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LEGAL ALERT

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What You Need To Know About Hawaii's New Environmental Court

By Robert H. Thomas

You may have heard that the Hawaii Legislature, after an intensive years-long effort by environmental groups, recently created a new court with specialized jurisdiction that could have a big impact on how property and business owners are treated by Hawaii's courts.

Known as the "Environmental Court," this new court has been given the exclusive jurisdiction to hear most civil and criminal cases affecting the environment. Because Hawaii's court is only just getting off the ground and is in uncharted territory (only one other state—Vermont—has a court with a similar mandate), those who stand to lose the most in this new court—property and business owners—have many unanswered questions.

Here's what you need to know.

Why A New Court?

According to its proponents, the new Environmental Court is not expressly meant to change outcomes in environmental cases, and is only designed to bring "consistency" to rulings in such cases, and to remove "improper influences" (supposedly by business and property owners' interests) from judicial decision making in such cases.

Proponents point to two aspects of the new court.

No New Judges

First, it does not have separate physical facilities, and the judges who have been appointed to staff it are not new to the bench. Nor did the Judiciary request more money in its budget to accommodate the new court. Instead, the circuit courts have simply established a new division in each county's existing court system, with a sitting judge, or judges, assigned to the Environmental Court. Many of these judges already preside over cases which involve issues that affect the environment, so are familiar with the subject matter, and this is, at least on the surface, simply an administrative reassignment of specific cases to pre-designated judges. So far, so good.

No New Law

Second, the court wasn't tasked with applying any newly-created laws. Rather, Environmental Court judges have been given exclusive jurisdiction to resolve cases under specific existing statutes which were deemed by the Legislature to be related to the environment. But isn't most everything dealing with land, water, and similar issues "related" to the environment?

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The Environmental Courts Broad Jurisdiction

Perhaps so, but the new jurisdictional scheme doesn't go quite that far, and the Environmental Court has been exclusively assigned jurisdiction to hear cases involving the following sections in the Hawaii Revised Statutes: 6D (cave protection), 6E (historic preservation), 6K (Kahoolawe Island Reserve), 128D (environmental response), 339 (litter control), 339D (electronic waste and recycling), 340A (solid waste), 340E (drinking water), 342B (air pollution), 342C (ozone protection), 342D (water pollution), 342E (nonpoint source pollution), 342F (noise pollution), 342G (integrated solid waste management), 342H (solid waste pollution), 342I (special wastes recycling), 342J (hazardous waste), 342L (underground storage tanks), 342P (asbestos and lead), and 508C (uniform environmental covenants act). In addition (and most importantly), the Environmental Court now has the exclusive jurisdiction to adjudicate cases in two areas that have resulted in more than a few well-known cases: Environmental Impact Statements (chapter 343), and cases involving public lands, water and flood control, mining and minerals, forestry and wildlife, ocean resources and wildlife, geothermal, trail access, and conservation easements (Title 12).

However, after input from property and business interests, the Legislature concluded that cases involving state land use policy (chapter 205), and the shoreline (205A) would not be within the new court's jurisdiction. Cases involving those issues will remain in the regular court system and be assigned to judges randomly, as they were before. Which means the scope of what the Environmental Court has exclusive power to consider is extremely broad, but not as wide-ranging as was initially proposed. Again, a good thing, if only because it could have been much worse.

Is The Environmental Court Needed?

Which leads to a good question: if all the new Environmental Court was meant to accomplish was an administrative rearrangement of circuit court calendars to assign certain cases to certain judges, why was such a court considered necessary? After all, Hawaii courts were already extraordinarily well-attuned to environmental concerns, and indeed, are among the most favorable courts in the nation for environmental groups to press their claims. As a study published in the University of Hawaii Law Review in 2011 reported, environmental plaintiffs enjoy an enviable record of success in the Hawaii Supreme Court, which during the years studied (1993-2010) found in favor of such groups "approximately eighty-two percent of the time, sixty-five percent of which reversed the Intermediate Court of Appeals."

