Of Counsel:

BAYS LUNG ROSE & HOLMA

BRUCE D. VOSS 6532-0
Attorney at Law
A Law Corporation
MATTHEW C. SHANNON 9043-0
Attorney at Law
A Law Corporation
Topa Financial Center
700 Bishop Street, Suite 900
Honolulu, Hawaii 96813
Telephone: (808) 523-9000
Facsimile: (808) 533-4184
bvoss@legalhawaii.com
mshannon@legalhawaii.com

Attorneys for Plaintiff
BRIDGE AINA LE`A, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

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.	) Civil No. 11-00414 SOM-BMK) (Other Civil Action))) PLAINTIFF'S MEMORANDUM IN) OPPOSITION TO STATE OF) HAWAII'S MOTION FOR) SUMMARY JUDGMENT) **[DKT. 105]**, FILED 12/31/15;)) Date: February 8, 2016) Time: 9:45 a.m.) Judge: Hon. Susan Oki Mollway)) *[caption continued on next page]*)

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,	) CERTIFICATE OF COMPLIANCE;) CERTIFICATE OF SERVICE) Trial Date: June 8, 2016) Judge: Susan Oki Mollway
Defendants.	

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PLAINTIFF'S MEMORANDUM IN OPPOSITION TO STATE OF HAWAII'S MOTION FOR SUMMARY JUDGMENT **[DKT. 105]**, FILED 12/31/15

I. INTRODUCTION

This takings case arises from unprecedented action by Defendant State of Hawaii Land Use Commission ("Commission"): for the first time in its 50-year history, the Commission changed the land use district boundaries of a property from urban use to agricultural use while affordable housing was being constructed on the Property.[1] A Circuit Court Judge found the Commission "lost sight of its mission" and had violated almost every applicable statute and administrative rule. Stubbornly refusing to acknowledge any wrongdoing, the Commission appealed to the Hawaii Supreme Court, which ultimately affirmed the Circuit Court ruling in November 2014—some five-and-a-half years after the Commission began its unlawful, vindictive odyssey against Plaintiff Bridge Aina Le'a, LLC ("Bridge").

Having denied Bridge all economically viable use of its Property for more than five years, and having cost Bridge tens of millions of dollars in damage, the Commission now seeks summary judgment as to all of Bridge's takings claims. To do so, the Commission's Motion ignores most of the record from the

[1] "The Property" refers to the 1,060 acres of land at Waikoloa, Island of Hawaii, which was the Petition Area in Commission Docket A87-617.

Commission proceeding, and then misrepresents Bridge's remaining claims. This Motion must be denied because:

1. Bridge has viable claims, supported by substantial evidence, for a categorical *per se* regulatory taking under Lucas v. S. C. Coastal Council, 505 U.S. 1003 (1992); a regulatory taking pursuant to the fact-specific factors of Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104 (1978); and unlawful enforcement of an unconstitutional land use condition.

2. All of Bridge's claims in this action were filed well within the applicable six-year statute of limitations.

3. The status of the EIS for the Property is no bar to, and indeed has no bearing on, any of Bridge's claims.

4. Bridge's Vested Rights claim for damages should not be dismissed.

II. BACKGROUND FACTS

A. Property Is Reclassified From Agricultural To Urban Use

On January 17, 1989, the Commission reclassified the Property from the state agricultural land use district into the state urban land use district. Exhibit 1. The 1989 order imposed a 60 percent affordable housing requirement on the project, but did not contain any specific time frame for completion. Exhibit 1, pg. 37.

On July 9, 1991, the Commission issued an Amended Findings of Fact, Conclusions of Law and Decision and Order ("1991 order") that reduced the project's density but mandated a minimum of 1,000 affordable units. Exhibit 2, pg. 51. Once again, however, there was no deadline for compliance with the 1991 order. Id., pp. 51-56. The 1991 order contained critical findings of fact by the Commission that recognized the Property's need for the urban classification: (i) the Property was designated by the County of Hawaii for urban expansion [id., pg. 13]; (ii) urban use conforms to various state and county planning guidelines and objectives [id., pp. 13, 43-50]; (iii) "**[t]he Property is not suitable for agriculture and there are no agricultural activities on site[]**" [id., pg. 7]; and (iv) "**[t]he Land Study Bureau rated the soils of the Property as Class E (very poor).**" Id. (emphasis added). These findings have never been amended, or disputed, by the Commission.

B. Commission Imposes Unprecedented Conditions On The Property

Bridge acquired the Property in 1999, and proceeded with planning and development work for the mixed-use residential and retail development ("the Project") approved by the Commission for the Property. Declaration of John Baldwin ("Baldwin Decl.), ¶ 2. On September 1, 2005, Bridge filed with the Commission a Motion to Amend Conditions 1 and 8 of the 1991 Order ("2005 motion"). Exhibit 3. Bridge requested that the affordable housing conditions be

reduced in order to be "consistent and coincide with County of Hawaii affordable housing requirements." Id., pg. 2. The Commission staff stated in a staff report that Bridge's request was "reasonable" and consistent with the "past position" of the Commission. Exhibit 4, pg. 12. The State of Hawaii Office of Planning, County of Hawaii, and County of Hawaii had no objections to Bridge's 2005 motion to amend, nor to the assignment to the County of Hawaii of the responsibility to oversee affordable housing compliance for the Project. Exhibit 5, pg. 1; Exhibit 6, pg. 9. However, the Commission refused to grant Bridge's 2005 motion to amend. Instead, the Commission ordered that Bridge build a minimum of 385 affordable housing units, and provide the Commission with certificates of occupancy for all of the Project's affordable housing units within five (5) years. Exhibit 7, pg. 11. The Commission's 2005 order requiring the construction of 385 affordable units within five years was not supported by any feasibility studies, housing analysis, or other factual findings. Id., pp. 2-6. For good reason, the Commission had **never** before, or since, ordered a developer to complete all of a project's affordable housing units by a specific date. Exhibit 4, pp. 1-2.

