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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	) Civil No. 11-00414 SOM BMK) (Other Civil Action))) PLAINTIFF BRIDGE AINA LE`A,) LLC'S MEMORANDUM IN) OPPOSITION TO DEFENDANTS') MOTION TO DISMISS) COMPLAINT FILED JUNE 7, 2011) (FILED 7/27/11) [#14];) CERTIFICATE OF WORD COUNT;) CERTIFICATE OF SERVICE))

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,	)	Date: December 19, 2011 Time: 9:00 a.m. Judge: Hon. Susan Oki Mollway
Defendants.	)	

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I. INTRODUCTION

For the first time in its 50-year history, the State of Hawaii Land Use Commission ("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]. In their rush to take unprecedented action to kill the Project[2], the Defendant Land Use Commissioners ("Commissioners") violated almost every applicable statute, administrative rule, and constitutional provision governing the Commission's amendment of land use district boundaries.

Plaintiff and landowner Bridge Aina Le`a, LLC ("Bridge") filed this action in First Circuit Court of the State of Hawaii on June 7, 2011. Defendants removed the case to federal court, obtained an extension of time to respond, then filed this shotgun-style Motion to dismiss all claims. Having caused more than

[1] "The Property" refers to the 1,060 acres of land at Waikoloa, South Kohala, which was the Petition Area in Commission Docket A87-617. Bridge Aina Le`a, LLC still owns approximately 1,000 acres of the Property, as the Commission's unlawful action has effectively blocked Bridge's phased sale of the Property to DW Aina Le`a Development, LLC.

[2] "The Project" refers to the mixed-use residential and retail development, commonly known as Aina Le`a, planned and approved for the Property. The Project envisions a regional shopping center and some 2,000 housing units, providing workforce housing for employees who work in and around the South Kohala resorts.

$35 million in damages they ultimately must pay, see Complaint ¶¶ 134-36, Defendants' objective is to delay this action and judgment as long as possible. Accepting as true all factual allegations of the Complaint, as this Court must on a Rule 12(b)(6) motion,[3] Defendants' Motion should be denied in its entirety.

II. ARGUMENT

A. THE COMMISSIONERS ARE NOT ENTITLED TO ABSOLUTE JUDICIAL IMMUNITY IN THEIR INDIVIDUAL CAPACITY

1. Under Longstanding Ninth Circuit Law, Land Use Commissioners Who Enforce Compliance With Their Own Rules and Requirements Are Not Entitled to Absolute Judicial Immunity

Defendants spend 13 pages of their brief arguing that the Commissioners are entitled to absolute judicial immunity in their individual capacity, but inexplicably fail to cite even once to the leading Ninth Circuit case on land use commissioners who seek to enforce compliance with rules and requirements the commissioners have themselves created. Zamsky v. Hansell, 933 F.2d 677 (9th Cir. 1991).

Zamsky concerned the Oregon Land Conservation and Development Commission (the "LCDC"), which has two primary functions: first, it adopts "goals" which become the mandatory state-wide planning standards with which all local land use plans must comply, and second, it reviews the comprehensive land

[3] See Hawaii Motorsports Investment, Inc. v. Clayton Group Services, Inc., 693 F.Supp.2d 1195-96 (D. Haw. 2010)

use plans which local governments are required to create and adopt for conformity with the LCDC's state-wide goals. Id. at 678. If the local government's land use plan does not conform with the LCDC's state-wide goals, the LCDC may issue a "continuance order" stating how to bring the plan into compliance. Id. Plaintiff Zamsky owned 1,950 acres of undeveloped land in Klamath County, Oregon. In 1984, Klamath County rezoned Zamsky's land, in response to an LCDC "continuance order" that approved parts of Klamath County's land use plan but required the county to rezone or make additional findings with respect to Zamsky's property. Id. Zamsky sued the individual LCDC commissioners, claiming they violated his constitutional rights under the equal protection, due process, and takings clauses. Id. As in this case, the LCDC commissioners claimed they were entitled to absolute immunity. The magistrate judge agreed with the LCDC commissioners, but the Ninth Circuit reversed.

In rejecting the LCDC commissioners' claims for judicial immunity, the Ninth Circuit noted that "the LCDC Commissioners are not insulated from the agency that promulgates the rules to be applied":

> **Instead, they are the same individuals who promulgate the "goals" in the first place; they combine the functions of lawmaker and monitor of compliance**. Such combined functions are not uncommon at the local level, but they are inconsistent with the judicial role and judicial immunity.

Zamsky, 933 F.2d at 679 (emphasis added).

Zamsky remains good law in the Ninth Circuit, as recognized even in the case relied on by Defendants. See Buckles v. King County, 191 F.3d 1127, 1136 (9th Cir. 1999) (acknowledging that under Zamsky, land use commissioners who act in a "dual role" as both "lawmakers and monitors of compliance" are not entitled to judicial immunity). See also Guru Nanak Sikh Society of Yuba City v. County of Sutter, 326 F.Supp.2d 1128, 1136 (E.D. Cal. 2003) (finding that County Board of Supervisors is not entitled to judicial immunity because the Board serves both the functions of lawmaker and compliance, "and indeed its actions in both capacities are the subject of the instant lawsuit").

2. The Commissioners Combined the Functions of Lawmaker and Monitor of Compliance in Taking Action to Amend the Property's Land Use Boundaries to Agricultural Use

All of the claims made against the Commissioners in this action arise from their functioning in a dual role: First, they acted as lawmakers, establishing the conditions, requirements, and "deadlines" for the Property and the Project in the Decisions and Orders created by the Commission. Second, the Commissioners acted as monitors of compliance, issuing a premature and invalid Order to Show Cause for allegedly failing to comply with the conditions they had set, and ultimately reclassifying the Property based on a purported failure to comply with conditions they had imposed.

