

Newsletter

July 1992

LETTER FROM THE CHAIR

A few years back, at a seminar given by this Section concerning Land Court registration, Bruce Graham commented that the Land Court would have "bounced" the recordation of the Louisiana Purchase because Napoleon Bonaparte didn't have a middle name. The remark reflected the frustrations of many real property practitioners when attempting to record transactions or understand the rationale for many of the procedures which at times have delayed transactions and, in some instances, caused transactions to go un-consummated. A member of our Board has even suggested that the Navy substitute

the Bureau of Conveyances for the Island of Kahoolawe as a target for bombing practice.

But in reality there have always been dedicated people at the Bureau (such as James "Smitty" Smith, Juanita Post, and Rudy Espinda) who have been extremely helpful in assisting attorneys and title companies in understanding the procedures, meeting deadlines and keeping track of the myriad of documents which must be recorded every business day. Such a person is Sandra Furukawa, the current Land Court Registrar. She has earned the respect of our members for her knowledge, cooperation and temperament in dealing with oftentimes very difficult recording problems.

In this issue, Sandy provides answers to many of the most frequently asked questions of the bar and general public concerning Land Court and Bureau procedures. (The "Little Corporal" would have been pleased.)

Also in this issue are highlights of some of those bills impacting real property law which were passed this legislative session. Act 50, which imposes new disclosure requirements under the Condominium Act, will be discussed in detail in our next issue.

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LEGISLATIVE HIGHLIGHTS

Act 132 amends The Uniform Land Sales Act, the most significant change being the deletion of the exemption from registration of subdivisions with less than 100 lots, as formerly contained in HRS 484-10(g). For those subdivisions which had obtained a preliminary 10(g) exemption prior to June 17, 1992 (the effective date of Act 132) final 10(g) exemptions will still be available, although the DCCA is "strongly urging" developers with such preliminary 10(g) exemptions to consider filing a public offering statement. The DCCA will be amending the rules applicable to the Uniform Land Sales Act in the near future.

Act 197 makes a number of changes to the recordation process and requirements applicable to documents to be recorded. Among other things: (a) all Owner's Transfer Certificates of Title shall be deemed to have been surrendered to the Assistant Registrar of the Land Court so that affidavits for lost TCTs will no longer be necessary;

(b) names of all individuals signing in their individual capacities must be typewritten, stamped or printed by some mechanical or electrical printing method beneath all signatures--no handwritten names will be accepted; (c) while, for documents signed in Hawaii, the notary must still initial all interlineations, erasures or changes, for documents signed outside of Hawaii either the notary or all signing parties must initial all interlineations, erasures or changes; and (d) a generic form of notary in the form included within the Act may now be used instead of special notaries for partnerships, corporations and individuals. The recording offices have expressed a preference for the generic form. References to corporate seals are no longer required.

Act 282 sets forth general guidelines for the adoption of impact fee ordinances and establishes uniform general provisions for county impact fee ordinances adopted after the effective date of the Act.

Act 262 is the adoption of the Uniform Statutory Rule Against Perpetuities, the stated intent of which is to avoid the harsh

effects of the common law rule against perpetuities while maintaining the prohibition against perpetual non-vested future interests.

Act 173, relating to condominium property regimes, provides, among other things that: (a) a request for an extension of a public report must be received by the Real Estate Commission at least 30 calendar days prior to the expiration date of the public report; (b) the Real Estate Commission may order that a final public report for a two-apartment condominium project shall have no expiration date provided that: a request for such an order is submitted 30 days prior to the expiration date of the public report; one or both of the apartments is retained by the developer or a family member of the developer; and the developer receiving such an order gives at least 30 days notice to the Commission before any subsequent sale of either apartment to any person.

Act 50, which imposes new disclosure requirements under the Condominium Act, will be discussed in detail in our next issue. ■

DID YOU KNOW...

