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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

BRIDGE AINA LE‘A, LLC, Plaintiff, vs. STATE OF HAWAII LAND USE COMMISSION, VLADIMIR P. DEVENS, in his individual and official capacity, KYLE CHOCK, in his individual and official capacity, THOMAS CONTRADES, in his individual and official capacity, LISA M. JUDGE, in her individual and official capacity, NORMAND R. LEZY, in his individual and official capacity, NICHOLAS W. TEVES, JR., in his individual and official capacity, RONALD I. HELLER, in his individual and official capacity, DUANE	Civil No. 11-00414 SOM BMK STATE OF HAWAII'S MOTION FOR SUMMARY JUDGMENT MEMORANDUM IN SUPPORT OF MOTION CERTIFICATE OF SERVICE

KANUHA, in his official capacity, and CHARLES JENCKS, in his official capacity, JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE ENTITIES 2-10 and DOE GOVERNMENTAL UNITS 1-10,

Defendants.

STATE OF HAWAII'S MOTION FOR SUMMARY JUDGMENT

The State of Hawai'i ("State")[1] hereby moves for summary judgment on all remaining claims in this case. In this Court's August 25, 2015 order, this Court stated that only the takings claims found in Counts I, II, and VIII and the vested-rights claim for damages of Count IV remained pending against the State of Hawaii Land Use Commission and the official capacity commissioners. The State is entitled to summary judgment on the takings claims for three independent reasons: (1) an affordable-housing requirement is not an unconstitutional condition, (2) the takings claims are time barred, and (3) the takings claims fail because plaintiff lacked the ability to develop the project for independent reasons. The State is entitled to summary judgment on the vested-rights claim for damages

[1] Defendants are State of Hawaii Land Use Commission ("Commission"), certain commissioners in their individual capacity, and all current commissioners in their official capacity. The only remaining claims involve the Commission and official capacity defendants, collectively referred to as the "State."

because a party cannot recover damages under this cause of action under Hawai‘i law.

This motion is brought pursuant to FRCP Rule 56 and Local Rule 56.1 and is supported by the Memorandum in Support of Motion, the Separate and Concise Statement of Facts, the declarations and exhibits, the pleadings in this case, and any other reasons that may be adduced at a hearing on this motion.

DATED: Honolulu, Hawai'i, December 31, 2015.

/s/ William J. Wynhoff
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MEMORANDUM IN SUPPORT OF MOTION

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I. INTRODUCTION

This Court has already dismissed the vast majority of plaintiff's claims. *See* Dkt. 93. Only the takings claims and a vested-rights claim remain. Defendants[1] now move for summary judgment on all remaining claims in this case.

The State is entitled to summary judgment as to plaintiff's takings claims for three separate and independently dispositive grounds. First, the affordable-housing condition imposed by the Commission is not an unconstitutional condition as a matter of law. Second, the claims are time-barred. Third, plaintiff was legally prohibited from developing the subject property during the period of the alleged taking for reasons wholly independent of any actions taken by the State.

The State is also entitled to summary judgment on the vested-rights claim based upon well-established Hawai'i law.

II. BACKGROUND

A. Proceedings Before the Commission

1. The Commission's 1989 Order

On November 25, 1987, Signal Puako Corporation ("SPC") filed a petition to reclassify approximately 1,060 acres of land in Waikoloa, County of Hawai'i (the "Property") from the agricultural district into the urban district. Concise

[1] Defendants are State of Hawaii Land Use Commission ("Commission"), certain commissioners in their individual capacity, and all current commissioners in their official capacity. The only remaining claims involve the Commission and official capacity defendants, collectively referred to as the "State."

Statement of Facts ("CSF") ¶ 1. Among other things, SPC proposed the construction of 2,760 housing units. *Id.*

On January 17, 1989, the Commission filed its Findings of Fact, Conclusions of Law, and Decision and Order (the "Order"), approving SPC's petition subject to various conditions. CSF ¶ 2. One of these conditions required that 60% of the housing units (*i.e.*, 1,656 units) be affordable. *Id.*

Neither SPC nor its successors in interest appealed the Commission's Order or sought to recover compensation from the State for a taking pursuant to the Order. CSF ¶ 3.

2. 1991 Modification of the Affordable-Housing Condition

SPC transferred the Property to Puako Hawaii Properties ("PHP"), which filed a motion to amend the Order, seeking to reduce the number of housing units. CSF ¶ 4.

