



KA NU HOU

"The News"

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FROM THE CHAIR

The Section congratulates Mark K. Murakami, the Section's second scholarship recipient for 1998. Mark's article entitled "From Details to Concepts: The 'New' Development Plans," appears in this issue.

Mark spent the past two (2) summers as a law clerk for the Coast Guard Legal Office in Honolulu. Prior to attending law school, he graduated from the United States Coast Guard Academy in New London, Connecticut, and was a Commanding Officer stationed in Morro Bay, California. Mark has received many scholastic awards during law school. During the 1996-1997 academic year, he was a Dean's Scholar and received the highest grades in Corporations, Property I, Contract I and Torts I. During the 1997-1998 academic year, he was awarded the Kono Foundation Award for academic achievement, the Bendet Fidel Sakai & Lee Award for corporations and the Coast Guard Achievement Medal for the summer of 1997. In addition, he was elected Articles Editor for the University of Hawaii Law Review.

The final quarter of 1998 will be a very busy one for the Section. We will be co-sponsoring the Real Property Litigation Update Seminar on November 20, 1998, chaired again by past-Chair Bill Deeley. This seminar should not be missed as very important cases will be discussed which may affect your practice. Look for seminar brochures in the very near future. Mitchell Imanaka, another past-Chair, has planned a conference that will bring leading experts in the vacation ownership industry to Hawaii. The seminar will be held in conjunction with the annual Hawaii Bar Association. You should have already received a brochure announcing "Va-

cation Ownership Coming of Age." This all day seminar is scheduled for December 1, 1998. Thanks to a subsidy from HSBA, you will be able to attend this seminar for only \$98.00. Our annual Section meeting will be held on December 9, 1998. The outstanding panelists will discuss the residential and commercial real estate market from the lender's, contractor's and real estate broker's perspectives as they address the "Real Estate Industry Outlook for 1999." Thank you to Jon Pang, this year's secretary, for organizing this event.

This newsletter also contains a ballot to elect the new officers and board members for 1999. Please remember to vote and to RSVP for the annual Section meeting.

As my year as Chair draws to a close, I want to thank the executive committee and board members for all of their support. Next year will be a busy year as the Section plans the Pacific Business News Supplement, adjusts to the transfer of continuing education responsibilities to HSBA and addresses issues such as certification of lawyers as specialists. I have every confidence that Randy Brooks will meet the challenges as he takes over as Chair of the Section and ask that you give him the support that you have given to me this year. Thank you for the opportunity to serve as your Chair this year.

Sincerely,

Sheila L. Y. Sakashita

Sheila L. Y. Sakashita,
Chair, Real Property and
Financial Services Section

FROM DETAILS TO CONCEPTS: THE "NEW" DEVELOPMENT PLANS

by Mark M. Murakami

I. INTRODUCTION

In 1992, the voters of the City and County of Honolulu amended the City Charter's land use and planning scheme. The three tiers of planning and land use controls still exist, but the amendment dramatically changed the intermediate tier between the general plan and the zoning ordinances. The new development plan has emerged as a conceptual reference tool for the City to use to implement its vision of development.

The old development plans consisted of a detailed map with textual provisions on the reverse side. The new development plans consist of visions, goals and supporting tables, charts and maps. Beyond the obvious changes, the process of preparing a development plan, and its usage upon adoption, has changed too. Wide public participation in the preliminary stages has replaced parcel-specific public comment at annual amendment hearings. The actual land control is now the zoning ordinance which utilizes the development plan as a measuring tool. Unfortunately, the City Council has adopted only one development plan, so conclusions derived at this time may be premature, but it is



likely that the new development plan will succeed as a planning tool.

II. PRE-1992 FRAMEWORK

In 1973, an amendment to the City Charter adopted development plans as an intermediate planning tool between the broad general plan and the specific zoning ordinances. The City adopted eight plans in 1983-84. Critics called the plans and the cumulative process "burdensome," but the scheme lasted until the 1992 amendment to the City Charter.

A. General and Development Plans Charter Provisions

Before 1992, the City Charter required the chief planning officer to prepare a general plan and development plans. The purpose of these plans was to declare the problems, opportunities and effects concerning development within the city. The City Council adopted and amended these plans by ordinance and the public could comment at Planning Commission hearings and City Council hearings.

The pre-1992 City Charter stated that the general plan established the long range development policies for the City. It included general social, economic, and environmental objectives that the city, state, or federal governments needed to accomplish. The general plan had to include policy and development objectives that the governments would achieve through social benefit distribution, desirable land use, circulation patterns and population densities.

To accomplish the general plan's objectives, the planning department drafted development plans. These development plans were detailed schemes and included a map of the affected area and textual statements establishing land use standards. Additionally, the devel-

opment plan had to identify areas of significance, the system of transportation, the location of public buildings, and the facilities for utilities, terminals and drainage. Finally, the development plan had to set out the "desirable sequence" for development.

The general plan had to be adopted by resolution and the development plans, together with their amendments, by ordinance. Following adoption of the development plan, all public projects, or any subdivisions or zoning ordinances had to "conform" to that area's development plan before adoption or initiation. The development plans required annual review.

Conceptually, the development plans were meant to be an intermediate planning document which bridged the gap between the general plan and the zoning ordinances. The Charter language suggested a logical progression from the general provisions in the general plans to the minute detail of parcel-specific zoning. Unfortunately, the development plans fell short of these intended goals.

