

LEGAL ALERT

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DAMON KEY LEONG KUPCHAK HASTERT | hawaii**lawyer.com**[®]
A LAW CORPORATION



Congratulations Madeleine!

Damon Key is proud to announce that as of January 1, 2019, Madeleine M.V. Young is a Director of the firm. Madeleine practices in the Trusts and Estates and Business and Commercial Law practice groups. Her practice focuses on probate and trust litigation, estate planning, conservatorship and guardianship proceedings, estate and trust administration, business planning, and real estate conveyance.

Madeleine joined us in 2013 and quickly impressed all of our attorneys with her ability to obtain favorable results for our clients. In addition to being a skilled lawyer, she possesses key leadership skills which will help us grow and evolve for the future.

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A skilled litigator with wide-ranging experience, Madeleine is licensed to practice in Hawaii and California courts and the United States District Courts for the District of Hawaii and the Central District of California. She is among the highly regarded Damon Key attorneys selected to the 2019 edition of The Best Lawyers in America,[®] in Litigation—Trusts & Estates.

Madeleine's diverse legal career is anchored in a desire to ensure fair treatment for all her clients, especially those who find themselves in difficult circumstances. In her time at Damon Key, following a hearing before an Administrative Law Judge, Madeleine secured a "fully favorable" decision from the Social Security Administration's Office of Disability Adjudication and Review on behalf of a permanently disabled individual. The decision resulted in securing the claimant's Supplemental Security Income payments, reversing a previous notice of disapproval. It is one of many successful and personally gratifying cases that Madeleine has undertaken.

Prior to joining Damon Key, Madeleine was an attorney for several years in the Legal Aid Society of Hawaii's Asset Protection Unit, primarily litigating on behalf of indigent persons in federal court. While there, she also managed a self-help clinic serving Hawaii's low-income communities and advocated for her clients at the Hawaii State Legislature on consumer protection issues. Previous to that, she worked at various private law firms in California over a seven-year period.

She is active in the Hawaii State Bar Association where she serves as a member of the Probate and Estate Planning Section, Elder Law Section, Litigation Section, and the Real Property & Financial Services Section. She is also a member of the Hawaii Estate Planning Council, the State Bar of California, and the California Lawyers Association, as well as the American Bar Association and the Hawaii Chapter of the National Asian Pacific American Bar Association. Madeleine serves on Damon Key's marketing and hiring committees.

Since 2013, Madeleine has volunteered with St. Ann School in Kaneohe, serving for three years as a member of the Advisory School Board and today serving as a member of the School Board of Education. She has participated in the KHON Action Line Law Week, answering questions from the community on the subject of estate planning.

In her free time, she enjoys traveling with her family and hiking with Lucky, their German Shorthaired Pointer. She lives on Oahu's windward side with her husband, Dr. Steven Minaglia, a urogynecologist and associate professor at the University of Hawaii at Manoa John A. Burns School of Medicine, and their four children.

Madeleine earned her law degree at Northwestern University Pritzker School of Law. She received her Bachelor of Arts degree in Law, Letters & Society, with general honors, from the University of Chicago. She is an alumna of 'Iolani School.

Madeleine's diverse legal career is anchored in a desire to ensure fair treatment for all her clients, especially those who find themselves in difficult circumstances.



2019 Lawyer of the Year, Best Lawyers and Super Lawyers



Robert H. Thomas



Matthew T. Evans



Tred R. Eyerly



Diane D. Hastert



Christine A. Kubota



Gregory W. Kugle



Kenneth R. Kupchak



David P. McCauley



Mark M. Murakami



Anna H. Oshiro



Douglas C. Smith



Michael A. Yoshida



Madeleine M.V. Young

Experienced. Trusted. Innovative.

Congratulations to Robert H. Thomas on being selected Lawyer of the Year and our colleagues on being selected to the latest edition of The Best Lawyers in America® and Super Lawyers. At Damon Key we are independent thinkers, yet work as a team to provide excellent service to our clients.

