

LAND USE: HEREIN OF VESTED RIGHTS, PLANS, AND THE RELATIONSHIP OF PLANNING AND CONTROLS

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There can be little argument about the jurisdictional importance of Hawaii land use law. Land use management and control is almost synonymous with Hawaii.¹ But Hawaii is not yet a particularly litigious state in the field of land use controls, and what litigation there is that has made its way into the federal and state appellate courts of record here has been relatively sparse. Most of its well-known state and local land use control regulations² are only recently or not yet challenged. While it is possible to extrapolate theories and principles from sparse existing case law and apply them in those many areas in which Hawaii has so far no appellate court³ cases, this is neither the province nor the purpose of a survey, which should be confined to reporting and interpreting what is. This sur-

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¹ See F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971) [hereinafter cited as *THE QUIET REVOLUTION*]; F. BOSSELMAN, D. FEURER & C. SIEMON, *URBAN LAW INSTITUTE, THE PERMIT EXPLOSION: COORDINATION OF THE PROLIFERATION* (1976); D. MANDELKER, *ENVIRONMENTAL AND LAND CONTROLS LEGISLATION* (1976) [hereinafter cited as *MANDELKER*]; P. MYERS, *ZONING HAWAII: AN ANALYSIS OF THE PASSAGE AND IMPLEMENTATION OF HAWAII'S LAND CLASSIFICATION LAW* (1975) [hereinafter cited as *ZONING HAWAII*].

² See *THE QUIET REVOLUTION*, *supra* note 1, at ch. 1; *MANDELKER*, *supra* note 1; *ZONING HAWAII*, *supra* note 1; Mandelker & Kolis, *Whither Hawaii: Land Use Management in an Island State*, 1 U. HAWAII L. REV. 48 (1979) [hereinafter cited as *Whither Hawaii*]. Most of these comment upon controls such as the Hawaii State Land Use Law, HAWAII REV. STAT. ch. 205 (1976 & Supp. 1979). There is little yet written upon controls such as Honolulu's charter provisions requiring all new land use changes to accord with local development plans. Charter of the City & County of Honolulu § 5-412(3). Development plans are presently in draft form.

³ It is only in late 1978 that an intermediate appellate court was authorized by constitutional amendment, see HAWAII CONST. art. VI, § 2, and but a few months ago that judges for that court were confirmed by the state senate, see letter from Seichi Hirai to Hon. George R. Ariyoshi (Fed. 27, 1980). This survey is based only upon appellate — and, therefore, until the recently authorized system is functioning — Hawaii Supreme Court decisions.

vey therefore concentrates on a number of recent cases⁴ which will critically influence certain specific areas of land use management and control in Hawaii: vested rights, the relationship of planning to zoning, the character of state zoning amendments, and water rights and coastal zone ownership.

I. VESTED RIGHTS

The point at which a developer is entitled to proceed with a development in the face of a newly enacted land use regulation which, if applied to the development, would hinder or prevent it is becoming a commonly litigated issue across the country.⁵ While it is fair to say that most jurisdictions are satisfied with an expenditure of funds in reliance upon a pre-existing zone classification to support a claim for these so-called vested rights,⁶ some jurisdictions have disregarded altogether fairly large amounts so expended.⁷ The law therefore appears to vary significantly with the jurisdiction.

There is a fair amount of recent case law in Hawaii on this critical subject.⁸ The Hawaii Supreme Court has dealt with it directly on five occasions in the past ten years,⁹ most recently in January of 1980.¹⁰ The trend appeared to be in the direction of the strict California rule until quite

⁴ *Kaiser-Aetna v. United States*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738); *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Hawaii 1978); *Life of the Land, Inc. v. City Council*, No. 7240 (Hawaii Sup. Ct. Jan. 4, 1980); *Life of the Land, Inc. v. Land Use Comm'n*, 61 Hawaii —, 594 P.2d 1079 (1979); *Life of the Land, Inc. v. City Council*, 60 Hawaii 446, 592 P.2d 26 (1979); *Kailua Community Council v. City & County of Honolulu*, 60 Hawaii 428, 591 P.2d 602 (1979); *Allen v. City & County of Honolulu*, 58 Hawaii 432, 571 P.2d 328 (1977); *Akahane v. Fasi*, 58 Hawaii 74, 565 P.2d 552 (1977); *Save Hawaii Loa Ridge Ass'n v. Land Use Comm'n*, 57 Hawaii 84, 549 P.2d 737 (1976); *Hall v. City & County of Honolulu*, 56 Hawaii 121, 530 P.2d 737 (1975); *Town v. Land Use Comm'n*, 55 Hawaii 538, 524 P.2d 84 (1974); *Denning v. County of Maui*, 52 Hawaii 653, 485 P.2d 1048 (1971); *Dalton v. City & County of Honolulu*, 51 Hawaii 400, 462 P.2d 199 (1969).

⁵ 2 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 56.02 (1975) [hereinafter cited as WILLIAMS]; 4 *id.* § 104.02; see Hagman, *The Taking Issue: The HFH et al. Round*, 28 LAND USE L. & ZONING DIG. No. II, at 5 (1976); McCown-Hawkes & King, *Vested Rights to Develop Land: California's Avco Decision and Legislative Responses*, 6 ECOLOGY L. Q. 755 (1978).

⁶ See 4 WILLIAMS, *supra* note 5, at § 111.02.

⁷ *E.g. Avco Community Developers v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 533 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

⁸ See Devens, *Overview Remarks*, in VESTED RIGHTS, DEVELOPMENT RIGHTS 9 (Proceedings of June 22, 1979 Conference on Planning for Growth Management, Honolulu, Hawaii).

⁹ *Life of the Land, Inc. v. City Council*, No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980); *Life of the Land, Inc. v. City Council*, 60 Hawaii 446, 592 P.2d 26 (1979); *Allen v. City & County of Honolulu*, 58 Hawaii 432, 571 P.2d 328 (1977); *Denning v. County of Maui*, 52 Hawaii 653, 485 P.2d 1048 (1971); *Dalton v. City & County of Honolulu*, 51 Hawaii 400, 462 P.2d 199 (1969).

¹⁰ *Life of the Land, Inc. v. City Council*, No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980).

recently. Much will depend on the extent to which future decisions either hearken back to the first true vested rights decision in Hawaii¹¹ or proceed down a "softer" path trod by the majority, over a strong dissent, in a later pronouncement by the court.¹²

The two most recent — and critical — cases dealing with vested rights and equitable estoppel in Hawaii bear the same name, *Life of the Land, Inc. v. City Council*.¹³ The litigation dealt respectively with attempts to preliminarily and permanently enjoin the construction of a multi-story condominium building. Because the majority and dissenting opinions in the first case divided on the extent of vested rights, and the court arguably departed from previous Hawaii cases on vested rights in the second case, the rulings place Hawaii at a crossroads in this area in many respects. In the first decision, both majority and dissent claimed *Denning v. County of Maui*¹⁴ as their touchstone. Since *Denning* was the first case to deal directly with the subject in Hawaii and was the basis for both *Life of the Land* cases and the intervening case of *Allen v. City & County of Honolulu*,¹⁵ we turn first to an analysis of *Denning*.

The facts of *Denning* are relatively straightforward. Denning purchased property near Kihei on Maui which was at the time (1968) classified in both the county master plan and the county zoning ordinance as "hotel district". Applicable regulations in the zoning ordinance limited buildings constructed in the hotel district to a height of twelve stories and a "floor area/lot area ratio" (FAR)¹⁶ of 150%.¹⁷ One year after purchasing the property, Denning sought from the county planning director informal "preliminary approval" of plans for an eight-story condominium project with an FAR of 144.1%. While agreeing that the proposed development accorded with existing zoning, the director also noted in his written reply that the county was then considering a proposed general plan which designated Denning's land "resort commercial". Zoning regulations applicable to the designation would reduce the maximum permitted height from twelve to six stories. The court in its factual summary interpreted these letters as "clearly" implying that the zoning regulations would control development although it is unclear whether by this the court meant that planning without implementing zoning was inapplicable or that Denning should then have been on notice that new regulations would likely apply

¹¹ *Denning v. County of Maui*, 52 Hawaii 653, 485 P.2d 1048 (1971).

¹² *Life of the Land, Inc. v. City Council*, 60 Hawaii 446, 451, 592 P.2d 26, 29 (1979) (Kidwell, J., dissenting).

¹³ No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980); 60 Hawaii 446, 592 P.2d 26 (1979).

¹⁴ 52 Hawaii 653, 485 P.2d 1048 (1971).

¹⁵ 58 Hawaii 432, 571 P.2d 328 (1977).

¹⁶ Floor/area ratio (FAR), as the court noted, is determined by dividing the square foot area of a lot into the square footage of floor space to be developed. Thus, if one knows the lot area and the required FAR, one can readily determine the amount of floor space permissible by multiplying the lot area by the FAR in the zoning ordinance.

¹⁷ 52 Hawaii at 654, 485 P.2d at 1049.

soon. Nevertheless, the director stated in two separate communications that it would be "difficult to determine" what regulations would apply to Denning's land.¹⁸

A couple of months later, an interim ordinance reducing the height on Denning's land was indeed enacted, and Denning accordingly modified his plans and reduced the height of his condominium project to six stories. The following month the director once again gave preliminary approval to Denning's plans much in the same form as before. Denning made minor changes as required by the director over the next three months and continued to receive assurances that his plans conformed to the existing ordinances. Then the county council enacted an ordinance further reducing the height in the area, including Denning's land, to two stories and the FAR to 100%. The director told Denning that the new ordinance would apply to his land and, more importantly, to his contemplated condominium project.¹⁹ (The court noted that the ordinance was "silent as to whether it affects development in progress to the extent of Denning's project."²⁰)

Informed that a building permit for his proposed project would be denied, Denning unsuccessfully sought permission to continue the development from the Maui County Board of Adjustment and Appeals, alleging that he had incurred approximately \$38,000 in architectural, advertising, and legal fees. There was nothing to indicate any physical work had begun on the site itself. The board refused to act, and Denning appealed to the circuit court which remanded back to the board for a hearing and decision.²¹

The Hawaii Supreme Court first dealt summarily with that remand. Noting that after the ordinance change (reducing the height to two stories and the FAR to 100%) the board "was bound to enforce the terms" of that ordinance, the court held that the board was without jurisdiction to permit Denning to proceed under the old ordinance, and since no variance²² had been sought it was without jurisdiction altogether. Therefore, the circuit court's remand was reversible error.²³ Nevertheless, the court set out what it considered to be the critical test for deciding vested rights cases, even though it was not called upon to do so by the posture of the case:

¹⁸ *Id.* at 655, 485 P.2d at 1049.