On July 9, 1991, the Commission entered Amended Findings of Fact, Conclusions of Law, and Decision and Order, which, among other things, amended the affordable-housing condition to require the offering of at least 1,000 affordable units. *Id.*

Neither PHP nor its successors in interest appealed the 1991 amended order or sought to recover compensation from the State for a taking pursuant to the amended order. CSF ¶ 5.

3. 2005 Modification of the Affordable-Housing Condition

On September 1, 2005, plaintiff, which had earlier acquired the Property, filed a second motion to amend the Order. Plaintiff sought to modify the affordable-housing condition to "coincide with County of Hawaii affordable housing requirements." CSF ¶ 6.

On November 25, 2005, the Commission entered an order amending the affordable-housing condition to allow plaintiff to offer even fewer affordable units. The new requirement was for only 385 units or 20% of the total, whichever was more. CSF ¶ 7.

The Commission stated that plaintiff "shall obtain, and provide copies to the Commission, the certificates of occupancy for all of the Project's affordable housing units within five (5) years of November 17, 2005." *Id.*

Plaintiff did not appeal the entry of this order. CSF ¶ 8. Plaintiff did not file an action to obtain compensation for a taking pursuant to the 2005 amended order until it filed its Complaint in the Hawai'i Circuit Court on June 7, 2011. *Id.*

4. Reversion of the Property to an Agricultural District

On December 9, 2008, the Commission filed an Order to Show Cause ("OSC") as to why the Property should not revert to its former land use classification given plaintiff's failure to perform in accordance with the conditions imposed. CSF ¶ 9.

On March 20, 2009, plaintiff notified the Commission that it intended to assign its interest in the project to DW Aina Le‘a Development, LLC (“DW”). CSF ¶ 10.

At the end of a hearing on April 30, 2009, the Commission voted unanimously to revert the Property to agricultural use. CSF ¶ 11.

On August 19, 2009, plaintiff moved for rescission of the Commission’s ruling returning the land to agricultural use. CSF ¶ 12.

On September 28, 2009, the Commission rescinded its order to show cause but imposed a condition that sixteen affordable units be completed by March 31, 2010. CSF ¶ 13. The requirement that all 385 units be completed by November 2010, was not altered. *Id.* The Commission also permitted DW to be named as a co-petitioner. *Id.*

Ultimately, the Commission concluded that plaintiff failed to satisfy the affordable-housing condition. CSF ¶ 13. The Commission filed its Order Adopting Proposed Findings of Fact, Conclusions of Law, and Decision and Order Reverting the Petition Area, as Amended as Commission’s Final Decision on April 25, 2011. *Id.*

B. State Court Proceedings Regarding the April 25, 2011 Decision

Plaintiff and DW appealed from the April 25, 2011 decision pursuant to HRS, Chapter 91. CSF ¶ 14. On June 25, 2012, the Hawai‘i circuit court entered

amended findings of fact, conclusions of law, and order reversing and vacating the Commission's decision. *See DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 134 Hawai'i 187, 206, 339 P.3d 685, 704 (2014). The circuit court filed its second amended judgment on February 13, 2013. On November 25, 2014, the Hawai'i Supreme Court issued its ruling, holding that the Commission erred in reverting the property to agricultural use. *See id.* at 220, 339 P.3d at 718.

C. For Wholly Independent Reasons, Plaintiff Could Not Legally Develop the Project

1. Plaintiff Failed to Secure Final Subdivision Approval

In 1992, the County Council for the County of Hawai'i enacted Ordinance No. 93-1. This ordinance constituted the County rezoning action needed to do the project, but imposed various conditions upon the rezoning. CSF ¶ 16.

In 1996, the Council enacted Ordinance No. 96-153, which amended the 1993 conditions. CSF ¶ 17. Among other conditions, the 1996 ordinance required that subdivision plans and "final subdivision approval for the first residential subdivision" be obtained within five years of the effective date of rezoning. The effective date of rezoning was September 21, 1999 ("Condition C"), *id.*, so originally the deadline was September 21, 2004. The planning department could extend this deadline for five more years (that is, to September 21, 2009). *Id.* Any further extension could only be given by the County Council. *Id.*

By letter dated August 24, 2004, the Planning Director granted an extension of time until September 21, 2009, to allow plaintiff to comply with Condition C. CSF ¶ 18. Plaintiff did not meet the deadline and has never obtained an additional extension of time from the County Council. CSF ¶ 19.

