



The Fight Against Condemnation

The loss of land assets hurts Kamehameha Schools ability to serve more Hawaiians

The latest events in Kamehameha Schools’ battle to preserve its rights as a landowner have brought a decades-old land reform controversy to the forefront once again.

Late last year, 31 owner-occupant lessees of the 196-unit Kāhala Beach condominium once again asked the Honolulu City Council to condemn the beachfront property in the elite East O’ahu community where the Wai’alae Country Club and Kāhala Mandarin Oriental Hawai’i hotel are located.

This was the lessees second such attempt. A 1999 City Council condemnation lawsuit on behalf of the lessees was successfully challenged when the Hawai’i Supreme Court ruled in favor of Kamehameha Schools. (See timeline sidebar on page 14.)

In December of 2002, the council – in a 5-4 vote – passed a resolution clearing the way for the city to condemn the land and force KS to sell the leased fee interest to the lessee owners of 31 apartments. In that same hearing, the council also passed two other resolutions to condemn land owned by the First United Methodist Church and another parcel owned jointly by the Kekuku Family Trust and the Sisters of the Order of the Sacred Heart.

What Public Purpose?

Much of the testimony offered against the Kāhala Beach condemnation by supporters of KS and the other landowners advocated that no public purpose – a key component to condemnation proceedings – was served by the transfer of property from one private owner to another.

Kamehameha trustees, executive leadership and staff, school alumni and students testified that KS’ ownership of the property would serve a much greater public purpose than forcing the transfer of ownership to 31 private individuals.

In his testimony, Kamehameha Schools trustee Nainoa Thompson challenged the City

Council to justify why such action was being taken. “I struggle with why we are even asking the question – when we weigh the benefits that could potentially accrue to 31 private individuals against the countless benefits this community enjoys as a result of the educational mission pursued by Kamehameha Schools. What public interest is this resolution supposed to serve?” Thompson asked.

“It is irresponsible and arbitrary for the council to abandon its responsibility – indeed its duty – to ensure that its actions are in the best interest of all of O’ahu’s citizens, especially in the application of a law that has been manipulated so that it no longer serves the interests of the larger community,” testified KS Chancellor and CEO Dr. **Hamilton McCubbin**.

A Steady Erosion of Assets

At one time, KS held the leased fee interest on about 14,000 single-family units and 13,000 condominium and apartment units throughout the state of Hawai’i. Mandatory conversions and a voluntary sales program over the last decade

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have reduced the inventory to fewer than 200 single-family units and less than 5,000 multi-family units.

“Kamehameha Schools responded to the community and its expressed interest in acquiring the fee title to Kamehameha lands by implementing a voluntary residential fee sales program in 1991,” testified Kamehameha trustee **Robert Kihune**. “Under the threat of condemnation, we voluntarily sold parcels that were less strategic in our long-term outlook.”

The Kāhala Beach Apartments is one of only two multi-family properties that KS has purposely chosen not to sell due to its potential future value. “It is our fiduciary responsibility as stewards of this land to preserve Kamehameha Schools’ options for possible future economic benefit,” Kihune said.

While proponents of mandatory leasehold conversion maintain that KS is able to replace lost lease rent income with alternate investments, this can prove to be a risky venture.

Consider Lunalilo Home, which cares for elderly Hawaiians. Once endowed by a land-based trust even more extensive than Bernice Pauahi Bishop’s, it was left nearly penniless when stock market investments that replaced the land

holdings plummeted in value in the early 20th century.

Then Kamehameha Chief Financial Officer Eric Yeaman testified that KS’ current return on the Kāhala Beach property would be difficult to replace under current market conditions, and that even a modest rise in real estate values for this property over the next five to 10 years would assure KS a stable, predictable income stream upon which plans for educational expansion could reliably be based.

Revenue generated from the Kāhala Beach Apartments currently provides a moderate but steady return of \$3.2 million annually to KS, said **Sydney Keli’ipuleole ‘69**, director of Kamehameha’s Residential Assets Division.

McCubbin told the City Council that \$3.2 million in revenues would enable KS to provide enough financial aid to send 720 4-year-olds to preschool for a year; send 809 high school graduates to college for a year; or provide supplemental funding for more than 4,500 students in a Department of Education conversion school.

“Kamehameha’s opposition to the Kāhala Beach Apartments condemnation is furthermore a statement that KS opposes and will oppose all forms of leasehold condemnation which further erodes landholdings and jeopardizes the revenue base,” Keli’ipuleole said.

A Call for Responsible Government

“The exercise of the city’s power of eminent domain is an extraordinary power because it forces landowners to sell,” said attorney Louanne Kam of the KS Litigation Legal Division in a written statement to the City Council. The application of such an awesome power requires stringent and consistent adherence by the city to its own qualification procedures.

Both Kam and Keli’ipuleole testified that the city’s condemnation procedures are flawed and often improperly executed, enabling the city to consistently qualify ineligible lessees and initiate illegal condemnation proceedings. The city has been successfully challenged by KS a number of times on faulty procedures, and as a result, Honolulu taxpayers have paid costly fines levied on the city.

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KS attorney Louanne Kam and RAD Director Sydney Keli’ipuleole ‘69

Key Events in the Struggle for Land Rights in Hawai'i

1884

Bernice Pauahi Bishop leaves 434,000 acres of Hawaiian land in perpetual trust for Kamehameha Schools.

1967

The "Land Reform Act" (Chapter 516 of the Hawai'i Revised Statutes) is passed by the state Legislature enabling the state to force charitable trusts and other private landowners to sell the leased fee interest in single-family properties to lessees.

