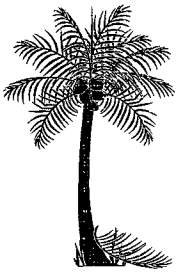
Real Property and Financial Services Section
Hawaii State Bar Association

KA NU HOU

"The News"



May 2000

FROM THE CHAIR

The year 2000 has gotten off to a great start for our section. The first seminar sponsored by our section, "*Restatement of the Law of Property, Third, Servitudes*", was a complete success. On behalf of the entire section, I would like to express our sincere appreciation to Professor Susan French of the UCLA Law School for sharing her first-hand knowledge of the *Restatement* with our membership and for comparing its principles with the recent decisions of the Hawaii Supreme Court addressing covenants and servitudes. I would also like to recognize the efforts of Past Chair David Callies and Boardmembers Gail Ayabe, Lorrin Hirano and Trudy Burns Stone for their efforts in putting together this well-attended seminar. As a follow-up, this edition of the newsletter attempts to provide a sampling of the wide-ranging practical effects that the Hawaii Supreme Court's recent decisions may have on the real estate and financing industries in Hawaii.

And this is just the beginning. In the coming months, our section will be sponsoring seminars on opinions of counsel, conveyancing and the newly revised UCC Article 9, which is still on track for adoption by the Legislature.

Meanwhile, our section continues to integrate the latest technology to expand our communication capabilities with our membership, especially through the efforts of Past Chair Nancy Grekin. Members who want to share thoughts or other information that may be useful to the entire membership can e-mail Nancy at *ngrekin@ggwlaw.com* and she will post the information at the website on the "Blah, Blah, Blah" page.

The section now also has its own Internet discussion group where members can post questions or comments and those posts will be transmitted to all other subscribing members by e-mail. Members can subscribe to the discussion group from the section website at *http:www.hsba.org/sections/rpfs*.

So, until next time, see you online!

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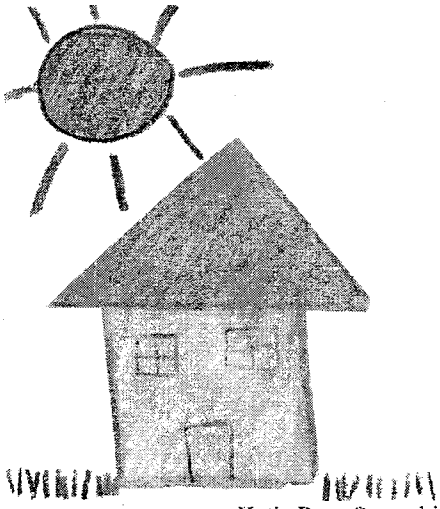


– Katie Rose Purzycki
age 11

WHAT'S THE 'STORY' ON HINER AND FONG?

PRACTITIONERS ASSESS IMPACT ON DRAFTING, ENFORCEABILITY OF DEED RESTRICTIONS, AND WHAT TO TELL THEIR CLIENTS FOLLOWING RECENT DECISIONS

EDITORIAL DISCLOSURE

As this year's Chair-Elect of the Real Property and Financial Services Section of the Hawaii State Bar Association, I am charged with the assembly, editing and production of a quarterly newsletter for our section. It is a task that takes a lot of work from a lot of people, especially for this issue.

In late 1999, following Hiner v. Hoffman, infra, the RPFSS board extended an invitation to Professor Susan French of UCLA Law School, the Reporter for the recently published *Restatement of the Law of Property, Third, Servitudes*, to come to speak, which she did on March 24th. In the interim, the court handed down the Fong v. Hashimoto decision, infra, on February 1, 2000. As a result of the Fong holding, and of Professor French's seminar, in this issue, the RPFSS Board decided to present articles from several RPFSS members about the real-world impact of the Hawaii Supreme Court's recent decisions in the area of restrictive covenants and equitable servitudes.

For five years, I have been lead counsel for the Fong family of Alewa Heights as they tried to enforce a "one-story-in-height" deed restriction on their neighbor's downslope property. After a hard-fought bench trial, and a favorable 1998 Intermediate Court of Appeals Opinion, we ultimately lost on February 1, 2000, when the Supreme Court ruled, as it had in Hiner, that the height restriction in Fong was too "ambiguous" to be enforceable.

It is clearly difficult to be unbiased when discussing a decision that was such an unmitigated disaster for my clients. They lost their spectacular view of the ocean, the value of their homes, and the peace of their small community.

However, as newsletter chair, I feel an obligation to be as fair, balanced and accurate as possible. Therefore, I requested that opposing counsel, Mike Lilly, give the membership his impressions about Hiner and Fong, since, ironically, he was involved with both cases. Mike, who represented the prevailing defendants in Fong, had just the year before represented the plaintiff community association in Hiner, which had sought unsuccessfully to enforce a "two-story-in-height" restriction found in its DCCR's.

The Board also solicited contributions from attorneys who represent condominium associations, such as Joyce Neeley and Anne Anderson, and other trial attorneys who must enforce these kinds of deed restrictions, such as Bill Deeley, who was kind enough to recap some of Professor French's remarks from her recent seminar.

Faced with an acknowledged departure from prior case law in this area, Board members are beginning to hear that some attorneys are now referencing the *Restatement, Third* in their condominium and association documentation in an effort to make them more enforceable. Counsel for some title insurers are also reported to be wrestling with the fallout from these cases, in particular, their perceived potential for increased litigation.

The RPFSS board is inviting comments from all of its members about this shifting area of our practice. By clicking on the RPFSS homepage *(http://hbsa.org/sections/rpfs)*, you will be directed to our new RPFSS "E-Group", where you can subscribe to a discussion group devoted to these and other questions of Hawaii real property practice.

It would appear that these recent decisions have left this area of real property law more up in the air than - - a two-story house? What do you think? Where do we go from here? The Board encourages you to join the discussion.

Trudy Burns Stone
Newsletter Chair

OVERVIEW OF MARCH *RESTATEMENT* SEMINAR

We were very fortunate at our section's most recent seminar to have a prominent mainland guest speaker, UCLA Law School Professor Susan Fletcher French, who presented a morning program on the *Restatement of the Law of Property, Third, Servitudes*. Interest in this seminar was high. Approximately 175 people were in attendance at the HEI Training Center on March 24, 2000. The consensus was that she provided an excellent presentation on a very complex topic.

Professor French has been the Reporter for the ALI committee on the *Restatement* for the past fourteen years. She shared with the attendees some of the changes that will be contained in the new *Restatement,* and discussed how some recent Hawaii case law compares and contrasts with the propositions contained in the new *Restatement.*

As Professor French explained, the essential goal of the *Restatement* is to simplify and clarify the law of servitudes, defined to include profits, easements, and covenants. The commentators recognize that case law that has developed in this area is rife with archaic, obsolete terminology and vague distinctions that are hard to apply to modern cases.

It appears that underlying the *Restatement* there is a recognition of the fact that modern real estate development involves higher density, more integrated communities. Land use regulation and community planning play a much larger role than they did centuries ago when the servitude doctrines were developed.

Professor French explained how the "touch and concern" doctrine and the doctrine of vertical privity have therefore been modified to provide more direct and common sense rules of applicability. Under the *Restatement*, for example, a party seeking to avoid the enforcement of a servitude has the burden to establish that it is an arrangement that should not be allowed to run with the land. Also, the *Restatement* recognizes the ability of a party to more freely create and transfer benefits in gross. The *Restatement* also includes a whole chapter (Chapter 6) devoted to servitudes contained in community and condominium association declarations. Finally, Professor French's presentation also included a brief discussion of several recent Hawaii cases, including Waikiki Malia, Hiner v. Hoffman, and Fong v. Hashimoto, infra.

Gail Ayabe and Lorrin Hirano are members of the RPFSS Board, were co-chairs of the seminar, and contributed to this article.