B. Judicial Applications of the Old Scheme

While the "dearth" of land use cases in Hawai'i appellate courts has been termed an anomaly, the old development plans did receive judicial scrutiny and the courts upheld the plans and the process. Perhaps the most vivid example of the shortcoming of annual review in the old development plan scheme is *Lum Yip Kee, Ltd. v. City and County of Honolulu*.¹ In *Lum Yip Kee*, the McCully Neighborhood Board, the City Council, the planning department and the voters engaged in a multi-year de-

¹ 70 Haw. 179, 767 P.2d 815 (1989).

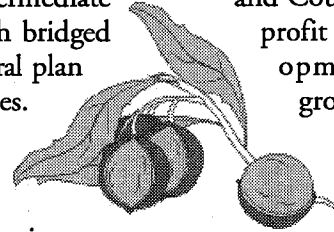
velopment plan battle over a specific parcel of land. The landowner filed suit after the voters approved an initiative and the City Council redesignated the parcel. The trial court upheld the validity of this action. On appeal, the Hawai'i Supreme Court held that the City Council's enactment of and amendments to the development plans were legislative acts and were entitled to a presumption of validity. The court reviewed the record of the ordinance and found the process complied with the Charter and state law. While hardly an affirmation of the land use system's strengths, the Supreme Court's decision gave legal validation to the process.

In *Protect Ala Wai Skyline v. City and County of Honolulu*,² a non-profit group challenged a development in Waikiki on the grounds that the development would be inconsistent with the general plan. The Intermediate Court of Appeals held that the general plan served as a "policy guideline" while the development plan was a "specific control" over development and density. Thus, the court viewed the development plan as a regulatory instrument.

Other courts have held that the development plan was not the ultimate regulatory tool. In *Kaiser Development Co. v. City and County of Honolulu*,³ a landowner and developer sued the City and County of Honolulu alleging that development plan regulations constituted a "taking" of their property. Until the landowner could show that the City Council had made a final determination (i.e. denial of variance) which deprived

² 6 Haw. App. 540, 735 P.2d 950 (1987).

³ 649 F.Supp. 926 (D.Haw. 1986).



the property of economically viable uses, the claim for taking was not ripe for judicial review. Thus, the court implicitly recognized that the development plan was not a final regulatory tool.

The jurisprudence of the old development plan scheme demonstrates the validity of the development plan as a regulatory, land control tool, while vividly illustrating the shortcoming of an annual review process. First, judicial deference to the City Council was high. Second, the development plan itself was not the final decision regarding a parcel of land, and until the City Council denied a zoning change, a takings claim was not ripe for review. An analysis of the old scheme's flaws demonstrates the utter ineffectiveness of the short lived development plans.

III. NEW CHARTER FRAMEWORK

Based on criticisms of the development plans, several concerned parties asked the Charter Commission to revise the Charter language. The Commission found that while the language of the Charter would permit reform to the development plan system, revisions to the Charter would reinforce the efficiency of the plans. After the Commission approved the revision, the voters adopted it in the 1992 General Election.

The new Charter outlines similar purposes for preparing general and development plans. These purposes are to "recognize and anticipate problems and opportunities concerning the social, economic and environmental needs and future development of the city..." Additionally, the plans establish a "desired direction" and pattern for future growth.

The new Charter requires that the

general plan set out the City's objectives and policies for long range development. The general plan is to contain statements of social, economic, environmental and design objectives to promote the welfare and prosperity of the people. It also must include the most desirable population distribution and regional development pattern.

The change in Charter language about general plans is less drastic than the language about development plans. The new development plans consist of "conceptual schemes" for implementing the objectives of the general plan. The new development plan must include a map, land use standards and principles, urban design principles and priorities to facilitate coordination of development activities. The Charter provides that the new development plans and maps are not to be as detailed as zoning maps. The new plans are to outline the desired urban character and the significant natural, scenic, and cultural resources of the city. It must include descriptive language to serve as a policy guide for the zoning maps, regulations, and public and private sector investment decisions.

The chief planning officer has the responsibility to prepare both plans. During preparation, the people living in the area affected by the development plan are given reasonable opportunity to present facts and arguments about the plan. The general plan and revisions are adopted by resolution, while the development plans and amendments are adopted by ordinance. The Commission deleted the language referring to an annual review of the development plans.

A crucial change in the relationship between the development plan

and the zoning ordinance is reflected in HRC § 5-410 (3)(1994), Adoption of the General Plan and Development Plans. A requirement that subdivision and zoning ordinances be "consistent" with the development plan replaced the old "conform" language. The Charter then provides that development plan amendments and zoning map amendments may be processed concurrently.

The 1992 initiative also changed the public hearings section of this article of the City Charter. After the City Council or Chief Planning Officer proposes amendments or revisions, the Planning Commission reviews them. The Planning Commission is required to have public hearings before it makes its recommendations, and the recommendations must include written findings. The public also has the opportunity to comment at the City Council.

IV. THE NEW PLANS

Since the 1992 amendment, the City Council has only adopted the Ewa Development Plan ("Ewa DP"). Because of the large scale of the proposed development in Ewa, the Ewa DP was completed first.

A. Common Provisions of All Development Plans

The common provisions ordinance, (Hon. Rev. Ord. § 24 (1997)), provides the governing language for development plans. Despite the Charter amendment, the existing ordinance adopted under the earlier scheme still controls. While an in-depth analysis of all the common provisions would be illuminating, this article merely surveys the field and discusses potential areas of conflict.