¹⁹ *Id.* at 657, 485 P.2d at 1050.

²⁰ *Id.*

²¹ *Id.*

²² A variance is an exception from applicable land use regulations granted in cases of hardship uniquely caused to the applicant for relief. A variance is usually granted to provide relief to the landowner who has been unduly burdened. There are basically two types of variances: bulk variances and use variances. See Garner & Callies, *Planning Law in England and Wales and in the United States*, 1 *ANGLO-AMERICAN L.J.* 292, 309 (1972) [hereinafter cited as Garner & Callies].

²³ 52 Hawaii at 658-59, 485 P.2d at 1051.

[F]or Denning to be allowed the right to proceed in constructing the planned structure the facts must show that Denning had been given assurances of some form by appellants that Denning's proposed construction met zoning requirements. And that Denning had a right to rely on such assurances thereby equitably estopping appellants from enforcing the terms of [the ordinance].³⁴

Citing a California case,³⁵ the court continued: "Mere good faith expectancy that a permit will issue does not create in a property owner a right to continue proposed construction."³⁶ This differed from the trial court's rule.³⁷ The key appears to be the matter of "right." What is the quality of the assurance? Is it merely an "expectancy" that a permit will issue? The court held that the passage of the *first* of the ordinances (*reducing* the height from twelve to six stories) could very well be critical. The court's reference to the purpose of the first ordinance as protecting the proposed general plan while zoning regulations were being formulated³⁸ and its reference to an article³⁹ discussing with approbation interim zoning measures⁴⁰ suggest that the court considered the first ordinance to be in the nature of an interim zoning regulation. Since Denning clearly had notice of the first ordinance according to the facts, he presumably would *not* be able to claim any vesting of rights (or damages?) between the notice and the eventual refusal to issue a building permit on the strength of the second ordinance further restricting his right to develop.

Six years later, the court again considered vested rights and development rights in *Allen v. City & County of Honolulu*.⁴¹ It is here that the court made a distinction between vested rights and equitable estoppel. The court had before it one of three cases decided by the lower court in which money damages had been awarded to compensate developers for expenditures alleged to have been made in reliance upon then existing zoning regulations of the city and county. Allen had purchased a parcel

³⁴ *Id.* (footnotes omitted).

³⁵ *Russian Hill Impr. Ass'n v. Board of Permit Appeals*, 66 Cal. 2d 34, 423 P.2d 824, 828, 56 Cal. Rptr. 672, 676 (1967).

³⁶ 52 Hawaii at 659, 485 P.2d at 1051 (footnote omitted).

³⁷ The trial court had ruled: "If Denning expended substantial sums for the preparation of plans and documents in good faith reliance upon law prior to Ordinance No. 641 and which expenditures were incurred upon the reasonable probability of a building permit being issued then Denning must be allowed the right to proceed." *Id.* at 658, 485 P.2d at 1051.

³⁸ *Id.* at 659, 485 P.2d at 1051: "The function of this measure [the first ordinance] was undoubtedly to protect the design of the proposed General Plan 701 while the zoning regulations pertaining thereto were still in their incubative stage."

³⁹ *Id.* at n.8 (citing Note, *Stogap Measures To Preserve the Status Quo Pending Comprehensive Zoning or Urban Redevelopment Legislation*, 14 W. RES. L. REV. 135 (1962)).

⁴⁰ Interim zoning is a temporary measure used to prevent development in an area that has not been zoned or an area that is undergoing a comprehensive study for rezoning. Interim measures can be useful in assuring orderly development but also can be misused by a government to delay zoning or rezoning an area. See D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* 84 (1971).

⁴¹ 58 Hawaii 432, 571 P.2d 328 (1977).

classified A-3 under the zoning code for the purpose of constructing an eleven-story condominium. The current zoning permitted buildings up to 350 feet high. There was evidence that Allen purchased the property only after inquiring about existing zoning and consulting an architect. Immediately following purchase, Allen retained the same architect and "commenced architectural, engineering and other work necessary to obtain a building permit from the city."³² Six months later a rezoning amendment which had the effect of downzoning Allen's property was passed by the city council. Meanwhile, Allen had testified against the proposal at a public hearing two months before passage and four months after purchase of the property and had applied for a building permit which had been partially approved on the date the rezoning ordinance was passed. Allen did not wait for a denial, however, and promptly *withdrew his building permit application*.³³

Allen thereafter sued the city for \$77,000 in damages — allegedly the amount of nonrecoverable costs incurred up to the date the downzoning ordinance was passed. The trial court found there had been a substantial change in position resulting in some \$68,000 of nonrecoverable costs³⁴ and found the city liable for that amount.³⁵

But the supreme court held that Allen could not recover monetary damages from the city, whether or not he had a valid vested rights claim:

In our opinion, to permit damages for development costs is not only unprecedented but would also be unsound policy. Were we to affirm the award of damages, the City would be unable to act, if each time it sought to rezone an area of land it feared judicially forced compensation. Monetary awards in zoning disputes would inhibit governmental experimentation in land use controls and have a detrimental effect on the community's control of the allocation of its resources.³⁶

Further, the court held that if found to be equitably estopped from enforcing its ordinance, then the city should decide whether to condemn

³² *Id.* at 433, 571 P.2d at 328.

³³ *Id.* at 434, 571 P.2d at 329.

³⁴ *Id.*:

Prior to the effective date of Ordinance 4145, the Plaintiffs in reliance on the A-3 zoning then in effect and on the reasonable probability that a building permit would be issued, substantially changed their position and incurred certain nonrecoverable costs for the development of their property in the amount of \$67,950.26 for which they were and are liable.

³⁵ *Id.* at 434-35, 571 P.2d at 329:

(1) Plaintiffs had the right to rely on the zoning requirements existing prior to the effective date of Ordinance 4145. (2) The City is liable for the costs incurred by the Plaintiffs in reliance on the then existing A-3 zoning and on the reasonable probability of the issuance of a building permit. (3) The mere introduction of Bill 46 on March 6, 1973 does not constitute notice to the Plaintiffs that the zoning would be changed.

³⁶ *Id.* at 438, 571 P.2d at 331.

the property rights or repeal its zoning restrictions:

Prohibiting damages for development costs does not mean that a property owner must suffer an injury without compensation, for if the facts establish that the doctrine of equitable estoppel should apply to prevent the City from enforcing newly enacted prohibitive zoning, then the property owner is entitled to continue construction. Once the City is estopped from enforcing the new zoning, if it still feels the development must be halted, it must look to its powers of eminent domain. In order for the City to operate with any sense of financial responsibility the choice between continued construction and paying to have it stopped by condemnation, if possible, must rest with the City—not property owners.³⁷

But it is the Hawaii Supreme Court's *dicta*, not its *holding* in *Allen*, which is important for predicting its future direction in vested rights cases. Citing with apparent approval recent cases from California³⁸ and Illinois,³⁹ a unanimous court seemed to favor applying an increasingly strict standard to property owners claiming vested rights or equitable estoppel as against a change in land use regulations applicable to their property. The court began by quoting with approval a distinction between vested rights and estoppel,⁴⁰ noting that courts reached the same results under either theory.⁴¹ The court then noted the tough standards applied in California and Illinois and reiterated its language in *Denning* that "mere good faith expectancy" would not be enough.⁴² So far, the court *appears* to be saying that *Allen* had no more than such an expectancy.

But it is on this point that the court concentrated on the issue of damages, noting that in two other cases decided the same day by the trial court⁴³ building permits had issued and construction had begun.⁴⁴ In each

³⁷ *Id.* at 439, 571 P.2d at 331.

³⁸ *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977).

³⁹ *First Nat'l Bank & Trust Co. v. City of Rockford*, 47 Ill. App. 3d 131, 361 N.E.2d 832 (1977).

⁴⁰ 58 Hawaii at 435, 572 P.2d at 329 (quoting Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 64-65):

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

⁴¹ 58 Hawaii at 435, 571 P.2d at 329.

⁴² *Id.* at 436, 571 P.2d at 330.

⁴³ *Hale Kona Kai Dev. Corp. v. Yuasa*, Civ. No. 39391; *Guerin v. Yuasa*, Civ. No. 39390 (1st Cir. Ct. Hawaii July 24, 1973) (decided together).

of these declarative and injunctive relief had been sought, the trial court had held that the permits had been rightfully revoked, and damages had been awarded.⁴⁵

In sum, it would appear from *Allen* (and especially in light of *Denning*) that the Hawaii Supreme Court was moving, if not directly toward strict standards making a showing of vested rights or equitable estoppel difficult in cases of downzoning, at least toward a theory of compensable regulations in which the law would stand but some measure of compensation might be due the landowner stopped *in medias res*. Nevertheless, *Allen* left many questions unanswered, not the least of which was: Is a developer who has expended sums in reliance on existing zoning, but who has not commenced construction, likely to be able to show any vested rights or claim equitable estoppel?

The first *Life of the Land, Inc. v. City Council*⁴⁶ case would seem to answer, yes. In this recent decision, a bare majority of the court held that where a developer, in good faith reliance upon existing law, has expended substantial sums for the preparation of plans and documents for the purpose of applying for a building permit, and it is further shown that he has been given assurance in some form by county officials charged with administering the law that his proposed construction meets zoning requirements, and that he had a right to rely on such assurances, the county will be *equitably estopped* from denying him a building permit by reason of a subsequently enacted prohibitory ordinance. The critical questions become: (1) What reliance is "good faith"; (2) what sums are "substantial"; (3) what constitutes "assurance" by officials; and (4) when does a developer have a right to rely on such assurances? While some answers are discernible from the majority opinion, they must be carefully considered not only in light of the strong dissents by two of the five justices sitting, but also in light of the retirement of one justice each from the majority and dissenting blocks.⁴⁷ Appointments to the State's highest court could change considerably the future lineup on these critical questions. Moreover, the case is tinged by the intense political and public controversy over construction of the Admiral Thomas condominium project overlooking one of Honolulu's treasured urban parks.⁴⁸ Finally, a unanimous supreme court (with two temporary justices assigned by reason of the aforementioned vacancies) has rejected *Life of the Land's* request for a permanent injunction.⁴⁹

The salient facts are relatively uncomplicated and undisputed.⁵⁰ The

⁴⁴ 58 Hawaii at 437, 571 P.2d at 330.

⁴⁵ *Id.*, 571 P.2d at 330-31. Neither decision was appealed.

