Real Property and Financial Services Section
Hawaii State Bar Association

Newsletter

January 1993

LETTER FROM THE CHAIR

Pursuant to our Section Bylaws, two of the purposes of this Section are "to provide a forum for the exchange of experiences, ideas and opinions with respect to real property and financial services through discussion, study and publication" and "to sponsor, encourage and promote scholarship in the financial services and real property law fields." As a positive step toward meeting these goals and purposes, the Board of Directors, at its December meeting, voted to offer two prizes of $250 each to the students receiving the highest marks for their semester papers in the Real Property and Environmental Law Seminar classes at the University of Hawaii Law School. The winning students will prepare, for publication in this newsletter, shortened versions of those papers. If the program is successful, as we hope and anticipate it will be, it could become an annual award program.

Board Meetings Open to Members

As a reminder to the Section members, the Board of Directors meetings are held every third Friday of the month at the HSBA offices from 12:00 p.m. - 1:00 p.m. All Section members are welcome to attend. The meeting schedule for 1993 is as follows:

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

Deborah Macer Chun
Chair, Real Property and
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NEWS FROM THE BUREAU OF CONVEYANCES

New Deadlines for Submission of Documents for Recording

Beginning January 4, the Bureau of Conveyances adopted new recording procedures for escrow and title companies. All documents for recording must be delivered to the Bureau by 8:30 a.m the day before recordation. If a recording is to be "pulled", the title company must fax its instructions by 3:00 p.m. the day before recording. If the transaction is to be recorded after all, instructions to record may be faxed by 4:30 the day before recording. Title companies will still be limited to 3 special recordings per day.

Escrow companies are requiring that documents be in escrow by 11:00 or 1:00 p.m. two days prior to recording in order to meet these deadlines and are also requiring that instructions to pull a recording be received by at least 2:00 p.m. the day before the planned recording in order to allow time to fax the instructions to the Bureau. Escrow companies are still requiring that good funds for the transaction be in escrow by 11:00 A.M. the day before recording since they are able to pull the recording up until 3:00 P.M. of that day if funds are not received.

Bureau Tours

The Bureau of Conveyances has announced that it is now offering free presentations on procedures and recordation processes, and recent legislative changes that affect the fee schedules. The presentation lasts about 45 minutes, and can be arranged by contacting the Bureau of Conveyances at 587-0314. Several members of the Board have attended the tours, and found them helpful and informative. Sandra Furukawa and her assistant were present to conduct the tour,

and were willing to answer questions and hear comments from attorneys regarding procedures and problems. ■

REAL ESTATE COMMISSION REVISES BY-LAWS CHECKLIST

In October, 1992, the Real Estate Commission published a revised by-laws checklist for filing condominium project registrations. The checklist included approximately 20 new items which were not listed in the previous checklist. Most of the new items covered are governance matters, which although regulated by Chapter 514A, are not specifically required by §514A-82 to be included in the by-laws. A number of attorneys have inquired as to whether the non-statutory items had to be included in the by-laws and noted on the checklist.

The Real Estate Commission has now considered the matter, and has determined that items not listed specifically in §514A-82, although recommended for inclusion in the by-laws by the Commission, will not be required as a condition to issuance of an effective date for a public report. The Real Estate Commission plans to issue a new checklist which will include two separate lists of items: those required by §514A-82, and those which are not mandatory, but which the Commission recommends for inclusion. Until the new checklist is issued, attorneys may file the October, 1992 form, but may indicate "N/A" on the form for items which are not listed in §514A-82 and which the attorney does not wish to include in the by-laws. ■

MEMBERS' CORNER

In recent months, several Manoa property owners have reported that the Department of Land Utilization of the City and County of Honolulu has been requiring the payment of substantial park dedication fees (in lieu of dedication of part of the land to the City) as a condition to the granting of subdivision approval to proposed small family subdivision applications. In at least one such case, a $60,000.00 dedication fee was quoted as a condition to granting a two-lot subdivision, for the purpose of conveyance of the smaller lot from parent to child, notwithstanding the owners' agreement to execute a covenant not to further subdivide, on the grounds that the property "could be further subdivided" and hence the two-lot exception of amended Ordinance No. 90-2 (effective 1/18/90) does not apply. See Rule 7.2 (c) of the Park Dedication Rules and Regulations of the City and County of Honolulu. Although both the Ordinance and the Rules are broad enough to encompass such a subdivision application, the position adopted by DLU, in applying the park dedication requirements to non-commercial, non-remunerative intra family subdivisions may as a practical matter make subdivision impractical in such instances.

