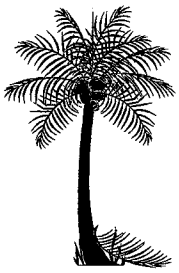
Real Property and Financial Services Section
Hawaii State Bar Association

KA NU HOU

"The News"



July 1997

FROM THE CHAIR

This has been an active quarter in many respects. First, I am delighted to report that the Section's Board has approved new bylaws, which are available to any Section member upon request. Many thanks to Randy Brooks and Harrilynn-Joy Kameenui, whose months and months of toil have finally borne fruit! Also, many thanks to Nancy Grekin, who has designed a Web Site for the Section. It is full of useful information about us, and about current events relating to property and the Section's activities. More information about our Web Site is located on page 14 of this newsletter.

It should be of critical interest to all Section members who practice before the Land Use Commission, the Land Board, and any other state land use agency, that the state legislature has formed a joint committee to study and review our state land use law (House Concurrent Resolution 215) and to recommend amendments to the legislature for 1998. The joint resolution was supported by the local chapters of the American Planning Association, American Institute of Architects, Council of Consulting Engineers, the state's Office of Planning, the directors of the four county planning departments, and the Land Use Research Foundation. The commission's deliberations are worth following; hopefully it will be soliciting suggestions from those members of the bar who practice before such state land use agencies.

The U. S. Supreme Court decided Suitum v. Tahoe Regional Planning Agency (1997 WL 273658) on May 27th. Contrary to most news reports, the case says very little about the substantive law of regulatory takings. Indeed, it says very little about ripeness beyond the facts unique to the case. The Court held (unanimously) that plaintiff landowner's case was ripe for a takings determination and remanded it (presumably to the federal district court) for a decision on the merits. That the landowner had not sought to market her meager development rights - to which she was entitled in lieu of a permit to construct a single-family dwelling on her lot - was irrelevant. The concurring opinion (by Justice Scalia, with Justices Thomas and O'Connor) may signal how the Court might decide the issue on the merits, however. Scalia has very little good to say about the use of transferred development rights as an element in deciding whether a regulatory taking has occurred. He would restrict their use solely in deciding the adequacy of compensation after a regulatory taking.

The annual meeting of the American Law Institute in May considered at some length the enforcement of negative covenants and easements (now collectively "servitudes"), approving Tentative Draft No. 6, Restatement of Property (Servitudes) on May 21st. The draft is short and worth reading both for the approved black letter law and the copious case digests and citations accompanying each new section.

Lastly, I am pleased to report that Federal Circuit Judge S.J. Plager has accepted our invitation to keynote a land use seminar on Tuesday, November 18th, and will comment on recent federal "takings" decisions. Other topics that will be presented in the land use seminar include: Corps of Engineers Dredge and Fill permits (wetlands), land development conditions, exactions and impact fees, and Honolulu Department of Land Utilization permits and conditions.

With Aloha,

David L. Callies,
Chair, Real Property and
Financial Services Section

HAWAII'S CEDED LANDS TRUST: THE ALLOCATION OF REVENUE TO NATIVE HAWAIIANS

*By Shirley M. Cheung**

I. INTRODUCTION

The controversial issue of the allocation of revenue from ceded lands has spurred dispute between the Office of Hawaiian Affairs ("OHA") and the State of Hawaii. The State of Hawaii holds the ceded lands in trust for the benefit of native Hawaiians and the general public.[1] The State uses ceded lands to house governmental offices and also leases the lands to private interests to generate revenue.[2] Revenue from the trust is considered "income derived from the use of ceded lands in the public land trust."[3] Under Act 304, the Legislature determined that OHA was to receive twenty percent of proprietary revenues from the Ceded Lands Trust.[4] However, the distinction over which revenues are subject to the trust is unclear.

Uncertainty about the allocation of income from the Ceded Lands Trust has placed OHA at odds with the State of Hawaii over OHA's entitlement to revenues. Two landmark cases, Trustees of the Office of Hawaiian Affairs v. Yamasaki[5] and Office of Hawaiian Affairs v. State of Hawaii,[6] demonstrated this unsettled state of affairs. The Hawaii Supreme Court in Yamasaki de-

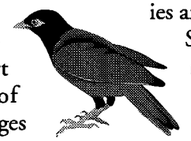
clined to rule on the issue because it lacked judicial standards.[7] The Court maintained that it could go no further without legislative action.[8] However, in OHA v. State, the circuit court did rule on the issues. The court adopted OHA's interpretation of "revenue," holding that the State owes OHA back payments from various operations involving ceded lands.[9] The court remanded the case for a determination of the exact amounts owed to OHA.[10]

II. Background

A. Trustees of the Office of Hawaiian Affairs v. Yamasaki: Exploring the Boundaries of Act 273

The trustees of OHA were dissatisfied with the unsettled state of affairs regarding funds OHA was entitled to under HRS Chapter 10.[11] The trustees felt that the State was not allocating twenty percent of all funds derived from the ceded lands trust to OHA as required by HRS § 10-13.5.[12] Consequently, the trustees filed two lawsuits against the State, which the circuit court consolidated in the case, Trustees of OHA v. Yamasaki.[13] OHA filed the first suit in 1983 claiming twenty percent of a settlement the State negotiated in lieu of action against an illegal sand-mining operation at Popahaku Beach on Molokai.[14] In the second lawsuit filed in 1984, OHA sought twenty percent of all income and proceeds from the operation of harbors on all major islands, the Honolulu International Airport and the Aloha Tower complex.[15]

The Hawaii Supreme Court reversed the circuit court's denial of the State's motions for dismissal in the consolidated suit.[16] The Court declined to rule on the merits of the case because the issues lacked "judicially discoverable and manageable standards" for resolving the disputes in construing the language of HRS § 10-13.5.[17] The Court ruled that, absent a statutory base for declaring that damages such as those in question were to be included in the Ceded Lands Trust, it must defer to nonjudicial discretion.[18] Therefore, the Court concluded that the issue of whether these types of damages were included in "the sale, lease or other disposition" of the ceded lands, as described in HRS § 10-3, was a matter for the legislature to decide.[19]



B. Attempted Resolution of the Ceded Lands Dispute

In response to Yamasaki, the governor of Hawaii[20] committed himself to resolving the ceded lands revenue issue without further resort to the courts.[21] The governor came to an agreement with OHA on February 8, 1990, which was approved by the Legislature as Act 304.[22] Act 304's purposes were to:

(1) Clarify the lands comprising the public land trust under Chapter 10, Hawaii Revised Statutes;
(2) Clarify the revenues derived from the public land trust which shall be considered to establish the amount of funding to the Office of Hawaiian Affairs for the purpose of the betterment of the condition of native Hawaiians; and
(3) Provide for a process to determine the actual amounts payable to the office under the clarified standards enacted and for the formulation of a plan for payment of that sum . . .[23]

Effectively, Act 304 provided a definition for "public land trust" and "revenue" in HRS § 10-2[24] and eliminated the original funding language which the Supreme Court declared was ineffective in Yamasaki.[25] Act 304 also amended § 10-5 and § 10-13 to make clear that the funds owed to OHA include all monies and equivalents received by the State from ceded lands.[26] Finally, Act 304 clarified that the Ceded Land Trust proceeds could only be used for the benefit of native Hawaiians.[27] The question of entitlement for all Hawaiians, regardless of blood quantum, was still in negotiation.[28]

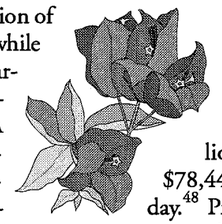
Three years later, the State reached an agreement with OHA which was memorialized in a Memorandum dated April 28, 1993.[29] From the agreement, OHA received $136.5 million in general obligation bond proceeds.[30] The State contended that the payment satisfied the State's obligation under Act 304 for unpaid ceded lands revenues owed to OHA for the period of June 16, 1980 through June 30, 1991.[31] However, OHA asserted that the payment settled a portion, but not all, of the monies owed to it.[32] OHA contended that certain significant claims were not included in this settlement and remained outstanding through paragraph 7 of the Memorandum which stated:

> Excluded Matters. Notwithstanding any of other provisions of this Memorandum to the contrary, [the Office of State Planning] and OHA recognize and agree that the Amount specified in section 1 hereof does not include several matters regarding revenue which OHA has asserted is due to OHA and which OSP has not accepted or agreed to.[33]

This difference underlies OHA's claims in Office of Hawaiian Affairs v. State of Hawaii.[34]

