., Vol. 28 at 143-72.) First Church then filed a timely notice of cross-appeal on January 23, 2008. (R., Vol. 28 at 179-208.).

The City did not appeal.

II. STATEMENT OF POINTS OF ERROR ON APPEAL

A. The Circuit Court erred when it ruled that Lessees Lawrence Reich and Andrea Hagin and their unit were qualified under ROH Ch. 38.

Citation to the Record where the error occurred:

1. "Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Defendant First United Methodist Church's Motion for Partial Summary Judgment on the Issue of Lessee Qualifications, Filed September 7, 2006," filed on December 26 2006 ("Summary Judgment Order") at 8. (R. Vol. 27 at 123-32.)

2. "THE COURT: With Reich and Hagin, personally, I think the actions that were taken were clearly done to bring them within the technical requirements of Chapter 38. It's somewhat of a subterfuge. But here I think Kahala Beach applies. And so my inclination would be that they are qualified." (Transcript of Proceedings, 10/10/06, at 32.)

3. "MR. NAKASHIMA: The motion is denied as to Hagin and Reich, is that correct? THE COURT: Correct. I find based on Kahala Beach, they're qualified." (*Id.* at 55.)

Conclusion of the trial court urged as error:

"Defendants LAWRENCE REICH and JOYCE A. HAGIN (Unit 2001) are qualified." (R. Vo. 27 at 130.)

Where in the Record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court:

[9] A copy of the Final Judgment is attached as Appendix "F."

1. Memorandum in Support of Motion for Partial Summary Judgment on the Issue of Lessee Qualifications at 12-17. (R. 25 at 1-305.)

2. Defendant First United Methodist Church's Reply Memorandum in Support of Motion for Partial Summary Judgment on the Issue of Lessee Qualifications at 5-6. (R. 27 at 1-83)

3. Transcript, 10/10/06, at 32-33, 34-35.

B. The Circuit Court Erred When It Denied First Church Its Attorneys' Fees and Costs Incurred in the First Appeal of This Action.

Citation to the Record Where the error occurred:

1. "Order Granting in Part and Denying in Part Defendant First United Methodist Church's Motion for an Order Determining Amount of Damages Incurred by Movants Pursuant to Hawai'i Revised Statutes § 101-27," filed on March 28, 2007. (R. Vol. 28 at 103-06.)

Conclusion of the trial court urged as error:

"This trial court is not in a position to determine the reasonableness of fees incurred in an appeal—that is for the appellate courts. Therefore, this court denies the fees that Defendant claims were incurred on appeal in the amount of $69,114.50." (*Id. at* 104.)

Where in the Record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court:

1. "Defendant First United Methodist Church's Reply Memorandum in Support of Motion for an Order Determining Amount of Damages Incurred by Movants Pursuant to Haw. Rev. Stat. § 101-27," at 3-6. (R. 28 at 1-102.)

2. Transcript of Proceedings, 2/15/07, at 3-4.

III. STANDARD OF REVIEW

A. Motions for Summary Judgment (Point Of Error A)

Summary judgment is reviewed *de novo* under the same standard applied by the trial court. *Hawaii County Federal Credit Union v. Keka*, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). Under Rule 56(c) of the Hawaii Rules of Civil Procedure:

> summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

"The purpose of summary judgment under Rule 56 is to expedite matters 'where there is no genuine issue of material fact.'" *Flint v. MacKenzie*, 53 Haw. 672, 672-73, 501 P.2d 357, 358 (1972).

B. Evidentiary Burden of Motion for Summary Judgment (Point of Error A)

"The moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim of defense which the motion seeks to establish or which the motion questions . . .; and (2) based on the undisputed facts it is entitled to summary judgment as a matter of law. *Rodriguez v. Nishiki*, 65 Haw. 430, 438, 653 P.2d 1145, 1150, *reconsideration denied*, 65 Haw. 682 (1982)." *GECC Financial Corp. v. Jaffarian*, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (1995).

"Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." *Id.*

"Pursuant to HRCP Rule 56(e) . . . affidavits in support of a motion for summary judgment 'shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the

matters stated therein.' Consequently, affidavits which state ultimate or conclusory facts or conclusions of law cannot be utilized in support of a motion for summary judgment." *Id.*, 79 Hawai'i at 524-25, 904 P.2d at 538-39.

C. Attorneys' Fees and Costs (Point of Error B)

> This court reviews the trial court's grant or denial of attorneys' fees and costs under the abuse of discretion standard. *Price* [*v. AIG Hawaii Insurance Co.*], 107 Hawai'i at 110, 111 P.3d at 5 (citations omitted).
>
> > The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.
>
> *Id.* (citations omitted).

Enoka v. AIG Hawaii Insurance Co., 109 Hawai'i 537, 544, 128 P.3d 850, 857 (2006) (material in brackets added).

IV. ARGUMENT

A. Lessees Reich and Hagin and Their Unit Were Disqualified From the Beginning Because They Both Owned Disqualifying Fee Simple Residential Real Estate Which They Hid in Solely-Owned and -Controlled Limited Liability Companies.

Lawrence Reich and Andrea Hagin owned Unit 2001. None of the following facts were disputed below by the City and the Lessees. As set forth in the Statement of the Case, their Application is dated January 27, 2003, and their Affidavit is dated January 27, 2003 (for Reich) and January 28, 2003 (for Hagin). The Department received their Application on February 5, 2003 (Affidavit of Cravalho re: Unit 2001).

Immediately prior to application, Lawrence Reich owned a piece of disqualifying fee simple residential real estate, namely Apartment 3706 located in the One Archer Lane Condominium Project. By Warranty Deed dated December 18, 2002, and recorded on January 6, 2003, Mr. Reich conveyed the disqualifying property to and entity named "Miele-LR Properties LLC." The DCCA information sheet on this LLC, among other things, notes that the LLC address is the Hagin-Reich Admiral Thomas apartment and that Reich is the sole member and agent.

In his deposition Reich admitted he formed and is the only member of Miele-LR Properties LLC. (Reich Depo. at 18.) He makes the decisions as to what the LLC does. (Reich Depo. at 22.) Its only purpose is to hold and rent real estate. (Reich Depo. at 19.) The LLC's only asset is the One Archer Lane property (Reich Depo. at 19-20.) Rent paid by the renter in the unit goes into the LLC and then is distributed to Reich's checking account after paying expenses. (Depo. at 21-22.) It has no plans to engage in any other activities than holding and renting the One Archer Lane property. (Reich Depo. at 22.)

At the time the property was transferred to the LLC, it was subject to a mortgage on which Mr. Reich personally was the borrower. (Reich Depo. at 27-28.) Reich never notified the lender of the transfer to the LLC. (Reich Depo. at 28.) The mortgage was paid off and released on September 21, 2004. (Reich Depo. at 29, Ex. 5 to Reich Depo.) The funds that paid off the mortgage came entirely from another sale of residential property in Arroyo Grande, California, which Reich owned personally. (Reich Depo. at 29-31.)

Joyce Hagin also owned a piece of disqualifying fee simple residential real estate, namely Apartment 8 in the Makakilo Mala condominium project. By Limited Warranty Deed dated

December 17, 2002, and recorded on January 6, 2003, Dr. Hagin transferred the property into an entity named "Rattin-Jah Property, LLC."

In her deposition Hagin admitted that she formed Rattin-Jah Property, LLC and is the sole member. (Hagin Depo. at 14-15.) She formed the LLC because she wanted to buy her Admiral Thomas fee and could not because Makakilo property was fee simple residential property which would prevent her from buying the fee. (Hagin Depo. at 16-17.) She transferred the property into the LLC based on advice of her attorney, Jim Case. There were no assets in the LLC other than the Makakilo property. (Hagin Depo. at 17.) The LLC did not do anything other than hold title to the Makakilo property. (Hagin Depo. at 18.)

At the time she transferred the Makakilo property into the LLC, it was subject to mortgages which she was individually the borrower (Hagin Depo. at 20).

