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DAMON KEY LEONG KUPCHAK HASTERT
A LAW CORPORATION

45 YEARS
SERVING HAWAII
SINCE 1963

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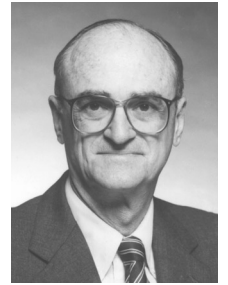
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A Tribute to our Founders

This year marks the 45th anniversary of the founding of our firm by Frank Damon and Henry Shigekane. While Henry retired from the firm in 1978, Frank continued to serve clients in the area of wills, trusts and estate planning for many more years.

This first article is dedicated to Frank Damon for his vision, professional excellence, and commitment to service. For those who know Frank, they will not be surprised at learning about his family background and how it influenced him so. For those who don't, then read and learn about a very special human being.



The Damon Heritage

The many influences of the Damon family on Hawai'i began as far back as 1842 when The American Seamen's Friend Society sent Frank's great grandfather Rev. Samuel Chenery Damon to Honolulu to take charge of the Oahu Bethel Church – the first church organization for foreign seamen. And with the same warm, caring charm and spirit that has continued through each succeeding generation, the Damon family has fostered Christian values, community service, education and interracial harmony.

Beginning with Rev. Samuel Damon, those influences are seen in an unbroken Damon succession of four generations of Punahou School Trustees; creation of the "The Friend" publication; and the founding of what are now known as the First Chinese Church of Christ, Mid-Pacific Institute, Kindergarten Children's Aid Association, Chinese Palolo Home, East-West Center and the Richardson School of Law.

Frank Damon

Cyril Francis Damon, Jr. was born in Honolulu in 1926. Growing up as "Frank" just as his grandfather was called before him, he recalls spending a lot of time with his grandmother, Mary Happer Damon, at her Moanalua house, which resembled a house in China. Mary often sang lullabies in Chinese to the Damon grandchildren. She was the daughter of a well-known American medical missionary in China who grew up in the Canton (now Guangzhou) area of China. Both Frank's grandfather and grandmother spoke Cantonese fluently.

Frank's grandmother spent a lot of time with Asians who joined their family in celebrations in the Moanalua area. While the Damon family was Caucasian and in the upper economic class, it didn't phase any of them that they were socially interracial mixed and spending time together.

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Having heard about his grandfather's life mottos, Frank eventually made them a part of his own. "Tackle the Dread," inspired him to do his best and make things better for everyone. And the second motto was: "Within the Four Seas, all Men are Brothers." These mottos would continue to drive Frank's life, the formation of his law partnership with Henry Shigekane, and their practice of law in Honolulu.

Frank left Hawai'i in August 1941 to attend a New England prep school, where he played football. He missed home, his family and friends. And he missed the ethnic mix of Hawai'i.

After three lonely years on the Mainland, he was finally able to return to Hawai'i. He could not return home sooner because of war time restrictions. He received a call from Matson about a ship that was leaving the next day and enthusiastically accepted. The trip home was filled with great experiences and memories as he shared a small cabin with eight other men including Honolulu businessmen James E. Dole and Charlie Pietsch.

Frank was overjoyed to be home -- being away made him realize what special places Hawai'i and Punahou School were, and how the relationships that were cultivated were close to his heart.

One fond memory was going to Honolulu harbor. At that time, the passenger ship was the main mode of transportation off the island. Frank and his father often walked toward the ocean on Maunakea Street, which was lined with Hawaiian women who sold leis. The women would sell to people who were going to welcome guests or bid farewell. His father would always buy multiple leis from the lei sellers and then would give them away. The boat harbor was a memorable sight, full of streamers and leis. The Royal Hawaiian Band made for a dramatic and tearful atmosphere. Local boys dove for coins tossed into the harbor by passengers on the Lurline and Matsonia.

Frank Meets Henry

When Frank arrived home the war was still on. So, in 1944 he joined the Navy where he served for two years. After his discharge from the Navy in 1946, he continued his education at Yale University. A popular hangout was the college post office where many would go to collect and send out their mail. There was an electric atmosphere at the Yale post office, especially on Fridays and Mondays.