III. Office of Hawaiian Affairs v. State of Hawaii

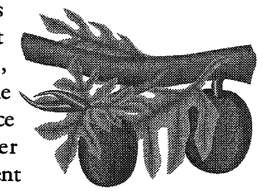
The State has consistently denied OHA's claim to certain revenues in connection with ceded lands.[35] OHA has advocated for a broad definition of its entitlement to "revenue," while the State undoubtedly has argued a much narrower interpretation. As a result, OHA sued the State in 1994 to obtain back payments, including interest, from the operation of community hospitals, state affordable housing and duty-free concessions.[36] The court granted OHA's motion for summary judgment, thereby recognizing OHA's entitlement to the disputed revenues generated by operations on ceded lands.[37] In its decision, the court cited the federal government's "Apology Bill," which determined that the overthrow of the Hawaiian Monarchy was illegal, and the 1,800,000 acres of ceded lands that were part of the overthrow were improperly taken.[38] The court also utilized the "Aloha Spirit Law" which allowed it to "give consideration to the aloha spirit."[39] The court stated that it could not conceive of a more appropriate situation to apply this law than "ruling on issues that are directly related to the betterment of native Hawaiian people."[40]



The court declared that the State clearly had a contract with native Hawaiians and cannot escape suit under the Sovereign Immunity Doctrine.[41] It relied on previous case law in holding that a contract was formed when the State assumed the role of trustee for the Ceded Lands Trust.[42] Pursuant to trust principles, the beneficiaries had standing to enforce that trust.[43] The court's acknowledgment of the importance of court access for ceded lands claims is viewed as "an incredibly courageous and moral decision" by the plaintiffs.[44] However, the governor insists that the ruling would plunge the State into financial ruin.[45]

The Cayetano administration estimates that the ruling could cost the State over $1 billion.[46] However, OHA's estimate is more conservative at $178 million.[47] Using OHA's estimate, $78,442 in interest is accruing each day.[48] Proponents on both sides have expressed strong sentiments regarding the potential implications of the decision. The attorney for the Airlines Committee of Hawaii speculated that the ruling could adversely affect the visitor industry.[49] In order to compensate for an increased debt, landing fees and costs of transportation for passengers and cargo could skyrocket.[50] Consequently, airlines could reduce flights to Hawaii as well as eliminate stopovers from West Coast flights en route to Asia.[51]

The governor concedes that the State cannot afford to pay the vast amounts due, and has criticized the Senate for not having the "courage" to remedy the problem in an election year.[52] OHA's response is that "justice is justice."[53] OHA contends that it appropriately went to court to assert its rights, but is now being cast as the "bad guys" for having justice prevail.[54] OHA further maintains that its entitlement is not a privilege, but a right supported by the Constitution and the court.[55] However, OHA is willing to negotiate and has stated that "[t]his issue has dragged on now for more than a hundred years. It's high time we all start working together, Hawaiians and non-Hawaiians, to find a lasting and fair solution to the ceded lands issue."[56]



The resolution to the problem may come in the form of a settlement.[57] Settlement negotiations may involve cash, exclusive licenses, exclusivity to certain lands and a demand to the federal government for the return of all ceded lands not strictly required for defense.[58] Such a settlement will avoid a great deal of litigation and serve to mitigate the economic impacts on the general public.[59] Nevertheless, any resolution to this difficult issue will affect the economy as well as the relationship between the general public and the native Hawaiian community.

IV. Analysis

The ceded lands dispute is premised on the interpretation of "revenue" as set out in HRS § 10-2:

> "Revenue" means all proceeds, fees, charges, rents, or other income, or any portion thereof, derived from any sale, lease, license, permit, or other similar proprietary disposition, permitted use, or activity, that is situated upon and results from the actual use of lands comprising the public land trust . . . .[60]

The principal role of a statute is to provide general guidance to citizens and enforcers of law.[61] Interpretation frequently involves construing the specific meaning of broad language so as to apply the statute to the particular set of facts.[62] Often, the measure of correctness is whether it will promote the social, political, or economic goals the statute was enacted to address.[63]

Courts have often stated that the fundamental starting point for statutory interpretation is the actual language of the statute.[64] Where the language is plain and unambiguous, courts will give effect to its plain and obvious meaning.[65] In determining the common meaning of a word, courts may look at the definition given in a recognized dictionary.[66] However, if the meaning of words are not clear, courts must refer to extrinsic aids, particularly legislative history.[67]

A. Calculation of Airport Revenue

The most highly-profiled and controversial issue surrounding the ceded lands dispute is the calculation of airport revenue derived from duty-free concessions.[68] Hawaii, an island state, is highly dependent on airplanes for inter-island and mainland transportation.[69] With tourism as its major source of income, the State of Hawaii places great importance on the airport and its ancillary services.[70] The Airport Revenue Fund, which is made up of rents, concessions, aircraft landing fees and aviation fuel tax, maintains the airport system.[71] At the Honolulu International Airport ("HIA"), the Duty-Free Shoppers ("DFS") concession has provided the bulk of the fund's revenues.[72] However, the Waikiki DFS outlet accounts for about eighty percent of DFS' business.[73] Any modification of revenue calculation from the concession would have a significant impact on the amounts due to OHA.

The State's argument is simple: OHA is not entitled to revenue from the Waikiki DFS Store because income from the off-site concession does not result from the "actual use" of ceded land, as required by HRS § 10-2.[74] The State contends that the plain meaning of "actual use" limits OHA's share to revenues derived from DFS' retail store and warehouse at HIA, which is physically situated on ceded land.[75] OHA's argument is more complex. Federal law requires in-bond[76] sales to be made only to passengers with foreign destinations, because such sales are exempt from taxes and tariffs and therefore available at lower prices.[77] In-bond goods can be given to these foreign-bound passengers only at their departure at HIA.[78] Without being able to deliver the merchandise at HIA, the DFS Waikiki store could have no in-bond sales. Further, without the use of ceded lands, there would be no HIA. Therefore, under this analysis, any revenue generated at the DFS Waikiki store should be attributed to the Ceded Lands Trust, of which OHA would be entitled to twenty percent.

1. The "Site-Specific" Method

When trust lands are leased, clearly the lease rentals are subject to the Ceded Lands Trust.[79] However, the State claims that any income that lessees derive from the use of the lands belong exclusively to the lessees.[80] Furthermore, the State contends that when it operates a public enterprise on trust lands, it is in the same position as lessees of public lands.[81] Thus, the State asserts that the Ceded Lands Trust should apply only to the rental value of the trust lands in its unimproved state and not to any income that may be derived from the use of the lands or the improvements made to the lands.[82] OHA's share would then be limited to twenty percent of the value of the raw land exclusive of improvements.[83]

The Legislative Auditor's Final Report supported OHA's entitlement and found that "income" generated from trust lands should be included in the Ceded Lands Trust.[84] The report pointed out that:

> It is doubtful that the legislature intended to limit OHA's entitlement to funds generated by sales, leases or other dispositions since the constitutional amendments provide for OHA sharing in the trust, including income generated by trust lands, established by the Admission Act.[85]

In addition, Public Law 88-233 provided that any lands, property, improvements, and proceeds conveyed to the state shall be considered a part of the public trust.[86] Therefore, pursuant to Public Law 88-233, the trust res[87] consists not only of raw land, but of improvements on these lands. Accordingly, the trust res of HIA includes its retailers and concessions, which are part of the calculation of "revenue" owed to OHA.

The State's argument requires a "site-specific" method of calculating revenue. The interpretation of "actual use" requires its plain meaning be examined. "Where the language of an enactment is clear . . . the words employed are to be taken as the final expression of the meaning intended."[88] The statute itself covers income generated from the actual use of lands comprising the public land trust and does not expand to the use of lands that are not part of the public trust.[89] Black's Law Dictionary defines "comprise" as "[t]o comprehend; include; contain; embrace; cover."[90] Webster's New Collegiate Dictionary adds the definition, "to be made up of."[91] The HIA land itself clearly is "included" in and "make up" the land trust, but the land underlying the Waikiki DFS store literally is not.

Another component to the "actual use" analysis involves comparing the rents paid by DFS and HIA's other major concessions.[92] The rents of HIA's next four largest concessionaires range from $500 to $800 per square foot, whereas DFS' rent is $5600+ per square foot, which is about eight to ten times greater.[93] This immense premium is attributed to the significant advantage that DFS enjoys over other retail establishments.[94] This advantage is the result of DFS's status as the in-bond concessionaire in Hawaii and not derived from the actual use of raw lands.

