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

KA NU HOU

FROM THE CHAIR

OCTOBER 2014

Aloha Section Members:

Welcome to the second issue of this year's Ka Nu Hou. The Real Property & Financial Services Section continues to have a remarkable and productive year thanks to our dedicated volunteers and the assistance of the Hawaii State Bar Association.

The Section sponsored the "Updates in Real Estate Transactions" Seminar in May and is indebted to Cindy Ching and Tina Ohira, who planned and organized the Seminar, as well as to Deb Chun, who was on the Seminar's panel of speakers. In June, Nathan Aipa and Alan Kido updated the Section Members on changes to the Hawaii Association of Realtors® update on standard forms. In July, David Rair organized, and Lisa Ayabe, Nathan Okubo and Kawena Beaupre presented the Section with the update on new legislation. September's brown bag organized by Kyle Sakumoto and presented by Morris Atta gave Section Members great insight on the progress of the Honolulu Rail Transit Project. Many thanks to all of our excellent organizers and speakers and for your continued participation!

Please see "Save the Date" on this page for upcoming events including the annual Hawaii State Bar Convention in which the Section will host a session on an update on real estate Opinion Letters, the 2014 Gifford Lectureship in Real Property, the annual Litigation update, the Annual Meeting and the Bi-Annual Hawaii Land Use Budget Seminar.

Our featured author in this issue is David Robyak, currently a law student at the William S. Richardson School of Law and the honorable recipient of the C. Jepson Garland Memorial Scholarship. Congratulations to David!

As this year draws to a close, I would like to thank each and every one of my fellow Board Members and former Chairs as well as all of you for your support. Jennifer A. Lim (formerly known as Jennifer A. Benck) will serve as Chair for the 2015 and will undoubtedly bring much success to this Section. It has truly been an honor to serve as your 2014 Chair and I thank you for the opportunity.

Aloha,
Wes Chang

In this Issue:

"Save the Date":

Friday, October 24, 9:00 am to 5:00 p.m.
Hawaii State Bar Convention at Hilton Hawaiian Village: Real Estate Opinion Letter Update hosted by the Legal Opinion Letter Committee of the Section led by Jon M.H. Pang

Wednesday, November 5, 4:30 pm to 6:00 p.m.
Gifford Lectureship in Real Property delivered by Gregory S. Alexander, the Robert A. Noll Professor of Law at Cornell Law School, Held at the Moot Courtroom at the William S. Richardson School of Law

Friday, November 21, 12:00 p.m. to 1:00 p.m.
Brown Bag Presentation in the HSBA Conference Room, 1100 Alakea Street, Suite 1000, Gregory W. Kugle & Mark M. Murakami will present the Litigation Update (Board Meeting to follow)

Thursday, December 11, 12:00 p.m. to 1:30 p.m.
Annual Meeting of the Real Property & Financial Services Section at the Pacific Club, 1451 Queen Emma Street, Speaker Mayor Kirk Caldwell

January 15 & 16, 9:00 a.m. to 5:00 p.m.
Bi-Annual Hawaii Land Use Budget Seminar at the YWCA, 1040 Richards Street, Speaker David L. Callies

COMMUNITY MATTERS: WHY DEVELOPMENT AGREEMENTS ARE SELDOM USED IN HAWAII AND HOW COMMUNITY BENEFIT AGREEMENTS CAN CHANGE THAT

David Robyak

Spring 2013 – Second Year Seminar

Professor Calvert Chipchase

William S. Richardson School of Law

Community Matters: Why Development Agreements Are Seldom Used in Hawaii and How Community Benefit Agreements Can Change That

I. Introduction

Development agreements are enforceable, voluntary contracts between local governments and property developers that allow the parties to negotiate better terms than otherwise obtainable in the land use entitlement process.[1] Employed extensively in California,[2] which enacted the nation's first

[1] Development agreements have been the focus of considerable scholarship since they were first conceived more than three decades ago, but their basic definition and purposes have remained constant. *E.g.*, DAVID L. CALLIES, CECILY TALBERT BARCLAY & JULIE A. TAPPENDORF, DEVELOPMENT BY AGREEMENT: A TOOL KIT FOR LAND DEVELOPERS AND LOCAL GOVERNMENTS 15 (2012); Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 609-10 (2011); John J. Delaney, *The Development Agreement: An Evolving Vehicle for Avoiding Vapid Vesting Vapors*, SM004 ALI-ABA 1211 (Aug. 17 – 19, 2006); Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 393-94 (2004); DAVID L. CALLIES, DANIEL J. CURTIN, JR., & JULIE A. TAPPENDORF, BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES 3 (2003); Patricia Grace Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119, 123-24 (1993-94); John J. Delaney, *Development Agreements: The Road from Prohibition to "Let's Make A Deal!"* 25 URB. LAW. 48, 52-53 (1993); Daniel J. Curtin, Jr. & Scott Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761, 762-63 (1992-93); David S. Goldwich, *Development Agreements: A Critical Introduction*, 4 J. LAND USE & ENVTL. L. 249, 249-51 (1988-89); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 994-1003 (1986-87); David L. Callies, *Developer's Agreements and Planning Gain*, 17 URB. LAW. 598, 599 (1985); Robert M. Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for Its Application*, 1 J. LAND USE & ENVTL. L. 451, 451-52 (1985).

[2] By 2010, more than one thousand development agreements had been negotiated in California. DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII 103 (2d. Ed. 2010). A 1986 survey revealed that more than 150 of over 450 California municipalities had 300 development agreements in place with another 150 under negotiation. David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees, and Development Agreements*, 23 URB. LAW. 221, 241 (1991) For background on and analysis of the use of development agreements in California, *see generally*, Daniel J. Curtin, Jr., *Effectively Using Development Agreements to Protect Land Use Entitlements: Lessons from California*, 25 ZONING &

development agreement enabling statute in 1980,[3] such contracts have failed to catch on in Hawaii, which followed California's legislative lead in 1985.[4] At first glance, Hawaii's land use context suggests development agreements would benefit the state's four county governments and local developers alike, yet only two development agreements have been inked in the islands over nearly three decades.[5] This raises an obvious question: why have development agreements flourished in California but remain virtually unused in Hawaii?

Incentives for entering a development agreement are clear.[6] Local governments are constitutionally limited in the conditions they can impose for development permits and approvals.[7] That which can legally be exacted from a developer to entitle a specific project may not address a locality's most pressing infrastructure or service needs.[8] Meanwhile, developers generally have no rights to

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PLANNING L. REP. 33 (2002); Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 STETSON L. REV. 761 (1992-93); William G. Holliman, Jr., *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44 (1981).

[3] Currently codified at CAL. GOV'T CODE §§ 65864 – 65869.5 (West, Westlaw through 2012 Reg. Sess. laws, Gov. Reorg. Plan No. 2 of 2011 – 2012, and all propositions on 2012 ballots).

[4] Hawaii's development agreement statute is currently codified at HAW. REV. STAT. §§ 46-121 to -132 (West, Westlaw through 2012 Reg. Sess. & Spec. Sess.).

[5] John B. Ray, *1961 Land-Use Law Prohibitive*, HONOLULU ADVERTISER, Oct. 5, 2003 (recounting that Hawaii County signed a development agreement in 2003 for the much litigated Hokuli'a project); Andrew Gomes, *Affordable-Housing Plan Needs County's OK*, HONOLULU STAR-ADVERTISER, Nov. 12, 2010 (reporting, among other things, that a development agreement between the Hawaii Housing Finance and Development Corporation and developer Forest City Hawaii, LLC for the Kamakana Villages project on the Big Island "require[d] that at least 50 percent of the homes be sold at prices affordable to people earning no more than 140 percent of the Big Island's median income").

[6] DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 4.

[7] *See infra* Part III.

[8] DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 91.

existing zoning and other land use regulations, which are subject to change during an entitlement process that often takes several years and involves substantial up-front investment.[9] Under most states' common law, development rights vest upon application for, issuance of, or expenses incurred after obtaining a building permit[10]—usually the last major component of development approval—so developers face considerable risk that changed law could prohibit a project or render it economically unviable.[11] Ultimately, the losers are communities and consumers: local development needs may go unmet, taxpayers bear greater infrastructure costs, and the price of risk is passed on to buyers and renters.[12] Moreover, where development is chilled, communities are deprived of the job creation and other accompanying economic benefits.[13]

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[9] *See infra* Part II.

[10] In 2004, rights in eight states vested upon valid and complete application for a building permit: Idaho, Massachusetts, Minnesota, Ohio, Utah, Vermont, Washington, and Wisconsin. Rights in three states vested upon probability of issuance of a building permit plus expenses in reliance: Georgia, Hawaii, and Illinois. Rights in Georgia also vested solely upon issuance of a building permit, regardless of expenditure. In fourteen states, vesting required a building permit plus substantial reliance expenditures: Arkansas, Arizona, California, Colorado, Kentucky, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, and Wyoming. In another thirteen states, rights vested after substantial construction based on a valid building permit: Connecticut, Indiana, Kansas, Louisiana, Maryland, Michigan, Mississippi, Nebraska, New York, Pennsylvania, Tennessee, Texas, and Virginia. Several states, including many listed above, distinguished equitable/zoning estoppel from vested rights. Others employed balancing of interests tests, allowed vesting upon issuance of a lower approval (e.g., subdivision plan), and/or had codified vested rights. John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment and Due Process and Taking Claims*, SJ052 ALI-ABA 753, 769-72 (Apr. 22-24, 2004). *See also*, John J. Delaney, *The Development Agreement: An Evolving Vehicle for Avoiding Vapid Vesting Vapors*, SM004 ALI-ABA 1211 (Aug. 17 – 19, 2006) (noting that "[a]bout 30 state courts apply the 'late vesting' rule" based on issuance of a building permit).

[11] *See infra* Part II.

[12] Patricia Grace Hammes, *supra* note 1, at 124-25; Michael H. Crew, *Development Agreements after Nollan v. California Coastal Commission, 483 U.S. 825 (1987)*, 22 URB. LAW. 23, 29-30 (1990).

In theory, development agreements offer a win-win solution to the downsides of both constitutional restrictions on land use exactions and the late vesting of development rights.[14] In a development agreement, local government bargains for better and more diverse public benefits from developers in consideration for freezing zoning and other land use regulations as they apply to a specific project. Conversely, developers bargain for early vesting of the right to complete a project in consideration for voluntary dedications, contributions, and facilities that would otherwise constitute illegal exactions.[15] Although developers must still secure all necessary permits and approvals in the regular fashion,[16] local officials are presumably less likely to raise objections during the entitlement process for projects carrying extra benefits. Not least, communities get needed infrastructure and other things without having to pay for them.

In practice, development agreements enjoy only scattered acceptance among the states[17] and little has been published on the economic outcome of their use.[18] One possible reason for the limited

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[13] The linkage between property development and the economy is particularly strong in Hawaii. Alan Yonan, Jr., *Construction Industry—Back on the Job: Economists Forecast an Uptick in Activity Thanks to New Condos and Rail*, HONOLULU STAR-ADVERTISER (Mar. 29, 2013) ("The health of the construction industry is followed closely in Hawaii because it has more of an impact on the overall economy than it does on the mainland").

[14] DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 15.

[15] David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 666-671 (2001).

[16] *Id.* at 671.

[17] Fifteen states have enacted statutes authorizing development agreements: Arizona, California, Colorado, Florida, Hawaii, Louisiana, Maryland, Nevada, New Jersey, North Carolina, Oregon, South Carolina, Utah, Virginia, and Washington. DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 15, 28 n.4.

adoption of development agreements is that courts (and scholars) disagree over the scope of constitutional limitations on land use exactions.[19] In jurisdictions that restrict application of the test established by the United States Supreme Court in *Nollan v. California Coastal Commission* (1987)[20] and refined in *Dolan v. City of Tigard* (1994),[21] local governments presumably have less incentive to bargain for benefits from developers. Furthermore, several states have preferred to tackle the issue of developer risk by other means. Some have enacted legislation which vests development rights significantly earlier than the building-permit rule the majority applies at common law.[22] Courts in other

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[18] Much has been published about development agreements, covering their legal foundations, treatment by the courts, and theoretical benefits, *see supra* note 1, but there are no scholarly analyses focused on their actual, real-world impact.

[19] For two opposing views, *see* David L. Callies & Christopher T. Goodin, *The Status of Nollan v. California Coastal Commission and Dolan v. City of Tigard after Ling v. Chevron U.S.A., Inc.*, 40 J. MARSHALL L. REV. 539 (2007); Daniel L. Siegel, *Exactions After Lingle: Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 STANFORD ENVTL. L. J. 577 (2009). The Supreme Court may decide some of these issues this term. *See, e.g., St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So.3d 1220 (Fla. 2011), *cert. granted*, 133 S.Ct. 420 (2012) (holding by Fla. supreme court that heightened scrutiny of land development conditions does not apply beyond physical dedications of property to fees and other monetary exactions).

[20] 483 U.S. 825 (requiring an "essential nexus" between land development conditions and the harm or impact expected from development).

[21] 512 U.S. 374 (requiring "rough proportionality" between development conditions imposed and the extent of expected harm or impact).

[22] In 2004, fifteen states had codified vested rights: Arizona, Colorado, Connecticut, Florida, Kansas, Maine, Massachusetts, New Jersey, North Carolina, Oregon, Pennsylvania, Texas, Vermont, Virginia, and Washington. John J. Delaney, et al., *Recognizing Vested Development Rights as Protected Property, supra* note 11, at 761.

states have relaxed that rule, allowing vesting upon submission, or probability of issuance, of a building permit application, or even at time of subdivision or plat approval.[23]

In any case, it is difficult to judge the real-world efficacy of development agreements from the existing literature. There is a sizable body of scholarship treating the legality of, and possible challenges to, development agreements. But while commentators have extolled their virtues in the abstract and courts have frequently upheld their validity, there are no broad studies of whether, or to what extent, development agreements in practice have delivered on their promise of wide-ranging, enhanced benefits for the parties and the public.[24]

Nonetheless, there is evidence that governments and developers consider development agreements to be viable, valuable tools. At least fifteen states have passed statutes enabling development agreements, and over one thousand have been signed in California alone.[25] Although development agreements have been challenged on various grounds—especially for "contracting away the police power" in violation of the reserved powers doctrine—a well-drafted development agreement conforming to enabling statutes and ordinances is likely to meet judicial muster in most jurisdictions.[26] In other words, given the right context and adequate legal foundations, development agreements have the potential to attract substantial interest and, presumably, positively influence the development process.

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[23] Kenneth R. Kupchak, Gregory W. Kugle & Robert H. Thomas, *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawaii*, 27 U. HAW. L. REV. 17, 26-27 (2004).

[24] *See supra* notes 1 & 19.

[25] *See supra* notes 2 & 23.

[26] *See infra* Part IV.

Several facets of Hawaii's development environment suggest that development agreements should generate interest among the county governments as well as developers. According to the Hawaii Supreme Court, Hawaii broadly applies the heightened scrutiny of the *Nollan*/*Dolan* test to all development conditions and exactions,[27] a relatively developer-friendly situation that, at least in theory, gives government more cause to bargain. At the same, Hawaii's counties face a variety of development and infrastructure needs in an era of reduced federal subsidies.[28] Among other things, the state suffers a chronic shortage of affordable housing,[29] a benefit commonly sought in development agreements because it can be difficult to obtain as a condition under *Nollan*/*Dolan*.[30] Indeed, in Hawaii's development agreement statute, the legislature lists affordable housing first among the benefits the

[27] *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1257, 1272-73 (Haw. 1995) (". . . conditions may be placed on development without effecting a 'taking' so long as the conditions bear an 'essential nexus' to legitimate state interests and are 'roughly proportional' to the impact of the proposed development") (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

[28] Massive federal subsidies to states and municipalities ended in the 1980s, focusing government attention on the need for developers to mitigate the public expense and problems that stem from their projects. DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 5.