On March 25, 2005, by "Apartment Deed (By Way of Exchange) (Direct Conveyance Pursuant to Exchange Agreement)" the LLC transferred the Makakilo property to Leon Warren Sims, II. Dr. Hagin admitted that the LLC exchanged the Makakilo property for property located in Cave Creek, Arizona. (Hagin Depo., 26:13-18.) The exchange deed for the Cave Creek, Arizona property conveyed title not to the LLC, but to "Joyce A. Hagin, a married woman, as her sole and separate property." (Hagin Depo. at 26-27). Dr. Hagin also obtained a loan personally from USAA Federal Savings Bank to acquire part of the Arizona Property, because the lender would not make a loan to an entity such as an LLC. (Hagin Depo. at 28.) She continues to be the borrower personally on the loan and continues to make the payments personally. (Hagin Depo. at 29.) On April 26, 2005, Dr. Hagin conveyed the Arizona property into Rattin-Jah Property, LLC.

It is undisputed that it is the policy of the City's Department of Community Services that holding title to fee simple residential property or any interest therein disqualifies the applicant. Exhibit 30 to "Defendant First United Methodist Church's Memorandum in Opposition to Defendant Lessees' Motion for Partial Summary Judgment Filed on 4/29/04." (R. 19, 1-226.) Even if this were not the case, however, there is abundant case law which says that the LLC entities utilized by Hagin and Reich to hide their fee simple residential property must be disregarded. Dr. Hagin in particular admitted under oath that the purpose of her LLC was to hold title to her fee simple residential property so that she could claim she qualified under Chapter 38. Other than holding title to the disqualified properties, the LLCs engaged in no other function. The properties continued to be subject to mortgages where the individual lessees were the borrower. Reich used personal funds from the sale of another property to pay the mortgage on his LLC property. Hagin exchanged her LLC property for another property in Arizona which she took in her own personal name.

While the Hawaii appellate courts have not specifically ruled as to limited liability companies, Hawaii recognizes the doctrine of "alter ego" in the context of a corporation:

> Generally speaking, a corporation will be deemed the alter ego of another "where recognition of the corporate fiction would bring about injustice or inequity or when there is evidence that the corporate fiction has been used to perpetrate a fraud or defeat a rightful claim." *Chung v. Animal Clinic, Inc.*, 63 Haw. 642, 645, 636 P.2d 721, 723 (1981); see also *Kahili, Inc. v. Yamamoto*, 54 Haw. 267, 271-72, 506 P.2d 9, 11-12 (1973).

Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transportation Company, Inc., 91 Haw. 224, 242-43, 982 P.2d 853, 870-71 (1999). Our Supreme Court notes that one of the indicia recognized by courts is

> whether the "fiction of corporate entity . . . has been adopted or used to evade the provisions of a statute.' *Kavanaugh v. Ford Motor Co.*, 353 F.2d 710, 717 (7th Cir. 1965); see also *Central*

> *States, Southeast and Southwest Areas Pension Fund v. Sloan*, 902 F.2d 593, 596-98 (7th Cir. 1990) (finding that creation of alter ego was motivated by a desire to circumvent federal pension fund laws); *Houston-American Life Ins. Co. v. Tate*, 358 S.W.2d 645, 656 (Tex. Civ. App. 1962) (corporate fiction ignored when it is used, inter alia, to "achieve or perpetrate monopoly" or to circumvent the insurance code and usury statutes); *United States v. Advance Machine Co.*, 547 F.Supp. 1085, 1093 (D. Minn. 1982) ("The law will not recognize corporate formalities used to circumvent statutory policy or to violate a law.")

