

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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

Plaintiff-Appellee,  
Cross-Appellee,

vs.

JAMES M. SHERMAN, also known as James Malcolm Sherman, and AKIKO S. SHERMAN, also known as Akiko Sakiyama Sherman, as Trustees under that certain unrecorded James M. Sherman and Akiko S. Sherman Revocable Trust dated May 2, 1989, JAN CAMILLE BELLINGER, Trustee under the Jan Camille Bellinger Revocable Living Trust, under that certain unrecorded Trust Agreement dated November 23, 1993, CLARENCE K. LEE, as Trustee of and for the Clarence K. Lee Revocable Trust under that certain unrecorded Trust Agreement dated January 28, 1992, as amended; MYRNA P. CHUN-HOON, Successor Trustee under that certain unrecorded Revocable Trust of Albert C.K. Chun-Hoon dated October 11, 1984, as amended, and MYRNA P. CHUN-HOON, Trustee under that certain unrecorded Revocable Trust of Myrna P. Chun-Hoon, dated October 11, 1984, as amended; GEORGE B. GARIS, also known as George Benjamin Garis, as Trustee under that certain unrecorded George B. Garis Revocable Trust dated November 28, 1989, as amended; CHINH TRONG LE; KAREN WILSON ROSA; ELIZABETH W. TAKAHASHI, Trustee of the Elizabeth W. Takahashi Revocable Living Trust under that certain unrecorded Trust Agreement dated July 14, 1993, STUART EDWIN GROSS, as Trustee under that certain unrecorded Trust Agreement known as The Stuart E. Gross Trust dated February 19, 1985, and MARCIA KURZWEIL GROSS, as Trustee under that certain

) CIVIL NO. 03-1-0963  
)  
) APPEAL FROM THE  
)  
) 1) FINAL JUDGMENT, filed on December  
) 11, 2007  
)  
) 2) FINDINGS OF FACT, CONCLUSIONS  
) OF LAW AND ORDER GRANTING IN  
) PART AND DENYING IN PART  
) DEFENDANT FIRST UNITED  
) METHODIST CHURCH'S MOTION FOR  
) PARTIAL SUMMARY JUDGMENT ON  
) THE ISSUE OF LESSEE  
) QUALIFICATIONS, FILED SEPTEMBER 7,  
) 2006, filed on December 26, 2006  
)  
) CROSS-APPEAL FROM THE  
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) 1) FINAL JUDGMENT, filed on December  
) 11, 1007  
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) 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  
)

CLARENCE K. LEE  
STATE DEPARTMENT  
NORMA T. YARA  
INTERMEDIATE COURTS  
2008 FEB - 1 PM 1:52

FILED

unrecorded Trust Agreement known as The )  
 Marcia K. Gross Trust dated February 19, 1985; ) **FIRST CIRCUIT COURT**  
 JOHN PHILIP SPIERLING; MARK SPERRY )  
 and MOLLIE SPERRY, Co-Trustees of the ) **HONORABLE VICTORIA S. MARKS Judge**  
 Mark Sperry Revocable Trust dated May 29, )  
 1989, and MOLLIE SPERRY and MARK )  
 SPERRY, Co-Trustees of The Mollie Sperry )  
 Revocable Trust dated May 29, 1989; SAYURI )  
 TANIGUCHI and ERICA TANIGUCHI )  
 DORMAN; KENNETH GRAHAM )  
 PATTERSON and LILLIAN PAPCOLAS )  
 PATERSON; 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, and 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; and )  
 RUTH MILDRED KING and ARTHUR R. )  
 KING, Co-Trustees of the unrecorded Ruth )  
 Mildred King Trust Agreement dated May 18, )  
 1990; DEANNA LOU LEVY, as Trustee under )  
 that certain unrecorded Trust Agreement known )  
 as The Deanna Lou Levy Revocable Trust dated )  
 December 4, 1990; ROBERT G. LEES and )  
 YUKO LEES, Co-Trustees under that certain )  
 unrecorded Trust Agreement known as The )  
 Yuko Lees Trust dated June 14, 2000; )  
 ELISABETH KEHRER ANDERSON, as )  
 Trustee of the Elisabeth Kehrer Anderson )  
 Revocable Living Trust Agreement dated June )  
 29, 1981, as amended and restated; RAMEZ )  
 BASSIR; PAUL JOHN CASEY as Trustee )  
 under that certain unrecorded Self-Trusteed )  
 Trust dated August 31, 1987, and 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 REICK; 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 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. )

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

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and

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FIRST UNITED METHODIST CHURCH



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1-100; DOE ENTITY 1-100, )

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

Defendant-Appellee / Cross-Appellant FIRST UNITED METHODIST CHURCH ("First Church"), timely submits its Answering Brief in response to the Opening Brief of Defendants-Appellants/Cross-Appellees JAMES M. SHERMAN, *et al.* ("Lessees") filed on May 21, 2008 ("Opening Brief"). This Answering Brief is filed pursuant to Hawaii Rules of Appellate Procedure ("HRAP") Rules 25, 28(c) and 32 and is based on the Record on Appeal ("the Record," cited as "R").

The original date for filing of this Answering Brief was July 2, 2008. Pursuant to HRAP Rule 29(a), on June 27, 2008, the appellate clerk granted First Church an extension of time to and including August 1, 2008.

**I. COUNTER-STATEMENT OF THE CASE**

**A. Disqualifications of Lessees Up Through Granting of Motion for Summary Judgment.**

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

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

On February 28, 2006, the Hawaii Supreme Court issued its opinion in *City and County of Honolulu v. Sherman*, 110 Hawai'i 39, 129 P.3d 542 (2006), vacating in part the trial court's judgment.<sup>1</sup> The Court remanded the case for further proceedings to determine whether there are sufficient qualified units for conversion to fee simple, and, if so, to consider evidence of the fair market value of the leased fee interest being acquired. 110 Hawai'i at 77, 129 P.3d at 580.

