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

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) FIRST CIRCUIT COURT

) HONORABLE VICTORIA S. MARKS Judge

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Defendants-Appellants, Cross-Appellees,

and

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

Defendant-Appellee, Cross-Appellant,

and

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

Defendants.

DEFENDANT-APPELLEE / CROSS-APPELLANT
FIRST UNITED METHODIST CHURCH'S
REPLY BRIEF TO
DEFENDANTS-APPELLANTS / CROSS-APPELLEES
JAMES M. SHERMAN, *ET AL.*'S
ANSWERING BRIEF ON CROSS-APPEAL

APPENDIX 1

and

CERTIFICATE OF SERVICE

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FIRST UNITED METHODIST CHURCH

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JAMES M. SHERMAN, *ET AL.*'S
ANSWERING BRIEF ON CROSS-APPEAL

Defendant-Appellee / Cross-Appellant FIRST UNITED METHODIST CHURCH ("First Church"), timely submits its Reply Brief regarding its cross-appeal, in response to the Answering Brief of Defendants-Appellants/Cross-Appellees JAMES M. SHERMAN, *et al.* ("Lessees") filed on June 27, 2008. This Reply Brief is filed pursuant to Hawaii Rules of Appellate Procedure ("HRAP") Rules 25, 28(d) and 32 and is based on the Record on Appeal ("the Record," cited as "R").

The original date for filing of this Reply Brief was July 14, 2008. Pursuant to HRAP Rule 29(a), on July 1, 2008, the appellate clerk granted First Church an extension of time to and including July 24, 2008.

I. THIS SITUATION IS FUNDAMENTALLY DIFFERENT FROM THAT IN *HSIUNG*

Lessees argue that Reich and Hagin's situation is analogous to that in the *Hsiung* case. It is totally different.

In *Hsiung*, the lessor challenged the qualifications of lessees who had quitclaimed fee simple residential property to relatives at the time they applied. In that case, however, there was no allegation that the lessees continued to have any sort of legal or beneficial interest or control over the properties that had been quitclaimed. The argument was simply that the relatives might give the disqualifying property back once the mandatory conversion process was complete. Therefore, it was easy for the Hawaii Supreme Court to conclude that "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. . . . Based upon the plain language, we hold that the circuit court erred in ruling that Ault and the Dixons were not qualified. . . ." *Hsiung v. City and County of Honolulu*, 109 Hawai'i 159, 171, 124 P.3d 434, 446 (2005).

In this case, however, First Church established that Reich and Hagin retained complete control over the disqualifying properties that were transferred into their single-member limited liability companies. That included the right to continue to occupy the property if they so wished, plus the complete ability to rent the property out to others, which they did.

As set forth in First Church's Opening Brief, putting the disqualifying property into limited liability companies was purely a subterfuge in order to avoid having to report such ownership on their applications.

II. THE COURT SHOULD CONSTRUE THE ORDINANCE TO AVOID AN ABSURD RESULT.

It is clear that the City Council did not intend Chapter 38 to apply to lessees who "owned" other fee simple residential property. The Hawaii Supreme Court stated the following about the intentions of the City Council:

> In 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 condominium owners' leased fee interests into 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 v. City & County of Honolulu, 98 Hawai'i 233, 259-60, 47 P.3d 348, 374-75 (2002) (emphasis added) Yet, the position advanced by the Lessees would lead to an absurd result, which is that every lessee who would otherwise be disqualified could avoid the disqualification simply by transferring the tainted property into a limited liability company through which they would still maintain complete control and benefit of the property. This would completely eviscerate the public purpose of Chapter 38, which is to exclude those owners who are "not among those most at risk of losing their homes" because they own other fee simple residential property. This construction cannot be in accord with what the City Council meant by "own."

The question, then, is what is meant by "own"? The applicable provisions of ROH Ch. 38 state:

> **Sec. 38-2.4 Qualification for purchase.**
>
> (a) 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 or having [*sic*] pending before the state housing finance and development corporation, or the city department of housing and community development an unrefused application to lease or purchase residential real property for dwelling unit purposes. 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.

(Emphasis added.) The Court in *Hsiung* never dealt with the portion of the language of the ordinance underlined above. It stopped its analysis at the first sentence of the ROH § 38-2.4(a)(4) which states that the lessees "[d]o not own property in fee simple lands suitable for

residential purposes within the City and County of Honolulu." *Hsiung*, 109 Hawai'i at 171, 124 P.3d at 446. Here, the Court is called on to determine the meaning of the second sentence of the subsection, that is, that the lessee is deemed to own lands if he or she "own[s] lands, including any interest, in a land trust in the City and County of Honolulu."

Initially, First Church notes that the language is ambiguous. On its face the sentence is not grammatically correct. Do the words "including any interest" modify "own lands" or "land trust"? Are the words "in a land trust" meant to be the sole exception to legal ownership or is it a non-exclusive example of other types of ownership that can disqualify an applicant?

