# LEGAL ALERT

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recently attended the Forum on Construction Law's "Winter Warm-Up" a Forum Fireside Virtual Construction Conference. The final day's keynote presentation was by Anirban Basu, the CEO of Sage Policy Group, Inc., who spoke about the "Anticipated Impact of the Biden Administration on the U.S. Construction Industry". Anirban Basu spoke extensively about the impact of Covid 19 on spending habits,

By Anna H. Oshiro

and how that might affect the construction industry. After the keynote address, the Steering Committee for Division 13 on Public Construction met, and we were joined by Jimmy Christianson, Vice President of Government Relations at the Associated General Contractors of America, for a conversation about his predictions for 2021. Jimmy offered his own insights into how the Biden Administration may affect specifically public construction in 2021. Here are some takeaways from both of these interesting (and somewhat hopeful) presentations.

- Consumers discovered during Covid quarantine that they did not need to work in office spaces, so that prospects for office building construction suffered during 2020 and appear dim in the near future.
- On the other hand, consumers discovered they very much preferred to live in a single family dwelling during quarantine. Housing prices, expected to dip during the pandemic, did not, and inventory for single family dwellings remained very tight. Prospects for home construction, home remodeling, and other single family dwelling related construction, were positively affected by the pandemic.

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- Although 2020 was financially devastating to many economic sectors, Basu noted that the devastation was
  definitely not uniform. People staying home and saving money on travel and vacations and going out to
  dinners, meant more time renovating their home offices and buying things online. As a result, the construction
  industry did not suffer as much the types of projects changed but all work did not disappear. And for
  companies like Home Depot, Lowes and especially Amazon, 2020 proved a fruitful year.
- Both Basu and Christianson cast some doubt on whether President Biden would be able to pass a large
  infrastructure bill in the near future. The American Society of Civil Engineers routinely gives American
  infrastructure poor grades, citing water main breaks, poor road conditions, aging bridges, etc. Biden's
  infrastructure plan is priced at around 2 trillion dollars. Basu did not think the prospects for passing this bill
  look great, mostly because Congress has not been able to pass any large legislation, despite every presidency
  expressing an interest in infrastructure.
- However, Basu did express optimism over the economy in general over the course of 2021, noting that the
  second half of 2021 may be the most dynamic period of economic growth any of us have experienced in our
  lifetimes, and this may be hastened or made even greater by passage of the Covid Relief bill. However, this
  may not be all good news as we face inflation, federal deficits, and potentially rising interest rates that
  accompany a heated economy.
- As for Christianson, he thinks passing an infrastructure bill in the wake of a \$1.9 trillion coronavirus relief bill
  will be a big challenge because of a lack of bipartisan support for the expenditure, and even greater divergence
  over how to pay for it.
- Christianson anticipates that although public construction will be supported by the Biden administration, any
  infrastructure expenditures would likely come with new federal strings, such as project labor agreements and
  local hiring mandates.
- On the immigration side, Christianson noted that there are over 100,000 workers in the construction industry that are either in the DACA or TPS (Temporary Protected Status) program. These programs are both ones Biden has indicated he will continue, which means that the industry will not be disrupted by a sudden dismantling of these programs, as had previously been threatened.

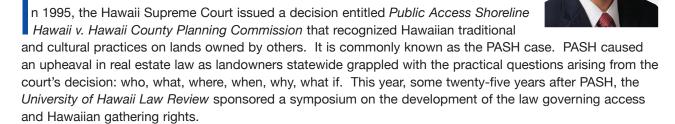
Overall, 2021 is shaping up to be a much better year for construction than 2020, as many projects which were sidelined by crisis come off the shelves and gear up for a new start. The combination of public monies, new private construction, and repurposing and redesigning vacant spaces left by the unfortunate commercial fatalities of the pandemic, could make for a dynamic and exciting year for the construction industry.



For more information on this article or construction issues, please call Anna at 531-8031 or email her at aho@hawaiilawyer.com.

