Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai‘i

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I. INTRODUCTION

The modern land regulation and development process—particularly in Hawai‘i where both the state and the local government may be involved in excruciating detail—is a complex, lengthy, expensive, and very often uncertain undertaking[1] for any property owner desiring to exercise the fundamental right to make reasonable use of its property.[2] The uncertainty is compounded by the ability of the government to change the regulations applicable to property after the owner has begun planning or building but has not completed construction. Operating within a system that is rightly or wrongly perceived as arbitrary or subject to change at whim or for political reasons only magnifies owner uncertainty and regulatory risk.[3] On the other hand, the

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[1] The Hawai‘i Legislature recognizes the complexities of the land use regulation and development process:

> The legislature finds that with land use laws taking on refinements *that make the development of land complex, time consuming, and requiring advance financial commitments, the development approval process involves the expenditure of considerable sums of money*. Generally speaking, the larger the project contemplated, the greater the expenses and the more time involved in complying with the conditions precedent to filing for a building permit.
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> The *lack of certainty in the development approval 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.

HAW. REV. STAT. § 46-121 (2003) (emphases added).

[2] The right to make reasonable use of property is a fundamental right. *See* Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one."). The right to develop land is inherent in ownership. Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625, 633 (1978).

[3] The "arrow of time" in this Article's title refers to reconciliation of the theory in quantum mechanics about time having no direction—and thus no meaning—with the human perception that the arrow of time moves forward. *See* ILYA PRIGOGINE, THE END OF CERTAINTY: TIME,

government understandably seeks to retain maximum flexibility in the application of its police power and have the ability to respond to changing situations by amending land use regulations.

Attempting to balance these competing interests, the courts have responded by creating the doctrines of vested rights and zoning estoppel. These closely-related principles permit the government to retain flexibility in land use planning only if a property owner has not proceeded sufficiently along the development path that it would be unconstitutional or unfair to prevent it from completion. These often judicially overlapped doctrines have roots in constitutional law,[4] the law of variances and non-conforming uses, and equitable principles of detrimental reliance.

Once an owner's rights have "vested," the owner possesses development rights,[5] and these development rights are property rights that "cannot be taken away by government regulation."[6] If the government is estopped, it is prevented from applying any future incompatible, albeit legal, regulations to the property. Vested rights and zoning estoppel thus counterbalance the government's unfettered ability to use its police power to regulate land uses, providing some insulation of the land development process from shifting political winds.[7]

Vested rights and zoning estoppel arise in several situations, the most common being when the government issues a permit, but later takes some action to affirmatively revoke, rescind, or invalidate it.[8] Or when the

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CHAOS, AND THE NEW LAWS OF NATURE (1997). A physicist of the Brussels School probably would not care for the vested rights and zoning estoppel doctrines as they are but one of the law's attempts to wrest order from chaos and insure a level of certainty in future events. We suppose predictability and repose only have meaning if the future and past exist but that weighty question is well beyond the scope of this Article.

[4] The Due Process, Takings, and Ex Post Facto Clauses, for example, which prohibit arbitrary, standardless, uncompensated, and retroactive laws, respectively.

[5] "Use of the term 'vested right' refers, of course, to a *right* to develop land; the characterization of a right as *vested* usually means that it is secure, recognized, or presently existing." Cunningham & Kremer, *supra* note 2, at 629.

[6] David Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 64-5.

[7] *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1569-70 (2003) (Constitutional limitations on the ability to impact property "anticipates the danger that a local majority might co-opt the legislature and persuade it to seize the property of a minority without paying compensation."); *see*, *e.g.*, Allen v. City & County of Honolulu, 58 Haw. 432, 434 n.1, 571 P.2d 328, 329 n.1 (1977) (ordinance to change zoning was "in response to political pressure." (quoting Trial Court's Finding of Fact No. 8)).

[8] *See*, *e.g.*, Alderman v. Stevens, 189 So. 2d 168 (Fla. Dist. Ct. App. 1966) (attempt to "cancel" permit). In that case, the property owner wanted to build a garage and playhouse and telephoned the city building inspector who approved with no setback. *Id.* at 169. After the owner began working, the building inspector apparently had a change of heart and informed him

government, instead of revoking approvals, creates new regulations or amends existing regulations rendering the prior approvals ineffective,[9] or some combination of the above.[10] And while development agreements are available to some degree to anticipate and prevent vested rights and zoning estoppel litigation in those Hawai'i counties that have enacted development agreement ordinances, an understanding of these doctrines is necessary in order to understand development agreements and their limitations, and for the property owner and government in the City and County of Honolulu to determine when development approvals become immune from revocation or alteration.[11] The development agreement statute also incorporates by reference the rules of vested rights, so an understanding of the doctrines is necessary to understanding the proper scope of development agreements.[12]

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that a 15 foot setback was required. *Id.* When the owner appealed to the board of adjustment, the city claimed a 25 foot setback was mandated by law. *Id.* Ultimately, after an appeal, the board of adjustment informed the property owner that if he could get a permit with a 15 foot setback, the board would take no action (meaning the board would recognize an exemption). *Id.* at 170. The owner obtained such a permit. But one month later the board cancelled the permit, presumably because of insufficient setback. *Id.* at 169. However, the building inspector admitted that he had permitted at least four other owners to proceed with setbacks similar to Mr. Stevens, who believed the board when it told him it would take no action if he obtained a 15 foot setback building permit. *Id.* at 170. The court held that the building permit could not be revoked since it was validly issued, and the owner had every reason to believe it was valid. *Id.* *See also* O'Laughlin v. City of Chicago, 357 N.E.2d 472, 473 (Ill. 1976) (city revoked building permits for cause after mistakenly issuing them); Crow v. Bd. of Adjustment of Iowa City, 288 N.W. 145 (Iowa 1939) (city's attempt to "cancel" and "revoke" building permit rejected).

[9] *See*, *e.g.*, Denning v. County of Maui, 52 Haw. 653, 485 P.2d 1048 (1971) (after preliminary approval but before construction, government lowered height limit). For a more recent example, *see Maunalua Associates v. City & County of Honolulu*, No. 89-3539-11SSM (Haw. Cir. Ct. filed Nov. 14, 1989), in which the Honolulu City Council issued a Special Management Area Permit (SMP) to the developer for property zoned "Residential," giving its final permission to build a residential housing project, but after public pressure, downzoned the property to "Preservation." *Id.* Honolulu did not have a process for revoking SMP's, so the Council amended the underlying zoning in an attempt to render the SMP valueless. *Id.*

[10] *See*, *e.g.*, Transland Props., Inc. v. Bd. of Adjustment, 198 S.E.2d 1 (N.C. Ct. App. 1973) (after owner had started actual construction of a condominium, the government changed the regulations to prohibit condominiums, and revoked previously issued building permits).

[11] Of Hawai'i's four counties, only three—Maui, Kauai, and Hawai'i—have enacted development agreement ordinances pursuant to the enabling legislation, Hawai'i Revised Statutes section 46-123. The City and County of Honolulu, however, has not done so and development agreements are not an available tool to the government or developers on Oahu.

[12] The statute provides that entering into a valid development agreement will give rise to "vested property rights," but does not define those rights:

> Development agreements will *encourage the vesting of property rights* by protecting such rights from the effect of subsequently enacted county legislation which may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project. Development agreements are intended to provide

This Article explains the doctrinal differences between vested rights and zoning estoppel in Part II. Part III discusses the application of the doctrines in other jurisdictions and the potential choices the Hawai'i Supreme Court had before it when it first formulated its own rules, while Part IV details the development of the doctrines by the Hawai'i courts. Part V discusses the application of vested rights and zoning estoppel in Hawai'i land use litigation. Part VI discusses remedies, and Part VII analyzes alternatives to vested rights and zoning estoppel litigation such as development agreements, land swaps, and transferred development rights.

II. THE DISTINCTION BETWEEN VESTED RIGHTS AND ZONING ESTOPPEL

Although usually treated by courts and many commentators as interchangeable,[13] the theories of vested rights and zoning estoppel are doctrinally distinct.

A. Common Theoretical Underpinnings

As a general rule, the government is free to enact prospective regulations—including those that impact property uses—and change the rules regulating uses of those interests, but no law may have retrospective operation unless expressly stated or obviously intended.[14] This proscription, however, begs the questions: can the government simply declare a regulation prohibits or modifies that which had previously been permissible? May the government revoke a granted permit, or change its interpretation or application of the law

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> a reasonable certainty as to the lawful requirements that must be met in protecting *vested property rights*, while maintaining the authority and duty of government to enact and enforce laws which promote the public safety, health, and general welfare of the citizens of our State.

HAW. REV. STAT. § 46-121 (2003) (emphases added). The Hawai'i Supreme Court in *County of Kauai v. Pacific Standard Life Insurance Co.* (hereinafter *Nukolii*, named for the location of the land at issue), noted that the Kauai County Charter also used the term "vested rights," but did not define it; the court defined the term under the common law principles of "zoning estoppel," 65 Haw. 318, 325-26, 653 P.2d 766, 773 (1982).

[13] *See* Shea Homes Ltd. P'ship v. County of Alameda, 2 Cal. Rptr. 3d 739, 758 (Cal. Ct. App. 2003) ("Estoppel and vested rights claims are essentially synonymous in land use issues. . . ."). *See also* Robert M. Rhodes & Cathy M. Sellers, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 20 STETSON L. REV. 475, 476 (1991) ("Although the doctrines of equitable estoppel and vested rights arise from distinct theoretical bases, Florida courts have employed these concepts interchangeably."); Cunningham & Kremer, *supra* note 2, at 648 ("A majority of courts presume that the rationale underlying the vested rights doctrine is found in the concept of equitable estoppel.").

[14] HAW. REV. STAT. § 1-3 (2003) ("No law has any retrospective operation, unless otherwise expressed or obviously intended.").

and apply that interpretation to disapprove that which it previously approved? With respect to land use, hornbook law allowed the government to change its mind without consequence unless the development had been completed: "[P]ermits for buildings and businesses are not per se protected against revocation in effect by subsequent enactment or amendment of zoning laws prohibiting the building, business or use for which they have been issued."[15] The government could simply legislate permitted uses out of existence. Under this rule the property owner would absorb all of the regulatory risk: development would always be subject to the possibility of intervening incompatible regulation or revocation of government approvals, until the last nail was driven.

Because it would be both unfair and unconstitutional to allow the government to simply decree rights out of existence, particularly when dealing with real property, the power was limited when applied to preexisting uses or structures. Thus, most zoning codes contain provisions mandating the continuation of non-conforming or preexisting structures or uses, also known as "grandfathering."[16] By the same token, broad-based zoning code amendments often expressly disclaim any retroactive effect so as not to impact projects or buildings that are under construction but not complete at the time of enactment.[17] In sum, all works well when the government can be trusted to rein in the reach of its regulations and actions.

When it cannot, the Constitution and equity limit the power of government to change the ground rules without due process and without compensation, or when to do so would be fundamentally unfair to the property owner. For example, what if the owner has not yet completed construction, and what about those unfortunate property owners who have been intentionally and actively targeted—by either the government or the public (which are frequently one-in-the-same)—through an effort to prevent a planned project that was completely legal at the outset and may have even received necessary government approvals? In those circumstances, the courts have recognized two related doctrines—vested rights and zoning estoppel—to protect the rights of the minority from the excesses of the majority.[18]

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[15] *Nukolii*, 65 Haw. at 326-27, 653 P.2d at 773 (quoting 8 EUGENE MCQUILLIAN, THE LAW OF MUNICIPAL CORPORATIONS § 25.156, at 459 (3d ed. 1976)).

[16] *See* Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals, 86 Hawai'i 343, 354, 949 P.2d 183, 194 (Haw. Ct. App. 1997) (grandfather provisions in zoning act and land use ordinance prohibit new ordinances from interfering with owner's lawful uses).

[17] *See*, *e.g.*, Protect Ala Wai Skyline v. Land Use & Controls Comm., 6 Haw. App. 540, 548-49, 735 P.2d 950, 955-56 (1987) (the General Plan is prospective in nature and only applies to changes in use or zoning proposed after its adoption), *overruled in part on other grounds by* GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998).

[18] *See*, *e.g.*, Denning v. County of Maui, 52 Haw. 653, 656-57, 485 P.2d 1048, 1050 (1971) (ordinance enacted without grandfather provision); Ralph D. Rinaldi, Comment, *Virginia's Vested Property Rights Rule: Legal and Economic Considerations*, 2 GEO. MASON L. REV. 77,

B. Vested Rights—Constitutional Property Rights

Vested rights analysis focuses on whether an owner has made irrevocable commitments which create a property right deserving constitutional protection.[19] In other words, whether the owner possesses constitutional "property rights which cannot be taken away by government regulation."[20] The vested rights analysis turns on whether the property owner has gone so far down the development path that the government cannot change the law or its interpretation or application of the law.[21] The key question as posed by the United States Supreme Court regarding the due process context in *Board of Regents v. Roth*,[22] is whether the owner has "a legitimate claim of entitlement"[23] to the right to continue. As *Roth* also held, this question is a matter for the states to decide.[24]

Property rights are not created by the state, and the reasonable use of property is a fundamental human right, one of the trinity of rights acknowledged in both the Fifth and Fourteenth Amendments, on par with life and liberty.[25] Consequently, the states do not have a completely free hand in regulating and defining property rights, as their own constitutions and the United States Constitution place limits on their ability to simply wipe out settled and long-standing expectations without due process and by taking and paying for them.[26] This is the wellspring of the vested rights doctrine, and a

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78 (1994) (vested rights issues arise when government does not put a "grandfather" provision in new regulations to protect completed or ongoing developments).

[19] *Nukolii*, 65 Haw. at 336-39, 653 P.2d at 779-81.

[20] *Id.* at 325, 653 P.2d at 772 (quoting Allen v. City & County of Honolulu, 58 Haw. 432, 435, 571 P.2d 328, 329 (1977)); *see also* Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 518 (Iowa 1980) (vested rights are "property right[s] which cannot be arbitrarily interfered with or taken away without compensation").

[21] *Nukolii*, 65 Haw. at 338, 653 P.2d at 780.

[22] 408 U.S. 564 (1972).

[23] *Id.* at 577.