⁴⁶ 60 Hawaii 446, 592 P.2d 26 (1979).

⁴⁷ Justice Kobayashi who voted with the majority has recently retired, as has Justice Kidwell.

⁴⁸ The Admiral Thomas condominium overlooks Thomas Square Park.

⁴⁹ *Life of the Land, Inc. v. City Council*, No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980).

⁵⁰ *Id.*, slip op. at 1.

developers' property is located in a district which, at the time of application to build, was controlled by a building permit moratorium. The moratorium had been in effect for eighteen months when the developers applied to the city council for an exemption, which it may grant in its discretion under the terms of the moratorium ordinance.⁵¹ Two months later, the council approved such an exemption for a 350-foot, 177-unit, 35-story condominium. Had it not been for the moratorium, the proposed building would have been a permitted use in the A-4, high density apartment zone.⁵²

Approximately one month later, the city reduced the height limit to 299 feet and the number of units to 150 and added, among other conditions,⁵³ a 95-foot setback from Victoria Street.⁵⁴ The developers agreed. Two months later, plans embodying these changes appear to have been submitted.⁵⁵ But the following month, the Thomas Square Historic, Cultural and Scenic (HCS) District Ordinance became effective.⁵⁶ That ordinance prohibited a structure such as that proposed by the developer. Three months later, Life of the Land sued the city and the developer, and late in 1978 the trial court decided in favor of the defendants. It was only after that decision that the council "determined" that all conditions had been met by the developer, leaving the city's department of land utilization free to issue a building permit.⁵⁷

The Hawaii Supreme Court upheld the trial court's refusal to grant a temporary injunction. In so doing it reaffirmed its language in *Denning*⁵⁸ and *Allen*⁵⁹ that a developer who spends money in good faith reliance on existing law may have a right to proceed — the local government being *equitably estopped* from enforcing an ordinance which does not permit such development. But the majority further expanded the scope of vested rights which, although defensible, *purports* to be derived from the two earlier cases. It is not altogether clear that a basis for such expansion can be found in or fairly implied from either prior case.

First, the court clearly extended equitable estoppel rights to expenditures for plans and documents — in this case an amount apparently ex-

⁵¹ 60 Hawaii at 448, 592 P.2d at 27.

⁵² *Id.*, 592 P.2d at 28.

⁵³ The developers were mandated to enter negotiations with the Honolulu Academy of Arts for underground parking, to consider any urban design policy that might emerge for the Thomas Square area in designing the project, and to study the possibility of constructing two residential buildings rather than one. *Id.* at 455 n.4, 592 P.2d at 31 n.4 (Kidwell, J., dissenting).

⁵⁴ *Id.* at 454-55, 592 P.2d at 31 (Kidwell, J., dissenting).

⁵⁵ *Id.* at 449, 592 P.2d at 28. Whether plans in conformance with these changes were *in fact* submitted is not clear. Justice Kidwell, at least, regarded this as a factual issue to be considered later. *Id.* at 459, 465, 592 P.2d at 33, 37.

⁵⁶ *Id.* at 449, 592 P.2d at 28.

⁵⁷ *Id.*

⁵⁸ See text accompanying note 24 *supra*.

⁵⁹ See text accompanying note 37 *supra*.

ceeding half a million dollars.⁶⁰ Although the previous cases did in fact deal with such expenditures, there is at least a suggestion in *Allen* that neither the amount nor kind of spending would lead to the application of equitable estoppel.⁶¹ Indeed, the court in *Allen* expressly held it was not deciding whether the city should be estopped from enforcing the ordinance in question, but only whether the damage remedy was proper.⁶² Whether it is appropriate in Hawaii to extend equitable estoppel to money spent in planning and design prior to the issuance of a building permit, the point is that it is not nearly so clear the court had already done so in *Allen* and *Denning*, yet the court apparently thought it did so then. In any event, it does so now.⁶³

Second, and more troublesome, the court assumed without discussion that the developers had acquired development rights by virtue of their acquisition of the property zoned A-4 prior to the passage of the moratorium.⁶⁴ While there may be jurisdictions that so hold, more discussion and explanation seems preferable if this is the direction Hawaii means to go. Following *Allen* the Hawaii legal community justifiably could have

⁶⁰ 60 Hawaii at 450, 592 P.2d at 29. It is not terribly clear, of all the amounts discussed by the court, which it considered applicable to the issue in this case:

In this case, the expenditures made by the developers were substantial. In reliance upon Section IV of Ordinance No. 4551, they proceeded to file an application for an exemption from the moratorium on July 11, 1977. The record is not clear exactly how much was spent by the developers in the preparation of plans and designs in support of their application, but it does show that up to September 21, 1977, when the city council gave its express approval to the proposed construction, they had already incurred expenditures in excess of \$150,000 for planning and design. They first acquired development rights to the property on August 22, 1975, before the passage of Ordinance No. 4551. Following council approval, and between September 21, 1977 and November 10, 1977, they incurred expenditures of close to \$95,000 for the project, of which the sum of approximately \$85,000 was allocated for planning and design. Subsequent city council action on November 10, 1977, necessitated further construction design modifications. Between that date and April 20, 1978, the developers incurred expenditures of approximately \$321,000, of which some \$275,000 went for planning and design. By the time the suit was filed on May 2, 1978, in an attempt to put a halt to the project, they had incurred further expenditures of approximately \$7,500 for planning and design. These expenditures for planning and design were incurred by reason of, and in compliance with, council action on their application, and in reliance upon the implicit assurance that if the special construction conditions imposed by the council were met, a building permit would issue.

Id. at 450-51, 592 P.2d at 29.

⁶¹ Here, the trial court ruled that appellees had a right to rely on the A-3 zoning and that the city was liable for appellees' nonrecoverable preparatory expenses. On review of the record it is difficult to ascertain the basis of that ruling.

⁶² 58 Hawaii at 436, 571 P.2d at 330.

⁶³ Justice Kidwell is not so sure. In his dissent he notes the alternate grounds presented by corporation counsel for the city for approving the project. 60 Hawaii at 456-57, 592 P.2d at 32. However, it is clear from the brief majority opinion that the court is speaking in estoppel terms, citing *Denning* and *Allen* with approval.

⁶⁴ "They first acquired development rights to the property on August 22, 1975 . . ." 60 Hawaii at 450, 592 P.2d at 29.

counselled quite the opposite considering the court's apparent reliance on the *Avco*⁶⁵ case from California, a jurisdiction to which Hawaii often looks for guidance on issues of first impression.

One of the dissenting justices⁶⁶ set out additional problems with the decision in what is virtually a parallax opinion to that of the majority. Three issues were raised in that dissent: (1) Good faith reliance and notice, (2) good faith reliance and certainty, and (3) legislative intent.

The first is one of good faith reliance and notice. By virtue of the very fact that the interim moratorium ordinance was just that — interim and moratorium — any property owner to whom it applied *must* have been put on notice that changes were in the wind. Indeed, the whole purpose of such an ordinance is to freeze development until such time as a new scheme is in place, expressly to prevent developers from becoming grandfathered into the existing system while the government perforce works its public way to change the rules.⁶⁷ Moreover, it appears that for some time the developers here knew precisely what was being planned for the property — an ordinance that would virtually prohibit their development.⁶⁸ Under these circumstances, it is not easy to characterize the developer here as having relied in good faith and *without notice*.

There is a more difficult issue as well. Good faith reliance requires a relatively certain set of development possibilities. Here there was hardly any such certainty. While it may well be that the developers had more than what the dissent characterized as “ambiguous promises that the pro-

⁶⁵ *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977) (rejecting developer's claim to vested right in construction of project even though developer before passage of the permit legislation had spent more than \$2 million in constructing storm drains, culverts, utilities, and similar improvements, had incurred several thousand dollars in liability, and was losing nearly \$10 thousand per day; rejecting claim of estoppel based on agreement between developer and government agency on ground that government cannot contract away its police powers, including land use regulations).

⁶⁶ Justice Kidwell, since retired, wrote the dissenting opinion.

⁶⁷ See *Silvera v. City of South Lake Tahoe*, 3 Cal. App. 3d 554, 83 Cal. Rptr. 698 (1970); Hagman, A “Back Door Run” Around Limitations on Granting Zoning Variances, 22 LAND USE L. & ZONING DIG. 146 (1970).

⁶⁸ 60 Hawaii at 456, 592 P.2d at 32 (Kidwell, J., dissenting):

From some date prior to September 2, 1977, the Developers were aware that a draft of an ordinance creating a “historic, cultural and scenic district” which would include the Admiral Thomas parcel was under consideration by a committee of the Council and that the draft ordinance contemplated height restrictions which were inconsistent with the Developers' plans. The Developers had, prior to September 21, 1977, presented arguments directly to a member of the Council in an attempt to defeat the ordinance. A public hearing on the proposed ordinance was scheduled to be held on January 25, 1978. On January 24, 1978 the Developers filed an application for a building permit. The proposed ordinance became effective as the HCS Ordinance by its passage by the Council and its approval by the mayor on February 22, 1978. The HCS Ordinance by its terms prohibits construction on the Admiral Thomas parcel of any structure in excess of a height limit computed by a formula. It is not disputed that the building proposed to be constructed by the Developers would exceed that height limit.

posed construction would be permitted in the legislative discretion of the Council,"⁶⁹ nevertheless it is fair to characterize their reliance, especially after passage of the interim moratorium, as something less than the relative certainty provided by an existing and unencumbered zoning classification. The dissenting opinion set out the lack of assurance which the developers had here, contrasting it with the *Denning* decision:

It is necessary at the outset to recognize a critical difference in the posture of the Developers from that of the landowner in *Denning*. There the existing ordinance left nothing to be determined by the county authorities except compliance of the proposed development with a set of criteria spelled out in the ordinance. In the present case, on the other hand, the governing ordinance forbade the proposed development, subject only to modification of the application of the ordinance in the legislative discretion of the Council. The Developers could receive assurances that their proposed construction was not prohibited by the IDC Ordinance only by way of action by the Council. Moreover, the IDC Ordinance contained an express limitation on the power, as distinct from the discretion, of the Council, that any such modification must be consistent with proposed amendments to existing land use regulations and with "the health, safety, morals and general welfare."

The Developers must find the assurances they need to satisfy the *Denning* test in the action of the Council on September 21, 1977 and November 10, 1977. These actions were far from unqualified and unambiguous. . . .

