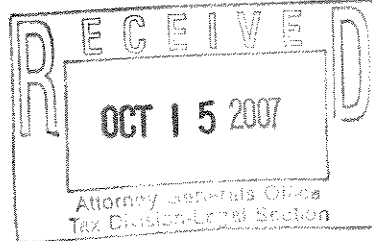


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FIRST CIRCUIT COURT  
STATE OF HAWAII  
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Gary H. Okino, and Rod Tam, in  
their capacities as the Trustees  
of the Kapiolani Park Trust

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

In the Matter of the

KAPIOLANI PARK TRUST

) T. NO. 03-1-0018  
) (Trust)

) PETITIONERS' RESPONSE TO THE  
) ATTORNEY GENERAL'S  
) SUPPLEMENTAL RESPONSE FILED ON  
) APRIL 27, 2006 TO PETITION FOR  
) INSTRUCTIONS REGARDING ART  
) FENCE AND CRAFT FAIRS AT  
) KAPIOLANI PARK FILED FEBRUARY 25,  
) 2003; CERTIFICATE OF SERVICE

) HEARING DATE:

) Date: December 14, 2007

) Time: 10:00 a.m.

) Judge: Honorable Colleen K. Hirai

PETITIONERS' RESPONSE TO THE ATTORNEY GENERAL'S  
SUPPLEMENTAL RESPONSE FILED ON APRIL 27, 2006 TO  
PETITION FOR INSTRUCTIONS REGARDING THE ART FENCE AND  
CRAFT FAIRS AT KAPIOLANI PARK FILED FEBRUARY 25, 2003

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COME NOW Petitioners TODD K. APO, ROMY M. CACHOLA, DONOVAN M. DELA CRUZ, CHARLES K. DJOU, NESTOR R. GARCIA, ANN H. KOBAYASHI, BARBARA MARSHALL, GARY H. OKINO, and ROD TAM, in their capacities as the TRUSTEES OF THE KAPIOLANI PARK TRUST (hereinafter collectively referred to as the "Petitioners" or "Trustees"), by and through their attorneys, CARRIE K. S. OKINAGA, Corporation Counsel, and LORI K. K. SUNAKODA, Deputy Corporation Counsel, and pursuant to Probate Rule 10(c), hereby submit their Response to the Supplemental Response filed on April 27, 2006 by Respondent MARK J. BENNETT, Attorney General, State of Hawaii, representing the interests of the public as *parens patriae* (hereinafter "the Attorney General") to the Petition for Instructions Regarding Art Fence and Craft Fairs at Kapiolani Park filed by Petitioners on February 25, 2003.

**I. THE FEBRUARY 23, 2003 PETITION FOR INSTRUCTIONS FILED BY THE TRUSTEES CURRENTLY PENDING BEFORE THIS COURT CLEARLY IDENTIFIES THE SPECIFIC ISSUES RELATING TO THE EXISTING CONTROVERSY, THEREBY PRECLUDING THE INTRODUCTION OF ANY ADDITIONAL ISSUES, ALLEGATIONS, AND/OR ARGUMENTS WHICH ARE NOT EMBODIED IN SAID PETITION FOR INSTRUCTIONS**

As a preliminary matter, Petitioners note that the Attorney General's Supplemental Response attempts to introduce additional issues, allegations and/or arguments which are not embodied in the underlying subject February 25, 2003 Petition for Instructions filed by the

