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Inside this Issue:

Eminent Domain Tourism, Asheville Style

By Robert H. Thomas

Those of us who practice eminent domain and land use law see the world through a different lens than everyone else. When normal people get stuck in traffic because of highway construction, they may view it as a mass of cement mixers, graders, and safety-vested crews. We eminent domain lawyers see *partial takings, severance damages, limited access problems,* and *condemning agencies*. Where others see a harbor or a dam, we see *navigational servitudes*. You may see a billboard, but we wonder if it's a fixture for which the owner is entitled to compensation. And that's not a train, it's a *future rails-to-trails case*.

So when I travel away from our home base, I somehow locate the eminent domain angle, no matter how obscure.

Such was the case on a recent visit to Asheville, North Carolina for the Spring Meeting of the ABA State and Local Government Law Section. One afternoon, during a break in the proceedings, I came across the Grove Arcade (pictured right), a neat multi-story building filled with shops on the lower level, offices on the upper floors, and a slanted floor we have not encountered elsewhere.

I also came across a plaque with a summary of how this building came to be. It notes the Arcade was the creation of E.W. Grove (the same fellow who built the nearby iconic Grove Park Inn), in order to foster a "vibrant downtown." At one time, it was the largest building in the region, and "for 13 years, the Arcade was the center of commercial and civic life in Western North Carolina."

Continued on page 2

Continued from cover

But then, "the Arcade was closed in 1942 when the Federal Government *took over the building* as part of the effort to win World War II. Officials chose the building because it was large and located in a safe, remote place -- important considerations in the war effort. 74 shops and 127 offices were evicted with less than one month's notice."

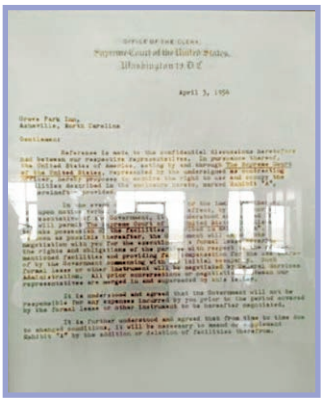
My eminent domain sense was starting to tingle: "Took over the building with less than one month's notice?"

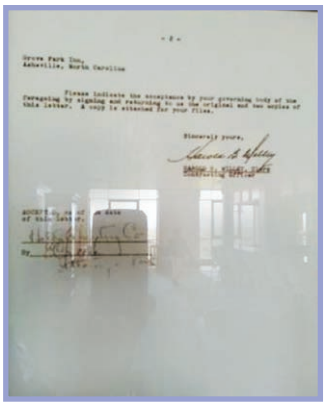
A quick visit to the internet confirmed the takeover and quick evictions were accomplished by an exercise of eminent domain:

> *By most accounts, though, the dire economic times (the Depression) had little effect, and the building and its public market quickly became a vital social and economic anchor in downtown Asheville — until the federal government stepped in. In 1942, with World War II in full swing and the government expanding at an astonishing rate, Uncle Sam, under the auspices of eminent domain, took over the building. Within a month, the tenants were evicted and the government moved in, covering the building's many street-level windows with yellow brick and transforming the ornate structure into a utilitarian workhorse.*

Eureka! Visit http://www.grovearcade.com/history for more details. Just compensation was $275,000, a mere pittance in today's money. In 1997, the City of Asheville obtained the property from the feds, and remains the owner to this day.

Speaking of the Grove Park Inn, there's a law angle there, also. Apparently, the U.S. Supreme Court once selected the hotel as its alternative site in the event of Judgment Day. On the wall of one lounge hangs a letter from the Clerk of the Court to the Inn (pictured below).





I know the letter is difficult to see clearly, so here's the gist. The letter is from the Supreme Court Clerk, Harold B. Willey, who, in addition to his duties as Clerk, was also the Contracting Officer for the Court. He wrote the Grove Park Inn that the Court "hereby proposes to acquire the right to use and occupy the facilities described in the enclosure hereto." And what would cause the Court to move from its tony digs on First Street NE, Washington, D.C.? "In the event of an enemy attack or the imminence thereof," wrote Willey. Head for the hills, the Reds are coming!

