

July 17, 1995

The Honorable Benjamin J. Cayetano
Governor of Hawaii
Executive Chambers
Hawaii State Capitol
Honolulu, Hawaii 96813

Dear Governor Cayetano:

Re: Authority to Alienate Public Trust Lands

This responds to your request for our opinion as to whether the State has the legal authority to sell or dispose of ceded lands.

For the reasons that follow, we are of the opinion that the State may sell or dispose of ceded lands. We note that any proceeds of the sale or disposition must be returned to the trust and held by the State for use for one or more of the five purposes set forth in § 5(f) of the Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959)(the "Admission Act").

In Part I of this opinion, we determine that under the Admission Act and the Constitution the State is authorized to sell ceded lands. In Part II, we conclude that the 1978 amendments to the State Constitution do not alter the State's authority.

I. The Admission Act Authorizes the Sale or Disposition of Public Trust Land.

The term "ceded land" as used in this opinion is synonymous with the phrase "public land and other public property" as defined in § 5(g) of the Admission Act:

[T]he term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded. ([top](#))

The United States granted the ceded lands to the State of Hawaii in § 5(b) of the Admission Act. That section, in relevant part, declares:

(b) Except as provided in subsections (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property

.....

Section 5(f) of the Admission Act imposes a trust upon these lands and appoints the State as the trustee.¹ The section states:

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a

breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university. [Emphases added.]

The Admission Act § 5(f) expressly acknowledges that ceded or public trust land may be alienated when it refers to "the proceeds from the sale or other disposition of any such lands."

There is further evidence that alienation of the trust land was contemplated and permitted under § 5(f); one of the five enumerated purposes for which the public trust land may be used is, "the development of farm and home ownership on as widespread a basis as possible." (Emphasis added.)

This Admission Act language is echoed in article XI, § 10 of the State Constitution (previously numbered article X, § 5) which provides:

The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law. [Emphases added.]

The Hawaii Supreme Court has affirmed that "[t]he language of this section refers expressly to farm and home ownership and not leaseholds." *Big Island Small Ranchers Ass'n v. State*, 60 Haw. 228, 235, 588 P.2d 430, 435 (1978). The history of the 1950 constitution further reflects that fee ownership was intended. Standing Committee Report No. 78, adopted by the Committee of the Whole, stated:

The Committee unanimously agreed that for the public good, fee simple homes and farms should be made available on as widespread basis as possible, however, it was felt by the Committee that reasonable judgment should be exercised in the manner of making the lands available. . . . The thought of the Committee is that the more families are placed as independent land owners on the public domain, the more stable the economy of the State will be

1 Proceedings of the Constitutional Convention of Hawaii 1950, at 233 (1960) (emphases added).

Additionally, § 5(f) mandated that the constitution and the law prescribe the manner in which the State was to manage and dispose of ceded lands. In adopting article XIV, § 8 (now renumbered, and as amended, article XVI, § 7) "the State affirmatively assume[d] the § 5(f) trust responsibilities." *Pele Defense Fund v. Paty*, 73 Haw. 578, 586 n.2, 837 P.2d 1247, 1254 n.2 (1992), cert. denied, U.S. , 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). That section provided that:

[A]ny trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation.

Thus, the State Constitution placed the responsibility for compliance with the Admission Act on the legislature.

The legislature carried out this responsibility by enacting Act 32, 1962 Haw. Sess. Laws 95. Section 1 of the act provided, in relevant part:

By virtue of section 15 of the Statehood Act, a serious question exists as to whether or not Hawaii has any land laws relating to the management and disposition of the public lands.

It is of immediate importance to the economy and to the people of Hawaii that we adopt a

set of laws for the management and disposition of our public lands in accordance with present day needs.

