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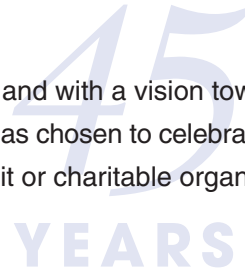
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With gratitude for the support from this community and with a vision toward its continued enrichment, Damon Key Leong Kupchak Hastert has chosen to celebrate its 45th Anniversary by making monetary donations to the following non-profit or charitable organizations selected by our attorneys in lieu of our annual wine tasting:



American Heart Association

American Red Cross, Hawaii Chapter

Easter Seals Hawaii

Goodwill Industries of Hawaii

Hawaii Ballet Theatre for Youth

Hawaiian Humane Society

Institute for Human Services

Kailua United Methodist Church

Legal Aid Society of Hawaii

Le Jardin Academy

Lyon Arboretum Association

Make-A-Wish, Hawaii, Inc.

Mid-Pacific Institute

Palolo Chinese Home

Punahou School

Sierra Club, Hawaii Chapter

Susan G. Komen for the Cure

YWCA of Oahu

We further invite you to join us in celebrating our 45th anniversary by assisting Hui Ku Maoli Ola, a native Hawaiian plant nursery, with a wetland restoration project in Kailua. On Saturday, September 20, 2008, from 9 am to noon, the Damon Key ohana will be planting native Hawaiian plants and removing invasive alien species along Hamakua Road near the Kawainui marsh. If you would like additional information please contact Robert D. Harris at 526-3622 or at rdh@hawaiiattorney.com.



ESTA: The New DHS Pre-Boarding Requirement for 90-Day Visitors to U.S.

By David P. McCauley



International travelers who wish to travel to the United States, including Hawai'i, under the Visa Waiver Program (VWP) are now subject to enhanced Department of Homeland Security (DHS) requirements. All eligible travelers who wish to travel under the VWP must apply for authorization using the DHS/CBP Electronic System for Travel Authorization (ESTA) Web Site. The VWP allows visitors from 27 countries, including Japan, Australia, New Zealand, Singapore and most Western European countries, to visit the U.S. without a visa. The establishment of ESTA implements a recommendation of the 9/11 Commission to create a fully automated electronic travel authorization system to collect such information as DHS deems necessary to evaluate, in advance of travel, the eligibility of the person to travel to the United States, and whether such travel poses a law enforcement or security risk.

ESTA allows US Customs and Border Protection (CBP) to screen travelers seeking to enter the United States under VWP prior to their arrival in the United States. DHS notes, however, that an authorization to travel to the United States under ESTA is *not* a determination that the person ultimately is admissible to the United States. That determination will be made by a CBP officer only after an applicant for admission is inspected by the CBP officer at a U.S. port of entry. ESTA is *not* a visa or a process that acts in lieu of any visa issuance determination made by the Department of State. Travel authorization under ESTA allows a VWP participant to travel to the United States, but does not guarantee that the person will be admitted into the U.S. upon arrival.



Although ESTA does not become mandatory until January 12, 2009, it is already up and running on a voluntary basis. **ESTA will become mandatory for VWP travelers on January 12, 2009. After that date, VWP travelers will not be allowed to board a flight or cruise to the United States without an ESTA authorization.** VWP travelers will be able to apply for ESTA authorization at any time prior to travel to the United States, but are encouraged to do so at least 72 hours before traveling.

The information submitted by the person in his/her ESTA application will be checked by CBP against all appropriate databases, including, but not limited to, lost and stolen passport databases and appropriate watchlists. If a person does not provide the information required or provides false information in his/her ESTA application, or if any evidence exists indicating that the person is ineligible to travel to the United States under VWP or that permitting such travel poses a law enforcement or security risk, CBP may deny the ESTA application. Without an ESTA approval, the person will not be allowed to board the aircraft. According to DHS, ESTA will reduce the number of travelers who are determined to be inadmissible to the United States during inspection at a port of entry, thereby saving, among other things, the cost of return travel to the carrier, inspection time, and delays and inconvenience for the traveler.