In September 2005, Bridge filed a motion with the Commission to amend the affordable housing condition for the Project, asking that it be changed to be "consistent and coincide with the County of Hawaii affordable housing requirements." Complaint, ¶ 23. The Commission had granted similar motions to modify the affordable housing requirements for at least seven other major development projects. Id., ¶ 21. Despite the Commission's clear precedent, the Commissioners refused to accept Bridge's proposed affordable housing amendment. Instead, the Commissioners insisted that Bridge construct a minimum number of affordable housing units, regardless of the total number of units in the Project, and complete all of those affordable housings by a certain date. ¶ 25. On November 25, 2005, the Commissioners entered a Decision and Order, requiring Bridge provide certificates of occupancy for all of the Project's affordable housing units by November 17, 2010. ¶ 26-29. Other than this Project, the Commission had never before included a condition that a developer obtain certificates of occupancy for all of a project's affordable housing units by a specified date. ¶ 31.

Throughout 2006 and 2007, as ordered by the Commissioners, Bridge "periodically appeared before the Commission to give updates on the Project and explain the progress and compliance with all conditions of the 2005 Order." Id., ¶ 31. Bridge and its contractors completed major grading and site development work for the Project, ¶ 33-35, but development was slowed in 2007 by a change in

Hawaii law requiring the Project obtain an Environmental Impact Statement. ¶ 36.

On December 9, 2008—nearly two years before the November 17, 2010 "deadline" they had imposed—the Commissioners entered a written Order to Show Cause for alleged failure "to perform according to the conditions imposed and representations and commitments made to the Commission in obtaining reclassification of the (Property) and in obtaining amendments to conditions of reclassification". Id., ¶ 38 The Order to Show Cause alleged Bridge failed "to provide no fewer than 385 affordable housing units within the (Property) . . . and substantially comply with representations made to the Commission." ¶ 39. On April 29, 2009—after refusing to allow Bridge to present evidence—the Commissioners by "voice vote" purported to change the Property to an agricultural use classification, "based on the fact that (Bridge) has failed to meet the conditions as promised". ¶ 43-50.

In March 2009, Bridge had notified the Commission of its intent to assign the Project to DW Aina Le`a Development, LLC ("DW"), in phases; Bridge and DW subsequently were made co-petitioners in the Commission's docket for the Project. Id., ¶ 46; 52. DW had already begun extensive planning for the development, and asked the Commission to stay its action changing the property's land use boundaries to agricultural use. ¶ 53. In August 2009, Bridge filed a Motion to Rescind the Commissioners' Order to Show Cause, noting that Bridge

and its predecessors had 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." ¶ 56-58. On September 28, 2009—after noting "much progress has been made" on the Project—the Commissioners vacated the Order to Show Cause, "provided that as a condition precedent, the Petitioner completes 16 affordable units by March 31, 2010." ¶ 60-61.

Between September 2009 and June 2010, major construction was undertaken on the Project, including the completion of 16 affordable housing units by March 31, 2010, as required by the Commissioners' Order. Id., ¶ 65. Apparently unsatisfied with the Project's compliance, on June 2, 2010 the Commissioners demanded a "current written status report" on the progress made towards fulfilling the "existing conditions". ¶ 68. DW submitted a detailed written status report, including photos of the completed affordable housing units and other construction at the Project site. Id. Nonetheless, at a July 1, 2010 meeting, the Director of the State Office of Planning urged the Commissioners to go back and change the Property to agricultural use, so the land could be sold or transferred to another developer. ¶ 73-74. At the conclusion of the meeting—without any discussion or citing any evidence—the Commissioners voted unanimously to find that the condition precedent rescinding the Order to Show Cause had not been met, because 16 units were not "completed" by March 31, 2010. ¶ 75. The Commissioners also

voted unanimously to declare that building 385 affordable houses by November 17, 2010 was a "deadline, not a goal". Id.

The Commissioners scheduled a November 18, 2010 hearing on their reinstated Order to Show Cause. On the day before the hearing, Commission Chairman Vladimir P. Devens—who advocated changing the Property's land use boundaries to agricultural use—unilaterally decided that the Commissioners would not take action at the November 18 hearing, because Devens believed he did not have enough votes from Commissioners attending the November 18 hearing to kill the Project. Id., ¶ 86. Twenty members of the community testified in support of the Project at the hearing, and even the attorney for the Office of Planning admitted there was a "need for jobs" the Project would provide. ¶ 87-89.

On January 20, 2011, the Commissioners held another hearing on their Order to Show Cause. Throughout the hearing, Commissioner Devens sought to develop evidence in favor of changing the Property to agricultural use, in blatant violation of his duties to act as an impartial arbiter of the facts. Id., ¶ 92 Commissioner Devens participated as a decision-maker at the hearing even though his law firm previously had sued Bridge over water rights to the Project. ¶ 121-22. At the end of the January 20 hearing, only five Commissioners voted in favor of changing the Property to agricultural use, one vote short of the six affirmative votes required for any boundary amendment under Hawaii law. ¶ 93-94. Despite the

clear language of the statute, the Commissioners took the position that their vote had changed the Property's land use classification to agricultural use. ¶ 96. At an April 21, 2010 meeting to consider a proposed Final Order, several Commissioners urged their fellow Commissioners to amend the Project's Decision and Order, to allow the County of Hawaii oversee the affordable housing development consistent with longstanding Commission precedent. ¶ 115-17. Commissioners Heller and Devens responded that County authority was not relevant, that they wanted to impose "consequences" on Bridge and DW for failing to comply with conditions. ¶ 118. The Commissioners then voted to amend the Property's land use boundaries to agricultural use in a Final Order, and kill the Project. ¶ 123-25. Three weeks later, the LUC Commissioners met again to try to correct one of their many procedural errors. ¶ 130. At the May 13, 2011 meeting, Commission Chairman Devens verbally attacked counsel for Bridge; demanded to know what claims Bridge had against the Commissioners; and interrogated Bridge's counsel regarding Bridge's litigation strategy. ¶ 131.