PROFESSOR FRENCH DISCUSSES HINER AND FONG

Recently the Hawaii Supreme Court decided several cases in which it gave its views concerning the interpretation and enforcement of covenants, including Hiner vs. Hoffman, 90 Haw. 188, 977 P. 2d 878 (1999) and Fong vs. Hashimoto, Sup. Ct. No. 19424 (February 1, 2000). At the March 24th seminar, the RPFSS asked Professor Susan F. French, Reporter for the *Restatement of Law Third, Property, Servitudes*, to examine Hiner and Fong and analyze whether these decisions might have been different had the Court applied the *Restatement, Third.*

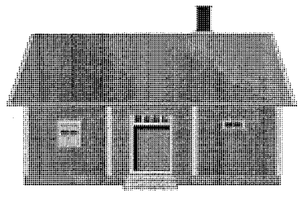
What follows are excerpts from her comments.

• "In examining these cases, it is important to stress two principals which are embodied in the *Restatement*. First, covenants can benefit third parties. The "touch and concern" doctrine no longer has any real value in the modern world. Second, if the intent to create a covenant is clear, the covenant should be interpreted by the courts to carry out its purposes.

The Fong Court held that a grantor cannot impose a covenant to benefit a previously conveyed lot. Under the *Restatement*, a grantor can benefit anyone with a covenant if he or she makes the intent clear."

• "What does a drafting attorney in Hawaii do if he or she wants to impose a covenant to benefit a previously conveyed lot?

One approach would be to use a defeasible fee. To impose a covenant to benefit a previously conveyed lot, convey the lot in fee simple determinable or convey a fee simple with a condition subsequent. Then create a right of entry, and if the grantee violates the condition, give the right of entry to the



neighbors. Create it first and then give it to the neighbors, because if the right is in the grantor, it's not subject to the rule against perpetuities. Then you can transfer it to a third person and it's still not subject to the rule against perpetuities. If you created it directly in the third person, then it would be an executory interest and it might be subject to the rule against perpetuities. So in order to avoid the rule, create the covenant in the grantor in one piece of paper and then, in a second piece of paper, transfer it to the neighbor.

However, one shouldn't have to do this, because third party beneficiary theory works fine for covenants [under the *Restatement*] and should allow you to create covenants that benefit your neighbors, or if you are a developer, to benefit property previously conveyed."

• "The Fong Court held that covenants are to be strictly construed to favor the free use of land. The Restatement suggests that the courts should attempt to ascertain what a reasonable purchaser buying the property would have understood the words to mean."

• "The Fong Court held that ambiguous covenants are void. The *Restatement* suggests that, as with contracts, wills and deeds, if a provision is ambiguous, the Court should consider extrinsic evidence to resolve the ambiguity, and not void the covenant."

• "The Hiner Court held that the Courts should construe covenants against the person seeking enforcement. Under the *Restatement*, there isn't any constructional preference between grantees of a common grantor.

When you have two neighbors in a subdivision with covenants, why not construe the covenant against the one who is deviating from the neighbor hood norm, against the person who is violating the covenant? Construing against the developer, sure, that makes sense. The developer had control over the document. If you were going to construe it in favor of the people who bought the property, you may want to construe it against the developer, but when you are talking about people who bought from the same developer, why favor one over the other? The *Restatement* says there should be no constructional preference in a case like this."

• "The Hiner Court held that a restrictive covenant prohibiting dwellings more than 'two stories in height' was ambiguous and unenforceable against lot owners who constructed a three-story residence. I gather that the Hiner Court was concerned that the word 'story' had so little content that it was as if the covenant had used the word 'Bfstplk' and nobody could possibly impose a covenant that said one couldn't do 'Bfstplk'.[1]

There is a section in the *Restatement's* interpretation section that states that, when interpreting covenants, one must keep in mind that the covenants are intended to run with the land and usually evidence of intent will be found in the recorded documents.The *Restatement* is clear that the court should admit extrinsic evidence to ascertain what an ordinary person would mean by the words 'two stories in height'. I think that a court would find that the average person would say that, in the context of a house, the word 'story' was not just a nonsense word."

• "The court in Hiner had another goal. It said that courts should strictly construe covenants in order to penalize bad drafting practices. This is a laudable goal. However, one of the animating ideas that runs through the *Restatement* is to try to put people, who use ordinary lawyers, with ordinary foibles, or who don't use lawyers at all but are still acting as reasonable citizens, in a position that is somewhat equivalent to the position they would be in if they used really good lawyers. When you draft a will, your words should be interpreted to carry out what you intended, rather than a strict construction that says: if you don't say it just right, your heirs will suffer. The same is true in covenants that affect consumer or residential housing. We should recognize that people buy into these communities without expert legal advice and that covenants are very often created by people who don't pay for the very best legal advice in order to create these covenants. The court's job should be to make these covenants work."

• "Why should they work? It's useful housing. Lots of people live in these communities. There's going to be a lot of hardship and frustrated expectations if, for the sake of good drafting, we punish the people who are not in a very good position to protect themselves against sloppy drafting."

• "The Hiner Court held that freedom of land use is more important than meeting the expectations of land owners. The *Restatement* addresses this. It is the expectation of land owners that they are not getting 'free property'. They expect that the property they are purchasing is restricted and that, not only is their property restricted, but that their neighbors are subject to the same restrictions they are. The *Restatement's* position is that construing covenants in favor of free use of land is not in accord with the realities of the modern housing market."

These highlights from Professor French's remarks were assembled by William J. Deeley, Esq., who is a member of the law firm of Deeley, King and Pang. He is a Past Chair of the Real Property and Financial Services Section, and his practice is concentrated in administrative law, commercial litigation, real property litigation, time sharing law, business law and personal injury.

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1 Joe Bfstplk was a character in the "L'ilAbner" comic strip created by Al Capp. He always travels with a dark cloud over his head.

RECENT DECISIONS OF THE HAWAI`I SUPREME COURT AND COMMUNITY ASSOCIATIONS

Three recent decisions of the Hawai`i Supreme Court represent a marked departure from the national trend of recognizing restrictive covenants as an important and viable component of modern land development. Community associations serve an important public function, for example, in maintaining property values, maintaining property tax revenues and reducing reliance upon local government for maintenance of infrastructure:

> Common interest communities play an increasingly important role in American housing. Both the private property owners in the community and the public have stakes in the association's ability to maintain the common property and both may be affected by the association's ability to carry out its other functions. Deteriorating common property and facilities and lack of covenant enforcement are likely to depress property values, decreasing property tax revenues as well as the wealth of the property owners. If the common interest community also controls streets, drainage channels, open space, parks, and other recreational facilities, or provides trash collection, utilities, security, and other services, inability of the com mon interest community to raise sufficient funds to carry out its functions will cast additional burdens on local government. Particularly where development approval was granted on the assumption that the common interest community would provide and finance various facilities for which local government would otherwise be responsible, the public has a strong interest in the financial viability of the common interest community.
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> *Restatement (Third) Of Property (Servitudes)* §6.5, Comment b (emphasis added)(Tentative Draft No. 7, April 15, 1998) *("Restatement").*[1]

Hawai`i, if anything, has a greater stake than other jurisdictions in the future viability of community associations. The latest census information available, for example, shows that Hawai`i ranks first among the states for the percentage of condominiums comprising the total of all housing units.[2] The 1990 census showed Hawai`i with over 20% of its housing units in condominiums. The only other state to reach double digits in 1990 was Florida, a distant second with 15.5% of its housing units in condominiums. And, condominiums are an ever- decreasing portion of the housing units which comprise community associations. While the total of condominium units in the United States was nearly equal to the total of planned community units in 1990, by 1998 the number of planned community association units was twice the number of condominium units.[3]

