THE NEWSLETTER OF THE REAL PROPERTY & FINANCIAL SERVICES SECTION OF THE HAWAII STATE BAR ASSOCIATION

KA NU HOU

FROM THE CHAIR ELECT

Aloha Section Members:

Welcome to the October 2013 issue of Ka Nu Hou, the newsletter of the Real Property and Financial Services Section of the Hawaii State Bar Association. RPFSS has over 400 members and is the largest section in the HSBA. Our primary mission has been to provide top-notch continuing legal education opportunities for our members through a variety of means, including presenting seminars and informal brown bag sessions, publishing practice manuals, books and this newsletter.

Many thanks go to Mark Ito for his tremendous leadership this past year as our 2013 Chair and to all of our 2013 board members for their outstanding contributions to the section.

The section has had a number of excellent and well attended brown bag sessions in 2013 and its annual legislative update, and the section will be having its annual litigation update this November. The Board will be planning additional brown bag and educational sessions for 2014 and welcomes any suggestions that RPFSS members might have.

The section has a new website, which can be viewed at the following address:

http://www.hawaiirealpropertysection.com

Many thanks go to Nancy Grekin for her previous hard work and dedication in setting up the section's original website and to Alyson Wee and Raphael Lowe in setting up the current website. It took a while to set up a website that is a worthy successor to Nancy's original website.

Past issues of Ka Nu Hou as well as handouts from some of the 2013 brown bag sessions, and a link to a video of the recent brown bag session on 1031 exchanges have been posted to the website. We hope you find the new website useful to you, and are open to any comments on improvements to the website you might have.

Aloha,

Wesley Y. S. Chang, 2014 Chair Elect
Real Property and Financial Services Section

In this Issue: October 2013

VALID REGULATION OF LAND-USE OR AN OUT-AND-OUT PLAN OF EXTORTION? COMMENTARY ON ST. JOHNS RIVER WATER MGMT. DIST. v. KOONTZ

by Catherine L. Hall, a 2013 graduate of the William S. Richardson School of Law. Ms. Hall's work received the annual 2012 RPFSS Award, and an edited version of her article appeared in the Real Estate Law Journal published by West Publishing. See also the author's postscript on the United States Supreme Court's Koontz opinion of June 25, 2013.

BEACH, BREACH, AND BURDEN:
PUSHING THE ENVELOPE FOR REVITALIZATION IN WAIKIKI

by Andrea K. Ushijima, a 2013 graduate of the William S. Richardson School of Law and now an associate at Cades Schutte LLP. Ms. Ushijima's work received the C. Jepson Garland Memorial Scholarship Award. This article discusses the application by Kyo-ya Hotels and Resorts, LP for a variance from the coastal setback requirements of the Waikiki Special District.

"Save the Date":

Tuesday, November 5, 8:30 to 10:30 a.m. – HEI Training Center, 8th Floor, ASB Tower, **RPFSS Litigation Update** (Presented by Mark M. Murakami; Gregory Kugle). 1 hr MCPE, 1 jr VCLE. Register for In Person Seminar at http://www.legalspan.com/hsba/catalog.asp?ItemID=20131009-299250-154147 and Live Webcast at http://www.legalspan.com/hsba/catalog.asp?ItemID=20131009-299250-160211

Monday, November 18, 4:30 to 6:00 p.m., 2013 Gifford Lecture on Real Property at the Moot Courtroom at the William S. Richardson School of Law. Nicole Stelle Garnett from the University of Notre Dame will present ***Was Jane Jacobs Wrong? Confronting the Paradoxes of Mixing Land Use***, and reception will be held at WSRSL. A light reception from 5:30 to 6:00 p.m. to follow. No charge.

Thursday, December 5, noon to 1:00 p.m. – Don't miss the annual Real Property Financial Services Section meeting at the Pacific Club. Professor David Callies will speak on ***When Government Exactions Are "Extortionate": the Constitutionality of Impact Fees, Mitigation Fees and In-Lieu Fees after Koontz.*** Registration info to follow.

Note: An edited version of this article has been published in the *Real Estate Law Journal* by West Publishing

VALID REGULATION OF LAND-USE OR AN OUT-AND-OUT PLAN OF EXTORTION? COMMENTARY ON ST. JOHNS RIVER WATER MGMT. DIST. v. KOONTZ

Catherine L. Hall[a1]

I. Introduction

Eminent domain is a complex yet fundamental area of property law in American jurisprudence. The Takings Clause of the Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, constrains the powers of the government by requiring compensation whenever private property is taken for public use.[1] Another principal purpose of the Takings Clause is to prevent the government from forcing some people alone to bear public burdens that justice and fairness would require the public as a whole to bear.[2] These constitutional protections extend into the realm of land-use regulation. Courts, however, have struggled to apply Supreme Court precedent to land-use exaction takings claims.[3]

***271** In *St. Johns River Water Mgmt. Dist. v. Koontz*[4] the Florida Supreme Court failed to follow Supreme Court precedent and instead followed a recent trend that shifts the takings analysis towards increasing government power and away from protections for private property owners. In doing so, the court undermined the dual purposes of government constraint and equitable distributions of public burdens encompassed in the Fifth Amendment. In this paper I will argue that: (1) the Florida Supreme Court erred by holding that it would not apply constitutional scrutiny to land-use exactions unless they involve real-property; (2) a property owner is entitled to constitutional scrutiny of land-use exactions, whether or not a permit has been issued; and (3) in this case the property owner's claim should have been dismissed because the record did not support an analysis of a land-use exaction claim. Part II of this paper revisits the Supreme Court's holdings in the area of land-use exactions, part III analyzes *St. Johns River Water Mgmt. Dist. v. Koontz*, part IV compares land-use exaction cases in other jurisdictions, and part V articulates the necessary steps in a land-use exaction takings claim.

II. The Fundamental Takings Cases

Takings are classified as either physical or regulatory. A physical taking is a physical appropriation or invasion of property.[5] A regulatory taking can occur when a governmental entity imposes restrictions that either deny a property owner all economically viable use of the property[6] or unreasonably interfere with the owner's right to use and ***272** enjoy the property.[7] A distinct category of regulatory taking occurs when the government conditions the approval of a permit or some other type of governmental approval on an exaction from the approval-seeking landowner.[8] The following cases trace the Supreme Court's consideration of land-use exactions in Fifth Amendment takings challenges.

A. Preventing Out-and-Out Extortion: Exactions Must Have an Essential Nexus to the Government's Purpose for Imposing Them

In 1987 the Supreme Court decided a case that started to redefine land-use regulation and takings case law.[9] The Nollans leased a beachfront property in Ventura, California, with an option to purchase.[10] The option to purchase was conditioned on the Nollans' promise to demolish and replace the small bungalow that was on the property.[11] In order to replace the bungalow they were required to obtain a coastal development permit from the California Coastal Commission for the project.[12] The commission granted the Nollans a permit to replace the small bungalow on their beachfront lot with a larger house, with the condition that they allow the public an easement to pass across their property to the beach.[13]

The Nollans filed a petition for writ of administrative mandamus asking the court to invalidate the access ***273** condition.[14] They argued that the condition could not be imposed unless there was evidence that their proposed development would have a direct adverse impact on public access to the beach.[15] The court agreed and remanded the case to the commission for a full evidentiary hearing on that issue.[16] The commission determined that the purported government interests justifying the dedication were preventing blockage of the public's view of the ocean and assisting the public in overcoming a perceived "psychological barrier" to using the beach.[17] Following the commission's determination the Nollans challenged the easement as a takings violation.[18] The court then granted them a writ of administrative mandamus and directed that the permit condition be struck.[19] The state court of appeal reversed this decision, and the Nollans appealed to the United States Supreme Court, which granted certiorari.[20]

The Supreme Court began its examination by noting that if California had simply required the Nollans to make an easement across their beachfront available to the public in order to increase public access to the beach, rather than conditioning the permit to rebuild their house on agreeing to do so, it would have been a taking.[21] Because requiring an uncompensated conveyance of an easement would have violated the Fourteenth Amendment, the question became whether requiring it to be conveyed as a condition for issuing a land-use permit altered the outcome.[22] To decide this issue, the Court analyzed whether the commission's requirement substantially advanced a legitimate state interest.[23] If the conditions imposed on the Nollans' development had ***274** advanced the stated purposes of the commission and if the new house had impeded these purposes, the commission would have been able to deny the Nollans the permit outright.[24] However, the Court discarded the view and "psychological barrier" arguments as having no nexus to the development condition and held that the commission had no authority to impose them.[25]

Unless the permit condition served the same governmental purpose as the development ban, the building restriction was not a valid regulation of land use but "an out-and-out plan of extortion."[26] If the condition had an essential nexus it would have been permissible, just as a permit denial would have been if it contained a nexus.[27] The condition would have been permissible even if it required an outright dedication of land, so long as it had the essential nexus to the condition imposed.[28] Without the essential nexus the condition failed to further the stated purpose, was an easement without payment of compensation, and was not even within the outer limits of "legitimate state interests" in the takings and land-use context.[29] Ultimately, by requiring a nexus between a governmental exaction and the burden being imposed by the new development, the *Nollan* Court limited the nature of government demands on developers.[30] Having established that government demands on developers must ***275** answer a need created by the project in question, the question still remained as to how close that connection must be.[31]

B. The Government Must Demonstrate Rough Proportionality Between an Exaction and the Projected Impact of a Development

In *Dolan v. City of Tigard*, decided seven years after *Nollan*, the Supreme Court expanded its land-use exactions jurisprudence to address the question of how close the connection between the government exaction and the projected impact of the development must be.[32] Florence Dolan owned a plumbing and electrical supply store located in Tigard, Oregon, that was bordered on one side by Fanno Creek.[33] Dolan applied for a building permit to increase her store size and parking lot.[34] The planning commission granted approval subject to conditions imposed by the recently enacted Tigard Community Development Code, which required dedication of a portion of her property for storm drainage and an additional strip of land for a bicycle pathway.[35]

Dolan first requested a variance, which was denied.[36] Subsequently, she appealed to the Land Use Board of Appeals (LUBA) on the ground that the city's dedication requirements were not related to the proposed development, and therefore, those requirements constituted an uncompensated taking of her property under the Fifth Amendment.[37] LUBA found a reasonable relationship and upheld the ***276** exaction.[38] The Oregon Court of Appeal affirmed, rejecting Dolan's contention that *Nollan* had abandoned the ""reasonable relationship" test in favor of a stricter "essential nexus" test.[39] On further appeal, the Oregon Supreme Court affirmed, agreeing that under *Nollan* an "exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve."[40] Dolan appealed to the Supreme Court, which granted certiorari.

The Supreme Court began its analysis the same way it had in *Nollan*, noting that if the city had required Dolan to dedicate a strip of land along Fanno Creek for public use rather than conditioning the grant of her permit to

redevelop her property on such a dedication, a taking would have occurred.[41] The Court also noted that the city had made an adjudicative decision to condition the application for a building permit on an individual parcel.[42] The conditions imposed were not simply a limitation on the use of Dolan's parcel, but a requirement that she deed portions of the property to the city.[43] The Court found that this fell under the well-settled doctrine of "unconstitutional conditions," because the government could not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.[44] The constitutional right that Dolan was being asked to give up was a right to just compensation when private property is taken for public use, under the Fifth Amendment.[45]

When evaluating a claim under the Fifth Amendment, the Court stated it must first determine whether the "essential nexus" exists between the "legitimate state interest" and the ***277** permit condition exacted by the city.[46] If the Court finds that a nexus exists, it must then decide the required degree of connection between the exaction and the projected impact of the proposed development.[47] Since the conditions in Dolan were not "gimmicks" and the required nexus existed, the Court sought to determine the required connection.[48] The Court thought the term "rough proportionality" best encapsulated the requirement of the Fifth Amendment.[49] The Court also placed the burden on government to prove the relationship.[50] No precise mathematical calculation was required under this new standard, but the city must make some sort of individualized determination that the required dedication was related, both in nature and extent, to the impact of the proposed development.[51]

After reviewing the two dedications demanded of Dolan, the Court found that the city did not meet its burden of demonstrating the required relationship.[52] Because the requirements exceeded the need created by the development, they could not be imposed.[53] In deciding *Dolan*, the Supreme Court reinforced the underlying purposes of government constraint and equitable distribution of public burdens as encompassed in the Fifth Amendment. The Court next considered whether these protections extended to exactions of property outside of land-based dedications.

C. Impact Fees Should also be Considered In Light of *Dolan*

Immediately after deciding *Dolan*, the Supreme Court accepted certiorari in *Ehrlich v. City of Culver City*.[54] The dispute in *Ehrlich* had begun when a developer filed a petition for a writ of mandate to set aside fees imposed by Culver City as a prerequisite to its approval of a development ***278** project.[55] The lower court had invalidated the fee to mitigate loss of community recreational facilities, but upheld the public arts fee, and subsequently both parties appealed.[56] The California Court of Appeal then reversed as to the mitigation fee, affirmed the art fee, and ordered the court on remand to vacate the peremptory writ.[57] The United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to be considered in light of *Dolan*.[58] By doing so, the Supreme Court signaled that impact fees are exactions that should be reviewed based on *Nollan* and *Dolan*. Following remand, the California Supreme Court held that the Fifth Amendment takings analysis applied to non-possessory exactions in the form of individual and discretionary monetary fees.[59] On subsequent appeal to the Supreme Court, certiorari was denied.[60]

D. *Dolan* Only Applies to Challenges Based on Excessive Exactions, not Denial of Permits

Several years later, the Supreme Court decided a different kind of takings case. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, a development company claimed that a city's repeated rejections of its development proposals deprived it of all economically viable use of its land.[61] This case was analyzed using the *Penn Central* regulatory takings analysis, not a land-use exaction analysis. However, the Supreme Court provided guidance on distinguishing the two types of claims and how the *Dolan* test applied to land-use exaction takings claims.

To determine if the land-use exactions analysis applied, ***279** the nature of the claim must first be examined. The Court stated that the rough-proportionality test of *Dolan* did not apply beyond the special context of exactions--land-use decisions conditioning approval of development on the dedication of property to public use.[62] The Court also reiterated that the rule in *Dolan* considers whether dedications demanded as conditions of development are proportional to the development's anticipated impacts.[63] The Court instructed that *Dolan* was not designed to address, and is not readily applicable to, the much different questions arising where, as in *Del Monte Dunes*, the landowner's challenge is based not on excessive exactions but on denial of development.[64] Accordingly, it stated the

rough-proportionality test of *Dolan* is inapposite to such a case.[65] In summary, the Court demonstrated how to untangle a *Penn Central* claim from a land-use exaction claim and provided guidance on how a land-use exaction claim must be framed. First, land-use exaction claims must involve land-use decisions conditioning approval of development on the dedication of property to public use. Second, the court stated that a landowner must challenge an excessive exaction, not a denial of development, to be considered under *Dolan*.

E. Courts Must Separate Takings and Due Process Claims

Several years later, in *Lingle v. Chevron U.S.A., Inc.*,[66] the Supreme Court took a step back and analyzed the basis of the regulatory takings law that it had thus far created, which for some brought needed coherence.[67] *Lingle* synthesized the takings doctrine by stating that a plaintiff seeking to challenge a government regulation or action as an uncompensated taking of private property may proceed under one of four theories, alleging either (1) a "physical" taking, (2) a *Lucas-type* "total regulatory taking," (3) a *Penn Central* taking, or (4) a land-use exaction violating the standards set ***280** forth in *Nollan* and *Dolan*.[68] Going forward a plaintiff is limited to one of these four types of theories when making a takings claim.[69]

The *Lingle* dispute involved a dispute over rent control and focused on the "substantially advances" question which had its basis in *Agins v. City of Tiburon*. The Court held that *Agins* was no longer good law.[70] The ""substantially advances" test from *Agins* asked in essence whether a regulation of private property was effective in achieving some legitimate public purpose, a question that was only logical in the context of a Due Process challenge.[71] The Court held that while a regulation that failed to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause, such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.[72] For purposes of takings claims, courts should no longer inquire if a condition "substantially advances" a legitimate government interest.

The *Lingle* Court characterized *Nollan* and *Dolan* as unconstitutional condition inquiries, not substantive due process inquiries. The Court rejected the argument that the *Agins* formula played a role in their decisions in *Nollan* and *Dolan* but admitted it drew upon the *Agins* language.[73] The Court distinguished *Nollan* and *Dolan* as specifically involving Fifth Amendment takings challenges to adjudicative ***281** land-use exactions.[74] In each case the Court had begun with the premise that, had the government simply appropriated the easement in question, there would have been a *per se* physical taking.[75] The question was whether the government could, without paying the compensation that would otherwise be required upon affecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny.[76] The Court stated that exaction cases involve a special application of the "doctrine of unconstitutional conditions."[77] This doctrine provides that the government may not require a person to give up a constitutional right, such as the right to receive just compensation when property is taken for a public use, in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.[78] By separating due process from the takings analysis, the Court attempted to clarify the context in which constitutional scrutiny applied to land-use exactions.

Since *Nollan* and *Dolan*, three Supreme Court opinions have commented on the scope of these tests: *Ehrlich*, *Del Monte Dunes*, and *Lingle*. These Supreme Court cases have instructed that in land-use exaction inquiries: (1) exaction fees require constitutional scrutiny under the *Nollan/Dolan* tests, (2) plaintiffs must protest the excessive exaction not the denial of development, and (3) courts should not ask if a condition "substantially advances" a legitimate government interest. Despite these directives, many courts have been unable to coherently apply Supreme Court precedent to land-use exaction claims. An examination of *St. Johns River Water Mgmt. Dist. v. Koontz* reveals that the Florida Supreme Court failed to apply Supreme Court precedent when determining if exactions imposed on a Florida developer constituted a taking.