Robert H. Thomas

Eminent Domain & Condemnation Law
Land Use & Zoning Law
Litigation – Land Use & Zoning
Real Estate Law
2018 Lawyer of the Year: Eminent Domain & Condemnation Law
2017 Lawyer of the Year: Land Use & Zoning Law
2014 Lawyer of the Year: Eminent Domain & Condemnation Law
Super Lawyers: Appellate

Matthew T. Evans

Super Lawyers: Business Litigation

Tred R. Eyerly

Super Lawyers: Insurance Coverage

Diane D. Hastert

Arbitration
Commercial Litigation
Litigation – Real Estate
Super Lawyers: Business Litigation

Christine A. Kubota

Corporate Law
Employment Law – Management
Real Estate Law
2013 Lawyer of the year: Corporate Law

Gregory W. Kugle

Commercial Litigation
Construction Law
Land Use & Zoning Law
Litigation – Construction
Litigation – Land Use & Zoning
Real Estate Law
2017 Lawyer of the Year: Litigation – Land Use & Zoning
2013 Lawyer of the Year: Land Use & Zoning Law
Super Lawyers: General Litigation

Kenneth R. Kupchak

Corporate Law, Construction Law
Litigation – Construction
Litigation – Land Use & Zoning
Eminent Domain & Condemnation Law
Real Estate Law
2017 Lawyer of the Year: Eminent Domain & Condemnation Law
2015 Lawyer of the Year: Litigation – Land Use & Zoning
Super Lawyers: Construction Litigation

David P. McCauley

Super Lawyers: Immigration

Mark M. Murakami

Eminent Domain & Condemnation Law
Land Use & Zoning Law
Litigation – Real Estate
Real Estate Law
2013 Lawyer of the Year: Eminent Domain & Condemnation Law
Super Lawyers: Business Litigation

Anna H. Oshiro

Arbitration
Construction Law
Government Contracts
Litigation – Construction
Super Lawyers: Construction Litigation

Douglas C. Smith

Litigation – Trusts & Estates
Tax Law
Trusts & Estates
2015 Lawyer of the Year: Litigation – Trusts & Estates
2013 Lawyer of the Year: Trusts & Estates
Super Lawyers: Estate Planning & Probate

Michael A. Yoshida

Business Organizations (including LLC's & Partnerships)
Construction Law
Mortgage Banking Foreclosure Law
Real Estate Law
Super Lawyers: Creditor Debtor Rights

Madeleine M.V. Young

Litigation – Trusts & Estates



Received A Notice of Violation or Order For A Transient Vacation Rental?

Take A Closer Look At The Evidence And Fine Being Levied Against You Because It May Be Unenforceable.

By Gregory W. Kugle and Veronica A. Nordyke



If you, or anyone you know is facing a Notice of Violation (“NOV”) or Notice of Order (“NOO”) for an alleged transient vacation rental, or any other Land Use Ordinance (“LUO”) violation, you should pay attention to a recent decision by the Hawaii Intermediate Court of Appeals (“ICA”), because it clarifies that (1) the alleged violation must be grounded in reliable, probative, and substantial evidence, (2) a violation occurs only during the period that the prohibited use occurs, and (3) in determining a fine Department of Planning and Permitting (“DPP”) must exercise discretion within the parameters set forth in DPP’s administrative rules. This ruling applies to every county’s zoning enforcement and is not limited to Honolulu.

In *Leland H. Dao v. Zoning Board of Appeals*, CAAP-15-0000565 (Jan. 31, 2019), the ICA considered the sufficiency of DPP’s evidence and the magnitude of DPP’s fines levied against a homeowner (“Dao”) for violating Hawaii’s land use laws by impermissibly renting out his property as a transient vacation rental.

The factual context of the case involves two appeals from two alleged violations. The first appeal arose from DPP’s issuance of a NOV and NOO based upon an unidentified telephone complainant and a DPP Inspector’s conversation with an unidentified individual who stated that he was renting the Property for three days (“Violation #1”). The second appeal arose from DPP’s issuance of a NOV and NOO based upon *inter alia* a complaint brought by an identifiable individual (a neighbor), a DPP Inspector’s discussions with identifiable individuals staying at the property, discrepancies between those individuals and the names of individuals listed on rental agreements, and overlap of timing in rental agreements (“Violation #2”). The fines for each violation were calculated as an initial fine of \$1,000, plus \$1,000 per day until the violation was corrected, for a total fine for Violation #2 of \$62,000. The Zoning Board of Appeals (“ZBA”) and Circuit Court upheld DPP’s decisions, and Dao appealed to the ICA.