The common provisions ordinance

establishes that existing zoning ordinances control the regulation of land use within demarcated zones, and the height, bulk, size and location standards. Where the development plan provisions are more restrictive than the zoning ordinances, the Department of Land Utilization ("DLU") is required to prepare ordinances to bring the zoning into conformance with the development plan. The Planning Commission then has 45 days to forward its recommendation to the City Council.

For other situations where the development plan is more restrictive than the existing zoning ordinances or when public facilities are inadequate to service the allowable land uses, the DLU must prepare and submit to the City Council interim controls to regulate development until the zoning can be brought into conformance. The City Council must find any amendments to the development plan to be consistent with the development plan and the general plan. The Planning Department must also review any amendment proposal and report through the Planning Commission the inconsistencies and conflicts of the proposal with the plans.

The City Council has provided the Planning Department and DLU with factors to determine whether a proposed action is consistent with the development plan. Initially, the agency must consider whether the proposed development is consistent with the land use map or zoning provisions. Next, the agency must determine whether the development is consistent with the general height controls in the development plan. Then, the agency must consider whether the proposed development is consistent with the population distribution policies of the general plan. The agency also must contemplate the impact of the development on the living conditions of residents, while

addressing local area issues and other social impact factors. Finally, the agency must look at the time and place of the proposed development and determine if it is consistent with the location and sequence of public facility construction. The common provisions ordinance provides that the agency must have: specific findings regarding the foregoing factors for a change in zoning action; a "plan review use" under the Land Use Ordinance; and any funding for land acquisition, construction of a public improvement, or project to be included for the first time in the capital improvement program.

The common provisions ordinance establishes that development plan maps are to be interpreted flexibly. Changes to permitted land uses requiring an ordinance do not require a development plan amendment, but only a zoning map change if they meet certain conditions. This provision will likely address the inherent delays of the old system.

The common provisions also set out general principles for the development plans to address the implications of the land use map. These considerations include urban design, parks, recreation, and preservation areas. Additionally, the land use maps must include identification of historical areas, public thoroughfares, and public facilities.

The common provisions ordinance incorporates the priority of sequencing, which the City Charter formerly required. Sequencing was a controversial requirement of the old City Charter and debate ensued over the application of the sequencing principle. The common provisions ordinance outlines that the purpose of the general and development plans is to establish the desired sequence, patterns and characteristics of development. One purpose of the devel-

opment plan is to establish the "desired sequence for constructing public facilities consistent with general plan sequencing objectives and policies, and in a manner that will also provide guidance for private development decisions." Public facilities implicitly control the rate of development and private development of these facilities could disrupt the planned growth pattern.

The social impacts section of the common provisions ordinance remedies a shortcoming of the old development plan scheme. The ordinance includes "social impact factors" to be considered when evaluating any proposed development. An applicant for a development plan amendment must include a certification that the applicant considered impact factors which included an opportunity for impacted parties to identify alternatives or mitigation of negative social impacts.

Like the old development plan scheme, the common provisions ordinance provides for an annual review of development plan amendments. The ordinance provides an exception if the amendment satisfies the requirements for independent consideration. The common provisions ordinance establishes the procedure and timing for regular amendments and the independent consideration amendments.

The common provisions ordinance addresses many of the concerns with the old scheme. The ordinance outlines consistency and conformance. It also delineates the function and relations of the text and maps. The ordinance lists land use categories and includes general urban design principles, park and preservation controls, and identification of public facilities. It outlines policies of sequenc-

ing development and assessing social impacts. Finally, amendment procedures are explained. This ordinance provides the framework for all development plans.

B. Development Plan Revision Process

The development plan revision process is a public participation intensive scheme. It is made up of six planning steps with attendant comment and review. The first stage is "Orientation and Overview" where a private consultant prepares a briefing and newsletters which are reviewed by the planning department, the Neighborhood Board Advisory Committee ("NBAC"), and the Functional Advisory Network ("FAN"). The next step is the "Opportunities and Constraints phase." The private consultant prepares working papers on the major functional areas that undergo review by the planning department, the NBAC, and the FAN.

The revision process then calls for an "Alternative Development Strategies" phase. The consultant prepares draft alternative land use and infrastructure strategies and a scope for evaluating those strategies. After review, the next workshop will preview the evaluation and development consensus policies.

In the "Public Review Draft Plan" phase, the consultant prepares a "development plan technical report" with an evaluation of recommended strategy and a "Public Review Draft Development Plan." The consultant will present the draft plan to the public at an informational meeting with a questions/comments session. Then, the area workshop will review the comments and suggestions, with planning department responses.

The "Final Proposed Development

Plan" phase begins when the consultant prepares the final proposed development plan. The planning department reviews the proposed plan and presents it at an informational meeting. This meeting includes a public comments session.

The final stage begins when the planning department prepares the draft ordinance and staff report, then transmits it to the Planning Commission. In its recommendation to the City Council, the Planning Commission includes findings of fact and conclusions of law. The public can provide testimony and testify at the Planning Commission hearings and the Council hearings.

C. Ewa Development Plan

The Ewa DP was the first (and so far, only) development plan to undergo the revision process and subsequent City Council adoption. The ordinance adopting the plan does not include the same provisions as the common provision ordinance. Despite this change, the Ewa DP does substantially fulfill the requirements of the Charter and the common provision ordinance.

