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## Hawaii Construction Law Blog



By Anna H. Oshiro

**M**onths ago when my partners Mark Murakami and Robert Thomas invited me to a lunch to discuss the prospect of starting a blog on Hawaii construction law, I confess I was initially more interested in the lunch invitation than the prospect of “blogging.” However, as my partners were quick to point out, the blog should practically write itself; every few months I contribute an article about new, interesting construction cases to the ABA Forum on the Construction Industry’s quarterly publication, and because I already keep up with construction law in order to make that contribution, it would be a simple matter to share short blurbs online about interesting cases that may or may not make it into the quarterly case notes. As my co-blogger Christi-Anne Kudo Chock and I started gathering cases that appeared “blog worthy,” the scope of the blog naturally extended to posts about Hawaii’s construction industry. Legal work relating to construction makes up a big part of Damon Key’s practice, and blogging represents a very useful way to keep up with both the law and Hawaii’s construction industry as a whole.

Today, everything from new legislation to insurance coverage for construction defects, to bid protests, is fair game for legal note and discussion, but so also are posts about new construction projects that may be coming down the pike, cases outside of construction law that might affect the industry, and of course, anything related to the potentially biggest and longest running construction project for Hawaii’s foreseeable future -- rail. The aim of the Hawaii construction law blog is to provide timely news and information relative to Hawaii’s construction industry, to keep abreast of laws and cases that may affect the industry, and to discuss construction law cases from other jurisdictions. Everything relating to construction law, and Hawaii’s construction industry, is fair game for mention and, when time permits, more in depth discussion. We have also tried to make the site a legal resource that includes links to online resources for contractors seeking to do business in Hawaii and attempting to navigate their way through the applicable laws and rules regulating their trade.

Please stop by [www.hawaiiconstructionlaw.com](http://www.hawaiiconstructionlaw.com), check it out, and if you see something in the news that looks interesting and hasn’t made its way to the site, feel free to contribute a comment or a post.

**For more information on this article, please call Anna at 531-8031 ext 601, email her at [aho@hawaiiattorney.com](mailto:aho@hawaiiattorney.com), or scan the code with your smartphone.**



### Inside this Issue:

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# Real Estate and Construction Practice Group

**T**ogether with tourism, real estate and construction are the historical pillars of Hawaii's economy. It is therefore no accident that Damon Key's law practice has been shaped by the needs of these industries and the firm's clients working in them. For 49 years, Damon Key has maintained an active and evolving real estate, land use, and construction practice.



By Anna H. Oshiro

Starting in the 1960's, the firm's real estate and construction attorneys worked on real estate transactions, and complicated leases. Through the work of one of the firm's earliest partners, Charlie Key, Damon Key was instrumental in completing one of the island's first single family complex condominiums, a legal development that forever changed and expanded potential residential development in the islands. Following the island's construction booms of the 1970's and the Japanese-led real estate and construction '80s, Damon Key's litigators worked on some of the largest real estate and construction defect claims in the State, achieving record settlements and establishing new case law and rules regarding bid protests, Miller Act litigation, licensing, and payment claims. Today, the firm's construction practice includes everything from reviewing contracts to litigating multi-million dollar condominium and commercial building defect and delay claims, to representing insureds and insurers in construction-related coverage claims.

Our construction and real estate practice has a symbiotic relationship with the firm's immigration practice group, which has helped companies bring in and keep their skilled workers, and has assisted developers and entrepreneurs seeking to start new businesses and lives in the islands.

Another key element of the firm's real estate and construction law practice is Damon Key's land use practice group. Rather than positioning itself as a quasi-political operative working behind the scenes, the firm serves as the champion of clients whose prior efforts have failed. When the State seeks to claim or condemn private property for a claimed public use that is questionable and challenged, Damon Key has stepped in to protect its clients' interests. When a client's rights to create, use, and monitor private waterways inherent in their private construction were challenged, they called Damon Key. Land use cases are complicated, and case law governing these cases' resolution is constantly evolving. As such, the firm's fights on behalf of its clients have spanned all the way from the State land use board to Hawaii's appellate courts, to the United States Supreme Court, where the firm prevailed in a landmark water rights decision. While the RECON group prides itself on its practical and pragmatic approach to its clients' needs, this team does not shy away from finding new solutions, from crafting legal ways to develop residential lots, to working through the cutting edge of the land use laws. In this way, over the course of the firm's 49 years of practice in real estate, construction, and land use, the RECON group has actually helped to shape the island's landscape.