The reference to land trusts in the ordinance at a minimum demonstrates that the City Council intended to include, as a disqualification, ownership that went beyond a legal title interest. In a land trust, the legal interest is held by a trustee and the beneficiaries have a beneficial interest that is a personal property interest. *See, e.g., In re Estate of Au*, 59 Haw. 474, 476 n. 4, 583 P.2d 966, 969 n. 4 (1978) (tenancy by the entirety can exist in personal property such as shares of a land trust). Further, it does not appear that the City Council intended to limit other disqualifying ownership to a land trust, because if so it would have worded the phrase as "including an interest in a land trust. . . ."

This is confirmed by the first sentence of ROH § 38-2.4(a)(4), which is also curiously worded. Instead of simply saying that the lessees cannot own fee simple land, or cannot own fee simple property, the first sentence reads, in pertinent part: "Do not own property in fee simple lands suitable for residential purposes. . . ." (Emphasis added.) As seen above, "property," as envisioned by the City Council can be both a legal title interest and a personal property interest such as a share in a land trust. First Church would strongly assert that it would also include the

sole ownership and control of a limited liability corporation whose sole asset is disqualifying fee simple residential property.

In practice, the City's own construction of the sentence was that "any interest" modifies the "own lands" portion of the sentence, and, implicitly, that a land trust was simply one example of "any interest." Thus, the City's "Notification to Applicants" that was given to all those applying for participation in the fee conversion program warns applicants:

> You are not permitted to own any fee simple property (including any interest whatsoever) suitable for residential purposes within the City and County of Honolulu at the time of application and throughout the implementation process.

Exhibit 30 to "Defendant First United Methodist Church's Memorandum in Opposition to Defendant Lessees' Motion for Partial Summary Judgment Filed on 4/24/04" (emphasis added). (R. Vol. 19, 1-226.) A copy of the Notification is attached as Appendix A. The City's broad definition of "ownership" as "including any interest whatsoever," and the fact that the City itself has interpreted the ordinance as prohibiting more than fee simple legal title ownership, should be given deference. *Mahalepu v. Land Use Commission*, 71 Haw. 332, 335, 790 P.2d 906, 908 (1990).

The Hawaii Supreme Court was faced with a similar problem of ambiguity in the *Coon* case, where there was a conflict as to who constituted a "lessee," and whether a "trust" could be a "lessee" despite certain parts of the ordinance which, on their face, specifically precluded that. As stated by the Court:

> ROH ch. 38 is not free from ambiguity with respect to trusts. ROH § 38-1.2 defines "lessee" to include "any person to whom land is leased ... and who is the owner-occupant of the residential condominium unit," defines "owner- occupant" as an "individual," and yet includes "trusts" and other legal entities--in addition to individuals--within its definitions of "lessees." Thus, ROH § 38-1.2 appears to be internally inconsistent insofar as it restricts the definition of a "lessee" to an "owner-occupant" who must be "an

> individual," while at the same time extending "lessee" status to trusts and other legal entities. Moreover, ROH § 38-2.4(a)(1) limits eligible lessees to those who "[a]re at least 18 years of age and are owner-occupants of their condominium units," requirements that only a natural person could meet. Nevertheless, the City Council's decision, reflected in ROH § 38-1.2, to define "lessees" to include "trusts" would be meaningless if "trusts" could never qualify to purchase the leased fee interests in condominiums to which they have title.

Coon, 98 Hawai'i at 259, 47 P.3d at 374. There, the problem was very similar to this case. Should the Court give a limited construction to the word "lessee" that would exclude any lessee who had put their leasehold into a personal trust, or did it interpret the language to include trusts so long as the lessee was actually living in the apartment unit as his or her residence and thereby give maximum effectuation to the City Council's intent?

In *Coon*, the Court instructed that if the language is susceptible of multiple interpretations, the courts should adopt the interpretation that best reconciled all parts of the language to achieve the intention of the drafters:

> "It is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all words of the statute." *Franks v. City and County of Honolulu*, 74 Haw. 328, 339, 843 P.2d 668, 673 (1993) (quoting *State v. Wallace*, 71 Haw. 591, 594, 801 P.2d 27, 29 (1990) (quoting *Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984))); see also *Beneficial Hawaii, Inc.*, 96 Hawai'i at 309, 30 P.3d at 915; *State v. Young*, 93 Hawai'i 224, 236 n. 6, 999 P.2d 230, 243 n. 6 (2000); *In re John Doe, Born on November 23, 1978*, 90 Hawai'i 246, 250, 978 P.2d 684, 688 (1999). Thus, we must attempt to make sense of the City Council's inclusion of "trusts" within the definition of "lessees" and whether it evinces an intent to allow for the conversion of the leased fee interests of condominium units held in trust.

