

KA NU HOU

The Newsletter of the Real Property & Financial Services Section of the Hawaii State Bar Association

From the Chair

May 2002

Aloha, and welcome to another year of *Ka Nu Hou*, the newsletter of the Real Property and Financial Services Section of the Hawaii State Bar Association.

2002 will be a busy and exciting year for the Section. With the legislature currently in session, there are a number of bills that could affect Section members and their clients, involving everything from accreted lands to zoning. Many of those bills are listed in this issue of the newsletter. To see these and other bills, and to check the status of the bills, check the Legislature page of the Section's website at www.hsba.org/sections/rpfs/. And if you haven't used the website lately, I strongly encourage you to check out the site's new look and many links to useful resources.

This year the Section will also continue its efforts to put on seminars that are timely, informative and useful to Section members. We will, of course, be putting on our annual Legislation and Litigation Update Seminars. In addition, we are tentatively planning a seminar on Current Issues in Drafting and Enforcing Planned Community Documents. Finally, we also plan to co-sponsor a seminar with the Natural Resources Section on Critical Habitat Designations under the Endangered Species Act and other environmental law issues that affect land use.

Finally, many Board and Section members have been working with the Real Estate Commission on the pending recodification of the Hawaii Condominium Property Act. Legislation to implement the recodification will be introduced in the 2003 session, which means that the proposed recodification must, as a practical matter, be completed by this fall.

If you have suggestions for the recodification, please feel free to email them to me at: Kiefer@Carlsmith.com.

Rick Kiefer
Carlsmith Ball LLP
RKiefer@Carlsmith.com

The Officers and the Board of the Real Property and Financial Services Section are elected by the Section members at the annual meeting held in December. For 2002, they are:

Chair-Rick Kiefer
Carlsmith Ball

Chair-Elect/Vice Chair-Lorrian Hirano
Title Guaranty of Hawaii, Inc.

Secretary-Janel M. N. Yoshimoto
Oshima Chun Fong & Chung

Treasurer-Gail O. Ayabe
Goodsill Anderson Quinn & Stifel

Directors:
Andrew R. Bunn,
Chun Kerr Dodd Beaman & Wong

William C. Byrns,
Rudy & Byrns

Max W. J. Graham, Jr.,
Belles Graham Proudfoot & Wilson

Nancy N. Grekin
Goodsill Anderson Quinn & Stifel

Grace N. Kido
Cades Schutte Fleming & Wright

Peter Kubota
Attorney at Law

(Continued on page 2)

From the Chair, cont...

Directors, cont:

Kenneth M. Marcus
Starn O'Toole Marcus & Fisher

Robert E. Rowland
Attorney at Law

Sylvester V. Quitiquit
Brooks Tom Porter & Quitiquit

Livingston S. M. Wong, Jr.
Kamehameha Schools/Bishop Estate

Thomas M. Rosenberg,
Attorney at Law

Kim Wong Yoshimoto
Imanaka Kudo & Fujimoto

New Board Member

This month's feature new Board member is Andrew R. Bunn. This is Mr. Bunn's first term as Director of the Section. He is a member of CHUN, KERR, DODD, BEAMAN & WONG, a limited liability law company, in Honolulu, Hawaii. Andy's practice is concentrated in the areas of real estate and business law, with an emphasis on commercial leasing and real estate development. He received his Bachelor of Arts from Williams College in 1990 and his Juris Doctor from the William S. Richardson School of Law at the University of Hawaii in 1994. While in law school, Andy was a member of the Jessup International Law Moot Court Team, which was United States Champion and World Champion Runner-up in 1993. Prior to law school, he worked for the German

Marshall Fund of the United States in Washington D.C., a foundation devoted to improving U.S.-European relations and public policy. Andy's professional memberships include the Hawaii State Bar Association, the American Bar Association, the International Council of Shopping Centers and the Association of Conference Attorneys of the United Church of Christ (to which he serves as secretary). In addition to practicing law, Andy is a director and a past president of the Honolulu Chamber Music Series. On a personal note, Andy is an avid tennis player. His wife, Miki, is a doctor in the University of Hawaii OB/GYN residency program and they have two children, ages 1 and 5.

Legislative Update

With the 2002 Legislative Session drawing to a close, the Board has been watching several bills of particular interest to Section members. (We apologize in advance if your favorite bill is not included in this list, or if the synopsis or report on status (drawn mostly verbatim from the Legislature website as of May 2, 2002) is not complete.) The following is a summary of various bills of interest, and their status as of May 2, 2002:

House Bill (HB) 1825/(companion bill is Senate Bill (SB) 2291): Relating to the Revised Uniform

Commercial Code Article 9; amends definition of "agricultural lien" to include a security interest in farm products. Adds a sale by an individual of an account that is a right to payment of lottery or other chance winnings as a security interest perfected upon attachment. *Status: Approved by the Governor as Act 27.*

HB2550/SB2808: Relating to Appurtenant Rights Under the Water Code; authorizes the Commission on Water Resources Management to determine

(Continued on page 3)

Legislative Update, cont...

