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Get The Facts On Immigrants, Whether Legal Or Illegal, In The US!

With presidential campaign politics well under way, immigration is again a hot topic, most recently in the context of Syrian refugees. Regrettably, the debate has been characterized by misstatements, half-truths, fear and xenophobia, and myths having no basis whatsoever in fact. Fortunately, the facts are out there, so let's take a look at some of these myths and see if they have any foundation in reality.

Myth: Immigrants are more likely to be criminals than the native-born.
Not true. It's just the opposite.

Between 1990 and 2013, the foreign-born share of the U.S. population grew from 7.9 percent to 13.1 percent. The number of "undocumented" immigrants tripled from 3.5 million to 11.2 million. During that same period, FBI data show that violent crime rate declined 48 percent, and property crime fell 41 percent. According to 2010 census data, incarceration rates among young, less-educated Mexican, Salvadoran, and Guatemalan men who make up the bulk of the unauthorized population are significantly lower than for native-born young men without a high-school diploma: less-educated native-born men age 18-39 had an incarceration rate of 10.7 percent—more than triple the 2.8 percent rate among foreign-born Mexican men, and five times greater than the 1.7 percent rate among foreign-born Salvadoran and Guatemalan men.¹



By David P. McCauley

Myth: Immigrants take jobs away from native-born workers.
Not true.

If this were true, we should find high unemployment rates in parts of the country with large numbers of immigrants—especially immigrants who came here recently and, presumably, would be willing to work for lower wages and under worse conditions. U.S. Census data show this is not the case. Places with high unemployment rates do not necessarily have large numbers of recent immigrants, and locales with many recent immigrants do not necessarily have high unemployment rates. In short, unemployment rates in an area offer no clue as to how many recent immigrants live there, nor does the number of recent immigrants in an area indicate what the unemployment rate might be.



¹ Source: The Criminalization of Immigration in the United States, American Immigration Council, July 2015

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For example, 2000 Census data showed recent immigrants made up 8.4 percent of the population in the Pacific region (California, Oregon, Washington, Alaska, and Hawaii), but only 2.8 percent in the East North Central region (Ohio, Michigan, Indiana, Illinois, and Wisconsin). Yet these two regions had almost the same unemployment rate: 10.8 percent in the Pacific region and 10.0 percent in the East North Central region. New immigrants are in no way stealing jobs from Americans. As of 2008, immigrants who arrived during the last decade made up only 5.5 percent of our workforce.²

**Myth: Immigrants take more than they contribute to our economy.
Not true.**

Immigrants account for one out of every eight people in the United States, and one out of every six workers. Together, Latinos and Asians in the U.S. wield \$2 trillion in consumer purchasing power, and the businesses they own have sales of \$857 billion and employ 4.7 million workers at last count. In 2012, unauthorized immigrants comprised 3.5% of the population (or 11.2 million people), and made up 5.1% of the U.S. workforce (or 8.1 million workers). A 2008 report from The Perryman Group found that if all unauthorized immigrants were removed from the United States, **the country would lose \$551.6 billion in economic activity, \$245 billion in Gross Domestic Product (GDP), and approximately 2.8 million jobs.**³ Unauthorized immigrants in the United States paid **\$11.8 billion** in state and local taxes in 2012, including \$7.1 billion in sales taxes, \$1.1 billion in personal income taxes, and \$3.6 billion in property taxes, according to data from the Institute on Taxation and Economic Policy. If they were to obtain lawful permanent resident (“green card”) status, they would pay even more: **\$14.1 billion** in state and local taxes, including \$7.8 billion in sales taxes, \$2.3 billion in personal income taxes, and \$4 billion in property taxes.⁴

**Myth: Refugees coming to the U.S. are terrorists.
Absolutely no U.S. evidence on jihadi-inspired events since 9/11 supports this.**