- In a 1031 transaction in which there is "boot", the buyer must withhold only on the gain recognized under HARPTA, but must withhold on the full purchase price under FIRPTA.
- There are several unrecorded federal easements for ammunition storage, some of which pass through the middle of Honolulu and affect Land Court property.
- Subscriptions to this newsletter are available for purchase at \$15 per year for non-members of the Real Estate Section. Call Deborah Chun for order form at 528-4200. ■

INTERVIEW WITH SANDY FURUKAWA, Registrar of Conveyances

Hawaii is the only state that maintains a single state-wide recording office for the transfer of land titles. The Regular System branch within the Bureau of Conveyances records an average of 800 documents daily relating to unregistered lands. Because the State of Hawaii does not guarantee title to land in the Regular System, the requirements for recordation of the documents in the Regular System are not as stringent as in the Land Court system. The Land Court system records an average of 450 documents daily relating to registered lands. The Bureau issues a certificate of title showing vested ownership, which is guaranteed by the State of Hawaii. Because the State of Hawaii insures the title, the technical requirements for recordation and the review of those documents by the staff at the Land Court system are much more comprehensive than in the Regular System. It is only the rare and lucky attorney who has not had a document bounced at the Land Court system, either for a technical error, which is generally easily corrected, or for a substantive issue with which the attorney may or may not agree. The Board of Directors of this Section felt it might be helpful and interesting to compile a list of common issues and problems which arise in connection with the recordation of documents in the Land Court system. Sandy Furukawa, the Registrar of Conveyances, graciously agreed to respond to the list of questions posed to her. The Board wishes to express their appreciation for her assistance.

Q A few years ago, the Bureau of Conveyances instituted a requirement that, with respect to Land Court property, a certificate of good standing or attorney's opinion attesting to the existence and

good standing of a foreign entity be submitted at the time of recordation of any document to which such an entity was a party. What was the purpose of the rule? Is it still being enforced?

- A** Confirmation of a foreign entity was always required. If a corporation is in the business of buying and selling real estate, the corporation is required to register with the State of Hawaii. Due to the increase in "one shot" sales in the late 80's by foreign corporations, recording a transaction involving a foreign corporation was made easier by showing proof of registration with the Certificate of Good Standing or an attorney's opinion. If registration is not required, then a foreign certificate of good standing or a foreign attorney's opinion is required to at least confirm the corporate status of the corporation. The rule is still enforced.
- Q** Is a certificate of good standing or opinion required each time a document is filed or will a previously submitted certificate of good standing or opinion be sufficient for some period of time? Does the Bureau keep a record of the certificate of good standing or opinion?
- A** A previously submitted Certificate of Good Standing or opinion from an attorney may be used for subsequent recordings within twelve months of the date of the opinion or Certificate of Good Standing.
- Q** From time to time, the Bureau of Conveyances will institute new requirements or modify or delete prior requirements. Is a current, written source of all such requirements available?
- A** Modifications or deletions are made pursuant to the Hawaii Revised Statutes, Rules of the Land Court or Administrative Rules of the Department of Land and Natural Resources. The Administrative Rules of the Department of Land and Natural Resources is on file with the Lieutenant Governor. Otherwise, procedural requirements are established by way of agreements with private parties, such as the title association, but those requirements only pertain to the parties with whom the agreements were made.
- Q** What is the procedure for deleting from the TCT a lease which has expired by its terms or otherwise?
- A** If the expiration date is shown, or can be calculated from another document, and if the lease has expired by its terms, further documentation is not required and on the next issuance of a Certificate of Title, the lease will not be noted. If no date was shown, or the expiration date cannot be determined on the face of the document, you will need to record an instrument to have the lease termi-

nated, cancelled or expunged, which instrument must be signed by both lessor and lessee. If it is not possible, for whatever reason, to obtain such a document, the lease may possibly be expunged through Land Court petition.

- Q** Why is it that financing statements relating to fixtures on Land Court property, or at least notices thereof, are not accepted for recording in the Land Court system and noted on the applicable TCT?
- A** In 1967, HRS 490:9-401 was amended to delete the recording of financing statements with the Assistant Registrar of the Land Court.
- Q** When more than one owner holds title to property, only one TCT has been issued, and one of the owners transfers his or her interest, how is the transfer noted on the TCT?
- A** A notation of the conveying instrument is noted on the TCT, with a reference to the document number, the grantee's name, the interest of grantor being sold, and a new TCT number is issued for the interest transferred.
- Q** When a document is not accepted for recording for reasons which the person attempting the recordation feels are incorrect, what channels are available for resolving the problem?
- A** The recorder always has the right to ask to speak to the next person in charge. Organization is as follows: Registrar, Deputy Registrar, Land Court/Regular Branch Chief, Land Court/Regular Branch Supervisor, Receiving Clerk.
- Q** Under what circumstances are correction instruments accepted for filing the Land Court system?
- A** Correction instruments will NOT be accepted for changes to the grantees' names, marital status or tenancy. For other issues, such as the omission of a "together with" paragraph, a correction instrument will be accepted.
- Q** Can a general power of attorney be recorded in the Land Court system, and, if so, how is it noted?
- A** Yes. A general power of attorney is indexed onto the grantor/grantee indices and onto the power of attorney index in the Land Court Automated Title System (LCATS).
- Q** Why does the Bureau of Conveyances require a developer recording a condominium declaration and by-laws to prepare and submit a checklist of items required to be included in the declaration and by-laws, with page numbers, which is similar, but not identical to the checklists required to be submitted to