While this case was on appeal, the City repealed ROH Ch. 38. The City Council specified that condemnation actions could only be continued as to those units that had specifically been approved by the City Council. Any designation for which there had not been Council approval was no longer valid:

SECTION 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH, as existing on the day before the effective date of this ordinance. "Development" means the same as defined under Section 38-1.2, ROH, on the day before the effective date of this ordinance. "Valid designation" means a designation of specific units in a development for leasehold conversion and subsequent approval for condemnation by the council that complied with Chapter 38, ROH, as existing on the day before the effective date of this ordinance and construed by the Hawaii Supreme Court in Coon v. City and County of Honolulu, 98 Haw. 233, 47 P.3d 348 (2002).

Honolulu Ordinance 05-001 at 2-3 (emphasis added). See Appendix 2 to Lessee's Opening Brief.

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

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

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<sup>1</sup>The opinion was corrected on March 22, 2006.

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

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

4. The Lessee or the Lessee’s spouse cannot own fee simple land suitable for residential purposes within the City and County of Honolulu. ROH § 38-2.4(a)(4); *Amended Rules for Residential Condominium, Cooperative and Planned Development Leasehold Conversion*, promulgated September 28, 2000 (“Rules”), §2-4(d).<sup>2</sup> A Lessee “is deemed to own lands, for the purpose of this paragraph, if the person, the person’s spouse, or both the person and the person’s spouse . . . own lands, including any interest, in a land trust, in the City and County of Honolulu.” ROH § 38-2.4(a)(4). The wording of the ordinance shows that the City Council intended “ownership” to include situations other than when the lessee owns the property in his or her own individual name, including making reference to the use of a land trust. The City’s Department of Community Services (“DCS”), which was responsible for administering ROH Ch. 38, has recognized this in its forms provided to applicants. Thus, the Department’s “Notification to Applicants” states that “[y]ou are not permitted to own any fee simple property (including any

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<sup>2</sup>A copy of the Rules is attached as Appendix “B” to First Church’s Opening Brief on Cross-Appeal.

interest whatsoever) suitable for residential purposes within the City and County of Honolulu at the time of application and throughout the implementation process.” See Exhibit 30 to “Defendant First United Methodist Church’s Memorandum in Opposition to Defendant Lessees’ Motion for Partial Summary Judgment Filed on 4/29/04” (emphasis added) (R 19, 1-226.)

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

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

First Church moved for partial summary judgment on the issue of qualifications on September 7, 2006, asserting that, at most, there were only qualified Lessees for 21 units. First Church’s motion demonstrated the following. At the time of remand by the Hawaii Supreme Court there were at most 32 units. However, at the time of remand, 11 of those units were disqualified. Seven of the 11 disqualified units were not contested by the Lessees:

1. **Elisabeth Kehrer Anderson (Unit 2704)** died on June 7, 2004. On April 27, 2005, her unit was **sold** for \$570,000 and the lease assigned to Beau Robert Champion. (R 25 at 1-305, Exhibits B, C and D.)
2. **Chinh Trong Le (Unit 902)** sold his unit on August 24, 2005 for \$415,000, and the lease was assigned to Iris Lee Ebia. (R 25 at 1-305, Exhibits E and F.)<sup>3</sup>
3. **Robert G. Lees and Yuko Lees (Unit 2101)** sold their unit on August 2, 2005 for \$729,000, and the lease was assigned to Albert Peter DeBiasi. (R 25 at 1-305, Exhibits G and H.)
4. **Deanna Lou Levy (Unit 1801)** sold her unit on May 23, 2006 for \$710,000, and the lease was assigned to Gary and Patricia Casson. (R 25 at 1-305, Exhibits I and J.)
5. **Mark Sperry and Molly Sperry (Unit 1205)** sold their unit on April 4, 2005 for \$635,000, and the lease was assigned to Debra Leigh Foster. (R 25 at 1-305, Exhibits K and L.)
6. **John Philip Spierling (Unit 1204)** died on June 17, 2004. On November 17, 2004, his unit was **sold** for \$580,000 and the Lease assigned to Peter Matthew Sheehan (R 25 at 1-305, Exhibits M, N and O.)
7. **Erica Taniguchi Dorman (Unit 1502)**, had moved to England and **rented** out her unit. (R 25 at 1-305, Exhibits P, Q and R.)

Four of the 11 disqualified units were disputed by the Lessees:

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

8. **Clarence K. Lee and Elsa Carl Lee (Unit 704)** were disqualified because Mrs. Lee **owned disqualifying fee simple property**. Mr. Lee owns Unit 704. His spouse and co-applicant is Elsa Carl Lee. On April 27, 2005, Elsa Carl Lee and Mrs. Lee's daughter, Emily Gilpin Carl, acquired disqualifying fee simple residential property located at 607 Auwai Street, Kailua, Hawaii 96734. (R 25 at 1-305, Exhibits S and T.) Mrs. Lee admitted in her deposition she owned the property. (R 25 at 1-305, Exhibit U, Deposition of Elsa Lee at 17-18.)
9. **Wallace Lee Young and Ernestine Young (Unit 503)** were disqualified because they **rented** the property. Mrs. Young admitted during her deposition that they in fact had rented the property during the period they were required to be owner occupants ("Defendant First United Methodist Church's Reply Memorandum in Support of Motion for Partial Summary Judgment on the Issue of Lessee Qualifications," Exhibit 10, Deposition of Ernestine Young at 9-10, R 27 at 1-83.)
10. **Ann Takako Yamamoto (Unit 2905) owned disqualifying fee simple property**. It is undisputed that Ms. Yamamoto owned an interest in a 7 unit residential apartment building at the time she applied. (R 25 at 1-305, Exhibit BB). Her application recited that she owned an 8.8% undivided interest in the apartment building. Receipt of her application was acknowledged on May 14, 2001 by Karen Marshall, Leasehold Conversion Program Specialist of DCS. (R 25 at 1-305, Exhibit CC: Ex. 2 to Deposition of Yamamoto.) The date of "filing" of the application is the date the application is received by DCS. (R 27 at 1-83, Deposition of Cravalho at 104:21-105:18, attached as Exhibit 6 to First Church's Reply Memorandum in Support of Motion for Summary Judgment.) This is the date at which the applicant must initially be found to qualify. *Sherman*, 110 Hawai'i at 67-68, 129 P.3d at 569-70.
11. **Lawrence Reich and Andrea Hagin (Unit 2001)**. They each **owned disqualifying fee simple residential property** that they transferred into

single-member limited liability companies immediately before applying. (The disqualification of Reich and Hagin is dealt with in detail in First Church's Opening Brief on Cross Appeal filed herein on April 18, 2008, and its Reply Brief to Lessees' Answering Brief on Cross-Appeal, filed herein on July 24, 2008.)

The Lessees opposed the last four disqualifications, but did not contest the specific facts put forth by First Church, only their legal implications. They also argued that in computing the minimum number that must be maintained, the trial court was required to count other applicants who had never been approved by the City Council, were not parties to the condemnation action and could never become parties because of the repeal of ROH Ch. 38. (R 26 at 111-336.)

After a hearing on the motion, the trial court again determined that there were not a sufficient number of qualified lessees and units to maintain a condemnation under ROH Ch. 38, and entered summary judgment in favor of First Church. The trial court rejected Lessees' assertion that persons who were never approved by the City Council and were not parties to the condemnation action must be counted towards the minimum. "Findings of Fact, Conclusions of Law and Order Granting in Part and Denying in Part Defendant First United Methodist Church's Motion for Partial Summary Judgment on the Issue of Lessee Qualifications, Filed September 7, 2006," filed on December 26 2006 ("Summary Judgment Order"). (R 27 at 123-32.)

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

The disqualification of the Lees, the Youngs and Yamamoto reduced the total to 22 units. As argued in First Church's Cross-Appeal, because Reich and Hagin are also disqualified, only 21 units remained at that time.<sup>4</sup>

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

The City did not appeal.

**B. Further Disqualifications of Lessees and Units Not Disclosed by Lessees to this Court.**

The number of the Lessees properly in this action has further declined since summary judgment was entered against them. Since summary judgment was entered, the Lessees for 5 more units have become disqualified by virtue of sales of their units or acquisition of disqualifying fee simple residential property. Lessees have not notified this Court of the disqualifications or taken steps to have the disqualified Lessees dismissed from this appeal.

The Court can take judicial notice of these transactions which occurred after the determination of the trial court. Haw. R. Evid. 201; *Kaho'ohanohano v. State*, 114 Hawai'i 302, 328 and 329 n. 19, 162 P.3d 696, 722 and 723 n. 19 (2007) (appellate courts may take judicial notice of new developments not considered by the lower court). Counsel have an obligation to disclose to the appellate courts material facts that could impact the outcome of an appeal. *AIG Hawai'i Insurance Co. v. Bateman*, 82 Hawai'i 453, 459-461, 923 P.2d 395, 401-403 (1996)

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<sup>4</sup>Reich and Hagin subsequently sold their Admiral Thomas unit on April 5, 2007, to Sarah Watson Heath, and thus are now also disqualified for that reason. A certified copy of the Assignment of Apartment Lease is attached to First Church's Opening Brief on Cross Appeal as Appendix "D." First Church continues to assert that Reich and Hagin have always been disqualified by virtue of their ownership, via their solely-owned and -controlled limited liability companies, of fee simple residential property.

(counsel had ethical duty to bring material facts that would moot appeal to the attention of the appellate tribunal).

First Church brings the additional disqualifications to this Court's attention by the certified conveyance documents attached hereto (and by the conveyance document for Reich and Hagin attached to its Opening Brief on Cross Appeal), and requests that this Court take judicial notice of the additional disqualifications:

1. Gail Suzanne Kogelman (Unit 3203). On March 23, 2007, Lessee Gail Suzanne Kogelman sold her Admiral Thomas unit to Sandra Seung Won Sakuma by Assignment of Lease filed in the Land Court of the State of Hawaii ("Land Court") as Document No. 3578351, and recorded in the Bureau of Conveyances of the State of Hawaii ("Bureau") as Document No. 2007-053157. A certified copy of this document is attached as **Appendix 1**.

2. Lawrence Reich and Joyce Andrea Hagin (Unit 2001). On April 5, 2007, Lessee Reich and Hagin sold their Admiral Thomas unit to Sarah Watson Heath by Assignment of Lease filed in the Land Court as Document No. 4584334, and recorded in the Bureau as Document No. 2007-061318. A certified copy of the Assignment of Lease was attached as Appendix "D" to First Church's Opening Brief on Cross-Appeal filed herein on April 18, 2008.

3. Meredith Kwock Pang (Unit 3204). On May 25, 2007, Lessee Meredith Kwock Pang acquired a fee simple condominium unit in Yacht Harbor Towers by Apartment Deed filed in the Land Court as Document No. 3606891. A certified copy of this document is attached as **Appendix 2**.

