Real Property and Financial Services Section
Hawaii State Bar Association

Newsletter

July 1994

FROM THE CHAIR

This issue includes a summary of one of two papers written by University of Hawaii law students who will receive monetary awards from the Section for excellent research papers. The paper summarized in this issue was written by Dan Mueller who will be a Senior at the Richardson School of Law this Fall, for Professor David Callies Spring 1994 seminar on Land Use and Development.

As Chair of the Section I have been asked to serve on the HSBA Consumer Protection Committee. This Committee is exploring the issue of unsupervised paralegal practice, and each Section has been requested to provide a position paper to the Committee discussing whether unsupervised paralegal practice would be possible in our specialty area. An ABA committee has spent considerable time considering this issue because there is thought to be great need for lower cost legal services to be made available to people who are too "rich" to qualify for legal aid, but who require "simple" legal services.

I have attended two meetings of the Consumer Protection Committee, and the Board of the Section has discussed this issue at some length. The Chair and some members of the Consumer Protection Committee believe that some unsupervised paralegal practice should be permitted in nearly all practice areas. The Section Chairs who are members of the Committee are concerned that even though seemingly simple legal services such as conveyancing, forming corporations, or drafting "simple" wills can be done by paralegals, it requires a lawyer to determine whether the service should be rendered at all. We will be preparing our paper for submission to the Committee by September 19, and would be very interested in the comments of members as to whether they believe there are any legal services which could be provided by unsupervised paralegals.

Nancy N. Grekin, Chair
Real Property and
Financial Services Section

- That the Hurricane Iniki special recording fee will now be applied to every mortgage recorded, including multiple mortgages securing the same debt. The form to be filed with the Bureau of Conveyances has also been changed and must now be on lavendar paper.
- That Professor David Callies of the Richardson School of Law, and a member of our Board, has recently completed a summary of U.S. Land law which has been translated into Japanese (kanji) and published in Japan this past month. The book may be ordered through Professor Callies who can be contacted at 956-6550, or by fax at 956-6402.
- That Act 12, 1994 Session Laws, reverses Tax Information Release 93-7 which required revocable living trusts to obtain a general excise tax number (in the name of the trust) for business income. Tax Information Release 94-5 issued July 12, 1994 explains Act 12 and the Tax Department's interpretation. ■

THE STRUGGLE TO DEFINE NATIVE HAWAIIAN GATHERING RIGHTS WITHIN THE CONTEXT OF HAWAII'S MODERN SYSTEM OF LAND TENURE

By Dan Mueller

Native Hawaiian gathering rights were acknowledged as a property right in *Kalipi v. Hawaiian Trust Co., Ltd.*[1] (*Kalipi*). However, because the intrusive nature of gathering rights conflicts with the "rigid exclusivity associated with the private ownership of land," Hawaii courts have struggled to define the modern parameters of this ancient right.

Ultimately, *Kalipi* concluded that gathering rights are held subject to the landowner's right to exclude. This conclusion is evinced by the numerous restrictions placed on gathering rights by the court. One of the principal restrictions was that gathering rights accrue to only ahupuaa residents (the residency requirement). In *Pele Defense Fund v. Paty*[2] *(PDF)*, however, the court abrogated the residency requirement, thereby altering the nature of the right.

For private landowners, whether gathering rights are limited to ahupua'a residents will determine whether gathering rights are a general cultural easement, held by all Hawaiians, or whether gathering rights accrue to only those native Hawaiians who live within the same ahupua'a in which the rights are asserted. This paper analyzes the elimination of the residency requirement. First, was the court's reasoning persuasive? Second, is the elimination of the residency requirement vulnerable to constitutional challenge as violative of the Takings Clause?

Pele Defense Fund v. Paty:

The Elimination of the Residency Requirement

In *Pele Defense Fund v. Paty* (*PDF*), the Hawaii Supreme Court found that, contrary to the conclusion in *Kalipi*, gathering rights may accrue to other than ahupua'a residents. This conclusion, however, is not supported by contemporary Hawaii property law. Neither the statutory sources of native Hawaiian rights, nor the judicial interpretations thereof, lend themselves to this conclusion of *PDF*.