One day while Frank was at the post office, he noticed an Asian person. Frank asked "Are you from Hawai'i?" Henry Shigekane responded "yes," and the two talked about home. Because Frank was a year ahead of Henry, he took time to show him around the school and occasionally dropped in to check on Henry in his dorm.

On one occasion, Frank asked Henry if he was interested in going skiing with him and his brother, Gordon, at his cousin's lodge in Vermont. Henry was excited because he had never seen snow. They drove to Vermont and Henry went skiing for the first time. It was a memorable experience for both and further established their lifetime friendship.

From Yale, Frank moved westward to the University of Colorado Law School. After graduating, he returned home and passed the Hawai'i bar exam in 1954. His first job was with the large Honolulu law firm of Smith, Wild, Beebe & Cades. Frank practiced law there for five years. When Hawai'i became a state in 1959, one of its new U.S. Senators Hiram L. Fong asked Frank to serve as his administrative assistant in Washington, D.C.

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The opportunity was a difficult choice for Frank. He had recently married and his wife was pregnant with their first child. But, they concluded this was an opportunity of a lifetime, "So, off we went to Washington. We had two children there." Senator Fong got Frank admitted to practice before the U.S. Supreme Court.

Working with Senator Fong was an exciting time for Frank, and he became more engaged in politics and the changing of people's attitudes of interracial relationships. Soon after arriving in Washington D.C., Senator Fong gave his first speech in the Senate chambers on immigration. Being an administrative assistant, Frank was able to stand in the back of the Senate chambers and observe the activities of the meeting — a practice not allowed today. He remembers the room where the Democrats sat on the left side, and the Republicans on the right side, with an aisle between the two parties.

Senator Fong was a Republican. He spoke about immigration with a strength and passion that inspired others. He was not just a Chinese person from Hawai'i, but the first Asian Senator. Other Senators were so moved that some Democrats left from their seats, crossed the aisle and sat on the Republican side. Eventually half a dozen more Democrats joined their fellow Senators on the Republican side. Old timers told Frank they had never seen this happen before. Frank remembers that moment as it represented the growing acceptance in the U.S. Mainland of Asians and other people of different backgrounds.

Senator Fong, together with his friend, Senator Oren E. Long, a Democrat and former Governor of Hawai'i, helped to create the East-West Center which represented the world and Asia building relationships to work together. Frank worked closely with Bob Kamins, a University of Hawai'i professor and administrative assistant to Senator Long. The two would go to the different senatorial offices to get support for the East-West Center. A strong bill was created with the support of both Republicans and Democrats.

Frank had planned to work just a few years with Senator Fong. When he returned home, he was asked by Governor William F. Quinn to serve in his cabinet as Director of Labor and Industrial Relations. *Frank asked Governor Quinn why he was selected. "Bill, what good does this do to you politically? I'm a haole...." "And Gov. Quinn responded, 'Well we've worked with you and with Hiram for years and we know what you can do and you kept in touch with our office the whole time. So I know I can trust you.' And so I accepted."*

On the advice of the Governor, he called on labor leaders in Hawai'i. He went to the offices of Jack Hall (ILWU) and Art Rutledge (AFL) -- two of the most powerful labor leaders in Hawai'i. No labor director up to that time had ever come to see them in that capacity, and this gave Frank a special connection with both unions. Frank, as a Republican, served as the Director of Labor and Industrial Relations for the State of Hawai'i for about one year until the election of Democrat John Burns.

Taking the time to deliberate over what he wanted to do next, Frank talked with old friends and prominent lawyers Dudley Pratt and Russell Cades. Despite his deep respect for both men, he turned down offers to join their respective firms. With his experience in Washington D.C. and the changing times of bringing races and cultures together, Frank wanted to try something different. He did not want to remain a part of the establishment. He wanted to be independent and to strike out on his own.

Both Frank and Henry were at a time in their lives when they weren't sure what they were going to do. At that time, major law firms in Hawai'i had few, if any, Asian or woman lawyers and none as partners. Frank had an idea and contacted Henry, "Why don't we start a law firm together?"

A separate article will be presented in our next issue of Legal Alert on our firm's co-founder Henry Shigekane.