It is not possible to read the resolution of November 10, 1977, as the Developers seemingly would have us do, as merely an expression of hope on the part of the Council with no sanction available to the Council to enforce its directives. In my opinion, the action of the Council can reasonably be interpreted only as conditioning its approval upon the satisfactory compliance by the Developers with those directives. Not only did these directives require the Developers to engage in a course of negotiation with other parties which would be subject to subsequent evaluation by the Council, but also the Developers were required to consider changes in the design of the project as necessary to conform to the standards of the HCS Ordinance when enacted. It is clearly implied that the Council was to review the Developers' consideration of these standards and that the Council would have to be satisfied that its directive had been observed before the building permit would issue. Such confirming action on the part of the Council did not take place until October 28, 1978.

These facts do not support equitable estoppel under the *Denning* test. On the date of enactment of the HCS Ordinance the Developers had, instead of assurances that the proposed construction met zoning requirements, only ambiguous promises that the proposed construction would be permitted in the legislative discretion of the Council if the efforts of the Developers subsequent to November 10, 1977 to comply with the Council's directives were determined to meet some unexpressed standard of sufficiency.⁷⁰

If the Council's actions were more than "ambiguous promises" — and I

⁶⁹ *Id.* at 464, 592 P.2d at 37. (Kidwell, J., dissenting).

⁷⁰ *Id.* at 463-65, 592 P.2d at 36-37 (Kidwell, J., dissenting).

submit that they were — they were also something less than a certainty upon which to build a case of equitable estoppel.

Finally, the dissent raised an interesting question of legislative intent: Did the passage of the HCS District Ordinance contain any exception for the Admiral Thomas project, and if not, could the court supply one? The answer is plainly, no. Rules of statutory construction permit no reading in of unexpressed intent; the council, with a clear opportunity to express its intent in the ordinance, passed a measure that was unambiguous and expressly effective upon enactment.⁷¹ But it is worth examining the consequences of this particular answer: no vested rights or equitable estoppel will apply to any project upon which construction has not yet begun, regardless of the good-faith reliance of the developer or the amount expended in such reliance. This is a bit far reaching and would put Hawaii at or near the forefront among jurisdictions (like California) in which the absence of a building permit virtually forecloses either vested rights or equitable estoppel regardless of the other circumstances.⁷²

The most recent (January 1980) supreme court decision on these facts⁷³ did not really resolve many of these issues, holding as it did that the city never *intended* that the HCS District Ordinance restricting heights in the Thomas Square area should apply to the developers here.⁷⁴ Thus, the court avoided the vested rights issue almost entirely by construing the facts in such a way as to make the passage of the aforesaid ordinance,

⁷¹ *Id.* at 460, 592 P.2d at 34 (Kidwell, J., dissenting):

Rules of statutory construction do not permit a court to read into legislation which changes zoning standards an unexpressed intent to leave proposed construction unaffected. The HCS Ordinance is unambiguous. It expressly was effective on enactment, with no exception for the Admiral Thomas project. There was no occasion for the Council to express its intent more clearly in order for the ordinance to be effective in accordance with its terms.

⁷² *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975); Hagman, *The Taking Issue: The HFH et al. Round*, 28 LAND USE L. & ZONING DIG. No. II, at 5 (1976); see Kanner, *Public Right to Compensation for Public Land Use Control*, in VESTED RIGHTS DEVELOPMENT RIGHTS 43 (Proceedings of June 22, 1979 Conference on Planning for Growth Management, Honolulu, Hawaii); Kanner, *The Consequences of Taking Property by Regulation*, 24 PRAC. LAW. 65 (1978).

In fairness, it is worth observing that there is no mention of equitable estoppel in the quotation from Justice Kidwell in note 71 *supra*, and it is therefore arguably separable from the equitable estoppel issue and the way I have chosen to phrase it.

⁷³ *Life of the Land, Inc., v. City Council*, No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980). The court discusses a host of technical and procedural issues raised by plaintiff-appellant Life of the Land which, while of some importance to the outcome of this particular appeal, are beyond the scope of the survey article which focuses on the major issue of vested rights. It is worth noting that the court seems more concerned with compliance with the *spirit* of the plethora of procedural requirements for land use changes in Honolulu than with their strict letter. See, e.g., *id.*, slip op. at 48 (no need to formally state "self-evident" undue hardship); *id.* at 52 (no need for formal "justification" report).

⁷⁴ *Id.* at 66.

otherwise restricting the developers' rights, inapplicable to the now virtually completed condominium building.⁷⁵

To do so, the court exhaustively set out the facts, especially the sequence of events leading to the approval of the HCS District Ordinance by the city council.⁷⁶ Pointing in particular to language from various members of the council in the course of hearings on the ordinance and the "compromise" by which the Thomas Square developers agreed to reduce building height and density,⁷⁷ the court held:

It is clear from (a) the discussion at the Committee of the Whole meeting of November 10, 1977; (b) the discussion at the public hearing held on the proposed HCS District No. 5 Ordinance on January 25, 1978; and (c) the HCS District No. 5 Ordinance as finally enacted, that the City Council did not intend that the ordinance should operate to deny to the Developers the building permit for the Admiral Thomas project, to which they would have been entitled, pursuant to the November 10, 1977, approval of their application for variance or modification under the Kakaako Ordinance.

Those provisions in the Revised Kakaako Ordinance affirmed and expressed the clearly ascertainable intent of the City Council that the Admiral Thomas project be exempted from the operation of the HCS District No. 5 Ordinance.⁷⁸

Then, the court emphasized the absence of anything in the record or legislative history indicating the HDC ordinance was meant to apply *retroactively*. Since the court decided that the developer had received approval *before* HDC's passage, the ordinance would have to be retroactive in order even to *raise* a vested rights question: "There is no provision in the quoted section, or in any other section of the ordinance, which makes it operate retrospectively. Consequently, it operates only prospectively."⁷⁹

Finally, the court proceeded to deal briefly with the question of equitable estoppel. After citing *Denning*⁸⁰ and *Allen*,⁸¹ the court set out its definition of the applicable rule (which, by virtue of its earlier joining of the two concepts, applies in Hawaii to vested rights as well):

The doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely pro-

⁷⁵ *Id.*

⁷⁶ *Id.* at 2-36, 60-70.

⁷⁷ *Id.* at 61-62, 65-68.

⁷⁸ *Id.* at 66, 70.

⁷⁹ *Id.* at 69.

⁸⁰ *Id.* at 73 (citing *Denning v. County of Maui*, 52 Hawaii 653, 485 P.2d 1048 (1971)).

⁸¹ *Id.* (citing *Allen v. City & County of Honolulu*, 58 Hawaii 432, 571 P.2d 328 (1977)).

ceed with the project.⁸³

More questionable is the court's assertion that the official assurances which developers received at various times in 1977 were "official assurances on which the Developers had a right to rely to proceed with their projects,"⁸³ *in light of similar fact situations in Denning*. Recall that Denning also was in compliance with then existing zoning ordinance provisions. Recall that Denning also was aware of pending legislation that would make his project unbuildable *but* that he was advised by appropriate officials that he was then in compliance. He also spent sums in reliance on that assurance.⁸⁴ While it is true that Denning spent far less in reliance upon these assurances (by several hundred thousand dollars) *and* Denning had not sought a formal "variance" from existing zoning restrictions as did the developers in *Life of the Land*, nevertheless the theoretical distinction is weak. The court in *Denning* held that Denning failed to demonstrate he had been given assurances (upon which he had a right to rely) that his project met existing zoning requirements.⁸⁵ Yet, he appears to have received about as much assurance as the developers in *Life of the Land*. If Denning could not proceed, then why should not the Victoria Partnership have been similarly precluded if the Hawaii Supreme Court continues, as it says it does, to rely on *Denning* for precedent in the area of estoppel and vested rights?

Of course, it is again worth noting that vested rights — equitable estoppel — was only one of several issues discussed by the court and raised by plaintiff-appellants.⁸⁶ Moreover, based upon earlier conclusions with respect to the intent of council and the prospective nature of the HDC ordinance, such rights may have been irrelevant to the outcome of *this* case. The importance of the decision lies in its continued cloud over the issue of vested rights — equitable estoppel as applied to land use decisions in Hawaii.⁸⁷

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See discussion of *Denning* in text accompanying notes 16-30 *supra*.

⁸⁶ See text accompanying note 24 *supra*.

⁸⁷ No. 7240, slip op. at 30 (validity of council action; effective dates of approval of developers' application and the HCS Ordinance).

⁸⁷ A final note. The supreme court discussed the issue of variance in connection with the existing ordinance scheme pertaining to the land upon which the condominium structure was proposed to be built. The court discussed the nature of interim ordinances and found them *not* to be zoning ordinances at all, and therefore the council's activities with respect to developers' request for a variance therefrom not to be subject to the customary requirements and procedures usually required for such land use changes:

That provision did not apply to the Developers' application because the Developers' application was not a petition for varying the application of a zoning ordinance with respect to a particular parcel of land, but was an application for variance or modification under the Kakaako Ordinance, which was not a zoning ordinance.

Id. at 47.

II. THE RELATIONSHIP OF PLANNING TO ZONING

"The best-laid schemes o' mice an' men gang aft a-gley."

Robert Burns

While it may very well be that the best of plans are all for naught in practice, there is no question that plans, at least land use plans, were always *supposed* to precede land use controls as exemplified by zoning.⁸⁸ That they did not for decades after the judicial⁸⁹ and legislative⁹⁰ actions which led to the rapid spread of zoning is well nigh indisputable.⁹¹ Recently, however, many jurisdictions have thought better of it,⁹² and, at least at the state level,⁹³ zoning is once more to be in accordance with a

It will be interesting to see how this language is interpreted by the courts in subsequent decisions. There is a tendency in Hawaii for variance requirements to be more or less loosely observed. The court's language here will do nothing to circumscribe that tendency. It is also not true that all interim land use ordinances are not zoning ordinances, despite the court's interpretation and citing of eminent authority to the contrary, 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 11.01 (1979), cited in *id.* at 42. Many interim land use ordinances are zoning ordinances, and are entitled to the same procedural and substantive treatment upon application for modification as any so-called standard zoning ordinance.

It is worth noting that two radically different bills were introduced in the current Hawaii legislative session, each purporting to resolve the vested rights issue. See H.B. 2671-80, H.D. 1; S.B. 3097-80, S.D. 1, 10th Hawaii Leg., 2d Sess. (1980). The house bill died; the surviving senate bill (as of March 1980) restates the common law in several jurisdictions.