[29] Affordable housing has been a high priority issue in Hawaii since at least the last time the statutory state plan and state functional plans were updated in the late 1980s and early 90s. HAW. REV. STAT. §§ 226-106(1),(8) (West, Westlaw through Act 329 of the 2012 Reg. Sess.); HAW. HOUS. FIN. & DEV. CORP., THE HAWAII STATE PLAN: HOUSING 6-7 (1989); HAW. HOUS. FIN. & DEV. CORP., ADDENDUM TO THE STATE HOUSING FUNCTIONAL PLAN 10 (1990). In 2012, the median price for a single-family detached home in Hawaii was $635,000, with some predicting the price would reach $800,000 by 2015. Vicki Viotti, *Affordable Housing: Will It Materialize in Hawaii?* HONOLULU STAR-ADVERTISER, Aug. 12, 2012, http://www.staradvertiser.com/editorialspremium/20120812_Affordable_housing_will_it_materialize_in_Hawaii.html?id=165831876.

[30] Michelle DaRossa, *When Are Affordable Housing Exactions an Unconstitutional Taking?* 43 WILLIAMETTE L. REV. 453 (2007).

county governments are authorized to bargain for.[31] With Hawaii's steadily increasing population,[32] that is one issue not likely to disappear.

On the other side of the bargain, developers operating in Hawaii face the sorts of challenges that increase investment risk and thus make development agreements attractive. Land in Hawaii is arguably the nation's most heavily regulated,[33] and a recent study indicates the state's real estate is among the most expensive, noting that "[p]olicies limiting lots available for construction drove up land prices."[34] It can take upwards of ten years for large projects to be fully entitled in Hawaii,[35] during which time developers incur significant up-front costs for permitting and infrastructure.[36] Hawaii follows a common law rule under which development rights do not vest until a developer, in good faith, has made a substantial expenditure in reliance on the government's "final discretionary action."[37] That essentially means changed laws can affect and possibly prohibit a project until it has reached a procedural point

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[31] HAW. REV. STAT. § 46-121.

[32] Hawaii's population grew from just over 154,000 in 1900 to over 1.2 million in 2000 and had increased to 1.36 million by 2010. FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY Appendix A, Table 1 (2002); U.S. CENSUS BUREAU, UNITED STATES SUMMARY: 2010 30 (2012). Hawaii's population is projected to exceed 1.7 million by 2040. STATE OF HAWAII, DEP'T OF BUS., ECON. DEV. & TOURISM, POPULATION AND ECONOMIC PROJECTIONS FOR THE STATE OF HAWAII TO 2040 2 (2012).

[33] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 1.

[34] *Study Ranks Honolulu as least affordable U.S. Housing Market*, HONOLULU STAR-ADVERTISER (Jan. 22, 2012).

[35] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 1.

[36] DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 135-39.

[37] *Cnty. of Kauai v. Pac. Standard Life Ins. Co.*, 653 P.2d 766, 775 (Haw. 1982) (known as *Nukoli'i*).

where the government can no longer impose conditions.[38] While that results in slightly less risk than in jurisdictions that apply the building permit rule, Hawaii developers nonetheless face significant risk exposure that could be mitigated with a development agreement.[39]

Moreover, despite a minor flaw, Hawaii's development agreement statute was crafted such that it should withstand the sorts of challenges usually brought against development agreements, including allegations that the government has "bargained away" its police power.[40] Significantly, the Hawaii Supreme Court has decided two cases involving the same development agreement and identified no foundational problems with the concept or the enabling statute.[41] Thus, there is no apparent legal reason why the statute cannot fulfill the purposes expressly intended by the Hawaii legislature, which believed that "development agreements could strengthen the public planning process, encourage private and

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[38] *See infra* Part II.

[39] Kenneth R. Kupchak, et al., *Arrow of Time*, supra note 24, at 58 – 60.

[40] *See infra* Part IV.

[41] *Cnty. of Haw. v. C&J Coupe Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008); *Cnty. of Haw. v. C&J Coupe Family Ltd. P'ship*, 242 P.3d 1136 (Haw. 2010). Both cases concerned condemnation of land for a major bypass highway to be built by the developer of a large Big Island subdivision pursuant to the state's first development agreement. The agreement provided that the county would exercise its powers of eminent domain if the developer was unable to purchase the needed land via private sale. While the first of two condemnation attempts failed, at issue in both was whether the county had demonstrated "public purpose." Given that the land was for construction of a public highway (a classic "public use"), and in light of the Supreme Court's holding in *Kelo v. City of New London*, 545 U.S. 469 (2005), this is somewhat surprising. David L. Callies, Emily Klatt, Andrew Nelson, *The Moon Court, Land Use, and Property: A Survey of Hawaii Case Law, 1993-2010*, 33 U. HAW. L. REV. 635, 651-54 (2011). In any case, the court found nothing objectionable about development agreements as such. For helpful information on these complex opinions, *see Supreme Court Upholds Land Condemnation for Big Island Road*, HONOLULU STAR-ADVERTISER (Nov. 11, 2010); Kevin Dayton, *Construction of Kona Highway to Resume*, HONOLULU ADVERTISER (Sept. 27, 2007); Kevin Dayton, *Will Kona Bypass Ever Open?* HONOLULU ADVERTISER (Apr. 16, 2007)

public participation . . . , reduce the economic cost of development, allow for the orderly planning of public facilities and services and the allocation of cost."[42]

This paper contends that development agreements in Hawaii have failed to reach their potential because, in their current form and despite appearances, they do not address the realities of developing real property in the state. The counties' general lack of interest almost certainly reflects the fact that they have little incentive in practice to enter such contracts. Despite what some commentators have characterized as overreaching by the counties in the imposition of development exactions, developers in Hawaii are historically reluctant to oppose permitting and approval conditions in court.[43] Development agreements have no value as protection against the risks and costs of developer lawsuits if developers habitually decline to sue.

Rather than considering why developers avoid suing, it is more revealing to focus on who does. In Hawaii, a host of community and special interest groups have repeatedly demonstrated their willingness to oppose development at every stage, and the Hawaii Supreme Court has tended to side with them against developers' interests.[44] In other words, the parties most likely to prevent or delay development in Hawaii are presently unable to participate directly in the negotiation of a development agreement. Furthermore, Hawaii's development history since the 1970s indicates that these community groups perceive development as primarily benefitting non-community interests.

This paper proposes enabling "community benefits agreements" to rebalance the political equation in favor of bargained for solutions, community participation, and more reasonable imposition

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[42] HAW. REV. STAT. § 46-121.

[43] *See infra* Part VI.

[44] *See infra* Part VI.

of land use conditions.[45] A community benefits agreement (CBA) is a side contract between a developer and a local community which can be made legally enforceable through incorporation into a development agreement. In a CBA, community groups bargain for additional benefits from a developer in consideration for a binding promise not to oppose a project in court. Communities not only get facilities and infrastructure; in the case of commercial developments, they can also obtain benefits such as union-friendly policies and the payment of a "living wage" for any jobs created on the developed property. While CBAs mean further concessions in exchange for development, developers will presumably find them useful, if they reduce the risks of project-preventing lawsuits and result in communities pressuring the counties to enter development agreements in the first place.

Part II treats vested rights, both generally and in Hawaii, and examines developer risk in more detail. Constitutional limits on development conditions and the incentive they give local governments to enter development agreements are examined in Part III. Part IV explores the general advantages, validity, and enforceability of development agreements, while Part V reviews Hawaii's development agreement enabling act in light of those factors and issues. Part VI explores why development agreements are almost never used in Hawaii. Finally, Part VII traces the history of community opposition to development in Hawaii and how CBAs can make partners out of opponents.

II. Vested rights and developer risk

Imagine a large development project almost anywhere in the United States. Conception to completion will take several years and require a long entitlement process, pursued at the local, state, and federal levels. Hurdles potentially include: rezoning; obtaining a variance or special or conditional use

[45] *See infra* Part VII.

permit; subdivision approval; dedications for and construction of streets; provision of other infrastructure, such as water and sewer lines; set-asides for parks, utilities, and schools; imposition of various impact and in-lieu fees to offset burdens placed on municipal services; and a host of other permits for, perhaps, demolition and grading, wetlands and storm-water drainage (under the Clean Water Act), wildlife protection (under the Endangered Species Act), and coastal zone protection (under the Coast Zone Management Act)—all culminating in the issuance of a building permit. To negotiate this labyrinth, the developer will need to attend multiple hearings, hire attorneys, engineers, architects, planners, and other professionals, and pay for the preparation of environmental impact reports and studies gauging the project's effect on state or municipal infrastructure and services. Large sums of money will be at risk, and it is likely that some citizens or special interest groups will either express reservations about or openly oppose the project during the process.[46] Meanwhile, government retains broad power to change land use law at any time and, under political pressure from concerned individuals and groups, government will demand various concessions.[47] This raises a basic question of fundamental fairness and constitutionality: at what point in the entitlement process should a developer obtain the right to complete a project, notwithstanding changes to applicable regulations?[48]

The courts have created two closely related doctrines—vested rights and equitable estoppel (a.k.a. zoning estoppel)—to determine the point at which the developer obtains the right to complete the

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[46] For a highly readable and insightful account of the development process, see WITOLD RYBCZYNSKI, LAST HARVEST: HOW A CORNFIELD BECAME NEW DALEVILLE: REAL ESTATE DEVELOPMENT FROM GEORGE WASHINGTON TO THE BUILDERS OF THE TWENTY-FIRST CENTURY, AND WHY WE LIVE IN HOUSES ANYWAY (2007).

[47] Kenneth R. Kupchak, et al., *Arrow of Time*, *supra* note 24, at 18.

[48] Kenneth R. Kupchak, et al., *Arrow of Time*, *supra* note 24, at 20-21.

project, despite changes in zoning or certain other laws that might prohibit or restrict it.[49] The doctrine of vested rights, founded on constitutional as well as common law, grew from the doctrine of non-conforming uses and asks whether the land owner has acquired a real property right; zoning estoppel is a claim in equity and focuses on the conduct of the parties.[50] Despite their different origin and underlying principles, many courts and commentators treat the two concepts interchangeably as "vested rights."[51]

Under both vested rights and zoning estoppel, the law requires an act or omission by government upon which a developer detrimentally relies in substantially changing position, such change usually demonstrated in the form of financial expenditure.[52] Generally, the government act is the granting of a permit or approval which is subsequently rescinded or rendered ineffective by new or changed land use regulations.[53] In most jurisdictions today, common law vesting occurs late in the entitlement process, usually at or after application for a building permit,[54] although some courts have found development

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[49] DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 7; DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, supra note 1, at 128.

[50] David L. Callies & Julie Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution*, *supra* note 16, at 670; DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 128-130.

[51] DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 130; *Allen v. City & Cnty. of Honolulu*, 571 P.2d 328, 329 (Haw. 1977) ("Though theoretically distinct, courts across the country seem to reach the same results when applying [vested rights and equitable estoppel] to identical factual situations").

[52] DAVID L. CALLIES, AT AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 130-32; DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 8-9.

[53] Kenneth R. Kupchak, et al., *Arrow of Time*, *supra* note 24, at 18-19.

[54] John J. Delaney, et al., *Recognizing Vested Development Rights as Protected Property*, *supra* note 11, at 769-773.

rights to vest at an earlier stage, such as subdivision plat approval or site plan approval.[55] Also often significant is the amount of expenditure by the developer in reliance, with courts applying a variety of standards, from balancing tests to percentages of total project cost, and differing on what sorts of expenses qualify for inclusion.[56]

A prima facie case for zoning estoppel adds the requirement of "good faith."[57] That usually means the land owner did not rush to begin or complete a project with knowledge that regulations were going to change and that government did not renege on commitments or approvals on which it knew the developer had relied in order to frustrate the particular project.[58] The need to show "good faith" is in theory a very significant difference, but many courts conflate the two doctrines and usually include "good faith" as an element of so-called "vested rights."[59]

A key case on vested rights, particularly as that doctrine relates to development agreements,[60] is the California Supreme Court's 1976 opinion in *Avco Community Developers, Inc. v. South Coast*

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[55] DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 130-59.

[56] *Id.* at 131-32; John J. Delaney, et al., *Recognizing Vested Development Rights as Protected Property, supra* note 11, at 760.

[57] DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, supra note 1, at 132-34.

[58] *Id.*

[59] *Id.* at 130 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)); DAVID L. CALLIES, DEVELOPMENT BY AGREEMENT, *supra* note 1, at 8. In *Palazzolo*, the Supreme Court overturned the state in holding that a land owner's pre-purchase knowledge of regulations did not preclude a taking claim for the property value thereby allegedly destroyed. *Palazzolo*, 533 U.S. at 616.

[60] John J. Delaney, at al., *The Development Agreement, supra* note 1, at 1213; Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 608 (2011); DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 9; DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 132.

Regional Commission.[61] Strictly applying state case law, the court held that rights to development did not vest until the issuance of a building permit.[62] Avco spent over $2,000,000 and accrued debts of another $700,000 to prepare a tract of coastal land for a large residential project.[63] Before Avco could apply for a building permit, the state passed coastal zone regulations that prohibited the development.[64] The court held that vested rights could only apply to permits which had set out in specificity the details of a project, including the number, placement, height, size, and use capacity of buildings—details usually finally approved via building permit applications.[65] The decision in *Avco* "focused national attention" on the issue of vested rights and left developers searching for a way to safeguard investments in large projects.[66] It also directly led to California's passage of the nation's first development agreement statute in 1980.[67] By 2006, at least 23 states had enacted early vesting and/or development agreement statutes.[68]

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[61] 553 P.2d 546 (Cal. 1976).

[62] *Id.* at 550-54.

[63] *Id.* at 549.

[64] *Id.* at 548-49.

[65] *Id.* at 551-52.

[66] Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, *supra* note 1, at 608.

[67] DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 9; David L. Callies & Julie Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution*, *supra* note 16, at 670; Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, *supra* note 1, at 608. John J. Delaney, et al., *The Development Agreement*, *supra* note 1, at 1213.

[68] John J. Delaney, et al., *The Development Agreement*, *supra* note 1, at 1216; John J. Delaney, et al., *Recognizing Vested Development Rights*, *supra* note 11, at 761.

Hawaii's common law on vested rights was largely forged between 1971 and 1989[69] and is, effectively, equitable estoppel with a loose definition of what constitutes a government act upon which a developer is entitled to rely.[70] In *County of Kauai v. Pacific Standard Life Insurance Co.* (1982)[71] (known as *Nukoli'i* after the names of the proposed development and the citizen group opposing it), the Hawaii Supreme Court set out its current standard for vested rights/zoning estoppel.[72] In Hawaii, development rights vest when a developer changes position

> by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.[73]

Although the subsequent decision in *Kaiser Hawaii Kai Development Co. v. City & County of Honolulu* (1989)[74] reduced developer risk under that standard by prohibiting ballot box rezoning, the rule remains vague and slippery: a developer never truly knows when or if the right to complete a project has vested until final adjudication in its favor.

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[69] Kenneth R. Kupchak, et al., *Arrow of Time, supra* note 24, at 31-40; DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 103-05.

[70] *Cnty. of Kauai v. Pacific Standard Life Ins. Co.*, 653 P.2d 766, 774-76 (Haw. 1982) [known as *Nukoli'i* after the name of the development at issue].

[71] *Nukoli'i*, 653 P.2d 766.

[72] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 103-05.

[73] *Nukoli'i*, 653 P.2d at 775 (quoting *Life of the Land, Inc. v. City Council of the City and County of Honolulu*, 606 P.2d 866, 902 (Haw. 1980) (*Life of the Land II*)).

[74] 777 P.2d 244 (Haw. 1989).