(Continued from page 2)

appurtenant water rights under the State Water Code. *Status: Approved by the Governor as Act 35.*

SB2730/HB2472 Relating to Mergers; expands and clarifies business merger laws. *Status: Approved by the Governor as Act 41.*

HB2266 (similar to SB2008) Relating to Accreted Lands; these measures would have defined accreted lands, and would have included accreted lands in the definition of public lands; it also would have required that accreted lands be state lands except that a private property owner would have been able to file an accretion claim to regain title to the owner's eroded land that has been restored by accretion. *Status: Vetoed by the Governor, Gov. Msg. No. 361.*

HB1713/SB2470 Relating to Condominium Property Regimes; requires that an apartment owner who has requested information from a condominium association be provided 10 days prior written notice of the intent to charge the owner the cost of providing the information, except where costs are assessed to provide information on delinquent assessments or in connection with enforcement proceedings. *Status: passed and enrolled to the Governor..*

HB1715/SB2471 Relating to Condominium Property Regimes; extends from 120 to 365 days the time period for obtaining the required percentage of apartment owner votes to approve condominium bylaw amendments, for both apartment association boards and volunteer apartment owners' committees. *Status: passed and enrolled to the Governor.*

HB1716/SB2300 Relating to Condominium Property Regimes; requires both the apartment owner and the board of directors to pay for their own costs in mediating a dispute between them, unless they both agree that one party will pay all or a specified portion of the mediation costs. *Status: passed and enrolled to the Governor.*

SB2341 Relating to Condominium Property Regimes;

requires that condominium property regimes located in special flood hazard areas be covered under a policy of flood insurance that complies with the National Flood Insurance Program and the Federal Insurance Administration. *Status: Approved by the Governor as Act 17.*

SB2289 Relating to Condominium Property Regimes; gives a board of directors of a condominium association the authority to install telecommunications equipment in project common areas to account for obsolescence or provide an equivalent function by a different means. *Status: passed and enrolled to the Governor.*

HB2413 Relating to Condominium Property Regimes; allows the owners association of a condominium partially converted to fee simple to acquire the remaining fee interest in a bulk sale if 75% of the remaining lessees approve a declaration amendment authorizing the sale. *Status: passed and enrolled to the Governor.*

SB2975 Relating to Mechanic's Liens; this measure was designed to extend the time for filing an application for a mechanic's and material man's lien from 45 to 90 days. *Status: deferred.*

SB2242 Relating to Public Land Leases; requires that the length of any lease extension resulting from economic hardship shall not exceed five years. Authorizes BLNR to extend or modify a lease affected by eminent domain-related proceedings, provided it determines that the lessee will not be adequately compensated pursuant to the lease provisions. *Status: passed and enrolled to the Governor.*

HB1749/SB2584 Relating to Adult Residential Care Homes; requires the Department of Health to disclose to adult residential care home operators the prior criminal history of certain prospective residents under certain circumstances; provides DOH with the discretion to allow more nursing facility residents to

(Continued on page 4)

Legislative Update, cont...

(Continued from page 3)

be allowed to live at adult residential care homes. *Status: passed Final Reading in House and Senate.*

HB2307 Relating to Electronic Transactions; permits electronic seals to be used if the law requires a signature or record to be notarized, certified, acknowledged, verified, or made under oath or seal of the person authorized to perform those acts. Facilitates the delivery of certified copies of documents by electronic means, rather than by mail. *Status: passed and enrolled to the Governor.*

HB2443/SB2701 Relating to the Prevention of the Filing of Frivolous Financing Statements; authorizes the registrar of the Bureau of Conveyances to verify the validity of financing statement filings and to issue a notice of unauthorized filing. *Status: passed and enrolled to the Governor.*

HB2553/SB2811 Relating to the Bureau of Conveyances; increases the amount of funding received by the Bureau of Conveyances from fees in order to continue modernization efforts and ensure adequate staffing. *Status: passed and enrolled to the Governor.*

SB2765/HB2507 Relating to Registration of Divorces and Annulments; this measure would have repealed the registration of divorces and annulments by the Department of Health. The rationale was to avoid the expense and duplication of record-keeping between the Department of Health and the Judiciary. *Status: Vetoed by the Governor, Gov. Msg. No. 362.*

SB2693/HB2435 Relating to Child Support Enforcement; deletes reference to public assistance debt and allows orders or judgments issued by another state to be recorded with the Bureau of Conveyances. *Status: enrolled to Governor, May 2, 2002.*

SB2728/HB2470 Relating to Escrow Depositories; makes a housekeeping amendment to provision relating to the voluntary termination of an escrow depository by eliminating redundancy. *Status:*

Approved by Governor as Act 21.

