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A Regulatory Takings Glossary (or How to Translate Property Rights Lawyerspeak)

One of my law school professors once remarked (hopefully in jest) “if it ain’t Latin, it ain’t the law.” While thankfully we are past the days when Latin and Norman French were the languages of the law, those of us who represent property owners defending their rights sometimes toss about terms that, although they purport to be standard English, often make others look at us askance.



By Robert H. Thomas

We may forget that not everyone might understand what we mean when we say, for example, “The court dismissed the regulatory takings claim on ripeness grounds under *Williamson County* because the property owner had not exhausted her administrative remedies. That left for the state court to decide whether the claim was a per se *Lucas* taking, or whether to apply the ad hoc *Penn Central* analysis.”

If you know what that means, congratulations. However, for those of you not yet familiar with the lingua franca of regulatory takings and eminent domain, here’s a crash course.

Condemnation

Another way of saying Eminent Domain.

Due Process

The requirement that government actions affecting property be accomplished by fair procedures (procedural due process) and for rational reasons (substantive due process).

Eminent Domain

The sovereign’s inherent power to seize private property for a public use or purpose, upon payment of just compensation.

Exhaustion

The requirement that a property owner avail themselves of all available “administrative” remedies before raising a federal takings claim in federal court.

Fifth Amendment

The Fifth Amendment to the U.S. Constitution. The relevant provision, known as the “Takings Clause” provides: “nor shall private property be taken for public use, without just compensation.”

Inverse Condemnation

When some action by the government has resulted in the taking of private property, but the government has not instituted condemnation proceedings. These are “inverse” because the property owner must sue.

Just Compensation

The general rule is that just compensation for a taking is the “fair market value” of the property on the date of the taking.

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Kelo

The U.S. Supreme Court's case regarding "public use" in eminent domain. The Court held that a redevelopment agency could take private homes under the "economic development" theory (a claim that another private owner would make more economically intense use of property is a sufficient justification for a taking).

Lucas

The 1992 U.S. Supreme Court decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), which held that if a regulation "denies all economically beneficial or productive use of land," it is a taking.

Nollan/Dolan

Two U.S. Supreme Court cases, most often treated together, requiring that (1) a development exaction (the government demanding the property owner dedicate a property interest in return for a development permit) or a condition in a land use permit is a taking unless the government shows some rational "nexus" between the exaction and an important public interest, and (2) that the exaction be "roughly proportional" to the impact of the proposed use.

Penn Central

In 1978, the U.S. Supreme Court issued an opinion in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978), under which a court determines whether a regulation works a taking by measuring: (1) the economic impact of the regulation; (2) the property owner's reasonable investment-backed expectations; and (3) the character of the government action.

Physical Invasion

If the government physically invades property, or invites the public to do so (even if the intrusion has little if any impact on the property owner) the courts will find this is a taking. Examples include dedication requirements, and public easements.

Police Power

The power of government to regulate for the "health, safety, and welfare" of the public. Zoning and rent control ordinances are classic "police power" regulations.

Property

Not just land (real property), but any interest protected by the Fifth Amendment from an uncompensated taking, and by the Due Process Clause from deprivation without fair procedures or a rational reason.

Public Use/Public Use Clause

The first half the eminent domain equation (the other being just compensation). Under the Fifth Amendment and similar provisions in most state constitutions, all takings must be "for public use." This means more than the property taken is owned or used by the public, and over the years, the courts have interpreted this to require that the government merely have some public "purpose" in taking the property.

Regulatory Taking

The situation where it is alleged by a property owner that a government regulation has the same impact on the property as an affirmative exercise of the eminent domain power, but the government has not bothered to institute a condemnation proceeding and is not willing to provide just compensation.

Takings

Situations where the government has either (1) seized private property for public use by eminent domain and instituted condemnation proceedings and willingly provides just compensation (see Eminent Domain); or (2) government has taken some action that has the effect of seizing property, but has not instituted condemnation proceedings.

Takings Clause

One part of the U.S. Constitution's Fifth Amendment, which provides: "nor shall private property be taken for public use, without just compensation."

Temporary Taking

If the government takes property by eminent domain or by a regulatory taking, the Fifth Amendment requires it pay just compensation even if the taking is only temporary.

Williamson County

The U.S. Supreme Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which prohibited federal courts from considering takings claims by holding a federal lawsuit is not "ripe" until the property owner has exhausted administrative remedies and has sought compensation in state court. Be warned: do not mention the words "Williamson County" to a regulatory takings lawyer unless you have a lot of time.

An earlier version of this article appeared in the June 2010 Reporter, the monthly magazine of California's Western Manufactured Housing Communities Association.

For more information or questions regarding this article, please call Robert at 531-8031 ext 627 or email him at rht@hawaiilawyer.com, or visit Robert's blog at www.inversecondemnation.com

How Does the 2010 Estate Tax Repeal Affect Your Estate?

