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' REPLY BRIEF

APPENDIXES "6" AND "7"

CERTIFICATE OF SERVICE

DAVID A. NAKASHIMA 2064-0
LERISA L. HEROLDT 7519-0
ALSTON HUNT FLOYD & ING
American Savings Bank Tower
1001 Bishop Street, 18th Floor
Honolulu, Hawai`i 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591

Attorneys for
Defendants-Appellants/Cross-Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

ORDINANCES AND RULES

DOCKET CASES

DEFENDANTS-APPELLANTS' REPLY BRIEF

I. INTRODUCTION

Defendants-Appellants/Cross-Appellees JAMES M. SHERMAN, et al. ("Lessees"), by and through their attorneys Alston Hunt Floyd & Ing, respectfully submit their Reply Brief to the Answering Brief ("Ans. Br.") filed by Defendant-Appellee/Cross-Appellant FIRST UNITED METHODIST CHURCH ("Lessor") on August 1, 2008. This Reply Brief is filed pursuant to Hawai`i Rules of Appellate Procedure ("Haw. R. App. P.") Rules 25, 28(d) and 32 and is based on the Record on Appeal.[1]

While the Repeal Ordinance expressly allows ongoing condemnation actions to continue, Lessor persuaded the Circuit Court to ignore additional qualified applicant-units, which was later determined to be contrary to this Court's ruling in *City and County of Honolulu v. Sherman et al.*, 110 Hawai`i 39, 66-67, 129 P.3d 542, 569-70 (2006).[2] Lessor also convinced the Circuit Court that the City Council -- not the Department -- has the authority to grant final approval for the Chapter 38 process, which contravenes Chapter 38's express language. In addition, the Circuit Court erred in taking a narrow, restrictive interpretation of Chapter 38, contrary to this Court's liberal construction test. The Circuit Court's errors have caused irreparable harm to Lessees and perpetuated an inequitable delay in their Chapter 38 proceedings.

II. ARGUMENT

A. The Circuit Court Failed to Consider the Five Applicant-Units That Had Obtained Final Approval

Lessor conveniently ignores the Hawai`i Supreme Court's holding in *Sherman*, and instead relies on the unsupported conclusion that the Repeal Ordinance invalidated the Third

---

[1] The original deadline for the filing of this Reply Brief was August 15, 2008, which was a holiday. Pursuant to Haw. R. App. P. 29(a), on August 14, 2008, the appellate clerk granted Lessees an extension of time to and including August 28, 2008.

[2] The term "Repeal Ordinance" as used herein refers to Ordinance 05-001, which repealed Chapter 38 on February 9, 2005. The defined terms used in this Reply Brief are those used in *Defendants-Appellants' Opening Brief*, filed May 21, 2008 ("Opening Brief").

Amendment to Original Designation and, thus, precluded Lessees from meeting Chapter 38's numerosity requirement. Ans. Br., at 14-15. *Sherman*, which was published one year *after* the Repeal Ordinance's enactment, specifically addressed the significance and effect of amendments to the Original Designation without reference to Chapter 38's repeal. Notably, *Sherman* did *not* hold that the Repeal Ordinance invalidated any amendment to the Original Designation or that the Original Designation was invalid. Further, at *no* time was the Finding of Effectuation of Public Purpose for Admiral Thomas ever rescinded or revoked by the Department.[3] The *Sherman* Court held that as long as Chapter 38's numerosity requirement was met when the Department issued the Original Designation, any applicant-units that were added thereafter by amendments to the Original Designation may count toward the continuous maintenance of the minimum twenty-five units required by R.O.H. §38-2.2(a)(1). *Sherman*, 110 Hawai`i at 66-67, 129 P.3d at 569-70.

Here, the numerosity requirement was met when the Department first designated Admiral Thomas units on October 11, 2002, by the Original Designation. ROA 26:145-48. Further, from the time of the Original Designation through the Circuit Court's ruling on October 10, 2006, the minimum number of twenty-five applicant-units was continuously maintained. *See Sherman*, 110 Hawai`i at 66, 129 P.3d at 569. ROA 26:150-51.

