

MARK J. BENNETT 2672  
Attorney General of Hawai'i

WILLIAM J. WYNHOFF 2558  
Deputy Attorney General  
Department of the Attorney  
General, State of Hawai'i  
465 King Street, Suite 300  
Honolulu, Hawai'i 96813  
Telephone: (808) 587-2993

Attorneys for State of Hawai'i

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAI'I

DONN CARSWELL, GALE CARSWELL,	)	CIVIL NO. 06-1-0049
FRANK O. HAY, PAUL T. MATSUNAGA,	)	(Injunctive Relief)
ARLENE Y. MATSUNAGA, DOES 1-130,	)	(Declaratory Judgment)
	)	
Plaintiffs,	)	DEFENDANT STATE OF HAWAI'I'S
	)	MOTION FOR SUMMARY JUDGMENT
vs.	)	
	)	MEMORANDUM IN SUPPORT OF
DEPARTMENT OF LAND AND	)	MOTION
NATURAL RESOURCES, STATE OF	)	
HAWAI'I, INDIVIDUAL DOES 1-10, DOE	)	AFFIDAVIT OF JAMES B. SPRINGER
PARTNERSHIPS 1-10, DOE	)	
CORPORATIONS 1-10 AND DOE	)	AFFIDAVIT OF DAWN T. HEGGER
ENTITIES 1-10,	)	
	)	EXHIBITS "A" TO "F"
Defendants.	)	
	)	NOTICE OF HEARING MOTION
	)	
	)	CERTIFICATE OF SERVICE
	)	
	)	DATE: JULY 6, 2006
	)	TIME: 1:00 P.M.
	)	JUDGE: KATHLEEN N. A. WATANABE

DEFENDANT STATE OF HAWAI'I'S MOTION FOR SUMMARY JUDGMENT

Defendant State of Hawai'i<sup>1</sup> moves this Honorable Court, through counsel and pursuant to HRCP 56, for summary judgment as to all claims.

This Motion is based on the memorandum, affidavits, and exhibits attached hereto and the records and files herein.

DATED: Honolulu, Hawai'i, June 7, 2006.



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William J. Wynhoff  
Deputy Attorney General  
Attorney for State of Hawai'i

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<sup>1</sup>“A suit against a state’s agencies . . . is a suit against the state.” Makanui v. Department of Educ., 6 Haw.App. 397, 406, 721 P.2d 165, 171 (1986).

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Defendants. )

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MEMORANDUM IN SUPPORT OF MOTION

**I. INTRODUCTION**

Plaintiffs lease residential-recreational cabin lots in the Waimea district of Kauai from the State of Hawai'i through its Board of Land and Natural Resources.<sup>2</sup> The leases expire on December 31, 2006. The leases provide that ownership of all leasehold improvements "shall vest in the Lessor" at the end of the leases.

Plaintiffs nevertheless want the State to pay them for the improvements. They bring this action seeking to force payment. Their complaint has no merit as a matter of law. The State is

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<sup>2</sup>The Department of Land and Natural Resources (the "department" or "DLNR") is the state agency charged to manage, administer, and exercise control over all of the State's public lands, including submerged land and beaches. Haw. Rev. Stat. § 26-15(b) (Cum. Supp. 2005); Haw. Rev. Stat. § 171-3 (Cum. Supp. 2005). The department is headed by an executive board called the Board of Land and Natural Resources (the "Board"). Haw. Rev. Stat. § 26-15(a) (Cum. Supp. 2005).

entitled to summary judgment.

## II. FACTS

### A. GENERAL BACKGROUND OF KOKE'E AND THE LEASES

The State owns lots in the Koke'e, Pu'u ka Pele, and Halemanu "subdivisions" of Koke'e State Park and Waimea State Park ("Koke'e"). More than 100 of these lots are subject to residential-recreational cabin leases. All the leases expire on December 31, 2006. Exhibit "A" is a map showing Koke'e's general location. Exhibit "B" shows the lease sites.

The roots of these leases date back to the 19th century. The Kingdom of Hawai'i leased portions of the area to Kauai pioneer Valdemar Knudsen in 1856. Knudsen used the area for recreation and built a vacation house there. Over the years, Knudsen and his family entertained many guests at Koke'e and allowed others to establish "camps" in Koke'e.