Robert's Hawaii, 91 Haw. at 242-43, 982 P.2d at 871-72. Additional indicia listed by the Hawaii Supreme Court in *Robert's Hawaii* that are present here include: (1) commingling of personal and corporate funds (i.e., use of personal funds to pay off a mortgage on LLC property; use of LLC funds to acquire personal property in Arizona); (2) the treatment by an individual of assets of the corporation as his own (again, the Arizona property acquisition); (3) the holding out of an individual that he is personally liable for the debts of the corporation (personal liability on and/or payment of the mortgages on assets owned by the LLCs); (4) identical equitable ownership in the two entities; (5) identity of directors and officers of the two entities; (6) sole ownership by one individual or members of a family; (7) use of the same office or business location; (8) employment of the same employees; (9) use of a corporation as a mere shell, instrumentality or conduit for a single venture or the business of an individual; (10) the concealment and misrepresentation of the identity of the responsible ownership, management and financial interest, or concealment of personal business activities; (11) incorporation for the purpose of avoiding public policy or statutes; (12) whether the parent finances the subsidiary (use of personal funds by Reich to pay off the LLC mortgage; Hagin financing of the LLC acquisition of Arizona property through taking out and becoming personal liability on mortgage). See *Robert's Hawaii*, 91 Haw. at 241-43, 982 P.2d at 870-72.

Courts in other states have held that LLCs should be subject to the same kinds of "alter ego" tests as are applicable to corporations, and First Church urges that this Court should apply the same standards here:

> We recognize that the separate existence of a corporate entity for liability purposes represents a public policy choice, as expressed in Connecticut's legislation governing the formulation and regulation of corporations and limited liability companies, and that the corporate or limited liability form should not be disregarded lightly. Toshiba America Medical Systems, Inc. v. Mobile Medical Systems, Inc., 53 Conn.App. 484, 489, 730 A.2d 1219, cert. denied, 249 Conn. 930, 733 A.2d 851 (1999). We note additionally that of the many factors underlying a finding that the instrumentality or identity rule has been satisfied, no one factor or group of factors is necessarily dispositive of the inquiry. However, "[w]hen the statutory privilege of doing business in the corporate [or limited liability company] form is employed as a cloak for the evasion of obligations, as a mask behind which to do injustice, or invoked to subvert equity, the separate personality of the corporation [or limited liability company] will be disregarded." (Internal quotation marks omitted.) Id., at 492, 730 A.2d 1219.

Litchfield Asset Management Corp. v. Howell, 70 Conn. App. 133, 158, 799 A.2d 298, 316 (Conn. App. 2002) (emphasis added). *See also*, *Kaycee Land and Livestock v. Flahive*, 2002 WY 73, 46 P.3d 323 (Wy. 2002) (holding common law doctrine of "piercing the corporate veil" also applies to LLCs); *KLM Industries, Inc. v. Tylutki*, 75 Conn. App. 27, 29 n.2, 815 A.2d 688, 690 n.2 (Conn. App. Ct. 2003) (same analysis would be applied to disregarding LLC protections as applied to piercing of corporate veil); *Bonner v. Brunson*, 262 Ga. App. 521, 585 S.E.2d 917 (Ga. Ct. App. 2004) (applying "piercing analysis to LLC"); *Filo America, Inc. v. Olhoss Trading Company, L.L.C.*, 321 F.Supp.2d 1266 (M.D. Ala. 2004) (discussing weight of scholarly commentary and case-law of the states, and concluding that veil-piercing would be applied by Alabama courts to LLCs); *Lee v. Clinical Research Center of Florida, L.L.C.*, 889 So. 2d 317 (La. Ct. App. 2004) (applying piercing doctrine to LLCs).

That the separate existence of the LLCs must be disregarded is also supported by applicable federal tax law. As outlined above, Hagin and Reich disregarded the LLC entity when it suited them, for example, not notifying lenders that title had been transferred, having the LLC pay their own personal obligations under mortgages, and in the case of Hagin, eventually having the LLC exchange her disqualifying Hawaii property for residential property in Arizona which Hagin took title to in her own individual name. This would be a violation of federal tax laws, unless the LLC entity is structured such that it would be disregarded as a separate legal entity for tax purposes. (*See* Section 301.7701-3 of the *Internal Revenue Service Procedure and Administration Regulations* (R. Vol. 27 at 1-83, Exhibit 7), and *Internal Revenue Service Rev. Rul. 99-5* (R. Vol. 27 at 1-83, Exhibit 8), copies of which are attached hereto as Appendix "G" and Appendix "H" and of which First Church requests that this Court take judicial notice. *Kaho'ohanohano, supra*, 114 Hawai'i at 328, 162 P.3d at 722.)