A stunning statistic, which highlights two things. First, there's no reason to think that the court had changed its approach, and in the time between 2010 and today, had begun to "inconsistently" apply environmental laws as the Legislature concluded. Second, rather than being subject to "improper influences" from business and property owners as was claimed, it reveals that the courts were remarkably free of such forces.

In short, the Environmental Court was a solution in search of a problem.

Now What?

But other than complain that the Legislature adopted a law that was designed to address illusory problems, what are property and business owners to do? After all, the debate about whether the new court is truly necessary has become academic. Because it is here. The Second Circuit (Maui) Environmental Court is already considering the first case, a challenge to traditional plantation cane burning. And there surely will be more to come.

First, pay close attention to how the courts rule in this new case, and down the road. Because the reasons for creating the Environmental Court don't really hold up, the actual reason for creating the court may have been to push the application of laws related to the environment even further out of balance. Normally, we shouldn't be concerned, since courts are generally very good at remaining objective and avoiding regulatory capture. But when a court is charged with a mission other than the evenhanded administration of justice—here, to "ensure that the State upholds its constitutional obligation to protect the public trust for the benefit of all beneficiaries"—the danger of environmental *judges* becoming environmental *prosecutors* must be taken seriously and guarded against. Only time will tell whether the startling success rates reported in the previously-mentioned law review article will increase under this new scheme.

Second, watch for legislative action. While the scope of the Environmental Court was curtailed in order to make the bill more palatable and ensure its passage—and the court was not given jurisdiction to consider state land use and shoreline cases—"mission creep" could well set in, with future calls to enlarge the scope of the court's jurisdiction to include these and other topics. After all, nearly anything could conceivably be "related" to the environment, and it is not hard to see how the court's jurisdiction will be expanded, if it is deemed a "success" as its proponents hope.

For more information on this article or on Environmental Law, please email Robert Thomas at rht@hawaiilawyer.com or scan the code with your smartphone.

Hawaii Ban on Noncompetes For Tech Workers

"Ige signs law banning noncompete clauses," read the July 6 Star Advertiser headline. Are noncompete clauses now banned in Hawaii? Not for most employees. The ban only applies to employees of "technology businesses." Moreover, even for technology businesses, there are steps that businesses can take to limit what employees do after leaving.

By Sara E. Coes

Purpose is "to Stimulate Hawaii's Economy"

Act 158's (which contains the ban) stated purpose "is to stimulate Hawaii's economy by prohibiting noncompete agreements and restrictive covenants that forbid post-employment competition for employees of technology businesses." Supporters of the Act assert that noncompetes are hurting the growth of Hawaii's tech sector. Further, given Hawaii's geography, non-competes that limit competition within a certain distance can result in workers needing to move out of state. Some critics of the Act think that it will hurt the growth of Hawaii's technology sector by serving as a disincentive for tech businesses to set up in Hawaii.

Hawaii Tech Workers Can Jump to a Competitor and Bring Their Coworkers

Tech workers in Hawaii can now go work for a competitor of their employer and openly solicit their colleagues to do the same. The new law prohibits the inclusion of "a noncompete or a nonsolicit clause in any employment contract relating to an employee of a technology business." The law came into effect on July 1 and applies only to employment contracts for technology businesses that are signed on or after July 1.

The Act defines a "noncompete clause" as "a clause in an employment contract that prohibits an employee from working in a specific geographic area for a specific period of time after leaving employment with the employer," and a "nonsolicit clause" as "a clause in an employment contract that prohibits an employee from soliciting employees of the employer after leaving employment with the employer." These definitions do not encompass contract clauses prohibiting the solicitation of customers, so arguably tech workers can still be required to sign client nonsolicit clauses.

A "technology business" is defined as "a trade or business that derives the majority of its gross income from the sale or license of products or services resulting from its software development or information technology development, or both." The definition specifically excludes any business that is part of the broadcast industry or any telecommunications carrier. "Information technology development" is defined as "the design, integration, deployment, or support services for software" and "software development" is defined as "the creation of coded computer instructions."