Construction In Risky Economic Times

by Anna H. Oshiro and Gregory W. Kugle

Hawaii's construction industry has enjoyed a boom for the last five years that appeared to have no signs of stopping. However, with the worldwide financial crisis currently exploding, it is only a matter of time before the islands are affected. Performing construction in precarious financial times makes it more essential than ever to plan ahead and stay abreast of rights and remedies, to prevent the nation's financial crisis from becoming your own.



1. Choose Wisely

Because construction projects are comprised of multiple contracts between different players contributing to the whole, the economic viability of all team members will affect the project as a whole, and should be chosen with this thought in mind. While it may be impossible to dictate all members of a construction team, it is always possible, and advisable, to vet the immediate members of your team before proceeding. For example, from the Owner's standpoint, this means choosing a contractor with sufficient financial stability to see a job through to completion. This involves asking a few questions prior to the start of the job: (1) on what other projects is the contractor working (i.e., how financially strapped will they be if they suffer setbacks on these other jobs)? (2) can the contractor get a performance/payment bond? (3) have they declared bankruptcy in the last five years? (4) what subcontractors will be working on the project? From the Contractor's standpoint, its main concern is getting paid: (1) how is this project being financed? (2) by whom? (3) what contingencies are built into the financing? (4) who is this owner and who are its partners? Is it a single purpose limited liability entity that will disappear after this job is finished? Just asking these types of questions can open up additional lines of inquiry that may be quite telling about whether your anticipated project partner is a viable risk.

2. Design Your Contract Carefully

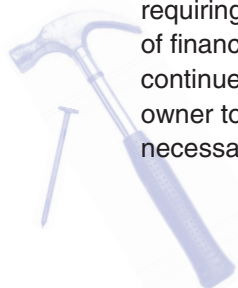
If you are a contractor preparing to take on a project with an unknown owner about whom you have concerns, the time to address your doubts is when you are contracting for the work. The 1997 version of the American Institute of Architects (AIA) general conditions form contained language providing contractors some assurance of continued resources and/or rights, by requiring owners to provide to the contractor evidence of financing for the project as a condition precedent to continued work on the job, as well as requiring the owner to provide the contractor with information necessary to perfect its lien rights on the job.

Contractors should also pay very close attention to the requirements for pay applications and whether they allow too much subjectivity to be exercised by either the owner, the owner's representative, or the owner's lender.

Likewise, if you are an owner and are concerned about your contractor's financial stability, your first and foremost protection would be to require the contractor to provide a performance and payment bond for its work, requiring that surety step in to arrange for completion of the project in the event the contractor became insolvent or otherwise unable to do the work, and/or pay the subcontractors and suppliers on the job would be paid, in the event the contractor does not. Even asking for the contractor to provide a bond can be telling as to whether your prospective contractor is able to procure one – in this environment, the ability to obtain bonding is in and of itself an indicia of financial stability. After demanding the bond (and determining that the surety on the bond is in fact a viable surety), it is necessary to actually keep a copy of the bond available, and ensure that the bond period covers the entire anticipated length of the project. Many private bonds include language and notice deadlines that if allowed to pass will lapse coverage.

3. Recognize The Signs and Know Your Remedies

Sometimes it is too late to protect your rights by choosing your partners wisely, and contracting for contingencies in advance of a job. When that happens, the crucial thing to do is to recognize signs of trouble, demand accountability, and shore up your remaining legal rights. This means, if you are a contractor, starting your title search early to see whether the property you are working on has any equity available for a mechanics lien, and then taking action to perfect it. It takes time to put together lien application and notices, including performing title searches, gathering paperwork to establish the right to payment, and other issues that have to be resolved before the claim can proceed.



In an uncertain financial climate, these should not be delayed. From the Owner's side, that means investigating and comparing the remaining loan draws or costs to complete against the amount of work that is left on the job, to ensure the project has not been overdrawn by a contractor hurting for cash, demanding that all checks written to your contractor be written as joint checks to your contractor and its subcontractors and suppliers, starting to investigate who is on your project so that you can monitor whether they have been paid, and demanding and obtaining for yourself lien releases from all subcontractors and major suppliers. From both the contractor and the owner's standpoint, the key is not to let the project get too far out in front of you before you act to preserve your rights.

4. Bankruptcy: What Happens Now

Parties involved in a construction project often enter into complex contracts in an effort to allocate risks and to provide for contingencies, but sometimes the best laid plans can be laid to waste when one of the project team members files for bankruptcy.