1 The *Restatement* was approved for final publication with minor revisions at the 75th Annual Meeting of the American Law Institute, May 11-14, 1998. Although only recently approved, numerous courts have cited and relied upon various sections of the *Restatement*. See, e.g., Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229 (Colo. 1998) (Supreme Court of Colorado citing with approval Sections 4.1 and 4.5 of the *Restatement*); Permagent v. Loring Properties, 599 N.W.2d 146 (Minn. 1999) (Supreme Court of Minnesota citing with approval Section 7.5 of the *Restatement*); Bolan v. Avalon Farms Property Owners Ass'n., 250 Conn. 135, 735 A.2d 798 (Conn. 1999); (Supreme Court of Connecticut citing with approval Sections 2.2 and 2.6 of the *Restatement*); Chittenden v. Waterbury Center Community Church, 726 A.2d 20 (Vt. 1998) (Supreme Court of Vermont citing with approval Section 2.16 of the *Restatement*); Maples Homeowners Ass'n. v. T. & R Nashville Ltd. Partnership, 993 S.W.2d 36 (Tenn.Ct.App. 1998) (Court of Appeals of Tennessee citing with approval Section 4.1 of the *Restatement*); Lewis v. Young, 92 N.Y.2d 443, 705 N.E.2d 649, 682 N.Y.S.2d 657 (N.Y. 1998) (Court of Appeals of New York citing with approval *Restatement* Section 4.8); Abington Ltd. Partnership v. Heublein, 246 Conn. 815, 717 A.2d 1232 (Conn. 1998) (Supreme Court of Connecticut citing with approval Sections 2.1, 2.2, 4.1, 4.5 and 4.10 of the *Restatement*); Exit 1 Properties Ltd. Partnership v. Mobil Oil Corp., 44 Mass.App.Ct. 571, 692 N.E.2d 115 (Mass. App. 1998) (Appeals Court of Massachusetts citing with approval Section 3.6 of the *Restatement*); Mandia v. Applegate, 310 N.J. Super. 435, 708 A.2d 1211 (N.J. Super. A.D. 1998) (Superior Court of New Jersey citing with approval *Restatement* Sections 2.11 to 2.14 and 4.1); Chesus v. Watts, 967 S.W.2d 97 (Mo. App. W.D. 1998) (Missouri Court of Appeals citing with approval Section 6.11 of the Restatement).

2 C.Treese, *Community Associations Factbook* (3rd ed. 1999).

3 Id.

Assuming Hawai`i is following the national trend, it is possible today that over one half of the housing units in Hawai`i are part of a community association.[4]

The Hawai`i Supreme Court recently rendered opinions in three separate cases involving the issue of covenant enforcement which is central to the function of a community association. Although only one of the decisions involved an attempt by a community association to enforce covenants, the decisions in these cases may affect the way the Hawai`i courts view covenant enforcement for community associations in the future. A brief discussion of important aspects of these cases for community associations is set forth below.

I. Pelosi v. Wailea Ranch Estates.

In Pelosi v. Wailea Ranch Estates,[5] a Hawai`i general partnership named Wailea Ranch Estates ("WRE") purchased a lot ("Lot 29") in a residential subdivision known as the Maui Meadows Unit III Subdivision ("MMIII"). Rather than building a single-family dwelling on Lot 29 as required by the restrictive covenants, WRE built a roadway and tennis court. The roadway provided access to 9 residential lots in a neighboring subdivision known as Wailea Ranch Estates which was being developed by WRE. WRE subsequently conveyed the 9 lots in Wailea Ranch Estates. The purchasers of those 9 lots each received an interest in Lot 29. Angelo Pelosi ("Pelosi") an owner of a lot in MMIII filed suit to enforce the restrictive covenant which required Lot 29 to be used for residential purposes and prohibited the construction of any building other than a single-family dwelling (and accessory buildings) on the lot. Pelosi sought injunctive relief prohibiting the use of Lot 29 as a roadway and a tennis court. The case was appealed twice. The Hawai`i Supreme Court rendered a decision in the second appeal on July 8, 1999.

One of the issues on appeal was whether the relative hardships to the parties should be considered when deciding whether to grant requests for mandatory injunctive relief. The Hawai`i Supreme Court stated that the relative hardships test will not be applied "where a property owner 'deliberately and intentionally violates a valid express restriction running with the land or intentionally 'takes a chance.'[6] However, the Supreme Court held that the relative hardships test does apply "when a prior landowner has violated a restrictive covenant and a subsequent purchaser, who took no action regarding the initial violation, is asked to bear the burden of a mandatory injunction to remove the violation."[7]

The Hawai`i Supreme Court ruled that the relative hardships test did apply with respect to Pelosi's request for mandatory injunctive relief against the purchasers of the lots in Wailea Ranch Estates (the "individual defendants") because they did not actually construct the unauthorized improvements and therefore could not be said to have engaged in a deliberate and intentional violation or taken a chance regarding the violation. In balancing the relative hardships, the court found that without the roadway, Wailea Ranch Estates would be an illegal landlocked subdivision and that the removal of the roadway would render the homes in Wailea Ranch Estates essentially worthless. The court found that "[a]lthough substantial harm has been done to Pelosi and to the MM III restrictive covenant by the building of a roadway on Lot 29, removal of the roadway would mean a complete loss for the individual defendants. Removal of the roadway would entail a gross disproportion between the harm to the individual defendants and the benefit to Pelosi."[8] The Supreme Court therefore concluded that mandatory injunctive relief was not appropriate — the roadway would be permitted to remain even though it was in violation of the covenant.

4 Community associations include cooperative housing corporations as well as condominiums and planned communities. Although there are coops in Hawai`i, they represent a small and relatively static portion of community associations.

5 91 Hawai`i 478, 985 P.2d 1045 (1999). (See earlier decision at 10 Haw. App. 424, 876 P.2d 1320, reconsideration denied, 10 Haw. App. 631, 879 P.2d 591, cert. denied, 77 Hawai`i 373, 884 P.2d 1149 (1994)).

6 Id., at 489, 985 P.2d at 1056 quoting Sandstrom v. Larsen, 59 Haw. 491, 500, 583 P.2d 971, 978 (1978).

7 Id., at 489, 985 P.2d at 1056.

8 Id., at 492, 985 P.2d at 1059.

The Court came to a different conclusion under the relative hardships test with respect to the tennis court. The Supreme Court found that the removal of the tennis court would create a significantly greater benefit to Pelosi than harm to the individual defendants, noting that many of the defendants purchased their lots before the tennis court was completed and that while Pelosi had presented evidence that the tennis court had caused him harm, the individual defendants had not shown that the removal of the tennis court would represent a hardship to them. As such, the Supreme Court held that a mandatory injunction was appropriate requiring the removal of the tennis court.

The drafters of the *Restatement* have given the courts wide latitude to choose an appropriate remedy:

Section 8.2 Remedies. A servitude may be enforced by any appropriate remedy or combination of remedies regardless of the way the servitude was created or the estate or interest of the person held liable. Appropriate remedies may include declaratory judgment, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens to secure payment of servitude obligations.

In selecting an appropriate remedy, the purpose of the servitude and its utility to the parties, the conduct of the parties, the interests of third persons and the public and the judicial costs likely to be entailed may be considered.

The drafters recognized, however, that injunctive relief should normally be available to enforce covenants:

Injunctive relief is normally available to redress violations of easements and restrictive covenants without proof of irreparable injury or a showing that a judgment for damages would be inadequate. The value of a restrictive covenant or easement is often difficult to quantify and may be impossible to replace. When it is enjoyed as an appurtenance to ownership of land, its value to the land owner may not be adequately reflected by market values. An award of damages instead of injunctive relief that would allow the other party to buy out the servitude obligation would seldom be appropriate so long as the servitude continues to serve the purpose contemplated at its creation. This consideration is even more important for conservation and preservation servitudes than for other types of servitudes.

Restatement, §8.2, Comment c. The Pelosi case undeniably presented a difficult challenge for the courts faced with depriving nine residential owners from access to their lots. However, rather than focusing on the criteria delineated in §8.2, the Court focused on the fact that the wrongdoer had conveyed the property to parties who, although not "innocent purchasers," were not instrumental in creating the problem. The Court's focus on the subsequent purchaser is almost certain to encourage an argument that a wrongdoer can simply sell property to avoid entry of an injunction forcing compliance. The Court did, however, emphasize that "the relative hardship test will be applied when the rights of a neighbor clash with the rights of a purchaser with notice. In order to protect the neighbor, it should be noted that the state of mind of the purchaser may be weighed in the balancing of the equities." Id. at 490, 985 P.2d at 1057. Presumably, if the purchaser who buys with notice of the violation has an intent to avoid compliance, the balance should weigh in favor of injunctive relief.

II. Hiner v. Hoffman.

In Hiner v. Hoffman,[9] the Hawai`i Supreme Court decided the issue of whether a restrictive covenant prohibiting dwellings which "exceed two stories in height" was enforceable. In that case, suit was filed against an owner for constructing a three-story residence. The covenant sought to be enforced read:

> No dwelling shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling, which contains a floor area, exclusive of open porches, garages and carports, of less than 800 feet, and which exceeds two stories in height.