[24] *Id.* "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

[25] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. The constitutional acknowledgment and protection of property stems from the natural rights philosophy of John Locke, which asserts that property rights predate government and thus cannot be subject to absolute state control. *See* James S. Burling, *Private Property Rights and the Environment after* Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1, 2-5 (2002) (the Supreme Court firmly embraced the Lockean view of property in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)).

[26] *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (the state may not, "by *ipse dixit* . . . transform private property into public property without compensation"); Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (the government cannot defeat property rights and permit a taking simply by declaring that the

majority of jurisdictions, Hawai'i included, hold that vested rights are property rights for purposes of the federal and state constitutions.[27] The owner of the right has a right to procedural due process,[28] substantive due process,[29] and is protected from a taking without just compensation.[30] These property rights are not limited to real property, and include development and permit rights, so just compensation in this context must include fair market value of the property in its fully entitled state.[31]

C. Estoppel—Equity and Reliance

Equitable estoppel in the land use context is known as "zoning estoppel," and shifts the focus from the owner's irrevocable commitments to the government's process and whether it would be unfair to permit the government to

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property never existed at all); *Palazzolo*, 533 U.S. at 627 (2001) (the state cannot simply wipe out property rights by prospective legislation); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029-30 (1992) (regulation destroying all value of property is a taking unless it codifies common law nuisance).

[27] *See* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URBAN & CONTEMP. L. 27 (1996) (listing decisions treating vested rights as constitutionally-protected property rights).

[28] Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals, 86 Hawai'i 343, 353-54, 949 P.2d 183, 193-94 (Haw. Ct. App. 1997) ("[D]ue process principles protect a property owner from having his or her vested property rights interfered with . . . and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate.") (citations omitted); *see also* Brown v. Thompson, 91 Hawai'i 1, 11, 979 P.2d 586, 596 (1999) (boat mooring and live-aboard permits are property and may not be revoked without due process).

[29] Town of Orangetown v. Magee, 665 N.E.2d 1061, 1065 (N.Y. 1996) (downzoning in violation of vested rights was also arbitrary and capricious and violated substantive due process).

[30] Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) ("While the consent of individual officials representing the United States cannot 'estop' the United States, it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.") (citations omitted); *see also* Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 152 (Cal. Dist. Ct. App. 1948) (once a property right is vested, the "permit cannot be revoked"). *See generally* Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 237-38 (1995) ("A landowner's expectations are investment-backed and reasonable when he substantially proceeds in good faith after government approval of his development.").

[31] *See Kaiser Aetna*, 444 U.S. at 178 ("economic advantage" that has "the law back of it" cannot be interfered with without exercising eminent domain); Order Granting Summary Judgment, Maunalua Assocs. v. City & County of Honolulu, No. 89-3539-119SSM (Haw. Cir. Ct. filed Nov. 14, 1989) (noting that just compensation and damages owed for taking land and permit) (copy on file with authors).

exercise its regulatory power to change regulation after its act or omission has induced a property owner to alter its position in reliance.[32] In *Life of the Land, Inc. v. City Council of the City and County of Honolulu*,[33] the Hawai'i Supreme Court described the general rule of zoning estoppel, focusing on expenditures made in reliance on "*official assurance*" that a proposed use can proceed.[34] The court adopted the most common formulation of zoning estoppel:

> A local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith (2) upon some act or omission of the government (3) had made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly has acquired.[35]

As the court explained in *Nukolii*, the initial zoning estoppel inquiry is whether the government has given official assurance to the developer that the proposed project may proceed, and whether the owner relied on the official assurance to its detriment.[36] Thus, the policy underlying zoning estoppel is two-fold: hold the government to its commitments, and treat property owners who rely fairly.

Although the vested rights and zoning estoppel doctrines are different and have significantly different theoretical underpinnings—the Constitution and common law on one hand, and equity on the other—many courts, including the Hawai'i Supreme Court, have collapsed the two approaches into one, rationalizing that the two analyses rarely produce a different result.[37] This gross oversimplification can be traced originally to a journal article which explained:

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[32] County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 325, 653 P.2d 766, 772 (1982) [hereinafter *Nukolii*]. For a recent formulation of the zoning estoppel doctrine, *see Shea Homes, Ltd. P'ship v. County of Alameda*, 2 Cal. Rptr. 3d 739, 758 (Cal. Ct. App. 2003):

> In the context of land use, the principle of estoppel prohibits a governmental entity from exercising its regulatory power to prohibit a proposed land use when a developer has incurred substantial expense in reasonable and good faith reliance on some governmental act or omission so that it would be highly inequitable to deprive him of the right to complete the development as proposed.

Id. (citing Toigo v. Town of Ross, 82 Cal. Rptr. 2d 649, 656 (Cal. Ct. App. 1998)).

[33] 61 Haw. 390, 606 P.2d 866 (1980).

[34] *Id.* at 453, 606 P.2d at 902 (emphasis added).

[35] Heeter, *supra* note 6, at 66. *See generally* David Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAW. L. REV. 167, 174 (1979).

[36] *Nukolii*, 65 Haw. at 327-28, 653 P.2d at 774-75.

[37] Allen v. City & County of Honolulu, 58 Haw. 432, 435, 571 P.2d 328, 329 (1977) ("Though theoretically distinct, courts across the country seem to reach the same results when applying these defenses to identical factual situations.").

> The defense of estoppel is derived from equity, but the defense of vested rights reflects principles of common and constitutional law. Similarly their elements are different. Estoppel focuses on whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by governmental regulation. Nevertheless, the courts seem to reach the same results when applying these defenses to identical factual situations.[38]

Even though the judicial analyses to determine whether an owner has a "legitimate claim of entitlement" for vesting purposes, and whether the government has given "official assurance" for zoning estoppel are often the same, the doctrines should be kept separate. In a vested rights determination the focus is on the property owner's expectations and fundamental rights, while in analyzing zoning estoppel the focus is on the government's process and whether it induced the owner's reliance.

III. Other Jurisdictions' Approach to the Trigger to Vested Rights and Zoning Estoppel

Because state law defines property rights, each jurisdiction to consider vested rights and equitable estoppel has been free to develop its own rules, either by statute or decisional law, and the courts have approached the doctrines in a variety of ways.[39]

While the results differ under the various approaches, the key elements remain roughly similar: rights will vest and the government will be estopped when a property owner substantially changes position in reliance on some government act or omission. The key difference is in timing—what government action in the development approval process gives a property owner the green light.

A. The Building Permit Rule

A number of jurisdictions determine that property rights vest very late in the development process. This rule, epitomized by the California case *Avco Community Developers, Inc. v. South Coastal Regional Commission*,[40] finds vesting when the government issues a building permit and the developer

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[38] *Id.* (quoting Heeter, *supra* note 6, at 64-65).

[39] *See generally* Lynn Ackerman, Comment, *Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations*, 36 EMORY L. J. 1219, 1235-73 (1987) (surveying different jurisdictions' approaches to vested rights and zoning estoppel).

[40] 553 P.2d 546 (Cal. 1976).

begins "substantial work."[41] The developer remains at risk until construction is well under way. Despite the obvious unfairness to property owners, *Avco* created a very bright line rule and reasoned that to allow vesting prior to building permit issuance and substantial work would unreasonably tie the hands of government regulators and would permit property owners to lock in regulations and not be in any hurry to complete development resulting in vested property lying undeveloped and subject to outdated regulations.[42]

While it does provide for certainty, the building permit rule has been widely criticized, even by courts that apply it, because it provides for certainty too late in the process, does not forestall litigation, and maximizes the owner's exposure to regulatory risk.[43]

B. The Early Vesting Rules

Other states are not as limited as building permit jurisdictions and follow the modern trend of providing for vested rights at earlier stages in the development process. For example, Virginia's rule triggers vested rights early in the development process after the owner relies on any governmental site-specific approval, such as a preliminary plan or subdivision approval.[44] The

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[41] *Id.* at 550. New York and Maryland follow the building permit rule. Thirty other states have also adopted the rule without substantial modification. *See, e.g.*, Prince George's County v. Sunrise Dev. Ltd. P'ship, 623 A.2d 1296 (Md. 1993).

[42] Avco spent at least $2 million dollars but had not obtained its building permit or begun substantial construction, so its rights to develop did not vest. *Avco*, 553 P.2d at 549.

[43] *See, e.g.*, Leroy Land Dev. Corp. v. Tahoe Reg'l Planning Agency, 543 F. Supp. 277, 281 (D. Nev. 1982):

> The Court had some difficulty ascribing much significant or magical to the ministerial act of issuing a building permit mandated by prior discretionary approval of governmental agencies. Nevertheless, even though the final discretionary approval test might provide a fairer and more logical basis to determine vested rights, it is not the law. This Court is not free to choose what it might believe to be the better test.

Id. at 282. The Hawai'i Supreme Court rejected *Avco* as "harsh." County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 338, 653 P.2d 766, 780 (1982) [hereinafter *Nukolii*]. For a summary of judicial and scholarly criticisms to all of the various vesting rules, *see* Karen L. Crocker, *Vested Rights and Zoning: Avoiding All-or-Nothing Results*, 43 B.C. L. REV. 935, 954-58 (2002); *see also* Cunningham & Kremer, *supra* note 2, at 626-27 (building permit rule does not recognize modern practice since it developed in an era of "small-scale land development projects which take only a few months to construct and are proposed by individual entrepreneurs"); *and* John J. Delaney & William Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U. L.J. 219, 241-48 (1979) (building permit rule is harsh).

[44] *See generally* Bd. of Supervisors of Fairfax County v. Med. Structures, Inc., 192 S.E.2d 799 (Va. 1972) (a special use permit triggers vested rights); Bd. of Supervisors of Fairfax County v. Cities Serv. Oil Co., 193 S.E.2d 1 (Va. 1972) (a special use permit triggers vested rights). Virginia subsequently clarified the rule and held that a vested right arises upon issuance

Virginia rule also requires good faith reliance and a substantial change in position by the property owner.[45] Other jurisdictions hold that property rights vest even earlier on the filing of a subdivision application.[46] These early vesting rules are more sound than the building permit rule, and are more consistent with modern, large-scale and long term development projects. The rise of development agreement and vesting statutes are legislative recognition that the late vesting rules have not lived up to their billing of providing certainty.[47]

IV. DEVELOPMENT OF THE DOCTRINES IN HAWAIʻI

Instead of choosing one of these vested rights and zoning estoppel models, Hawaiʻi courts charted their own path, selecting the trigger to vesting as official assurances of some form based upon the land use regulation scheme applicable to the land at issue.[48] The Hawaiʻi Supreme Court characterized its rule as "the midpoint in a wide spectrum of possibilities represented by the decisions of other jurisdictions."[49] While it may not be squarely center, the court's rule does take into account the special nature of development in Hawaiʻi, where, depending on the location of the property, differing regula-

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of any government permit, or approval of a site plan. *See* Town of Stephens City v. Russell, 399 S.E.2d 814 (Va. 1991) (the owner did not have a vested right because it had not obtained any site-specific permit or approval). Prior to these cases, Virginia had followed the late vesting "building permit" rule of *Avco*.

[45] Rinaldi, *supra* note 18, at 82. This is an odd result given that Virginia explicitly rejects zoning estoppel, reasoning that the government is not subject to estoppel when discharging its governmental functions. *See* Notestein v. Bd. of Supervisors of Appomattox County, 393 S.E.2d 205, 208 (Va. 1990). Property rights should not be dependent on quasi-estoppel elements such as "reliance" and especially "good faith," since constitutional rights do not derive from equity. Some commentators have suggested that good faith inquiries have no place in vested rights analysis which is founded in common and constitutional law of property. *See* DAVID L. CALLIES, DANIEL J. CURTIN & JULIE A. TAPPENDORF, BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES 129-130 & n.756 (2003) (citing Morgan R. Bentley, *Effects of Equitable Estoppel and Substantial Deviations to Vested Rights in DRI Projects: A New Approach*, 43 FLA. L. REV. 767, 774 (1991) (analyzing the differences between vested rights and estoppel and arguing that equity principles are not applicable to vesting questions)).

[46] *See*, *e.g.*, Smith v. Winhall Planning Comm'n, 436 A.2d 760 (Vt. 1981).

[47] California has effectively supplanted *Avco*'s "building permit rule" for vesting by permitting development agreements pursuant to statute. *See* CAL. GOV'T CODE § 65865.2 (West 2003) (providing for development agreements); *see id.* § 66498.1-3 (providing for "vesting tentative maps"). In the absence of a development agreement, however, the building permit rule still applies. *See*, *e.g.*, Toigo v. Town of Ross, 82 Cal. Rptr. 2d 649 (Cal. Ct. App. 1998).

[48] *See Nukolii*, 65 Haw. at 329-32, 653 P.2d at 775-76.

[49] *Id.* at 329 n.8, 653 P.2d at 774 n.8.

tory schemes may be applicable, each with unique requirements.[50] Thus, the determination of vested rights or zoning estoppel is dependent on the specific set of regulations applicable to a particular piece of property, and one rule is not applicable to every conceivable situation, or every parcel developed. The *Nukolii* case is the most well-known and the latest Hawai‘i appellate decision dealing with vested rights and zoning estoppel, but it was not the first, nor is it the only precedent to examine when undertaking an analysis.[51] To understand vested rights and zoning estoppel rules it is necessary to examine cases beyond *Nukolii* which remain essential elements in the Hawai‘i vested rights and zoning estoppel canon.

A. Denning—*"Assurances of Some Form" as the Zoning Estoppel Trigger*

The Hawai‘i Supreme Court's first pass at zoning estoppel came in *Denning v. County of Maui*.[52] Denning purchased a parcel zoned "Hotel," a classification which permitted construction of a twelve story structure. He submitted plans for an eight story building to the planning director and received preliminary approval.[53] However, before construction commenced, the zoning was changed to allow only six-stories; Denning submitted revised plans for a six-story structure and again received preliminary approval.[54] However, the County again downzoned the parcel, this time limiting height to only two stories.[55] The planning director informed Denning that the new ordinance would be applied to the project and no building permit would be issued for any structure exceeding this new, lower height limit, but by that time Denning had spent $38,000 for architectural, advertising and legal fees on the project.[56]

Denning sought a determination by the Maui Board of Adjustment and Appeals (BAA) that the new ordinance did not apply to the property and

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[50] But "official assurance" may not be the "midpoint." By choosing to base vested rights and zoning estoppel on "official assurances," the Hawai‘i Supreme Court was choosing a point fairly early in the development process, more towards the early vested rights jurisdictions, and nowhere near the extremes of the building permit jurisdictions, which it criticized as "harsh." *Id.* at 338, 653 P.2d at 780.

