LAND USE BULLETIN

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Executive Director's Message

Which Comes First, Housing or Jobs?

By Dean Uchida

It is easy for us in Hawaii to get complacent as we enjoy prosperous economic times as the military privatization and healthy tourist industry are pumping money into the economy, and low interest rates push up the demand for housing. A recent article in the New York Times examined the residential real estate market in Denver and provided a sobering insight into what might happen in Hawaii.

During the late 1990's through the early 2000's, Denver was experiencing double digit appreciation in their residential real estate market (sound familiar?). Large international telecommunication companies were locating in the Denver area resulting in new jobs and increased demand for homes. Suddenly, as quickly as it started, Denver lost 6 percent of its jobs (74,000) between 2000 and 2003. People who lost their jobs could no longer afford their mortgages and put their houses up for sale, causing a glut in the market. Today, even with historically low interest rates, Denver's residential market is slowly recovering.

As we again find ourselves struggling with the cyclical nature of the real estate market and the challenges of providing "affordable housing" for the workforce in Hawaii, the Denver experience points out the need for us to consider income as one of the factors that influence the housing market. Interest rates and income drive the demand for housing and developers build where they can sell homes.

The HUD standard is that no more than 30 percent of a family's gross income should be dedicated for housing. The table on page 2 illustrates income levels in Hawaii and the buying power with historically low interest rates.

In Hawaii, the focus of the community (policy makers and developers) has always been on the supply side of the problem. And, considering the complexities of the market, that may well be the proper focus for government. However, after looking at the table, I began to also take a closer look at the demand side.

Looking at the demand side also requires a longer term view as one considers how to increase income in Hawaii, or stated another way: How do we insure quality jobs over time and thereby increase workers' income? While there have been a few success stories of home grown companies providing quality, knowledge-based jobs, the real challenge is growing more high quality jobs. How then do we begin to expand the knowledge-based jobs in Hawaii? What do employers, who could provide high quality, knowledge based jobs, look for in locating or expanding into a new market?

Aside from the obvious business decisions a company must consider in opening or relocating a new office, such as market location, production and transportation costs, etc., two of the fundamental issues that I find consistently referred to by employers are educated workforce and affordable housing. Depending on the product or service, employers do not want to spend an inordinant amount of time and money on training workers, or worse yet, have to provide remedial education to get the workers up to a level that they are "trainable."

Raising the median income of the family of four above the current $67,750 requires a longer term view of things. Realistically, we are not talking about solutions that will impact buyers in this current housing cycle, but quite possibly the next.

Perhaps we are focusing on a symptom and not the real problem. Perhaps the answer to the affordable housing crisis is not only in increasing the supply of housing in general, but of equal importance, in focusing on creating an educated workforce. Perhaps it is going

back to some very basic concepts and ideals that education and intelligence are the keys to economic and social prosperity.

HUD Median Gross Income Family of 4 for Honolulu $67,750.00						
Interest Rate	$200,000.00		$300,000.00		$400,000.00	
	30 Year Fixed Monthly Mortgage Payments	Income Requirement Assuming Mortgage Payment is 30% of Gross Income	30 Year Fixed Monthly Mortgage Payments	Income Requirement Assuming Mortgage Payment is 30% of Gross Income	30 Year Fixed Monthly Mortgage Payments	Income Requirement Assuming Mortgage Payment is 30% of Gross Income
5.00%	$ 1,073.64	$ 42,945.60	$ 1,610.46	$ 64,418.40	$ 2,147.29	$ 85,891.60
5.25%	$ 1,104.41	$ 44,176.40	$ 1,656.61	$ 66,264.40	$ 2,208.81	$ 88,352.40
5.50%	$ 1,135.58	$ 45,423.20	$ 1,703.37	$ 68,134.80	$ 2,271.16	$ 90,846.40
5.75%	$ 1,167.15	$ 46,686.00	$ 1,750.72	$ 70,028.80	$ 2,334.29	$ 93,371.60
6.00%	$ 1,199.74	$ 47,989.60	$ 1,798.65	$ 71,946.00	$ 2,398.20	$ 95,928.00

Median Price						
Interest Rate	$500,000.00		$600,000.00		$700,000.00	
	30 Year Fixed Monthly Mortgage Payments	Income Requirement Assuming Mortgage Payment is 30% of Gross Income	30 Year Fixed Monthly Mortgage Payments	Income Requirement Assuming Mortgage Payment is 30% of Gross Income	30 Year Fixed Monthly Mortgage Payments	Income Requirement Assuming Mortgage Payment is 30% of Gross Income
5.00%	$ 2,684.11	$ 107,364.40	$ 3,220.93	$ 128,837.20	$ 3,757.75	$ 150,310.00
5.25%	$ 2,761.02	$ 110,440.80	$ 3,313.22	$ 132,528.80	$ 3,865.43	$ 154,617.20
5.50%	$ 2,838.95	$ 113,558.00	$ 3,406.73	$ 136,269.20	$ 3,974.52	$ 158,980.80
5.75%	$ 2,917.86	$ 116,714.40	$ 3,501.44	$ 140,057.60	$ 4,085.01	$ 163,400.40
6.00%	$ 2,997.75	$ 119,910.00	$ 3,597.30	$ 143,892.00	$ 4,196.85	$ 167,874.00