4 George H. and Joann C. Lumsden (Unit 2901). On June 29, 2007, Lessees George H. and Joann C. Lumsden sold their Admiral Thomas unit to Jeff Roger Rowley and Kathaleen Kaina Rowley, as Trustees, by Assignment of Lease filed in the Land Court as Document No.

3621785, and recorded in the Bureau as Document No. 2007-117199. A certified copy of this document is attached as **Appendix 3**.

5. Elaine N. Min (Unit 1605). On August 27, 2007, Lessee Elaine N. Min acquired a fee simple condominium unit in 909 Kapiolani, together with Donna Min Shiroma and Valerie Lyn Yukiko Taksue Shiroma [*stet*], by Apartment Deed filed in the Land Court as Document No. 3646933. A certified copy of this document is attached as **Appendix 4**. First Church would also point out that the Apartment Deed was to be returned to Elaine Nam Min at 2915 Lauoha Place, Honolulu, Hawaii 96813, which may also indicate that Lessee Min was also no longer living in her Admiral Thomas unit.

As a result of the further disqualifications, there are, at most, presently only **17** qualified Lessees remaining in this suit.<sup>5</sup>

**C. Summary Chart of Lessee Qualifications**

To assist the Court, the following is a chart showing the qualification status of each Lessee (plus certain applicants who were never part of the lawsuit but who Lessees are arguing must be counted):

**LESSEE/APPLICANT QUALIFICATION STATUS**

<b>Last Name of Lessee-Applicant (Non-Qualified Lessees in Bold)</b>	<b>Status</b>	<b>Disqualified?</b>	<b>Record Reference</b>
<b>AHN</b> (Third Amendment applicant)	Never approved by City Council; Never a Party in Suit	Never Qualified	R 26 at 111-336, Dec. of Cravalho at 6 ¶ 14
<b>ANDERSON</b>	Died 6/7/04; Unit sold and lease assigned.	Ceased to Qualify by Death	R 25 at 1-305, Exhs. B, C and D

<sup>5</sup>It is possible other Lessees could also now be disqualified for reasons not appearing of public record, such as renting their units out, or no longer living in the unit.

<b>Last Name of Lessee-Applicant (Non-Qualified Lessees in Bold)</b>	<b>Status</b>	<b>Disqualified?</b>	<b>Record Reference</b>
<b>ATWOOD/LE</b>	Sold to Disqualified Buyer Le 7/31/03	Disqualified by Sale	R 25 at 1-305, Exhs. E and F
<b>BASSIR</b>			
<b>BECKER</b> (Third Amendment applicant)	Never approved by City Council; Never a party in the suit	Never Qualified	R 26 at 111-336, Dec. of Cravalho at 6 ¶ 14
<b>BELLINGER, Jan</b>			
<b>BELLINGER, Neil</b>			
<b>BROWN</b>			
<b>CASEY</b>			
<b>CHUN-HOON</b>			
<b>CLOTHIER</b> (Third Amendment applicant)	Never approved by City Council; Never a party in the suit	Never Qualified	R 26 at 111-336, Dec. of Cravalho at 6 ¶ 14
<b>EARLE</b> (Third Amendment applicant)	Never approved by City Council; Never a party in the suit	Never Qualified <sup>6</sup>	R 26 at 111-336, Dec. of Cravalho at 6 ¶ 14
<b>GARIS</b>			
<b>GROSS</b>			
<b>KANEKO</b> (Third Amendment applicant)	Never approved by City Council; Never a party in the suit	Never Qualified	R 26 at 111-336, Dec. of Cravalho at 6 ¶ 14
<b>KELLY</b>			
<b>KING</b>			
<b>KOGLMAN</b>	Sold unit 3/23/07; <i>Sale never disclosed to Court</i>	Disqualified by sale	Appendix 1 attached hereto
<b>LEE</b>	Spouse acquired interest in disqualifying fee simple residential property on 4/27/05	Disqualified by ownership of fee simple residential property	R 25 at 1-305, Exhs. S, T and U, Depo. of Elsa Lee at 17-18

<sup>6</sup>Ms. Earle's husband also has an interest in disqualifying fee simple residential property, also disqualifying her. See **Appendix 5** attached hereto.

Last Name of Lessee-Applicant (Non-Qualified Lessees in Bold)	Status	Disqualified?	Record Reference
<b>LEES</b>	Sold 8/20/05	Disqualified by sale	R 25 at 1-305, Exhs. G and H
<b>LEVY</b>	Moved 2/06; Sold unit.	Disqualified by move, then sale	R 25 at 1-305, Exhs. I and J
LO			
<b>LUMSDEN</b>	Sold 6/29/07; <i>Sale never disclosed to Court</i>	Disqualified by Sale	Appendix 3 attached hereto
<b>MIN</b>	Acquired interest in fee simple residential property 8/27/07; <i>Disqualification never disclosed to Court</i>	Disqualified by ownership of fee simple residential property	Appendix 4 attached hereto
<b>PANG</b>	Acquired interest in fee simple residential property 5/25/07; <i>Disqualification never disclosed to Court</i>	Disqualified by ownership of fee simple residential property	Appendix 2 attached hereto
PATTERSON			
<b>PLOTTS</b>	Withdrew 11/18/02, Never approved by City Council; Never a party in the suit	Never qualified	R 26 at 111-336, Dec. of Cravalho at 4 ¶ 6
<b>POWERS</b>	Withdrew 7/31/03	No longer part of suit	R 26 at 111-336, Dec. of Cravalho at 6 ¶ 13
<b>REICH &amp; HAGIN</b>	At time of application, owned disqualifying residential real property through single-member LLCs created solely to circumvent requirements of ROH Ch. 38; Sold Admiral Thomas unit 4/5/07; <i>Sale never disclosed to Court</i>	Never Qualified; even if assuming <i>arguendo</i> qualified at date of application, then disqualified by subsequent sale of property	See pp. 6-9 of First Church's Opening Brief on Cross-Appeal and Record references therein; also Appendix "D" to First Church's Opening Brief on Cross-Appeal
ROSA			
<b>SHAW</b> (First Amendment applicant)	Sold Unit on 6/15/04, Never approved by City Council, never party in suit	Disqualified by sale of property	R 26 at 111-336, Dec. of Cravalho at 7, ¶ 18
SHERMAN			