By Caron N. Ikeda



The federal estate tax is repealed in 2010. Therefore, at present there is no federal estate tax liability imposed on the estates of U.S. citizens or U.S. residents who pass away in 2010, regardless of the size of their estate. The federal estate tax is currently set to return in 2011 with an exemption amount of \$1 million, and a 55% tax on gross estates in excess of this exemption amount. The 2010 federal estate tax repeal also applies to the estates of non-resident, non-U.S. citizens ("NRNCs") owning property in the United States. The federal estate tax on estates of NRNCs is currently set to return in 2011 with an exemption amount of \$60,000 and a 55% tax on gross estates in excess of this exemption amount.

A less known aspect of the repeal of the federal estate tax this year is the replacement of the favorable "step-up" basis rule with a "modified carryover basis" rule. In general, a step-up in basis allows a beneficiary to inherit an asset with a cost basis equal to the fair market value of the asset on the decedent's date of death. This allows the beneficiary to avoid paying capital gains tax on any increase in value from the date the decedent acquired the property to the date of death. With the current modified carryover basis rule, a beneficiary inherits property with a cost basis equal to the lower of the decedent's cost basis in the property or the fair market value of the property on the decedent's date of death. Estates may elect to apply a special basis adjustment to increase its basis in any appreciated property by up to \$1.3 million, with an additional \$3 million basis adjustment for assets passing to a spouse. This basis adjustment is limited to \$60,000 for NRNCs, with an additional \$3 million basis adjustment for assets passing to a spouse. The full step-up in basis rule is currently set to return in 2011.

Also, in April the Hawaii State Legislature passed a measure imposing a state estate tax of up to 16.0% on Hawaii gross estates valued in excess of \$3.5 million. The state estate tax applies to the estates of persons dying after April 30, 2010. The State of Hawaii Department of Taxation recently issued Tax Information Release No. 2010-06 ("TIR No. 2010-06"), to provide guidance to administrators and practitioners

on the application of this new law. However, exactly how this tax will be imposed is still unclear since there is some disagreement among commentators as to the law's interpretation. TIR No. 2010-06 can be found online at <http://hawaii.gov/tax/>.

The present and future status of the federal estate tax is uncertain. Congress may: (1) do nothing; (2) enact legislation affecting the estate tax rate and exemption amount for 2011; or (3) seek to enact legislation retroactively imposing a federal estate tax in 2010. If Congress does attempt to impose a retroactive federal estate tax on 2010 estates, it will most likely be challenged as being in violation of the Due Process Clause of the United States Constitution.

This uncertainty with the federal estate tax, coupled with the imposition of the Hawaii estate tax and the uncertainty connected with this new law presents many challenges for estate planning. If you have any questions as to the impact of these laws on your estate plan, you should contact us.



**For more information or questions regarding this article,
please call Caron at 531-8031 ext 609 or email her at cni@hawaiilawyer.com**

Damon Key Welcomes Rebecca Copeland and Christopher Pan

Damon Key Leong Kupchak Hastert is proud to welcome two new attorneys to our team, Rebecca Copeland and Christopher Pan. Both Rebecca and Christopher add new dimensions to the level of service we provide to our clients and their extensive experience will add to our firm's expertise and strength. We welcome both to Damon Key.

Rebecca specializes in litigation and appeals. Prior to joining Damon Key, she served as the Deputy Solicitor General in the Appellate Division of the State of Hawaii's Department of the Attorney General after moving to Hawaii from Texas, where she was born and raised in New Braunfels. She also previously served as a law clerk to the Honorable John S.W. Lim of the Hawaii Intermediate Court of Appeals. In Texas, she held several positions including Member at Reagan Burrus Dierksen Lamon & Bluntzer, PLLC; Of Counsel at the Bexar County Appellate Public Defender's Office; Adjunct Professor at St. Mary's University School of Law; Associate at Thornton Biechlin Segrato Reynolds & Guerra, LC; and Judicial Clerkship at the State of Texas' Fourth Court of Appeals.

She attended Southwest Texas State University where she earned a Bachelor of Arts degree in Psychology and minor in French. She earned her Juris Doctorate at St. Mary's University School of Law in San Antonio, Texas where she was also a recipient of many awards and honors including National Order of Barristers, Dean's Leadership Award, and Outstanding Moot Court Advocate Award. Rebecca also served as Senior Associate Editor of St. Mary's Law Journal where she had many articles published. More of her published work can be found in publications such as The Appellate Advocate and Texas Tech Law Review.

In her free time, Rebecca enjoys reading, writing, going to the beach, and spending time with her husband Jesse and two daughters, Miranda and Maya, in Liliha where they reside.



