No. 28945

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

CITY AND COUNTY OF HONOLULU, a municipal corporation of the State of Hawaii,

Plaintiffs-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, 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

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, 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

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 STATUTES § 101-27, filed on March 28, 2007

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/CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

APPENDIXES 1 THROUGH 5

CERTIFICATE OF SERVICE

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MISCELLANEOUS

DEFENDANTS-APPELLANTS/CROSS-APPELLEES' ANSWERING BRIEF ON CROSS-APPEAL

I. INTRODUCTION

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

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[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

(continued...)

Alston Hunt Floyd & Ing, respectfully submit their Answering Brief to *Defendant-Appellee, Cross-Appellant First United Methodist Church's Opening Brief on Cross-Appeal*, filed April 18, 2008 ("Cross-Appeal").

This Cross-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 ("R.O.H.") 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

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[1] (...continued)
Patricia Carleen Brown Revocable Trust Agreement dated January 21, 1993; RANDY NEIL 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 provided a mechanism by which condominium owners may convert their leased fee interests into fee simple interests appurtenant to their condominium units. Chapter 38 authorized 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 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 (continued...)

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 condominium development known as the Admiral Thomas Apartments ("Admiral Thomas").

Two issues are presented in Defendant-Appellee/Cross-Appellant FIRST UNITED METHODIST CHURCH's ("Lessor") Cross-Appeal: (1) whether the Circuit Court of the First Circuit, State of Hawai`i ("Circuit Court") correctly determined that Defendant-Appellants/Cross-Appellees JOYCE A. HAGIN ("Dr. Hagin"), LAWRENCE REICH ("Mr. Reich") and their Admiral Thomas Unit qualified for the leasehold conversion process under Chapter 38; and (2) whether the Circuit Court erred when it denied Lessor an award from the City of the attorneys' fees and costs incurred in the first appeal of this action. Lessees limit their Answering Brief to the first issue and take no position on the second since it is solely a matter between Lessor and the City.

Lessor moved to disqualify and dismiss Dr. Hagin, Mr. Reich and their Admiral Thomas unit, arguing that they had abused Chapter 38 by transferring the ownership of other disqualifying fee simple residential property on Oahu to limited liability entities. Unfortunately, to make this argument Lessor: (1) conveniently ignored the plain language of Chapter 38 and the Rules,[4] (2) disregarded Hawai`i Supreme Court precedent and

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[3] (...continued)
matter pending before the United States District Court for the District of Hawaii ("D. Haw."). *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 the 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).

[4] "Rules" refers to the Amended Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion (2000). A copy of the Rules is attached as
(continued...)

(3) improperly imposed requirements beyond those required by law.

Lessor's arguments were rejected by the Circuit Court, which properly followed the Hawai`i Supreme Court's precedent in *City and County of Honolulu v. Hsiung*, 109 Hawai`i 159, 171 P.24 P.3d 434 (2005) (holding that the intent regarding lessee-applicant's conveyance of other fee simple residential property is irrelevant in determining a lessee's qualifications).[5] The Circuit Court denied Lessor's summary judgment motion in part as to Dr. Hagin and Mr. Reich, and determined that they and their unit qualified for the Chapter 38 process.[6]

On appeal Lessor has neither raised any compelling arguments nor cited new case law on appeal justifying a different result before this Court. The Circuit Court's sound determinations do not warrant reversal on appeal. Accordingly, as to Dr. Hagin, Mr. Reich and their Unit, Lessor's Cross-Appeal must be denied.

II. COUNTER-STATEMENT OF THE CASE

A. Factual Background

Under Chapter 38, the Department:

> may designate all or that portion of a development containing residential condominium land for acquisition, and facilitate the acquisition of the applicable leased fee interests in that land by the city through the exercise of the power of eminent domain . . . after:

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[4] (...continued)
Appendix "3".

[5] *See* Transcript of Proceedings, 10/10/2006, at 32:8-9; 55:10-13.

[6] *See also 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 December 26, 2006 ("Order"); *Final Judgment*, filed December 11, 2007. Copies of the Order and Final Judgment are respectively attached as Appendixes "4" and "5".