Last Name of Lessee-Applicant (Non-Qualified Lessees in Bold)	Status	Disqualified?	Record Reference
<b>SPERRY</b>	Purchased fee simple property on 9/29/04, unit sold on 4/5/05	Disqualified by ownership of fee simple property, sale of unit	R 26 at 111-336, Dec. of Cravalho at 7, ¶ 9
<b>SPIERLING</b>	Died 6/20/04, unit subsequently sold	Ceased to Qualify by Death and Sale	R 25 at 1-305, Exhs. M, N and O; R 26 at 111-336, Dec. of Cravalho at 7, ¶ 9
TAKAHASHI			
<b>TANIGUCHI &amp; DORMAN</b>	Surviving applicant moved from unit 2/05; Rented unit	Disqualified by moving, renting	R 25 at 1-305, Exhs. M, N and O; R 26 at 111-336, Dec. of Cravalho at 7, ¶ 9
WATANABE			
<b>YAMAMOTO</b>	Owned an interest in disqualifying real property at the date of her application	Never Qualified	R 25 at 1-305, Exhs. BB and CC; Exhs. 2, 5 to Depo. of Yamamoto, R 27 at 1-83, Ex. 6 (Depo. of Cravalho at 104:21 – 105:18)
YEAGER			
<b>YOUNG</b>	Rented; Did not live in the unit for 1 year prior to application	Never Qualified	R 25 at 1-305, Exhs. V and W, Depo. of Ernestine Young at 9-10, Depo. of Kulinsky at 39:17-19; R 27 at 1-83, Exhs. 9 and 10

**Qualified Lessees and Units at Time of Motion for Summary Judgment: 21**

**Qualified Lessees and Units as of August 1, 2008: 17**

## II. ARGUMENT

As set forth in the Counter-Statement of the Case above, as of August 1, 2008, there are presently at most only 17 qualified Lessees. This means that the Lessees must win every one of their arguments in order to meet the 25 minimum to prevail on this appeal. They must win on their argument that those 5 applicants who were never approved by the City Council and never made part of the suit must still be considered for numerosity purposes, and must also demonstrate that the trial court was wrong when it determined that Lessees Lee, Yamamoto and Young were not qualified.

If they fail on a single argument--for example, if this Court concludes that Lessee Lee was properly disqualified because his spouse owns disqualifying fee simple residential property--this appeal is over.

A. **The Trial Court Did Not Fail to “Follow Precedent” in Ruling That There Were an Insufficient Number of Qualified Lessees and Units, Or in Determining that the Applicants in the “Third Amendment” Could Not Be Considered.**

Lessees erroneously assert that the trial 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.” Lessees’ Opening Brief at 16. This is incorrect.

By the time that this case had been remanded to the trial court, ROH Chapter 38 had been repealed by the Honolulu City Council. The City Council provided for limited grandfathering of cases which were still pending. The City Council specified that condemnation actions could only be continued as to those units that had specifically been approved by the City Council. “Designation” was defined as a designation of “specific units.” Any designation, however, of units for which there had not been specific Council approval was no longer valid:

SECTION 3. (a) This ordinance shall not affect any eminent domain proceeding for the acquisition of units validly designated

in projects, the condemnation of which units was approved by the council by resolution before the effective date of this ordinance. Such an eminent domain proceeding may be instituted or, if already instituted, continued after the effective date of this ordinance in accordance with Chapter 38, ROH, as existing on the day before the effective date of this ordinance. “Development” means the same as defined under Section 38-1.2, ROH, on the day before the effective date of this ordinance. “Valid designation” means a designation of specific units in a development for leasehold conversion and subsequent approval for condemnation by the council that complied with Chapter 38, ROH, as existing on the day before the effective date of this ordinance and construed by the Hawaii Supreme Court in Coon v. City and County of Honolulu, 98 Haw. 233, 47 P.3d 348 (2002).

Ordinance 05-001 at 2-3 (emphasis added). Thus, in the case at hand, there had been specific Council approval for the units in the original Designation and in the First and Second Amendments to the Designation (with the exception of applicants Plotts and Shaw). However, no action was ever taken by DCS to have the applicants in the Third Amendment approved for condemnation, and those units were never approved for condemnation by the City Council. Therefore, the trial court was not abusing its discretion, but instead following the express terms of the repeal Ordinance in not considering the Third Amendment since it had never been approved by the Council.

Further, *Sherman* makes it clear that the 25-minimum count must be continually maintained. *Sherman*, 110 Hawai‘i at 66-67, 129 P.3d at 569-70. Even if, for the sake of argument, the applicants in the Third Amendment are deemed to have initially “qualified,” because the law was repealed they could never be added into the suit as parties or be able to acquire their units under ROH Ch. 38. In that way, they are no different than a lessee that subsequently withdraws or dies during the proceedings, and can no longer be counted towards maintaining the minimum:

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 maintains its public purpose and need not be terminated.

*Sherman*, 100 Hawai‘i at 66, 129 P.3d at 569 (emphasis added). Accepting the Lessees’ argument means, however, that these 5 applicants must be considered to continue to make up the minimum number, even if the actual number of units should fall to as low as 20.