Eminent domain was not mentioned, and thankfully, we've not yet had to figure out what to do with ourselves -- much less Their Honors -- if the Soviets hit the button. But we suppose that in the event these came to pass and negotiations with the hotel broke down, the Court could just take it. As the Wall Street Journal notes, "the hotel considers itself still bound by the agreement," although "citing security concerns, a Supreme Court spokeswoman declined to confirm whether the relocation plan remains in effect, or to comment further. Several current and retired justices said they were unaware the court had readied for the first Monday after Armageddon." For the entire story see http://tinyurl.com/nfrt9pa.

And just so you don't think that I'm obsessed with eminent domain, I offer this parting photo, a sign on a nearby cafe which also gave me pause.

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

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The Role of the Uniform Information Practices Act in Ensuring Open and Transparent Government

by Christopher J.I. Leong

Like all other states, Hawaii law provides a means for members of the public to access, view, and copy government records. Other jurisdictions label it the "Freedom of Information Act" (FOIA), or similar, but in Hawaii, we know it as the Uniform Information Practices Act (UIPA), Chapter 92F of the Hawaii Revised Statutes. The basis for Hawaii's UIPA and similar laws is that the government and its agencies are meant to "aid the people in the formation and conduct of public policy." Therefore, "opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." As a result, the legislature has declared it to be the public policy of this State that government shall be conducted as openly as possible.

The UIPA affirmatively declares: "All government records are open to public inspection unless access is restricted or closed by law." Thus, any individual, organization, corporation, or any other legal entity can make a request to any government agency to inspect and copy government records during the agency's regular business hours. While a government agency is under no duty to create documents, it must make available records that do exist, and it must "assure reasonable access to facilities for duplicating records and for making memoranda or abstracts." Government agencies, however, are not required to disclose records when disclosure would constitute a clearly unwarranted invasion of personal privacy or frustrate a legitimate government function.

When a government agency has denied a person's request for disclosure or inspection of a government record, the person may bring a court action, within two years of the denial, to compel disclosure. Recognizing that individuals and organizations may not have the time or resources to bring a lawsuit even if access has been wrongfully denied, the legislature included a provision in the UIPA that when a complainant prevails in an action to compel disclosure, the court shall assess against the government agency reasonable attorney's fees and all other expenses incurred by the complainant.

All of the concerns addressed by the UIPA were at play in *Oahu Publications, Inc. v. Abercrombie*, a recent case in which the *Honolulu Star-Advertiser* sought access to government records. Damon Key represented the newspaper. In short, after the Judicial Selection Commission had transmitted its list of six candidates to Governor Neil Abercrombie from which the Governor ultimately nominated Justice Sabrina McKenna for appointment to the Hawaii Supreme Court in 2011, the Governor refused to release the names of the other five candidates to the public as previous governors had done. The *Star-Advertiser* requested the list of names from the Governor's Office and was denied access. The *Star-Advertiser* filed suit in circuit court, and the Governor defended the suit mainly on the ground that disclosing the entire list, rather than only the person selected, would deter candidates from applying for judgeships. The circuit court agreed with the *Star-Advertiser* that the list was a public document, ordered that the list be disclosed, and awarded attorney's fees and costs. The Governor disclosed the list, but appealed to the Intermediate Court of Appeals (ICA) only on the issue of fees and costs. The ICA also agreed with the *Star-Advertiser*, affirming the award of fees and costs based on the language and policy of the UIPA.

Because the ICA did not award all of the fees and costs incurred on appeal, however, the *Star-Advertiser* sought review in the Hawaii Supreme Court, which recently issued an opinion disagreeing with the ICA and reaffirming one of the core principles of the UIPA: that a prevailing complainant must be awarded all, not just a part, of its fees and costs reasonably incurred at all stages of the litigation.