### Twenty-Five Years Since PASH: A Look Back

By Mark M. Murakami



Since the 1840's, tenants of an ahupua'a maintained the right to gather subsistence and culturally important materials in lands owned by others. These rights were codified and well defined: non-tenants of an ahupua'a had no right to such access or gathering of materials. In 1978, the voters adopted several amendments developed by the Constitutional Convention. These amendments created several new agencies, including the Office of Hawaiian Affairs, Commission on Water Resource Management, and the Judicial Selection Commission.

The 1978 CONCON also adopted a new provision that said:

The state reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposed and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

The PASH decision involved a real estate development on Hawaii Island. A group sought to intervene in the land use permitting process to protect their asserted rights of access and gathering. The agency did not allow the community group to participate in the permitting process. The Hawaii Supreme Court found this to be an error, noting the historical rights and the rights listed in the 1978 CONCON and held that the group had "standing" to intervene in the permitting process. The language of the decision caused an uproar, because the court did not limit the recognition of those rights to undeveloped lands, nor did it limit practitioners to tenants of the ahupua'a.

Several years later, in two criminal trespass cases, the court limited the recognition of PASH rights to undeveloped land and found that the state could restrict PASH rights through reasonable regulations balancing the interests of all involved.



As part of the 25th anniversary symposium, retired Supreme Court Justice Simeon Acoba wrote an article outlining PASH and the development of the law protecting Hawaiian gathering rights. Summer Sylva of the Native Hawaiian Legal Corporation, Bill Meheula, private practice attorney, and I all wrote responses calling for additional clarity in this area

of the law to ensure that the interests of landowners and Hawaiian cultural practitioners and gatherers are appropriately balanced.

For more information on this article, call Mark at 531-8031 or email him at mmm@hawaiilawyer.com.

## Estate Planning Under President Biden's Proposed Tax Plan

By Laurel E. Pepe

hether you already have an estate plan or are looking to establish one for the first time, proposals under President Biden's Tax Plan are important to consider. Under current law, the estate and gift tax exemption amount is \$11.7 million, and anything over the exemption amount is taxed at a 40% rate. In addition, currently, inherited assets receive a "step-up in basis" at the owner's death. This means that



whoever inherits the asset does not pay capital gains tax on any increase in value from the date the owner purchased the asset through the date of their death. The basis of the asset "steps up" to the fair market value at the date of the owner's death. The result is that many estates currently fall under the exemption amount, and benefit from, among other things, a step-up in basis.

However, under Biden's proposed Tax Plan, this could change.

One of President Biden's proposals is to eliminate the step-up in basis at death. This means that recipients would have to pay capital gains on inherited assets – affecting *many* highly appreciated assets, including qualified stocks, business interests, and real property – yes, that includes your home. If you purchase a home which then increases in value, then you pass that home on to the next generation, not only will your descendants receive a cherished piece of property – they will also receive the burden of paying capital gains tax on that appreciation. If those descendants choose to sell that home, they will pay capital gains tax on the part of the sale price *in* excess of what you bought it for. If you purchased the home many years ago, this could be a large sum, and a significant tax burden.



The proposed Tax Plan also considers lowering the estate and gift tax exemption, as well as raising the rate of estate and gift tax. While many estates currently fall under the \$11.7 million threshold and are therefore exempt from estate taxes, President Biden's Tax Plan proposes lowering this exemption amount to \$3.5 million – which would capture many more estates. Further, the plan proposes an increase of the tax rate to 45%, meaning any assets in your estate in excess of \$3.5 million would be subject to a 45% estate tax. Note that your estate includes *all* of your property, whether it be cash, securities, real property, or otherwise, so it is important to regularly take stock not only of where you stand in relation to the exemption amount today, but

to project where you may be in the future and plan for that as well.

There are many tools estate planners can utilize to help you achieve your goals and protect your legacy. Some of these tools include using gifting strategies and specific types of trusts to both maintain your standard of living and ensure that your estate passes as you wish – whether it be to loved ones, charities, or otherwise.

It is important to note that much of this is speculative unless and until Congress takes action and passes new legislation. However, the implications are that many estates will require careful planning to protect and preserve assets for future generations.

For more information on this article or Trusts and Estates issues, please call Laurel at 531-8031 or email her at lep@hawaiilawyer.com.