2. Plaintiff Lacks Required Environmental Impact Statement

On October 11, 2007, the County of Hawai‘i informed plaintiff that development of the project required the preparation of an Environmental Impact Statement ("EIS") pursuant to HRS, Chapter 343. CSF ¶ 20.

DW prepared the EIS, which was published on the State Office of Environmental Quality Control ("OEQC") website in November 2010. CSF ¶ 21. The proposed action for the project was the construction of infrastructure, including power- and water-related utilities for the project. CSF ¶ 22. The public was notified of the EIS in the OEQC's Environmental Notice, dated November 8, 2010. CSF ¶ 23.

On January 5, 2011, a lawsuit was filed challenging the adequacy of the EIS in the Circuit Court of the Third Circuit, State of Hawai‘i in a case docketed as *Mauna Lani Resort Association v. County of Hawai‘i*, Civil No. 11-1-005K. CSF ¶ 24.

On March 28, 2013, the circuit court filed its order and judgment ruling as a matter of law that the EIS was inadequate. CSF ¶ 25. As a result, the court tolled all development of the project. *Id.*

D. Proceedings in This Court

On June 7, 2011, plaintiff filed its complaint in state court. *See* Dkt. 1. On June 27, 2011, the State filed a Notice of Removal. *Id.* On July 27, 2011, the State filed its Motion to Dismiss. Dkt. 14.

On March 30, 2012, this Court entered an order staying this case until the resolution of the Commission's appeal before the Hawai‘i Supreme Court in the *DW Aina Le‘a* litigation. Dkt. 48. Plaintiff and the State appealed. Dkts. 49, 55. After the Hawai‘i Supreme Court issued its ruling, the Ninth Circuit affirmed this court's action and remanded for further proceedings.

On remand, this court granted the State's motion to dismiss "in all respects now being moved on by Defendants." Dkt. 93 at 3. The court's order left

> only the following claims for adjudication: (1) the takings claim for just compensation in Counts I, II, and VIII, to the extent asserted against the Commission and Official Capacity Commissioners; and (2) Count IV, to the extent seeking damages against the Commission and Official Capacity Commissioners.

Id. at 64.

III. STANDARD OF REVIEW

Summary judgment is appropriate if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FRCP 56(a). The moving party can satisfy its burden of persuading the court that there is an absence of a genuine issue of material fact "with affirmative evidence or by showing—that is, pointing out to the district court—that there is an absence of evidence to support the non-moving party's case." *See Olson v. Lui*, Civ. No. 10-00691 ACK-RLP, 2012 WL 39140, at *3 (D. Haw. Jan. 6, 2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)) (internal quotation marks omitted); *see also Rodriguez v. Gen. Dynamics Armament & Tech. Prods., Inc.*, 696 F. Supp. 2d 1163, 1176 (D. Haw. 2010) (Mollway, J.) ("Summary judgment must be granted against a party that fails to demonstrate facts to establish what will be an essential element at trial."). Where the evidence "could not lead a rational trier of fact to find for the nonmoving party, no genuine issue exists for trial." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

IV. SUMMARY OF ARGUMENT

The State is entitled to summary judgment on all remaining claims. With respect to plaintiff's takings claims, the State is entitled to summary judgment for each of three independent reasons:

- First, the affordable-housing condition imposed by the Commission is not an unconstitutional condition at all. We discuss this point in Section A.1. of the Argument, pages 10 – 16.
- Second, the takings claims are time barred. We discuss this point in Section A.2. of the Argument, pages 17 – 22.
- Third, plaintiff was legally prohibited from developing the subject property during the period of the alleged taking for reasons wholly independent of any actions taken by the Commission. We discuss this point in Section A.3. of the Argument, pages 22 – 24.

The State is also entitled to summary judgment on plaintiff's common-law vested-rights claim because:

- Under *Allen v. City and County of Honolulu*, 58 Haw. 432, 571 P.2d 328 (1977), and pursuant this Court's own analysis of that case in its August 25, 2015 order, plaintiffs cannot recover damages under a vested-rights cause of action as a matter of law. We discuss this point in Section B of the Argument, pages 24 – 26.

V. ARGUMENT

A. The State is Entitled to Summary Judgment on Plaintiff's Taking Claims

Plaintiff's remaining claims in Counts I, II, and VIII (although given different names) in fact constitute one singular claim stemming from the same set

of facts—an alleged taking claim flowing from the Commission's imposition and implementation of an affordable-housing condition.

