

19, 1985; KENNETH GRAHAM)
PATTERSON and LILLIAN PAPACOLAS)
PATTERSON; MOSES MOSAI LO and)
SHEILA DICKENSON LO; FRANK K.)
MIN, also known as Frank Kui Pong Min,)
and ELAINE N. MIN, also known as Elaine)
Nam Min, Trustees under that certain Trust)
Agreement dated April 9, 1985; ELAINE N.)
MIN, also known as Elaine Nam Min and)
FRANK K. MIN, also known as Frank Kui)
Pong Min, Trustees under that certain Trust)
Agreement dated April 9, 1985; ARTHUR R.)
KING, JR., and RUTH MILDRED KING,)
Co-Trustees of the unrecorded Arthur R.)
King, Jr. Trust Agreement dated May 18,)
1990; RUTH MILDRED KING and)
ARTHUR R. KING, Co-Trustees of the)
unrecorded Ruth Mildred King Trust)
Agreement dated May 18, 1990; RAMEZ)
BASSIR; PAUL JOHN CASEY, as Trustee)
under that certain unrecorded Self-Trusteed)
Trust dated August 31, 1987; JANICE)
YOKO CASEY, as Trustee under that certain)
unrecorded Self-Trusteed Trust dated May)
20, 1988; GEORGE HENRY LUMSDEN and)
JoANNE CHUN LUMSDEN; ANN)
TAKAKO YAMAMOTO, as Trustee of the)
Self-Trusteed Trust Agreement of Ann)
Takako Yamamoto, under unrecorded Trust)
Agreement of Ann Takako Yamamoto dated)
April 10, 2000; FRANCES M. WATANABE,)
Trustee under that certain unrecorded Frances)
M. Watanabe Revocable Trust dated April 2,)
1993; MEREDITH KWOCK LEONG PANG;)
NEIL SIMMS BELLINGER, Trustee under)
that certain unrecorded Neil S. Bellinger)
Revocable Living Trust dated November 20,)
2002; WALLACE LEE YOUNG and)
ERNESTINE CHING YOUNG; JOYCE A)
HAGIN and LAWRENCE REICH; DAVID)
PATRICK KELLY and KEIKO KELLY;)
PATRICIA CARLEEN BROWN, Trustee for)
the Patricia Carleen Brown Revocable Trust)
Agreement dated January 21, 1993; RANDY)
NEIL YEAGER and SUSAN KAYCIE)

FIRST CIRCUIT COURT

HONORABLE VICTORIA S. MARKS
Judge

YEAGER; and GAIL SUZANNE)
 KOGLMAN,)
)
 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.)
 _____)

DEFENDANTS-APPELLANTS' OPENING BRIEF

APPENDIXES "1" THROUGH "5"

CERTIFICATE OF SERVICE

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DEFENDANTS-APPELLANTS' OPENING BRIEF

I. INTRODUCTION

Defendants-Appellants/Cross-Appellees,¹ by and through their attorneys

¹ Defendants-Appellants/Cross-Appellees (hereinafter collectively referred to as "Lessees") are 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, 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; KAREN WILLSON 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; MARCIA KURZWEIL GROSS, as Trustee under that certain unrecorded Trust Agreement known as The Marcia K. Gross Trust dated February 19, 1985; KENNETH GRAHAM PATTERSON and LILLIAN PAPACOLAS PATTERSON; MOSES MOSAI LO and SHEILA DICKENSON LO; FRANK K. MIN, also known as Frank Kui Pong Min, and ELAINE N. MIN, also known as Elaine Nam Min, Trustees under that certain Trust Agreement dated April 9, 1985; ELAINE N. MIN, also known as Elaine Nam Min and FRANK K. MIN, also known as Frank Kui Pong Min, Trustees under that certain Trust Agreement dated April 9, 1985; ARTHUR R. KING, JR., and RUTH MILDRED KING, Co-Trustees of the unrecorded Arthur R. King, Jr. Trust Agreement dated May 18, 1990; RUTH MILDRED KING and ARTHUR R. KING, Co-Trustees of the unrecorded Ruth Mildred King Trust Agreement dated May 18, 1990; RAMEZ BASSIR; PAUL JOHN CASEY, as Trustee under that certain unrecorded Self-Trusteed Trust dated August 31, 1987; JANICE YOKO CASEY, as Trustee under that certain unrecorded Self-Trusteed Trust dated May 20, 1988; GEORGE HENRY LUMSDEN and JoANNE CHUN LUMSDEN; ANN TAKAKO YAMAMOTO, as Trustee of the Self-Trusteed Trust Agreement of Ann Takako Yamamoto, under unrecorded Trust Agreement of Ann Takako Yamamoto dated April 10, 2000; FRANCES M. WATANABE, Trustee under that certain unrecorded Frances M. Watanabe Revocable Trust dated April 2, 1993; MEREDITH KWOCK LEONG PANG; NEIL SIMMS BELLINGER, Trustee under that certain unrecorded Neil S. Bellinger Revocable Living Trust dated November 20, 2002; WALLACE LEE YOUNG and ERNESTINE CHING YOUNG; JOYCE A HAGIN and LAWRENCE REICH; DAVID PATRICK KELLY and KEIKO KELLY; PATRICIA CARLEEN BROWN, Trustee for the Patricia Carleen Brown Revocable Trust Agreement dated January 21, 1993; RANDY NEIL

(continued...)

Alston Hunt Floyd & Ing, respectfully submit their Opening Brief.

This appeal involves the interpretation and application of Ordinance 91-95 of Plaintiff/Cross-Appellee the CITY AND COUNTY OF HONOLULU (the "City"), as codified in Revised Ordinances of Honolulu ("ROH") Chapter 38 (1991) ("Chapter 38").² Chapter 38, entitled "Residential Condominium, Cooperative Housing and Residential Planned Development Leasehold Conversion", established the authority of the City to file eminent domain actions for a lease-to-fee conversion of certain leased-fee interests.³ Lessees applied to the City under Chapter 38 to convert their leasehold interests into fee simple interests in their units and the appurtenant land at the Admiral Thomas condominium complex (the "Admiral Thomas").

¹ (...continued)
YEAGER and SUSAN KAYCIE YEAGER; and GAIL SUZANNE KOGLMAN.

² A copy of Chapter 38 is attached as Appendix "1".

