

ORIGINAL

LAND COURT  
STATE OF HAWAII

2008 NOV -3 AM 10: 01

KATHLEEN HANAWAHINE  
REGISTRAR

IN THE LAND COURT OF THE STATE OF HAWAII

In the Matter of the )	APPLICATION NO. 787
Application )	
)	LAND COURT NO. 01-0007
of )	
)	FINDINGS OF FACT, CONCLUSIONS
HONOLULU CONSTRUCTION AND )	OF LAW, AND ORDER
DRAYING COMPANY, LIMITED, )	
)	
to register title to land )	TRIAL: NOVEMBER 6, 7, 8,
situate )	DECEMBER 11, & 12, 2002
at Honolulu, City and County )	
of )	JUDGE: GARY W.B. CHANG
Honolulu, State of Hawai'i )	
)	

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER**

RECEIVED  
NOV 13 2008

On May 15, 2001, Petitioner ALOHA TOWER DEVELOPMENT CORPORATION ("ATDC") filed a Petition to Expunge Deed Restrictions from Land Court Certificate of Title No. 310,513. On June 14, 2001, Respondents William L. Olds, Jr., Jane Olds Bogart, William L. Olds, III, George T. Cronin, and Anthony O. Zanze, Trustees of the William G. Irwin Charity Foundation (hereinafter collectively referred to as "FOUNDATION") filed an Answer and Response to ATDC's Petition. On June 27, 2001, Respondents William L. Olds, Jr. ("OLDS") and Jane Olds Bogart ("BOGART") filed their Answer and Response to ATDC's Petition. On September 17, 2001, Intervenors SCENIC HAWAI'I, THE OUTDOOR CIRCLE, HISTORIC HAWAI'I FOUNDATION, HAWAI'I'S THOUSAND FRIENDS and LIFE OF THE LAND ("PRESERVATION ORGANIZATIONS") filed their Response to the Petition. On June 15, 2001, Respondent CITY AND COUNTY OF HONOLULU ("CITY") filed a motion to intervene in this matter. CITY's motion was granted by an order filed on November 9, 2001. On February 25, 2002, Respondent STATE OF HAWAI'I ("STATE") filed a joinder in ATDC's petition. On May 3, 2002, Respondents STATE and DEPARTMENT OF LAND AND NATURAL

RESOURCES ("DLNR") filed their response to an Order to Show Cause that was filed on April 3, 2002.

The Court, having considered the records and files herein, the testimony of witnesses and evidence admitted at a non-jury trial held on November 6, 7 and 8 and December 11, 2002, and the arguments by the parties given on December 12, 2002, and

GOOD CAUSE APPEARING, the Court makes the following findings of fact, conclusions of law, and order.

#### **FINDINGS OF FACT**

##### **The Parties and Property at Issue**

1. The property that is the subject of this Petition is that certain property being all of Esplanade Lots 34, 35, 36, and 37 and portions of Esplanade Lots 38, 40, and 41, containing an area of 24,303 square feet, as shown on Map 1, filed with Land Court Application 787, described in and covered by Land Court Certificate of Title No. 310,513 ("Property"). The Property is owned by the State of Hawai'i subject to restrictions and conditions of the transferor Helene Irwin Fagan

("Mrs. Fagan"). The restrictions and conditions are registered encumbrances on Transfer Certificate of Title No. 310,513, issued in 1986 by the Office of the Assistant Registrar of the Land Court of the State of Hawai`i and revised in 1988.

2. The Property is today known as Irwin Memorial Park ("Irwin Park"). Irwin Park is located mauka of the Aloha Tower Marketplace bounded by North Nimitz Highway, Fort Street, Bishop Street and Aloha Tower Drive.

3. Petitioner ATDC is the ground lessee of the Property. Petitioner is a public body corporate and politic, a public instrumentality, and an agency of the State of Hawai`i, pursuant to Chapter 206J of the Hawai`i Revised Statutes. Its principal place of business is located at 33 South King Street, Suite 403, Honolulu, Hawai`i 96813.