2. The "But-For" Method

HIA is state owned and its contracts for airport services, with the exception of lei stands, are exclusive.[95] DFS has an exclusive contract to sell in-bond merchandise pursuant to HRS § 261-7, which allows no more than two such licenses.[96] The statute further states that:

> [e]ach such contract shall confer the right to operate and maintain commercial facilities within the airport for the sale of in-bond merchandise and the right to deliver to the airport in-bond merchandise for sale to departing foreign-bound passengers.
>
> The department . . . may take into consideration: (1) The payments to be made on in-bond merchandise sold at Honolulu International Airport and on in-bond merchandise displayed or sold elsewhere in the State and delivered to the airport[.][97]

The contract expressly preserves the in-bond status of merchandise delivered from facilities outside the airport. Thus, in-bond merchandise sold on the premises is not distinguishable from in-bond merchandise sold elsewhere in the state for purposes of exclusivity.[98] They both exist because of a license granted by the State which is made possible only by the "actual use" of ceded lands.[99] The State computed DFS's rent by relying on revenues generated at both HIA and in Waikiki.[100] Accordingly, both would be includible in the calculation of revenues owed to OHA.

This argument is supported, in part, by Sakamoto v. Duty-Free Shoppers.[101] In Sakamoto, the court held that DFS' exclusive right to deliver goods sold elsewhere on the island to departing passengers at the Guam airport was "rationally related to producing revenue."[102] In fact, the court found it was "not disputed that the franchise agreement raises revenue for the airport."[103] Guam, like Hawaii, depends on proceeds from the in-bond concession contract as a major source of funding for the maintenance of the airport terminal.[104] Likewise, DFS in Waikiki raises revenue for HIA and is "rationally related" to an exclusive contract granted pursuant to delivering goods at the airport. Hence, DFS in Waikiki actually uses the airport.

In Duty Free Shoppers v. Tax Commissioner,[105] a Hong Kong corporation owned DFS shops at the airport, in various hotels and other in-town locations.[106] The court found that the application of a Guam state tax extended to the DFS shops within and outside of the airport, which delivered items to departing passengers.[107] The court found that the tax, which is measured by gross receipts, was for the privilege of doing business within the State.[108] Thus, gross receipts were properly attributed to the off-site DFS for "levying a fair tax on the business of exporting goods from Guam in return for the benefits and protection given to that business by Guam."[109] Applying that logic to the ceded lands dispute, gross revenue from the Waikiki DFS store would be attributed to the privilege of possessing an in-bond concession license. Furthermore, the revenue payments to OHA would be given "in return for the benefits and protection given to that business" by the public land trust.

In OHA v. State, the court utilized the "but-for" analysis advocated by OHA and held that "if there were no airport concessions on ceded lands, it would be impossible for those other concessions to be generating revenue."[110] The court found it clear that both the revenues from the airport DFS and any off-site DFS are "derived" from public trust lands.[111] The court reasoned that "items purchased at an off-site facility still must be transported out of the State of Hawaii through the airport facility."[112] Thus, "but-for" ceded lands there would be no airport and "but-for" the airport there would be no DFS.

Income from the duty-free concessions make up the bulk of the Airport Revenue Fund. Whether or not income from the Waikiki DFS is included in the calculation of revenue will have a big impact on the amounts owed to OHA. The court, in OHA v. State, has agreed with OHA that the Waikiki DFS is an actual use of the ceded lands on which HIA is situated. In response, the State has lobbied to have the law changed to clarify that "revenue" does

not include such income. However, legislation proposed to nullify this holding is halted as the State appeals this issue to the Hawaii Supreme Court.

B. Hilo Hospital Income

Since 1965, responsibility for the operation of many of Hawaii's public health facilities, particularly those located on the Neighbor Islands, has rested with the State's Department of Health.[113] The Hilo Hospital is a community hospital located on ceded land that is part of the State's Community Hospital Division.[114] The State does not dispute that patient services fees and cafeteria sales at the hospital constitute income derived from the actual use of ceded land.[115] However, the State argues that this income is a result of the State exercising a "sovereign function" and therefore not includible as revenues owed to OHA.[116] OHA contends that Hilo Hospital's income is proprietary, not sovereign, and therefore not exempt from Act 304.[117]

Under Act 304, revenues from public trust land are segregated into two categories, sovereign and proprietary revenue.[118] Sovereign revenues are revenues derived from the exercise of governmental or sovereign power.[119] This revenue is not subject to the OHA trust provision. Act 304 provides that "sovereign functions" excluded from the ceded lands trust include:

(1) Taxes;
(2) Regulatory or licensing fees;
(3) Fines, penalties, or levies;
(4) Registration fees;
(5) Moneys received by any public education institution . . .;
(6) Interagency and intra-agency administrative fees or assessments;
(7) Moneys derived from or provided in support of penal institutions and pro grams;
(8) Grants, carry-overs, and pass-throughs;
(9) Federal moneys, including federal-aid, grants, subsidies, and contracts;
(10) Moneys collected from the sale or dissemination of government publications; and
(11) Department of defense proceeds on state-improved lands.[120]

Proprietary revenues, to which OHA is entitled to, are revenues generated from the use or disposition of the public trust lands.[121]

1. The Hilo Hospital as a "Sovereign Function"

The State's argument is premised on the operation of Hilo Hospital as a public, and thus, "sovereign function." The State contends that the Hilo Hospital is mandated by law for "the protection and promotion of public health," and thus, a governmental function.[122] The Hawaii Revised Statutes provide that the Department of Health shall establish a division of community hospitals to plan, construct, improve, manage, control, and operate public health facilities.[123] The definition of "public health facilities" expressly includes the Hilo Hospital.[124]

In Hagerman v. City of Seattle,[125] the court set out a test to distinguish the two functions: "[t]he underlying test in distinguishing governmental functions from [proprietary] functions . . . is . . . whether the act performed is for the common good of all, that is, for the public, or whether it is for the special benefit or profit of the corporate entity."[126] The Hilo Hospital, as defined by the HRS, is for the promotion of public health. It also provides funds for other public health facilities which cannot survive on their own.[127] It is required by statute to place its receipts into a special fund, but must contribute toward the hospital system's administrative costs.[128] Applying the Hagerman test, the Hilo Hospital fits the definition of a sovereign function, because it is for the "common good" and not operated for a profit.

In Sanders v. City of Long Beach,[129] the court held that receiving profit from an activity is not the essential factor in distinguishing between a sovereign or proprietary function.[130] Instead, the determining factor is whether the activity is "essentially governmental in character." The State maintains that the manner in which the hospital is operated and funded is governmental in nature. First, the hospital was created under a mandate of the law.[131] Second, "unlike private hospitals which are only obligated to treat patients to stabilize them, [the Hilo Hospital does] not turn patients away."[132] Third, a deputy director of health serves as the "governing body" for all thirteen hospitals in the system.[133] Fourth, its rates are established pursuant to the HRS and are uniform system-wide.[134] The hospital does not always make enough to cover expenses, but when they do, any excess is used to subsidize other hospitals that don't.[135] When they do not, the general fund provides additional funding.[136] Accordingly, all aspects of the Hilo Hospital are operated in conjunction with the government and should be classified as "governmental in character" and a sovereign function exempt from Act 304.

2. The Hilo Hospital as a "Proprietary Function"

OHA advances the opposite argument, that the operation of the Hilo Hospital is a proprietary function subject to Act 304.[137] OHA claims that other jurisdictions have found the operation of state hospitals to be proprietary, and not governmental or sovereign.[138] For example, in Thomas v. Hospital Authority of Clarke County, a Georgia court noted that "the function of a hospital is not, in essence, a governmental function."[139] The Thomas court further stated that::

> while it may be an appropriate goal or objective of government to establish a hospital authority, it does not follow that [its] daily operations . . . constitute a governmental function. Governmental functions more properly refer to the tasks of governing. There is, for example, a governmental character to activities such as the collection of taxes or the operation of a court system. But the services of healing offered by a public hospital are not governmental functions.[140]

In addition, proprietary activities have been defined as "those that make a profit or have a private counterpart, such as hospitals, parking garages, zoos, recreational facilities, and the like."[141]

In Beard v. City and County of San Francisco,[142] the court found that the distinction between a proprietary and a sovereign function was simple as applied to a hospital.[143] The court stated that a hospital established for the health and public welfare has two courses to follow - "it may maintain a hospital for the indigent alone, or it may maintain one in competition with private hospitals in the same community, charging fees for both medical care and hospitalization."[144] If the latter course is chosen, the hospital would be operating in a proprietary capacity as to "paying patients."[145] The court analogizes it to "operations of street railways, water, gas and electric facilities, and other utilities for the benefit of the community at large."[146]

OHA only claims entitlement to revenues from "paying patients," specifically, from rent, cafeteria revenues and patient service revenues net of Medicare and Medicaid payments.[147] Also, The Hilo Hospital is not limited to admitting indigent patients, so the State has elected to operate it in a proprietary capacity. Accordingly, as a proprietary function of the State, the Hilo Hospital income is subject to the public trust provisions.