In short, in this bizarre multi-year proceeding, the Commissioners' role was in no way "functionally comparable to that of a judge." Buckles, 191 F.3d at 1135. The Commissioners were not "insulated from the agency that promulgates the rules to be applied." Zamsky, 933 F.2d at 679. The Commissioners created the administrative rules applied to all petitioners in any proceeding before the

Commission. See HAR § 15-15. The Commissioners then created all of the requirements and conditions for the Project, in the original Decision and Order; the 2005 Order amending the Decision and Order; and the 2009 Order (temporarily) rescinding the Order to Show Cause. Having promulgated all the rules, conditions, and requirements applicable to the Property and the Project "in the first place," Zamsky, 933 F.2d at 679, the Commissioners then actively monitored compliance with their 2005 Order and 2009 Order. The Commissioners' 2008 Order to Show Cause—and their 2010 Order reinstating the Order to Show Cause—were based upon the Commissioners' self-assumed monitoring role. Commission Chairman Devens played the role of prosecutor rather than neutral arbiter, manipulating the Commission agenda and developing evidence in favor of changing the Property's land use classification. The Commissioners ultimately voted to impose "consequences" on Bridge, based on an alleged failure to comply with conditions the Commissioners created. The Commissioners at various times wore at least four hats: lawmaker, compliance monitor, prosecutor, and executioner, all the while disregarding any semblance of due process. "Such combined functions . . . are inconsistent with the judicial role and judicial immunity." Zamsky, 933 F.2d at 679.

3. The LUC Commissioners' Proceedings Lacked Procedural Safeguards Available in Judicial Process

While the Ninth Circuit's decision in Zamsky is dispositive of the Commissioners' claim for absolute judicial immunity, a review of some of the other factors cited in Buckles confirms why judicial immunity is not appropriate in this case.

First, the Commissioners' proceedings in this case had few if any "characteristics of the judicial process." Buckles, 191 F.3d at 1134 The Commissioners first refused to hear Bridge's evidence before voting to change the Property's land use classification. Complaint, ¶ 48-51. The Commissioners later reinstated the Order to Show Cause without any discussion or citing any evidence. Id., ¶ 75-79. The Commissioners engaged in illegal ex parte communications among themselves, to produce a pre-determined result. ¶ 77. Commission Chairman Devens was permitted to preside over the proceeding, and manipulate the agenda, even though his law firm previously sued Bridge in a dispute over water rights to the Project. ¶ 121-122. Commissioner Devens actively sought to develop evidence in favor of changing the Property's land use classification, and then tried to bully the parties into withdrawing a pending motion. ¶ 92, 97. The Commissioners purported to change the Property's land use boundaries to agricultural use based on the Order to Show Cause without ever considering or ruling upon the many procedural or substantive violations in the Order to Show

Cause proceeding. ¶ 96. None of that, obviously, is characteristic of a true judicial process.

Second, the Commissioners are not "insulated from political influence". The Commissioners are appointed by the Governor. HRS § 26-34(a). The Director of the State Office of Planning is appointed by the Governor. HRS § 225M-2. Both the Commission and the Office of Planning are administratively under the Governor's Department of Business, Economic Development and Tourism. Id., HRS § 205-2. In this case, for the first time ever, the Governor's Office of Planning was publicly advocating that the Commissioners kill an ongoing affordable housing project, with the express purpose that the land for the project be sold to another developer who could build a different project on the land. Complaint, ¶ 74. The Commissioners were "under obvious pressure to resolve (the) dispute in favor of" the position of the Governor, who appointed them. Cleavinger v. Saxner, 474 U.S. 193, 204 (1985). That relationship "hardly is conducive to a truly adjudicatory performance." Id.

Third, unlike a judge, the Commissioners willfully disregarded their own precedent throughout the proceeding. The Commissioners disregarded their longstanding precedent in amending the Project's affordable housing condition (Complaint, ¶ 21-31); in enforcing the conditions of the Project's Decision and Order (Id., ¶ 41-42, 162-64); and in refusing to permit the County to oversee the

Project's affordable housing development (¶ 113-119). No court, at least in this country, operates the way the Commissioners did.

"[A] public official seeking 'absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." Buckles, 191 F.3d at 1133. The Commissioners "have fallen far short of that burden." Guru Nanak, 326 F.Supp.2d at 1135.

B. THE COMMISSIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY IN THEIR INDIVIDUAL CAPACITY

As they did with their argument for absolute immunity, Defendants seek qualified immunity on all claims without informing this Court of Ninth Circuit precedent directly on point. Gerhart v. Lake County, Montana, 637 F.3d 1013, 1024-25 (9th Cir. 2011) (denying commissioners' claim for qualified immunity because property owner had a "constitutional right to not be intentionally treated differently than other similarly situated property owners without a rational basis"); Lazy Y Ranch, Ltd. v. Behrens, 546 F.3d 580, 588-592 (9th Cir. 2008) (denying state officials' claim for qualified immunity on property owner's equal protection claim).

In evaluating a claim for qualified immunity, "the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he

confronted." Gerhart, 637 F.3d at 1024 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)). "A right can be clearly established in a novel factual situation, so long as existing law gives the defendants 'fair warning' that their actions are unconstitutional." Id. (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

Here the Commissioners unquestionably knew their conduct was unlawful. Bridge submitted to the Commissioners a report from University of Hawaii Law School Professor David L. Callies, a nationally recognized expert on land use regulation. Complaint, ¶ 105. Professor Callies reviewed the entire record of the proceeding, including transcripts, and provided his opinions to the Commissioners on the propriety of their actions. Id. Among other things, Professor Callies concluded (1) the Commissioners violated due process in the manner they had conducted the hearing; (2) while the Commissioners may be frustrated with delays in the project, the record is "rife with examples of bias and rancor towards Bridge," supporting an equal protection claim; and (3) the 2005 affordable housing condition was an unconstitutional (and thus enforceable) land development condition. ¶ 106. Based upon Professor Callies' report, and the parties' other submissions, the Commissioners had actual knowledge and notice that their proposed action to change the Property's land use classification to agricultural use was illegal and unconstitutional. ¶ 107. The Commissioners willfully ignored their "fair warning".

Bridge had a clearly established right "not to be intentionally treated differently than other similarly situated property owners without a rational basis." Gerhart, 637 F.3d at 1024; HRPT Properties Trust v. Lingle, 715 F.Supp.2d 1115, 1141 (D. Hawaii 2010); Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The Commissioners willfully violated those rights. Complaint, ¶¶ 21-22, 41-42, 161-66.