(1) At least 25 of all the condominium owners within the development or at least owners of 50 percent of the condominium units . . . apply to the [D]epartment to purchase the leased fee interest pursuant to Section 38-2.4, and file an application with the [D]epartment; and

(2) Due notice given and a public hearing held, . . . the [D]epartment finds that the acquisition of the leased fee interest in the development . . . , through exercise of the power of eminent domain . . . will effectuate the public purpose of [Chapter 38].

R.O.H. § 38-2.2(a). *See also* Rules §§ 2-3, 2-6, 2-7, 2-11.

In order to qualify for the Chapter 38 process, condominium owners cannot, *inter alia*:

> 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 . . . own lands, including any interest, in a land trust in the City and County of Honolulu.

R.O.H. § 38-2.4(a)(4). *See also* Rules § 2-4.

Condominium owners in the development who are not one of the applicants at the time of the designation "may apply and become an additional applicant . . . ." Rules § 2-11(d). "Once all of the applicable requirements under Chapter 38 . . . and the[] [R]ules have been met by any additional applicant, the designation . . . shall be amended to include the additional applicants(s) and the individual condominium interests." Rules § 2-11(d)(1).

Pursuant to R.O.H. § 38-2.2(a)(2), Rules § 2-7 and 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 that the acquisition of a portion 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.[7] ROA 26:145, 169-71. Thereafter, pursuant to R.O.H. § 38-2.2(a), Rules § 2-11 and 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. Dr. Hagin and Mr. Reich's Admiral Thomas Unit was not included in the Original Designation. ROA 26:145-47, 159-64.

Dr. Hagin and Mr. Reich obtained the leasehold interest in Admiral Thomas Unit 2001 on December 14, 2001. ROA 26:140-41, 234-49. At that time, Dr. Hagin owned the Makakilo Property[8] in her capacity as Trustee of The Joyce A. Hagin Trust dated August 9, 1989, restated March 15, 1996, ROA 26:140-41, 250, 252-58, and Mr. Reich owned One Archer Lane[9] in his individual capacity. ROA 26:227-33. On January 6, 2003, Dr. Hagin, Trustee conveyed the Makakilo Property to Rattin-JAH Property, LLC. ROA26:141, 259-66. On January 6, 2003, Mr. Reich conveyed his interest in One Archer Lane to Miele-LR Properties LLC. ROA 26:126-129, 227-33.

On February 5, 2003, Dr. Hagin and Mr. Reich applied to purchase the leased fee interest in their Admiral Thomas Unit under Chapter 38 in their individual capacities by

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[7] 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].

[8] "Makakilo Property" refers to the real property located at 92-832 Kinohi Place, Apt. 8, Makakilo, Hawai`i, and identified as Tax Map Key No. (1) 9-2-19-16-7.

[9] "One Archer Lane" refers to the real property located at 801 South King Street, Apt. 3706, Honolulu, Hawai`i, and more particularly described as Tax Map Key No. (1) 2-1-44-51-276.

filing with the Department an Application to Purchase Lease Fee Interest Under Chapter 38, R.O.H. ("Application") and an Affidavit of Applicant ("Affidavit"). ROA 26:126,151-52, 224-26. At that time, neither Mr. Reich nor Dr. Hagin owned fee simple property on Oahu suitable for residential purposes. ROA 26:126-28, 140-41, 151-52, 227-33, 250-66. The Department accepted Dr. Hagin and Mr. Reich's Application and Affidavit on February 5, 2003. ROA 26:151-52.

On March 20, 2003, pursuant to R.O.H. § 38-2.2(a), Rules § 2-11(d)(1) and 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 additional Admiral Thomas units, bringing the number of designated Admiral Thomas units to thirty-three. ROA 26:147-48, 165-66. Dr. Hagin, Mr. Reich and their Unit were included in the First Amendment to Original Designation. ROA 26:147-48, 165-66.

On April 23, 2003, pursuant to R.O.H. § 38-2.2(a), Rules § 2-11(d)(1) and 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-four. ROA 26:148-49, 167-68.

On April 20, 2004, pursuant to R.O.H. § 38-2.2(a), Rules § 2-11(d)(1) and 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.[10]

Accordingly, Lessees were determined by the Department to have met all qualifications stated in Chapter 38 and the Rules, entitling them to purchase their respective duly designated leased fee interests in the Admiral Thomas ("Designated Leased Fee Interests"). R.O.H. § 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 sold their unit on August 2, 2005; and

[10] During the interim between the Second Amendment to Original Designation and the Third Amendment to Original Designation, two Admiral Thomas units were withdrawn from the Chapter 38 process. ROA 26:148-50.