It is clear that Reich and Hagin transferred their disqualifying fee simple residential property into their LLCs solely for the purpose of hiding ownership so that they could claim they qualified for condemnation under Chapter 38. This Court should disregard the separate entities, and rule that they are disqualified.

The trial court was of the opinion, based upon the Hawaii Supreme Court's opinion in *City and County of Honolulu v. Hsiung*, 109 Hawai'i 159, 124 P.3d 434 (2005) ("*Kahala Beach*"), that because Reich and Hagin had transferred legal title out of their personal names and into the LLCs right before they applied, that was enough to qualify them. However, the situation in *Kahala Beach* can be easily distinguished. In *Kahala Beach*, applicants Ault and Dixon had quitclaimed disqualifying fee simple residential property to relatives shortly before the time they applied. Although the lessor challenged the transfers in that case on the ground that it would

create a "false poverty" to become eligible under ROH Ch. 38, there was no evidence presented in that case that the applicants continued to maintain full control of the property and received the income that was being generated by the property. *Cf.*, *Kahala Beach*, 109 Hawai'i at 170-71, 124 P.3d at 445-46.

Here, however, it is clear that the only reason for the transfer of the disqualifying real estate was so that Reich and Hagin could claim they were qualified. There was a change in the form of their ownership of the property, but as a practical matter their control, management and ownership rights of the other properties continued unchanged.

ROH Chapter 38 clearly evidences an intention of the City Council to include, within the context of ownership, situations where the lessee may not be on legal title. Thus, ROH § 38-2.4(a)(4) states, in pertinent part, that to qualify the applicants cannot

> own property in fee simple lands suitable for residential purposes within the City and County of Honolulu . . . . A person is deemed to own lands, for the purposes of this paragraph, if the person, the person's spouse, or both the person and the person's spouse . . . own lands, including any interest, in a land trust in the City and County of Honolulu.

The intention of the City Council was to include "any interest," referring specifically to the beneficial interest in a land trust.

It is important to note that ROH Ch. 38 is the codification of Ordinance 91-95, which became effective on December 18, 1991.[10] Limited liability companies were not recognized as legal entities in Hawaii until 1996, when the Legislature first enacted HRS Ch. 428, the "Uniform Limited Liability Company Act." *See* Act 92, 1996 Session Laws. Thus, it is understandable why limited liability companies were not expressly included along with land trusts in the language of the ordinance.

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[10] A copy of Ordinance 91-95 is attached as Appendix "I."

First Church submits that in using the words "any interest," the intent of the City Council was to include an ownership interest in other entities which themselves controlled disqualifying property. Otherwise, the ability to exclude non-qualifying Lessees could easily be circumvented, as was done here, by the expedient of simply creating an LLC to hold the property. Since nothing exists to prevent every disqualified Lessee from engaging in such a paper transfer, for the courts to permit it would be to turn the prohibition into a nullity, and lead to an absurd result.

B. First Church is Entitled to Reimbursement of All of Its Attorneys' Fees, Including Those Incurred on the First Appeal.

The trial court denied First Church's request for reimbursement of fees and costs incurred on the first appeal. The trial court denied the request, not because it believed the request was unreasonable, but because the court mistakenly believed that it did not have the ability to consider such fees:

> "This trial court is not in a position to determine the reasonableness of fees incurred in an appeal—that is for the appellate courts. Therefore, this court denies the fees that Defendant claims were incurred on appeal in the amount of $69,114.50."

(R. Vol. 28 at 104.)

The grant or denial of fees and costs is reviewed by this Court under the abuse of discretion standard. This does not prevent the Court, however, from reversing where the ruling below was based on misapprehension of the legal requirements. "The trial court abuses its discretion if it bases its ruling on an erroneous view of the law . . . ." *Enoka, supra*, 109 Hawai'i at 544, 128 P.3d 850 at 857 (emphasis added).