LEGISLATIVE UPDATE, 2005 SESSION

Here is the final status of selected major bills that LURF tracked, digested, and testified on during the 2005 Legislative Session that adjourned *sine die* on May 5. Governor Lingle announced her decisions to veto certain measures on June 27. Other bills not so designated will either receive her approval or become law without her signature as of July 12. Further details on these and other bills are contained in LURF's "Legtrack" Bill Digest and Status, which was distributed weekly to interested LURF members throughout the Session.

1. Affordable Housing. SB 179 SD3 HD2 CD1 (**Act 196**) will establish a GET exemption for developers of certified affordable rental housing projects for specified percentages of households below the median family income; separate the Housing and Community Development Corporation of Hawaii (HCDCH) into a Housing Finance and Development Administration and a Public Housing Administration; establish a Legislative Affordable Rental Housing and Homeless Task Force; and enact various other measures to help increase the supply of low-income rental units for persons and families earning less than 80 percent of the median family income.

HB 931 HD2 SD2 CD1 (**Act 197**) will exempt certain leased residential lots from mandatory lease-to-fee conversion under HRS Chapter 516, the Land Reform Act, to encourage development of workforce and affordable housing.

LURF Position: Support a GET exemption for affordable housing, as well as an exemption and certification process for leasehold housing development.

2. Automatic Permit Approvals. HB 852 HD2 SD2 CD1 (**Act 68**) will provide that lack of a quorum by a permit issuing agency shall not initially trigger an automatic approval under HRS § 91-13.5.

LURF Position: Support retention of automatic approvals, with amendment regarding quorum; oppose repeal.

3. Energy. HB 1017 HD3 SD2 CD1 (**Act 157**) will require homeowner associations to adopt rules providing for placement of solar energy devices, and require owners in residential or townhouse projects to obtain consent before placing such a solar device on a common element of the project. The owner shall be responsible for damages and eventual removal of the device, and shall not void the roof warranty.

LURF Position: Oppose mandatory solar hot water systems [in original bill].

4. Environmental. HB 895 HD2 SD2 CD1 (**Act 224**) will prohibit artificial light from floodlights, uplights, or spotlights that directly illuminate the shoreline and ocean waters for decorative or aesthetic purposes, with exceptions for hotels, hotel/condominiums, and government agencies and their authorized users; special management area (SMA) permits will be prohibited for structures that allow such artificial lights.

HB 408 HD2 SD1 CD1 (**Act 130**) will provide a definition of "wastewater treatment unit" for purposes of an environmental impact statement (EIS) trigger under HRS Chapter 343, and authorize the Office of Environmental Quality Control (OEQC) to review an agency's EIS determination and advise whether it is in compliance, if the agency is also proposing the action.

LURF Position: Oppose light prohibitions; support definition of wastewater treatment unit to clarify Chapter 343.

5. Impact Fees. SB 1814 SD2 HD2 CD1 (**Act 246**) will create a school impact fee working group to perform an overview of alternative financing methods for school construction, including preparation of a Central Oahu needs assessment as a case study.

LURF Position: Support rational impact fees based on needs assessment; oppose imposition of entitlement conditions without statutory authority.

6. Important Agricultural Lands. HB 1640 HD3 SD2 CD1 (**Act 183**) will implement the constitutional mandate to conserve and protect important agricultural lands (IAL) by establishing a process for identifying IAL, including County mapping and voluntary designation by landowners, with adoption by the Land Use Commission (LUC) contingent on the prior legislative enactment of an incentive package for agriculture. If the majority of a landowner's holdings are already designated as IAL, the LUC may not designate additional lands except by petition of the owner. The bill also establishes standards and criteria for the reclassification or rezoning of IAL.

LURF Position: Support a comprehensive approach to identification of IAL, contingent on enactment of incentives, petition by landowners, and County input.

7. Land Use. HB 109 HD1 SD2 CD1 (**Act 205**) will prohibit new golf courses and golf driving ranges in the agricultural district as of July 1, while allowing them in the rural district; and authorize the Counties to convene advisory groups to redefine the rural district and assist in developing a work plan to improve rural land use policies.

LURF Position: Support reform of the LUC process, including greater flexibility in use of the rural district. Oppose further restrictions on agricultural subdivisions which would make existing uses non-conforming.