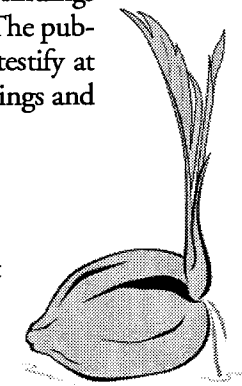
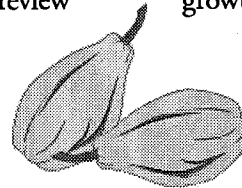
The intent of the Ewa DP is to provide a guide for orderly and coordinated public and private development. Development should be in a manner consistent with the general plan which includes the designation of Ewa as the secondary urban center for Oahu and an urban fringe area for residential development. The ordinance establishes that the provisions of the Ewa DP "are not regulatory in nature." The ordinance revisits the explicit intent of providing a "coherent vision" to development in Ewa. The Ewa DP is meant to guide the phasing of development and public investment in infrastructure, zoning and the capital im-

provement program.

The Ewa DP ordinance establishes the relationship between the plan and the land use controls. Existing subdivisions and zoning already approved remain effective following the enactment of the ordinance. The existing ordinances applicable to the Ewa DP area will regulate land use until the City Council amends the subdivision and zoning to be consistent with the Ewa DP. Finally, all applications for subdivision actions and land use permits are subject only to the applicable ordinances in effect at the time of application. This provision will likely provide for an orderly transition from the old scheme to the new one.

The consistency section of the ordinance differs from the common provisions ordinance. City agencies' actions are required to conform to and implement the Ewa DP. The ordinance then states that pursuant to the Charter, public improvement projects, subdivision and zoning ordinances "shall become consistent" with the Ewa DP. Its unknown whether the substitution of "become" for "be" is an error, but it does confuse the process of determining consistency.

The Ewa DP also generalizes the consistency analysis from a multi-factored approach to a conceptual one. The ordinance states that the City Council will ultimately resolve all questions of consistency between zoning and the development plan. When examining consistency between zoning, subdivision, or unilateral agreements and the development plan, the existing ordinances will prevail until the City Council amends them to be consistent.



The City will implement the ordinance through seven actions. First, developments will be phased to support the conceptual vision of the area and to maximize the effect of investment into infrastructure. Second, the City will guide development through the formulation of a special area plan for critical concern areas. Third, the City will guide public investment in infrastructure to support the vision. Fourth, the City will also promote the policies and guidelines of the plan to assure the consistency of new developments with the plan. Fifth, the City will incorporate the plan's priorities in the preparation of the annual capital improvement program. Sixth, the City will periodically evaluate the progress in achieving the plan. Finally, the City will review the plan itself every three years. These implementation goals are in keeping with the conceptual/visionary framework sought in the Charter amendment.

The conceptual framework will become reality through the zoning change applications. The planning department will review all zone change applications for consistency with the general plan, Ewa DP, and any special area plans. If 25 or more acres are involved, a project master plan has to be included in an Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") and the chief planning officer shall review it for consistency. If the proposed development is covered by an already approved master plan, then the chief planning officer need only determine if the proposed zone change is "generally consistent" with the existing master plan. If a project involves a significant zone change, the applicant is required to submit an EA to the DLU before they may accept the zoning change application. The DLU will review the EA and the director will determine whether an EIS will be required. If an

EIS is required, the director must accept it before the applicant may initiate a zone change application. These procedural requirements provide several internal controls over zoning applications to ensure the implementation of the Ewa DP's conceptual scheme.

D. Pending Development Plans

Other development plans are in various stages of preparation and revision, but the City has not yet adopted them. The proposed East Honolulu DP is expected to be transmitted to the Planning Commission in March of 1998. The East Honolulu DP attempts to implement the general plan policy that the area be retained as an urban fringe residential community with limited population growth. It is intended to protect the significant natural areas, and allow for expanded access to the shoreline and mountains. It establishes lower height guidelines for apartment buildings and guides commercial development to serve the region's neighborhoods.

The North Shore DP is expected to be transmitted to the Planning Commission in the Spring of 1999. It is likely to embrace a "Keep the Country country" vision meaning limited expansion of rural towns and existing subdivisions, and express support for diversified agriculture, outdoor recreation, eco-tourism, and supporting industrial and commercial activities. The rural character of the area is to be retained by protecting and preserving open space, views, and parks and maintaining the low-rise nature of the commercial and residential structures. The DP intends to protect the natural and cultural resources of the area while providing adequate infrastructure, facilities and services.

The Central Oahu DP is in draft

form and is expected to be transmitted to the Planning Commission in the Fall of 1998. Growth in Central Oahu is expected to support development of the Secondary Urban Center in Kapolei and the Primary Urban Center. The vision includes a rapid transit corridor with nodes in Waipahu, and phased development to insure adequate infrastructure. An Urban Growth Boundary will protect agricultural lands and an open space network within the boundary includes a major regional park in Waiola. The plan would likely allow limited development of planned residential communities and shopping centers to support those communities and would support redevelopment of Waipahu and Wahiawa.

The Primary Urban Center DP is in earlier evaluation stages and a draft development plan is not expected until the Spring of 1999. The vision for the Primary Urban Center is full development. Full development means protecting and enhancing natural and cultural resources, maintaining and revitalizing mature, stable communities, and promoting economic and residential redevelopment in growth areas. The development plan will promote a "livable city" concept with distinctive neighborhoods, while reclaiming the waterfront and natural streams, and maintaining an "open space network." Discussion items for meetings include visitor industry development, transportation systems, and housing in the Primary Urban Center.