[51] Lyle S. Hosoda, Comment, *Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U. HAW. L. REV. 173, 174 n.3 (1985) ("The *Nukolii* decision was not the Hawaii Supreme Court's first attempt to resolve the issue of vested rights. Rather, *Nukolii* was the impetus which carried the development community over the boiling point in terms of waiting for the courts to resolve the problem.").

[52] 52 Haw. 653, 485 P.2d 1048 (1971).

[53] *Id.* at 655, 485 P.2d at 1049.

[54] *Id.* at 656, 485 P.2d at 1050.

[55] *Id.* at 656-57, 485 P.2d at 1050.

[56] *Id.* at 657, 485 P.2d at 1050.

Denning could proceed with his six-story project.[57] The BAA refused to act, asserting it had no power to permit Denning to continue as it was obligated to apply the current zoning.[58] The trial court issued a writ of mandamus directing the BAA to hear Denning's case.[59]

On appeal, the Hawai'i Supreme Court concluded that the BAA lacked jurisdiction over the controversy, because it was bound to apply the existing law.[60] However, the court remanded the case to the trial court for a further determination, setting forth the test for zoning estoppel:

> [W]e are of the opinion that for Denning to be allowed the right to proceed in constructing the planned structure the facts must show that Denning had been given *assurances of some form* by [the County] that Denning's proposed construction met zoning requirements. And that Denning had a right to rely on such assurances thereby equitably estopping [the County] from enforcing the terms of [the new zoning ordinance].[61]

The court observed the "[m]ere good faith expectancy that a permit will issue does not create in a property owner a right to continue proposed construction" but that the property owner needed "assurances of some form."[62] The court remanded the case to the trial court to determine whether Denning had been given assurances and whether he had a right to rely.[63] The court left unanswered the question of when a property owner "had a right to rely."[64]

B. Waianae Model—*Government Good Faith Begets Justifiable Reliance*

Two years later, the court decided *Waianae Model Neighborhood Area Ass'n v. City and County of Honolulu*,[65] answering the question left open in *Denning*. In that case, the City and County of Honolulu enacted the Comprehensive Zoning Code (CZC), which would have prevented the owner's proposed apartment/hotel development in rural Oahu.[66] The CZC contained a grandfather provision for building permit applications submitted prior to its effective date.[67] A planning department official charged with reviewing the

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57 *Id.*
58 *Id.*
59 *Id.*
60 *Id.* at 657-58, 485 P.2d at 1050-51.
61 *Id.* at 658-59, 485 P.2d at 1051 (emphasis added).
62 *Id.*
63 *Id.*
64 *Id.* at 659, 485 P.2d at 1051.
65 55 Haw. 40, 514 P.2d 861 (1973).
66 *Id.* at 40, 514 P.2d at 862.
67 *Id.* at 42, 514 P.2d at 862.

proposed plans granted the developer's request for an extension of time not explicitly permitted by the CZC to submit revisions to his application.[68]

The developer complied, and was issued a building permit.[69] Neighbors filed suit against the City seeking to invalidate the permit since the application revisions were untimely filed, claiming the planning department official had no authority to extend the application deadline.[70]

The Hawai'i Supreme Court held that the authority of the planning official granting the extension was "at least debatable," and although the CZC did not explicitly allow for extensions of time, neither did it specifically prohibit it.[71] The actual good faith of the official was not disputed, nor did the court examine whether the planning department official was correct when he allowed the extension.[72] The court held:

> [A]n act of an administrative official which is without any semblance of compliance with or authorization in an ordinance, is beyond his competence and is utterly void; but if an act of such official, done in good faith and *within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance*, is no more than an irregularity, and the validity of such act may not be questioned after expenditures have been made and contractual obligations have been incurred in reliance thereon in good faith.[73]

In other words, government good faith action leads to justifiable reliance by the property owner. Because the extension of time was within the official's ambit of authority, the property owner was entitled to rely on the official's action, even if wrong.

The developer had incurred unrecoverable expenses in reliance and the court affirmed summary judgment in favor of the City and against the third-

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68 *Id.* at 43, 514 P.2d at 863.

69 *Id.* at 42, 514 P.2d at 863.

70 *Id.* Contrast this with the situation where the government issues a permit in compliance with existing policy, but then subsequently changes its policy and attempts to revoke the permit. This is not an error of law or a "mistake," but rather is a change of policy. *See, e.g.*, Aranosian Oil Co. v. City of Portsmouth, 612 A.2d 357 (N.H. 1992), where the court held that the government could not revoke a building permit claiming "mistake" in its issuance. *Id.* at 359. In that case, the property owner sought and obtained a building permit to convert his gas station service bay into a convenience store. *Id.* at 357. After the owner completed the work, the city shut him down claiming that the permit had been issued in error because the government had not realized the service bays would be abandoned in favor of retail sales. *Id.* at 358. The court rejected the city's attempt to revoke because the property owner's permit application did not hide his plans, and the permit itself properly described the elimination of the service bays. *Id.* at 358-59.

71 *Waianae Model*, 55 Haw. at 45, 514 P.2d at 864.

72 *Id.* at 45, 514 P.2d at 865.

73 *Id.* at 44, 514 P.2d at 864 (emphasis added) (citing Schultze v. Wilson, 148 A.2d 852 (N.J. Super. Ct. App. Div. 1959)).

party objectors.[74] *Waianae Model* is in accord with cases from other jurisdictions that hold that reliance on an erroneously issued permit is reasonable if the property owner had no reason to know that the permit was erroneously issued or reliance was induced by the conduct of the government officer.[75]

C. Allen *and* First English—*Builder's and Compensation Remedies*

Four years later, the Hawai'i Supreme Court decided *Allen v. City and County of Honolulu*.[76] In *Allen*, the landowner purchased an oceanfront parcel zoned "Apartment," which permitted up to a 350-foot tall building. The landowner submitted a building permit application for an eleven story structure in conformity with the zoning, and several City departments preliminarily approved the plans.[77] The property owner spent over $77,000 in non-recoverable expenses.[78] Before issuance of the building permit, however, and in response to pressure by neighborhood residents, the City downzoned the property from "Apartment" to "Residential," a classification that did not allow the proposed structure.[79] Upon enactment of the downzoning ordinance, the property owner withdrew its building permit application and plans and sued the City for damages to recover the money spent.[80] The trial court held that the property owner incurred expenses in reliance on the Apartment zoning on the reasonable probability that a building permit would be issued, and because the owner had a right to rely on the zoning requirements, the City was liable to pay damages.[81]

The Hawai'i Supreme Court first noted the claim for damages was based on both a vested rights and a zoning estoppel theory, but immediately discarded

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[74] Note in this case the government sided with the developer and defended its actions against a third-party attack.

[75] *See* Waste Recovery Enter., LLC v. Town of Unadilla, 294 A.D.2d 766 (N.Y. App. Div. 2002); Town of Orangetown v. Magee, 665 N.E.2d 1061 (N.Y. 1996); Roseberry Life Ins. Co. v. Zoning Hearing Bd. of the City of McKeesport, 664 A.2d 688 (Pa. Commw. Ct. 1995). However, if the permit applicant in fact knows the permit was wrongfully issued because she misled the government, she has no right to rely on a wrongfully issued permit. *See*, *e.g.*, O'Laughlin v. City of Chicago, 357 N.E.2d 472, 473 (Ill. 1976) (permit applicant induced city to issue building permit in error by manipulating his permit application to make it appear they conformed to the regulation, and should have known that the application did not comply with the law). *Cf.* Cities Services Oil Co. v. City of Des Plaines, 171 N.E.2d 605, 607-08 (Ill. 1961) (city gave owner a copy of an outdated ordinance which was no longer effective; when owner relied on that ordinance, city estopped from claiming a violation of the new ordinance).

[76] 58 Haw. 432, 571 P.2d 328 (1977).

[77] *Id.*

[78] *Id.* at 434, 571 P.2d at 329.

[79] *Id.* at 434, 571 P.2d at 329 n.1.

[80] *Id.* at 434, 571 P.2d at 329.

[81] *Id.* at 434-35, 571 P.2d at 329.

any distinction between them.[82] The court reaffirmed *Denning*'s two-part zoning estoppel test of "assurances of some form" that the proposed development met zoning requirements, coupled with reliance by the owner.[83] However, the court stopped short of determining whether Allen had vested rights or the City was estopped, focusing instead on the remedy available to the property owner if it prevailed.[84] The court recognized only a "builder's remedy"—invalidation of the ordinance and permitting the development to proceed.[85] Presumably the remedy was limited even if the regulation had totally wiped out all of the property's value for the period the invalid regulation was in effect.

Subsequently, the United States Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[86] recognized that a just compensation remedy is constitutionally required for a temporary deprivation of value, even if the government rescinds the illegal regulation or the courts invalidate it, so the remedy holding of *Allen* is no longer viable, and an owner asserting vested rights has a claim for damages or inverse condemnation for the time the government interfered with its rights, as well as the builder's remedy.

Allen is also remembered for another still valid proposition—a vested right is a property right, and if the government still desires to prevent development, it must exercise eminent domain and pay just compensation:

> Once the City is estopped from enforcing the new zoning, if it still feels the development must be halted, it must look to its powers of eminent domain. In order for the City to operate with any sense of financial responsibility the choice

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[82] *Id.* at 435, 571 P.2d at 329.

[83] *Id.* at 437, 571 P.2d at 330.

[84] *Id.*

[85] *Id.* at 438-39, 571 P.2d at 331. Allen sought only damages, and did not seek to complete construction. *Id.* at 434, 571 P.2d at 329. The Hawai'i Supreme Court rejected as a matter of law the claim for damages. *Id.* at 438, 571 P.2d at 331. In other words, when faced with a judgment holding a regulation unconstitutional, all the government need do was "merely amend the regulation and start over again." San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1981) (quotations omitted).

[86] 482 U.S. 304 (1987). In *Allen*, the Hawai'i Supreme Court adopted California's then-valid doctrine that the only remedy available to the property owner when a regulation resulted in a taking was judicial invalidation of the regulation, and did not include just compensation for the time in which the regulation was in effect and placed a cloud on the property. *Allen*, 58 Haw. at 436-39, 571 P.2d at 330-31. California's limitation of the remedy—along with *Allen*'s—was rejected by *First English*. Some courts hold that *First English* requires a state to provide a compensation remedy, even if it has not explicitly done so. *See*, *e.g.*, Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824, 829-30 (9th Cir. 2004) (a regulatory takings claim was not ripe since property owner had not sought compensation via state procedures and had not shown that such procedures were unavailable).

> between continued construction and paying to have it stopped by condemnation, if possible, must rest with the City not property owners.[87]

Thus, *Allen* stands for the proposition that after establishing vested rights or zoning estoppel, the government is obligated to either let the development progress, or it must exercise eminent domain and pay the fair market value of the property as entitled. It is barred from using regulation to prevent development.

D. Life of the Land—*Post-Assurance Expenditures and Soft Cost Reliance*

After *Allen* came two opinions in a lawsuit seeking to stop a large apartment project in central Honolulu.[88] In that case, existing zoning permitted the proposed 350-foot high building.[89] However, the City enacted a moratorium on the acceptance of any building permits for apartment projects while it was considering enactment of special historic district provisions for the area.[90] The moratorium did not affect the zoning and provided for variances giving the City discretion to exempt applicants from the building permit moratorium.[91]

After taking into account opponents' objections, the City granted a variance and permitted the developer to construct its apartment project in compliance with the zoning.[92] The City also imposed conditions on the variance to mitigate the project's impact, such as reducing the height and density of the planned building.[93] After the owner's plans were completed, it submitted a building permit application to the City as allowed by the variance, but the third-party objectors filed suit against the City, which consequently withheld final action on the application.[94]

After the trial court ruled in favor of the City, the City Council determined that all of the conditions imposed in the variance had been met. This freed the building department to issue the building permit, which it did.[95]

In the first opinion, *Life of the Land I*, the Hawai'i Supreme Court denied the third-party objectors' motion for temporary injunction pending appeal,

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[87] *Allen*, 58 Haw. at 439, 571 P.2d at 331.

[88] Life of the Land, Inc. v. City Council of Honolulu, 60 Haw. 446, 592 P.2d 26 (1979) [hereinafter *Life of the Land I*] (denial of temporary injunction pending appeal), *on appeal after remand*, 61 Haw. 390, 606 P.2d 866 (1980) [hereinafter *Life of the Land II*] (affirming summary judgment).

[89] *Life of the Land II*, 61 Haw. at 394, 606 P.2d at 871.

[90] *Id.* at 394-95, 606 P.2d at 872.

[91] *Id.* at 395, 606 P.2d at 872.

[92] *Life of the Land I*, 60 Haw. at 448, 592 P.2d at 27-28.

[93] *Id.* at 449, 592 P.2d at 28.

[94] *Id.*

[95] *Id.* at 449, 592 P.2d at 28.

noting that the City was likely to prevail on the merits of a zoning estoppel claim.[96] The court held that the amounts incurred by the developers for planning and design were substantial, implicitly rejecting the *Avco* building permit rule, and choosing a point for "official assurances" somewhere before the issuance of a building permit.[97]

> The expenditures for planning and design were incurred by reason of, and in compliance with, council action on their application, and in reliance upon the *implicit assurance* that if the special construction conditions imposed by the council were met, a building permit would issue.[98]

In *Life of the Land II*, the court expanded on this opinion in a massive, wandering decision on the merits, affirming the "official assurance" touchstone from *Denning* and *Allen*, and further clarifying the standards for zoning estoppel:

> The doctrine of equitable estoppel is based on a change of position on the part of a land developer 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.[99]

Applying this rule, the court noted that the first official assurance on which the developer could rely was the Council's conditional approval of the variance.[100] The second official assurance was the Council's amendment to the prior approval, reducing further the height and density of the project.[101] The court concluded that the post-variance expenditures brought the developer within the zoning estoppel rule—in other words they were substantial as a matter of law.[102] By the same token, the pre-variance expenditures before official assurance was obtained (primarily site acquisition and preliminary planning and design fees), did not count for purposes of the rule.[103]

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[96] *Id.* at 451, 592 P.2d at 29.

[97] *Id.* at 450-51, 592 P.2d at 29.