8. Taxes. HB 1308 HD1 SD2 CD1 (**Act 156**) will require 10 percent of conveyance tax revenues to be deposited into the Land Conservation Fund for acquisition of interests or rights in land having resource preservation value to the State, as determined by DLNR; provides a stable funding mechanism for the Natural Area Reserves System; increases the allocation of conveyance tax revenues to the Rental Housing Trust Fund to 30 percent; increases conveyance tax rates in a sliding scale up to 30 cents per $100 valuation on property conveyances of $1 million or greater, and up to 35 cents for non-occupant residential properties; and appropriates $1.1 million to DLNR for purchase of agriculture easements to match federal funds for farm and ranch land protection.

LURF Position: Oppose increase in the conveyance tax for unrelated purposes.

STATE OF HAWAII

Department of Health: Uniform Environmental Covenants Act

The Department of Health (DOH) is considering legislation to enact a Hawaii version of the "Uniform Environmental Covenants Act" (UECA), similar to HB 1706 and SB 1167 which were introduced last Session. The intent would be to avoid problems that might invalidate, impair, or limit the use of covenants attached to "brownfield" sites; and to facilitate financing of cleanup of such sites by mainland lenders.

An environmental covenant, as used in some states, controls the potential risk of residual contamination when real property is cleaned up only to the level determined by a particular use, rather than to the standard of unrestricted use. The purpose of such covenants is to ensure that control of the risk is reflected and enforced as a valid servitude running with the land and binding on subsequent owners, thus enabling the formerly contaminated property to be returned to productive use, for example under a state "voluntary response program."

A model UECA prepared by the National Conference of Commissioners on Uniform State Laws intends to provide that an environmental covenant will survive tax lien foreclosure, adverse possession, marketable title statutes, and prior recorded interests with priority. In order to mitigate future liability concerns, the model act confers on property owners the right to enforce the covenant, and requires the owner's consent to any termination or modification. The interests of lenders holding a prior mortgage would also be validated, absent voluntary subordination.

The model act is not intended to address or limit the exercise of any federal or state remediation regulations, jurisdiction for which may concurrently exist. Nor is the act intended to provide any protection from remediation liability for prospective purchasers. Instead, the act supplies the "legal infrastructure" to create and enforce site-specific environmental use restrictions mutually determined by a regulatory authority and the property owner as part of a risk-based cleanup project. In this context, it is important that prospective purchasers of contaminated properties have actual as well as constructive knowledge of environmental covenants, in the manner that flood plains and other hazard districts are noticed to the public by the land recording agency. Ultimately, a state may require authority (outside of the model act) to condemn and take a partial interest in contaminated property, in order to record a valid servitude on it.

At this point, DOH staff are working on crafting a bill adapting the UECA to Hawaii statutory and common law, with the inclusion of some kind of enforcement mechanism. This process will require substantial input from landowners, title companies, lending institutions, property law attorneys, and the Counties, to avoid impairing existing property rights or creating new regulatory layers and obstacles. However, the Department has set itself a mid-September deadline to draft an acceptable bill. An Advisory Group was convened on June 30 to assist DOH, and will meet next on July 19.

Amendments to Water Quality Standards

At the April 8 meeting of the State Water Quality Standards (WQS) Informal Advisory Subgroup, Department of Health (DOH) staff stated that they would be responding to comments previously submitted in writing, once they make some further changes to their proposed WQS rule amendments (see the *Land Use Bulletin* for March/April 2005). Staff indicated that they are continuing their efforts to make the WQS more "flexible,"in part to reflect "salinity gradients" offshore. Among the proposed changes to the WQS rule amendments as of April 11 are these: (1) deletion of the requirement that the DOH Director accept soil and water conservation plans for purposes of meeting the soil erosion criteria of the rules; and (2) allowance of registered aquatic pesticides in surface waters in excess of the concentrations otherwise allowed by the rules. The latter provision is under review by the Attorney General's office.

CITY AND COUNTY OF HONOLULU

Bill 46 Affordable Housing Conditions in Unilateral Agreements

On August 5, a moratorium will expire that since 1999 has lifted certain conditions on the approval of affordable residential development projects. LURF has been actively working to continue that moratorium, including

testifying in support of Bill 46 (see below).

Ordinance No. 99-51 suspended (1) income and other restrictions on buyers of affordable housing units, and (2) restrictions on transfer of these units such as buyback and shared appreciation provisions. As set forth in the findings of the ordinance, these restrictions and controls were actually having a negative effect on the construction of new residential housing on Oahu, at both "affordable" and market prices. Essentially the free market for new owner-occupant housing in Honolulu was so close to the "affordable" price-controlled, income-controlled residential market that buyers did not want to buy the restricted units. The inability of developers to sell affordable units resulted in the construction of fewer housing units overall because of these entitlement conditions.

