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Inside this Issue:

Attorneys honored by peers and community

Do you know where your principal place of business is located?

Lanai

\$85,000,000 Is Price City Paid For 30 Acres Illegally Taken At “Sandy Beach”

It started almost a quarter century ago. We were asked to represent the developer of Hawaii Kai, Hawaii’s first planned community and our first client, against challenges to its plan, of twenty years, to provide homes along Kalaniananole Highway across and down the road from the Sandy Beach Park.

Over the ensuing decades, following several landmark cases, which included televised oral arguments at the Hawaii Supreme Court, the City was required to divest itself of many acres of land at Manana, several street remnants and cash, valued at approximately \$85 million, for its obstruction of Hawaii Kai’s development rights.

It began with Ken Kupchak testifying before City Council that a denial of a pending shoreline permit for 177 homes on 30 acres of land, would be an “unconstitutional taking.” Following the issuance of Special Management Area and cluster permits, various individuals unsuccessfully attacked both. Failing, they then sought to use the initiative process to cancel the zoning upon which Hawaii Kai had been relying for decades. When the Hawaii Supreme Court declared this to be an illegal use of the zoning power, these individuals again convinced the City Council to illegally reverse course and down zone the land by ordinance.

Along the way, Robert Thomas was assigned to do a “couple hours” of work assisting Ken. Ten years later, Greg Kugle, joined their team. In 2001, the three of them, having won all of the



Greg W. Kugle and Ken R. Kupchak, who with Robert H. Thomas (not pictured) successfully fought repeated attempts to down zone Golf Course 5 & 6.

legal liability battles, were set to go to trial. This time the issue was the amount of damages Hawaii Kai had suffered from the City’s numerous illegal attempts to deprive it of its vested right to build the project. Facing damages that could exceed the entire City annual fire and police protection budgets, the City settled. It took another eight years to administer this settlement because the City was required to sell off practically its entire land holdings in the Manana area.

Continued on page 2



Orange circle indicates Golf Course 5 & 6.

Had the City merely condemned the land for a park when Hawaii Kai sought its SMA permit, it probably would have cost the public less than a quarter of the \$85 million that the City eventually had to pay. And this amount did not include the extensive attorneys' and experts' fees and costs and the extensive loss of productive time by numerous City employees over the twenty-three year legal battle. Ken's initial testimony advised the City that this would be the costly end result if the City attempted to "take" the property without paying the legal piper.

As consideration for the initial 1960s Hawaii Kai development plan pre-cleared with the City, in addition to building the infrastructure for its planned community, Hawaii Kai arranged for Koko Head and Koko Crater and other Hawaii Kai areas to be given to the public. Thus, by the mid-'80s when this project was being developed, Hawaii Kai already contained approximately 1/3 of Oahu's park land. Paying any money for more parks in Hawaii Kai, therefore, was problematic; especially when there were many park-poor neighborhoods on Oahu. Having to expend in excess of \$85 million for 30 more acres of park in East Honolulu deprived the park-poor areas of park and other City funding. This trade off, however, was unfortunately not subjected to public debate, beyond Ken noting it in public testimony.

Over the years, Damon Key Leong Kupchak Hastert has repeatedly and successfully gone to bat for responsible landowners when, because of popular sentiment, government has decided to change the rules of the game after these owners have relied on them. Permits for residences on Maui's Palauea Beach and an eco-camping program on Molokai were among those also successfully defended by Ken, Robert and Greg. Where justified by law, however, we also successfully supported conservation efforts, including the reclassification to conservation of the last privately owned land of Kawainui Marsh. We then helped obtain the legislative funds to acquire it. Recently, we also obtained a decision holding that the County of Hawaii illegally condemned our clients property and a Supreme Court ruling requiring the courts to examine whether a condemnation was a mere pretext for private benefit.

Ken, Robert and Greg have, in the process, not only developed a significant land owners' rights practice of their own, but they have also compiled and shared the teachings of their cases in a law review article: *"Arrow Of Time: Vested Rights, Zoning Estoppel, And Development Agreements"* in 27 University of Hawaii Law Review 16 (2004).