Bridge had a clearly established right to procedural and substantive due process of law. Richardson v. City & County of Honolulu, 124 F.3d 1150, 1162 (9th Cir. 1997). The Commissioners willfully violated those rights. Complaint, ¶¶ 138-42.

With regard to any government land development approvals and restrictions on its Property, Bridge has a clearly established right first, that there must be a direct connection or nexus between what public facility needs a land development will generate or what public problems it will cause, on the one hand, and the land development conditions government imposes to satisfy those needs or ameliorate those problems, on the other, and second, that the conditions imposed be proportional to those specific needs and problems generated by the particular project. Dolan v. City of Tigard, 512 U.S. 374 (1994). The Commissioners willfully violated those rights. Complaint, ¶¶ 209-14.

On this Motion to Dismiss, all factual allegations of the Complaint must be accepted as true. Where a plaintiff has sufficiently "alleged a constitutional violation", (as Bridge has here), and the constitutional rights violated were "clearly established at the time", (which the Commissioners do not and cannot dispute), a defendant is not entitled to dismissal on the ground of qualified immunity. Gerhart, 637 F.3d at 1024. Cf. Lazy Y Ranch, 546 F.3d at 592 (Defendants "not entitled to qualified immunity" because "the principle that government actors may not draw irrational or arbitrary classifications . . . is clearly established").

C. BRIDGE IS ENTITLED TO JUST COMPENSATION AND DECLARATORY AND INJUNCTIVE RELIEF FOR ITS TAKINGS CLAIM

1. Bridge Can Properly Maintain An Action Against The Commission and the Commissioners In Their Official Capacity For Inverse Condemnation Seeking Just Compensation

The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation," and applies to the States through the Fourteenth Amendment. See Lingle v. Chevron U.S.A. Inc. 544 U.S. 528, 536 (2005). State agencies, such as the Commission, can be sued for a taking in violation of the Fifth and Fourteenth Amendment. See e.g., Nollan v. California Coastal Com'n, 483 U.S. 825 (1987). Moreover, state officials can also be sued in their official capacity for a taking claim. See Seven Up Pete Venture v. Schweitzer, 523 F.3d 948, 955-956 (9th Cir. 2008).

"[A] landowner is entitled to bring an action for inverse condemnation as a result of 'the self executing character of the constitutional provision with respect to compensation[.]'" United States v. Clarke, 445 U.S. 253, 257 (1980). The Ninth Circuit in Seven Up Pete Venture recognized that the Eleventh Amendment did not bar a claim originally filed in state court against state officials based on the "self executing" nature of the Fifth Amendment. Seven Up Pete Venture, 523 F.3d at 955-56.

Hawaii state courts thus have correctly permitted takings claims to proceed in State court under the Fifth and Fourteenth Amendment of the U.S. Constitution and under Article I, § 20 of the Hawaii Constitution. See Kepoo v. Kane 106 Hawai'i 270, 294, 103 P.3d 939, 963 (Hawai'i 2005) (addressing claimant's Fifth Amendment taking claim); HRS § 101-10.

When the state removes a case to federal court, the state waives Eleventh Amendment immunity to claim that the plaintiffs cannot assert its claims in a federal forum. Lapides v. Board of Regents of University System of Georgia, 535 U.S. 613, 624 (2002) (holding that state's action joining the removing of the case to federal court waived its Eleventh Amendment immunity for money damages); Embury v. King, 361 F.3d 562, 565-66 (9th Cir. 2004) (holding that state's action in removing case to federal court waived Eleventh Amendment immunity with respect to state and federal claims). The Court in Lapides observed

that it is anomalous or inconsistent for a state to both invoke federal jurisdiction and claim immunity from federal suit in the same case. Lapides, 535 U.S. at 619. Permitting states to do so could generate "seriously unfair results." Id. Thus, "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the [s]tate's otherwise valid objection to litigation of a matter." Id. at 624.

Bridge filed this Complaint in State court and is entitled to bring direct claims against the Defendants based on the self-executing nature of the Fifth Amendment made applicable to the states through the Fourteenth Amendment. Defendants voluntarily removed this case to federal court and the same policies recognized in Lapides and Embury apply here. It would be "seriously unfair" if Defendants are permitted to avoid a takings claim merely by removing this case to federal court. By removing this case to federal court, the Defendants have consented to be sued in federal court for a takings claim seeking damages.

2. Bridge Is Entitled To Injunctive Relief For Its Direct Takings Claim

Contrary to Defendants' argument that "the only possible remedy for a taking is just compensation[,]" see Defendants' Motion, p. 40 (citing Lingle), Bridge can properly maintain a claim for damages and/or injunctive relief based on its claim that the Defendants' decision was not predicated on a public purpose or use, but rather was based solely on the Defendants' animus towards Bridge.

In Lingle, 544 U.S. at 543, the Court observed that the Taking Clause requires compensation where government takes private property "***for public use***." (emphasis added.) "It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'" Id. (emphasis added in Lingle). The Lingle Court went on to recognize that "if a government action is found to be impermissible-for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process-that is the end of the inquiry. No amount of compensation can authorize such action." Id.

In the Ninth Circuit, "[l]andowners are allowed to seek such equitable relief in order to resist takings that threaten to violate the Constitution." Madison v. Graham, 316 F.3d 867, 871 (9th Cir. 2002). After the Lingle case was decided, other circuits have reiterated the rule that "[a] plaintiff that proves that a government entity has taken its property for a private, not a public, use is entitled to an injunction against the unconstitutional taking, not simply compensation." Carole Media LLC v. New Jersey Transit Corp. 550 F.3d 302, 308 (3rd Cir. 2008); Fideicomiso De La Tierra Del Cano Martin Pena v. Fortuno, 604 F.3d 7, 17 (1st Cir. 2010) (same). Where state action is invalidated based on the takings clause, the proper remedy is to award the plaintiff damages for the temporary taking and injunctive and declaratory relief to invalidate the decision. First English

Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304, 318 (1987).