Ordinance 99-51 achieved its objectives, according to the Department of Planning and Permitting (DPP) in "A Report on the Implementation of Ordinance No. 99-51" (2001). Developers had built a substantial amount of affordably priced housing since the ordinance took effect, and "this ordinance has not hindered low and moderate income families from participating as buyers in today's housing market." Major homebuilders such as Castle & Cooke, Gentry, Haseko, and Schuler all submitted housing data confirming the validity of the approach taken in Ordinance 99-51. Accordingly, Ordinance 01-33 was enacted, extending Ordinance 99-51 for another four years. This time period allowed for the planning, subdivision, site development, building, marketing, and sales of additional affordable housing projects.

The time has now come to consider extending Ordinances 99-51 and 01-33 again. However, this time the DPP submitted its "Report on Affordable Units and Buyers under Ord. 01-33" to City Council on February 28 with the finding that when buyer qualification restrictions were suspended, sales of affordable units were made to families who would not have qualified with the restrictions in place. Accordingly, DPP recommended that the moratorium be *lifted* and that buyer eligibility qualification provisions be reinstituted on affordable units.

In response to a request from DPP pursuant to Ordinance 01-33, LURF contracted with SMS Research and Marketing Services for a statewide affordable housing market study, the first phase of which assesses whether to continue the existing moratorium on affordable housing restrictions for residential developments on Oahu. This report, "Market Study in Response to Ordinance 01-33, City and County of Honolulu," provides basic information on the historical housing market on Oahu and discusses various options for policy makers to consider. The report was submitted to City Council on July 5 in support of continuing the moratorium.

The current shortage of affordable housing on Oahu is a symptom of a larger problem, namely the lack of housing in general for all segments of the market. Providing more supply of housing in all segments of the housing market is one way to address this crisis. The LURF/SMS study found that affordably priced homes sold new in previous years generally remain affordable in the resale market today. Thus if a greater supply of new homes is made available, existing homeowners with greater income or buying power (due to lower interest rates) may trade up to larger, more expensive residences, making their previous affordable units available to first time buyers. However, without an adequate supply of dwellings in all segments of the housing market, competition and demand for a limited supply will drive up prices for all buyers.

Another major factor contributing to the affordable housing crisis in Hawaii today is the land use entitlement system. The LURF/SMS study found that (1) buyer qualifications provide an additional brake on a housing market that is already slowing; (2) shared appreciation requirements tend to impoverish first-time affordable home buyers; and (3) buyback controls are simply impractical under the City's current staffing and budget constraints. Rather than focusing on the continuation of existing affordable housing restrictions, LURF believes that the City Council should consider less costly design standards for affordable housing, and ways to shorten the entitlement process to open up more lands for all segments of the housing market. In this light, Ordinances 99-51 and 01-33 continue to represent an innovative approach that does not hinder bona fide buyers of affordable housing, and reduces government paperwork and processing time.

Bill 46 (introduced for first reading in City Council on July 6) would have extended the moratorium under Ordinances 99-51 and 01-33, at least until June 30, 2006. Unfortunately, this bill has run afoul of procedural defects and must be resubmitted. By the time it can be properly reintroduced and considered, the suspension of

restrictions on new affordable housing developments will have expired.

Bill 40 CD1 Establishing an Excise Tax Surcharge for Mass Transit

City Bill 40, CD 1 (2005) would establish a one-half percent general excise and use tax surcharge for the City and County of Honolulu and create a special account within the general fund for the purpose of funding the operating and capital costs of a "locally preferred alternative" for a mass transit project. The proposed ordinance is authorized by House Bill No. 1309 H.D. 2, S.D. 2, C.D. 1 (**Act 247**) for such purpose from January 1, 2007, through December 31, 2022, provided that no moneys collected by and received from the State for the surcharge shall be used for a public transportation system already in existence. The ordinance for the surcharge must be in place by December 31, 2005.

LURF supported Bill 40 CD 1 on June 6 and July 6 with reservations. Not improving the transportation infrastructure in Oahu's rapidly growing Ewa and Central Oahu regions is simply not an option, if public policy directs continued development of the "second city" to provide affordable housing and locations for new employment opportunities. The costs of the requisite infrastructure improvements must be equitably shared by *all* residents and not become the burden solely of those who live and work in Oahu's new communities.

While LURF appreciates and understands the need for alternatives to address the traffic problems on Oahu, there is also concern regarding the proposed funding mechanism used to pay for mass transit on Oahu. The areas which need to be thoroughly discussed and considered by the City Council include the following.