All of the Sept. 11 attackers entered the United States using tourist, business or student visas. Richard C. Reid, the would-be “shoe bomber” in 2001, is a British citizen, and did not need a visa to enter the U.S. Hesham Mohamed Hadayet, who fatally shot two people at the El Al ticket counter at Los Angeles International Airport in 2002, had a green card. Umar Farouk Abdulmutallab, a Nigerian would-be underwear bomber in 2009, had a tourist visa. Naveed Haq, who shot and killed one person and wounded five others at the Jewish Federation of Greater Seattle in 2006, was born in the U.S. Mohammed Reza Taheri-azar, who drove an SUV through a crowd at the University of North Carolina in 2006, was a naturalized American. Abdulhakim Mujahid Muhammad, who killed one soldier and wounded another at a military recruiting center in Little Rock in 2009, was born in the U.S. Nidal Malik Hasan, who committed mass murder in a shooting at Fort Hood in 2009, was born in Virginia. Faizal Shahzad, the Times Square car bomber in 2010, was a naturalized American. Yonathan Melaku, who fired shots at D.C. military buildings, including the Pentagon, in 2010 was a naturalized American. At the time of the Boston Marathon bombings in 2013, Dzhokhar Tsarnaev was a naturalized American citizen, and his brother Tamerlan had a green card. Ali Muhammad Brown, charged with murdering four people in Washington State and New Jersey in 2014, was U.S.-born. So was Altan Nolan, charged with murder for beheading his co-worker in Oklahoma in 2014, as was Zale H. Thompson, who attacked New York police officers with a hatchet in the same year. So were Elton Simpson, Nadir Hamid Soofi, and Abdul Malik Abdul Kareem, who together planned and carried out an attack on a gathering in Garland, Tex., that showcased artwork and cartoons depicting the Prophet Muhammad. Mohammod Youssuf Abdulazeez, who killed four Marines and a sailor at a military recruiting office in Chattanooga, was a naturalized American. None of these men was, or had ever been, a refugee.⁵

So don't believe everything you read or hear. Do a little digging. Get the facts.

² Source: The Unemployment and Immigration Disconnect: Untying the Knot, Immigration Policy Center, 2009.

³ The right-leaning American Action Forum calculated the cost of deporting 11 million people would take about 20 years and cost the government between \$400 billion and \$600 billion. The impact on the economy would be even larger, according to the study: Real GDP would drop by nearly \$1.6 trillion and the policy would shave 5.7 percent off economic growth. See *The Atlantic*, March 6, 2015.

⁴ Source: The Political and Economic Power of Immigrants, Latinos, and Asians in the United States; American Immigration Council (Updated 2015)

⁵ SERGIO PEÇANHA and K.K. REBECCA LAI “The Origins of Jihadi-Inspired Attackers in the U.S.,” *The New York Times*, November 25, 2015.

**For more information on this article, please call David McCauley at 531-8031 ext 618,
email him at dpm@hawaiilawyer.com or scan the code with your smartphone.**



Damon Key's Jim McWhinnie is Appointed as Oahu District Court Judge

Please join us in congratulating Damon Key's own James C. McWhinnie on his appointment to the District Court of the First Circuit (Oahu). The appointment was announced in October with full Senate confirmation following in early November. A swearing-in ceremony was held on Thursday, December 17, 2015, with his six-year term commencing the next day.

Jim joined Damon Key as a director in 1989 and was chair of the firm's Practice Management Committee and the Litigation Practice Group. In his nearly 27 years at the firm, Jim's practice included substantial commercial, product liability, construction, environmental and personal injury cases. He has also been involved in all aspects of alternative dispute resolution, having acted as an advocate, arbitrator and mediator.

"I've been practicing law for nearly 33 years and have thought about becoming a judge for quite a while," said Jim in reflection. "Now seems like a good time to do it." District Court judges handle diverse and heavy caseloads, including everything from large, commercial summary possession cases to traffic citations. Understanding that 70 to 75 percent of the public's only exposure to the state's legal system is at the district court level, Jim sees this as an opportunity to give back and make a difference.