The Bankruptcy Code provides for either straight liquidation or reorganization of either businesses or consumers. The twin policies of the Code are: (1) to provide debtors with a "fresh start" and; (2) to provide for an equitable distribution of assets among creditors, and the bankruptcy courts are granted broad powers to effectuate these goals. Thus, upon the filing of a bankruptcy petition, the code's "automatic stay" freezes virtually all collection activity against the debtor.

The automatic stay takes effect upon bankruptcy filing, and prohibits among other things, creation, perfection or enforcement of mechanics liens. A critical issue arising at the very outset of an owner's bankruptcy case is what protections are afforded to those who have claims against the owner's real property? If the subcontractor or supplier (or even the general contractor) has perfected its mechanics' lien under state law before the filing of the petition, the lien on the property will survive the bankruptcy case. While the perfection of a mechanics' lien against the owner's property does not per se violate the automatic stay against actions affecting the general contractor's property, the Court may nevertheless enjoin such activity on the grounds that it will necessarily involve the general contractor and its property. Thus, this situation may give rise to an order from the Court precluding the perfection of mechanics' liens, even though the lien is asserted against the owner's property, not the general contractor's. In other words, in

a shaky economy, if you are an unpaid subcontractor, supplier, or contractor, you should not wait to file and perfect your lien rights if you even suspect the owner of the property to which you provided labor or materials, or the contractor you are working for, are in financial straits.

When a general contractor files for bankruptcy protection, the automatic stay precludes collection efforts against the general contractor. A subcontractor or supplier is permitted to assert a claim against the debtor-general contractor in the bankruptcy proceeding, however, the claims of general unsecured creditors like these would be of negligible value. Thus, if you are a subcontractor working with a general contractor who appears to be on the verge of financial collapse, it is crucial that you take steps to preserve your lien rights as they may be the only source of recovery left in the event the general contractor is liquidated in bankruptcy.

Another thing to be mindful of is that once a party to a construction project declares bankruptcy, there is no guarantee the construction contract will be completed. The Bankruptcy Code permits the bankruptcy trustee to assume or reject "executory [unfinished] contracts". The issue of assumption and rejection of construction contracts most frequently arises in the case of the bankruptcy of the general contractor (or a subcontractor), which may compel the owner (or the general contractor, in the case of a subcontractor's bankruptcy) to continue to deal with a party already in default, or even an entirely new party, if the contract is assigned. The debtor or trustee may elect to "reject" an executory contract where assumption would be burdensome to the estate. This would likely occur where construction costs have increased markedly, providing the trustee for the estate of the contractor ample incentive to walk away. In such a case, the owner is entitled to a non-priority unsecured claim for damages, based on the measure of damages for breach of contract under state law. The court may even find a liquidated damages provision – so prevalent in construction contracts – to be the appropriate measure of damages. As noted above, however, an unsecured claim in a Chapter 7 liquidation may not result in any recovery at all. In the case of an owner's bankruptcy, the debtor or trustee may seek to assume a below-market prime construction contract.

For more information or questions regarding this article, please call Anna at 531-8031 ext 601 or email her at aho@hawaiilawyer.com or Greg at 531-8031 ext 603 or email him at gwkw@hawaiilawyer.com

Employee Wellness Programs

by Noelle B. Catalan and Courtney S. Kajikawa



In a day and age where, more than ever, society has embraced the concept of leading healthy lifestyles, businesses have likewise realized the benefits of having healthy and fit employees. Within the past few years, several local businesses have begun to implement voluntary employee wellness programs designed to encourage general overall health and to provide employees with certain incentives for their participation in such programs. Employers have realized that increasing health awareness and overall employee health not only benefits individual employees, but also the business. By instituting wellness programs which aim to combat certain preventable illnesses and health related concerns, many employers believe that they will be more likely to retain qualified employees, as well as bolster employee morale and productivity. For example, some local businesses have started to offer employees nutrition counselling and healthy meal options. Other local businesses have offered smoking cessation programs and offered bonuses to employees who quit smoking for a set period of time. Yet other businesses have offered employees discounts to local health clubs, allowed employees to use a specified number of hours of work time per week on approved fitness activities, or created incentives for employees who institute a weekly exercise regimen.