The covenant did not prescribe, in feet or by some other numerical measure, the maximum "height" of a "story." The Supreme Court found that the covenant was ambiguous and unenforceable (finding that the covenant failed to provide any dimensions for the term "story" making it impossible to determine whether the owners' three-story structure exceeded "two stories in height"). The significance of the decision goes beyond the finding that the restriction was ambiguous. The decision reinforces a policy of strictly construing covenants and resolving ambiguities against the person seeking enforcement:

> As noted previously, established precedent requires this court to resolve substantial doubts or ambiguity in restrictive covenants against the person seeking enforcement. [citation omitted]. Put another way, "[t]he prevailing rule is that restrictive covenants are to be liberally construed in favor of the grantee[.]" [citation omitted]. Courts strictly construe restrictive covenants in favor of the grantee to reinforce the policy favoring careful drafting of covenants and because "it is not too much to insist that [restrictive covenants] be carefully drafted to state exactly what is intended — no more and no less." [citation omitted].
>
> Moreover, our decision today comports with the long-standing policy favoring the unrestricted use of property. Indeed, "[i]t is a well-settled rule that in construing deeds and instruments containing restrictions and prohibitions as to the use of property conveyed[,] all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee." [citation omitted]....[10]

This position taken by the Supreme Court is contrary to the positions being taken by courts in other states who have recognized the fallacy of applying this doctrine of restrictive interpretation to the concept of restrictive covenants developed for community associations. In a 1997 decision, the Supreme Court of Washington explored the rule of strict construction and concluded that it does not apply to the interpretation of subdivision covenants:

> The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among home owners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The court's goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances. The court will place 'special emphasis on arriving at an interpretation that protects the homeowners' collective interests.'

Riss v. Angel, 131 Wash. 2d 612, 623, 934 P.2d 669, 676 (emphasis added) (citations omitted). The Washington Court recognized that "[s]ubdivision covenants tend to enhance, not inhibit, the efficient use of land .... In the subdivision context, the premise [that covenants prevent land from moving to its most efficient use] generally is not valid." Riss v. Angel, 131 Wash. 2d at 622, 934 P.2d 669. See also, Lakes at Mercer Island Homeowners Ass'n v. Witrak, 61 Wash. App. 177, 179, 810 P.2d 27 (1991)("While restrictive covenants were once disfavored by the courts, upholding the common law right of free use of privately owned land, modern courts have recognized the necessity of enforcing such restrictions to protect the public and private property owners from the increased pressures of urbanization."); Highbaugh Enter. Inc. v. Deatrick & James Constr. Co., 554 S.W.2d 878, 879 (Ky. Ct. App. 1977) (Court rejected strict construction as covenants are "regarded more as a protection to the property owner and the public rather than as a restriction on the use of property.")

The new *Restatement* rejects the doctrine of strict construction altogether in recognition of the fact that the doctrine was developed "to guard against certain dangers posed by servitudes, particularly infringement on the alienability of land due to a lack of a public land records system (in England) and perpetua-

9 90 Hawai`i 188, 977 P.2d 878 (1999).

10 Id., at 195, 977 P.2d at 885.

tion of obsolete servitudes due to inadequate termination doctrines"[11] and has no place in a modern context:

Section 4.1 Interpretation of Servitudes

(1) A servitude should be interpreted to give effect to and be consistent with:

(a) the intentions of the parties to an expressly created servitude;

(b) the intentions or reasonable expectations of the parties to a servitude created by implication, necessity, or estoppel; and

(c) the reasonable expectations of the party against whom a servitude is created by prescription.

(2) A servitude should be interpreted to carry out the purpose for which it was created.

(3) To the extent not inconsistent with the interpretation arrived at under subsections (1) and (2), a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred.

The drafters of the *Restatement* were especially critical of applying the rule that language be construed against the drafter in the context of an association dispute:

The rule that language will be construed against the drafter . . . can be applied in resolving disputes in which the drafter is involved, but should not uncritically be applied to the detriment of successors to the drafter. After control of the unit owners association has passed to the owners, servitude provisions drafted by the developer ordinarily should not be construed against the association because it stands in a different relation to the owners. Although the association has succeeded to rights of the developer, the association represents the unit owners collectively, who should not be penalized for the developer's drafting failures when they seek to further the development plan.

Restatement, §4.1 Comment c. Especially because Hiner involved an association attempting to enforce its covenants, the Court's unquestioning reliance on an outdated doctrine is of concern. As the dissent noted, that interpretation "denies homeowners and purchasers the ability to rely on the plain language of covenants." The Court based its analysis in Hiner on a policy favoring "careful drafting":

> Today's decision merely reinforces this court's long-standing policies favoring (1) careful drafting of covenants in order to reduce uncertainty and litigation and (2) unrestricted use of property where, as here, the language of a covenant is ambiguous.[12]

In fact, a strict construction rule which invalidates (rather than interprets) vague language will likely do little to foster careful drafting — it is more likely, as the dissent noted, to foster "opportunistic non-compliance." As anyone who has drafted contracts or restrictive covenants can attest, it is very difficult to foresee where parties or courts will encounter difficulty in interpretation. More importantly, however, the "policy" does not punish the "wrongdoer" (i.e., the developer), instead it punishes all those homeowners who live in the subdivision and who purchased in reliance on the fact the covenants would be enforced as written.

III. Fong v. Hashimoto.

In Fong v. Hashimoto, Supreme Court No. 19424, slip op. (February 1, 2000), the Court again explored a height restriction in the context of a covenant in a deed. The Fongs were attempting to enforce a height restriction in a deed against the Hashimotos, their downhill neighbors. Only 3 of the 15 lots in the subdivision in question had height restrictions. Although all of the lots were at one time owned by a common developer or his estate, the Fongs' lot was transferred by agreement of sale prior to the transfer of the Hashimotos' lot. Thus, the trial court concluded that because the developer had an insufficient property interest in the Fong lot, he could not burden the lower lot with height restrictions for the benefit of the Fong Lot. The Supreme Court agreed:

> We . . . emphasize that, as a matter of law, a restrictive covenant burdening a downslope lot for the benefit of an upslope lot is not enforceable at law when either (1) the deeds to the affected lots do not contain a recitation establishing which lot or lots are to be benefitted or burdened by the restriction or (2) the common grantor simply does not have a sufficient interest in the affected properties to create an enforceable restrictive covenant with respect to the benefitted lots.

The main focus of the Court's discussion was the question of whether a developer who retained legal title (as a vendor under an agreement of sale) had a sufficient interest to impose the restrictive covenant. This is a question which should not be of importance to most community associations; however, the decision may be cited by lot owners in subdivisions which were formerly leasehold as a reason to invalidate the covenants the lessors typically placed on the fee simple interest prior to conveyance. Those covenants which were previously enforced by the lessor as covenants in the lease may now be subject to challenge. It will be interesting to see whether the Court believes that the lessors had sufficient interest prior to conveyance of the leased fee interest in the lots to impose those restrictive covenants.

IV. Conclusion.

While the Court has refused to enforce restrictive covenants in certain cases, community associations have generally met with much success in covenant enforcement actions. The primary concern to community associations from the decisions in Pelosi, Hiner and Fong is that the Court continued to adhere to a constructional doctrine which has no place in application of the law to modern forms of land development. The Hawai`i Supreme Court has previously rejected antiquated doctrines in dealing with community associations. After recognizing that its construction of the then new condominium statute should be "imaginative and progressive rather than restrictive," the Court wrote:

> This court will not follow a common law rule relating to property where to do so would constitute a quixotic effort to conform social and economic realities to the rigid concept of property law which developed when jousting was a favorite pastime.

State Savings & Loan Ass'n v. Kauaian Development Company, Inc., 50 Haw. 540, 555, 445 P.2d 109, 120 (1968). "As experience has shown that servitudes are important tools of modern land development, courts and legislatures have eroded the old constraints on servitude creation to the point where recognizing a general freedom to create servitudes more accurately describes the law." *Restatement*, §3.1 Comment a. The popularity of community associations with developers and home buyers in Hawai`i cannot be ignored. The Hawai`i courts have a long history of relying upon the Restatements of Law in various subject areas.[13] The new *Restatement* will likely be given significant consideration in the future covenant enforcement actions. If the new *Restatement* is adopted, one can expect to see greater emphasis on the value and importance of restrictive covenants and the end of the interpretative doctrines developed "when jousting was a favorite pastime."