Lessor's argument that the Section 3(a) of the Repeal Ordinance invalidated the Third Amendment to Original Designation is particularly disingenuous and unpersuasive where it was drafted by Lessor's attorney herein during the pendency of the first appeal.[4] Ans. Br.,

---

[3] Pursuant to R.O.H. § 38-4.2(1)(2), only the Department is vested with the authority to determine whether or not acquisition of the leased fee interest in a development or a portion thereof, through exercise of the power of eminent domain will effectuate Chapter 38's public purpose.

[4] *See* letter from James K. Mee, Esq. to Council Member Romy M. Cachola and the Members of the City Council's Executive Matters Committee, dated January 12, 2005, at 14, available at, http://www4.honolulu.gov/docushare/dsweb/Get/Document-26177/05tdc8k5.pdf.

Pursuant to Hawai`i Rules of Evidence ("Haw. R. Evid.") 201, Lessees request that the Court take judicial notice of Mr. Mee's letter to City Council, which is a public record that is posted on the City's website at the aforementioned address. *See MGIC Indem. Corp. v.*

(continued...)

at 14-15. Further, neither Chapter 38 nor the Rules give the City Council the power to revoke or rescind the Original Designation, any amendments thereto including the Third Amendment to Original Designation, or the Finding of Effectuation of Public Purpose.[5]

Lessor's effort to undermine the significance of the Third Amendment to Original Designation by claiming that it only "initially qualified" those lessees for the Chapter 38 process is specious. Ans. Br. at 15. In reality, no applicant-unit could be designated for acquisition pursuant to Chapter 38 unless it had received written final approval from the Department. *See* Rules §§ 2-2 through 2-11, attached as Appendix "3" to Lessees' Opening Brief. Lessees here all received final approval from the Department because the designation of applicant-units could only occur *after* the Department provided written final approval to the lessee-applicants.[6]

Lessor would like the Court to believe that under Chapter 38, final approval for the Chapter 38 process could only be given by the City Council through a resolution authorizing Corporation Counsel to initiate an eminent domain action on the lessee-applicants behalf. *See* Ans. Br., at 14-15. Lessor claims that (1) the applicant-units contained in Third Amendment to Original Designation failed to obtain such "final approval" to proceed with the Chapter 38 process because the City Council had not approved a resolution authorizing

---

[4] (...continued)
Weisman, 803 F.2d 500, 504 (9th Cir. 1986) (pursuant to Fed. R. Evid. 201, which is identical to Haw. R. Evid. 201, a court may take judicial notice of matters of public record outside the pleadings). Rule 1001(5), Haw. R. Evid., defines "public record" as "any writing, memorandum entry, print, representation, report, book or paper, map or plan, or combination thereof, that is in the custody of any department or agency of government." Further, the fact that Mr. Mee provided the City Council with the language for the Repeal Ordinance's savings clause is an adjudicative fact that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *See* Haw. R. Evid. 201(b). Accordingly, a true and correct copy of Mr. Mee's letter, without exhibits, is attached hereto for the Court's convenience as Appendix "6".

[5] *See* Chapter 38, attached as Appendix "1" to Lessees' Opening Brief; Rules, attached as Appendix "3" to Lessees' Opening Brief.

[6] *See* Rules § 2-11 (Designation) (providing in part: "If no agreement is reached by the parties by negotiation and after final approval of the applicants, the director shall designate all or a portion of the development for acquisition upon the following conditions . . . .").

Corporation Counsel to add them as defendant-lessees to the condemnation action prior to the enactment of the Repeal Ordinance, and (2) as a result, they cannot be used to maintain the minimum number of twenty-five applicant-units. *Id.* Lessor is incorrect.