The ICA vacated Violation #1 in its entirety, and vacated Violation #2 in part and remanded it back to the ZBA for further proceedings. In doing so, the ICA keys in on three important legal and practical matters (1) the evidentiary requirements that DPP must establish in order to validly issue a NOV or NOO, (2) measurement of the term of an LUO violation, and (3) the parameters that DPP must follow when levying a fine for the alleged violation. Each is discussed in turn below.

Evidentiary Requirements for Issuance of A NOV or NOO

The ICA held that Violation #1 was clearly erroneous because of a lack of substantial evidence, whereas Violation #2 was not. In delineating between the two, the ICA set forth the evidentiary requirements that DPP must meet in order to validly issue a NOV or NOO. Specifically, the ICA provided the following:

[I]f an agency’s factual determination that a violation occurred and is continuing is not grounded in **reliable, probative, and substantial evidence**, including any reasonable inferences that may be drawn from that evidence, then the agency’s decision may be determined to be clearly erroneous and therefore unjust and unreasonable in its consequences, warranting reversal or modification.

Dao at 34 (emphasis added). In other words, DPP must base a NOO or NOV in “reliable, probative, and substantial evidence” or risk reversal or modification. The takeaway being, take a close look at DPP’s basis for an alleged NOV or NOO – if DPP cannot back up its allegations with substantial evidence, it may be unenforceable.

Term of the Violation

Second, the ICA held that

the LUO's prohibition of transient vacation rentals in residential districts is violated when, and **only during the period that, the prohibited use occurs.**

...

Thus, for a determination that a violation of the LUO occurred for a continuous period of time to be upheld, there must be "credible evidence of a sufficient quality and probative value to enable a person of reasonable caution to support a conclusion" that the violation occurred throughout that period of time.

Dao at 40 (emphasis added). The ICA further noted that, a series of violations, such as those described for Violation #2, could result in the issuance of multiple orders for recurring violations based upon similar evidence. *Dao* at 40, fn 26. The takeaway being, DPP cannot fine you every day until the violation is corrected unless there is credible evidence to support such a conclusion that the violation persisted throughout that period of time. For vacation rentals, which are by their nature transitory, there may be times where the use of the property is not in violation of the LUO. With that said, this doesn't mean you won't be penalized for continuing such use; be aware that if you continue to violate the LUO after receiving an NOV, DPP may issue multiple NOOs for reoccurring violations, which as discussed below, results in increased fines.

The Fines

Last, the ICA discussed the manner in which DPP must issue fines. The ICA provided that, "notwithstanding the discretion vested in the Director to determine an appropriate fine for a violation of the LUO, discretion must be exercised within the parameters stated in the DPP's administrative rules." *Dao* at 41. Specifically, the ICA pointed to DPP's Rules of Practice and Procedure § 10-3, which discusses administrative fines and sets forth a Schedule of Civil Fines and a Fine Schedule for Recurring Violations, which increases the amount of the fine for each subsequent violation. In the case at hand, the ICA concluded that the fine against *Dao* appeared inconsistent with the fine schedules and thus should be recalculated. Here, the takeaway is to compare any fine levied against you to ensure that it tracks the DPP's fine schedules. If it doesn't, you may be able to argue for a lower fine and we can assist with that.

Conclusion

While we don't endorse illegal use of one's property, if you happen to find yourself facing a NOV and/or NOO for an alleged transient vacation rental, or another land use violation, you should take a look at the basis for the NOV and/or NOO to first make sure that the county zoning agency has met threshold evidentiary requirements to establish the alleged violation. If no, the violation may be unenforceable. If yes, check to see that the length of the violation and amount of the fines levied are in line with administrative rules. If no to either, the violation may again be unenforceable.

We have decades of experience defending property rights. If you have concerns of questions about an NOV or NOO you've received, we may be able to help.