4. Respondent FOUNDATION is a charitable foundation whose principal place of business is in San Francisco, California. The FOUNDATION is the principal beneficiary of the residuary estate of the deceased Mrs. Fagan.

5. Respondents OLDS and BOGART are the natural children of Jane Fagan Olds, daughter of Mrs. Helene Irwin Fagan, and her husband William Olds; and are the grandchildren

of Mrs. Fagan. Both are also Trustees of the FOUNDATION, and reside in San Francisco, California. Jane Fagan Olds and William Olds are now deceased. Respondents OLDS and BOGART respond herein as the natural heirs of their grandmother, Mrs. Fagan, and persons with an interest in effecting her registered restrictions and conditions subject of TCT 310,513.

6. Respondents SCENIC HAWAI' I, THE OUTDOOR CIRCLE, HISTORIC HAWAI'I FOUNDATION, HAWAI'I'S THOUSAND FRIENDS, and LIFE OF THE LAND ("PRESERVATION ORGANIZATIONS") are Hawai'i non-profit corporations with their principal places of business within the City and County of Honolulu, State of Hawai'i. The Preservation Organizations have been granted leave to intervene herein in the public interest.

7. Respondent CITY is a municipality within the State of Hawai'i.

8. STATE owns the Property and has demised and leased the Property to Petitioner by way of that certain Aloha Tower Ground Lease made on or about September 29, 1993. STATE has been joined as a necessary and indispensable party in interest.

9. DLNR is the administrative agency of STATE which manages and administers the public lands of STATE pursuant to Hawai'i Revised Statutes § 26-15, and houses STATE's commission on historic sites. In said capacity, it has been joined as a necessary and indispensable party in interest.

#### Title Transactions and Registrations

10. Honolulu Construction & Draying, Ltd. ("HC&D") filed the original petition herein seeking registration of title to the Property, together with Map 1 of Land Court Application No. 787. This Court granted the petition and issued Original Certificate of Title No. 6983 to HC&D on April 13, 1928.

11. On September 3, 1930, the Territory of Hawaii ("Territory") entered into an agreement with Mrs. Fagan and HC&D ("tri-party agreement"). By this tri-party agreement, HC&D agreed to sell the Property to Mrs. Fagan for 2300 shares of common stock of Standard Oil Company of California; Mrs. Fagan agreed to then donate the Property to the Territory and the Territory agreed to accept the donation, subject to that certain restriction that the Property could be used as a public park to beautify the entrance to Honolulu Harbor.

12. Pursuant to the tri-party agreement, the following thereafter occurred:

a. Mrs. Fagan consummated her purchase of the Property from HC&D on October 21, 1930, as appears by the certified copy of the deed from HC&D to Mrs. Fagan dated October 21, 1930, and registered as Document No. 22731 in the Office of the Assistant Registrar of the Land Court. The Land Court that day issued TCT No. 9791 to Mrs. Fagan.

b. Mrs. Fagan thereafter conveyed the Property to the Territory, as appears by the certified copy of the Indenture from Helene Irwin Fagan to the Territory of Hawaii dated November 7, 1930, and filed as Document No. 22917 in the Office of the Assistant Registrar of the Land Court on November 21, 1930 ("Indenture"). The Indenture conveyed the Property subject to restrictions and conditions (hereinafter "Restrictions & Conditions") as follows:

(1) The [Territory] shall proceed with reasonable diligence to close as a public street that portion of Kekuanaoa Street between Allen and Halekauwila Streets in the City of Honolulu and to convert the said parcel of land, together with all other real property located in the City of Honolulu bounded by Fort Street, Allen Street, Bishop Street and Halekauwila Street, and shall, within three (3) years from and after the date hereof have converted all of said land, into a public park to be designated as the "Irwin Memorial Park."

(2) The [Territory] shall, at all times hereafter, suitably maintain all of said real property as a public park under the jurisdiction and control of the Territorial Board of Harbor Commissioners, or their successors in office, and shall, at its own expense, cause the memorial hereinafter described to be properly and suitably kept up and maintained.