**For more information or questions regarding this article,
please call Ken at 531-8031 ext 602 or email him at krk@hawaiilawyer.com**

Congratulations to our very own Christine Kubota

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With Passion



Damon Key is proud that director Christine Kubota was named as a finalist in the Women Who Mean Business Awards Program sponsored by Pacific Business News. Here are quotes from the three executives who nominated her.

“For the past 10 years, she has volunteered for the State’s Judiciary system to provide better access to the courts for non-English speaking people. Because of those efforts, there is now a registration system and a testing system for court interpreters. Another improvement is revamped compensation for court interpreters. This commitment to achieving fairness for our society without much fanfare is typical of Christine’s style.

Last year, she led the group with the ambitious plan of hosting a large forum format with one of Japan’s most influential businessmen. Dr. Kazuo Inamori, founder of Kyocera Corporation, one of Japan’s leading conglomerates, made an unprecedented U.S. visit, addressing a standing-room-only crowd of business leaders. HJCC continues to leverage partnerships formed through this landmark event.

In my many, many years as a Chamber member, I haven’t seen very many others who have affected the organization so dramatically.”

Wayne Ishihara
President
Honolulu Japanese Chamber of Commerce

“Christine is very active with the Honolulu Japanese Chamber of Commerce where she serves as Vice Chairman of the Board. She has also assumed the role of chairwoman of the International Relations Committee, which targets Japanese businesses and their executives to become members of the HJCC. Through the International Relations Committee, unique and innovative programs, such as the “Nihongo De Dozo” networking events, have been introduced under her leadership.

Although she is not a native of Hiroshima, she has cultivated strong business and government relationships with the Hiroshima Prefectural Government, the Hiroshima City Government, and the Hiroshima Chamber of Commerce and Industry.

As Christine is bi-lingual, she regularly volunteers her interpreter and translation skills –for example, Christine has tirelessly helped in assisting the HJCC in negotiating important yet delicate matters relating to chambers of commerce in Japan. Through her careful attention details and cultural differences, she has earned the respect and confidence of those business and political leaders in Japan.”

Wayne T. Miyao
Vice Chairman
Ohana Pacific Bank

“Christine Kubota is a strong, strong leader of women, of attorneys, of legal organizations, and in the Japanese -American community in Hawaii. She is a prime example of how one person can make a huge difference in our Hawaii community.

As a longtime member of the Honolulu Japanese Chamber of Commerce, I am surprised at how she has been able to attract those from Japan to join the Chamber in membership. She heads the committee with the largest membership (due to her charismatic leadership). Her International Business Development (IBD) Committee has grown to record-setting 60-plus members and it is still growing. Her natural leadership and caring nature shows through in all dealings with her.”

Candice Naito
Vice President/Business Banking
First Hawaiian Bank

Garrett Sullivan, Janis Loo and Kaikor Construction Honored by Peers and Community

Damon Key client Garrett Sullivan, of Kaikor Construction Co. Inc., has been selected by the Small Business Association (SBA) of Hawaii as the Small Business Person of the Year for the City & County of Honolulu. He was one of the business owners, advocates and business leaders who were honored at the 23rd annual Statewide SBA Small Business Awards Luncheon on April 30, 2010 at the Hilton Hawaiian Village. Damon Key's Anna Oshiro is proud to have nominated Mr. Sullivan and Kaikor Construction.

Founded in 1985, by Mr. Sullivan and Grandison "Buck" Allen, Kaikor Construction specializes in services such as structural concrete, pervious concrete, concrete bridges, concrete buildings, pre-cast concrete installation, concrete foundations, bridge repair and upgrades, drainage structures, marine superstructure concrete, flatwork concrete, expansion joints, and concrete stamping and staining. The firm has represented Kaikor Construction Co. Inc. since its start. As CEO, Mr. Sullivan oversees the company's 36 employees and strategic planning and business development. Under his leadership and innovative approach, the company competes successfully, regardless of the size of its competitors, by focusing on core competency and being a leader in the specialized field.

Since its inception, the company has completed more than 400 projects valued at more than \$147 million, on time and under budget. Clients and projects include the Honolulu International Airport concrete spall repairs, Halona Blowhole Lookout spall repairs, Ala Moana Park Pedestrian Bridge, University of Hawaii's Dole Street Parking Structure, Otani Produce, Hawaii National Guard Emergency Response Administration Building, hydrant fuel system replacement for Hickam Air Force Base, Maunawili Stream bridge replacement, and Waianae High School concrete bleachers.