Here Bridge has pled facts sufficient to establish a complete taking of Bridge's property, or alternatively, a claim that Bridge is entitled to injunctive and declaratory relief to invalidate the Commissioners' decision, and an award of damages for the temporary taking of Bridge's property. Complaint ¶ 158. In particular, Bridge alleges that there is no public use or purpose for the Defendants' decision to change the Property to agricultural use. Id. ¶¶ 142 and 216.b. Defendants have previously conceded that the Property is appropriately classified as urban and was "not suitable for agriculture[.] ¶ 13. Simply put, there is no legitimate public purpose advanced by this decision, and the decision to change the Property's land use classification to agricultural use was an arbitrary decision by the Defendants to punish Bridge based on the Defendants' animus. ¶ 139. Defendants never even considered the factors they were required to weigh to change the Property's land use classification. ¶ 99. Bridge therefore has properly pled sufficient facts to support a claim for both injunctive and declaratory relief and damages for the State's taking.

D. BRIDGE IS ENTITLED TO PROSPECTIVE INJUNCTIVE RELIEF AGAINST THE COMMISSIONERS IN THEIR OFFICIAL CAPACITY AS WELL AS DAMAGES AGAINST THE 1983 COMMISSIONERS IN THEIR INDIVIDUAL CAPACITIES UNDER 42 U.S.C. § 1983

1. It Is Undisputed That Bridge Is Entitled To Maintain Its Claims For Injunctive Prospective Relief Against The Commissioners In Their Official Capacity Under 42 U.S.C. § 1983

Defendants also do not dispute that Bridge is entitled to pursue claims for prospective injunctive relief against the Commissioners in their official capacity for deprivation of constitutional rights under 42 U.S.C. § 1983. See Motion at 38-39 (citing Ex Part Young, 209 U.S. 123 (1908). See also Office of Hawaiian Affairs v. Department of Educ., 951 F.Supp. 1484, 1489 -1490 (D.Hawai‘i 1996) (recognizing that "state officials subject to the 'prospective injunctive relief' exception to the Eleventh Amendment would be regarded as 'persons' under § 1983 and hence those claims could be brought in federal or state court").

To plead a claim under § 1983, the plaintiff only needs to allege (1) that some person has deprived him of a federal right; and (2) that the person so depriving him acted under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980). In this case, Bridge has properly pled the Commissioners deprived Bridge of procedural and substantive due process (Count I); denied Bridge equal protection (Count III); took Bridge's property without a public purpose and without compensation (Count II); and imposed and enforced an unconstitutional land

development condition (Count VIII). Consequently, Count VI, asserting claims for injunctive prospective relief set forth in Counts IX and X, cannot be dismissed.

E. BRIDGE IS ENTITLED TO PROSPECTIVE INJUNCTIVE RELIEF AGAINST THE COMMISSION BASED DIRECTLY ON FEDERAL DUE PROCESS AND EQUAL PROTECTION

Bridge is entitled to declaratory and injunctive relief with respect to its constitutional claims directly under the federal Due Process and Equal Protection Clauses. In Lingle, the Supreme Court recognized that if a "government action" is "impermissible" because it is so "arbitrary as to violate due process," [n]o amount of compensation can authorize such action." Lingle, 544 U.S. at 532 (2005).

In Maizner v. Hawaii, Department of Education, 405 F. Supp. 2d 1225, 1231 (D. Haw. 2005), this Court held that the Eleventh Amendment did not bar "direct claims" against the State of Hawaii "under the federal Due Process and Equal Protection Clauses." More recently, this Court again recognized a direct right for prospective injunctive relief based on the Declaratory Judgment Act, 28 U.S.C. §§ 2201 & 2202. See HRPT Properties Trust v. Lingle, 715 F.Supp.2d 1115, 1124 (D.Haw. 2010).

In this case, Bridge has properly pled its direct claims for denial of substantive and procedural due process, violation of equal protection, and enforcement of an unconstitutional land development condition. See Complaint ¶¶ 137-146, 160-169, 208-214 (Counts I, III, and VIII). The factual allegations are

detailed at length, and accepting those allegations as true, these direct claims cannot be dismissed on a Rule 12(b)(6) motion.

1. 42 U.S.C. § 1983 Does Not Provide The Exclusive Remedy

Defendants cite Arpin v. Santa Clara Valley Trans., 261 F.3d 912, 925 (9th Cir. 2001) for the proposition that "a litigant complaining of a violation of a constitutional right does not have a direct cause of action under the United States Constitution but must utilize 42 U.S.C. § 1983." Arpin and other cases recognizing this principle are distinguishable, as those cases involved claims against a local municipality initiated in federal court where the court found that the plaintiffs had express remedies against these agencies under 42 U.S.C. § 1983.

In Arpin, the Ninth Circuit stated that "[a] local governmental entity may be sued under section 1983 where the alleged constitutional deprivation was inflicted pursuant to an official policy or custom." Id. at 925. The court recognized that because Congress has expressly established a mechanism for redress under 42 U.S.C. § 1983 against local governmental entities, the plaintiff was required to follow this framework.

In this case, unlike Arpin, the Defendants are arguing that Bridge cannot maintain a direct claim under the Constitution or a claim under 42 U.S.C. § 1983, and that there is no relief for Defendants' many constitutional violations. Such an interpretation would make the requirements of the Constitution

meaningless, and give states free rein to violate the Constitution. Moreover, the U.S. Supreme Court has recognized implied causes of action based on the Fourth and Fifth Amendment in these same circumstances where the plaintiff would have no effective means to obtain redress from the courts. See Davis v. Passman, 442 U.S. 228, 243-44 (1979) (holding that the plaintiff had a cause of action directly under the Fifth Amendment where "she has no effective means other than the judiciary to vindicate these rights"); Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (recognizing an implied federal cause of action under the Fourth Amendment for damages against federal officers alleged to have violated a citizen's constitutional rights).

Simply put, Defendants cannot have it both ways. They cannot claim that Bridge is unable to bring these claims directly under the Constitution because Bridge is required to follow § 1983, and then argue that § 1983 does not apply. If the Commission and the Commissioners in their official capacity cannot be sued under 42 U.S.C. § 1983 (as Defendants claim), Bridge must be permitted to bring these claims against these defendants directly.