For more information on this article, please call Greg or Veronica at 531-8031, or email Greg at gwk@hawaiilawyer.com or Veronica at van@hawaiilawyer.com.

American Bar Association Forum on Construction Law Midwinter Meeting January 30 – February 1, 2019

At the Millennium Biltmore in Los Angeles, Co-Program Chair Anna Oshiro of Damon Key Leong Kupchak Hastert convened the nearly 500 Construction Lawyers in attendance.



The meeting's subject matter was public construction, with topics ranging from how to get paid on public jobs, to the economic forecast in public construction for 2019. Anna and her co-chair, Peter Hahn, of Dinsmore Shohl in Ohio, developed the topics for the program, then worked with ten teams of lawyers and experts from across the country for a year to develop and hone their sessions.

Congratulations, Anna, on organizing this highly successful conference.



Matthew Evans, Gregory Kugle and Anna Oshiro from Damon Key

American Law Institute-CLE Eminent Domain Conference, Palm Springs



W. Taylor Reveley III, 27th President of the College of William and Mary, and former Dean of the William and Mary Law School, delivering the keynote address "Property Rights: Foundation of a Free Society."

In January, the American Law Institute-CLE produced the 36th Annual Eminent Domain and Land Valuation Litigation Conference in Palm Springs, California. Damon Key's Robert Thomas is the Co-Planning Chair for the Conference, and is responsible along with his colleague Joe Waldo of Norfolk, Virginia, for planning the agenda and faculty.

This Conference is the annual gathering of the nation's most experienced eminent domain and property lawyers and is two-and-a-half days of legal education programming on topics such as jury presentations, appeals, expert appraisal testimony, and ethical issues for property lawyers.



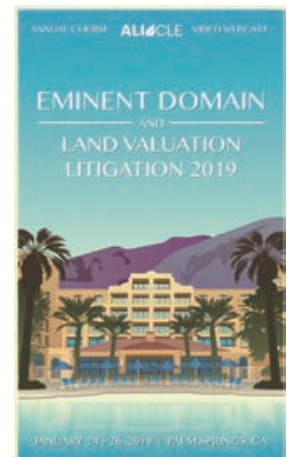
Damon Key's Mark Murakami, and colleagues W. Andrew Gowder (Charleston, SC), and Kelly Daniels Sheeran (Chesapeake, Virginia), debunking "Misconceptions and Urban Legends About Eminent Domain."

Damon Key's Mark M. Murakami was featured in the presentation on "Responding to Misconceptions and Urban Legends About Eminent Domain," a session devoted to how property law and eminent domain are perceived by the public, and how lawyers respond to those misconceptions, both in court and outside.



Federal Judge Andrew Edison, here being interviewed after his featured presentation on the takings issues surrounding the federal government's seizure of the Zapruder film.

But it wasn't all business. Texas federal judge, The Honorable Andrew M. Edison presented a very interesting session on "JFK: The Assassination, the Zapruder Film, and Just Compensation" about the eminent domain issues presented when the federal government took the famous film from Dallas.



The conference saw record attendance, over 250 registrants and faculty. The 2020 Conference will be held in Nashville, Tennessee.

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ADVERTISING MATERIAL

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

Japanese attorneys visit Damon Key to learn about Estate Planning in Hawaii



The Japan Federation of Bar Associations Trust Center recently visited Hawaii to learn about estate planning. Damon Key was one of several law firms visited by 12 Japanese attorneys to learn about estate planning in Hawaii. They also visited the the Hawaii Supreme Court, Probate & Estate Planning Section of the Hawaii State Bar Association and the University of Hawaii William S. Richardson School of Law.



Tred R. Eyerly was on the faculty of the annual American Bar Association's Insurance Coverage Litigation Committee's Seminar in Tucson, Arizona in March. His presentation with two other panelists addressed coverage for harm arising from climate change. This was Tred's eleventh year in making presentations at this conference.

Ross Uehara-Tilton received his LL.M. (Masters of Laws) degree in Taxation and Certificate in Estate Planning from Boston University. An internationally recognized postgraduate law degree, Ross is furthering his specialization and skills in tax planning, compliance and audits, and estate planning.