#### Immigrants In Hawaii

By David P. McCauley

mmigration continues to be a hot topic in politics and the news, as the Biden Administration begins rolling back some of the anti-immigrant actions and policies of his predecessor. In Biden's first 100 days, these efforts have included presidential executive orders, as well as directives from Secretary Alex Mayorkas, head of the



Department of Homeland Security, which houses the U.S. Citizenship and Immigration Services agency (USCIS). Secretary Mayorkas, himself a refugee immigrant from Cuba, served as the Director of USCIS under President Obama from 2009 to 2013. His directives take effect the instant they are issued.

Biden's team has begun sending proposed legislation to Congress, including the American Dream and Promise Act, the Farm Workforce Modernization Act, the US citizenship Act of 2021, with more to come. We won't know which of these will pass and become law, or in what form, until they have made their way through the Congressional sausage machine. Instead of trying to follow or predict these legislative moving targets, this article looks at the state of immigrants in Hawaii. The information presented here comes from the US Census Bureau's 2018 American Community Survey, the American Immigration Council, and the Pew Research Center, among others.



Already one of the most ethnically diverse locations in the world, Hawaii continues to have a sizable community of immigrants. One out of five people living in Hawaii was born in another country. One in seven is a native-born American with at least one immigrant parent.

In 2018, immigrants made up nearly 20 percent of our population: 145,237 women, 105,564 men, and 15,346 children. According to the Census Bureau, 213,848 nativeborn Americans in Hawaii (15 percent of our population) had at least one immigrant

parent. The top countries of origin for immigrants were the Philippines (45 percent of immigrants), China (9 percent), Japan (8 percent), Korea (6 percent), and the Marshall Islands (4 percent).

Nearly sixty percent had become U.S. citizens. More than three-quarters reported speaking English "well" or "very well." Hawaii Immigrants are distributed across the educational spectrum. While almost 30 percent have a college degree or some college education, nearly one-fifth (19 percent) have less than a high school diploma. Among all people born in the U.S., the range for those with some college or a degree is 33 to 35 percent; some 5 percent lack a high school diploma.



In 2018, we had 161,938 immigrant workers. This was almost one out of four workers in the state, roughly 25% of our entire work force, across all industries.

The largest shares of immigrant workers were in the following occupation groups:

	Occupation Category	Occupation Category
	Building and Grounds Cleaning & Maintenance	44
	Farming, Fishing, and Forestry	38
	Healthcare Support	36
	Production	35
	Food Preparation and Serving Related	29

And yes we have our share of undocumented immigrants, so-called "illegal aliens." According to the Pew Research Center, 45,000 undocumented immigrants comprised 17 percent of the immigrant population and 3 percent of the total state population in 2016. Some 30,000 U.S. citizens in Hawaii live with at least one family member who is undocumented. The American Progress Organization found that 60,202 people in Hawaii, including 29,223 U.S. citizens, lived with at least one undocumented family member between 2010 and 2014. During the same period, about 4 percent of children (13,536 children) in the state were U.S. citizens living with at least one undocumented family member.

During the current Covid pandemic, undocumented immigrants have been performing essential jobs in many sectors of the workforce. An estimated 389,000 are working as farmworkers and food processors securing the nation's food supply, even as food processing plants have become epicenters of the virus, and agricultural areas are experiencing some of the nation's highest concentrations of coronavirus outbreaks. There are also an estimated 225,000 undocumented health care workers serving as doctors, nurses, and home health aides. An additional 190,000 are working not as health care providers but in necessary custodial and administrative roles to ensure health care settings remain safe and open. Millions more are stocking grocery shelves, packing warehouses, and cleaning and sanitizing businesses, enabling them to remain open.

The economic impact of immigrants in our state must not be underestimated. Hawaii's immigrant-led households paid \$1.7 billion in federal taxes and \$960.7 million in state and local taxes in 2018. They enjoyed \$6.4 billion in after-tax income spending power. Some 21,250 immigrant entrepreneurs and business owners accounted for 26 percent of all self-employed Hawaii residents and generated \$441.7 million in business income.