The trial court erred as a matter of law when it determined it did not have the ability to award fees related to the first appeal. Directly on point is *Nelson v. University of Hawaii*, 99

Hawai'i 262, 54 P.3d 433 (2002).[11] There, the Hawaii Supreme Court had vacated a judgment notwithstanding the verdict (JNOV) entered against the plaintiff, and remanded the case for a new trial. (*See* the Court's prior opinion in *Nelson v. University of Hawaii*, 97 Hawai'i 376, 38 P.3d 95 (2001).) The plaintiff then moved in the Hawaii Supreme Court for an award of fees and costs. The Hawaii Supreme Court ruled that the request was premature, and that the request for fees and costs, including the fees and costs for the appeal, should be brought in the circuit court if the plaintiff prevailed on remand:

> Finally, Nelson contends that it is the better policy that this court decide the reasonableness of attorneys' fees incurred during this appeal, rather than perhaps requiring a future trial court to do so. Specifically, Nelson suggests that she may win some or all of her claims on remand. If so, she will certainly be entitled, *inter alia*, to an award of reasonable attorneys' fees incurred during the present appeal, which would have been necessary in order for her ultimately to secure the trial judgment. However, because this court will no longer have jurisdiction over the case in such an instance, the *trial* court will then have to determine the reasonableness of fees incurred during the present appeal. Nelson posits that it is better for *this* court to review the current fees request because this court "is in the best position of all to decide those issues, having decided the appeal and having been familiar with the work that was done to produce the result in this case correcting the reversible error of the trial court."
>
> We agree with Nelson that, as a general rule, it would be preferable for this court to determine the reasonableness of attorneys' fees incurred for work performed in this appeal, rather than leaving the task to a future trial court should the hypothetical

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[11] In fairness to the trial judge, neither party cited this case to her, and at hearing counsel for First Church stated that "we did try to research this to see if we could find any case directly on point in the situation. And we weren't able to." (Transcript of Proceedings, 2/15/2007 at 3.) However, neither a Westlaw search nor a review of the Hawaii Digest would have revealed the *Nelson* case, because none of the headnotes for the case are indexed under any of the topics for attorneys' fees and costs. As shown by the copy of the opinion attached hereto as Appendix "J," the headnote relating to the award of fees and costs is instead digested by the West system under "Civil Rights ⚷ 455." *Cf. Nelson*, 99 Hawai'i at 262-63, 54 P.3d at 433-34. In any event, counsel for First Church argued that the trial court could consider the award of such fees under other case opinions of the Hawaii Supreme Court.

> situation she poses arise. Indeed, in *S. Utsunomiya Enterprises*, this court declined to consider, as an original matter, awarding the portion of attorneys' fees attributable to work at the trial level due, in part, to the disputed issues concerning the reasonableness of the fees incurred during trial, which this court believed could best be determined by the trial court. *See S. Utsunomiya Enterprises*, 76 Hawai'i at 402, 879 P.2d at 507. However, we do not believe that the foregoing consideration merits adopting an interpretation of HRS § 378-5(c) that would require this court to award fees in circumstances, such as those here, where the plaintiff ultimately may not prevail and would therefore not be entitled to such fees. Although, as previously stated, it would be preferable for this court to determine the reasonableness of fees incurred for appellate work, such a consideration does not warrant perverting the intent of HRS § 378-5(c) in the first place. Moreover, there is less possibility of error when a trial court is called upon to assess the reasonableness of fees incurred for appellate work than when, as in S. Utsunomiya Enterprises, an appellate court is called upon to assess the reasonableness of fees incurred for trial work. There are a multitude of situations that arise during litigation at the trial level that may contribute to the legal and strategic decisions made by each party; the trial judge is in the best position to ascertain the motivations of the parties and the reasonableness of actions undertaken by counsel and the parties. In contrast, the appellate record is less voluminous, and the appellate arguments are narrowly focused on the few legal issues that the appellant has identified as error. A trial judge can assess the reasonableness of appellate work in much the same way as he or she can assess the reasonableness of time spent for an equivalent issue in a trial brief. Accordingly, should Nelson succeed on some or all of her claims on remand, and this court does not again acquire jurisdiction over the case, the trial court can assess the reasonableness of attorneys' fees for work done in the instant appeal.