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

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Harvesting the Sun: Common Questions on Alternative Energy Farming on Ag Land

By Bethany C.K. Ace

In Hawaii, agricultural (Ag) land isn't limited to just "farming" in the conventional sense of the word. A whole host of uses are possible so long as they are permitted under both state and county laws. Figuring out what those uses are can be tricky when the state adds new uses and the counties haven't yet amended their various zoning and land use laws to reflect the changes. This is so with solar farming, a use permitted on Ag land by the state, with county laws not yet uniformly revised to address this newer use.

Let's say you own Ag land and a company wants to lease some of your land to run a solar farm. Here are a couple things to consider:

How much of your Ag land can be used for solar energy facilities?

It depends on your land's soil productivity rating (classes A through E). State law allows solar farms on classes B, C, D, and E. Until 2014, there was an absolute cap under HRS Chapter 205 for facilities on class B and C land: they could not occupy more than 10% of the parcel or 20 acres, whichever was less. There were no size caps on class D and E lands. This year, the Hawaii Legislature adopted Acts 52 and 55, which among other things, allow larger solar farms on class B and C lands if the owner obtains a special use permit (SUP) under HRS § 205-6. There are a number of conditions for allowing these larger projects, including how the remainder of the land is used. See HRS § 205-4.5(21). Also keep in mind that there is no guarantee that you'll get a SUP and the application process can be expensive and time-consuming. The project will still need to meet all applicable county zoning laws.

Do you need a conditional use permit (CUP) from the County?

It will depend on the county. In Honolulu, the Land Use Ordinance (ROH Chapter 21) has not been specifically updated to address how and where solar farms may be used (as was done to address use for wind machine installations). Honolulu's Department of Permitting and Planning (DPP) treats them as either "Type A" or "Type B" utility installations, the latter requiring a minor CUP to be installed on Ag land. DPP has adopted "Solar Guidelines" to determine whether the project is Type A or B. If you meet all of the Guidelines, DPP will treat the project as Type A and no minor CUP is needed. Even if you don't meet all of the guidelines, you're allowed to submit a written request to the DPP Director that the solar farm be classified as a Type A installation. The requirements for such written requests are set forth in the Guidelines.[1] Otherwise, the project will automatically be deemed a "Type B" installation and you will need to get a minor CUP.

Do you need to subdivide the leased land?

Usually, when you lease only a part of your land, county law requires that you legally subdivide the leased parcel from the remainder of your land. However, HRS § 205-4.5(f) provides that any contrary law notwithstanding,

Continued on page 5

[1] The Guidelines are available at:
http://www.honoluludpp.org/Portals/0/pdfs/zoning/Solar%20Farm%20Guidelines.pdf

Continued from page 4

Ag lands may be leased and subdivided for uses and activities permitted under § 205-4.5(a) exempt from any county subdivision standards; provided that the lot and lease meet the following requirements:

(1) The principal use of the leased land is agriculture;

(2) No permanent or temporary dwellings or farm dwellings, including trailers and campers, are constructed on the leased area. This restriction shall not prohibit the construction of storage sheds, equipment sheds, or other structures appropriate to the agricultural activity carried on within the lot; and

(3) The lease term for a subdivided lot shall be for at least as long as the greater of:
(A) The minimum real property tax agricultural dedication period of the county in which the subdivided lot is located; or
(B) Five years.

Although not defined, "agriculture" in this context should be read as uses permitted in the agricultural district (uses listed in HRS §§ 205-2 and 205-4.5(a)), including solar farms.

If you need legal advice on solar farming or permitting requirements for your agricultural land, please contact **Gregory W. Kugle**, **Mark M. Murakami**, or **Bethany C.K. Ace**, at **531-8031**.

Christine A. Kubota Appointed Honorary Chair of the Pan-Pacific Festival Advisory

We are proud to announce that one of our own, Director Christine A. Kubota, has been appointed to a 5-year term as Honorary Chair of the Pan-Pacific Festival Advisory Committee. In this role, Christine will serve as the official goodwill ambassador of the prestigious festival held in Hawaii each summer. As part of her duties as Honorary Chair, she will help to garner support and sponsors for the event, serve as a media spokesperson, and represent the organization in the community.