C. Bridge Expends Substantial Funds To Develop The Project

Notwithstanding the Commission's unprecedented conditions, Bridge spent several million dollars grading and constructing wells, roads, and other infrastructure on the Property. Baldwin Decl., ¶¶ 5, 10. Throughout 2006 and

2007, Bridge periodically appeared before the Commission to give updates on these substantial funds that were expended to commence development of the Project. Following the Commission's 2005 order, Bridge: **(1)** submitted to the Commission its Submission of Mass Grading Contract and Joint Venture Agreement in accordance with the requirements of the 1991 Order, as amended; **(2)** executed a Water Agreement with the County of Hawaii Department of Water Supply with regards to the allocation of offsite water improvements; **(3)** executed an easement agreement with Mauna Kea Development Co. for water transmission lines from Petitioner's well sites to the Department of Water Supply's Mauna Kea reservoir tank; **(4)** executed agreements with Hawaii Electric Light Company to construct and develop the electrical infrastructure to the site; **(5)** passed a Resolution of Intention for a Community Facilities District proposal through the County Council of the County of Hawaii; **(6)** entered into a mass grading contract with Goodfellow Brothers, Inc. for site work; **(7)** obtained a grubbing permit to begin construction of the utility corridor; **(8)** completed the inspection and clearing of the spine road and utility corridor for munitions and/or unexploded ordinances; **(9)** completed the emergency ingress and egress road for Waikoloa Village in conjunction with the County of Hawaii; **(10)** completed the GPS Base Station and its concrete foundation; and **(11)** constructed and completely outfitted a non-

potable well to provide water for dust control for construction. Baldwin Decl., ¶¶ 6-9.

On October 11, 2007, the County of Hawaii informed Bridge that an Environmental Impact Statement would now be required for the Project since it involved improvements within the state right-of-way, pursuant to Sierra Club v. Dep't of Transp., 115 Hawaii 299, 167 P.2d 292 (2007) ["the Superferry case"]. Baldwin Decl., ¶ 11. Bridge began the EIS process for the Project, and incurred costs of hundreds of thousands of dollars on various consultants and reports. Id., ¶ 12.

D. Bridge Executes A Contract To Sell The Property For $40.7 Million

Bridge also had spent hundreds of thousands of dollars working with planners, consultants, and engineers to develop a new Master Plan for the Project. Baldwin Decl., ¶ 3. As a result of Bridge's planning and development work, numerous developers expressed interest in buying the Property and taking over the Project. Id., ¶ 14. On October 1, 2008, Bridge entered into a Purchase and Sale Agreement ("PSA") to sell the Property to Relco Corp., in phases, for **$40.7 million**. Exhibit B. On February 9, 2009, the PSA was amended and restated, with DW Aina Le'a Development, LLC ("DW"), a Relco affiliate, taking over as buyer of the Property and prospective future developer of the Project. Exhibit C. The total purchase price remained $40.7 million.

E. Commission Enters An Unprecedented Order To Show Cause

Even though Bridge had substantially commenced use of the Property to develop the Project, in December 2008 the Commission issued an Order to Show Cause, ordering Bridge to show why the Property's land use classification should not be changed back to agricultural use. Exhibit 8. The Order to Show Cause alleged that Bridge failed ". . . to provide no fewer than 385 affordable housing units within the Petition Area that meet or exceed all applicable County of Hawaii affordable housing standards and substantially comply with representations made to the Commission." Id., pg. 2. This action was unprecedented in the Land Use Commission's history. Exhibit 9, pp. 34-35.

On April 28, 2009, the County issued subdivision approval for the affordable housing portion of the Project, which consists of approximately 61 acres. Exhibit 10. The County strongly supported the Project and argued that "the public interest would be best served by allowing (the Project) to move forward." Exhibit 11. Nonetheless, the Commission inexplicably pushed forward with the Order to Show Cause.

On April 30, 2009, the continued hearing on the Order to Show Cause reconvened. The County once again requested the Commission allow the project to proceed because it is "appropriate and that the public interest would be best served by allowing Petitioner to maintain its current classification." Exhibit 12, pg. 30.

However, in blatant violation of the applicable procedural rules**, the Commission by "voice vote" purported to amend the Property's land use district boundary from urban to the agricultural district.** Id., pp. 90-91. Bridge strongly objected to the voice vote procedure because it took place without allowing Bridge or DW the opportunity to present evidence regarding the status of development. Id., pg. 69. The Commission's action cast an immediate and substantial cloud over the project, delaying the project and making it nearly impossible for DW to obtain financing. Baldwin Decl., ¶ 17. Following the April 30, 2009 hearing, DW continued design and construction of the project's affordable housing, spending approximately $4.5 million in actual costs (excluding legal fees). Exhibit 9, pg. 11. Moreover, in response to a request by the Commission, Bridge submitted a detailed itemization of the millions of dollars Bridge had spent on the Project. Exhibit A; Baldwin Decl., ¶ 13.

F. Bridge Files A Motion To Rescind The Order To Show Cause

On August 19, 2009, Bridge filed a Motion to Rescind Order to Show Cause Dated December 9, 2009 ("Motion to Rescind"). Exhibit 13. Bridge (correctly) argued that the Commission's purported actions constituted a boundary amendment under HRS § 205-4 (g) because the Co-Petitioners had achieved

"substantial commencement of the use of the land."[2] Id., pp. 10-11. As Bridge specifically explained: "Bridge and its predecessor petitioner in this docket has spent substantially in excess of $10 million to develop the project in accordance and compliance with the Decisions and Orders of the Commission in this docket. Such expenditures, and work—together with the continuing work and millions of dollars subsequently spent by DW, as Bridge's assignee under the PSA—unquestionably constitute substantial commencement of use of the land within the meaning of HRS Section 205-4." Exhibit13, pg. 12. But the Commission could not be deterred from continuing its illegal conduct.

On September 28, 2009, the Commission filed its Order Rescinding Order to Show Cause Upon Condition Precedent and Accepting DW Aina Le'a Development, LLC as Co-Petitioner ("2009 order"). Exhibit 14. The 2009 order specifically found that substantial funds had been expended on the project: "With DW Aina Le'a Development, LLC **much progress has been made within the last four months**. Both the affordable housing component and the anticipated construction jobs are desirable." Id., pp.3-4 (emphasis added). These were undisputed factual findings by the Commission. Id. Under the 2009 order, the Commission ordered the following:

[2] This was the basis for the Hawaii Supreme Court's eventual ruling in Bridge's favor on the administrative appeal.

> Rescind and vacate the Order to Show Cause adopted on April 30, 2009, provided that as a condition precedent, the Petitioner completes 16 affordable units by March 31, 2010. Further, that the County of Hawaii shall provide quarterly reports to the Land Use Commission in connection with the status of Petitioner's progress in complying with this condition. (emphasis added).