- applicant Deaana Lou Levy vacated her unit in February 2006.

ROA 26:150.

At no time since the Original 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 in eminent domain against Lessor and some of the Lessees seeking condemnation of a portion of the leased fee interests in the Admiral Thomas pursuant to Chapter 38, the Rules and Haw. Rev. Stat. § 101-13(1993). ROA 1:1-163. On June 10, 2003, Lessor filed a Counterclaim, ROA 1:319-43, and the City filed the First Amended Complaint on February 12, 2004. ROA 3:97-290. Dr. Hagin and Mr. Reich were among the ten additional applicants who were included as Defendant Lessees in this action by the First Amended Complaint as a result of the Department's determination that they had met all of the applicable requirements under Chapter 38 and the Rules. ROA 3:97-290, 165-68.[11] The First Amended Complaint added six new units to this action. ROA 3:97-290.

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[11] The First Amended Complaint included as Defendant Lessees eight of the nine applicants whose leased fee interests in five units were designated for acquisition by the First Amendment to Original Designation, and the two applicants whose leased fee interest in one unit was designated for acquisition by the Second Amendment to Original Designation. ROA 3:97-290; 26:165-68. Although applicant Adam Shaw's leased fee interest was designated for acquisition by the First Amendment to Original Designation, ROA 26:166, he sold his unit was never added to this action as a Defendant Lessee. ROA 3:97-290; 26:150.

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 (Appendix "2"). 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 was approved by the City Council by resolution before the effective date of the repeal. *Id.*, § 3. Because this action was initiated nearly two years prior to the repeal of Chapter 38, it is excepted from the repeal's scope. *Id.*

One year after Chapter 38's repeal, the Hawai`i Supreme Court issued its opinion on the parties' appeals and cross-appeals in *City and County of Honolulu v. Sherman*, 110 Hawai`i 39, 129 P.3d 542 (2006). Among other things, the Court considered whether the Circuit Court's conclusion that there were not enough qualified applicant units to maintain a Chapter 38 proceeding was correct. *Sherman*, 110 Hawai`i at 64, 129 P.3d at 567. Lessor contended that because the City improperly attempted to add six new units (including Dr. Hagin and Mr. Reich's Unit) to the action by the First Amendment to Original Designation *after* the 12-month limit imposed by R.O.H. § 38-5.2 had expired,[12] and

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[12] Section 38-5.2, R.O.H., provides as follows:

> Within 12 months after the designation of the development or portion thereof for acquisition, the [D]epartment shall facilitate the acquisition of the leased fee interest in the land beneath the development by the City and County of Honolulu through voluntary action of the parties, or the institution of eminent domain proceedings to acquire the leased fee interest or portion thereof so designated.

(continued...)

Defendant Lessees had allegedly failed to maintain the original class of applicants designated by the Original Designation, the Original Designation was stale and could not be cured by amendment. Lessor argued that as a result, there were not enough qualified units under Chapter 38 to maintain the condemnation action. *Id.*, 110 Hawai`i at 64-65, 129 P.3d at 567-68.

The Court rejected Lessor's arguments and held that the six units were properly added to the Original Designation by the First and Second Amendments to Original Designation within R.O.H. § 38-5.2's 12-month limit and, *if* the numerosity requirement was met when the Department issued the Original Designation, the six added units could count toward the previously existing minium qualified twenty-five units continuously necessary for Chapter 38 proceedings:

> the City both initiated a condemnation action and 'added new units' within twelve months of its October 11, 2002 designation of the Admiral Thomas. Therefore, the City did not violate the rule in *Coon*[13] regarding the timely initiation of a condemnation action, nor without more, did it improperly add units to the original designation. . . .
>
> This court recently addressed the argument that 'ROH chapter 38 does not require that the statutory minimum number of applicants be maintained only from the [applicants] originally designated' in *City and County of Honolulu v. Hsiung*, 109 Hawai`i 159, 177, 124 P.3d 434, 453 (2005) . . . .