(3) [Mrs. Fagan] shall have the perpetual right to erect and maintain upon any portion of said public park such structure as shall be deemed by [Mrs. Fagan] to be a memorial suitable to the memory of William G. Irwin, deceased, which shall be approved by the said Board of Harbor Commissioners, or their successors in office.

(4) In the event that the [Territory] shall fail to proceed with reasonable diligence to close said street and convert all of said real property into a public park as hereinbefore provided, or if said street shall not have been closed and all of said real property shall not have been converted into a public park within three (3) years from and after the date hereof, or if all of said land shall not be suitably maintained by the [Territory] at any time hereafter as a public park, or if said public park shall at any time cease to be designated as "Irwin Memorial Park", or if at any time hereafter any portion of said land shall be abandoned as a public park, or if at any time hereafter [Mrs. Fagan] shall cease to have the right to erect and/or maintain said memorial as hereinbefore provided, or if the erection and/or maintenance thereof shall be prevented, or if said memorial shall at any time hereafter cease to be properly and suitably kept up and maintained at the sole cost and expense of the [Territory], thereupon forthwith all right, title and interest of the [Territory], and its successors and assigns, in or to said real property hereby conveyed, or any portion thereof, shall forthwith terminate, and title to all of said real property shall forthwith terminate, and title to all of said real property hereby conveyed shall forthwith immediately and without further act of either party to this agreement, their successors or assigns, revert



to [Mrs. Fagan], and her heirs and assigns, in fee simple absolute.

c. TCT No. 9857 then issued to the Territory, noting that the Territory now owned the Property, as follows:

"subject, however, to any of the encumbrances mentioned in Section 3229 of said Revised Laws of Hawaii which may be subsisting, and subject also to the reservations and conditions as set forth in that certain deed made by Helene Irwin Fagan to the Territory of Hawaii, dated November 7th, 1930, filed in the Office of the Assistant Registrar of the Land Court as Document 22917 to which reference is hereby made."

d. Governor Lawrence M. Judd thereafter issued Executive Order No. 472 on March 13, 1931, setting aside the Property "for park purposes, which shall henceforth be known as the 'IRWIN MEMORIAL PARK', to be under the Control and Management of the Board of Harbor Commissioners of the Territory of Hawaii." The Executive Order further noted:

This Executive Order is issued subject to the reservations and conditions set forth in the deed of Helen [sic] Irwin Fagan to the Territory of Hawaii, referred to above, and as contained in Certificate of Title No. 9857, and subject especially to the following:

1. THAT, there is reserved to Helene Irwin Fagan, and to her heirs and assigns forever, the perpetual right to erect upon the tract of land secondly hereinabove described, such structure as shall be deemed by her, or them, to be a memorial suitable to the memory of William G. Irwin, deceased, which memorial shall be approved by the Board of Harbor Commissioners of the Territory of Hawaii, or their successors in office, and

2. THAT all of the land hereinabove set aside, shall, and must, within three (3) years from November 7, 1930, be converted into a public park to be henceforth and forever known as the "IRWIN MEMORIAL PARK", and

3. THAT the Board of Harbor Commissioners, or their successors in office, shall, at all times, at the expense of said Board, properly maintain said "IRWIN MEMORIAL PARK" and any structure as shall be erected thereon, as above provided for, as a suitable memorial in memory of William G. Irwin, deceased.

13. In compliance with the 1930 tri-party agreement, the Indenture, and Executive Order No. 472, the Property was set aside and converted into a public park; the park was named Irwin Memorial Park; a memorial to William G. Irwin was erected on the Property; and the Territory through its Board of Harbor Commissioners maintained said park and memorial.

14. Executive Order No. 472 remains in full force and effect, and has never been set aside, modified, rescinded, nullified, or revoked.

