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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,
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