The Knudsen lease expired in 1917. Thereafter the Territory began issuing camp permits to various persons. The number of permits and available sites increased over the years.

By 1963, all permits had expired. The Board controlled the land. It faced the issue of how to deal with the permittees, some of whose families had been using the land for generations.

At that time, the Board did not have authority to negotiate directly with the permittees for leases of the lots. But in 1965, the legislature inserted section 38 into Act 239, 1965 Hawaii Session Laws 412 specifically to allow issuance of 20-year leases by direct negotiation. The section is now codified as Haw. Rev. Stat. § 171-44 (1993). Pursuant to this authority the Board negotiated with the existing permittees and issued leases for the lots. Most of the leases were effective starting January 1, 1966. All the leases expired December 31, 1985.

When those leases expired in 1985, the Board declined to issue new leases by direct negotiation. Instead it auctioned new 20-year leases pursuant to Haw. Rev. Stat. § 171-14

(1993). Virtually all of the leases, including the three leases specifically at issue in this case, were extended for a one-year holdover period pursuant to Haw. Rev. Stat. § 171-40 (1993). All the leases are due to expire on December 31, 2006. These now-expiring 1985 leases are at issue in this case.

As it did in 1985, the Board has decided to lease the lots to the highest bidder at auction. Plaintiffs claim that, even though their leases provide that leasehold improvements belong to the State at the end of the lease, the State must nevertheless compensate plaintiffs for the improvements.

## **B. FACTS AS TO PLAINTIFFS' LEASES**

### **i. Carswell lease**

Before 1965, plaintiffs Donn and Gale Carswell held the permit for Lot 61 at Koke'e. The Board issued a lease to them by direct negotiation on July 11, 1968, effective January 1, 1966.

The Carswells were also the successful bidders at auction for the 1985 lease of Lot 61. A true and correct copy of their lease is attached as Exhibit "C."

### **ii. Hay lease**

Before 1965, Wilson and Alice Pang held the permit for Lot 38 at Koke'e. The Board issued a lease to the Pangs by direct negotiation on July 11, 1968, effective January 1, 1966. The Pangs assigned this lease to plaintiff Frank Hay in October 1975.

Mr. Hay was also the successful bidder at auction for the 1985 lease of Lot 38. A true and correct copy of their lease is attached as Exhibit "D."

### iii. Matsunaga lease

Plaintiffs Matsunaga did not have an interest in Lot 63 at Koke'e before 1985. But they were the successful bidders at auction for the 1985 lease of Lot 63. A true and correct copy of their lease is attached as Exhibit "E." The Matsunagas separately agreed to buy the existing improvements directly from the previous lessees, Tsukasa and Mitsuyo Miyake. Exhibit "F."

#### C. THE TERMS OF THE 1985 LEASES

All the Koke'e leases, including plaintiffs' leases, have the same terms. The key provisions for purposes of this case are paragraph 9 on page 8 and paragraph 31 on page 20. Paragraph 9 specifically says that upon expiration of the lease the State owns the cabins and all other leasehold improvements:

9. Improvements. [The parties agree] That the Lessee shall not at any time during said term construct, place, maintain and install on said premises any building, structure or improvement of any kind and description whatsoever except with the prior approval of the Board and upon such conditions the Board may impose, including the requirement that such building, structure or improvement be constructed of new materials only. The ownership thereof shall be in the Lessee until the expiration or termination pursuant to a breach of the lease, at which time the ownership thereof shall vest in the Lessor.

The Board reserves the right to limit the number of dwellings on the premises.

Emphasis added.

