

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU
Court-Appointed Mediator CLYDE Wm. MATSUI'S Ex-Parte Motion to
Unseal Transcript of January 12, 2006, having come before this Court and the Court
having reviewed the motion, declaration, records and files herein, and good cause
appearing therefor,

IT IS HEREBY ORDERED that Court-Appointed Mediator CLYDE Wm.
MATSUI's Ex-Parte Motion to Unseal Transcript of January 12, 2006, be and hereby is
GRANTED. The transcript of January 12, 2006, in the above-entitled action shall be
unsealed and shall no longer be subject to being sealed.

DATED at Honolulu, Hawaii, JAN 13 2006

Gary Won Bae Chang

Judge of the Above-Entitled Court



1st Circuit Clerk's
STATE OF HAWAII
FILED

Of Counsel:
MATSUI CHUNG SUMIDA & TSUCHIYAMA
A Law Corporation

2006 JAN 13 PM 4: 23

CLYDE WM. MATSUI 1329-0
Suite 1400 Mauka Tower
737 Bishop Street
Honolulu, Hawaii 96813
Telephone No. 536-3711

B. TERAGA
CLERK

Court-Appointed Mediator

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU, a
municipal corporation,

Plaintiff,

vs.

ATTRACTIONS HAWAII; et al.,

Defendants.

CIVIL NO. 01-1-03622-12 (GWBC)
(Condemnation)

THE COURT-APPOINTED MEDIATOR'S
CLOSING REPORT TO THE
HONORABLE GARY W.B. CHANG,
PRESIDING JUDGE

THE COURT-APPOINTED MEDIATOR'S CLOSING REPORT TO THE
HONORABLE GARY W.B. CHANG, PRESIDING JUDGE

Introduction:

As the Court is aware, in the mediation of a normal case, I have never found need or reason to report on the meditative process nor to comment on the manner in which settlement was achieved. Indeed, the usual case often requires that such information be protected.

However, this condemnation case is entirely unique, in that a great portion of settlement funding comes from very well-intending organizations, all of whom are *not* party-litigants. Their participation in the process was strictly voluntary,

and their individual and collective commitments to funding were indeed substantial.

Background and Mediation History:

Under the guidance of the Court, mediation was intermittently engaged several times over the past years. Most were attempted because the City was incapable of funding amounts beyond the \$5.1 million deposit already deposited with the Court, and mediation sessions were only initiated when land exchange opportunities presented themselves. There became available at least four varying parcels suitable for exchange. None proved adequate or desirable to the landowner.

The Involvement of Interested Organizations:

The success of this last attempt finds its genesis in a well-attended and widely-publicized City Council hearing, which occurred on December 7, 2005. What was supposed to be Council's approval of a settlement, which included retained development rights to the landowner, turned into a consistent and determined public rejection of any further development of Waimea Valley, however slight or seemingly insignificant. Frequent references were made to the valley as being "sacred" and "a treasure."

At the hearing and in conjunction therewith, it was disclosed that certain organizations desired to champion the cause clearly stated – that being to save the valley from any further development, and, instead, to secure it in its present state in perpetuity – and representations were made that these organizations possessed funds available to attempt to purchase the property. Immediately

after the hearing, certain organizations were invited into the mediation process.

These were:

- 1) United States Army Garrison Hawaii ("Army"): represented by Colonel Howard J. Killian, Commander and Joel Godfrey, Chief, Environmental Division
- 2) The Trust For Public Lands ("TPL"): represented by Joshua Stanbro, its Project Manager
- 3) The Office of Hawaiian Affairs ("OHA"): represented by Clyde Namuo, its Administrator, and Trustee Hauani Apoliona, Chairperson
- 4) The State of Hawaii Department of Land and Natural Resources ("DLNR"): represented by Peter Young, Director, and
- 5) The National Audubon Society ("Audubon"): represented by John Flicker, President and Ken Kupchak, Counsel

After intense and necessarily hurried negotiations, all of the organizations listed above were asked to contribute varying sums to the settlement fund. It was remarkable to see how swiftly all members of the group responded with solid and unwavering commitments, especially since all of them work either through a chain of command or board.

At this point, I would be entirely remiss were I not to advise the Court that all of the organization were so well and commendably represented by the individuals listed above. Each possessed a sincere sense of urgency in a cooperative and determined effort to "save the valley." It was indeed a pleasure to work with each and all of them.

Settlement Commitments:

From the outset, all of the representatives were told that, although the focus of our effort was to commit sufficient funding to settle the lawsuit, we should not be driven by either "what the other side wants" or, restated, "what will

it take to get rid of this thing.” Rather, the effort was to determine – independent of demand – what a reasonable price would be to secure the valley in its present state. All of this, of course, in light of the liability and damages issues presented by the case, which we discussed at great length.

Guided by the two appraisal reports that would become evidence at trial, and after considering the manner in which the court and jury would likely assess the evidentiary base as a whole, and after much further deliberation, it was determined that \$12 Million would be well within a range of a fair sum to pay, or at least offer, under all known circumstances.

As previously mentioned, already on deposit with the Court was the sum of \$5.1 million, as an advance paid by the City. In order to derive \$12 million, then, an additional \$6.9 million would be required. The commitments to pay were then as follows:

1) Department of the Army	\$1.5 million*
2) OHA	\$2.9 million
3) DLNR	\$1.5 million
4) Audubon	<u>\$1.0 million</u> ***
TOTAL	\$6.9 million

(*While the Army and TPL were participants, it should be made clear that all funding is derived from the Department of the Army.)