Income from the Hilo Hospital is not listed specifically as an exception to "revenue."[148] OHA asserts that Act 304 must be construed broadly to include such income as "revenue," because Act 304 is a remedial statute.[149] Remedial statutes are "those which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries."[150] The purpose of Act 304 is to:

> [c]larify the revenues derived from the public land trust which shall be considered to establish the amount of funding to the office of Hawaiian affairs for the purposes of the betterment of the conditions of native Hawaiians . . . .

Thus, it is remedial because it was enacted to effectuate the intent and spirit of the Admission Act.[151] Remedial statutes are to be construed liberally in order to accomplish the purpose for which is was enacted.[152] Further, where statutes have profound social and economic overtones, the interpretation of such must be "imaginative and progressive rather than restrictive."[153]

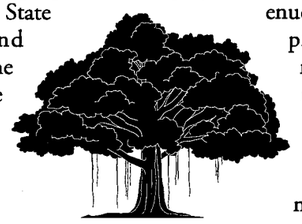
In Price v. State,[154] the court recognized that it was a "simple and universal" principle that the provisions of the Admission Act be looked to when considering "the nature and extent of the State's duties and powers" with respect to ceded lands.[155] Under the Admission Act, Hawaii's ceded lands, together with "proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held as a public trust . . . for the betterment of the conditions of native Hawaiians . . . ."[156] The historic significance and importance of the Admission Act qualifies it as having "profound social and economic overtones" and so must be construed broadly.

OHA contends that the plain language of the Admission Act illustrates the legislative intent to permit a liberal construction of "revenue."[157] Thus, the use of the words "proceeds" and "income therefrom" demonstrate that Congress intended that all revenues derived from the ceded lands be placed in public trust.[158] Using this analysis, by including revenues generated from the Hilo Hospital, the purposes of the Admission Act will be carried out: (1) for the state to hold the public lands in trust; and (2) to remit twenty percent of the revenue generated from the use of these lands to OHA.

In OHA v. State, the court found that OHA is clearly entitled to twenty percent of all revenues generated by the Hilo Hospital, whether they are from cafeteria sales or rental of rooms, or from patient services.[159] The court expressly held that the Hilo Hospital is "clearly" a proprietary exercise of power.[160] In fact, the court stated that "the argument that the hospital is being run as a sovereign function rather than a proprietary function . . . is not a persuasive argument . . . ."

C. Revenues from the Housing Finance and Development Corporation and the Hawaii Housing Authority

The Housing Finance and Development Corporation ("HFDC") develops and sells projects located on ceded lands.[161] Through the Hawaii Housing Authority ("HHA"), the State receives rental income for projects situated on ceded lands.[162] OHA claims entitlement to twenty percent of these revenues under Act 304 as proprietary functions.[163] The State claims that HFDC and HHA were created by the HRS as a remedial statute and cannot make a profit, and therefore, are sovereign functions not subject to Act 304.[164]



1. The State claims income from HFDC and HHA operations is not "revenue."

The HHA was created for the purpose of remedying rental housing-related conditions.[165] HRS § 356-1 acknowledges the uninhabitable conditions of existing accommodations that pose a threat to the health, safety and welfare of the public.[166] That section also states that providing "safe and sanitary dwelling accommodations are public uses and purposes for which public money may be spent and private property acquired . . . ."[167] Private enterprise could not operate HHA's rental public housing projects, because unlike a private landlord, HHA may only rent to persons who meet the qualifications.[168]

The HFDC was similarly created to remedy the "critical shortage of safe and sanitary" affordable housing.[169] HRS § 201E-1 states that the causes of the inadequate housing include the cost and availability of land, financing, development, government regulation, labor and materials and the inflationary state of the economy.[170] HFDC was created to help solve these problems for the "general well-being of the State." Therefore, HFDC and HHA were created pursuant to remedial statutes.

HHA cannot make a profit: HRS § 356-34 provides that the HHA "shall not construct or operate any such project for profit, or as a source of revenue to the State."[171] That provision also sets the maximum rents which may be charged and the criteria for tenant selection.[172] In addition, HRS § 359-20 mandates that all net revenues be deposited in the general fund of the State.[173] Its rental charges must be directed solely "to the end that the housing project shall be and always remain self sufficient."[174] Thus, HHA cannot profit from the rents.

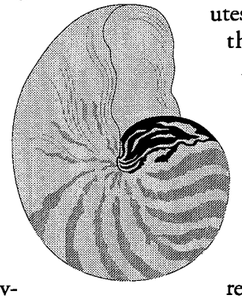
The State also contends that HFDC and HHA proceeds are generated by sovereign, not proprietary, functions, and hence, not subject to the Ceded Lands Trust.[175] HHA operates sixty-six federally aided low-rent public housing projects.[176] Under federal law, only a public housing authority may operate these federally assisted projects.[177] A "public housing agency" as used in the statute refers to "[a]ny State, county, municipality or other governmental entity or public body . . . which is authorized to engage in or assist in the development or operation of housing for low-income families."[178] As such, each of the authorities constitutes a "public housing agency." A private entity would not qualify.

2. OHA claims income from HFDC and HHA operations is "revenue."

There is no dispute that the HHA and HFDC projects are located on ceded lands.[179] OHA's position is that the State cannot sell, transfer or otherwise alienate ceded lands until Hawaiian land claims are resolved because the State received the lands as a trust and title is uncertain.[180] However, an opinion issued by the Attorney General on July 17, 1995, found that under the Admission Act, the State had the right to sell or dispose of ceded land.[181] The opinion also stated that "any proceeds of the sale or disposition must be returned to the trust."[182]

HFDC is responsible for developing affordable housing.[183] Under Act 304, "revenue" includes "proceeds, fees, [and] charges . . . derived from any sale . . . that is situated upon and results from the actual use" of ceded lands.[184] Thus, any sale of homes on ceded land by HFDC is subject to the Ceded Lands Trust. Likewise, HHA is primarily responsible for the management of low income rental units. "Revenue" also includes "rents" derived from a permitted use that is "situated upon" and "results from the actual use" of ceded lands.[185] Therefore, any rental income from HHA rental units on ceded lands is also subject to the Ceded Lands Trust.

In OHA v. State, the court dismissed the State's "sovereign function" argument by stating that it is "not based on any language in the Admission Act . . . ."[186] The court adopted the rule of construction that is given to remedial statutes: that the court interpret these statutes liberally.[187] It recognized that proprietary actions have generated these revenues, although there may be some claim of sovereign immunity that might apply.[188] The court ruled that income from the HFDC and the HHA "are clearly covered by the trust created [by the] Admission Act, and by the relevant provisions of 304."[189] It also extended this holding to encompass any remaining revenues generated through rentals or leases of ceded lands.[190]



D. Interest Income

OHA claims that the provisions of Act 304 entitles native Hawaiians to interest for revenues owed to OHA from June 16, 1980.[191] Section 8 of Act 304 provides that interest on actual amounts owed to OHA will be added to such amounts until paid.[192] Interest on "revenue" accrued from June 16, 1980 to June 17, 1982, is compounded annually at a rate of six percent, while interest on "revenue" from June 18, 1982, is compounded annually at ten percent.[193]

The State maintains that the Ceded Lands Trust is a statutory trust and does not use laws pertaining to private trusts.[194] The terms of a statutory trust are set out in the statute and can only be implemented in accordance with those statutorily specified terms.[195] Thus, OHA is not entitled to interest income because there are no provisions for interest payments in the statutes which set out the terms of the public land trust.[196] Also, the State contends that if OHA wants private trust principles to apply to the Ceded Lands Trust revenue provision, the same principles must be applied to every aspect of the trust.[197] Hence, the trust revenue, rather than the general fund should pay for improvements to the lands.

OHA claims that the case Ahuna v. Department of Hawaiian Homelands[198] clearly support its contention that general trust principles govern the public trust created by the Admission Act. In Ahuna, the court recognized that the State had a fiduciary duty to the native Hawaiian beneficiaries of the public trust, who had standing to sue the State.[199] The Ceded Lands Trust, as part of the same public trust as the Hawaiian Homelands, would apply the same principles. OHA claims that absent authority to the contrary, the State is bound by Ahuna.[200]

The State contends that the Legislature had not intended for the trust to include interest as "revenue."[201] If it had, interest would have been included under HRS § 10-2 and § 10-13.5 and not considered separately in section 8 of Act 304. Similarly, if interest had been contemplated, the Office of State Planning would not need to "develop and assist in the implementation of appropriately revised policies, practices, and procedures and to ensure that [OHA] receives its revenue entitlement promptly."[202]

The court in OHA v. State agreed with OHA that the Legislature clearly intended interest in Act 304. Legislative intent is shown through its specifically setting out the six percent interest due for the period June 16, 1981 to June 17, 1982, and ten percent from June 18, 1982 on.[203] Therefore, OHA is entitled to the additional amounts in interest along with the twenty percent payment of the revenue derived from the HIA, Hilo Hospital, HFDC and HHA.