Section 2 of Act 32, codified as chapter 171, Haw. Rev. Stat., contains the provisions for the management and disposition of public lands.² Chapter 171 applies to any and all "public lands," including ceded lands or lands the State acquired by other means.³ Act 32 recognized the uniqueness of the ceded lands in section -18 of section 2 (codified as Haw. Rev. Stat. 171-18). It prescribed that "all proceeds and income from the sale, lease or other disposition" of ceded lands were to "be held as a public trust." Like section 5(f) of the Admission Act, Haw. Rev. Stat. § 171-18 expressly provides that ceded or public trust land may be alienated. Both the Admission Act and Haw. Rev. Stat. § 171-18 refer to "the proceeds and income from the sale, lease or other disposition" of ceded lands.

Dispositions of ceded lands may also include land exchanges in which the State conveys ceded lands to other parties in exchange for land from those parties. In its definition of ceded lands, the Admission Act deals expressly with land exchanges as a means of disposing of ceded lands.

As noted earlier, § 5(g) of the Admission Act defines "public land and other public property" as:

the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded. (Emphasis added.)

Land exchanges, like other types of dispositions, were contemplated by the Legislature when it enacted Act 32, 1962 Haw. Sess. Laws 95. Presently codified as chapter 171, Hawaii Revised Statutes, the statute provides for exchanges of public for private lands at §§ 171-50 and -50.2. Because any such exchange must be made for "substantially equal value" § 171-50(b), the value of the ceded land trust is not diminished by the exchange.

This treatment of land exchanges affecting the trust so as not to diminish the value of the trust is an analogue to Haw. Rev. Stat. § 171-18, which provides that proceeds and income from the sale, lease or other disposition of ceded lands "be held as a public trust." Thus, whether the disposition of the ceded lands results in money or land, the proceeds are subject to the trust and must be held by the State for use for trust purposes.

The Admission Act, pursuant to which the State acquired title to ceded lands, allowed the State to sell, alienate, or otherwise dispose of those lands. The State Constitution and laws enacted thereunder also reflect the State's right to sell.

II. The 1978 Constitutional Amendments Did Not Alter the Express Authority to Alienate Public Trust Land.

No law enacted after the Admission Act has altered the alienability of § 5(f) trust land. We appreciate, however, that the argument has been made that a change in the State Constitution in 1978 altered the law on the issue of alienability.

In 1978, Hawaii amended its constitution to include a specific reference to the public trust established in the Admission Act. Article XII, § 4 provides:

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

In article XVI, § 7, referred to by article XII, § 4, the State affirmatively assumes the Admission

Act § 5(f) trust provisions, and consequently the trust purposes, powers, and authority. Pele Defense Fund, 73 Haw. at 586, n.2, and 601, 837 P.2d at 1254, n.2, and 1262. Article XVI, § 7 now provides:

Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.⁴

An analysis of the meaning of article XII, § 4 requires consideration of other related provisions of the Constitution, as amended in 1978. "A constitutional provision must be construed in connection with other provisions of the instrument, and also in light of the circumstances under which it was adopted and the history which preceded it, and the natural consequences of a proposed construction" *In re Carter*, 16 Haw. 242, 244 (1904). See also Haw. Rev. Stat. § 1-16 (1985); Att'y Gen. Op. No. 83-2 (April 15, 1983).

A companion provision to article XII, 4, which also had its origin in 1978 Constitutional Convention is article XII, 6. Section 6 refers to the trust established in article XII, 4 in a manner that leaves no doubt that the ability to alienate public trust land conferred by 5(f) of the Admission Act was recognized as continuing after the 1978 amendments to the constitution. Section 6 states that the Office of Hawaiian Affairs ("OHA") board:

[S]hall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. [Emphases added.]

This language acknowledges expressly the continued viability of the power, first conferred upon the State by § 5(f) of the Admission Act, to alienate ceded lands.

If the State did not have continuing authority and power to dispose of ceded lands, "proceeds from that pro rata portion" could not be generated. Further, an interpretation which would render the reference to "proceeds" superfluous should not be adopted. *Littleton v. State of Hawaii*, 6 Haw. App. 70, 73, 708 P.2d 829, 832 (1985). Therefore, the power and authority to generate proceeds from, or power to alienate, lands held in public trust, exist under article XII, § 4.