Three other development plan areas, Koolaupoko, Koolauloa, and Waianae, are in the earlier stages of the revision process. The planning department is forming the committees and starting the orientation meetings. The draft development plans are expected in the Fall of 1998.

V. SURVEY OF REACTIONS TO THE NEW DEVELOPMENT PLANS

Reaction to the new development plan scheme has been optimistic and positive. Although this system is so new that parties cannot realistically criticize the application of the new development plan ordinances, some parties have criticized the ordinances and the additions to the proposed Ewa DP. Presented below are the impressions and reactions to the new development scheme from the perspective of a government planner, a large landowner, a developer, the City Council, and two community groups.

A. Government Planner

The City planners decided to revise the development plans before the general plans because of the immediate need for the plans, especially in Ewa and Central Oahu.⁴ City planners stated that the new development plan scheme better fulfills the role of the plans in land use. The old scheme encumbered the zoning process with redundant delays and the plans had no long-term focus. The new development plan process establishes a vision while streamlining the procedures associated with zoning.

The new conceptual vision is not developer driven, as the old development plan amendment process was, but rather through continual community outreach, the vision is implemented and revised based on changing needs. While the City Council membership can change, the multi-year review process allows for reassessment of goals. While the Ewa DP establishes a bold vision for the area, controversial issues do impact the implement-

⁴ Interview with Ralph Ukishima, City Planning Department, in Honolulu, Haw. (Feb. 2, 1998) (notes on file with author).

tation process. The Ewa DP also includes an assumption that the Waiahole Ditch irrigation system will continue to provide water to the Leeward side.

Perhaps the most controversial feature of the Ewa DP is the location of the Urban Growth Boundary. Since 1995, approximately eight thousand acres have gone out of sugar cultivation in Ewa and Central Oahu. Three thousand acres are considered prime agricultural lands and state agencies have indicated that the state should retain these lands for agricultural use. The planning department considers the reuse of these lands to be critical. The Urban Growth Boundary will be used for the next 20 to 25 years to give protection to the agricultural and preservation lands.

The planning department seems satisfied with the Ewa DP and the new development plan scheme. By moving from detailed maps to conceptual plans, the planning department will more effectively implement the general plan policies and goals. Because of the increased public participation in the preparation of the development plans, it is likely that the vision embodied in the plans will adequately represent all interested parties.

B. Landowner

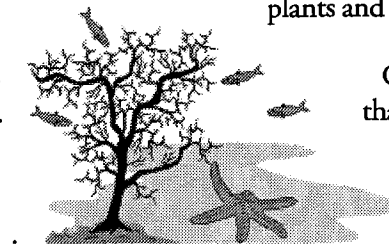
The development plan is likely to impact the landowner most tangibly. The old development plan scheme required the applicant to proceed through three tiers of governmental review: 1) land use redesignation by the State Land Use Commission; 2) development plan amendment; and 3)

⁵ Interview with Henry Eng, Land Planning Manager-Estate of James Campbell, in Kapolei, Haw. (Feb. 9, 1998) (notes on file with author).

zoning change ordinance.⁵ By moving to a generalized land use development plan, the need to frequently amend the plan has disappeared.

Because of existing plans for development in the Ewa DP area, Campbell Estate was "very active" in reviewing and formulating the new development plan. To supplement the development plan's public participation process, Campbell Estate has regular public meetings to advise the public of plans and changes, thereby self-monitoring their activities. Thus, Campbell Estate is satisfied with the level of public interaction and comment, as well as private input, in the preparation of the Ewa DP.

Representatives of Campbell Estate have expressed some ongoing concerns about future development in Ewa. Notably, they have stated that they have a substantial need for cheap water. Because they are active in promoting diversified agriculture on former sugar lands, this water is critical for the Estate's development goals. The Estate also recognizes the limited nature of water resources in Ewa and has encouraged xeriscape plants and dual water systems.



Campbell Estate stated that a balanced approach to the environmental problems associated with large-scale development will ensure the best result. The Estate contends that the new development plan scheme does not sacrifice public review, and that through interaction they can make the right choices of where and how to develop. Indeed, the Ewa DP's vision of greenways and setbacks was derived from the Estate's plans.

Another residual issue is the University of Hawai'i's West Oahu campus. The

Estate is confident that it can fulfill all the University's residential needs and can do so without the attendant problems of the Manoa campus (i.e. parking and housing). However, the Estate is awaiting the State's decision on the actual location of the campus.

Because Campbell Estate had such a large interest in the Ewa area, it was "active" in the development plan revision process. It has stated that through continuing public interaction, it can ensure responsible development decisions. Unresolved issues of potable water sources and the new University campus concern the Estate, but these are long term issues (with overlapping state government jurisdiction) which simply could not be resolved in the Ewa DP.

C. Developer

The developer is the person most intimately familiar with the practical application of the new development plan scheme. While the new process is too new for conclusions, representatives from Gentry Homes are optimistic that the flexibility and latitude of the new plans will streamline their zone change applications.⁶ The new process remedies the "painfully redundant" development plan scheme. Once the Land Use Commission changed the land use designation, the developer faced the duplicative development plan and zone change processes.