Further, the Lessees argue that the trial court, and now this Court, must assume such additional applicants were and continue to be qualified without any inquiry into whether they actually have met the qualification requirements of ROH Ch. 38. Although First Church has never had the opportunity to do formal discovery on these applicants, it is clear that at least one of them fails to meet the qualification requirements.

Immediately prior to his wife applying, the husband of Third Amendment applicant Jacqueline Earle conveyed his disqualifying fee simple residential real property into a single-member limited liability company. A certified copy of the Warranty Deed between John Lawrence Earle and Aliikai Enterprises, LLC, dated October 17, 2003 and filed in the Land Court as Document No. 3013168, whereby Mr. Earle transferred his interest in a fee simple town-home at Ko Olina, is attached hereto as **Appendix 5**. If this Court agrees with First Church’s argument in its Cross-Appeal that transferring disqualifying residential fee simple property to a single-member LLC controlled by the lessee is still ownership of that property, this appeal then becomes moot because of Mr. Earle’s ownership of the Ko Olina property, *i.e.*, there is no longer any possible way there can be **25** qualified applicants in this suit. *Cf., Bateman, supra.*

Finally, Lessees argue that

[a]ny 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. . . .

Lessees' Opening Brief at 17.

However, in the trial court below, the Lessees never argued that the repeal was unconstitutional or otherwise invalid. They did not assert any counterclaims against the City regarding the legality of the repeal of Chapter 38. It was only once they lost this case below that they then attempted to collaterally attack the judgment in federal district court, in a case that is still pending but has not seen any determination on the merits. However, they have never asserted such arguments in this suit until their Opening Brief in this appeal.

Lessees have not pointed this Court to any place in the Record where any error occurred in this regard. HRAP 28(b)(4) provides that in its statement of points of error, the appellant shall "state . . . where in the record the alleged error occurred . . . [,] and . . . where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency . . . Points not presented in accordance with this section will be disregarded . . . ."

Further, the appellate courts have long held that issues not presented to the trial court will be deemed waived on appeal. *Molinar v. Schweizer*, 95 Hawai'i 331, 339, 340-41, 22 P.3d 978, 986-87 (2001)(appellate court would not consider appellant's claim that trial court's decision violated her constitutional rights when raised for the first time on appeal); *Kawamata Farms v. United Agri Products*, 86 Hawai'i 214, 248-49, 948 P.2d 1055, 1089-90 (1997) (constitutional issues not raised in the lower court will not be considered on appeal). Since Lessees did not assert any infirmity of the repeal below, they cannot raise it here. They cannot claim the trial

court failed in its duties as to arguments that were never made below. *Kawamata Farms*, 86 Hawai'i at 248, 948 P.2d at 1089 (would be unfair to trial court and opposing party to reverse on a ground not raised below).

In any event, the pending argument of certain lessees in federal court that the repeal of ROH Ch. 38 violated their rights under the Contracts Clause would not have any effect on this appeal, as the lessees' remedy (if any) for a Contracts Clause violation lies in money damages against the City. Even if a Contracts Clause violation is asserted, a sovereign cannot be compelled by the courts to condemn property where it has determined not to. *See, e.g., Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C.*, 176 P.3d 737, 745-46 (Colo. 2007):

[W]hile a contractual obligation to condemn particular properties if necessary is not void, and while compensation may be ordered for injury resulting from its breach by the government, as a matter of public policy, if not constitutional necessity, the discretion to exercise the power of eminent domain in the public interest must remain with the body to which it was delegated, and not the courts.

This is especially true here, where the City in its repeal found that there was no longer any public purpose for condemning multi-family leased fees. Ordinance 05-001, SECTION 1.

**B. Lessee Yamamoto Was Properly Disqualified Because She Owned an Interest in Fee Simple Residential Property at the Time She Applied.**

First Church agrees with Lessees that the time at which an application is filed with the City is the operative time for determining whether lessees initially qualify under ROH § 38-2.4. *Sherman*, 110 Hawai'i at 68, 129 P.3d. at 571.

Yamamoto's application was not filed with the City on October 1, 2001, and her Affidavit on October 2, 2001, as argued by the lessees. First Church demonstrated below that it was filed with the City on May 14, 2001.

Ann Takako Yamamoto initially recited on her application that she owned an interest in a 7-unit residential apartment building. (R 25 at 1-305, Exhibit BB). Her application recited that she owned an 8.8% undivided interest in the apartment building. Her application is initially dated May 7, 2001. Her affidavit, also dated May 7, 2001, has paragraph 4 of the affidavit lined out (the paragraph that says she does not own fee simple property suitable for residential purposes.)

On May 14, 2001, Karen Marshall, Leasehold Conversion Program Specialist of the City's Department of Community Services, sent Ms. Yamamoto a letter stating “. . .we are in receipt of your application. . . .” The letter also stated that “[w]e would like to request additional information regarding the other fee simple property named in Schedule E on page 3 of your application.” (*Id.*, Exhibit 2 to Deposition of Yamamoto.) This letter was not disputed by Lessees below.

In her deposition, Ms. Yamamoto admitted that Sally Cravalho, the City's Program Administrator for the Chapter 38 program, advised her that ownership of the property was not acceptable. (*Id.*, Depo. of Yamamoto at 10.) On May 30, Karen Marshall of the City apparently sent the following e-mail to Ms. Yamamoto, which stated, in pertinent part:

I've just met with Sally and we would like to review the Thomas Takayoshi Yamamoto Revocable Trust and the Amy Midori Yamamoto Revocable Trust Agreements to further determine if you have any possessory control of the Young Street property. At this point it would appear that you would need to gift your interest in the Young Street to your brother to become eligible to participate in the Leasehold Conversion Program for Admiral Thomas, however Sally would like to review the trust agreements first to confirm this.