Another provision of the Constitution, article XI, § 10, also supports the State's continued authority to alienate ceded lands. Article XI, § 10 of the Hawaii Constitution provides that the "public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law." Although repeal of this provision was proposed in 1978, the repeal was not validly ratified. *Kahalekai v. Doi*, 50 Haw. 324, 342, 590 P.2d 543, 555 (1979). Absent valid ratification, the proposed repeal was a nullity. *Id.*; 16 C.J.S. Constitutional Law § 14 (1984); 16 Am. Jur. 2d Constitutional Law §§ 41 and 44 (1979).

Moreover, the proposed repeal was not intended to diminish the power to alienate the public lands for fee home and farm ownership. In fact, Delegate Anthony Chang emphasized: "[t]his [repeal of article X, § 10] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands would be used." 1 Proceedings of the Constitutional Convention of Hawaii 1978 (hereinafter referred to as "1978 Proceedings"), at 445-46.⁵

The history of article XII, § 4, contains nothing to suggest that the section was intended to override the power to sell or dispose of the public trust land provided for in § 5(f) of the Admission Act.⁶ Rather, the history indicates that article XII, § 4 was intended to reiterate the trust contained in the Admission Act. According to the Standing Comm. Rep., § 4 "recites the trust corpus of section 5(b) and names the two principal beneficiaries established in section 5(f) of the Admission Act - those [who are] native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, and the general public." Stand. Comm. Rep. No. 59, 1978 Proceedings, at 643-44.⁷

Courts have recognized that article XII, § 4 must be interpreted by reference to the terms of the Admission Act, § 5(f). According to the Hawaii Supreme Court, "Article XII, § 4 was added to the Hawaii Constitution to expressly recognize the trust purposes and trust beneficiaries of the § 5(f) trust." *Pele Defense Fund v. Paty*, 73 Haw. 578, 603, 837 P.2d 1247, 1263 (1992), cert. denied, U.S. , 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). The Supreme Court wrote: "Article XII, § 4 imposes a fiduciary duty on Hawaii's officials to hold ceded lands in accordance with the § 5(f) trust provisions." *Id.*, 73 Haw. at 605, 837 P.2d at 1264. There can be no "doubt that the provisions of the [Admission] Act must be looked to when we consider the nature and extent of the State's duties and powers." *Price v. State of Hawaii*, 921 F.2d 950, 955 (9th Cir. 1990).

The words "public trust" do not require the State to adopt any particular form of management of public lands. "Those words alone do not demand that a State deal with its property in any particular manner Those words betoken the State's duty to avoid deviating from § 5(f)'s purpose. They betoken nothing more." *Price*, 921 F.2d at 956.

The phrase "shall be held by the State as a public trust" in article XII, § 4, does not mean that the State may not sell the trust land. This language is very like the provision in § 5(f) of the Admission Act which says that the lands granted to the State "shall be held by said State as a public trust." Significantly, side by side in § 5(f) with this provision is the language that contemplates proceeds from the sale of the trust land.

The case of *State v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977), describes common law public trust principles that are generally applicable when a state holds land in trust. The court said:

Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, e.g., recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.

58 Haw. at 121, 566 P.2d at 735.

In view of § 5(f) of the Admission Act, relevant constitutional provisions, and common law public trust principles, we conclude that the State has been and remains empowered to sell trust lands subject to the terms of the trust. This authority was in no way modified by the constitutional amendments made in 1978. In fact, the Constitution, as amended in 1978 refers to proceeds from the sale or disposition of ceded lands with a prospective allocation of such proceeds to OHA.