Neither Chapter 38 nor the Rules vested the City Council with any discretionary powers over the Chapter 38 process. The City Council's limited involvement in the Chapter 38 process occurs only *after* the designation and then only for ministerial purposes. After designation occurs, Rule § 2-12 requires the Director of the Department to "request the corporation counsel to prepare and present to the City Council a Resolution for the exercise of the power of eminent domain for the condemnation of the legal and equitable interests of the fee owner . . . and may request the appropriation of the funds necessary to pay compensation for the leased fee interest."[7] Notably, the City Council's adoption of such a resolution is an administrative, ministerial act, rather than a legislative one, because it does not require the formulation of policy nor does it create a binding rule of conduct. *See Kaahumanu et al. v. County of Maui et al.*, 315 F.3d 1215 (9th Cir. 2003). In adopting a resolution under Rules § 2-12, the City Council carries out, not changes, the policies embodied in Chapter 38. *Id.*

Lessor's statement that "no action was ever taken by [the Department] to have the applicants in the Third Amendment [to Original Designation] approved for condemnation" is

---

[7] Rule §2-12 is consistent with and mirrors Hawai`i Revised Statutes ("Haw. Rev. Stat.") §101-13 and Revised Ordinances of Honolulu ("R.O.H.") §2-3.2. Section 101-13, Haw. Rev. Stat., which governs the exercise of the right of eminent domain by a county, provides in pertinent part:

> Whenever any county deems it advisable or necessary to exercise the right of eminent domain in the furtherance of any governmental power, the proceedings may be instituted . . . after the governing authority . . . of the county has authorized such suit by resolution duly passed, or adopted and approved, as the case may be. . . .

Section 2-3.2, R.O.H., which prohibits Corporation Counsel from certain acts, provides in pertinent part:

> The corporation counsel shall not:
>
> . . .
>
> (b) Other than situations where corporation counsel is expressly authorized by federal or state statutes or city laws, bring action against a private person as defined in Section 1-4.1 without first obtaining the consent and approval of the city council which shall be manifested by an adopted council resolution.

also misleading. The record shows that the Department diligently processed the applications of Lessees and other applicant-units. *See e.g.*, ROA Vols. 9-16. However, the Circuit Court dismissed this action on July 8, 2004, two and one-half months after the Third Amendment to Original Designation was issued and before any resolution allowing for the addition of those applicant-units to the condemnation action could be drafted, introduced to and approved by the City Council. ROA 21:80-82. It is, among other things, the City Council's actions, and/or lack of action with respect to the applicant-units listed in the Third Amendment to Original Designation that gives rise to the constitutional claims asserted against the City in *Young et al. v. City and County of Honolulu*, D. Haw., Civil No. CV 07-00068 JMS-LEK. However, contrary to Lessor's contention, Lessees are not attempting to collaterally attack the Circuit Court's Final Judgment below by the federal court action. *See* Ans. Br., at 17. They are simply seeking recourse for violations of their constitutional rights. Further, Lessees are not claiming here that the City's application of the Repeal Ordinance against them was unconstitutional. *See* Ans. Br., at 16-18. Lessees are simply advising the Court that a federal court action is pending that may impact this Court's determination of whether the repeal of Chapter 38 invalidated the Third Amendment to Original Designation.

Lessees do not ask this Court to blindly assume that the applicant-units listed in the Third Amendment to Original Designation were *and continue to be* qualified without any inquiry into their qualifications. *See* Ans. Br., at 16. Rather, the qualifications should have been determined by the Circuit Court when it adjudicated Lessor's Summary Judgment Motion and ruled on the numerosity issue. Opening Brief, at § III.[8] If this Court agrees with

---

[8] Lessees respond as follows to Lessor's contention that Lessees have not pointed to any place in the record where any error occurred, *see* Ans. Br., at 17:

1. The Circuit Court erred in granting in part Lessor's Summary Judgment Motion when it concluded as a matter of law that the Third Amendment to the Initial Designation could not be considered for purposes of determining whether Chapter 38's numerosity requirement was satisfied. ROA 27:130; Transcript of Proceedings, 10/10/06, at 35. The Circuit Court concluded: "Because the Third Amendment to Designation was not approved by the City Council prior to the repeal of Chapter 38, it does not constitute a valid designation for purposes of evaluating whether the numerosity requirements of Chapter 38 have been satisfied." ROA 27:130. This error was objected to in Lessees' Memorandum in Opposition

(continued...)