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[12] (...continued)
The original 28 units were designated by the Original Designation October 11, 2002. ROA 26:159-64. Lessor argued that the First Amended Complaint, which added the six units designated by the First and Second Amendments to Original Designation to this action, had to be filed within 12 months of October 11, 2002. *Sherman*, 110 Hawai`i at 65, 129 P.3d at 568. Since the First Amended Complaint was filed on February 12, 2004, Lessor claimed that the six units could not count toward the minimum twenty-five applicant units necessary to initiate and maintain a Chapter 38 proceeding. *Id.*, 110 Hawai`i at 64, 129 P.3d at 567.

[13] In *Coon v. City and County of Honolulu*, 98 Hawai`i 233, 255, 47 P.3d 348, 370 (2002), the Court mandated that the City initiate a condemnation action within twelve months of designating the property for acquisition.

> . . . [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. . . .
>
> Therefore, the City's amended designation adding six units . . . would allow added qualified applicant-units to count toward the previously existing minimum qualified twenty-five units continuously necessary for ROH ch. 38 proceedings.

Id., 110 Hawai`i at 65-67, 129 P.3d at 568-70. The *Sherman* Court also held that:

- 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 R.O.H. § 38-2.4, *id.*, 110 Hawai`i at 68, 129 P.3d at 571.

Accordingly, the Hawai`i Supreme Court: (1) vacated the Circuit Court's July 8, 2004 order denying Defendant Lessees' summary judgment motion, ruling that there were not twenty-five qualified applicants throughout the proceedings, because it was erroneously based upon the finding that several applicants did not qualify at the time that they signed their Applications; 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 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"), and properly

concluded that, as a matter of law, Dr. Hagin and Mr. Reich qualified for the Chapter 38 process. ROA 27:123-32.

III. COUNTER-STATEMENT OF POINTS ON APPEAL

A. Whether the Circuit Court properly denied in part Lessor's Summary Judgment Motion when it ruled that Dr. Hagin, Mr. Reich and their Admiral Thomas Unit qualified for the leasehold conversion process under Chapter 38. ROA 26: 111-138, 140-141,151-52, 224-266; 27: 123-32; Transcript of Proceedings, 10/10/2006, at 32-35, 55.

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. 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 appellate 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).

D. 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.*

E. 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 Properly Determined That Dr. Hagin, Mr. Reich and Their Admiral Thomas Unit Qualified for the Chapter 38 Leasehold Conversion Process

Lessor's argument that the Circuit Court should have dismissed Dr. Hagin, Mr. Reich and their Admiral Thomas Unit because they impermissibly transferred title to the One Archer Lane and Makakilo Property to limited liability companies in order to qualify for the Chapter 38 process is meritless because Lessor: (1) conveniently fails to acknowledge that the plain language of Chapter 38 and the Rules does not prohibit this practice, (2) ignores Hawai`i Supreme Court precedent, and (3) improperly imposes requirements beyond those required by law.

Dr. Hagin and Mr. Reich obtained the leasehold interest in Admiral Thomas Unit 2001 on December 14, 2001. ROA 26:140-41, 234-49. At that time, Dr. Hagin owned the Makakilo Property in her capacity as Trustee of The Joyce A. Hagin Trust dated August 9, 1989, restated March 15, 1996, ROA 26:140-41, 250, 252-58, and Mr. Reich owned One Archer Lane in his individual capacity. ROA 26:227-33. On January 6, 2003, Dr. Hagin, Trustee conveyed the Makakilo Property to Rattin-JAH Property, LLC ("Rattin-JAH"). ROA26:141, 259-66. On January 6, 2003, Mr. Reich conveyed his interest in One Archer Lane to Miele-LR Properties LLC ("Miele-LR"), ROA 26:126-129, 227-33.

On February 5, 2003, Dr. Hagin and Mr. Reich applied to purchase the leased fee interest in their Unit under Chapter 38 in their individual capacities by filing with the Department an Application and Affidavit. ROA 26:126,151-52, 224-26. The Department accepted Dr. Hagin and Mr. Reich's Application and Affidavit on February 5, 2003. ROA 26:151-52. By that time, neither Mr. Reich nor Dr. Hagin owned fee simple property on Oahu suitable for residential purposes. ROA 26:126-28, 140-41, 151-52, 227-33, 250-66. *See also Sherman*, 110 Hawai`i at 68, 129 P.3d at 571 (holding that date Application is filed with Department is operative date for determining whether lessees qualify to purchase the fee simple interest in their condominium units pursuant to R.O.H. § 38-2.4).