In that same year, <u>undocumented</u> immigrants in Hawaii paid an estimated \$65.3 million in federal taxes and \$47.6 million in state and local taxes. DACA recipients and DACA-eligible individuals in Hawaii paid an estimated \$2.5 million in state and local taxes in 2018. DACA, *Deferred Action for Childhood Arrivals*, is an Obama program that protects around 800,000 young people — known as "DREAMers" — who entered the United States unlawfully as children. The program does not grant them official legal status or a pathway to citizenship, but it does allow them to apply for a driver's license, social security number, and work permit. Biden hopes to create the path they do not now have.

Hawaii's foreign-born residents represent a vital share of our state's labor force in many sectors. More than a third of our healthcare support workers are immigrants, as are nearly two-fifths of our farmers, fishers, and foresters. Immigrants own more than a quarter of all Hawaii businesses. As neighbors, business owners, taxpayers, and workers, immigrants are integral components of Hawaii's diversity. Their contributions benefit all of us.



### Is My Seawall Legal?

By Cheyne I.Y. Yonemori

or decades, owners of beachfront properties have constructed seawalls and other barriers to protect their real estate from damaging ocean waves. However, as increasing scientific evidence becomes available to show that seawalls contribute significantly to the erosion of public beaches, State and County governments have



been put under growing pressure to enforce historically lax regulations regarding seawalls and to close loopholes which have allowed beachfront property owners to construct or repair seawalls in spite of those regulations.

It is the policy of the State of Hawaii, pursuant to its Coastal Zone Management law, to discourage all shoreline armoring which may adversely affect access to or the geography of public beaches. In furtherance of said policy, the State of Hawaii's Coastal Zone Management law prohibits the construction of private shoreline armoring structures, including seawalls. However, that same law carves out an exception for beachfront property owners who may experience hardship as a result of not being allowed to construct or repair a seawall.

Hawaii Revised Statutes ("HRS") § 205A-46 allows a variance to be granted for the construction of "private facilities or improvements that will not adversely affect beach processes, result in flanking shoreline erosion, or artificially fix the shoreline; provided that the authority may consider any hardship that will result to the applicant if the facilities or improvements are not allowed within the shoreline area". In short, beachfront property owners have historically been able to obtain variances to construct or repair seawalls if they could show that they would experience some hardship without said variance. Generally, the hardship cited to by most beachfront property owners when requesting a variance was harm to property interests. Under the exception granted by HRS § 205A-46, numerous beachfront property owners have successfully sought out and been approved for variances allowing them to construct new seawalls or to repair currently existing ones. However, this is no longer the case.





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State and County governments have historically been relatively lax in regard to the enforcement of policies prohibiting shoreline armoring structures such as seawalls. However, likely in response to increasing pressures on government officials to step up protections for public beaches, State and County governments have become much more reluctant to grant variances for the construction and repair of seawalls. In many cases, it is now nearly impossible to obtain such a variance. This is in addition to increased efforts to enforce regulations against seawalls that are constructed without first receiving the proper authorization. Recent fines for the unauthorized construction or repair of seawalls have ranged from several thousand to tens-of-thousands of dollars. Some beachfront property owners have even been ordered to remove their seawalls or other barriers; and further changes in regard to the regulation of seawalls are likely coming.

The Hawaii State Legislature is no stranger to bills which would regulate the construction and repair of seawalls. The Legislature debated one such bill in 2017, which died after lobbyists for developers argued that there was insufficient scientific evidence to justify the bill. A 2019 bill requiring prospective buyers to be made aware of the risks of purchasing beachfront properties, that would have likely had a similar effect, also failed. Most recently, a 2021 bill which would require beachfront property owners to remove emergency sandbags and tarps installed along public beaches to protect their real estate after three years, has failed. However, with growing activism and ever-increasing scientific evidence to support a finding that seawalls do in-fact detrimentally impact public beaches, the current trend in the law appears to lean toward even stricter regulation of seawalls.