Lessees and remands this action, the Circuit Court will have an opportunity to evaluate qualifications of the applicant-units listed in the Third Amendment to Original Designation.

B. Mr. Earle's Conveyance of Real Property Does Not Disqualify Ms. Earle from the Chapter 38 Process

Lessor asks this Court to determine that Jacqueline Earle is not qualified for the leasehold conversion process under Chapter 38 because her husband conveyed fee simple residential real property to a single-member limited liability company prior to Ms. Earle's submission of her Chapter 38 application to the Department. *See* Ans. Br., at 16. However, the facts regarding Ms. Earle's application are not a part of the record below and without that information this Court cannot make such a determination.[9] Further, even if this Court considers Lessor's arguments regarding the Earles, the arguments are meritless because

---

[8] (...continued)
to Lessor's Summary Judgment Motion, filed October 2, 2005 ("Opposition Memorandum"), at 4-5 (ROA 26:122-24), and at the hearing on Lessor's Summary Judgment Motion, which was held on October 10, 2006. Transcript of Proceedings, 10/10/06, at 35-53.

2. The Circuit Court erred in granting in part Lessor's Summary Judgment Motion when it concluded that Lessees Ernestine Ching Young, Clarence K. Lee, Trustee and Ann Takako Yamamoto, Trustee do not qualify for the Chapter 38 process. ROA 27:130-31. The Circuit Court concluded: "Defendants WALLACE LEE YOUNG and ERNESTINE CHING are not qualified because they do not meet the definition of 'owner-occupant' set forth in Revised Ordinances of Honolulu (1990) ("R.O.H.") § 38-1.2 . . . . Defendant CLARENCE K. LEE . . . is not qualified because he does not meet the requirements of R.O.H. § 38-2.4(a)(4) . . . . Defendant ANN TAKAKO YAMAMOTO . . . is not qualified because she does not meet the requirements of R.O.H. § 38-2.4(a)(4)." ROA 27:130. This error was objected to in Lessees' Opposition Memorandum, at 7-8, 11-17, and at the hearing on Lessor's Summary Judgment Motion held on October 10, 2006. Transcript of Proceedings, 10/10/06, at 13-32.

3. The Circuit Court erred in granting in part Lessor's Summary Judgment Motion when it concluded that a minimum number of twenty-five Admiral Thomas units has not been continuously maintained as a matter of law, and then dismissed and terminated this action. ROA 27:130-31. The Court concluded: "As there are not qualified lessees for at least 25 units, this condemnation action must be dismissed." ROA 27:130. This error was objected to in Lessees' Opposition Memorandum, at 4-20, at the hearing on Lessor's Summary Judgment Motion held on October 10, 2006. Transcript of Proceedings, 10/10/06.

[9] *See Stewart v. Smith*, 4 Haw. App. 185, 189, 662 P.2d 1121, 1124 (Haw. Ct. App. 1983) (an appellate court will not consider matters not appearing in the record). For example, the record does not indicate when Ms. Earle applied for the Chapter 38 process nor does it contain any information regarding Aliikai Enterprises LLC.

Lessor: (1) conveniently fails to acknowledge that the plain language of Chapter 38 and the Rules does not prohibit the transfer of fee simple residential property on Oahu to limited liability companies, (2) ignores Hawai`i Supreme Court precedent, and (3) improperly imposes requirements beyond those required by law. Lessees raised these arguments against disqualification with respect to Defendants-Appellants/Cross-Appellees Joyce A. Hagin and Lawrence Reich in *Defendants-Appellants/Cross-Appellees' Answering Brief on Cross-Appeal*, filed herein on June 27, 2008 ("Lessees' Answering Brief"), at §V.A. Accordingly, Lessees incorporate by reference as though fully stated herein the arguments contained in Lessees' Answering Brief, at § V.A., and assert them here in opposition to Lessor's request that this Court make a determination regarding the qualifications of Ms. Earle and her unit.