A leader in the legal community for many decades, Jim has volunteered in a broad range of activities. He has been a member of the Supreme Court Special Committee on Judicial Performance for the past 17 years, served as a delegate to the Hawaii State Judicial Conference for a number of years and served as Secretary and Director of the Hawaii State Bar Association.

Jim fondly remembers when Steven Levinson, who also went on to become a judge, and Mike Yoshida recruited him to join Damon Key as a partner. At the time, Jim was a partner at another Honolulu law firm and was given just two days to respond to the offer. He also will always remember that his first day at Damon Key was April Fool's Day in 1989.

Jim points to then managing partner Denis Leong—whom he describes as an extremely fair, practical, thoughtful and down-to-earth guy—as one of the main



reasons he joined Damon Key. As for a case that stands out, Jim recalled representing Jetway Systems in a bid protest in the early 1990's, which resulted in Jetway being awarded a contract to provide about \$50 million in passenger boarding bridges at numerous airports throughout the state.

Jim, originally from a suburb of Chicago, came to Hawaii at the age of 21 to visit a friend and, shortly thereafter, he moved here. He holds a bachelor's degree in psychology and political science from St. Mary's University of Minnesota and a J.D. from DePaul University College of Law.

Jim leaves his clients in good hands with a strong transition team in place. "We have good depth of quality litigation practitioners at Damon Key. Each attorney brings something a little different to the table," said Jim. While he anticipates a heavy workload as a judge, Jim hopes to continue to enjoy playing golf, but adds, "I think my handicap is going up."

The entire Damon Key ohana wishes Jim the very best in this new chapter of life. With a long history of success with the firm and a strong reputation for integrity in the local and global legal community, we know he will serve the people of Hawaii well.



BID PROTESTS

I. What is a bid protest

Bid protests allow disappointed bidders to act as watchdogs of public procurement, ensuring that all bidders are bidding on an even playing field, untouched by corruption or cronyism. When a bidder spots an irregularity in another bidder's bid, or sees something in the invitation for bids that affects the fairness of the bidding process, the law affords a mechanism to raise the issue with the public agency, and take the matter to public hearing if necessary. Hawaii's procurement code and accompanying administrative rules provide clearer timelines for protests, as well as a mechanism for a timely administrative review of agency decisions on protests. However, the uniform procedure set forth in the statute and accompanying rules, is accompanied by procedural pitfalls of timing, required content, and other quirks that can moot a protest before it is decided. This article addresses two common procedural traps of which bidders should be aware in order to preserve their right to a substantive review of their complaints.



By Anna H. Oshiro

II. Procedural Issues in Bid Protests

A. Timing

Bidders often wait too long to protest. They may decide that a solicitation is illegal, but they will try to get the bid anyway, thinking if they lose the bid, they can protest because the bid solicitation was unlawful. This will not work. Busy agencies and hearings officers will be more than happy to dismiss as untimely a bid protest submitted after bid opening, that is in fact a protest of the form of a solicitation. If a solicitation violates the procurement code bidders need to file a protest before the bids are opened.

After bid opening, protest of a competing bid must occur within five working days from the date a bidder knew or should have known of the grounds for the protest, OR, no later than five working days from the date a notice of award is issued. The latter situation (after notice of contract award) is the latest a bidder can act, but by no means should the bidder wait until the notice to file a protest if it learns of grounds to protest before then. Not only would you be risking dismissal of your protest by submitting it late, you would also be limiting the relief available under the code. TIP: Take action early and often -- submit your protest as soon as you know of the grounds for protest -- both your chances at a substantive review, and your potential remedies, are better if you do.