[98] *Id.* (emphasis added). One major lesson to be learned from *Life of the Land I* is that absent the issuance of a temporary restraining order pending appeal, construction may continue despite objections.

[99] Life of the Land, Inc. v. City Council of Honolulu, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980) [hereinafter *Life of the Land II*].

[100] *Id.*

[101] *Id.*

[102] *Id.* at 454, 606 P.2d at 903.

[103] Not surprisingly, the court rejected the objectors' contention that these sums were expended in "bad faith" simply because they preceded official assurance. *Id.* at 455, 606 P.2d at 903. Anyone familiar with the land development process knows that neither land, nor

Moreover, the court observed that it was immaterial whether the developer had applied for or obtained a building permit for the project. The issuance of a building permit is purely ministerial and the building department must issue it when the application complies with the applicable statutes, ordinances, rules, regulations and conditions previously imposed.[104] The court implicitly rejected California's strict "building permit rule"[105] holding that in Hawai'i, zoning estoppel occurs at a point in the development process prior to the building permit stage.[106]

E. Nukolii, *the Last Discretionary Action, and Industry Standards*

The "official assurance" standard and the *Denning*, *Waianae Model*, *Allen*, and *Life of the Land* opinions did not provide sufficient guidance to land owners and local governments who needed to put this standard into action,[107] and the core question remained unanswered: given Hawai'i's complex and multi-jurisdictional land development process, is there a general rule of when a developer can proceed? Thus, the stage was set for the touchstone *Nukolii* opinion.

That case involved the oceanfront Nukolii parcel on Kauai, which was zoned for open space and agriculture at the time it was purchased.[108] After the County designated the parcel "Resort" on the County General Plan, the landowners sought a rezoning to permit construction of three hotels.[109] The County Council approved the resort and condominium use, but scaled back the

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planners and designers, are free. This simply confirms that, as long as the government has not provided official assurance of some form, the developer bears a degree of risk. *See infra* Part V.A.2.

The court also clarified that the owner's state of mind is not relevant in the zoning estoppel inquiry, and noted that despite expending funds and making development efforts before the variance, the developers "acted in good faith throughout the controversy." *Life of the Land II*, 61 Haw. at 455, 606 P.2d at 903. This holding is critical when facing a claim that a developer engaged in a "race of diligence" to vest its rights. *Life of the Land II* informs that this inquiry is not relevant to "good faith," as there is nothing wrong with vigorously pursuing property rights.

[104] *Id.* at 454, 606 P.2d at 903.

[105] Some states hold that vesting occurs either upon the submission of an application for a building permit or upon issuance of the building permit, and not before. *See supra* Part II.

[106] *Life of the Land II*, 61 Haw. at 454, 606 P.2d at 903.

[107] *See* Hosoda, *supra* note 51, at 174 n.3 (The cases preceding *Nukolii* "failed to provide developers with any standards or guidelines for how to proceed with developments, and did not delineate a point in the development process the developer had to reach before the government was precluded from making subsequent zone changes.").

[108] County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 320-21, 653 P.2d 766, 770 (1982) [hereinafter *Nukolii*].

[109] *Id.* at 321, 653 P.2d at 770.

proposed project and exacted an "in-lieu" fee from the developer.[110] At that time, a referendum petition pursuant to the County Charter was circulated to repeal the resort zoning and return the parcel to agriculture and open space zoning.[111] At the same time the landowner applied to the County Planning Commission for a Special Management Area permit.[112] Before the Special Management Area permit was issued, however, enough signatures had been obtained on the petition and the referendum was certified by the County and placed on the ballot for the next election.[113]

The Planning Commission issued the Special Management Area permit, and the landowner applied for and received a building permit for 150 condominium units (at that point, the circuit court denied an injunction against the construction).[114] On the day before the referendum election, the landowner obtained a building permit for a 350 unit hotel.[115] The next day, the voters passed the referendum and repealed the resort zoning ordinance by a two-to-one margin.[116] The County sought a declaratory judgment in the trial court, which held that the owner's rights had vested and the County was equitably estopped from prohibiting completion of the project.[117]

The Hawai'i Supreme Court addressed zoning estoppel and vested rights separately, first addressing the equity claim:

> Put another way, "[t]he critical questions become: (1) What 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?" Because the logical analytical progression begins with the last two questions, we shall consider these together first.[118]

From there, the court examined *Life of the Land II*, noting the variance in that case was a non-legislative implementation of an existing ordinance in which the City Council imposed conditions precedent to the issuance of a building permit.[119] Consequently, the variance was a "discretionary" action, and the court concluded it would define the "final discretionary action" as the "official assurance" for the *Nukolii* development.[120] The court reasoned:

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 322, 653 P.2d at 771.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 322-23, 653 P.2d at 771.
[118] *Id.* at 327, 653 P.2d at 774 (citing Callies, *supra* note 35, at 174).
[119] *Id.* at 327-28, 653 P.2d at 773-74 (discussing Life of the Land, Inc. v. City Council of Honolulu, 61 Haw. 390, 606 P.2d 866 (1980) [hereinafter *Life of the Land II*]).
[120] *Id.* at 328, 653 P.2d at 774.

> This rule acknowledges the incremental nature of the modern development process and strikes the appropriate balance between competing private and public interests. It preserves government control over development until the government's own process for making land use decisions leaves nothing to discretion. A proper understanding of the last discretionary action in a governmental process will lead to predictable results consistent with the important public policy considerations that underlie Hawaii's estoppel rule.
>
> *In each case, then, the central focus must be on the existing legal process*. Identification of the operative mechanisms also will determine whether analogous governmental actions give rise to a similar right to rely.[121]

The court searched the existing legal process for the Nukolii parcels for approvals analogous to the *Life of the Land II* variance and held that under the existing process, a shoreline permit normally would be the final discretionary action for the project.[122] The court did not stop there, however, since the Kauai Charter permitted referenda, and one was certified prior to the County Planning Commission issuing the shoreline permit.[123] The referendum election, therefore, was part of the parcel's "existing legal process" and the vote was the last discretionary action.[124] The court supported its choice by reference to the standards of the development industry: In considering whether a developer's expenditures were made in good faith, we employ an objective standard that reflects "reasonableness according to the practices of the development industry."[125] Once the referendum was certified the owner should have known that the voters were going to have the last say on the project, not the County Planning Commission.[126]

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[121] *Id.* at 328-29, 653 P.2d at 774-75 (emphasis added).

[122] *Id.* at 330, 653 P.2d at 775.

[123] *Id.* at 329-30, 653 P.2d at 775-76. Referenda, as a standardless yes-no vote by the electorate in which citizens' passions, prejudices and biases are insulated from inquiry epitomize discretionary action. *See generally* Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu, 70 Haw. 480, 777 P.2d 244 (1989) (initiative is not a proper means of enacting land use ordinances in Hawai'i).

[124] *See Nukolii*, 65 Haw. at 329-31, 653 P.2d at 774-76.

[125] *Id.* at 332, 653 P.2d at 777 (quoting Cunningham & Kremer, *supra* note 2, at 720). The Hawai'i Real Estate Commission warned potential purchasers of the condominium about the upcoming vote, and the developer's bank reserved its right to terminate financing if the referendum was approved. *Id.* at 334, 653 P.2d at 777-78.

[126] The process in *Nukolii* was unusual since the existence of the referendum process meant that there was a discretionary hurdle to cross even after the last ministerial permit (the building permit) had been issued. Generally speaking, ministerial action follows discretionary, not the other way around. The developers could hardly be blamed for believing their rights were vested since "[v]irtually all authorities agree that the granting of a building permit vests the land development rights of a landowner." CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 135.

This is not to say that the standards of the development industry determine what is "official assurance," or what is the last discretionary action in the legal process applicable to the land at issue. The law is the law, of course, and the standards of the development industry cannot change that. What the court was getting at was that the industry standards confirmed the court's choice of the last discretionary action as the green light to rely in that situation.[127] Thus, the court held that any expenditures made or obligations incurred by the owner in reliance on the shoreline permit were subject to the known risk that the voters might approve the referendum and withhold their discretionary approval for the project. The court observed that the landowner's expenditures which predated the outcome of the referendum election did not count for estoppel purposes because the landowner had not obtained the final official assurance, which was the vote itself.[128]

The court then undertook a vested rights analysis to determine whether there were any constitutional prohibitions:

> When a property owner has actually proceeded toward development pursuant to then existing zoning, the initial inquiry is whether a developer's actions constituting irrevocable commitments were reasonably made or were speculative business risks not rising to the level of a vested property right. Thus, the Developers may not establish "a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." The particular circumstances of each case will determine whether "the regulation has interfered with distinct investment-backed expectations" sufficient to require compensation therefor.[129]

Applying this rule, the court referred to its prior zoning estoppel analysis, noting that the landowner's reasonable belief a resort could be built became speculative once the referendum petition was certified. Thus, it held the expenditures and site preparation work were business risks rather than a basis for a constitutional claim:

> Because the referendum was certified before any post-zoning approvals were obtained, preliminary or otherwise, enforcement of the 1980 referendum, which returned the permitted land use for the Nukolii site to the prepurchase zoning, does not offend principles of equity or constitutional guarantees. Since they acquired no irrevocable rights to construct the resort complex by virtue of the

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[127] *Nukolii* did not address vested rights on parcels where no discretionary approvals are necessary because that was not the case before it. *See infra* Part V.A.3.

[128] *Nukolii*, 65 Haw. at 338, 653 P.2d 780.

[129] *Id.* (citations omitted). The court equated establishing a vested right with establishing a regulatory taking. *Id.*

> intervening events, the Developers have no constitutional claim that a taking has occurred.[130]

Nukolii was subject to criticism since it did not choose an absolute bright-line rule but relied on a flexible case-by-case standard.[131] Say what you will about *Avco*'s harsh building permit rule or early vesting rules—the lines they draw are very bright, and property owners in those jurisdictions know before the process starts when their rights will vest. Any criticism of *Nukolii*, however, should be tempered because a careful examination of the opinion and the zoning estoppel cases that preceded it reveal objective standards that may be applied to similar controversies. No application of judicial decisions is ironclad of course. However, the court has enunciated concrete rules which, when read in light of the permit register statute can lead to predictable results.

V. SUMMARY JUDGMENT IN VESTED RIGHTS AND ZONING ESTOPPEL LITIGATION

As the Hawai'i cases demonstrate, the key questions are ones of law. What actions constitute "official assurances?" Are there discretionary acts in the regulatory scheme applicable to a parcel, and if so, what is the "last discretionary act?" What is "good faith" reliance, and what is "substantial?" As issues of law, the answers to these questions should be bright line rules for the lower courts to apply.[132] Consequently, vested rights and zoning estoppel claims should be subject to resolution by summary judgment, and a trial should not be necessary on the questions of official assurances, good faith or substantial expenditures. The overarching goals of vested rights and zoning estoppel analysis are to provide property owners certainty about what their rights are, what uses the government may or may not permit, and to allow for predictable results in the land development process.[133] These purposes would obviously be frustrated if uncertainty during the permitting stages were removed by the vested rights and zoning estoppel doctrines, only to be reim-

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130 *Id.* at 339, 653 P.2d at 781.

131 Hosoda, *supra* note 51, at 174 n.3 (*Nukolii* opinion did not provide certainty and spurred the development community to seek a legislative solution).

132 Rinaldi, *supra* note 18, at 100 n.107 (citing 1983 ZONING & PLANNING LAW HANDBOOK § 5.04[3] (Fredric Strom, ed. 1983) (vested rights determinations are "pervasive legal questions")). *See also* West Main Assoc. v. City of Bellevue, 720 P.2d 782, 785 (Wash. 1986) (purpose of the vested rights doctrine is to set rules that permit owners to understand them and plan accordingly).

133 *See*, *e.g.*, *Nukolii*, 65 Haw. at 332, 653 P.2d at 777; (standards of development industry are guidelines to objective reliance); Delaney & Kominers, *supra* note 43, at 220. The legislature agrees. *See* HAW. REV. STAT. § 46-121 (2003) ("Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public.").

posed during litigation, or by the lower court's misreading a case-by-case balancing test into the legal analysis.[134] If late-coming opponents to a development (whether private or governmental) were able to oppose a claim of vested rights for years by initiating lawsuits and avoiding summary adjudication by demanding a trial, the policies of certainty and predictability would be meaningless. State and county regulatory agencies and trial courts should understand that the Hawai'i Supreme Court's opinions confirm the issues are readily amenable to summary adjudication.[135]

A. Official Assurances and the "Last Discretionary Action"

1. The central coordinating agency and the county permit register

The first step in determining whether a use is vested or the government is estopped is to understand the existing regulatory process applicable to the property and the development project and determine what "assurances of some form" need to be made. This determination should not be difficult and the owner can consult the applicable "permit register," a repository of every federal, state and local land use regulation and restriction that Hawai'i law requires every county compile and maintain. The counties are required to be able to instruct an owner of all regulations applicable to her property. Section 46-18(a) of the Hawai'i Revised Statutes ("H.R.S.") requires:

> Each county shall, by ordinance, designate an existing agency within each county which shall be designated as the central coordinating agency and in addition to its existing functions shall:
>
> (1) Maintain and continuously update a repository of all laws, rules and regulations, procedures, permit requirements and review criteria of all federal, state and county agencies having any control or regulatory powers over land development projects within such county and shall make said repository and knowledgeable personnel available to inform any person

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[134] *See* Rinaldi, *supra* note 18, at 85 ("[A] particular vested rights rule is better than a balancing test in that it fosters certainty in the law."). *See also id.* at 100 (citing Nott v. Wolff, 163 N.E.2d 809 (Ill. 1960) (court balances public and private benefits and held the owner's rights vested)); Ackerman, *supra* note 39, at 1269 (an owner can never be completely sure that it has vested rights under case specific determinations).

[135] *See, e.g.*, Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 461-63, 606 P.2d 806, 907 (affirming summary judgment in favor of landowner) [hereinafter *Life of the Land II*]; *Nukolii*, 65 Haw. at 339, 653 P.2d at 781 (reversing summary judgment for landowner and entering summary judgment for project opponents). *See also* Maunalua Assocs. v. City & County of Honolulu, No. 89-3539-119SSM (Haw. Cir. Ct. filed Nov. 14, 1989) (entering summary judgment on liability for a taking of land and vested permit).