(***All of the entities committed that funds were available to be paid, except for Audubon, which advised that funds might have to be derived in the future. Because of its close working relationship with OHA, OHA indicated that it would consider advancing the funding for Audubon, then work repayment out between them, separate and apart from the mediation process.)

Negotiations With The Landowner:

Next came negotiations with the landowner, Attractions Hawaii ("Attractions"), and its principal, Christian Wolfer. Both were ably represented by Bill McCorrison and Darolyn Lendio.

Also participating – but at all times kept separate from the other side – were the City's outside litigation counsel, Mervyn Kotake and Deputy Corporation Counsel Donna Woo. While Mr. Kotake represented the entirety of the City's interests, Ms. Woo functioned mainly as a liaison for Mayor Mufi Hannemann.

It should be noted that Mr. Kotake was of invaluable assistance to the mediation process, primarily because of his superior knowledge of the facts and issues presented in the lawsuit. Also, Ms. Woo's participation was essential, because it was made known to the court-appointed mediator that the landowner desired to deal with the Mayor as the chief contact for the City, and the Mayor had expressed a desire to be fully apprised of developments as the mediation progressed.

After intense negotiations, mostly with Mr. McCorrison – although Mr. Wolfer was afforded ample opportunity to be heard – there came the usual exchange of settlement numbers.

Late in the process, the \$12 million was finally offered, which was summarily rejected in due course. Since that sum represented the whole amount available to the court-appointed mediator, it appeared that the process was destined to derive no settlement.

Indeed, it was during the process of advising all interested parties of this unfortunate outcome that Ms. Woo advised that she had reported developments to the Mayor, who expressed a desire that the mediation not end, and that he wished to participate in the mediation process. Thus, the Mayor then became involved in the negotiations. (Incidentally, this came at a most opportune time since the landowner's side requested that the Mayor be actively involved in the process.)

During discussions with Mr. McCorriston and the court-appointed mediator, the Mayor expressed his strong feeling that the case should be settled and that further concern for the City's potential liability be obviated. Further, the Mayor disclosed to the court-appointed mediator that he had secured a further commitment from the Army/TPL to commit to an additional \$2 million toward the settlement fund.

Thereupon, after further negotiation, the case settled for \$14 million.

It goes without saying that a special expression of appreciation should be directed to the Department of the Army for its further commitment to the cause. As the Court noted in the proceeding of January 13, 2006, the fact that the non-litigant entities would come forward, take responsibility, and unfailingly execute the mission of saving Waimea Valley is indeed extraordinary. And it is clear that this mission would never have obtained without the willingness of the Army to truly go above and beyond the call.

As a final matter, on the morning of January 12, just before the settlement was to be placed on the record, there was the residual matter of a potential

shortfall of funds, occasioned by the fact that \$100,000 of the \$5 million had been reserved to cover the claims of *kuleana* claimants and other intervenors, both extant and future. After brief and hurried discussions, DLNR – acting through its Director, Peter Young – agreed that it would increase its commitment by the needed sum, raising its participation to \$1.6 million.

A final note on valuation is that the court-appointed mediator agrees with the Court that the settlement sum of \$14 million is eminently reasonable and is certainly in the best interest of not only the parties, but also that of the public-at-large.

Real Property Interests to be Created By the Settlement:

By agreement of the parties, and with the blessing of the interested contributors toward settlement, title to the property will lodge with OHA. This removes for the City the costs and expenses usually associated with fee ownership of real property, chief among which are the necessary and expensive ones of insuring and maintaining the property.

In exchange, the City, and all other entities involved in this process, will secure, for themselves and for the general public, a far more lavish real property interest. OHA, in exchange for title, will convey an expansive conservation and public access easement, such as would not only preserve the valley in its present state, but would also permit reasonable access to all who desire to experience the splendor of it.

The settlement agreement will also contain one or more negative covenants, which will run with the land, to insure that no future development of

the valley will be permitted, and that it will remain as it is for all future generations, forever.

The Court-Appointed Mediator's Requests to the Court:

It should be obvious to the Court that this report was prepared to call to the attention of this governing tribunal the extraordinary effort, commitment and compassion of the contributing parties. If the Court will permit, I ask that this be officially filed to document within the very docket of this case these deeds of unheralded caring and concern.

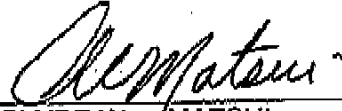
However, there is one more factor which has caused your court-appointed mediator to recount the events of mediation to you. This has to do with the Court's closing comments during the placing of this case's settlement upon the record.

In concise fashion, the Court seems to have eloquently stated the higher value derived from this case, and the resolution of it, than the mere avoidance of litigation and potential of liability. I am sure that all who were fortunate enough to be in the courtroom were as moved as I was, not only by your wisdom in assessing the situation, but by your candid expression of your heartfelt gratitude for the achievement of a loftier goal. As you referred to it, it is the perpetuation of the life of the land through righteousness.

So that it can be shared by others, I respectfully request that the transcript of that proceeding be unsealed upon my planned and agreed upon announcement of the fact of settlement. Toward that end, I will be filing with this court, forthwith, an *ex parte* motion to that effect.

Respectfully submitted,

DATED: HONOLULU, HAWAII, January 13, 2006.



CLYDE Wm. MATSUI
COURT-APPOINTED MEDIATOR

City and County of Honolulu, a municipal corporation vs. Attractions Hawaii, et al.; Civil No. 01-1-03622-12 (GWBC); The Court-Appointed Mediator's Closing Report to the Honorable Gary W.B. Chang, Presiding Judge.