The State is entitled to summary judgment on this one remaining taking claim for each of three reasons: (1) the imposition and implementation of the affordable-housing condition is not an unconstitutional condition, (2) plaintiff's takings claim is time barred, and (3) plaintiff could not have proceeded with the development of the Property during the time of the alleged taking.

1. An Affordable-Housing Requirement is Not an Unconstitutional Condition

This Court should grant summary judgment on plaintiff's takings claim because the imposition and implementation of the affordable-housing condition does not constitute a taking.

In takings jurisprudence, unconstitutional-conditions claims consider "exactions"—"land-use decisions conditioning approval of development on the dedication of property to public use." *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702–03 (1999). The predicate to an unconstitutional-conditions claim is that "the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598 (2013). In other words, unconstitutional-conditions claims must be based upon state action that would constitute a taking if the government

simply forced a private entity to surrender a property interest rather than coercing the entity into giving it up by other means.

The seminal cases are *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Nollan*, the government conditioned the approval of a permit upon the permittees' grant of a public easement over their property. *Nollan*, 483 U.S. at 828. In *Dolan*, the government conditioned the approval of a permit on the permittee's dedication of a portion of her property for flood control and traffic improvements. *Dolan*, 512 U.S. at 377. The key to the Court's analysis was its observation that if the government simply ordered such dedications of land, they would constitute takings. *See Nollan*, 483 U.S. at 834 (stating that "requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment"); *Dolan*, 512 U.S. at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred."); *see also Kamaole Point Dev. LP v. Cnty. of Maui*, 573 F. Supp. 2d 1354, 1364 (D. Haw. 2008) (holding that the first step in a *Nollan*/*Dolan* analysis is to ask "whether government imposition of the exaction would constitute a taking").

Thus, the threshold inquiry when analyzing an unconstitutional condition is whether an obligation is imposed that, absent the condition, would constitute a taking. It necessarily follows that if the obligation imposed by the condition would not independently constitute a taking, then the condition passes constitutional muster.

An affordable-housing requirement does not constitute an unconstitutional condition. The State is not aware of any federal precedent directly on point,[2] but the recent California Supreme Court case of *California Building Industry Association v. City of San Jose*, 351 P.3d 974 (Cal. 2015) (petition for certiorari pending) contains a thorough analysis of federal law and is highly persuasive in establishing that an affordable-housing requirement does not constitute an unconstitutional condition.

In *San Jose*, the city enacted an ordinance that imposed a 15% affordable housing requirement on certain developments.[3] 351 P.3d at 983. A developer sued to invalidate the ordinance, contending that it constituted an unconstitutional

[2] The State notes that in *Commercial Builders of N. California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), the Ninth Circuit considered a condition upon permits that required the payment of a fee to assist in the financing of low-income housing. 941 F.2d at 873. The Supreme Court in *Koontz* specifically held that monetary exactions are subject to the *Nollan/Dolan* requirements of nexus and rough proportionality. 133 S. Ct. at 2599. This case, however, does not involve a monetary exaction.

[3] The ordinance also provided for alternative methods of compliance with the affordable-housing requirement, which are not relevant for purposes of this analysis. *See id.* at 983.

condition. *Id.* at 985. The trial court concluded that the ordinance was invalid, but the court of appeals reversed, holding, *inter alia*, that the ordinance did not require a dedication of property. *See id.* at 986.

The California Supreme Court affirmed, holding that the affordable-housing ordinance "does not violate the unconstitutional conditions doctrine because there is no exaction—the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process." *Id.* at 991.

The court began its analysis by stating the general proposition that "the unconstitutional conditions doctrine imposes special restrictions upon the government's otherwise broad authority to condition the grant of a privilege or benefit when a proposed condition requires the individual to give up or refrain from exercising a constitutional right." *Id.* at 988.

The court noted that both *Nollan* and *Dolan* concerned the dedication of a portion of property for public use and that, in such cases, "the government may impose such a condition only when the government demonstrates that there is an 'essential nexus' and 'rough proportionality' between the required dedication and the projected impact of the proposed land use." *Id.* at 988–89 (citing *Nollan* and *Dolan*). The court further noted that in *Koontz*, the U.S. Supreme Court held that the *Nollan*/*Dolan* test applied not only when the government conditions approval

of land use permit on the dedication of property but also when "it conditions approval of such a permit upon the owner's payment of money." *Id.* at 989.