In developing your company's employee wellness program, there are several Hawai'i employment laws which may affect or be relevant to the type of program you create. Some examples of Hawai'i laws which may be relevant include:

1. Equal Employment Laws. Hawai'i law prohibits employers from discriminating on the basis of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record. Discrimination based on sex includes discrimination based on pregnancy, childbirth, or related medical conditions.

2. Breastfeeding. Employers may not prohibit an employee from expressing breastmilk during any meal period or any other break period required by law or by a collective bargaining agreement.

3. Victims Leave Protection. Employers are required to allow an employee to take unpaid victim leave if the employee or the employee's minor child is a victim of domestic or sexual violence and the leave is for purposes of seeking medical attention, obtaining services from a victim services organization or to seek counseling, relocating, or taking legal action. For purposes of this law "domestic or sexual violence" means domestic abuse, sexual assault, or stalking.

4. Workers' Compensation. Hawai'i law prohibits employers from suspending or discharging any employee solely because the employee suffers any work injury which is compensable under Hawai'i's workers' compensation statutes and which arises in the course of employment unless the employer can prove that the employee is no longer capable of performing the employee's work and that the employer has no other available work which the employee is capable of performing.

5. Medical Insurance. Hawai'i's Prepaid Health Care Act requires employers to provide medical insurance coverage to employees who have been employed for at least 4 consecutive weeks and who work at least 20 hours per week.

If an employee is hospitalized or otherwise prevented by sickness from working, the employer must enable the employee to continue the employee's coverage by contributing to the premium the amounts paid toward such premium prior to the employee's sickness for the period up to three months or the period for which the employer has

undertaken the payment of the employee's regular wages, whichever is longer.

6. Family Leave. Hawai'i's family leave law applies to employers with 100 or more employees and entitles employees to 4 weeks of family during any calendar year upon the birth or adoption of a child, or to care for the employee's child, spouse or reciprocal beneficiary, or parent with a serious health condition.

7. Temporary Disability. Hawai'i employers are required to provide temporary disability benefits to employees after the first 7 days of disability.

8. Smoking. Hawai'i law prohibits smoking in all enclosed or partially enclosed areas of places of employment. The law also allows an owner, operator, manager or other person in control of an establishment, facility or outdoor area to declare that an entire establishment or any part thereof as a place where smoking is prohibited. The law prohibits an employer from discharging, refusing to hire, or in any manner retaliate against an employee, applicant for employment or customer because that employee, applicant or customer exercises any rights afforded by the law or attempts to prosecute a violation of law.

9. Alcohol and Drug Testing. Hawai'i Revised Statutes Chapter 329 sets forth the basic requirements for workplace testing procedures, and Hawai'i law requires the employer to pay for any company-mandated drug and alcohol testing.

Businesses with specific questions about implementing an employee wellness program or about Hawai'i employment laws should contact legal counsel, as the above is just intended as a brief overview and summary of some of the many Hawai'i employment laws, and does not include detailed information about the scope of each law or their respective exemptions.

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Damon Key Advocates in the U.S. Supreme Court

By Mark M. Murakami



Continuing the firm's tradition of high-level appellate advocacy, Damon Key attorneys Robert H. Thomas, Mark M. Murakami and Christi-Anne H. Kudo Chock recently filed two friend-of-the-court briefs in the U.S. Supreme Court involving complex constitutional, maritime and environmental issues.

In the first case, *Winter v. Natural Resources Defense Council*, the Supreme Court struck down an injunction which restricted the Navy's use of mid-frequency active (MFA) sonar in training exercises off the Southern California coast.

In August, Robert, Mark, and Christi-Anne filed a brief amicus curiae on behalf of several military service organizations including the Navy League, the Military Affairs Council of the Chamber of Commerce of Hawai'i, and the Southwest Defense Alliance. The brief outlined the views of nine retired Admirals that the Navy's judgment on how it trains its sonar operators should be respected. The brief highlighted the over 300 years of naval service by the Admirals, and their reasons why the injunction poses a grave threat to national security and the men and women in the U.S. Navy. The Navy uses MFA sonar -- which transmits sound and listens for a reflection from the target -- to hunt for quiet diesel-electric submarines. These submarines are designed to avoid detection by other types of sonar, and are employed by Iran, North Korea, and China, among others. Several recent incidents illustrate the danger: in late 2006 near Okinawa, a Chinese diesel-electric attack submarine was not detected by the Kitty Hawk Carrier Strike Group until it surfaced within torpedo range. In November 2007, the same battle group was "shadowed" by a submarine in the Taiwan Strait prompting a confrontational standoff for twenty-eight hours.