(*Id.*, Exhibit 5 to Dep. of Ann Yamamoto) (emphasis added). In her deposition, Ms. Yamamoto said she did not recall getting this e-mail, but admitted “[t]here's no reason to believe I would not have received it.” (*Id.*, Deposition of Yamamoto at 18.)

Subsequently, Ms. Yamamoto sent Ms. Cravalho a copy of a "Warranty Gift Deed," dated July 18, 2001 and recorded on July 20, 2001, showing the transfer of her interest in the Young Street property to her brother. In her deposition, Yamamoto admitted she had paid no state or federal gift tax on the transfer. (*Id.*, Depo. of Yamamoto at 20 ). On the front of the document was an undated transmittal sheet in Ms. Yamamoto's handwriting that said: "Thank you so very much for your help on this!" (*Id.*, Exhibit 6 to Depo. of Yamamoto.)

On September 14, 2001, Sally Cravalho apparently sent a letter to Ms. Yamamoto, acknowledging that she had received from attorney Edward E. Case a copy of the recorded conveyance document "granting to Glenn Yamamoto your interest in the fee simple property located at 1641 Young Street," and enclosing her Application, Personal Financial Statement, Affidavit, and deposit check. The letter instructed her to re-date and re-sign the documents. (*Id.*, Exhibit 7 to Deposition of Yamamoto). In her deposition, Ms. Yamamoto said she had no memory of receiving the letter, but had no reason to assume it was not received by her. (*Id.*, Depo. of Yamamoto at 22.) Ms. Yamamoto testified she did the things that the letter instructed her to do. (*Id.*, Depo. of Yamamoto at 22-24.)

Based on the foregoing, it cannot be disputed that Ms. Yamamoto owned disqualifying fee simple residential property at the time her application was filed with the Department of Community Services, as evidenced by the May 14, 2001 letter. The DCS thereafter advised Ms. Yamamoto to transfer the disqualifying real property out of her own name to a relative's, and also instructed her to re-date her application documents for a date after the date she transferred the disqualifying real property. The Lessees now claim that the application was "filed" at a later date.

Nevertheless, Lessees admit in their brief that Yamamoto had “initially signed her Application on May 7, 2001 and had submitted it to the Department by May 14, 2001.” Opening Brief at 18. The City also admitted in the proceedings below that an application is deemed “filed” when first received by the DCS. As stated by former administrator Sally Cravalho in her deposition:

Q. [By Mr. Aoki] Now, you indicated earlier that the operative date with respect to applications is the date that it's received by the department. Correct?

A. [By Ms. Cravalho.] Correct.

Q. How do we determine when that date is?

A. Well, there's usually something in the file that indicates that date or it's usually the date when the check is deposited. There's various evidence of when applications are received.

Q. I think in some of the files, there's a letter referencing receipt of the application, but not all of them. So if there isn't a letter or something specifically addressing receipt, the next best thing would be the date of the receipt of the check?

A. Transmittal of the check. Initial TMK run could be. Could be -- you know, on the back of some documents, there is a received date. All kind of indicia.

Q. But -- okay. Well, the check. There's usually something in the file that indicates that a check is transmitted to Beryle.

A. Yeah.

Q. Is that an indication that --

A. Could be. In absence of something else. Or in combination with other things. But usually, there is a letter in the file acknowledging receipt.

R 27 at 1-83, Ex. 6, Deposition of Cravalho at 104:21 – 105:18 (emphasis added). In Yamamoto's case, there is a letter from DCS acknowledging receipt of her application on May 14, 2001, and at that time she owned disqualifying fee simple residential property.

Despite this, however, the Lessees argue that Yamamoto and the DCS could evade the qualification requirements by hiding her disqualifying real property and then purporting to file a new “application.” However, at that point, as a matter of law, it is too late. *City and County of Honolulu v. Hsiung*, 109 Hawai‘i 159, 170-71, 124 P.3d 434, 445-46 (2005) (lessee Poag disqualified at time he applied).

C. **Lessee Lee Was Properly Disqualified Because His Wife Acquired Fee Simple Residential Property after Lee had Applied.**

In their Opening Brief, Lessees do not dispute the facts. They admit that Mrs. Lee acquired fee simple residential property in Kailua together with her daughter. (Opening Brief at 19-20.) That disqualified Applicant Lee. All of the arguments of the Lessees as to why Mrs. Lee’s ownership of the property should not be considered to disqualify Applicant Lee are irrelevant.

Despite all of the machinations in their Opening Brief, Lessees never address the fact that an applicant is disqualified if the applicant, or the applicant’s spouse, own other fee simple residential property:

(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.)

Another red herring is that it makes a difference that Mr. Lee's trust is technically the owner of the property. That contention was rejected by the Hawaii Supreme Court, which held that in a trust situation one looks to whether the beneficiary qualifies. *Coon v. City and County of Honolulu*, 98 Hawai'i 233, 260, 47 P.3d 348, 375 (2002) ("allowing occupants of condominiums, who qualify . . . in all respects except that legal title . . . is technically held in trust for their benefit, to convert . . . furthers the ordinance's goal of protecting those condominium owners most at risk.")

Mrs. Lee now gives numerous reasons why she should not be considered to own the Kailua residential property. The fact that she owned it together with her daughter is irrelevant. A cotenant is deemed to have equal rights of occupancy and use, *Lui v. Kaleikini*, 10 Haw. 391 (1896); *Nahinai v. Lai*, 3 Haw. 317 (1871).