How Technology Companies Can Protect Themselves

Hawaii and federal laws that allow companies to prohibit departing employees from using the company's trade secrets to compete against the company are still in effect. A trade secret is information that provides a competitive advantage, has value by virtue of remaining secret, and is the subject of reasonable efforts to maintain its secrecy.

Steps that all employers who possess trade secrets can take are:

- require employees to sign a confidentiality agreement on day one of employment and remind all departing employees of their obligations;
- take steps to maintain the secrecy of trade secrets, such as password protecting documents, giving access on a need to know basis, and not allowing highly confidential information to be printed or downloaded onto employee's personal devices; and
- provide training to employees on maintaining the confidentiality and value of the company's trade secrets.

Reasonable Noncompete and Nonsolicit Clauses Allowed In Other Industries

For businesses other than "technology businesses," noncompete and nonsolicit clauses that pass a reasonableness analysis are generally enforceable in Hawaii.

For more information on this article, please call Sara Coes at 531-8031 ext 611, email her at sec@hawaiilawyer.com or scan the code with your smartphone.

Just Be Clear: How Hawaii's Appellate Courts Are Requiring Administrative Agencies To Make Their Decisions Easier To Understand (And Appeal, If Necessary)

By Christopher J.I. Leong

If you have ever applied for a building permit or any other land use permit, or a license to become a contractor or nurse or to operate a beauty school, chances are you are already familiar with state and county administrative agencies. These include, for example, the Department of Land and Natural Resources, the Department of Commerce and Consumer Affairs, and the Department of Planning and Permitting of the City and County of Honolulu, just to name a few.

Normally, the process of obtaining a permit or license involves the submission of an application, often with supporting paperwork, and a good deal of waiting. Once your permit or license is issued, you can be on your way. If the agency denies your permit or license for some reason, the Hawaii Administrative Procedures Act provides avenues to appeal the agency's decision. What may be unfamiliar to many, however, are the questions of when, what, and how to appeal when this happens. In three cases decided since 2013, the Hawaii Supreme Court and Intermediate Court of Appeals (ICA) have acted to bring some much-needed clarity to the process of appealing an adverse agency decision. Those cases are very briefly discussed below.

In *Hoku Lele, LLC v. City and County of Honolulu*, a 2013 ICA case, Hoku Lele (which was represented by Damon Key) applied for building permits to rebuild the structures on its property and submitted a zoning verification request to the Department of Planning and Permitting of the City and County of Honolulu (DPP) to confirm that the structures were legal and could be rebuilt. The Director of DPP denied the request and explained that Hoku Lele could either provide additional information to support the request or perhaps apply for a variance; he did not inform Hoku Lele that it could appeal his denial to the Zoning Board of Appeals (ZBA). Hoku Lele filed suit in court after further communication with DPP proved unsuccessful. The circuit court dismissed this suit, however, because Hoku Lele did not appeal to the ZBA and therefore did not exhaust all possible administrative remedies before coming to court. On appeal, the ICA actually concluded that the Director's determination of the zoning request did not fall into the limited category of decisions appealable to the ZBA; therefore, Hoku Lele did not have to appeal before filing suit in court. As a practical matter, however, the ICA noted that had the Director's determination been appealable to the ZBA, the Director's letters were deficient for failing to notify Hoku Lele of its right to appeal and that it must appeal within thirty days from the date of the Director's determination.

In *Kellberg v. Yuen* (2014), the Hawaii Supreme Court picked up where *Hoku Lele* left off regarding the notice that must be provided to an aggrieved party. In this case, Yuen, the Planning Director of the County of Hawaii, approved a subdivision of a certain parcel of land into several lots. Kellberg (represented by Damon Key on appeal), who owns a neighboring parcel, first learned of the subdivision exactly thirty-one days after approval.