PDF escaped the residency requirement by misconstruing both *Kalipi* and Article XII, § 7 of the Hawaii Constitution.

Despite *PDF's* assertion otherwise, *Kalipi* does not lend itself to the conclusion that gathering rights may extend beyond the ahupua'a in which a native Hawaiian resides. *PDF* tried to pin its elimination of the residency requirement to H.R.S. § 1-1.[3] However, although *Kalipi* found that "the precise nature and scope of the rights retained by § 1-1 would ... depend upon the particular circumstances of each case," *Kalipi* concluded that both as a matter of law and policy the rights, whatever their scope, would be limited to ahupua'a residents.

Article XII, § 7 of the Hawaii constitution also does not support the elimination of the residency requirement. Article XII, § 7 provides:

> The State reaffirms and shall protect all rights customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a *tenants* who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

The express language of the amendment limits its application to ahupua'a tenants, a point not addressed by *PDF*.

Instead, PDF cited the legislative history of Article XII, § 7 for the proposition that the drafters of the amendment intended it to eliminate the residency requirement. The Drafting Committee wrote:

> [Gathering rights] are personal rights. Rather than being attached to the land, these rights are inherently held by Hawaiians and do not come with the land. For instance, it was customary for a Hawaiian to use trails outside the ahupua'a in which he lived to get to another part of the Island.[4]

The Drafting Committee also commented that Article XII, § 7 was intended to reaffirm "*all* rights customarily and traditionally held by ancient Hawaiians." From this language, *PDF* concluded that "[t]he [drafting] committee intended this provision to protect the *broadest possible spectrum of native rights*." This conclusion, however, is not convincing.

First, the report of the Drafting Committee treats the issue of residency inconsistently. Following the above-quoted language, the Drafting Committee report continued: "[a]lthough a *tenant* may not own any land in the ahupuaa, since these rights are personal in nature, *as a resident of the ahupuaa*, he may assert any traditional and customary rights necessary for subsistence, cultural, or religious purposes."

Second, even assuming the Drafting Committee intended to eliminate the residency requirement, this intention was rejected by the Committee of the Whole:

> [The] Committee [of the Whole finds] that [Article XII, § 7] does not attempt to grant unregulated, abusive and general rights to native Hawaiians; but rather it allows *tenants* of an ahupuaa, *not all native Hawaiians*, access rights to the mountain and the sea, as was traditionally and customarily asserted by their ancestors.[5]

Third, and finally, as will be shown in the next section, the Constitutional Convention could not have reas-

serted the pre-Mahele historical nature of gathering rights without providing compensation therefor. Prior to the enactment of Article XII, § 7, native Hawaiian rights did not extend to other than ahupua'a residents; therefore, if the Constitutional Convention -- as *PDF* urged -- intended to extend the scope of native Hawaiian rights so as to eliminate the residency requirement, the State would be obligated to compensate private landowners for the corresponding deprivation of the exclusionary interest.

Takings

Underlying the difficulty in defining the scope of gathering rights lies the tension between the intrusive nature of gathering rights and the exclusionary expectations of the modern landowner. The Takings Clause of the United States Constitution dictates that the line between these interests be drawn according to the historical definition of the nature of the fee simple title under the State's law of property.

Lucas v. South Carolina Coastal Council provides particular guidance:

> [W]e assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title.... We believe similar treatment should be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the land title itself, in the restrictions that the background principles of the State's law of property and nuisance already place upon land ownership.

According to one commentator:

> Simply stated, the *Lucas* rule says that government's right to constrain the use of property without paying compensation therefor is limited by what it withheld from owners at the outset. Government cannot change the rules of the game after the game has started. To find the rules articulated when the game began, one is directed to historical definition.[6]

Accordingly, to determine when, if ever, the enforcement of native Hawaiian rights would constitute a taking, we must look to the *background principles* of Hawaii property law to determine the scope of native Hawaiian rights preserved upon Hawaii's transformation to a Western system of property. In particular, do the *background principles* of Hawaii property law limit gathering rights to ahupua'a residents?

