

6 August 2006

UPDATE! Carswell et al vs. Department of Land and Natural Resources – Civ. No. 06-1-0049

This letter may repeat some information that you already have. It is intended to bring you up to date on the legal action filed against the State of Hawai'i by some Koke'e leaseholders, including a tentative agreement stemming from that lawsuit, as well as the status of the much-dreaded auction.

On February 10, 2006, the Board of Land & Natural Resources [the Board] voted to place all Koke'e recreation residence leases up for auction to the highest bidder, and stated that it would offer no compensation to existing lessees for our cabins. Instead, the State would take ownership of them without paying the current owners a penny in compensation, relying on what many viewed as ambiguous and contradictory terms in the lease agreement.

Shortly thereafter, Donn and Gale Carswell filed a request for a contested case hearing, and were joined by about a dozen other leaseholders. Donn and Gale were represented by Dan Hempey, a respected and well-known attorney in Lihue. At a subsequent meeting, the Board denied the request for the requested hearing.

To preserve their rights, Donn and Gale, Paul and Arline Matsunaga, and Frank Hay filed an action in Fifth Circuit Court, protesting what they saw as a taking of private property [their cabins] without compensation, in violation of the Fifth and Fourteenth Amendments of the US Constitution and Article I, Section 20, of the Hawaii State Constitution. After all, the document we signed was a lease – not a lease and contract for sale of cabin. The State does acknowledge that we currently OWN our cabins. We have since been joined by more than a dozen other leaseholders:

Peter Baldwin, A. J. and Betsy Knudsen Toulon, Greg and Cecelia Williams
Sam Blair and Carmen Wong
Erik Coopersmith
Frank Cox
Elizabeth Dunford
Bob French/ Lealani Corporation
Michael and Joann Scanlan Givens
Glenn Hontz and Virginia Dunas
David Koch
Sherry Miller
Will Miyake/ Waimea Garage
Bob Sweney
Dan and Nancy Williamson
Cindy and Jim Wilson

Several others are expected to join this week. Dan Hempey represents us all. We think you should join too – or if you prefer, you should strongly consider another legal action.

The State filed a motion for summary judgment, and we countered with our own cross-motion. Those were heard before Judge Kathleen Watanabe in Fifth Circuit Court on July 6. The Judge denied both motions, finding that two questions remained: whether or not any compensation was due, and second, what the amount of that compensation should be if we are awarded compensation. Simply put, she determined that neither side had a 'slam dunk' case. A hearing date of August 14th was set.

In the following weeks, the attorneys worked out a tentative agreement, which they presented to Judge Watanabe in a pre-trial conference on Wednesday, August 2. The major points of the agreement are:

1. The August 14th hearing on our motion for a temporary restraining order to postpone the auction, will not take place until at least next year.
2. The auction (tentatively scheduled for September 9 and 10, 2006) will not take place until at least 2007. A later email from Peter Young confirmed that the auction has been postponed indefinitely.
3. DLNR will provide at least ninety days notice before any auction.

Bill Wynhoff, the Deputy Attorney General representing DLNR, coordinated a submittal to the Board of Land and Natural Resources to provide us with revocable permits, pending resolution of our case against the State. This will be heard before the Board on Friday, August 11.

The submittal is available on the DLNR Land Board's web site [see Item E 1] at <http://www.hawaii.gov/dlnr/chair/meetings/submittals/20060811/Agenda/060811agenda.htm>

These revocable permits will not in any way diminish our property rights. In other words, we still own our cabins and will continue to do so unless and until a Court decides otherwise. The short-term leases or revocable permits should extend until the case is decided – and that may take a separate action from the Board, if they expire before then. However, there is no guarantee that the leases will be extended, and if for some reason the State later refuses to extend the leases before the case is decided, we could have to go back to Court to ask for some relief.

The attorneys, together with Judge Watanabe, and depending on the action the Board takes on the 11th, are considering either:

- a. a trial – before the end of this year – or
- b. interlocutory appeals (bypassing the trial, at least for now) to the Hawaii Supreme Court.

Neither side has a lot to gain from a trial, if both would appeal the decision. We understand that the State would definitely appeal, if they lost. So would we. However, the Supreme Court could send the action back for trial in Circuit Court – or send it to the Intermediate Court of Appeals.

If there is a trial, the attorneys – and the Judge – have tentatively agreed to use representative plaintiffs instead of making each individual plaintiff testify. That means only a few leaseholders – likely one of us in each category – those who bought their cabins before the auction, at the auction, and since the auction - will serve to present the case. Only those representative plaintiffs will be deposed or called as witnesses. Sam Blair has volunteered to be one of the representative plaintiffs.

If there is to be an appeal, the appeal is based on the record – the documents presented in evidence, together with a record of the trial – again, if there is a trial.