In *Nukoli'i*, a developer successfully petitioned the County to rezone land to allow a condominium and hotel project.[75] Before the developer applied for a required Special Management Area (SMA) permit to develop in a protected coastal zone, however, a community organization "circulated [a] petition to repeal the resort zoning ordinance pursuant to the referendum provisions of the county charter."[76] The county clerk certified the referendum before the County issued the SMA and building permits, but the referendum was not approved by voters until three months after the developer had obtained all required permits.[77]

The court in *Nukoli'i* set out to answer four "critical questions": "(1) [w]hat reliance is 'good faith'; (2) what sums are 'substantial'; (3) what constitutes 'assurance' by officials; and (4) when does a developer have a right to rely on such assurances?"[78] Focusing on the last two, the court held that "final discretionary action constitutes official assurance for zoning estoppel purposes" as long as that "final discretionary action conform[s] with the intent, purpose, and spirit" of "the overall zoning scheme."[79] In this case, the developer had not obtained the SMA permit—the final discretionary approval—at the time the referendum was certified, and thus the developer was on notice that "the referendum procedure has made discretionary approval of the underlying zoning an integral part of the development process."[80]

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[75] *Id.* at 770.

[76] *Id.*

[77] *Id.*

[78] *Id.* at 774 (quoting David L. Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAW. L. REV. 167, 174 (1979)).

[79] *Nukoli'i*, 653 P.2d at 774 (citing *Life of the Land II*, 606 P.2d at 903).

[80] *Id.* at 775.

Once the referendum was certified, all approvals were voidable and any money spent thereafter could not be in "good faith" as "[the developer] proceeded at risk that the referendum would pass."[81] With regard to the definition of "substantial" expenditure, however, the court neglected to provide much guidance, beyond noting that the nearly $160,000 the developer spent after the property was rezoned, but before the referendum was certified, was insufficient.[82]

Applying the "last discretionary act" standard in *Nukoli'i* presents two potentially troublesome issues: (1) the need to distinguish between "discretionary" and "ministerial" actions,[83] and (2) lingering uncertainty over zoning by referendum.[84] First, the court in *Nukoli'i* suggested that discretionary action is "non-legislative action imposing new conditions on the development which expressly made compliance therewith precedent to the issuance of the building permit."[85] "The ability to impose conditions on approval is the hallmark of discretionary action," with examples in Hawaii including "approvals of coastal zone permits, preliminary subdivision plats, and special use permits."[86] On the other hand, "a ministerial approval is one which the government has no ability to deny if the applicant has conformed to the law," and examples include "approvals of building permits, final subdivision

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[81] *Id.* at 775-777.

[82] *Id.* at 777.

[83] Kenneth R. Kupchak, *Arrow of Time*, *supra* note 24, at 41-46.

[84] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 104-05.

[85] 653 P.2d at 775; Kenneth R. Kupchak, *Arrow of Time*, *supra* note 24, at 42.

[86] Kenneth R. Kupchak, *Arrow of Time*, *supra* note 24, at 42.

plats[, and] site plans."[87] Because of the complex land use regime in Hawaii, however, sometimes drawing that distinction can be difficult.[88]

Second, the decision in *Kaiser Hawaii Kai*[89] leaves open whether a future referendum could function as a final discretionary act.[90] In that case, the Supreme Court of Hawaii invalidated a zoning initiative, holding that the state Zoning Enabling Act of 1957 preempted provisions in the City charter that allowed zoning by initiative because "the need for comprehensive planning for orderly land use development" was a matter of statewide concern.[91] While "[i]t is likely that the Hawaii Supreme Court would also invalidate zoning by referendum,"[92] it remains legally possible that a citizens' referendum could again change applicable law to prevent a project.

Given the uncertainties[93] and costs[94] of litigation, and the potentially large amounts developers must spend prior to government's "last discretionary act,"[95] Hawaii's common law of vested rights

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[87] *Id.* at 42-43.

[88] *Id.* at 43-46.

[89] 777 P.2d 244 (Haw. 1989).

[90] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 104-05.

[91] *Kaiser*, 777 P.2d at 248-50.

[92] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 105.

[93] Between 1993 and 2010, the Hawaii Supreme Court ruled against developer interests in land use and property cases roughly 82% of the time. David L. Callies, et al., *The Moon Court, Land Use, and Property*, *supra* note 42, at 636.

[94] Obtaining information on litigation costs is difficult, but in the failed condemnation action discussed *supra* note 42, the landowners claimed over $1.5 million in attorney's fees and court costs, most of which the trial court granted. *Cnty. of Hawaii v. C&J Coupe Ltd. P'ship*, 242 P.3d 1136, 1146 (Haw. 2010).

provides relatively little security for developer investment when compared—at least theoretically—with the assurances of a contractually binding development agreement. Logically, the value of substantial risk reduction under a development agreement determines the ceiling of what a developer is likely to trade in consideration for early vesting. In other words, a development agreement is presumably a good deal for a developer, as long as the cost of additional public benefits under a development agreement is less than the cost of bearing the risk without one.

Recent vested rights cases provide some understanding of current developer risk and, by extension, the attractiveness of development agreements. Over roughly the last four years, at least one hundred cases decided nationally in state appellate and federal courts involved claims of zoning estoppel and/or vested rights in a land use context.[96] At least sixty cases remain after excluding those about mines, quarries, landfills, junkyards, pawnshops, and billboards (where the parties and/or courts often confused vested rights and non-conforming uses),[97] water rights (which exceed the purview of this

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[95] In *Avco Community Developers, Inc. v. South Coast Regional Commission*, discussed above, the developer spent roughly $2.7 million before vesting under California's common law. 553 P.2d 546, 549 (Cal. 1976). That figure would be much higher today if adjusted for inflation.

[96] A Westlaw search for cases since 2009 including the terms "vested rights" or "zoning estoppel" and some form of "develop" or "property" yielded over 1,100 opinions, but the vast majority were not relevant because they did not concern real property but instead related to entitlement to government benefits, contract disputes, pension plans, and sundry other issues.

[97] *E.g.*, *Lamar Co. v. City of Fremont*, 771 N.W.2d 894 (Neb. 2009) (billboards); *Jones v. Town of Carroll*, 931 N.E.2d 535 (N.Y. 2010) (landfill); *Nelson v. Cnty. of Kern*, 118 Cal.Rptr.3d 736 (Cal. App. Ct. 2010) (mine); *Pawn America Minn., LLC v. City of St. Louis Park*, 787 N.W.2d 565 (Minn. 2010) (pawnshop); *Cobleskill Stone Prods., Inc. v. Town of Schoharie*, 945 N.Y.S.2d 793 (N.Y. App. Div. 2012) (quarry); *Huggins v. Prince George's Cnty.*, 683 F.3d 525 (4th Cir. 2012) (junkyard).

essay),[98] and disputes involving nuisances or changed law required for public health and safety (where a development agreement would be of no avail).[99] Further exclusion of claims over small projects, e.g., individual residences,[100] leaves at least twenty-six cases concerning development projects large enough to make a development agreement worthwhile economically.

Landowners generally fared badly in those twenty-six opinions, with courts finding against development rights in eighteen cases, or roughly 70% of the time. In four of the five cases where developers prevailed on vested rights or zoning estoppel claims, statutes or ordinances vesting development rights earlier than at common law were determinative.[101] When developers lost, it was

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[98] *E.g., Meridian Ranch Metro. Dist. v. Colorado Ground Water Comm'n*, 240 P.3d 382 (Colo. App. 2009).

[99] *E.g., Md. Reclamation Assocs. v. Harford Cnty.*, 994 A.2d 842 (Md. 2010) (zoning estoppel not applicable where permit denied because study demonstrated that constructing landfill would negatively affect the health and welfare of nearby residents); *McClure v. City of Hurricane*, No. 3:10-0701, 2011 WL 1485599 (S.D.W.Va., April 19, 2011) (construction of homes on 31 of 81 lots in permitted subdivision not "grandfathered" when law changed to require storm water management system to reduce demonstrated flooding risk).

[100] *E.g., Genser v. Bd. of Zoning and Appeals*, 885 N.Y.S.2d 327 (Sup. Ct. App. Div. 2, 2009) (no vested right to construct second residence on half of lot subdivided for the purpose when setback ordinance changed before landowner incurred substantial expenses in reliance on subdivision approval); *L.C. Canyon Partners, LLC v. Salt Lake Cnty.*, 266 P.3d 797 (Utah 2011) (no vested right to construct single-family residence deemed too close to canyon mouth when county rescinded zoning ordinance amendment permitting structure before the ordinance took effect).

[101] *Chase Alexa, LLC v. Kent Cnty. Levy Court*, 983 A.2d 11 (Conn. App. Ct. 2009) (developer obtained vested right to develop residential subdivision on 166-acre parcel when it submitted subdivision plan application within six months of preliminary conference with county land use officials as provided under county early vesting ordinance); *Harper Park Two, LP v. City of Austin*, 359 S.W.3d 247 (Tex. Ct. App. 2011) (developer obtained vested right to construct hotel as part of 98-acre mixed-use subdivision project under Texas early vesting statute that froze regulations upon submission of first required development permit); *Reserve at Woodstock, LLC v. City of Woodstock, 958 N.E.2d 1100* (Ill. App. Ct. 2011) (developer obtained vested right to complete 26-lot residential subdivision under vesting provisions of subdivision and platting ordinance and relaxed common law early vesting rule that allowed

generally where courts applied the common law building permit rule or a slightly relaxed version of it, as used in Hawaii. Development rights failed to vest for several reasons. Often, a building permit or other approval was either not applied for or not issued, such that the developer lacked sufficient government assurance upon which to rely.[102] Some courts deemed expenditures in reliance insufficient where they did not reach some percentage of a project's total cost, despite being no small sums,[103] while other courts refused to recognize expenses incurred prior to application for, or issuance of, a building permit.[104] The requirement of "good faith" also contributed to developer loss, with courts excluding

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reliance on probability that landowner would obtain the necessary development approvals); *City of San Antonio v. Rogers Shavano Ranch, Ltd.*, 383 S.W.3d 234 (2012) (landowner obtained vested right to develop 1780-acre ranch for residential and commercial uses under Texas early vesting statute).

[102] *E.g.*, *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 218 P.3d 180 (Wash. 2009) (no vested right to construct 575-unit, 24-building condominium complex because developer had not filed complete building permit application before the city rezoned the property); *Kelly v. Cnty. of Chelan*, 237 P.3d 346 (Wash. Ct. App. 2010) (no vested right to construct lakefront residential and recreational complex based on conditional use permit where rights vested at common law upon submission of complete building permit application); *CK Dev., LLC v. Town of Nolensville*, No. M2010-00633-COA-R3-CV, 2012 WL 38287 (Tenn. Ct. App., Jan. 6, 2012) (no vested right to former roadway standards for later phases of large planned unit development where rights vested at common law upon issuance of a building permit); *Frapple v. Comm'rs of the Town of Rising Sun*, No. WDQ-10-0018, 2012 WL 835604 (D.Md., Mar. 8, 2012) (no vested right to develop 227-lot subdivision despite final subdivision approval and developer dedication of open space, streets, and water rights to the town where rights vested at common law upon issuance of a building permit and completion of substantial construction).

[103] *E.g.*, *1350 Lakeshore Assocs. v. Randall*, 928 N.E.2d 181 (Ill. App. Ct. 2010) (denial of vested right to construct 40-storey, 196-unit apartment complex because reliance expenditures of one-half of 1% of total project cost were not "substantial" after purchase price of land was excluded from the calculations); *Friends of Yamhill Cnty., Inc. v. Bd. of Comm'rs of Yamhill Cnty.*, 264 P.3rd 1265 (Or. 2011) (holding that consideration of ratio and ultimate cost of a project, in addition to the amount actually spent, are essential to determining whether a developer's reliance expenses are "substantial" in vested rights cases); *Campbell v. Clackamas Cnty.*, 270 P.3d 299 (Or. Ct. App. 2011) (denial of vested right to construct 41-lot residential subdivision when expenses in reliance amounted to $1.3 million, or 4.7% of the total project cost, where anything below 5% was held presumptively insufficient).

[104] *E.g.*, *Deer Creek Developers, LLC v. Spokane Cnty.*, 156 Wash.App. 1014 (2010) (denial of vested right to complete second phase of 23-building residential apartment complex in part because millions of

reliance expenses incurred after notice of possible changes to the law.[105] Moreover, in one case a statute precluded claims of vested rights and zoning estoppel where the developer of a large subdivision failed to appeal within thirty days a planning board decision that prior approval had expired.[106] In another case, rights did not vest to complete a twenty-six-lot subdivision in part because prior approval was found invalid for lack of required details on streets, lighting, and drainage.[107] One developer's claim to complete a large planned unit development failed in part when the court declared unconstitutional for procedural reasons a statute that allowed rejection of rezoning applications only for purposes of public health and safety.[108] As those cases make clear, vested rights and zoning estoppel claims are subject to a host of potential pitfalls.

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dollars spent on infrastructure were invested prior to submission of complete building permit application); *MLC Automotive, LLC v. Town of Southern Pines*, 702 S.E.2d 68 (N.C. Ct. App. 2010) (denial of common law vested right to construct multi-dealer auto park on 21 acres in part because $2 million spent on land and preparation of the parcel were invested prior to approval of any permit required for physical change to the land).

[105] *E.g.*, *Weiss v. City of Gainesville*, No. 10-12099, 2012 WL 933592 (11th Cir., Mar. 21, 2012) (claims of vested rights and zoning estoppel to construct mixed-use project on 940-acre parcel undermined by developer's approval of expiration of rezoning provision in annexation agreement); *Frapple*, 2012 WL 835604 (zoning estoppel claim undermined by developer's knowledge, when it made dedications as conditions of subdivision approval, that the town's water and sewer system was incapable of supporting the project).

[106] *Collden Corp. v. Town of Wolfeboro*, 993 A.2d 184 (N.H. 2010).

[107] *DB Land Holdings v. Town of Fredonia*, No. 1 CA-CV 08-0797, 2009 WL 3878296 (Ariz. App. Div. 1, Nov. 19, 2009).

[108] *Riebe Living Trust v. Concord Twp.*, No. 2011-L-068, 2012 WL 764425 (Ohio Ct. App., Mar. 12, 2012).

The only reported vested rights and zoning estoppel claims in Hawaii since 2009 were two related state[109] and federal[110] cases filed by the developers of a large golf-oriented, mixed-use community on roughly one thousand acres on the Big Island known as "The Villages of Aina Lea" (Aina Lea). Although constitutional, jurisdictional, and procedural issues dominated the Aina Lea cases, "the tortured history of efforts stretching back more than two decades to develop the property"[111] reflects Hawaii's complex development situation and the many pre-vesting risks faced by developers in the state. While the reported opinions indicate that the federal court claims have been stayed and the state law claims have been decided on constitutional grounds[112] in favor of the developers in an

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[109] *DW Aina Le'a Dev., LLC v. Haw. Land Use Comm'n*, No. CAAP-12-0000629, 2012 WL 5058480 (Haw. Ct. App., Oct. 18, 2012) (dismissing for lack of jurisdiction where trial court's order in favor of developer appealing Land Use Commission decision to down-zone property was held to be interlocutory for failing to satisfy "final judgment document rule").

[110] *Bridge Aina Le'a, LLC c. Haw. Land Use Comm'n*, No. 11-00414 SOM-BMK, 2012 WL 1109046 (D. Haw., Mar. 30, 2012) (staying state and federal claims pending resolution of state law issues in state court under the "*Pullman* abstention doctrine").