Rebecca Copeland



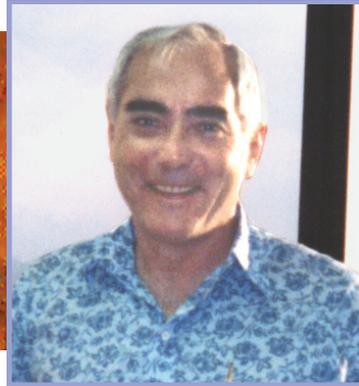
Christopher Pan

Christopher specializes in business and commercial law. He recently moved to Hawaii from the San Francisco Bay Area, where he was an associate at Davis Polk & Wardwell LLP in Menlo Park, California. He has extensive experience advising clients with respect to a wide variety of corporate, commercial and financing transactions, including public and private securities offerings, mergers and acquisitions, private equity and venture capital investments, business entity formation, SEC disclosure and corporate governance matters. He has advised, among other clients, Oracle, E*TRADE, El Paso Electric Company and Callidus Software, and his recent transactions include OpenTable's initial public offering and Oracle's \$4.5 billion bond offering. During law school, Christopher served as a legal intern for the International Justice Mission in Mumbai, India, where he worked to combat forced child prostitution.

Born and raised in New Haven, Connecticut, Christopher earned his Bachelor of Arts degree in Philosophy from Yale University and a Masters in Theology from Trinity Evangelical Divinity School in Deerfield, Illinois. He received his Juris Doctorate from New York University School of Law, where he served as an editor on the NYU Review of Law and Social Change. He is conversant in Mandarin Chinese.

Christopher enjoys spending time with his wife Alia (Yap), a Punahou graduate, and two children, Kaira Grace and Isaac. He is an avid New York Mets baseball fan and resides with his family in Kaimuki.

The Greeley Key Award



By Diane D. Hastert

During the 2010 Hawaii State Bar Association Annual Meeting in November, the first annual **Greeley Key Award for Innovation** will be awarded to recognize “an attorney or non-attorney for out-of-the-box legal work that involves promoting new and creative uses of, or approaches to, the law as a positive force in our community.” Damon Key is proud to have this award named in honor of Charles W. Key, our beloved partner who passed away in 2008.

The back story is a tribute to friendship and devotion to community service. It began with a group of young lawyers starting The Wednesday Group more than 40 years ago. Charlie, Hod Greeley, Vernon Char, Phillip Ching, Ed Chun, George Dyer, John Jubinsky, Dwight Rush, Jack Smart (and later Jeremy Harrison) had lunch together on Wednesdays - no matter what. If a member was in town, he attended. Occasionally, an outsider was privileged to join them, but attendance was not admission to the “family.” The Group has shared more than 2000 lunches.

Four of them, including Charlie and Hod became HSBA Presidents. Charlie was elected as a Hawaii delegate to the American Bar Association House of Delegates and also proudly chaired the ABA Standing Committee on Ethics. He was consistently

recognized by his peers as among the Best Lawyers in Hawaii.

Charlie’s unrelenting devotion to ethical issues inspired all of us. When discussing an issue of concern, he never asked only if an action was legal or ethically permissible; he always also asked if it was right. If one couldn’t answer “yes” firmly; one would receive Charlie’s refreshingly direct response. The many of us he mentored are delighted his contributions will be memorialized by the HSBA - recognizing that he was and in memory continues to be a “positive force in our community.”

“an attorney or non-attorney for out-of-the-box legal work that involves promoting new and creative uses of, or approaches to, the law as a positive force in our community.”

CJ and Frank Damon

By Michael A. Yoshida



On June 21, 2010, former retired Chief Justice of the Hawaii Supreme Court William S. Richardson, or “CJ” as he was known, passed away at the age of 90. Decades ago, CJ and Frank Damon, one of the founders of our law firm, ardently supported the creation of a law school for the people of Hawaii. At the time, this was a very controversial proposal. Through their vision and perseverance, the law school was opened in 1973. In honor of his efforts, the law school was ultimately named the William S. Richardson School of Law. Our firm and, in particular, our William S. Richardson School of Law alumni, benefitted greatly as a result of CJ’s and Frank’s efforts. Damon Key owes them both a debt of gratitude.

The following is an excerpt of an e-mail received from Avi Soifer, Dean of the William S. Richardson School of Law regarding the CJ’s passing:

“CJ” was indeed loved throughout the Law School community as well as in countless other circles that radiated out from this extraordinary man. CJ was devoted to seeking opportunity and justice for Native Hawaiians and for all the people of Hawai’i. He was a leader of Hawai’i in many ways and he served as Chief Justice from 1965-1982, led the way in founding the Law School, and remained an extraordinary friend and inspiration for people from all walks of life.