The California Supreme Court held that nothing in controlling federal precedent suggests that "the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval." *Id.* at 990. In other words, "[i]t is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called 'exaction' under the takings clause that brings the unconstitutional conditions doctrine into play." *Id.* In explaining its holding, the court noted that it was aware of no authority that conditions imposed to increase the stock of affordable housing would constitute a taking outside the permit process or would be subject to the *Nollan/Dolan* test. *Id.* at 992.

In our case— as in *San Jose*— the affordable-housing condition imposed by the Commission pursuant to the Order is not an unconstitutional condition because the underlying action does not effectuate a taking outside of the permit process. In 1989, the Commission approved plaintiff's predecessor's petition for reclassification of the Property subject to the condition that 60% of the total 2,760 proposed housing units (*i.e.*, 1,656) units would be affordable pursuant to the

terms of the Condition. CSF ¶ 2. Pursuant to the 1991 modification to the Order, plaintiff's predecessor was required to offer at least 1,000 affordable units. CSF ¶ 4. In 2005, the Commission substantially reduced the required the number of affordable units to 20% of the residential units but no less than 365 affordable units. CSF ¶ 7. The affordable-housing condition does not exact a dedication of property or money, but simply affects the use of land. Therefore, the affordable-housing condition imposed is not an unconstitutional condition, and the Commission did not effect a taking by imposing it.

This conclusion is not affected by any benchmarks imposed by the Commission for the purpose of enforcing the affordable-housing condition. The Hawai‘i Supreme Court explicitly rejected this exact argument in the *DW Aina Le‘a* case. In plaintiff's answering brief filed with the Supreme Court, plaintiff argued that the affordable-housing condition in the Commission's 2005 order was an "unconstitutional land development condition." CSF ¶ 15. Plaintiff argued that the condition should be subject to heightened *Nollan*/*Dolan* scrutiny and that the affordable-housing condition was the "'wrong place, wrong time' to impose a development condition requiring a specific number of affordable houses be built by a specific time, as the Commission did in Condition 1 of its 2005 Order," exactly duplicating the language in plaintiff's Complaint. *Compare* Ex. D at 30,

with Compl. ¶ 211. The Hawai‘i Supreme Court explicitly rejected plaintiff's argument:

> Bridge argues that the affordable housing condition was an "unconstitutional land development condition." However, as noted above, HRS § 205-4(g) gives the [Commission] broad authority to impose conditions, including those necessary "to assure compliance with representations made by the petitioner." Given this broad authority and Bridge's representations to the LUC, *and its included deadline were valid*. Bridge cites no authority that would prevent the [Commission] from imposing benchmarks or deadlines on development schedules.

DW Aina Le‘a, 134 Hawai‘i at 214 n.17, 339 P.3d at 712 n.17 (emphasis added). As the Hawai‘i Supreme Court recognized, the affordable-housing condition and its deadline were valid.

The affordable-housing condition is not an unconstitutional condition because it does not effectuate a taking as a matter of law. Therefore, this Court should grant summary judgment on all plaintiff's remaining taking claims.[4]

[4] Even if this Court should rule that the State is not entitled to summary judgment on all remaining claims pursuant to this argument, this Court should at least grant summary judgment on Count VIII of the Complaint. Count VIII is explicitly based on a *Nollan*/*Dolan* theory. Compl. ¶¶ 209–14. In *Kamaole Pointe*, this court, in a published decision addressing the constitutionality of a Maui affordable-housing ordinance, held that because the plaintiffs failed to assert a physical invasion of their property, *Nollan* and *Dolan* were "inapposite." 573 F. Supp. 2d at 1370 (Ezra, J.); *see also Alto Eldorado P'ship v. Cnty. of Santa Fe*, 634 F.3d 1170, 1178 (10th Cir. 2011) (requirement that developers provide affordable housing in new subdivision not subject to *Nollan/Dolan* because no physical *per se* taking).

2. Plaintiff's Taking Claims are Time Barred

The State is also entitled to summary judgment because plaintiff's claims are time barred as a matter of law. This conclusion is grounded in the sound reasoning of *Daniel v. County of Santa Barbara*, 288 F.3d 375 (9th Cir. 2002).