Since 1980, the Pan-Pacific Festival has aimed to bring together various cultures and people through the sharing of cultural music, arts, crafts, and stage performances. The annual event, popular among locals and visitors alike, comes to life through an assortment of weekend events in and around Waikiki. The Honorary Advisory Committee consists of leaders from some of Hawaii's most influential cultural organizations.

"This particular appointment calls for an exemplary individual who is highly regarded in the local business and social communities," said Michael Yoshida. "We believe Christine is an excellent choice as Honorary Chair and trust that she will help to advance the organization's goals – just as she's done here at Damon Key."

Her community service with the festival is added to a long list of volunteer leadership posts, including serving as past President of the United Japanese Society, Chair of the Honolulu Japanese Chamber of Commerce and current Executive Committee member for the Japanese Cultural Center of Hawaii. Christine was also co-chair of the Women's Leadership Summit presented earlier this year by the Japanese Women's Society Foundation. She is an active member of the Japan America Society of Hawaii and the U.S. Japan Council.

We congratulate Christine on her ongoing commitment to Hawaii's rich cultural diversity and tradition.

The Uniform Power of Attorney Act

by Madeleine M.V. Young

The Hawaii State Legislature passed a new "Uniform Power of Attorney Act" in the most recent session SB2229, SD2, Act 022 (2014), signed into law by Governor Abercrombie on April 17, 2014, repealing the prior statute under Chapter 551D, Hawaii Revised Statutes (known as the "Uniform Durable Power of Attorney Act"). When you execute a power of attorney, you (the "principal") appoint an "agent" (commonly a family member, friend, or adviser) to act on your behalf in financial and legal matters. The new Act provides more guidance to the principal, the agent, and third persons who are asked to accept the agent's authority.

The new statutory power of attorney has certain default provisions that are distinct from the prior law; A power of attorney under the new Act is durable, is effective immediately upon execution, and is unaffected by a lapse of time. A "durable" power of attorney just means that the document stays in effect if you become incapacitated and unable to handle matters on your own. Another difference from the prior law is that an agent's authority under the new Act continues even if another fiduciary is later appointed, unless a court limits, suspends, or terminates the agent's authority. The new Act also provides sample forms upon which our new Statutory Form Power of Attorney is based.

The new Act gives greater guidance for agents than in the prior law by specifying mandatory duties and distinguishing between general and specific (or extraordinary) grants of authority. In the new form, the individual subject areas in these categories are clearly listed, so that there is no confusion as to what authority the principal intends the agent to have. The details of these provisions can be covered in greater detail should you wish to come in to update an existing power of attorney, or have a new one prepared.

Most notable perhaps is that third parties presented with a power of attorney created under the new Act are obligated to accept and honor the power of attorney unless they request additional documentation (e.g., agent certification, opinion of counsel, or a translation) within seven business days after presentation of the power of attorney for acceptance. If such additional documentation is requested, the person must accept the power of attorney within five business days after receipt unless refusal is based upon certain "safe harbor" provisions in the Act. A person who refuses to accept an acknowledged power of attorney in violation of the Act is subject to liability for reasonable attorney's fees and costs in an action to enforce the power of attorney. This change in the law reflects the challenges some of our clients have experienced in the past when banks or other financial institutions have refused to accept valid, properly drafted powers of attorney.

Hawaii's new Uniform Power of Attorney Act is a substantial new law, and serves to protect the principal's choice of agent and provide clear guidelines for agent conduct, while allowing for flexibility in crafting delegated authority.

For more information on this article, please call Madeleine at 531-8031 ext 608, email her at mmvy@hawaiilawyer.com or scan the code with your smartphone.

2014 Legislative Update

The Hawaii State Legislature concluded its 2014 Regular Session with 235 bills becoming law. Here are a few of the noteworthy new laws.