*282 III. St. Johns River Water Mgmt. Dist. v. Koontz

This case began in 1994, when Koontz wanted to develop his Florida property and applied for the necessary permits.[79] The St. Johns River Water Management District, which managed the Riparian Habitat Protection Zone where most of Koontz's 14.2 acre property was located, agreed to allow Koontz to dredge 3.25 acres of wetlands for

a 3.7 acre development.[80] The development approval was conditioned on Koontz performing off-site mitigation and deed restricting the remainder of his 14.2 acre property for conservation purposes.[81] In the alternative, the district proposed a one-acre development with the rest of the property to be a dedicated conservation area.[82] Koontz agreed to deed his excess property into conservation status but refused St. Johns' demands for offsite mitigation or reduction of his development from 3.7 to one acre.[83] Consequently, St. Johns denied his permit application.[84] Koontz then sued the River Water Management District alleging that the denial of the permit to dredge his wetland property constituted a regulatory taking.[85] Seventeen years after the initial permit requests were made the Florida Supreme Court accepted the case from the Florida Court of Appeal, bringing an apparent end to the long procedural history.[86] Before examining the Florida Supreme Court opinion, it is helpful to first examine the majority and dissenting opinions from the court of appeal.

A. *Koontz IV:* The Court of Appeal Applied the Proper Remedy but Failed to Recognize that the Claim Should have been Dismissed

In *Koontz IV* the court held that the conditions imposed on Koontz were unconstitutional and that Koontz was entitled to compensation for a temporary taking of his property during ***283** the time that the District adhered to the conditions.[87] The majority opinion was correct to recognize that the *Nollan/Dolan* tests applied to the type of exactions imposed by St. Johns. The dissent, however, was also correct to recognize that the court should not apply the *Nollan/Dolan* tests because Koontz sought relief for denial of a permit as opposed to an excessive exaction. Both the majority and dissenting opinions in *Koontz IV* attempted to apply the relevant precedent, some of which was being developed simultaneously to the ongoing litigation in *Koontz*, but neither opinion was entirely correct in its application.

1. The Majority Recognized that the Conditions Imposed on Koontz were Unconstitutional

"[W]hile the doctrine of unconstitutional conditions may be 'well-settled,' it is certainly not well understood."[88]

The majority in *Koontz IV* held that Koontz was entitled to compensation for a temporary taking.[89] In considering the land-use exaction takings claim, the majority focused on the fact that the conditions imposed on Koontz had failed to meet constitutional scrutiny. In deciding the case, the majority recognized that the conditions placed on Koontz lacked the "essential nexus" and "rough proportionality" required for land-use exactions.[90] The court reviewed the record and provided additional details about the reasons for St. Johns' denial of the permits, which are important in an exaction takings analysis.[91] The reasons listed in the order denying the permits were that Koontz's proposed development would adversely impact Riparian Habitat Protection Zone fish and wildlife, and that the purpose of the mitigation was to offset that impact.[92] The trial court had determined that the offsite mitigation imposed by St. Johns had no "essential nexus" to the development restrictions already in place on the Koontz property and was not ""roughly proportional" to the ***284** relief requested.[93] Accordingly, the majority found that the conditions did not meet constitutional scrutiny.

The majority correctly applied the relevant precedent when it examined St. Johns' arguments. Although St. Johns acknowledged that an exaction claim is a form of takings claim, and was thus cognizable, it argued that no such exaction occurred because Koontz refused the exaction; therefore nothing was exacted from him.[94] St. Johns questioned whether an exaction claim could be made when the landowner refused to agree to an improper request from the government resulting in the denial of the permit.[95] The majority correctly recognized that a landowner is not required to agree to an exaction to make a claim.[96] The majority recognized that the question had already been answered in *Dolan* itself, which also involved a challenge to rejected conditions.[97] St. Johns also contended that a taking claim could not be made because the condition it had imposed on Koontz did not involve a physical dedication of land but instead a requirement that Koontz expend money to improve land belonging to the District.[98] In response to this contention, the majority held that the Supreme Court had already implicitly decided the issue in *Ehrlich v. City of Culver City*.[99] Without a more definitive statement from the Supreme Court, the majority found the distinctions advanced by St. Johns were not legally significant and that an exactions analysis applied.[100] In reaching its conclusion, the Florida Court of Appeal correctly recognized that the Supreme Court ***285** remand in *Ehrlich* required consideration of fees under *Dolan*.[101]

2. The Dissent Recognized that Koontz's Claim was Insufficient to Support Constitutional Scrutiny

"There is very little of the law important to this case that is settled law[.] "[102]

In contrast to the majority, the dissent first focused on the nature of Koontz's claim, as opposed to the merits. Koontz had filed an inverse condemnation lawsuit in 1994 claiming that the District had taken his property by imposing an unreasonable condition of off-site mitigation on the issuance of a permit.[103] Koontz's claim stipulated that he was not "proceeding upon a theory that the District final orders deprived [him] of all or substantially all economically beneficial or productive use of the subject property."[104] Rather, in describing the issue to be litigated, Koontz's claim stated, "[t]he issue before this Court is whether the conditions imposed by the District on the Koontz property, and in particular the required mitigation, resulted in a regulatory taking[.]" Koontz claimed that "[t]he off-site mitigation did not serve a substantial purpose."[105]

The dissent correctly points out that this theory was principally based on *Agins v. City of Tiburon*.[106] During the many years the Koontz case proceeded below, the dissent recognized that Koontz's original theory of liability had evaporated.[107] This distinction is extremely important because *Agins* had been overruled during the time this case was pending and the case was not properly framed on a takings theory to allow the court to review under the *Nollan* ***286** and *Dolan* standards. The dissent correctly recognized that the case should have been dismissed.

The dissent also questioned whether Koontz was entitled to bring an exactions takings claim because (1) no property was ever taken; (2) the exaction was not real property; and (3) the exaction was rejected. None of the questions by the dissent withstand an application of Supreme Court precedent. First, the dissent questioned the right to just compensation for the taking of property under the Fifth Amendment when no property of any kind was ever taken by the government and none ever given up by the owner.[108] The dissent in *Dolan* also advanced this dispute, and as the majority had recognized, it was implicitly rejected.[109] The dissent failed to recognize that a party properly contesting an exaction is entitled to relief when a condition fails to meet *Nollan* and *Dolan* standards.[110] Second, the dissent also argued that giving up an interest in property was not enough where the objected to exaction was not an interest in land.[111] Here the objected to exaction was the requirement to perform certain off-site mitigation in the form of clean up of culverts and ditches to enhance wetlands several miles away.[112] The dissent did not consider the first *Ehrlich* remand, and focused on the Supreme Court denial of certiorari on the second appeal of *Ehrlich*. By omitting the *Ehrlich* remand from consideration, the dissent failed to recognize that the Supreme Court had signaled that fees should be considered under *Nollan/Dolan* standards. Third, the dissent incorrectly reasoned that the question of whether or not a condition that has been rejected can constitute a taking was not resolved in *Dolan*, and that a taking does not occur under such circumstances.[113] The dissent failed to recognize that Koontz was entitled to relief from the unconstitutional conditions if he properly protested the exactions, whether or not the condition was rejected. In both *Nollan* and *Dolan*, when ***287** the conditions failed to meet the "essential nexus" or "rough proportionality" tests, the Court struck the conditions. Although the dissent conceded that the off-site mitigation condition for issuance of the permit was invalid, it failed to recognize that as a result, Koontz was entitled to relief from the conditions.[114]

B. The Florida Supreme Court Created Conflicting Precedent

Following the *Koontz IV* decision, St. Johns appealed and the Florida Supreme Court accepted the certified question from the court of appeal.[115] The original certified question asked (1) if an exaction taking occurred where a landowner concedes that permit denial did not deprive him of all or substantially all economically viable use of the property; and (2) whether an exaction taking would be recognized where the compelled dedication was not a dedication of real property. The first part of the certified question was essentially asking whether a *Penn Central* analysis applied. Presumably because the first question was inappropriate for a land-use exaction analysis, the Florida Supreme Court rephrased the question as follows:

> Do the Fifth Amendment to the United States Constitution and Article X, Section 6(a) of the Florida Constitution recognize an exactions taking under the holdings of *Nollan* and *Dolan*, where there is no compelled dedication of any interest in real property to public use and the

> alleged exaction is a non land-use monetary condition for permit approval which never occurs and no permit is ever issued?[116]

Both the lower court and the Florida Supreme Court asked whether the application of *Nollan* and *Dolan* applied to exactions that did not involve real property. While the court of appeal had focused on whether or not land had to be taken before a claim is brought, the Florida Supreme Court focused on whether or not a permit had to be issued before a claim is brought, and reworded the certified question to reflect this. Both courts questioned when an exaction claim could be brought and if it could be made for a non-real property exaction. The Florida Supreme Court began its analysis by noting that state and federal courts had been inconsistent with regard to interpretation of the scope of the *Nollan/* ***288** *Dolan* tests.[117] The court also noted a clear divide between courts on the issue of whether the test applies to conditions that do not involve the dedication of land or conditions imposed upon the land.[118]

The Florida Supreme Court reversed the court of appeal and held that non-land based exactions were not subject to constitutional scrutiny.[119] The Florida Supreme Court departed from Supreme Court precedent by holding that the *Nollan/Dolan* rule is only applicable where the condition or exaction sought by the government involves a dedication of or over the owner's interest in real property in exchange for permit approval, and only when the regulatory agency actually issues the permit sought.[120] In contrast, the Supreme Court in *Nollan* and *Dolan* provided relief to the contested exactions before permits were issued. The Florida decision also departed from the Supreme Court remand in *Ehrlich* where the Court signaled that impact fees are non-land based dedications that should be analyzed under *Dolan*. Instead, the court focused on the second *Ehrlich* petition for certiorari and the conclusion that the Supreme Court's denial of certiorari was no expression of opinion upon the merits of the case.[121]

The court also relied on a strained interpretation of *Del Monte Dunes* to determine that exactions analysis should not apply to land-use exactions unless they were dedications of *real* property to public use.[122] In *Del Monte Dunes* the Supreme Court stated that the takings analysis for the special context of exactions is only applicable when a land-use decision conditions approval of development on the dedication of *property* to public use.[123] The Supreme Court also stated the analysis does not apply where a landowner's challenge is based solely on denial of development approval, ***289** rather than excessive exactions.[124] In contrast, the *Koontz* interpretation of *Del Monte Dunes* incorrectly limited the holding to apply to *real property* only, and failed to consider that the exaction must be contested, not the denial of permit.

Although the Florida Supreme Court incorrectly analyzed the relevant case law and its application to this case, the outcome was correct. The court should not have reached the question of whether *Nollan*, *Dolan* and *Ehrlich* applied at all due to the doctrinal shift in the United States Supreme Court during the course of the Koontz litigation. Because Koontz framed his objections to the permit conditions for review under the *Agins* test of whether a government regulation substantially advances a legitimate purpose, the court should have decided the original takings claim based on *Lingle*.[125] Koontz not only failed to protest the conditions as necessary to proceed with a takings claim, but also failed to protest all of the conditions imposed. Koontz should have also protested the requirement of converting land to conservation. However, proceeding only under *Agins* as to the mitigation, Koontz's theory of the case did not lend itself to an exactions analysis and should have been reversed for this reason alone. The situation presented in *Koontz* is analogous to that in *Lingle*, where the plaintiff argued only a ""substantially advances" theory.[126]

Apart from the procedural limitation, the Koontz claim had merit. By Supreme Court definition, the conditions imposed on Koontz were an "out-and-out plan of extortion" and the case history indicates that there was ample evidence to support a takings claim.[127] When the circuit court had reviewed the proposed off-site mitigation, the condition failed the "essential nexus" and ""rough proportionality" tests.[128] Furthermore, the amount of wetlands on Koontz's property ***290** was found to be significantly less than originally perceived.[129] Because the condition did not meet the *Nollan/Dolan* standards, Koontz's claim should have succeeded if it had been properly framed for consideration.

Koontz could have also protested the deed conversion to conservation. Many courts have recognized that a government mandate to convert fee-simple property to a conservation easement may also be an excessive exaction

entitled to constitutional protections.[130] The lower court, in fact, found no distinction between deed restriction and a conservation easement.[131] Whether or not the distinction was relevant, the failure to protest the deed conversion requirement in addition to the off-site mitigation was a limiting factor in Koontz's claim.

The Florida Supreme Court was correct to reverse the temporary taking award but only because Koontz failed to properly protest the exaction. Koontz should have first contested the exorbitant conditions demanded by St. Johns based on "essential nexus" and "rough proportionality." If Koontz had protested the conditions, then the resulting delay in permit approval would have warranted a claim for a temporary taking. However, Koontz failed to properly protest the exactions. The lower court properly calculated an award of $376,154 for a temporary taking of property, however, it should not have been awarded.[132] The lower court failed to recognize that the compensation claim for a temporary taking ***291** should never have been considered because the record did not support an analysis of a land-use exaction claim.

Ultimately, the Florida Supreme Court's decision was a letdown for many scholars and courts that were anticipating a clarification of the exactions takings analysis. Instead, the court further confused the issues by failing to follow precedent. The court failed to consider the stated Supreme Court remand in *Ehrlich* in its taking analysis, instead focusing on the denial of certiorari petition on the second *Ehrlich* appeal to the Supreme Court. The court also incorrectly interpreted *Del Monte Dunes* and held that an exaction analysis only applies to real property. Finally, the court failed to separate the *Agins* due process claim from the relevant takings analysis, as required by *Lingle*. While the court failed to correctly apply the Supreme Court precedent or to clarify the relevant tests to use in considering exaction claims, many jurisdictions are using equally baffling standards as they answer some of the same questions presented in *Koontz*.

IV. Exactions Cases in Other Jurisdictions

A survey of state and federal decisions reveals there is considerable disagreement about when the application of *Nollan* and *Dolan* apply to the exactions takings analysis. Many courts have concluded that a condition must be adjudicative or *ad hoc*, as opposed to legislative, to be reviewable under the exactions takings analysis, yet there is still ongoing debate.[133] The Florida Supreme Court and other courts have issued conflicting opinions about whether impact fees and off-site mitigation should be subject to scrutiny under this doctrine.[134] While Florida failed to apply the remand in *Ehrlich*, many courts have ignored or dismissed it outright.[135] Courts have also misconstrued the dicta in *Del Monte Dunes* to limit constitutional scrutiny to only realproperty ***292** exactions.[136] As the following cases reveal, many claims are not properly framed for consideration under *Nollan* and *Dolan*, but courts fail to either dismiss such claims, or distinguish the deficiencies.

A. The Eighth Circuit

In *Iowa Assurance Corp. v City of Indianola*, the Eighth Circuit applied an exactions taking analysis to a case that did not properly assert a land-use exaction takings claim.[137] The plaintiff claimed that the city's requirement that it build a fence around two or more racecars parked on a property was an exaction.[138] However, an exaction is a demand that a regulatory agency places in exchange for property development.[139] In this case there was no property development, only the disputed regulatory ordinance. The plaintiff's claim that the ordinance created an uncompensated regulatory taking was not analogous to the type of land-use exactions that *Nollan* and *Dolan* are applicable to. The plaintiff suggested that the ordinance constituted a taking because the city did not provide a sufficient amortization period to effect the change or allow for a continued non-conforming use exemption (which is actually a due process claim); and that the ordinance effectively conditioned the use of the property as a place to store racecars upon building a fence (a dispute over the nature of the regulation as it effects the owners use and enjoyment of the property, which is actually a *Penn Central* claim).[140]

Although the Eighth Circuit correctly concluded that the tests in *Nollan* did not apply to this claim, it also concluded that *Nollan* only applied to easements.[141] After the court correctly stated that *Nollan* did not apply, it stated the reason it did not apply was because the ordinance did not require the property owner to dedicate any portion of its property to either the city or the public's use or affect the owner's right ***293** to exclude others.[142] The Eighth Circuit

holding stated that constitutional scrutiny of land use exactions should only be applied to easements.[143] This holding narrowed the applicability of Supreme Court precedent on land use exactions and diluted the Fifth Amendment's protections for private property owners.

B. The Ninth Circuit

In *McClung v. City of Sumner*, the Ninth Circuit also analyzed a claim by a property owner that was not properly framed for consideration as an exaction taking, but extended its holding to affect all land-use exaction claims.[144] The Ninth Circuit correctly determined that a legislative requirement that a developer install 24-inch storm drain pipes was not properly to be considered under the *Nollan/Dolan* analysis because the owner did not contest the exaction.[145] The court recognized that the issue was not preserved on appeal to be considered under an exactions takings test.[146] Also, the city ordinance that required 12-inch pipes was not an exaction by definition, as it was not a development condition demanded in exchange for development but a general building requirement that the city imposed on all development.[147] The Ninth Circuit's holding that this case did not require an exactions taking analysis was correct. However, the Ninth Circuit also held that *Nollan* and *Dolan* should never apply to non-land "fungible" exaction conditions, a holding that is counter to the Supreme Court remand of *Ehrlich*.

This case began in 1995 when the McClungs sought to develop property they owned in the City of Sumner, Washington. The McClungs' underground storm drainpipe did not meet the city's requirement for new developments to include pipes at least 12 inches in diameter.[148] The McClungs asserted that the city's subsequent request that they install a 24-inch pipe in exchange for approving their permit application, and waiving certain permit and facilities fees, affected ***294** an illegal taking of their property.[149] The Ninth Circuit questioned whether a legislative, generally applicable development condition that did not require the owner to relinquish rights in real property, as opposed to an adjudicative land-use exaction, should be reviewed pursuant to the ad hoc standards of *Penn Central* or the nexus and proportionality standards of *Nollan* and *Dolan*.[150] The court correctly held that the *Penn Central* analysis applied to the 12-inch pipe requirement because the ordinance was not an adjudicative determination applicable solely to the McClungs and required in exchange for development.[151] The Ninth Circuit then correctly recognized that the 24-inch pipe requirement could not properly be analyzed as a takings claim because the McClungs had voluntarily contracted with the city to install the 24-inch pipe.[152]

However, the court also held that even if the required upgrade to 24-inch pipe could be considered a monetary exaction, the constitutional conditions doctrine would not apply.[153] Although the court correctly separated the *Penn Central* claims from the exactions analysis, it diminished the Fifth Amendment protections with this holding. The Ninth Circuit held that because money was different from real or personal property it should not be considered in light of the *Nollan/Dolan* conditions.[154] This distinction is inapposite to the constitutional protections of the Fifth Amendment and Supreme Court precedent. Whenever private property is taken for public use compensation is required, and this should depend on the nature of the taking not the type of ***295** the property.[155] Furthermore, the *Ehrlich* remand by the Supreme Court signaled that exaction fees should be considered in light of the takings analysis.

