

Newsletter

January 1994

LETTER FROM THE CHAIR

With this issue we begin the third year of publication of the Real Property and Financial Services Section Newsletter. We publish quarterly on January 31, April 30, July 31 and October 31. We hope that the Newsletter will continue to provide a forum for our members to share their experiences and expertise with other members of the Section, and we appreciate your suggestions for articles, as well as your contributions. We are in the process of planning the semi-

nars for this year as well, and we always appreciate suggestions for topics as well as volunteer speakers.

We welcome three new members to our Board this year: Nathan Aipa of Kamehameha Schools/Bishop Estate, Jane Howell of the Corporation Counsel's Office, City and County of Honolulu, and Ed Watson, of the Attorney General's office.

Finally, Board meetings are open to all members, and we welcome your attendance and input. Meetings are held on the third Friday of each month in Conference Room A of the HSBA office. Meetings will be held this year on the following dates:

February 18
March 18
April 15
May 20
June 17
July 15
August 26
September 18
October 21
November 18
December 16

*Nancy N. Grekin
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DID YOU KNOW

- That Chapter 479, H.R.S. requiring freedom of choice of insurers in loan transactions, and barring recovery of interest for failure to give notice of the freedom to choose, was repealed in 1993. You no longer need to include the familiar notice of freedom of choice of insurers in your mortgages.
- That "extended coverage" is an obsolete form of property insurance. The broadest form of coverage

now available is called "special form." Mortgage and lease documents calling for "extended coverage" policies could result in inadequate insurance coverage since the form of coverage required is unavailable.

- That Tax Information Release No. 93-7 issued December 23, 1993, and effective as of January 1, 1994 requires that revocable living trusts be treated as separate tax-paying entities for purposes of the General Excise Tax Law. The De-

partment of Taxation will now require that individuals who own assets which generate income subject to the General Excise Tax Law (such as investment real estate) in their revocable living trusts to obtain a GET number for the trust, and report and pay the GET in the trust, not individually. There is a bill in the Legislature to invalidate this Release.

- That Judge Harold Fong ruled in the case of Security Pacific Bank Washington vs. Jing Long Chang,

individually and as Trustee of the Jing Long Chang Revocable Living Trust, et al., Civ. No. 91-00512 HMF in the United States District Court for the District of Hawaii, that a judgment creditor of the defendant Mr. Chang could not reach property held in his revocable living trust which was formerly held as by him and his wife as tenants by the entirety, to satisfy a judgment against Mr. Chang alone. Mr. and Mrs. Chang had conveyed the entirety property one-half to each of their revocable living trusts before execution of the note by Mr. Chang alone.

- That there are three 1993 forms of the standard DROA in use dated May, 1993, June, 1993 and July 1993.
- That §501-84, H.R.S., was amended by the 1993 Legislature to require that whenever two or more persons are registered owners of Land Court property, a new TCT will be issued covering all interests even when only one registered owner conveys his or her interest. Previously, the Land Court did not cancel a TCT if only one owner of several conveyed; rather a new TCT was issued covering only the partial interest conveyed to the new owner. ■

COVENANTS IN GROSS
Waikiki Malia Hotel Inc. v. Kinkai Properties Limited Partnership

By Lorrie Lee Stone, Esq.
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On November 19, 1993, the Hawaii Supreme Court decided Waikiki Malia Hotel Inc. v. Kinkai Properties Limited Partnership, Appeal No. 15184. The Court, in a unanimous decision, overturned a 1991 State Circuit Court injunction which would have forced

Kinkai Properties to tear down a portion of its Waikiki building because the building exceeded a height restriction in a deed. The building houses the Duty Free Shoppers store. It was estimated that the teardown would have cost millions of dollars.

Factual Background

The events leading up to the litigation began in 1979, when a partnership consisting of Joanna Leong, Malcolm Tom and Kenton Tom ("JMK") purchased under an Agreement of Sale Lot 48, a 4,500 square foot parcel in Waikiki adjacent to the Waikiki Malia Hotel. At that time the Waikiki Malia Hotel (shown on the map below as Lot 269) was owned by Aina Luana Apartment Hotel Limited ("Aina Luana"), a wholly-owned subsidiary of Waikiki Malia Hotel Inc. ("WMH"). From prior to 1983 to the present, Joanna Leong, Malcolm Tom and Kenton Tom (the "Toms") have held a majority of the outstanding common stock of WMH.

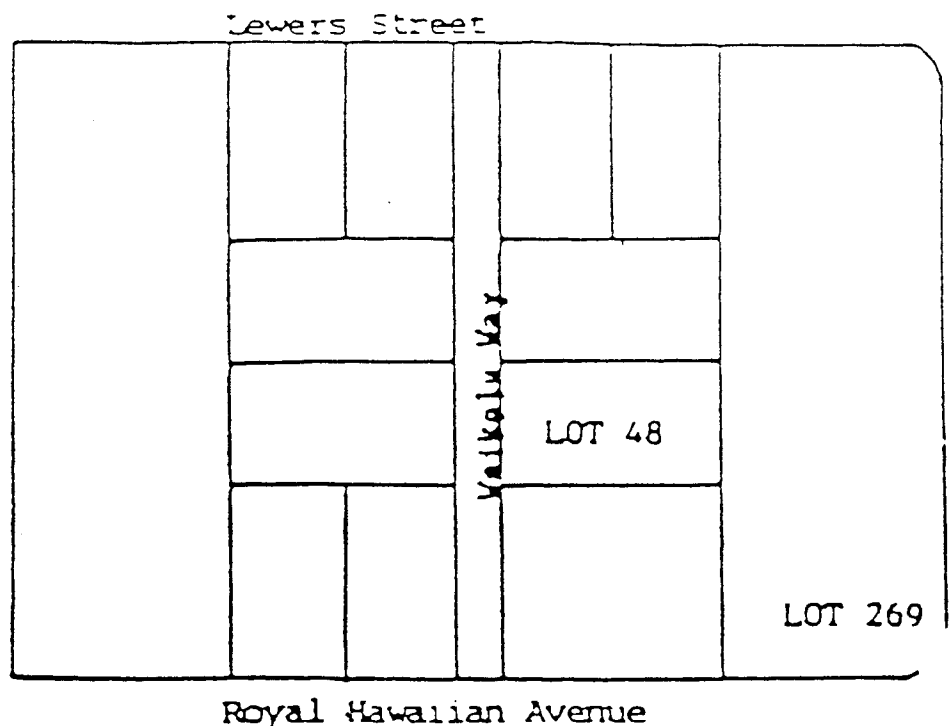
In 1983, the partnership, which apparently at that time also included WMH, sold the lot to the owners of the ABC Stores ("MNS"), and imposed