Minimum Wage (Act 82)

The current $7.25 per hour minimum wage will increase to $7.75 on January 1, 2015, $8.50 on January 1, 2016, $9.25 on January 1, 2017, and $10.10 on January 1, 2018. In addition, the tip credit for tipped employees increases from 25 cents per hour below the applicable minimum wage to 50 cents on January 1, 2015, and 75 cents on January 1, 2016. Tipped employees may be paid at these amounts below the minimum wage as long as the combined amount received from the employer and in tips is at least 50 cents more than the applicable minimum wage; however, Act 82 also raises this amount to "at least $7.00 more than the applicable minimum wage" beginning on January 1, 2015.

Financial Disclosure Statements (Act 230)

Historically, the annual financial disclosure statements of certain State officials were matters of public record, while the records of most other State board and commission members remained confidential after submission to the State Ethics Commission. Citing limited resources on the part of the State Ethics Commission and finding that "the public is in the best position to identify conflicts of interest", Act 230 requires the financial disclosure statements of members of certain boards and commissions to be made available for public inspection and duplication, including: the Board of Regents of the University of Hawaii, the Hawaii Community Development Authority, the Hawaiian Homes Commission, the Board of Land and Natural Resources, the Land Use Commission, the Public Utilities Commission, the Commission on Water Resource Management, and the State Ethics Commission.

Planned Community Association Assessments (Act 65)

Act 65 provides that when a unit in a planned community association is voluntarily conveyed, the grantee shall be liable together with the grantor for any unpaid assessments against the grantor for the grantor's share of common expenses up to the time of the conveyance. The Act provides that if the grantee pays off the unpaid assessments, the grantee may seek recovery from the grantor. Also, the grantor and grantee may request a statement from the board of directors of the association that sets forth the amount of unpaid assessments. The grantee shall not be liable and the unit shall not be subject to a lien for any unpaid assessments in excess of the amount set forth in the statement.

Real Estate Arbitration Awards (Act 73)

For arbitrations to determine market value or market rent of leasehold property, Act 73 makes the arbitration awards and all supporting materials matters of public record. Additionally, licensed or certified real estate appraisers who serve as arbitrators must record all arbitration awards and supporting materials with the Bureau of Conveyances within 90 days of notifying the parties of the award. Failure to comply with this Act shall be a violation for purposes of licensing or certification requirements.

Late Voter Registration (Act 166)

Beginning in 2016, a person who is eligible to vote but has not registered may register during the absentee voting period by appearing in person and submitting an application at the early walk-in absentee polling place for the county in which the person resides. Beginning in 2018, a person will be able to register on the day of the election by appearing in person and submitting an application at the polling place for the person's voting precinct.

Mandatory Kindergarten (Act 76)

Beginning with the 2014-2015 school year, attendance in kindergarten shall be mandatory for every child who turns five years old on or before July 31 of that school year, unless subject to certain exemptions provided for elsewhere in the law.

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Attorneys in the News

In August, **Matthew T. Evans** attended the American Bar Association Annual Meeting in Boston. Matt currently serves as Co-Chair of the Young Lawyers Committee of the ABA Section of State and Local Government Law.

Clare M. Hanusz was asked to be on a panel following the premier of "Underwater Dreams", part of the Human Rights Film Festival on September 23rd at the Doris Duke Theatre.

Mark M. Murakami has been elected President of Good Beginnings Alliance, a Hawaii based, 501 (c)(3) non-profit corporation dedicated to advocacy for early childhood education, safety and health. Mark was also appointed to the Board of Directors of Good Beginnings Alliance – Children's Action Network, a political action committee formed to support the Constitutional Amendment on preschool.

In August, Damon Key attorney **Robert H. Thomas** assisted in authoring a friend-of-the-court brief in a case pending in the Texas Supreme Court. The brief was filed on behalf of the Owners' Counsel of America, an invitation-only association of the nation's most experienced eminent domain lawyers, with one member per state. Robert is the Hawaii member of OCA. The issue in the case is whether Texas must pay for billboards which were destroyed in the course of a freeway-widening project. While we don't have billboards in Hawaii, Robert noted that the brief was important because it emphasized that "As a baseline principle of federal law, the government cannot avoid its obligation to pay compensation under the Fifth Amendment when it invades, destroys, or physically appropriates private property, which it certainly did here." A decision is expected in the case before the end of the year.