Each ESTA travel authorization will be valid for a period of up to two years. A person may travel to the United States repeatedly within the validity period using the same ESTA authorization. Travelers whose ESTA applications are approved, but whose passports will expire in less than two years, will receive travel authorization that is valid only until the expiration date on the passport. A VWP traveler must obtain a new ESTA authorization if any of the following occur: (1) The person is issued a new passport; (2) The person's name changes; (3) The person changes his or her gender; (4) The person's country of citizenship changes; or (5) The person's answer to any of the ESTA questions changes.

Although DHS is allowed to charge a fee to use ESTA, at this time, payment of a fee will not be required. There is no appeal or judicial review available for an adverse ESTA determination. A determination under ESTA that an alien is eligible to travel to the United States under the VWP may be revoked at the discretion of the DHS.

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In estimating the costs of the ESTA program from 2008 to 2018, DHS has stated “that costs to air and sea carriers to support the requirements of the ESTA program could cost \$137 million to \$1.1 billion over the next 10 years depending on the level of effort required to integrate their systems with ESTA, how many passengers they need to assist in applying for travel authorizations, and the discount rate applied to annual costs. Costs to foreign travelers could total \$1.1 billion to \$3.5 billion depending on traveler volume, their value of time, and the discount rate applied.” “The estimated annual public cost for ESTA is \$63.8 million. This is based on the number of responses (17,000,000) x a response time of 15 minutes x an average hourly rate of \$15 = \$63.8 million.” [Federal Register: June 9, 2008]

At the 2008 Annual Conference of the American Immigration Lawyers Association, a DHS representative stated the U.S. has 15 million VWP visitors per year, an average rate of 60,000 visitors per day. He said DHS expects ESTA to result in 30 denials per day. ESTA is now available online at <https://esta.cbp.dhs.gov/esta/>.

Illegal Workers: Worksite Enforcement

By David P. McCauley

On August 22, federal agents and police temporarily shut down a condo construction site at Honokowai, Maui and arrested twenty-two illegal immigrant workers. On July 20, U.S. Immigration and Customs Enforcement (ICE), Department of Homeland Security (DHS) arrested 43 Mexican workers employed in Hawai'i by The Farms, an agricultural business. In May, 22 suspected illegal workers were arrested at two restaurants on Maui. In December 2007, 19 foreign workers were arrested on immigration charges at a downtown Honolulu construction site and a Halawa warehouse. These arrests are examples of the nationwide enforcement actions being taken against illegal workers and their employers by DHS/ICE as part of its “comprehensive immigration enforcement strategy for the nation’s interior.” As stated by DHS Secretary Chertoff, “Hard-hitting interior enforcement will reinforce the strong stance we are taking at our borders. . . . We will aggressively target the growing support systems that make it easier for aliens to enter the country and find work outside of the law. This department will counter the unscrupulous tactics of employers with intelligence-driven worksite enforcement actions and combat exploitation by dangerous smuggling organizations with the full force of the law.”

Although the brunt of such enforcement has in the past fallen on the illegal workers, DHS/ICE is now actively prosecuting employers as well. In 1999, there were only 24 criminal cases brought for worksite violations. In 2006, the number had risen to 716 criminal charges brought against employers for employing illegal workers, and the number continues to grow.

Under U.S. immigration law, it is unlawful for anyone to knowingly “hire, recruit or refer for a fee” individuals who are not legally authorized to work in the United States, even if this is done through contractors or subcontractors. In addition to facing civil penalties, employers can also face a wide range of criminal charges, including harboring illegal aliens for commercial advantage, aiding and abetting, money laundering, and conspiracy to avoid income taxes. Violators face fines, years of imprisonment, and seizure and forfeiture of money and property, in some cases totaling millions of dollars. Accounts of such cases are published in the news releases on the ICE website, www.ice.gov.

An employer’s first line of defense is the I-9 Employment Eligibility Verification process. Although the government is now pushing its new “E-Verify” system, it is the I-9 process that is mandated under U.S. immigration law. Compliance with I-9 procedures and record keeping is not difficult, but the task should be delegated to responsible human resources personnel who are trained in I-9 compliance. The I-9 files should be periodically reviewed, especially in the case of foreign workers whose employment authorization documents may have expiration dates. If the review reveals missing or incomplete information, the employer should immediately obtain the missing information and/or documents. Employers must retain the I-9 forms for at least three years after the date the person is hired or one year after the person’s employment is terminated, whichever is later.