Regulation of the construction and repair of seawalls is a rapidly evolving area of the law, and the law as it stands today may not be the same as it will be even in the near future. While it was once a relatively simple process to obtain a variance for the construction or repair of a seawall, today obtaining such a variance is much more difficult. As such, before going through with the construction or repair of any seawalls on your property, you may want to ask, "Is my seawall legal?"

For more information on this article, call Cheyne at 531-8031 or email him at ciyy@hawaiilawyer.com.



#### Director *Emeritus* Robert H. Thomas

fter more than thirty years with Damon Key Leong Kupchak Hastert, Director Robert Thomas has retired from private practice to join a nonprofit law firm, the Pacific Legal Foundation. Although he will no longer practice with the firm, we have named him "Director Emeritus" in recognition of his long association with our firm.

We asked Robert a few questions about this change in career:

**Legal Alert:** Robert, let's get to the \$64,000 question: why did you leave private practice?

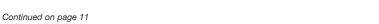
RHT: The time was right. The firm is in excellent hands and firm leadership has been doing a fantastic job shepherding Damon Key through very difficult and uncertain times, and day-to-day operations. Many firms have been shaken hard by COVID and the locking down of the courts. But not DK, which kept services going without missing a beat. My confidence was so high that when an opening for a senior position at Pacific Legal Foundation opened up, I could not say no even though I love Damon Key.

**Legal Alert:** How long were you with the firm?

RHT: I joined up as a Summer Associate way back in 1986, between my second and third year at U.H. Law School. Mike Yoshida came up to campus to interview potential hires, and after we spoke for a few minutes, I immediately cancelled my remaining interviews. It was either Damon Key or ... nowhere as far as I was concerned. And I got hired for the summer, and eventually joined up as an Associate. And I kept going, to being "Of Counsel" and then eventually the firm allowed me to be a Director. So let's see ... 2021 minus 1986 is ... 35 years. Wow.

Legal Alert: Yes, a long time. Tell us about this new gig at Pacific Legal Foundation.

RHT: PLF is the premiere national nonprofit law firm that represents property owners seeking to vindicate their constitutional right to property. So it's really a civil rights firm for property rights. PLF has been instrumental in shaping property law for the last 50 years, and has been to the Supreme Court probably 14 or 15 times, and has an enviable record of success. They do some great work, and the opportunity to join a fantastic nonprofit law firm was really appealing.





Robert with dad and mom at the DK party celebrating his swearing-in as lawyer, 1987.



Dad, Robert, Ken Kupchak, Frank Damon, Mom, and Michael Yoshida at the 1987 swearing-in ceremony at the Capitol.

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Robert with Cathy (Legal Secretary), at the 1988 DK summer picnic at the nowdemolished "Magnum PI" place in Waimanalo.



Robert with Brian Koeberle (Summer Associate, now a sports marketing lawyer in Pittsburgh, Pennsylvania) at the 1990 Century Bike Ride, somewhere in Hauula.

Legal Alert: PLF's cases are a lot like the cases you litigated at Damon Key.

RHT: Yes, I would say that Damon Key is where I learned about property law and property rights. I took a class on Property in law school, but the firm is where I got my *real* education. When I was in law school, we studied the famous U.S. Supreme Court case about Hawaii Kai Marina, *Kaiser Aetna vs. United States*. Charlie Bocken and Diane Hastert took that case to the U.S. Supreme Court and won. I wanted to be at the firm where I could learn from these masters. Which I did, and I was able to apply what they taught me in two cases we did together in which we secured the rights of property owners on Molokai, and adjacent to San Francisco Bay. And no sooner did I join the firm than Ken Kupchak asked me to work with him on what he called a "small" land use law matter. What is now known as the famous "Sandy Beach" case. Well, it wasn't such a small case after all (ask Ken about that one!), and between several trips to the Hawaii Supreme Court, one visit to the U.S. Supreme Court, and more time than I can accurately remember, this "small" case wrapped up with a great result nearly 20 years later. In the course of that case, I learned more about property law and how to get to a good result than I had in my entire career in law school and got to work along side great lawyers such as Ken, Greg Kugle, and other professionals like Genie Kincaid.