Trustees. Specifically,<sup>1</sup> the Attorney General's Supplemental Response contains a section entitled "Role of the Trustees," in which the Attorney General refers to the 1991 Circuit Court Ruling (which appointed the members of the City Council as the Successor Trustees of the Kapiolani Park and provided that the "day-to-day operations, maintenance and running of Kapiolani Park, including the Trust lands, shall remain with the executive branch of the City") and alleges that "[t]he roles of the City Council and the executive branch of the City, however, still appear confused." The Attorney General goes on further to question the appropriateness of the respective actions and roles of the Trustees and Intervenor-Respondent Department of Parks and Recreation and asks this Court "to clarify the role of the Trustees and the executive branch of the City, respectively." (Supplemental Response at pp. 134-37). With respect to the foregoing, the Trustees object on the grounds that such issues, allegations and/or arguments including the relief sought by the Attorney General essentially amounts to a Motion to Clarify and/or Amend the Circuit Court's prior 1991 Order (S.P. No. 89-0015, City and County of Honolulu v. Warren Price III and Kapiolani Park Preservation Society, Amended Findings of Fact and Conclusions of Law and Decision and Order, filed June 28, 1991) (hereafter referred to as "1991 Circuit Court Ruling") in which the State Attorney General, as *parens patriae*, was a

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<sup>1</sup>Petitioner notes that other additional issues, allegations and/or argument(s) which are not embodied in the underlying subject February 25, 2003 Petition for Instructions filed by the Trustees, include for example: (1) the Attorney General's contention that "[t]he [c]urrent [p]ractice of the [s]ale of [a]rts and [c]rafts at Kapiolani Park [m]ay [v]iolate [e]ven the *City Rules*." (Supplemental Response at p. 119) (emphasis added); (2) the Attorney General's allegations regarding the future "Swap Meet at the Waikiki Shell" (Id. at p. 131); (3) the Attorney General's allegation that "art/craft booths for Sunset on the Beach" were allowed on Trust property via a City permit (Supplemental Response at p. 130); and (4) the Attorney General's allegation that the City "issue[d] permits for reserve parking stalls at Kapiolani Park for . . . Sunset on the Beach events." (Id. at p. 66).

party), which is clearly beyond the scope of the Petition for Instructions<sup>2</sup> and not properly before this Court. 90A C.J.S. Trusts § 352 (2007) (*citing, Fowler v. Hancock*, 89 N.H. 301, 197 A. 715 (1938) (court declined to issue instructions regarding a question which was neither included in the petition for instructions nor properly raised)); 90 C.J.S. Trusts § 358 (“The court, in instructing a trustee, generally can lay down only such rules as are within the scope of the questions propounded, and will not determine issues not raised by the pleadings.”) In particular, the Attorney General’s allegation that the Trustees may have breached their fiduciary duty and the Attorney General’s request that the Court “correct any deviation of the Trust as appropriate” is clearly outside the scope of the pleadings and the specific issue embodied in the Trustees’ Petition for Instructions. Additionally, the relief requested by the Attorney General, requesting in part that “the Court correct any deviation of the Trust as appropriate,” is similarly beyond the scope of the Petition for Instructions and should be precluded.

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<sup>2</sup>Subsection (c) of Rule 126 of the Hawaii Probate Rules governing the content of Petitions for Instructions filed in Trust proceedings, provides:

(c) *Instructions.* A trustee or other interested person seeking an interpretation of a trust instrument or instructions regarding the administration of the trust may file a petition, setting forth the name of the settlor of the trust, the date the trust was created, the nature and value of the trust assets, the name and address of the trustee, the names and addresses of the current beneficiaries, the names and addresses of any contingent or remainder beneficiaries whose rights may be affected by the issue raised in the petition, the trust provisions applicable to the issues raised in the petition, and **a description of the specific issues for which instructions are sought**. The court may appoint a guardian *ad litem* to represent the interests of unborn, unascertained, or minor beneficiaries. The petitioner shall serve notice of the date, time, and place of the hearing on all interested persons.

(Emphasis added).