F. THIS COURT SHOULD NOT ABSTAIN

"A district court should abstain only in the 'exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.'" C-Y Development Company v. City of Redland, 703 F.2d 375, 377 (9th Cir. 1983). "[T]here is little or no discretion to abstain in a case which does not meet traditional abstention requirements." Id.

Neither *Pullman* nor *Younger* abstention apply here.

1. *Pullman* abstention

"*Pullman* abstention 'is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy' that is properly before it." Porter v. Jones, 319 F.3d 483, 491-492 (9th Cir. 2003). "In order to 'give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims,' *Pullman* abstention should rarely be applied." Id.

A federal court may abstain under *Pullman* only if each of three factors is present: "(1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) [the proper resolution of] the possible determinative issue of state law is uncertain." Id. "Thus, the absence of any one of these three factors is sufficient to prevent the application of *Pullman*

abstention." Id. (finding district court abused its discretion under *Pullman* where first factor was not satisfied). See also Fireman's Fund Ins. Co. v. City of Lodi, California, 302 F.3d 928, 939-940 (9th Cir. 2002) (reversing district court's abstention under *Pullman* because the first and third factors were not met)

Here all three factors have not been satisfied. First, the Complaint does not involve a sensitive area of social policy best left to the states to address. The Complaint seeks damages for a taking of Bridge's property rights, and prospective injunctive and declaratory relief for constitutional violations. Those claims do not turn on the application of unique state law. Moreover, the interpretation and application of the land use statutes and rules implicated in this case can also be addressed equally by a federal court or state court. In Fireman's Fund, 302 F.3d at 940, for example, the Ninth Circuit held that although the interpretation of a local ordinance governing hazardous waste remediation was undoubtedly an area of "serious local concern," the resolution of the issues in the case need not be resolved in isolation by a state court, and the federal court was free to review this matter without abstention. The same rationale applies here.

The second factor, that constitutional adjudication can be avoided if a definite ruling on the state issue would terminate the controversy, is also not met. In Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 481 (1977), the U.S. Supreme Court held that *Pullman* abstention was not appropriate

notwithstanding an amicus argument that "if appellee were to pursue his administrative appeal, he might be granted benefits on the same ground." Id. Mere speculation that an administrative appeal may provide the same relief is not adequate grounds to apply *Pullman*. Id. at 481. The Supreme Court stated: "Pullman abstention is an equitable doctrine that comes into play when it appears that abstention may eliminate or materially alter the constitutional issue presented. There is a point, however, at which the possible benefits of abstention become too speculative to justify or require avoidance of the question presented." Id. See also Wall & Ochs, Inc. v. Hicks, 469 F.Supp. 873, 880 (D.C.N.C. 1979) (recognizing that state administrative procedures are a peculiarly inappropriate area to apply equitable abstention where there are significant questions as to the quality of hearings and judicial review of possibly suspect agency decisions is narrow).

In this case, the administrative appeal will not resolve the claims asserted in this case. Bridge's constitutional claims for damages can only be brought in this action and cannot be resolved through an administrative appeal. The administrative appeal is limited to a review of the Commission's decision and the appeal will only reverse the decision of the Commission to reclassify the property or uphold the decision. Regardless of the outcome of the administrative appeal, Bridge will still have claims for either a temporary or permanent taking of its property, and claims for declaratory and injunctive relief to enjoin the Defendants

from interfering with Bridge's property rights in the future. Bridge's constitutional claims cannot be avoided, making *Pullman* inapplicable.

The third factor, that "resolution of the state law issue is uncertain," also has not been met. The fact that a state court has not decided a pending administrative appeal does not mean that the proper resolution of the state law issue is "uncertain." Fireman's Fund Ins., 302 F.3d at 940. "Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." Pearl Inv. Co. v. City and County of San Francisco, 774 F.2d 1460, 1465 (9th Cir. 1985) A state law issue can be uncertain because a particular statute is ambiguous, precedent conflicts, or the question is novel and of sufficient importance that it should be addressed by a state court first. Id. None of these factors are present here with regard to Bridge's constitutional claims.

Moreover, application of *Pullman* to this case runs afoul of the Supreme Court's pronouncement in Patsy v. Florida Board of Regents, 457 U.S. 496 (1981), that "exhaustion of administrative remedies [is] not required as a prerequisite to bringing an action pursuant to § 1983." Id. at 516. It is "plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." Felder v. Casey, 487 U.S. 131, 142 (1988).

Moreover, even if all three factors are met, the *Pullman* abstention is a discretionary doctrine and federal courts are "not required to send a case to state court if doing so would simply 'impose expense and long delay upon the litigants without hope of its bearing fruit,' to the contrary, under such circumstances, 'it is the duty of a federal court to decide the federal question when presented to it[.]'" Potrero Hills Landfill, Inc. v. County of Solano, 657 F.3d 876, 889-90 (9th Cir. 2011). In this case, the Project that Defendants sought to kill is partially constructed and the Project's buildings—including affordable housing units—are deteriorating every day that the Defendants' unlawful conduct is not enjoined. To delay adjudication on the merits of this action, Defendants removed to federal court, then gained another five months of delay by filing this everything-but-the-kitchen-sink motion. Having invoked the jurisdiction of this Court, for their own benefit, Defendants should not be rewarded with further delay by sending the claims back to state court to start over.

Finally, if the Court finds that *Pullman* abstention is applicable, the proper remedy is to stay the federal claims in this action and remand the state law claims to the Circuit Court for determination. VH Property Corp. v. City of Rancho Palos Verdes, 622 F.Supp.2d 958, 970 (C.D.Cal. 2009) (concluding that the district court "should retain jurisdiction over [plaintiff's] federal claims, and remand only the state law claims to state court").