Additional information on I-9 Employment Eligibility Verification and the government’s new E-Verify program can be found on the U.S. Citizenship and Immigration Services website, www.uscis.gov.



Immigration Practice

Damon Key's immigration practice group has been serving clients in this area of the law for more than twenty years. We provide services in a full range of immigration matters, including family-based and employment-based "green cards" and U.S. citizenship, non-immigrant visas, consular processing, asylum applications, deportation defense, as well as representation before the Board of Immigration Appeals and the Federal Courts.

We represent foreign businesses and investors in setting up or acquiring U.S. business operations and bringing in personnel to manage them. We help U.S. businesses obtain needed foreign workers, and we guide them in complying with U.S. immigration laws. We have helped hundreds, perhaps thousands, of U.S. citizens and permanent residents in getting permanent resident status and citizenship for their spouses, fiancées, parents and children.

We serve individuals, families and businesses from all over the world: the United States, the entire Asia-Pacific region, Europe, North and South America, and Africa. Our clients range from individuals and their families to Kona Coffee growers, international athletes and entertainers, professional people in all fields, and business of all types, large and small.

If you have immigration questions, please call us. The call is free.



Meet The Immigration Practice Group



David P. McCauley

A former litigator, David has more than 15 years of experience in immigration law and is the head of Damon Key's Immigration Law Section. David regularly represents clients before the Honolulu Immigration Court, the Board of Immigration Appeals, the Administrative Appeals Office, and the United States District Court for the District of Hawai'i. Although now working exclusively in immigration law, David maintains his litigator's mind-set: his goal in all his cases is to win on behalf of his clients.

Christine A. Kubota

Chris, born and reared in Japan, joined the firm in 1988 and immediately began building a practice in corporate, commercial, and real estate law, primarily with Japanese-speaking clients. To address the needs of her Japanese clients, her practice encompasses business, commercial transactions, employment, estate planning and immigration matters.



Michelle M. Shin

Michelle has been assisting clients with their business and real estate transactions since 1998. She has extensive experience assisting clients with business acquisitions and helping foreign investors obtain business visas. Her other areas of practice include intellectual property law and employment law.



Courtney S. Kajikawa

Courtney joined Damon Key after serving as Law Clerk for Probate Judge Colleen Hirai. She assists foreign investors with their business due diligence and helps them obtain business related visas. She also focuses her practice on assisting clients with their estate planning disputes and probate matters.



Noelle B. Catalan

Noelle obtained her law degree, cum laude, from the William S. Richardson School of Law, University of Hawai'i in 2006. While in law school, she was a member and Managing Editor of the University of Hawai'i Law Review and a member of the Moot Court Board. During law school, she also received CALI awards for the highest grades in Constitutional Law I and Constitutional Law II. She has experience in various business and commercial transactions and assists foreign investors in obtaining business related visas. She also practices in the areas of real estate law and dispute resolution.



Caprice R. Itagaki

Caprice obtained her law degree from the Moritz College of Law at The Ohio State University. She is the recipient of the Honorable Joseph P. Harter Memorial Award for Outstanding Performance in Trial Practice. She is the former law clerk to the Honorable Dexter D. Del Rosario and the Honorable Gary W.B. Chang of the First Circuit Court, State of Hawai'i. Her immigration practice includes nonimmigrant visa applications, labor certifications, green card and adjustment of status issues. She also practices in the areas of real estate and construction, business and commercial law, and land use litigation.



Transient Vacation Rentals in Hawai'i - the Latest Front in the War on Property Rights

by Gregory W. Kugle



Local governments in America have a long and sordid history of exclusionary zoning; using the land use laws to keep out those that a city might deem “undesirable.” Thus, in 1917, the United States Supreme Court ruled that a zoning ordinance barring an African-American from acquiring real estate in a Caucasian residential neighborhood was unconstitutional. Later, in 1977, the Supreme Court struck down a Cleveland ordinance that attempted to limit the composition of a “family” with an overly-restrictive relationship requirement for household occupants. More recently, in 1985, the Supreme Court held that a special permit requirement for a group home for the mentally retarded was unconstitutional.