**II. ASSUMING, ARGUENDO, THAT THE ATTORNEY GENERAL IS NOT PRECLUDED FROM INTRODUCING ADDITIONAL ALLEGATIONS, ISSUES AND/OR ARGUMENTS NOT EMBODIED IN THE PETITION FOR INSTRUCTIONS, PETITIONERS SUBMIT THAT THE ATTORNEY GENERAL'S CONTENTION THAT THE TRUSTEES DO NOT APPEAR TO HAVE CONSIDERED "CONCERNS" AND "PERCEPTIONS" REGARDING COMMERCIAL ACTIVITIES AT KAPIOLANI PARK, AND THEREFORE, MAY HAVE VIOLATED THEIR FIDUCIARY DUTY TO PROTECT THE PARK GROUNDS AND THEREBY COMMITTED A BREACH OF THE TRUST, IS OFFENSIVE AS WELL AS FACTUALLY AND LEGALLY INACCURATE**

The "concerns" referred to by the Attorney General are based on allegations and complaints primarily expressed by one non-profit organization (Kapiolani Park Preservation Society or "KPPS"). It should be noted that the concerns expressed by KPPS, including for example: (1) the number of available parking stalls at Kapiolani Park; (2) the condition of the grassy areas in Kapiolani Park and the type of grass species found in certain portions of the grassy areas of Kapiolani Park; the frequency and number of commercial activities occurring in Kapiolani Park; (3) the condition of Kapiolani Park immediately following an event or commercial activity, etc. (see Supplemental Response at pp. 67 and 69-70), constitute daily park management responsibilities ("day-to-day operations, maintenance and running of Kapiolani Park") which, pursuant to the 1991 Circuit Court Ruling, were committed to the City's Department of Parks and Recreation. Accordingly, the foregoing allegations and concerns expressed by KPPS involve park management matters which are not relevant to the legal determination of whether the Art Fence and Craft Fair activities violate the terms of the Trust and therefore constitute a breach of the Trust.

**A. It is a Well-Established Principle that Trustees May Petition the Court for Instructions Regarding the Administration of the Trust.**

The Hawaii Supreme Court has recognized that trustees of a charitable trust are entitled to seek instructions from the court:

The trustees are entitled to instructions as to the proper construction of the trust instrument, as to the validity of the trust, and as to the extent of their powers and duties. The purpose of the giving of instructions by the court is to enable the trustees properly to discharge their duties under the trust and to protect them in the discharge of these duties.

Takabuki v. Ching, 67 Haw. 515, 527, 695 P.2d 319, 327 (citing, Midkiff v. Kobayashi, 54 Haw. 299, 302, 507 P.2d 724, 728 (1973); Bishop v. Kemp, 35 Haw. 1, 2 (1939); 4 Scott, *The Law of Trusts*, § 394 (3d ed. 1967) (footnotes omitted)); see also, 90A C.J.S. Trusts § 348 (footnotes omitted) (“Unless the trust is created by a statute and imposes specific duties, it is permissible for the trustee, when in doubt as to the extent of his or her powers or as to the proper manner in which to proceed, to apply to a court of equity for instructions concerning the administration and execution of the trust; and the court will give such instructions”).

**B. In the Instant Case, the Trustees Took Appropriate and Reasonable Action by Properly Petitioning the Court *Precisely for the Purpose* of Seeking the Court’s Guidance and Clarification Regarding the Art Fence and Craft Fair Activities.**

It is well-settled that trustees may petition the “appropriate court for instructions regarding the administration or distribution of the trust if there is reasonable doubt about the powers or duties of the trusteeship or about the proper interpretation of the trust provisions.” Rest. 3d Trusts § 71 (2007); Steiner v. Hawaiian Trust Co., 47 Haw. 548, 393 P.2d 96 (1964) (citing, In Estate of James Campbell, 38 Haw. 573 (Haw. Terr. 1950)) (“... trustee was entitled to apply to the courts for instructions as to the administration of the trust if he is in reasonable doubt as to his duties or powers as trustee”); see Bogert and Bogert, *The Law of Trusts and Trustees* §553 (3d ed. 2000) (“when there is reasonable doubt (i.e., due to an ambiguous meaning of the trust instrument or uncertainty as to the proper application of the law to the facts), the trustee may obtain protection and insulation from liability by applying for instructions from the court before taking any action); see also, 90A C.J.S. Trusts § 348 (footnotes omitted) (“... it is

permissible for the trustee, when in doubt as to the extent of his or her powers or as to the proper manner in which to proceed, to apply to a court of equity for instructions concerning the administration and execution of the trust; and the court will give such instructions”). See Bogert and Bogert, *The Law of Trusts and Trustees* § 553 (3d ed. 2000) (“[w]hen there is reasonable doubt (i.e., due to an ambiguous meaning of the trust instrument or uncertainty as to the proper application of the law to the facts), the trustee may obtain protection and insulation from liability by applying for instructions from the court before taking any action”).