Chief Justice Richardson accomplished remarkable things by remaining a down-to-earth dreamer. He was an irrepressible optimist who loved and was loved by a very broad and diverse spectrum of people. His legacy will live on through the multiple ways that he influenced and changed the law in Hawai’i but also by all those he touched personally. Over the last years, CJ had an office at the Law School, where he was a regular source of support and inspiration. CJ was a strikingly warm and gentle man and a rare kind of gentleman. They hardly ever did and they really do not make people like him anymore. He will be hugely missed.

We join in the above sentiments. Currently, our firm has 10 graduates of the William S. Richardson School of Law. They are: Diane D. Hastert (1978); Michael A. Yoshida (1979); Robert H. Thomas (1987); Douglas C. Smith (1990); David P. McCauley (1993); Gregory W. Kugle (1995); Mark M. Murakami (1999); Noelle B. Catalan (2006); Christi-Anne H. Kudo Chock (2007), and Matthew T. Evans (2008).

Did You Know

Question: I sit on a nonprofit board of directors. About what should I be concerned from a liability stand point?

Answer: First, if the organization complies with the Hawaii Nonprofit Corporations statute, Haw. Rev. Stat. c. 414D, some protections apply. Essentially, directors are not liable so long as they act in “good faith.” Haw. Rev. Stat. [section symbol] 414D-149 explains what that means and is worth your time to read. You can find it at: <http://codes.lp.findlaw.com/histatutes/2/23/414D/VIII/414D-149>.

The second thing you need to consider is insurance. It is extremely unlikely your personal insurance (professional coverage, homeowners, general liability, etc.) covers your actions as a nonprofit director. Therefore, it’s important to know whether the nonprofit organization carries director and officer liability insurance that covers you. In addition, you should know whether your nonprofit carried employment practices liability insurance, a relatively new form of insurance that protects an employer and its directors and officers against claims made by employees for discrimination, wrongful termination, harassment, etc. If your organization does not have both of these types of insurance, you need to find out why not.

Almost every Damon Key attorney serves on at least one nonprofit board. If you have any questions about your role, contact any of us.

Damon Key Leong Kupchak Hastert invites you and a friend to a seminar on estate planning.

Coming to the Big Island!

“Planning for the Future”



(L-R) Douglas C. Smith, Caron N. Ikeda, Christine A. Kubota, Courtney S. Kajikawa

Saturday, October 2, 2010

Afternoon Seminar

1:30 – 1:45 pm Registration

1:45 – 2:15 pm Seminar

2:15 – 4:00 pm 15 minute private sessions with appointment

Refreshments will be served

At the Keauhou Beach Resort

Kahalu’u III Room

78-6740 Ali’i Drive, Kailua-Kona

This FREE seminar will provide information on estate and trust planning to include discussions related to: Wills • Revocable Living Trusts • Short Form Trusts • Durable General Power of Attorney • Advance Health Care Directives and other planning tools.

*Parking is free for seminar guests • Appointment required
Please call or email Pat Gurganas before September 27 for an appointment: 808-531-8031 (telephone) or pat@hawaiiattorney.com
Visit us at www.hawaiiattorney.com*

The seminar is presented by the Damon Key Leong Kupchak Hastert Estate and Trusts Practice Group.

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Attorneys in the News

Doug C. Smith and **Courtney S. Kajikawa** co-authored a chapter in the upcoming HSBA *Hawaii Conservatorship and Guardianship Forms Manual* on consolidated conservatorship/guardianship proceedings in Probate Court. In conjunction with the forms manual, Doug will be a speaker at the HSBA Convention (September 17th) and will present the chapter.

Mark Murakami and **Tred Eyerly's** article, "Getting Around LHWCA's Exclusion Remedy Roadblock - Injured Employee's Claims Against Employer and Insurer for Intentional Torts," was published in the July/August 2010 issue of *Coverage*, an ABA publication focusing on insurance coverage. Although an exclusive remedy provision under the Longshore Harbor and Workers Compensation Act bars actions against insurers for bad faith handling of claims, the article suggests that pursuing intentional torts, including intentional infliction of emotional distress, may be appropriate. The full article is available at http://www.insurancelawhawaii.com/insurance_law_hawaii/2010/08/coverage-publishes-our-lhwca-article.html

Robert Thomas and **Mark Murakami** attended the American Bar Association's Annual Meeting in San Francisco from August 5-8. Robert moderated a well-attended program on the Supreme Court's recent decision in *Stop the Beach Renourishment v. Fla. Dep't of Env't'l Protection*, the latest case on ownership of beachfront property. His panelists included two law professors, one of the property owners' Supreme Court counsel, and a takings expert from the Pacific Legal Foundation. Robert also continued his leadership in the Section on State and Local Government Law, where he is Chair of the Committee on Condemnation Law, and was recently selected to Chair the Section's Continuing Legal Education programs. Mark also attended the State and Local Government Section's meetings, focusing on Homeland and Port Security, and Disaster Relief.