The court properly held in favor of OHA concerning revenues from the Hilo Hospital, HFDC and HHA. Operations of the Hospital, HFDC and HHA were unquestionably "actual uses" of ceded lands. The only issue was whether the operations were sovereign or proprietary functions. The nature and character of the "revenues" collected at the Hilo Hospital were clearly proprietary and subject to the Ceded Lands Trust. The hospital was not limited to indigent patients and "revenues" were only collected from paying patients. Similarly, HFDC and HHA operations were also proprietary functions. Act 304 expressly includes "proceeds" and "rents" in defining revenue. Income from the development and sale of land by HFDC and rental of public housing by HHA are clearly "proceeds" and "rents," respectively. Therefore, the operations fit the definition of "revenue" and should be subject to the Ceded Lands Trust.

The calculation of airport revenues is a much more difficult issue and should be a settled between the parties instead of decided in court. Both parties advance plausible and persuasive arguments, but both sides also have a lot to lose if the Hawaii Supreme Court should rule against them. If the case is decided by the Supreme Court, it will

likely interpret "actual use" in favor of the State. The Waikiki DFS is not situated on ceded land, and the "but-for" method of calculating revenue, essential in OHA's case, may be too far-reaching. If that is the case, the State will succeed in narrowing the interpretation of Act 304 as well as protecting the State's fiscal health. However, the Court will need to rely on legislative intent, which does not specifically address off-site revenue producing property. Thus, the outcome of this issue is unpredictable and relying on the courts for a decision may be too risky for both sides.

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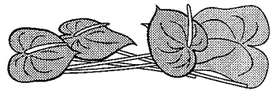
Ms. Cheung is being recognized for her outstanding effort in Professor David Callies' real property, land use and local government second-year seminar class. In addition to the inclusion of a condensed version of her article in this issue of Ka Nu Hou, Ms. Cheung will also receive a scholarship from the Section.)



End Notes

[1] See Joint Resolution of Annexation of July 7, 1989, H.R.J. Res. 55, 55th Cong., 2d Sess. (1898), 30 Stat. 750 (1898) [hereinafter Joint Resolution].

[2] Questions and Answers About the Ceded Lands Trust, 13 Ka Wai Ola O OHA, No. 5 at 11 (May 1996) [hereinafter Questions and Answers]

[3] Questions and Answers, supra note 2.

[4] Act 304, 15th Leg., 2d Sess., 1990 Haw.Sess.L. 947.

[5] Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987).

[6] Civ. No. 94-0205 (1st Cir. 1996) [hereinafter OHA v. State].

[7] Yamasaki, 69 Haw. at 173, 737 P.2d at 457.

[8] Id.

[9] Office of Hawaiian Affairs v. State of Hawaii, Civ. No. 94-0205 (1st Cir. 1996).

[10] Court's Ruling on Various Motions, Transcript of Proceedings, Office of Hawaiian Affairs v. State of Hawaii at 19, Civ. No. 94-0205 (1st Cir., 1996) [hereinafter Court's Ruling].

[11] Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 165, 737 P.2d 446, 453 (1987).

[12] Id.

[13] 69 Haw. 154, 737 P.2d 446 (1987).

[14] Id. at 166, 737 P.2d at 453.

[15] Id.

[16] Id. at 167, 737 P.2d at 454.

[17] Id. at 173, 737 P.2d at 457.

[18] Id. at 174, 737 P.2d at 458 (citing Final Report, supra note 58, at 3).

[19] Id.

[20] John Waihe'e served as Hawaii's governor from 1987 to 1994.

[21] Alan Matsuoka, The Ceded Lands Ruling: Will it Break the Bank?, Honolulu Star-Bulletin, Jan. 13, 1997, at A-5. See John Waihe'e, State of the State Address to the 1988 Hawai'i State Legislature (Jan. 25, 1988).

[22] Act 304, supra note 4.

[23] Act 304, supra note 4, at 947-948.

[24] Haw. Rev. Stat. § 10-2.

[25] Haw. Rev. Stat. § 10-3.

[26] Haw. Rev. Stat. § 10-5 and § 10-13.

[27] Section 1 of Act 304 explains that although "[c]hapter 10 provides that the beneficiary of the public trust entrusted upon the office of Hawaiian affairs means native Hawaiians and Hawaiians," the act "addresses only the native Hawaiian beneficiary." Act 304, supra note 4, at 947.

[28] The Legislature explained that Act 304 addressed only native Hawaiian beneficiaries of the public trust, because benefits to Hawaiian beneficiaries remain an unsettled issue. Act 304, supra note 4, at 947. See Patrick Johnston, Hawaiians Kukakuka on Future of Ceded Lands Trust, 13 Ka Wai Ola O OHA, No. 1, at 1 (Jan. 1996) (discussing the OHA trustees' support in changing the laws to allow more Hawaiians access to ceded lands revenue).

[29] Matsuoka, supra note 21.

[30] Matsuoka, supra note 21.

[31] Defendant State of Hawaii's Memorandum in Opposition to Plaintiffs Office of Hawaiian Affairs and the Board of Trustees of the Office of Hawaiian Affairs' Motions for Partial Summary Judgment on the Issues of 1) Whether the Revenues Derived from the Waikiki Duty Free Store Fall Within Act 304, 2) Revenues from Hilo Hospital, 3) Revenues from the Housing Finance & Development Corporation and Hawaii Housing Authority, and 4) Interest Income Filed on May 7, 1996 at 20, Office of Hawaiian Affairs v. State of Hawaii, Civ. No. 94-0205 (1st Cir., filed June 24, 1996) [hereinafter Opposing Memorandum].

[32] Plaintiffs Office of Hawaiian Affairs and the Board of Trustees of the Office of Hawaiian Affairs' Reply Memorandum in Support of Motions for Partial Summary Judgment Filed on May 7, 1996 at 3, Office of Hawaiian Affairs v. State of Hawaii, Civ No. 94-0205 (1st Cir., filed June 25, 1996) [hereinafter Reply Memorandum].

[33] Reply Memorandum, supra at note 32, at 17 (citing 1993 Memorandum at 9).

[34] Office of Hawaiian Affairs v. State of Hawaii, Civ No. 94-0205 (1st Cir. 1996).

[35] Reply Memorandum, supra at note 32, at 17.

[36] Office of Hawaiian Affairs v. State of Hawaii, Civ. No. 94-0205 (1st Cir., 1996).

[37] Court's Ruling, supra note 10, at 10.

[38] Court's Ruling, supra note 10, at 5. The court quoted the Apology Bill that:

> [t]he health and well-being of the native Hawaiian people is intrinsically tied to their deep feeling and attachment to the land . . . . [T]he native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language and social institutions.

Id. See also S.J. Res. 19, 103d Cong., 1st Sess. (1993).

[39] Court's Ruling, supra note 10, at 6. "Aloha means mutual regard and affection and extends warmth and caring with no obligation in return, and aloha is the essence of relationships in which each person is important to every other person for collective existence." See Haw. Rev. Stat. § 5-7.5.

[40] Court's Ruling, supra note 10, at 7.

[41] Court's Ruling, supra note 10, at 10.

[42] Court's Ruling, supra note 10, at 10 (citing York v. State, 53 Haw. 557 (1972); State v. Jim, 80 Hawaii 169 (1995); and Ancient Hawaiians v. Hawaiian Homes Commission, 78 Hawaii 192 (1995)).

[13] See generally Pele Defense Fund v. Paty, 73 Haw. 578 (1992) (recognizing the right of beneficiaries of the public lands trust to bring suit for the limited purpose of enjoining state officials' breach of trust by disposal of trust assets in violation of the Hawaii constitutional and statutory provisions governing the public lands trust).

[44] Linda Hosek, Ruling Holds up Sales of Ceded Land by State, Honolulu Star-Bulletin, July 9, 1996.

[45] See Bruce Dunford, Legislative Leaders: No Surprises in Cayetano Speech, Associated Press Pol. Serv., Jan. 22, 1996 WL 5393186.

[46] Matsuoka, supra note 21. See also Alan Matsuoka, Worst Case?, Honolulu Star-Bulletin, Jan. 14, 1997, at A-1 (attorney estimates that the State's airport debt to OHA could range from $594 million to $1.2 billion).