SB2732/HB2474 Relating to Business Registration; updates and clarifies business registration requirements. This measure makes substantive changes to and supplements existing law. Among other things, it also repeals certain provisions in the new Hawaii Non-profit Corporation Act (Act 105, SLH 2001) allowing member resignation. *Status: passed and enrolled to the Governor.*

SB2724/HB2466 Relating to Real Estate; repeals Real Estate Commission's arbitration authority in housing cooperative disputes, clarifies authority and duties of principal broker and broker in charge, and clarifies requirements for broker examination and license renewal. Repeals duplicative requirements for condominium managing agents who are licensed brokers. *Status: passed and enrolled to the Governor.*

SB2898 Relating to Cave Protection; protects caves and the unique cultural and natural resources inside them. *Status: passed and enrolled to the Governor.*

HB1798 Relating to Land Use; this measure would have increased the maximum acreage for county-processed land use district boundary amendments and special permit requests from 15 acres to 75 acres. *Status: deferred by House Committee on Water and Land Use.*

HB1778 Relating to Financial Services Loan Companies; replaces article 9 of the code of financial institutions relating to financial services loan companies with two new articles governing depository FSLCs and nondepository FSLCs, respectively. *Status: referred to conference committee.*

SB2698/HB2440 Relating to Chapter 846E, Hawaii Revised Statutes; makes statutory revisions to comply with the Hawaii Supreme Court's decision in State of Hawaii v. Eto Bani; specifically, allows release of information about educational institutions attended by or employing sex offender; requires State to petition

(Continued on page 5)

Legislative Update, cont...

(Continued from page 2)

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Recent Developments

On April 17, 2002, the United States Supreme Court decided a case which has an immediate impact on married individuals with tax liens. The case is entitled *United States v. Craft*, Slip Op. No. 00-1831 (April 17, 2002).

Sandra Craft and her husband owned property in Grand Rapids, Michigan, as tenants by the entirety. Sandra's husband failed to pay federal income taxes and the Internal Revenue Service filed a notice of tax lien in Michigan. After the notice was filed, the couple jointly executed and recorded a quitclaim deed purporting to transfer the husband's interest in the property to Sandra for one dollar. Sandra later attempted to sell the property and the IRS asserted both a lien on the property and a claim that the transfer to Sandra was a fraudulent conveyance; for the purposes of the litigation, the IRS agreed to release the lien to allow the property to be sold with one-half of the proceeds being held pending a final court order.

The District Court for the western district of Michigan initially ruled in favor of the IRS on summary judgment. The Sixth Circuit, however, reversed,

holding that the tax lien did not attach to the property since under Michigan law, the husband had no separate interest in property held as tenants by the entirety. On remand, the District Court followed the Court of Appeals ruling, but held that the husband's use of non-exempt money to pay the mortgage on the property was a fraudulent act under state law, and consequently awarded the IRS a share of the proceeds from the sale. Both parties appealed again, and the Sixth Circuit affirmed. The IRS then appealed to the U.S. Supreme Court on the denial of its claim to a lien on the husband's "separate interest" in the couple's property. The Supreme Court granted certiorari, and in an opinion written by Justice O'Connor, reversed.

The Supreme Court began its analysis by citing to the common idiom which describes property rights as a "bundle of sticks." Then, the Court said, although state law determines what sticks are in a person's bundle, federal law determines whether those sticks qualify as "property" for the purposes of the federal tax lien statute, 26 U.S.C. §6321. After reviewing the common law of concurrent ownership, the Court held that according to Michigan law, respondent's husband had rights in the entireties property, among them: the

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NEXT MEETING:

May 17, 2002
12 Noon
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1001 Bishop Street

Questions/Comments?
E-mail Lorrin Hirano at lhirano@tghawaii.com

Recent Developments, cont...

(Continued from page 3)

right to use the property, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally. Slip op. at 8. These rights, the Court concluded, constituted "property" or "rights to property" to which the federal tax lien attached. The Court declined to attempt to value these rights, however, and remanded the issue as to proper valuation to the Sixth Circuit Court of Appeals.

In its decision, the Court specifically stated that "[w]e recognize that Michigan makes a different choice with respect to state law creditors: '[L]and held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either husband or wife alone.' Sanford v. Bertrau, 204 Mich. 244, 247, 169 N.W. 880, 881 (1918). But that by no means dictates our choice." Slip op. at 14.

The *Craft* decision changes what had been the

rule applied in the U. S. District Court for the District of Hawaii. Previously, citing Sawada v. Endo, 57 Haw. 608, 561 P.2d 1291 (1977) and In Re Estate of David Au, 59 Haw. 474, 583 P.2d 966 (1978), the Hawaii federal district court had ruled that under Hawaii law an IRS lien against one spouse does not attach to property held as tenants by the entirety. Theo. H. Davies & Co., Ltd. v. Long & Melone Escrow, Ltd. 876 F. Supp. 230 (D. Hawaii 1995).

Land Court has Moved!

On April 26, 2002, the Land & Tax Appeal Court moved its offices from the former Queen Street location to the first floor of Kaahumanu Hale. Their new address is at 777 Punchbowl Street, First Floor, Kaahumanu Hale, Honolulu, Hawaii 96813-5018. The new offices are located in the Diamond Head-makai corner, across the hall from the Circuit Court filing counters.