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# FITs and Starts: Recent Developments in Renewable Energy Projects



By Mark M. Murakami

**R**enewable energy projects can take advantage of the three tiers of the Public Utilities Commission's Feed-In-Tariff, or FIT, program. Generally speaking, the FIT is a standardized program that circumvents the need for power developers to enter into a bilateral negotiated Power Purchase Agreement (PPA) with HECO. The FIT was seen as a way to streamline the development of renewable energy projects. Per HECO's promotional materials, FIT is "designed to encourage the addition of more renewable energy projects in Hawaii." HECO published set rates and standardized contracts so developers could project the revenue stream from their project and benefit from an accelerated project development timeframe. FIT applies to solar, hydro and wind projects.

Since solar projects are more common than the others, I will provide the specifics for those projects. Fit Tier 1 is for projects that generate 0-20 kW on all islands. Tier 2 is for projects that generate 20 kW to 500 kW on Oahu, less for Maui, Hawaii, Lanai and Molokai. Tier 3 is for projects that generate from 500 kW and up to 5 MW on Oahu, and up to 2.72 MW for Maui and Hawaii. Projects above 5 MW are not eligible for the FIT program and must be negotiated using a PPA.

The payment rates depend on the type of renewable energy source. For Tier 1 photovoltaic projects, HECO will pay 21.8 ¢ per kWh. For Tier 2 photovoltaic projects, HECO will pay 18.9 ¢ per kWh. And, for Tier 3 projects, HECO will pay 19.7 ¢ per kWh. If the power seller opts to forego Hawaii's state renewable energy technology income tax credits and agrees to a lesser tax credit, it can obtain higher rates from the sale of energy to HECO.

Alas, HECO's FIT project set a maximum FIT capacity for Oahu at 60 MW. The queue for FIT 3 projects opened up late last year but was very quickly filled to capacity. If a project made it into the queue or if the capacity opens up, the next hurdles are engineering based. HECO will

determine whether it will require an Interconnection Requirements Study. Very generally speaking, these studies are used to determine if HECO has the requisite equipment and backup capacity in the grid to tolerate a fall-off in energy production (i.e. cloud passing over the solar panels). At some point, batteries are expected to become part of renewable energy systems to provide the backup now provided by fossil fuel generated electricity. As batteries become more advanced, HECO should allow greater penetration of renewable projects into the grid.

In addition to the FIT program, many residential photovoltaic system owners are in the Net Energy Metering (NEM) program. To the extent there is capacity, owners on NEM can opt to change to FIT. The primary difference between FIT and NEM is that FIT developers obtain cash for the energy they sell to HECO while Net-Energy-Metering provides credits on future electricity bills that must be redeemed within 12 months.

Renewable energy projects require understanding of real estate, land use, public utility law and contract law. Our Renewable Energy Practice Group is assisting several landowners with renewable energy projects.

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Mark



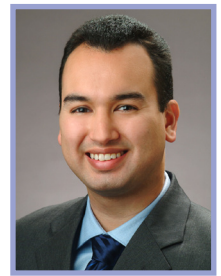
Chris



# When Can An Unlicensed Contractor Be Paid? The Year In Review At The Intermediate Court of Appeals



Gregory W. Kugle



Matthew T. Evans

**H**awaii has strong laws meant to deter unlicensed contractors from performing work in the State. In the words of the Hawaii Supreme Court, these tough laws frequently “produce harsh results” in furtherance of the strong public policy requiring that contractors in Hawaii apply for and receive licenses. Although unlicensed contractors often try to evade these laws, in a trio of recent decisions, the Intermediate Court of Appeals has reaffirmed that these laws prohibit unlicensed contractors from recovering payment for work they perform, while acknowledging some possible limitations.

Two primary laws implement the prohibition on payment for unlicensed contracting. The failure to obtain a contractor’s license “shall prevent such person from recovering for work done, or materials or supplies furnished, or both on a contract or on the basis of the reasonable value thereof, in a civil action....” Haw. Rev. Stat. § 444-22. Similarly, an unlicensed contractor cannot obtain a mechanics’ lien on residential property. Haw. Rev. Stat. § 507-49. For decades, Hawaii’s courts have interpreted these laws to bar a lawsuit by an unlicensed contractor seeking to recover for work performed.

In *Wagner v. World Botanical Garden*, decided on December 23, 2011, the Intermediate Court of Appeals reaffirmed that an independent contractor who engages in services covered by the contractor licensing law, Chapter 444, cannot recover payment for its services. Mr. Wagner was a director and founder of the botanical garden, and sued to recover sums allegedly owed, including for his services in improving the land and creating the gardens. The Court reversed the lower court’s summary judgment in favor of the defendant, finding there were disputed questions of fact. To prevail, the defendant must demonstrate that the services provided by the contractor required a license that it did not have.