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M. ANNE ANDERSON is a member of the firm of Neeley & Anderson. Ms. Anderson is the Chairperson of The People's Law School at Kaimuki Community School which is an educational service sponsored by the Consumer Lawyers of Hawai`i. She has been a regular lecturer on the topics of community association law and

11 *Restatement*, §4.1 Comment a.

12 90 Hawai`i at 193, 977 P.2d at 883.

landlord-tenant law.

13 *See*, e.g., Small v. Baldenhop, 67 Haw. 626, 701 P.2d 647, (1985) (citing Restatement of Restitution): In the Matter of the Trust Estate of Kaleipua Kanoa, 47 Haw. 610, 393 P.2d 753 (1964) (citing Restatement of Property); SGM Partnership v. Nelson, 5 Haw. App. 526, 705 P.2d 49 (1985) (citing Restatement of Contracts); Caldeira v. Sokei, 49 Haw. 317, 417 P2d 823 (1966) (citing Restatement of Contracts); Taylor-Rice v. State of Hawai'i, 91 Hawai'i 60, 979 P2d 1086 (1999) (citing Restatement (Second) of Torts); Kohala Agriculture v. Deloitte & Touche, 86 Haw. 301, 949 P.2d 141 (1997) (citing Restatement (Second) of Torts); Smith v. Cutter Biological Inc., 72 Haw. 416 823 P.2d 717 (1991) (citing Restatement (Second) of Torts).

FONG: THREE STEPS BACKWARDS

The Fong opinion held that (1) a height restriction of record for more than 60 years was invalid because, based upon the holding in Hiner, the phrase "one story in height" was ambiguous and unenforceable; (2) a prior conveyance of an upslope parcel by the original developer, Edward P. Fogarty, prohibited him from imposing a height and setback restrictions on a lot in the same subdivision that he conveyed later in time; and (3) there was no "common plan or scheme" for the Fogarty Subdivision because only three of the fifteen lots were subject to height restrictions.

(1) The height restriction. Form-over-substance reasoning led the Fong Court to eviscerate recorded height restrictions that used the phrase "story[ies] in height" to convey their meaning. The holding represents a radical departure from established Hawaii case law on the enforcement of restrictive covenants. Most troubling, long-term, is the possible expansion of the Court's analysis. For example, if this Court could find that a common-sense phrase such as "story in height" was ambiguous, what about other such common phrases, such as "single-family residence" or "residential use"?

In fact, the phrase "story in height" has been around since at least 1927, when the Uniform Building Code ("UBC") was first enacted by the International Conference of Building Officials. The UBC has been revised at approximately three-year intervals from that time to the present.[1] Amazingly, not only did the Fong Court disregard a trial record replete with expert testimony on how high a one story house could be on the defendant's lot, it held a nullity a term of common parlance that is an ascertainable term of building height, that has been in use for generations and that continues to be in use today in deed restrictions and in UBC's across the nation.

(2) Equitable conversion. The Supreme Court in Fong agreed with the trial court, which found that no enforceable restrictive covenant was created because, at the time the grantor imposed height restrictions on the defendant's downslope property, he only owned a vendor's interest in the plaintiffs' upslope property. Ownership of such "bare legal title" under an agreement of sale, according to the Fong Court, was not a real property interest sufficient to enable the grantor to accord a benefit to that property. Query: Since the beneficial interest holder/ vendee of that parcel would also not have had the right to benefit or burden the property, then who could? According to Fong, apparently, no one. This result is particularly illogical under the facts, in Fong, where Mr. Fogarty, the common grantor/developer, was selling off lots in his new subdivision.

(3) Common Plan or Scheme/Equitable Servitude. Finally, the Fong Court states that the fact that only 3 of the 15 lots had height restrictions in their deeds was proof of an absence of common plan or scheme. In doing so, the court totally disregarded its own opinion in Waikiki Malia Hotel v. Kinkai Properties Ltd. Partnership, 75 Haw. 370, 385, 862 P.2d 1048, 1058 (1993), which called for the court to consider extrinsic evidence, such as the topography, in the case of an allegedly ambiguous covenant. By making the bar for establishment of a common plan or scheme so high, the court invalidated the plaintiffs' ability to enforce the height restrictions under the theory of equitable servitudes. This, then, also represents a departure from established Hawaii case law precedent.

1 See International Conference of Building Officials, Uniform Building Code (1994), p. iii.

The Fong holding is especially harsh and potentially disruptive in light of the widespread use of and reliance upon such private land use arrangements by so large a portion of our state's population. Fong is at total odds with the very practical recommendations of the American Law Institute in the most recent *Restatement*. In particular, the Court declined to follow the recommendations of the ALI at Section 4.1 of the *Restatement*, which require that servitudes be interpreted to give effect to the intentions of the parties and the purpose for which it was created. The Fong Court chose instead to embrace archaic notions of property law to arrive at a result that strains common sense, and summarily invalidates the plaintiffs' valuable property rights.

Trudy Burns Stone is a member of Chun, Kerr, Dodd, Beaman & Wong, a Limited Liability Law Company. Ms. Stone's practice is concentrated in the area of real estate development and transactions, and commercial leasing. Ms. Stone was lead counsel on the Fong case.

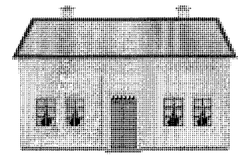
HINER AND FONG: A VIEW FROM BOTH SIDES

You posed an important question when you asked me to write an article for the HSBA/ Real Property newsletter regarding the impact and meaning of Fong v. Hashimoto and Hiner v. Hoffman (citations omitted).

Since I represented the prevailing party in Fong and the losing party in Hiner, you asked what advice I would give a future client wanting to enforce recorded restrictive covenants against a neighbor. My advice is very practical. These new cases demonstrate that Hawaii's courts are loathe to enforce restrictive covenants, especially if it requires someone's home being torn down.

To demonstrate just how strongly the courts will not enforce restrictive covenants, one must recall that Sandstrom v. Larsen, 59 Haw. 491, 583 P.2d 971 (1978) firmly held that the intentional violation of a restrictive covenant justifies a "mandatory injunction" - i.e., destruction of the offending portion of the construction:

> In the instant case, there was **no dispute that appellants were aware, both actually and constructively, of the one-and-one-half story height restriction at the time they purchased their property.** In addition, **testimony was adduced at trial which indicates that several neighbors discussed the existence of the height**



> **restriction with appellants prior to their commencing reconstruction of the home. Appellants nevertheless proceeded with construction** of the second story, and they continued with the construction until completion despite the fact that appellees had warned appellants of impending legal action if appellants did not cease construction... **Hence, appellants acted at their own risk in completing their two-story structure.** (Citation omitted.)
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> * * * * *
>
> **We are convinced that where a property owner "deliberately and intentionally violates a valid express restriction running with the land or intentionally 'takes a chance,' the appropriate remedy is a mandatory injunction to eradicate the violation."** (Emphasis added). (Citation omitted.) Appellants took just such a chance in proceeding with construction of the second story of their home. Therefore, mandatory injunctive relief was available to appellees without

the necessity of consideration by the court below of the relative hardship between the parties.

Sandstrom, 59 Haw. at 499-500(emphases added). Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 876 P.2d 1320, recon. denied, 879 P.2d 591, cert. denied, 77 Haw. 373, 884 P.2d 1149 (1994) was in accord, holding that an intentional violation justified a mandatory injunction. Note that the restrictive covenants in Pelosi and Sandstrom ("not to exceed one and one-half stories in height") are legally indistinguishable from the restrictions in Hiner and Fong.[1]

No stronger bar-exam-fact-pattern for a Sandstrom/Pelosi mandatory injunction could be written than the facts in Hiner.

First, a restrictive covenant of the Pacific Palisades Community subdivision, which covered the defendants' residence, limited all houses to "two stories in height."

Second, all houses in the Community were two stories.

Third, the defendants had the Circuit Court rule in favor of plaintiffs and ordered defendants' offending third story removed.

On appeal, defendants argued the restrictive covenant was ambiguous and therefore unenforceable. I frankly did not believe this argument had merit. For one thing, the original subdivider clearly wanted the neighborhood restricted to two-story houses. And, the 1988 Uniform Building Code unambiguously defined the term "story".