Paragraph 31 on page 20 requires the lessees to surrender the premises together with all improvements to the State at the end of the lease:

31. Surrender. [The parties agree] That the Lessee shall, at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the demised premises, together with all improvements existing or constructed thereon unless otherwise provided. The Lessor may, at its option, on or about the end of the lease elect to retain the improvements or require the Lessee, at the Lessee's own expense, to remove such

improvements and restore the premises to a condition satisfactory to the Lessor.<sup>3</sup>

### III. ARGUMENT

Plaintiffs seek relief in this case based solely on the theory that the State is effecting an unconstitutional taking by refusing to pay “just compensation” to the lessees for the leasehold improvements at the end of the lease. This claim fails as a matter of law for the simple reason that plaintiffs will not own the improvements when the leases expire. Therefore the State is not required to compensate them for the improvements; failure to do so is not a taking.<sup>4</sup>

#### A. THE THRESHOLD QUESTION IS WHETHER PRIVATE PROPERTY IS TAKEN

The Takings Clause of the Fifth Amendment to the United States Constitution provides: “nor shall private property be taken for public use, without just compensation.” The parallel provision in the Hawai‘i Constitution is Article I, sec. 20: “Private property shall not be taken or damaged for public use without just compensation.” Thus the threshold question in any taking case is whether “private property” is at issue. As the Supreme Court put it in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992), compensation need not be paid “if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”

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<sup>3</sup>We omit from this quote a second paragraph relating to removal of personal property and vehicles.

<sup>4</sup> In any event, plaintiffs can never be entitled to declaratory or injunctive relief. It is an elementary principle of takings jurisprudence that (given a public purpose) the State can take private property provided it pays for the taking. Plaintiffs’ only remedy, if they had a claim, would be just compensation. See e.g. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 536 (2005) (“As its text makes plain, the Takings Clause ‘does not prohibit the taking of private property, but instead places a condition on the exercise of that power.’ In other words, it ‘is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.”) Citations omitted.

Similarly, in Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002), the Ninth Circuit denied a taking claim after determining as a threshold issue that “plaintiff’s claimed property right never existed” in the first place. See also Maritrans Inc. v. U.S., 342 F.3d 1344, 1351 (Fed. Cir. 2003) (In deciding whether governmental action constitutes a taking of private property without just compensation, “[f]irst, a court must evaluate whether the claimant has established a ‘property interest’ for purposes of the Fifth Amendment.”); Conti v. U.S., 291 F.3d 1334, 1339 (Fed. Cir. 2002) (“However, if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking.”); Raceway Park, Inc. v. Ohio, 356 F.3d 677, 683 (6th Cir. 2004) (“[T]here is no taking if there is no private property in the first place.”).

**B. IN THIS CASE NO PRIVATE PROPERTY IS TAKEN**

“[A]s a general rule, the construction and legal effect to be given a contract is a question of law.” In interpreting [the contract], “[a]bsent an ambiguity, [the] contract terms should be interpreted according to their plain, ordinary, and accepted sense in common speech.”

Foundation Intern., Inc. v. E.T. Ige Const., Inc., 102 Hawai‘i 487, 494-495, 78 P.3d 23, 30-31 (2003).

In this case, the leases unambiguously provide that the State owns the improvements at the end of the lease term. At that point, lessees simply have no remaining property interest that is or could be taken. Their taking claim accordingly fails to meet the threshold question and is wholly without merit.

To the extent plaintiffs allege or believe that the new leases will become effective before the existing leases have expired (Comp. ¶ 22), that belief is incorrect. The department hopes to

conduct the auction in September. However, the new leases will not take effect until January 2007 at the earliest.

To the extent plaintiffs allege they cannot remove their cabins (Comp. ¶¶ 38-47), those allegations are irrelevant, even if true.<sup>5</sup> The leases have been in place since 1985. The terms have always been the same. If plaintiffs do not have time to remove the cabins, the problem is solely attributable to plaintiffs. Nothing (certainly not the State) prevented plaintiffs from starting the process earlier. Plaintiffs' failure to act in a timely manner does not require the State to pay for the cabins, either pursuant to the leases or under the law of taking.

To the extent it is uneconomical for plaintiffs to remove the cabins, again that problem does not require the State to pay for the cabins.

Plaintiffs' takings claims have no merit, as a matter of law, for the most straightforward possible reason – the State is not taking any of their private property.

### III. CONCLUSION

For the reasons stated, the State is entitled to summary judgment.

DATED: Honolulu, Hawai'i June 7, 2006 .



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<sup>5</sup> Mr. Hay and the Matsunagas have filed applications for the required Conservation District Use Permit. There is no reason at this point to believe the permits will be denied or that these plaintiffs will be unable to remove their cabins. The Carswells apparently are not going to try to remove their cabin, because they have not applied for the permit.

THEY HAVE!!