

WAIKIKI SIDEWALKS – Dark Business BACKDOOR CORPORATE GRAB OF PUBLIC LAND

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DEVELOPERS DEFY NINTH CIRCUIT COURT RULINGS and CITY'S CONSTITUTIONAL LAW ADVISER

March 03, 2011 **ATTENTION** Street Artists / Performers / Buskers / Community Advocates:

Construction work on the Kalakaua Avenue sidewalk streetscape project will begin in a matter of days. **Mayor Peter Carlisle** has chosen not to intervene in this exceptionally wasteful and unnecessary project despite identifying multimillion-dollar wastes he says are carried over from the Mufi Hannemann Administration.

The city has ignored the Waikiki Neighborhood Board in their request for integrating the sidewalk artists into the design.

Can it be that Carlisle is controlled by the same private corporate interest as Hanneman? -Namely the **Waikiki Improvement Association** and **Waikiki Business Improvement District, both private organizations which are directing the project through WIA Director Rick Egged.**

The city has never held a hearing on the project. Greg Hee of the Department of Design and Construction had to be coaxed by Waikiki board members to shed light on the project at a September 14, 2010 meeting - after city/private developer plans and funds were approved. Hee assured the Waikiki board that Waikiki businesses had planning input. Indeed! The large property owners are moving this project! But the most affected, the street buskers have never been consulted and the Waikiki Neighborhood Board has been shunned.

Since project details have become known concerns in the community include well grounded fears that the funding of this joint venture is illegal. Concerns also include the fact that the artists and sidewalk users will be illegally dislocated and are being discriminated against, that the city and private property owners are now open to expensive litigation, and that taxpayers cannot afford **the \$20 million phase one price.**

Developers, the mayor and the council members intend to move forward with this project. Professor **Jon Van Dyke**, a University of Hawaii Constitutional lawyer had earlier addressed

Corporate Counsel of the City and County of Honolulu at an August 31, 2010 public infrastructure hearing recorded by Olelo Community Media. His presentation as city legal consultant is on the city's website [click: View Meetings and Agenda - update: it has been deleted!]. He warned the city of the rights of the public for free speech use on the sidewalk.

All sidewalks are protected by First Amendment rights of free speech which allows artists and public voices to exhibit, rally and fundraise on the sidewalk. In an email to a resident, Van Dyke responded to this question:

“When the city installs its new sidewalk planter boxes, grass-covered berms and tiles, what happens to the private property line if part or all of the public sidewalk disappears?”

The public aspect of the sidewalk was altered by streetscape designs on the makai (beach) side of Kalakaua Avenue. This runs the entire length of Royal Hawaiian Shopping Center. Note also, that Beachwalk (Lewers Street), Luxury Row by Tiffany's and the old NikeTown sidewalk district have had a privatized makeover. And, of further intrigue in Waikiki, is the stretch of Kalakaua Avenue sidewalk adjoining Kuhio Beach from the HPD Substation to Kapahulu Street. It was a non-parks sidewalk long ago - built by public funds.

Repeatedly in the federal U.S. Ninth Circuit Court the public has had their rights reaffirmed. Public sector and nonpublic-sector unions, ACLU and individuals have all the while reaffirmed their right to free speech without discrimination on the entire sidewalk; **from the roadway curb to the private property line** (the building line, and NOT the unmarked easement line somewhere in the middle). This includes all sidewalk 'easement' strips along side private property or building lines which private security guards try to use to discriminate against certain street users. Note that pedestrians have access to these easements. Because it is illegal to discriminate against users of the sidewalk under equal application of the law, the easement is open to free speech use. If one person

can use any part of the sidewalk then all persons can use that same part of the sidewalk.

Free speech on the sidewalk is a fundamental right and an essential means of community interchange in the very way as the pavement is used to get from a to b.

The state, HPD, private business, private security or any entity **cannot deny** one or any user of First Amendment rights on the sidewalk.

In his email and deliberation to the city, and in his capacity as a paid legal consultant, Van Dyke said that unions, churches and the public will maintain First Amendment rights of free speech on the sidewalk and cited the federal ruling handed down in the **Venetian Casino Resort case** (Las Vegas, 2001). Here, the luxury hotel took away the public sidewalk designing the appearance of private ownership. **Judge Hug** ordered Venetian Casino to replace the sidewalk saying the sidewalk affected had been connected to the city sidewalks and was **Public Forum** protected by the U.S. Constitution.