As Justice Thurgood Marshall, the Supreme Court's first African-American justice, observed in 1974: “Zoning officials properly concern themselves with the *uses of land* – with, for example, the number and kind of dwellings to be constructed in a certain neighborhood or the number of persons who can reside in those dwellings. But zoning *authorities cannot validly consider who those persons are*, what they believe, or how they choose to live, whether they are Negro or white, Catholic or Jew, Republican or Democrat, married or unmarried.” (Emphasis added). Justice Marshall's words of caution are taking on added importance today.

In Hawai'i, we are seeing with increasing frequency the latest battleground on who may occupy a residential dwelling. This time, however, the fight is not about whether the occupants are of the right ethnicity, or are sufficiently closely related to each other, or are mentally or physically fit enough to live in the neighborhood. Rather, the question today is whether the occupants are full-time residents of the home, or whether they are just visiting. Although often described as a debate over “transient vacation rentals,” in fact the various county and state laws do not distinguish between tourists and locals, and these laws can be and are applied to both.

Each of Hawai'i's counties has a zoning ordinances that attempts to regulate the location and duration of short-term rentals of dwelling units. Some counties, like Oahu, regulate multiple rentals in a thirty-day window. Others, like Maui, attempt to restrict rentals of less than 180 days. In addition, the state-wide zoning law can also impact whether or how a residence can be rented.

Not only do the specific zoning ordinances differ from county to county, but the interpretation and enforcement of those laws can and does change over time. For instance, in an abrupt and heavy-handed change, Maui County has recently begun to issue violations and assess fines against property owners who applied for the appropriate permits years ago, despite the County's failure to act on those permits. On Oahu, some private citizens who disagree with the City's enforcement of the thirty-day rule are seeking to use the courts to achieve what they cannot obtain from the City Council. And recently, every county council has taken up the issue of short term rentals, and if and how the laws should be changed.

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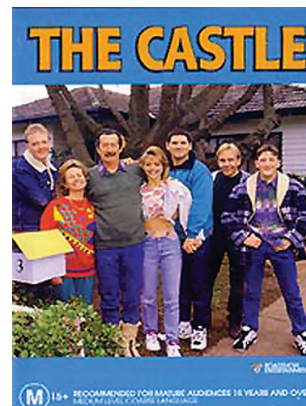
In response to our clients' needs in each of the four counties, Damon Key has assembled a Transient Vacation Rental Task Force. This task force is led by Damon Key directors Gregory Kugle, Robert Thomas and Mark Murakami, and is assisted by associates Noelle Catalan, Christi-Anne Kudo Chock and Caprice Itagaki and paralegals Bonnie Sin, Genie Kincaid and Diana Young. The task force is currently defending clients in the circuit courts of Oahu and Maui, and before the Intermediate Court of Appeals, and is also advising and defending them in connection with administrative enforcement in all of the counties and with state agencies. Damon Key is quickly becoming known as the “go to” firm for Hawai'i transient vacation rental issues.

**For more information or questions regarding this article,
please call Greg at 531-8031 ext 603 or email him at gwk@hawaiilawyer.com**

Movie Review: *Kelo Down Under*

By Robert H. Thomas

In Kelo v. City of New London, a case decided in 2005 by the U.S. Supreme Court, the Court allowed the city to condemn perfectly good middle-class homes and turn over these properties to a developer who promised to make more intensive use and generate more taxes for the city. The nationwide outrage following the decision spurred changes in eminent domain law in many states.



The Kerrigan home will never make the pages of *Australian House Beautiful*: it sits in the flight path of the Melbourne airport, massive power lines run overhead, the back yard used to be a toxic landfill, and the owner has installed a few – ahem -- “unauthorized” additions including a greyhound kennel, a massive TV aerial, and a faux chimney.

But despite its faults, it’s home – “*The Castle*” -- and tow-truck driver Darryl Kerrigan intends to protect it from “compulsory acquisition” (Australia’s version of eminent domain) when the airport authority, backed by a large corporation, decides it needs to take the neighborhood for an expanded runway. The family’s peaceful existence is shattered by the take-it-or-leave-it offer from the local council for paltry compensation.