> requesting information as to the applicability of the same to a particular proposed project within the county.[136]

A property owner should be able to rely absolutely on the permit register and official statement of applicability as official assurances of what regulations are applicable to the property. *Waianae Model* instructs that when "knowledgeable personnel" from the central coordinating agency "inform any person" about the regulatory scheme applicable to a proposed project, the official is acting within the ambit of his authority and the developer is entitled to rely on that information, even if incorrect.[137] This statute brings *Waianae Model* into context since the government is obviously in a better position than citizens to determine what the government's own regulations require. Government is the best source of its own restrictions and requirements.[138] It is incumbent on the government to provide this information, and not leave the public guessing as to what the government's position may be.[139] The constitutional protections of private property rights may even require a statute like section 46-18. The alternative is that citizens could never trust or rely upon what the planning department tells them.

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[136] HAW. REV. STAT. § 46-18(a) (2003). State law also requires the state department of business, economic development, and tourism to "[m]aintain and update a repository of the laws, rules, procedures, permit requirements, and criteria of federal, state, and county agencies having control or regulatory power over land and water use for development or the control or regulatory power over natural, cultural, or environmental resources." *See id.* § 201-63(2) (2003). The state maintains a "permits guide" on the web. *See* State of Hawai'i Dep't of Business, Econ. Dev. & Tourism, Permits Guide at http://www.hawaii.gov/dbedt/ert/permits.html (last visited Oct. 30, 2004).

[137] Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu, 55 Haw. 40, 44, 514 P.2d 861, 864 (1973) (owner is entitled to rely on official acting under color of office who provides a "debatable" interpretation of the law).

[138] Aranosian Oil Co. v. City of Portsmouth, 612 A.2d 357, 359 (N.H. 1992) (The government "knew the details of the proposed project and must be presumed to know its own zoning requirements.").

[139] *See* Texas Co. v. Town of Miami Springs, 44 So. 2d 808 (Fla. 1950). In that case, the court held that when government officials affirmed that a property owner could make particular use of his property, the property owner had a right to rely on those assurances:

> The appellant took the precaution before it purchased the property involved of going to the only place it could get authoritative information to determine whether the land could be used for the purpose intended. There it was advised that there was no inhibition against the construction of the filling stations and was granted formal permission to proceed. The authority was repeated and emphasized when the permits were renewed. Relying upon the information and the authorization from an official source, the appellant bought the land, and bought it for one purpose only.

Id. at 809.

2. Distinguishing discretionary from ministerial action

The next step is to identify what government action in this process is the "official assurance" on which the owner is entitled to rely, and whether any discretionary approvals are necessary. *Nukolii* should not be misread as requiring a search for a "last discretionary action" in every case. Rather, *Nukolii* holds that *if* there is discretion in the process, the "last discretionary act" is "official assurance."[140] The *Nukolii* analysis is not applicable where there are no discretionary approvals in the process.[141] In those circumstances, the property owner need only obtain "assurances of some form" from the government as the green light to reliance.[142]

Discretionary action is "non-legislative action *imposing new conditions* on the development which expressly made compliance therewith precedent to issuance of the building permit."[143] The ability to impose conditions on approval is the hallmark of "discretionary" action.[144] Approvals of coastal zone permits,[145] preliminary subdivision plats, and special use permits[146] are common examples of discretionary government actions. The supposed antithesis of a discretionary action is a ministerial action. A "ministerial" act is one performed under a given set of facts and in a prescribed manner without exercise of judgment.[147] As the court held in *Life of the Land II*, a ministerial action by an official is "to process the application for compliance with all applicable statutes, ordinances, rules and regulations, and the conditions

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[140] *Nukolii*, 65 Haw. at 329-30, 653 P.2d at 775.

[141] *Id.*

[142] Denning v. County of Maui, 52 Haw. 653, 658-59, 485 P.2d 1048, 1051 (1971) ("assurances of some form . . . that [the] proposed construction met zoning requirements").

[143] *Nukolii*, 65 Haw. at 330, 653 P.2d at 775 (emphasis added).

[144] *See*, *e.g.*, Friends of Westwood v. City of Los Angeles, 191 Cal. App. 3d 259, 273 (1987) (the question in determining whether a statute authorizes discretionary power is "whether the [government] had the power to deny or condition." If not, it would be ministerial power.).

[145] *Nukolii*, 65 Haw. at 330, 653 P.2d at 775.

[146] CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 142-43. *See*, *e.g.*, Richlands Medical Ass'n v. Commonwealth *ex rel*. State Health Comm'r, 337 S.E.2d 737 (Va. 1985) (commissioner who was exercising a quasi-judicial duty, weighed conflicting evidence, interpreted law, and applied law to facts was acting in a discretionary manner).

[147] Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 42 (D.D.C. 2002) (quoting Wilbur v. United States, 281 U.S. 206, 218-19 (1930)). A "ministerial duty" must be:

> so plainly prescribed as to be free from doubt and equivalent to a positive command . . . . Where the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

Id.

attached to the approvals, and to issue the requested building permit after such processing."[148] In other words, a ministerial approval is one which the government has no ability to deny if the applicant has conformed to the law. Approvals of building permits,[149] final subdivision plats,[150] site plans,[151] and in some jurisdictions grading permits[152] are common examples of ministerial actions.

Under Hawai'i's complex mix of land use regulations where every parcel it often seems has unique regulatory criteria, conclusory statements and lists of examples such as these are not very useful in determining whether a regulatory scheme contains discretionary acts or not.[153] The following Part details the identifying marks of discretionary and ministerial actions and proposes a template to evaluate land use regulations to determine whether a court should focus on the *Denning* "official assurance" standard, or on the "last discretionary act" standard of *Nukolii*.

The temptation is to view most regulatory language as discretionary, for what exercise of authority does not rely to some degree on the judgment of the person administering it? However, great care should be exercised in the determination of whether discretionary approvals exist in the process, since delegations of discretion without any meaningful standards are unconstitutionally vague, and a property owner should not be left guessing.[154]

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[148] Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 545, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*].

[149] *Id.*; Waterfront Estates Dev., Inc. v. City of Palos Hills, 597 N.E.2d 641 (Ill. App. Ct. 1992).

[150] CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 140.

[151] *See*, *e.g.*, Bd. of County Supervisors of Prince William County v. Hylton Enter., Inc., 221 S.E.2d 534 (Va. 1976).

[152] *See*, *e.g.*, Juanita Bay Valley Cmty Ass'n v. City of Kirkland, 510 P.2d 1140 (Wash. Ct. App. 1973) (no functional difference between a grading permit and a building permit).

[153] For example, the legislature defines "discretionary consent" in the context of environmental impact statements as an action "for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent." HAW. REV. STAT. § 343-2 (2003). This definition is somewhat circular and is not applicable to the non-statutory vested rights and zoning estoppel doctrines.

[154] *See*, *e.g.*, Stringer v. Realty Unlimited, Inc., 97 S.W.3d 446, 447-48 (Ky. 2002) ("[A]n ordinance which lays down no requirements to be followed and no general and uniform rule is invalid because it leaves the granting of such a thing as a building permit to the sometimes arbitrary discretion of municipal authorities." (quoting Colyer v. City of Somerset, 208 S.W.2d 976, 977 (Ky. 1947)) (quotations omitted) (alterations in original)). In *Stringer*, the county zoning commission disapproved a landowner's subdivision map. *Id.* at 447. The language in the ordinance contained the word "may" (specifically "may not") as well as mandatory language. *Id.* at 448. The court held that interpreting the word "may" to connote discretionary authority would render the ordinance unconstitutional because it set forth no standards to be followed. *Id.*

If the property owner has been informed by the "knowledgeable personnel" what the regulations require, an actual analysis of the regulations may not be necessary, because in *Waianae Model* the court held that the relevant inquiry is what the planning official conveyed to the owner about the law, not what the law is. Recall that in that case, a planning department official informed an applicant that he could have more time to submit his application even though the ordinance was silent regarding extensions. The court did not inquire whether the official was right or not. It held that as long as the authority of the planning official was "at least debatable,"[155] the applicant was entitled to rely on the official and "the validity of such act may not be questioned after expenditures have been made and contractual obligations have been incurred in reliance thereon in good faith."[156] The court held that even an "erroneous and debatable interpretation" would suffice to trigger reliance when a government official acts in "good faith and within the ambit of his duty."[157] Indeed, the court never even analyzed whether the planning department official in that case correctly interpreted and applied the ordinance in question; the court simply noted that the question was "debatable" and affirmed summary judgment for the applicant.[158] Thus, the only relevant inquiry under *Waianae Model* is what the planning department officials told the property owner and whether the officials were within their official capacity and acting under color of office. Illustrative of the "ambit of authority" principle is *City of Peru v. Querciagrossa*,[159] in which the court held:

> Persons dealing with the zoning inspector would expect an official in that position to have knowledge of the zoning ordinance and to advise building permit applicants correctly. We think defendants were justified in relying upon the express instructions he gave them concerning setback lines and upon the building permit he issued. Clearly, it was this conduct of the zoning inspector which induced defendants to proceed with their building plans and to make substantial expenditures. The only conclusion that can be drawn from these facts is that the city is estopped to revoke the permit and to enjoin construction.[160]

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155 Waianae Model Neighborhood Area Ass'n, Inc. v. City & County of Honolulu, 55 Haw. 40, 45, 514 P.2d 861, 864 (1973).

156 *Id.* at 44, 514 P.2d at 864.

157 *Id.*

158 *Id.* at 45-46, 514 P.2d at 864-65. *See also* Cities Serv. Oil Co. v. City of Des Plaines, 171 N.E.2d 605, 608 (Ill. 1961) (city allegedly gave owner a copy of an outdated ordinance which was no longer effective and issued owner's predecessor in interest a building permit; when owner in good faith relied on that ordinance permit, city was estopped from claiming a violation of the new, correct, ordinance).

159 392 N.E.2d 778 (Ill. App. Ct. 1979).

160 *Id.* at 780.

Similarly, in *Texas Co. v. Town of Miami Springs*,[161] the Florida Supreme Court held that when government officials granted permits allowing a property owner to make particular use of his property, the property owner had a right to rely on those assurances:

> The appellant took the precaution before it purchased the property involved of going to the only place it could get authoritative information to determine whether the land could be used for the purpose intended. There it was advised that there was no inhibition against the construction of the filling stations and was granted formal permission to proceed. The authority was repeated and emphasized when the permits were renewed. Relying upon the information and the authorization from an official source, the appellant bought the land, and bought it for one purpose only.[162]

If there have been no clear expressions by the government officials, even though H.R.S. section 46-18 would seem to require them, the starting point is the language of the regulation. The terms "shall" or "may" are strong indicators of ministerial or discretionary authority. The word "shall" generally signals ministerial action, while "may" signals ministerial.[163] This analysis is not necessarily conclusive, however, since courts have held that "may" and "shall" are not absolutely determinative and that legislative intent may be examined.[164]

Many land use regulations require the government to make factual determinations prior to granting approvals,[165] but that ability by itself is not a

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[161] 44 So. 2d 808 (Fla. 1950).

[162] *Id.* at 809.

[163] *See In re* Fasi, 63 Haw. 624, 626, 634 P.2d 98, 101 (1981). *See also* Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 43 (D.D.C. 2002); BLACK'S LAW DICTIONARY 1375 (6th ed. 1990) ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory . . . . The word in ordinary usage means 'must' and is inconsistent with a concept of discretion."); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1075-76 (10th ed. 1993) ("used in laws, regulations, or directives to express what is mandatory"); Abreu v. United States, 796 F. Supp. 50, 53 (D.R.I. 1992) ("Mandatory language indicates a [legislative] limitation on agency discretion.").

[164] Courts have sometimes used the words "may" and "shall" interchangeably. *Compare* Bd. of Comm'rs of Vigo County v. Davis, 36 N.E. 141, 142 (Ind. 1894) ("The word *may* has in some instances, been construed as the equivalent of the word *shall* . . . ." (emphases added) (internal quotations omitted)) *with* People *ex rel.* Oak Supply & Furniture Co. v. Dep't of Revenue, 320 N.E.2d 236, 239 (Ill. Ct. App. 1974) ("shall" may be read as "may" if the legislative intent indicates). *See also* Seiden v. United States, 537 F.2d 867, 869 (6th Cir. 1976) ("use of the mandatory 'shall defend' . . . does not *require* the conclusion that the [administrator's action] is ministerial rather than discretionary") (emphasis added).

[165] *See*, *e.g.*, HAW. REV. STAT. § 205A-22 (Supp. 2003), in which the Legislature delegated authority to the counties to determine whether a proposed action within the shoreline special management area is a "development" requiring a permit. This statute sets forth factual criteria that the county authorities must adhere to when evaluating whether a proposed action is a "development." *Id.*

delegation of discretionary authority.[166] A requirement of fact-finding does not necessarily confer discretion, and may signal ministerial action based on a set of predicate facts.[167] If the predicate facts are determined to exist, a duty outlined in the regulation that must be performed is ministerial.[168]

The most important indicator to determine whether a particular approval is discretionary or ministerial is language conferring the ability to impose conditions. The Hawai'i Supreme Court defines discretionary action as "non-legislative action imposing new conditions on the development which expressly made compliance therewith precedent to issuance of the building permit."[169]

Absence of conditional language indicates ministerial authority. Thus, if the regulations do not authorize the permitting authority to impose conditions, then the power granted is ministerial and the answer to what assurance are official lies elsewhere.[170]

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[166] *See*, *e.g.*, Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 454, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*] (a ministerial act is one performed under a given set of facts and in a prescribed manner without exercise of judgment).

[167] *See*, *e.g.*, *Davis*, 36 N.E. at 141 ("An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act."); Hilt Truck Line, Inc., v. Peterson, 337 N.W.2d 133, 136 (Neb. 1983) (citing Little v. Bd. of County Comm'r of Cherry County, 140 N.W.2d 1, 3-4 (Neb. 1966)) ("[A]n act may be held to be ministerial even though the person performing it may have to satisfy himself that a certain state of facts exist under which it is his duty to perform the act."); 2 AM. JUR. 2D *Administrative Law* § 60 (2004) (Any discretion upon the municipal officer may be discretion in ascertaining the facts in which are necessary in administering the statute. "The fact that a necessity may exist for the ascertainment of the facts or conditions, upon the existence of which the performance of an act becomes a clear and specific duty, does not convert a ministerial act into a discretionary one.").