Exhibit 14, pg. 4.

The 2009 order did not define the term "complete," nor was it supported by any feasibility or other housing studies. Also, the order's deadline and condition precedent were unilaterally imposed by the Commission, without any feasibility studies, housing analyses, or other evidence in the record. Id., pg. 4.

G. DW Completes Construction Of 16 Units By March 2010

In response to the Commission order, in December 2009 Bridge modified the PSA with DW to enable DW to purchase the 61-acre affordable housing portion of the Property for $5 million. Exhibit D. DW, which still owed Bridge $35.7 million for the balance of the Property under the PSA, began construction of the affordable housing. On June 10, 2010, DW provided the Commission a written status report detailing extensive design and construction work on the Project, **including completed interiors and exteriors of 16 townhouse units by March 31, 2010**. Exhibit 15, pg. 2, Exhs. II-LL. The County of Hawaii corroborated the substantial progress on the overall Project. Exhibit 16, pg. 1 ("The 16 townhouse units were completed by March 31, 2010"). Despite completion of the 16 affordable housing units by the Commission's purported

deadline, on July 1, 2010, the Commission held a meeting, during which the Office of Planning urged the Commission to change the Property's land use classification to agricultural use, so the land could be sold or transferred to another developer to build a different project.[3] Exhibit 17, pg. 102. Two minutes later, without any further discussion or citing any evidence, Commissioners voted on a verbal motion to find that the "condition precedent requiring 16 affordable homes be completed by March 31, 2010 has not been met." Id., pp. 103-05. The Commission subsequently entered an Order purportedly reinstating the 2008 Order to Show Cause, without citing any statutory authority to do so. Exhibit 18. The Commission's action on July 1, 2010, however invalid, crippled DW's efforts to conclude financing to continue the affordable housing construction and to purchase the remaining Project property from Bridge under the PSA. Baldwin Decl., ¶¶ 19-20.

On August 30, 2010, DW filed a Motion to Amend Conditions 1, 5, and 7 of the 2005 order. Exhibit 19, pp.2-5. DW detailed $20 million spent since

[3] Abbey Mayer, Director of the State Office of Planning, testified to the Commission: "[I] say it with full knowledge of the severe economic conditions on the Island of Hawai'i, the severe unemployment in the construction industry. I know this is the only major project goin' on there. I know this is a good place for a project to happen. What we suggest is revert. We get a bona fide landowner, a bona fide petitioner, a bona fide developer to come back, make a bona fide proposal and move forward in a way that we can all feel comfortable with." Exhibit 17, pg. 102.

2010 to move the project forward. Exhibit 21, pg. 2. DW also summarized the difficulty in obtaining financing for the project given the cloud created over the Project caused by the Commission's illegal voice votes to amend the Property's land use boundary. Exhibit 9, pp. 15-16.

On November 12, 2010, Bridge filed a motion to invalidate the Commission's Order to Show Cause, alleging multiple violations of the relevant statutes and administrative rules by the Commission, including (1) failing to establish that Bridge did not substantially commence the use of the land, in violation of HRS § 205-4, and (2) improperly holding a hearing on a two-year-old order to show cause in violation of the 365 day limit under HRS 205-4(g) and HAR § 15-15-51(e). Exhibit 20, pp. 1-2. The Commission never substantively ruled on these motions, despite the fact that they clearly warned the Commission that its conduct was illegal.

H. The Commission Continues To Take Illegal Action, Despite Bridge's Repeated Protests And Warnings

On January 20, 2011, some 772 days after the 2008 Order to Show Cause was first issued, the Commission held another hearing. Exhibit 22. However, the Commission refused to consider motions from Bridge and DW challenging the Commission's many procedural irregularities, claiming the motions were now "moot." Id., pp. 133-35. The Commission simply ignored Bridge's repeated protests that the action taken by the Commission was clearly illegal.

On April 8, 2011, the Commission met in Honolulu to consider finalizing and adopting the proposed order as a final decision and order. Prior to the hearing, Bridge submitted to the Commission a report from University of Hawaii Law School Professor David L. Callies. Professor Callies is a nationally recognized expert on land use regulation, and has authored 17 books on land use law. Professor Callies reviewed the entire record of the Order to Show Cause proceeding and opined that the Commission violated various statutes, administrative rules, and due process in the manner they had conducted this proceeding. Exhibit 23 at Exh. A. Bridge's objections to the Commission's proposed order explained, in exhaustive detail, how and why the Commission's action was illegal under state and federal law. Id. The Commission thus had ***actual*** knowledge that its proposed boundary amendment was unlawful and unconstitutional.

On April 21, 2011, the Commission held another meeting to vote on whether to adopt the proposed order as a final order. The Commission heard extensive public testimony in favor of the project. Exhibit 24, pp.38-53. Once again, the County also testified strongly in support of the project. Id., pp. 54-56. Commissioner Kanuha then stated that based on his review of Commission files, the Commission over the years had consistently deferred to the respective counties regarding fulfillment of projects' affordable housing conditions. Commissioner

Kanuha cited numerous recent dockets in which the Commission had assigned affordable housing regulation to the counties. Commissioner Kanuha, joined by Commissioner Jenks, argued that the Commission should let the County of Hawaii oversee the affordable housing development, consistent with the Commission's extensive precedent. Exhibit 24, pp. 63-70. **However, Commissioners Heller and Chairperson Devens responded that they were determined to impose "consequences" on the petitioners for failing to build all 385 affordable housing units by the deadline imposed by the Commission**. Id., pg. 74. The Commission adopted its final order amending the Property's land use district boundary back to agriculture district ("Final Order"). Exhibit 25. The Commission also refused to consider the recent motions by Bridge and DW challenging the validity of the Commission's actions. Exhibit 26.

III. PROCEDURAL BACKGROUND

A. State Court Administrative Appeal Reverses Commission

In May 2011, Bridge filed an administrative appeal of the Commission's Final Order. On December 16, 2011, after carefully reviewing a voluminous record, Circuit Court Judge Elizabeth Strance verbally ruled for Bridge on almost all claims, and ordered the Commission to rescind its Final Order and return the Property to urban use. Exhibit 27, pp. 91-92. However, the Commission refused to meet to rescind its order changing the Property's land use classification.