- Bruce G. Jackson

As we begin the second year of publication of our Newsletter, we once again encourage you to submit articles and ideas for seminars. If you have encountered an interesting problem, or have expertise in an area the members would find useful, your contribution would be welcome. We will publish April 30, July 31 and October 31. Contact Nancy N. Grekin with your ideas or contributions.

HONOLULU'S AMENDED OHANA ORDINANCE

By Jody Lynn Kea

The State of Hawaii enacted legislation in 1981 which required each county to amend its zoning codes to permit landowners to construct additional dwelling units on their residentially zoned lots. Such dwellings were called ohana units. The use of the word "ohana", the Hawaiian word for extended family, implied that such housing was solely for use by extended family members. The legislature apparently did not intend to so limit the use, stating that the purpose of the ordinance was to increase the supply of affordable housing by assisting families to purchase affordable individual living quarters.

In 1982, the Honolulu City Council amended Honolulu's zoning code to include an ohana ordinance. The ordinance has been subsequently amended, most recently in 1992. Ordinance Number 92-101, which became effective September 10, 1992, amends previous Honolulu ohana zoning legislation in several significant ways.

First, the amendment refocuses ohana zoning to be consistent with the concept of "ohana". The purpose of the ordinance is to "encourage and accommodate extended family living without substantially altering existing neighborhood character." The reference in the prior ordinance to providing affordable housing and meeting critical rental needs has been deleted. Ohana zoning no longer appears to be the City Council's solution to Honolulu's housing problems, but primarily a means by which to encourage a particular lifestyle which only incidentally increases housing.

The amendment restricts occupancy of the ohana dwelling unit to persons who are related by blood, marriage, or

adoption to the family living in the principal dwelling. Units for which building permits were obtained prior to September 10, 1992, are exempt. Thus, two types of ohana dwellings will exist, those constructed under prior ordinances which can be rented or sold freely and those built under the new ordinance which must be occupied by "family".

The restriction raises interesting questions. How is the familial relationship requirement to be enforced? For example, suppose the owner of the principal dwelling sells the lot and relocates. Since the familial relationship no longer exists, must the family in the ohana unit move even though the new owner wishes to rent to them? In the case of families related by marriage, must the affected family move when divorce severs the required relationship? When is the familial relationship determined? If the relationship must be documented at the time of the building permit application, what are the consequences of the relative who was to occupy the ohana dwelling dying or declining to occupy the unit upon its completion? Must the dwelling remain empty if no other relatives wish to rent or occupy the unit? Ohana zoning regulations are expected to be issued in the spring of 1993, and should clarify these requirements and provide enforcement guidelines.

Second, the amendment expands ohana-eligible areas. Prior ohana zoning ordinances restricted their location to residentially zoned districts. The amendment permits ohana dwelling units on lots zoned for county or agricultural use. Maximum floor areas are established with sizes ranging from 700 square feet in R-5 and R-7.5 districts to 1,000 square feet in agricultural, county and R-20 districts.

Perhaps as a safeguard against overdevelopment, especially of agricultural and county lands, the amendment permits only one ohana dwelling unit per lot in all types of zoning districts. Thus, landowners are prevented from creating defacto subdivisions by building multiple units on their lots.

Third, the amendment also requires that the "ohana dwelling unit and the principal dwelling unit be located within a single structure" (i.e. within the same two-family detached dwelling). Prior ordinances permitted the ohana dwelling units to be fully independent structures.

The single structure requirement is a significant change which also promotes the extended family concept in that the ohana dwellings will be less independent. While relatives may enjoy living in such close proximity, non-related parties may find such conditions overly confining.