2. *Younger* abstention

In Younger v. Harris, 401 U.S. 37 (1971), the U.S. Supreme Court held that a federal court should abstain from hearing a case that would interfere with a state proceeding. Specifically, "[a]bstention by a district court is required under *Younger* when three criteria are satisfied: (1) state judicial proceedings are ongoing; (2) the proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to raise federal questions." Kay v. City of Rancho Palos Verdes, 504 F.3d 803, 808 (9th Cir.2007)

Younger abstention does not apply where the defendants remove the case to federal court. Kenny A. ex. rel. Winn v. Perdue, 218 F.R.D. 277, 285 (N.D. Ga. 2003) ("It would be fundamentally unfair to permit State Defendants to argue that this Court must abstain from hearing the case after they voluntarily brought the case before this Court."); Cummings v. Husted, 2011 WL 2375282 at *12 (S.D. Ohio June 8, 2011). See also Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 480 (1977) ("If the state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.").

In this case, Defendants removed this case to federal court, and are barred from claiming this Court should abstain under *Younger*.

G. BRIDGE HAS PROPERLY PLED ITS CLAIM FOR PROSPECTIVE RELIEF

Defendants incorrectly argue that Bridge has not sufficiently pled its claims for prospective relief because there is "nothing to enjoin" as the taking has already occurred. Motion, p. 39. Both federal and Hawaii rules on notice pleading requires only that a complaint set forth a "short and plain statement of the claim that provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests." In re Genesys Data Technologies, Inc., 95 Hawai'i 33, 41, 18 P.3d 895, 903 (2001). See also FRCP Rule 8(a)(2).

A declaratory judgment action is justiciable if "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Eureka Federal Sav. and Loan Ass'n v. American Cas. Co., 873 F.2d 229, 231 (9th Cir. 1989). Declaratory relief is appropriate "(1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Id.

In this case, Bridge seeks a declaratory order invalidating the Commission's decision and injunctive relief against the Defendants from enforcing the decision or taking any further action to deny Bridge its constitutional rights. Bridge is entitled to pursue these remedies under the U.S. Constitution, 42 U.S.C. §

1983, and 28 U.S.C. §§ 2201 & 2202. Bridge has alleged a substantial controversy with the Defendants relating to ongoing violations of constitutional rights, and the controversy is of sufficient immediacy and reality to warrant declaratory relief. A declaratory judgment in this case will settle this dispute and will terminate the uncertainties between the parties.

Defendants' argument that there is "nothing to enjoin" would improperly deny Bridge remedies under the Constitution and acts of Congress. Federal courts may enjoin enforcement of a land use decision that results in a violation of a plaintiff's constitutional rights. See e.g., Crown Point Development, Inc. v. City of Sun Valley, 506 F.3d 851, 857 (9th Cir. 2007) (holding that plaintiff's substantive due process claim relating to the city's denial of an application for a land use permit was not foreclosed by the takings clause); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1508 (9th Cir.1990) (concluding that there was a triable issue of fact when city approved project subject to conditions, plaintiff fulfilled those conditions and then city "abruptly changed course and rejected the plan, giving only broad conclusory reasons"). In this case, the Court is authorized to enter declaratory and injunctive relief finding that the Defendants' actions violated the United States Constitution, and that the decision is invalid. The Court may then award damages for Bridge for the temporary taking and injunctive and declaratory relief to prevent any further

actions by the Defendants to enforce the invalid decision, or to take further action to deprive Bridge of its constitutional rights.

H. BRIDGE IS ENTITLED TO RELIEF ON ITS STATE LAW CLAIMS

1. The Commissioners Are Not Entitled To Immunity Under Hawaii Law

Defendants ask the Court to create new Hawaii law, granting the Commissioners "absolute quasi-judicial immunity as to state law claims." Motion, p. 45. That argument fails for numerous reasons. First, as Defendants admit, there is no Hawaii case or statute granting absolute quasi-judicial immunity to commissioners on Hawaii state commissions. Id. Second, even if such quasi-judicial immunity did exist under Hawaii law, the Commissioners would not be entitled to either absolute or qualified immunity for the reasons stated in Sections II A-B above. Third, the statute cited by Defendants, HRS § 26-35.5(b), by its terms does not apply to claims founded upon a violation of the Hawaii State Constitution. Fourth, even if § 26-35.5(b) did apply to the claims in this case, there is no immunity where "the member acted with a malicious or improper purpose," which is precisely what Bridge alleges in its Complaint. See e.g. Complaint, ¶¶ 73, 76, 96, 97, 101, 102.

Indeed, the cases cited by Defendants actually support Bridge's contention that the Commissioners are not entitled to immunity, and that Bridge must be given an opportunity to obtain discovery on the Commissioners' malicious

or improper conduct as alleged in the Complaint. See Medeiros v. Kondo, 55 Haw. 499, 500, 501, 522 P.2d 1269, 1270 (1974) (reversing trial court's granting of motion to dismiss by defendant Director of State Department of Taxation, and ruling that non-judicial officers do not have absolute immunity when they act in bad faith or maliciously); see also Awakuni v. Awana, 115 Hawaii 126, 142, 165 P.3d 1027, 1043 (2007) (recognizing that immunity to state commissioners provided by HRS § 26-35.5 would not apply where actions were motivated by ill will or reckless disregard of committing wrongful act).

The Complaint alleges facts to adequately support its claims and negate any potential Hawaii state statutory immunity for the Commissioners. Bridge has pled specific facts of actual malice, ill will, and reckless disregard of the law by the Commissioners. See Complaint, ¶¶ 73, 76, 96, 97, 101, 102, 118, 121, 131, 132, 139, 140, 162, 163, 192. The Complaint shows that Bridge has suffered damages as a result of more than a mere policy or enforcement decision by the Commission, but instead a concerted, malicious pattern by the individual Commissioners to strip Bridge of its entitlements in the property and prevent Bridge or its successors from ever developing the Project.

2. Bridge Can Maintain Its State Law Claims For Constitutional Violations

The Hawaii Supreme Court has recognized that "the Hawaii Constitution affords greater protection than required by similar federal

constitutional or statutory provisions." Pele Defense Fund v. Paty, 73 Haw. 578, 601, 837 P.2d 1247, 1262 (1992) (holding that plaintiff had a direct claim against state officials for violating the duty imposed by Article XII, §4 of the Hawaii Constitution relating to ceded lands).