I finally got my hands on an original Australian version of this 1997 comedy about a slightly offbeat family’s attempt to resist a *Kelo*-like taking of their home.

Mr. Kerrigan isn’t interested in selling. The family doesn’t consider the adjacent airport to be a nuisance (it’ll be conveniently within walking distance if they have to fly one day), and they optimistically view the overhead power lines as just “a reminder of man’s ability to generate electricity.” Their neighbor Farouk, a Lebanese immigrant, explains why he doesn’t mind deafening airplane noise in his back yard: “They say the plane, they fly overhead, drop the value. I don’t care. In Beirut, plane fly overhead, drop bomb. I like this plane.”

At first, Kerrigan tries self-help in the local courts.

Judge: What is the case you are putting?

Kerrigan: I told you. I mean, you just can’t walk in and take a man’s house.

Judge: Mr. Kerrigan, are you disputing the amount of compensation?

Kerrigan: I’m not interested in compensation. I’m saying you can’t kick me out.

Judge: What is your argument?

Kerrigan: That’s it. That’s my argument. You can’t kick me out.

Judge: And on what law do you base that argument?

Kerrigan: The Law of bloody common sense!

“You can’t buy what I’ve got,” he responds when asked whether the compensation offered is insufficient. But predictably, these arguments get him nowhere, so he retains a well-intentioned but horribly inept local solicitor, who is, by his own estimation, over his head when it comes to eminent domain and constitutional law. He only makes the case worse when he bases his argument on “the vibe” of the constitution. Only when an experienced constitutional barrister takes on the case pro bono do things begin to look up.

The final act plays out in Australia’s High Court, with the barrister arguing that the Constitution’s requirement that takings be accomplished on “just terms” prohibits the seizure of family homes to satisfy corporate desires.

The film doesn’t gloss over the legal issues, and touches upon the well-known *Mabo* and *Tasmanian Dam* cases, and article 51 of the Australian Constitution. But whether the film is accurate from the standpoint of Australia’s law of compulsory acquisition isn’t really important, because it accurately catches “the vibe of the thing” (to paraphrase one of the film’s more well-known lines) of why home and business owners resist eminent domain.

Some things, I suppose, are universal. The U.S. release is available at Amazon.

Robert Thomas practices eminent domain law, and with Ken Kupchak, filed an amicus brief supporting the property owners in *Kelo v. City of New London*, 545 U.S. 469 (2005).

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Attorneys in the News

Christine A. Kubota was appointed and confirmed as Vice Chair of the Honolulu Japanese Chamber of Commerce and as Chair of the International Business Development Committee for fiscal year July 2008 – June 2009. She was also reappointed as a member of the Supreme Court Committee on Court Interpreters for a three year term from July 2008 – June 2011.

Mark M. Murakami was a speaker on the faculty of Coastal Engineering and Land Use Issues in Hawai'i held at the Hilton Waikiki Prince Kuhio Hotel.

James C. McWhinnie, Vice-Chair of Meritas and Chairman of its Finance Committee, will be attending the Meritas Executive Committee Meeting, Board Meeting and Asian Regional Meeting on September 4 - 6, 2008, at the Westin Hotel in Tokyo, Japan. He will also be presenting to the Board of Directors for its consideration a new World Market Dues Initiative for the organization.

Robert H. Thomas will be on the faculty of the U.H. Law School's workshop on burial issues on September 23, 2008.

On August 14, 2008, **Robert H. Thomas**, **Mark M. Murakami**, and **Christi-Anne H. Kudo Chock** filed a friend of the court brief on behalf of the Navy League and nine retired Admirals in the pending U.S. Supreme Court case about the Navy's use of sonar off the California coast, *Winter v. Natural Resources Defense Council, Inc.*, No. 07-1239. The Court will hear oral arguments in the case in October. For a copy of the brief, please visit www.hawaiiocceanlaw.com.

Robert H. Thomas and his blog on property law issues (www.inversecondemnation.com) were cited in the August 8, 2008 edition of Pacific Business News story "State acquires land quickly using friendly condemnation" about the use of eminent domain for a service road near the H-3 freeway in Halawa.