In *Daniel*, Johnson owned beachfront property in California. In 1974, he sought to subdivide the property. 288 F.3d at 378–79. A regional arm of the coastal commission approved the division conditioned on Johnson providing a firm continuing offer of dedication to the county of an access easement for a period of 25 years. *Id.* at 379. The commission affirmed on appeal, but Johnson brought no judicial challenge to the decision.

In 1977, the commission approved Johnson's permit application to build a house on one of the subdivided parcels subject to a renewal of the firm offer. *Id.* Again Johnson did not challenge the decision.

In 1987, Johnson's successors in interest, the Bucklews, signed a 25-year irrevocable offer to dedicate the easement to the county in response to a demand from the commission. *Id.* At no time did any of the owners administratively or judicially challenge these conditions or demands. *See id.*

In 1997, the Daniels purchased the parcel. *Id.* In 1998, after the Daniels attempted to rescind the Bucklews' offer, the county accepted the 1987 offer. *Id.*

Because an affordable-housing requirement is not a *Nollan*/*Dolan* condition, Count VIII must be dismissed.

The Daniels filed suit against the county, alleging a violation of the Takings Clause. *Id.* The district court dismissed the claim, holding that, among other things, the takings claim accrued in 1974 or, in the alternative, 1977, and, in any event, no later than 1987. The claims were therefore time barred. *Id.*

The Ninth Circuit affirmed, holding that the Daniels' claim was an impermissible attempt to revive time barred claims of their predecessors in interest. *Id.* at 380. In its analysis, the Ninth Circuit utilized the *Williamson County* framework that a takings claim is ripe when (1) there is a final decision regarding how the owner will be allowed to develop the property and (2) a plaintiff sought compensation through available state procedures. *Id.* at 381. The Court held that the permitted usage of the parcel was known to a reasonable degree of certainty in 1974 when Johnson unsuccessfully appealed. *Id.* The Court further held that no one ever attempted to use state procedures to obtain compensation and that "[t]he failure of Johnson and the Bucklews to use such state procedures cannot now be cured because the applicable state limitation periods have long since expired." *Id.*

The Court rejected the Daniels' contention that the county's exercise of the Bucklews' option in 1998 was the taking. The Court held that the Daniels purchased the property with full notice of the exactions and held that "[t]hey cannot, by virtue of their purchase, obtain greater rights than those held by their predecessors in interest." *Id.* at 382–83. Noting that under federal law, a taking

occurs when an option is granted rather than when it is exercised, the county's subsequent acceptance of the Bucklews' offer "took nothing from the Daniels that had not already been taken." *Id.* at 383.

For the exact reasons stated in *Daniel*, plaintiff's claim is similarly time barred. As in *Daniel*, the taking claim was ripe long ago and cannot now be revived.

First, the affordable-housing condition's affect on the Property was known to a reasonable degree of certainty in 1989 when the Commission approved SPC's petition to reclassify the Property subject to the affordable-housing condition. On January 17, 1989, the Commission entered its findings of fact and conclusions of law approving SPC's petition to reclassify the Property from an agricultural district into an urban district subject to the condition that 60% of the total 2,760 housing units (*i.e.*, 1,656 units) needed to be affordable-housing units.[5] CSF ¶ 2. The January 17, 1989 was a final decision regarding how the owner of the Property would be allowed to develop it. Proceedings before the Commission initiated by a petition to amend district boundaries are contested cases. *See* HRS § 205-4(a), (b). Decisions in contested cases are final and appealable. *See id.* §§ 205-4(i), 91-14(a). Under *Daniel*, the date of accrual of a takings claim is the date of the final decision, which in this case is January 17, 1989.

[5] SPC did not appeal the Commission's decision. CSF ¶ 3.

Exactly like Johnson and the Bucklews in *Daniel*, neither SPC nor its successors in interest sought compensation for the alleged 1989 taking through available state procedures. While the Hawai‘i Supreme Court has never stated the statute of limitations to apply where a party seeks compensation for an alleged taking, this court should apply the two-year statute of limitations found in HRS § 657-7. When analyzing Hawai‘i statutes, courts adhere to the plain meaning of unambiguous statutes. *Schmidt v. Bd. of Dirs. Of AOAO Marco Polo Apts.*, 73 Haw. 526, 531–32, 836 P.2d 479, 482 (1992). Under Hawai‘i law, actions to recover "compensation" for damage or injury to property must be instituted within two years of the date of accrual. HRS § 657-7. The key term—"compensation"—is utilized in the Fifth Amendment itself. U.S. Const. am. 5 ("nor shall private property be taken for public use, without just compensation"). The application of HRS § 657-7 is consistent with the fact that courts apply that statute to civil-rights claims brought under § 1983. *See Pascual v. Matsumura*, 165 F. Supp. 2d 1149, 1151 (D. Haw. 2001) (Mollway, J.). The application is of the two-year statute of limitations is also consistent with the general statute of limitations applicable against the state. *See* HRS § 661-5. Because neither plaintiff nor its predecessors in interest sought to recover compensation for the alleged taking within two years of January 17, 1989, plaintiff's instant claim for damages is time barred.

