Real Property and Financial Services Section
Hawaii State Bar Association

Newsletter

April 1994

FROM THE CHAIR

Every year, a member of the Board of the Section proposes that we introduce legislation to abolish the Land Court system. This year the Board appointed a sub-committee to study the matter. Walt Beh, Sandy Furukawa, Bruce Jackson, John Jubinsky, Jack Rolls and I met on April 8 to explore the issue. After some discussion, it was decided to begin by pursuing the possibility of amending Chapter 501 to permit withdrawal of property from Land Court registration. This would preserve existing rights accrued by virtue of Land Court registration, while enabling those who no longer wish to conform to Land Court requirements to withdraw. Cook County, Illinois, which has a Torrens system has adopted provisions permitting withdrawal, and has also terminated new registrations and set a date some years in the future after which their Torrens system would be abolished. John Jubinsky has agreed to research the Cook County experience as a point of beginning for our discussions. If you have any thoughts on this issue, we would very much like to hear from you.

Coralie Matayoshi, Executive Director of the HSBA, attended the February meeting of the Board to tell us about the various services offered by HSBA to its members. An article also appeared in the March issue of the Bar Journal. Many of us may not be aware of the wide variety of very useful services and information made available to us by HSBA. Services of particular interest to our section include a comprehensive legal secretarial training course, and secretarial placement. HSBA also offers a variety of computer services, including a software library available for you to experiment with programs, training in various computer applications, and computer access to Hawaii appellate cases, Attorney General's opinions and member data bases.

In the last issue, I listed the dates of the Board meetings but failed to state the time. All meetings are at 12 noon in the HSBA conference room.

Nancy N. Grekin
Chair, Real Property and Financial Services Section Hawaii State Bar Association

A FEW WORDS ABOUT THE AMERICAN BAR ASSOCIATION

By Charles W. Key

The ABA is the largest voluntary professional organization in the world. There are approximately 850,000 lawyers in the U.S.A., and of these, about 350,000 are members of the ABA. We have a high per capita ABA membership in that about 58% of Hawaii lawyers are members of the ABA. Just about every ABA member belongs to one or more sections of the ABA. Our closest ABA counterpart is its Section of Real Property, Probate and Trust Law (8,000+ members). The annual fee for section membership is $35.00 for practicing attorneys. You (more than) get your money's worth--in fact, it's a real bargain.

As a member of the Section, you receive the following benefits:

- The ***Probate and Property*** magazine, distributed every other month, and containing cutting edge, practical articles you can use immediately;
- The ***Real Property, Probate and Trust Law Journal***, distributed quarterly, and containing in depth analyses of major legal topics;
- The opportunity to become involved in one or more of the Section's 100+ committees;
- Advance notice of and reduced rates for a wealth of continuing legal education programs conducted throughout the year;
- Access at reduced rates to an extensive library of original books, monographs, pamphlets and forms relating to real property, estate, probate, trust, employees benefits, environmental, and construction law;
- The opportunity to network with colleagues, to promote interaction, both professionally and socially.

For general information concerning the Section or any of the above activities, please call (312) 988-5590. The Section staff in Chicago is available to answer your questions.

In addition to our counterpart section, I want to mention the ABA Division of Bar Services. Besides many other functions, this Division serves as the principal link between the ABA and the more than 3,000 bar associations in the U.S.A. More importantly, in that the ABA is a large and complex organization, Bar Services makes it "consumer friendly" and acts as an informational source about all aspects of the ABA. As an ABA member, feel free to call Bar Services **for general information** concerning the ABA and the Profession --(312) 988-5352. You can, of course, also contact Vernon Char (member of the ABA Board of Governors), phone: 522-5133; Hod Greeley (your ABA Delegate to the ABA House of Delegates), phone: 526-2211; Jeff Portnoy (your HSBA Delegate to the House of Delegates), phone: 521-9221; Margaret Masunaga (Executive Council Representative - ABA/Young Lawyers Division), phone: 324-7117; or Charlie Key (Chair, ABA Standing Committee on Lawyer Competence and State Chair of the ABA Membership Committee), phone: 531-8031. ■

OHANA ZONING RULES ADOPTED BY HONOLULU COUNTY

By Jody Lynn Kea, Esq.
Gerson Grekin Wynhoff & Thielen

In 1992 the Honolulu City Council adopted Ordinance Number 92-101 reinstating Ohana zoning but with significant substantive changes from the original Ohana ordinance adopted in 1982. The new Ordinance was discussed in the January, 1993 issue of the Newsletter. In January, 1994, the City and County adopted rules interpreting the 1992 Ordinance. The rules address many of the concerns raised in the Newsletter article, including: (1) The procedures for making a census tract ohana-eligible and for excluding a census tract from eligibility; (2) a procedure for "pre-check" of zoning and infrastructure requirements; (3) enforcement of the required familial relationship, and (4) rules for rebuilding Ohana units if destroyed. The rules are divided into five chapters: general provisions; designation of ohana-eligible areas and exclusion from ohana development; procedure for obtaining an ohana building permit; compliance with the Land Use Ordinance; and existing ohana dwellings.