Recently, in an unpublished opinion the Ninth Circuit also declined to extend the *Nollan/Dolan* tests to off-site public improvements in *West Linn Corporate Park, LLC v. City of West Linn*.[156] Because the rough-proportionality tests found in *Nollan* and *Dolan* involved dedications of real property for public use, and the conditions of development in *West Linn* called for construction of several off-site public improvements, the court found them distinguishable.[157] This holding further limits the scope of constitutional scrutiny that the Ninth Circuit will apply to land-use exactions. Following *West Linn*, both fees and off-site public improvements are excluded from consideration under the land-use exactions taking analysis.

C. Texas

In contrast to the Ninth Circuit, the Texas Supreme Court in *Town of Flower Mound v. Stafford Estates Ltd. P'ship*. upheld the applicability of an exactions taking claim for an offsite public improvement condition for development.[158] The Town of Flower Mound's Land Development Code required that a subdivision developer improve abutting

streets that did not meet specified standards, even if the improvements were not necessary to accommodate the impact of the subdivision.[159] The town conditioned its approval of development of the residential subdivision on the developer rebuilding ***296** an abutting road.[160] The developer objected to the condition at every administrative level and requested that the town grant an exception that was available under the code, to no avail.[161] Finally, the developer rebuilt the road and then sued the town to recover the cost.[162]

The district court held that the condition imposed on Stafford's development was a taking without compensation and awarded Stafford the cost of improvements not necessitated by increased traffic from the subdivision.[163] The court of appeal affirmed.[164] On appeal the Texas Supreme Court considered two principal questions regarding the takings analysis.[165] First whether Stafford could wait until after making the improvements to sue, and second, whether the town's condition on Stafford's development amounted to a compensable taking.[166] The court affirmed the judgment of the court of appeal on both issues finding that Stafford was entitled to adequate compensation for the taking of property.[167] The Texas Supreme Court stated that for purposes of determining when a government's exaction constitutes a compensable taking, "we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved."[168]

In a recent decision in *City of Carrollton v. HEB Parkway S., Ltd.*, the Texas Court of Appeal narrowed the applicability of the exactions takings analysis to those cases where the plaintiff has objected to the exaction.[169] The dispute in this case arose over a city-imposed ordinance that required a developer to construct erosion control improvements.[170] The court held that the landowner failed to seek a variance from land-use regulation, and therefore its regulatory takings ***297** claim based on the land-use exaction theory was not ripe.[171] Instead of requesting a variance from the zoning and planning board, the landowner had entered into a development agreement with the city in which it agreed to construct the improvements in order to comply with the regulations.[172]

The court held that ripeness is a condition that limits the ability of a plaintiff to sue for an uncompensated taking in land-use exaction cases and denied the developer's claim.[173] The court stated that, just as in other regulatory takings cases, the landowner must object to the exaction so as to give the government the opportunity to exercise its discretion and to establish the permissible uses of the property to a reasonable degree of certainty in order to establish a regulatory taking through a land-use exaction.[174] The court held that "a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation."[175] Although it noted that neither the United States Supreme Court nor the Supreme Court of Texas had expressly stated that the standard for determining ripeness of other regulatory takings claims applied to land-use exaction takings claims, the court of appeals saw no reason to apply a different standard. Consequently, the court declined to consider the developer's exactions taking claim.[176]

These conflicting opinions in other jurisdictions indicate that there is an ongoing struggle in deciding when to apply constitutional scrutiny to land-use exaction takings claims. While the Eighth Circuit has held that the takings analysis for exactions only applies to easements, the Ninth Circuit has held that only land-based exactions are subject to constitutional scrutiny.[177] Conversely, both the California Supreme Court (in *Ehrlich*), and the Texas Supreme Court ***298** (in *Stafford* and *City of Carrollton*) applied the land-use exaction analysis to fees and off-site mitigation, based on the Supreme Court remand in *Ehrlich*. Texas has also recognized that a land-use exaction must be contested before a takings claim is ripe. Because of the inconsistency in the application of the Supreme Court's land-use exaction precedent, the doctrine of unconstitutional conditions remains elusive. Courts, however, may be able to revive the constitutional protections of the Fifth Amendment by recognizing that certain steps are required in making land-use exaction takings claims and by consistently applying scrutiny to claims.

V. Land-Use Exactions Claims Must Be Consistent

Courts presented with land-use exaction taking claims should recognize the following: (1) in challenging excessive exactions, property owners should first contest the unconstitutional condition; (2) the excessive exaction, not the denial of development approval must be challenged; (3) having challenged the exaction, if an owner complies with an unconstitutional demand or refuses to comply and significant delay or denial results, a claim for compensation is then appropriate.

A. A Plaintiff Should First Challenge the Exaction

Prior to making a claim for compensation a plaintiff should first challenge the condition. To successfully challenge an excessive exaction, a plaintiff should seek a writ of mandamus, request a zoning variance, or seek declaratory relief. In *Nollan* and *Ehrlich* the landowners protested the exaction demands by seeking a writ of mandamus to prevent the government from requiring the unconstitutional condition. In Dolan, the property owner first sought a zoning variance for relief from the excessive exaction. As determined by *Dolan*, the government has the burden to demonstrate rough proportionality between an exaction and the projected impact of a development, and the writ of mandamus can also be used to compel this determination. Although some state courts may not allow the use of a writ of mandamus to question a discretionary act such as approval of a permit, a claim for declaratory relief or a formal written protest can be made.[178] Whether or not the landowner chooses to proceed with development while under protest, the issuance of a ***299** permit is not relevant to whether the court may decide if the conditions meet the standards of *Nollan* and *Dolan*.[179] The next step in the inquiry focuses on when it is within a court's purview to consider a claim for relief under the exactions takings analysis.

B. A Plaintiff Must Protest the Exaction not the Denial of Permit

Courts must separate the relevant land-use exactions claims from the many other types of claims, especially the "substantially advances" variety. Courts have struggled to separate the *Agins* due process inquiries from the essential takings analysis as demanded by the Supreme Court in *Lingle*. For instance, the two paramount cases on exactions takings, *Nollan* and *Dolan*, both intermixed the language (if not the analysis) of *Agins* with takings inquiries, and many courts continue to do so. In *St. Johns River Water Mgmt. Dist. v. Koontz*, the Florida Supreme Court incorrectly considered the takings claims of a plaintiff who had framed his protest under the "substantially advances" test by protesting the denial of permit and not the excessive exactions.[180] Similarly, courts often have to separate *Penn Central* claims from land-use exaction claims. Recent decisions regarding exactions in the Eighth and Ninth Circuits should have been dismissed because the plaintiffs failed to properly protest the excessive exactions.[181]

A plaintiff seeking to challenge a government regulation ***300** as an uncompensated taking of private property may proceed by alleging a land-use exaction violating the *Nollan* and *Dolan* standards, however, a plaintiff that argues only a "substantially advances" theory is not entitled to a judgment on a takings claim.[182] Courts should no longer base an inquiry on whether or not the government's condition substantially advances a legitimate state purpose. Instead, the inquiry must focus on whether it has an ""essential nexus" to the stated purpose.[183] Once challenged, the government is required to provide an individualized determination of the impacts of development.[184] Courts should then determine whether or not the conditions demanded are "roughly proportional" to the developments impact.[185]

The Supreme Court stated that *Dolan* was not designed to address, and is not readily applicable to, the questions arising where the landowner's challenge is based not on excessive exactions but on denial of development.[186] The rough-proportionality test of *Dolan* is inapposite to such a case.[187] Challenges to excessive exactions are made by using the writ of mandamus, by seeking declaratory relief, or by requesting a variance. The next step in the inquiry focuses on when it is within a court's power to award equitable relief for a Takings Clause violation under the exactions takings analysis.

C. When a Claim for Compensation is Warranted

Whether the constitutional protections of the Fifth Amendment are more than theoretically meaningful to citizens and whether they genuinely constrain government power is determined by the efficacy of remedies available when a taking has occurred.[188] Enforcement of the unconstitutional conditions doctrine requires the award of compensation for ***301** any significant period of time that a constitutionally invalid regulatory position has interfered with the otherwise proper use and enjoyment of real property.[189] Before initiating a claim for compensation a plaintiff must first protest the exaction, if not, as the court in *City of Carlton* recognized, "exhaust the administrative remedies."[190] If the exaction has been properly protested, a claim for compensation may be warranted whether the condition was complied with or refused. When a property owner complies under protest with an exaction that is later determined to lack the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan*, a claim for compensation

would reimburse the plaintiff for the cost of compliance.

On the other hand, when a property owner refuses to comply with an exaction, a claim for compensation may be warranted depending on whether the government or agency amends, or refuses to amend, its position. If the government or agency amends its position once it is determined that the condition lacks either the "essential nexus" or "rough proportionality," as was done in both *Nollan* and *Dolan*, then a claim for compensation may not be necessary or appropriate. If, however, a government or regulatory agency refuses to amend a required condition for development after a court has determined that they lack either the "essential nexus" or "rough proportionality" requirement, then a claim for compensation for a temporary taking must be considered. In *St. Johns River Water Management District v. Koontz*, if the plaintiff had properly contested the exactions, the lower courts determination of the remedy for a temporary taking would have been correct.[191] The trial court properly awarded damages for the period of time that the District adhered to its unconstitutional position.[192] Although the District had the benefit of a state statutory mechanism that allowed it the opportunity to moderate its position after a judicial review of the exactions challenge, it chose to adhere to its original ***302** regulatory position for six years before the permit was actually issued.[193] The formula used by the lower courts was correct and would have been the proper remedy for the temporary taking imposed by St Johns' adherence to the unconstitutional condition. Courts should consider claims when a significant delay in development amounts to a "taking" of property rights if they are properly framed for consideration.

VI. Conclusion

In *St. Johns River Water Mgmt. Dist. v. Koontz*, the Florida Supreme Court followed a recent trend when holding that they would not apply the *Nollan/Dolan* tests to "non-real property" exactions. They also created a new and confusing precedent by deciding that an exaction analysis is not applicable when a permit is never issued. The dual purposes of government constraint and equitable distribution of public burdens are the basis for the Fifth Amendment's constitutional protections. An examination of Supreme Court precedent suggests that constitutional scrutiny should be applied to all exactions, whether or not they are real property, or a permit has issued. However, property owners must challenge the excessive exaction, not the denial of development approval when contesting unconstitutional conditions. While certainty, predictability, and reliability are highly prized common-law goals, recent decisions in land-use exactions cases indicate they are lacking in this fundamental area of law. Conflicting opinions and inconsistency have begun to erode the protections for private property owners that the Fifth Amendment should guarantee. Courts must consistently apply constitutional scrutiny to land-use exaction takings claims, and separate the claims not properly framed for consideration.

Postscript by the author:

After this paper was originally written, the Koontz case was appealed to the Supreme Court, and certiorari was granted. Shortly thereafter, Thomson Reuters/West published this paper in the Real Estate Law Journal, and then several months later the Court decided the case. Many might consider the Court's decision a resounding victory for private property owners and while this may be true, the decision represents a victory for what this paper identified was most needed, consistency and predictability in this important area of law.

The Supreme Court certified two questions in the Koontz case. These two questions are exactly the same as two of the issues this paper identified as being wrongly decided, based on Supreme Court precedent. In analogous arguments to many of those presented in this paper, the Supreme Court reversed and remanded the case holding that: (1) constitutional scrutiny should be applied to fees demanded as land-use exactions; (2) a property owner is entitled to constitutional scrutiny of land-use exactions, whether or not a permit has been issued. The final Koontz decision cleared up a great deal of confusion and contradiction in lower courts on the issues of land-use exaction takings claims. Hopefully, the steps identified in this paper that clarify how to proceed with a takings claim based on an excessive land-use exaction will be useful to practitioners, especially in light of the final Koontz decision that may now also be cited for support.

Footnotes

[a1] Catherine L.M. Hall wrote this paper for her second year seminar course at the William S. Richardson School of Law in 2012. The Hawaii State Bar Association Financial Services and Real Property Section chose the paper as the outstanding paper on a section topic that year. Catherine has since graduated, and is now a litigation associate at Carlsmith Ball LLP.

[1] U.S. Const. Amend. V ("[N]or shall private property be taken for public use, without just compensation."); U.S. Const. Amend. XIV; *see also* Aviam Soifer, *Text Mess: There is no Textual Basis for Application of the Takings Clause to the States*, 28 U Haw. L. Rev. 373, 385 (2006) (Discussing the applicability of the Takings Clause to the states, and suggesting that it might "entail interpreting law in the name of fundamental values: equity, fairness, and other appealing albeit vague concepts[.]").

[2] Armstrong v. United States, 364 U.S. 40, 49, 80 S. Ct. 1563, 4 L. Ed. 2d 1554, 1961 A.M.C. 17 (1960).

[3] *See, e.g.*, St. Johns River Water Management Dist. v. Koontz, 5 So. 3d 8, 14 (Fla. 5th DCA 2009), decision quashed, 77 So. 3d 1220 (Fla. 2011), cert. granted, 2012 WL 1966013 (U.S. 2012) ("while the doctrine of unconstitutional conditions may be 'well-settled,' it is certainly not well understood."). *See also infra* part IV of this paper.

[4] St. Johns River Water Management Dist. v. Koontz, 77 So. 3d 1220 (Fla. 2011), cert. granted, 2012 WL 1966013 (U.S. 2012).

[5] *See* Kaiser Aetna v. U. S., 444 U.S. 164, 176, 100 S. Ct. 383, 62 L. Ed. 2d 332, 13 Env't. Rep. Cas. (BNA) 1929, 2000 A.M.C. 2495, 10 Envtl. L. Rep. 20042 (1979) (holding that "the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property"). *See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868, 8 Media L. Rep. (BNA) 1849 (1982) (holding that a permanent physical presence equals a taking).

[6] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798, 34 Env't. Rep. Cas. (BNA) 1897, 22 Envtl. L. Rep. 21104 (1992).

[7] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 107, 98 S. Ct. 2646, 57 L. Ed. 2d 631, 11 Env't. Rep. Cas. (BNA) 1801, 8 Envtl. L. Rep. 20528 (1978).

[8] *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 548, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005) (referring to "land-use exaction" takings theory).

[9] *See* David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523 (1999) (noting that 1987 was a "truly watershed year" for takings law after the half century of silence where it was left to the states to sort through, and consequently erode, the Supreme Court's takings jurisprudence).

[10] Nollan v. California Coastal Com'n, 483 U.S. 825, 827, 107 S. Ct. 3141, 97 L. Ed. 2d 677, 26 Env't. Rep. Cas. (BNA) 1073, 17 Envtl. L. Rep. 20918 (1987).

[11] *Id.*

[12] *Id.* at 828 (the relevant California building code was Cal. Pub. Res. Code Ann. §§ 30106, 30212, and 30600 (West 1986)).

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 830.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 831 (Adding that "[p]erhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it[.]")

[22] *Id.* at 834.

[23] *Id.* ("We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," (citing Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106, 14 Env't. Rep. Cas. (BNA) 1555, 10 Envtl. L. Rep. 20361 (1980) (abrogated by, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005)).

[24] *Id.* at 835.

[25] *Id.* at 839 ("[The] Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes.").

[26] *Id.* at 837 (citing J. E. D. Associates, Inc. v. Town of Atkinson, 121 N.H. 581, 432 A.2d 12, 14-15 (1981) (overruled by, Town of Auburn v. McEvoy, 131 N.H. 383, 553 A.2d 317 (1988)).

[27] *Id.* at 836-37 ("If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.").

[28] *Id.* (The Court noted that requiring a viewing platform, for instance, may have been permissible.).

[29] *Id.*

[30] *See* Daniel J. Curtin Jr. & Cecily T. Talbert, Applying Nollan/Dolan to Impact Fees, Ch. 13 § 13.1, in Taking Sides on Takings Issues (T. Roberts ed., ABA Press 2002).

[31] Curtin & Talbert, *supra* n. 30.

[32] 512 U.S. 374 (1994) ("We granted certiorari to resolve a question left open by our decision in Nollan of what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." (internal citation omitted)).

[33] *Id.* at 378.

[34] *Id.* at 380.

[35] *Id.* at 377-80 ("[P]ursuant to the States requirements, the city of Tigard, a community of some 30,000 residents on the southwest edge of Portland, developed a comprehensive plan and codified it in its Community Development Code (CDC). The CDC required property owners in the area zoned Central Business District to ... limit total site coverage, including all structures and paved parking, to 85% of the parcel [and] ... required that new development ... dedicat[e] land for pedestrian pathways[.]").

[36] *Id.* at 382.

[37] *Id.*

[38] *Id.*

[39] *Id.* at 383.

[40] *Id.*

[41] *Id.* at 384.

[42] *Id.*; *see supra* n. 35 (although the Court noted that the City had made an adjudicative decision the case history also shows that the requirements were based on a legislative requirement, the recently enacted Tigard Community Development Code).

43 *Id.*

44 *Id.* at 384-85.

45 *Id.*

46 *Id.* at 386 (citing *Nollan*, 483 U.S. at 837).

47 *Id.* (The Court stated that it was not required to reach this question in Nollan, because it concluded that the connection did not meet even the loosest standard.).

48 *Id.* at 387-88 (The Court used the term gimmick to refer to the condition the government attempted to impose on the Nollans.).

49 *Id.*

50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.* at 395.