⁸⁸ See R. BABCOCK, *THE ZONING GAME* (1966); *THE QUIET REVOLUTION*, *supra* note 1; Garner & Callies, *supra* note 22; Haar, "In Accordance With a Comprehensive Plan", 68 HARV. L. REV. 1154 (1955).

⁸⁹ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *City of Aurora v. Burns*, 319 Ill. 84, 149 N.E. 784 (1925).

⁹⁰ STANDARD CITY PLANNING ENABLING ACT (U.S. Dep't of Commerce 1928); STANDARD STATE ZONING ENABLING ACT (U.S. Dep't of Commerce rev. ed. 1926).

⁹¹ See R. BABCOCK, *THE ZONING GAME* (1966); *THE QUIET REVOLUTION*, *supra* note 1; Garner & Callies, *supra* note 22.

⁹² *E.g.*, California, Florida, and Oregon. See Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 931-44 (1976).

⁹³ How it will fare at the federal level, which has recently reentered the zoning game after five decades of silence, is another matter. Despite an impassioned plea from an amicus brief filed on behalf of the National Association of Homebuilders, the American Institute of Planners, and the American Society of Planning Officials (the last two since merged into the American Planning Association) the United States Supreme Court in *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), did much to destroy the efficacy of planning as a necessary prelude to land use controls. See Callies, *The Supreme Court is Wrong About Zoning by Popular Vote*, 42 PLANNING 17 (1976). But see DuBose, *The Supreme Court Is Right About Zoning By Popular Vote*, 42 PLANNING 4 (1976). Its pale rehabilitation in its unfortunate decision in *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (effectively setting back antidiscrimination by zoning a decade or so, contrary to the hopes and wishes of many commentators — see, *e.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969)), is too little, too late.

comprehensive plan.⁹⁴ Some states have gone so far as to require that no future local land use regulation shall be enacted or amended unless it is in accordance with a comprehensive plan,⁹⁵ causing some courts to invalidate those zoning ordinances and amendments passed after the date of such legislation if the zoning is not clearly in accordance with the approved comprehensive plan.⁹⁶ So it appears to be with Hawaii.

A. The Importance of a Plan

The benchmark for such an interpretation is *Dalton v. City & County of Honolulu*.⁹⁷ The case is significant primarily for its interpretation of that part of the Charter for the City and County of Honolulu⁹⁸ which requires zoning to follow the direction of a comprehensive plan. Less clear is what procedural and substantive planning and research steps must precede a change in the general plan in light of 1973 revisions to the charter made specifically in response to *Dalton*. The case also set out some points concerning standing⁹⁹ and laches¹⁰⁰ in land use decisionmaking which are not pertinent here.

In *Dalton* the city and county amended the Comprehensive Zoning Code [CZC] to permit increased density on Castle Estate land. The amending ordinances were passed after the council first amended the general plan detailed land use map and general plan text so that the permissible use of the Castle Estate land changed from residential and agricul-

⁹⁴ See generally Haar, "In Accordance with a Comprehensive Plan", 68 HARV. L. REV. 1154 (1955).

⁹⁵ See, e.g., *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); CAL. GOV'T CODE § 65860 (West Supp. 1978-1979); FLA. STAT. ANN. 163.3194 (West Supp. 1979). See also Charter of the City and County of Honolulu art. V, § 5-412(3).

⁹⁶ *Dalton v. City & County of Honolulu*, 51 Hawaii 400, 462 P.2d 199 (1969); *Baker v. City of Milwaukie*, 271 Or. 500, 533 P.2d 772 (1974); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); *1000 Friends of Ore. v. Board of County Comm'rs*, 32 Or. App. 413, 575 P.2d 651 (1978). See Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 956-65 (1976).

⁹⁷ 51 Hawaii 400, 462 P.2d 199 (1969). See the discussion of *Dalton* in Chatburn, *Comprehensive Planning: Only as Certain as Your Survival*, VIII HAWAII B.J. 15 (1971).

⁹⁸ Honolulu is a home rule municipality. It is therefore more independent of the State in many functional areas than it would be as simply a creature of the State, as an incorporated governmental unit whose powers are solely what the State chooses to grant. See HAWAII CONST. art. VIII.

⁹⁹ 51 Hawaii at 402-03, 462 P.2d at 202. For a discussion of a more recent decision focusing on the standing issue, see text accompanying notes 191-204 *infra*.

¹⁰⁰ *Id.* at 403-08, 462 P.2d at 202-05 (remanding the issue to trial court). "Laches" is an equitable doctrine in which the plaintiff is estopped from enforcing his rights because, due to his delay in invoking those rights, the position of the other party has so changed that he cannot be restored to his former condition. *Wisdom's Adm'r v. Sims*, 284 Ky. 258, 144 S.W.2d 232 (1940). The doctrine requires both passage of time and express or implied acquiescence in the alleged wrong. *Tracerlab, Inc. v. Industrial Nucleonics Corp.*, 313 F.2d 97 (1st Cir. 1963).

tural to medium-density residential.¹⁰¹ The plaintiffs contended that the *zoning amendment* was invalid because it was based upon an invalid *general plan amendment*. The Hawaii Supreme Court agreed.¹⁰²

The court first dealt with the question of procedures for amending the general plan. Noting that the charter's provisions for initial passage of the plan (as an ordinance, which procedure has been changed to a resolution under the revised charter) required submission to both the planning director and the planning commission before the council could consider it (and an extraordinary majority council vote to override their recommendations),¹⁰³ the court held the same procedural safeguards were applicable to *amendments* to the general plan as well.¹⁰⁴ Similar procedural treatment was necessary for amendments, said the court, to avoid defeating the safeguards necessary to ensure the long-range and comprehensive nature¹⁰⁵ of the planning process and its integrity.¹⁰⁶ The court then af-

¹⁰¹ 51 Hawaii at 401, 462 P.2d at 201.

¹⁰² *Id.* at 416, 462 P.2d at 209.

¹⁰³ *Id.* at 412, 462 P.2d at 206-07.

¹⁰⁴ *Id.*, 462 P.2d at 207:

The effect of these special procedures, applicable only to the general plan, is that when the general plan is submitted to the council, the council is powerless to make additions or changes without first referring its additions or changes to the planning director and the planning commission for their recommendation. Without their recommendation, the council may adopt such additions or changes "only by the affirmative vote of at least two-thirds of its entire membership."

¹⁰⁵ The meaning of "long-range" and "comprehensive" is clarified by reference to (1) expert testimony received by the charter commission in formulating § 5-509, and (2) the supporting data of the general plan submitted by the planning commission to the council.

Shortly before adopting the requirement that the general plan be "long-range" and "comprehensive", the charter commission solicited and received the advice of a city planning expert:

He believed that it should be the primary responsibility of the planning department to study, prepare and maintain a *long range comprehensive general plan* to guide the physical development of the city on a current basis, which would be recommended to the planning commission for further study and which in turn, if agreed on, would be recommended for adoption by the policy body. He believed it very important that the development and carrying out of the general plan *be spelled out in the charter*, explaining that such a plan should, of course, look forward to the needs of the community *not for just one or two years but twenty years hence*, and which would have to do with matters of traffic, police, fire, schools and playgrounds, land use, etc. Without a general plan, which is also a policy statement concerning zoning and subdivisions, there could be no long-range planning.

Minutes of the 64th Meeting of the Charter Commission held March 25, 1957, p. 2, on file in the Public Archives, at Honolulu, State of Hawaii.

In the supporting data of the 1964 general plan, p. 48, it is stated:

Land uses proposed in this report and designated on Plate [*sic*] 39, the General Plan for the City and County of Honolulu, *cover the next 20 years*—as far ahead as it is safe to predict.

B. To insure that the general plan would be "long-range" and "comprehensive", stringent procedural hurdles were required to be overcome before a general plan could be

firmed the critical relevance of the general plan. Based on the applicable

adopted. These hurdles are:

§ 5-503. . . . The planning director shall:

(a) Prepare a general plan and development plans for the improvement and development of the city.

§ 5-505. . . . The planning commission shall:

(b) Review the general plan and development plans and modifications thereof developed by the director. The commission shall transmit such plans with its recommendations thereon through the mayor to the council for its consideration and action. The commission shall recommend approval in whole or in part and with or without modifications or recommend rejection of such plans.

§ 5-512. . . .

1. The council shall adopt the general plan or any development plan by ordinance.

4. Any addition to or change in the general plan proposed by the council shall be referred by resolution to the planning director and the planning commission for their recommendation prior to final action by the council. If the commission disapproves the proposed change or addition, or recommends a modification thereof, not accepted by the council, or fails to make its report within the period of thirty days, the council may nevertheless adopt such addition or change, but only by the affirmative vote of at least two-thirds of its entire membership.

Id. at 410-12, 462 P.2d at 206-07 (footnote omitted) (original emphasis). This language is no longer contained in the applicable revised charter provisions pertaining to the general plan (or, for that matter, development plans). Charter of the City and County of Honolulu art. V, § 5-408.

¹⁰⁸ 51 Hawaii at 412-13, 462 P.2d at 207:

These stringent requirements for initial adoption of the general plan would be pointless if the council's general power to amend were held applicable to the general plan. For example, suppose that after the general plan had been prepared and recommended to the council, five of the nine members of the council proposed to change the plan. Charter § 5-512.4 would require that this proposal be referred by resolution to the planning director and the planning commission. Without the approval of the commission, the five councilmen would be powerless to adopt the change. But if the general plan could be amended as the defendants here contend, the five councilmen could join the other councilmen and adopt the general plan without proposing any changes, and thereafter, the five councilmen could promptly amend it in any manner they wished, subverting the limitation expressed in charter § 5-512.4.

Id. at 415-16, 462 P.2d at 208-09:

A careful review of the legislative history of § 5-515 and of the other pertinent sections of the charter compels this Court to conclude that the amendment process must meet certain strict procedural hurdles. Looking at the totality of the problem before us with the whole of Honolulu as one indivisible unit, we conclude that the better and correct interpretation of charter § 5-515 requires that in the process of amending the general plan, not only a public hearing is necessary but the council, the planning commission and the planning director are required to follow a course of conduct consistent with the safeguards that were required in the initial adoption of the general plan. This interpretation will not only meet the spirit of the law but fulfill the true intent of the laws covering the

charter provisions,¹⁰⁷ the court concluded that "the charter commission . . . wrote into the charter a specific prohibition against zoning ordinances which do not conform to and implement the general plan."¹⁰⁸ The revised charter contains identical language, only substituting "development plan" for "general plan."¹⁰⁹ Presumably the court would make the same comment with respect to development plans today.