³ Specifically, Chapter 38 authorized the City to acquire, either by voluntary purchase or through exercise of the power of eminent domain, the fee simple interest in land situated underneath condominium developments from the fee owners of the land in order to convey fee simple title to the owner-occupants of the condominium units, who, prior to the City's acquisition, leased the fee interests from the fee owners. As such, Chapter 38 provides a mechanism by which condominium owners may convert their leased fee interests into fee simple interests appurtenant to their condominium units. Chapter 38 authorizes the City's Department of Community Services, fka Department of Housing and Community Development (the "Department") to promulgate administrative rules in order to facilitate the lease-to-fee conversion process and administer Chapter 38. *Coon v. City and County of Honolulu*, 98 Hawai'i 233, 237 n. 1, 47 P.3d 348, 352 n. 1 (2002). Effective February 9, 2005, the Honolulu City Council ("City Council") passed Bill 53/Ordinance 05-001, which repealed Chapter 38 ("Ordinance 05-001"). A copy of Ordinance 05-001 is attached as Appendix "2". Nevertheless, the repeal of Chapter 38 does not affect the present matter, inasmuch as the City Council had already authorized the eminent domain proceeding at issue. *See* Ordinance 05-001 § 3(b) ("Any designation of a development for leasehold conversion shall be invalid on the effective date of this ordinance if the council did not authorize before the effective date of this ordinance the eminent domain proceeding to acquire all or a portion of the leased fee interests to the development.").

The Circuit Court of the First Circuit, State of Hawai'i ("Circuit Court") committed reversible error in ruling in favor of Defendant-Appellee/Cross-Appellant FIRST UNITED METHODIST CHURCH ("Lessor") and against Lessees by finding that there was an insufficient number of qualified applicant units to acquire the fee. The Circuit Court refused to follow Hawai'i Supreme Court precedent when it concluded that the five additional Admiral Thomas units designated for acquisition by the City on April 20, 2004, could not be considered in the Circuit Court's determination of whether of Chapter 38's numerosity requirement had been satisfied. The Circuit Court improperly disregarded the Hawai'i Supreme Court's precedent in *City and County of Honolulu v. Sherman et al.*, 110 Hawai'i 39, 66-67, 129 P.3d 542, 569-70 (2006),⁴ and ignored the indisputable evidence that the City had properly qualified, designated and continuously maintained the applicant owners of more than twenty-five units at the Admiral Thomas, pursuant to Chapter 38 and the Amended Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion (the "Rules").⁵ The Circuit Court's Order⁶ granting in part Lessor's summary judgment motion and dismissing Lessees' condemnation action is plainly in error, an egregious abuse of discretion and has caused irreparable harm to Lessees. Accordingly, the Final

⁴ In *Sherman*, the Hawai'i Supreme Court reversed the Circuit Court's first dismissal of this action and remanded for proceedings consistent with its opinion, including a determination as to whether there are the requisite number of qualified applicants, their qualifications to be determined from the date that their applications were filed with the City, and, if so, to consider evidence of the fair market value of the leased fee interest being acquired. *Id.*, 110 Hawai'i at 77, 129 P.3d at 580.

⁵ A copy of the Rules is attached as Appendix "3".

⁶ "Order" refers to *Findings of Fact, Conclusions of Law and Order Granting In Part and Denying In Part Defendant First United Methodist Church's Motioin for Partial Summary Judgment on the Issue of Lessee Qualifications, filed September 7, 2006*, filed December 26, 2006. A copy of the Order is attached as Appendix "4".

Judgment⁷ below should be reversed and the case remanded to the Circuit Court with instructions to vacate the Order dismissing this action, proceed with Lessees' condemnation action and add the units designated by the City's April 20, 2004 designation, and their leasehold owner occupants, to the condemnation action.

II. STATEMENT OF THE CASE

A. Factual Background

Lessees each filed an application with the Department under Chapter 38 to convert to their leasehold interests in the Admiral Thomas into fee, and were determined by the Department to have met the qualifications stated in Chapter 38 entitling them to purchase their respective duly designated leased fee interests ("Designated Leased Fee Interests").⁸

ROA 26:145-49, 159-68, 209-11.

Before the repeal of Chapter 38 on February 9, 2005, ROH § 38-2.2(a), stated, in part, that the Department "may designate all or that portion of a development containing residential condominium land for acquisition" using the power of eminent domain of the City after the requirements in ROH §§ 38-2.2(a)(1) and 38-2.2(a)(2) are met. ROA 26:139-40, 175. Section 38-2.2(a)(1), ROH, stated in part that the process may commence when at least 25 of all the condominium owners within the development of the owners of at least 50% of the condominium units have filed an application with Department to purchase the leased fee interest. *Id.* Section 38-2.2(a)(2), ROH, stated in part that the Department shall hold a

⁷ "Final Judgment" refers to the *Final Judgment*, filed December 11, 2007. A copy of the Final Judgment is attached as Appendix "5".

⁸ The Record on Appeal is cited as "ROA". Documents within the ROA are cited by volume (in Arabic numerals) and page (in Arabic numerals) as follows: ROA [volume]: [pages].

public hearing after notice and may find that the proposed purchase of the leased fee interest will effectuate the public purpose of Chapter 38. *Id.*

Pursuant to the *Finding of Effectuation of Public Purpose by the Director, Department of Community Services, City and County of Honolulu for Admiral Thomas ("Project")*, dated May 2002 ("Finding of Effectuation of Public Purpose"), the Department found, pursuant to ROH § 38-2.2(a)(2) and Rules of Residential Condominium Cooperative and Planned Development Leasehold Conversion (2000) ("Rules") § 2-7, that the acquisition of the leased fee interest in Admiral Thomas using the power of eminent domain of the City will effectuate the public purpose of Chapter 38, as found and stated by the City Council in Ordinance 91-95. ROA 26:145, 169-71. Thereafter, pursuant to the *Designation of Admiral Thomas Apartments Pursuant to Chapter 38, Revised Ordinances of Honolulu 1990 and the Rules for Residential Condominium, Cooperative and planned Development Leasehold Conversion, as Amended*, dated October 11, 2002 (the "Original Designation"), the Department designated for acquisition the leased fee interests in twenty-eight Admiral Thomas units. ROA 26:145-47, 159-64. On or about November 18, 2002, an applicant withdrew her application bringing the number of designated Admiral Thomas units to twenty-seven. ROA 26:147.

On March 20, 2003, pursuant to the *First Amendment to Designation of Admiral Thomas Apartments ("Project") Pursuant to Chapter 38, Revised Ordinances of Honolulu 1990 and The Rules for Residential Condominium Cooperative and Planned Development Leasehold Conversion, as Amended*, dated March 20, 2003 ("First Amendment to Original Designation"), the Department designated for acquisition the leased fee interests in six Admiral Thomas units, bringing the number of designated Admiral Thomas units to

thirty-three. ROA 26:147-48, 165-66. On July 31, 2003, an applicant withdrew from the Chapter 38 process, bringing the number of designated Admiral Thomas units to thirty-two. ROA 26:149. On September 9, 2003, an applicant sold her unit to a buyer who was ineligible for the Chapter 38 process and her unit was subsequently withdrawn. ROA 26:149-50. As a result, the number of designated Admiral Thomas units was brought to thirty-one. ROA 26:147-50.