In interpreting Chapter 38, this Court must give effect to the intention of the legislature, which is to be obtained primarily from the language contained in Chapter 38 itself. *Sherman*, 110 Hawai`i at 49, 129 P.3d at 552. "The plain language of ROH § 38-2.4 is both unqualified and unambiguous: 'No sale of condominium land within a development shall be made unless the lessees . . . [d]o not own property in fee simple lands suitable for residential purposes.' There being no ambiguity in the ordinance, this [C]ourt is not at liberty

to look beyond its plain language." *Hsiung*, 109 Hawai`i at 172, 124 P.3d at 447 (citing *City and County of Honolulu v. Ing*, 100 Hawai`i 182, 189-90, 58 P.3d 1229, 1236-37 (2002)). Thus Chapter 38 simply requires that the "lessee"[14] not own any fee simple property on Oahu suitable for residential purposes at the time the lessee files his or her Application with the City. *See* R.O.H. § 38-2.4(a)(4); *Sherman*, 110 Hawai`i at 68, 129 P.3d at 571. *See also* Rules §§ 2-3, 2-4. Dr. Hagin and Mr. Reich were "lessee[s]" for purposes of Chapter 38 in their individual capacities -- rather than as managing members of limited liability companies -- because that is the capacity in which they held title to their Admiral Thomas Unit and applied for the Chapter 38 process. ROA 26:140-141, 151-52, 224-226, 234-24. When Dr. Hagin and Mr. Reich's Application and Affidavit were filed and accepted by the Department on February 5, 2003, neither one of them owned fee simple property on Oahu suitable for residential purposes in their individual capacities. ROA 26:126-28, 140-41, 151-52, 227-33, 250-66. *See also Sherman*, 110 Hawai`i at 68, 129 P.3d at 571 (date Application is filed with Department is operative date for determining whether lessees qualify to purchase the fee simple interest in their condominium units pursuant to R.O.H. § 38-2.4).

Further, neither Chapter 38 nor the Rules preclude ownership of fee simple residential property on Oahu by any limited liability entity in which a lessee has an ownership interest, and/or acts as the managing member. Had the City Council intended to exclude lessee-applicants who are sole managing members of limited liability companies that

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[14] Under Chapter 38, "lessee" is defined as "any person to whom land is leased or subleased, including the person's heirs, successors, legal representatives, and assigns and who is the owner-occupant of the residential condominium unit . . . ." R.O.H. § 38-1.2. Similarly, under the Rules "lessee" is defined as "a natural person to whom land is leased or subleased, including the person's heirs, successors, legal representatives and assigns, and who is also concurrently the owner-occupant of a residential condominium . . . ." Rules § 1-2.

own residential fee simple property on Oahu, it certainly could have made an express exclusion or amended Chapter 38 and the Rules to address that interest, but it did not. *See Richardson v. City & County of Honolulu*, 76 Haw. 46, 56, 868 P.2d 1193, 1203 (1994) ("[W]hen the legislature expresses things through a list, the court assumes that what is not listed is excluded[.]"); *Cf. Korean Buddhist Dae Won Sa Temple*, 87 Hawai`i 217, 239, 953 P.2d 1315, 1337 (1998). Thus, the principle of *expressio unius est exclusio alterius* directs the Court to assume that the City Council did not intend to include the ownership of fee simple residential property on Oahu by a corporate entity or a limited liability company, even where the lessee applicant is the sole managing member, as a factor warranting disqualification from the Chapter 38 process. Indeed, a limited liability company is a distinct and recognized legal entity. Haw. Rev. Stat. § 428-210 ("A limited liability company is a legal entity distinct from its members").

The Hawai`i Supreme Court precedent in *Hsiung* is determinative of this issue. *Hsiung* confirms that based on Chapter 38's plain and unambiguous language, "at the time [Dr. Hagin and Mr. Reich] applied and throughout the condemnation proceedings, neither [Dr. Hagin nor Mr. Reich] owned fee simple property suitable for residential purposes within the City and County of Honolulu . . . ." *Hsiung*, 109 Hawai`i at 170-71, 124 P.3d at 445-46.