Nelson, 97 Hawai'i at 269, 54 P.3d at 433 (italicized emphasis in original, underlined emphasis added).

The jurisdictional right to recover fees is based on statute, not court rule. *See, e.g., S. Utsunomiya Enterprises v. Moomuku Country Club*, 76 Hawai'i 396, 398-99, 879 P.2d 501, 503-04 (1994). First Church was requesting fees based upon Hawaii Revised Statutes ("HRS") § 101-27 (2004). This statute allows for a defendant in a condemnation proceeding to recover "all such damages as may have been sustained by the defendant by reason of the bringing of the proceedings" "[w]henever any proceedings instituted under this part are abandoned or

discontinued before reaching a final judgment[.]" HRS § 101-27 (emphasis added). Clearly attorneys' fees incurred defending and prosecuting appeals that would have been unnecessary if the City had not commenced these proceedings are included within the damages sustained by First Church.

In *Housing Finance and Development Corporation v. Takabuki*, 82 Hawai'i 172, 921 P.2d 92 (1996), the Hawaii Supreme Court explained the consequences if mandatory lease-to-fee condemnation proceedings were terminated:

> [I]f the HFDC terminates the proceedings after designation but prior to commencement of the condemnation action, the HFDC will be required to "reimburse the fee owner, the lessor and the legal and equitable owners of the land.., for actual out-of-pocket expenses of appraisal, survey, and attorney fees as the owner, the lessor, and the legal and equitable owners may have incurred as a result of the designation." HRS § 516-23. Similarly, if the HFDC terminates the proceedings after the condemnation action has commenced, the HFDC will be required to pay "all damages as may have been sustained by the defendant by reason of the bringing of the proceedings . . . including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith and other reasonable expenses." HRS § 101 -27 (1993).

Id. at 183, 921 P.2d at 103 (emphasis added).

The Court in *Takabuki* equated the provisions of HRS § 516-23 as "similar" to HRS § 101-27, with both requiring the condemning authority to pay all damages, e.g., actual out-of-pocket expenses, sustained or incurred by the defendant condemnee. The provisions of HRS § 516-23 and ROH § 38-5.2 are almost identical,[12] and both require the payment of the condemnee's expenses to make it whole in the event that proceedings to take the condemnee's property are discontinued.

Moreover, interpreting the predecessor of Haw. Rev. Stat. § 101-27,[13] the Hawaii Supreme Court stated:

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[12] ROH § 38.5-4 provides that "the city shall reimburse the fee owner, the lessor, and the legal and equitable owners of land so designated for actual out-of-pocket expenses they incurred as appraisal, survey, and attorney fees as a result of the designation."

[13] Rev. Law of Haw. 1955 § 8-25 (1957) is identical in relevant part to HRS § 101-27. Section 8-25 provides that "a defendant. . . shall be entitled.. . to recover from the plaintiff all such damage as may have been sustained by him by reason of the bringing of the proceedings and

> [P]ursuant to section 8-25, a defendant who would have been entitled to compensation or damages if the property had been finally taken, is allowed damages upon the abandonment of the proceedings. Our statute guarantees to those who are entitled to compensation or damages in the event of a final taking, that if the proceeding is not completed, damages sustained by reason of the bringing of the proceeding and the taking of possession will be paid.

City & County of Honolulu v. Bishop Trust Co., 49 Haw. 494, 502, 421 P.2d 300, 305 (1966) (emphasis added). The fact that HRS § 101-27 is viewed by the Court as a guaranty or indemnity statute making the condemnee whole fundamentally distinguishes it from the normal statute providing for award of fees and costs. Application of the same analysis to HRS § 101-27 likewise leads to the conclusion that reasonable attorneys fees incurred on appeal should be allowed. Nothing in the statute restricts the ability of this court to grant such fees.