On April 23, 2003, pursuant to the *Second Amendment to Designation of Admiral Thomas Apartments ("Project") Pursuant to Chapter 38, Revised Ordinances of Honolulu 1990 and The Rules for Residential Condominium Cooperative and Planned Development Leasehold Conversion, as Amended*, dated April 23, 2003 ("Second Amendment to Original Designation"), the Department designated for acquisition the leased fee interests in one Admiral Thomas unit, bringing the number of designated Admiral Thomas units to thirty-two. ROA 26:148, 167-68.

On April 20, 2004, pursuant to the *Third Amendment to Designation of Admiral Thomas Apartments ("Project") Pursuant to Chapter 38, Revised Ordinances of Honolulu 1990 and The Rules for Residential Condominium Cooperative and Planned Development Leasehold Conversion, as Amended*, dated April 23, 2003 ("Third Amendment to Original Designation"), the Department designated for acquisition the leased fee interests in five Admiral Thomas units, bringing the number of designated Admiral Thomas units to thirty-seven. ROA 26:149, 209-11. Accordingly, Lessees were determined by the Department to have met all qualifications stated in Chapter 38 and the Rules, entitling them to purchase the Designated Leased Fee Interests. ROH § 38-5.2; Rules § 2-12. ROA 26:145-50, 159-68, 181, 204, 209-11.

As a result of the following events, the number of designated Admiral Thomas units was brought to thirty by the time of the Circuit Court's ruling on October 10, 2006:

- applicant Elizabeth Kehrer Anderson, Trustee passed away on June 7, 2004;
- applicant Adam B. Shaw sold his unit on June 15, 2004;
- applicant John Philip Spierling passed away on June 20, 2004;
- applicants Mark and Mollie Sperry, Trustees purchased fee simple residential property on O'ahu on September 29, 2004;
- applicant Sayuri Taniguchi passed away and applicant Erica Taniguchi Dorman vacated their unit in February 2005;
- applicants Robert G. Lees and Yuko Lees, Trustees sole their unit on August 2, 2005; and
- applicant Deaana Lou Levy vacated her unit in February 2006.

ROA 26:150.

At no time since the Initial Designation on October 11, 2002, through this Circuit Court's ruling on October 10, 2006, did the number of designated Admiral Thomas units fall below twenty-five. ROA 26:150-51.

B. Procedural Background

By its Resolution 02-301, adopted on December 4, 2002, the City Council authorized Corporation Counsel to initiate a complaint in eminent domain pursuant to Chapter 38 regarding Admiral Thomas. ROA 1:5-6, 151-59. On May 8, 2003, the City filed its Complaint against Lessor and some of the Lessees thereby initiating this action. ROA 1:1-163. On June 10, 2003, Lessor filed a Counterclaim alleging that the actions of the City violate the First Amendment to the United States Constitution as well as the Religious Land

Use and Institutionalized Persons Act of 2000 ("RLUIPA"). ROA 1:319-43. On February 12, 2004, the City filed the First Amended Complaint. ROA 3:97-290.

After the Circuit Court's adjudication of the parties' summary judgment motions, Final Judgment was entered on September 21, 2004. ROA 22:50-56. The parties appealed and/or filed cross-appeals. ROA 22:176-201, 300-317.

On February 9, 2005, and effective as of that date, Chapter 38 was repealed by Ordinance 05-001. Ordinance 05-001. Excepted from the scope of the repeal were only those eminent domain proceedings initiated under Chapter 38 for the acquisition of units "validly designated" by the Department in projects, the condemnation of which units as approved by the City Council by resolution before the effective date of the repeal. *Id.*, § 3(b).

Because this action was initiated nearly two years prior to the repeal of Chapter 38, it is excepted from the repeal's scope. *Id.*

On February 28, 2006, the Hawai`i Supreme Court issued its opinion on the parties' appeals and cross-appeals in *Sherman*. Among other things, the Court held that:

- If Chapter 38's numerosity requirement was met when Admiral Thomas was first designated for acquisition pursuant to Chapter 38 in 2002, then any properly added applicant-units may count toward the continuous maintenance of the minimum twenty-five units, *Sherman*, 110 Hawai`i at 66-67, 129 P.3d at 569-70;

- the relevant date to determine whether a unit qualifies for Chapter 38 condemnation is when a lessee files an application with the City and not when the application is signed by the lessee, *id.*, 110 Hawai`i at 67, 129 P.3d at 570; and

- the time an application is filed with the City is the operative date for determining whether lessees initially qualify to purchase the fee simple interest in their condominium units pursuant to ROH § 38-2.4, *id.*, 110 Hawai`i at 68, 129 P.3d at 571.

Accordingly, the Hawai`i Supreme Court: (1) vacated the July 8, 2004 order of the Circuit Court to the extent that it ruled that there were not twenty-five qualified applicants throughout the proceedings; and (2) remanded this action to the Circuit Court for proceedings consistent with its opinion, including a determination as to whether there are the requisite number of qualified applicants, their qualifications to be determined from the date that their applications were filed with the City, and, if so, to consider evidence of the fair market value of the leased fee interest being acquired. *Id.*, 110 Hawai`i at 77, 129 P.3d at 580.

On October 10, 2006, the Circuit Court granted in part and denied in part *Defendant First United Methodist Church's Motion for Partial Summary Judgment on the Issue of Lessee Qualifications*, filed September 7, 2006 ("Lessor's Summary Judgment Motion"). ROA 27:123-32. The Circuit Court erroneously: (1) concluded that, as a matter of law: (a) the Third Amendment to Original Designation could not be considered for purposes of determining whether Chapter 38's numerosity requirement was satisfied; (b) Lessees Ernestine Ching Young, Clarence K. Lee, Trustee, and Ann Takako Yamamoto, Trustee did not qualify for the Chapter 38 process; and (c) there were not qualified lessees for at least twenty-five Admiral Thomas units; and (2) dismissed and terminated this action. ROA 27:123-32.

III. STATEMENT OF POINTS OF ERROR

A. The Circuit Court erred in granting in part Lessor's Summary Judgment Motion when it concluded as a matter of law that the Third Amendment to the Initial Designation could not be considered for purposes of determining whether Chapter 38's numerosity requirement was satisfied.

B. The Circuit Court erred in granting in part Lessor's Summary Judgment Motion when it concluded that Lessees Ernestine Ching Young, Clarence K. Lee, Trustee and Ann Takako Yamamoto, Trustee do not qualify for the Chapter 38 process.