[168] *See also* Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 695 (D.S.D. 1973) (even though statute "was couched in permissive terms . . . the Administrator's discretion extended only to a determination as to whether a particular area met the criteria as an emergency loan area. The permissive language did not confer absolute discretion on the Secretary . . . ."); Taylor County Farm Bureau v. Bd. of Supervisors, 252 N.W. 498, 500 (Iowa 1934) (duty is ministerial when it is to be performed upon a certain state of facts, even though the officer or body must judge according to their best discretion whether the facts exist, and whether they should perform the act); State v. Union Tank Car Co., 439 So. 2d 377, 380 (La. 1983) ("[A]lthough the legislature may not delegate the legislative power to determine what the law shall be, it may delegate to administrative boards and agencies of the state the power to ascertain and determine the facts upon which the laws are to be applied and enforced.") (citations omitted).

[169] County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 330, 653 P.2d 766, 775 (1982) [hereinafter *Nukolii*].

[170] For an example of conditional language typical of a grant of discretionary authority, *see* the Hawai'i Coastal Zone Management Act's provisions authorizing the counties to grant special management area use permits "[a]ll developments in the special management area shall be *subject to reasonable terms and conditions set by the authority*." HAW. REV. STAT. § 205A-26(1) (Supp. 2003) (emphasis added).

3. Triggering vested rights and zoning estoppel on parcels with no discretionary approvals remaining

What if there is no discretionary action beyond existing zoning applicable to the property at issue? For example, an owner has a parcel on which no conditional use permits, site plan approvals, development plan, subdivision, or other special approvals are necessary, and only a ministerial building permit is needed—what then? In an "everything in its place" Euclidean scheme, zoning alone may give rise to a right to develop.[171] Can the owner rely before obtaining the building permit and will obligations incurred "count" towards vested rights or estoppel? The Hawai'i Supreme Court has disclaimed the building permit rule as too "harsh,"[172] so it would be ironic if the owner of a parcel on which there are no discretionary approvals necessary were to vest later in the process than an owner who needed the last discretionary act.

As a general rule, a property owner is not entitled to rely and its rights are not vested on zoning alone.[173] However, the Hawai'i Supreme Court's formulation of the "assurances of some form" standard in *Denning*[174] and *Nukolii*'s "last discretionary action" trigger,[175] represents a significant departure from

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[171] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 265 (1926) (U.S. Supreme Court upheld the state's authority to zone against a due process challenge). The Hawai'i Supreme Court adopted the traditional Euclidean model and held that a building permit is ministerial, not discretionary, so if a property has proper zoning the owner can generally build any of-right use. *Life of the Land II*, 61 Haw. at 453-54, 606 P.2d at 902-03. It was in *Nukolii*, however, that the court for the first time explicitly endorsed the Euclidean standard. *Nukolii*, 65 Haw. at 336-37, 653 P.2d at 779 (citing *Euclid*, 272 U.S. 265).

[172] *Nukolii*, 65 Haw. at 338, 653 P.2d at 780 (rejecting the *Avco* rule as too "harsh").

[173] *See id.* at 327, 653 P.2d at 774 (zoning estoppel is based on change in position in reliance "not solely on existing zoning law or on good faith expectancy that his development will be permitted"); CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 130-31 (traditionally an owner could not base vested rights or zoning estoppel on zoning unless it was recent or accomplished at the owner's behest). *See*, *e.g.*, Golden Gate Corp. v. Town of Narragansett, 359 A.2d 321, 328 (R.I. 1976) (existing classification "in and of itself confers no vested right"). However, the property owner's lack of vested right does not give the government carte blanche to impact the land, since ownership of the land itself gives rise to due process protections. *See*, *e.g.*, DeBlasio v. Zoning Bd. of Adjustment for Township of West Amwell, 53 F.3d 592, 601 (3d Cir. 1995).

[174] Denning v. County of Maui, 52 Haw. 653, 658-59, 485 P.2d 1048, 1051 (1971) ("[T]o be allowed the right to proceed in constructing . . . the facts must show . . . assurances of some form . . . that [the] proposed construction met zoning requirements.").

[175] "When a property owner has actually proceeded toward development pursuant to then existing zoning, the initial inquiry is whether a developer's actions constituting irrevocable commitments were reasonably made or were speculative business risks not rising to the level of a vested property right." *Nukolii*, 65 Haw. at 338, 653 P.2d at 780.

the general rule of no vesting from zoning alone.[176] In *Denning*, after zoning there were no further discretionary approvals in the process. Presumably, since *Denning* was decided before enactment of the permit register requirement, today an absence in the permit register of further discretionary approvals or assurances by the County's "knowledgeable personnel . . . as to the applicability of the same to a particular proposed project,"[177] would be "assurances of some form" triggering a right to rely. The standards of the development industry are relevant to determine whether an owner has an objectively reasonable right to rely on the permit register, the "knowledgeable personnel," or some other form of government assurance. Provided the government has no discretion remaining in the regulatory scheme applicable to a parcel—in other words, all that remains are ministerial approvals which the government cannot deny if the applicant has complied with the standards—the owner of such property is entitled as a matter of law to incur costs and obligations in reliance on zoning provided they are towards some concrete development goal. It would make little sense to delay vesting until the application for or issuance of a building permit, as this would acknowledge vested rights later in the development process on less-regulated parcels than on those subject to more complex land use controls.[178] Such a rule would also violate the Hawai'i Supreme Court's consistent policy of soft cost expenditures counting towards vested rights and zoning estoppel, as analyzed in Part V.C.1.

B. The Landowner's Right to Rely—"Good Faith" as a Matter of Law

The most important lessons of *Life of the Land II* and *Nukolii* are that once the government provides official assurances—whatever those may be under the circumstances—the property owner is entitled as a matter of law to rely on that approval in making expenditures. Once that approval is in hand, the landowner may proceed without fear that the rug can be pulled out from under him.

In *Life of the Land II*, the citizens' group attempted to argue that the developer proceeded in bad faith because it incurred obligations before the government had given official assurances. The court rejected the argument,

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[176] Even the general rule was subject to myriad exceptions. Some courts do not follow this rule and hold that zoning alone may trigger vested rights. *See*, *e.g.*, Texas Co. v. Town of Miami Springs, 44 So. 2d 808, 809 (Fla. 1950).

[177] HAW. REV. STAT. § 46-18(a) (2003).

[178] The Hawai'i Supreme Court expressly rejected California's common law "building permit" rule, and by focusing on when in the process the government has no more discretion to deny development, held that vesting in Hawai'i occurs sometime earlier than issuance of a ministerial building permit. *Nukolii*, 65 Haw. at 338-39, 653 P.2d at 780.

however, holding that the developers acted in good faith throughout the case.[179] *Nukolii* clarified, holding that once official assurance is obtained in the form of the last discretionary action, subjective good faith and bad faith are no longer relevant, particularly in a constitutional vested rights claim where state of mind should not matter.[180] The court instructed that it would employ an objective standard guided by the practice of the development industry.[181] The court determined that a reasonable developer would not have relied upon the shoreline permit, but would have waited for the referendum results. In other words, once official assurances have been given, subsequent expenditures by the owner are considered reasonable, regardless of the owner's actual state of mind. Under *Nukolii*'s rationale, obligations incurred before the official assurance (the referendum) should be disregarded as speculative, and conversely, those incurred after the final discretionary action must be considered objectively reasonable and made in good faith because the official green light may be relied upon as a matter of law.[182]

What if the government is mistaken, however? Provided the government was acting in good faith, defined by *Waianae Model* as "within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance,"[183] then the innocent owner is entitled to rely on such government action.

A rule requiring judicial inquiry into an owner's post-assurance subjective belief is unfair and unworkable. The government—or even a development's opponents—could always defeat vested rights and zoning estoppel simply by

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[179] *Life of the Land, Inc. v. City & County of Honolulu*, 61 Haw. 390, 455, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*].

[180] "In considering whether a developer's expenditures were made in good faith, we employ an objective standard that reflects 'reasonableness according to the practices of the development industry.'" *Nukolii*, 65 Haw. at 332, 653 P.2d at 777 (quoting Cunningham & Kremer, *supra* note 2, at 720). The court held that state of mind and subjective good faith are not relevant concerns in a vested rights or zoning estoppel analysis: "[c]onsideration of a developer's race to complete a project before adoption of anticipated restrictive legislation usually reflects a subjective test of good faith, complicated by the uncertainty inherent in the normal legislative process." *Id.* at 335 n.18, 653 P.2d at 777 n.18.

[181] The court noted that the undisputed evidence before it was that the development industry considered the owner's expenditures speculative business risks because they were made before the last discretionary act. Therefore, its rights did not vest. *Id.* at 334-35, 653 P.2d at 777-78. The documents for the owner's financing of its project contained language in which the lender warned it that its expenditures were speculative since the last discretionary action had not taken place. *Id.* Further, the Hawai'i Real Estate Commission warned in a report on the project that the last discretionary action had not taken place, and thus the owner's rights were speculative. *Id.*

[182] *Id.* at 332, 653 P.2d at 777.

[183] Waianae Model Neighborhood Ass'n v. City & County of Honolulu, 55 Haw. 40, 44, 514 P.2d 861, 864 (1973) (citing Schultze v. Wilson, 148 A.2d 852 (N.J. Super. Ct. App. Div. 1959)).

instructing property owners, rightly or wrongly, not rely on any of its permits, and a trial could be required in every case to inquire into what the developer knew and when he knew it.[184] So much for summary judgment and so much for certainty. By rejecting the subjective good faith rule, *Nukolii* avoids the expensive and inherently unreliable nature of an inquiry into an owner's state of mind, which invariably leads to unjust and questionable results.[185] A clear example of good faith comes in *Sakolsky v. City of Coral Gables*.[186] In that case, the property owner visited the mayor of the city to "discuss with him the best location for [a 12-story building]."[187] The mayor suggested a suitable place. Based on these actions, the owner entered into options to purchase the land the mayor suggested. The mayor also suggested that the owner prepare plans, which he did and which were submitted to the city's planning department for approval, which tentatively was granted.[188] After the public was notified of the project, one hundred objectors showed up at the hearing.[189] The city commission nevertheless granted permission to build over one "no" vote, and issued a permit.[190] All looked well for Mr. Sakolsky and he began planning his building. But then the commissioners sat for election, and the composition of the commission changed. The dissenting member of the

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[184] One federal court questioned the U.S. Army Corps of Engineers' attempt to issue a "provisional" permit that cautioned "NOT VALID . . . DO NOT BEGIN WORK." *See* Cooley v. United States, 324 F.3d 1297, 1301 (Fed. Cir. 2003).

[185] *See* Cunningham & Kremer, *supra* note 2 at 719-20 ("Insofar as the good faith element of the vested rights doctrine implies clean hands or moral cupidity, it thus usually operates to penalize the developer who is astute or sophisticated enough to recognize the threat of proposed legislation, while rewarding the developer naive or duplicitous enough to ignore the potentialities of the legislative proposals."). The authors explain further:

> Rather than making the moral judgment implicit in application of the rule of good faith, a more realistic guide would involve a determination of whether a developer's irrevocable commitment was "reasonable" according to the practices of the development industry . . . . "Reasonableness" should be defined to incorporate many of the elements discussed in good faith cases, but the definition would recognize the political and financial aspects of straightforward risk-taking for what they are, business decisions based on an informed appraisal of the situation.
>
> . . . If a project proponent could demonstrate that a permit process was designed such that the effective approval had been achieved at some finite stage short of the ultimate permit, that proof would substantiate the reasonableness of a decision to commit resources irrevocably.

Id. at 720.

[186] 151 So. 2d 433 (Fla. 1963).

[187] *Id.* at 434.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 435.

commission, whose "no" vote had been overridden, mustered enough support on the newly-elected commission to "rescind" the permit.[191]

Within the span of nineteen days, Mr. Sakolsky saw his permit granted, an election shift commission membership, and his permit "rescinded." The city shut him down and he sought relief in the courts. The city took the position that the owner had no business believing the city's original assurances or acting on the permit because, "at the time [he] obtained his permit and thereafter he 'had good reason to believe' the official mind might change because 'strenuous objection was present and made known, suit was threatened and the political issue made apparent.'"[192] The public knew that an election was impending and that the commission composition was subject to change.[193] The court rejected the argument: "The basic concepts of equitable estoppel, held by the prior cited case to be applicable to municipalities as to individuals, preclude the notion of such instability in municipal action merely because its business is conducted through a body whose membership is subject to change."[194] The court also explicitly rejected the rule that "an impending change of municipal officers can prevent reliance on an act of the current governing body, is in error and inconsistent with precedent condemning arbitrary action by these public bodies."[195] The court concluded:

> Such a permit as that here involved, intentionally and lawfully issued by the proper municipal officers, can have no other purpose than to authorize action by the permittee in reliance on its terms. Notice or knowledge of mere equivocation independent of actual infirmities or pending official action, cannot in this situation operate to negative or prevent reliance on the official act.[196]

"We conclude consequently," the court held, "that [Mr. Sakolsky] acted in good faith."[197] This rationale is consistent with *Waianae Model* analysis where an owner is entitled to rely on an official acting within the ambit of authority.

C. What are "Expenditures" and "Commitments," and How Much is "Substantial?"

Under the vested rights and zoning estoppel rules, it is not enough that the government has provided official assurances—there must be "substantial

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191 *Id.*
192 *Id.*
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.* at 435-36.
197 *Id.* at 436.

expenditures" made in reliance. The maxim "equity aids the vigilant, not those who sleep on their rights"[198] is likely the source of this requirement, and is the key to understanding this element of vested rights and zoning estoppel.[199] The expenditure element presents two issues: what types of expenditures count, and what are "substantial" expenditures?

1. "Soft" vs. "hard" construction costs

Because Hawai'i has rejected the building permit rule in favor of an earlier date for vesting, unlike other jurisdictions which require substantial actual construction or "hard" construction costs before rights can vest, Hawai'i requires neither.[200] It follows from the fixing of "official assurances" as the green light that hard costs (which are generally incurred later in the process) are not necessary. The type of obligations incurred following such approvals are soft costs and obligations such as architect's fees, financing points,[201] legal fees,[202] advertising fees,[203] fees for engineering work,[204] costs for "design and

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[198] *See, e.g.*, Kenosha County v. Town of Paris, 434 N.W.2d 801, 807 (Wis. Ct. App. 1988).