However, in two recent unreported decisions, the Intermediate Court of Appeals declined to reverse cases in which unlicensed contractors sought recovery. On February 24, 2011, in *Okamura v. Williams*, the Court

held that the trial court did not err in refusing to order the return of \$50,000 paid by Okamura to the unlicensed contractor, Williams, because “Section 444-22 does not provide that a party who uses an unlicensed contractor may recover for payments already made.”

In the other unreported decision issued on January 17, 2012, the Court refused to vacate an arbitrator’s award that was allegedly rendered against the public policy underlying the contractor’s licensing laws. In *Ori Anuenue Hale, Inc. v. Kasan Construction Corp.*, a property owner challenged an arbitration award in favor of a subcontractor that had been allegedly hired by an unlicensed general contractor. The Court did not premise its ruling on the distinction between “civil action” and arbitration. Rather, the Court affirmed the arbitrator’s finding that the unlicensed general contractor was not required to be licensed since, under the circumstances, it was acting as the owner’s agent and not as a general contractor.

The lessons from these and earlier cases are clear. Claims brought by an unlicensed contractor should be barred if the defendant can demonstrate that a license was required for the work performed. If the allegedly unlicensed contractor is not acting as a contractor, i.e., performing work for which a license is required, then the bar to a lawsuit will not apply. Finally, one who pays an unlicensed contractor may find more difficulty in recovering sums already paid than avoiding the obligation to make further payments.

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Greg



Matt

# Continuing our Founders' Commitment to Public Service 2012



**D**amon Key lawyers volunteer their time in the community and are active board members and chairs on sub-committees for various organizations such as:

## **Noelle Catalan**

Director, Make-A-Wish Foundation of Hawaii

## **Christi-Anne Kudo Chock**

Secretary of Hawaii State Bar Association Appellate Section

## **Rebecca Copeland**

Member of the Hawai'i Access to Justice Commission, Committee on Increasing Pro Bono Legal Services

Founder and 2012 Chair of the HSBA Appellate Section

2012 Secretary for the HSBA Litigation Section

Adjunct Professor, University of Hawai'i School of Law, Legal Practice II

Board Member for the City and County of Honolulu's Zoning Board of Appeals.

## **Tred Eyerly**

Coordinator for the Sierra Club, Sandy Beach Quarterly Cleanups

Chair for the Hawaii State Bar Association Insurance Coverage Litigation Section

Participant, Whale Count, Hawaiian Humpback Whale Marine Sanctuary

Co-Editor of the American Bar Association Section of Litigation, Insurance Coverage Litigation Committee website

## **Diane Hastert**

Founding Director, Easter Seals Hawaii Foundation

Vice-Chair Easter Seals, Inc. National Board of Directors

Board of Bar Examiners

Disciplinary Board of the Hawaii Supreme Court

## **Caron Ikeda**

Chair of the Elder Law Section and Vice Chair of the Tax Section, Hawaii State Bar Association

Volunteer, Project Dana

Volunteer, Honolulu Japanese Chamber of Commerce, Generational Awards Banquet Committee

## **Courtney Kajikawa**

Volunteer, YWCA of Oahu, Event Management Committee

Volunteer, Honolulu Japanese Chamber of Commerce, Program & Community Affairs Committee

## **Christine Kubota**

Chair of the Honolulu Japanese Chamber of Commerce

President of the United Japanese Society (begins July 1, 2012)

Board member of the Hawaii Senior Life Enrichment Association

Board member of the Hiroshima Kenjinkai

Chair of the Awards Committee, Hawaii State Bar Association

Member, Mentor/Mentee Program, Hawaii State Bar Association

Co-Chair, Supreme Court Committee on Court Interpreters and Language Access

Member, Commission on Access to Justice – Committee on Overcoming Barriers to Access to Justice

## **Greg Kugle**

American Bar Association, Forum on the Construction Industry Section

Hawaii State Bar Association, Real Property and Financial Services Section

Meritas Law Firms Worldwide, Real Estate Steering Committee.