B. Content

Initial bid protests are submitted to agencies in the form of a letter, typically identified as a "bid protest" in the heading. Many bidders, because a letter is perceived as a more informal means of addressing their concerns about the legality of a competing bid, do not include specific information in their bid protest letter, or fail to list every irregularity of which they take issue. This is a mistake. Assuming a bidder wants to preserve its right to take a case through administrative appeal if its letter protest is rejected, it is essential to be as comprehensive as possible in presenting one's case to the agency. That means a bidder should mention and try to provide support for, everything it believes is wrong with the competing bidder's bid. If a bidder finds out something else about a bid two days after it sent in its bid protest, but still within the time limit to submit a protest, it should submit that additional complaint as an additional bid protest. The reason for this is that administrative hearing officers will often take the position that if something was not raised in a bid protest, and is raised for the first time at administrative hearing, it is untimely and the "new" reason will not be heard. TIP: When in doubt, get the protest out.



For more information, see this related article on how bid protests might affect the cost of rail, found at <http://www.hawaiiconstructionlaw.com/files/aho-rail-article.pdf>.

For more information on Damon Key's construction practice, call Anna Oshiro at 531-8031 ext 601, her email is aho@hawaiilawyer.com or scan the code with your smartphone.



Applying for a Zoning Variance? Know the Legal Boundaries



By Loren A. Seehase

Recently, in *Surfrider Found. v. Zoning Bd. of Appeals*, the Hawaii Supreme Court unanimously delivered a landmark decision that harshly critiqued and reversed the Department of Planning and Permitting's ("DPP") issuance of a variance to the coastal height setback requirements for a proposed redevelopment project in Waikiki by Kyo-ya Hotels & Resorts, LP. In 2010, Kyo-ya applied for a land use permit to redevelop the 8-story Diamond Head Tower into 26-stories.

One of the several permits needed was a variance to allow the redeveloped tower to encroach 74% into the coastal height setback. The DPP granted the variance and both the Zoning Board of Appeals and the Circuit Court upheld it. After a five-year battle, the plaintiffs prevailed at the State's highest court with the capstone of their judicial endeavors being the Court's admonishment of the DPP's woefully inadequate application of the variance test. As a result, the Supreme Court delineated the parameters of the legal standard for issuing a variance.

Zoning Variance

A landowner can obtain a variance to a zoning ordinance if they can prove that without this variance (or exception) they will suffer unnecessary hardship. Unnecessary hardship must be established by showing that: (1) the applicant will be deprived of the reasonable use of the land or building, (2) the request is due to unique circumstances and not just the general conditions of the neighborhood, so the reasonableness of the neighborhood zoning is not drawn into question, and (3) the variance will not change the essential character of the neighborhood or be contrary to the intent and purpose of the zoning ordinances. If the variance is granted the DPP must specify the particular evidence that supports the granting of the variance.

Surfrider Decision

In *Surfrider*, the Court reiterated that it is the landowner's burden to prove all three elements of the variance test. A determination of hardship must be established by the facts and circumstances in effect at the time of the application: not unrealized, hypothetical, or future facts and circumstances. The Court further defined each prong of the variance test by stating what does not meet the definition.

First, "reasonable use" is not determined by the landowner's most desirable or profitable use. Variances cannot be given to make more money or save money. If an alternative use exists, such as renovating the existing structure, then the landowner is not being deprived

of the reasonable use. And, the inability to utilize the maximum density potential of the property is not a denial of reasonable use.

Second, the "unique circumstances" pertains to specific attributes of the parcel, not the landowner's unique plans for the parcel. A narrow lot, by itself, is not unique. If other properties in the neighborhood have the same hardship, such as zoning setbacks, then it is not unique. Furthermore, provisions of the zoning ordinances are legal requirements, and adherence to them does not constitute a unique circumstance.

Third, a variance is not "consistent with the character of the neighborhood" by the mere existence of other nonconforming structures and it cannot serve as the basis for further non-conformance. Proving that a variance is "not contrary to the intent and purpose of the ordinance" requires more than partial compliance with some Special District requirements. Lastly, the greater the disparity between the variance and the ordinance's restriction the more specific and compelling evidence is required.

Given the recent *Surfrider* decision, landowners may face increased scrutiny in obtaining a variance and the DPP may be less likely to grant it.



