

DISSENTING OPINION BY REIFURTH, J.

I respectfully dissent. I disagree with the majority's conclusion that Kolio's second-degree theft conviction was a "criminal activity that posed a 'threat' within the meaning of section 8(p)(1) of the Rental Agreement and provided sufficient grounds for the Eviction Order[,] because Kolio's offense does not involve the type of conduct supporting eviction under the plain language of Section 8 of the Rental Agreement. Accordingly, I would reverse the Circuit Court's decision affirming HPHA's Eviction Order.

HPHA found that Kolio had violated numerous provisions of his Rental Agreement including Section 8, titled "Tenant's Obligations," subsection (p)(1), which stated that:

Tenant shall, at all times during the term of this Rental Agreement, perform the following obligations:

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(p) Assure that Tenant, any member of the household, a guest or another person under Tenant control, shall not engage in:

(1) Any criminal activity or alcohol abuse that threatens the health, safety or right to peaceful enjoyment of Management's public housing premises by other public housing residents or neighboring residents or employees of Management[.]

(Emphases added.) In this case, the question is whether Kolio's criminal activity in fact "threatens the health, safety or right to peaceful enjoyment" of the "premises by other public housing residents or neighboring residents or employees".

The Rental Agreement constitutes a contract between Kolio and HPHA, and as such, is subject to the law of contracts. *Hi Kai Inv., Ltd. v. Aloha Futons Beds & Waterbeds, Inc.*, 84 Hawai'i 75, 78, 929 P.2d 88, 91 (1996) ("Leases are essentially contractual in nature and are reviewed under principles of contract law." (citing *Cho Mark Oriental Food, Ltd. v. K & K Int'l*, 73 Haw. 509, 519, 836 P.2d 1057, 1063 (1992))). "A contract term or phrase is only ambiguous when it is capable of being reasonably understood in more ways than one." *Cho Mark Oriental Food, Ltd.*, 73 Haw. at 520, 826 P.2d at 1063-64 (citing *Stewart v. Brennan*, 7 Haw. App. 136, 142-43, 748 P.2d 816, 821 (1988)). A contract ambiguity may arise "from words plain in

themselves but uncertain when applied to the subject matter of the instrument. In short, such an ambiguity arises from the use of such words of doubtful or uncertain meaning or application." *Hawaiian Ass'n of Seventh-Day Adventists v. Wong*, 130 Hawai'i 36, 46, 305 P.3d 452, 462 (2013) (quoting *Hokama v. Relinc Corp.*, 57 Haw. 470, 475, 559 P.2d 279, 282 (1977)) (internal quotation marks omitted). Here, an ambiguity arises because it is unclear how Kolio's conduct, although admittedly criminal, "threatens the health, safety or right to peaceful enjoyment" of the public housing premises.

In interpreting lease terms, the Hawai'i Supreme Court has held that "[c]ontract terms are interpreted according to their plain, ordinary, and accepted sense in common speech[,] "*Wong*, 130 Hawai'i at 47, 305 P.3d at 463 (citing *Cho Mark Oriental Food, Ltd.*, 73 Haw. at 520, 839 P.2d at 1064), and "[w]here terms are undefined, the court may resort to legal or other well-accepted dictionaries to determine their ordinary meaning." *Id.* (citing *Sierra Club v. Hawai'i Tourism Auth.*, 100 Hawai'i 242, 253, 59 P.3d 877, 888 (2002)). Neither the Rental Agreement nor the applicable regulations of the U.S. Department of Housing and Urban Development^{1/} ("HUD") defines any part of the phrase "threatens the health, safety or right to peaceful enjoyment". See 24 C.F.R. § 966.2 (2001); 24 C.F.R. § 5.100 (2012).

Under the terms of the lease, a tenant's non drug-related "criminal activity" may serve as a basis for a breach of the Rental Agreement if it threatens the residents' (1) health, (2) safety, or (3) peaceful enjoyment of the premises. Black's Law Dictionary defines "health" as "[t]he state of being sound or whole in body, mind, or soul" and "[f]reedom from pain or sickness." BLACK'S LAW DICTIONARY 787 (9th ed. 2009). "Safe" is defined, in part, as "[n]ot exposed to danger; not causing

^{1/} Section 8(p)(1) of the Rental Agreement should be interpreted in accordance with federal HUD regulations. Section 8(p)(1) was included in the lease pursuant to the Code of Federal Regulations, 24 C.F.R. § 966.4, because the housing project, the Mayor Wright Homes, is a federally subsidized housing project. See 24 C.F.R. § 996.1 (2001) ("[T]his part prescribes the provisions that must be incorporated into leases for public housing dwelling units.").

danger[,] " *id.* at 1452, and "peaceful," an adjective describing "peace," which is defined, in part, as "[a] state of public tranquility; freedom from civil disturbance or hostility[,] " *id.* at 1244-45. Finally, "threat" is defined in relevant part as "[a] person or thing that might well cause harm." *Id.* at 1618.