The Commission then appealed Judge Strance's Order, knowing that by doing so, it was potentially increasing the State's takings liability by millions of dollars. On November 25, 2014, the Hawaii Supreme Court affirmed Judge Strance's order, finding that the LUC had violated Hawaii's land use statute, HRS Chapter 205, and the Commission's own rules. Exhibit 28, pp. 4-5. Specifically, the Hawaii Supreme Court held that the Commission's "reversion" was improper because the construction of the sixteen units constituted "substantial commencement of the use of the land" in accordance with HRS § 205-4 (g). This is exactly what Bridge had been arguing to the Commission for the past five years—Bridge was finally vindicated, but not without damage. Because the Commission's unlawful actions virtually rendered the Property unmarketable and killed any conventional financing that would have been available, therefore, DW was unable to obtain financing and pay Bridge the remaining $35.7 million owing under the PSA. Baldwin Decl., ¶¶ 17, 20, 21.

B. <u>Bridge Files Takings And § 1983 Lawsuit</u>

On June 7, 2011, Bridge filed this lawsuit in state court, asserting various federal and state constitutional claims. ECF Docket ("Dkt.") 1-2. Defendants subsequently removed to federal court. Dkt. 1. On March 30, 2012, this Court entered its order staying the case pending resolution of the state court administrative appeal. Dkt. 48. The Commission appealed, and Bridge cross-

appealed. Dkts. 53, 56. On January 23, 2015, the Ninth Circuit remanded the case to this court in light of the Hawaii's Supreme Court decision. Dkt. 64. On August 25, 2015, this Court entered the Order Granting Revised Motion to Dismiss, which essentially dismissed all of Bridge's claims except the monetary relief portions of the claims based on regulatory takings, imposition of unconstitutional land development conditions, and deprivation of common law vested rights. Dkt. 93. This Court's ruling left the following claims remaining in this lawsuit: (1) the takings claims for just compensation in Counts I, II, and VIII, to the extent asserted against the Commission and Official Capacity Commissioners; and (2) Count IV[4], to the extent seeking damages against the Commission and Official Capacity Commissioners. Dkt. 93, pg. 64.

C. Bridge's Expert Reports Support Takings Claims

On November 30, 2015, Bridge served its expert disclosures pursuant to this court's amended Rule 16 Scheduling Conference Order. Bridge submitted three expert reports that support its takings claims against the Commission: First, Bridge submitted an appraisal report from experienced, respected Hawaii real estate appraiser Steven Chee, MAI. Chee opines that the value of the Property in the urban land classification prior to the Commission's action was approximately $40 million, and its value as agricultural land after the Commission's unlawful action

[4] Count IV of the Complaint is "Common Law Deprivation of Vested Rights."

was approximately $6.6 million—a loss of value of approximately $34 million, or 84 percent. Exhibit 29. The Commission has not submitted a competing appraisal report. Second, Bridge submitted an expert report from Hawaii land use economist Bruce Plasch, PhD. Dr. Plasch opined that there was no economically viable use of the land of the Property in the agricultural classification, which is entirely consistent with the Commission's 1991 Order that originally reclassified the property to urban. Exhibit 30. Third, Bridge submitted an expert report from Dave Burger, a CPA who opined that Bridge's return on invested capital from 2009 to 2014 (during the time period of the temporary taking), was 10.12 percent. Exhibit 31. These expert reports, combined with the evidence in the record, establish a regulatory takings claim sufficient to defeat the Commission's motion for summary judgment.

IV. STANDARD OF REVIEW

It is well-settled that the court's determination of a regulatory taking is an "intensely factual inquiry." See Karuk Tribe v. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000) (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (U.S. 1978). Numerous cases teach that dismissal of a regulatory takings claim on summary judgment, without a full record before the court, is generally improper. See, e.g., Palazzolo v. Rhode Island, 533 U.S. 606, 634, 636, 121 S. Ct. 2448, 2466, 2467 (2001) (O'Connor, J., concurring); Whitney Benefits Inc. v. United States, 752

F. 2d 1554, 1560 (F. Cir. 1985) ("[W]hether or not there has been a taking, even if not so intended, is normally a fact issue that cannot be resolved except on a 'complete record' at trial."); Moden v. U.S., 404 F.3d 1335, 1342 (C.A. Fed. 2005) ("due to the fact-intensive nature of takings cases, summary judgment should not be granted precipitously"); cf. David Hill Devel.v. City of Forest Grove, 2012 U.S. Dist. LEXIS 156028 at *61 (D. Or. 2012) (affirming jury verdict finding regulatory taking: "[G]iven the *ad hoc* nature of takings inquiries, the relevant issues normally are fact issues that must be determined on the entirety of a complete record or at trial"). The Commission's motion does not even come close to meeting its burden for summary judgment on this fact-intensive inquiry.

V. BRIDGE HAS ESTABLISHED TAKINGS CLAIMS

A. Bridge Asserts All Three Types Of Regulatory Takings Claims

Courts have recognized **three separate types of regulatory takings claims**: (1) a categorical per se regulatory taking under Lucas v. S. C. Coastal Council, 505 U.S. 1003 (1992); (2) a regulatory taking pursuant to the fact-specific factors of Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104 (1978); and (3) imposition of unconstitutional land use conditions under Nollan v. Cal. Coastal Com, 483 U.S. 825, 107 S. Ct. 3141 (1987), and Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994). Here, Bridge has asserted all three types of takings

claim against the Commission, and has put forth the requisite facts to defeat summary judgment on all three claims.[5]

B. The Commission's Improper Conduct Constituted A *Per Se* Takings

The first claim for regulatory taking encompasses total regulatory deprivations, referred to as *per se* or categorical takings. A categorical taking, like a permanent physical invasion of property, is deemed a per se taking under the Fifth Amendment. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538, 125 S. Ct. 2074, 2081 (2005); see also Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 477 (2009) (stating that "[g]overnment regulation goes 'too far,' and effects a total or 'categorical' taking, when it deprives a landowner of all economically viable use of his 'parcel as a whole'"). A property owner can raise a claim under the "total regulatory taking" theory of Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1020 (1992), where the property owner can show that a regulation has the effect of denying all "economically viable" use of his land. In such circumstances, there exists a categorical duty to provide compensation to the owner who has suffered a regulatory

