HAWAII STATE BAR ASSOCIATION
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Real Property and Financial Services Section

Newsletter

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LETTER FROM THE CHAIR

The Real Property & Financial Services Section is one of the largest sections of the Hawaii State Bar Association. Our current membership is 223. Our Section has always been active and we become more active every year. Our Board represents a cross-section of the Bar from the private sector, government, house counsel, the law school, and each neighbor Island. Our Board meetings are open to all members and are held on the third Friday of every month at the Bar Association located at 1136 Union Mall, PH-1.

On a personal note, I'd like to thank Charlie Key for the marvelous job he did as Chairman in 1991.

As always, the beginning of the year, which ushers in the new legislative session, is a busy time. Over the years, our Section has, as a service to the Legislature and our members, conducted an annual review of proposed legislation affecting real property and financial services. Our purpose is not to lobby for or against any legislation or to take any position on the merits of any bills, but rather to act as a resource for the legislature on matters of technical form and legal sufficiency as well as providing legal background. Our legislative policy is discussed in this issue.

This service cannot be provided without the dedication of dozens of volunteer attorneys who agree to review legislation and, if requested, render assistance to individual legislators. They all deserve our thanks.

Although many issues to be heard by the United States Supreme Court this year have received a lot of media attention, this term has the potential of having a historic impact on land-use issues. This fact was not lost on Senator Biden, who waved, with alarm, a copy of Professor Richard Epstein's 1985 book, *Takings*, in the Clarence Thomas hearing. Our special thanks to Professor David Callies for his timely article on the case of *Lucas v. South Carolina Coastal Council*, which will be heard by the Court this term.

On February 28, 1992, at the Exhibition Hall of the AMFAC building, our Section will hold a lunch-time seminar on another timely topic, the Americans With Disabilities Act.

Since the primary purpose of this section is the continuing legal education of our members, and we depend upon each other for that education, we are interested in hearing from you about cases involving significant legal issues concerning real property or financial services which you may come across in your practice. Of particular interest are Circuit Court rulings, which, from time to time, will be summarized in our Newsletter.

We hope this inaugural edition of our Section's Newsletter will be the beginning of a valuable communication to all practicing attorneys.

William J. Deeley, Chair
Real Property &
Financial Services Section
Hawaii State Bar Association ■

UPCOMING SEMINARS

Each year, the Real Property and Financial Services Section co-sponsors four to six seminars with HICLE. The seminars scheduled for this year include the following:

February 28	Americans with Disabilities Act: Public Access and Real Property Concerns
April 30*	Property and Liability Insurance: Drafting Issues
July 10*	Legislative Update
October 16*	Real Property Litigation Update
November 20	Conveyance Manual III

All of the seminars are two-hour luncheon programs, except the November seminar given in connection with the Annual HSBA Convention, which is a full-day program. Dates noted with an "*" are tentative dates.

BOARD MEETING HIGHLIGHTS BOARD POLICY ON LEGISLATIVE TESTIMONY

From time to time, members of the Real Property and Financial Services Section provide testimony and comment to the legislature on proposed legislation affecting real property and financial services. One of the Section's most active committees providing such testimony is the condominium committee, which consists of members of the Section representing all of the various parties interested in condominium law, including developers, property managers, condominium owners and associations and financial institutions. Recently, and in the past, legislators have requested Section members to draft and review legislation **prior** to the legislation being introduced. The activities of our Section members have come to be viewed by some of the legislators as a valuable service and resource. However, questions always arise regarding the permissible extent and context of the testimony of members testifying on behalf of the Section. Each member testifying on behalf of the Section (as opposed to members testifying on their own behalf or on behalf of a client) must be careful to remain neutral as to public policy matters and to not advance the personal interests of any client. As a result, in order to guide the Section members, the Board of Directors of the Section passed the following Resolution in May of 1991: RESOLVED, when testifying before the Legislature, City Council, or other administrative or governmental bodies on behalf of the Section or any of its committees, the member shall identify the Section or committee on whose behalf the member is appearing, will answer questions about the legislation or other matter which is the subject of the testimony and may: (1) describe the legal background and ramifications of the proposed legislation or administrative action and describe how it relates to existing law and court decisions; and (2) comment on the technical form and legal sufficiency of the proposed legislation or administrative action for clarity, consistency and effectiveness, regardless of the member's personal opinion as to the merits of the legislation or administrative action or the policy being supported or hindered thereby.The Resoultion and proposed modifications thereto, as well as comprehensive policy pertaining to testimony given on behalf of the Section, will be discussed further at the Board's February meeting. If you have any input or questions regarding the Resolution, please attend the February meeting and the Board will be happy to listen to your comments and concerns. ■

MEMBERS' CORNER

The Real Estate and Financial Services Section would like to make this Newsletter as interesting and useful to you as possible. We invite your comments, ideas, suggestions, and articles. We plan to publish quarterly, on January 31, April 30, July 31 and October 31, and would appreciate having any written materials at least one month prior to the scheduled publication date.