[111] Andrew Gomes, *Big Isle Land Project Loses Approval*, HONOLULU STAR-ADVERTISER (Jan. 22, 2011). In addition to the cases cited immediately above, for a summary of that "tortured history," *see* Andrew Gomes, *New Community on Big Island OK'd*, HONOLULU ADVERTISER (Dec. 1, 2005); *Bridge Aina Le'a Involved in 'The Villages of Aina Le'a'*, HONOLULU ADVERTISER (July 19, 2007); *State Gives $1 Billion Bridge Aina Le'a Developers Another Chance*, HONOLULU STAR-BULLETIN (June 6, 2009); Andrew Gomes, *More Time Sought to Build Big Isle Homes*, HONOLULU STAR-ADVERTISER (Sept. 14, 2010); Paul J. Schwind, *A Primer on the Federal Court Challenge to the State of Hawaii Land Use Commission's Power to Reclassify Land Upon an Order to Show Cause*, HAWAII FREE PRESS (Dec. 23, 2011),http://hawaiifreepress.com/ArticlesMain/tabid/56/ID/ 5717/categoryId/42/A-Primer-on-Bridge-Aina-Lea-Case.aspx.

[112] The state circuit court judge "concluded that the [LUC's] decision violated chapters 205 and 91 of the Hawaii Revised Statutes; Bridge and DW's right to due process under the Fourteenth Amendment of the United States Constitution and article I, section 5, of the Hawaii constitution; and Bridge and DW's right to equal protection under the United States Constitution and the Hawaii constitution." *Bridge Aina Le'a*, 2012 WL 1109046 at *2.

interlocutory order held to be non-appealable—both suggesting more legal action to come—the current developer's website indicates the project is moving forward.[113]

The Hawaii Land Use Commission (LUC) first reclassified the land for the Aina Le'a project from agricultural to urban in 1989, on condition that the original owner offer 60% of the planned 1,924 homes "at prices affordable to families earning a little more than the Big Island median income."[114] According to an attorney for the developer, Bridge Capital (Bridge), who acquired the property in 1999 following foreclosure, that "affordable housing requirement . . . basically blocked any development on that property, and unintendedly prevented the creation of any affordable housing."[115] At a hearing in 2005, where more than four hundred people submitted testimony in favor, Bridge successfully petitioned the LUC to reduce the affordable housing condition to 20% to make the project viable.[116] The LUC, however, mandated that certificates of occupancy for all 385 affordable housing units under the new development plan be submitted within five years.[117]

By April 2009, at the height of the economic crisis and roughly twenty months before the LUC deadline, Bridge had added only a few affordable homes to the 107 constructed by its predecessor.[118] Finding that Bridge could not meet its commitment, the LUC voted to reclassify the land back to

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[113] Http://www.ainaleaasia.com/our-current-project (last visited Apr. 19, 2013). Presumably the state decided not to appeal any final order against it, if one has been issued.

[114] Andrew Gomes, *New Community on Big Island Ok'd*, *supra* note 112.

[115] *Id.*

[116] *Id.*

[117] Paul J. Schwind, *supra* note 112.

[118] *Id.*

agriculture, but that order was stayed two months later upon reconsideration, in part because Bridge had enticed a new investor, DW Aina Le'a, to the project.[119] In January 2011, at the urging of the state Office of Planning, the LUC formally revoked its approval for the project when it judged progress on the required affordable homes to be inadequate, leaving "60 affordable homes in various stages of completion,"[120] and the lawsuits followed. At that time, according to the developer, $25 million had been spent on the project.[121]

III. Constitutional limits on land use exactions

Whereas a developer's bargaining position in negotiating a development agreement is logically determined by the value of the risk avoided by entering one, local governments negotiate from the standpoint of the constitutional limits on land use regulation.[122] Unilaterally imposed development conditions that exceed those limits are illegal exactions, a species of regulatory taking,[123] making them

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[119] *State Gives $1 Billion Bridge Aina Lea Developers Another Chance*, *supra* note 112.

[120] Andrew Gomes, *Big Isle Project Loses Approval*, *supra* note 112.

[121] *Id.*

[122] David L. Callies, et al., *Unconstitutional Land Development Conditions and the Development Agreement Solution*, *supra* note 16, at 665-66.

[123] As summarized by Justice O'Connor in *Lingle v. Chevron, USA, Inc.*, 544 U.S. 528, 536-548 (2005), the United States Supreme Court recognizes four types of regulatory takings: (1) permanent physical invasion, as characterized by *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); (2) total regulatory taking (a.k.a. "inverse condemnation"), as characterized by *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); (3) land use exactions, as characterized *by Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994); and (4) partial regulatory taking, as characterized by *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

the sorts of benefits and concessions that must instead be sought in a development agreement.[124] Thus, to negotiate effectively, the parties to a development agreement must be aware of what government can require and what it must bargain for when entitling land for development.

The 5th and 14th Amendments clearly stand for the principle that private entities have rights in property.[125] To define "property" and its attendant rights, courts and scholars in the United States generally have adopted the "bundle of sticks" metaphor first advanced by Justice Cardozo.[126] In Cardozo's metaphor, property is not a thing but a collection of rights that define relationships among a thing, its owner, and others.[127] Among the "sticks" that courts have found in the "bundle" are the rights

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[124] David L. Callies, et al., *Unconstitutional Land Development Conditions and the Development Agreement Solution*, *supra* note 16, at 666-669.

[125] U.S. CONST. amend. V ("No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation"); U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of . . . property, without due process of law"). The Takings Clause of the Fifth Amendment is applied to the states via the Fourteenth Amendment. *Chicago, B & Q. R. Co. v. City of Chi.*, 166 U.S. 226 (1897). See also *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Chicago, B & Q. R. Co.*). "That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

[126] *United States v. Craft*, 535 U.S. 274 (2002) (citing Benjamin Cardozo, PARADOXES OF LEGAL SCIENCE 129 (1928) (reprint 2000)). *See also,* Myrl L. Duncan, *Reconceiving the Bundle of Sticks: Land As a Community-Based Resource*, 32 ENVTL. L. 773, 774-76 (2002); Robert C. Ellickson, *Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith*, 8 ECON J. WATCH 215, 215-16 (2011); J. E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. Rev. 711, 712-14 (1996); Kristine S. Tardiff, *Analyzing Every Stick in the Bundle: Why the Examination of a Claimant's Property Interests Is the Most Important Inquiry in Every Fifth Amendment Takings Case*, 54 FED. LAW. 30, 30-32 (Oct. 2007).

[127] *United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945); DAVID L. CALLIES, J. GORDON HYLTON, JOHN MARTINEZ & DANIEL R. MANDELKER, CONCISE INTRODUCTION TO PROPERTY LAW 1 (1st ed. 2011); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1362 (1993).

to possess, transfer, exclude, use, and enjoy.[128] While the Supreme Court of the United States has emphasized the right to exclude as perhaps the most important of property rights,[129] it has consistently found or implied a constitutional right to use property, especially land, for profit and enjoyment.[130]

Like other rights, however, the right to use land is not unfettered.[131] It is subject to government regulation and in certain cases, such as private nuisance and restrictive covenants, to private control.[132] Indeed, a central theme in the history of modern land use law is the story of owners, government, and

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[128] *United States v. Gen. Motors Corp.*, 323 U.S. at 378 (rights to possess, use, and dispose).

[129] *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-27 (1982); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (citing *Kaiser Aetna*, 444 U.S. at 176); *Lingle v. Chevron U.S.A, Inc.*, 544 U.S. 528, 539 (2005). *See also*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (arguing that the right to exclude is "the sine qua non" of property rights because it underpins all the others); CALLIES, ET AL., CONCISE INTRODUCTION TO PROPERTY LAW, *supra* note 122, at 105 (asserting that "no right associated with property ownership is more important than the right to exclude").

[130] *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 172 (1871) (holding that interruption of the right to use property constituted a taking); *Buchanan v. Warley*, 245 U.S. 60, 78-79 (1917) ("Colored persons . . . have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color"); *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 414 (1922) ("What makes the right to mine coal valuable is that it can be exercised with profit"); *United States v. General Motors Corp.*, 323 U.S. at 378 (noting that the constitutional definition of property includes "the right to possess, use and dispose of it"); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (holding that regulations that prohibit all economically beneficial use of land constitute a compensable taking); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) (noting in a case concerning transferrable development rights that "[t]he right to use and develop one's own land is quite distinct from the right to confer upon someone else an increased power to use and develop his land").

[131] Justice Holmes' famous sentence in *Pennsylvania Coal* has been cited often by succeeding courts: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

[132] DAVID L. CALLIES, ET AL., CASES AND MATERIALS ON LAND USE 6, 16 (6th ed. 2012); *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491 (1987) ("Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property").

third parties competing to define land use rights and limitations. In general, there has been a trend of expanding government regulation of land use beginning in 1926, when the Supreme Court first upheld local a local zoning ordinance under the police power in *Village of Euclid v. Ambler Realty Co.*[133] Over the following decades, whether under the police power, the Commerce Clause, or common law doctrines such as nuisance and the public trust, courts have upheld a growing and increasingly complex patchwork of federal, state, and local law regulating land use.[134]

Beginning in the 1960s, land use regulation at all levels of government intensified. States and localities began to institute planning regimes and some states sought to exert greater control in land use planning, taking back some of the police power granted to localities—what was called at the time a "quiet revolution in land use control."[135] Many localities began to use zoning to regulate aesthetics and passed ordinances to preserve historic buildings and districts.[136] Congress passed the Clean Air Act (1970),[137] Coastal Zone Management Act (1972),[138] Endangered Species Act (1973),[139] Clean Water Act

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[133] 272 U.S. 365 (1926).

[134] Justice Holmes foresaw creeping regulation in *Pennsylvania Coal*: "When this seemingly absolute protection [of private property in the Fifth Amendment] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." 260 U.S. at 415.

[135] *See generally,* FRED BOSSELMAN & DAVID L. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

[136] DAVID L. CALLIES, ET AL., LAND USE, *supra* note 133, at 74-77.

[137] Currently codified, as amended, at 42 U.S.C. §§ 7401 – 7671q (West, Westlaw through P.L. 112-283).

[138] Currently codified, as amended, at 16 U.S.C. §§ 1451 – 1466 (West, Westlaw through P.L. 112-283).

[139] Currently codified, as amended, at 16 U.S.C. §§ 1531 – 1544 (West, Westlaw through P.L. 112-283).

(1977),[140] and other legislation designed to protect the environment either through direct regulation or via federal subsidies to states enacting corresponding legislation. Increasing recognition of the need to manage growth and control sprawl in a coordinated fashion eventually produced the "smart growth" movement that matured in the 1990s.[141] Today, all manner of government authorities, from the Army Corps of Engineers to zoning boards of appeal determine what we can and cannot do with land. If a particular use in a particular location is not expressly prohibited, government can often impose conditions and fees, mandate dedications and easements, and require and array of approvals, permits, and environmental studies to fully entitle a project.[142]

From the early 1980s, however, huge federal and state subsidies to local governments for infrastructure and services were reduced, forcing local governments to devise ways "to shift many of the infrastructure costs, historically borne by municipalities in supporting and absorbing the externalities associated with private development, to the private developer itself."[143] This created a risk that local governments would overreach, charging "catch-up" fees against new development for needs arguably created by land uses already approved and developed. Meanwhile, land owners brought action against what they saw as government excesses of regulation, resulting in the evolution of takings law in

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[140] Currently codified, as amended, at 33 U.S.C. §§ 1294 – 1281a (West, Westlaw through P.L. 112-283).

[141] DAVID L. CALLIES, ET AL., LAND USE, *supra* note 133, at 839-40.

[142] For an overview of the land use regime in America, *see generally* Craig Anthony Arnold, *The structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441 (2007).

[143] Patricia Grace Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, *supra* note 1, at 121.

landmark cases such as *Penn Central* (1978), *Loretto* (1982), *Nollan* (1987), *Lucas* (1992), and *Dolan* (1994).[144]

Unconstitutional development exactions are challenged under the 5th Amendment's Takings Clause as applied to the states via the 14th Amendment and the 14th Amendment's Due Process Clause.[145] Fifth Amendment Takings law can be complex and confusing,[146] but at bottom, to use Justice Black's famous sentence, "[t]he Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[147] Since the Supreme Court's famous pronouncement in 1922 in *Pennsylvania Coal Co. v. Mahon*, "the general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[148] Justice O'Connor, writing for a unanimous court more than eighty years later agreed, but noted that "[t]he rub, of course, has been—and remains—how to discern how far is 'too far.'"[149] What constitutes "too far" has been the subject of much litigation.[150]

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[144] *See supra* note 124.

[145] For a thorough survey of takings law, *see* Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307 (2007).

[146] *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty"); Robert Meltz, *Takings Law Today*, *supra* note 146, at 310.

[147] *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[148] *Pennsylvania Coal*, 260 U.S. at 415.

[149] *Lingle*, 544 U.S. at 539.

Although the jurisdictions are currently split on a few outstanding issues, some of which the Supreme Court may decide this term,[151] courts and scholars seem to agree that the test established in *Nollan v. California Coastal Commission*[152] in 1987 and refined in *Dolan v. City of Tigard*[153] in 1994 applies to all ad hoc physical dedications of property required as conditions of development. Whether the *Nollan*/*Dolan* test also applies to monetary exactions and to legislatively imposed exactions is hotly disputed, but there are strong arguments that they do.[154] One problem for local governments, which are responsible for most land use exactions, is that the harms anticipated from proposed development may not reflect the most pressing infrastructure or service needs facing their communities.[155] If *Nollan*/*Dolan* does not apply to fees and legislation, local governments can more easily satisfy community needs without resorting to a development agreement.

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[150] Thirty-three of forty-nine takings cases before the United States Supreme Court between 1978 and 2005 involved real property, with the vast majority concerning land use disputes. Robert Meltz, *Takings Law Today*, *supra* note 146, at 371.

[151] *E.g.*, *St. Johns River Water Mgmt. Dist. v. Koontz*, 77 So.3d 1220 (Fla. 2011), *cert. granted*, 133 S.Ct. 420 (2012).

[152] *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

[153] *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

[154] *E.g.*, *Ehrlich v. City of Culver City*, 114 S.Ct. 2731 (1994) (remanding California mitigation fee case to be decided based on Dolan); *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 118 (1995) (Thomas, J., dissenting) ("The distinction between sweeping legislative takings and particularlized administrative takings appears to be a distinction without a constitutional difference"), *denying cert. to* 450 S.E.2d 200 (Ga. 1994).

[155] DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 91.

The *Nollan-Dolan* standard is a three-part test which (1) presumes a valid exercise of the police power and requires demonstration of (2) an "essential nexus"[156] and (3) "rough proportionality"[157] between the harm caused by proposed development and the land use exactions demanded without compensation. In *Nollan*, the United States Supreme Court found a taking when a California coastal management statute required landowners to dedicate an easement on the dry sand beach parallel to the ocean as a condition for a permit to rebuild a larger home structure on an ocean front lot.[158] In an opinion by Justice Scalia, the court found no connection between the condition and the government's stated objective of protecting coastal views from the roadway.[159] The court held that

> a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found a taking if the refusal to issue the permit would not constitute a taking. . . . Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach . . . [,] for example a height limitation, a width restriction, or a ban on fences—so long as the Commission could have exercised its police power . . . to forbid construction of the house altogether, imposition of the condition would also be constitutional. . . . The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition.[160]

Lacking such an "essential nexus," said the court, the demanded easement was "an out-and-out plan of extortion."[161] If the Commission "wants an easement across the Nollans' property, it must pay for it."[162]

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[156] *Nollan*, 483 U.S. at 837.

[157] *Dolan*, 512 U.S. at 391.

[158] *Nollan*, 483 U.S. at 827-35.

[159] *Id.* at 836-38.

[160] *Id.*

[161] *Id.* at 838 (quoting *J.E.D. Associates, Inc. v. Atkinson*, 432 A.2d 12, 14-15 (1981)).