In Waikiki you can see an example of this on the Ala Moana Boulevard and Kalia Road corner where **Hilton Hawaiian Village** truncated the public sidewalk altogether. They ran a passageway across their property connecting back to the regular city sidewalks. You can see that the passageway has a green line on the inner side of the passageway which demarks the right of public use. It's open for pedestrians, union protesters, artists, newspaper stands and other **Public Forum** activities. This is called sidewalk "**replacement**".

Now, as the area of Kalakaua Avenue sidewalk affected by the streetscape is to be diminished then sidewalk replacement has to be made such as at Venetian Casino and Hilton Hawaiian Village. In the case of Venetian it was ordered after the fact, but since that case *and* because of it, in the case of Hilton the designers planned and constructed the replacement without a court battle and with minimal disruption.

BUT replacement has not been planned in the current joint city/developer plan on Kalakaua Avenue. In this high density area where multi-story buildings butt the sidewalk on one side and the roadway on the other, it is a monumental, probably unrealistic, challenge to keep the new

project and accommodate the U.S. Constitution at the same time. The ***Public Forum*** must either extend into retail and building space or onto the street. **OR** the new planter boxes going in must be ripped up!! No court can rip up the Constitution but a court can order the planter boxes be removed.

Under federal law people can put their tables, chairs and shading up, distribute flyers, chant and praise their deity, rally and protest, ask for donations and do all that's been established as free speech. It appears you can name prices for products, entertainment and services based on anti-discrimination principles. The **Star Advertiser** for instance openly advertises price and sells newspapers **for profit** using the public sidewalk under the ***Public Forum***. (Refer to "Jingles" case No.96-55545 -Ninth Circuit: NMI PERRY v. LOS ANGELES POLICE DEPARTMENT)

City and state government and property owners have convinced many, including our agencies such as **HPD**, that the rules governing the sidewalk are locally Hawaiian ones, or change from suburb to suburb, or from one side of the street to the other or from one property to the next, or even from entity to entity and person to person. Worse, the local "rules" are more often than not **just hearsay**. This accounts for the obscene number of sidewalk arrests that go to state court with no conviction resulting. Things are applied with discrimination picking on venerable, poor and less assertive people.

LOCAL AUTHORITIES, PROPERTY OWNERS AND SECURITY PERSONEL ARE FABRICATING SIDEWALK LINES AND RULES RESULTING IN HARRASMENT AND SUPPRESSION OF INDIVIDUALITY AND FREE SPEECH!
WHERE STATE RULINGS AND LOCAL HEARSAY CONFLICT WITH THE RIGHTS OF FREE SPEECH AND WHICH THE U.S. SUPREME COURT UPHOLDS THEN THE STATE RULINGS ARE OVERRIDDEN. THE SIDEWALKS MUST BE PROTECTED FOR FREE SPEECH BY AND FOR THE PEOPLE! NOTHING CAN BE MORE OBVIOUS IN THE WAKE OF THE EGYPTIAN REVOLUTION WHICH IS A SUCCESSFUL USE OF PUBLIC SPACES AGAINST THAT GOVERNMENT DICTATORSHIP. THE PROTESTS IN PUBLIC SPACES AGAINST UNION BUSTING IN WISCONSIN IS ALSO OF NOTE! PRIVATE CORPORATES IN WAIKIKI ARE CURRENTLY STEALING THE PEOPLE'S PHYSICAL AND INTELLECTUAL PROPERTY - AND AT TAX PAYER EXPENSE!

WAIKIKI SIDEWALK UPHEAVAL

LEGAL INFORMATION FOR BUSKERS, STREET ARTISTS AND STREET USERS

When the sidewalks are pushed onto private property because of the new streetscape project down Kalakaua Avenue you can be sure of massive public confusion and congestion. Phase One of the project is underway on the mauka side between Tony Roma's and the Hyatt.

For street artists and performers and groups in the way of the bulldozers, the prospect of upheaval and harassment by police maybe a part of the plan by the developers and the city. Buskers need to be aware and avoid trouble by understanding their rights.

- 1) The public is allowed to assemble and do all the activities currently done on the Kalakaua Avenue strip as part of the Public Forum (constitutional free speech)
- 2) The party/s responsible for taking away the **Public Forum** are obliged to provide sidewalk "**Replacement**", sidewalk space of equal free speech value. In 2001 the Venetian Casino in Las Vegas was held responsible for taking away the sidewalk and were held liable for "Replacement"
- 3) Since "Replacement" has apparently not been planned for along Kalakaua Avenue, any damages, such as loss of livelihood, income, loss of freedom and free speech opportunity, harassment or injury by police or private security must be documented for the benefit of legal action.