Coon, 98 Hawai'i at 259, 47 P.3d at 374. There, the Court adopted the construction which would allow the greatest number of qualified lessees to participate in the Chapter 38 program. It

decided that it would consider both legal and beneficial interests as constituting ownership, and therefore interpreted the language as not barring lessees whose only disqualification was the holding of legal title in a trust:

> [A] trust is nevertheless, a single bundle of interests, irrespective of its particular parts, for the benefit of the trust's beneficiaries. *See James v. Gerber Products Co.*, 483 F.2d 944, 949 (6th Cir. 1973) ("Separating the legal and beneficial incidents of ownership in property is a mere technical argument since there is only one interest at stake and that is the beneficiary's.") Thus, allowing the occupants of condominiums, who qualify to purchase their leased fee interests pursuant to ROH ch. 38 in all respects except that legal title to the condominium unit is technically held in trust for their benefit, to convert their leased fee interests in their condominium unit into fee simple interests furthers the ordinance's goal of protecting those condominium owners most at risk. Moreover, permitting such conversions gives greater effect to ROH ch. 38 in its entirety, consistent with the "cardinal rule of statutory construction" described above.

98 Hawai'i at 260, 47 P.3d at 375 (emphasis added).

Similarly, in order to further Chapter 38's goal of protecting those condominium owners most at risk (and correlatively, not protecting those persons like Reich and Hagin who were not at risk of losing their homes), this Court should construe the ordinance so as to make it clear that transferring disqualifying property to another ownership vehicle, whether it be a land trust, limited liability company or other similar entity, is still ownership and does not remove the disqualification taint. Since the ownership entity continues to be controlled by the lessee and the lessee still has full beneficial ownership of the property, this Court should take into account both legal title ownership and beneficial ownership, because for purposes of determining ownership, "[s]eparating the legal and beneficial incidents of ownership in property is a mere technical argument since there is only one interest at stake." *Id.*

III. THE COURT SHOULD CONSTRUE THE ORDINANCE SO AS TO AVOID CONSTITUTIONAL QUESTIONS.

As set forth above, the public purpose of the ordinance was to protect those lessees most at risk of losing their homes, not lessees like Hagin and Reich who own other fee simple residential property. Hagin and Reich were not intended to have the protection of the ordinance. Again, as stated by the Hawaii Supreme Court in the *Coon* case: "[T]he ordinance excludes condominium owners who do not occupy their units or who occupy their unit but own other residential property in fee simple, because those owners are not among those most at risk of losing their homes." *Coon v. City & County of Honolulu*, 98 Haw. 233, 259-60, 47 P.3d 348, 374-75 (2002) (emphasis added).

The power of eminent domain must be strictly construed against the condemnor. *Marks v. Ackerman*, 39 Haw. 53, 58-59 (1951) (holding that provision of eminent domain statute would be strictly construed against the condemnor); *In re Widening of Fort Street*, 6 Haw. 638, 646-47 (1887) ("when a statute confers upon the Government the right to take another's property for public purposes, every form and particular required by such statute must be complied with.") As stated by the Court in *Coon*:

> The power of eminent domain must be conferred by the legislature, either expressly or by necessary implication, and will not be construed from doubtful inferences. . . Strict construction is not, however, the exact converse of liberal construction, for it does not require that the words of a statute be given the narrowest meaning of which they are susceptible. The language used by the legislature may be accorded a full meaning that will carry out its manifest purpose and intention in enacting the statute, but the operation of the law will then be confined to cases which plainly fall within its terms as well as its spirit and purpose.

98 Hawai'i at 247 n. 18, 47 P.3d at 362 n. 18 (emphasis added), quoting from *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 717 (Tex. App. 2000).

Here, clearly, the intent of the ordinance was not to include lessees who own other fee simple residential property on Oahu. Allowing such people to participate in the condemnation proceedings by the simple device of transferring legal title to a limited liability company goes totally against the public purpose of the ordinance. A construction of the ownership restrictions that would allow this, despite clear statements both by the City Council and the Hawaii Supreme Court to the contrary, would create a serious issue as to the constitutionality of the ordinance because it would permit condemnation of property not within the scope of the stated public purpose.

It is well settled that, if at all possible, statutes are to be construed so as to avoid creating constitutional questions. *See, e.g. Doe v. Doe*, 116 Hawai'i 323, 332, 172 P.3d 1067, 1076 (2007) (in construing statute, court "must keep in mind that the legislature is presumed not to intend to enact laws that are unconstitutional," and "is presumed to have enacted valid statutes in harmony with all constitutional provisions"). Agreeing with the lessees' position would be to construe the statute in a manner that is both contrary to the City Council's expressed intent, and contrary to the constitutional guaranty that private property shall not be taken except for a public use. U.S. CONST. amend. V; HAWAII CONST., art. I, § 20.

To allow lessees such as Reich and Hagin to acquire First Church's property would not be for a public purpose, but simply for their own private gain, and would be unconstitutional:

> [T]the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party. See *Midkiff*, 467 U.S., at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void"); *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896). Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.

Kelo v. City of New London, 545 U.S. 469, 477-78 (2005). A construction of the ordinance that would allow that would likewise render it unconstitutional.

IV. CONCLUSION

For the foregoing reasons, the Lessees' arguments must be rejected. This Court should reverse in part the judgment of the trial court below and determine that Lessees LAWRENCE REICH and JOYCE ANDREA HAGIN and their unit were disqualified from participating in this action.

DATED: Honolulu, Hawaii; July 24, 2008.

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