This result is not affected by any later amendments to the 1989 order. Each subsequent amendment to the 1989 Order required the offering of fewer affordable housing units. The 1991 amendment reduced the minimum number of affordable housing units from 1,656 to 1,000. CSF ¶¶ 2, 4. The 2005 amendment, in turn, significantly reduced both the requisite percentage of affordable housing units from 60% of total units to 20% and the minimum number of units from 1,000 to 385. CSF ¶¶ 4, 7. The Commission could not have effected a taking through such amendments because the Commission *reduced* the impact of the affordable-housing condition through the years. The date of accrual of plaintiff's takings claim remains January 17, 1989.

Even if it could be argued that the date of accrual was November 25, 2005, the date the Commission entered its order amending the affordable-housing condition, plaintiff's taking claim is still time barred. On that date, the Commission reached a final decision regarding how plaintiff would be allowed to develop the Property. *See Daniel*, 288 F.3d at 381. Plaintiff did not file an appeal from the Commission's order. Plaintiff did not seek compensation for an alleged taking prior to November 25, 2007. Thus, plaintiff's claim would still be time barred.

Finally, the State notes that plaintiff apparently contends a taking claim accrued on April 30, 2009 — the date that the Commission voted to revert the

Property to agricultural use. Plaintiff's expert, Steven Chee, utilizes this date in his expert report to show that the alleged diminution of value caused by the Commission occurred on this date. CSF ¶ 26. However, even if April 30, 2009, is the date that plaintiff's takings claim accrued, plaintiff did not file an action to recover damages pursuant to a taking until it filed its complaint in the instant matter on June 7, 2011, more than two years after the date of accrual. Therefore, even under plaintiff's own theory, plaintiff's takings causes of action are time barred under *Daniel*.

Based on the foregoing, plaintiff's takings claims are time barred as a matter of law, and the State is entitled to summary judgment on Counts I, II, and VIII of the Complaint.

3. Plaintiff's Taking Claims Fail Because It Lacked the Ability to Develop the Project

Plaintiff's takings claims fail as a matter of law for a third independent reason. Plaintiff was unable to develop the project at the time of the alleged taking for reasons wholly separate from the Commission's actions and, thus, is not entitled to compensation. Notwithstanding the Commission's April 25, 2011 order reverting the Property to an agricultural district, plaintiff failed to satisfy key conditions and obligations it owed under municipal and state law that would enable it to proceed with the development of the Property.

Plaintiff could not proceed with the development of the project because it failed to satisfy conditions imposed by the County of Hawai‘i under Ordinance 93-1 as amended by Ordinance 96-153, the County's re-zoning ordinance. It is well established that even when confronted with an alleged total regulatory taking, the government is not required to pay compensation where "'background principles of nuisance and property law' independently restrict the owner's intended use of the property." *See Lingle*, 544 U.S. at 538 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026–32 (1992). Here, Plaintiff failed to satisfy, among other things, Condition C of Ordinance 96-153 because it failed to obtain final subdivision approval for the first residential subdivision by September 21, 2009. CSF ¶¶ 17–19. Pursuant to Condition AA, plaintiff is now required to obtain County Council approval to allow it to come back into compliance with Ordinance 93-1, its conditional district reclassification ordinance. CSF ¶ 17. Without final residential subdivision approval, and given the lack of completion of required infrastructure, plaintiff failed to meet the requisite conditions of the County's re-zoning ordinance during the time of the alleged taking.

In conjunction with this, plaintiff could not proceed with the project because it never had a valid EIS. Before issuance of the EIS on November 8, 2010, plaintiff could not develop key infrastructure because the "[a]cceptance of a required final statement shall be a condition precedent to implementation of the

proposed action." CSF ¶ 21; HRS § 343-5. When the circuit court ruled that the EIS was inadequate on March 28, 2013, the court tolled all development of the project. CSF ¶ 32.