Kolio's theft in this case involved the appropriation and personal use of funds that were designated by HUD as a "Resident Participation Fund". 24 C.F.R. § 964.150 provides that a housing authority "shall provide funds it receives . . . to the duly elected resident council . . . to use for *resident participation activities*." 24 C.F.R. § 964.150 (2000) (emphasis added). These activities are generally designed to improve living conditions and satisfaction among residents. See 24 C.F.R. §§ 964.100 (2000), 964.200(a) (2000). At the hearing before the HPHA Oahu Eviction Board, testimony indicated that the Resident Participation Fund "is supposed to be used to generate programs for the residents within the community to gain either employment or anything to make them become self sufficient, or to provide anything that would be a benefit to the residents within the community." This could include "anything from computer classes to sewing classes to reading classes, anything that would benefit . . . the residents"

Based on the ordinary meaning of "health", "safety" and "peaceful", the theft of monies from a Resident Participation Fund would not pose a threat to the "health, safety, or peaceful enjoyment" of the residents. For example, while funds might be used to improve resident life through classes and other programs, any link between Kolio's theft of those funds and resident health or safety requires a number of assumptions about what the funds would be used to achieve. Taking money from the Resident Participation Fund would not appear to *threaten* residents' health, safety, or peaceful enjoyment of the premises. Any conclusion that it did would require factual findings not made in this case.^{2/} At the very least, it is clear that Kolio's conduct

^{2/} Moreover, in its findings of fact, the HPHA Oahu Eviction Board made assumptions about a fiduciary duty owed by Kolio to residents, but such a duty is not part of Kolio's lease terms.

did not constitute the type of threat to health, safety or peaceful enjoyment posed by, for example, a violent crime, see 24 C.F.R. § 5.100, drug-related criminal activity, *id.*, or prostitution, see *Costa v. Fall River Housing Authority*, 881 N.E.2d 800, 808 n.8 (Mass. App. Ct. 2008) (refraining from deciding whether prostitution is a per se prohibited criminal activity or comprises an "occasion for specific proof of a threat to the health, safety, or right of peaceful enjoyment of residents and neighbors").

Similar to HPHA, other jurisdictions have incorporated standardized HUD lease terms into their state and local housing authority rental agreements. Since Hawai'i courts have not had occasion to interpret the standardized Rental Agreement language at issue here, interpretation of the same language from other jurisdictions may be instructive. In *Boston Housing Authority v. Bryant*, 693 N.E.2d 1060 (Mass. App. Ct. 1998), for instance, the Appeals Court of Massachusetts addressed whether a tenant's conduct in committing the crime of larceny by false pretenses gave the local housing authority the ability to terminate her lease without a hearing. 693 N.E.2d at 1062. The tenant had used the personal information of a housing authority property manager to obtain credit cards at several stores. *Id.* at 1061. The Massachusetts court noted that "[t]o be the victim of credit card fraud, an embezzlement, or of a commercial scam through the mail is profoundly disturbing but does not implicate, in the sense commonly understood, a threat to health and safety[,] and that a connection between the two required "a chain of conjecture about hypothetical facts" that should not be the basis for a legal conclusion. *Id.* at 1062. While that court's ultimate holding dealt with the procedures required for termination of a lease under a state statute, *id.* at 1062-63, its reasoning as to why embezzlement or fraud may not constitute a threat to the health and safety of other tenants appears applicable to this case.

Kolio has been punished by the penal system for his criminal conduct. Where his actions do not threaten the health, safety, or peaceful enjoyment of other tenants as provided in the

Rental Agreement, however, the agreement does not provide for his eviction or of that of his family from public housing on that basis. Accordingly, I would conclude that Kolio's conduct, although criminal, is not contemplated by Section 8(p)(1) of the Rental Agreement as a threat to the health, safety, and peaceful enjoyment of other residents,^{3/} and that it cannot, therefore, serve as the basis for his eviction under that provision.

Based on the foregoing, I would reverse the Circuit Court's decision affirming HPHA's Eviction Order and remand the case to HPHA to reconsider its Eviction Order to the extent that it relies on Kolio's alleged violation of Section 8(p)(1) of the Rental Agreement.

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^{3/} This conclusion is also consistent with the HPHA rules, which define "criminal activity" as

(1) the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute, or use the drug; or

(2) any illegal activity that has as one of its elements the use, attempted use, or threatened use of physical force substantial enough to cause, or be reasonably likely to cause, serious bodily injury or property damage; regardless of whether there has been an arrest or conviction for such activity and without satisfying the standard of proof used for a criminal conviction.