the Real Estate Commission with the public reports?

A Since title is being insured, the receiving clerk needs to confirm that the statutory requirements to establish a valid condominium are satisfied. The receiving clerks are required to record instruments presented to them between the hours of 8:01 and 3:29. The person presenting the instrument for recording is required to remain while the instrument is being reviewed. Messengers have more than one errand to do and time is of the essence; therefore the checklist was developed to facilitate recordings and is not required.

Q When dealing with a property held in trust, how and where does the Land Court prefer the powers to be set forth?

A The recital of powers after the names of the Trustees is preferred. Many times the powers are overlooked when the document to the Trustees is being drafted.

Q If the powers of a trustee are not set forth in the conveyance document (as, for example, where the trustees take title to property by virtue of filing of an Order of Distribution issued in a probate action), what is the proper manner in which to present evidence of the powers of the trustees to mortgage, sell, etc.

A In the case of a probate, the Will usually recites the powers and must be recorded with the Order of Distribution.

Q If a trustee holding property died and a successor trustee was appointed, the previous practice was to file a petition to note the death and the appointment of the successor trustee, which was then noted on the existing TCT. It now appears that a new TCT is being issued when a successor trustee is appointed even though there is, actually, no conveyance. Is this the case, and, if so, why?

A Early practice was to issue a new TCT to the successor trustee, as permitted by HRS 501-133. However, an exemption was received for the estates that had vast holdings, such as Bishop Estate, Campbell Estate, etc., so that the appointment of a successor trustee was permitted to be done by making a notation of said appointment. With the computerization of the program, new TCTs are issued pursuant to HRS 501-133.

Q Is a new TCT issued with respect to property held as joint tenants or tenants by the entirety when one of the title holders dies?

A Upon submittal of a certified copy of the Land Court petition for death of a party of interest for recording, the death will

be noted on the Certificate and a new Certificate is not issued at that time.

Q In what instances are new TCTs issued?

A New TCTs are issued when there is a transfer of fee simple title, request by way of petition to the Land Court, consolidation and resubdivisions when different owners/certificates are involved, and upon recording of a Declaration of CPR or Time Share pursuant to Land Court Orders 92780 and 82781.

Q With respect to time share units, is one TCT issued for each condominium apartment and the owners of all of the time share interests noted on that one TCT?

A On fee simple time share units, each owner of an interval is issued its own TCT. On intervals for a use or floating period, the time share conveyances are noted on the individual apartment TCT.

Q If a Land Court Order (such as to change an encumbrance or note a merger of two projects into one) is filed affecting a condominium project, are the TCT numbers for all units in that project changed?

A It depends on the type of merger. If it is administrative only with no changes in the percentage interests appurtenant to the various apartments, no new TCT numbers are issued. If it is a merger in which the percentage interests are changed, new TCTs are issued since, in that case, it is Land Court's view that there has been a conveyance.

Q Can you explain what a "floating document" is and how they are determined and treated in the Land Court System?

A "Floating documents" are documents where the grantor (or operative signatory) has no recorded interest on the TCT but the instrument was accepted for recordation in error. When the error is caught, the document is "memoed" onto the TCT referenced in the document. With the modernization of the system, such documents are rare.

Q How are "floating instruments" located and tracked by those searching the title records. When and how are the parties to a "floating instrument" notified that the instrument has become a floating instrument after the document has been accepted for recording?