[47] Patrick Johnston, Heely Rules in Favor of Native Hawaiians, 13 Ka Wai Ola O OHA, No. 8 at 1.

[48] Matsuoka, supra note 21.

[49] Matsuoka, Worst Case?, Honolulu Star-Bulletin, Jan. 14, 1997, at A-1.

[50] Matsuoka, supra note 49.

[51] Matsuoka, supra note 49.

[52] Dunford, supra note 45. Cayetano blamed the Senate for failure to act on Senate Bill 1698, which would have classified the running of airports, harbors and a number of the state-run operations on ceded lands as "sovereign functions of the state." The result would be that OHA would no longer be eligible to receive these funds, which presently constitute eighty percent of its revenues from airports and harbors. See Questions and Answers, supra note 2; see generally What Would SB 1698 Mean to the OHA Trust and Hawaiians?, supra note 16, at 10.

[53] Barbra Ann Pleadwell, State Denies Hawaiians Airport Revenue, 13 Ka Wai Ola O OHA, No. 10, at 1 (Oct. 1996).

[54] Matsuoka, supra note 21.

[55] Pleadwell, supra note 53.

[56] Office of Hawaiian Affairs, The OHA Legislative Report, Honolulu Advertiser, Feb. 20, 1997.

[57] Clayton Hee on 'Scare Tactics,' More, Honolulu Star-Bulletin, Jan. 15, 1997, at A-12.

[58] Clayton Hee on 'Scare Tactics,' More, supra note 57; Pleadwell, supra note 53.

[59] Clayton Hee on 'Scare Tactics,' More, supra note 57.

[60] Haw. Rev. Stat. § 10-2.

[61] Robert J. Araujo, S.J., The Use of Legislative History in Statutory Interpretation: A Look at Regents v. Bakke, 16 Seton Hall Legis. J. 57, 64 (1992).

[62] Araujo, supra note 61, at 65.

[63] Araujo, supra note 61, at 69.

[64] See e.g. In re Tax Appeal of Lower Mapunapuna Tenants Association, 73 Haw. 63, 68, 828 P.2d 263, 266 (1992); Schmidt v. Board of Directors of the Association of Apartment Owners of the Marco Polo Apartments, 73 Haw, 526, 531, 836 P.2d 479, 482 (1992).

[65] See e.g. In re Tax Appeal of Lower Mapunapuna Tenants Association, 73 Haw. at 68, 828 P.2d at 266; State v. Kelekolio, 74 Haw. 479, 521, 849 P.2d 58, 77 (1993).

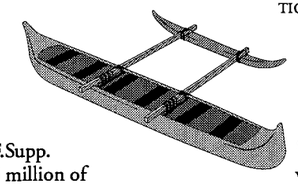
[66] Smith v. Sno Eagles Snowmobile Club, 823 F.2d 1193, 1197 (7th Cir. 1987) (citing Arkwright-Boston Manufacturers Mutual Insurance Co. v. Wausau Paper Mills Co., 818 F.2d 591, 594 (7th Cir. 1987)).

[67] U.D. Registry v. Municipal Court, 50 Cal.App.4th 671, 674, 57 Cal.Rptr.2d 788, 790 (1996).

[68] See e.g. Mike Yuen, Airlines Join State to Battle OHA Fees, Honolulu Star-Bulletin, Sept. 18, 1996, at A-1.

[69] Deak-Perera Hawaii v. Department of Transportation, State of Hawaii, 553 F.Supp. 976, 978 (1983).

[70] Charley's Taxi Radio Dispatch v. Sida of Hawaii, 562 F.Supp 712, 713 (1983).



[71] This is required by Hawaii Revised Statute § 261-5, entitled "Disposition of airport revenue fund."

[72] Deak Perera Hawaii, 553 F.Supp. at 978. Approximately $7.5 million of 50 percent of OHA revenues come from the airport. Patrick Johnston, Governor Threatens to Withhold Airport Revenues, 13 Ka Wai Ola O OHA, No. 6 at 1 (June 1996).

[73] Matsuoka, supra note 49, at A-6.

[74] Opposing Memorandum, supra note 31, at 33-34.

[75] Opposing Memorandum, supra note 31, at 34.

[76] In-bond products are merchandise of foreign origin that are not subject to import or export taxes. See Black's Law Dictionary 505 (6th ed. 1990).

[77] See 19 U.S.C. ' 1554 (1980).

[78] See 10 U.S.C. ' 1555 (1980).

[79] Legislative Auditor of the State of Hawaii, Progress Report on the Public Land Trust, Rep. No. 83-13, at 1 (March 1982) [hereinafter Progress Report].

[80] Progress Report, supra note 79, at 66.

[81] Progress Report, supra note 79, at 66.

[82] Progress Report, supra note 79, at 66.

[83] See Yuen, supra note 68. Only about one percent of DFS's airport retail space, 175 square feet out of 17,847, is on ceded land. The State takes one percent of the store's total gross revenues and OHA then gets twenty percent of that amount. Matsuoka, supra note 49, at A-6.

[84] Legislative Auditor of the State of Hawaii, Final Report on the Public Land Trust, Rep. No. 86-17, at 106-109 (Dec. 1986) [hereinafter Final Report].

[85] Melody Kapilialoha MacKenzie, Native Hawaiian Rights Handbook 34 (1991). See Final Report, supra note 84, at 112-113.

[86] Act of Dec. 23, 1963, Pub. L. No. 88-233, 77 Stat. 472.

[87] The "trust res" is the property of which the trust consists. Black's Law Dictionary 1515 (6th ed. 1990).

[88] United States v. Missouri Pacific R.R., 278 U.S. 269, 278 (1929).

[89] See Opposing Memorandum, supra note 31, at 34.

[90] Black's Law Dictionary 287 (6th ed. 1990).

[91] Webster's New Collegiate Dictionary 230 (1979).

[92] See Opposing Memorandum, supra note 31, at 35.

[93] Opposing Memorandum, supra note 31, at 35.

[94] See 19 U.S.C. ' 1555 which states that "'duty-free merchandise' means merchandise sold by a duty-free sales enterprise on which neither Federal duty nor Federal tax has been assessed pending exportation from the customs territory." Id.

[95] Charley's Taxi Radio Dispatch v. Sida of Hawaii, 562 F.Supp. 712, 714 (1983). The court notes that only Hawaii, Alaska and Rhode Island are airports owned and operated by the State. Id. at 714, n.4 (citing Membership Directory, Airport Operators Council International (1983)).