## **Kenneth Kupchak**

Chair of the Board of Trustees of Mid-Pacific Institute

Fellow of the American College Of Construction Lawyers

Cornell Class of 1964 Class Counsel and 50th Reunion Committee

## **David McCauley**

Director, The Friends of Lyon Arboretum

Director, Volunteer Legal Services of Hawaii

## **James McWhinnie**

Hawaii Supreme Court – Special Committee on Judicial Performance

Attorney Delegate, United States District Court Conferences

Meritas Law Firms Worldwide, Ad hoc Governance Committee, Bylaws Task Force

## **Mark M. Murakami**

Board Member of the Good Beginnings Alliance

Board Member of the Hawaii State Bar Association

Section Chair, Admiralty Law Section, Hawaii State Bar Association

## **Christopher Pan**

Advisory Board Member, Best Buddies of Oahu

## **Michelle Shin**

Board Member, Real Property and Financial Services Section, Hawaii State Bar Association

## **Douglas Smith**

Catholic Charities Hawaii, Public Policy Committee

Chair, Goodwill Contract Services Hawaii

Board Member, Goodwill Industries of Hawaii

Chair, Ohu Ohu Koolau

## **Michael Yoshida**

Hawaii Swimming Board of Review

Director, Koko Head Skeet Club

Attorney Delegate, United States District Court Conferences

## **Robert Thomas**

Chair, Condemnation Law Practice Group, ABA Section of State & Local Government Law

Director, Continuing Legal Education Programs, ABA Section of State & Local Government Law

Chair, Regulatory Takings Subcommittee, ABA Section of State & Local Government Law

Owners' Counsel of America – Hawaii member (membership limited to 1 lawyer per state)

Member, ABA Council of Appellate Lawyers

ABA Litigation Section (Hawaii editor, Case Notes)

# The Known or Obvious Danger Defense No Longer Offers a Complete Bar in Premises Liability Cases in Hawaii



By Rebecca A. Copeland

**P**roperty owners take note: last December, the Hawaii Supreme Court issued a ruling that could impact the defenses that may be available to you in premises liability cases. In *Steigman v. Outrigger Enterprises, Inc.*, the court concluded that a property owner may no longer rely on a “known or obvious danger” defense in such cases. Until this ruling, property owners were able to rely on the defense to bar an injured plaintiff’s negligence claims.

In the case, Ms. Steigman sought damages in court after she suffered from a slip-and-fall accident while she was a guest at the Ohana Surf Hotel. The accident occurred when she fell after stepping barefoot and wet onto a lanai that had been exposed to wind and rain. After the trial, the jury ruled in favor of the hotel and decided that it had not been negligent.

Ms. Steigman appealed, and Hawaii’s Intermediate Court of Appeals (“ICA”) agreed with the jury’s decision. According to the ICA, because the condition of the lanai was not known or obvious, the hotel was not liable for Ms. Steigman’s injuries – what is known as the “known or obvious danger” defense.

Ms. Steigman appealed again to the Hawaii Supreme Court, arguing that Hawaii’s comparative negligence statute nullified the “known or obvious danger” defense. Unlike the complete bar to liability offered by the “known or obvious danger” defense, comparative negligence is a legal doctrine that reduces the amount of damages that a plaintiff can recover in a negligence-based claim based upon the degree to which the plaintiff’s own negligence contributed to cause the injury. Therefore, while the plaintiff may be found to have contributed in some way to the accident, and thus any damage award reduced by the percentage of the plaintiff’s contributory negligence, the property owner may still be held liable for some percentage of the damages.

The Hawaii Supreme Court agreed with Ms. Steigman’s argument that the “known or obvious danger” defense conflicted with Hawaii’s comparative negligence statute. What the court’s decision means is that from now on, if an individual is injured on a premises owned by another, the property owner no longer has the legal benefit of asserting the “known or obvious danger” defense to completely bar a finding of liability and imposition of damages.

*ABOUT THE AUTHOR: Rebecca A. Copeland concentrates her practice in the areas of appeals and litigation at Damon Key. She maintains an active blog devoted to appeals at [www.recordonappeal.com](http://www.recordonappeal.com). Rebecca is also the Founder and 2012 Chair of the Hawaii State Bar Association’s Appellate Section, a Board Member on the City and County of Honolulu’s Zoning Board of Appeals, and an Adjunct Professor at the University of Hawaii’s William S. Richardson School of Law teaching first year law students in the art of appellate advocacy.*



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# Property Rights...In China?

In October, I joined the nation's leading property law scholars (including Richard Epstein, James Ely, and David Callies) and U.S. and China property law lawyers for the 2011 Brigham-Kanner Property Rights Conference, held for the first time at the Tsinghua University Law School in Beijing, China. The B-K prize is awarded annually by the William & Mary Law School in Virginia to a legal scholar who has promoted property and other constitutional rights in his or her scholarship. The prize is named after my colleagues in the Owners Counsel of America, Toby Brigham (Miami), and Professor Gideon Kanner (Loyola LA), two pioneers in the law of eminent domain and property rights. This year, the prize was awarded to retired Supreme Court Justice Sandra O'Connor.