C. The Circuit Court erred in granting in part Lessor's Summary Judgment Motion when it concluded that a minimum number of twenty-five Admiral Thomas units has not been continuously maintained as a matter of law, and then dismissed and terminated this action.

IV. STANDARD OF REVIEW

A. Summary Judgment

Grants of summary judgment are reviewed *de novo*. *Sherman*, 110 Hawai'i at 48-49, 129 P.3d at 551-52. The standard for granting a motion for summary judgment is settled:

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. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Id. (citations omitted).

B. Statutory Interpretation

A circuit court's interpretation of a statute is reviewed *de novo*. *Sherman*, 110 Hawai'i at 49, 129 P.3d at 52. Statutory construction is guided by established rules:

When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.

When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .

In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.

. . . This court may also consider "[t]he reason and spirit of the law, and the cause which induced the legislature to enact it . . . to discover its true meaning." HRS § 1-15(2) (1993).

Id. (citations omitted).

C. Inherent Powers

A trial court's refusal to exercise its inherent powers is subject to review for abuse of discretion. *Kukui Nuts of Hawai'i, Inc. v. R. Baird & Co.*, 6 Haw. App. 431, 438, 726 P.2d 268, 272 (Haw. Ct. App. 1986).

D. Findings of Fact

This Court reviews the trial court's findings of fact under the clearly erroneous standard. *Beneficial Hawai'i, Inc. v. Kida*, 96 Hawai'i 289, 305, 30 P.3d 895, 911 (2001). A finding of fact is clearly erroneous when, despite evidence to support the finding, the appel-

late court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed. A finding of fact is also clearly erroneous when the record lacks substantial evidence to support the finding. This Court has defined substantial evidence as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion. *Id.* (internal citations, quotations marks, brackets, and block quotation format omitted).

E. Conclusions of Law

Conclusions of law are reviewed de novo under the right/wrong standard. *Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd.*, 100 Haw. 149, 159, 58 P.3d 1196, 1206 (2002). Under this standard, the Court examines the facts and answers the question without being required to give any weight to the trial court's answer to it. Thus a conclusion of law is not binding upon the appellate court and is freely reviewable for its correctness. *Id.*

F. Judgment

Hawaii Revised Statutes ("Haw. Rev. Stat.") § 641-2 (1993) provides statutory standards for "review on and disposition of" an appeal.

In case of appeal to the supreme court from a judgment, order or decree of a circuit . . . court . . . in a civil matter, the supreme court shall have power to review, reverse, affirm, amend, or modify such judgment, order, or decree in whole or in part, and as to any or all of the parties.

. . .
The supreme court . . . need not consider a point which was not presented in the trial court in the appropriate manner. No judgment, order or decree shall be reversed, amended or modified for any error or defect unless the court is of the opinion that it has injuriously affected the substantial rights of the appellant.

V. ARGUMENT

A. The Circuit Court Improperly Refused to Consider the Third Amendment to Original Designation in Determining Whether Chapter 38's Numerosity Requirement was Satisfied

The Circuit Court's failure to follow the Hawai'i Supreme Court's precedent in *Sherman*, which provides a framework for analyzing Chapter 38's numerosity requirement and amendments to original Chapter 38 designations, is reversible error.⁹ *Sherman* is precedent. "Precedent is '[a]n adjudged case or decision of a court, considered as furnishing an example of authority for an identical or similar case afterwards arising or a similar question of law.'"¹⁰ The purpose of precedent is to "furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; . . . eliminat[e] the need to relitigate every relevant proposition in every case; and . . . maintain[] public faith in the judiciary as a source of impersonal and reasoned judgments."¹¹ The practice of abiding by precedent, *i.e.*, applying the same legal precepts to similar factual situations, is referred to as the doctrine of stare decisis.¹² The import of creating precedent is

⁹ See *United States v. Virginia et al.*, 518 U.S. 515, 555 (1996) (appellate court committed plain and reversible error when it refused to apply heightened standard of review established by Court precedent, and instead devised another test using a lower standard of review and proceeded to find the new test satisfied); *Matsuda v. City and County of Honolulu*, 512 F.3d 1148, 1155 (9th Cir. 2008) (vacating district court's grant of summary judgment in favor of City where the court failed to analyze lessees' Contract Clause claim under the framework established by United States Supreme Court precedent).

¹⁰ *State v. Garcia*, 96 Hawai'i 200, 205, 29 P.3d 919, 924 (2001) (quoting BLACK'S LAW DICTIONARY 1176 (6th ed.1990)).

¹¹ *Id.* at 205-06, 29 P.3d at 924-25 (quoting *Robinson v. Ariyoshi*, 65 Haw. 641, 653 n. 10, 658 P.2d 287, 297 n. 10 (1982)).

¹² See *State v. Brantley*, 99 Hawai'i 463, 479, 56 P.3d 1252, 1268 (2002) (Acoba, J., dissenting) ("[S]tare decisis ensures that the law will not merely change erratically and permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

that courts do not depart from the doctrine of stare decisis without some compelling justification.¹³ Once a decision of the Hawai'i Supreme Court has become precedent, it establishes the "framework [in which subsequent cases] must be evaluated."¹⁴

The Circuit Court committed reversible error when it refused to follow precedent and apply *Sherman's* framework for analyzing Chapter 38's numerosity requirement and the amendments to the Original Designation. ROA 26:130. It is clear that *Sherman* constitutes precedent¹⁵ and provided the "framework" for the Circuit Court's adjudication of Lessor's Summary Judgment Motion. *See id.* at 480, 56 P.3d at 1269 (citations omitted).

In *Sherman*, the Hawai'i Supreme Court held that:

[I]f the numerosity requirement was met when *first* designated, then any properly added applicant-units may count toward the continuous maintenance of the minimum twenty-five units. In other words, if the lessees maintained at least twenty-five qualified units up to the date of an amended designation, then **the number from the initial designation is added to the number of the amended designation for a total number of qualified units.** If, thereafter, a unit drops out of the condemnation process or the lessee of another unit passes away, as long as the minimum number of twenty-five units is continuously maintained, the condemnation retains its public purpose and need not be terminated. . . . [T]his conclusion is supported by the . . . case law and we can likewise find no language in ROH ch. 38 that would preclude (1) the addition of qualified units by amended designation or (2) the enumeration of those added units toward the requirement that twenty-five qualified units must be continuously maintained.

Therefore, . . . the amendment of the original designation would allow added qualified applicant-units to count toward the previously existing minimum qualified twenty-five units continuously necessary for ROH ch. 38 proceedings.