15. In 1939, the Territory sought Mrs. Fagan's ratification of and consent to the imposition of certain fees on the parking of vehicles in the park. The Territory and Mrs. Fagan entered into a Supplemental Agreement to so ratify and consent, which agreement noted that "the intention at the time of execution of said agreement [the 1930 tri-party agreement] and said indenture [the 1930 deed from Fagan to the Territory, subject to conditions and restrictions] was, among other things, to permit the parking of vehicles of whatsoever nature, whether with or without the payment of a fee or fees . . . on that portion of said park now set aside for the parking of vehicles . . . ."

16. The aforesaid Supplemental Agreement was executed before notaries public by Mrs. Fagan and Governor Poindexter in the Territory of Hawaii in 1939. The document was delivered to the Territory in 1939, and the Territory and the State of

Hawai'i have imposed parking fees on vehicles parked in Irwin Park.

17. On January 16, 1986, the Supplemental Agreement of 1939 was filed for the first time in the Office of the Assistant Registrar of the Land Court as Document No. 1346597.

18. On that same day, January 16, 1986, the Office of the Assistant Registrar of the Land Court issued Land Court Certificate of Title ("LCCT") No. 310,513 to the State of Hawai'i. The LCCT listed as an encumbrance Document No. 22917, being the deed from Mrs. Fagan to the Territory with its "Restrictions & Conditions;" Document No. 23706, being Executive Order No. 472, "setting aside the within premises for 'Irwin Memorial Park'; " and Document No. 1346597, the Supplemental Agreement of 1939.

19. On or about September 29, 1993, Petitioner ATDC entered into a Ground Lease with the STATE as lessor and ATDC as lessee. The Property is included as a part and parcel of the demised premises. The Ground Lease is not recorded, nor is it filed in the Office of the Assistant Registrar of the Land Court.

20. On or about September 30, 1993, a short form of the aforesaid Ground Lease was recorded in the Bureau of Conveyances of the State of Hawai'i as Document No. 93-161407, and in the Office of the Assistant Registrar of the Land Court on April 19, 2001, as Document No. 2698340. On that same day, a Confirmation of Aloha Tower Ground Lease was recorded in the Bureau of Conveyances as Document No. 2001-056923, and in the Office of the Assistant Registrar of the Land Court as Document No. 2698341.

**Circumstances of the Alleged Waiver**

21. Sometime prior to 1951, the Territory, through its Department of Public Works, developed plans to improve, construct and widen Nimitz Highway. The plans entailed encroachment upon a portion of Irwin Park (24,303 square feet).

22. The Territory approached Mrs. Fagan to request her consent to the construction, and waiver of all of the Restrictions & Conditions because of the encroachment. By a letter dated August 7, 1951, the Territory, through R.M. Belt, the then Superintendent of Public Works, offered to work out an arrangement whereby the Territory could build a suitable memorial at Irwin Park in memory of William G. Irwin or provide

funds for the construction of such a memorial or pay Mrs. Fagan a suitable amount in return for her release of the Restrictions and Conditions.

23. Thereafter, in a letter dated January 25, 1952, Wilford D. Godbold, a Special Deputy Attorney General with the Territory's Department of Public Works, sent a letter to the Irwin Estate for Mrs. Fagan regarding the proposed construction of Nimitz Highway. The letter reads in pertinent part as follows, and the Court emphasizes, in boldface and/or underscoring, the language which it finds particularly relevant:

In connection with the above referred to matter [noting the file for construction of the Halekauwila-Ala Moana section of Nimitz Highway] an opinion has been received from the Territorial Attorney General and an appraisal has been obtained from the Territorial Board of Appraisers whereby **an exchange** has been held proper in connection with Mrs. Helene Irwin Fagan's **reversionary interest** in a portion of Irwin Memorial Park. **The Territorial land which can be exchanged for such interest** is of course **limited to the value of \$5,000.00.** Pursuant to your request, **an appraisal is now being made of the Hana Airport land** by the Territorial Board of Appraisers.