This process is expected to take between a year and a half to three years – or even more. Dan noted that he now has a case before the Supreme Court where all the preliminary steps are completed, the briefs filed, and it has been **two years** without a ruling from the Supreme Court.

So we have a “reprieve” for at least the length of time it takes to resolve the case, and we expect the Board to approve the revocable permits at their meeting on August 11. It is possible that the Board will take no action, and in that case, we would prepare for a trial before the end of the year.

How does this affect you, and what can you do to protect your interests?

First, we all may have a “reprieve”, for anywhere between one and three years or more. Second, the statute of limitations is two years, beginning on February 10, 2006, when the Board decided to take our cabins without compensation. You may think that if the case is decided before February 10, 2008, then you need do nothing – and may benefit from the outcome without risking a penny. The State, however, has mentioned to our attorney several times that it reserves the right to not pay compensation to any person who does not have a Court order directing they be paid compensation.

Of course, if the State prevails, we’re all out of luck. However, we think that it is highly unlikely to be decided by an appellate Court in such a short time – it’s not a burning issue, affecting all the people of Hawaii, but rather a local issue, affecting one hundred leaseholder families. Although it is certainly a priority for us, it’s not necessarily a priority for the Court.

If you do not join this action, join another action, or file an action on your own, you run what may be a substantial risk of losing your cabin without compensation. Let’s say the case is decided a year and a half from now – **before February 10, 2008** – in record time for the Supreme Court. If we win, we will all be compensated for our cabins, or retain ownership of them, which is really our ultimate goal. If we lose, the State gets several million dollars of our property.

However, if the case is not decided until **after February 9, 2008** – and you have not joined in an action, whether this one or another – the ruling, whatever it may be, will not apply to you. If we win, we get the right to compensation, or to keep our private property – but you will not. The State will take your cabin – as they have stated is their intention – and not pay you a penny. This is the effect of the statute of limitations – you’ve got to bring a case before the Court within the time allowed by statute.

Of course, if we lose, we all lose – and the State gains several million dollars of property. But don’t forget, there are several levels of appeals still available to us should it come to that. That would buy us additional time, at least, and hopefully a reversal of a lower court decision.

What will it cost to join? So far, we’ve all put less than \$2000 each (on a per cabin basis). We recognize that almost \$2000 at one time may not be in your budget. We started with \$500 each, and that’s what we ask you to start with – with a promise to pay your fair share (to bring your contributions up to that of the rest of us) within 60 days. We will split the bills equally among all plaintiffs until the case is resolved. It’s possible – depending on the number of plaintiffs who join – that we might all not pay much more than our initial investment. But there is no guarantee, and you could withdraw at any time.

There is another avenue open for resolution of this matter in our favor. We have already begun lobbying our legislators in advance of the opening of the next Legislature to introduce a bill settling the compensation issue and mandating DLNR to issue directly negotiated leases under HRS 171-44 for all Koke’e cabins.

We made considerable progress in the last Legislature – and within the last few weeks the Koke’e issue has been discussed extensively on KKCR and KONG radio and in both The Garden Island and The Honolulu Advertiser. Kauai people are beginning to take up arms against what many see as the selling of Koke’e to the highest bidder – and brushing local families aside in favor of more money for DLNR. The issue has surfaced on the Governor’s radar screen – and although we don’t know how she feels about the issue, it has certainly gained her attention. We’re on a roll – and need your help too

Please consider a few more items:

- There is strength in numbers.
- The greater the number of plaintiffs, the greater exposure to the State (more cabins to pay the owners for).
- The greater the financial exposure to the State, the more leverage we have towards a negotiated settlement.
- The more plaintiffs, the lesser the financial exposure to each of us. For example, if the case winds up costing a us a total of \$100,000 – and it could – dividing a \$100,000 pie between thirty plaintiffs is a lot less exposure than dividing it by fifteen.

Please also note, we're going to be getting the next year or more at the 1996 adjusted lease rent [per the submittal to the Board's August 11 meeting] and that is likely to be much less than what we might pay for new leases. So that savings can apply to your legal costs.

Remember also that your cabin, in today's inflated real estate market, is likely worth several times the assessed value on the free market. Compensation could very well be at fair market value, per the Hawaii Revised Statutes.

More plaintiffs make a stronger public statement, as well as to the Legislature, the Governor, and the Board of Land and Natural Resources, as a united front for Koke'e!

We need your commitment by Tuesday, August 15. This deadline is real – we have to file an amended complaint the next day. This is your last chance to join us.

And this letter is not likely to have answered all your questions. Please call us to discuss. To join us, you'll need to fill out a simple agreement and an information sheet – we'll send them to you once you've indicated your interest.

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