Representatives of Gentry Homes expressed residual concerns with the Ewa DP. While acknowledging the community's attempts to limit development, Gentry was concerned that the lo-

⁶ Interview with Tosh Hosoda and Debra M. A. Luning, Gentry Homes Ltd., in Honolulu, Haw. (Apr. 7, 1998) (notes on file with author).

cation of the Urban Growth Boundary does negatively impact on Gentry's plans for development. Representatives also noted that the public facilities map only showed city funded facilities. They expressed the idea that all public facilities should be identified, regardless of the funding source. Representatives seemed concerned over the gradually increasing burdens placed on developers to provide for schools and "other" facilities. Because representatives attended the development plan workshops and provided comments, they are positive about the Ewa DP. However, due to its newness, they are cautious about the implementation of the new development plan scheme.

Gentry Homes had a pending zone change application when the City Council adopted the Ewa DP. This zone change application is the first to be reviewed under the new development plan scheme. The DLU used the new Ewa DP and included a "consistency" analysis. Gentry and the DLU are currently negotiating the unilateral agreements associated with the Ewa By Gentry zone change application. A principal issue is whether to use restrictive covenants to enforce the master site plan and master landscape plan. The DLU recommended that these plans be incorporated as restrictive covenants, while Gentry considers them "guidelines" and objects to them as encumbrances. Ultimately, the City Council must resolve this issue and the resolution will indicate practically how the City will implement the development plan.

While Gentry Homes' zone change application is pending, representatives remain cautiously optimistic. They did participate in the development plan drafting process

and appreciate the flexibility of the new plans. The representatives did have specific criticisms with some provisions of the Ewa DP, but their reaction was generally positive. Gentry Homes and the DLU are negotiating the unilateral agreements attached to the zone change application. Since this is the first zone change to undergo the new development plan process, the resolution of these issues will likely demonstrate either the validity or shortcomings of the process.

D. City Council and Staff

The government entity most likely to resolve these issues is the City Council. The City Council,⁷ among others, viewed the old development plan scheme as "cumbersome" and duplicative of zoning. Developers underwent the development plan amendment process, then a review of the actual zoning ordinance. This protracted process gave community groups the time and opportunity to "galvanize" their forces, allowed community awareness to increase, and allowed more public input at the hearings. The new development plan process does require more input at the formation stages. When the Ewa DP underwent its final revisions, City Councilmembers felt that specific community groups were too late in providing their comments. While the old process required the Council to "sell" development plans to the community, the new plans are community driven and consensus based.

⁷ This section is based on an interviews with Councilmember Jon Yoshimura and his staff, Jim Williston of the Office of Council Services, and from a memorandum authored by Jane Howell of the City's Corporation Counsel.

Unfortunately, consensus-building slows down the process of writing and enacting a development plan.

Exactly how a Councilmember would use the development plan was difficult to establish. Some members viewed the general plan's policies as "aspirational" while others considered them "mandatory." There is a danger of losing sight of the "big picture" since, besides the internal reviews of the development plan, the only actions regularly coming before the Council would be the zoning applications. However, because the development plans have so much community input, the Councilmembers would be unlikely to deviate from the plan.⁸

The conceptual, descriptive language of the new development plans requires the DLU to perform a consistency analysis using the impacted development plan. Upon reviewing the developer's application for re-zoning, the DLU can approve, disapprove, or approve with conditions. The Council will then negotiate the conditions, using the development plan as a guide, and craft unilateral agreements for the developer.

These unilateral agreements are how impact fees are exacted from developers. The Ewa DP includes a call for "fair share contribution" from developers of residen-

⁸ Id. Councilmember Yoshimura called the development plan "influential", but not "absolute." Interview with Councilmember Jon Yoshimura and staff, City & County of Honolulu, in Honolulu, Haw. (Apr. 13, 1998) (notes on file with author).

⁹ Interview with Jim Williston, Office of Council Services, in Honolulu, Haw. (Feb. 12, 1998) (notes on file with author).

tial projects to ensure adequate school facilities. It is likely that more impact fees for schools, day care facilities, and transportation will become part of future unilateral agreements.⁹ The development plans will provide users with a predictive reference tool from which they can craft zoning ordinances.

Councilmember Yoshimura anticipates future criticisms of the plans and the process. The new process requires community involvement at the drafting stage of the development plan. While the process is an "open" one, it does have some "notice" problems, as was evident in the adoption of the Ewa DP. Community members who participated in the whole drafting process were critical of those groups who only commented during the final stages of adoption. Councilmember Yoshimura stated that specific community groups need to reassess their role in the land use process in light of their seemingly counter-consensus perspective.

The Council and their staff remain optimistic that the new development plan scheme streamlines the development process and fulfills the requirements of the Charter. While the public may have lost some beneficial delays (the "galvanize" period) when the new development plan scheme came about, the public continues to have the opportunity to control development. The new development plans will become an important tool for a Councilmember, who will use the vision and guidelines of the development plan to draft appropriate zoning ordinances.

E. Public Groups

The final interested parties surveyed are two community groups. The League

Of Women Voters ("LWV") and the Sierra Club ("SC") were very active in all stages of the revision process and have expressed specific concerns about the Ewa DP. Perhaps because of their active involvement, these groups have not been critical of the new development plan scheme.

The LWV generally supported the Ewa DP, but was critical of specific aspects of it.¹⁰ They criticized the amount of land included within the Urban Growth Boundary. Thus, the land would be subject to "scattered, sprawling development."