Kaikor Construction is consistently recognized as one of the "best places to work" in Hawaii, where employees enjoy 401K and health plans and other wellness benefits. Awards include Hawaii Business Best Places to Work 2010, 2009, and 2008; Psychologically Healthy Workplace "Hawaii Small



*Mr. Sullivan: Oahu SBA Small Business Person of the Year
Ms. Loo: Hawaii's Jefferson Award Recipient
Kaikor Construction: "Best Place to Work", Hawaii Business*

Business Category" 2009; General Contractors Association of Hawaii's Build Hawaii Awards 2009 and 2008; General Contractor's Association of Hawaii's Safety Awards 2007, 2006, 2005, and 2004; and Associated General Contractors of America "Zero Incident Award" 2004.

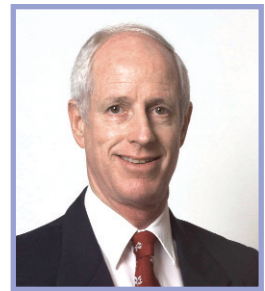
Mr. Sullivan's wife, Janis Loo, also serves as Kaikor Construction's Secretary of the Corporation, Director, and Office Manager, ensuring daily operations of the company since 1997. Last month, Ms. Loo was one of six persons selected as the 2010 state recipients of the Jefferson Awards For Public Service. She was chosen to represent Hawaii at the national awards ceremony in June in Washington, D.C. In addition to her volunteer work at the Hawaiian Humane Society and other charity groups, she was recognized for her inspiring services to other countries such as Africa and South America, where she and Mr. Sullivan helped build orphanages and water purification systems. In 2002, Ms. Loo donated a kidney to the next matching person on the donor list, who still lives today because of her kind generosity.

Ms. Loo's sister, Laurel Loo, was an attorney at Damon Key before she returned home to practice on Kauai.

We salute Garrett, Janis, and Kaikor Construction on their recent awards and recognition for their service to the islands and beyond. They serve as inspirations to all of us at Damon Key.

When is Coverage in Your Homeowner's Policy Triggered?

By Tred R. Eyerly



In the high desert country of Tucson, Arizona, I recently attended the American Bar Association's Insurance Coverage Litigation Committee's annual conference.

At this year's conference, I led a session on triggers of coverage applied in property policies, including homeowners' policies. "Trigger" is a mechanism for determining when coverage under a policy is activated. Triggers may also help decide which of several policies provide coverage. In a typical situation, the trigger of coverage is clear. For example, if a windstorm causes property damage to a building, the policy in effect on the date of the storm damage is triggered and provides coverage.

Where the property damage is ongoing, but undiscovered, a dispute may arise over coverage, however. For example, construction of a home is completed, the occupants move in, and years later they discover that water has been continuously leaking from a hidden pipe, causing rot and decay. If, after moving in, the homeowner was insured each year by a different insurer, which policies are responsible? Damage occurred during each insurer's policy period. Should each insurer be responsible, or only the insurer whose policy was in effect during the year in which the damage was discovered? The homeowner wants all policies to be responsible in order maximize coverage, but the insurers will point to the one policy in effect when the damage was first discovered. Deciding which insurer must provide coverage turns on the type of trigger that applies.

The courts commonly use one of two triggers with property policies: manifestation trigger or injury-in-fact trigger. Under the manifestation trigger, property damage occurs when the damage manifests itself. The insurer on the risk at the time of manifestation, or discovery, is solely responsible for the entire loss, even if the property damage continues after the policy expires. Under injury-in-fact, however, coverage is triggered by property damage occurring during the policy period. Therefore, when there is continuous, ongoing property damage over several policy periods, each policy is triggered.

Only a few states have decided which trigger applies for property policies. California is the leading state adopting the manifestation trigger. California

holds the policy in effect when the manifestation of property damage is first discovered must pay the entire claim. Nevada has followed the California decisions in applying the manifestation trigger to property policies.