Further, the Supreme Court has already held that such *post hoc* rationalizations are unavailing. In *Hsiung*, lessee applicant Poag similarly gave numerous reasons why he should not be disqualified for owning fee simple residential real property, including that he owned it for business purposes and that it supposedly was not habitable. The Court held that "the relevant inquiry under ROH § 38-2.4 centers around the character of the land itself—whether the property can be used for residential purposes or dwelling unit purposes. Under the plain language of the ordinance the *habitability* of any structures atop land suitable for residential purposes is not relevant." 109 Hawai'i at 171, 124 P.3d at 446 (emphasis in original). The Court further held that the reasons why Poag owned the property were irrelevant. 109 Hawai'i at 172, 124 P.3d at 447.

Just like Poag, Mrs. Lee owned fee simple property suitable for residential purposes after the date of application, and that is fatal.

**D. Lessee Young was Properly Disqualified Because The Youngs had Did Not Reside in the Unit and had Rented It Out**

Again, in their Opening Brief, Lessees do not dispute the facts.

Mrs. Young admitted during her deposition that they in fact had rented the property to Dr. Lynn Ashby until the end of August, 2002, four months before their application. (R 25 at 1-305, Depo. of Ernestine Young at 9.) During that period they did not have possession of the unit. (*Id.*, Depo. of Young at 10). The building manager, Russell J. Kulinsky, similarly testified that the Youngs had rented their apartment out. (*Id.*, Depo. of Kulinsky at 39:17-19.)

Lessees do not dispute that the Youngs did not occupy their unit for the year preceding their application and in fact were renting out their unit. The Lessees now argue that the DCS would have re-considered her application and urged "her to refile it" if they knew the Youngs' situation. This argument disregards the reason the DCS had not "learned of Ms. Young's situation": the Youngs had lied and committed perjury on their application and affidavit and said under oath that they had lived in the unit when in fact they had been renting out the unit.

It also does not take into account that the Youngs continued to lie and deceive in their responses to discovery requested by First Church. In its Request for Answers to Interrogatories, Question 12 asks:

"Has Your Admiral Thomas condominium unit been rented or leased to or by any beneficial owner or any other person or entity for any period of time during the year preceding Your Date of Application (see Your answer to interrogatory number 5) and for each year since that date? If so, identify when You rented, or leased Your Admiral Thomas unit, and identify to whom it was rented, or leased."

The Youngs' answer was "No". (R 27 at 1-53, Exhibit 9 to First Church's Reply Memorandum in Support of Motion for Summary Judgment.) It was only when the resident manager stated

during his deposition that the Youngs had a renter in their unit that First Church became aware of the Youngs' perjury.

The Youngs knew exactly what they were doing. When Mrs. Young was deposed, she admitted they had rented the unit and produced a portion of her tax return for 2002 showing that she and her husband had received \$6,200 in rent for her Admiral Thomas unit in 2001. (*Id.*, Exhibit 10.) It was one thing for the Youngs to lie on their applications and discovery responses, but they well knew it was another to deceive the IRS on a tax return by not reporting the rent they received from their Admiral Thomas unit.

In any event, allowing Mrs. Young to reapply after a year elapsing, as argued by Lessees in their Opening Brief, would have been a futile act. Young's declaration says "I returned to live in Unit 503 at the end of September 2002. . ." One year after the end of September 2002 would be October 1, 2003 which would put her in the same category as the additional 5 applicants that were never approved by the City Council.

**E. The Trial Court Did Not Abuse Its Discretion by Failing to Invoke its "Equitable Powers" to Ignore the Law and Assist in the Abuses of ROH Ch. 38 Perpetrated by the Lessees and the City.**

Equity has no application here. The law is clear. The trial court was required to follow the law in determining whether or not Lessees were qualified. It ruled correctly as to the Lessees it determined were not qualified. It did so, applying the precedents of the Hawaii Supreme Court and the express provisions of ROH Ch. 38 and Ordinance 05-001. It also correctly ruled that it could not count persons and units whose condemnation was never approved by the City Council and were not even part of the condemnation action.

Lessees and the City are not entitled to argue equity. As amply laid out to the trial court, there was a whole panoply of abuses engaged in by the City and Lessees in order to try to illegally take First Church's property and distribute it to people who did not qualify under the

law. This included coaching and assistance by City personnel in how to hide disqualifying fee simple residential property, the re-dating of applications to claim applicants applied at times different from when they actually applied, the transfer by Lessees of disqualifying fee simple residential property into solely-owned and controlled limited liability companies so they could claim they no longer owned it, and finally, in the case of Lessee Young, committing perjury in her application and maintaining that she and her husband met the qualification requirements when discovery by First Church revealed they did not.

### **III. CONCLUSION**

First Church has been fighting to keep its property from being taken in an illegal condemnation since 2003. Lessees continue to argue that this Court should permit that illegal condemnation process to continue, despite there presently being 17 Lessees, at most, who still qualify. The law itself was repealed as having no further public purpose, as a result of a huge public outcry regarding the law's abuses and its disparate impact on Native Hawaiians and small single-parcel landowners like First Church.

The City, the ostensible if only the nominal condemnor in this whole process, did not appeal the judgment of the trial court. This Court can draw its own conclusion as to whether the condemnor thinks this condemnation continues to have any public purpose or merit.

First Church strongly urges this Court to affirm the trial court's rulings regarding the inability of the Court to consider non-party applicants in the Third Amendment as counting towards the minimum number, in ruling that Lessees Yamamoto, Lee and Young were disqualified, and in granting summary judgment in First Church's favor.

DATED: Honolulu, Hawaii; August 1, 2008.



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