The power of eminent domain is a formidable power, whereby a citizen is dragged into court against her will and deprived of her property. The purpose of HRS § 101-27 is to protect citizens from the government changing its mind about taking the property, thus leaving the property owner stuck with the costs of defending herself against the government:

> The purpose of R.L.H.1955, § 8-25 [now Haw. Rev. Stat. § 101-27], is to protect the property owner against caprice on the part of the condemnor and to afford him redress if the condemnor, after having commenced the action and thus restraining the owner from complete and free use of the property in the open market, does not proceed and finally acquire the property for public use.

Helela v. State, 49 Haw. 365, 372, 418 P.2d 482, 486 (1966) (emphasis added).

To adopt the City's position would be to limit the condemnee's right to damages the statute expressly declares should be awarded. The statute says the right to damages is triggered if the condemnation is abandoned any time before final judgment,[14] and thus by its express terms

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the possession by the plaintiff of the property concerned if such possession has been awarded including his costs of court, a reasonable amount to cover attorney's fees paid by him in connection therewith, and other reasonable expenses....

[14] In *State v. Heirs of Kapahi*, 50 Haw. 237 (1968), the Hawai'i Supreme Court stated: "[r]eviewing [Revised Laws of Hawaii 1955] §§ 8-23, 8-25 and 8-30, which are in pari materia, we feel compelled to conclude that the term 'final judgment' as used in § 8-23 should be interpreted to mean the judgment which is entered after the disposition of an

encompasses fees and costs incurred in an interlocutory appeal such as occurred here. In this regard the *Nelson* case is also instructive. There, under the attorneys' fees statute invoked, the plaintiff was not entitled to fees, including the fees on a remanded appeal, until she had recovered a "judgment" in her favor. An application before then would be premature:

> We note that HRAP Rule 53(b) requires that parties moving for attorneys' fees pursuant to a statute must do so within fourteen days of entry of judgment. In this case, the term "judgment" in HRAP Rule 53(b) is given the same meaning as the term "judgment" in HRS § 378-5(c). Thus, for example, in a case such as this one, Nelson would not be required to file her motion for fees performed during this appeal unless and until she obtains a HRS § 378-5(c) " judgment." Once she obtains such a judgment, however, she must file the motion within fourteen days in whatever court has jurisdiction of the case at the time. (Hawai'i Rules of Civil Procedure (HRCP) Rule 54(d) also requires that parties moving for attorneys' fees pursuant to statute must do so within fourteen days after entry of " judgment" and, in this context, the term " judgment" in HRCP Rule 54(d) also carries the same meaning as the term in HRS § 378-5(c).) As in this case, premature fee requests will be denied without prejudice to the litigant's right to be awarded fees in the future.

Nelson, 113 Hawai'i at 269 n.5, 38 P.3d at 440 n. 9.

As the policy of the statute is to protect citizens from the caprice of government, the policy would be furthered by allowing the condemnee to recover all reasonable damages incurred, which includes its attorneys' fees incurred on appeal. Accordingly, this Court should remand this case back to the trial court for the limited purpose of determining the amount of reasonable fees and costs to be awarded to First Church with regard to the first appeal.

Alternatively, this Court should determine that First Church is entitled to such fees and costs, and award such amount to it. *See, e.g., Fought & Co., Inc. v. Steel Engineering and Erection, Inc.*, 87 Hawai'i 37, 52, 951 P.2d 487, 502 (1998). The amount of such fees and costs can be found at R. Vol. 27 at 137-266.

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appeal to this court." *Id.* at 240 (emphasis added). Accordingly, the condemnation has been abandoned before final judgment, and First Church is entitled to damages incurred on appeal.

V. CONCLUSION.

For the reasons set forth above, this Court should grant the following relief:

1. Reverse in part the judgment of the trial court below and determine that Lessees LAWRENCE REICH and ANDREA HAGIN and their unit were disqualified from participating in this action.

2. Remand this case to the trial court for the limited purpose of determining the amount of attorneys' fees and costs to be awarded First Church for the first appeal of this case, or, in the alternative, that this Court itself determine and award to First Church its attorneys' fees and costs incurred in the first appeal.

DATED: Honolulu, Hawaii; April 18, 2008.

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