**Legal Alert:** Any other cases stand out in your memory?

RHT: For sure. Some big, some not so big. Mark Kellberg and his property on the Big Island. Chuck and Joan Coupe and their absolute confidence in their case challenging the County of Hawaii unfairly trying to take their family property south of Kona by eminent domain. (We went to the Hawaii Supreme Court on that one, and created some darn good law – thanks, Joan and Chuck!). Jim Satterfield and his family business on Kauai. I told Jim that his case was the reason I went to law school. I hadn't known it until then, but after we took him on as a client, my professional purpose became clear. Unfortunately, we didn't win that one in the end, but I still think we were right. Trying to fix Hawaii's broken legislative apportionment system, which excludes one-tenth of the population from political representation merely because they serve in the military. Along with Mark Murakami and Anna Oshiro, we ran that one up to the U.S. Supreme Court, and we represented a diverse coalition of clients including Andrew Walden, Col. David Brostrom, and Representative Mark Takai. Don Williams and his property on Maui, and us fighting for his rights as the State of Hawaii tried to bulldoze them. Helping the Hawaii Farm Bureau work through some of their land and property questions, and learning how laws really get made with Mae Nakahata and Warren Watanabe, my friends at HFBF. And a series of Hawaii Supreme Court pro bono cases on



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which I worked with Mark Murakami, Joanna Zeigler, Ross Uehara-Tilton, and Nica Nordyke. This isn't to say, of course, that there are not others. We didn't work together on cases all that much, but having great people like Denis Leong, Charlie Key, Chris Kubota, and Matt Evans as partners made the practice of law enjoyable. One of the great things about Damon Key is the variety of clients the firm represents, and the different areas of law it can do, and do well. I'm grateful for every client whose case I had a chance to work on over the decades.

Legal Alert: Director "Emeritus." Does that mean you are now officially "old?"

**RHT:** Well, let's hope not! I am very grateful that the firm saw fit to recognize our longstanding association by conferring on me this honorific. What a wonderful gesture. I always felt that the lawyers and staff at the firm were more my friends than merely "professional colleagues," and I'm happy that still being associated with the firm is possible. We may not be working together day-to-day any more, but I still have a place on the hawaiilawyer.com web site, so I still feel like part of the Damon Key family.



Robert helping to present an award to one of his heroes in the law, University of Hawaii Law Professor David Callies. Also presenting the award are two other of Robert's law heroes, Andrew Brigham (R), and Professor Gideon Kanner (L).



Robert and former DK Associate (now Judge) Dean Ochiai, at the 1987 swearing-in ceremony.



Joanna Zeigler, Rafael Del Castillo (co-counsel), Tred Eyerly, and Robert at the Hawaii Supreme Court after Tred's successful oral arguments in the Adams v. HMSA insurance law case.



Damon Key Director's Retreat in 2012.

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

**Tred R. Eyerly** was a co-panelist addressing "The Future of D&O Insurance" at the American Bar Association's Insurance Coverage Litigation Committee virtual CLE seminar in March.

Christine A. Kubota was invited to attend the virtual discussion with First Lady Dawn Amano Ige and others regarding Japanese American nonprofit organizations in Hawaii. Christine also spoke with the Think Tech Hawaii program "Lawyers Across the Sea" on international business transactions https://www.youtube.com/watch?v=\_bn4Tdw1US0



Mark M. Murakami was part of a very distinguished lineup of presenters for the University of Hawaii Law Review Virtual Symposium: 25 Years of PASH "The Proper Role of the Court: Restoring Justice Through the Public Trust Doctrine."



Volume 50 of the American Bar Association Section of State and Local Government Law's scholarly law journal, "The Urban Lawyer" is out and features editing work from Associate Editors **Tred R. Eyerly, Madeleine M.V. Young, Loren A. Seehase, Joanna C. Zeigler, Ross Uehara-Tilton** and **Laurel E. Pepe** 

The American Bar Association Section of Litigation Real Estate, Condemnation and Trust Litigation Committee is hosting a roundtable, "Property as a Civil Right: Historical Look at Segregation, Discrimination and Bias in Housing and Zoning Policy" May 12, 2021 at 1:30pm, Register at: form.jotform.com/210757344835157