[96] HAW REV. STAT. § 261-7.
[97] HAW REV. STAT. § 261-7.
[98] See Reply Memorandum, supra note 32, at 25.
[99] See Reply Memorandum, supra note 32, at 25.
[100] See Reply Memorandum, supra note 32, at 25.
[101] 764 F.2d 1285 (1985).
[102] Id. at 1285.
[103] Id. at 1289.
[104] Id. at 1286.
[105] 464 F.Supp. 730 (1979).
[106] Id. at 732.
[107] Id. at 736. Guam Government Code " 19540 and 19541 impose a tax on the privilege of doing business in Guam. Under § 19541-0101, gross receipts from proceeds of "sales of tangible property in foreign commerce" are specifically included in taxable sales. Id. at 733.
[108] Id. at 736.
[109] Id. at 736.
[110] Court's Ruling, supra note 10, at 14.
[111] Court's Ruling, supra note 10, at 14.
[112] Court's Ruling, supra note 10, at 14.
[113] Opposing Memorandum, supra note 31, at 36.
[114] Opposing Memorandum, supra note 31, at 36.
[115] See Reply Memorandum, supra note 32, at 26; Opposing Memorandum, supra note 31, at 36.
[116] See Reply Memorandum, supra note 32, at 26; Opposing Memorandum, supra note 31, at 36.
[117] Reply Memorandum, supra note 32, at 25.
[118] Act 304, supra note 4, at 949.
[119] Questions and Answers, supra note 2.
[120] Act 304, supra note 4, at 949.
[121] See MACKENZIE, supra note 85, at 37.
[122] HAW. CONST. art. IX, § 1.
[123] HAW. REV. STAT. § 323-62.
[124] HAW. REV. STAT. § 323-61.
[125] 189 Wash. 694, 66 P.2d 1152 (1937).
[126] Id. at 701, 66 P.2d at 1155.
[127] This includes the Kula and Samuel Mahelona Memorial Hospitals. Opposing Memorandum, supra note 31, at 39.
[128] See HAW. REV. STAT. § 323-73.
[129] 54 Cal.App.2d 651, 129 P.2d 511.
[130] Id. at 660, 129 P.2d at 517.
[131] See HAW. REV. STAT. § 323-62.
[132] Opposing Memorandum, supra note 31, at 38.
[133] Opposing Memorandum, supra note 31, at 38.
[134] See HAW. REV. STAT. § 323-70.
[135] See HAW. REV. STAT. § 323-73.
[136] See HAW. REV. STAT. § 323-73.
[137] See Reply Memorandum, supra note 32.
[138] Reply Memorandum, supra note 32, at 27. The cases cited by OHA were Thomas v. Hospital Authority of Clarke County, 440 S.E.2d 195 (Ga. 1994); Hershel v. University Hospital Foundation, 610 P.2d 237 (Okl. 1980); Sides v. Cabarrus Memorial Hospital, 213 S.E.2d 297 (N.C. 1975).
[139] Thomas, 440 S.E.2d at 197, n.6.
[140] Id. (citing Lykins v. Peoples Community Hospital, 355 F.Supp. 52, 53 (1973)).
[141] H. PINE, TORT LIABILITY OF GOVERNMENTAL UNITS IN EMERGENCY ACTIONS AND ACTIVITIES (1988).
[142] 79 Cal.App.2d 753, 180 P.2d 744 (1947).
[143] Id.
[144] Id. at 756, 180 P.2d at 746.
[145] Id.
[146] Id.
[147] Reply Memorandum, supra note 32, at 34.
[148] See Act 304, supra note 4, at 949.
[149] Reply Memorandum, supra note 32, at 30.
[150] Flores v. United Air Lines, 70 Haw. 1, 12, 757 P.2d 641, 647 n.8 (1988) (citing 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 60.02 (N. Singer, 4th ed. 1986)).
[151] Act 304, supra note 4.
[152] See Flores, 70 Haw. at 12, 757 P.2d at 647; Roe v. Doe, 59 Haw. 259, 265, 581 P.2d 310, 315 (1978).
[153] State Savings & Loan Association v. Kauaian Development, 50 Haw. 540, 552, 445 P.2d 109, 119 (1968).
[154] 921 F.2d 950 (1990).
[155] Id. at 955.
[156] Admission Act § 5.
[157] Reply Memorandum, supra note 32, at 34.
[158] Reply Memorandum, supra note 32, at 34.
[159] Court's Ruling, supra note 10, at 17.
[160] Court's Ruling, supra note 10, at 17.
[161] Memorandum in Support of Motion, Office of Hawaiian Affairs v. State of Hawaii, Civ. No. 94-0205 at 6-7 (1st Cir., filed May 7, 1996) [hereinafter Plaintiff's Motion].
[162] Plaintiff's Motion, supra note 161, at 5-6.
[163] Plaintiff's Motion, supra note 161, at 8.
[164] See HAW. REV. STAT. § 201E-3 pertaining to the HFDC and § 356-5 pertaining to the HHA.
[165] See HAW. REV. STAT. § 356-1.
[166] HRS § 356-1 states in pertinent part:

> It is so declared: that unsanitary or unsafe dwelling accommodations exist in various areas of the State and that many persons are forced to reside in these dwelling accommodations; that there is a lack of safe or sanitary dwelling accommodations available to all inhabitants of the State and that consequently many persons are forced to occupy overcrowded and congested dwelling accommodations; that these conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the inhabitants of the State and impair economic valued; that these conditions cannot be remedied by the ordinary operations of private operations . . . .

HAW. REV. STAT. § 356-1.
[167] HAW. REV. STAT. § 356-1.
[168] See Opposing Memorandum, supra note 31, at 41.
[169] See HAW. REV. STAT. § 201E-1.
[170] HAW. REV. STAT. § 201E-1.
[171] HAW. REV. STAT. § 356-34.
[172] HRS § 356-34, entitled "Operation not for profit" states in relevant part:

> [HHA] shall fix the rentals for dwellings in its projects at no higher rates than it shall find to be necessary in order to produce revenues which . . . will be sufficient:
> (1) To pay . . . the principal and interest on the bonds of the authority;
> (2) To meet the cost of, and to provide for, maintaining and operating the projects (including the cost of insurance) and the administrative expenses of the authority; and
> (3) To create . . . a reserve sufficient to meet the largest principal interest payments which will be due on such bonds in any one year thereafter and to maintain the reserve.

Id.
[173] HAW. REV. STAT. § 356-20.
[174] HAW. REV. STAT. § 356-20.
[175] Opposing Memorandum, supra note 31, at 40.
[176] Opposing Memorandum, supra note 31, at 42 (citing Affidavit of Willson Sakai).
[177] 24 C.F.R. § 941-201(a) (1995).
[178] 24 C.F.R. § 882.102(b) (1995).
[179] Plaintiff's Motion, supra note 161, at 8 (citing Affidavit of Gary Nishikawa).
[180] Hearings on the Sale of Ceded Lands, 13 KA WAI OLA O OHA, No. 4 at 5 (April 1996). OHA maintains that the Hawaiian people, the beneficiaries of the land prior to the Overthrow, never agreed to the transfer of title and so must be consulted, and their claims resolved, before any shifts in the trust can take place. Id.
[181] Authority to Alienate Public Trust Lands, Op. No. 95-03, 1995 WL 469623 (Hawaii A.G.).
[182] Authority to Alienate Public Trust Lands, supra note 181.
[183] See HAW. REV. STAT. § 201E-1.
[184] Act 304, supra note 4, at 949.
[185] Act 304, supra note 4, at 949.
[186] Court's Ruling, supra note 10, at 16.
[187] Court's Ruling, supra note 10, at 16.
[188] Court's Ruling, supra note 10, at 16.
[189] Court's Ruling, supra note 10, at 15.
[190] Court's Ruling, supra note 10, at 15.
[191] See Reply Memorandum, supra note 32, at 35.
[192] Act 304, supra note 4, at 951.
[193] Act 304, supra note 4, at 951.
[194] Opposing Memorandum, supra note 31, at 44.
[195] Opposing Memorandum, supra note 31, at 44 (citing FRATCHER, 1 SCOTT ON TRUSTS § 17.5 (4th Ed. 1987)).
[196] Opposing Memorandum, supra note 31, at 44
[197] Opposing Memorandum, supra note 31, at 45.
[198] 64 Haw. 327, 640 P.2d 1161 (1982).
[199] Id.
[200] Reply Memorandum, supra note 32, at 35.
[201] Opposing Memorandum, supra note 31, at 45.
[202] Act 304, supra note 4, at 952.
[203] Court's Ruling, supra note 10, at 18.

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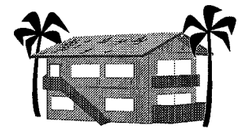

CONGRESS PREEMPTS STATE, LOCAL AND PRIVATE LAWS, REGULATIONS AND RULES RESTRICTING SATELLITE DISHES AND VIDEO ANTENNAS

*By Richard Kiefer, Esq.**

In a significant victory for the telecommunications industry, Congress included in the Telecommunications Act of 1996 a provision directing the Federal Communications Commission ("FCC") to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service or direct broadcast satellite services." The legislative history of this provision indicates that Congress intended to broadly preempt "existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules" that prevent the use of television antennas and satellite receivers.

In September 1996, the FCC issued its initial rule ("Rule") implementing this provision. See 61 Fed. Reg. 46557 (amending 47 C.F.R. Part 1, subpart S). The Rule prohibits "[a]ny restriction" that "impairs the installation, maintenance, or use" of a television antenna or satellite dish one meter or less in diameter on property directly or indirectly owned, and within the exclusive use or control of, the antenna user, such as a condominium apartment or its appurtenant, exclusive limited common elements. For purposes of the Rule, a restriction is deemed to impair installation, maintenance or use of an antenna if it "(i) unreasonably delays or prevents installation, maintenance or use, (ii) unreasonably increases the cost of installation, maintenance or use, or (iii) precludes reception of an acceptable quality signal."

There are two narrow exceptions to the Rule's broad preemptive effect. First, a restriction is not preempted if it is necessary and narrowly tailored "to accomplish a clearly defined safety objective that is either stated in the text, preamble or legislative history of the restriction or [that is] described as applying to that restriction in a document that is readily available to antenna users." Second, a restriction is not preempted if it is necessary and narrowly tailored to preserve a district listed or eligible for listing in the National Register of Historic Places. In order to qualify for either of these exceptions, the restriction in question must be equally applicable to other "appurtenances, devices, or fixtures that are comparable in size, weight and appearance" to the restricted antennas.