It is essential, however, that the contract for the proposed construction of this Halekauwila Section of the Makai Arterial be awarded immediately. It is therefore requested that you confirm, on the enclosed copy of this letter, your previous statement that Mrs. Fagan **would** waive all of the reversionary provisions contained in that deed dated November 7, 1930 and recorded in Registration Book 99, Page 229,

in the Bureau of Conveyances at Honolulu. The necessary instruments to formalize this waiver and proposed exchange will be prepared as soon as possible. You will be informed immediately upon receipt of the **appraisal of the Maui land.**

24. On January 31, 1952, Mrs. Fagan responded to the Godbold request by signing a copy of his letter with the following insertion over her signature:

Waiver is hereby made of any and all damages resulting from a breach of the conditions contained in that certain deed above referred to. It is **hereby agreed** that the **restrictive conditions** contained in such deed will be withdrawn and cancelled.

This inserted language constitutes an agreement to agree (to exchange a waiver for Hana land), not the waiver itself.

25. Mrs. Fagan did not intentionally relinquish in favor of the Territory her reversionary interests in the Property by her January 31, 1952 inserted language. Therefore, she did not waive her reversionary rights.

26. Mrs. Fagan did not have any then present donative intent to gift to the Territory her reversionary interest in the Property. Her January 31, 1952 inserted language expressed an *in futuro*, value for value exchange. Moreover, she did not actually deliver, nor did the Territory accept a gift of Mrs. Fagan's reversionary interest in the Property. Mr. Godbold

clearly stated in his January 25, 1952 letter that the instruments to formalize the waiver "will be prepared as soon as possible." Those instruments were never prepared. Therefore, Mrs. Fagan did not gift her reversionary interest in the Property to the Territory.

27. The record shows that the Hana Airport land was subsequently appraised at well over \$5000.00. In a Memorandum dated April 24, 1952 to Norman D. Godbold (Commissioner of Public Lands), Wilford Godbold noted that the governor had requested a report on the proposed exchange of Hana Airport land for Mrs. Fagan's reversionary interest. There is no further communication or other documentation in the record regarding the proposed exchange.

28. Nimitz Highway was constructed, and the construction encroached upon a portion of Irwin Park. However, the proposed exchange of Hana land never occurred. The Territory never provided Mrs. Fagan with any instruments, drafts, confirmations, or other form of legal documents sufficient to memorialize or formalize the proposed value for value exchange of the waiver for the Hana Airport land. No documents were recorded or registered in the Office of the



Assistant Registrar of the Land Court whereby Mrs. Fagan ratified and consented to the encroachment as she had previously ratified and consented to the parking fees in the park. No such ratification or consent prepared for the signature of Mrs. Fagan and the Governor of the Territory has been found anywhere, much less filed with the Office of the Assistant Registrar of the Land Court. The agreement into which Mrs. Fagan agreed to enter, set forth in the January 31, 1952 language inserted by Mrs. Fagan in her response to attorney Godbold's January 25, 1952 letter, was never consummated.

29. On May 30, 1966, Mrs. Fagan died in the State of California. Respondents OLDS and BOGART are her natural heirs. Respondent FOUNDATION is named in Mrs. Fagan's will as the principal beneficiary of her residuary estate.

30. Up to the filing of this Petition on May 15, 2001, the STATE and ATDC treated the Restrictions & Conditions as valid and subsisting. For example:

a. In a memorandum to Governor Burns dated May 14, 1969, Fujio Matsuda, the then director of the State Department of Transportation which succeeded to the Territorial Department of Public Works, discussed an agreement that had been

drafted prior to Mrs. Fagan's death which would have removed any cloud on title resulting from an improvement of the parking lot for Piers 8, 9, 10, and 11. Dr. Matsuda noted that "because the [agreement] was not executed, the **reversionary clause is still in effect** and it is possible legally that Mrs. Fagan's heirs may reclaim this property for breach of agreement."

b. In 1981, the Legislature of the State of Hawai'i enacted Chapter 206J of the Hawai'i Revised Statutes ("H.R.S.") which created Petitioner ATDC. H.R.S. § 206J-6 specifically provides that "Irwin Memorial Park shall be retained as a public park subject to the reservations and conditions set forth in the deed of Helene Irwin Fagan to the Territory of Hawaii."