54 Ehrlich v. City of Culver City, 911 P.2d 429, 432-33 (1996).

55 Ehrlich v. City of Culver City, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, 432-33 (1996).

56 *Id.*

57 *Id.*

58 *Ehrlich*, 512 U.S. at 1231 (Holding "[t]he petition or writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of California, Second Appellate District, for further consideration in light of Dolan.").

59 *Ehrlich*, 911 P.2d at 433. (he question regarding whether exaction "fees" are subject to constitutional limitations seems to have been decided by the Supreme Court remand in Ehrlich, and the Supreme Court in California decided this case accordingly.).

60 Ehrlich v. City of Culver City, 519 U.S. 929, 117 S. Ct. 299, 136 L. Ed. 2d 218 (1996).

61 City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed. 2d 882, 48 Env't. Rep. Cas. (BNA) 1513, 29 Envtl. L. Rep. 21133 (1999).

62 *Id.* (emphasis added).

63 *Id.*

64 *Id.*

65 *Id.* at 702-03.

66 Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005).

67 *See, e.g.*, Robert G. Dreher, Lingle's Legacy: Untangling Substantive Due Process From Takings Doctrine, 30 Harv. Envtl. L. Rev. 371, 372 (2006) ("Lingle brings a remarkable coherence to the Court's confused regulatory takings doctrine.").

68 *Lingle*, 544 U.S. at 548; *see supra* n. 5 (presuming the Court intended to categorize a "Loretto" type taking as a "physical" taking when it created these categories).

69 *Id.*

[70] Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106, 14 Env't. Rep. Cas. (BNA) 1555, 10 Envtl. L. Rep. 20361 (1980) (abrogated by, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 542, 125 S. Ct. 2074, 161 L. Ed. 2d 876, 35 Envtl. L. Rep. 20106 (2005)).

[71] *Lingle*, 544 U.S. at 542.

[72] *Id.*

[73] *Id.* at 546. *But cf.* Daniel L. Siegel, Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope, 28 Stan. Envtl. L.J. 577, 582 (2009) (Arguing that "the doctrinal basis of the Court's new requirement stemmed from the subsequently repudiated test under which regulations were deemed to violate the Takings Clause if they did not 'substantially advance legitimate state interests [.]'" (emphasis added)).

[74] *Lingle*, 544 U.S. at 546.

[75] *Id.*

[76] *Id.* at 546-47.

[77] *Id.*

[78] *Id.*

[79] St. Johns River Water Management Dist. v. Koontz, 5 So. 3d 8, 10 (Fla. 5th DCA 2009), decision quashed, 77 So. 3d 1220 (Fla. 2011), cert. granted, 2012 WL 1966013 (U.S. 2012).

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] St. Johns River Water Management Dist. v. Koontz, 77 So. 3d 1220 (Fla. 2011), cert. granted, 2012 WL 1966013 (U.S. 2012).

[87] St. Johns River Water Management Dist. v. Koontz, 5 So. 3d 8, 14 (Fla. 5th DCA 2009), decision quashed, 77 So. 3d 1220 (Fla. 2011), cert. granted, 2012 WL 1966013 (U.S. 2012) (hereafter Koontz IV).

[88] *Koontz IV*, 5 So.3d at 14 (Orfinger, J. concurring).

[89] *Koontz IV*, 5 So. 3d at 10.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* ("In reaching this conclusion, the trial court applied the constitutional standards enunciated by the Supreme Court in Nollan and Dolan.").

[94] *Id.* at 10-11.

[95] *Id.*

[96] *Id.*

97 *Id.* (The court reasoned that the precise argument was implicitly rejected in the Dolan majority because it had been addressed by the dissent (citing Dolan, 512 U.S. at 408. (Stevens, J., dissenting)).

98 *Id.* at 12.

99 *Id.* (citing Ehrlich v. City of Culver City, 512 U.S. 1231, 114 S. Ct. 2731, 129 L. Ed. 2d 854 (1994)) (where a city conditioned a permit on the payment of money to build tennis courts and purchase artwork and the Supreme Court vacated the decision and remanded the case to the state court to reexamine in light *of Dolan)*.

100 *Id*

101 *Id.* at 12. *See also* Mark Fenster, Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity, 92 Cal. L. Rev. 609, 637 (2004) (noting that the Supreme Court "may have settled this issue in favor of extending Nollan and Dolan to non-possessory exactions" when it remanded Ehrlich).

102 *Koontz IV*, 5 So. 3d at 15 (Griffin, J. dissenting).

103 *Id.* at 16.

104 *Id.* (this is an important distinction, this type of taking would have been a Penn Central regulatory taking claim).

105 *Id.*

106 *Id.* (citing *Agins*, 447 U.S. at 260).

107 *Id.* (In 2005, the United States Supreme Court issued its decision in *Lingle*, 544 U.S. at 532, which significantly revised and restated federal "takings" jurisprudence.).

108 *Id.*

109 *Dolan*, 512 U.S. at 407-08 (1994) ("Dolan has no right to be compensated for a taking unless the city acquires the property interests that she has refused to surrender. Since no taking has yet occurred, there has not been any infringement of her constitutional right to compensation.") (Stevens, J. dissenting); *Koontz IV* at 10.

110 *Koontz IV*, 5 So. 3d at 10.

111 *Id.* at 15.

112 *Id.*

113 *Id.* at 20.

114 *Id.* at 20-22.

115 *Koontz*, 77 So. 3d at 1222 n. 1.

116 *Id.* at 1222 (internal citations omitted).

117 *Id.* at 1229.

118 *Id.*

119 *Id.* at 1230 (quoting Teague v. Lane, 489 U.S. 288, 296, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)).

120 *Id.* at 1222.

121 *Id.* (referring to the second *Ehrlich* petition for certiorari which was denied).

122 *Id.* (emphasis added); *but cf.*, *Del Monte Dunes*, 526 U.S. at 698.

123 *Id.* (emphasis added).

124 *Id.*

125 *See, e. g.*, *Dreher* supra n. 67, at 406 ("[Lingle returns the takings analysis to] a simpler, clearer model of regulatory takings, focused on the functional equivalence of such takings to physical appropriation without extraneous consideration of the government's purposes or the efficiency with which those purposes are achieved.") (internal citations omitted).

126 *Lingle*, 544 U.S. at 530.

127 *See Nollan*, 483 U.S. at 837 (a condition for development that does not have an essential nexus to the stated reason for imposing it).

128 *See Koontz IV*, 5 So. 3d at 10 ("the trial court determined that the off-site mitigation imposed by the District had no essential nexus to the development restrictions already in place on the Koontz property and was not roughly proportional to the relief requested by Koontz").

129 *Koontz*, 77 So. 3d at 1224-25.

130 *See, e.g.*, Lara Womack Daniel & James D. Timmons, Conservation Easements and Eminent Domain at the Intersection; How Modern Legal Creations Meet Constitutional Principles, 36 Real Est. L.J. 433 (2008); Jessica Owley, The Enforceability of Exacted Conservation Easements, 36 Vt. L. Rev. 261, 302 (2011).

131 St. Johns River Water Management Dist. v. Koontz, 861 So. 2d 1267, 1271 (Fla. 5th DCA 2003) ("The final orders require Koontz to preserve his land with a conservation easement or deed restriction consistent with Section 704.06 [which] states that conservation easements are perpetual, undivided interests in property that may be created or stated in the form of a restriction, easement, covenant or condition in any deed .... Thus, whether expressed in the form of a deed restriction or easement, the final orders required the orders to be consistent with the statute, which provide for access onto the land by others." (internal citations and emphasis omitted)).

132 *Koontz*, 77 So. 3d at 1225 (Having determined the mitigation condition did not meet either of the *Nollan/Dolan* standards, it was then determined that the property was considered "taken" during the period from 1999, when the permit was first denied, until 2005 when the permit had finally been issued.).

133 *See, e.g.*, Steven A. Haskins, Closing the Dolan Deal--Bridging the Legislative/Adjudicative Divide, 38 Urb. Law. 487 (2006) (arguing that the legislative/adjudicative distinction should not apply in takings analysis).

134 *See Koontz*, 77 So. 3d at 1224; *see also*, Curtin, Gowder, et al., Exactions Update: The State of Development Exactions After Lingle, Annual Review of the Law: Recent Developments in Land Use, Planning and Zoning Law (ABA 2006) (discussing conflicting state and federal opinions on impact fees as exactions).

135 *See Koontz*, 77 So. 3d at 1224; *see also*, Curtin, Gowder, et al., *supra* n. 134 (discussing conflicting state and federal opinions on impact fees as exactions).

136 *See infra* part A and B.

137 Iowa Assur. Corp. v. City of Indianola, Iowa, 650 F.3d 1094, 1096-97 (8th Cir. 2011) (the plaintiff did not seek a writ of mandamus, but rather sued for an uncompensated taking).

138 *Id.* at 1094.

139 *See Del Monte Dunes*, 526 U.S. at 702 (stating that land-use exaction claims must involve land-use decisions conditioning approval of development on the dedication of property to public use).

140 *See id.*

141 *Id.* at 1098.

142 *Id.*

143 *Id.*

144 McClung v. City of Sumner, 548 F.3d 1219 (9th Cir. 2008).

145 *Id.*

146 *Id.*

147 *Id.* at 1228 (Ordinance 1603 did not require the dedication of property or the payment of money in exchange for permit approval. Rather, it provided an across-the-board requirement for all new developments.).

148 *Id.* at 1222.

149 *Id.* (The McClungs made no objection to the 24-inch pipe installation requirement and received the benefit of certain fees being waived in exchange for installing it, and then filed suit.).

150 *Id.*

151 *Id.* at 1227-28 (The Ninth Circuit stated "[t]o extend the Nollan/Dolan analysis here would subject any regulation governing development to higher scrutiny and raise the concern of judicial interference with the exercise of local government police powers ... [and] any concerns of improper legislative development fees are better kept in check by 'ordinary restraints of the democratic political process.'") (internal citations omitted, emphasis in original).

152 *Id.*

153 *Id.* at 1228.

154 *Id.* (the Court noted that money was "fungible").

155 U.S. Const. Amend. V ("[N]or shall private property be taken or public use, without just compensation."). U.S. v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946) ("The meaning of 'property' as used in Fifth Amendment prohibiting the taking of private property for public use without just compensation, is a 'federal question,' but it will normally obtain its content by reference to local law."); *see also* Brown v. Legal Foundation of Washington, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003) (the Court indicated that where a discrete fund is involved, a governmental appropriation of money from that fund can be deemed a per se physical taking).

156 West Linn Corporate Park, LLC v. City of West Linn, 428 Fed. Appx. 700, 702 (9th Cir. 2011), cert. denied, 132 S. Ct. 578, 181 L. Ed. 2d 441 (2011).

157 *Id.*

158 Town of Flower Mound v. Stafford Estates Ltd. Partnership, 135 S.W.3d 620 (Tex. 2004).

159 *Id.* at 622.

160 *Id.*

161 *Id.* at 624.

162 *Id.*

163 *Id.* at 622-23.

164 *Id.*

165 *Id.* at 623.

166 *Id.*

167 *Id.*

168 *Id.* at 640.

169 City of Carrollton v. HEB Parkway South, Ltd., 317 S.W.3d 787 (Tex. App. Fort Worth 2010), reh'g overruled, (July 29, 2010).

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.* at 787.

174 *Id.*

175 *Id.* at 794-95 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 620-21, 121 S. Ct. 2448, 150 L. Ed. 2d 592, 52 Env't. Rep. Cas. (BNA) 1609, 32 Envtl. L. Rep. 20516 (2001)).

176 *Id.*

177 *See, e.g.*, Curtin, Gowder, et al., Exactions Update: he State of Development Exactions After Lingle, Annual Review of the Law: Recent Developments in Land Use, Planning and Zoning Law (ABA 2006) (discussing conflicting state and federal opinions on impact fees as exactions).

178 *See* Erik W. Scharf & Wayne R. Atkins, Coram What? An Introduction to Federal Special Writs, Fla. B.J., June 2011, at 89-90 ("astute Florida practitioners will note that federal mandamus differs from Florida mandamus because the federal writ can be used to 'correct a clear abuse of discretion,' whereas the signature attribute of Florida mandamus is its inapplicability to discretionary acts").

179 *See, e.g.*, Ehrlich v. City of Culver City, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, 435 (1996) (The plaintiff/developer originally filed a writ of mandate to set aside the fee imposed by the city, thereafter, the plaintiff filed formal written protests with the city to the imposition of the development fees, pursuant to Government Code sections 66020 and 66021. The city rejected both protests. Plaintiff then amended his complaint to allege that imposition of the fees amounted to an unconstitutional taking without just compensation. The parties later entered into an agreement whereby plaintiff agreed to pay the fees under protest in exchange for the necessary building and grading permits for the project. Plaintiff retained the right to proceed with his lawsuit, and agreed that the city would obtain a lien on the property as security for payment of the fee.).

180 *Koontz*, 77 So. 3d at 19 (Fla. 2011).

181 *See, e.g.*, *Iowa Assurance*, 650 F.3d at 1096-97 (the plaintiff did not seek a writ of mandamus, was not seeking governmental approval, but sued for an uncompensated taking); *see also McClung*, 548 F.3d at 1222 (the McClungs made several claims, but made no objection to the 24-inch pipe installation requirement and received the benefit of certain fees being waived in exchange for installing it, and then filed suit).

182 *Lingle*, 544 U.S. at 530.

183 *Nolan*, 483 U.S. at 827.

184 *Id.*

185 *Dolan*, 512 U.S. at 391.

186 *Del Monte Dunes*, 526 U.S. at 702 (emphasis added).

187 *Id.* at 702-03.

188 *See Brief of Amici Curiae Florida Home Builders Association & National Association of Home Builders, in Support of Respondent*. *2010 WL 262547 (Fla.)*, 15-18.

189 *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 321, 107 S. Ct. 2378, 96 L. Ed. 2d 250, 26 Env't. Rep. Cas. (BNA) 1001, 17 Envtl. L. Rep. 20787 (1987).

190 City of Carlton. 317 S.W.3d at 787 (holding that ripeness is a condition that limits the ability of a plaintiff to sue for an uncompensated taking in land-use exaction cases).

191 *See Koontz IV*, 5 So. 3d at 17 (the court determined that the time of the taking was the time period from when the permit was first denied until the time that it was issued).

192 *Id.*

193 *Id.*

BEACH, BREACH, AND BURDEN:
PUSHING THE ENVELOPE FOR REVITALIZATION IN WAIKIKI

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I. INTRODUCTION

In 2010, Kyo-ya Hotels and Resorts, LP ("Kyo-ya") proposed redeveloping the Moana Surfrider Hotel's Diamond Head Tower.

[1] The existing Diamond Head Tower is a nondescript, sixty-year-old structure adjoining the stately, historic Banyan Wing of the hotel.[2] The proposed redevelopment featured a more slender, modern structure that can accommodate more units than the existing tower.[3] The Honolulu City Council widely supported Kyo-ya's redevelopment plan ("Project") because it would help revitalize Waikiki.[4]

There was one major caveat with the proposed design. Approximately seventy-five percent of the structure would be in non-conformance with the coastal setback requirements under the Waikiki Special District.[5] The proposed structure would exceed the building envelope by encroaching sixty feet into the one-hundred-foot shoreline setback, and by encroaching over one hundred feet into coastal height setback.[6]

On December 1, 2010, the director of the Department of Planning and Permitting addressed the matter by granting Kyo-ya a variance to exceed the Waikiki Special District coastal height setback.[7] The director's grant of variance was based, in part, on (1) the City Council's approval of the Project's planned development-resort ("PD-R") designation, (2) a coastline that would have existed farther seaward but for the state's alleged breach of contract, (3) the shallow dimensions of the lot, and (4) the hardship created by the Banyan Wing's historic preservation status.[8] The director's grant of Kyo-ya's variance set the stage for a legal dispute between environmental interest groups and the property owner. The environmental interest groups objected to the sanctioned violation of the Waikiki Special District setbacks.[9] From their perspective, the county impermissibly allowed the developer to violate important land use controls that serve the public interest.[10] The environmental interest groups claimed the variance sets a dangerous precedent that will allow other developers build excessively tall structures within the coastal setback area.[11]

Traditionally, courts view variances strictly as "constitutional safeguards" preventing the regulatory taking of property, warranted only in exceptional circumstances.[12] But some municipalities view variances as flexible tools of equity, granting them under less exceptional circumstances.[13] This paper examines whether the Honolulu variance standard is limited to the traditional, narrow standard or if it also embraces the flexible, equitable standard. This paper also examines the implications of the Waikiki Special District PD-R designation upon the variance analysis. The purpose of the PD-R designation is to allow for flexible development otherwise prohibited by the strict application of the Waikiki Special District design standards.[14] Therefore, once a project plan obtains a PD-R designation, should the developer then have a right to all variances necessary to execute the plan?

Part II of this paper provides a brief history of Waikiki, followed by a discussion of the Waikiki Special District. Part III describes Kyo-ya's redevelopment plan, and Part IV discusses the county's variance standard. Part V analyzes whether the director properly granted the variance. Part VI then examines whether the decision sets a dangerous precedent for the county's ability to bargain away statutory land use regulations, or whether this decision was granted in narrow circumstances and therefore is unlikely to jeopardize the existing zoning scheme.

II. WAIKIKI: BACKGROUND AND SPECIAL DISTRICT GUIDELINES

Residents and visitors alike tend to think of Waikiki as its own microcosm, separate from the rest of O'ahu.[15] Indeed, Waikiki is different and distinct from the rest of the island. This section describes Waikiki's past and discusses the Waikiki Special District.