C. Lessee Ann Takako Yamamoto Filed Her Chapter 38 Application in October 2001

Lessor fails to recognize that the Department did *not* accept Ms. Yamamoto's initial Application in May 2001 because she was ineligible for the Chapter 38 process at that time. ROA 26:125-25, 151. Contrary to Lessor's arguments, just because Ms. Yamamoto's Application bears two dates, *i.e.*, May 7, 2001, and October 1, 2001, ROA 25:227, does not mean that her Application was "filed" in May 2001.

Sally Cravalho, the Department's Leasehold Conversion Program Administrator for Admiral Thomas, testified that Ms. Yamamoto's Application was filed with the Department on October 1, 2001, and her Affidavit was filed on October 2, 2001. ROA 26:151.[10]

---

[10] *See Coon v. City and County of Honolulu*, 98 Hawai`i 233, 245, 47 P.3d 348, 360 (deference will be given to decisions of administrative agencies acting within the realm of their expertise) (internal quotation marks, brackets and citation omitted). Further, the Department's determination that Ms. Yamamoto's Application and Affidavit were filed in October 2001, when she did not own any interest in fee simple residential property on Oahu, does not contravene Chapter 38's manifest purpose. *See Coon*, 98 Hawai`i at 245, 47 P.3d at 360 (stating that judicial deference to an agency's decisions does not apply when the agency's reading contravenes the legislature's manifest purpose); R.O.H. § 38-1.1 (stating that the purpose of Chapter 38 is to "establish the right of any person, who is a lessee under a long-term lease of land upon which is situated [a] residential condominium property regime projects created under HRS Chapter 514A . . . to purchase at a fair and reasonable price the fee simple title to such land").

Ms. Cravalho also testified that there are various types of evidence in an applicant's file that determine when the application was filed with the City. ROA 27:44-45. In addition to the post-May 2001 revisions and October 2001 date on Ms. Yamamoto's Application, Ms. Yamamoto's file contains ample evidence showing that her Application was "filed" with the Department in October 2001. For example, Ms. Yamamoto's second Affidavit was signed on October 2, 2001, ROA 25:230; the receipt for Ms. Yamamoto's deposit under Chapter 38 from the City's Treasury bears a "PAID RECEIPT" stamp dated October 5, 2001, ROA 25:244; and a transmittal form regarding Ms. Yamamoto's deposit to the City's Treasury is dated October 4, 2001. ROA 25:245. Further, Ms. Yamamoto expressly disclosed her ownership interest in the Young Street Property to the City in May 2001, and made clear that the submission of her Application at that time was based on her understanding that her disclosure was sufficient for the purposes of complying with Chapter 38's requirements. ROA 25:240-43.[11] It was not so she transferred her ownership interest in the Young Street Property to her brother, revised and re-dated her Application, and completed a new Affidavit. ROA 25:225-30; 26:220-23, Ms. Yamamoto's revised Application and second Affidavit were then filed and accepted by the Department in early October 2001, when she held no interest in fee simple residential property on Oahu. ROA 25:290-91; 26:151, 332-34.[12]

---

[11] The copy of the document at ROA 25:243 does not contain the entire handwritten note at the bottom of the page. Lessees produced this document during litigation and have a more accurate copy in their files. Accordingly, Lessees have attached a better true and correct copy of ROA 25:243 as Appendix "7".