c. In the 1998-99 session of the Legislature, Petitioner ATDC acknowledged the existence of the Restrictions and Conditions by drafting and supporting bills to acquire or condemn them. The bills were introduced in the Legislature as part of Governor Benjamin Cayetano's legislative package. The provisions as to the Restrictions & Conditions did not pass.

d. On August 30, 1999, representatives of Petitioner ATDC, the Office of the Governor, the Department of

Business Economic Development & Tourism, and Aloha Tower L. P. (the entity which operates the Aloha Tower Marketplace, now in bankruptcy) invited Respondents Olds and Bogart to meet with them in Hawai'i to discuss a "Revitalization Project" for Irwin Memorial Park that entailed, *inter alia*, the construction of a parking garage on the Property. Respondents Olds and Bogart were asked to consent to the development of the project. They did not reject the proposal out of hand, but did not consent.

31. In October 1999, Respondents SCENIC HAWAI'I and HISTORIC HAWAI'I FOUNDATION filed an application to place Irwin Park on the Hawai'i Register of Historic Places. Following a public hearing, the Hawaii Historic Places Review Board voted unanimously to enter Irwin Park on the Hawaii Register of Historic Places.

32. At or around this period of time, Petitioner solicited the assistance of a person or persons in the Harbors Division, Department of Transportation, to locate a document or documents in the files and records of the STATE which would tend to show that Mrs. Fagan waived her registered interest in the Property in or after 1952.

33. On December 22, 1999, Petitioner formally requested the assistance of the Harbors Administrator in locating said document(s).

34. Pursuant thereto, Petitioner caused a search to be made of all pertinent State files and records relating to the Property including, without limitation, the files and records of the Highways Division (the present custodian of documents of the original files of the Territorial Department of Public Works) and the Harbors Division of the Department of Transportation (the successor to the Territory's Board of Harbor Commissioners), the DLNR (custodian of records for all public lands held by the State), and the State Archives.

35. The original of the copy of the January 25, 1952 letter from Wilford Godbold bearing Mrs. Fagan's signature dated January 31, 1952 was found in the records of the Right-of-Way Branch of the Department of Transportation Highways Division.

36. The search yielded no other writing signed by Mrs. Fagan regarding "documents to formalize the transaction." No documents have been found by which the Governor of the Territory agreed or consented to any waiver of the Restrictions & Conditions except for the Supplemental Agreement of 1939.

37. To the extent that any of these findings of fact may be construed as conclusions of law, they shall be operative as such.

#### CONCLUSIONS OF LAW

Based upon these findings of fact, the Court makes the following conclusions of law.

1. Petitioner ATDC brings the Petition herein pursuant to H.R.S. § 501-196. This Court has subject matter jurisdiction over ATDC's Petition herein pursuant to said statutory section and over the Property at issue; to wit: Irwin Park. All parties have been duly served with the Petition and joined. Therefore, the Court also has personal jurisdiction over all parties herein.

2. This Court interprets Section 501-196 to permit modification and/or amendment of certificates of title as prayed for by the Petition.

3. This Court finds and concludes from the evidence that the copy of the January 25, 1952 letter by Wilford D. Godbold is authentic and that Mrs. Fagan's signature on said copy is genuine.

4. This Court also finds and concludes from the evidence that Wilford D. Godbold was authorized to negotiate on behalf of the Territory regarding Mrs. Fagan's reversionary interest in the Property.

5. Petitioner ATDC alleges that the registered Restrictions and Conditions must be expunged from title to the Property, because Mrs. Fagan relinquished her reversionary interest in the Property in 1952, either by waiver or gift. Petitioner's third theory, estoppel, was dismissed by the Court on motion.

ATDC argues that Mrs. Fagan either waived her reversionary interest through the language Mrs. Fagan inserted on January 31, 1952, into the copy of the January 25, 1952 letter of Wilford Godbold or that Mrs. Fagan made a gift of her reversionary interest to the Territory through said letter.