A. Waikiki's History.

Ancient Hawaiians settled in Waikiki, erecting thatched grass and wood dwellings along the shore.[16] The early settlers cultivated the land to raise taro in the *lo'i*[17] and fish in aquacultural ponds.[18] After conquering the island of O'ahu, Kamehameha the Great settled in Waikiki,[19] establishing his residence where the Moana Surfider and Royal Hawaiian hotels stand today.[20]

In the early 1800s, Waikiki's population dwindled after Kamehameha moved to Honolulu,[21] and plummeted further when an epidemic of virulant diseases ran rampant among the native Hawaiians.[22] As a result, Waikiki became an unsightly place marked by unattended taro farms and fish ponds.[23] In the mid-1800s, Kamehameha IV endeavored to restore traditional Hawaiian culture by cultivating taro once again,[24] but eventually allowed Chinese immigrants to convert the taro fields and fish ponds into more profitable rice fields and duck ponds.[25] During this time, Waikiki Beach was a narrow barrier beach fronting the swamp and lagoon area where the rice fields and duck ponds were located.[26] Major streams draining Makiki, Mānoa, and Pālolo valleys emptied into the ocean in the area now occupied by the Royal Hawaiian and the Moana Surfrider hotels.[27] Waikiki Beach was usually kept clean because the nearby wetlands filtered the valleys' waters.[28]

In the 1860s, the city improved the roadways into Waikiki.[29] As a result, Waikiki evolved into a relaxing beach town frequented by Honolulu residents.[30] In 1901, W.C. Peacock and Company built the elegant Moana Hotel, the first of its kind in Waikiki.[31] The Moana Hotel was the second tallest building in Honolulu, with four stories and a fifth-story roof garden.[32] The hotel attracted affluent world travelers.[33] The Moana Hotel, therefore, was instrumental in establishing Waikiki's reputation as an international travel destination.[34]

Despite Waikiki's growing reputation as a resort destination, poor drainage and stagnant water hindered its appeal.[35] In 1906, L.E. Pinkham, the President of the Board of Health, determined that the Waikiki district was unsanitary and deleterious to the public health, and sought to transform it into a "beautiful and unique district . . . that will add immensely to the reputation of Honolulu at home and abroad."[36] Pinkham proposed a "reclaimation plan" to dredge and fill the swamp land.[37] In 1913, Pinkham became governor of the Territory of Hawai'i and began executing his plan.[38]

In the 1920s, the Territory built the Ala Wai Canal, draining the wetlands and reclaiming over 600 acres of land.[39] The Ala Wai Canal had the effect of physically severing Waikiki from the surrounding community.[40] The reclaimation effort vastly expanded resort development in Waikiki,[41] and developers built seawalls along the Waikiki shore to protect road and resort developments.[42] The seawalls, however, interfered with natural onshore-offshore sand movement,[43] and the sand fronting these walls began eroding soon thereafter.[44] As a result, the public could not pass along the Waikiki shoreline without walking on the seawalls or crossing private property.[45]

In 1927, the Territory Legislature passed Act 273 to rebuild Waikiki Beach.[46] Pursuant to the Act, the territory entered into the *Waikiki Beach Reclamation Agreement of 1928-29* with private land owners to secure easements for public use.[47] Despite the territory's early efforts, Waikiki Beach saw little improvement, save for the limited success of replenishing the beach fronting the Royal Hawaiian and Moana hotels.[48] In 1948, the territory resumed beach restoration efforts under the *Waikiki Beach Erosion Control Project.*[49] Despite the effort, the sand fill rapidly eroded, requiring the territory to replace 18,757 cubic yards of sand.[50]

In 1963, the U.S. Army Corps of Engineers conducted the *Cooperative Beach Erosion Control Study* to determine the most practical and economical method of restoring Waikiki Beach.[51] Following the study, the state legislature appropriated $540,000 to restore Kuhio Beach, contingent upon an agreement with at least two-thirds of the shorefront property owners from Kuhio Beach to the Royal Hawaiian Hotel.[52] The legislation contained a provision allowing the state to condemn littoral[53] rights if property owners refused the terms of the agreement.[54]

Thus, in 1965, Kyo-ya and other Waikiki beachfront property owners entered into the Surf Rider-Royal Hawaiian Sector Beach Agreement ("1965 Beach Agreement")[55] with the State of Hawai'i, in which the land owners agreed to relinquish their littoral rights and the state agreed to use its best effort to widen the beach.[56] Under the agreement, the state sought to widen the beach fronting the Moana Hotel to an average width of 180 feet.[57] The state has since failed to do so.[58]

The state's inaction under the 1965 Beach Agreement was a significant consideration in the Kyo-ya variance matter. In his decision, the director reasoned that the shoreline would have been 180 feet farther away if the state had widened the beach pursuant to the agreement.[59] The director considered the implication of this adjusted shoreline on the coastal height setback, described in the next section discussing the Waikiki Special District.

B. The Waikiki Special District.

Tourism is Hawaii's primary industry.[60] Waikiki, therefore, is critical to the state's economy as it generates more economic activity than any other single enterprise in the state.[61] In 1976, the City and County of Honolulu established the Waikiki Special District[62] to preserve Waikiki's unique character while assuring its continued economic viability.[63] The district objectives include, *inter alia*,

> (b) Guide development and redevelopment with due consideration to community benefits. These shall include the preservation, restoration, maintenance, enhancement and creation of natural, recreational, educational, historic, cultural, community and scenic resources.
>
> *.* *
>
> (f) Provide for the ability to renovate and redevelop existing structures that might otherwise experience deterioration . . . the zoning requirements of this special district should not . . . function as barriers to desirable restoration and redevelopment lest the physical decline of structures in Waikiki jeopardize the desire to have a healthy, vibrant, attractive and well-designed visitor destination.
>
> *.* *
>
> (h) Provide opportunities for creative development capable of substantially contributing to rejuvenation and revitalization in the special district, and able to facilitate the desired character for areas susceptible to change.
>
> *.* *
>
> (j) Maintain and improve where possible: mauka views from public viewing areas in Waikiki, especially from public streets; and a visual relationship with the ocean, as experienced from Kalakaua Avenue . . . . In addition, improve pedestrian access, both perpendicular and lateral, to the beach . . . .
>
> (k) Maintain a substantial view of Diamond Head from the Punchbowl lookouts by controlling building heights in Waikiki that would impinge on this view corridor.
>
> (l) Emphasize a pedestrian-orientation in Waikiki. Acknowledge, enhance and promote the pedestrian experience to benefit both commercial establishments and the community as a whole. . . . Where appropriate, open spaces should be actively utilized to promote the pedestrian experience.
>
> (m) Provide people-oriented, interactive, landscaped open spaces to offset the high-density urban residence. Open spaces are intended to serve a variety of objectives including visual relief, pedestrian orientation, social interaction, and fundamentally to promote a sense of "Hawaiianness" within the district.[64]

Under the Waikiki Special District, development should preserve historic properties[65] and maintain or enhance significant public views, including continuous ocean views along Kalākaua Avenue.[66]

The Waikiki Special District specifies a coastal height setback distancing tall buildings from the shoreline to maximize: (1) public safety, (2) the sense of open space, and (3) public enjoyment associated with coastal resources.[67] The coastal height setback is a building envelope defined by the intersection of three planes.[68] The first plane is a vertical plane that begins one hundred feet from the shoreline,[69] effectively prohibiting structures within one hundred feet of the shoreline.[70] The second plane is a forty-five degree building height setback from the shoreline,[71] meaning, structures beyond the one-

hundred-foot-line must have a coastal height setback of 1:1, or forty-five degrees, measured from the certified shoreline.[72] The third plane is the maximum height limit,[73] which is unspecified for the Diamond Head Tower lot[74] because its maximum height is controlled by the 1:1 building height setback.[75]

C. The Planned Development-Resort Project Designation

The Waikiki Special District allows for a Planned Development-Resort Project designation.[76] The purpose of the PD-R designation is to allow for "creative redevelopment" otherwise prohibited under strict adherence to special district development standards.[77] The designation allows the county to provide developers with flexibility for district requirements such as project density, height, and open space.[78] PD-R projects must be at least one acre in size,[79] and are only permitted in areas designated "resort mixed use."[80] The designation allows a maximum building height of 350 feet,[81] and density up to a maximum floor area ratio ("FAR")[82] of 4.0.[83]

To obtain a PD-R designation, the project must offer timely and demonstrable benefits to the community and must contribute to the stability, function, and overall ambiance and appearance of Waikiki.[84] The PD-R application process requires approval from both the City Council and the Department of Permitting and Planning.[85] First, the City Council approves a conceptual development plan making the property eligible for PD-R status.[86] Next, the Department of Permitting and Planning reviews a more detailed development plan, and either grants or denies the applicant's PD-R permit.[87] The following section outlines Kyo-ya's plan and the procedural steps it took to secure its approvals, including the PD-R project designation.

III. KYO-YA'S PLAN AND THE CITY COUNCIL'S SUPPORT

In 2010, Kyo-ya proposed its redevelopment plan. The City Council provisionally approved Kyo-ya's conceptual plan. This section describes the configuration of the current Moana Surfrider hotel complex, the development plan, and the City Council's support of the plan.

A. The Existing Moana Surfrider Hotel Complex

The Moana Surfrider hotel complex consists of three main buildings along the shore: the Surfrider Tower on the west, the historic Banyan Wing in the center, and the Diamond Head Tower on the east.[88] Sheraton built the twenty-one story, 432-unit Surfrider Tower in 1969.[89] The Banyan Wing is the original 1901 Moana Hotel structure, and it was entered into the National Historic Register on August 7, 1972.[90] The 241-unit Banyan Wing houses the main lobby area for the complex.[91] Kyo-ya has no plans to redevelop the historic Banyan Wing.[92]

The Diamond Head Tower was originally an autonomous hotel, constructed in 1952.[93] It became a part of the Moana Surfrider hotel complex in 1969.[94] The 141-unit[95] Diamond Head Tower is an eight-story structure, ninety-five feet in height.[96] The tower is situated directly between Kalākaua Avenue and the beach, with the first story façade facing Kalākaua Avenue and the *makai*-facing guest rooms overlooking the beach.[97] To the east of the tower is a police substation and beach concession.[98] The existing tower is oriented in the 'Ewa-Diamond Head direction, largely obstructing public views of the ocean.[99]

B. Kyo-Ya's Proposed Redevelopment of the Moana Surfrider Diamond Head Tower

The proposed twenty-six story Diamond Head Tower is 282 feet high.[100] The planned structure exceeds the building envelope significantly. The coastal height setback restricts development to a maximum height of about sixty feet at the *makai*[101] face of the tower, and a maximum height of about 170 feet at the *mauka*[102] face of the tower.[103] The structure begins to encroach into the coastal height setback from the fourth floor.[104] After the sixteenth floor, the entire building encroaches into the coastal height setback.[105] Compared to the existing tower, the proposed structure improves public view corridors between the public block and the ocean, but casts larger shadows on the beach and surrounding areas during morning hours.[106]

On May 28, 2010, Kyo-ya entered into a Memorandum of Understanding with the state for the *Waikiki Beach Maintenance Project*.[107] Under the agreement, Kyo-ya will contribute $500,000 to the state to maintain the beach fronting the Moana and Royal Hawaiian hotels. The project seeks to widen the beach by up to forty feet, adding up to 24,000 cubic yards of sand to the beach.[108] Under the agreement, the state will return Kyo-ya's funds if the project fails to proceed.[109]

C. City Council Approvals

On July 14, 2010, the City Council passed Resolution No. 10-185,[110] granting Kyo-ya a special management area use permit and shoreline setback variance for the Project.[111] The shoreline setback variance permits a forty-foot encroachment into the one-hundred-foot shoreline setback area.[112] The variance was necessary to for the construction of a new retaining wall, fill, swimming pool, deck, stairway, and lateral walkway.[113] The City Council's approval was subject to the grant of the Project's PD-R permit, Waikiki Special District permit, and zoning variance.[114]

On August 18, 2010, the City Council passed Resolution No. 10-212,[115] approving the conceptual plan for the PD-R project.[116] The resolution imposed several conditions on the Project, including: (1) a maximum floor area of 754,072 square feet, or a FAR of 4.72, whichever is less, for the entire Moana Surfrider hotel complex,[117] (2) a minimum open space requirement of forty-five percent of the zoning lot,[118] (3) a maximum height of 308 feet,[119] and (4) a twenty-five year prohibition on any alteration of the Banyan Wing.[120]

On December 1, 2010, the director approved the major special district permit for the Project.[121] The director found that the Project supported the Waikiki Special District objectives by (1) encouraging architectural features complementing Hawaii's tropical climate and ambiance, (2) emphasizing a pedestrian-oriented experience, and (3) providing people-oriented, interactive, landscaped open spaces to offset the high density urban ambiance.[122] In his decision, the director concluded that Kyo-ya's proposal met the approval criteria for the Waikiki Special District and PD-R designation.[123] On the same day, the director approved the zoning variance for the Project, concluding that the Project met the three-prong variance standard, discussed below.[124]

IV. THE VARIANCE STANDARD

Variances are an important part of zoning administration because they allow municipalities to relieve property owners from unnecessary hardships created by zoning ordinances.[125] Although variance standards differ widely across jurisdictions, the Honolulu variance standard generally conforms to the three-prong "unnecessary hardship" test set forth in the seminal variance case, Otto v. Steinhilber.[126] This section provides an overview of variances, followed by a discussion of the three-prong "unnecessary hardship" test.

A. The Purpose of Zoning Variances

Zoning ordinances, strictly applied, can sometimes create severe hardships for property owners.[127] A variance permits a property owner to use or build on his land in a way otherwise prohibited by the zoning ordinance.[128] Variances, therefore, allow municipalities to correct the occasional inequities created by general zoning ordinances.[129] Variances are also referred to as "safety valves" of zoning administration[130] because they prevent a zoning restriction from being applied in a way that essentially amounts to an unconstitutional taking of property.[131] By granting variances, municipalities can avoid litigating constitutional questions and can instead offer quick, equitable remedies when special conditions exist.[132]

There are two general classifications of variances: use variances and area variances.[133] Use variances permits land uses otherwise prohibited under the zoning code.[134] For example, a property owner would seek a use variance to build a commercial establishment in a residential district. Area variances permit property owners to build in a way otherwise prohibited by ordinances governing physical standards.[135] For example, a property owner would seek an area variance to build a structure exceeding the height restriction in the area. The City and County of Honolulu has one variance standard governing both use variances and area variances.[136]

B. The City and County of Honolulu Variance Standard

Under Honolulu Revised Charter section 6-1517, the director must hold a public hearing prior to his decision to grant or deny a variance.[137] The director has discretion to grant a variance for an "unnecessary hardship" based upon the following three factors:

(1) the applicant would be deprived of the *reasonable use* of such land or building if the provisions of the zoning code were strictly applicable;

(2) the request of the applicant is due to *unique circumstances* and not the general conditions in the neighborhood, so that the reasonableness of the neighborhood zoning is not drawn into question; and

(3) the request, if approved, will not alter the *essential character of the neighborhood* nor be contrary to the *intent and purpose* of the zoning ordinance.[138]

Honolulu's three-prong variance test roughly follows the *Otto v. Steinhilber* criteria, which provides,

> The record must show that (1) the land in question cannot yield a *reasonable return* if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to *unique circumstances* and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the *essential character* of the locality.[139]

When granting a variance, the director must specify the particular evidence supporting his decision.[140] On appeal, the director's action will be upheld unless, *inter alia*, clearly erroneous, or characterized by abuse of discretion.[141] Under Hawai'i law, the director's decision "carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences."[142]

1. The General "Hardship" Standard

The county's three-prong test is used to demonstrate whether the applicant suffers an "unnecessary hardship."[143] Although variance tests range widely across jurisdictions,[144] they all fundamentally require that the applicant demonstrate some type of substantial hardship to justify the variance.[145] Generally, the hardship must burden the land, rather than burdening the owner personally.[146]

Under Hawai'i law, an applicant's hardship cannot be self-created.[147] A property owner creates his own hardship when he makes unpermitted improvements then seeks a variance to allow use of the improvements.[148] Self-created hardships also ensue when an owner subdivides the property, sells the parcels but retains a "substandard" parcel that he cannot reasonably use, then seeks a variance to make reasonable use of the lot.[149]

Hawai'i courts consider an applicant's purchase of property with the knowledge of the zoning restrictions a self-created hardship.[150] Many jurisdictions agree that "purchase with knowledge" constitutes a self-created hardship precluding the owner from obtaining a variance.[151] The rationale behind finding "purchase with knowledge" a self-created hardship is that (1) the owner's problem is caused by his own conduct, not by the strict application of the ordinance, making relief from the letter of the ordinance inappropriate; and (2) the purchase price of the property reflects the applicable zoning so the grant of the variance would be a windfall to the present owner.[152]

Some jurisdictions disagree, considering "purchase with knowledge" insufficient by itself to justify denying a variance.[153] In Richard Roeser Professional Builder, Inc. v. Anne Arundel County,[154] part of the applicant's property was located in a critical area "buffer" zone adjacent to wetlands.[155] The county board of appeals rejected the variance application, finding the applicant's hardship was self-created when the applicant purchased the property with knowledge of the wetlands restrictions.[156] The appellate court reversed, recognizing that a purchaser of property should not hold less of a right to a

variance than her predecessor.[157] The court acknowledged that automatically classifying "purchase with knowledge" as a self-created hardship places an unreasonable limitation on the municipality's ability to grant variances.[158] Therefore, a property owner's purchase with knowledge of restrictions should not preclude her right to seek a variance.[159]

Variances may be granted despite "purchase with knowledge" if the property owner cannot otherwise make reasonable use of his property.[160] Variances can also be justified despite "purchase with knowledge" when community impact is minimal, and where the purchase price did not reflect the zoning ordinance.[161] Therefore, although Hawai'i courts strictly construe "purchase with knowledge" as a self-created hardship, other jurisdictions disagree.