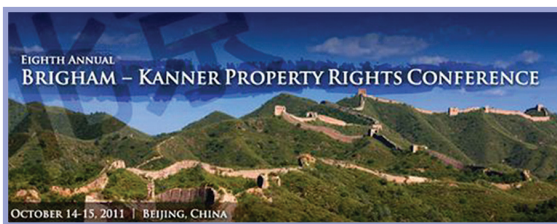
By Robert H. Thomas

The Conference took place over two days in the Tsinghua Moot Courtroom, complete with simultaneous translators, and included lectures by the scholars and lawyers who were joined by their Chinese counterparts in frank discussions of the past and future of property law, the environmental consequences of industrialization, and how property rights are the cornerstone of a sound economy and individual freedom. Topics of discussion included "Property as an Instrument of Social Policy," "Culture and Property," and "Property as an Economic Institution."

William & Mary Law School selected Beijing as the unusual venue – the Conference is usually held at the school's Williamsburg campus – in order to highlight the

progress of China in recognizing and protecting property rights, and in celebration of the emergence of the rule of law in that country. It was a heartening and eye-opening experience, as my last visit to China was in 1978, when that country had just opened up to western visitors; it was a vastly different political and economic environment that I witnessed on this trip. I blogged about the Conference and my observations here: <http://tinyurl.com/79mpdxw>.

The Conference was not all business, and included the obligatory visits to the Forbidden City, a hike up the Great Wall, and more than a few celebratory banquets, including a reception at the U.S. Embassy in celebration of Justice O'Connor's award.



Damon Key hat at the Great Wall of China



Weixing Shen, Dean of the Tsinghua Law School

# Damon Key Lawyers Lead Water Law Conference

Damon Key attorneys Gregory W. Kugle and Robert H. Thomas were on the faculty of the Hawaii Water Law Conference, held last month in Honolulu. Greg taught a session on Shoreline Law and related issues, while Robert was the co-Planning Chair (along with the Director of the State of Hawaii Department of Planning, Jesse Souki), and also led sessions on the Corps of Engineers' Clean Water Act jurisdiction and Legal Ethics. The attendees at the Conference included landowners, lawyers, planners, engineers, and public officials.



Greg Kugle discussing shoreline issues

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## Attorneys in the News

**Christi-Anne Kudo Chock** and **Anna Oshiro** spoke at a Lorman Seminar on American Institute of America (AIA) Construction Contracts on March 27, 2012, at the Ala Moana Hotel. Also, at the April annual meeting of the ABA Forum on the Construction Industry the Forum will introduce its newest national publication on Construction Defects. Christi and Anna contributed chapter 5 to that book, writing on the rights and liabilities of parties.

**Courtney S. Kajikawa** and **Caron N. Ikeda** spoke at an estate planning seminar hosted by Hawaii Theatre Center on March 21, 2012, at the Pacific Club.

**David P. McCauley** will be presenting an Immigration Law update at the Employment Law Seminar “Beyond the Basics” in Honolulu on March 22, 2012.

**Greg W. Kugle, Mark M. Murakami, Robert H. Thomas** and **Anna H. Oshiro** will be presenting at an Eminent Domain and Land Use in Hawaii seminar at the YWCA in Honolulu on May 10, 2012. For more information, contact Mark at [mmm@hawaiilawyer.com](mailto:mmm@hawaiilawyer.com).

**Kenneth R. Kupchak** has been elected Chair of the Board of Trustees of Mid-Pacific Institute.



**Mark M. Murakami** has been elected to the Board of the Hawaii State Bar Association.

**Rebecca A. Copeland** has been appointed to serve as a Board Member for the City and County of Honolulu’s Zoning Board of Appeals.

**Robert H. Thomas** was on the faculty of the American Law Institute-American Bar Association’s annual program on eminent domain in San Diego. Along with University of Hawaii law professor David Callies, Robert presented a session on “The Role of Hawaii’s Unique Property Law in the U.S. Supreme Court’s Takings Cases.” Robert also attended the ABA’s midyear meeting in New Orleans where he and his colleagues in the Section of State and Local Government Law drafted and shepherded a resolution regarding qualified immunity from civil rights lawsuits for private lawyers who represent government entities through the ABA House of Delegates.

**Tred R. Eyerly** co-presented a seminar on “Do Lower Premiums Pay? Issues in High Deductible/Self Insured Retentions and Retrospectively Rated Policies” at the ABA’s Insurance Coverage Litigation Committee conference in Tucson, Arizona March 1-3, 2012.