6. As to ATDC's theory of waiver, a waiver is the intentional relinquishment of a known right or such conduct as warrants an inference of such surrender. Thus, in order to establish a waiver, ATDC must prove that Mrs. Fagan intended to surrender her reversionary interest in the Property and that Mrs. Fagan actually surrendered such interest.

7. At most, Mrs. Fagan's inserted language of January 31, 1952 expressed her willingness to relinquish her reversionary interest in the Property *in futuro* in return for the Territory's transfer of the Hana Airport land to her. This *in futuro* relinquishment never did materialize; to wit: The transfer of the Hana Airport land from the Territory to Mrs. Fagan was a condition precedent to any relinquishment of her reversionary interest in the Property.

8. Mrs. Fagan did not intended to surrender her reversionary interest in the Property to the Territory until they consummated an agreement to exchange her reversionary interest for the Hana Airport land. Neither the value for value exchange nor the execution of an appropriate instrument formalizing the exchange ever did occur. Therefore, Mrs. Fagan did not actually surrender her reversionary interest in the Property. Therefore, this Court finds and concludes that Mrs. Fagan did not relinquish her reversionary interest in the Property and, consequently, did not waive such interest.

9. As to Petitioner ATDC's gift theory, in order to establish a gift, Petitioner ATDC must prove donative intent, delivery, and acceptance. As discussed above, the evidence

establishes that Mrs. Fagan agreed on January 31, 1952, to enter, *in futuro*, into an agreement to relinquish her reversionary interest in the Property in exchange for her value for value acquisition of the Hana Airport land. Since this value for value exchange never occurred, this Court finds and concludes that the requirements of donative intent, delivery, or acceptance have not been proven. Therefore, Mrs. Fagan's January 31, 1952 inserted language does not constitute a gift of her reversionary interest in the Property to the Territory.

10. For the foregoing reasons, this Court finds and concludes that the Restrictions & Conditions contained in the Indenture from Helene Irwin Fagan to the Territory of Hawaii dated November 7, 1930 and filed as Document No. 22917 in the Office of the Assistant Registrar of the Land Court on November 21, 1930 as well as in Executive Order No. 472 issued on March 13, 1931 and referred to in TCT No. 9857 are still valid and remain in full force and effect. The Territory did not acquire any interest in Mrs. Fagan's reversionary interest in the Property.

11. ATDC is not entitled to any relief pursuant to its Petition filed herein. The subject deed restriction shall



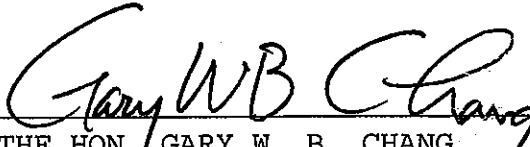
not be expunged from Land Court Certificate of Title No. 310,513. The Property is, and remains, subject to the restriction that it be used as a public park to beautify the entrance to Honolulu Harbor.

12. To the extent that any of these conclusions of law include or can be construed to be findings of fact, those conclusions shall operate as such.

**ORDER**

Based on the foregoing Findings of Fact and Conclusions of Law, the Petition filed herein on May 15, 2001 is denied with prejudice. To the extent that recovery of attorney's fees and costs may be awardable under law, Respondents may have 30 days (or such other time period as may be ordered by the Court) from the date these Findings of Fact and Conclusions of Law are filed herein, within which to file a motion for attorney's fees and costs. Final judgment in favor of Respondents and against Petitioner shall enter upon disposition of any motions, if any there be, in accordance with these Findings of Fact and Conclusions of Law, and Order.

DATED: Honolulu, Hawaii, NOV - 3 2008

  
\_\_\_\_\_  
THE HON. GARY W. B. CHANG  
JUDGE OF THE ABOVE-ENTITLED COURT

---

In the Matter of the Application  
of Honolulu Construction & Draying  
Company, Ltd.,

Application No. 787

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER

---