2. The Three-Prong "Unnecessary Hardship" Test

The county variance standard requires that the applicant demonstrate an unnecessary hardship by showing (1) he cannot make reasonable use of the land under the zoning ordinance (2) due to unique circumstances, and (3) the proposed use will not alter the essential character of the neighborhood nor be contrary to the intent and purpose of the ordinance. A property owner must satisfy all three prongs to demonstrate an unnecessary hardship. This section discusses each prong of the unnecessary hardship test.

a. The First Prong: "Reasonable Use"

Under Hawai'i law, the "reasonable use" of the land is not necessarily the use most desired by the property owner.[162] An applicant's showing that the variance allows greater profitability is irrelevant to the director's decision.[163] Theoretically, almost any property owner could show greater profitability for a desired use, and the greater profit would come at the expense of the neighboring property owners.[164]

The most stringent reading of the "reasonable use" prong demands that the zoning ordinance deprive the property owner of all reasonable use of her property.[165] Under such strict application of the "reasonable use" standard, zoning authorities have very limited discretion in granting variances because zoning ordinances seldom deprive property owners of all reasonable use of the land.[166] Traditional courts and scholars tend to favor the logic behind the strict "reasonable use" standard, viewing variances as narrow avenues for relief under the most oppressive circumstances.[167]

In practice, zoning authorities approve variances without meeting this rigorous standard.[168] As a result, courts and scholars often criticize zoning authorities for improperly applying the "reasonable use" standard.[169] But other scholars advocate a less stringent application of the "reasonable use" standard. Under one approach, authorities would only apply the strict "no reasonable use" test to use variances, and would apply a less stringent standard to area variances.[170] The rationale behind this distinction is that area variances generally pose less harm to neighbors than use variances.[171] Under another approach, zoning authorities would consider the degree of reasonable use impairment in a balancing test against the other factors to determine the owner's hardship.[172]

Courts agree that variance applicants must do more than simply show that the property could be worth more or be more productive with the variance.[173] In Township of Birmingham v. Chadds Ford Tavern, Inc.,[174] a Pennsylvania restaurant and tavern applied for a variance to the minimum sideyard setback so that it could expand its facilities.[175] The tavern presented evidence that the addition would be economically beneficial to the business.[176] The zoning board approved the variance, and the trial court affirmed.[177] The appellate court reversed, concluding that the record did not show that the tavern's continued existence would be threatened without the variance.[178] Thus, under *Birmingham*, merely showing economic benefit is not enough to justify a variance.[179]

In Green v. Bair,[180] two Maryland physicians sought a variance to expand their medical facility to accommodate the growing storage needs of their existing practice.[181] They did not seek to increase their patient load, and testified they would suffer great difficulty continuing their practices without the proposed expansion.[182] The zoning board granted the variance but the trial court reversed.[183] The appellate court affirmed, reasoning that the applicants did not meet the burden of showing they would be unable to secure a reasonable return from or make reasonable use of the existing property.[184] Thus, under *Green*, an applicant cannot merely show difficulty in continuing operations to justify a variance.

In Samaco v. Town of Clay,[185] the property owners sought a variance to build a structure in the front yard setback.[186] They presented evidence that, without the variance, profits would remain steady or decline by as much as fifteen percent.[187] But, with the variance, profits would increase by ten percent. [188]

Although the restaurant structure could be expanded to the rear, it was not feasible because the relocation and reconstruction of the kitchen and would cost nearly $200,000 more than the proposed expansion in the front yard.[189] The zoning board denied the variance, and the trial court affirmed, concluding that the applicants' position amounted to no more than a business preference.[190] The court reasoned that greater profit was not a sufficient basis for the grant of an area variance.[191]

In State v. Winnebago County,[192] the applicant's Wisconsin parcel consisted of eight lots, four of which were encumbered by shoreland setbacks that limited the lots to only a twenty-foot wide strip of buildable area.[193] The property owners applied for a variance, seeking to accommodate eight units on the parcel.[194] The zoning board granted the variance, finding that the affected lots could not be developed to its "highest and best use" under the shoreland setbacks.[195] The trial court affirmed the board's decision,[196] but the appellate court reversed.[197] Although the "highest and best use" analysis was applicable to determine just compensation for takings claims, it was an improper test for variances.[198] Instead, the applicant must show that it cannot make "feasible use" of the property without a variance.[199] Because the applicant could develop four units on the land, the court rejected the notion that the setbacks prohibited feasible use of the property.[200]

In sum, the traditional interpretation of the "reasonable use" standard holds that variances should be granted only when the zoning ordinance amounts to a *Lucas*-type regulatory taking of the land, depriving the property owner of all reasonable use of the land. In practice, many zoning authorities interpret the "reasonable use" standard more liberally, but draw the line at construing "reasonable use" as more profitable use or more productive use of the land. Therefore, the "reasonable use" criterion can be widely construed, from an unconstitutional "safety valve" to a more flexible standard, so long as the "reasonable use" does not interfere with neighboring property owners' rights.

b. *The Second Prong: "Unique Circumstances"*

Zoning ordinances impose uniform hardships upon all properties in a given district. Therefore, it is inequitable to grant variances unless the property owner can show that her property is uniquely affected.[201] Under Hawai'i law, "unique circumstances" are specific attributes of the particular parcel that justify the variance request.[202] "Unique circumstances" may be irregular lot size or shape, or exceptional topographical characteristics, such as a steep hill or ravine.[203] For example, a large setback imposed on an unusually shallow lot creates a severe burden on the property owner, creating a hardship not shared by others in the zoning district.[204]

Stringent application of the "unique circumstances" prong helps curb discretionary authority in variance administration.[205] Like any decision-making body, variance-granting authorities are subject to influence by special interest groups and partisan politics, sometimes resulting in inconsistent application of variance standards.[206] Therefore, the zoning variance decision is more objective when municipalities require that the applicants' property feature unique physical characteristics that make it inequitable for the municipality to strictly apply the zoning classification.

The "unique circumstances" requirement also prevents variances from incrementally rendering a zoning scheme valueless.[207] Critics opposing liberal variance standards say zoning authorities often fail to consider cumulative impacts of variances on broader community interests.[208] Indeed, a concentration of variances in a zoning district could ultimately destroy the integrity of a zoning scheme. In addition, liberally-granted variances can make it difficult for property owners to know what restrictions exist in a given area.[209] Once granted, any undesirable effect of a variance will be ongoing and cumulative, as a "benefit" running with the land.[210] Failing to consider cumulative impacts can controvert one of the principal functions of zoning, that is, promoting the public welfare by preventing land uses that are harmful to neighbors and the larger community.[211]

Therefore, the "unique circumstances" prong helps prevent adverse outcomes by relying on anomalous property characteristics that truly implicate the applicant's hardship.[212] By strictly construing the "unique circumstances" requirement, municipalities are forced to consider whether a particular piece of property is uniquely and unduly burdened by a zoning

ordinance. Therefore, the "unique circumstances" prong, properly construed, serves as an important check on zoning integrity and authority.

c. *The Third Prong: "Essential Character" of the Neighborhood and "Intent and Purpose" of the Zoning Ordinance*

Under the third prong of the "unnecessary hardship" test, the applicant must show that the proposed structure or use (1) will not alter the essential character of the neighborhood, and (2) is not contrary to the intent and purpose of the zoning ordinance.[213] Under the "essential character" criterion, courts must determine whether the proposed structure or use comports with the already existing character of the neighborhood, not the desired character of the neighborhood under the zoning ordinance. Under the "intent and purpose" criterion, courts may or may not implicitly consider the public interest as part of the "intent and purpose" of the ordinance.

i. The "Essential Character" of the Neighborhood.

Under Hawai'i law, excessive height can constitute alteration of the "essential character of the neighborhood," resulting in a denial of a variance.[214] In Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, the reconstructed temple exceeded maximum height requirements, and the applicant sought a variance for the nonconforming structure.[215] The director found that the excessive height altered the essential character of the neighborhood, and denied the variance.[216] Despite the applicant's assertions that the "less than well-maintained" neighborhood was made up of various mixed uses, and that the new temple was comparatively strikingly beautiful, the record evidence showed that neighbors felt oppressed by structure's height, did not find it "strikingly beautiful," and resented its presence.[217] Therefore, the Hawai'i Supreme Court upheld the director's decision, finding the evidence sufficient to support the director's determination.[218]

Courts evaluate the variance's impact upon the character of the neighborhood by looking at the already existing conditions. In St. Onge v. City of Concord,[219] the New Hampshire applicant's property was located in a "general residence" district that was otherwise predominated by multiple-family dwellings and apartment houses.[220] The applicant sought to expand his existing apartment building and applied for a variance.[221] The city argued that the applicant's proposed expansion would endanger the public right to maintain the restricted character of the general residence district.[222] The New Hampshire Supreme Court ruled for the applicant, reasoning that the character of the district is determined by its already existing conditions.[223]

In Kontogiannis v. Fritts,[224] a New York developer was fined for constructing a recreational building in a single-family residential district.[225] The developer sought a variance to convert the recreational building into a multi-family apartment building.[226] The zoning board denied the variance.[227] The New York Supreme Court reversed the board's decision, reasoning that even if the petition was inconsistent with the district's zoning restrictions, it did not alter the essential character of an area if compatible with the area's existing uses.[228]

In sum, *Korean Buddhist* holds that the director's determination under the "essential character" prong will be upheld so long as the record evidence supports the determination. When evaluating "essential character," courts look at the already existing conditions of the neighborhood, not the aspirational character of the neighborhood under the zoning ordinance. Therefore, the relevant consideration for Kyo-ya is the already existing conditions of Waikiki.

ii. The "Intent and Purpose" of the Zoning Ordinance.

Under Hawai'i law, the director must find that the proposed use is not contrary to the intent and purpose of the zoning ordinance.[229] Some scholars maintain that a variance authorizing an action contrary to the ordinance's intent essentially amounts to an ordinance amendment.[230] In such cases, a zoning amendment or special use permit would be more appropriate avenues for relief than a variance.[231]

Although the county's variance standard does not expressly require consideration of the public interest, the public interest is implicit in any zoning scheme. Some critics argue that the potential impact of a variance on community interests

should be an important limiting factor in a board's decision to grant a variance.[232] In the Kyo-ya variance matter, environmental interest groups argue that the director should have considered environmental concerns in his decision.[233]

Lawmakers sometimes integrate environmental protection requirements into pre-existing, locally-administered zoning ordinances instead of creating new environmental protection programs.[234] Thus, when such zoning ordinances are violated, the concerns do not merely involve those of the surrounding community, but the wider public interest in protecting the environment.[235] Some scholars suggest that environmental protection regulations within the zoning code have a greater claim to the public interest than traditional zoning concerns.[236] When zoning authorities grant variances for encroachment into environmentally-sensitive areas simply because the variation will not change the essential character of a neighborhood, they fail to acknowledge the inherently different scope of environmental regulations.[237]

When environmental protections are closely related to public health, courts may weigh the public interest heavily in variance decision-making.[238] In Eason Oil Co. v. Uhls,[239] the applicant sought a variance to drill for oil and gas in an area otherwise prohibiting such activity.[240] Despite the applicant's showing of financial hardship,[241] the zoning board denied the variance.[242] The Supreme Court of Oklahoma affirmed, finding that the "reasonable probability" of water supply contamination was of sufficient concern to the public interest.[243] In *Eason*, the public interest was expressly enumerated as a criterion for permitting drilling in non-drilling areas.[244] Unlike *Eason*, the Honolulu variance standard does not expressly enumerate the public interest as a factor for consideration.[245]

Variance decisions are complicated when environmental restrictions are based on less tangible values.[246] In Town of Beverly Shores v. Bagnall,[247] the property owners sought a variance to build a home on sand dunes protected by a zoning ordinance.[248] One of the purposes of the ordinance was "the conservation of natural contours, vegetation, wild life and all the scenic qualities of the area of the sand dunes and all associated and related geographical elements which are so unique and valuable to the balance of nature."[249] The zoning board denied the variance, raising concern over the damage to the sand dunes.[250] The Indiana Supreme Court affirmed, finding the board's concern over the ensuing sand dune damage sufficient to show that the applicants' plan was contrary to the general welfare.[251] Like *Eason*, "general welfare" was an expressly enumerated criterion in the municipality's variance standard.[252] The Honolulu variance standard, however, does not expressly enumerate "general welfare" as a factor for consideration.

Environmental protection proponents suggest courts should recognize the fundamental differences between traditional zoning and environmental land use controls, and should closely scrutinize the potential harm to the public in variance decision-making.[253] Municipalities implement environmental land use controls to protect public resources.[254] Therefore, under the third-prong of the *Otto* test, some advocates believe that variance-granting authorities should consider the prospective harm to the resource that the regulation was designed to protect.[255]

In sum, the Honolulu variance standard requires that an applicant demonstrate an unnecessary hardship by showing it (1) cannot make reasonable use of the property (2) due to unusual circumstances, and (3) that the proposed structure or use will not alter the essential character of the neighborhood, nor be contrary to the intent and purpose of the zoning ordinance. In the Kyo-ya variance matter, the director determined that Kyo-ya satisfied all three prongs of the variance test. The next section analyzes the director's decision under each of the three prongs.

V. ANALYZING THE COUNTY'S GRANT OF VARIANCE FOR KYO-YA'S PROPOSED MOANA SURFRIDER DIAMOND HEAD TOWER REDEVELOPMENT.

On December 1, 2010, the director granted (1) Kyo-ya's special district permit approving the Project's PD-R designation, and (2) the zoning variance allowing the Diamond Head Tower to encroach into the coastal height setback.[256] This section discusses the director's findings under each prong of the county's variance hardship test. This paper posits that although some of the findings were erroneous, these findings were not material and the director properly granted the variance.

A. Kyo-ya Satisfied the "Reasonable Use" Prong by Obtaining the City Council's Approval of the Project's PD-R Designation.

To satisfy the first prong, Kyo-ya must be deprived of the reasonable use of land if the zoning code were strictly applied.[257] The director concluded that Kyo-ya satisfied this prong because (1) the proposed development complied with the Waikiki Special District objectives, (2) the shoreline would be fixed farther away, permitting the proposed design, had the state widened the beach pursuant to the 1965 Beach Agreement, and (3) the City Council approved the conceptual plan for PD-R eligibility.[258] Although the first two considerations were extraneous to the "reasonable use" analysis, the director properly found that the City Council's approval of the PD-R project designation satisfied the "reasonable use" prong.

1. The Director's Consideration of Compliant Design Alternatives Was Not Relevant to the "Reasonable Use" Analysis.

The director found the Project supported the Waikiki Special District objective of revitalizing and rejuvenating the district.[259] The director reasoned that the proposed tower design is preferred to Kyo-ya's alternative compliant design of a "massive monolithic wall" obscuring view corridors from Kalākaua Avenue to the ocean.[260] This analysis is misplaced. The "reasonable use" prong does not demand a consideration of alternatives. It merely asks whether an applicant is deprived of all reasonable use of the property.[261] Therefore, the comparison of the proposed design to a hypothetical "massive monolithic wall" is inapplicable to the "reasonable use" analysis.

2. The Director's Contemplation of an Extended Shoreline Was Not Relevant to the "Reasonable Use" Analysis.

Kyo-ya contended that the state's breach of the 1965 Beach Agreement impaired its ability to make reasonable use of the property.[262] If the state had properly performed the agreement, the beach fronting the Diamond Head Tower could be up to 180 feet wider.[263] Accordingly, the proposed design would be largely compliant based on setbacks from a coastline fixed 180 feet farther seaward than it is today.[264] The director accepted this reasoning and adjusted the maximum height as if the coastline was 180 feet farther seaward.[265]

The notion that a building envelope can be measured from a non-existent or prospective coastline deserves scrutiny.[266] First, it is unclear whether the state breached the 1965 Beach Agreement because the state only agreed to use its "best efforts" to widen the beach "substantially in accordance" with the 1963 Cooperative Study.[267] Second, even assuming the state did widen the beach under the agreement, natural erosion processes would substantially reduce the beach's width over time.[268] Therefore, the director cannot be certain that the state would have widened the beach by the maximum 180 feet, and that the beach would remain the same width today.[269]

Regardless of whether a building envelope can be fixed from a non-existent coastline, the 1965 Beach Agreement analysis is not pertinent to the "reasonable use" prong of the hardship test. After analyzing the proposed tower design under the building envelope measured from of the extended coastline, the director found "[t]he proposal, viewed in that context, is not excessive."[270] Again, the pertinent analysis is whether Kyo-ya would be deprived of all "reasonable use" under the zoning code. Whether Kyo-ya's proposed plan is excessive or not is irrelevant to the inquiry. The "reasonable use" prong focuses upon the detrimental impact of the zoning ordinance, not the reasonableness of the applicant's plan.

3. The Director Properly Construed the City Council's PD-R Project Approval as Sufficient to Satisfy the "Reasonable Use" Prong.

The zoning code as strictly applied permits Kyo-ya's current reasonable use of the property.[271] The existing Diamond Head Tower is a legally nonconforming structure that can be redeveloped under the Waikiki Special District provisions, so long as the redevelopment meet certain guidelines.[272] But the director's decision does not mention whether Kyo-ya could continue to make reasonable use of its property.[273] Instead, the director considered that if Kyo-ya observed all setbacks the compliant tower would suffer a sixteen percent reduction of the current density.[274]

The director determined that the limited density was contrary to the City Council's approval of the Project's increased density under the PD-R conceptual plan.[275] Because the strict application of the setbacks would prohibit the conceptual plan, Kyo-ya would thereby be deprived of "reasonable use" of its property. Therefore, Kyo-ya would be denied "all reasonable use" because the setback would effectively preclude Kyo-ya from obtaining the height and density as approved by the City Council.[276]

Based upon the director's reasoning, once the city council affirmatively acts to permit greater height and greater density under a PD-R conceptual plan, the acceptable "reasonable use" of the parcel is elevated to the provisionally-approved plan, rendering the existing use of the property, essentially, "unreasonable." The director's reasoning is logical. The purpose of the PD-R designation is to allow flexible development otherwise prohibited under strict application of the special district standards.[277] A developer seeking to modestly redevelop a nonconforming structure is already permitted to do so under the Waikiki Special District ordinance.[278] A developer would therefore only seek a PD-R designation for large-scale Waikiki redevelopment otherwise prohibited by the district design standards.[279] The developer would invariably need variances to execute its development plan. The strict "reasonable use" standard, however, would preclude a developer from obtaining the necessary variances, because opponents can always point to the applicant's existing use as a "reasonable use" permitted under the applicable zoning. Without the variances, the developer would then be forced to construct a strictly compliant structure, rendering the PD-R designation meaningless.