[5] Given that the Property has been returned to the urban district, Bridge's claim constitutes a temporary regulatory taking. Under well-settled law, the U.S. Constitution mandates compensation for a temporary taking of private property. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987); Wheeler v. Pleasant Grove, 896 F.2d 1347 (11th Cir. 1990) (temporary taking following development ban); Nemmers v. Dubuque, 764 F.2d 502 (8th Cir. 1985) (temporary taking following down-zoning of property).

taking arises where "*no* productive or economically beneficial use of land is permitted." Lucas, 505 U.S. at 1017 (holding that a coastal environmental statute that limited allowable uses to walking, camping and picnicking constituted a regulatory taking requiring compensation under the Fifth Amendment because the statute deprived plaintiff of all economically beneficial use of the property); see also Steel v. Cape Corp., 677 A.2d 634 (Md. Ct. App. 1996) (open space zoning requirement constituted per se regulatory taking because it negated economically viable use of the property); Love Terminal Partners v. United States, 97 Fed. Cl. 355, 391 (2011) (granting plaintiff's motion for partial summary judgment on liability for per se takings where statute interfered with plaintiff's lease of airport property).

As Professor David Callies, one of the country's leading experts on takings law, explains:

> **A land use regulation totally takes property by regulation when it leaves the landowner without "economically beneficial use" of land. The land may have value. Indeed, it may even have some limited "salvage" uses, such as for walking or picnicking. But if it has no economically beneficial use, then the government must pay for the land as if it had condemned it, or lift the offending regulation and potentially pay for the time during which the unconstitutional regulation affected the use of the relevant land. These are the rules of *Lucas v. South Carolina Coastal Council,* and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.**

Callies, David L. and Robyak, David A. (2014) "The Categorical (Lucas) Rule: 'Background Principles,' Per Se Regulatory Takings, and the State of Exceptions,"

Touro Law Review: Vol. 30: No. 2, Article 10, pg. 1; Lucas, 505 U.S. at 1015 (compensation required "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle.").

Here, Bridge has presented sufficient evidence to establish a per se taking under Lucas. First, the Commission's own 1991 order found that the property had no viable agriculture use. The 1991 order specifically provided that "[t]he Property is not suitable for agriculture and there are no agricultural activities on site[]"; and "[t]he Land Study Bureau rated the soils of the Property as Class E (very poor)." Exhibit 2, pg. 7. Indeed, the very purpose of the original reclassification was to recognize the lack of viable agriculture use, as well as the consensus amongst the County and various local and state planning agencies that the Property was more appropriately designated as urban. Therefore, the Commission's unlawful reclassification of the Property back to agricultural use denied Bridge any economically viable use of the Property, **by the Commission's own admission**.

Second, Bridge has presented the expert report of Hawaii land use economist Bruce Plasch, PhD., who opines that "none of the activities allowed on the Property under Agricultural Districting would have been economically feasible between 2009 and 2014." Exhibit 30, p. 18. Dr. Plasch is one of the preeminent

land use economists in Hawaii. Id. [Curriculum Vitae and Selected Projects and Reports]. He closely examined all of the permitted agricultural uses under the applicable statute, but none of those "uses" had any economically viable application on this specific Property. Exhibit 30, pp. 8-18. Because the Commission's expert disclosures **do not dispute Dr. Plasch's opinion**, nor his conclusions that the Property had no economically viable use under any of the allowed agriculture uses, Bridge has a valid per se takings claim to be decided by the jury at trial.

C. Bridge Has Established A Regulatory Takings Claim Under *Penn Central*

Where plaintiff alleges that the "government regulation has diminished the value of property to an unconstitutional degree, the claim sounds in regulatory takings under the fact-specific factors of Penn Central Transportation Co. v. City of New York, 438 U.S. 104, [] (1978)." Levin v. San Francisco, 71 F. Supp. 3d 1072 (N.D. Cal. 2014). Even if the land use regulation "fall[s] short of eliminating all economically beneficial use, a taking nonetheless may have occurred," Palazzolo, 533 U.S. at 617. Courts typically examine at least three factors to determine whether a plaintiff can establish a regulatory taking under Penn Central: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action," Penn Central, 438 U.S. at 124. These factors provide

"important guideposts," under which "[t]he *Takings Clause* requires careful examination and weighing of all the relevant circumstances." Palazzolo, 533 U.S. at 634, 636 (O'Connor, J., concurring); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321, 122 S. Ct. 1465, 1478 (2002) (whether a taking has occurred "depends upon the particular circumstances of the case"); Yee v. City of Escondido, 503 U.S. 519, 523, (1992) (regulatory takings claims "entail[] complex factual assessments"). Bridge has submitted strong evidence as to all three factors.

1. The Commission's Unlawful Action Had An Enormous Economic Impact on the Property

Bridge's appraiser Steven Chee opines that the Property lost approximately $34 million in economic value (or approximately 84 percent of its market value) as soon as the Commission voted to illegally "revert" the land use designation back to agriculture. Exhibit 29. Chee's opinion is factually supported by Bridge's pending PSA with DW, comparable sales on the Kohala coast, and the cloud over title and development created by the Commission's illegal action. Id., § II. Similarly, as Dr. Plasch explains, the Commission's action changing the land use classification to agricultural use deprived Bridge of any economically viable use of the Property. Exhibit 30, pg. 18. This factor, while not by itself dispositive, weighs heavily in favor of Bridge in the Penn Central analysis.

2. The Commission's Unlawful Action Interfered with Bridge's Reasonable Investment-Backed Expectations

As detailed above, Bridge spent millions of dollars grading and constructing wells, roads, and other infrastructure on the Property; on creating a new Master Plan for the Property; and on EIS studies for the Property, all in preparation for development and/or sale of the Property. Baldwin Decl., ¶¶ 5-10, 12; Exhibit A. Furthermore, unlike most takings cases, Bridge had a very distinct and undisputed investment-backed expectation: specifically, the receipt of $40.7 million under its pending Purchase and Sale Agreement with DW. Exhibits B, C.