1983

In the landmark *Midkiff v. Hawai'i Housing Authority* ruling, the U.S. Supreme Court upholds the Hawai'i Land Reform Act that allows the state to condemn residential property to sell to lessees.

1991

In a 5-4 vote, the Honolulu City Council passes a mandatory condominium conversion bill (Ordinance 91-95) permitting the city to force landowners to sell the leased fee interest in multi-family properties to lessees. KS challenges the ordinance in U.S. District Court.

1992

The U.S. District Court rules that the ordinance is constitutional, but asks the Hawai'i Supreme Court to determine whether the ordinance is preempted by state laws.

1994

The Hawai'i Supreme Court, in a 3-2 vote, rules that state law does not preempt the city ordinance. Federal courts uphold the ordinance as constitutional. KS appeals the ruling to the U.S. 9th Circuit Court of Appeals.

1995

The city Department of Housing and Community Development designates the Kuapā Isle condominium development in Hawai'i Kai for lease-to-fee conversion, but condemnation is deferred until the legal challenge is resolved.

1997

The U.S. 9th Circuit Court of Appeals upholds the constitutionality of the city ordinance.

1998

The city files a condemnation lawsuit of leased-fee interests to 28 Kuapā Isle condo units.

1999

The city files a condemnation lawsuit of leased-fee interests to 25 Kāhala Beach Apartments condo units.

2002

In May, the Hawai'i Supreme Court rules that the city had been misinterpreting the minimum number of applicants required to initiate the conversion (the Coon decision) in both Kuapā Isle and Kāhala Beach Apartments. KS prevails and is eligible to collect attorney fees and court costs.

In a second attempt in June, 31 apartment lessee owners at the Kāhala Beach Apartments ask the city to initiate condemnation proceedings. Amid heated debate, the council passes the resolution in December by a 5-4 vote.

In December, the city and lessee applicants at Kuapā Isle dismisses their condemnation lawsuit. The applicants pursue purchase of the leased-fee interest through KS' voluntary sales program.

In December, the Hawai'i Supreme Court (the Ing decision) upholds KS' challenges to the city's condemnation lawsuit of the 1999 Kāhala Beach Apartments.

2003

The city files a condemnation lawsuit of leased-fee interests to 31 Kāhala Beach Apartments condo units based on the December 2002 City Council hearing.



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KS Vice President for Legal Affairs **Colleen Wong '75** reminded the council in her testimony that since 1991, the courts have ordered the city to pay Kamehameha nearly \$750,000 in legal fees and penalties for premature actions and failure to follow their own rules and regulations.

The Changing Face of Leasehold

Kāpalama Campus Headmaster and KS President Dr. **Michael Chun '61** reminded council members that the concept of a land oligopoly (a market condition in which a few landowners have control) has never been applicable to the multi-family housing market. The concept has been applied successfully to the single-family residential market, and spurred the forced condemnation, sale and resale of thousands of single-family leasehold properties.

"Condominium owner-occupants make up a very small percentage of condominium owners," Chun explained. "At the Kāhala Beach Apartments, just 31 out of 196 total units are owner-occupants. The same ratios exist in most other condominiums. There is no oligopoly here."

Chun went on to remind council members that most condominium landowners are small families and charitable trusts that use their lease rent income to sustain their families or fund public programs and services.

The city's multi-family condemnation law, titled Chapter 38, now benefits just a handful of residents, many of whom have prospered financially with more than 30 years of low, fixed lease rents.



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– RAD DIRECTOR SYDNEY KELI'IPULEOLE

“especially House Bill 675 and Senate Bill 633, both of which were introduced by the Hawaiian Caucus and seek to protect charitable trust lands from condemnation. We are grateful that they recognized some action needed to be taken to carve out an exception for lands that benefit our native people.”

The Fight is Not Over

Kamehameha Schools is committed to pursuing this cause in the legal arena and has retained the law firm of Ashford and Wriston to represent the institution as it moves to challenge the Kāhala Beach condemnation on grounds that the procedures used to determine whether to proceed with the condemnation were faulty.

The lawsuit, filed in December, alleges that the council failed to determine whether the condemnation served a public purpose. By divesting itself of this responsibility, the council placed itself in a position of having no discretion to approve or disapprove a condemnation action.

“We simply believe it is the council’s duty to weigh and consider the public purpose of each condemnation,” McCubbin said. “Their refusal to do so forces us to go to court to compel the city to abide by the law, and will end up costing taxpayers more money.”

A decision on the case is expected before summer.

What Now?

Leasehold issues at the 2003 Hawai'i Legislature and City Council

At the 2003 Hawai'i state Legislature, KS is actively supporting House Bill 675 and Senate Bill 633, both of which seek to protect charitable trust lands from condemnation. KS is also supportive of efforts to strengthen the requirement for a demonstration of public purpose in order to exercise the power of eminent domain.

KS is opposing bills that allow lessees a one-time rent renegotiation if market values have decreased (HB 648, SB 903 and 905), and others that strengthen the counties' eminent domain powers. This is the first year in a two-year Legislative cycle, so all bills will be resurrected during the next session.

The Honolulu City Council is also reviewing leasehold issues and examining options such as the formation of a leasehold advisory group to make the laws fair to both lessors and lessees.

You can stay informed about these and other legislative acts by visiting www.capitol.hawaii.gov.

Important definitions

Leasehold: ownership of a residence such as a single-family home or condominium, but not the land beneath the building. The homeowner (lessee) pays the landowner monthly lease rent for the use of the land which is renegotiated periodically to reflect the current market value of the land.

Fee simple: single-family homes or condominiums sold with the land included.

Condemn: to declare legally appropriated for public use under the right of eminent domain.