However, the Hawaii Supreme Court concluded the terms "two stories in height" were "ambiguous because it does not establish an enforceable height restriction." Slip op., at 7. The Court pointed out the restrictive covenants failed to define "the maximum 'height' of a 'story'," thereby rendering "the language of the covenant ambiguous." Slip op., at 9. In short, the Supreme Court refused to require the removal of the defendants' third floor.

By contrast, Fong presented the opposite situation, although the facts were not as compelling from the plaintiffs' point of view. The Fong deed clearly had a one-story height restriction. No evidence demonstrated actual knowledge by the current owners of the height restriction, although one defendant recalled her father saying she had to watch the height in the neighborhood, which she took to mean some kind of regulation or law regarding heights.

The Circuit Court rejected plaintiffs' position on the basis of "standing" because of the unique facts of the case. The Hawaii Appellate Court reversed and issued a mandatory injunction. In the interim, Hiner was rendered. On certiorari, the Hawaii Supreme Court in Fong agreed with defendants' three independent arguments for not enforcing the one-story height restriction, one of which included the Hiner rationale on ambiguity.

Coincidentally, one of my partners was involved in another restrictive covenants case in which the lower court granted mandatory relief for our clients, enforcing a covenant on a neighbor's property. However, that decision was also reversed on appeal.

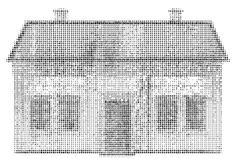
Where does this bring us in the area of restrictive covenant enforcement? The operative word is "unsettled."

It appears to me that Hawai'i courts are very reluctant to enforce restrictive covenants, especially when homeowners are threatened with removal of an offending part of their residence or otherwise with a severe restriction on their use and enjoyment of their properties.

Hiner and Fong raise many more questions than they settle. Certainly, defendants in restrictive covenant cases now have a strong arsenal with which to defend the unrestricted use of their real properties. For plaintiffs, especially community associations desiring to maintain an ambiance created by a common scheme of restrictive covenants, these cases make it much harder to enforce such a scheme. In every case, the defendants will scrutinize their restrictions to argue that it is ambiguous. For, as Hiner made clear, a "[s]ubstantial doubt or ambiguity is resolved against the person seeking its enforcement." Hiner, slip op., at 7 (citation omitted)(emphasis in original).

While the defendants prevailed in both Hiner and Fong, it cannot truly be said that any of the parties in either case actually "won." The families spent a great deal of personal resources, time and emotional energy prosecuting and defending their claims all the way to the Hawaii Supreme Court. Yet these cases were fundamentally not about "money," making settlement all but impossible. The plaintiffs in both cases wanted to preserve an unobstructed makai view plane. On the other hand, the defendants wanted the right to construct a residence of their choice. In the end, all parties - plaintiffs, defendants and neighbors - were embroiled in a dispute, which inevitably led to unresolved acrimony in a community.

Michael A. Lilly is a member of the law firm of Ning, Lilly & Jones. His practice is concentrated in the areas of Estate Planning, Personal Injury and Employment Litigation.



1 Sandstrom pointed out that no question had been raised as to the potential ambiguity of the restriction on appeal. Id., at 496.

DEVELOPMENTS IN THE LAW OF REGULATORY TAKINGS DISCUSSED AT RECENT LAND USE CONFERENCE

The Rocky Mountain Land Use Institute was established in 1992 at the University of Denver College of Law to provide a non-partisan forum for education, debate, and analysis of land issues and policy options relating to land use, growth management, and environmental preservation in the West. In March, the Institute held its ninth annual land use conference. While much of the two-day event focused on broader urban planning issues of combating sprawl and creating mixed-use developments, the conference offered several "break-out" sessions on constitutional limitations to land use regulation and defenses to regulatory taking claims. I was able to attend the conference thanks in large part to a generous grant from the Real Property and Financial Services Section of the Hawaii State Bar Association.

The session on defenses to regulatory taking claims left a particularly strong impression. The panel included a noted scholar in the land use field, Professor Daniel R. Mandelker of Washington University in St. Louis, Missouri. He was joined by Professor Steven J. Eagle of George Mason University and Professor Orlando E. Delogu of the University of Maine School of Law.

Prior to the conference, I understood the U.S. Supreme Court's decision in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), to stand for the basic proposition that regulations that deprive land of all economically beneficial use require compensation under the Takings Clause of the Fifth Amendment. This categorical rule does not apply, however, if the proscribed use does not inhere in title under background principles of state property law or nuisance law.

For example, the property owner's "bundle of rights" never includes the right to use his property in a manner that would injure adjoining property; accordingly, there could be no taking of such a protected property interest. Also, notably, Lucas does not equate the property owner's "bundle of rights" with his "reasonable investment-backed expectations". A regulation that proscribes any economically beneficial use, i.e. a "total" regulatory taking, should be actionable whether or not the property owner had prior notice. Indeed, in Nollan v. California Coastal Commission, Justice Scalia stated that the landowners' property rights "had not been altered merely because they acquired their property well after the Commission had begun to implement its policy." 483 U.S. 825, 833, n.2 (1987).

The Panel challenged this basic understanding of Lucas. Citing a recent decision by the Court of Appeals for the Federal Circuit, Good v. United States, 189 F.3d

1355 (1999), cert. denied 2000 U.S. LEXIS 2387, the Panel characterized Lucas as practically irrelevant. In Good, the Court declared that reasonable investment-backed expectations are an element of every regulatory takings cases, including cases involving a total deprivation of all economically beneficial use. Id. at 1361 (citing Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994)("In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest or to have assumed the risk of any economic loss.").

For his part, the landowner in Good argued that he had reasonable investment-backed expectations of building a residential subdivision on his property, which consisted mostly of wetlands, because he had already received several dredge-and-fill permits at the time he acquired the property. 189 F.3d. at 1361. While conceding that the landowner's position was "not entirely unreasonable," the Court nevertheless held that the landowner did not have a reasonable expectation because of the "regulatory climate that existed when [the landowner] acquired the subject property." Id. (Emphasis added.)

While the Court did not distinguish between a "partial" taking and a "total" taking, it is instructive that the landowner in Good was not able to show that he had been deprived of all economically beneficial use of his property. Specifically, the Endangered Species Act did not require that the property be left in its natural state, and the U.S. government had shown that the property retained value, either for development or for sale of transferable development rights. Id. at 1360.

On these facts, Lucas is readily distinguishable from Good and other partial takings cases that consider the landowner's reasonable investment-backed expectations under the multi-factor balancing test set forth in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

Although the Panel did not fully explore the distinction between total and partial regulatory takings beyond the problem of identifying the relevant parcel or interest (i.e. the denominator issue), Prof. Mandelker discussed the concept of regulatory risk as a means of more pragmatically defining the boundaries of regulation protected from attack under the Takings Clause. Under this theory, a landowner's reasonable investment-backed expectations depend on the risks present at the time in the market, including regulatory uncertainty. Courts should recognize landowner expectations when risks are minimal, but they should refuse to recognize expectations when risks are high. Of course, the problem remains of quantifying regulatory risk, particularly when the prevailing "regulatory climate" is sufficient to defeat landowner expectations.

Nathan Lampard is the third-year law student at the University of Hawaii selected to participate at this annual land use conference. His attendance was funded in part by a RPFSS $500 scholarship. Nate received a B.A. (Honors) degree in History from Queen's University at Kingston, Ontario, Canada. In September, he will join the Honolulu law firm of Case Bigelow & Lombardi as an associate attorney.

MEMBERS ARE WELCOME TO ATTEND

Please feel free to attend our Board of Directors' meetings. The remaining meetings in 2000 are: May 19, June 16, July 21, August 18, September 15, October 20 and November 17. Our Annual Membership Meeting will be held on December 7th at the Plaza Club.

All regularly scheduled Board of Directors' meetings are held in the new offices of the HSBA, now located at 1132 Bishop Street, Suite 906, in the old First Hawaiian Building next door to its former offices in the Union Mall building.

WHAT HAS YOUR BOARD BEEN UP TO?