¹³ *Id.* at 480, 56 P.3d at 1269 (*quoting Garcia*, 96 Hawai'i at 206, 29 P.3d at 925 (citation omitted)).

¹⁴ *Id.* (arguing that *Brantley* should have been decided under the "framework" of *State v. Jumila*, 87 Hawai'i 1, 950 P.2d 1201 (1998)).

¹⁵ *Cf. Brantley*, 99 Hawai'i at 479, 56 P.3d at 1268 (Acoba, J., dissenting) ("Upon its publication in 1998, *Jumila* became precedent").

Sherman, 110 Hawai'i at 66-67, 129 P.3d at 569-70 (emphases added). It is clear that the Court looks to the units designated in determining the twenty-five minimum. Consequently, when *Sherman's* holding is applied in this case, it is indisputable that the minimum number of twenty-five units had been continuously maintained as a matter of law, raising an issue of material fact sufficient to defeat Lessor's Summary Judgment Motion. *Id.*

Specifically, on October 11, 2002, the date of the Original Designation, twenty-eight Admiral Thomas units were designated for acquisition through the Chapter 38 process. ROA 26:145-47, 159-64. On or about November 18, 2002, a lessee withdrew her application bringing the number of designated units to twenty-seven. ROA 26:147.

The Original Designation was first amended on March 20, 2003, to include six units. ROA 26:147-48, 165-66. At no time during the period of October 11, 2002, through March 20, 2003, did the number of qualified units fall below twenty-five. ROA 26:148. Thus, under *Sherman*, 110 Hawai'i at 66-67, 129 P.3d at 569-70, the First Amendment to Original Designation brought the number of designated Admiral Thomas units to thirty-three units. ROA 26:147-48, 165-66.

The Original Designation was amended a second time on April 23, 2003, to include an additional unit. ROA 26: 148, 167-68. At no time during the period of March 20, 2003, through April 23, 2003, did the number of designated units fall below twenty-five. ROA 26:148. As of Second Amendment to Original Designation, there were a total of thirty-four designated units. *Sherman*, 110 Hawai'i at 55-67, 129 P.3d at 569-70; ROA 26:145-48, 159-68. On July 31, 2003, a lessee's application was withdrawn bringing the number of designated units to thirty-three. ROA 26:149. On September 9, 2003, lessee Brenda Atwood sold her unit to Chinh Trong Le. ROA 26:149-50. Although Mr. Lee filed a Chapter 38

application and was added as a party to this action, pursuant to *City and County of Honolulu v. Hsiung*, 109 Hawai'i 159, 124 P.3d 434 (2005), he did not meet Chapter 38's occupancy requirements and he was not eligible for the Chapter 38 process, thereby bringing the number of designated units to thirty-two. ROA ROA 26:145-50, 159-68.

The Original Designation was amended a third time on April 20, 2004. ROA 26:149, 209-11. Five additional units were designated. ROA 26:149, 209-11. At no time during the period of April 23, 2003, through April 20, 2004, did the number of designated units fall below twenty-five. ROA 26:150. As of Third Amendment to Original Designation, there were a total of thirty-seven designated units. *Sherman*, 110 Hawai'i at 55-67, 129 P.3d at 569-70; ROA 26:145-50, 159-68, 209-11.

Subsequent to April 20, 2004, several events occurred which brought the number of designated units to thirty when the Circuit Court improperly granted in part Lessor's Summary Judgment Motion. ROA 29:150. Two lessees passed away, two units were sold, the lessor of one unit purchased other fee simple property on O'ahu suitable for residential purposes and then sold their Admiral Thomas unit, the lessees of another unit vacated and then rented out their unit, and another lessee vacated her unit. ROA 29:150.

Because there is no dispute that the numerosity requirement was met at the time of the Original Designation and "the amendment[s] of the [O]riginal [D]esignation . . . allow[s] added qualified applicant-units to count toward the previously existing minimum qualified twenty-five units . . . necessary for ROH ch. 38 proceedings", *Sherman*, 110 Hawai'i at 66-67, 129 P.3d at 569-70, the Circuit Court was required to count the units that were included in the Third Amendment to Original Designation when it determined whether Chapter 38's numerosity requirement had been met. Had the Circuit Court followed

Sherman's precedent, there would have been a genuine issue of material fact precluding a grant of summary judgment in favor of Lessor on the numerosity issue, and the condemnation action would have proceeded accordingly.

Any argument by Lessor that the repeal of Chapter 38 invalidated the Third Amendment to Original Designation is disingenuous and not dispositive where the constitutionality of Ordinance 05-001, as applied to certain Lessees and the owners of those Admiral Thomas units designated by the Third Amendment to Original Designation, is a matter pending before the United States District Court for the District of Hawaii ("D. Haw.").¹⁶

B. The Circuit Court Erred Ruling that Lessees Ernestine Ching Young, Clarence K. Lee, Trustee and Ann Takako Yamamoto, Trustee Do Not Qualify for the Chapter 38 Process

1. Lessee Ann Takako Yamamoto Qualifies for the Chapter 38 Process

The Circuit Court's determination that Ms. Yamamoto is disqualified because she owned a fractional interest in other fee simple residential property on O`ahu when she filed her Chapter 38 application with the Department is reversible error.

Sherman confirms that the time an application is filed with the City is the operative date for determining whether lessees initially qualify to purchase the fee simple interest in their condominium units pursuant to R.O.H. § 38-2.4. *Sherman*, 110 Hawai`i at 68, 129 P.3d at 571. An application is "filed" with the City when the Department has

¹⁶ See *Young et al. v. City and County of Honolulu*, D. Haw., Civil No. CV 07-00068 jms-lek. In a related case, *Matsuda et al. v. City and County of Honolulu*, D. Haw., Civil No. CV 05-00125 dae-lek, the Ninth Circuit recently vacated district court's grant of summary judgment in favor of City and remanded for further proceedings where the court failed to analyze lessees' Contract Clause claim under the framework established by U.S. Supreme Court precedent).

received the applicant's Application to Purchase Leased Fee Interest Under Chapter 38, ROH ("Application") and an executed copy of the Affidavit of Applicant ("Affidavit"). ROA 26:151. Ms. Yamamoto's Chapter 38 Application was filed with the Department on October 1, 2001, and her Affidavit on October 2, 2001. *Id.* Accordingly, the Department determined that Ms. Yamamoto's completed Application had been filed and accepted on October 2, 2001. *Id.* By that time, Ms. Yamamoto had no interest in the Young Street Property¹⁷ for she had already conveyed all of her 8.88% interest in it to Glenn T. Yamamoto by July 20, 2001. ROA 26:220-23.