In *Dolan*, the Supreme Court looked beyond "essential nexus" to the relationship between the harm or impact of proposed development and the burden on the developer's property from related exactions, expressly adding a step—another balancing test—to the analytical process.[163] When a property owner sought permission to enlarge a building and parking lot for a plumbing supply business, the city conditioned approval on the dedication of land for a bike lane, pedestrian path, and flood management system along an abutting creek. Applying the test set out in *Nollan*, the court found an "obvious" nexus between the planned development, which presumably would increase traffic and storm water runoff, and the city's stated purposes of reducing downtown congestion and controlling flooding along the creek.[164]

In reaffirming *Nollan*, the court explained that the "essential nexus" test was based on the "well-settled doctrine of 'unconstitutional conditions'" in which "the government may not require a person to give up a constitutional right—here 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 sought has little or no relationship to the property."[165] In other words, if the government cannot legally demand the exaction in the first place, it cannot require it as a condition of development.

Going further, the *Dolan* court mandated a finding of "rough proportionality" to uphold development conditions: "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and

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[162] *Id.* at 842.

[163] *Dolan*, 512 U.S. at 374.

[164] *Id.* at 387.

[165] *Id.* at 385.

extent to the impact of the proposed development."[166] Because the city merely stated that the bikepath "could offset some of the traffic demand,"[167] and because the city did not explain "why a public greenway, as opposed to a private one, was required in the interests of flood control," there was insufficient justification for "the loss of [the property owner's] ability to exclude others."[168] While government's goals may be "laudable," there are "outer limits" as to how they may be achieved.[169] In distinguishing "rough proportionality" from the "reasonable relationship" and other tests created by the states, the court established a heightened, intermediate level of scrutiny for analyzing land use exactions.

As noted above, however, the reach and applicability of the *Nollan*/*Dolan* test are by no means settled among the jurisdictions.[170] Outstanding issues include whether *Nollan*/*Dolan* applies beyond dedications of land and whether it applies to conditions imposed by legislative as well as adjudicative and administrative entities. Moreover, it is very difficult to get a takings claim heard in federal court because of the requirements that (1) plaintiffs first obtain a "final decision" at the local level, clarifying precisely what is and is not permitted, and (2) plaintiffs must first seek compensation unsuccessfully in state court in a way that does not preclude any federal claims.[171] How individual state courts apply the law is critical, because all takings claims will start, and probably conclude, in state courts.

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[166] *Id.* at 391.

[167] *Id.* at 395-96.

[168] *Id.* at 393.

[169] *Id.* at 396.

[170] *See supra* note 20.

[171] *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (creating two-part ripeness test for regulatory takings claims in federal court: plaintiffs must demonstrate finality of

IV. Development agreements: advantages, validity, and enforceability

As discussed in Section II, development agreements can be traced to the 1976 decision in *Avco*,[172] where California strictly applied a late vesting rule, requiring both the issuance of a building permit and substantial reliance thereafter in the form of "substantial work" on the project.[173] Motivated by the severity of the rule applied in *Avco*, especially given the significant developer investment that was lost, the building industry in California lobbied the legislature for statutory certainty in determining when rights to complete development vest.[174] After three fizzled attempts at legislatively defined vested

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decision regarding application of regulations to the subject property, as well as unsuccessfully seek adequate compensation through state procedures); *San Remo Hotel, L.P. v. City & Cnty. of S.F.*, 545 U.S. 323 (2005) (confirming the two-prong test established in *Williamson County*). Although there is debate over whether the test applies to exactions challenged under *Nollan*/*Dolan*, *see* DAVID CALLIES, ET AL., LAND USE, *supra* note 133, at 390-94 (arguing that under *Nollan*/*Dolan* landowners seek declaratory relief, not compensation), the Ninth Circuit has held that it does. *Carpinteria Valley Farms, Ltd. v. KBDR Props., Ltd.*, 344 F.3d 822 (9th Cir. 2003). Hawaii's federal district court applied the *Willliamson County* rule in the state's only takings claim challenged under *Nollan*/*Dolan*. *Kamaole Pointe Dev. L.P. v. Cnty. of Maui*, No. 07-00447 DAE-LEK, 2008 WL 5025004 (D. Haw. Nov. 25, 2008); *Kamaole Pointe Dev. L.P. v. Cnty. of Maui*, 573 F.Supp.2d 1354 (D. Haw. 2008); *Kamaole Pointe Dev. L.P. v. Cnty. of Maui*, No. 07-00447 DAE-LEK, 2009 WL 3172733 (D. Haw. Sept. 29, 2009).

[172] 553 P.2d 546, 552 (1976).

[173] Cecily T. Talbert, *Redevelopment, Development Agreements, and the Public/Private Partnership*, SL005 ALI-ABA 877, 880 (Aug. 25-27, 2005); Kenneth R. Kupchak, et al., *Arrow of Time*, *supra* note 24, at 25; David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution*, *supra* note 16, at 670; John J. Delaney, *The Development Agreement: An Evolving Vehicle for Avoiding Valid Vesting Vapors*, SM004 ALI-ABA 1211, 1213 (Aug. 17-19, 2006).

[174] William G. Holliman, Jr., *Development Agreements and Vested Rights in California*, *supra* note 2, at 44-49.

rights in 1977 and 1978, California passed the nation's first development agreement enabling act in late 1979.[175]

Similar processes played out in other states applying common law late vesting rules,[176] and by 2004 thirteen states had passed legislation authorizing local governments to enter development agreements, and fifteen states, including some of the thirteen, had passed measures codifying vested rights.[177] By 2012, fifteen states had authorized development agreements by statute.[178] Although legislatures emphasized reduction of developer risk in enabling development agreements, local governments also have significant incentive to enter them.

For developers, large projects have required an increasing number of permits, extending the entitlement process and thereby raising risks to investment: the longer it takes to obtain a building permit or otherwise vest development rights, the more likely it is that regulations will change.[179] For government, the incentive to seek a development agreement has come largely from the Supreme Court's decisions in *Nollan* and *Dolan*,[180] as discussed above.[181] While some jurisdictions have held that *Nollan*/*Dolan*'s heightened scrutiny does not apply beyond land dedications and physical invasions or to

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[175] *Id.*; David S. Goldwich, *Development Agreements: A Critical Introduction*, *supra* note 1, at 250.

[176] Daniel P. Selmi, The *Contract Transformation in Land Use Regulation*, *supra* note 1, at 607-11.

[177] John J. Delaney, et al., *Recognizing Vested Development Rights as Protected Property*, *supra* note 11, at 761.

[178] DAVID L. CALLIES, AT EL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 15, 28 n.4.

[179] *See supra* Part II.

[180] Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, *supra* note 1, at 610.

[181] *See supra* Part III.

legislatively imposed conditions, there is a "growing consensus" that the test "also applies to monetary fees and exactions" and other conditions, whether legislatively or quasi-judicially imposed.[182] When municipalities negotiate outside the limits of *Nollan*/*Dolan*, they can obtain benefits such as affordable housing, requirements that developers use the latest water and energy saving technologies, and fees "in excess of those needed to cover the costs associated" with a particular project.[183]

But decreased risk to investment and avoidance of constitutional limitations are not the only advantages offered by development agreements. Development agreements could be used to promote competition among developers, such that local governments gain leverage to bargain for an even better deal. They also help to ensure that infrastructure is completed in a timely manner and "serve as additional security in the real estate financing process" to "enhance the creditworthiness of the proposed development." The lower financing costs that result are ultimately passed on to the consumer.[184] Development agreements thus promise to "change the nature of the relationship . . . in the land development process from adversarial to cooperative."[185] "Furthermore, many states do not require

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[182] David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 365 (2007); David L. Callies & Julie A. Tappendorf, *Development Agreements*, SU010 ALI-ABA 175, 178 (Aug. 8-10, 2012) (asserting that "it is generally agreed that the constitutionality of laws applicable to impact fees, exactions, and in lieu fees, as well as to compulsory land dedications is the same, given that they all represent development conditions levied at some point in the land development process").

[183] Cecily T. Talbert, *Redevelopment, Development Agreements, and the Public/Private Partnership*, SL005 ALI-ABA 877, 888-90 (Aug. 25-27, 2005).

[184] Patricia Grace Hammes, *supra* note 1, at 124-25; Michael H. Crew, *Development Agreements after Nollan*, *supra* note 13, at 29-30.

[185] David L. Callies & Julie A. Tappendorf, *Development Agreements*, *supra* note 1, at 177.

development . . . agreements to be consistent with comprehensive plans or zoning codes,"[186] although consistency with a plan renders a development agreement less susceptible to legal challenge where a state's zoning enabling act requires conformance or consistency.[187] Also appealing to local governments is the potential for development agreements to "avoid[] costly and prolonged litigation and administrative hearings" and "vested rights disputes [that can] deter development, slow the growth of the tax base, and interfere with the planning and development of public facilities. Development agreements allow municipalities the flexibility to produce regulation more closely tailored to the surrounding community."[188]

As hinted at above, development agreements, for all their claimed advantages, are not immune from legal challenges and scholarly criticisms. While there is relatively little case law on development agreements, courts and commentators have identified several issues surrounding their legality, including: (1) whether the government has "contracted away its police power" in violation of the reserved powers doctrine; (2) whether the Contracts Clause of the United States Constitution supports or undermines development agreements; (3) whether the local government has acted with sufficient statutory authority; (4) whether the municipality's approval of the agreement is considered a legislative or administrative act (the former may be subject to initiative and referendum); and (5) what happens

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[186] Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement, and Adaptive Planning in Land use Decisions, Installment One*, 24 STAN. ENVTL. L.J. 3, 28 (2005).

[187] Daniel J. Curtin, Jr. & Jonathan D. Witten, *Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Access*, 32 B.C. ENVTL. AFF. L. REV. 325, 328-39.

[188] Michael H. Crew, *Development Agreements after Nollan*, *supra* note 13, at 30-31.

when an agreement is amended, cancelled, or breached.[189] Moreover, while admitting the benefits and flexibility enjoyed by both developers and municipalities in a development agreement, one scholar has criticized development agreements for "tend[ing] to make land use decisionmaking more opaque and less inclusive, to the detriment of deliberative democracy" and thereby eroding "the legitimacy of local land use decisions."[190] Another scholar has argued that, although development agreements "enlarge the range of outcomes" available to municipalities and "allow[] . . . choices to be made in a fashion that promotes efficiency," they ultimately increase municipal discretion too much, creating a hazard that land use law will be applied unfairly and extortionately—precisely the problem that the United States Supreme Court sought to address in *Nollan* and *Dolan*.[191]

The most significant legal concern by far is whether freezing zoning and other land use regulations is tantamount to "contracting away of the [municipality's] zoning authority and, therefore, a surrender of the right to exercise its police power in future" or "enhances the [municipality's] power to regulate land use and to achieve . . . land use goals" under proper authority from the state.[192] It is established case law that:

> a local government may not contract away its authority to exercise the police power, particularly in the context of zoning decisions. Because land use and development regulations represent exercises of the police power, a development . . . agreement binding

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[189] For general surveys of these issues and more, see DAVID L. CALLIES, ET AL, DEVELOPMENT BY AGREEMENT, *supra* note 1, at 16-28; DAVID L. CALLIES, ET AL., BARGAINING FOR DEVELOPMENT, *supra* note 1, at 91-115.

[190] Alejandro Esteban Camacho, *Mustering the Missing Voices*, *supra* note 187, at 65.

[191] Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, *supra* note 1, at 644.

[192] *Santa Margarita Area Residents Together v. San Luis Obispo Cnty.*, 100 Cal.Rptr.2d 740, 747, 749 (Cal.Ct.App. 2000).

> local government not to exercise these powers in the future arguably violated the reserved powers doctrine, under which a government must reserve the exercise of certain regulatory or police powers for itself, and therefore is beyond the government's authority.[193]

While the United State Supreme Court has never considered development agreements, the decisions in *Giger v. City of Omaha*,[194] *Santa Margarita Area Residents Together v. San Luis Obispo County*,[195] *Home Builders Association of Central Arizona v. City of Maricopa*,[196] and others, strongly suggest that a development agreement will avoid trouble with the reserved powers doctrine and be binding on future governments as long as it: (1) is not permanent but limited to a reasonable period; (2) allows government to retain some discretionary authority and preserves future options, especially use of the police power in the case of emergency; (3) sets out a description of the proposed development with specificity as to basic parameters; (4) does not promise support or special handling of permit approvals; and (5) is consistent with local zoning and, if applicable, local and state planning, such that the goals of the land use regulations are advanced, especially if the development agreement restricts the uses of the property more narrowly than existing zoning.[197] Thus, the language of the enabling act and the drafting of the individual development agreement appear to be of paramount importance to surviving any legal challenges.

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[193] DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 16.

[194] 442 N.W.2d 182 (Neb, 1989).

[195] 100 Cal.Rptr.2d 740 (Cal.Ct.App. 2000).

[196] 158 P.3d 869 (Ariz.Ct.App. 2007).

[197] DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 16-18.

The Contracts Clause—"No State shall . . . pass any . . . Law impairing the Obligation of Contracts"[198]—would seem to support the enforcement of a development agreement, as long as the specific agreement did not prevent a local government from using the police power to address a crisis or emergency, despite the terms of the agreement. The issue of breach, which usually occurs when either the local government changes regulations and attempts to apply them or a developer fails to deliver the negotiated benefits in a timely fashion or at all, is generally not a major issue as long as the considerations above are addressed, and should result in payment of damages or the voiding of new regulations as they apply to the property for the duration of the agreement.[199] Finally, there is the issue of whether a development agreement is subject to the *Nollan*/*Dolan* test, a question raised by critics who claim a development agreement is simply "[t]he most sophisticated form of exaction" and subject to "public abuse, referring to those results favorable to the government or the public as a whole, and private abuse, referring to outcomes favorable to individuals."[200] Assuming a development agreement is "invested with a public purpose" and "neither government nor landowner [was] compelled to negotiate or execute" it, a court will likely find "essential nexus" and "rough proportionality" unnecessary limitations on its scope.[201]

While development agreements have not met with universal approval in either the courts or among scholars, even those critical of development agreements readily admit their benefits, such as

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[198] U.S. CONST. art I, § 10, cl. 1.

[199] DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 18-25.

[200] Michael H. Crew, *Development Agreements after Nollan*, *supra* note 13, at 27, 49-50.

[201] DAVID L. CALLIES, ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1, at 25-26; Daniel J. Curtin, *Effectively Using Development Agreements to Protect Land Use Entitlements*, *supra* note 2, at 42.

flexibility, efficiency, reduced costs for all involved, and better ability to meet community needs. Moreover, development agreements have generally passed judicial muster, having been "broadly upheld in those states that provide for them by statute."[202] Based on numbers alone, it seems clear that development agreements have proven their worth to both developers and local governments in California, "where more than a thousand have been negotiated and executed."[203] In California, "development agreements have been used to facilitate agricultural land preservation, to compensate for lost tax revenues, to foster community redevelopment, and to bolster available low and moderate income housing supplies."[204] Given the decision in *Avco*, it is easy to surmise why developers in California see development agreements as useful and advantageous. Judging from the over 100 reported state and federal appellate decisions involving California real property that either discuss or apply the *Nollan*/*Dolan* test, it is also easy to infer why local governments in California could find development agreements appealing.[205]

V. Hawaii's Development Agreement Statute

Hawaii's development agreement act, which has not been amended since its passage in 1985, appears to be legally sound, with one minor exception, when examined against the potential pitfalls and

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[202] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 1, at 103.

[203] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 1, at 103.

[204] Judith Welch Wegner, *Moving Toward the Bargaining Table*, *supra* note 1, at 994 (1986-87).