The "reasonable use" standard, therefore, must be broadly construed in situations where the City Council has authorized the developer to exceed zoning provisions, as in the case of PD-R designations. If it were not the case, the PD-R designation process would be a futile exercise, and the objectives of the PD-R designation would never be realized. Critics may question why the variance should even be needed for PD-R projects, when the otherwise noncompliant plan is provisionally approved under the PD-R designation. That question, however, is best left to the City Council to decide.

In sum, the director's consideration of the Waikiki Special District objectives and the 1965 Beach Agreement were irrelevant to the "reasonable use" analysis. The director's consideration of the PD-R designation, however, was well-founded. Therefore, the director was correct to conclude that Kyo-ya's proposal satisfied the "reasonable use" prong.

B. Kyo-ya's Unusually Shallow Lot Satisfied the "Unique Circumstances" Prong.

To satisfy the second prong, Kyo-ya must show its variance request "is due to unique circumstances and not the general conditions in the neighborhood, so that the reasonableness of the neighboring zoning is not drawn into question."[280] The director concluded that Kyo-ya satisfied the "unique circumstances" prong because (1) the preservation of the historic Banyan Wing leaves Kyo-ya with a particularly shallow lot, and (2) the shoreline fronting the Moana is artificial and atypical compared to natural beaches.[281] Although the director improperly construed the artificially manipulated shoreline as a "unique circumstance," he properly found that the shallow lot constrained by the historic preservation requirement satisfies the "unique circumstances" prong.

1. The Banyan Wing's Historic Preservation Status Effectively Limits the Buildable Area of the Property to a Shallow Lot.

The director determined that the Diamond Head Tower lot is one of the shallowest lots along the Waikiki shoreline.[282] The lot is 340 feet deep at the west end, and 159 feet deep on the east.[283] A shallow lot burdened by a large setback is a classic example of a parcel that fulfills the "unique circumstances" requirement.[284] But here, the shallow lot is not delineated solely by property lines, it also relies upon an implicit "boundary line" on the west, created by the Banyan Wing's historic preservation status. Therefore, to satisfy the "unique circumstances" prong, the historic preservation requirement must be unique amongst neighboring property owners, and the coastal height setback must unduly burden the property based on this unique characteristic.

First, Kyo-ya's historic preservation requirement is unique among neighboring property owners. The century-old Banyan Wing is the only structure in the Waikiki Special District that is listed on the National and State Register of Historic Places.[285] In addition, the Project's PD-R designation specifically requires that Kyo-ya preserve the Banyan Wing for at least

twenty-five years after receiving the Diamond Head Tower's certificate of occupancy.[286] Therefore, Kyo-ya's historic preservation requirement is a unique characteristic of the property.

Second, the coastal height setback unduly burdens the Diamond Head Tower lot, bounded by Kyo-ya's inability to redevelop the historic Banyan Wing. By solely concentrating on the east end of the lot, Kyo-ya is reduced to building on the narrowest part of the lot, further burdened by the one-hundred-foot coastal setback, twenty-yard front yard setback along Kalākaua Avenue, and fifteen-foot wide public beach access along the east end of the lot.[287] The director reasoned that the variance would be an equitable means of essentially transferring the development rights from the low-revenue historic Banyan Wing to the more profitable Diamond Head Tower lot.[288] Therefore, the shallow lot burdened by the PD-R designation's historic preservation requirement constitutes "unique circumstances" satisfying the second prong of the hardship test.

2. The Moana's Artificially Manipulated Shoreline Does Not Satisfy the "Unique Circumstances" Prong.

The director found that the beach fronting the Diamond Head Tower constitutes a unique circumstance.[289] Unlike other sandy beaches on O'ahu, the beach fronting the Moana has been artificially manipulated for years, and will likely continue to be periodically replenished.[290] Because this particular shoreline can, and likely will, be artificially extended through beach restoration efforts, it should not serve as a hard line restricting Kyo-ya's plans.[291] The director found it impractical and infeasible to restrict Kyo-ya's development on the existing shoreline, because it would essentially require Kyo-ya to develop the Diamond Head Tower on a piecemeal basis as the state incrementally extends the shoreline seaward.[292]

Although an artificial shoreline may be unconventional, it is not a valid consideration for the "unique circumstances" prong. The artificial shoreline characteristic is common to nearly all of the neighboring properties. By asserting that the strict application of coastal height setback forces Kyo-ya to develop in infeasible increments, Kyo-ya calls into question the reasonableness of the coastal height setback. Like Kyo-ya, any Waikiki beachfront property owner could enter into a similar memorandum of understanding with the state to widen the beach fronting their property, then argue that the coastal height setback forces them to develop in piecemeal fashion. Therefore, Kyo-ya's artificial shoreline characteristic does not satisfy the "unique circumstances" prong because it simply is not unique to the property.

In sum, Kyo-ya's artificial shoreline is a characteristic shared by the neighboring properties, and therefore is disqualified from being a "unique circumstance" for purposes of the hardship test. But, the shallow lot, combined with the Kyo-ya's historic preservation requirement does constitute a "unique circumstance" unduly burdened by the coastal height setback. Thus, the director properly concluded that Kyo-ya satisfied the "unique circumstances" prong.

C. Kyo-ya Satisfied the "Essential Character" and "Intent and Purpose" Prong Because the Existing Character of Waikiki is Densely Urban and the Project Generally Conforms to the Waikiki Special District Objectives.

Under the third prong, the proposal shall not "alter the essential character of the neighborhood nor be contrary to the intent and purpose of the zoning ordinance."[293] The director found that Kyo-ya satisfied the third prong because (1) the essential character of the Waikiki district is densely urban, (2) the proposal is not contrary to the Waikiki Special District objective of renovating and redeveloping existing structures. These findings are correct.

1. Kyo-ya's Project Will Not Alter the Essential Character of Densely Urban Waikiki.

The director reasoned that Waikiki is heavily urban, densely populated, with many other nonconforming structures that encroach into the coastal height setback and shoreline setback.[294] Therefore, the relatively tall, high-density proposed structure will not alter the essential character of Waikiki.[295] Although *Korean Buddhist* suggests that an excessively tall structure is sufficient to alter the essential character of a neighborhood, the facts underlying the Kyo-ya variance application distinguish it from the circumstances under *Korean Buddhist*.[296]

First, the *Korean Buddhist* temple's hardship was self-created when the religious organization built the temple in knowing violation of the zoning height restrictions.[297] After the temple was constructed, the organization sought a variance

for post-hoc compliance with the zoning district.[298] Here, Kyo-ya seeks a variance prior to development, and did not create its own hardship.[299] Second, in *Korean Buddhist*, the director denied the temple's variance petition at the outset.[300] Here, the director approved Kyo-ya's variance petition,[301] and the opposition bears a heavy burden to overcome the deference to the director's decision on appeal.[302] Finally, case law in other jurisdictions support the notion that the essential character of the neighborhood depends on the already existing conditions, not the aspirational character of the governing ordinance.[303] Therefore, the director was justified in concluding that the Project will not alter the essential character of the densely populated, urban center of Waikiki.

2. Kyo-ya's Proposal is Not Contrary to the Intent and Purpose of the Waikiki Special District Ordinance.

The director reasoned that the Project was not contrary to the intent and purpose of the zoning ordinances because it generally conformed to the Waikiki Special District objectives.[304] In particular, the Waikiki Special District encourages redevelopment of existing structures that would otherwise experience decline.[305] The redevelopment of the Diamond Head Tower is consistent with city's goal of preserving Waikiki's status as a premium resort destination, especially considering that this will be the first new hotel development on Waikiki Beach in the last thirty years.[306]

The issue here is that the controlling ordinance contains multiple purposes, some that support Kyo-ya's position, and some that are contrary to Kyo-ya's position.[307] For example, one of the fourteen enumerated Waikiki Special District objectives is to "[g]uide development and redevelopment in Waikiki with due consideration to optimum community benefits. These shall include the preservation, restoration, maintenance, enhancement and creation of natural, recreational, educational, historic, cultural, community and scenic resources."[308] This objective can be construed to support both Kyo-ya and its opposition. On one hand, Kyo-ya's proposal helps preserve the historic Banyan Wing, enhances scenic resources by improving the view corridor from Kalākaua Avenue to the ocean, and enhances recreational use by allowing for a larger public surfboard rack on the property.[309] On the other hand, the proposal is contrary to the preservation of scenic resources by interrupting mountain views from the shoreline, and is contrary to the preservation of recreational and community benefits by casting long shadows on the beaches, discouraging beach use.[310]

Because the Waikiki Special District contains numerous, possibly conflicting, objectives, the director has substantial discretion in determining whether proposed development in Waikiki is contrary to the intent and purpose of the zoning ordinance.[311] Larger developments will invariably contain some feature or features that may be contrary to some intent or purpose embedded within of the zoning code. The Waikiki Special District objectives, therefore, offer the director a wealth of "intents and purposes" that he may use to substantiate either his approval or denial of a variance under the third prong of the "unnecessary hardship" test.

In sum, despite some extraneous considerations under the three-prong hardship test, the director correctly concluded that (1) Kyo-ya would be deprived of reasonable use of the land if it were not allowed to exceed the coastal height setbacks in light of its conditionally approved PD-R conceptual plan, (2) Kyo-ya's variance request is due to the unique circumstance of having a shallow lot and the burden of preserving the historic Banyan Wing, and (3) the Project will not alter the dense, urban character of Waikiki, nor is it distinctly contrary to the intent and purposes of the zoning code.[312] This paper recognizes that an applicant seeking development in Waikiki has a far greater chance of obtaining a variance when the City Council approves the project's PD-R designation. The "unique circumstances" prong, however, prevents the variance from being an entirely discretionary tool.

VI. THE POLICY IMPLICATIONS OF THE DIAMOND HEAD TOWER VARIANCE

On January 3, 2011, environmental interest groups filed an appeal with the Zoning Board of Appeals, contesting the director's partial variance grant.[313] The board held a contested case hearing from March through July 2012, where the parties presented the testimony of numerous witnesses.[314] On February 14, 2013, the board denied the appeal, concluding that the appellants failed to meet their burden of proving, by a preponderance of the evidence, that the director's decision was based on a clearly erroneous finding of material fact.[315] On March 21, 2013, the environmental interest groups filed an appeal in the State of Hawaii Circuit Court of the First Circuit.[316] The petitioners seek reversal of the director's partial variance grant, and the board's affirmation thereof, plus injunctive relief and attorney's fees.[317]

If the court overturns the director's decision on the "reasonable use" prong, the county will be forced to reconcile how the PD-R project designation interacts with the rest of the zoning ordinances, and how the procedure can be improved to carry out the objectives of the designation. If the court overturns the director's decision on the "unique circumstances" prong, property owners will gain some guidance on what does not constitute "unique circumstances," but will likely still be unsure of the threshold for this hardship criterion. If the court overturns the director's decision on the "essential character of the neighborhood," criteria, property owners will learn that an ordinance's aspirational "essential character" may supersede the actual existing "essential character" of the neighborhood for purposes of the third prong. Finally, if the court overturns decision on the "contrary to the intent and purpose" prong, the county will have to evaluate how larger developments implicating numerous zoning objectives could possibly satisfy this prong.

If the court upholds the director's decision, it will demonstrate that the county's variance standard, as it applies to large-scale development, is flexible. In many ways, it has to be flexible. The standard is applied to all types of circumstances, from a homeowner seeking to extend a garage, to a developer constructing a multi-million dollar commercial complex.[318] Critics of the traditional "unnecessary hardship" criteria comment that zoning authorities pay little attention to legal variance requirements and instead search for equitable solutions to variance applications they perceive as harmless.[319] Yet, land use policy generally seeks productive uses of the land. An unnecessarily strict variance standard inhibits such policy.

Opponents of the planned Diamond Head Tower development fear the Kyo-ya variance will set a dangerous precedent, opening the door to variances for other beachfront owners.[320] Others argue the variance creates a slippery slope towards complete abrogation of the Waikiki Special District restrictions.[321] Kyo-ya's variance, however, was granted on a narrow set of facts, unlikely to open the doors to similar variances along the shoreline. First, the City Council approved the Project's PD-R designation, strongly indicating the county's support for the development.[322] Second, the Diamond Head Tower lot was uniquely burdened by a shallow lot and the inability to alter the historic Banyan Wing.[323] Third, on appeal, the petitioners in opposition to the variance failed to allege that the director's decision was characterized by abuse of discretion, likely the most plausible avenue for reversal.[324] Therefore, the Kyo-ya case creates little precedent for similar beachfront development.

If environmental interest groups are displeased by the director's failure to consider environmental interests, they should urge the City Council to amend the county variance standard. Statutory criteria expressly requiring the director to consider the public interest or general welfare, as in *Eason* and *Bagnall*, would encourage the director to consider potential environmental harms.[325] In turn, the courts would have a statutory basis for vacating or reversing the director's decision for failing to consider such adverse environmental impacts. Without more, the court's appellate review of the variance grant is limited and the director's decision shall be granted great deference under the pertinent law.

Postscript by the author:

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[1] Honolulu, Haw. Res. 10-185, Comm. Rep. (2010) (enacted).

[2] Kyo-ya Hotels & Resorts, LP, Findings of Fact, Conclusions of Law, and Decision and Order, File No. 2010/VAR-9 7 (Dep't of Planning and Permitting Dec. 1, 2010) [hereinafter Director's D&O Zoning Variance]; Kyo-Ya Hotels & Resorts, LP, FINAL ENVIRONMENTAL IMPACT STATEMENT, PRINCESS KAIULANI RENOVATION AND DEVELOPMENT, AND REPLACEMENT OF THE MOANA SURFRIDER HOTEL DIAMOND HEAD TOWER 128 (Feb. 2010) [hereinafter EIS].

[3] Director's D&O Zoning Variance, *supra* note 2.

[4] *See* Honolulu, Haw. Res. 10-185, Comm. Rep. (enacted); Honolulu, Haw. Res. 10-212, Final Draft 1 (2010) (enacted).

[5] Director's D&O Zoning Variance, *supra* note 2, at 1.

[6] EIS, *supra* note 2, at Appendix 1-87(a).

[7] *See* Director's D&O Zoning Variance, *supra* note 3, at 1.

[8] *See id.* at 6-11.

[9] Petition Before the City and County of Honolulu Zoning Board of Appeals at 3, *In re* Hawaii's Thousand Friends (2011) (No. 2011/ZBA-1) [hereinafter *HTF Petition*].

[10] *See id.* at 3-4.

[11] *Id.* at 4.

[12] EDWARD H. ZIEGLER, JR., ARDEN H. RATHKOPF, & DAREN A. RATHKOPF, 3 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 58:5 (2011).

[13] David W. Owens, *The Zoning Variance: Reappraisal and Recommendations for Reform of a Much-Maligned Tool*, 29 COLUM. J. ENVTL. L. 279, 288 (2004).

[14] *See* HONOLULU, HAW., REV. ORDINANCES § 21-9.80-4(d) (2011).

[15] George S. Kanahele, WAIKIKI 100 B.C. TO 1900 A.D. 1 (1995).

[16] *Id.* at 37.

[17] *Id.* at 20. "Lo'i" refers to an "[i]rrigated terrace, especially for taro, but also for rice; paddy." Nā Puke Wehewehe 'Ōlelo Hawai'i, Hawaiian Dictionaries, http://wehewehe.org (last visited Apr. 22, 2012).

[18] Kanahele, *supra* note 15, at 43.

[19] *Id.* at 90.

[20] *Id.* at 91.

[21] *Id.* at 104.

[22] *Id.* at 110.

[23] *Id.* at 111-13.

[24] *Id.* at 120-21.

[25] *Id.* at 121-22.

[26] U.S. ARMY ENGINEER DIST., HONOLULU CORPS OF ENGINEERS, WAIKIKI BEACH, ISLAND OF OAHU, HAW. – COOPERATIVE BEACH EROSION CONTROL STUDY 9 (1963) [hereinafter 1963 STUDY].

[27] Masakazu Ejiri, THE DEVELOPMENT OF WAIKIKI, 1900-1949: THE FORMATIVE PERIOD OF AN AMERICAN RESORT PARADISE 236 (1996).

[28] *Id*. at 236.

[29] *Id*. at 141.

[30] *Id*.

[31] *Id*. at 149.

[32] *Id*. at 151.

[33] *Id*. at 153.

[34] *Id*. at 6.

[35] *Id*. at 230, 236.

[36] L.E. Pinkham, RECLAMATION OF THE WAIKIKI DISTRICT OF THE CITY OF HONOLULU, TERRITORY OF HAWAII 3-4 (1906).

[37] *Id*. at 10.

[38] Ejiri, *supra* note 27, at 242.

[39] *Id*. at 20-21, 244.

[40] *Id*. at 21.

[41] *Id*. at 249.

[42] Robert L. Weigel, WAIKIKI, OAHU, HAWAII, AN URBAN BEACH: ITS HISTORY FROM A COASTAL ENGINEERING PERSPECTIVE, iii-iv, 3, Nov. 15, 2002.

[43] 1963 STUDY, *supra* note 26, at 8.

[44] Memorandum for Commander, US Army Engineer Division, Pacific Ocean, Fort Shafter, Subject: Waikiki Beach Erosion Control Reevaluation Report 3 (2002) [hereinafter Erosion Report].

[45] *Id*. at 3.

[46] *Id*.

[47] *Id*. at 3, 9.

[48] *Id*. at 4.

[49] *Id*.

[50] *Id*. at 5.