1. The excise tax is "a tax on the manufacture, purchase, or sale of a good or service, and the tax may be based on the number of units or on value." Neighbor island businesses and residents may be subject to the tax as a "pass through" applied to goods or services purchased on Oahu. The Council needs to consider ways to mitigate or eliminate this prospect, since neighbor island residents will receive few if any benefits of the tax surcharge.

2. It appears that the moneys to be collected from the excise and use tax surcharge will be used primarily for the construction of the preferred mass transit alternative. At the present time, it is unclear how operation and maintenance of the system will be covered. The Council needs to develop an independent means to fund the long term operating and maintenance costs of the mass transit system.

3. Finally, data for Honolulu in the 2005 Urban Mobility Study, recently issued by the Texas Transportation Institute, suggest that Oahu urban areas have experienced a comparatively *low* increase in congestion (measured by delay per traveler and total delay) from 1982 and 2003. This finding seems to conflict with the "real" traffic problems experienced by residents, especially in leeward Oahu.

COUNTY OF HAWAII

Bill 80 Relating to Subdivision of Land

Bill No. 80, Relating to Subdivision of Land, would have amended Hawaii County Code § 23-23 to prohibit any subdivision of agricultural land from including (1) restrictive covenants against agricultural practices; (2) resort-like features; (3) an inadequate supply of water for agriculture; (4) a golf course with residential lots; (5) gated or limited (guarded) entry; or (6) any dwelling greater than 3,500 square feet. LURF strongly opposed this measure on May 17, and on June 14 the Planning Committee of the County Council voted 8 to 1 to "close the file" (hold) the bill.

Currently, HRS § 205-4.5(a) and HRS § 205-2(d) allow golf courses, farm dwellings in support of agricultural activities on the property, and open area recreational facilities in the Agricultural District on lands classified as C, D, E or U under the Land Study Bureau system. Farm dwellings are also allowed on class A and B lands. Private restrictions on agricultural uses and activities are already disallowed under HRS § 205-4.6 [Act 5, 2003 Special Session], except where taken to protect agricultural leases [Act 170, 2004 Session].

If the intent of Bill 80 was to further define the allowable uses in the County's agricultural, family agricultural, or intensive agricultural zones, this might be done following the approach envisioned by House Bill No. 109 HD1 SD2 CD1 (**Act 205**), under which the Rural District would accommodate golf courses and other "quasi-urban" land uses.

Bill 80 would also arguably have been facially unconstitutional. The prohibition against gated or limited (guarded) entry would have the effect of requiring the dedication of a right-of-way or permanent easement giving the public access to and across private roads which have not been deeded to the County for maintenance and assumption of liability. As such, a "permanent physical occupation" of private property would occur, in violation of the owner's fundamental right to exclude others. The United States Supreme Court has opined, in the context of mandatory lateral shoreline access, that such a requirement would be an unconstitutional taking of private property for public use without just compensation, in violation of the Fifth and Fourteenth Amendments of the United States Constitution. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987), citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1979).

Under Bill 80, the government would have been able to exercise its power to prohibit a development amenity within the private landowner's right to exclude others from the property. Bill 80 therefore poses some interesting questions under Hawaii law. The "right to exclude" trespassers from commercial property after reasonable warning or request to leave has been upheld in Hawaii, even in the context of a peaceful protest demonstration [which would be protected free speech on public property] on the premises of a large shopping center that is intentionally open to the public without restriction. *See State v. Vigliemo*, 105 Hawai`i 197, 95 P.3d 952 (2004). How then can reasonable preventive means to exert the same right (by gates or guards) be denied to owners of a private residential subdivision?

Other questions that arise are whether the resident owners (individually or collectively by association) must assume responsibility for maintenance, repair, and liability for their private roadway(s), and whether the public has an implied easement over such roadways. Normally the appropriate means to secure public access and use would be for the County to accept the roadways by way of a deed of conveyance in which the owner surrenders or dedicates title. But where the County takes no express action to accept such conveyance pursuant to HRS § 264-1, liability is determined by the degree of control (rather than mere ownership), and the existence of an implied easement depends on the intent of the parties. These are both questions of fact to be resolved on a case by case basis. *See Wemple v. Dahman*, 103 Hawai`i 385, 83 P.3d 100 (2004).

Bill 80 would have required the landowner to create *new* public access where none existed before, and where the development did <u>*not*</u> *per se* create the need for the access. As the Supreme Court observed, this is "an out-and-out plan of extortion"; if government "wants an easement … it must pay for it." *See Nollan*, 483 U.S. at 837, 842.

LURF cannot support legislation that would require private property owners to dedicate private roads for public access without compensation. If that is the intent, the appropriate means to secure such public access would be for the County to accept the roads by way of dedication, thereby relieving the owners of the responsibility and expense of maintenance and the liability for public use of the improvements.