For more information on this article, please call Loren at 531-8031 ext 609, email her at las@hawaiilawyer.com or scan the code with your smartphone.

The Securities and Exchange Commission on Crowdfunding



By Megumi Honami

On October 30, 2015, the Securities and Exchange Commission (“SEC”) adopted new rules “Regulation Crowdfunding,” which allow companies to offer and sell securities through crowdfunding under the provisions of Title III of the Jumpstart Our Business Startups Act, widely known as JOBS Act. The JOBS Act was passed with a bipartisan support and signed into law by President Barack Obama on April 5, 2012, and was intended to encourage cost-effective funding of small business by easing overly burdensome securities regulations.

Crowdfunding is a method of raising funds for small businesses and start-ups through websites such as online intermediaries known as funding portal as well as social network services. Under the Securities Act of 1933, companies cannot offer or sell securities to the public unless (a) the offering is registered with the SEC, or (b) there is an available exemption from registration. Under the pre-JOBS Act regulatory regime, backers for entrepreneurial start-ups utilizing the crowdfunding would provide funds on a donation basis in exchange of early access to products or other enticement.

The Regulation Crowdfunding now enables individuals to purchase shares of companies on a crowdfunding portal. While encouraging more accessible and cost-effective means of raising funds for small business, the new rules also strive to create sufficient safeguards for investors by setting certain restrictions and limitations on crowdfunding. Here are some notable features of Regulation Crowdfunding:

Company Rules

A company can raise up to \$1 million in a 12-month period through crowdfunding offerings. All transactions must be conducted on an SEC-registered intermediary, either a broker-dealer or a funding portal. Companies that offer securities under the new rules must file certain information with the SEC and provide this information to investors and the intermediary to disclose: the price to the public of the securities or the method for determine the price, the target offering amount; financial statements of the company reviewed by an independent public accountant or audited by an independent auditor (a company offering more than \$500,000 but not more than \$1 million of securities under the new rules may provide

reviewed rather than audited financial statements); a description of the business and the use of proceeds from the offering; information about officers and directors as well as owners of 20% or more of the company.

Investor Rules

Individual investors whose annual income or net worth is less than \$100,000 can invest, in a 12-month period, up to the greater of \$2,000 or 5% of the lesser of their annual income or net worth. Individual investors whose annual income or net worth is equal to or more than \$100,000 can invest, in a 12-month period, up to 10% of the lesser of their annual income or net worth. The total amount of securities sold to an investor through all crowdfunding offerings cannot exceed \$100,000 in a 12-month period. Securities purchased in a crowdfunding transaction generally may not be resold for one year.

Crowdfunding Intermediaries Rules

A crowdfunding portal must register with the SEC and become a member of a national securities association. Crowdfunding intermediaries are required to take steps to prevent securities fraud, provide required disclosure to investors, and make certain information available for the public, among other things.

The Regulation Crowdfunding is a complex yet game-changing body of law for start-ups and small businesses. Companies that consider offering securities under these new rules should first carefully assess the feasibility of raising funds in exchange of securities through a crowdfunding portal by balancing the factors such as costs associated with making required disclosure and providing audited or reviewed financial statements, and the amount of funds to be raised and the number of investors it needs to raise the target amount.



For more information on this article, please call Megumi Honami at 531-8031 ext 615, email her at mh@hawaiiattorney.com or scan the code with your smartphone.



Welcome Megumi Honami and Loren A. Seehase

New Associates Join Damon Key

Damon Key welcomes Megumi Honami and Loren A. Seehase as Associates. Megumi joins the firm's Business and Commercial Law, Real Estate, and Immigration and Naturalization Practice Groups and Loren joins our Litigation and Dispute Resolution Practice Group. Both are recent graduates of the University of Hawaii William S. Richardson School of Law, have previously called Hawaii home, and bring valuable skill sets to the firm.