Designation of Ohana Eligible Areas

Chapter Two (designation of ohana-eligible areas and exclusion from ohana development) provides the general standards necessary for the designation of an area as ohana-eligible, as well as the procedures for excluding an otherwise eligible area from ohana development. The Board of Water Supply, Department of Wastewater Management and Department of Transportation Services will determine and designate which areas have adequate water supply and pressure, public wastewater facilities and roadway access to accommodate ohana development. Based on such designations, the Director of DLU will prepare maps identifying ohana-eligible areas. Such maps will be made available for public inspection. Once an area is designated as ohana-eligible, notice will be published in the newspaper, and neighborhood boards in the affected areas will receive written notification of the designation. Such notice is intended to provide the affected lot owners with the opportunity to exclude their census tract from ohana development.

In order to exclude an otherwise ohana-eligible area, owners of at least sixty percent (60%) of the lots in the census tract must file a petition with the Director of DLU requesting that the tract be excluded as an ohana-eligible area. The rules provide the specific form and contents of the petition, signature requirements, signature withdrawal procedures and signature verification procedures. Signature sheets must be accompanied by an affidavit (not necessarily of a person who signed the petition) stating that to the best of the affiant's knowledge and belief the signatures are those of owners or lessees and that such persons signed with full knowledge of the petition's contents. The affidavit requirement may be quite burdensome, especially in large census tracts.

Pre Check Procedure

Chapter Three (procedures for obtaining ohana building permit) creates a pre-check procedure for ohana application. The pre-check procedure is intended to provide applicants with zoning and infrastructure reviews and approval without having to prepare a full set of plans prior to applying for a building permit. The procedure requires routing a form to the various County departments for confir mation that the lot is appropriately zoned and meets public facilities standards.

Section 3-3 permits an owner of an existing non-conforming second structure in an area designated as ohana-ineligible to request that such unit be reviewed and approved for ohana designation through the use of the pre-check procedure. In order to be eligible for approval, the unit must be non-conforming (i.e. constructed prior to Ohana zoning), the neighborhood public facilities must have been determined adequate, and the unit must be attached to the principal dwelling and not exceed the maximum allowable floor area for that zoning district. If designation as an ohana dwelling unit is obtained, the owner would be permitted to rebuild the unit, if destroyed, pursuant to the rules on rebuilding as discussed below.

Enforcement of Familial Relationship Requirement

Chapter Four (compliance with the land use ordinance) provides some clarification of the Ordinance's familial relationship requirement. Ohana dwelling: must be occupied by persons related by blood, marriage, or adoption to a member of the family residing in the principal dwelling. The Ordinance itself did not include any rules regarding occupancy by unrelated persons or remedies or penalties if the familial relationship is terminated due to death, divorce, sale, etc.

The number of occupants permitted in the ohana dwelling is clarified in this Section. Surprisingly, up to three unrelated accessory roomers, in addition to the primary occupant, are permitted so long as one occupant meets the familial relationship requirement. Section 4-3(2) of the rules specifically provides that the ohana unit may not be occupied by a family consisting of five unrelated persons, even though one of the persons is related to the family in the principal dwelling. This is apparently intended to supercede (for Ohana zoning purposes) the definition of "family" in the Land Use Ordinance which would permit five unrelated persons.

The rules also provide enforcement procedures. First, the owner of the principal unit must record, prior to the issu ance of the ohana building permit, a covenant stating that the two dwellings

will be occupied by related family members (through blood, marriage or adoption). Second, should the family occupancy of the ohana accessory unit be discontinued or the familial relationship terminated, the Director of DLU may require that the two-family dwelling be converted to a single-family dwelling. DLU has confirmed that this must be accomplished by eliminating the second kitchen and constructing a door leading from the principal residence to the Ohana unit through the demising wall. Since the Land Use Ordinance defines a dwelling as an independent housekeeping unit with a single kitchen with kitchen being defined as a facility containing a stove, a sink and a refrigerator, conversion could presumably be accomplished by removing one of the three appliances.

Rebuilding Following Destruction

Chapter Five (existing ohana dwellings) lists the requirements for rebuilding and for redesignating existing ohana dwelling units. While any ohana unit destroyed to the extent of more than fifty percent (50%) of its replacement value may be rebuilt, if the building permit was approved prior to September 10, 1992 when the Ordinance was adopted, an attached unit must be replaced with an attached unit. Detached units may be replaced with either attached or detached units. Units originally built pursuant to a permit received prior to September 10, 1992, are not subject to the familial requirements and the restriction on Condominium Property Regime submission contained in the Ordinance.

Where existing dwelling units on a zoning lot were never designated as being either the ohana or the principal unit because they were constructed under the original Ordinance, the building superintendent may make the designation, based upon the units' history and sizes and the owner's preference. The superintendent may also redesignate existing ohana and principal dwelling units, provided such redesignation will not create or increase any nonconformity. The dwelling redesignated as the ohana unit must comply with all applicable standards for ohana dwelling units.