[205] A Westlaw search of California, Ninth Circuit, and U.S. Supreme Court decisions with the keywords "Nollan," "Dolan," and "land" conducted on Feb. 19, 2013, returned 163 opinions, 53 of which did not relate to vested rights, takings claims, land use exactions, or development agreements. The vast majority of relevant cases were brought by land owners.

case law discussed above. The act's "findings and purpose" section touts many advantages for developer, government, and community, explaining that "the lack of certainty" in the "complex, time consuming" and financially risky entitlement process, "can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning. Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public."[206] The act allows counties by ordinance to authorize "the executive branch of the county" to enter development agreements "with any person having a legal or equitable interest in real property,"[207] where "'person' means any individual, group, partnership, firm, association, corporation, trust, governmental agency, governmental official, administrative body, or tribunal or any form of business of legal entity."[208] Moreover, "[i]n addition to the county and the principal, any federal, state, or local government agency or body may be included as a party."[209] The act also provides broad coverage for the substance of development agreements:

> All laws, ordinances, resolutions, rules, and policies governing permitted uses of the land that is the subject of the development agreement, including but not limited to uses, density, design, height, size, and building specification of proposed buildings, construction standards and specifications, and water utilization requirements applicable to the development of the property subject to a development agreement, shall be those . . . in force at the time of execution of the agreement.[210]

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[206] HAW. REV. STAT. § 46-121.

[207] HAW. REV. STAT. § 46-123.

[208] HAW. REV. STAT. § 46-122.

[209] HAW. REV. STAT. § 46-126(d).

[210] HAW. REV. STAT. § 46-127(b).

Thus, virtually every kind of land development project undertaken by almost any sort of public or private entity can be covered, and vesting can conceivably be negotiated with all relevant regulatory agencies at all levels of government—an element beneficial to all in ensuring that any covered project is completed on time.

The provisions of the act appear to steer clear of any problems with the reserved powers doctrine, and would likely avoid being considered a contracting away of a county's police power. The act requires all development agreements to have a "specific period" or termination date, but that date can be extended by mutual agreement, and subsequent development agreements may be entered by the parties.[211] Development agreements may specify commencement and completion dates, which can "be extended at the discretion of the county . . . upon good cause shown."[212] Assuming the duration is not deemed to be unreasonably long, it should legally bind future governments, and the statute anticipates "successors in interest," so the agreement should be assignable.[213]

The act requires periodic compliance review by the counties and an appeal process for curing any defects, allows cancellation or amendment by mutual consent, and permits a county unilaterally to cancel or modify the agreement in the event of material breach by the principal.[214] More importantly,

> A development agreement shall not prevent a government body from requiring the principal from complying with laws, ordinances, resolutions, rules, and policies of general applicability enacted subsequent to the date of the development agreement, if they could have been lawfully applied to the property . . . at the time of execution of the

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[211] HAW. REV. STAT. §§ 46-121, -126(a)(4).

[212] HAW. REV. STAT. § 46-126(b).

[213] HAW. REV. STAT. §§ 46-122, -127(a), -130, -132.

[214] HAW. REV. STAT. §§ 46-123(3),(4), -125(a),(b), -130.

> agreement if the government body finds it necessary to impose the requirements because a failure to do so would place the residents of the subdivision or of the immediate community, or both, in a condition perilous to the residents' health or safety, or both.[215]

Thus, it appears the counties retain substantial latitude under the statute. A development agreement must also "describe the land," "specify the permitted uses of the property, the density or intensity of the use, and the maximum height and size of the proposed buildings," and be "consistent with the county's general plan and any applicable development plan,"[216] further deflecting any potential attack under the reserved powers doctrine.

Moreover, the act sets out that "[p]ublic benefits from development agreements may include, but are not limited to, affordable housing, design standards, and on- and off-site infrastructure and other improvements"[217] and must "[p]rovide, where appropriate, for reservation or dedication of land for public purposes as may be required or permitted pursuant to laws, ordinances, resolutions, rules, or policies in effect at the time of entering into the agreement."[218] Given the breadth of possible benefits authorized, it is unlikely that a resulting development agreement could be characterized as *ultra vires* or somehow subject to *Nollan-Dolan*. Finally, while any development agreement must be authorized by ordinance and cannot be entered into until the "county legislative body," after a public hearing, finds the

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[215] HAW. REV. STAT. § 46-127(b).

[216] HAW. REV. STAT. §§ 46-126(a)(1),(2), -129.

[217] HAW. REV. STAT. § 46-121.

[218] HAW. REV. STAT. § 46-126(a)(3).

agreement consistent with county planning,[219] the statute nevertheless deems "[e]ach development agreement . . . an administrative act,"[220] thus precluding the type of referendum at issue in *Nukoli'i*.[221]

The only obvious shortcoming in the act pertains to the provision that makes any subsequent changes in regulations "void as applied to property subject to" a development agreement.[222] It is unclear what law, if any, would apply to property where new regulations are "void," if the development agreement were to be terminated or canceled. Overall, however, Hawaii's development agreement enabling statute appears to maximize potential benefits for both developers and the counties while staying within the judicial standards that would likely be applied to it.[223] The development agreement statute itself is probably not a reason why development agreements are virtually non-existent in Hawaii.

VI. Why development agreements are seldom used in Hawaii

Similar to the impact of the *Avco* decision in California, the 1982 *Nukoli'i* opinion in Hawaii "stunned many developers" with its "harsh, anti-development stance,"[224] although one local

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[219] HAW. REV. STAT. §§ 46-123, -128.

[220] HAW. REV. STAT. § 46-131.

[221] *See supra* Part II.

[222] HAW. REV. STAT. § 46-127(b).

[223] The Hawaii Supreme Court has twice issued opinions tangentially related to a development agreement, both concerning the same underlying dispute, but has never heard a direct challenge to an agreement or the enabling act. *Cnty. of Haw. v. C & J Couple Family Ltd. P'ship*, 198 P.3d 615 (Haw. 2008); *Cnty. of Haw. v. C & J Couple Family Ltd. P'ship*, 242 P.3d 1136 (Haw. 2010). *See supra* note 42.

[224] Lyle S. Hosoda, *Develpoment Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U. HAW. L. REV. 173, 173 (1985).

commentator preferred to look on the bright side, noting that the "last discretionary permit" standard was better than the building permit rule.[225] As in California, the building industry lobbied for legislation to codify vested rights, initially unsuccessfully, with three bills dying in committee in 1983, largely because of confusion over the meaning of *Nukoli'i*.[226] Recast as development agreement enabling legislation and reintroduced in 1984, the bill was eventually enacted in 1985,[227] making Hawaii the second state to pass such a statute.[228] Curiously, development agreements have been widely used in California, but Hawaii has seen only two.[229]

The reasons behind that difference in reception are various and not fully knowable, but some factors and circumstances suggest themselves. Developers were keen on passing legislation to enable development agreements, and there is nothing to indicate that they are any less concerned with vested rights now than in 1985. Indeed, as the entitlement process has lengthened, the risks associated with development have increased.[230] On the other side of the bargain, however, one could infer that the

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[225] Benjamin A. Kudo, *Nukolii: Private Development Rights and the Public Interest*, 16 URB. LAW. 279, 311 (1984).

[226] Lyle S. Hosoda, *supra* note 224, at 174-75.

[227] HAW. REV. STAT. §§ 46-121 to 132. The bill passed 44 to 7 in the House and 24 to 1 in the Senate, where then Senator, now Governor Abercrombie cast the lone "no" vote. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE THIRTEENTH LEGISLATURE, STATE OF HAWAII: REGULAR SESSION OF 1985 556 (1985); JOURNAL OF THE SENATE OF THE THIRTEENTH LEGISLATURE, STATE OF HAWAII: REGULAR SESSION OF 1985 629 (1985).

[228] Daniel S. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, *supra* note 2, at 777.

[229] *See supra* note 6.

[230] *See supra* Part II.

county governments are less convinced of the benefits of development agreements. Only two of Hawaii's four counties have passed authorizing ordinances.[231] More significantly, landowners have been reluctant to contest development conditions, often imposed in the form of a "unilateral agreement," that they must record prior to receiving permits and approvals.[232] "In most jurisdictions, this kind of conditional zoning is considered illegal,"[233] and it has "added to Hawaii's reputation for hostility to economic development."[234]

Despite case law and scholarship suggesting that Hawaii developers might successfully challenge unilateral agreements and other land use exactions,[235] not least because such agreements may not be enforceable under contract,[236] regulatory takings claims have been rare, even following the

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[231] REVISED ORDINANCES OF HONOLULU §§ 33-1.1 to -1.10 (1990); HAWAII COUNTY CODE §§ 33-1 to -12 (2005 ed., as amended).

[232] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 1, at 62-63.

[233] *Id.*

[234] David L. Callies, et al., *The Moon Court, Land Use, and Property: A Survey of Hawaii Case Law, 1993-2010*, 33 U. HAW. L. REV. 635, 640 (2011).

[235] *See, e g.*, David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 361-69 (2007) (discussing doctrine and cases supporting application of *Nollan*/*Dolan* test to all development conditions, including fees and legislative acts); David L. Callies, *Mandatory Set -Asides as Land Development Conditions*, 42/43 URB. LAW. 307 (2010-11) (discussing doctrine and cases supporting application of *Nollan*/*Dolan* test to mandatory affordable housing set-asides); David L. Callies, *It All Began in Hawaii*, 45 J. MARSHALL L. REV. 317, 344-45 (1011-12) (arguing with support of California and Ninth Circuit case law that affordable housing set-asides as required in Hawaii fail the *Nollan*/*Dolan* test).

[236] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 62.

decisions in *Nollan* and *Dolan*,[237] and even though the Hawaii Supreme Court has said that *Nollan*/*Dolan* applies in Hawaii.[238] Instead, the majority of suits filed in the state's courts have been brought by non-governmental organizations opposing development. The Hawaii Supreme Court has sided with them "approximately eighty-two percent of the time," leading one commentator to characterize as "appalling" the court's "record on preserving property rights guaranteed by the U.S. Constitution's Fifth and Fourteenth Amendments in the face of regulatory challenges."[239] The failure of land owners to contest potentially unconstitutional conditions, informed by the knowledge that they are unlikely to prevail in court if they do, has effectively removed any incentive for Hawaii's counties to seek development agreements. Why bargain for that which can be demanded?

In 1995, two University of Hawaii law students published a study examining the then-recent decision in *Dolan* and its probable effect on land use exactions in Hawaii.[240] The study identified several key points where the case would impact takings law in favor of development rights[241] and cited nine instances since passage of the development agreement statute where benefits required in "unilateral agreements" would likely have been prohibited by *Nollan*/*Dolan*. Those exactions included a large gift

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[237] A Westlaw search on Feb. 23, 2013, turned up only one reported decision (*Kamaole Pointe Dev. LP v. Cnty of Maui*, 573 F.Supp.2d 1354 (D. Haw. 2008)) at the state or federal level involving a challenge under *NollanDolan* for a land use exaction imposed on Hawaii real property, and in that case the court found the plaintiff's case was not ripe for failure to seek compensation in state court. S*ee supra* note 172.

[238] *Public Access Shoreline Haw. v. Haw. Cnty. Planning Comm'n*, 903 P.2d 1246, 1257, 1272-73 (Haw. 1995).

[239] David L. Callies, et al., *The Moon Court, Land Use, and Property*, *supra* note 42, at 636, 669.

[240] Michael B. Dowling & A. Joseph Fadrowsky, III, *Dolan v. City of Tigard: Individual Property Rights and Land Management Systems*, 17 U. HAW. L. REV. 193 (1995).

[241] *Id.* at 249.

of land without specific county plans for its use, impact fees reaching as high as one-hundred-million dollars, and disproportionately large set asides and dedications for on- and off-site improvements, including affordable housing, schools, sports and community centers, and other health and cultural amenities. In all cases, the exactions were either weakly connected with or incommensurate to the probable impact of the proposed development projects.[242] Moreover, there was evidence to suggest that some county officials realized the conditions were of dubious legality and would continue imposing them unless challenged.[243] The study concluded that "implementing the [Supreme] Court's heightened scrutiny by using a 'rough proportionality' test will likely have substantial impact in Hawaii" in favor of both homeowners and big developers and would, among other things, push counties toward legal ways of securing otherwise unconstitutional benefits, such as in development agreements.[244]

Despite those predictions, not much has changed. Since March 1996, the HONOLULU STAR-BULLETIN, the HONOLULU ADVERTISER, and their merged successor, the HONOLULU STAR-ADVERTISER, have published at least three hundred articles, editorials, commentaries, and letters dealing directly with Hawaii land use law, policy, and disputes.[245] Those newspaper articles cover more than thirty-five specific proposed or ongoing development projects, in addition to broader land use debates about water rights, the preservation of agricultural land and open space, environmental protection, population

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[242] *Id.* at 246-57.

[243] *Id.* at 258-59.

[244] *Id.* at 196, 258, 260-61 (1995).

[245] Online archival searches of STAR-BULLETIN (Mar. 18. 1996 to June 6, 2010), ADVERTISER (Mar. 15, 2001 to June 6, 2010) and STAR-ADVERTISER (June 7, 2010 to Feb. 2, 2013). Copies of more than three hundred articles are on file in hard copy with the author, but not all relevant articles returned in the search were printed for review.

growth, housing, sprawl, culture, history, and the economy. Taken together, the journalism makes clear that the basic issues and interests have remained more or less the same since the late 1970s. Communities and special interest groups have continued vigorously to oppose virtually all development, ranging from small projects, such as a single cell phone tower,[246] to large residential subdivisions,[247] often bringing administrative and legal action. Meanwhile, the counties have continued to impose dubious development conditions,[248] developers have generally declined to challenge them,[249] and the

[246] June Watanabe, *Waimanalo Cell Phone Tower on Ag Land Got OK from City*, HONOLULU STAR-ADVERTISER, Sept. 30, 2010 (reporting that "[t]he neighborhood board had 'voted against (the tower) because the community was really angry' and concerned about radiation and other safety issues, as well as it being on agricultural land").

[247] E.g., Rod Thompson, *Judge Halts Big Island's Hokulia Development*, HONOLULU STAR-BULLETIN, Sept. 10, 2003 (reporting that a Hawaii County circuit judge had sided with Native Hawaiian and community groups to halt work on a county-approved 1,550-acre luxury, large-lot subdivision of "fake farms" on land classified for agriculture by the state).

[248] Don Clegg, *City Development Approval Can Be A Shell Game*, HONOLULU STAR-BULLETIN, Aug. 4, 2002 (former planning director of the City and County of Honolulu asserting that use of unilateral agreements to obtain affordable housing and other benefits by Honolulu city council fails the "rational nexus test" because "market-priced housing . . . does not create the need for affordable houses"); Nicholas Ordway, *Empty Libraries, Empty Schools, Empty Heads*, HONOLULU STAR-BULLETIN, Aug. 4, 2002 (professor at University of Hawaii College of Business Administration strongly suggesting that the many developer-built empty schools and libraries required as land development conditions by the LUC are evidence that the "rational nexus" and/or "rough proportionality" tests are being violated).

[249] A Westlaw search on Feb. 23, 2013, turned up only one reported decision (*Kamaole Pointe Dev. LP v. Cnty of Maui*, 573 F.Supp.2d 1354 (D. Haw. 2008)) at the state or federal level involving a challenge under *Nollan-Dolan* for a land use exaction imposed on Hawaii real property, and in that case the court found the plaintiff's case was not ripe, partly for failure to seek compensation in state court. In 2003, a newspaper reported that a developer of property in Kaanapali, Maui was suing the county for "taking away the use of [its] property" because of a permit denial, but the facts reported suggested an estoppel analysis. *Kaanapali Land Use Dispute Heads to Court*, HONOLULU STAR-BULLETIN, Apr. 12, 2003.

Hawaii Supreme Court has continued on balance to favor the interests of those opposed to development.[250]

As reflected in the reporting, the debates and controversies over land use in Hawaii over the last fifteen years have been more about competing public interests and the environment, not property rights or unconstitutional development conditions. The phrases "rational nexus" and "rough proportionality" appear in only two newspaper pieces about land use between March 1996 and February 2013, both by experts critical of Hawaii's current land use entitlement system,[251] and there is scant mention of "property rights," even in pro-development editorials and comments.[252] Rather, the central questions in the public discourse have revolved around the 1961 Land Use Law that established the Land Use Commission (LUC) and created the statewide land classification system.[253]

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[250] David L. Callies, et al., *The Moon Court, Land Use, and Property, supra* note 42, at 636.

