ISSUES IN OWNERSHIP OF REAL ESTATE

U.S.A. - HAWAII
Case Lombardi & Pettit

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1. Is perpetual fee simple ownership of real property permitted? If not, what are the principal forms of ownership, or other principal form of ownership, of real property?

Yes, perpetual fee simple property ownership is permitted in Hawaii.

2. What instruments are used to convey fee simple ownership, or other principal form of ownership, of real estate?

A deed is used to convey legal title to fee simple property.

3. How in this jurisdiction is the ownership of real property recorded or searched? Who generally performs the search?

Hawaii has a single statewide recording office in Honolulu, the Bureau of Conveyances, where all documents are recorded regardless of which island or county in which the property is located. There are two types of land registration, as Hawaii has both the Land Court (Torrens) system for recording registered land and the “Regular System” for recording unregistered land. Requirements for recording in the Regular System are generally less stringent than in the Land Court system.
Land Court property is registered pursuant to HRS Chapter 501 and always is described by reference to lot and map number filed with a specific (numbered) a Land Court Application. Regular System property may be described in a number of ways, e.g., by reference to a file plan or recorded map, or a metes and bounds description.

The distinctive feature of Land Court property is that title is evidenced by a certificate of title, and encumbrances are not effective against the property, until such encumbrances are noted on the certificate of title for the property. When the fee interest is conveyed, a new transfer certificate of title (“TCT”) is issued to the new owner. Thereafter, the title of each new fee owner is evidenced by a new TCT.

Title searches are conducted by title companies. While the Bureau of Conveyances keeps a grantor/grantee index, title companies generally search electronic title systems, using property descriptions. As a practical matter, title searchers generally rely on a prior search for the first known source of title. The original source of title may date back to a land patent or award of title at the time of the first division of lands in Hawaii which occurred in 1848.

4. What assurances of ownership are available to purchasers of real property (e.g., title insurance or title opinions)? What is the cost of obtaining such assurances?

Title insurance is available in Hawaii. The cost of premiums and shares is set by the individual title company in a published and posted schedule. The schedule may be changed or amended at any time. HRS §431:20-120.

5. What are the most common forms of investment vehicles? What are the most common entities employed to own investment real estate in a tax efficient manner?

A Hawaii limited liability company or a Hawaii corporation are the most common forms of entities used.

6. Has this jurisdiction adopted, or is it considering, legislation permitting the creation of real estate investment trusts or similar entities?

Hawaii does not have a specific REIT statute.

7. What state or local transfer, stamp or similar taxes are levied generally on sellers or buyers upon the direct transfer of real estate?

A conveyance document will not be accepted for recordation unless it is accompanied by either (a) a conveyance tax certificate and the tax, if any, has been paid, or (b) an exemption to conveyance tax certificate if the conveyance is specifically exempt from tax pursuant to HRS §247-6. Depending on the type and value of the property being conveyed, the conveyance tax ranges from ten cents ($0.10) to thirty-five cents ($0.35) on each one hundred dollars ($100) of actual and full consideration.
8. What state or local transfer, stamp or similar taxes are levied generally on sellers or buyers upon the transfer of interests in entities which own real estate?

Hawaii Real Property Tax Act (HARPTA), HRS §235-68, is Hawaii’s counterpart to the Foreign Investment in Real Property Act of 1980 (FIRPTA). HARPTA provides for the withholding of income tax equal to five percent (5%) of the amount realized on the disposition of Hawaii real property by a non-resident person. The party acquiring the property is required to withhold and pay over to the State Department of Taxation the required amount of tax by the 20th day after the date of the transfer of the property, unless the seller furnishes the buyer with a Certificate for Exemption from the Withholding of Tax on the Disposition of Hawaii Real Property (Form N-289). Escrow companies generally make the withholding payment out of the gross proceeds in transactions subject to HARPTA.

9. How significant is local regulation and taxation of real estate? How significant is the variation of real estate law among political subdivisions of this jurisdiction?

Land use is regulated at both the state and county level.

State land use laws classify all lands into one of four land use districts: urban, rural, agricultural, and conservation. HRS § 205-2(a). In establishing the boundaries of the districts in each county, the State Land Use Commission considers the general plan of the county.

Subdivision and zoning regulation is delegated to the four counties. However, zoning is subject to the limitations of the State’s districting scheme. Any conflict between the State provision and the county zoning ordinance is resolved in favor of the State statute. As to certain specific areas, county regulations have been superseded by community development districts. In addition, and without limitation, special management area permits issued by the county planning authority are required to develop land within a special management area (land extending inward from the shoreline). There may be significant variations between the four counties’ zoning and subdivision ordinances.

Real property taxation is delegated to the counties. Property tax assessments are made, and the property taxes administered, by the finance departments of the respective counties in which the real estate is located. Real property is assessed as of October 1 of each year. Different tax rates are applied to different classifications of land, classified by the counties based on their highest and best use. Except as exempted by ordinance, all real property is subject to tax on 100% of its fair market value. Although the real property tax laws are essentially similar, administrative procedures or policies and/or tax rates may vary by county.

10. Must ultimate beneficial owners of entities which own real estate be disclosed as a matter of public record?

No