[12] This practice was approved by the Hawai`i Supreme Court in *City and County of Honolulu v. Hsiung*, 109 Hawai`i 159, 171, 124 P.3d 434, 446 (2005). In *Hsiung*, the Court held that the fact several Chapter 38 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 is irrelevant in determining their qualifications. *Id.* 109 Hawai`i at 170-71, 124 P.3d at 445-46. What matters is that at the time the lessees applied the applicants do not own fee simple residential property on Oahu. *Id.*

D. Lessees Lee and Young Should Be Deemed to Qualify for the Chapter 38 Process

Lessor advocates for a strict construction of R.O.H. § 38-2.4(a) against Mr. Lee and Ms. Young. However, in *Coon* the Hawai`i Supreme Court held that strict construction of an eminent domain statute does not require that the words of statute be given the narrowest meaning of which they are susceptible. *Coon*, 98 Hawai`i at 233 n.18, 47 P.3d at 348 n. 18. Rather, in dealing with remedial statutes like Chapter 38, "[t]he express purpose of the ordinance promulgated by the City Council must, in turn, be effected to the fullest extent possible through interpretation of its language and the resolution of ambiguities in accordance with the 'liberal construction' rule." *Id. See Taylor v. Government Employees Ins. Co.*, 90 Hawai`i 302, 308, 978 P.2d 740, 746 (1999) (under liberal construction rule, remedial statutes must be liberally construed in order to accomplish the purpose for which it was enacted and to suppress the perceived evil and advance the enacted remedy).

Under the liberal construction rule, several factors warrant a determination that Mr. Lee did not own other fee simple residential property on Oahu during the Chapter 38 process. First, in May 2005, the Lees understood that the Circuit Court's dismissal of this action in July 2004, and the Repeal Ordinance's enactment in February 2005, precluded Mr. Lee from acquiring the leasehold interest in his Admiral Thomas unit. ROA 26:154. At that time, Ms. Lee assisted her daughter from a previous marriage purchase fee simple residential property in Kailua and she briefly held title to it with her daughter as joint tenants. ROA 26:142, 154, 311-28. Within one month after the Hawai`i Supreme Court published *Sherman*, Ms. Lee conveyed all her interest in the Kailua Property to her daughter. ROA 26:154, 322-26. Second, Ms. Lee never: (1) lived, resided at and/or occupied, or intended to live, reside at and/or occupy, the Kailua Property with or without Mr. Lee; (2) considered the Kailua Property to be suitable for her and Mr. Lee's residential purposes; (3) exercised physical control and/or possession over the Kailua Property or any part thereto; or (4) claimed or intended to claim the Kailua Property as her own. ROA 26:154-55. Third, the City Council did not intend for R.O.H. § 38-2.4(a)(4)'s prohibition to be applied to lessees whose spouses

owned fee simple property that is *unsuitable* for residential purposes because those lessees would still be at risk of losing their homes as a result of housing cost inflation. *Coon*, 98 Hawai1i at 259-60, 47 P.3d at 374-75.

Similarly, there are factors warranting a determination that Ms. Young was an "owner-occupant" throughout the Chapter 38 process. Ms. Young's Application was filed with the Department on December 26, 2002. ROA 17:4. During the preceding year, Ms. Lee rented out their unit as a matter of medical and economic necessity. ROA 26:157-58. Rules §1-2 expressly provides that the Department "may consider exceptions to the occupancy requirement . . . based on serious illness". However, throughout 2001 and 2002, Ms. Lee was unable to manage or consider any issues pertaining to her Application because of her cancer. ROA 26:158. Accordingly, she did not have the ability to inform the Department of her situation. Had the Department learned of Ms. Young's serious illness it could have made an exception pursuant to Rules § 1-2 or it could have advised her to re-file her Application after she had moved back to her unit at the end of September 2002. ROA 26:152.

III. CONCLUSION

For all of these reasons herein and in the Opening Brief, the Final Judgment below should be reversed and the case remanded to the Circuit Court with instructions to vacate the Order dismissing this action, proceed with Lessees' condemnation action and add the units designated by the Third Amendment to Original Designation, and their leasehold owner occupants, to the condemnation action.

Dated: Honolulu, Hawai`i, August 28, 2008.

DAVID A. NAKASHIMA
LERISA L. HEROLDT
Attorneys for
Defendants-Appellants/Cross-Appellees