JANUARY 21, 2000 BOARD MEETING

• ***COMMITTEES***. Chair Jon Pang recommended the formation of several additional standing committees, in addition to the nominating committee provided for in the By-Laws:

• *Seminars Committee:* to assist in the production of section seminars. Max Graham and Charlie Loomis agreed to serve.

• *Legislative Committee:* to identify pending bills in the Legislature that might be of interest to section members. Grace Kido and Lorrin Hirano agreed to serve.

• *Internal Operations Committee:* to deal with communications, membership, and bylaws issues, if any. Rick Kiefer agreed to serve.

• *Ad Hoc Treasury Surplus Committee* consisting of Bill Deeley, David Callies, and Rick Kiefer, that was formed at the November 1999 Board meeting for the purpose of proposing to the board ways to use the section's treasury surplus that is in keeping with the goals of the section.

• ***SEMINARS***. Co-Chair Lorrin Hirano reported that Prof. Susan French's seminar on the soon to be released *Restatement of the Law of Property, Third, Servitudes* was scheduled for March 24, 2000 at HEI. Registration would be from 7:30 to 8:30, with the seminar scheduled to run from 8:30 to 10:30.

• Jon Pang reported that a draft report by the RPFSS Ad Hoc Opinion Letter Seminar Committee has been prepared and a seminar on the new opinion letter is tentatively expected some time in May.

• The conveyancing seminar is tentatively scheduled for the end of April.

• Jon Pang also reported that he had contacted Deb Chun and Bill Deeley about doing their Annual Legislative Update and Annual Litigation Update seminars in July and October, respectively.

• ***NEWSLETTER***. Chair-elect Trudy Burns Stone reported that the January newsletter would be issued shortly. Board members who know of pending cases, legislation, or other news and issues that might be of interest to section members were asked to call or e-mail Trudy Stone with that information for publication in the newsletter.

• ***TREASURER'S REPORT.*** Treasurer Gail Ayabe submitted the Treasurer's Report for the month ending November 30, 1999 showing a balance of $6,481.16, and the Treasurer's Report for the month ending December 31, 1999 showing a balance of $14,106.16, reflecting receipt of annual dues from over 360 section members. Both Treasurer's Reports were approved.

• ***NEW BUSINESS***. Past Chair David Callies announced that the 9th Annual Land Use Conference would be held at Denver, Colorado on March 9th and 10th.

• The Board discussed the need to emphasize use of the Section's website.

• Lorrin Hirano reported on a bill that would amend Chapter 501 to permit a personal representative to record conveyance documents for the sale of Land Court property without submitting a certified copy of a court order approving the sale, so long as the personal representative submits certified copies of the letters of appointment and an affidavit attesting that the decedent's will does not require a confirmation of the transaction and that no devisee or heir has demanded the confirmation. Vice Chair Trudy Stone asked about whether this revised procedure would provide adequate notice to heirs.

FEBRUARY 18, 2000 BOARD MEETING

• ***COMMITTEES***. Secretary Rick Kiefer reported on the status of the Internal Affairs Committee project to collect e-mail addresses for all section members to be used to disseminate useful and timely information by the Board of Directors.

• Chair Jon Pang reported that Director Bill Byrns had agreed to serve on the Seminars Committee.

• Directors Grace Kido and Lorrin Hirano distributed the results of the Legislative Committee's review of pending bills affecting real property and financial services, which Nancy Grekin agreed to integrate

with the bills already posted at the Real Property and Financial Services Section website *(http://www.hsba.org/sections/rpfs)*.

• Secretary Rick Kiefer, on behalf of the Ad Hoc Treasury Surplus Committee, proposed that the Board issue a one-time, $500 scholarship to partially underwrite the attendance by a UH Law School student at the 9th Annual Land Use Conference to be held in Denver, Colorado on March 9th and 10th,. The Board approved the proposal, and asked that the law student selected to go to submit a written report of the conference to be published in the April Newsletter.

• ***SEMINARS***. Co-Chair Gail Ayabe reported on Prof. Susan French's seminar on the soon to be released *Restatement of the Law of Property, Third, Servitudes* that has been scheduled for March 24, 2000 at the HEI Conference Room. In light of the State appellate courts' recent cases in the servitudes area, the Board agreed that Chair Jon Pang would invite the justices of the Hawaii Supreme Court and the Intermediate Court of Appeals to attend this seminar as guests of the Section.

• Chair Jon Pang reported that the RPFSS Ad Hoc Opinion Letter Seminar Committee's new form of opinion letter is expected to be completed by the end of March.

• Past Chair Nancy Grekin reported that Gino Gabrio would be heading the conveyancing seminar this year.

• HSBA Executive Director Coralie Matayoshi reported that this year's Bar Convention would feature half-day seminars. Board members were asked to suggest topics for seminars at the Bar Convention to the Seminar Committee. Coralie Matayoshi and the Board discussed ways to improve coordination between the HSBA dn the RPFSS regarding the conduct and marketing of seminars. Coralie Matayoshi reported on the upcoming Bankruptcy seminar, and the Real Property and Financial Services Section Board agreed to co-sponsor the program with the Bankruptcy Section.

• ***NEWSLETTER***. Chair-Elect Trudy Burns Stone reported that the January newsletter was issued. Board members who know of pending cases, legislation, or other news and issues that might be of interest to section members were asked to call or e-mail Trudy Stone with that information for publication in the next newsletter. Topics and authors for the April newsletter were suggested.

• ***TREASURER'S REPORT***. Treasurer Gail Ayabe submitted the Treasurer's Report for the month ending December 31, 1999 showing a balance of $14,056.16, and the Treasurer's Report for the month ending January 31, 2000 showing a balance of $15,676.96. Both Treasurer's Reports were approved.

• ***NEW BUSINESS***. Cynthia Yee reported on three bills pending in the legislature that would affect condominiums:

• Senate Bill 3160 would extend the period during which condominium developers cannot offer at least fifty percent (50%) of the residential apartments in a condominium project to any buyers other than prospective Owner-Occupants from thirty (30) days to six (6) months;

• Senate Bill 2986 would amend Chapter 514A H.R.S. to permit the creation of only residential condominiums; and

• House Bill 2222 would appropriate funds for remodification of Chapter 514A.

Cynthia Yee also reported that the Real Estate Commission was no longer requiring developers of condominiums in the City & County of Honolulu to submit, with a public report application, evidence that the Notice of Intention and Questionnaire, condominium map, and draft public report for the project had been submitted to the DPP (formerly the DLU).

MARCH 17, 2000 BOARD MEETING

• ***COMMITTEES***

• *Seminars Committee*. Charlie Loomis and Coralie Matoyoshi discussed the seminar format for the December 2000 convention seminar. The preference of the HSBA appears to be for a half-day format. Several ideas include doing a program on UCC Article 9 to be chaired by a panel led by Mark Hazlett. The board deferred the question of whether the section should do one or two half-day sessions.

• *Legislative Committee*. Lorrin Hirano discussed a proposed limiting change in the definition of "Apartment" under Chapter 514-A, H.R.S. (A follow-up fax from Lorrin clarified the proposal.)

• Ad Hoc Treasury Surplus Committee. Bill Deeley reported that his *committee* expected to finalize its proposal shortly. David Callies reported that U.H. law student Nate Lamphard had attended the Rocky Mountain Land Use conference on the $500 scholarship authorized by the Board at our last meeting.

• **SEMINARS.**

• *Restatement of the Law of Property, Third, Servitudes Seminar*. HSBA Executive Director Coralie Matayoshi reported that 152 people have signed up so far for the seminar. In response to the information that the Chief Justice was unable to accept the Board's invitation [*Ed. Note, extended to all of the appellate justices and judges*] to attend Professor French's lecture as our guest, but that he had asked for a copy of the videotape of the program, Coralie said that HSBA seminars were typically only videotaped for neighbor island programs, and that the cost of video taping was $85 an hour. The Board overruled the HSBA restriction and, upon the Board's representation to the HSBA that at least four (4) video tapes of the program would be purchased, Coralie agreed to arrange for videotaping of the seminar. The Board agreed to provide one (1) copy to the Chief Justice pursuant to his request. Professor Callies invited all of the board members to join him for no-host dinner with Professor French and her husband on March 24th at the Outrigger Canoe Club at 6:00 p.m. Co-Chair Lorrin Hirano reported that the Introduction to the *Restatement* was being reprinted with the permission of the American law Institute, and would be dissemination at the seminar.