In *Hsiung*, the fact that several Chapter 38 lessee-applicants transferred title to other fee simple residential property on Oahu, *prior to* their submission and the Department's acceptance of their Chapter 38 Applications, was irrelevant in determining their qualifications. *Hsiung*, 109 Hawai`i at 170-71, 124 P.3d at 445-46. The circuit court ruled that certain applicants were not qualified because they owned fee simple property suitable for residential purposes within the City and County of Honolulu that was quitclaimed for no

consideration to relatives shortly before or at the time they applied to participate in the condemnation proceedings. *Id.*, 109 Hawai`i at 171, 124 P.3d at 446. The circuit court did not believe that the lessees were qualified because the property that they had quitclaimed in order to qualify for the condemnation proceedings could be quitclaimed back to them. *Id.* The lessor argued that the circuit court was correct because the transactions were similar to the creation of false poverty to become eligible for governmental assistance programs or fraudulent conveyances. *Id.* The *Hsiung* Court disagreed:

> The clear and unambiguous language of ROH §38-2.4 provides that applicants are not eligible to participate in condemnation proceedings under ROH chapter 38 unless they '[d]o not own property in fee simple lands suitable for residential purposes within the City and County of Honolulu or have pending . . . an unrefused application to lease or purchase residential property for dwelling unit purposes.' In the instant case, it is undisputed that, at the time they applied and throughout the condemnation proceedings, neither Ault nor the Dixons owned fee simple property suitable for residential purposes within the City and County of Honolulu or had a pending, unrefused application to lease or purchase residential real property for dwelling unit purposes. Based on the plain language of the ordinance, we hold that the circuit court erred in ruling that Ault and the Dixons were not qualified to participate in condemnation proceedings under ROH chapter 38.

Id., 109 Hawai`i at 171, 124 P.3d at 446.

Further, Lessor's argument that the limited liability companies' ("LLCs") veils should be disregarded because Dr. Hagin and Mr. Reich failed to treat their LLCs as separate entities is without merit. Hawai`i's Uniform Limited Liability Company Act ("Chapter 428") allows for member management of the LLC. Haw. Rev. Stat. § 428-301. It also allows the individual member of a member-managed LLC to bind the LLC to debts and contracts. Haw. Rev. Stat. § 428-301. The plain language of Chapter 428 indicates that the legislature did **not** intend for member management to infringe on an LLC's ability to maintain its status as a

separate and distinct entity. Thus, under Chapter 428, the fact that Dr. Hagin and Mr. Reich managed or controlled their respective LLCs does not indicate that they were treating the LLCs' property as their own or that the LLCs were their alter egos.

In addition and contrary to Lessors' arguments, the facts indicate that Dr. Hagin and Mr. Reich each dealt with their respective LLC as a separate legal entity. For example, after the Makakilo Property was conveyed to Rattin-JAH, Dr. Hagin notified the lenders holding mortgages on the Makakilo Property of the transfer, and Rattin-JAH -- not Dr. Hagin -- made payments on the mortgages encumbering the Makakilo Property through its own checking account. ROA 25:213-14. Rent for the Makakilo Property was paid to a property manager who deposited it into Rattin-JAH's checking account, and other expenses incurred for the Makakilo Property were paid by Rattin-JAH. ROA 25:214. Lastly, title to the Arizona exchange property was conveyed to Rattin-JAH. ROA 25:215-16. Under these circumstances, Dr. Hagin and Mr. Reich are not the alter egos of Rattin-JAH and Miele-LR.

Furthermore, even if the LLCs are alter egos (which they are not), there is still no basis to pierce the LLCs' veils for purposes of Chapter 38. In *Robert's Hawaii School Bus, Inc. et al. v. Laupahoehoe Trans. Co., Inc. et al.*, 91 Hawai`i 224, 240, 982 P.2d 853, 869 (1999), plaintiffs sought to pierce the corporate veils of two corporate entities. Although the Court agreed with plaintiffs' characterization of the corporations as "shell corporations", it recognized that Hawai`i courts have been reluctant to disregard the corporate entity and denied plaintiffs' request to pierce the veils to impose liability on the alter egos. 91 Hawai`i at 240 n. 12, 245-46, 982 P.2d at 869 n. 12, 874-75. The Court's two-part test was premised on whether the claims asserted were against the shell corporation: (1) are plaintiffs asserting a claim against the alter ego upon a cause of action that otherwise would have existed only

against the shell corporation; and (2) are plaintiffs attempting to pierce the corporate veil as a means of imposing liability on an underlying cause of action, such as a tort or breach of contract, incurred solely by the shell corporation? *Id.*, at 246, 982 P.2d at 875 (answering "no" to both questions").