Further, the rights and privileges guaranteed in the Hawaii Constitution are "self-executing to the fullest extent that their respective natures permit." See Article XVI, § 16. Those self-executing provisions of the Hawaii Constitution entitle a plaintiff to injunctive and declaratory relief for violations of due process and equal protection. Here, Bridge has properly pled and supported its claims for relief under the Hawaii Constitution, including (1) Denial of Procedural Due Process - Haw. Const. Art. 1, §§ 5 and 20; (2) Denial of Substantive Due Process - Haw. Const. Art. 1, §§ 5 and 20; (3) Inverse Condemnation - Haw. Const. Art. 1, §§ 5 and 20; and (4) Denial of Equal Protection - Haw. Const. Art. 1, § 5. Bridge is entitled to maintain these claims under the Hawaii Constitution's self-executing provisions.[4]

[4] Other jurisdictions with self-executing state constitutions similarly have found those constitutions create direct causes of action. See e.g., Harley v. Schuykill County, 476 F.Supp. 191, 195 (E.D.Pa.1979); Schreiner v. McKenzie Tank Lines, 408 So.2d 711 (Fla.App. 1 Dist., 1982); Brown v. State, 674 N.E.2d 1129, 1137-1138 (N.Y. 1996); Corum v. University of North Carolina, 413 S.E.2d 276 (N.C. 1992).

3. Bridge Has Properly Asserted A Claim For Zoning Estoppel

Under the doctrine of equitable estoppel, when a landowner changes position by substantial monetary expenditures based on "official assurance on which he has a right to rely that his project has met zoning requirements[,]" the government may be equitably estopped from rescinding the development approval. Life of the Land v. City Council, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980); Denning v. County of Maui, 52 Haw. 653, 658, 485 P.2d 1048, 1051 (1970) ("To be allowed the right to proceed in constructing . . . the facts must show . . . assurances in some form . . . that [the] proposed construction met zoning requirements")

In Life of the Land, the Hawaii Supreme Court upheld summary judgment in favor of a real estate developer for a claim of zoning estoppel based on the Honolulu City Council's approval of a variance from a moratorium on building permits. The Court found that the City Council's approval of the variance constituted official assurance that the developer could proceed with the project. Id. at 421-5. The Court also found that the developer's reliance was in good faith because the developer worked with both the City Council and surrounding community to revise the project, give concessions, and garner public support. Id. at 455-6. Further, the City Council approval was consistent with the overall intent of Honolulu's larger zoning scheme, and despite the fact that it contained conditions,

was sufficient to trigger a zoning estoppel claim. Id. at 401. Last, the developer's expenditure of $275,719.23 spent after approval of the variance was substantial and made in reliance on the variance's approval by the City Council. Id. at 454.

Here, Bridge has alleged sufficient facts in its Complaint to support its zoning estoppel claim. Bridge relied in good faith on the Commission's classification of the property as urban, which was consistent with the County general plan and overall zoning scheme for the Kohala Coast. Compare Life of the Land, 61 Haw. at 462 with Complaint, ¶¶ 13, 23, 24, 60, 72. The Commission's reclassification of the Project from agriculture to urban was "official assurance" by the Commission for purposes of triggering zoning estoppel, at which point the County of Hawaii's zoning regulations take over. See Complaint, ¶¶ 21, 72, 82. Bridge incurred millions of dollars in expenses in order to develop the property in accordance with the conditions and requirements of the Commission's order. See Complaint, ¶¶ 33, 34, 35, 65. Bridge worked in good faith to garner significant public support for the Project, the Project has obtained the required building permits from the County of Hawaii, and the first sixteen affordable housing units have been completed. See Complaint, ¶¶ 18, 34, 43, 45, 47, 53, 65, 82, 87, 134, 173.

Defendants argue, wrongly, that unspecified conditions contained in their prior orders bar a zoning estoppel claim. However, the Hawaii Supreme Court has expressly found that a government approval with conditions may still constitute

"official assurance" to trigger zoning estoppel. See Life of the Land, 61 Haw. at 401.

4. Bridge Can Maintain Claims For Declaratory and Injunctive Relief Under Applicable State Statutes and Administrative Rules

Under Hawaii law, state courts may enjoin enforcement of a land use decision that results in a violation of a plaintiff's constitutional rights. See Aged Hawaiians v. Hawaiian Homes Com'n, 78 Hawaii 192, 213, 891 P.2d 279, 300 (1995) (holding that Native Hawaiians were not required to exhaust their administrative remedies in challenging award of pastoral lands prior to bringing lawsuit against Land Use Commission). HRS § 91-7 provides "any interested person may obtain a judicial declaration as to the validity of an agency rule," and "the court shall declare the rule invalid if it find that it violates constitutional or statutory provisions."

Further, HRS § 632-1 does not require an "actual controversy." Rather, it grants courts of record the power to make "binding adjudications of right" in justiciable cases, under three types of situations. See County of Hawaii v. Ala Loop Homeowners, 123 Hawaii 391, 433, 235 P.3d 1103, 1145 (2010); Costa v. Sunn, 5 Haw.App. 419, 424, 697 P.2d 43, 47 (App.1985) (holding that the court's authority to grant ancillary relief under HRS § 91–7 is coextensive with its authority under HRS Chapter 632, and that the filing of an action under HRS § 91–7 triggers all the

power and authority of the court under HRS Chapter 632); Life of the Land, 63 Haw. at 177, 623 P.2d at 441

HRS § 91-7 entitles Bridge to pursue its claim for declaratory and injunctive relief to establish that the Defendants' amendment of the Project's land use boundaries violated the Hawaii Constitution, as well as the applicable statutes and administrative rules as alleged in the Complaint. See Complaint, ¶¶ 56, 57, 84, 98, 99, 203. Bridge is entitled to injunctive and declaratory relief on its procedural claims because even if "consequential relief" cannot be claimed, the Court has the authority to make "binding adjudications of rights" to resolve controversies between the parties. See HRS § 632-1.

III. CONCLUSION

Based on the foregoing, Bridge respectfully requests that this Court DENY Defendants Motion to Dismiss Bridge's Complaint.

DATED: Honolulu, Hawaii, November 28, 2011.

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