The inherent authority of courts (having jurisdiction over trusts) to issue instructions arising from the courts’ equitable powers has been long recognized. Rest. 3d Trusts § 71, comment a (2007). Further, the rationale underlying a trustee’s right to seek instructions from the court is preventive in nature. In order to avoid breaches of the trust or violations of a duty and the undue risk of liability that may arise from such breaches and/or violations, a trustee may seek judicial guidance and petition the appropriate court for instructions when reasonable doubt exists in matters concerning the nature or extent of the trustee’s powers and duties under the terms of the trust or the applicable law. Id.

In the instant case, based on the Trustees’ understanding that an actual controversy had arisen<sup>3</sup> concerning whether the sale of artwork at the Honolulu Zoo Art Fence and the sale of crafts by qualifying nonprofit organizations (including the sale of crafts by qualifying nonprofit

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<sup>3</sup>Petitioners note that the Attorney General does not dispute the existence of a controversy and uncertainty regarding the Art Fence and Craft Fair activities:

“[F]or each of these arguments [regarding whether the sale of art and crafts are permitted under the Trust], a counterargument may be made. There does not appear to be a clear and definite answer.”

See Supplemental Response at p. 3.

organizations in conjunction with cultural festivals or cultural events), on the Trust property is permitted under the Trust documents, the Trustees initiated the instant Trust proceeding and properly petitioned the Court to seek instructions and guidance regarding said controversy. *See* Trustees' Petition for Instructions filed on February 25, 2003.

Petitioners further note that pursuant to the prevailing general view, although Trustees have standing to seek guidance and instructions from the Court, they are not under an affirmative duty to do so. In the instant case, the Trustees pursued an appropriate and prudent course of action, taking the necessary steps to initiate the instant Trust proceeding to obtain the Court's guidance in order to address and resolve the existing controversy.

Based on the foregoing, the Trustees reasonably and diligently discharged their respective fiduciary duties by taking action to initiate the instant proceeding to seek guidance and instructions from the Court, refuting the Attorney General's suggestion that the Trustees may have violated their fiduciary duty and committed a breach of the Trust. *See, Thompson v. Martin*, 281 Mass. 41, 43, 183 N.E. 51, 52 (1932) (*citing, Security Trust Co. of Lynn v. Boyce*, 257 Mass. 586, 589, 154 N. E. 191 (1926)).

### **III. CONCLUSION**

For the foregoing reasons, the Trustees respectfully request that the Court grant the instant Petition for Instructions. Additionally, Petitioners reiterate their opposition to the relief requested by the Attorney General based on the objections and arguments previously set forth herein.

DATED: Honolulu, Hawaii, October 12, 2007.

Respectfully submitted,

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Corporation Counsel

By  \_\_\_\_\_

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Kobayashi, Barbara Marshall, Gary H. Okino, and  
Rod Tam, in their capacities as the Trustees of the  
Kapiolani Park Trust

T. NO. 03-1-0018, IN THE MATTER OF THE KAPIOLANI PARK TRUST - Petitioners' Response to  
the Attorney General's Supplemental Response Filed on April 27, 2006 to Petition for  
Instructions Regarding Art Fence and Craft Fairs at Kapiolani Park Filed February 25, 2003

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT  
STATE OF HAWAII

In the Matter of the ) T. NO. 03-1-0018  
KAPIOLANI PARK TRUST ) (Trust)  
 ) CERTIFICATE OF SERVICE  
 )  
 )  
 )

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof was served upon the following by either hand delivery or mailing the same, postage prepaid, on October 12, 2007:

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