[199] The Pennsylvania Supreme Court held that a landowner need spend nothing to obtain vested rights in permits to build townhouses which were issued prior to any contemplated zoning change (the property was downzoned to prohibit townhouses after the permits were issued). Gallagher v. Building Inspector, City of Erie, 247 A.2d 572 (Pa. 1968) (affirming summary judgment in mandamus action ordering issuance of improperly revoked permits). In fact, the Pennsylvania Supreme Court specifically assumed for the sake of argument that no expenditures had been made, and noted that the issue of expenditures arises only when the permit is obtained at the time of a pending zoning change. *Id.* at 573. This is consistent with the constitutional analysis of vested rights, in which an owner obtains a property right that cannot be taken away after the government has given its irrevocable permission to go forward. It is also consistent with state and federal constitutional protection of property (a legitimate claim of entitlement), which does not turn upon a showing that the citizen exercised extraordinary reliance to establish the existence of the right. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (public assistance payments are property which cannot be taken away without due process); Brown v. Thompson, 91 Hawai'i 1, 979 P.2d 586 (1999) (state-issued mooring and live-aboard permits are "property" within the meaning of the United States and Hawai'i Constitutions).

[200] For an example of "hard" construction costs, *see* Clackamas County v. Holmes, 508 P.2d 190, 199 (Or. 1973) (the acts of the owner should rise above preparatory work "such as the leveling of land, boring of test holes, or preliminary negotiations with contractors or architects").

[201] *See* Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu, 55 Haw. 40, 46, 514 P.2d 861, 865 (1973) (including architect's fees and financing points as costs incurred); Denning v. County of Maui, 52 Haw. 653, 657, 485 P.2d 1048, 1050 (1971) (architects fees incurred); Bd. of Supervisors of Fairfax County v. Med. Structures, Inc., 192 S.E.2d 799, 801 (1972) (architecture plans).

[202] *See Denning*, 52 Haw. at 657, 485 P.2d at 1050 (legal fees).

[203] *Id.* (advertising fees).

[204] Allen v. City Council of Honolulu, 58 Haw. 432, 433, 571 P.2d 328, 328 (1977) (the developer incurred costs for "architectural, engineering and other work necessary to obtain a building permit"); *Med. Structures*, 192 S.E.2d at 801 (engineering plans).

planning,"[205] costs of archeological research,[206] planning and development consultant fees,[207] and appraisal fees.[208] These examples, of course, are not exclusive, and it is clear that a wide range of project-specific costs count.[209]

The Hawai'i Supreme Court's focus on preliminary planning and non-construction costs recognizes the realities of the development process because one or more other actions will generally be required following official assurances before actual site work can commence. It therefore would not make sense to attempt to analyze these later obligations to measure whether a property owner earlier relied.

2. Strict quantum analysis

Equally important is how to determine when these expenditures and commitments are "substantial." Hawai'i courts undertake a strict quantum analysis to determine substantiality.[210] In other words, the actual money spent and obligations incurred are tallied as raw figures, not as a proportion of anticipated or actual project costs. The Hawai'i Supreme Court has never held that a landowner's expenditures (either proven or alleged) were insubstantial,[211]

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205 Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 454, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*] (developer spent approximately $360,000 for design and planning); County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 332, 653 P.2d 766, 777 (1982) [hereinafter *Nukolii*] (developer spent $158,797.64 for design and planning); Town of Longboat Key v. Mezrah, 467 So. 2d 488, 491 (Fla. Dist. Ct. App. 1985) (engineering specifications).

206 *Nukolii*, 65 Haw. at 333, 653 P.2d at 775.

207 *Id.*

208 *Id.*

209 There are other costs and obligations which support vested rights and zoning estoppel. *See*, *e.g.*, City of Gainesville v. Bishop, 174 So. 2d 100 (Fla. Dist. Ct. App. 1965) (commitments to purchase, sale negotiations, financing agreements); City of Lauderdale Lakes v. Corn, 427 So. 2d 239 (Fla. Dist. Ct. App. 1983) (request for annexation, changes to topography); *Mezrah*, 467 So.2d at 491 (Fla. Dist. Ct. App. 1985) (environmental and beach control plans, plans for sewage and water supply); Texas Co. v. Town of Miami Springs, 44 So. 2d 808 (Fla. 1950) (land purchase).

210 Hawai'i courts have implicitly rejected the approach utilized in a minority of jurisdictions that substantiality is measured as a proportion of total project costs. *See*, *e.g.*, Reichenbach v. Windward at Southampton, 364 N.Y.S.2d 283 (N.Y. Sup. Ct. 1975); Clackamas County v. Holmes, 508 P.2d 190 (Or. 1973). *But see* Miller v. Dassler, 155 N.Y.S.2d 975, 977-78 (N.Y. Sup. Ct. 1956) (landowner's expenditure of $4,029.69 was "substantial" for purposes of vested rights, "[e]ven in and of itself, without reference to total contemplated cost"). Besides having equal protection problems, total project cost is not applicable to analysis of Hawai'i vested rights questions since the jurisdictions that adopt it generally determine vesting much later in the development process when total costs are more certain.

211 For instance, in Denning v. County of Maui, 52 Haw. 653, 657-58, 485 P.2d 1048, 1050-51 (1971), the court suggested that the developer's expenditure of approximately $38,047.34 in soft costs would trigger zoning estoppel. In *Waianae Model*, the government was estopped

and has never suggested that actual expenditures or obligations are to be compared to future or anticipated project costs. In both *Life of the Land* opinions—decisions in which the court determined that the government was equitably estopped—neither the supreme court nor the trial court even calculated the total projected project cost despite ample opportunities during the course of two appeals and a remand; apparently, it was not relevant to the analysis.[212] Rather, each court accepted that the amount incurred by the owner was satisfactory in and of itself and not in relation to any other amount.[213]

Given the Hawai'i Supreme Court's choice of the vesting and estoppel trigger as a self-described "midpoint" in the spectrum of possible rules to adopt,[214] the strict quantum rule reflects a healthy dose of judicial pragmatism and the court's recognition of the realities of the development industry. At the early stages of a project, the total anticipated project costs are often unknown, and it would not have made sense in *Nukolii* to require an examination of total project costs since those costs were not capable of accurate determination at or just after the usual discretionary approval stage. Further, the purpose of vested rights and zoning estoppel—certainty—would be entirely undermined if courts were required to balance costs on a case-by-case basis.

Ultimately, the expenditure requirement should exist only as objective extrinsic evidence that a landowner has been vigilant and has not slept on its rights, but has actually and affirmatively relied on the government's assurances.[215] "Substantiality" is required not to protect those who spend more (rewarding those who plan larger development), but to allow early and definitive resolution of vested rights and zoning estoppel cases. These doctrines turn on timing, and the significant date is when official assurances are given

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because the developer spent $7,440 for architect's fees (and an additional $151,560 incurred but not paid); $7,255 for construction; and $78,281.25 paid for financing points (and an additional $297,468.75 by promissory note). Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu, 55 Haw. 40, 45-46, 514 P.2d 861, 865 (1973). In *Allen*, per case, $77,017.26 was incurred for "architectural, engineering and other work necessary to obtain a building permit." Allen v. City & County of Honolulu, 58 Haw. 432, 433-34, 571 P.2d 328, 328-29 (1977). In *Life of the Land*, the developer spent per case, $360,629.12 for design and planning. Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 454, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*]. In *Nukolii*, the developer spent $158,797.64 for design and planning, including $31,352.96 in architectural fees, $1,000 for archeological research, $125,456.68 in planning and development consultant fees, and $1,000 in appraisal fees. *Nukolii*, 65 Haw. at 332-33, 653 P.2d at 777.

212 *See* Life of the Land, Inc. v. City Council of Honolulu, 60 Haw. 446, 450, 592 P.2d 26, 29 (1979) [hereinafter *Life of the Land I*] ("The record is not clear exactly how much was spent by the developers in preparation of plans and designs in support of their applications . . . .").

213 *Id.*

214 *Nukolii*, 65 Haw. at 329 n.8, 653 P.2d at 774 n.8.

215 *See* Ackerman, *supra* note 39, at 1270 (substantial reliance requirement is to give owner notice that he must make "some diligent pursuit of the permitted use").

and the owner acts on those assurances, not some indeterminate date weeks or months later, when the owner spends that final penny which pushes its expenditures from the "insubstantial" into the "substantial."

VI. REMEDIES IN VESTED RIGHTS AND ZONING ESTOPPEL LITIGATION: A SWORD AND A SHIELD

Although sometimes referred to as "defenses,"[216] vesting and estoppel are, in practice, used both as a shield and as a sword. "Defensive" application can be seen in *Life of the Land* and *Waianae Model*, in which the doctrines were invoked by the government and the intervening landowners as defenses to third party suits to enjoin construction or invalidate permits.[217] Another version of the defensive use arises where the government seeks to enforce a new property regulation and the landowner invokes the doctrines as a defense to fines or tear-down orders for completed development, or to prevent application of the new regulation to halt ongoing development.[218] Vested rights and zoning estoppel may also be asserted as a defense when the government attempts to revoke previously-granted permits or permissions after an official change of heart.[219] The doctrines can also, however, be asserted affirmatively as positive claims against the government. For example, in *Denning*, when the county refused to issue a building permit, the property owner asserted that its rights had vested, and posed an affirmative claim to compel issuance.[220] Vested rights may also be asserted positively as an element of a due process or regulatory taking claim, to establish that the owner possesses "property" that was taken without just compensation or by a government action that does not substantially advance a legitimate state interest.[221]

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[216] *See*, *e.g.*, Heeter, *supra* note 6, at 64-65 (labeling both vested rights and zoning estoppel "defenses").

[217] *See*, *e.g.*, *Life of the Land I*, 60 Haw. 446, 592 P.2d 26.

[218] *See*, *e.g.*, Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals of Honolulu, 86 Hawai'i 343, 354, 949 P.2d 183, 194 (1997) (grandfather and non-conforming use provisions used a defense to tear-down order).

[219] *See*, *e.g.*, Sakolsky v. City of Coral Gables, 151 So. 2d 433, 435 (Fla. 1963) (new city administration attempted to revoke permit issued by prior administration, claiming mistake).

[220] Denning v. County of Maui, 52 Haw. 653, 657, 485 P.2d 1048, 1050 (1970). *See also County of Kauai v. Pac. Life Ins. Co.*, 65 Haw. 318, 329-30, 653 P.2d 766, 775-76 (1982) [hereinafter *Nukolii*] (the landowner can bring an action to mandate issuance of ministerial permits).

[221] *See*, *e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (setting forth the disjunctive regulatory takings test: a regulation takes property when it deprives an owner of use or fails to substantially advance a legitimate state interest); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834-35 (1987) (detailing the takings standard for substantially advancing legitimate state interests); Chevron U.S.A., Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Lingle v. Chevron U.S.A., Inc., __ U.S. __, 125 S. Ct. 314 (2004).

Because of the conflation of the doctrines, successfully establishing either vested rights or zoning estoppel will result in a "builders' remedy"—the right to complete the development in accordance with the earlier regulations. Furthermore, a finding of zoning estoppel will prevent the government from applying the newly-enacted regulation to the property owner.[222] *Allen* held that if the government determines that it is in the public interest to prevent a project that has already been approved, it must invoke its power of eminent domain and condemn the property at its entitled value.[223] Additionally, any period during which this right to complete the development was clouded by delay may also subject the government to liability for a temporary regulatory taking.[224]

Since vested rights are grounded in the Constitution, governmental interference with those rights also provides the property owner with potent tools and a wider range of possible remedies than under zoning estoppel. For example, zoning estoppel may only impact a government agency and other government agencies in privity,[225] but once property rights have vested, the owner is on more solid footing, since they are rights that cannot be taken away by regulation, and may be good against the world, not just the particular government entity that is estopped. This is extremely critical in Hawai'i which has both state and local zoning and planning and multiple layers of regulations by different governments and agencies. Also, success in a zoning estoppel claim will not necessarily result in a protected property right that must be condemned in order to be prevented—what the developer gets is a right to finish.[226] Also, establishing a vested property right gives rise to

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[222] *See*, *e.g.*, Allen v. City & County of Honolulu, 58 Haw. 438-39, 437, 571 P.2d 328, 330 (1977) (remedies are invalidation of ordinance or the right to complete; no "no damages" holding of *Allen* has been implicitly overruled by *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)); *Denning*, 52 Haw. at 658, 485 P.2d at 1051 ("constructing the planned structure"); Leroy Land Dev. Corp. v. Tahoe Reg'l Planning Agency, 543 F. Supp. 277, 279 (D. Nev. 1982) (the owner contended that it had a vested right to complete construction of planned condominium project); Town of Longboat Key v. Mezrah, 467 So. 2d 488, 489 (Fla. Dist. Ct. App. 1985) (the government must permit owner use of the property for zoning in place when approved, not later-enacted zoning). Of course, in a building permit jurisdiction, the vested right, if established, is easy to define by the terms of the building permit itself. *See* Avco Cmty. Developers v. S. Coast Reg'l Comm'n, 553 P.2d 546, 550 (Cal. 1976) (once vested, an owner "acquires a vested right to complete construction in accordance with the terms of the permit").

[223] *Allen*, 58 Haw. at 439, 571 P.2d at 331.

[224] *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 304-05 (1987).

[225] *See* Lerner v. Los Angeles City Bd. of Educ., 380 P.2d 97, 105 (Cal. 1963) (the estoppel binds not only the state board, but also those in privity with it such as the city board).

[226] The government should not assume that in the absence of a vested property right, the owner of a parcel of land has no other property rights that can be interfered with without due

federal remedies. For example, governmental interference with vested rights in response to public opposition to a project is a violation of substantive due process. In *Town of Orangetown v. Magee*,[227] the New York Court of Appeals affirmed an award of $5,137,126 for violation of substantive due process rights where a municipality interfered with an owner's property rights simply to appease public opposition to an already-approved project.[228] In addition, the permits were reinstated so construction could proceed.[229] Revocation of vested development rights can give rise to liability for violation of procedural due process as well. For instance, in *Tri County Industries, Inc. v. District of Columbia*,[230] the court reinstated the original jury verdict of $5,000,000 for the suspension of a building permit in response to public opposition, in violation of the permit holder's right to procedural due process.[231] Interference with vested rights can also result in a regulatory taking of property since vested property rights epitomize an owner's "investment-backed expectations" that must be condemned, and compensated if taken.[232] When the government reacts to public opposition to a previously-approved and vested development by rezoning the parcel to preclude the previously approved use, it is liable to pay just compensation for the diminution in value.[233] Temporary interference with a vested property right must also be compensated.[234]

In addition, because federal rights are protected from deprivation under color of state law by a federal civil rights statute,[235] a property owner has a

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process or properly exercised eminent domain authority. *See*, *e.g.*, DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 601 (3d Cir. 1995).