JUDICIAL WATCH

U.S. SUPREME COURT VALIDATES STATE RENT CONTROL LEGISLATION IN *LINGLE v. CHEVRON*

In a unanimous opinion authored by Justice O'Connor, the U.S. Supreme Court ruled on May 23 for the State of Hawaii and against Chevron USA in a case that should cause concern among private landowners, in particular lessors of commercial and industrial development properties. *See Lingle v. Chevron USA, Inc.*, 125 S.Ct. 2074 (2005). The result in *Lingle v. Chevron* could have profoundly adverse impacts on property owners, if subsequent challenges to economic rent control legislation will now be subject only to minimal "rational basis" rather than intermediate "reasonable relationship" scrutiny. The Ninth Circuit decision in *Richardson v. City and County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998), which struck down an ordinance regulating ground rent renegotiations and capping lease rents for existing residential condominium leaseholds, may also now be in jeopardy. A more immediate practical effect of *Lingle v. Chevron* could be that legislative proposals dictating the terms of commercial lease rent renegotiation in Hawaii [which LURF has consistently opposed, with past support from the State Attorney General] will now be less vulnerable to a constitutional takings challenge. The State's support of service station rent caps in this case therefore seems

somehow inconsistent with its past opposition to leasehold rent control.

The questions presented in *Lingle v. Chevron* were: (1) whether a court is authorized to invalidate economic (rent control) legislation for failure to substantially advance a legitimate state interest; and (2) whether in making such a determination, a court should defer to legislative findings of efficacy, or make its own findings. In ruling on these questions, the Court essentially said that the Takings Clause of the U.S. Constitution presupposes that government acts in pursuit of a valid purpose, so that the notion that a regulation effects a taking merely by virtue of its ineffectiveness or foolishness is untenable. On the other hand, if a government action fails to meet a "public use" or is so arbitrary as to violate due process, no amount of just compensation could authorize the action.

In the case below, District Court Judge Mollway apparently concluded, without addressing the pending implementation of the wholesale gas price cap under Act 257, that oil companies would raise wholesale gas prices to offset any service station rent reduction required. Upon this showing that rent control would be ineffective, the Ninth Circuit affirmed that Act 257 was unconstitutional, based on testimony that its means (service station rent caps) would not achieve the desired end (reduced retail gasoline prices), thereby not meeting the "substantially advance" test under *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *see Chevron USA, Inc. v. Lingle et al.*, 363 F.3d 846 (9th Cir. 2004). For more on the history of this case, see the *Land Use Bulletin* for November/December 2004. The Supreme Court, in reversing the Ninth Circuit, has now said that the *Agins* "substantially advance" formula is not a valid takings test. However, in thus "correcting course," the Court did not disturb its earlier precedents under which a plaintiff may challenge an uncompensated government regulation as a: (1) "physical" taking (under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)); (2) "total" regulatory taking (under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)); (3) "partial" regulatory taking (under *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)); or (4) land use exaction violative of reasonable relationship and rough proportionality (under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). In short, the Court in *Lingle v. Chevron* appears to have applied a lower standard of review not to all regulatory takings cases, but only to those that merely challenge the efficacy of government action.

The Court has thus reaffirmed a long tradition of judicial deference to legislative bodies, which have the prerogative of declaring the *intent and purpose* of legislation; and to administrative bodies, which are charged with *implementing* the legislation. In this case, the Court reaffirms that the Legislature is to be given deference in its determination of the need for and effectiveness of regulatory actions under Act 257. But courts will presumably continue to reserve to themselves the power to interpret the *constitutionality* of legislative and administrative measures. The Court found it "remarkable" that Judge Mollway had gone beyond the usual judicial deference to a legislative policy, although she had otherwise ruled based on previously valid case law [*Agins*] and the limited evidence the parties put on on remand. Again, the message to courts below seems to be, be more differential to legislative bodies. If anything, the Court was harsher on itself, taking the opportunity to clarify a relatively non-controversial piece of its *own* takings jurisprudence [*Agins*], which it charitably described as "imprecise."

U.S. SUPREME COURT HOLDS ECONOMIC DEVELOPMENT TO BE A "PUBLIC USE" IN *KELO v. CITY OF NEW LONDON*

In a sharply divided opinion which has received a great deal of media attention, the Supreme Court ruled on June 23 for the City of New London, Connecticut, and against Susette Kelo and several of her neighbors, in a case that may prove to be a mixed blessing for property owners. *See Kelo v. City of New London*, 125 S.Ct. 2655 (2005). Large landowners and developers who work closely with government redevelopment agencies may find that the *Kelo* decision will reduce barriers to quasi-public economic revitalization projects that require land acquisition by eminent domain. Individuals who wish to retain property such as homesites for noneconomic reasons, where no amount of compensation offered under threat of condemnation is persuasive, may henceforth be more easily displaced by other private parties acting under color of government authority.