Conclusion

While ohana zoning in Honolulu continues to be refined, the requirements may be so restrictive that ohana units cease to be a means of increasing the supply of affordable housing, the stated legislative purpose of the original ohana statute. ■

MEMBERS' CORNER

Notice of Freedom of Choice of Insurance

The "Did You Know" column of the last issue reported that Chapter 479, H.R.S. requiring notice of freedom of choice had been repealed, and indicated that the notice of freedom of choice of insurance given in mortgages could now be omitted. Neal Okabayashi of First Hawaiian Bank and Mark Hazlett, the Bank's outside counsel and a member of our Board, wrote explaining that this statement, although correct, did not fully cover the subject because there are other provisions of law in addition to Chapter 479 requiring notice of freedom of choice of insurance as well as certain federal law considerations. Following is their letter and analysis.

The Hurricane Iniki Bill (H.B. No. 1890 HD1, SD1, CD1) repealed Article 17 of the Insurance Code (Insurance Information Protection Act) as well as Chapter 479, H.R.S. Thus Section 431:17-103 on Freedom of Choice of Insurance Companies and the penalty section of Section 431:17-105, H.R.S. no longer exists.

Article 13 of the Insurance Code still exists, however, and Section 431:13-104(c) requires that a person

> who lends money or extends credit and who solicits insurance on real and personal property subject to subsection (b) must explain to the borrower in writing that the insurance related to such credit extension may be purchased from an insurer or agent of the borrower's choice, subject only to the lender's right to reject a given insurer or agent as provided in subsection (b)(2).

On its face, this particular subsection appears to apply only to lenders who both lend money and solicit insurance on real and personal property. Banks and certain other lenders have very restricted insurance powers and thus may not be able to solicit property insurance. The Insurance Code provision may have very limited application to such lenders; however, it should be noted the statute is limited neither to institutional lenders nor to real property mortgage loans.

Care should be taken before deleting existing insurance notices for several additional reasons. Savings institutions are subject to a separate special insurance notice requirement under OTS regulations (12 CFR §563.35(a)) in connection with home loans (loans secured by residences occupied or to be occupied by the borrower). This notice must inform the borrower of his or her right to freely select any person for "insurance services".

Lenders generally subject to federal truth in lending law, in order to exclude property insurance premiums or charges from finance charge and annual percentage rate computation on closed-end loans, must allow the consumer to choose the insurer and must disclose that fact. This disclosure must be made whether or not the property insurance is available from or through the creditor. Premium charges must be disclosed only if the consumer wishes to purchase the insurance from the creditor. A footnote to Regulation Z (12 CFR Part 226, which implements the Truth in Lending Act) indicates that the lender may reserve the right to refuse to accept with reasonable cause an insurer offered by the consumer. Variations of this truth in lending disclosure look very much like the old free choice of insurance notice formerly required under Chapter 479. The truth in lending law is largely limited to consumer loan and residential loan transactions.

A Terrifying True TCT Tale

A recent decision by Judge Watanabe, sitting as Judge of the Land Court, provides another reason for exercising care in reviewing actions of the Land Court Assistant Registrar in accepting documents for filing. In 1988, three individuals held title to land registered with the Land Court under a Certificate of Title showing each individual holding title to an undivided one-third interest. In April 1988, three documents were presented to the Assistant Registrar. Each of the three documents was a conveyance of the interest of one of the three individuals in the property covered by the Certificate of Title. The desired result of the three conveyances was the vesting of all interests in the property covered by the Certificate of Title in the entity named in each conveyance as the purchaser. The same entity was named in each of the three conveyances. By prior agreement with the Assistant Registrar, the three conveyances were presented with a single conveyance tax certificate reciting the total consideration paid by the purchasing entity to the three former owners.

The Assistant Registrar appears to have assumed that the three documents were an original and two copies of one conveyance. The first of the three was accepted and a new certificate of title was issued to the purchasing entity for an undivided one-third interest in the property. The second of the three conveyances was certified by the Assistant Registrar to be a copy of the first. The third conveyance was returned without any action being taken, evidently assumed by the Assistant Registrar to be an "extra" copy of the first conveyance. The original certificate of title remained outstanding, showing th two remaining parties as holding a two-thirds interest in th property.

In February 1990 a judgment was filed in First Circuit Court in which the grantor in the second of the three conveyances was named as the judgment debtor. In January 1993, the judgment creditor had the judgment filed with the Land Court and noted as an encumbrance on the original certificate of title.

The entity which thought it had purchased the interest of all three title holders filed a petition with the Land Court to amend the original certificate of title to show that the two remaining parties had no interest in the property described in the certificate as of the filing of the first of the three conveyances. Further amendment of the original certificate of title was sought to establish the filing of the judgment against the interest of the judgment debtor was a nullity, since the judgment debtor, as a practical matter, had no interest in the property at the time the judgment was filed.

The petition was argued before Judge Watanabe in August 1993. In April 1994, the Judge denied the petition thus permitting the creditor's lien to attach to the interest intended to be conveyed by the judgment debtor to the petitioner. The purchasing entity has made no decision concerning a possible appeal of the denial of the petition.

- Jack M. Rolls, Jr.

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