[51] 1963 STUDY, *supra* note 26, at 1.

[52] Erosion Report, *supra* note 44, at 9.

[53] "Littoral" means "of or relating to the coast or shore of an ocean, sea, or lake." BLACK'S LAW DICTIONARY 952 (8th ed. 1999).

[54] *Id*. at 10.

[55] Surf Rider-Royal Hawaiian Sector Beach Agreement, May 12, 1965.

[56] Erosion Report, *supra* note 44, at 10.

[57] *Id*. at 11-12.

[58] Director's D&O Zoning Variance, *supra* note 2, at 8.

[59] *Id*.

[60] Jacqueline D. Fernandez, *Non-Profit Peddling in Waikiki: To Permit or Not to Permit?*, 17 U. HAW. L. REV. 539, 539 (1995).

[61] *Id*.

[62] *See Honolulu Weekly, Inc. v. Harris*, 298 F.3d 1037, 1041 (9th Cir. 2002). Special Design Districts require special permits for any development within the district. *See* DAVID L. CALLIES, REGULATING PARADISE 58 (2d ed. 2010).

[63] *See* § 21-9.80(c).

[64] HONOLULU, HAW., REV. ORDINANCES § 21-9.80-1 (2011).

[65] HONOLULU, HAW., REV. ORDINANCES § 21-9.80-3(c) (2011).

[66] HONOLULU, HAW., REV. ORDINANCES § 21-9.80-3(a), (b).

[67] HONOLULU, HAW., REV. ORDINANCES § 21-9.80-4(g)(2).

[68] Department of Permitting and Planning for the City and County of Honolulu, *Waikiki Special District Design Guidelines* 4 (2002), *available at* http://honoluludpp.org/downloadpdf/zoning/WSD.pdf.

[69] *Id*.

[70] HONOLULU, HAW., REV. ORDINANCES § 21-9.80-4(g)(2)(A).

[71] *Waikiki Special District Design Guidelines*, *supra* note 68, at 4.

[72] § 21-9.80-4(g)(2)(B).

[73] *Waikiki Special District Design Guidelines*, *supra* note 68, at 4.

[74] HONOLULU, HAW., REV. ORDINANCES Table 21-9.86(B) (2011) (referring to HONOLULU, HAW., REV. ORDINANCES Exhibit 21.9.15).

[75] Director's D&O Zoning Variance, *supra* note 2, at 7 ("the coastal height setback effectively limits the building height to about 170 feet.").

[76] § 21-9.8-4(d).

[77] § 21-9.8-4(d).

[78] § 21-9.8-4(d).

[79] § 21-9.8-4(d)(1)(B).

[80] § 21-9.8-4(d)(1)(A).

[81] § 21-9.8-4(d)(3)(B).

[82] FAR is the intensity-of-use ratio, comprised of the ratio of floor area to land area permitted, expressed as a percent or decimal. CALLIES, *supra* note 62, at 58.

[83] § 21-9.8-4(d)(3)(A).

[84] § 21-9.8-4(d).

[85] § 21-9.8-4(d)(4).

[86] § 21-9.8-4(d)(4)(C).

[87] § 21-9.8-4(d)(4)(F).

[88] EIS, *supra* note 2, at 134.

[89] *Id*. at 19, 38.

[90] National and State Register of Historic Places, Oahu, 11, *available at* http://hawaii.gov/dlnr/hpd/register/regoahu.pdf.

[91] EIS, *supra* note 2, at 19.

[92] *Id*. at 6.

[93] *Id*. at 128.

[94] *Id*. at 129.

[95] Director's D&O Zoning Variance, *supra* note 2, at 2.

[96] EIS, *supra* note 2, at 129, 134.

[97] *Id*. at 129.

[98] *Id*.

[99] *Id*. at 16.

[100] *Id*. at 141.

[101] "Makai" means "on the seaside, toward the sea, in the direction of the sea." Nā Puke Wehewehe ʻŌlelo Hawaiʻi, Hawaiian Dictionaries, http://wehewehe.org (last visited Apr. 22, 2012).

[102] "Mauka" means "[i]nland, upland, towards the mountain." Nā Puke Wehewehe ʻŌlelo Hawaiʻi, Hawaiian Dictionaries, http://wehewehe.org (last visited Apr. 22, 2012).

[103] EIS, *supra* note 2, at Appendix 1-87a.

[104] *Id*.

[105] Director's D&O Zoning Variance, *supra* note 2, at 1-2.

[106] EIS, *supra* note 2, at 141.

[107] Position Statement in Support of Their Appeal from Director's Decision to Partially Approve Zoning Variance No. 2010/VAR-9 Filed December 1, 2010 at Exhibit 26, *In re* Hawaii's Thousand Friends (2012) (No. 2011/ZBA-1) [hereinafter HTF Position Statement].

[108] *Id*. at 1.

[109] *Id*. at 4.

[110] The city council passed Resolution No. 10-185 by an eight-to-one vote. Honolulu, Haw. Res. 10-185, Certificate (2010).

[111] Honolulu, Haw. Res. 10-185, Comm. Rep. at 1 (2010) (enacted).

[112] *Id.*

[113] *Id*.

[114] *Id*. at 4 ¶ K.

[115] The city council passed Resolution No. 10-212 by unanimous nine-member vote. Honolulu, Haw. Res. 10-212, Certificate (2010).

[116] Honolulu, Haw. Res. 10-212, Final Draft 1 (2010) (enacted).

[117] *Id*. at 2 ¶ 1.

[118] *Id*. at 2 ¶ 2.

[119] *Id*. at 2 ¶ 3.

[120] *Id*. at 5-6 ¶ 15.

[121] Kyo-ya Hotels & Resorts, LP, Findings of Fact, Conclusions of Law, and Decision and Order, No. 2010/SDD-33 (Dep't of Planning and Permitting Dec. 1, 2010) [hereinafter D&O Special District Permit].

[122] *Id*. at 10-11 ¶ B.1.

[123] *Id*. at 24.

[124] Director's D&O Zoning Variance, *supra* note 2, at 24.

[125] ZIEGLER, *supra* note 12, at § 58:1.

[126] Otto v. Steinhilber, 24 N.E.2d 851 (N.Y. 1939).

[127] ZIEGLER, supra note 12, at § 58:5.

[128] *Id*. at § 58:1.

[129] *Id.*

[130] *Id.*; Otto v. Steinhilber, 24 N.E.2d 851 (N.Y. 1939).

[131] ZIEGLER, *supra* note 12, at § 58:5.

[132] Simplex Tech., Inc. v. Town of Newington, 766 A.2d 713, 715 (N.H. 2001) (citing *Bouley v. Nashua*, 205 A.2d 38, 41 (N.H. 1964)).

[133] ZIEGLER, *supra* note 12, at § 58:1.

[134] *Id*.

[135] Jonathan E. Cohen, *A Constitutional Safety Valve: The Variance in Zoning and Land-Use Based Environmental Controls*, 22 B.C. ENVTL. AFF. L. REV. 307, 330-31 (1995). Area variances are sometimes referred to as a "dimensional" or "non-use" variances. *Id*.

[136] HONOLULU, HAW., REV. CHARTER § 6-1517 (2012).

[137] § 6-1517.

[138] § 6-1517. (emphasis added).

[139] 24 N.E.2d 851 (N.Y. 1939) (emphasis added).

[140] § 6-1517.
[141] § 6-1517.

[142] Korean Buddhist Dae Won Sa Temple of Haw. v. Sullivan, 87 Haw. 217, 229, 953 P.2d 1315, 1327 (1998).

[143] § 6-1517.

[144] ZIEGLER, *supra* note 12, at § 58:1.

[145] *Id*. at § 58:5.

[146] *Id*. at § 58-18.

[147] *Korean Buddhist*, 87 Haw. at 235, 953 P.2d at 1333.

[148] Osborne M. Reynolds, Jr., *Self-Induced Hardship in Zoning Variances: Does a Purchaser Have No One But Himself to Blame*, 20 URB. LAW. 1, 8 (1988) (hereinafter Reynolds I).

[149] *Id*. at 11.

[150] *Korean Buddhist*, 87 Haw. at 235, 953 P.2d at 1333.

[151] Reynolds I, *supra* note 148, at 13.

[152] *Id*. at 15.

[153] *Id*. at 15-16.

[154] 793 A.2d 545 (Md. 2002).

[155] *Id*. at 296.

[156] *Id*. at 296-97.

[157] *Id*. at 303.

[158] *Id*. at 307.

[159] *Id*. at 303.

[160] Reynolds I, *supra* note 148, at 16.

[161] *Id*. at 20.

[162] *Korean Buddhist*, 87 Haw. at 234-35, 953 P.2d at 1332-33.

[163] *Id*.

[164] *Korean Buddhist*, 87 Haw. 234-35, 953 P.2d at 1332-33 (citing Final Report of the Charter Commission of the City and County of Honolulu 1971-1972 at 33); *see* McPherson v. Zoning Bd. of Appeals, 67 Haw. 603, 699 P.2d 27 (1985).

[165] Owens, *supra* note 13, at 288.

[166] *Id*. at 288-89.

[167] *Id.*, at 317.

[168] *Id*. at 288.

[169] *Id*.

[170] *Id*. at 289.

[171] *Id*. at 290.

[172] *Id*.

[173] ZIEGLER, *supra* note 12, at § 58:5.

[174] 572 A.2d 855 (1990).

[175] *Id.* at 857-58.

[176] *Id.* at 859.

[177] *Id.* at 856.

[178] *Id.* at 859.

[179] *Id.*

[180] 549 A.2d 762 (Md. Ct. Spec. App. 1988).

[181] *Id.* at 763.

[182] *Id.*

[183] *Id.* at 762.

[184] *Id.* at 765.

[185] 558 N.Y.S.2d 418 (N.Y. App. Div. 1990).

[186] *Id*. at 418.

[187] *Id.*

[188] *Id.*

[189] *Id*.

[190] *Id.*

[191] *Id.*

[192] 540 N.W.2d 6 (Wis. 1995).

[193] *Id.* at 7, 10 n.8.

[194] *Id.* at 7-8.

[195] *Id.* at 8.

[196] *Id.* at 8-9.

[197] *Id.* at 11.

[198] *Id.* at 7, n.6.

[199] *Id.* at 7.

[200] *Id.*

[201] Arndorfer v. Sauk County Bd. of Adjustment, 469 N.W.2d 831, 834 (Wis. 1991).

[202] *Korean Buddhist*, 87 Haw. at 235, 953 P.2d at 1333.

[203] Osborne M. Reynolds, Jr., *The "Unique Circumstances" Rule in Zoning Variances-An Aid in Achieving Greater Prudence and Less Leniency*, 31 URB. LAW. 127, 133 (1999) [hereinafter Reynolds II].

[204] Randall W. Sampson, *Theory and Practice in the Granting of Dimensional Land Use Variances: Is the Legal Standard Conscientiously Applied, Consciously Ignored, or Something in Between?*, 39 URB. LAW. 877, 879 (2007).

[205] Reynolds II, *supra* note 203, at 140.

[206] *Id*. at 137.

[207] Nancy Perkins Spyke, *What's Land Got to Do With It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 Buff. L. Rev. 387, 404 (2004) (citing *Arndorfer*, 469 N.W.2d 831 (Wis. 1991)).

[208] Owens, *supra* note 13, at 319.

[209] Reynolds II, *supra* note 203, at 129.

[210] *Id*. at 130-31.

[211] Owens, *supra* note 13, at 319.

[212] Spyke, *supra* note 207, at 404.

[213] HONOLULU, HAW., REV. CHARTER § 6-1517 (2012); *see* McPherson v. Zoning Bd. of Appeals, 67 Haw. 603, 699 P.2d 26 (1985).

[214] *See Korean Buddhist*, 87 Haw. at 235-36, 953 P.2d at 1333-34.

[215] *Id*., 87 Haw. at 235-36, 953 P.2d at 1333-34.

[216] *Id.*

[217] *Id.*

[218] *Id*., 87 Haw. at 235-36, 953 P.2d at 1333-34.

[219] 63 A.2d 221, 222 (N.H. 1948).

[220] *Id.* at 222.

[221] *Id.*

[222] *Id.*

[223] *Id.* at 223.

[224] 516 N.Y.S.2d 536 (N.Y. App. Div. 1987).

[225] *Id.* at 537.

[226] *Id.*

[227] *Id.*

[228] *Id.* at 538-39.

[229] *McPherson*, 67 Haw. at 606, 699 P.2d at 28.

[230] Owens, *supra* note 13, at 293.

[231] *Id*. at 294.

[232] *Id*. at 293.

[233] HTF Petition, *supra* note 9, at 3-4.

[234] Cohen, *supra* note 135, at 344.

[235] *See id.* at 351.

[236] *Id*. at 362.

[237] *Id*.

[238] *Id*. at 353.

[239] 518 P.2d 50 (Okla. 1974) (disapproved by on other grounds in Bankoff v. Board of Adjustment of Wagoner County, 875 P.2d 1138, 1143 (Okla. 1994)).

[240] Cohen, *supra* note 135, at 353.

[241] *Eason*, 518 P.2d at 53.

[242] *Id*.

[243] *Id*. at 52.

[244] *Id*. at 52-53.

[245] See HONOLULU, HAW., REV. CHARTER § 6-1517.

[246] Cohen, *supra* note 135, at 355.

[247] 590 N.E.2d 1059 (Ind. 1059).

[248] *Id*. at 1060.

[249] *Id*. at 1062.

[250] *Id*. at 1063.

[251] *Id*.

[252] *Id*.

[253] Cohen, *supra* note 135, at 363-64.

[254] *Id.* at 363.

[255] *Id*.

[256] Director's D&O Zoning Variance, *supra* note 2, at 3.

[257] HONOLULU, HAW., REV. CHARTER § 6-1517(1).

[258] *See* Director's D&O Zoning Variance, *supra* note 2, at 6-8.

[259] *Id*. at 6.

[260] *Id*. at 7.

[261] HONOLULU, HAW., REV. CHARTER § 6-1517(1).

[262] Director's D&O Zoning Variance, *supra* note 2, at 8.

[263] *Id*.

[264] *Id*.

[265] *Id*.

[266] HTF Petition, *supra* note 9, at 5.

[267] Surf Rider-Royal Hawaiian Sector Beach Agreement, *supra* note 58, at 2 ¶ 1.

[268] HTF Petition, *supra* note 9, at 5.

[269] Director's D&O Zoning Variance, *supra* note 2, at 8.

[270] *Id*. at 8.

[271] HONOLULU, HAW., REV. CHARTER § 6-1517(1).

[272] HTF Petition, *supra* note 9, at 5 (citing HONOLULU, HAW., REV. ORDINANCES § 21-9.80-4(e)).

[273] *See* Director's D&O Zoning Variance, *supra* note 2, at 6-8.

[274] *Id*.

[275] *Id*.

[276] *See Id*.

[277] HONOLULU, HAW., REV. ORDINANCES § 21-9.80-4(d) (2011).

[278] § 21-9.80-4(e).

[279] § 21-9.80-4(d)(1)(B).

[280] HONOLULU, HAW., REV. CHARTER § 6-1517(2).

[281] *See* Director's D&O Zoning Variance, *supra* note 2, at 8-10.

[282] *Id*. at 8.

[283] *Id*.

[284] Sampson, *supra* note 204, at 879.

[285] EIS, *supra* note 2, at 172.

[286] Honolulu, Haw. Res. 10-212.

[287] *Id*. at 9.

[288] *Id*.

[289] Director's D&O Zoning Variance, *supra* note 2, at 9.

[290] *Id*. at 9-10.

[291] *Id*. at 10.

[292] *Id*.

[293] HONOLULU, HAW., REV. CHARTER § 6-1517(3).

[294] Director's D&O Zoning Variance, *supra* note 2, at 10.

[295] *Id*. at 10.

[296] *Korean Buddhist*, 87 Haw. at 226, P.2d at 1325.

[297] *Id.*, 87 Haw. at 222, P.2d at 1320.

[298] *Id.*

[299] Director's D&O Zoning Variance, *supra* note 2, at 1.

[300] *Korean Buddhist*, 87 Haw. at 222, P.2d at 1320.

[301] Director's D&O Zoning Variance, *supra* note 2, at 1.

[302] *Korean Buddhist*, at 221, P.2d at 1319.

[303] *See supra* Part IV.B.2.c.i.

[304] Director's D&O Zoning Variance, *supra* note 2, at 10.

[305] *Id*. at 10-11.

[306] *Id*.

[307] *See* HONOLULU, HAW., REV. ORDINANCES § 21-9.80-1.

[308] § 21-9.80-1.

[309] EIS, *supra* note 2, at 26.

[310] HTF Petition, *supra* note 9, at 3-4.

[311] *See* HONOLULU, HAW., REV. ORDINANCES § 21-9.80-1.

[312] *D&O Zoning Variance*, *supra* note 3, at 11.

[313] HTF Petition, *supra* note 9.

[314] *See* Kyo-ya Hotels & Resorts, LP, Findings of Fact, Conclusions of Law, and Decision and Order at 16-26, *In re* Hawaii's Thousand Friends (Dep't of Planning and Permitting Feb. 14, 2013).

[315] *Id.* at 32-34.

[316] Statement of the Case, Surfrider Found. v. Zoning Bd. of Appeals, Civil No. 13-1-0874-03 RAN.

[317] *Id.* at 20-21.

[318] Ann Martindale, *Replacing the Hardship Doctrine: A Workable, Equitable Test for Zoning Variances*, 20 CONN. L. REV. 669, 673 (1988).

[319] *Id*. at 674.

[320] HTF Position Statement, *supra* note 107, at 6.

[321] *Id*.

[322] *See* Honolulu, Haw. Res. 10-212.

[323] Director's D&O Zoning Variance, *supra* note 2, at 8-9.

[324] HTF Position Statement, *supra* note 107, at 1.

[325] *Eason*, 518 P.2d at 52-53; *Bagnall*, 590 N.E.2d at 1063.

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