• *Opinion Letter Seminar*. Chair Jon Pang reported that the next committee meeting was scheduled for the week of March 20th. Coralie informed the board that the HSBA Business Law Section was planning to bring in a speaker from the mainland to speak about the ABA Accord with funds from its section's treasury and that the Business Law Section was asking the RPFSS to co-sponsor the program. The Board agreed that co-sponsoring a mainland speaker would be a good idea, and that the committee should discuss the timing of its preparation of final work product. Trevor A. Brown is the reporter for the opinion letter seminar, which is currently scheduled to be held in May or June 2000.

• *Conveyancing Seminar*. Coralie Matayoshi reported that Gino Gabrio informed her that not all the authors had yet come through with their articles for the conveyance manual, but that they were still shooting for a June or July seminar date.

• *Annual Bar Convention Seminar(s)*. Grace Kido suggested possibly using the conveyancing seminar for a December bar convention seminar. Charlie Loomis offered to speak to Gino Gabrio about this possibility.

• **NEWSLETTER.** Chair-elect Trudy Burns Stone discussed the impact of the Supreme Court's decision in Fong vs. Hashimoto (February 1, 2000, No. 19424). The board agreed that the upcoming newsletter would be on the effect of the recent Fong and Hiner decisions on local practice. Trudy Stone also reported that Nancy Grekin has offered to write a quarterly newsletter column called "The Webmistress Speaks". She will include an announcement of the sale of videos from the March 24th Seminar, together with an article from the U.H. law student whose trip to the recent Denver Land Use conference was funded by a RPFSS scholarship.

• **TREASURER'S REPORT.** Treasurer Gail Ayabe was absent. Chair Jon Pang reported that she had forwarded the treasurer's reports for January 31st February 29th, 2000. Both Treasurer's report were moved, seconded and approved.

• **NEW BUSINESS.**

• Jon Pang reported on the bankruptcy law update seminar scheduled for April 19th from 9:00 a.m. to 12 noon at the HEI Center that the RPFSS is co-sponsoring with the bankruptcy section.

• Jon Pang also reported on a Hawaii Tax Institute Seminar at the Hawaii Regent from October 30th to November 3rd.

THE WEBMISTRESS SPEAKS . . .

EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT VIRUSES (BUT DIDN'T KNOW YOU SHOULD ASK)

If you are communicating by e-mail, receiving attachments, and especially if you are running Microsoft Word, you should understand what viruses are, and how to protect your computer against them.

What is a virus? A computer virus is malicious, executable code which runs when you boot your computer, load a program, or open a document. When the code runs, it can be as harmless as a silly annoying message flashing on your screen or as dangerous as code which tells your computer to delete the contents of your entire hard drive.

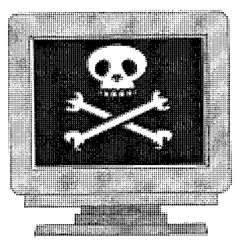
At this time last year the infamous "Melissa" virus propagated. That virus was embedded in a Microsoft Word document attached to e-mail, and used the Outlook address book to send infected attachments to everyone in an infected user's address book. Because the virus operated by sending infected e-mails to others, it spread phenomenally fast, and brought down computer systems at huge corporations. A very recent FBI case reported a self-replicating script that would erase hard drives and automatically dial 911 emergency services. Both of these viruses operated because a recipient opened an infected document attached to an e-mail.

How do viruses work? Virus code must execute in order to reproduce itself or to work the damage it is written to produce and that means the user must load a program or open a document to start the infection process. The most common viruses lawyers encounter are Microsoft Word macro viruses, which use the powerful Microsoft Visual Basic programming language to create a macro which is embedded in a document and which executes when the document containing the virus is opened. Microsoft Word viruses often infect the normal.dot template of the recipient. When they do, every document based on the default Word template will be infected until the virus is removed.

Some viruses are designed to infect the "boot sector" of your computer, an area of your hard drive that contains the commands necessary to start th e computer. These viruses will execute everytime you boot your computer and will continue to infect documents or inflict repeated damage.

How do you protect against viruses? There are numerous virus-checking programs available to run constantly in the background of your computer that will check for infected documents. The two most popular programs are Norton AntiVirus and McAfee VirusScan. Both programs install so that they load at boot, first checking the boot sector for infection, then running in the background to check incoming documents opened from e-mails or downloaded from the Internet. If an incoming document is infected, the virus checker will automatically appear on your screen informing you that the document is infected and giving you the option of cleaning the document or deleting it.

But it isn't enough to just buy and install these programs. Viruses are being created and



spread daily and the virus-checking programs have to be constantly updated to recognize newly created viruses. Most virus-checkers post updated virus definitions to their Web sites that can be downloaded for free. The updated virus definitions change as frequently as once a week. Once downloaded, the updated definition files will typically install themselves and politely ask you to reboot your computer in order to make the updated definitions available to the program.

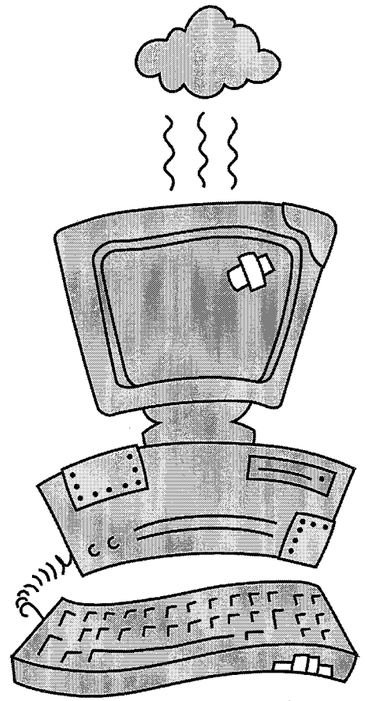
Rules of the Road. The following tips and tricks will help you protect against viruses:

- Can't say it enough times: Run a virus checking program and keep your virus definitions constantly up to date.

- If you run Microsoft Word, set it to warn you if you attempt to open a document with a macro. This is a default Word setting but check it to be sure it is set that way by clicking on the Tools/Options/General tab to make sure the "☑Macro virus protection" box is checked...

- If you attempt to open a Word document with a virus and you have set Word to warn you that a virus is present, Word will ask you is you want to disable macros. Say yes! Don't assume that because the document came from a reliable source that it is not infected with a macro virus. This writer has been twice infected, first by a document from a large prominent Honolulu real estate company, and again by a document from the corporate headquarters of Xerox Corporation. The first infection was passed to a large client and infected much of its wide area network, (this is not the way to impress clients, folks).

- Don't accept attachments from unknown sources or from friends who are novice computer users and probably not running virus checkers or keeping them up to date. This writer once received an infected Internet greeting card from a well-meaning relative in South America. Virus are everywhere on the Internet and often found in shareware or other free stuff (which becomes expensive stuff if it brings down your network!)



- If you are not expected a document from someone, don't open an attachment without verify that they sent it to you. "Melissa" spread like wildfire because the infected messages appeared to be from a known person.

- Be careful out there!

Nancy N. Grekin, a/k/a The "Webmistress", is a member of Gerson, Grekin & Wynhoff. She is a RPFSS Past Chair, and her practice areas include real estate law, commercial transaction and like-kind exchanges.

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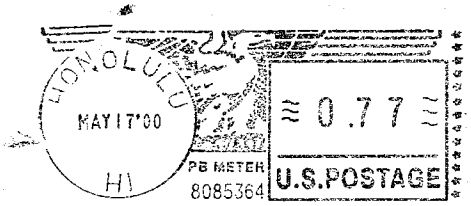

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CALENDAR OF EVENTS

May 19	Board of Directors' Meeting 1132 Bishop Street, #906 12:00 Noon
June 16	Board of Directors' Meeting 1132 Bishop Street, #906 12:00 Noon
July 13	RPFSS Legislative Update HEI Training Center 1001 Bishop Street Pacific Tower, 8th Floor 11:30 a.m. to 1:30 p.m.
July 21	Board of Directors' Meeting 1132 Bishop Street, #906 12:00 Noon
Comments?	Please send them to the newsletter chair by e-mail: *tstone@ckdbw.com*

And check our website:
http://www.hsba.org/sections/rpfs