He contacted Yuen multiple times to challenge the subdivision approval because it created more lots than was allowed by the zoning and subdivision codes. Yuen finally responded by letter over a year later and explained to Kellberg that he would not do anything to undo the subdivision even though the approval was erroneous. Kellberg thereafter filed suit in circuit court and appealed after the circuit court granted summary judgment in favor of Yuen on all counts. Ultimately, the Hawaii Supreme Court agreed that Kellberg did not fail to exhaust the administrative process before filing his lawsuit in court. Importantly, although Kellberg did not contact Yuen until after the 30-day window to appeal approval of the subdivision had passed, he was unable to do so because he had no actual notice of the approval. For an individual to be able to appeal an adverse agency decision, the agency must clearly communicate how and within what time limit the individual can do so.

Most recently, in *Doe v. Attorney General* (2015), the Hawaii Supreme Court addressed the appealability of an administrative decision in response to a petition for declaratory ruling. In this case, Doe was a registered sex offender in the State of Washington. Doe wanted to be able to travel with his family to Hawaii for vacation and contacted the Hawaii Criminal Justice Data Center (HCJDC), an agency of the Department of the Attorney General, to inquire whether he would need to register in Hawaii, and if so, whether he could petition for an exemption from registration. HCJDC replied that Doe needed to come to Hawaii, register, and then petition for termination of the registration requirement. Doe appealed to circuit court, which dismissed the appeal because Doe never registered in Hawaii and therefore did not follow the required administrative process. The Hawaii Supreme Court ruled that Doe's communications should have been broadly interpreted as a petition for a declaratory ruling on whether he was required to register in Hawaii. Because a decision on such a petition is appealable, the circuit court should have considered Doe's appeal rather than dismiss it.

In sum, these recent cases should serve to streamline at least part of the administrative process by requiring agencies to be much clearer in informing individuals what they are deciding, when the date of decision is, how an aggrieved individual can appeal, and by when they must do so.

For more information on this article, please call Christopher Leong at 531-8031 ext 623, email him at cjil@hawaiilawyer.com or scan the code with your smartphone

Pan-Pacific Festival Celebrated its 36th Anniversary with more then 1,500 Participants from Japan

From left to right: Mr. Shoichi Gonda, President & CEO of Kintetsu International, Christine Kubota, Director at Damon Key, Mr. Toyoei Shigeeda, Former Consul General of Japan in Honolulu, Governor David Ige, Mr. Wataru Ogawa, President of Kintetsu in Japan, Roy Amemiya C&C Managing Director, Mr. Koji Ikehata, Executive Officer of KNT CT Holdings, Mr. Nobuo Tsuji, President of Kintetsu in Hawaii

Leaders of various Japanese organizations from left to right; Lenny Yajima, JASH Executive Director, Rika Hirata, UJSOH President, Carole Hayashino, JCCH Executive Director, Candice Naito, HJCC Chair and our Christine Kubota, Pan Pacific Festival Chair

Christine Kubota, Honorary Chair of the Pan-Pacific Festival Advisory Committee, attended the Pan Pacific Festival which celebrated its 36th anniversary this year with more than 1,500 participants from Japan. The Festival encourages intercultural friendships and understanding through sharing of culture and highlighting music, dance, sports and art. The parade featured the Royal Hawaiian Band as well as local high school bands. Over 40 groups of participants helped to create a fun-filled afternoon for the Waikiki audience.

2015 Legislative Update

The Hawaii State Legislature concluded its 2015 Regular Session with 243 bills becoming law. Here are a few of the noteworthy new laws.

County Surcharge on State Tax (Act 240).

This Act authorizes counties that have already established a county surcharge on State general excise tax to extend the surcharge from January 1, 2023 to December 31, 2027 at the same rate. Currently only the City and County of Honolulu has established a surcharge. Act 240 also allows counties that have not previously established a county surcharge to do so, at a maximum rate of one half of one percent. Finally, Act 240 extends the definition of “public land” to include the air space over mass transit projects developed after July 11, 2005.