Second, the court set out in detail what it regarded as minimum substantive criteria for amending of the general plan:

[A]lterations in the general plan must be comprehensive and long-range. More specifically, if the city believes the general plan of 1964 is obsolete, then comprehensive updating of the 1964 plan's "studies of physical, social, economic and governmental conditions and trends" is in order. If new study reveals, among other things, (a) a housing shortage that was underestimated in the 1964 general plan, (b) the most rational solution to this housing shortage is more apartments, (c) some of these new apartments should most rationally be in Kailua, (d) the land set aside in the 1964 general plan for apartments in Kailua must be increased to meet this need, and (e) the acreage in question in this case is the best site for additional apartments (rather than some other site, or rather than some other use for this land to fit some other need underestimated in the 1964 plan); then the general plan may be amended to permit a change in zoning.¹¹⁰

This last is particularly significant. The court seems to preclude a general plan amendment meeting all of the appropriate procedural safeguards unless it is supported by studies demonstrating a sound basis for such amendment.¹¹¹ While the opinion clearly addresses only the question of

general plan.

We conclude that the city's general power to amend ordinances is not applicable to the general plan. The purpose of Honolulu Charter § 5-509 was to prevent the deterioration of our environment by forcing the city to articulate long-range comprehensive planning goals. The purpose of Honolulu Charter § 5-512.2 was to prevent the compromise of these planning goals. These sections of the charter allow less room for the exertion of pressure by powerful individuals and institutions. To allow amendment of the general plan without any of the safeguards which were required in the adoption of the general plan would subvert and destroy the progress which was achieved by the adoption of the charter's sections on planning, and by their effectuation in the 1964 general plan.

¹⁰⁷ Charter of the City and County of Honolulu art. V, § 5-512 (1959) provided in part:

1. The council shall adopt the general plan or any development plan by ordinance. The general plan and all development plans shall be kept on file in the office of the planning department.

2. No public improvement or project, or subdivision or zoning ordinance shall be initiated or adopted unless it conforms to and implements the general plan.

¹⁰⁸ 51 Hawaii at 415, 462 P.2d at 208.

¹⁰⁹ Charter of the City and County of Honolulu art. V, § 5-412(3).

¹¹⁰ 51 Hawaii at 416-17, 462 P.2d at 209.

¹¹¹ In this the court seems to foreshadow the emphasis on such studies in the approval of certain growth management ordinances passed and judicially approved in New York, *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138

support for such amendments to the general plan, it is worth considering whether such requirements would also be made of new or amended detailed plans, the detailed land use map plans of today, and the new development plans.

This *may* in part depend upon how the court will apply *Dalton* in view of the changes in the revised charter of 1973. That charter now calls for a general plan that is a broad statement of textual policies for long range development which is adopted and amended by resolution, rather than a comprehensive mapping of planned land uses that is adopted by ordinance.¹¹² As noted above, the requirement for consistency between planning and zoning has shifted to the local development plans.¹¹³ The development plans (DPs) are required to be more detailed and shorter range textual statements of principles and standards for implementing the general plan, and while a map of the area covered by the plan is still required, it need no longer show planned land uses,¹¹⁴ even though current drafts of DPs do show them.¹¹⁵

In changing the nature of the general plan, the charter commission ostensibly intended to relieve the city of only the cumbersome procedural burdens imposed by *Dalton*.¹¹⁶ The absence of a requirement that the general plan be comprehensive and founded on detailed studies (which was arguably the court's lever in *Dalton* for requiring that amendments also be based on detailed studies) from the revised charter's definition of the general plan and the DPs is more troublesome. The charter commission said it intended to move away from physical, end-state planning to a *process* which included *social* planning as well.¹¹⁷ The question remains: What is the status of the detailed, comprehensive studies requirement? As the cases below suggest, it is likely they are still basic requirements as the necessary support for plans to which future land use changes must comply even though it is true that these former general plan requirements were not transferred to the DP requirements in the revised charter.¹¹⁸

The court has considerably amplified its decision in *Dalton* in the decade since 1969. In *Hall v. City & County of Honolulu*,¹¹⁹ the court dealt

(1972), and *California, Construction Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975).

¹¹² Charter of the City and County of Honolulu art. V, § 5-408.

¹¹³ *Id.* § 5-412(3).

¹¹⁴ *Id.* § 5-409.

¹¹⁵ See, e.g., DEP'T OF GEN. PLANNING, CITY AND COUNTY OF HONOLULU, DEVELOPMENT PLAN ORDINANCE, PRIMARY URBAN CENTER (Draft, Sept. 1979).

¹¹⁶ FINAL REPORT OF THE CHARTER COMMISSION, CITY AND COUNTY OF HONOLULU, 1971-72, at 24.

¹¹⁷ *Id.*

¹¹⁸ Charter of the City and County of Honolulu art. V, § 5-409. Minimally, the inquiry shifts from their necessity as *charter* requirements to their necessity as indicia of a rational basis for the development plans.

¹¹⁹ 56 Hawaii 121, 530 P.2d 737 (1975).

with requirements for amending the DPs and the detailed land use maps (DLUMs) which were to give specific and detailed land use direction under the general guidance of the general plan. The court seemed to require that detailed studies accompany any modification or drawing up of DPs and DLUMs by way of requiring a review of the general plan for the area. The court reached this conclusion upon examination of pertinent language in the revised charter together with a review of its decision in *Dalton*.

The case arose upon a review of procedural requirements to amend the general plan in the Diamond Head area. As part of proceedings to adopt a DLUM and a DP for the area, the planning director recommended changing the general plan designation from residential to park. The change was challenged both as to the adequacy of the hearings held and the studies conducted.¹²⁰ The court held the hearings were improper and stale.¹²¹ As to the plans and studies, the court sharply distinguished the general plan, on the one hand, and the DPs and DLUMs, on the other:

The trial court has failed to take into consideration the important difference that exists between the General Plan and the Development Plan, and the difference between the General Plan and the Detailed Land Use Map.

Clearly, under Charter Section 5-509 (1969), the General Plan provides, *inter alia*, designated specific use of the land available within the City of Honolulu.

The Development Plan, under Charter Section 5-510 (1969), *merely* provides the "*detailed scheme for the placement or use of specific facilities within a defined area so as to insure the most beneficial use of such area A development plan is within the framework of and implements the general plan.*" (Emphasis added.)

Evidence adduced at the trial shows that the Detailed Land Use Map *merely* provides in more detail the specific boundaries of *the various land use activities shown on the General Plan.*¹²²

What follows from this distinction, however, is not so clear. The court first declared that plans and studies in support of a DP or DLUM do *not* suffice for the general plan because they are not sufficiently long range or comprehensive.¹²³ The court then declared that in order to amend the general plan (in this case presumably necessary) what was needed was "[a]n updated comprehensive and long-range study of the General Plan and of any amendments thereto."¹²⁴

But the nagging question remains: Having distinguished between a DP-DLUM and a general plan, what is needed to draw up or change a DP-DLUM for which no general plan amendment is necessary? Something,

¹²⁰ *Id.* at 126-27, 530 P.2d 740-41.

¹²¹ *Id.* at 128, 530 P.2d at 741.

¹²² *Id.* at 127, 530 P.2d at 741 (original emphasis).

¹²³ *Id.* at 128, 530 P.2d at 741.

¹²⁴ *Id.*

presumably; but what or how much is not yet clear. All we know for sure is that the presumably shortrange studies of the type found in *Hall* will not suffice for *both* general plan and DP-DLUM amendments, either or both of which may be a necessary precedent to a zoning amendment:

The facts further show . . . seven to nine months from June 17, 1969, was necessary for the preparation of a comprehensive and long-range study for the proper consideration of an amendment to the general plan of the subject area. No such study was ever submitted and considered before the enactment of the amendment to the General Plan.¹²⁶

Next, in *Akahane v. Fasi*,¹²⁶ the court addressed the question of *who* makes the studies precedent to plan modification. The answer for all three planning documents (general plan, DLUM, and DP) appears to be the department of general planning (DGP) rather than the city council, unless the DGP fails to respond to a legitimate city council request in a timely manner.

The question of authority to perform studies to support plans arose over a proposed contract between the city council and an independent consultant for a study of that area along Ala Moana Boulevard between Piikoi and Punchbowl Streets known as Kakaako. The city council was in the process of formulating development policies for the Kakaako area which would require amendments to all three planning documents as well as zoning ordinances. To accomplish this the council intended to retain a firm of planning consultants to review, evaluate, consolidate, and update all the previous studies made by public agencies.¹²⁷ The administration contended that the performance of such studies was an executive function and therefore beyond the power of the council, a legislative body, under traditional separation of powers principles.¹²⁸

After reviewing the pertinent parts of the city charter,¹²⁹ the court held

¹²⁶ *Id.* (emphasis added).

¹²⁶ 58 Hawaii 74, 565 P.2d 552 (1977).

¹²⁷ *Id.* at 83, 565 P.2d at 558.

¹²⁸ *Id.* at 79, 565 P.2d at 556.

¹²⁹ *Id.* at 82, 565 P.2d at 557:

Section 5-412 of the charter states, *inter alia*:

1. The council shall adopt the general plan or revisions thereof by resolution and development plans or amendments thereto by ordinance. Resolutions adopting or revising the general plan shall be laid over for at least two weeks after introduction. . . . Upon adoption, every such resolution shall be presented to the mayor, and he may approve or disapprove it pursuant to applicable provisions governing the approval or disapproval of bills.

The general plan and all development plans shall be kept on file in the department of general planning.

2. Any revision of or amendment to the general plan or any existing development plan may be proposed by the council and shall be processed in the same manner as if proposed by the chief planning officer. Any such revision or amendment shall be referred to the chief planning officer and the planning commission by resolution. If the planning

that, at least in the first instance, the responsibility for producing such plans lay with the administration through its executive offices.¹³⁰ The charter enumerates general planning powers and reserves them, although not exclusively to, executive agencies. And the executive branch is fully staffed to expeditiously proceed with the reserved power. In part, this is to avoid wasteful duplicate efforts.¹³¹ Therefore, the city council first formally must request such a report or study, if it wants one, from the administration, and there was no evidence of any such request by the council here.¹³² Following a request to the executive, the council is free to contract for services on its own.

Where, however, after a proper request by the city council is made, the executive branch is uncooperative or has failed, within a reasonable period, to assume and proceed with their responsibility, we are of the opinion that the city council can and must assume the reserved, but not exclusive, powers of the executive branch in the issue herein as an incidental exercise of their power to amend or revise an existing general plan or development plan.