Fourth, under the amendment, landowners are required to record covenants which are binding upon the owner, their heirs, successors or assigns to the effect that such persons will not submit the property or any portion thereof to a condominium property regime. Breach of the covenant permits the Director of the Department of Land Utilization to require the landowner to remove the property from the CPR. Prior to adoption of the new ordinance ohana dwellings were often submitted to the CPR to permit sale. This was a controversial practice which the Council wished to prohibit.

Fifth, the Council amended the nonconformities section of the Land Use Ordinance to specifically exclude ohana dwelling units from its repair, expansion and reconstruction requirements. The LUO section allows the enlargement and repair of nonconforming dwellings provided the changes comply with all other LUO provisions. Thus, changes to nonconforming dwellings must move them toward zoning code compliance. The non-conformities section also requires owners of nonconforming dwellings to rebuild destroyed units in conformity with current zoning regulations. The exclusion of ohana units from the non-conformities section of the LUO makes it clear that ohana owners must comply only with the requirements contained in the ohana zoning section.

The repair, expansion and reconstruction of ohana dwelling units is now exclusively governed by provisions within section 21-6.20-1 of the amendment. An ohana dwelling unit destroyed to the extent of more than fifty percent (50%) of its replacement value may be rebuilt to its original size if: a) the unit was legally constructed; b) the replacement unit will comply with all current district height, yard, maximum building area and parking requirements; and c) the rebuilt unit does not exceed the larger of the previously existing approved building plan floor area and the maximum floor size for the relevant zoning district at the time the building permit was issued. For example, if a 2,000 square foot ohana unit in an R-10 zoning district is destroyed, it may be rebuilt to its original size (rather than the R-10 maximum floor area of 900 square feet) provided that the original unit was legally constructed.

Section 21-6.20-1(b) governs the expansion of ohana dwelling units. Units submitted to the CPR may be expanded if the declaration was recorded prior to or on December 31, 1988, and the building permit was issued prior to April 28, 1988 (the effective date of the prior ohana ordinance which established maximum floor areas). Such expansion is limited. The maximum building area of each unit on the lot is not to exceed the ratio of that unit's proportionate share of the common interest (as specified in the CPR documents) to the total common interest of all units on the zoning lot, multiplied by the maximum building area of the lot. Any expansion must be in compliance with current zoning district yard and developmental standards, and additional expansion is not permitted if the maximum building area has already been reached. Units rebuilt or expanded under this section are exempt from compliance with the amendment's attachment requirements if building permits for such units were issued prior to September 10, 1992.

Sixth, the DLU, with assistance by other agencies, retains the power to designate ohana-eligible areas. Only areas with adequate public facilities will be eligible. Factors considered in determining such adequacy include: the structure and condition of access roadways; wastewater treatment and disposal facilities; available water pressure and water sources for domestic use and fire flow; compliance with parking requirements and other applicable community safety, health and welfare criteria. When an area is determined to be ohana-eligible, the Director must publish notice of the proposed change and notify neighborhood boards in the affected area.

Seventh, under the amendment, ohana development may be prohibited in certain areas. It is prohibited on noncon-

forming lots and in areas which have inadequate infrastructure and public utility facilities. Ohana units are also prohibited in ohana-eligible areas when wastewater treatment and disposal, transportation or water facilities are no longer adequate for further development. Owners (fee owners of non-leased land and lessees of property subject to leases) may prohibit ohana development in their census tracts. The DLU will not approve ohana units in such areas if the owners of sixty percent (60%) of the agricultural, county or residentially zoned lots in the census tract sign and submit a petition requesting that the tract be excluded from eligibility. The amendment empowers the Director to establish the petition forms, the procedures to authenticate signatures and the prohibition duration. By allowing owners of lots in affected areas to prohibit ohana eligibility, the Council appears to be trying to alleviate the problems which arose under prior legislation when residents opposed such development in their neighborhoods.

The Council continues to refine ohana zoning in Honolulu. The new ordinance is apparently intended to permit restricted ohana development while avoiding speculation. However, the ordinance may be so restrictive that ohana dwelling units may be undesirable to most landowners. ■

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