The metal strip that runs down Kalakaua is arbitrary and NOT LEGAL according to the city legal consultant **Jon Van Dyke**. The city must survey each block and mark off the newly ruled Pedestrian Use Zone which targets homeless from setting up camp and furniture on the sidewalk. The city PUZ laws accommodate First Amendment rights; for instance people can rally or set up a small table and chair in the zone for free speech activities.

That private property easement along the side of the buildings -the space that private property owners so eagerly protect beyond their property line as somehow being their own and therefore right to manage- is apparently also protected for groups and individuals to use for expressive activities – no different to the rest of the sidewalk!

Private security guards are implementing the notions of the building owners and act on conjured up information along the coconut wireless – but they have never seen the law – or the survey line! According to union leadership in Honolulu this easement is Public Forum! Unions often are forced to test sidewalk laws and are well experienced with the law.

If correct, private security guards, shop employees and HPD are acting with discrimination and harassment to approach sidewalk users with orders to move. They must treat all users of the sidewalk with respect whether the user is a pedestrian or engaging in free speech activities such as art, craft, voice, protest and so on.

Most people in security are employees and support unions and public interest. But if police, security guards, business employees threaten you get their name, badge number (for police), who they work for and note the time and date. Work together with other street users: take pictures, videos and get witnesses, full names and clear contact info!

KEEP ALL RECORDS and DOCUMENTATION FOR LEGAL REFERENCE!

Remind them of the current news in Wisconsin. Make it known to police that their counterpart union is using the sidewalk in Wisconsin to protest the corporate/Republican attack on Collective Bargaining. Show them the cover sheet of the Venetian Casino case (attached). This one sheet from the United States Court of Appeals, Ninth Circuit, clearly shows in the title that city and local unions, including **Clark County, the District Attorney, Las Vegas Metropolitan Police Department and ACLU** sued a private resort corporation **Venetian Casino Resort** for taking away the sidewalk. The ruling states:

“..judgment in favor of county and unions, and owner appealed. The Court of Appeals, Hug, Circuit Judge, held that replacement sidewalk was “public forum” subject to protection of First Amendment”.

Tell troublemakers (people who approach buskers to leave, uniformed or otherwise) to contact **Corporate Counsel** at Honolulu Hale (city hall) to find out where they stand before they bring legal trouble on themselves. Any line must be surveyed and posted and in any case is irrelevant on two counts: 1) it is public forum and 2) maybe considered “replacement”. The property owners being party to the streetscape project that impairs the Public Forum are liable for sidewalk “Replacement”.

Go to the front of the Hilton Hawaiian hotel by the pond corner area on Ala Moana Blvd. and all along the makai side of their property (Kalia Road) you will see the sidewalk green stripe which is the new replacement sidewalk most likely legal except the city NEVER SURVEYED THIS LINE.

SURVEYING MUST BE DONE. IT SHOULD BE DONE AT THE SAME TIME ON BOTH SIDES OF THE STREET - NO FOOT DRAGGING TO PROTECT THE **ROYAL HAWAIIAN SHOPPING CENTER, BEACHWALK, LUXURY ROW and KING KALAKAUA PLAZA (NIKE-TOWN)**.

Waikiki Improvement Association and City and County of Honolulu, the engineers of this apparent illegal expenditure of public funds must repair the damage they are causing. The project is an attempt to get rid of certain citizens, street performers, bands, churches and so on. The building owners want to make the sidewalk part of their control of everything. They don't like individuality, free speech or public democracy. They want new tiles on the pavement to match their shopping mall businesses - They want everyone to work for low wages for them - Or else they want you shut away, criminalized or derelict as being homeless, isolated, antisocial and a visible example.

WE HAVE TO GET CLARITY OF THE LAW REGARDING THE EGRESS OR EASEMENT ZONE, BUT AS HAS BEEN ASSERTED AT CITY HALL REGARDING THE NEW PREDESTRIAN USE ZONE, THE COURT WILL THROW OUT ANY TICKET OR CHARGE WHERE SIDEWALK MARKINGS ARE NOT SURVEYED. POLICE MUST PROVE CITY LINES IN COURT. THE CITY IS GRAPPLING WITH HOW TO MARK EACH CITY BLOCK FOR THE “PUZ” WITH CONTRACT COSTS RUNNING \$10K PER BLOCK AND TOLALLING \$250K. YET THEY ANNOUNCED \$14 MILLION (NOW THEY SAY IT'S LESS THAN THAT) FOR PHASE ONE OF THE STREETScape PROJECT - FOR PLANTS TILES AND LIES!