Although Ms. Yamamoto initially signed her Application on May 7, 2001 and had submitted it to the Department by May 14, 2001, ROA 25:227, 238, 285, the Department determined Ms. Yamamoto to be ineligible for the Chapter 38 process at that time because she owned an interest in the Young Street Property. ROA 25:290-91; 26:151, 332-34. Accordingly, the Circuit Court's reliance on the May 2001 dates are irrelevant and unfounded. Based on Chapter 38's clear and unambiguous language, what matters is that at the time Ms. Yamamoto filed her Application with the Department on October 2, 2001, and throughout the condemnation proceedings, she has owned no fee simple property suitable for residential purposes within the City and County of Honolulu. ROA 26:151; *Sherman*, 110 Hawai'i at 68, 129 P.3d at 571; *City and County of Honolulu v. Hsiung*, 109 Hawai'i 159, 171, 124 P.3d 434, 446 (2005).

¹⁷ "Young Street Property" refers to the real property located at 1641 Young Street, Honolulu, Hawai'i, and more particularly described as Tax Map Key No. (1) 2-8-001-028.

2. Lessee Clarence K. Lee, Trustee Qualifies for the Chapter 38 Process

Clarence Lee purchased the leasehold interest Unit 704 at Admiral Thomas over twenty-six years ago on August 19, 1980, prior to his marriage to Elsa Carl Lee. ROA 26:141, 153, 267-95. On April 13, 1992, Mr. Lee assigned his individual interest in Unit 704 to Clarence K. Lee, as Trustee of and for the Clarence K. Lee Revocable Living Trust, under that certain unrecorded Trust Agreement dated January 28, 1992. ROA 26:142, 296-306. On September 10, 2002, Mr. Lee, as Trustee, filed his Application to purchase the leased fee interest in Unit 704. ROA 26:152, 307-09.

The rights afforded under Chapter 38 and the Rules belong to those who are "lessees" as defined under Chapter 38.¹⁸ Thus, in order to be a "lessee" and applicant for purposes of Chapter 38, the individual must hold sole or joint legal title to the residential condominium unit at issue. *See e.g.*, R.O.H. §§ 38-1.1, 38-1.2, 38-2.3, 38-2.4. ROA 26:172-73, 175-76. Ms. Lee, Mr. Lee's spouse, has never held title to Unit 704. ROA 26:141-42, 152-53, 267-310. As such it is indisputable that Ms. Lee is precluded from being, and consequently never has been, an applicant and/or lessee under Chapter 38 and the Rules, despite Mr. Lee's inadvertent inclusion of her in his Chapter 38 application.¹⁹

¹⁸ *See* R.O.H. §§ 38-1.1, 38-1.2 (defining "lessees" and "owner-occupant"), 38-1.4, 38-1.5 (referring to the rights granted to "lessees" by Chapter 38); R.O.H. § 38-2.4 (referring to the qualifications each lessee must meet in order to purchase their leased fee interest pursuant to Chapter 38). ROA 26:172-76. *See also* Rules §§ 1-2 (defining "lessees" and "owner-occupant"), 2-4 ("To be eligible to purchase a leased fee interest, an applicant shall . . . [b]e . . . the owner-occupant of the condominium described in the application"). ROA 26:192-93, 198-99.

¹⁹ R.O.H. §§ 38-1.1, 38-1.2, 38-2.3, 38-2.4; Rules §§ 1-2, 2-4. ROA 26:172-73, 175-76, 189-94, 198-99. *See also* *Coon*, 98 Hawai'i at 260, 47 P.3d at 375 ("where a condominium unit is held in trust, only the trustee of the property is eligible to purchase the fee interest on the trust's behalf.").

In April 2005, Ms. Lee assisted her daughter from a previous marriage, Emily Carl, purchase fee simple residential property in Kailua located at 607 Auwai Street, T.M.K. No. (1) 4-3-62-20 (the "Kailua Property"), and she briefly held title to it with her daughter as joint tenants. ROA 26:142, 311-28. The Circuit Court erroneously concluded that Ms. Lee's brief joint ownership of the Kailua Property disqualified Mr. Lee from the Chapter 38 process and, therefore, dismissed him from this action pursuant to R.O.H. § 38-2.4(a)(4).²⁰ ROA 27:130-31. The Circuit Court's conclusions are wrong for the following reasons.

First, although Ms. Lee was jointly on title to the Kailua Property, at no time had she: (1) lived, resided at and/or occupied the Kailua Property with or without Mr. Lee; (2) intended to live, reside at and/or occupy the Kailua Property at any time with or without Mr. Lee; (3) considered the Kailua Property to be suitable for her and Mr. Lee's residential purposes; (4) exercised physical control and/or possession over the Kailua Property or any part thereto; or (5) claimed or intended to claim the Kailua Property as her own. ROA 26:154-55. During the period of Ms. Lee's status as a joint tenant to the Kailua Property, her understanding was that she had waived any and all of her possessory rights to the Kailua Property. ROA 26:155. Ms. Lee always intended and understood that Emily Carl was the

²⁰ R.O.H. § 38-2.4(a)(4) provided in pertinent part:

No sale of any condominium land within a development shall be made unless the lessees:

- ...
- (4) Do not 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 purpose of this paragraph, if the person, the person's spouse, or both the person and the person's spouse (unless separated and living apart under a decree of a court of competent jurisdiction) own lands, including any interest, in a land trust in the City and County of Honolulu.

ROA 26:176.

actual owner of the Kailua Property and entitled to full possessory control of it. *Id.* Ms. Lee and Ms. Carl's decision to hold title to the Kailua Property as joint tenants was simply to ensure that each would have the right of survivorship to the Kailua Property if the other passed away. *Id.* Accordingly, Ms. Lee never held any possessory interest in the Kailua Property and her ownership of it was passive, not active. *Id.*

Second, the Kailua Property is not suitable for Mr. and Mrs. Lee's residential purposes. Chapter 38's legislative history confirms that R.O.H. § 38-2.4(a)(4)'s purported proscription against Ms. Lee's limited and partial ownership of disqualifying lands goes beyond the City Council's intent. Chapter 38's legislative history confirms that the requirements set forth in R.O.H. § 38-2.4(a)(4) further Chapter 38's objectives of combating the rising cost of housing and protecting homeowners from losing their condominiums. *Coon*, 98 Hawai'i at 259-60, 47 P.3d at 374-75.²¹ Chapter 38 excludes condominium owners who do not occupy their units or who occupy their unit but own other residential property in

²¹ In *Coon*, the Court explained that:

[i]n enacting Ordinance No. 91-95, the City Council found that the division of land ownership on O'ahu – and specifically the phenomenon of condominium owners, among others, being required to lease the fee simple interest in the land underlying their condominium units– had contributed to the inflation of housing costs. Ordinance No. 91-95 § 1(a). To combat the rising cost of housing and to protect homeowners from losing their condominiums, the City Council sought to unify these property interests by creating a mechanism for the conversion of the condominium owners' leased fee interests into the fee simple interests appurtenant to their units. *Id.* ROH ch. 38's requirements that an applicant for lease-to-fee conversion, *inter alia*, hold legal title to his or her condominium unit, use the unit as his or her principal place of residence, and own no other property in fee simple within the City and County of Honolulu, obviously further the foregoing objectives. Correlatively, the ordinance excludes condominium owners who do not occupy their units or who occupy their unit but own other residential property in fee simple, because these owners are not among those most at risk of losing their homes.