The Commission's illegal conduct significantly "interfered with [Bridge's] reasonable investment-backed expectations regarding the land's use." Ark. Game & Fish Comm'n v. United States, 133 S.Ct. 511, 522 (2012) (reversing lower court's dismissal of takings claim against federal government). The Commission's illegal reversion interfered with Bridge's executed PSA to sell the Property to DW, and ultimately prevented DW from completing the purchase under the PSA. Baldwin Decl., ¶ 20, 21. Bridge could have no reasonable expectation that the Commission would take unprecedented action to amend the land use district boundary back to agriculture, something the Commission had never done in its entire 50 year history. More importantly, Bridge could have absolutely no reasonable expectation that the Commission would do so by committing such a gross violation of the law and its own rules. This factor weighs heavily in favor of Bridge. Cf. Sherman v. Town of Chester, 752 F.3d 554, 565

(2d Cir. 2014) (ruling for plaintiff under Penn Central because when plaintiff "bought [the property], it was already zoned for residential use. His reasonable expectation, therefore, was that he would begin recouping that investment after a reasonable time to get the Town's approval on at least some form of development. He could not have expected the Town's decade of obstruction that pushed him to the brink of bankruptcy."); Lockaway Storage v. County of Alameda, 216 Cal. App. 4th 161, 186 (Cal. App. Dist. 4 2013) (finding Penn Central taking: "there is no denying that Lockaway had a reasonable investment-backed expectation that its project could proceed from the time it purchased the property in 2000, until the County changed its position in 2002.").

3. The Character of the Government Action Supports a Regulatory Takings Claim

This is not a case where the government action "merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good." Lingle, 544 U.S. at 539. No "common good" was ever on the mind of the Commission: it singled Bridge out for unprecedented, retaliatory treatment, to try to "set an example." Exhibits 9, 23 (detailing violations of Bridge's equal protection rights).[6] As Bridge's filings

[6] Although this Court previously dismissed Bridge's equal protection claim, contrary to Gerhart v. Lake County, 637 F.3d 1013, 1022 (9th Cir. 2011), evidence that the Commission improperly treated Bridge as a "class of one" still weighs strongly for Bridge on this prong of the Penn Central analysis.

showed and Professor Callies plainly told the Commission in his report, the record was rife with the Commission's bad faith conduct, and clear animus toward Bridge. Cf. W.J.F. Realty Corp. v. Town of Southampton, 351 F. Supp. 2d 18, 20 (E.D.N.Y. 2004) (denying defendant's motion for summary judgment on regulatory takings claim: "Such conduct, if true, not only raises questions of impropriety, but may also support a 'bad faith' takings claim"). This also was no innocent misinterpretation of the law: Bridge and its expert **repeatedly** told the Commission that its conduct and proposed action violated the law on numerous grounds. Exhibits 13, 20, 23. The Commission, with the advice of counsel, recklessly disregarded the warnings and wantonly violated the law. The Commission dismissed Bridge's Motion to invalidate the Order to Show Cause as "moot," **because the Commission had already illegally reclassified the Property without even considering the Motion!** Exhibit 26. Having trampled on Bridge's rights, the Commission then refused to accept Judge Strance's ruling and appealed to the Hawaii Supreme Court, only lengthening the time of the temporary taking. This factor weighs overwhelmingly in favor of Bridge. Sherman, 752 F.3d at 565 (finding that the city "singled out [plaintiff] development, suffocating him with red tape to make sure he could never succeed in developing [the property][,]" which was unfair, unreasonable, and in bad faith."); Lockaway Storage, 216 Cal. App.4th at 187 ("These facts support the trial court's

conclusion that the County's regulatory about-face was manifestly unreasonable, not just because of its devastating economic impact on Lockaway, but also because it deprived Lockaway of a meaningful opportunity to protect its property rights"); cf. Ali v. City of L.A., 77 Cal. App. 4th 246, 251-55 (1999) (finding temporary taking requiring compensation "where the position taken by the City was so unreasonable from a legal standpoint as to be arbitrary, not in furtherance of any legitimate government objective, and for no other purpose than to delay any development").

D. The Commission Imposed Unconstitutional Land Use Conditions On The Property

A takings claim can also proceed under a subset of the unconstitutional conditions doctrine by alleging that a land-use exaction violates the standards set forth in Nollan 483 U.S. 825, and Dolan, 512 U.S. 374. The Nollan/Dolan line of cases "'involve a special application' of this doctrine," Koontz v. St. Johns' River Water Mgmt. District, 133 S.Ct. 2586, 2594 (2013), which **requires** that the government demonstrate an "essential nexus" and "rough proportionality" between a land use exaction and the project impact of the proposed land use. "The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such a taking, demand the easement as a condition for granting a development permit the government was entitled to deny." Lingle, 544 U.S. at 546. "No precise mathematical calculation is required, but the city must make

some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." Dolan, 512 U.S. at 391. The burden is a significant one, in which "the city must make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset some of the" development's negative impacts. Id. at 395-96.

Here, the Commission has not carried its burden to obtain summary judgment as a matter of law. The Commission cannot point to any "individualized determination" in the record to impose the affordable housing condition on the Property. The minimum 365 affordable units imposed by the Commission's 2005 Order was and is entirely arbitrary—the Commission did not support it with any evidence at the time, and it cannot do so now. The Commission's motion makes no attempt, **with evidence**, to show that the condition had any nexus or proportionality to the nature and extent of the Project on the Property. Indeed, the 385-unit condition in fact was not based on any studies or other analysis performed by the Commission. This is especially alarming given that it was the affordable housing requirement, or the alleged failure to comply with it, that the Commission used as a hammer to illegally change the property back to the agricultural district.

The Commission cites California Building Industry Assn. v. San Jose, 351 P.3d 974 (Cal. 2015), but that case is easily distinguishable. In San Jose, the 15% affordable housing requirement was supported by various legislative studies,

feasibility studies, and other legislative information that created a legislative program supporting the 15% requirement that was imposed. Moreover, San Jose does **not** state that as a matter of law affordable housing requirements can never be exactions, but rather that in that narrow factual circumstance it was appropriate because the condition was factually supported by a rigorous and extensive legislative analysis and program. Here, the Commission does not (and cannot) point to any information or study that supports the minimum 385 affordable units that it imposed on Bridge, nor can the Commission explain why it used the requirement as a tool to punish Bridge by changing the land use classification despite the fact that 16 units had been completed. This was not a comprehensive, coherent affordable housing program that was fairly imposed—it was an arbitrary requirement used and abused to impose "consequences" on Bridge.[7] Exhibit 24.