Hotel Service Charges (Act 137).

Act 137 requires hotels that apply a service charge for porterage services (i.e., moving luggage, bags, or parcels between a guest room and the lobby, front desk, or any area with vehicular access to a hotel, hotel-condominium, or condominium hotel) to either distribute those charges to employees in full, or disclose to customers that the charges are being used for other purposes.

Transient Accommodations Tax (Act 93).

Act 93 clarifies that “fair market rental value” used to compute the amount of transient accommodations tax includes resort fees but excludes optional goods and services, including food and beverage services and beach chair or umbrella rentals. Act 93 also increases the transient accommodations tax rate to 8.25% on fair market rental value starting January 1, 2016 and 9.25% starting on January 1, 2017.

Activity Desks (Act 61).

Under existing laws, activity desks in hotels and shopping malls must be registered with the State Department of Commerce and Consumer Affairs. Act 61 now requires each activity desk to designate a principal at the time of registration and each registration renewal who will have direct management and supervision of the activity desk. This Act also requires activity desks to disclose the name and contact information of the principal to a client trust account beneficiary upon request. For activity desks registered with DCCA prior to July 1, 2015, disclosure of the principal must start with the renewal required for registrations that expire on December 31, 2017.

Liquor Licenses (Act 227).

Act 227 permits restaurants, retail dealers, brewpubs, and small-craft producer pubs with a liquor license to sell beer, malt beverages, and cider for off-premises consumption if the beverages are sold in securely sealed or covered glass, ceramic, or metal containers that are sold to or provided by the customer and do not exceed one half gallon.

Renewable Energy (Act 228).

Act 228 adds hydroelectric facilities, including appurtenances associated with the production and transmission of hydroelectric power, as a permitted use on agricultural facilities. Such facilities must be accessory to agricultural activities on agricultural lands for agricultural use only, must not generate more than 500 kilowatts of energy, must comply with the state water code, and must not adversely impact the use of the agricultural land or the availability of surface or ground water for all uses on all parcels served by the ground water sources or streams used for the hydroelectric facility.

Historic Preservation (Act 89).

Act 89 requires the State Historic Preservation Division of the Department of Land and Natural Resources to conduct a survey to identify historic districts and single-family residences that will be potentially eligible for listing on the Hawaii Register of Historic Places. SHPD will also be required to report the results to the Legislature during the 2018 legislative session.

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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

Tred R. Eyerly will make a presentation entitled "Number of Occurrences" for the Insurance Coverage Litigation Section at the Hawaii State Bar Association Convention on October 23, 2015.

Clare M. Hanusz's article, "Recent Changes in Immigration Policies and President Obama's November 20, 2014 Executive Actions" was the lead story in the May 2015 Hawaii Bar Journal. She was invited to present a continuing legal education program, "Immigration 101," at the National Federation of Paralegal Associations' Annual Convention on October 8, 2015.

Christine A. Kubota is serving as co-chair for Kristi Yamaguchi's Always Dream Foundation, Golden Moment Hawaii skate show on November 20th and 21st at the Blaisdell Arena. Christine attended a reception at the Japan Consulate in Honolulu with the new Consulate General Misawa and his wife on September 23rd.

Judy A. Schevtchuk presented a seminar on military family law, specifically financial issues in divorce. The seminar was sponsored by the HSBA's Family Law Section and was held in Damon Key's conference room.

In late September, **Robert H. Thomas** moderated an expert panel of speakers on "Civil Forfeiture of Property" at the 12th Annual Brigham-Kanner Property Rights Conference at the William and Mary School of Law in Williamsburg, Virginia. The Conference brings together the nation's leading property rights academics and practitioners for a two-day sharing of ideas and scholarship, and the awarding of the Brigham-Kanner Property Rights Prize. This year, the prize is being awarded to Harvard Law School's Professor Joseph Singer.