If you have any ideas for articles or seminars; have an interesting problem which you solved or encountered; were involved in a significant, but unreported case in the lower courts; or have expertise in an area which you believe our members would find useful, your contribution would be welcome. If you have any ideas, or are willing to write an article, please contact Deborah M. Chun, William J. Deeley or Nancy N. Grekin.

BOARD MEETING SCHEDULE

All meetings of the Board of Directors of the Real Property and Financial Services are open to members of the Section. Meetings are held from 12:00 noon until 1:00 p.m. at the Hawaii State Bar Association Conference Room located at 1136 Union Mall, Union Plaza Penthouse (just ewa and parallel to Bishop Street, in the middle of the Pan Pacific Building construction). Meetings are the third Friday of each month. The meeting schedule for 1992 is as follows:

February 21	August 21
March 20	September 18
April 17	October 16
May 15	November 20
June 19	December 18
July 17	

As a general rule, the first part of the meeting involves various business items, with the remainder of the meeting consisting of a general discussion of current issues related to real estate and financial services matters. ■

PROPOSED AMENDMENTS TO THE UNIFORM LAND SALES PRACTICES ACT

June R. Kamioka, Executive Secretary of the Subdivision section of the Professional and Vocational Licensing Division of the Department of Commerce and Consumer Affairs, has submitted a proposal for consideration by the 1992 Legislature, to amend Chapter 484, HRS. She indicates that the purposes of the proposal are "to establish new definitions; to clarify requirements for registration; to repeal the 484-10(g) exemption; and to make housekeeping amendments."

Mrs. Kamioka has invited attorneys to express any concerns or suggested amendments to the proposal. If you wish to review the proposed amendments, you can contact Mrs. Kamioka at 586-2704, or you can write to her at P.O. Box 3469, Honolulu, Hawaii 96801. If you wish to comment on the proposal, please be aware of the policies of the HSBA and the Real Property and Financial Services Section regarding written and oral testimony given to or before the Legislature and administrative agencies. The policies do not affect comments made by an individual on his or her own behalf, but are applicable only to comments made by an individual as a member, or on behalf, of the HSBA or the Section. ■

REGULATORY TAKINGS

By David Callies

The United States Supreme Court may be about to rewrite the law on land use controls. It has accepted for review the beachfront regulation case of *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (1 991). The ramifications for attorneys practicing in the property and local government fields are major.

The U.S. Supreme Court (hereafter USSCT) introduced the concept that regulation of property can constitute a taking of property protected by the U.S. Constitution, back in 1922 (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393). There, the Court held, per Justice Holmes, that regulating land, if it goes "too far", does "take" property. "Too far" is decided by balancing the public reason for the property regulation against the economic loss to the landowner being regulated. The more "nuisance-like" the prohibited use (a brickyard in a residential neighborhood) the more totally a regulation can prohibit the use, even if the private economic loss is great. A 1987 decision of the USSCT (*Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. 470) suggests that if a regulation promotes the health, environment, or fiscal integrity of the people, government can eliminate virtually all economic use.

The USSCT which decided *Keystone* was sharply divided, 5 to 4. Chief Justice Rehnquist wrote for the 4-justice dissent, of which 3 are still members of the Court. These 3 have since been joined by 3 new justices, widely perceived to agree with the conservative views of the Chief Justice. The previous majority, on the other hand, has shrunk from 5 to 3. It therefore looks as though the Chief Justice may well command a 6-justice majority for substantially modifying or overruling the *Keystone* decision which sharply limited when a regulation of land could be a taking of property requiring compensation.

Now comes *Lucas v. South Carolina Coastal Council*, which the USSCT has agreed to hear and decide in 1992. A state coastal protection statute forbids the purchaser (for $1.2 million) of two beach lots from building houses on them. The statute virtually - but not totally - eliminates their economic value. The purpose of the statute is mixed: to protect the coast and its people and property from the ravages of ocean storms, to protect natural habitats, and to provide a basis for tourism and a healthy environment for South Carolina's citizens.