These concerns were compounded by last minute amendments to the Ewa DP.¹¹ The LWV criticized these amendments because they added lands available for development, grandfathered all projects already zoned for development under the old plan, and "possibly weaken[ed] the plan's enforceability." Several Councilmembers tried to defer the adoption until they could address these issues, but the Council adopted the plan anyway. The LWV stated that the amended plan "should not have been railroaded through in a week." They stated that the 1992 Charter amendment was supposed to correct the old scheme's problems, but the hurried adoption of the Ewa DP would lead to sprawl, high infrastructure costs, and transit problems.

The LWV has been supportive of the new development plan framework and has been instrumental in the revi-

¹⁰ See generally Astrid Monson, Ewa Plan Gets Hasty OK, HON. ADVERTISER, Aug. 14, 1997.

¹¹ Astrid Monson, Written Testimony offered at the City Council Meeting on Bill 67-CD-1, Ewa DP, Aug. 6, 1997 (on file with author).

sion process, but the political process attendant in the adoption of the plan caused concerns for the LWV. This process left the LWV with the feeling that the approval "made a mockery of public participation."

The SC also expressed concerns about the proposed Ewa DP and the adopted amendments.¹² An amendment provision declared that the plan was "not regulatory" which the SC asserted made the plan "meaningless." Additionally, the SC was critical of the deletion of the requirement of park space, the EA requirements, the removal of important master plan issues, and language suggesting that city parks will not be free.

Besides criticisms of the amendments, the SC identified issues that the proposed Ewa DP did not address. They expressed disappointment with the planned vision of suburban development in Central Oahu. The SC was critical of the treatment of the issues of polluted run-off, shoreline access, gated communities, parks as a capital improvement project priority, wider setbacks, hillside development in Makakilo, height limits, canopies, and maximum "hardcover" percentages. Finally, they expressed concern about Ko Olinā's failure to comply with unilateral agreements, and sought language requiring compliance with the existing unilateral agreements.

Conceptually, the SC has two criticisms of the Ewa DP. First, the amendment language diminished the regulatory "teeth" of the Ewa DP by explicitly stating that it was not regulatory and by deleting important land use controls and requirements. Second, the SC was critical of the plan's treatment of certain issues.

¹² David Frankel, Director of the Sierra Club, Hawai'i Chapter, Written Testimony offered at the City Council Meeting, July 30, 1997 (on file with author).

The community groups seem to be satisfied with the process of revising the development plans. They have been critical of the way the plan was amended before adoption, and certain terms and policies set out in the plan.

VI. CONCLUSION

The 1992 amendment to the City Charter changed the landscape of land use planning and controls in the City and County of Honolulu. The pre-1992 development plans were too detailed and provided little vision for developers and government planners. The new Charter established a conceptual system which would provide for long term guidelines and goals for development in the eight development plan areas. The development plan revision process is one of massive public input and process which generates a persuasive reference tool for the City entities to use as a measuring tool for zoning ordinances.

While the Ewa DP is the only plan that the City Council has adopted, the initial reaction to the plan is largely positive. Government planners and landowners have a conceptual tool to guide their projects. Developers have more guidelines for their projects. City Councilmembers have a document which illustrates the vision of development in an area. Community groups have raised specific issue areas of disagreement and have voiced concerns about the manner in which the City Council adopted the Ewa DP, but all interested parties were unanimous in their praise of the new scheme. Effective land use planning demands that parties involved in the development process address these criticisms and remember the criticisms of the old development plan scheme. Through this action, we can ensure the success of the new development plan scheme.

WHAT HAS YOUR BOARD BEEN UP TO?

June Meeting:

- Sovereignty Seminar - Vice Chair Brooks reported on a letter from Ms. Mahealani Kamauu of the Native Hawaiian Legal Corporation objecting to HICLE's sponsoring a seminar entitled "Sovereignty and Related Land Issues" with Bruce Graham as its sole speaker and Chair Sakashita's response. Vice Chair Brooks distributed copies of a Statement of Protest to the seminar. The Board approved a motion to ratify the actions of Chair Sakashita and not to respond to the Statement of Protest.
- PBN Special Supplement - Mark Hazlett reported that he will be distributing a notice from Chair Sakashita inviting the authors of the Hawaii Real Estate Law Manual to submit a summary of their articles for a special Pacific Business News real estate law supplement.
- Newsletter - Vice Chair Brooks reported that the July Newsletter will feature an article by Elijah Yip.
- Nominating Committee - Vice Chair Brooks reported that there will be two director position vacancies beginning in January 1999 and asked for recommendations from the Board.
- Seminars - Vice Chair Brooks reported that HICLE is continuing to distribute corrections to the Hawaii Real Estate Law Manual. Vice Chair Brooks also reported that Mitch Imanaka will be coordinating a time share seminar at the HSBA December annual meeting.
- Treasurer Rosenberg reported that as of May 31, 1998, the Section had \$7,897.90 in its treasury.
- Secretary Pang reported that the Section's annual meeting will be held at the

Plaza Club on Wednesday, December 9, 1998 at 12:00 noon. The proposed discussion topic will be the real estate industry forecast for 1999 by a panel of speakers. Speaker suggestions were requested.

- Mark Hazlett suggested that a "gathering rights" seminar be considered for 1999.