Moreover, where the executive branch has submitted to the city council proposed general or development plans or revisions and amendments thereto, the city council is necessarily empowered and authorized to employ consultants with the necessary expertise to review, evaluate, consolidate, and to advise the council on these various proposals.¹³³

The Hawaii Supreme Court has also discussed the applicability of the Hawaii Administrative Procedure Act (HAPA)¹³⁴ to the decisions of Honolulu's chief planning officer (CPO) in *Kailua Community Council v. City*

commission disapproves the proposed revision or amendment or recommends a modification thereof, not accepted by the council, or fails to make its report within the period of thirty days, the council may nevertheless adopt such revision or amendment, but only by the affirmative vote of at least two-thirds of its entire membership.

¹³⁰ *Id.* at 83-84, 565 P.2d at 558.

¹³¹ *Id.* at 86, 565 P.2d at 559-60.

The above procedure would avoid duplication of costs which the taxpayers of this State would sustain if each branch of government had an independent power to proceed with the primary responsibilities and duties of the other. It should be made clear that the holding in this case does not foreclose the city council from obtaining this assistance because the information obtained might also be relevant to the formulation by the executive branch of an original general plan and/or development plan. Our opinion herein would further avoid a competitive situation between the branches and would also prevent a complete bypassing of the executive responsibility thereby diluting or damaging to a point of impotency the executive responsibility.

¹³² *Id.* at 85, 565 P.2d at 559.

¹³³ *Id.* There was a strong dissent by Chief Justice Richardson and Justice Kidwell, principally on the ground that council should be free to obtain whatever help it needs in making legislative decisions, including the changing of the general plan. Whether this same information related to the DP process was therefore irrelevant. *Id.* at 87, 565 P.2d at 560 (Kidwell, J., dissenting, joined by Richardson, C.J.).

¹³⁴ HAWAII REV. STAT. ch. 91 (1976 & Supp. 1979).

& County of Honolulu.¹³⁵ The case revolved around the CPO's promulgation of *Instructions for Requesting Amendments to the General Plan for the City and County of Honolulu*. The instructions set out application procedures together with data to be submitted by an applicant.¹³⁶ There was no evidence the rules were formally adopted as set out in HAPA.¹³⁷ Subsequently, the CPO forwarded a recommendation for a general plan amendment to the city council, which passed appropriate ordinances in accordance with the recommendation, over plaintiff's objections.¹³⁸ Plaintiff then challenged the ordinances on the ground they were based on administrative rulemaking proceedings subject to HAPA, which had not been followed.¹³⁹

The court, however, held HAPA inapplicable on the facts of this case.¹⁴⁰ The court divided the CPO's duties into two categories: (1) Those determinations of public and private rights, in which he *may* be required to conform to HAPA;¹⁴¹ and (2) those "intimately connected with the enactment of municipal legislation affecting the general plan and the development plans of the city."¹⁴² In this latter category, HAPA does not apply because the final action is in the hands of the council and hence legislative in character. The court described the CPO's role in these situations as purely advisory and factfinding. Only the final action of the council affects the interests of the public. The function of the CPO in this process is analogous to that of a legislative committee.¹⁴³

¹³⁵ 60 Hawaii 428, 591 P.2d 602 (1979). Although the actions of the planning officer occurred in 1970, and HAPA has since been amended, the court's analysis would apply to the current statute.

¹³⁶ *Id.* at 429, 591 P.2d at 603.

¹³⁷ *Id.*

¹³⁸ *Id.* at 430, 591 P.2d at 604.

¹³⁹ *Id.* at 430-31, 591 P.2d at 604.

¹⁴⁰ *Id.* at 431, 591 P.2d at 604:

The determinative issue in this case is, whether the CPO, in processing applications for amendments or revisions to the general plan or development plans of the city, was subject to the provisions of the Hawaii Administrative Procedure Act. HRS Chapter 91. We agree with the defendants-appellants that in these situations the HAPA is not applicable to the CPO.

¹⁴¹ *Id.*

¹⁴² *Id.* at 432, 591 P.2d at 605.

¹⁴³ *Id.* at 432-33, 591 P.2d at 605-06:

[T]he final operative act giving legal effect to the proposal is the legislative action of the city council. The City Charter vests in the city council sole legislative power in municipal affairs. R.C.H. § 3-101 (1973). It also requires that revisions to the general plan be effectuated by council resolution and amendments to the development plans by ordinance. R.C.H. § 5-412 (1973). Thus, whether amendments or revisions are to be made is within the absolute discretion of the city council in the exercise of its legislative function. Its actions on the proposals are the only acts declarative of and affecting the interests of the public.

. . . .
In fulfilling his responsibility in this legislative process, the CPO serves as the initial factfinder for the city council, and he is in that sense performing a function which a

B. Planning in a Statewide Context

It is not the purpose of this section to detail the creation and operation of Hawaii's State Land Use Law, which has been more than adequately and elaborately described in a host of books,¹⁴⁴ articles,¹⁴⁵ and reports¹⁴⁶ over the past dozen years. Suffice it to say that by statute¹⁴⁷ Hawaii divides all the lands in the State into four zones: agriculture, conservation, rural, and urban. The State controls both the classification system and the use of land in the first zone, and shares some of that control with the counties in the second and third. Local government (counties, in Hawaii, as there are no separately incorporated cities or villages) controls the use of land within the urban zone.¹⁴⁸

An amendment to the State Land Use Law concerning land use commission standards for deciding boundary amendment applications also provides that no such amendment could be adopted unless it conforms to the state plan.¹⁴⁹ This, together with statements in the newly enacted Hawaii State Plan,¹⁵⁰ give the plan considerable significance in Hawaii.

1. *State Plan.* — The Hawaii State Plan is divided into three major parts dealing with objectives and policies,¹⁵¹ planning implementation and coordination,¹⁵² and priority directions.¹⁵³ It is the second part dealing with planning implementation and coordination that is most significant for purposes of land use control and management. This is so because of the language contained in the Hawaii Revised Statutes: "The decisions

legislative committee would normally perform. He reviews applications for revisions and amendments, R.C.H. § 5-403 (1973), and makes his recommendations to the planning commission which in turn reviews the proposals and transmits its own recommendations to the city council. Throughout this process, the CPO and the planning commission are performing a purely advisory function.

The court cited *Melemanu Woodlands Community Ass'n v. Koga*, 56 Hawaii 235, 533 P.2d 867 (1975), in support of this last proposition. There, the court held an action for injunction to stop the council from considering a recommendation from the planning commission (on a planned unit development ordinance) was premature as the recommendation was "advisory." *Id.* at 239, 533 P.2d at 870.

¹⁴⁴ See, e.g., *THE QUIET REVOLUTION*, *supra* note 1, at ch. 1; *MANDELKER*, *supra* note 1, at ch. VII; *ZONING HAWAII*, *supra* note 1.

¹⁴⁵ See, e.g., *Whither Hawaii*, *supra* note 2; Callies & Dinell, *Land Use Control in an Island State*, 3 *THIRD WORLD PLAN. REV.* — (1980) (forthcoming publication); Selinger, Van Dyke, Amano, Takenaka & Young, *Selected Constitutional Issues Related to Growth Management in the State of Hawaii*, 5 *HASTINGS CONST. L.Q.* 639 (1978).

¹⁴⁶ See, e.g., *ECKBO, DEAN, AUSTIN & WILLIAMS, STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW* (1969).

¹⁴⁷ HAWAII REV. STAT. ch. 205 (1976 & Supp. 1979).

¹⁴⁸ See *THE QUIET REVOLUTION*, *supra* note 1, at ch. 1.

¹⁴⁹ Act 4, 1976 Hawaii Sess. Laws 4, 5-6 (codified at HAWAII REV. STAT. § 205-4(h) (1976)).

¹⁵⁰ HAWAII REV. STAT. ch. 226 (Supp. 1979).

¹⁵¹ *Id.* §§ 226-5 to -28.

¹⁵² *Id.* §§ 226-51 to -63.

¹⁵³ *Id.* §§ 226-101 to -104.

made by the state land use commission shall be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter, and the state functional plans adopted pursuant to this chapter."¹⁵⁴ Thus it is that after the adoption of those functional plans the state's major land use decisionmaking body will be bound by the state plan and its subordinate functional plans in its boundary change decisions.¹⁵⁵ Moreover, the Hawaii State Board of Land and Natural Resources, which has the authority to decide what uses shall be made of both public and private land in the thousands of acres of land classified as conservation under the State Land Use Law, is similarly subject to the pertinent functional plans and the state plan.¹⁵⁶

While broad policy outlines are sketched in the state plan, it is the functional plan to which one must look for detailed direction. The state plan provides for the preparation of twelve such plans to be eventually adopted by the legislature by concurrent resolution.¹⁵⁷ The initial responsibility for preparing each functional plan lies with named state agencies¹⁵⁸ which are required to submit their plans periodically to an advisory committee¹⁵⁹ and policy council,¹⁶⁰ each of which is entitled by statute to have its recommendations accompany the functional plan to the legislature for action.¹⁶¹ So far, the legislature has adopted no functional plans, but most are due to be submitted in time for consideration by the 1980 legislature.¹⁶²

¹⁵⁴ *Id.* § 226-52(b)(2)(D).

¹⁵⁵ Nor is this the *only* effect on the use of land. It is common knowledge — and rather obvious — that a minimum level of so-called infrastructure improvements are generally held to be necessary for the development of raw land. *Id.* §§ 226-52(b)(2)(A) to -52(b)(2)(B) require that the appropriation of funds under both the biennial and supplemental budgets, as well as the capital improvements program, be subject to the state plan and functional plans as well.

¹⁵⁶ *Id.* § 226-52(b)(2)(E).

¹⁵⁷ *Id.* § 226-52(a)(3) provides:

State functional plans shall be prepared for, but not limited to, the areas of agriculture, conservation lands, education, energy, higher education, health, historic preservation, housing, recreation, tourism, transportation, and water resources development. State functional plans shall define, implement, and be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter. County general plans and development plans shall be used as a basis in the formulation of state functional plans.

Id. § 226-57(a) mandates the adoption of functional plans and amendments thereto by concurrent resolution.

¹⁵⁸ *Id.* § 226-57(a).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* § 226-58. Form and content are set out in some detail in draft administrative guidelines issued by the state department of planning and economic development as staff to the policy council and as required by the state plan under subsection 55(10).

¹⁶¹ *Id.* §§ 226-57(c), -58(b).