In contrast, other courts have adopted the injury-in-fact trigger for property policies. For example, in a Nebraska case, the insured built a storage tank that developed cracks over a number of years due to settling of the ground. The damage was not discovered until after the policy had expired. Reasoning that property damage progressing over time occurred when the damage first began and continued during the settling process, the court adopted the injury-in-fact trigger. Although the damage was not discovered until after the policy had expired, injury-in-fact that occurred during the policy period established coverage. Courts in Washington and North Dakota have also adopted the injury-in-fact trigger for property policies.

Although Hawaii follows the injury-in-fact trigger for comprehensive general liability policies, no Hawaii appellate decisions address the applicable trigger for property policies. We will continue to track the developments on this issue at our insurance blog, insurancelawhawaii.com.



For more information or questions regarding this article, please call Tred at 531-8031 ext 625 or email him at te@hawaiiawyer.com

Do You Know Your Principal Place of Your Business?



By Elizabeth L. Burroughs

Where is a corporation's principal place of business for the purposes of federal court diversity jurisdiction? This longstanding question was finally answered by the U.S. Supreme Court on February 23, 2010, in *Hertz v. Friend*, 130 S. Ct. 1181 (2010). The Court determined that the principal place of business is the corporation's nerve center, normally the place where a corporation maintains its headquarters.

It is important for potential plaintiffs and defendants alike to understand federal diversity jurisdiction. Federal courts have the authority to hear cases that would ordinarily be handled by state courts when the parties on each side of the case are citizens of different states, or a foreign country. In a diversity case, the federal court will apply the underlying state law in deciding the case, but use federal procedural and evidence rules. The general purpose of diversity jurisdiction is to protect out-of-state parties from potential local prejudice. Depending on the facts of a particular case, it may be more advantageous to try a case in federal court or to leave it at the state court level.

Determining the citizenship of an individual is usually straightforward, but what about for a corporation? Corporations are legal entities that can sue and be sued in state and federal court, and often conduct business in multiple locations in multiple states. According to federal statute, a corporation is always a citizen of all states where it is incorporated and at its "principal place of business."

As simple as the language appears on the surface, courts have had difficulty interpreting and applying the meaning of "principal place of business." Over time, different tests were created and applied by the Federal Circuit Courts for determining a principal place of business, and were often not applied consistently within the same circuit. Some courts focused on the central point of operations, and others focused on the amount of business conducted within a state. In the *Hertz* case, the 9th Circuit had applied the "totality of corporate activity test," analyzing the amount of Hertz's business activity, state by state. The Ninth Circuit determined that California was

Hertz's principal place of business because the amount of business activity in California was "significantly larger" than in other states, and "substantially predominated" there.

In *Hertz*, the Supreme Court recognized the need for a uniform test to determine a corporation's principal place of business, extolling the virtues of administrative simplicity in determining jurisdictional questions. The Supreme Court rejected the Ninth Circuit's rationale, concluding the "nerve center test" should be applied by all circuits across the country, bringing uniformity and greater certainty to an area of law that had previously been very unpredictable. The Court explained, "we conclude that "principal place of business" is best read as referring to the place where a corporation's officers direct, control, and coordinate the corporation's activities . . . and in practice it should normally be the place where the corporation maintains its headquarters—provided that the headquarters is the actual center of direction, control, and coordination, i.e. the "nerve center," and not simply an office where the corporation holds its board meetings."

With the *Hertz* decision, corporations can now be certain as to where they will be considered citizens for the purposes of diversity jurisdiction creating predictability and reducing the amount of time and money spent on fighting over these preliminary jurisdictional matters. Corporations can also locate their corporate headquarters accordingly to avoid certain state courts if state court litigation is a concern.



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Councilman's Claim to Lanai Residency Turns on Whether He Abandoned Lahaina

What does it mean for a politician to “forfeit” office? In February 2010 the Hawaii Supreme Court answered that question in a decision involving a Maui County council member. In that case, a coalition of Lanai residents alleged the person occupying the Lanai seat on the Maui County Council forfeited office because he was not a Lanai resident. The Lanai citizens were represented by Damon Key attorneys Ken Kupchak, Robert Thomas, and Elizabeth Burroughs.