[227] 665 N.E.2d 1061. Almost by definition, a successful assertion of vested rights or zoning estoppel evidence a lack of planning on the part of the government. Had it truly undertaken a comprehensive and long range planning process, it would not have found it necessary to reverse course after giving a property owner official assurances a project could proceed. The alternative—that the government simply reacts to the demands of the majority in derogation of the rights of the minority—is the epitome of arbitrariness, but it will also probably be a fact of life, notwithstanding constitutional protections.

[228] *Id.* at 1068.

[229] *Id.* at 1065.

[230] 200 F.3d 836 (D.C. Cir. 2000).

[231] *Id.*

[232] *See* Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978) (setting forth the three-part ad hoc takings test which examines, among other things, an owner's reasonable investment-backed expectations); Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 518 (Iowa 1980) (vested rights are investment-backed expectations).

[233] *See*, *e.g.*, A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483, 1488 (11th Cir. 1988) (taking occurred when city rezoned property to prevent completion of an approved wood-chipping facility in response to public opposition).

[234] *See*, *e.g.*, Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987) (damages for temporary interference is the "return on the portion of fair market value that is lost").

[235] 42 U.S.C. § 1983 (2003). This statute provides a remedy when federal rights are infringed upon by persons acting under color of state law, which include local governments:

federal statutory damage claim when its vested rights are infringed.[236] A property owner prevailing on a constitutional claim may recover attorneys' and experts' fees and costs.[237]

VII. THE RELATIONSHIP OF VESTED RIGHTS AND ZONING ESTOPPEL TO CREATIVE LAND USE PLANNING AND DISPUTE RESOLUTION TOOLS

Establishing a vested right means that the government cannot use regulation to take away that right. As *Allen* and *First English* instruct, the government may still exercise eminent domain upon payment of just compensation at entitled value if there is a public use in stopping a project.[238] Assuming the government has determined its interests are not served by the proposed development but it cannot or will not condemn the property and pay just compensation, it must look elsewhere for a solution. But even when the government is prevented from exercising its eminent domain power, establishing a vested right to develop provides opportunities for creative settlement strategies to both the property owner and the government.

A. Avoiding Vested Rights Litigation—Development Agreements

Development agreements are "vested rights" contracts between a developer and the local government in which the government agrees to not apply future

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

See id. Counties are "persons" liable under § 1983, and county officials, including elected officials, may be personally liable and have no immunity if they are acting in their non-legislative, administrative, or quasi-judicial capacity, such as issuing or revoking permits.

236 Section 1983 claims may be brought for regulatory takings, and procedural and substantive due process violations. *See id.*

237 42 U.S.C. § 1988(b) (2003).

238 Note that if the government invokes eminent domain to condemn a vested right, it must first demonstrate that the condemnation is for public use. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation."). The Hawai‘i Supreme Court has noted that in takings under the Hawai‘i Constitution, it may well require a higher nexus between invoked and actual public use than utilized by the U.S. Supreme Court in Fifth Amendment cases. *See* Haw. Hous. Auth. v. Lyman, 68 Haw. 55, 69, 704 P.2d 888, 896 (1985) (citations omitted) (the term "public use" in the Hawai‘i Constitution is not necessarily coterminous with the U.S. Constitution's "public use").

land use regulations against the property for a period of time.[239] They are prophylactic measures designed by the legislature to prospectively avoid many of the uncertainties of establishing a vested right.[240] They are useful tools to anticipate issues, avoid a mad rush to vest,[241] and to encourage developer investment while reserving the local government's police power.[242] In Hawai'i, development agreements have two explicit purposes: to eliminate the "lack of certainty in the development approval process," and to "provide a means by which an individual may be assured at a specific point in time that having met or having agreed to meet all of the terms and conditions of the development agreement, the individual's rights to develop a property in a certain manner shall be vested."[243] Development agreements also are designed to provide government assurances to the property owner about the state of its own existing regulatory process, and to give assurances that the owner may proceed with development if it complies with that process.[244] Development agreements, however, are not proper vehicles to change the existing process, affirm industry practices which do not comply with the law, or to bind other governments.[245] Thus, development agreements are not a panacea to all the problems in the land development process, nor are they a one-size-fits-all solution. The property owner and local government considering entering into a development agreement must insure that it is an appropriate means to achieve their goals since development agreements are not legislative sanction for local governments to begin wheeling and dealing for future or anticipated land uses.[246]

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[239] Development agreements provide for a "freezing [of] the existing zoning regulations." Morgran Co. v. Orange County, 818 So. 2d 640, 643 (Fla. Dist. Ct. App. 2002) (quoting Brad K. Schwartz, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 720 (2001)).

[240] *See* HAW. REV. STAT. § 46-121 (2003) providing in pertinent part:

> Development agreements are intended to provide a reasonable certainty as to the lawful requirements that must be met in protecting vested property rights, while maintaining the authority and duty of government to enact and enforce laws which promote the public safety, health, and general welfare of the citizens of our State.

See id.

[241] The title of a journal article on vested rights says it all: *He Who Rests Less, Vests Best*. *See generally* Delaney & Kominers, *supra* note 43, at 219.

[242] *See generally* CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 91.

[243] HAW. REV. STAT. § 46-121 (2003).

[244] *See id.*

[245] *See id.* For example, development agreements cannot bind another government unless it signs on. *See id.* § 46-126(d) (2003). This is particularly important to remember given Hawai'i's multi-tiered land regulation system where both state and county controls often are applicable to a single parcel.

[246] *See* Hosoda, *supra* note 51, at 190 ("The agreements must not become a vehicle for evading or subverting the currently existing planning and land use process.").

At best, development agreements "freeze" current land use regulations or practices of the governmental entity entering into the agreement, but do not permit it to enter into executory provisions for future government agreement, or to change existing zoning.[247] The property owner and the local government must carefully consider whether the scope of the agreement is within the local government's power to agree; "contract zoning" and a bargaining away of the police power are still not permitted.

The case of *Morgran Company, Inc. v. Orange County*[248] illustrates the limitations on the proper scope of development agreements. In that case, a developer sought to construct a "primarily residential, mixed-use" project on property that was zoned for agricultural uses.[249] The developer sought and obtained an amendment to the County's comprehensive plan, which was necessary to proceed with its plans. Also necessary was a rezoning of the property to "Planned Development."[250] The developer did not seek the zone change through the usual county process but rather entered into a development agreement with the County in which the County agreed to "support and expeditiously process" the rezoning request in exchange for the donation by the developer of fifty acres of its property for use as a public park once the zone change was completed.[251]

But after the County chairman—the very official who executed the development agreement—subsequently mandated a blanket rejection of all rezoning requests in areas where the school board considered the schools to be overcrowded—which apparently included the developer's property—the County failed to support and process the rezoning application as it had agreed, and instead repudiated the development agreement and actively opposed the rezoning.[252] When the developer sued the County for breach of contract and

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[247] *See* Schwartz, *supra* note 239, at 720 (defining development agreement as "a contract between [local government] and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits"). To the extent that a development agreement locks down existing zoning for a period of time into the future, most courts find this is not a bargaining away of future police powers. *See*, *e.g.*, Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors, 100 Cal. Rptr. 2d 740, 748 (Cal. Ct. App. 2000) (a zoning freeze does not contract away police power). Development agreements are designed to lock in current approvals, not to agree to new ones. *See* Hosoda, *supra* note 51, at 191 ("Developers must still apply for and receive traditional approvals. However, once a developer receives such ratification and complies with the terms of the agreement the government cannot obliterate the developer's right to continue."). *See also* HAW. REV. STAT. § 46-127(b) (2003) (valid agreement insulates property from subsequent change in the law).

[248] 818 So. 2d 640 (Fla. Dist. Ct. App. 2002).

[249] *Id.* at 641.

[250] *Id.*

[251] *Id.* at 642.

[252] *Id.*

promissory estoppel, the County asserted the development agreement was void as contract zoning beyond the ability of the County to agree to.[253] Despite warning that "[t]his case may also serve as a cautionary tale for anyone who enters into a contract with Orange County,"[254] the court agreed with the County, holding the government could not contractually bind itself to support a future request for rezoning.[255] The court reasoned that future approval is discretionary legislative power which cannot be agreed to in advance and was therefore beyond the scope of permitted development agreements.[256]

Contrast *Morgran*'s development agreement with the one at issue in *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*.[257] In that case, the County and the developer entered into an agreement as part of a settlement of a lawsuit.[258] The agreement froze existing zoning, committed the developer to file future applications, and committed the County to "process, review, and approve or disapprove the specific plan."[259] It did not commit the County to favorably consider the developer's applications, or even "support" the developer as in *Morgran*.[260] The County only agreed to process the future applications in accordance with the zoning and planning in effect at the time of the execution of the agreement for five years into the future.[261] Critically, the court held "[t]he Agreement does not give [the developer] a right to construct the Project or impose upon it an obligation to do so."[262] The County retained the discretion to approve or deny the developer's future applications, and the agreement did "not permit construction until the County has approved detailed building plans."[263]

Thus as a general rule, a development agreement may only freeze existing regulation and may not grant or promise future approvals or changes. This distinction makes sense because existing zoning is presumed valid having been imposed through the comprehensive Euclidean process, while there is no such procedural assurance for executory zoning accomplished by way of a

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253 *Id.* "Contract zoning is, in essence, an agreement by a governmental body with a private landowner to rezone property for consideration." *Id.* (citing Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Chung v. Sarasota County, 686 So. 2d 1358 (Fla. Dist. Ct. App. 1996)). *See also* CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 92 ("government cannot bind itself to not exercise its police powers").

254 *Morgran*, 818 So. 2d at 641.

255 *Id.* at 643.

256 *Id.*

257 100 Cal. Rptr. 2d 740 (Cal. Ct. App. 2000).

258 *Id.* at 742-43.

259 *Id.* at 743.

260 *Morgran*, 818 So. 2d at 641.

261 *Santa Margarita*, 100 Cal. Rptr. 2d at 743.

262 *Id.*

263 *Id.* at 748.

development agreement. Development agreements are not approved like zoning ordinances, since they are approved after a single public hearing and are administrative acts, while zoning regulations are legislative acts enacted by ordinance.[264]

B. Breaching Impasses—TDR's, Land Swaps, and Consent Decrees

When the situation presents itself and a development agreement is not available or possible, the cash-free concepts of transferred development rights, land swaps, and consent decrees can be useful to resolve difficult land use litigation. Local government coffers are not overflowing with cash but unconstitutional action may be undertaken by government officials independently or prompted by a public not aware of constitutional limitations or the consequences of failing to respect them.[265] The use of transferred development rights or land swaps may provide adequate consideration for a property owner to forego its legal claims. However, the adage "once bitten, twice shy" comes into play; where the government is attempting to prevent the completion of a project it has, by definition, already approved, there will be an understandable hesitancy on the part of a property owner to trust the government not to interfere with its new project or another property.

The consent decree provides the judicial oversight often required by the landowner to insure that its rights are not violated a second time. There is ample precedent for the use of the consent decree to resolve land use disputes.[266] These tools can be an effective means of giving all parties that

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[264] HAW. REV. STAT. § 46-131 (2003) (defining a development agreement as an "administrative act" of the county); *id.* § 46-128 (one public hearing).

[265] For stark examples, *see Kaiser Hawaii Kai Development Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989), and *Lum Yip Kee, Ltd. v. City & County of Honolulu*, 70 Haw. 179, 767 P.2d 815 (1989). In both of those cases, development was proposed consistent with zoning, but the public objected and through initiative attempted to stop the projects by changing the zoning and planning designations. The Hawai'i Supreme Court rejected zoning and planning by initiative in *Kaiser Hawaii Kai* and invalidated the initiative downzoning ordinance, holding that zoning and planning must be accomplished by the City Council under state law that trumped the City Charter's initiative provision. *Kaiser Hawaii Kai*, 70 Haw. at 489, 777 P.2d at 250. Subsequently, the City Council, sensing an inflamed electorate, passed a "confirmation" ordinance to downzone the parcels as the electorate had attempted to do by initiative. This resulted in a lawsuit for vested rights, zoning estoppel and a regulatory taking, among other claims, in which the trial court entered judgment on liability for the property owner. *See* Maunalua Assocs. v. City & County of Honolulu, No. 89-3539-119SSM (Haw. Cir. Ct. filed Nov. 14, 1989) (copy of judgment on file with the authors).

[266] Establishing a vested property right also results in the court having greater tools available for creative settlements. For example, vindicating a constitutional right permits a federal court to order a local government to undertake actions not permitted by development agreements or local ordinances. *See, e.g.*, Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 373 F. Supp.

which they desire: return on investment for the owner; cash-free solutions for the politicians; and public benefits for the taxpayers.

VIII. CONCLUSION

Under the doctrines of vested rights and zoning estoppel, the "arrow of time" moves forward. These principles shield property owners from the shifting winds of local politics and the vagaries of vindictive officials. While the counties and the state are aware that these rules protect property owners, they will often be tossed aside in the interest of political expediency, forcing the landowner to aggressively protect its rights. Vested rights and zoning estoppel inject a measure of certainty in an otherwise uncertain process and attempt to minimize the risk that the rug can be pulled out unexpectedly from a property owner after the government has given the green light to a use and the owner has started down the path in reliance.

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208 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977), *on remand*, 469 F. Supp. 836 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980). *See also* Mesalic v. Slayton, 689 F. Supp. 416 (D.N.J. 1988). Professor David Callies has authored a comprehensive analysis of the rationale and the process of using consent decrees to settle land use disputes. *See* David L. Callies, *The Use of Consent Decrees in Settling Land Use and Environmental Disputes*, 21 STETSON L. REV. 871 (1992). A very comprehensive settlement procedure was undertaken in *Maunalua Assocs*. See *Maunalua Assocs.*, No. 89-3539-119SSM.