Megumi was born and raised in Hiroshima, Japan. With a burning desire and determination to attend university in America and the need to learn English quickly, she spent her final year of high school as an exchange student in Washington State. Following high school, she enrolled at Kapiolani Community College and later transferred to the University of Hawaii at Manoa, where she obtained her bachelor's degree with a double major in political science and history.

Contemplating enrollment into law school, Megumi decided it would be best to test the waters first. So, once again, she made a bold move – quite literally – and relocated to New York City within two weeks of being offered a job interview at the most prominent Japanese-owned law firm in the U.S. With no other job prospects on the horizon and rent to pay, she was determined to get the Executive Legal Assistant position, and she did.

Several years later, she returned to Hawaii and worked as a Legal Translator and Assistant at Damon Key. While working in the law offices, she refined her professional-level Japanese oral and written communication skills and realized the advantages she could provide to legal clients with her strong bilingual ability and bicultural understanding.

Megumi enrolled in law school, where she served as Senior Editor of the Asian-Pacific Law and Policy Journal, President of the Pacific-Asian Legal Studies Organization, and Summer Law Clerk at Damon Key. She earned a Pacific-Asian Legal Studies Certificate and graduated cum laude. Megumi looks forward to helping clients avoid the intangible issue of cultural misunderstandings so that they can reach their goals.

Born in Southern California, Loren moved to Hawaii with her family at the age of six and attended public and private schools on Oahu before moving to Michigan in the ninth grade. Successful in the performing arts throughout high school, she studied vocal performance and theater at an Ohio university but moved on without a degree to work as a Team Coordinator for a national restaurant and entertainment company. Committed to the company for nearly five years, she managed the hiring, training, and development of 120 to 200 employees. Despite her significant contributions and rapid advancements, she was passed over for a promotion simply because the other candidate had a degree and Loren did not. Blindsided by the decision, Loren decided not only to get her bachelor's degree but to become a lawyer so that she would never again be ignorant of the law.

Loren earned her bachelor's degree in business administration from Indiana Wesleyan University, cum laude. Once in law school, she was a Staff Writer for the University of Hawaii Law Review, a Constitutional Law Teaching Assistant, a Judicial Extern, a Research Assistant, and a Summer Associate at Damon Key. She also earned an Environmental Law Certificate.

Loren was a top oralist at the Philip C. Jessup International Law Moot Court Competition. The University of Hawaii team was named the 2015 Jessup Pacific Regional Champion, where Loren won Best Oralist out of over 100 competitors. Loren looks forward to working relentlessly to help resolve conflicts and zealously advocating for Damon Key's clients.



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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

Damon Key attorneys volunteered all month in November to staff the Honolulu District Court Self Help Center which is a joint effort by the Legal Aid Society of Hawaii and the Hawaii State Bar Association.

Clare M. Hanusz was a guest lecturer at the University Lecture Series on Immigration & Law on November 19, 2015. Clare was invited to speak with attorneys from Thailand's Attorney General's office about human trafficking victims. She was also interviewed by KHON2 regarding the question who can or can't come to the country regarding Syrian refugees.

Mark M. Murakami and **Gregory W. Kugle** presented the 2015 Litigation Update to the Hawaii State Bar Association Real Property and Financial Services Section.

In early December, **Robert Thomas** was at the U.S. Supreme Court in Washington, D.C. to attend oral arguments in two election law cases which could impact the way elections are held in Hawaii. Both involve the "one person, one vote" principle, and how state legislative districts are drawn. He also co-authored an op-ed in the Honolulu Star-Advertiser with Col. David Brostrom, Andrew Walden, and Congressman Mark Takai about the cases, which is available here: <http://www.staradvertiser.com/editorial/hawaii-might-finally-be-forced-to-include-military-among-we-the-people/>

Robert H. Thomas and **Mark M. Murakami** are on the faculty for the 2016 American Law Institute's Annual Eminent Domain and Land Valuation Conference. This is the annual gathering of the nation's most experienced condemnation lawyers, set for Austin, Texas.