a 45-foot height restriction in the deed.

The restrictive covenant provide the following:

And in further consideration of the foregoing conveyance, Grantee [MNS] hereby covenants and agrees with Purchaser [JMK] its successors and assigns, that no building, structure or improvement hereafter constructed on [Lot 48] shall exceed the lesser of four (4) stories or forty-five (45) feet in height. This covenant shall run with the land and for a period of twenty-five (25) years from the date hereof and shall be binding upon the property, the Grantee, its successors and assigns, and all other person who shall have an interest in the property, including without limitation, all owners, lessees, licensees, grantees, assigns, and transferees thereof.

Although the deed was filed with the Land Court, the restrictive cove-



nant was not noted as an encumbrance on the Transfer Certificate of Title ("TCT").

In 1988, the owners of the ABC Stores sold Lot 48 to Kinkai Properties. Lot 48 was part of a larger parcel assembled for the purpose of constructing a new Duty Free store. The new building was to be six stories.

At the time Kinkai Properties acquired the lot, the Toms had already sold their interest in the neighboring Waikiki Malia Hotel to Outrigger Hotels. The Waikiki Malia Hotel's parking structure ended at a height of about 45 feet, where its guest rooms began. Believing that the height restriction was for the benefit of the neighboring hotel, Kinkai Properties approached Outrigger Hotels and obtained written consent to exceed the 45-foot height limitation. The consent was recorded, and Kinkai constructed the Duty Free building.

Waikiki Malia Hotel Inc. filed suit against Kinkai, taking the position that the height restriction was a personal benefit to it (a "covenant in gross") and that Kinkai needed its permission to exceed the height limitation.

In reversing the Circuit Court's teardown order, the Supreme Court made the following rulings:

1. Restrictive covenants restrain the free use of property and are strictly construed in favor of the grantee of the property and against the grantor because "[i]t is not too much to insist that they be carefully drafted to state exactly what is intended - no more and no less."

2. Because the covenant at issue did not indicate who or what was intended as the beneficiary of the imposed height restriction, the covenant was to that extent ambiguous.

3. If the language of a deed containing a restrictive covenant is ambiguous, surrounding circumstances may be considered but not parol evidence. In this case, the Court looked

at two factors in determining the intention of the parties. First, the Court noted that at the time the covenant was created, the Toms owned both Lot 48 (through JMK) and Lot 269 (through Aina Luana), and the interests of these entities were closely bound. Second, the Lot 48 restrictive covenant prohibits any structure above the lesser of four stories or 45 feet in height, and the hotel rooms with views in the Waikiki Malia Hotel begin at approximately the 45-foot level.

4. Therefore, the extrinsic evidence strongly implicates an intent by the partnership to have the benefit of the covenant run with the lot on which the Waikiki Malia Hotel was located.

5. Covenants in gross are disfavored, and therefore such a covenant must clearly and expressly reflect the intent to create a covenant in gross.

The Court noted strong policy reasons as to why covenants in gross are disfavored:

(a) They affect the marketability of the land because it is more difficult to trace the holder of a covenant in gross.

(b) Appurtenancy requirements help to limit "the power of the dead hand" and reduce the amount of veto rights that could be exercised against the current landowner because the number of appurtenant covenants would be restricted to properties near the burdened tract of land.

(c) Covenants in gross allow an outsider to impose his or her views on a community.

(d) Appurtenant covenants increase flexibility in enforcing and applying covenants and promote flexible consensual land use arrangements.

6. Since WMH no longer owned any land which the height restriction could benefit, WMH cannot enforce

the restrictive covenant at issue against Kinkai.

7. Although the deed containing the restrictive covenant was recorded in the Land Court system (also known as the "Torrens" land registration scheme), the TCT received by Kinkai did not contain an explicit and separate notation of the height restriction under HRS § 501-82.

8. Kinkai's knowledge of the encumbrance did not disqualify it as a holder of a TCT from the protection afforded by the Land Court registration statute.

9. The notation of the consent of Outrigger Hotels to exceed the height restriction was not a sufficient notation of the height restriction to make it enforceable against Kinkai.

The obvious message of the Court's decision is that restrictive covenants will be narrowly construed in favor of the grantee of the property, and that an intent to create a personal covenant must be especially clear from the language of the document to be enforceable. Moreover, special efforts need to be made by counsel for the beneficiary of a restrictive covenant burdening Land Court property to assure notation of the restriction on the relevant TCT. This may even require recordation of a separate document embodying the covenant, in order to assure continued notation of the covenant on TCTs issued to subsequent purchasers of the burdened property. ■

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