July Meeting:

- PBN Supplement Update - The Board deferred action to the next Board meeting on deciding on whether to take responsibility for producing the PBN real estate and financing law supplement.
- Nominations for 1999 Board - The Board approved the following nominating committee selections for the 1999 Board:

Chair-Elect: Jon Pang
 Secretary: Trudy Burns Stone
 Treasurer: Stanley Kuriyama
 Directors: Harrilynn-Joy Kameenui
 Gail Ayabe
 Tom Rosenberg
 Max Graham
 William Byrns

- Annual Section Meeting - The Board discussed possible panel speakers to speak on the topic, real estate forecast for 1999, planned for the annual Section meeting.
- Bar Convention Seminar - Treasurer Rosenberg reported that Mitch Imanaka has made significant progress coordinating the time share seminar to be held on December 1, 1998 at the Hawaii State Bar Convention. The American Resort Development Association and KPMG Peat Marwick will be co-sponsoring the event in conjunction with the HSBA. A reception is being organized for the attendees to be held after the seminar.
- Treasurer Rosenberg reported that as of June 30, 1998, the Section had \$7,897.90 in its treasury. Treasurer Rosenberg commented that the Section's treasury appears to be in good

shape, especially in light of the fact that the Section dues are scheduled to increase to \$25.00 in January 1999.

- The Board discussed issues relating to HICLE's request that HSBA provide funds to help HICLE financially and HSBA's agreement to provide HICLE with funds only for the Hawaii State Bar Convention. Carla Poirier indicated that HICLE has no funds for 1999 and unless fund-raising efforts are successful, HICLE will not be able to operate in 1999. In such event, HSBA has indicated that it will take over the continuing legal education functions of HICLE. The Board discussed issues relating to the status and functions of HICLE.

(No August Meeting)

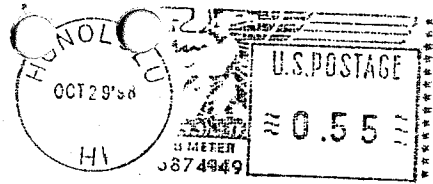
September Meeting:

- PBN Supplement Update - The Board has decided to proceed with producing a real estate and financing law supplement for the Pacific Business News to be published in June 1999. David Callies, Sheila Sakashita, Nancy Grekin and Mitch Imanaka will be editors of the supplement. The first draft of the articles are due January 1, 1999.
- Litigation Seminar Update - Bill Deeley announced that he will soon finalize the format and list of speakers for the seminar.
- Vacation Ownership Coming of Age Seminar - Chair Sakashita reported that the seminar will be held on December 1, 1998 at the HSBA annual meeting. In addition, she announced that the brochure for the seminar has been finalized and will be mailed out shortly.
- Annual Section Meeting - Secretary Pang reported that the annual Section meeting will be held on December 9, 1998 at 12 noon at the Plaza Club. Mike Sklarz of Locations has committed to being one of the speakers discussing the outlook for the real

estate industry for 1999.

- October Newsletter - Chair Sakashita reported that according to Vice Chair Brooks, the October newsletter is being finalized and will be ready to be mailed out.
- Casino Reinvestment Development Authority Condemnation Case - Chair Sakashita summarized for the Board the significance of the New Jersey case which struck down as violative of public purpose the condemnation of private property for the purpose of expanding a private casino.
- Treasurer's Report - Treasurer Rosenberg reported that as of August 31, 1998, the Section had \$5,699.66 in its treasury. The decrease in the account balance is due largely to two \$500.00 scholarships awarded to Mark Murakami and Elijah Yip, and expenses in producing the last issue of the newsletter. The financial reports for the period ending July 31, 1998 and August 31, 1998 were approved by the Board.
- Scholarships - Chair Sakashita presented the Section scholarships to Mark Murakami and Elijah Yip. Chair Sakashita received thank you notes from these individuals.
- HICLE - Chair Sakashita and Vice Chair Brooks met with Nancy Grekin and Jim Kawachika of the HSBA Board to discuss the Section's concerns regarding the possible demise of HICLE. HSBA has authorized a one-time \$98,000.00 subsidy to HICLE, provided that HICLE provide HSBA with a detailed budget. Chair Sakashita conveyed to Nancy Grekin and Jim Kawachika the Section's disappointment with the treatment it has been getting from HSBA. Jim Kawachika stated that he would relay the Section's concerns to the HSBA Board.
- Stan Kuriyama suggested that Section members might be interested in a current workshop being held on the topic of streamlining the state permitting process.

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**REAL PROPERTY AND
FINANCIAL SERVICES SECTION
HAWAII STATE BAR ASSOCIATION
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CALENDAR OF EVENTS

Nov 20	Real Property Litigation Update Hawaiian Electric Training Center Pacific Tower, 8th Floor 8:00 a.m. - 10:00 a.m.	Dec 9	Annual Section Meeting "Real Estate Industry Outlook for 1999" Plaza Club 12:00 noon
Nov 20	Board of Directors' Meeting 1136 Union Mall, Penthouse 1 12:00 noon	Dec 18	Board of Directors' Meeting 1136 Union Mall, Penthouse 1 12:00 noon
Nov 30 - Dec 1	HSBA Annual Convention Sheraton Waikiki	Jan 15	Board of Directors' Meeting 1136 Union Mall, Penthouse 1 12:00 noon
Dec 1	"Vacation Ownership Coming of Age" Seminar HSBA Annual Convention - Sheraton Waikiki 8:30 a.m. - 4:30 p.m.	Feb 19	Board of Directors' Meeting 1136 Union Mall, Penthouse 1 12:00 noon

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