South Carolina's lower courts held the state statute "took" property without compensation. The state supreme court reversed, basing its decision squarely on the 5-justice majority in the aforementioned USSCT *Keystone* case: "Lucas' argument tracks the position of Justice Rehnquist's dissent in *Keystone*. We follow the *Keystone* majority." (at 901) There are, however, a few twists. First, the South Carolina court focused primarily on the health and safety aspects of the state coastal protection statute rather than its welfare aspects. Citing several old USSCT decisions essentially regulating nuisances, the South Carolina court suggests that, by failing to attack the basis of the statute, Lucas has admitted its validity in terms of public purpose and the only question is whether he must constitutionally suffer the elimination of all economic use on his lots. It is therefore possible to read the decision as one based on the law of public regulation of nuisances, regardless of the court's explicit reliance on *Keystone*, which is, of course, far broader.

The *Lucas* decision was not unanimous and there is a two-justice dissent which rested much of its argument for upholding the court below and finding a regulatory taking of property, on the aforementioned, Rehnquist-led *Keystone* dissent. Noting that the USSCT has had a lot of trouble deciding when a regulation of property amounts to a constitutionally-protected taking, the dissent also begins with the old nuisance cases but argues first that such as *Mugler v. Kansas*, 123 U.S. 623 (1887) and *Hadacheck v. Sebastion*, 239 U.S. 394 (1915) stand for the broad proposition that where the legislature deems an act to be necessary for the health, safety and welfare of the people, the extent of the loss suffered by the property owner is irrelevant. Second, the dissent argues, Holmes opinion in *Pennsylvania Coal* substantially modified that proposition, requiring a balancing test regardless of the basis of a regulation in the police power, against the extent of private harm. Third, and most important, the dissent characterizes the South Carolina majority as resting their opinion on the discredited *Mugler* line of cases, which the *Keystone* majority also accepts, wrongfully ignoring the basic thrust of *Pennsylvania Coal*. This, says the *Lucas* dissent, was perceived by Chief Justice Rehnquist in his *Keystone* dissent, and which the *Lucas* dissent clearly prefers. Finally, the *Lucas* dissent refuses to view the South Carolina beach protection statute as nuisance-abating. For all these reasons, the dissent would find its effect on the Lucas lots a taking of property without compensation.

In accepting the *Lucas* case, the USSCT may first have to deal with two procedural matters before reaching the merits. First, the South Carolina beachfront regulation statute has been amended during the course of the litigation. The South Carolina Supreme Court observes in a footnote that it is no longer clear what Lucas may or may not be able to construct on his lots. It is therefore conceivable that the case could be remanded to deal with this possibility, on which there has been no evidence presented in South Carolina. Second, it is not clear from the discussion of the case by the South Carolina Supreme Court whether this is a facial attack on the ordinance, or an attack on the ordinance as applied to Lucas and his lots. The reliance on *Keystone* - a clear case of a facial attack - might lead to the conclusion that *Lucas* also represents a facial attack. On the other hand, the posture of the case reads very much like an "applied" case. If so, then the question of ripeness arises, according to the USSCT's own - and much in need of revisiting - decision in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1986). There is, after all, no indication in *Lucas* that the landowner has pursued either other avenues to seek relief from the state statute or compensation via inverse condemnation under an applicable state eminent domain procedure. Presumably, however, the USSCT considered these matters before it accepted the case for review in the first place.

If we agree that the USSCT would not have accepted the *Lucas* case only to send it back on procedural grounds or merely to clarify the law of regulatory taking, then it must have some pretty radical changes in mind. Here are some of the possibilities:

1. Overturn *Keystone* and make all land use regulations which are not "nuisance"-preventing, takings which require compensation, just like government physical invasion/condemnations. This would decimate most local zoning ordinances and eliminate all historic, aesthetic, architectural and cultural preservation regulations. This is arguably the position of the *Lucas* dissent. It is also the position which Chief Justice Rehnquist took in his 4-justice *Keystone* dissent in 1987. Particularly vulnerable under this alternative would be state laws protecting coastal zones and other areas of critical state concern, agricultural and conservation lands and those portions of county zoning ordinances based on welfare (aesthetics, cultural and historic preservation, coastal zone regulations not based on flood hazard protection) and all environmental laws not tied to health and safety of the nuisance-prevention variety.

2. Modify *Keystone* and more strictly scrutinize "welfare"-based regulations having to do with such as historic preservation and aesthetics. Either all such regulations would fail if they reduced the value of property to which they applied, or the "balancing" of economic damage vs. public need for the regulation would be heavily weighted in favor of taking and compensation. Health and safety-based regulations would continue to be subject to the old balancing test: the more needful the regulation for health and safety protection, the more likely economic damage to private property would be permitted without taking/compensation. This alternative is suggested by some USSCT decisions from the early 1980's, as well as by the 1987 decision in *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 324 (1987) by Chief Justice Rehnquist on compensation for regulatory taking ("insulating" regulations from takings attack if they are "safety regulations".) State and local regulations tied to health and safety would be defensible, but those tied mainly to welfare would be at risk.