For the entire length of time of any purported taking, plaintiff was legally prohibited from developing the project on grounds wholly independent from any alleged action of the State. For this reason and those raised above, this Court should grant the State summary judgment on all remaining takings claims.

B. Plaintiff's Vested-Rights Claim Fails Pursuant to Established Hawai'i Law

The State is entitled to summary judgment on plaintiff's vested-rights claim for damages found in Count IV of the Complaint because the Hawai'i Supreme Court explicitly held that plaintiffs cannot recover damages pursuant to a vested-rights claim in *Allen v. City and County of Honolulu*, 58 Haw. 432, 571 P.2d 328 (1977).

In *Allen*, the owners of land submitted a permit application to the city for the construction of a condominium in a zoning area that permitted high-rise construction. 58 Haw. at 433, 571 P.2d at 328–29. Subsequently, the city passed an ordinance that prevented high-rise construction in the area. *Id.* at 434, 571 P.2d 329. The trial court awarded the owners their costs incurred for the development of the property under vested right and equitable estoppel theories. *Id.* at 434–45, 571 P.2d at 329.

The Hawai‘i Supreme Court reversed, holding that the owners could not recover damages under either theory as a matter of law. The Hawai‘i Supreme Court noted that in vested-rights and equitable-estoppel cases, the proper remedy is the allowance of continued construction, not damages. *Id.* at 437, 571 P.2d at 330. The court held: "In our opinion, to permit damages for development costs is not only unprecedented but would also be unsound policy. Were we to affirm the award of damages, the City would be unable to act, if each time it sought to rezone an area of land it feared judicially forced compensation." *Id.* at 438, 571 P.2d at 331.

Here, Count IV is plaintiff's vested-rights claim to recover development costs. Under Hawai‘i law, plaintiff cannot recover damages pursuant to a vested-rights claim.

The conclusion that the State is entitled to summary judgment on this claim is amply supported by this Court's August 25, 2015 order. Dkt. 93. In dismissing plaintiff's equitable-estoppel claim, this Court relied upon *Allen* for the proposition that damages are not available under an equitable-estoppel claim. *See id.* at 42–43. Later in this Court's order, this Court again applied *Allen* to dismiss the vested-rights claim against the individual capacity defendants, stating that damages are unavailable for the same reasons as plaintiff's equitable-estoppel claim. *Id.* at 63–64. This Court noted: "Because the parties have reserved for later proceedings the

monetary relief claim against the Commission and Official Capacity Commissioners in Count IV, this court is not adjudicating that claim here, although it is not presently apparent why monetary relief would be available against the Commission and Official Capacity Commissioners." *Id.* at 48 n.8.

Therefore, the issue now being presented squarely, this Court should grant the State summary judgment on Count IV of the Complaint based upon *Allen* and this Court's previous reasoning in its August 25, 2015 order.

VI. CONCLUSION

Based upon the foregoing reasons and authorities, and any that may be adduced at a hearing on the motion, the State respectfully requests that this Honorable Court grant the instant motion *in toto*.

DATED: Honolulu, Hawai'i, December 31, 2015.

/s/ William J. Wynhoff
David D. Day
William J. Wynhoff
E. Diane Erickson
Deputy Attorneys General
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

BRIDGE AINA LE'A, LLC, Plaintiff, vs. STATE OF HAWAII LAND USE COMMISSION, VLADIMIR P. DEVENS, in his individual and official capacity, KYLE CHOCK, in his individual and official capacity, THOMAS CONTRADES, in his individual and official capacity, LISA M. JUDGE, in her individual and official capacity, NORMAND R. LEZY, in his individual and official capacity, NICHOLAS W. TEVES, JR., in his individual and official capacity, RONALD I. HELLER, in his individual and official capacity, DUANE KANUHA, in his official capacity, and CHARLES JENCKS, in his official capacity, JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE ENTITIES 2-10 and DOE GOVERNMENTAL UNITS 1-10, Defendants.	Civil No. 11-00414 SOM BMK CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on the date the foregoing document is filed it will be served on the following persons through the court ECF system:

Bruce D. Voss, Esq.
Michael C. Carroll, Esq.
Matthew C. Shannon, Esq.

DATED: Honolulu, Hawai‘i, December 31, 2015.

/s/ William J. Wynhoff
William J. Wynhoff
Deputy Attorney General
Attorney for Defendants