The Rule permits the FCC to exempt a specific restriction from the Rule's preemptive effect if the local government or association that promulgated the restriction petitions the FCC and establishes that the restriction in question is justified in light of "local concerns of a highly specialized or unusual nature." The Rule also establishes a process by which parties may petition the FCC for a declaratory ruling on whether a particular restriction is permitted (either because it falls within the two narrow exceptions discussed above or because it does not "impair the installation, maintenance or use" of antennas or satellite dishes).

The FCC's comments on the Rule indicate that the Rule is specifically intended to, among other things, preempt restrictions that impair the installation, maintenance or use of antennas based on aesthetic concerns. The FCC has also made it clear, however, that the Rule is not intended to preempt restrictions which "affect" rather than "impair" antennas and satellite dishes. The FCC commentary suggests, for example, that a requirement that rooftop equipment be painted a certain color or screened might not be deemed to "impair" the installation, maintenance or use of a rooftop antenna or satellite dish if the restriction is generally applicable to all rooftop equipment, does not impair reception, and does not unreasonably increase the cost of installing and maintaining the antenna or satellite dish. Unfortunately, however, the FCC's guidance is vague and until these issues have been clarified by the FCC and the courts it will be difficult to predict what restrictions affecting antennas and satellite dishes will be permitted.

Finally, as noted above, the Rule preempts only restrictions on the installation, maintenance and use of antennas and satellite dishes on property that the antenna or dish owner directly or indirectly owns and has exclusive use of or control over. The FCC has indicated, however, that it plans to propose additional rules in the next few months that address the Telecommunications Act of 1996's preemptive effect on restrictions on a condominium owner's ability to install an antenna or satellite dish in a common element and a tenant's ability to install an antenna or satellite dish outside of the premises it leases.

**(Rick Kiefer is an attorney in the Honolulu office of Carlsmith Ball Wichman Case & Ichiki where he concentrates on real property transactions and development, with a particular emphasis on condominium law.)*

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SURF WITH THE SECTION

No, not that kind of surfing. The Internet variety! The Section now has a Web Site which you can access at http://www.hsba.org/sections/rpfs/index.html. The Section is the first in the Hawaii State Bar to have its own Web Site and we are being hosted at no cost by HSBA at its site.

The site includes descriptions of all seminars planned for the year, updated periodically to let you know how you can register; new case discussions, legislation, developments, information and articles from Ka Nu Hou; a page of links to other Web Sites of interest to our members; and even a directory of members' e-mail addresses where you can click on a members' name in the directory and send him or her an e-mail. E-mail is useful not just for communication, but can also be used to electronically transfer documents (including word processing code) to another lawyer or client. When received by the other party, they can retrieve it in their word processor (most Windows word processors can read the code of the others and most can save in a different language so compatibility is generally not a problem), edit and return by e-mail. For East Coast and Far East clients and lawyers whose business days do not coincide with ours, this is an indispensable tool.

We hope you will visit our Web Site and let us know what you think and what you would like to see there. If you have discovered some useful links for Section members, let us know and we will add them. If you have an e-mail address and are not yet listed in the directory, please e-mail it to us (yes, there is a way to do that from the e-mail directory at the Web Site) and we will add your address.

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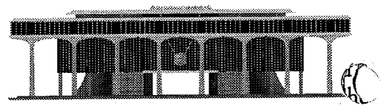

LEGISLATIVE UPDATE CORRECTION

The version of Act 353 actually passed by the Legislature and signed by the Governor differs from the version of the law discussed at the Legislative Update Seminar. The final bill only partially eliminates the pyramiding of the GET on income derived from leasing by allowing each lessee a credit in the amount of a portion of the rent paid to its lessor, against its gross income derived from leasing. The version of the bill discussed at the Legislative Update Seminar (as provided by the Legislative Reference Bureau which apparently was unaware that it was not the version passed by the Legislature) phased in the credit over a four-year period, and permitted a full 100% credit by 2001. The bill actually passed by the Legislature and signed by the Governor provides for a seven-year phase-in up to only 87.5% of the allowable credit, as follows:

- 12.5% in 1998
- 25% in 1999
- 37.5 % in 2000
- 50% in 2001
- 62.5% in 2002
- 75% in 2003
- 87.5% in 2004

Thanks to Section member, Wes Chang who followed the bill in the Legislature, and was familiar with the actual bill signed by the Governor, for commenting to me on the error and assisting me in obtaining the correct version of the bill.

Nancy N. Grekin

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WHAT HAS YOUR BOARD BEEN UP TO?

The Board of Directors of the Real Property and Financial Services Section generally holds its meetings at the HSBA offices on the third Friday of each month. Members of the Section are welcome to attend. The following is a brief summary of Board Minutes for March, April and May.

March Meeting:

• The Section, in conjunction with HICLE, is planning five seminars for this year including a seminar in connection with the Annual Meeting which will showcase the Master Real Estate Manual, a Land Use Seminar, a Water Rights Seminar, as well as our annual Litigation Update and Legislative Update Seminars.

• The Board voted unanimously to increase the Section's U. H. Law School Awards for best Land Use/Real Property seminar paper and best Environmental seminar paper from $250 to $300 each.

April Meeting:

• Nancy Grekin reported that there are several issues under the Uniform Probate Code passed last year, relating to recordings affecting Land Court registered land, which remain unresolved with the Bureau of Conveyances. It is the Bureau of the Conveyances' position that Hawaii Revised Statutes, Chapter 501 requires that Probate Court orders be issued to permit recordings even though such orders are no longer required in non-Court supervised probates. For now, ex parte orders permitting sale or distribution will have to be obtained to record conveyances from probate estates.

The Board discussed several other bills which were pending in the legislature, including the de minimis encroachment bill and amendments to the limit liability company statutes.

• The Board, in conjunction with HICLE, developed guidelines outlining both the Section's and HICLE's responsibilities for HICLE seminars. The guidelines will be used as a model for other sections which also sponsor HICLE seminars.

• The Board is currently revising the Section bylaws to bring them up to date and in conformance with current practices. Some of the changes include deletion of honorary members, procedures regarding nomination of directors, the appointment of standing subcommittees by the chair, decreasing the number of directors from 18 to 15 and a revision which will permit the Board to make amendments to the bylaws without membership approval. Since the existing bylaws provide that the membership must vote on amendments, the bylaws will be submitted to the membership for vote this year.

May Meeting:

• David Callies report that the State Legislature has formed a joint committee to study and review our state land use law (House Concurrent Resolution 215) and to recommend amendments to the legislature for 1998. The joint resolution was supported by the local chapters of the American Planning Association, American Institute of Architects, Council of Consulting Engineers, the State's Office of Planning, the directors of the four county planning departments and the Land Use Research Foundation.

• The Board reviewed the latest version of the Section bylaws and made additional revisions. The bylaws, with the additional revisions, were unanimously approved by the Board.

• The Board discussed various bills that were pending the Governor's signature. "A BILL FOR AN ACT RELATING TO TAXATION" was discussed and when signed, will alleviate the effects of pyramiding of the general excise tax on lease and sublease transactions. (See page 14 for more details on this bill.)

NOMINATIONS REQUESTED

The Nominating Committee is seeking talented, energetic people to join the Board. The positions available include the Chair-Elect, Secretary, Treasurer and Honolulu directors. Send or fax nominations by September 30, 1997, to Mitchell Imanaka, c/o Dwyer, Imanaka, Schraff, Kudo, Meyer & Fujimoto, P. O. Box 2727, Honolulu, Hawaii 96803, Fax No. 526-1419.

Real Property and Financial Services Section
Hawaii State Bar Association
c/o Paul Johnson Park & Niles
P.O. Box 4438
Honolulu, HI 96812-4438

CALENDAR OF EVENTS

Aug 15	Board of Directors' Meeting 12:00 HSBA Office (cancelled)
Sept 19	Board of Directors' Meeting 12:00 HSBA Office
Sept 22	Deadline to submit articles for October newsletter
Oct 17	Board of Directors' Meeting 12:00 HSBA Office
Oct 31	Litigation Update Hawaiian Electric Training Center 1001 Bishop Street Pacific Tower, 8th Floor 8:00 a.m. - 10:00 a.m.
Nov 18	Land Use Seminar Judge S.J. Plager - keynote speaker Japanese Cultural Center 9:00 a.m. - 4:30 p.m.
Nov 21	Board of Directors' Meeting 12:00 HSBA Office
Dec 9–10	Hawaii Real Estate Law HSBA Annual Convention Sheraton Waikiki 9:00 a.m.–4:30 p.m. Noon–2:00 Lunch
Dec 19	Board of Directors' Meeting 12:00 HSBA Office
Dec 22	Deadline to submit articles for January newsletter

(For further information regarding seminars, please call HICLE at 956-6551)