While there is a need for some corrective to public land use regulation which often ignores private property rights altogether, either of the above alternatives goes further than even Justice Holmes suggested in his famous 1922 decision which first suggested the notion that property could be "taken" by regulation. Justice Holmes did say that "if regulation goes too far it will be recognized as a taking." But he also said that "property may be regulated to a certain extent" and that "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." While Chief Justice Rehnquist has always been a firm defender of private property rights, (a category of civil rights also protected by the Bill of Rights), he has also demonstrated a rare comprehension of and fervent concern for local government (see in particular his ringing defense of Home rule in *Community Communications Co. v. City of Boulder*, 445 U.S. 405 (1982). Let us agree that government has, in Holmes's language, sometimes gone "too far" in regulating private property. But let us also hope that government will, in Holmes's words, be able to "go on" about its business of protecting the health, safety and welfare of the people after the U.S. Supreme Court finishes with the *Lucas* case.

David Callies is Professor of Law at the University of Hawaii, a member of the Board of the Section, and the author of several publications on regulatory taking of property. ■

NEW CONVEYANCE TAX FORMS

The Department of Taxation issued Tax Information Release No. 92-2 on January 3, 1992, to announce that the conveyance tax forms have been revised, and that the new forms must be used from March 2, 1992. Copies of the Tax Information Release and the new forms can be obtained from the Department of Taxation, although as of January 22, the forms were not yet available.

Both the Conveyance Tax Certificate and the Exemption from Conveyance Tax forms have been revised. Most of the changes are to the Conveyance Tax Certificate, which will now include four categories of transactions: Agreement of Sale, Exchange of Properties, Assignment of Lease, and Lease or Sublease, with appropriate lines for computation of the tax depending upon the nature of the transaction. Increased lease rental resulting from the transaction, and lease premiums paid will be taxed, with lease premiums being taxed without discounting and capitalizing at 6%.

The Tax Information Release states that penalties for late filing and interest on late payments will now be enforced. Under 247-4, HRS, the conveyance tax is due no later than 90 days after the transaction, and the Director of Taxation is given the power to impose penalties for non-payment, and interest on past due amounts. The Release states that the penalty to be imposed for non-payment will be 5% of the tax due for each month or portion of a month it remains unpaid. Interest on late payments will accrue at 2/3 of 1% per month or fraction of a month of the unpaid amount. The Release states that the "date of the transaction" is the later of the date of the document or the date of the last acknowledgment, thus the deadlines will be important if a transaction is to be recorded more than 90 days after the documents are executed, since in virtually all transactions the tax is not paid until the documents are recorded. The Release does state that the penalties and interest can be waived if "you can show reasonable cause for the delay."

Both forms now require that foreign purchasers report their acquisition of property in accordance with Honolulu City Ordinance No. 90-68. Questions regarding this portion of the form should be directed to

City and County of Honolulu
Department of Finance
Real Property Technical Office
842 Bethel Street
Honolulu, Hawaii 96813
527-5524 or 527-5512 ■

DROA STANDARD FORM REVISIONS

The Real Property and Financial Services Section has been advised that the Standard Forms Committee of the Hawaii Association of REALTORS plans to substantially revise the current DROA form and would appreciate input from members of the Section. It is the intention of the Committee to divide the present DROA into three separate documents, one form for sales of each of the following types of property: single-family residence, condominium, and vacant land. It is also the present intention of the Committee to attempt to incorporate the DROA Addendum. In the course of the project, all aspects of the DROA and the DROA Addendum will be reviewed.

At the October 25th meeting of the Board, Bob Warner, Bill Deeley and Bud Quitiquit (Chairman) were appointed as the Section's Realtors Liaison Committee to work with Wayne Pitluck, the liaison for the Hawaii Association of REALTORS. Accordingly, if any member of the Section has any particular concerns with respect to the current DROA form, and proposed solutions to the concerns, please feel free to send written comments to Bud Quitiquit at 75-5706 Kuakini Highway, #101, Kailua-Kona, Hawaii 96740, who will coordinate delivery of the comments from Section members to the Hawaii Association of REALTORS. Likewise, if any member would like to be placed on a mailing list to receive copies of proposed drafts of the revised DROA form, please send a written request to Bud Quitiquit. ■