Coon, 98 Hawai'i at 259-60, 47 P.3d at 374-75.

fee simple, because these owners are arguably not among those most at risk of losing their homes. *Id.*, 98 Hawai'i at 260, 47 P.3d at 375. Thus, R.O.H. § 38-2.4(a)(4)'s prohibition against a spouse's ownership of other fee simple residential property on O`ahu presumes that a lessee will be able to live at his spouse's property and will not be homeless if the lessee loses his leasehold condominium unit. *See id.*

The City Council did not intend for this prohibition to be applied to lessees whose spouses owned fee simple property unsuitable for residential purposes because these lessees would still be at risk of losing their homes. *See id.* Accordingly, R.O.H. § 38-2.4(a)(4)'s proscription against a spouse's ownership of disqualifying lands is inapplicable to Mr. Lee because the Kailua Property is unsuitable for his and Ms. Lee's residential purposes. The 600 square foot home is inadequate to meet the residential needs of needs of Mr. Lee, Mrs. Lee and Emily Carl. ROA 26:142, 155, 327-28.

3. Defendant Lessee Ernestine Young Qualifies for the Chapter 38 Process

Ernestine Young has owned the leasehold interest in Unit 503 at the Admiral Thomas since 1989. ROA 26:157. It is a one-bedroom apartment. *Id.* Mrs. Young was diagnosed with stage III breast cancer in April 2001. *Id.* She had surgery on May 30, 2001, and then began a rigorous course of weekly chemotherapy treatments for fourteen months, *i.e.* from July 12, 2001 through September 25, 2002, and radiation. *Id.* Mrs. Young was very ill during this time and was unable to care for herself. *Id.* She required 24-hour-a-day assistance to help her with her basic needs. ROA 26:158. Wallace Young, who was still alive at that time, was unable to provide this assistance because he too was ill and unable to

cope with Mrs. Young's illness. *Id.* Thus, Mrs. Young's sisters provided Mrs. Young with the assistance she needed during her medical treatment. *Id.*

Because Mrs. Young's sisters live on the Island of Hawai'i, they needed accommodations in Honolulu in order to provide constant care to Mrs. Young. *Id.* Unit 503 was too small to accommodate Mr. and Mrs. Young and the care giver. *Id.* Thus, Mr. and Mrs. Young rented a two-bedroom unit at the Admiral Thomas, Unit 905, from September 2001 through September 2002. *Id.* Because of the enormous medical costs incurred, and Mr. and Mrs. Young's status as retirees living on a fixed income, they were forced to rent out Unit 503 so they could live in the larger unit and accommodate the care giver. *Id.* Mrs. Young returned to Unit 503 at the end of September, 2002, and has lived continuously in that unit ever since. *Id.*

Mrs. Young has lived in Unit 503 for nearly twenty years, and but for the brief period when she and Mr. Young were unable to occupy the apartment due to their respective medical exigencies, it was and is Mrs. Young's home. Had the Department learned of Ms. Young's situation prior to the filing of her Application on December 26, 2002, it would have advised her to refile it after she had resumed living in Unit 503 for one year. ROA 26:152. The situation would have been curable. Mrs. Young would have attained a continuous year of residency at the end of September, 2003. At that time, Chapter 38 was still in effect, the lawsuit had not been dismissed, and Mrs. Young could have been added to the condemnation action. Ms. Young, however, was so ill during this time that she was unable to manage or consider any issues pertaining to her Application. ROA 26:158.

C. The Circuit Court Abused Its Discretion In Refusing to Consider the Third Amendment to Original Designation and Ernestine Young's Medical Condition

It is well established that Hawai'i's circuit courts have inherent equitable powers. *See e.g., Richardson v. Sport Shinko (Waikiki Corporation) d/b/a Queen Kapiolani Hotel*, 76 Hawai'i 494, 880 P.2d 169 (1994). In *Sport Shinko*, the Hawai'i Supreme Court explained that:

courts have inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them. Inherent powers of the court are derived from the state Constitution and are not confined by or dependent on *statute*. . . . ***Among courts' inherent powers are the powers to create a remedy for a wrong*** even in the absence of statutory remedies, . . . ***and to prevent unfair results***. . . . ***The courts also have inherent power to curb abuses and promote a fair process*** which . . . may include dismissal in severe circumstances. . . . It follows that if the trial court has the inherent power to level the ultimate sanction of dismissal, it necessarily has the power to take all reasonable steps short of dismissal depending on the equities of the case.

76 Hawai'i at 507-09, 880 P.2d at 182-84 (explaining that the trial court had the inherent power to provide a remedial jury instruction if it deemed such measure appropriate, and holding that court did not abuse its discretion when it refused to exercise its inherent power by denying plaintiffs' proposed jury instruction) (internal quotation marks, brackets and citations omitted, emphases added).²²

²² *See also Farrow v. Dynasty Metal Sys., Inc.*, 89 Hawai'i 310, 313, 972 P.2d 725, 728 (1999) (holding that court had inherent power to *sua sponte* correct arbitrator's award by changing incorrect name of defendant to the correct name for the sole purpose of curbing abuse and promoting a fair process); *Kawamata Farms, Inc. v. United Agri Products*, 86 Hawai'i 214, 247-48, 251, 948 P.2d 1055, 1088-89, 1092 (1997) (holding trial court did not abuse its discretion when it imposed discovery sanctions against DuPont); *Moniz v. Freitas*, 79 Hawai'i 495, 502, 904 P.2d 509, 516 (1995) (in action assigned to the Court Annexed Arbitration Program ("CAAP"), trial court's inherent powers allowed it to reassign "appealing party" status from the appealing party to the non-appealing party, thereby preserving "the (continued...)

Similarly, Haw. Rev. Stat. § 603-21.9(6) (1993), which is "a legislative restatement of the inherent powers doctrine",²³ provides that the circuit courts shall have the power:

[t]o make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them.