In an ongoing scenario HPD has never asked a group of young church evangelists who hold signs with their pictures on them to leave when they come to Kalakaua Avenue (beach side Diamond Head of the Police Substation). They come in a bus sometimes at nights and stand, not just on the sidewalk (which is their right) but on the beach and beach park! There is video of police talking to these people and doing nothing. On the other side of the avenue, many street artists, acting within the law have, in the past, been shut down, arrested, fingerprinted, strip searched or cited. This is unequal application of the law, or moreover unequal application of harassment.

From: Jon Van Dyke
Subject: Re: Venetian Case
Date: Fri, 3 Sep 2010 15:14:34 -0400

Yes, this ruling does mean that the same right to engage in expressive activities exists on the "replacement sidewalks" that would have existed on the public sidewalks had access to these sidewalks not been blocked. However, Honolulu does have a Peddling Ordinance that prohibits the sale of goods and services in the sidewalks of Waikiki, so any sales by "vendors (crafts sellers)" in the Waikiki Special District [regular sidewalks or replacement sidewalks] is now prohibited. The Ninth Circuit has also told us in the Berger case (involving Seattle) that it would be constitutional to prohibit the actual physical transfer of money on public sidewalks, so we could pass an ordinance that would prohibit donations to sidewalk performers. Hope this is helpful. I am in Washington DC now for a few days, but can be reached by email or cell phone () if you want to talk about any of this in more detail. Aloha, Jon

This is an email to a resident from Jon Van Dyke in his roll as legal counsel to the City. Here Van Dyke's assertion of "**replacement sidewalks**" is clear, although his comments on vendor sales is in conflict with the Ninth Circuit ruling "Jingles" case: **No. 96-55545 NMI PERRY v. LOS ANGELES POLICE DEPARTMENT** where the judge ruled that Jingles had the right to name a price and sell goods on the sidewalk.

PLEASE DIRECT YOUR COMPLAINTS TO:

Rick Egged
Waikiki Improvement Association
Phone: 808.923.1094
www.waikikiimprovement.com

Mayor Peter Carlisle
PHONE 808-7684385
M-F 7:45 am - 4:25 pm (not furlong Fridays)
After hours, record a message.
Email: mayor@honolulu.gov

For more information
including a Letter of Concern from the Waikiki Neighborhood Board to the city
and links to test court cases go:

www.savewaikikisidewalk.com

Legal Resources
Street Arts & Buskers Advocates

www.buskersadvocates.org

www.savewaikikisidewalk.com

March 03, 2011

<http://caselaw.findlaw.com/us-9th-circuit/1015032.html>

257 F.3d 937, 167 L.R.R.M. (BNA) 2596, 145 Lab.Cas. P 11,183, 00 Cal. Daily Op. Serv. 5847

Briefs and Other Related Documents

Judges and Attorneys

United States Court of Appeals,
Ninth Circuit.

**VENETIAN CASINO RESORT, L.L.C., a Delaware Limited
Liability Company, Plaintiff-Appellant,**

v.

**LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS;
Culinary Workers Union, Local No. 226, an Unincorporated
Association; Bartenders Union, Local No. 165, an
Unincorporated Association; Clark County, a Political
Subdivision of the State of Nevada; Stewart L. Bell, in his
capacity as District Attorney of Clark County, Nevada; Las
Vegas Metropolitan Police Department, Defendants-Appellees,

American Civil Liberties Union, Intervenor-Appellee.**

No. 00-15136.

Argued and Submitted July 18, 2000

Filed July 12, 2001

Property owner filed action against county seeking declaratory judgment that replacement sidewalk constructed on its property was not public forum and injunction requiring county to recognize and enforce owner's right to exclude labor union demonstrators from sidewalk. Labor unions intervened. The United States District Court for the District of Nevada, Philip M. Pro, J., denied owner's request for preliminary injunction, 45 F.Supp.2d 1027, and entered summary judgment in favor of county and unions, and owner appealed. The Court of Appeals, Hug, Circuit Judge, held that replacement sidewalk was "public forum" subject to protections of First Amendment.

Affirmed.