Very truly yours,

Margery S. Bronster
Attorney General

¹Section 5 essentially continues the trust which was first established by the Newlands Resolution

in 1898, and continued by the Organic Act in 1900. Under the Newlands Resolution, Congress served as trustee; under the Organic Act, the Territory of Hawaii served as trustee. [BACK TO DOCUMENT](#)

²Under § 171-13, Haw. Rev. Stat., "[e]xcept as otherwise provided by law and subject to other provisions of this chapter, the board may: (1) [d]ispose of public land in fee simple, by lease, lease with option to purchase, license, or permit . . ." Similarly, § 171-23, Haw. Rev. Stat. reflects that a land patent or deed may be issued "to the purchaser in fee simple of any public land or other land disposable by the board of land and natural resources." [BACK TO DOCUMENT](#)

³Haw. Rev. Stat. § 171-2 defines "public lands" as "all lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner . . ." [BACK TO DOCUMENT](#)

⁴Some questions remain as to whether the electorate approved the addition of the last sentence of article XV, § 7, as proposed by the 1978 Constitutional Convention. See *Kahalekai v. Doi*, 60 Haw. 324, 590 P.2d 543 (1979). [BACK TO DOCUMENT](#)

⁵The constitutional history reveals that the Constitutional Convention understood that the Admission Act requirements and powers would continue after, and generally be unaffected by, the proposed constitutional amendments. During the debates, Delegate Chang explained the State's authority to manage and dispose of public lands. According to Delegate Chang, "[t]he reason that the committee proposal was drafted to delete this portion (Continued)

[article X, § 5] of the Constitution was because of the evolving concept on the use of public land policy now reflects the uses to which the public lands were suspended to be put in conformance with the Organic Act [sic], and this is the multiple use concept.

"This [repeal of article X, § 5] would not preclude the State from developing house or farm lots on public lands, but merely broaden the purpose to which public lands should be put. And as I stated, this would be in conformance with the conditions set forth in the Organic Act [sic] with regard to public lands. The purposes to which public lands ought to be put under the terms of the Organic Act [sic] are five in number, and farm and home ownership is only one. . . ." 1978 Proceedings at 445-46. Delegate Chang subsequently changed his reference to the Organic Act to the Admission Act. *Id.* at 446. [BACK TO DOCUMENT](#)

⁶The electorate was given "[a] brief description of each of the proposed amendments" in an Informational Booklet which was part of the official 1978 ballot. With respect to article XII, sections 4, 5, and 6, the booklet provided:

If adopted, this amendment

* sets forth the trust corpus and beneficiaries of the Admission Act.

* establishes an Office of Hawaiian Affairs with an elected board of trustees and provides for an effective date.

There was no statement that any change in the purposes of the § 5(f) trust, or any change in the

management or disposition of such public lands subject to § 5(f), was proposed or intended. Such change in management and purposes would represent a fundamental change in the trust terms regarding the use and disposition of public lands which would require that the voters be given specific information that such a result was intended. Otherwise, the ratification would be suspect. *Kahalekai v. Doi*, 60 Haw. 324, 590 P.2d 543 (1979). [BACK TO DOCUMENT](#)

⁷In explaining the proposed changes to article XII, Delegate Kekoa Kaapu described the § 4 amendment as "a redefinition of the public trust, of those elements in the Admission Act which are of benefit to Hawaiians, by setting forth clearly what those two categories of beneficiaries are to make it more easily handleable to administer -- and that is, that the beneficiaries of the public trust under section 5(f) are in fact the general public and native Hawaiians." 1978 Proceedings, at 458 (1980).

According to Delegate John Waihee, "this proposal does not transfer to the trust any state lands. What is concerned is that section 5(f) of the Admission Act sets out categories of individuals or persons who are to receive the revenues from all public lands that were given to the State of Hawaii So what the trust would do would be to mandate the section of these revenues from public land which are to be given which are presently mandated by the Admission Act to be held in trust for Hawaiians --would be transferred directly to the new entity which we are calling the Hawaiian affairs trust. So what we're talking about in this paragraph is not the transfer of lands but the transfer of revenues that are generated by public lands We're not taking away any public lands, we're merely directing some of the revenues that are supposed to go to the Hawaiian people." *Id.* at 462. [BACK TO DOCUMENT](#)