The Background Principles of Hawaii Property Law

The *background principles* of Hawaii property law conclusively show that upon Hawaii's transformation to a Western system of land tenure, native Hawaiian rights were preserved, and were meant to co-exist with the rights of private landowners. However, the background principles also indicate that those rights were reserved only for ahupua'a residents. Under the *Lucas* analysis, the elimination of the residency requirement, therefore, constituted a taking.

There are three recognized sources (background principles) of native Hawaiian gathering rights: (1) H.R.S. § 7-1; (2) native Hawaiian custom and tradition, as codified in H.R.S. § 1-1; and (3) the reservation of the people's *kuleana* in lands converted to fee simple ownership.

Thus far, the courts have apparently concluded that the rights retained by native Hawaiians under the *kuleana* reservation are no more than those already listed statutorily in sections 7-1 and 1-1. Therefore, the breadth of sections 7-1 and 1-1 is determinative of the nature of the native rights preserved and intended to be part of our modern system of land tenure.

As *Kalipi* noted, the language of H.R.S. § 7-1 requires Hawaiians to be "on" the land before they become entitled to take products "from the land on which they live." In addition, although gathering rights were not the subject of judicial decision until *Kalipi*, all other considerations of native Hawaiian rights under § 7-1 limited the statute's application to ahupua'a residents. Section 1-1, because of its vague language, is much broader than section 7-1. However, it appears that, prior to *PDF*, Hawaii courts had never cited section 1-1 for the proposition that the native rights protected thereunder were meant to accrue to other than ahupua'a residents.

Conclusion

As Hawaii courts attempt to follow the constitutional mandate to protect native Hawaiian rights, the courts must confine the scope of native rights to that permitted under the historical definition of Hawaii property law. Because the historical definition of native rights limited their application to ahupua'a residents, the elimination of the residency requirement as a precondition to the exercise of gathering rights stands vulnerable to constitutional challenge.

Endnotes

1. 66 Haw. 1, 656 P.2d 745 (1982).

2. 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied*, __ U.S. __, 113 S.Ct. 1277, 122 L.Ed.2d 671 (1993).

3. Haw. Rev. Stat. § 1-1 (1985): The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or law of the United States, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage.

4. *See* Stand. Comm. Rep. No. 57, *reprinted in* 1 *Proceedings of the Constitutional Convention of Hawaii of 1978*, 637.

5. *See* CONSTITUTIONAL CONVENTION OF HAWAII, COMMITTEE OF THE WHOLE REPORT NO. 12, *reprinted in* 1 *Proceedings of the Constitutional Convention of Hawaii of 1978*, at 1016 (emphasis added).

6. Joseph L. Sax, Rights That "Inhere in the Title Itself": The Impact of the Lucas Case on Western Water Law, 26 Loy. L.A. L.Rev. 943 (1993). ■

HAWAII ASSOCIATION OF REALTORS SURVEY

The Hawaii Association of Realtors is surveying members and E&O carriers regarding real property litigation, and would appreciate information from members of the Real Property Section on the following questions:

1. Approximately how many cases involving real estate licensees has your firm handled during the past year in which the claims arose out of real estate transactions?

2. Of the real estate cases that your firm has handled during the past year involving real estate licensees and which are completed, approximately what percentage has:

a. Gone to trial? _____%
b. Settled? _____%
c. Were withdrawn% _____%
d. Other? _____% (Please explain)

3. Based upon your real estate litigation practice during the past year, do you feel that formal or informal claims against real estate licensees arising out of real estate transactions are generally increasing, decreasing, or remaining about the same? If increasing, how would you describe the rate of increase?

4. Based upon your firm's experience during the past year, what three (3) areas comprise the basis of the majority of formal or informal claims against real estate licensees, and what are the approximate percentages they represent to all of your cases?

a._____ _____%

b._____ _____%

c._____ _____%

If you are interested in responding to the survey, please fill it out and fax to Wayne Pitluck, who represents HAR, at 545-4015.

Real Property and Financial Services Section
Hawaii State Bar Association
1136 Union Mall, PH 1
Honolulu, HI 96813