The question presented in *Kelo v. City of New London* is squarely grounded in the Fifth Amendment to the U.S. Constitution, which states that private property shall not

be taken for public use without just compensation. The amount of compensation here not being the issue, the question went to whether the condemnation of property for the purpose of economic development satisfies the "public use" prong of the Takings Clause. The Court answered that it does, given that the private nonprofit New London Development Corporation's comprehensive development plan for the Fort Trumbull neighborhood was justified under a statute which declares the taking of developed land for an economic development project to be a "public use" and in the "public interest." Further, the project had received approvals from the relevant city and state agencies, and the corporation was designated as agent for New London to create jobs, generate tax revenue, and otherwise revitalize the downtown area and make it more attractive with leisure and recreational opportunities. There was no allegation that the Kelo or other condemned properties were blighted or in poor condition; they were simply in the way of the redevelopment project. For additional background on the history and facts of this case, see the *Land Use Bulletin* for September/October 2004.

To set the outcome in *Kelo* in proper context, it is perhaps useful to begin with Justice Thomas' separate dissenting opinion in the case. He would have us return to an eighteenth century view that the government may take property *only* if it actually uses, or gives the public a legal right to use, the property. In effect, Justice Thomas would insert the word "unless" into the Takings Clause before "for public use." He would also apparently overturn two seminal cases on which the majority relied: *Berman v. Parker*, 348 U.S. 26 (1954) (condemnation authorized to eliminate urban blight conditions), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (condemnation authorized to transfer residential leasehold properties to the tenants, where landownership was "severely overconcentrated"). His objection to these cases is that they equate the government's power to take land by eminent domain for public *use* with its police power to regulate land for public *purpose* (*e.g.*, by zoning or to abate nuisances, as determined by legislative policy).

Justice O'Connor's dissenting opinion, in which Chief Justice Rehnquist and Justices Scalia and Thomas joined, concedes that there was "errant language" in *Berman* and *Midkiff*, and that the police power and "public use" cannot always be equated, although the takings in those cases fell within both contexts. Her main objection to the majority decision, however, is that "any property may now be taken for the benefit of another private party," such that "the government now has license to transfer property from those with fewer resources to those with more." To avoid that result, she would have imposed the test that a "public purpose" of condemnation for private use is realized only when a *harmful* use is *eliminated*; otherwise the eminent domain power is limited to acquisition of private property for public ownership or the public's use (as in Justice Thomas' argument).

In that context, the majority opinion authored by Justice Stevens may be seen as an affirmation and further broadening of the Court's historically deferential approach (most recently in *Lingle v. Chevron*) to legislative determinations of "public use," "public welfare," and "public purpose," as those terms are used more or less interchangeably. The Court found no basis for exempting economic development from its traditionally broad understanding of public purpose. While immediate benefit to private parties may be coincident with achievement of a "public good," the Court did acknowledge that government may not use its eminent domain power (1) to effect "purely" private transfers of property; (2) for takings of property under the "mere pretext" of a public purpose; or (3) where there is evidence of an "illegitimate" purpose or "benefit [to] a particular class of identifiable individuals." Similarly, writing separately in a concurring opinion, Justice Kennedy would apply a more stringent standard of review to an undetermined class of cases in which the risk of undetected impermissible favoritism of private parties is so acute, or the transfer of property is so suspicious, or the procedures are so prone to abuse, or the purported benefits are so trivial or implausible, that a presumption of invalid or impermissible public purpose would be warranted. But no such circumstances were present in this case.

In short, generally the purpose of a condemnation action need only be legitimate as determined by a legislative body; the Court will not second-guess what lands are needed or whether the action was or may be effective in achieving the purpose. Finally, the Court in *Kelo* leaves the door open for states to further restrict the exercise of their takings power, for example to minimize the hardship that condemnations may entail. One aftermath of the decision, since reported in American Bar Association's "Government Law News," is that moves may already be

afoot in Congress, Connecticut, and Texas to restrict or prohibit economic development projects implemented by eminent domain.

KAUAI REAL PROPERTY TAX INITIATIVE APPEALED TO HAWAII SUPREME COURT IN *COUNTY OF KAUAI v. BAPTISTE*

In the 2004 General Election, the residents of the County of Kauai adopted an amendment to their County Charter capping residential real property taxes for owner occupants at the amount assessed in the latter of 1998-1999 or the year of acquisition, from which point the percentage increase in tax shall not exceed the lesser of two percent or the applicable cost of living adjustment for Social Security retirement benefits. In a "friendly" lawsuit, the County Attorney sued the Mayor and the Council seeking a declaratory judgment that the Charter Amendment was invalid, as well as an injunction against any action to give effect to the Amendment. Several taxpayer intervenors moved to dismiss the complaint. Intervenors' motion was denied, and instead, Fifth Circuit Judge George Masuoka granted the County Attorney's motion for summary judgment, finding the Charter Amendment invalid, as it violated both the Hawaii State Constitution and the Kauai County Charter. Regrettably, neither Judge Masuoka's written order of March 18, 2005, nor his subsequent final judgment of May 20, 2005, give any inkling of his reasoning.