Thus, under its inherent equitable powers, this Court has plenary power to fashion its decree in such a manner as to recognize and maintain the equities of the parties.²⁴

Equity serves to give such relief as justice and good conscience require and its province is to afford full relief and to protect all rights. . . . Our supreme court has stated that the court of equity has plenary power to mold its decrees in such form as to converse the equities of all parties Furthermore, the relief granted in equity is dictated by the equitable requirements of the situation, and must be adapted to the facts and circumstances of the particular case.

Wohlschlegel v. Uhlmann-Kihei, Inc., 4 Haw. App. 123, 141-42, 662 P.2d 505, 517 (Haw. Ct. App. 1983) (invoking court's equitable powers under the relevant case law and Haw. Rev.

²² (...continued)

purposes of the CAAP by not absolutely precluding a non-appealing party who genuinely seeks a full trial from obtaining a full trial, while at the same time preserving the disincentives to protracted and/or unnecessary litigation); *State v. Moriwake*, 65 Haw. 47, 55, 647 P.2d 705, 711-12 (1982) (inherent power to "administer justice" include power to dismiss a criminal indictment with prejudice under appropriate circumstances).

²³ *Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., Inc. et al.*, 6 Haw. App. 431, 437, 726 P.2d 268, 272 (Haw. Ct. App. 1986).

²⁴ *See supra*, note 22. *See also Cobb v. Willis*, 7 Haw. App. 238, 246, 752 P.2d 106, 111 (Haw. Ct. App. 1988) (court invoked its equitable powers to fashion its decree so as to preserve and protect the rights of the parties); *Chambrella v. Rutledge*, 69 Hawai'i 271, 285, 740 P.2d 1008, 1016 (1987) ("Fed. R. Civ. P. 54(c) and its Hawaii counterpart, HRCP 54(c), have adopted the approach of the equity courts for all civil actions"; "the court's duty [is] to grant the relief to which the prevailing party is entitled, whether it has been demanded or not.") (internal quotation marks and citations omitted).

Stat. § 603-21.9(6) (1976) to support its holding that the trial court's dismissal of plaintiffs' claims and appellants' cross-claims was a proper exercise of its authority even though there no motions to dismiss them and despite plaintiffs' and appellants' claim that the court committed procedural error in ordering their dismissal).²⁵

One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life. The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations. . . . We hold the court of equity has plenary power to mold its decrees in such form as to converse the equities of all parties. . . . In other words, the relief granted in equity is dictated by the equitable requirements of the situation, and must be adapted to the facts and circumstances in the particular case. . . . Moreover, equity will not permit a wrong to be without remedy.

Roxas v. Marcos, 89 Hawai`i 91, 126-27, 969 P.2d 1209, 1244-45 (1998) (in order to achieve manifest justice, the equities of the case required the Hawai`i Supreme Court to hold wife personally liable, at least to the extent of her interests in the asserts of her husband's estate, for the amount of the plaintiff's judgment against husband even though (internal quotation marks, brackets and citations omitted).

²⁵ See also *Aickin v. Ocean View Investments Co., Inc.*, 84 Hawai`i 447, 455-56, 935 P.2d 992, 1000-01 (1997) (holding trial court abused its discretion in refusing to exercise its equitable powers to renew commercial lease of real property, even though tenants failed to timely exercise right to renewal, where declaring option forfeit would do great harm to tenants); *PR Pension Fund v. Nakada*, 8 Haw. App. 480, 494, 809 P.2d 1139, 1147 (Haw. Ct. App. 1991) ("A trial court has the plenary power to fashion a decree to conform to the equitable requirements of the situation.") (internal quotation marks, brackets and citations omitted); *Tradewind Hotel, Inc. v. Cochran*, 8 Haw. App. 256, 268, 799 P.2d 60, 267 (Haw. Ct. App. 1990) ("An equity court has plenary power to fashion its decree in such a manner as to recognize and maintain the equities of the parties."); *Baldeviso et al. v. Thompson*, 54 Haw. 125, 132, 504 P.2d 1217, 1223 (1972) (even though couched in terms of a petition for mandamus, there was "no reason why the circuit court on remand should not use its plenary power to mold its decrees in such form as to converse the equities of all parties.") (internal quotation marks and citation omitted).

In view of the procedural history of this case,²⁶ the Hawai'i Supreme Court's opinion in *Sherman* and the qualified status of the Lessees, the Circuit Court abused its discretion when it refused to consider the units added by the Third Amendment to Original Designation, and their leasehold owner occupants who were stymied by the dismissal of this action, or Mrs. Ernestine Young, who was recovering from Stage III breast cancer and treatment. To hold that equity should not intervene to allow Lessees, and the units designated by the Third Amendment to Original Designation and their leasehold owner occupants, to proceed with this action would be "a regression to the days when hyper-technical legal arguments were relied upon to prevent fair and just results." *Aicken*, 84 Hawai'i at 456, 935 P.2d at 1001.²⁷

VI. CONCLUSION

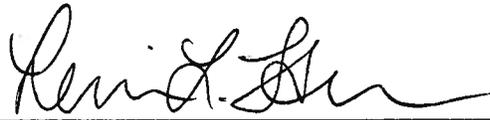
For the reasons stated herein, the Circuit Court's Order granting in part Lessor's Summary Judgment Motion plainly misapplies Hawai'i law regarding Chapter 38's numerosity requirements and the consideration of amendments to original Chapter 38 designations. The Final Judgment below should be reversed and the cases remanded to the Circuit Court with instructions to vacate the Order dismissing this action, proceed with

²⁶ But for the Circuit Court's dismissal of this action in June 2004, the units designated by the Third Amendment to Original Designation, and their leasehold owner-applicants, would have been added to this action prior to the repeal of Chapter 38.

²⁷ Hawai'i court recognize the following maxims governing a court's actions: "equity regards as done that which ought to be done", *In re Dean's Trust*, 47 Haw. 629, 646, 394 P.2d 432, 444 (1964); *In re Nelson*, 26 Haw. 809, 816 (1923); and "equity regards the substance rather than the form". *Schrader v. Benton*, 2 Haw. App. 564, 566, 635 P.2d 562, 564 (Haw. Ct. App. 1982); *Munoz v. Ashford*, 40 Haw. 674, 1955 WL 8769, *7 (Haw. Terr. 1955).

Lessees' condemnation action and add the units designated by the Third Amendment to Original Designation, and their leasehold owner occupants, to the condemnation action.

Dated: Honolulu, Hawai'i, May 21, 2008.



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STATEMENT OF RELATED CASES

Defendants-Appellants are not aware of any related cases pending before the
Hawai`i appellate courts.

Dated: Honolulu, Hawai`i, May 21, 2008.



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