[251] Don Clegg, *City Development Approval Can Be A Shell Game*, HONOLULU STAR-BULLETIN, Aug. 4, 2002; Nicholas Ordway, *Empty Libraries, Empty Schools, Empty Heads*, HONOLULU STAR-BULLETIN, Aug. 4, 2002.

[252] One of the few mentions of land owner rights appeared in an editorial in 1998, which asked "how far can we go to restrict the use of private property?" A.A. Smyser, *Excessive Restrictions on Developers*, HONOLULU STAR-BULLETIN, Apr. 23, 1998 ("Hawaii has tested the boundaries by imposing a 30 percent affordable housing requirement on new developments, mandating that a private golf course reserve 40 percent of its tee times to local residents at reduced rates, extracting $200,000 for child care in a landowner-provided public park, requiring 50 percent of boat slips in a private marina be available for public use, demanding a $4 million contribution to a community trust fund—and much, much more"). Affordable housing set-asides as exactions for residential development are particularly susceptible to both prongs of the *Nollan*/*Dolan* test. See generally, David L. Callies, *Mandatory Set-Asides as Land Development Conditions*, 42/43 URB. LAW. 307 (2010-11).

[253] Currently codified, as amended, at HAW. REV. STAT. §§ 205-1 to -18 (West, Westlaw through 2012 Reg. & Spec. Sess.). All land in Hawaii is classified in one of four categories. In 2010, 48% was designated conservation, 47% agriculture, 5% urban, and roughly one-half percent rural. Much of the land classified as agriculture is unsuitable for that use and functions as a de facto open space district.

Specifically at issue have been reclassifications of land from agriculture to urban, mostly to accommodate large residential projects. Many of the community interests at stake in development are revealed through these debates. Among other things, critics of reclassification argue that (1) there is already enough land in the urban district to meet Hawaii's housing needs;[254] (2) that further development of agricultural land is a threat to the state's long-term food security and environment generally;[255] (3) that reclassifications contravene the spirit of the 1961 Land Use Law, which was specifically designed to protect open space and agricultural land;[256] (4) that the housing being built on reclassified lands is often unaffordable for the average Hawaii resident,[257] and (5) that allowing further development in open areas is a betrayal of Hawaii's cultural values and a "course to finally extinguish the Hawaiian nation."[258] On the other side, proponents of reclassification cite (1) Hawaii's housing

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See DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 21-33 (explaining operation of Hawaii Land Use Act).

[254] E.g., Larry McElheny, *Fight O'ahu Urban Crawl with Knowledge*, HONOLULU ADVERTISER, Apr. 10, 2006.

[255] E.g., Vicki Viotti, *Robert Harris: The Leader of Sierra Club Hawaii Wants A Marshall-Style Plan for The State That Would Lead to Greater Food Self-Sufficiency*, HONOLULU STAR-ADVERTISER, Oct. 22, 2010.

[256] E.g., Blake McElheny, *Land-Use Law Helps Us All*, HONOLULU ADVERTISER, Nov. 4, 2003. Hawaii is not alone in seeking to protect farmland. Several states have created programs to protect agricultural land, although none employs a statewide system of land zoning/classification like Hawaii's. Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L.Q. 401 (1987).

[257] *E.g.*, Andrew Gomes, *Farming Finds No Home on Agricultural Land*, HONOLULU ADVERTISER, Jan. 27, 2013.

[258] Adam Bensley, *LUC Betrayed Hawaiian Values Approving Koa Ridge, Ho'opili*, HONOLULU STAR-ADVERTISER, June 20, 2012.

crisis;[259] (2) the jobs and other economic benefits that flow from development;[260] (3) the fact that there is a surfeit of unused agricultural land following the demise of the sugar and pineapple industries[261]; and (4) that much of the land classified for agriculture is unfit for such a use.[262]

During the course of this debate, two governors, Benjamin Cayetano, a Democrat, and Linda Lingle, a Republican, controversially attempted to abolish the LUC and shift its duties to the county governments.[263] One commentator spoke of attempts to change the state land use law as "a fight over the soul of Hawaii's Democratic Party."[264] A law review essay argued that denial of reclassification from agriculture to urban, when agriculture-classified land cannot support agriculture, was a *Lucas*-style total regulatory taking because it denied all economically beneficial use.[265] Nonetheless, amidst the

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[259] *E.g.*, Vicki Viotti, *Affordable Housing: Will It Materialize in Hawaii?* HONOLULU STAR-ADVERTISER, Aug. 12, 2012.

[260] *E.g.*, Alan Yonan, Jr., *Slowly Rebuilding*, HONOLULU STAR-ADVERTISER, July 22, 2012.

[261] *E.g.*, Pat Omandam, *Market Upheaval Prompts Review of Farm Land Policy*, HONOLULU STAR-BULLETIN, Aug. 29, 2001.

[262] *E.g.*, *Allow Housing on Ag Land Unfit for Farming*, HONOLULU STAR-BULLETIN, Mar. 4, 2006.

[263] Keith Kosaki, *Coalition Opposes Bill to Streamline Land Use: Letting Counties Control Use Puts the Economy over Public Input and the Land, They Say*, HONOLULU STAR-BULLETIN, Mar. 10, 1998; Timothy Hurley, *Developers Seek to End Land Use Board*, HONOLULU ADVERTISER, Sept. 26, 2003; Gordon Y.K. Pang, *Sierra Club Criticizes Lingle*, HONOLULU ADVERTISER, Oct. 18, 2003; Diana Leone, *Lingle is Blasted over Land Use Views*, HONOLULU STAR-BULLETIN, Oct. 20, 2003.

[264] David Kimo Frankel, *Land Use to Test Soul of Democrats*, HONOLULU ADVERTISER, Mar. 12, 2006.

[265] Norman Cheng, *Is Agricultural Land In Hawaii "Ripe" for a Takings Analysis?* 24 U. HAW. L. REV. 121 (2001). A sympathetic example of this situation is the attempt by Molokai Ranch to develop residential subdivisions on small portions of the 65,000 agriculture-classified acres it holds on the island. The ranch has been losing money for years and has shut down much of its operation. Vehemently opposed by local residents despite offers to donate thousands of acres for conservation in return for developing a few hundred, the Ranch has been unable to obtain reclassification from the LUC. More

politics and passions surrounding preservation of agricultural land, notions of property rights and developer risk have found little sympathy in the community discourse.

VII. The essential role of the community and how CBAs can make partners out of opponents

Why developers are reluctant to press takings claims in Hawaii is an open question. One commentator has suggested that it relates to local politics and the small worlds of island communities.[266] In any case, Hawaii developers have been unwilling to assert constitutional rights to bring governments to the bargaining table for a development agreement.[267] More significant is the public discourse on land use in Hawaii, where land is seen more as a community resource whose fate is to be decided by the community rather than as private property subject to reasonable regulation. Many in the community appear unconvinced that the benefits of development outweigh the drawbacks, and they have been willing to organize and fight vigorously against it with a high degree of success.[268]

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recently it has attempted to avail itself of statutes that allow landowners to obtain urban reclassification for parcels equivalent to 15 percent of any tracts voluntarily designated as "important agricultural land" and restricted solely for agricultural use. Gary T. Kubota, *Ranch Offers Land to Residents*, HONOLULU STAR-BULLETIN, July 312, 2005; Allison Scheafers, *Molokai Ranch Land Deal Goes Out for Public Hearings*, HONOLULU STAR-BULLETIN, May, 24, 2006; Kehaulani Cerizo, *Opposing Sides Both Say Their Goal is Saving Molokai*, HONOLULU ADVERTISER, May 14, 2007; Chris Hamilton, *Molokai Ranch will Cut Costs 15% after Land Board Decision*, HONOLULU ADVERTISER, Dec. 20, 2007; Andrew Gomes, *Ranch Owners Seek Ruling on Land Use*, HONOLULU STAR-ADVERTISER, Jan. 4, 2011; *High Hopes for Ag Designation*, HONOLULU STAR-ADVERTISER, Jan. 6, 2011.

[266] Mark Colemen, *David Callies: The UH Law Professor Says Too Many Land-use Rules in Hawaii Have Led to "Back-Door" Development*, HONOLULU STAR-ADVERTISER, Jan. 11, 2013.

[267] *See supra* Part VI.

[268] *See generally*, David L. Callies, Emily Klatt & Andrew Nelson, *Property: A Survey of Hawaii Case Law*, ST030 ALI-ABA 249 (Jan. 26-28, 2012) (reviewing, *inter alia*, the several suits brought by groups such as the Sierra Club, Earthjustice, Hawaii's Thousand Friends, and the Native Hawaiian Legal Corporation).

To understand the importance of community perspectives on property development requires some knowledge of Hawaii's meteoric development history. From the late 1950s to the late 1970s, Hawaii enjoyed an economic boom[269] and saw massive growth in its tourism industry driven in part by jet air travel, with a host of new hotels constructed in Waikiki and on the outer islands.[270] The "building boom" in resorts and hotels resulted in the NEW YORK TIMES in November 1969 calling Hawaii the "Land of the Crane and Bulldozer."[271] For some, development was not fast enough.[272] In 1961, the state estimated that Hawaii's population would double to 1,258,000 by 1980 and unveiled an ambitious development plan to accommodate it, including measures designed to stimulate the agriculture and tourist industries, diversify "industrial growth [by] utilizing untapped natural resources," and improve transportation with road construction and, possibly, an inter-island hydrofoil ferry service.[273]

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[269] Kent M. Keith, *The Hawaii State Plan Revisited*, 7 U. HAW. L. REV. 29, 30 (1985).

[270] John F. Burby, *New Waikiki Hotels: Hawaii Bureau Estimates Area Can Soon Accommodate 5,000 Visitors a Day*, N.Y. TIMES, Dec. 12, 1954; *New Galaxy of Hotels Rises in Hawaii*, N.Y. TIMES, June 12, 1955; Sanford Zalburg, *Rooms for Hawaii: Despite a Recent Decline in Tourism, the Long-Range View is Optimistic*, N.Y. TIMES, Apr. 13, 1958; *Hawaii Projects Gain: Developments to Include City Overlooking Pearl Harbor*, N.Y. TIMES, Jan. 9, 1961; *Hawaii Drafts 703 Million Plan of Development Over 20 Years*, N.Y. TIMES, Mar. 13, 1961 (noting that Gov. Quinn's development plan included "[t]he creation of a state zoning commission to designate major land-use areas and provide for the protection of land needed for industrial, agricultural, and tourist use"); *In 15 Years of Statehood, the Face of Hawaii Has Been Changed by the Jet Plane*, N.Y. TIMES, Nov. 16, 1974.

[271] Lawrence E. Davies, *Hawaii: Land of the Crane and Bulldozer—Building Boom will Double Hotel Rooms*, N.Y. TIMES, Nov. 4, 1969.

[272] Lawrence E. Davies, *Protests Mount on Hawaii "City": Henry J. Kaiser Project is Criticized for Delays*, N.Y. TIMES, June 16, 1963.

[273] *Hawaii Drafts 703 Million Plan of Development Over 20 Years*, N.Y. TIMES, Mar. 13, 1961. Interestingly, an inter-island ferry service did not materialize until 2007, but was quickly undermined by protests and legal action. Environmental and community groups succeeded, first, in stopping the ferry while an environmental impact report was prepared and, second, in obtaining a state supreme court

Hawaii's rapid growth, however, led to crowding in Honolulu, "creat[ing] one of the most expensive housing markets in the nation" by 1974.[274] As early as 1966, residents had begun to debate the seemingly contradictory paths of development and "prosperity" on the one hand and the maintenance of Hawaii as an idyllic "paradise" on the other, with concerns about population growth and the health of the agriculture industry looming in the background.[275] "Ardent conservationists insist[ed] that if something [wasn't] done to curtail or control development on the beaches and mountains, tourists [would] stop coming."[276] Planned development of the lower slopes of Diamond Head, opposed by the governor and members of the community, motivated the state to petition for the iconic crater's designation as a Registered National Landmark in 1968.[277] A small scandal erupted in 1971 when an activist sent to Hawaii by Ralph Nader to assist the University of Hawaii to "develop studies in pollution control and related fields" published and disseminated a brochure predicting that "an environmental disaster [would] engulf Hawaii and all of its people" if they did not repent their unsustainable ways.[278] But growth continued, and in 1979 the *New York Times* quipped that "[t]he building crane is known as

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ruling that a statute passed to keep the ferry running was unconstitutional. *Sierra Club v. Dept. of Transp.*, 202 P.3d 1226 (Haw. 2009).

[274] Wallace Turner, *In 15 Years of Statehood, the Face of Hawaii Has Been Changed by the Jet Plane*, N.Y. TIMES, Nov. 16, 1974.

[275] *Hawaii's Dilemma: Prosperity vs. Paradise*, N.Y. TIMES, Feb. 8, 1966.

[276] *Id.*

[277] William M. Blair, *Crater on Hawaii Now a Landmark: Step May Aid Those Against Building on Diamond Head*, N.Y. TIMES, Feb. 13, 1968.

[278] Wallace Turner, *Nader Aide's Pollution Data Stir Hawaii*, N.Y. TIMES, Apr. 6, 1971.

Hawaii's unofficial state bird."[279] Population growth, the transformation of former sugar and pineapple land into residential subdivisions, and the rise in housing costs had some "government officials and residents wonder[ing] whether the growth has been good and whether it should be curbed."[280]

The *Nukoli'i* decision and Hawaii's development agreement statute that sprang from it were thus shaped by an environment in which the aspirations of landowners and developers were already conflicting with not only those of government but also with elements of the community. In response to that tension, the Hawaii legislature had passed several measures to control and manage growth prior to *Nukoli'i*. A pioneer in land use regulation,[281] Hawaii adopted the nation's only state-wide, comprehensive land use law in 1961,[282] creating a classification system, administered by an appointed Land Use Commission (LUC), that overlays the zoning schemes of Hawaii's four counties.[283] Reclassification was made subject to LUC approval in a system designed "primarily to protect

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[279] *Doubts Grow Along with Hawaii's Rapid Growth*, N.Y. TIMES, Jan. 21, 1979.

[280] *Id.*

[281] The movement among some states, beginning with Hawaii, to regulate land use at the state level was dubbed "The Quiet Revolution in Land Use Control." FRED BOSSELMAN & DAVID L. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971). The "revolution" "'took back' some of the police power authority conferred upon local government to regulate the use of land." David L. Callies, *The Quiet Revolution Redux: How Selected Local Governments Have Fared*, 20 PACE ENVTL. L. REV. 277, 277 (2002).

[282] Now codified, as amended, at HAW. REV. STAT. §§ 205-1 to -52 (West, Westlaw through Act 329 of the 2012 Reg. Sess.).

[283] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 21.

agriculture lands, used primarily for large sugar and pineapple plantations, from urban sprawl."[284] As reported at the time,

> [t]he movement toward [state-level] regulation [was] the product of an intense, three-sided dispute involving apostles of development, crusaders for the environment, and individuals striving to reconcile the diverse interests at stake. . . . The crux of it is a transformation in the concept of land from that of a commodity, simply to be bought and sold, to that of a natural resource in which all citizens have a rightful interest.[285]

Although, as discussed above, the United States Supreme Court subsequently reaffirmed property rights, land use disputes in Hawaii continue to center around reclassification of agricultural for housing, resorts, and golf courses.