Intervenors appealed the order and final judgment to the Hawaii Supreme Court, and also moved for expedited consideration, stay of judgment, an order enjoining the County from collecting taxes in excess of amounts allowed by the Charter Amendment, and a writ of mandamus directing County officials to implement the Amendment [Kauai Charter art. XXXI]. Although intervenors' motion was denied, among the issues on appeal are these: (1) whether the "Counties" to which the power of real property taxation is delegated by the State Constitution (Haw. Const. art. VIII § 3) means "the people" as a body politic and corporate, rather than the County Council; (2) whether the lawsuit between government officials in this case was collusive and therefore not justiciable, as no actual controversy exists between them; and (3) whether the Amendment is not *de facto* an ordinance enacted by initiative to authorize or repeal the levy of taxes, as prohibited by Charter art. XXII § 22.02. Intervenors argue and hope for affirmative answers to these questions. *But see* Charter art. II § 2.02, where the Charter makes no provision, all powers of the County are to be executed by *ordinance of the Council*; and art. X § 10.04(T), operation and management of property tax functions as established by *ordinance* is within the powers and duties of the Director of Finance.

Although it is highly premature to speculate how the Hawaii Supreme Court may eventually decide this Kauai property tax case, following are a few points for consideration. The Hawaii State Constitution, as noted, delegates all functions, powers, and duties of real property taxation to the Counties (art. VIII § 3). The power of taxation is inalienable and can never be surrendered, suspended, or contracted away (art. VIII § 1). County Charter provisions are subject to general laws of the Legislature (art. VIII § 2), and the power of the Legislature to enact laws of statewide concern is not limited (art. VIII § 6). Article VIII § 3 and HRS §246A-2 (requiring the Counties to adopt tax policy and assessment by *ordinance*, and tax rates by *resolution* pursuant to ordinance) cover the whole subject of the Counties' real property taxation power and embrace the entire law on the matter. *See Gardens at West Maui Vacation Club v. County of Maui*, 90 Hawai`i 334, 341, 978 P.2d 772, 779 (1999). However, HRS § 246A-2 lapsed under its own terms eleven years after adoption of the constitutional amendments of 1978, and is therefore no longer controlling. Accordingly, the power to set real property tax exemptions is exclusively the Counties' and is no longer a matter of statewide concern reserved to the Legislature. *See State of Hawai`i v. City and County of Honolulu*, 99 Hawai`i 508, 521, 57 P.3d 433, 446 (2002).

From the limited citations above, it is apparent that the resolution of this case may be anything but predictable. On the one hand, it seems clear enough that constitutional and legislative intent at both the State and County levels is that property tax assessments and rates be determined by the duly elected representative body (the Council) rather than by direct initiative vote of the electorate. But by amending the Charter itself, so as to override the existing tax structure established by ordinance of the Council, have the proponents of the residential tax cap found a valid loophole, even if the Amendment conflicts with other sections of the Charter? The "cardinal principle" of judicial review of constitutional amendments is that they will be upheld unless shown to be invalid "beyond a reasonable doubt" [the highest evidentiary standard], *see Kahalewai v. Doi*, 60 Haw. 324, 331, 590 P.2d 543, 549 (1979). What if the Court simply vacates

the order and judgment below for lack of a justiciable controversy, leaving the Amendment intact but without further direction as to its implementation? Could Intervenors here then become Plaintiffs, alleging actual damages from overassessment of taxes at pre-Amendment amounts? Stay tuned – this one promises to be interesting!

LOTMA

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The Leeward Oahu Transportation Management Association (LOTMA) is a nonprofit association of landowners and developers that promotes alternative transportation opportunities in Leeward, Central and North Shore Oahu.

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CALENDAR OF EVENTS

July 4, 2005
Independence Day holiday

July 18, 2005 Noon - 1:30 p.m.
Alexander & Baldwin
-Executive Committee Meeting
Speaker: Robbie Alm, Hawaiian Electric Co.

August 15, 2005 Noon - 1:30 p.m.
The Plaza Club
-Board of Directors Meeting
Speaker: Laura Thielen, Office of Planning

September 5, 2005
Labor Day holiday

September 15, 2005 8:30 a.m. - 12:30 p.m.
Second Annual Planning Directors' Panel
Ilikai Hotel

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