

STATE OF HAWAII  
DEPARTMENT OF HAWAIIAN HOME LANDS

February 21, 2012

To: Chairman and Members, Hawaiian Homes Commission  
From: Dreana Kalili, Policy and Program Analyst   
Subject: Policy Development for Amendments to HAR Title 10 -  
Treatment of Previous Lessees

RECOMMENDED MOTION/ACTION

That the Hawaiian Homes Commission set a policy based on a recommendation from the Hawaiian Homes Commission Ad Hoc Committee on Administrative Rules to:

1. Clarify how many times a native Hawaiian may submit an application for each type of homestead lease; and
2. Clarify that the following applicants not be treated as a "previous lessee":
  - Applicants who have succeeded to a deceased family member's application.

DISCUSSION

In an effort to better serve Hawaiian Home Lands beneficiaries and to improve management of the trust, the Department of Hawaiian Home Lands is reviewing its programs and operations to determine how best to improve operational efficiency and delivery of services to beneficiaries of the trust; provide native Hawaiian beneficiaries with an opportunity for home ownership or land stewardship on homestead lands through the development of various award programs; and prioritize use of resources while updating its Administrative Rules.

At its regular meeting in August 2011, the commission approved a process for the development of amendments to the department's Administrative Rules (HAR Title 10). The crux of the process is the exploration and discussion of these issues by the commission ad hoc committee on Administrative Rules followed by a committee recommendation for action.

**Summary of the Issue: Treatment of Previous Lessees**

Hawaii Administrative Rule (HAR) §10-3-23 prohibits the award of a residential lot lease to an applicant who has previously been a lessee of a Hawaiian home lands residence lot, with certain exceptions. An applicant may be considered a "previous lessee" if:

1. He/she requested a lease award to be rescinded, and the commission approved the request and reinstated the lessee's original application to waitlist according to the original date of application; or
2. He/she transferred or surrendered a DHHL lease (residential, agricultural or pastoral) and submitted a new application. Some of the reasons for this include but are not limited to:
  - a. He/she was named as a successor to the application rights of a deceased applicant and transferred or surrendered his/her previous lease to succeed to the deceased applicant's application rights;
  - b. He/she was required to do so by the court as a condition of a divorce;
  - c. He/she was not able to fulfill one or more conditions of their lease (e.g., building, occupancy).
  - d. He/she just wanted to transfer the lease, possibly in exchange for money.

To comply with this rule, staff handles these cases as follows:

1. If the applicant rescinded his/her DHHL residential lot lease, he/she is not treated as a previous lessee and is included in offerings and not placed on any deferred status. The definition of "rescind", to abolish and restore the parties to the positions they would have occupied had there been no contract, means these applicants are treated as if a lease award never took place.
2. If an applicant transferred or surrendered (or the department cancelled) the same type of lease the applicant is re-applying for (i.e., the applicant previously transferred a residential lease and is re-applying for another residential lease), he/she will be placed on a deferred status from the offering until all applicants on that island-wide list have been offered an award. This is outlined in HAR §10-3-7.

There are a number of applicants (who are also previous lessees) who succeeded to the application rights of a family member, but in order to succeed to the application rights, were told by department staff that they had to transfer their existing lease to another qualified native Hawaiian in order to complete the

successorship to the application. In some cases, these application successors/previous lessees were not informed that they would be considered a "previous lessee" and would be placed on deferred status until all other applicants (non-previous lessees) on the list had an opportunity first. The argument here is that the deceased applicant's application did not have an opportunity to receive a lease. Should the department's determination factor be based on the deceased applicant's application rights (position) versus the person (the successor)?

There are a number of applicants who were ordered by the court to transfer his/her lease as a condition of divorce. If he/she submitted a new application not knowing the policy on the treatment of a "previous lessee," the argument is that the court forced the beneficiary to give up his/her lease. However, in most cases, the lessee received net proceeds from the lease to service the court decree. Should the receipt of net proceeds be a consideration in whether someone should be able to re-apply? Should a previous lessee be allowed to re-apply if the net proceeds from a transferred or surrendered lease are remitted to the department?

The existing rules leave room for various interpretations by different administrations, commissions, and staff over time. Amendments to the Administrative Rules are required to clarify the policy on the status of previous lessees to mitigate and/or eliminate arbitrary treatment of any beneficiary. The solution to this issue will consider how many times a beneficiary may submit an application and who should be considered and treated as a "previous lessee."

The following policy recommendation is made in consideration of the policy of the Hawaiian Homes Commission Act to enable native Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the self-determination of native Hawaiians in the administration of the Act, and, for the purpose stated in the Act of placing native Hawaiians on the lands set aside in a prompt and efficient manner and assuming long-term tenancy to beneficiaries of the Act and their successors.

***Recommendation***

That the Hawaiian Homes Commission should adopt a policy that clarifies how many times a native Hawaiian may apply for Hawaiian Home Lands which applicants should and should not be treated as previous lessees.

The first part of the policy addresses the number of homestead applications a native Hawaiian may submit. The current qualifications for applicants are blood quantum (50% native

Hawaiian) and age (minimum 18 years). These qualifications should be amended to exclude previous lessees of the homestead lease award that the applicant is applying for. In other words, a previous agriculture lessee may not submit an application for an agricultural lease award. This concept is consistent with the recommended "one chance" policy.

The second part of the policy exempts a previous lessee who succeeds to a deceased family member's application rights from being treated as a previous lessee. By adopting this policy, the department honors the application rights of a native Hawaiian who had not benefited from a homestead lease award.

The adoption of these policies removes language from HAR §10-3-23 that conflicts with HAR §10-3-7. HAR §10-3-23 allows an exception to the treatment of a previous lessee if the lessee surrendered or transferred the lease under compelling circumstances. The existing rules leave room for various interpretations by different administrations, commissions, and staff over time. The recommended policy that eliminates other subjective exemptions from the treatment of previous lessees ensures fairness and mitigates and/or eliminates arbitrary treatment of any beneficiary.

The commission may consider the recommendations of the ad hoc committee, input provided by the commission counsel, and any testimony from the public in developing a policy on this issue.

***Next Steps***

Once the commission makes agrees to a policy decision on these issue, staff will begin to draft rules based on the decision. A complete draft of the rules verbiage will be presented to the commission for preliminary approval once all decisions have been made. Once approved, these draft rules will be available to beneficiaries through beneficiary consultation.