Here, Lessor is not: (1) asserting a claim against Dr. Hagin or Mr. Reich upon a cause of action that otherwise would only have existed against the LLCs, or (2) attempting to pierce the LLCs' veils to impose liability on an underlying cause of action incurred solely by the LLCs. Consequently, under the *Robert's* two-part analysis, there is no basis to pierce the LLCs' veils and disregard their form for purposes of Chapter 38. *Id.*

Finally, as Lessor concedes, Hawai`i's appellate courts have not determined that LLCs should be subject to the same kinds of alter ego tests applicable to corporations. Although it is often assumed that the doctrine of piercing the corporate veil will be applied to LLCs because of the many similarities between close corporations and LLCs, there are problems with this assumption.[15] For example, commentators agree that failure to adhere to formalities should not be a factor in LLC veil piercing because LLC statutes are designed to forgo the most burdensome formalities.[16] Thus, the general consensus is that the common

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[15] *See e.g.*, Eric Fox, *Piercing the Veil of Limited Liability Companies*, 62 GEO. WASH. L. REV. 1143 (1994).

[16] Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375, 446 (1992) (arguing that "corporate-like formalities [are] less likely to create a veil piercing problem"); Curtis J. Braukmann, Comment, *Limited Liability Companies*, 39 KAN. L. REV. 967, 992 (1991) (stating that "failure to comply with normal corporate formalities ... would be inapplicable to an LLC"); Joseph P. Fonfara & Corey R. McCool, Comment, *The Wyoming Limited Liability Company: A Viable Alternative to the S Corporation and the Limited Partnership?*, 23 LAND & WATER L. REV. 523, 532 (1988) (explaining that "adherence to corporate formalities is not applicable because the LLC has statutorily dispensed with requirements for such formalities").

law doctrine should be applied to LLCs only to the extent that the LLC is analogous to a corporation[17] under the statute by which it is formed. Fox, at 1168.

Under Chapter 428 a LLC can be organized by one person and consist of a sole member. Haw. Rev. Stat. § 428-202(a). Unlike other jurisdictions, Chapter 428 does not specifically incorporate the application of the veil-piercing doctrine to LLCs formed under this provision, *see e.g.* Colo. Rev. Stat. Ann. § 7- 80 -107 (West Supp. 1993) (calling for the application of the veil-piercing doctrine to LLCs formed in Colorado), nor does it require centralized management or significant formalities. Accordingly, LLCs formed under Hawai`i's Chapter 428 are not significantly analogous to corporations and thus, should not be subject to the corporate-formalities and alter-ego factors in a veil-piercing analysis. Fox, at 1168.

VI. CONCLUSION

Like the lessees in *Hsiung*, it is undisputed that, at the time they applied and throughout the condemnation proceedings, neither Dr. Hagin nor Mr. Reich owned fee simple property suitable for residential purposes within the City and County of Honolulu. *Id.* ROA 26:126-28, 140-41, 151-52, 227-33, 250-66. The Circuit Court correctly followed the *Hsiung* Court's precedent in denying Lessor's Summary Judgment Motion in part as to Dr. Hagin and Mr. Reich, and determined that they and their unit qualified for the Chapter 38 process. ROA 26: 111-138, 140-141,151-52, 224-266; 27: 123-32; Transcript of Proceedings, 10/10/2006, at 32-35, 55. The Circuit Court's sound determinations do not

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[17] Braukmann, at 992 ("factors derived from case law apply only if the LLC involved is analogous to a corporation on the pertinent dimension").

warrant reversal on appeal. Accordingly, as to Dr. Hagin, Mr. Reich and their Unit, Lessor's Cross-Appeal must be denied.

Dated: Honolulu, Hawai`i, June 27, 2008.

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