MFA sonar unfortunately may injure marine mammals in some cases, even though there has not been a single document instance of such injury in the Southern California training area. After consultation with other federal agencies, the Navy concluded that the use of MFA sonar with certain self-imposed mitigation measures would not have a significant impact on the environment. The California federal court, however, restricted the Navy's training with MFA sonar, until the Navy completed an Environmental Impact Statement because of the possible threat to marine mammals such as whales, dolphins, and seals. The injunction prevented the Navy from qualifying at least one Strike Group prior to deployment.

On November 12, the Supreme Court, in a 7-2 decision, agreed with the Navy and the brief filed by Damon Key that judges should not lightly second-

guess commanders' judgment on how to train for deployment, and struck down the restrictions.

Closer to home, these same attorneys filed a brief on behalf the Ocean Tourism Coalition, a non-profit trade group in *UFO Chuting, Inc. v. Smith*, another case pending in the U.S. Supreme Court. That case involves the State of Hawai'i's attempt to ban parasailing in the waters off Maui for five months per year. A parasailing company sued the State in federal court, arguing the ban was unconstitutional because it interfered with federally-protected navigation. Although the court initially agreed and struck down the ban, the court reversed itself and dismissed the case after Hawai'i's congressional delegation attached a rider to an omnibus budget bill that seemed to allow the State to regulate in this area.

The Ocean Tourism Coalition's amicus brief urges the Supreme Court to review the dismissal, and points out that states are prohibited under the Constitution's commerce clause from enacting regulations that interfere with the free movement of commerce and navigation. The State of Hawai'i's and the federal government's responses are due in early October, and the Supreme Court will decide whether to review the case in late 2008.

The Winter and UFO Chuting amicus briefs, as well as the court rulings in both cases are available at Mark's blog on maritime law issues, www.hawaiiocanlaw.com.

Damon Key has a long history of high-stakes appellate litigation in the Hawai'i courts of appeals, as well as in the federal Ninth Circuit and the U.S. Supreme Court. Perhaps the firm's most famous appellate victory was in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), where Charlie Bocken and Diane Hastert won a Supreme Court case that protected the private nature of Hawai'i Kai Marina, and overturned one hundred years of law giving the army Corps of Engineers nearly unfettered ability to take private waterways.

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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

Kenneth R. Kupchak, Diane D. Hastert and James C. McWhinnie have been selected as Hawaii Super Lawyers, an honor bestowed on less than 5% of all Hawai'i lawyers.

Damon Key's Land Use attorneys have been involved recently in several very important cases:

On October 21, 2008, the Hawai'i Intermediate Court of Appeals issued a significant land use decision, affirming dismissal of a complaint filed against Molokai Ranch, Ltd., by several activists challenging Molokai Ranch's camping program. Greg Kugle and Ken Kupchak represented Molokai Ranch. The ICA held that private citizens have no right to file a lawsuit against a property owner for alleged violation of either the state-wide zoning law or the Molokai Community Plan. The decision affirms the circuit court's dismissal of the lawsuit, and validates the position of Molokai Ranch and Maui County that the overnight camping program on Agricultural land is a valid and permissible open-area recreational facility.

On October 16, the Supreme Court of Hawai'i heard oral arguments in two appeals challenging the County of Hawai'i's abuse of the eminent domain power. Ken Kupchak, Mark Murakami, Christi-Anne Kudo Chock, and Robert Thomas represented the property owner.

In September, the Circuit Court found that the Kauai Planning Commission wrongfully denied our client three zoning permits, finding that the denial was "arbitrary" and illegal. Robert Thomas and Mark Murakami represent the property owner.

On November 21, 2008, the U.S. Court of Appeals will hear oral arguments in a case regarding the legality of summarily closing down Maui vacation rentals. Robert Thomas and Mark Murakami, and Christi-Anne Kudo Chock represent the Maui Vacation Rental Association in its appeal against the County of Maui.

To get more information about these and other issues our Land Use attorneys are working on, please visit our web site, www.hawaiiattorney.com.