That curbing growth was high on Hawaii's political agenda was evident in administrative and legislative acts in the 1970s.[286] In 1973, the state legislature passed the Coastal Zone Management Act to restrict land use along the coast.[287] In 1976, the State Department of Transportation considered measures to limit the number of cars allowed on Hawaii's roads, but apparently gave up the idea in light of constitutional concerns.[288] In his 1977 State-of-the-State Address, then Governor George Ariyoshi highlighted "the problem of excessive population" as underlying the state's many problems:

> Too many people means too few jobs and too much competition for them; too many people means too little land for agriculture and parks and scenic vistas; too many people

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[284] David L. Callies, *The Quiet Revolution Redux*, *supra* note 282, at 279.

[285] Gladwin Hill, *Public Control Growing in a Land Use Revolution*, N.Y. TIMES, Sept. 3, 1973.

[286] Carl M. Selinger, Jon Van Dyke, Riki Amano, Ken Takenaka and Robert Young, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii*, 5 HASTINGS CONST. L.Q. 639, 639-40 (1978).

[287] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 209-34.

[288] Carl M. Selinger, et al., *Selected Constitutional Issues*, *supra* note 287, at 702-03.

> means too much crime and too much erosion of possibly our single most important commodity, the Aloha Spirit; too many people means too much pressure on all our governmental and private institutions. In short, too many people can spell disaster for this State. Hawaii is a national treasure, but it is a very fragile treasure, one which can be easily destroyed by over-population and excessive demands on its resources.

The governor called for "a Constitutional amendment permitting states to establish residency requirements for new arrivals for publicly supported programs such as welfare assistance, public employment and housing."[289] That year the legislature passed a one-year durational residency requirement for public employment, but it was repealed after Hawaii's federal district court enjoined the act.[290] Also in 1977, to protect agricultural land and limit growth, then Lt. Gov. Nelson Doi proposed amending Hawaii's constitution to "constitutionalize land use designations and require a public referendum to make any changes in classifications."[291] The measure never found traction, but the Malthusian worries of many in Hawaii were plainly evident.

In 1978, Hawaii was again a pioneer in enacting the nation's only statutory state plan.[292] Heralded as a reflection of the "values, goals, and aspirations of the people of the state" and a "basis for partnerships between citizens and their government,"[293] the plan established a multitude of factors and

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[289] State-of-the-State Address by Hon. George R. Ariyoshi, delivered before the Ninth State Legislature (Jan. 25, 1977), *quoted in* Carl M. Selinger, et al., *Selected Constitutional Issues*, *supra* note 287, at 641, 667.

[290] Carl M. Selinger, et al., *Selected Constitutional Issues*, *supra* note 287, at 642-45.

[291] *Id.* at 682-83.

[292] DAVID L. CALLIES, REGULATING PARADISE, *supra* note 2, at 33. The state plan is currently codified at HAW. REV. STAT. §§ 226-1 to -109 (West, Westlaw through Act 329 of the 2012 Reg. Sess.).

[293] Kent M. Keith, *The Hawaii State Plan Revisited*, *supra* note 270, at 32, 61.

interests to be weighed in "allocating limited resources, such as . . . land."[294] The state plan to this day reveals deep tensions between development to accommodate a growing population, especially the provision of affordable housing, and conservation of agricultural and other lands.

Mirroring the conflicted nature of the community, the plan provides little real guidance for decision-makers in resolving the issues resulting from Hawaii's island context. As Hawaii's director of planning and economic development admitted in 1985, "because the state plan and functional plans cover a broad variety of goals and objectives[,] . . . for every goal or objective which could be cited to support a government decision, another could be found which would appear to support the opposite or at least a different decision."[295] Plus, the state functional plans have not been updated for more than twenty years,[296] and the current State Plan anachronistically calls for measures to maintain the "economic viability of the sugar and pineapple industries,"[297] which have been a dead letter in Hawaii for at least a decade.[298] Although the State Plan in 1978 recognized the inevitability of population

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[294] HAW. REV. STAT. § 226-1.

[295] Kent M. Keith, *The Hawaii State Plan Revisited*, *supra* note 270, at 50.

[296] David L. Callies, *It All Began in Hawaii*, 45 J. MARSHALL L. REV. 317, 341 (2011-12).

[297] E.g., HAW. REV. STAT. § 226-103(c)(1); AGRICULTURAL FUNCTION PLAN, *supra* note 30, at II-1.

[298] David L. Callies, *The Quiet Revolution Redux*, *supra* note 282,at 280. The last sugar plantation on Oahu ceased operating in October 1996. Russ Lynch, *Waialua Closing the Book on Oahu's Sugar Industry*, HONOLULU STAR-BULLETIN, Oct. 2, 1996. Del Monte ended all pineapple operations on Oahu in 2006 after "more than 100 years of operations in Hawaii." Greg Wiles, *Del Monte Acreage Should 'Stay Ag Land'*, HONOLULU ADVERTISER, Nov. 21, 2006.

growth and increased urban land use, it also made clear that growth was intended to benefit "Hawaii's people,"[299] not outsiders.[300]

Given the promulgation of additional land use regulations in Hawaii since the late 1970s, resulting in the nation's most restrictive land use regime, it seems fair to say that anti-development views have predominated. Even pro-development authors have generally acknowledged that Hawaii is a special land use context due to its size, environment, economy, and history,[301] while they criticized the state's land use regime for requiring an increasingly long, expensive, and time-consuming entitlement process. One writer has spoken of "permit explosion"[302] and another of "a morass of regulatory requirements."[303] Developer costs and risks were rising, but under the decision in *Nukoli'i* there was no

[299] "Hawaii's people" is frequently juxtaposed with "visitor" in the plan. *E.g.*, HAW. REV. STAT. §§ 226-5(b)(1), (b)(3)-(4), 226-8(b)(2).

[300] E.g., HAW. REV. STAT. § 226-106(8) (directing state land use decision makers to "[g]ive higher priority to the provision of quality housing that is affordable for Hawaii's residents and less priority to development of housing intended primarily for individuals outside of Hawaii").

[301] Benjamin A. Kudo, *Nukoli'i: Private Development Rights and the Public Interest*, *supra* note 225, at 279; David L. Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, *supra* note 78, at 205, 208.

[302] David L. Callies, *Regulating Paradise: Is Land Use a Right or a Privilege?* 7 U. Haw. L. Rev. 13, 22-23 (1985).

[303] Benjamin A. Kudo, *Nukoli'i: Private Development Rights and the Public Interest*, *supra* note 225, at 281.

way to mitigate those risks.[304] And while the development community strongly supported the bill authorizing development agreements, the county governments were opposed.[305]

Noting that the decision in *Town v. Land Use Commission* (1974)[306] made all LUC boundary amendment decisions subject to judicial review, one commentator predicted an "increasing number of legal challenges to state and local land use decisions in the coming decade," particular vested rights suits by land owners and developers.[307] At the time, it was clear that "[h]ow the states deal with issues such as vested rights and land use controls may well decide the utility of—if not the necessity for—developers' agreements."[308] Ultimately, the question was, "[i]s the use of land in Hawaii a right or a privilege?"[309] As it happened, the forecast of increased land use litigation turned out to be prescient, but the majority of suits would be brought by special interest and community groups in opposition to development— not to protect land owners' rights—and the courts have tended to side against the developers.[310]

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[304] Dorothy Tom, *Development Rights in Hawaii*, 6 U. Haw. L. Rev.437, 478 (1984).

[305] Lyle S. Hosoda, *Development Agreement Legislation in Hawaii*, *supra* note 224, at 190; David L. Callies, *Regulating Paradise: Is Land Use a Right of a Privilege? supra* note 302, at 22-23.

[306] 524 P.2d 84 (1974).

[307] David L. Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, *supra* note 78, at 197-98, 208.

[308] David L. Callies, *Developers' Agreements and Planning Gain*, *supra* note 1, at 612.

[309] David L. Callies, *Regulating Paradise: Is Land Use a Right or a Privilege? supra* note 302, at 13.

[310] David L. Callies, et al., *The Moon Court, Land Use, and Property, supra* note 41, at 636.

Given the almost determinative impact of community voices on development, if developers in Hawaii want to reduce risks through early vesting via a development agreement, it might be useful for them to negotiate directly with local communities. One way to negotiate with the community is through a formal community benefits agreement (CBA).[311] A CBA is a contract between a developer and a community and resembles a development agreement (DA), except that in a CBA a developer obtains political support for a project in return for benefits to a particular neighborhood or area.[312] CBAs were first used by California, yet again a pioneer in land use law, in the late 1990s[313] and have since been employed in at least thirteen large metropolitan areas across the county, in states with and without DA

[311] The literature thus far on CBAs is limited and confined to a small groups of scholars. *See generally*, David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 URB. LAW. 657 (2007); Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 113 (2007-08); Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities and Community Organizations*, 26 U.C.L.A. J. ENVTL. L. & POL'Y 291 (2008); Patricia E. Salkin & Amy Lavine, *Understanding Commmunity Benefits Agreements: CBAs Have Both Opportunities and Traps for Developers, Municipalities, and Community Organizations*, 24/4 PRAC. REAL. EST. LAW 19 (2008); Steven P. Frank, *Yes in My Backyard: Developers, Government and Communities Working Together Through Development Agreements and Community Benefit Agreements*, 42 IND. L. REV. 227 (2009); Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, 18 J. L. & POL'Y 157 (2009); Thomas A. Musil, *The Sleeping Giant: Community Benefit Agreements and Urban Development*, 44 URB. LAW. 827 (2012).

[312] Patricia E. Salkin, et al., *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities, and Community Organizations*, *supra* note 311, at 324-25.

[313] Patricia E. Salkin, et al., *Community Benefits Agreements and Comprehensive Planning: Balancing Community Empowerment and the Police Power*, *supra* note 311, at 177.

enabling statutes.[314] Surprisingly, there have been few scholarly treatments of CBAs to date, and the results they report have been mixed.[315] Yet one recent study called CBAs a "sleeping giant" and "powerful tools"[316] and, taken together, the literature suggests that CBAs might be employed in Hawaii to encourage the use of DAs, as well as to reduce development costs that are ultimately passed on to consumers and more effectively tailor developer-provided benefits to actual community needs.[317]

Proponents of CBAs see them as a way to (1) make development decisions more democratic and increase accountability by including community voices often neglected; (2) include communities in the development process from an early stage; (3) supplement large-scale planning that may overlook the needs of particular neighborhoods; and (4) allow communities to obtain benefits often otherwise prohibited by law, such as affordable housing, a "living wage" for those employed on the project and who will work there when it is completed, a neutral policy on unions, preferences in hiring in favor of community members, assistance for local businesses, and recreational facilities. CBAs may also help to reduce NIMBY-ism ("not in my back yard").[318] But there are also a host of potential pitfalls: (1) CBAs can undermine planning due to their ad hoc, highly local nature; (2) determining who represents the

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[314] Patricia E. Salkin, et al., *Understanding Community Benefits Agreements: Equitable Development, Social Justice and Other Considerations for Developers, Municipalities, and Community Organizations*, *supra* note 311, at 317-19.

[315] E.g., Patricia E. Salkin, et al., *Negotiating for Social Justice and the Promise of Community Benefits Agreements*, *supra* note 311, at 114-129 (surveying 22 CBAs in California, New York, and six other states).

[316] Thomas A. Musil, *The Sleeping Giant*, *supra* note 311, at 828.

[317] *See, e g.*, Thomas A. Musil, *The Sleeping Giant*, *supra* note 311, at 832-33 (grouping into four categories the multitude of potential benefits which communities can negotiate for in a CBA).

[318] Steven P. Frank, *Yes in My Backyard*, *supra* note 311, at 248-49.

community could be contentious; (3) communities may not "have adequate leverage to obtain meaningful promises from a developer";[319] and (4) CBAs may be legally unenforceable or may be hard to monitor. CBAs have been most successful in California, which boasts the most CBAs of any state and allows CBAs to be incorporated into DAs, thus rendering them legally binding.[320]

While CBAs have generally been used as part of urban redevelopment projects, where gentrification may displace current, often minority residents and rouse significant opposition,[321] they could be effective in the Hawaii milieu of land reclassification, environmental concerns, and urban expansion. Generally, criticisms of CBAs do not hold much water in a Hawaii context. The influence and power of Hawaii's community and special interest groups is demonstrable through the pressure they have exerted in either stopping, delaying, or changing development projects, as well as their ability to fund expensive challenges before the LUC and courts. Unequal bargaining in favor of "sophisticated" developers is not a worry. CBAs might be seen as contrary to Hawaii's complex, multi-tiered state plan, but one could also argue that the land reclassification process administered by the LUC has broken down, to the extent that the LUC has not conducted regular five-year boundary reviews contemplated by statute,[322] and the systemic designation of "important agricultural lands" has not been completed under another statute passed in 2005.[323] Reclassification decisions are already being made on an ad hoc basis,

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[319] Patricia E. Salkin, et al., *Understanding Community Benefits Agreements*, *supra* note 311, at 321.

[320] *Id.* at 300-08.

[321] *Id.* at 398-99.

[322] HAW. REV. STAT. § 205-18 (West, Westlaw through Act 329 of the 2012 Reg. Sess.).

[323] HAW. REV. STAT. §§ 205-41 to -52 (West, Westlaw through Act 329 of the 2012 Reg. Sess.).

while the statutory state plan still prioritizes the moribund sugar and pineapple industries and offers inherently contradictory directives. According to one study, CBAs actually served to improve planning, because CBA campaigns resulted in local governments working more closely with communities in the planning process.[324]

With regard to community representation, Hawaii's otherwise politically impotent neighborhood boards might find a decision-making purpose, and at least some of the non-governmental organizations and community groups that usually resort to challenging development could be made stakeholders from the start, if the right benefits were on offer. In addition to affordable housing, "living wages," and agreements not to oppose unions as mentioned above, requirements to use renewable energy sources and offer special benefits to Native Hawaiians could also be attractive. In return, developers could require that any coalition of local organizations "agree[] not to institute legal action to block the development,"[325] an essential condition in a state where the majority of challenges to land use decisions are made by community and special interest groups, at great expense to developers and local government alike.[326] To the extent that those benefits are likely to be contractually enforceable if incorporated into a DA,[327] the introduction of CBAs may shift community support toward DAs and a

[324] Patricia E. Salkin & Amy Lavine, *Community Benefits Agreements and Comprehensive Planning, supra* note 311, at 214.

[325] Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements, supra* note 311, at 329.

[326] *Id.* at 296.

[327] *Id.* at 325-28.

more balanced form of community-managed development that lowers developer risk and allows developers to meet Hawaii's housing and other needs.

VIII. Conclusion

"The unique attribute of being an island state means that Hawaii is the nation's capital in endangered species; available land is sparse and prohibitively expensive; and most land uses are heavily regulated."[328] To ameliorate the special challenges Hawaii presents to developers, the state legislature passed the development agreement enabling act in 1985. And, in the abstract, development agreements still seem like a good idea today. If developers cannot or will not sue to protect their constitutional property rights in a state where, in the public discourse and the courts, the right to use land is treated more as privilege, CBAs could be one way to bring to the table those community and special interest groups who are the primary opponents of development. There is also evidence that the environmental movement that arose in the 1970s is beginning to find a confluence between effective conservation and property rights through the outright purchase of sensitive lands for private protection in perpetuity.[329] The effect of this confluence can be seen already in Hawaii[330] and may help to shift opinions in favor of measures, such as development agreements, that provide certainty and reduce costs for developers and consumers alike. In the end, however, it may simply be the fact that the average Hawaii resident is

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[328] Lisa A. Bail, et al., *Emerging Environmental and Land Use Issues*, 9 HAW. B.J. 4 (June 2005).

[329] Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 N.Y.U. J. L. & LIBERTY 987, 1019-20 (2005).

[330] Andrew Gomes, *A Boost for Hawaii Land Preservation*, HONOLULU ADVERTISER, Jan. 13, 2008; Michael Levine, *Kauai Council Approves Deal to Obtain Oceanfront Land*, HONOLULU ADVERTISER, Oct. 22, 2009.

increasingly unable to afford housing in his or her own state that will lead to public acceptance of urban expansion.

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