VI. BRIDGE'S CLAIMS ARE NOT TIME BARRED

A. Bridge's Takings Claims Are Subject To A Six-Year Statute of Limitations

Constitutional claims, such as Bridge's takings claims, are subject to the six-year statute of limitation set forth in HRS § 657-1. After stating that "the

[7] The Commission misconstrues the Hawaii Supreme Court's ruling in the administrative appeal, to argue that the affordable housing requirements do not constitute a taking. However, the Hawaii Supreme Court's footnote focused on the construction deadline—not the affordable housing requirement itself. The Court never ruled that the Commission's imposition of affordable housing requirements complied with Nollan/Dolan.

Hawai`i Supreme Court has never stated the statute of limitations to apply where a party seeks compensation for an alleged taking," the Commission urges this Court to take an unprecedented leap to hold that a two-year statute of limitations applies to and bars Bridge's takings claims. Dkt. 105-1, p. 20. The Court must decline the Commission's unsupported invitation for at least four reasons.

First, HRS § 657-1, and its six-year statute of limitations, applies. HRS Section 657-1(3) explicitly states that its covers actions for "taking" property, and HRS Section 657-1(4) applies to "[p]ersonal actions of any nature whatsoever not specifically covered by the laws of the State." Moreover, this Court has recognized that a six-year statute of limitations applies to Bridge's takings claims. "[T]he appropriate statute of limitations to apply to [] constitutional causes of action is Hawaii's catch-all statute of six years, Hawaii Rev. Stat. § 657-1(4)." Tamura v. FAA, 675 F.Supp. 1221, 1224 (D. Haw. 1987); Gates v. P.F. Collier, Inc., 256 F. Supp. 204, 214 (D. Haw. 1967) (under prior law, holding that "§ 241-7 [R.L.H.]," the predecessor of HRS Section 651-7, with its two-year statute of limitations for "actions for […] damages or injury to […] property," "has no application to the facts of this case. [Counterclaimant] is not claiming damage or injury to its property, but rather that [Counterclaim-Defendant] took the same, which by § 241-1(d) R.L.H. 1955 has a six-year period of limitation"), aff'd, 378 F.2d 888 (9th Cir. 1967); Emmert v. Clackamas Cnty., 2015 U.S. Dist. LEXIS 87139, *14-15 (D. Or.

May 12, 2015) (applying six year statute of limitations for regulatory takings claim).

Second, the Hawaii Supreme Court has also rejected application of HRS § 661-5's two-year statute of limitations to constitutional claims. See Kaho'ohanohano v. State, 114 Hawaii 302, 338, 162 P.3d 696, 732 (2007) (constitutional claims are "'not cognizable under [HRS chapter 661],' and therefore not subject to the statute of limitations set forth in HRS Section 661-5") (quoting HRS § 661-5); Au v. Au, 63 Haw. 210, 216, 626 P.2d 173, 178 (1981) ("HRS § 657-7 has been interpreted to apply to 'claims for damages resulting from *physical* injury to persons or *physical* injury to tangible interests in property.'") (emphasis in original, quoting Higa v. Mirikitani, 55 Haw. 167, 169-70 & n.5,517 P.2d 1, 3 & n.5 (1973)).

Third, with its Order Granting Revised Motion to Dismiss, this Court dismissed all of Bridge's § 1983 claims against the commissioners in their official and individual capacities. Dkt. 93. The LUC's discussion of the two-year statute of limitations' application to civil rights claims brought under § 1983 is therefore irrelevant.

Finally, and as a matter of policy, "'if a substantial question exists about which of two conflicting statutes of limitations to apply, the court should apply the longer.'" Marshall v. Kleppe, 637 F.2d 1217, 1224 (9th Cir. 1980)

(quoting De Malherbe v. Int'l Union of Elevator Constructors, 449 F. Supp. 1335, 1341 (N.D. Cal. 1978)); Guam Scottish Rite Bodies v. Flores, 486 F.2d 748, 750 (9th Cir. 1973). This is particularly true with regards to takings claims. George Family Tr. v. United States, 91 Fed. Cl. 177, 192 (2009) ("the Fifth Amendment does not dictate a draconian application of the statute of limitations. Rather, 'procedural rigidities should be avoided.'") (quoting United States v. Dickinson, 331 U.S. 745, 749 (1947)). Therefore, this Court should apply a six year statute of limitations to Bridge's takings claims.

B. Bridge's Claims Were Filed Within The Six-Year Limitations Period

Perhaps recognizing that a six-year statute of limitations applies to Bridge's takings claims, the Commission tries to alter the timeline for when Bridge's takings claims accrued.

Fundamentally, "'[a] taking occurs when governmental action deprives the owner of all or most of its property interest.'" Yamagiwa v. City of Half Moon Bay, 523 F. Supp. 2d 1036, 1100 (N.D. Cal. 2007) (quoting Northwest Louisiana Fish & Game Preserve Commission v United States, 446 F3d 1285, 1289 (Fed Cir 2006)). Moreover, "'[a] regulatory takings claim will not accrue until the claim is ripe.'" Love Terminal Partners v. United States, 97 Fed. Cl. 355, 377 (2011) (quoting Royal Manor v. United States, 69 Fed. Cl. 58, 61 (2005)). And "'[a] regulatory taking claim is ripe (and thus accrues) when 'the administrative agency

has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'" Love Terminal, 97 Fed. Cl. at 377 (quoting Barlow & Haun, Inc. v. United States, 87 Fed. Cl. 428, 435 (2009)); Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

Based on that well-settled law, Bridge's regulatory takings claims accrued at the earliest on April 30, 2009, when the Commission by "voice vote" purported to amend the Property's land use district boundary from urban to the agricultural district. Exhibit 12. Bridge's Complaint in this action was filed on June 7, 2011, well within the six-year limitations period from April 30, 2009. Furthermore, as detailed above, on September 28, 2009, the Commission conditionally rescinded and voided the Order to Show Cause [Exhibit 14]; on July 1, 2010, the Commission improperly "reinstated" the Order to Show Cause [Exhibit 18]; and on April 25, 2011, the Commission formally entered its Final Order describing its unlawful action. Exhibit 25. In short, whether the Court deems Bridge's regulatory takings action to have accrued on April 30, 2009 or April 25, 2011 when the Commission entered its Final Order, the Complaint was filed within the six-year limitations period.