A A searcher can locate a floating instrument in the grantor/grantee indexes. All grantor/grantee names are incorporated into these indexes at the time of recording. As far as notification of the parties, if the document is found to be flawed, the document is not recorded and is returned to the party presenting the document for recording, with a rejection slip identifying the errors. If the document is recorded in error it is noted

as an encumbrance onto the TCT and is returned to the party identified in the "after recordation, return to" portion of the document or to the title company, within ten working days, with a memo of what errors were found and recommendations as to how corrections can be made.

Q In your view, is a "floating instrument" binding on a third party dealing with the property? For example, if a mortgage is accepted for recording, and later rejected as having been accepted for recordation in error, would a person acquiring the property by way of a deed filed before the corrected mortgage is refiled take title subject to, or free and clear of, the mortgage?

A It depends on the situation. The mortgage is noted on the TCT. If someone is contesting its validity, they will need to go through a Land Court Petition. It is difficult to imagine a situation where a document, whether it is a "floating instrument" or not, is binding on persons not a party thereto. Such questions need to be answered by attorneys or judges.

Q If a deed is accepted for recording and a new TCT issued on the basis thereof and, subsequently, the deed becomes a "floating instrument", what happens to the new TCT? Who owns the property? What if the grantee named in the deed which later becomes a floating instrument has conveyed the property prior to the instrument becoming a floating instrument? What happens to the TCT issued to the new purchaser?

A Prior to the computerization and modernization of the Land Court recording program, there have been cases where "floating instruments" have been accepted for recording. These involved instruments where the grantor or operative signatory of the instrument appeared to have title. For example, where title is vested in John Appleseed as trustee of a trust and John Appleseed executed a deed of the property in his own name rather than in the name of John Appleseed as trustee. When the fact that the deed is flawed is discovered, a memorandum of the deed will be made onto the TCT and it will become an encumbrance on that TCT. Title would remain in the original owner until the flaw is corrected. Notification of the parties are made as described above. If, before it is discovered that a "floating instrument" has been recorded in error, there is a subsequent conveyance, the subsequent conveyance (by the proper grantor) would become an encumbrance on the TCT until the correction is made. The corrections are made by petition to the Land Court and the peti-

tions should request that title be vested in the last recorded owner after the corrections are made. If a TCT was issued to the grantee of the "floating instrument", the same procedure for correction would be followed. Generally, since the instrument involved the same person(s) in a trust situation, the corrections have not been a problem. The TCT issued on documents recorded in error is removed from the document and issued to the next conveyance document accepted for recordation.

- Q** Some condominiums are developed in phases, with the result being that the percentage interest appurtenant to each unit is modified. What is the Land Court's position as to how these changes should be noted? Does the Land Court have problems with phasing, whether by merger of two projects or otherwise?
- A** Yes, the merging of two projects or otherwise does create problems, especially when the interests appurtenant to the apartments change. Land Court has always maintained that once the conveyance of an undivided interest is

made in fee simple, the only party that can deal with that interest thereafter is the recorded owner. An actual conveyance would have to be made to a "straw party" of all the interests, then redistributed to the apartment owners for the new interest.

- Q** What are some of the most common errors (other than typographical) which are made in documents to be recorded? What are your "pet peeves?"
- A** Please refer to our pre-printed rejection slip. Pet peeve - Not being able to communicate with all the associates connected to the title industry at the same time.

With respect to the following additional questions, Sandy Furukawa referred us to the Land Court Judiciary. Barbara Wright, Registrar of the Land Court, agreed to discuss the questions and provide the answers. The Board would like to express our appreciation to her for her cooperation and assistance.

- Q** There seems to be some confusion as to the necessary parties to a petition for subdivision. Is it sufficient for only the

fee simple owners of the affected properties to sign or are mortgages, lessees and others with ancillary or collateral interests in the properties also required to sign the petition?

- A** Mortgages and lessees should be a party to a petition for subdivision. If an easement is being cancelled, the person in whose favor it runs should be a party.
- Q** What is the current timing for processing a petition for subdivision for Land Court property?
- A** A minimum of two weeks for a normal petition with no complicated surveying matters.
- Q** What is the procedure for obtaining a correction to a TCT, such as the deletion of an encumbrance which no longer exists or reflecting an encumbrance which is not noted on the TCT if one or more of the applicable parties is not available?
- A** By way of petition. With respect to any matter for which there is no evidence or insufficient evidence, it will be necessary to go to the Land Court. ■

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