The Maui County Charter allocates the nine seats on the Maui Council by residency area, with the island of Lanai entitled to one seat. The Charter also requires a council member maintain residency in his residency area. If he does not, the seat is immediately forfeited.

The coalition of Lanai residents asked the Second Circuit Court (County of Maui) to rule that Sol Kahoohalahala, the occupant of the Council’s Lanai seat, was not a resident of Lanai as he claimed. It is alleged that he lives in Lahaina and, therefore, had forfeited office. In October, the Supreme Court, in *Dupree v. Hiraga*, held that as of July 2008 Mr. Kahoohalahala was a resident of Lahaina for voter registration purposes and in order to change his residence he must affirmatively show he has “pulled up stakes” and abandoned his Lahaina residence, as well as demonstrate a real permanent presence on Lanai. His wife is the vice principal of a Maui school and he continues to live with his wife and daughter in Lahaina, when he is on Maui. The Maui court concluded the only way to remove a council member who does not maintain his residency in his area is to impeach or recall him. The court dismissed the case.

In an unanimous opinion in *DeJetley v. Kahoohalahala*, No. 29919 (Feb. 10, 2010), the Hawaii Supreme Court reversed. The Justices agreed with Ken, Robert and Elizabeth’s argument that the Charter’s residency requirements can also be enforced either by declaratory judgment, or by a special statutory procedure known as “quo warranto.”

These procedures allow ordinary citizens to file a lawsuit and request a court make a determination of the council member’s residency.

The Supreme Court rejected the Maui court’s conclusion that impeachment or recall of a council member are the only remedies available for Maui citizens to hold their council members accountable. The Supreme Court also held that “forfeit” meant that if the council member cannot meet his burden of showing residency in his residency area, he automatically loses office.

This decision is another important victory for the citizens of Maui County, and is a follow up to the Supreme Court’s earlier decision in *Dupree v. Hiraga* (Oct. 20, 2009), in which the Court held Mr. Kahoohalahala was not a resident of Lanai for purposes of his voter registration.

The *DeJetley* ruling continues Damon Key’s long tradition of high-level advocacy in cases of voting rights, election law, and matters of public interest. In 1989, for example, Ken and Robert convinced the Supreme Court that Hawaii law does not permit the adoption of land use ordinances by initiative. In 2005, Robert argued to the Supreme Court that Kauai voters were entitled to amend the county charter to deal with skyrocketing property taxes.

The Supreme Court’s ruling did not end the *DeJetley* litigation – the Supreme Court sent the case back to the Maui court to receive proof of Mr. Kahoohalahala’s residency.

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Legal Alert is published periodically by Damon Key Leong Kupchak Hastert to inform clients of legal matters of general interest. It is not intended to provide legal advice or opinion.

Attorneys in the News

Courtney Kajikawa, Christine Kubota, Greg Kugle and **Jim McWhinnie** attended the Meritas 20th Annual Meeting in Los Angeles in April.

David McCauley will be attending the 2010 American Immigration Law Association Annual Conference on Immigration Law from June 30 to July 3 in National Harbor, Maryland.

Jim McWhinnie and **Diane Hastert**, again, were named Hawaii Super Lawyers for 2010 in Business Litigation.

Mark Murakami taught a seminar at the University of Hawaii Law School, “Topics in Environmental Law” in March. He also appeared as a panelist for Prof. Randy Roth’s class on Professional Responsibility.

Matthew Evans attended the ABA Forum on the Construction Industry’s 2010 Annual Meeting held in Austin, Texas in April, where the topic of discussion was “Managing Money Issues in Construction.”

On April 30, **Robert H. Thomas** moderated a panel of international property law experts discussing the recently-published book “Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights,” edited by Professor Rachelle Alterman (Technion-Israel Institute of Technology) at the ABA Section of State and Local Government Law’s conference in Miami.

Robert also presented his article “Recent Developments in Challenging the Right to Take in Eminent Domain” at a later panel on “Land Use Hot Topics.”

On May 6, he presented a program on “Are The Courts Waking Up To Property Rights?” at the annual conference of the Western Manufactured Housing Community Association. He also presented his article “A ‘Regulatory Takings’ Glossary (Or, How to Translate Property Rights Lawyerspeak)” to the conference.