The Commission's statute of limitations argument appears primarily directed at Count VIII of Bridge's Complaint ("Unconstitutional Land

Development Conditions"). Clearly, the Commission misses the mark. Bridge's Unconstitutional Land Development Conditions claim is **not** based on the Commission's January 17, 1989 Order, or the 2005 Order, standing alone. Rather, Bridge's claim in Count VIII arises from the Commission's unlawful **enforcement** of the condition. See Complaint, ¶ 212. The enforcement of the unconstitutional land development condition occurred, at the earliest, on April 30, 2009, and thus Count XIII was brought within the six-year limitations period. Further, even if the claim in Count XIII was somehow deemed to accrue as of the date of the 2005 Order (November 25, 2005), the Complaint was still filed within six years from that date.

Bridge should not suffer any further prejudice for its decision to follow the rules and procedures that the Commission is required – but failed – to administer fairly, expediently, and in accordance with the law and its charter. Vail v. Emps.' Ret. Sys., 75 Hawaii 42, 56-57, 856 P.2d 1227, 1235-36 (1993) (where plaintiff persistently sought relief through agency procedures, but agency's action and inaction delayed resolution through those proceedings, applying two-year statute of limitations to bar plaintiff's claim "would be wrong"); see also Barlow & Haun, 87 Fed. Cl. at 438 ("[p]enalizing plaintiffs for trying to cooperate with the government instead of immediately filing suit would be incompatible with the

Supreme Court's mandate […] that taking claims be enforced with an eye toward fairness.") (quotation and citations omitted).

VII. BRIDGE'S TAKING CLAIM IS NOT AFFECTED BY THE EIS REQUIREMENT

The Commission wrongly argues that Bridge's takings claim should be dismissed because it lacked the ability to develop the Project. Tellingly, the Commission does not cite any case law whatsoever in support of this argument. First, it should be noted that the Commission's motion included a patently false argument that the subdivision approval was never obtained for the Property. This error was clear from the evidentiary record and multiple prior filings in the administrative appeal, and is a reflection of the lack of merit to the Commission's argument. After belatedly recognizing that half of its argument was factually inaccurate, the Commission quickly withdrew this portion of the argument from its brief. Dkt. 110. Second, the Commission's argument regarding the status of the EIS also borders on frivolous. The Commission does not cite statute or case law to support its argument that all approvals and permits for a project must be approved before a plaintiff may bring a regulatory takings claim. Indeed, regulatory takings claims are often premised on the fact that development approvals could not be obtained, which necessitated the request for just compensation. See Lost Tree Vill. Corp. v. United States, 115 Fed. Cl. 219, 230-231, (Fed. Cl. 2014) (responding to government's defense that lack of permit barred takings claim: "We suppose

appellant added this contention to provide a little humor for an otherwise serious and scholarly brief, and say no more about it.") (quoting Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 153, 156 & n. 5 (Cl. Ct. 1990)). Finally, the Commission's EIS argument is impeached by the facts of this case: DW agreed to pay Bridge $40.7 million for the Property, **before** any EIS was finalized and approved. Exhibit C. That arms-length transaction is perhaps the best indicator of the Property's value, the value that was taken by the Commission's unlawful action.

VIII. BRIDGE CAN MAINTAIN ITS VESTED RIGHTS CLAIM FOR DAMAGES

In seeking summary judgment on Bridge's vested rights claim, the LUC conflates the doctrine with equitable estoppel, ignores its own prior statements in this case, and overstates the effect of the Order Granting Revised Motion to Dismiss. As the Commission previously recognized, and this Court noted in its Order, the doctrines of equitable estoppel and vested rights are "theoretically distinct." Dkt. 93, p. 64 (citing Allen v. City and County of Honolulu, 58 Haw. 432, 435, 571 P.2d 328, 329 (1977)). Relying on Allen, this Court ruled equitable estoppel typically provides for equitable relief, not damages. Dkt. 93, p. 43 ("[i]njunctive relief is the appropriate remedy for equitable estoppel…"); cf. see Sadri v. Ulmer, No. 06-00430 ACK-K, 2007 U.S. Dist. LEXIS 20175, at *28 (D. Haw. Mar. 20, 2007) (recognizing that, under *equitable*

estoppel theory, property owner could recover development costs expended prior to county's suspension of building permits, rescission of SMA exemption, and issuance of stop-work order).

Contrary to the Commission's latest argument, neither Allen nor the Court's Order forecloses a damages remedy for Bridge's vested rights claims. To the extent that Allen could be read to preclude any award of damage for vested rights claims, Allen is no longer good law. "[T]he United States Supreme Court in First English […] 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 [specified in Allen]." Kenneth R. Kupchak, et al., Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i, 27 Hawaii L. Rev. 17, 32 (2004).

In holding that the Commission acted illegally toward Bridge, the Hawaii Supreme Court recognized that Bridge had vested rights at the time that the Commission illegally reclassified its land to agricultural use. "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." County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 338, 653 P.2d 766, 780 (1982). Bridge's "substantial commencement" vested Bridge's rights, and triggered additional protections of those rights under the law, which the LUC was **required**, but failed, to follow. DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC, 134 Hawaii 187, 216, 339 P.3d 685, 714 (2014); Maunalua Bay Beach Ohana 28 v. State, 122 Hawaii 34, 53, 222 P.3d 441, 460 (App. 2009) ("Rights are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest"). In other words, Bridge's "substantial commencement" cannot be revisited given the Hawaii Supreme Court's ruling, therefore, Bridge's claim for vested rights damages cannot be dismissed. Furthermore, Bridge's substantial commencement was not based on any "speculative business risks." County of Kauai, 65 Haw. at 338, 653 P.2d at 780. Rather, Bridge committed substantial resources to comply with its obligations, and reasonably expected that the Commission would comply with its obligations under the law. Id.

The Commission's failure to follow the law imposed a significant and cognizable economic injury on Bridge. The passage of time, and the Hawai`i Supreme Court's opinion, remove the Commission's option of simply allowing Bridge to proceed with its development. See Allen, 58 Haw. at 439, 571 P.2d at

331. Now, "'justice and fairness' **require**" that the Commission compensate Bridge for the economic injuries that the Commission caused by interfering with Bridge's vested rights. See County of Kauai, 65 Haw. at 339, 653 P.2d at 781 (emphasis added).

XI. CONCLUSION

Based on the foregoing, Bridge respectfully requests that the Defendants' Motion for Summary Judgment be DENIED.

DATED: Honolulu, Hawaii, January 19, 2016.

/s/ Matthew C. Shannon
BRUCE D. VOSS
MATTHEW C. SHANNON

Attorneys for Plaintiff
BRIDGE AINA LE`A, LLC