¹⁶² At this writing (March 1980) it appears that none of the functional plans will be adopted this year. Interim guidelines for the use of the LUC have been drafted, *see* H.B. 1775-80, 10th Hawaii Leg., 2d Sess. (1980), and likely will become law by the end of the

2. *County Plans.* — The state plan, which is in effect a statutory instrument, also requires that each county adopt a two-part planning system, wherein a series of area-specific DPs fit into a general plan:

County general plans shall indicate desired population and physical development patterns for each county and regions within each county. In addition, county general plans or development plans shall address the unique problems and needs of each county and regions within each county. County general plans or development plans shall further define, implement, and be in conformance with the overall theme, goals, objectives, policies, and priority directions contained within this chapter. State functional plans which have been adopted by concurrent resolution by the legislature shall be utilized as guidelines in amending the county general plans to be in conformance with the overall theme, goals, objectives, and priority directions.¹⁶³

Such plans now are required by the state plan, and hence state law, to contain certain elements by January of 1982:

§ 226-61 **County general plans; preparation.** (a) The county general plans and development plans shall be formulated with input from the state and county agencies as well as the general public.

County general plans or development plans shall indicate desired population and physical development patterns for each county and regions within each county. In addition, county general plans or development plans shall address the unique problems and needs of each county and regions within each county. The county general plans or development plans shall further define and implement applicable provisions of this chapter, provided that any amendment to the county general plan of each county shall not be contrary to the county charter. The formulation, amendment, and implementation of county general plans or development plans shall utilize as guidelines, statewide objectives, policies, and programs stipulated in state functional plans adopted in consonance with this chapter.

(b) County general plans shall be formulated on the basis of sound rationale, data, analyses, and input from state and county agencies and the general public, and contain objectives and policies as required by the charter of each county. Further, the county general plans should:

- (1) Contain objectives to be achieved and policies to be pursued with respect to population density, land use, transportation system location, public and community facility locations, water and sewage system locations, visitor destinations, urban design and all other matters necessary for the coordinated development of each county and regions within each county.
- (2) Contain implementation priorities and actions to carry out policies to include but not be limited to, land use maps, programs, projects, regulatory measures, standards and principles and interagency co-

current legislative session.

¹⁶³ HAWAII REV. STAT. § 226-52(a)(4) (Supp. 1979). As discussed at length *supra*, the City and County of Honolulu already has such plans.

ordination provisions.

(c) The county general plans and development plans shall be in conformance with the overall theme, goals, objectives, policies, and priority directions contained in this chapter by January, 1982.¹⁶⁴

3. *Potential Conflicts Between State and County Plans.* — A troublesome issue is the potential conflict between the state plan and the county plans. Each relates to the other. The state plan requires that “[c]ounty general plans and development plans shall be used as a basis in the formulation of state functional plans.”¹⁶⁵ But it also states: “State functional plans which have been adopted by concurrent resolution by the legislature shall be utilized as guidelines in amending the county general plans to be in conformance with the overall themes, goals and objectives, and priority directions [of the state plans].”¹⁶⁶

The question is, which takes precedence? The administrative guidelines issued by the Hawaii State Department of Planning and Economic Development address the question but do not resolve it.¹⁶⁷ Only in a single instance is the conflict potentially resolved in the state plan statute. The legislature may site a “specific project” regardless of county general plans to the contrary, upon a finding of “overriding state concern”.¹⁶⁸

In counties where there is not yet a general plan which meets the statutory criteria, the issue may never arise if the State legislature passes concurrent resolutions adopting all or most of the functional plans before such county plans are formulated. But what of the State’s most populous county, Honolulu? Here there is a general plan in place,¹⁶⁹ and the city council is moving rapidly toward the adoption of new DPs.¹⁷⁰ What, for example, would be the status of land use controls adopted by Honolulu, regulating the redevelopment of Kakaako if, based upon the Oahu General Plan and a DP for that area, they conflicted with a state functional plan for tourism approved (by joint resolution) of the legislature and in accordance with the state plan? Could the State claim the county plans failed to conform to the state plan or use the functional plan as a guideline? But then, could the county — a home rule unit of local government — claim with equal right that the functional plan failed to utilize the

¹⁶⁴ *Id.* § 226-61.

¹⁶⁵ *Id.* § 226-52(a)(3).

¹⁶⁶ *Id.* § 226-52(a)(4).

¹⁶⁷ HAWAII DEP’T OF PLANNING & ECONOMIC DEV., THE HAWAII STATE PLAN ADMINISTRATIVE GUIDELINES I-3 (Draft, June, 1979): “The formulation and amendment of State Functional Plans must conform to the State Plan *and utilize as guidelines County General Plans and Development Plans.* . . . The formulation, amendment and implementation of County Plans must conform to the State Plan *and utilize as guidelines the State Functional Plans.*” (emphasis added).

¹⁶⁸ HAWAII REV. STAT. § 226-59(b) (Supp. 1979).

¹⁶⁹ GENERAL PLAN: CITY AND COUNTY OF HONOLULU (Res. No. 238, Jan. 18, 1977).

¹⁷⁰ Smyser, *The Fight Over Development*, Honolulu Star-Bulletin, Oct. 10, 1979, at A-14, col. 2.

county's general plan and DP as guidelines in its formulation?¹⁷¹ Note this is not merely a matter of conflict between plans and land use controls. Each jurisdiction's land use *controls* are bound by the contents of the respective *plans*.

III. BOUNDARY AMENDMENTS: THE CHARACTER OF STATE ZONING CHANGES

Cases in the last decade have tended to focus on the manner in which reclassification takes place. The question of standards and facts relied upon to support such reclassifications runs through those reported decisions. As discussed in the preceding Part IIB, the new state plan,¹⁷² together with the subject-specific functional plans, will provide the basis for these and other land use decisions.¹⁷³ This section addresses these two major areas of activity.

Authority to reclassify land among the four districts described in Part IIB rests with Hawaii's land use commission (LUC).¹⁷⁴ These changes are generally referred to as "boundary amendments". The manner in which the LUC made such changes was apparently subject to considerable public criticism,¹⁷⁵ finally resulting in the landmark case of *Town v. Land Use Commission*.¹⁷⁶ Not only did the case decide the character of boundary amendments (whether legislative or quasi-judicial), but in light of recent decisions elsewhere, it may have inadvertently decided whether such decisions will ever be subject to binding initiative and referendum as well.

The case arose out of Town's objection to the LUC's delay in deciding a boundary amendment application (from agricultural to rural) which affected his property and to the LUC's taking of applicant testimony out of his presence.¹⁷⁷ The former — delay — was contrary to specific regulatory language requiring the LUC to render a decision within forty-five to ninety days of a required hearing.¹⁷⁸ The latter was contrary to the requirements of HAPA.¹⁷⁹ The LUC answered that a petitioner could waive

¹⁷¹ While failing to resolve this issue legislatively, the legislature apparently did foresee potential conflict between the State and the counties on the location of various projects. The legislature expressly reserved to itself the power to override county plans in those situations. See note 168 and accompanying text *supra*. Perhaps this type of solution should be utilized to settle the land use control question as well.

¹⁷² Act 100, 1978 Hawaii Sess. Laws 136 (signed into law on May 22, 1978) (codified at HAWAII REV. STAT. ch. 226 (Supp. 1979)), reprinted in HAWAII DEP'T OF PLANNING & ECONOMIC DEV., THE HAWAII STATE PLAN (1978).

¹⁷³ HAWAII REV. STAT. § 226-52 (Supp. 1979).

¹⁷⁴ *Id.* § 205-2 (1976 & Supp. 1979).

¹⁷⁵ See MANDELKER, *supra* note 1, at 309.

¹⁷⁶ 55 Hawaii 538, 524 P.2d 84 (1974).

¹⁷⁷ *Id.* at 539, 524 P.2d at 86.

¹⁷⁸ State Land Use District Regulation 2.35.

¹⁷⁹ HAWAII REV. STAT. ch. 91 (1968) (amended 1973, 1978).

the right to a decision within the time period (as here) and that HAPA was inapplicable as boundary amendments constituted "rulemaking" rather than a "contested case."¹⁸⁰ The court disagreed on both points.

The matter of delay was dealt with speedily. The court noted there was no provision for varying the time period; the language was clearly directory and mandatory. Moreover, to hold otherwise put objectors "in a state of limbo at the discretion of the applicant."¹⁸¹ Allowing a petitioner to pick and choose the LUC meeting at which his petition would be decided places an objector, like Town, in an impossible position.¹⁸²

More far reaching in the decision was the characterization of the boundary amendment process as quasi-judicial rather than quasi-legislative. The court said:

We are of the opinion that the adoption of district boundaries classifying lands into conservation, agricultural, rural or urban districts, or the amendment to said district boundaries is not a rule making process within the meaning of the above cited definition. . . . It logically follows that the process for boundary amendment is not rule making or quasi-legislative, but is adjudicative of legal rights of property interests in that it calls for the interpretation of facts applied to rules that have already been promulgated by the legislature.

. . . .
HRS § 91-1(5) defines "contested case" as: proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

We are of the opinion that the instant case is a "contested case" within the definition cited above. The appellant has a property interest in the amending of a district boundary when his property adjoins the property that is being redistricted. *East Diamond Head Association v. Zoning Board*, 52 Hawaii 518, 479 P.2d 796 (1971); *Dalton v. City and County of Honolulu*, 51 Hawaii 400, 462 P.2d 199 (1969). Therefore, any action taken on the petition for boundary change is a proceeding in which appellant has legal rights as a specific and interested party and is entitled by law to have a determination on those rights.¹⁸³

It then held that the contested case procedures of HAPA applied.¹⁸⁴ As HAPA specifically granted parties such as Town the right to cross-examine witnesses¹⁸⁵ and forbade the presenting of additional evidence without notice to parties such as Town,¹⁸⁶ the LUC's hearing a witness in Town's absence and the acting chairman's "field investigation" evidence

¹⁸⁰ 55 Hawaii at 545, 524 P.2d at 89.

¹⁸¹ *Id.* at 544, 524 P.2d at 88.

¹⁸² *Id.* at 545, 524 P.2d at 89.

¹⁸³ *Id.* at 546-48, 524 P.2d at 90-91.

¹⁸⁴ *Id.* at 548, 524 P.2d at 91.

¹⁸⁵ HAWAII REV. STAT. §§ 91-9(c), -10(3) (1968).

¹⁸⁶ *Id.* § 91-10(4).

rendered the LUC's decision invalid.¹⁸⁷

It is this characterization of boundary amendments as quasi-judicial that is critical. Indeed, by including even initial classifications and changes regardless of size, the court may have cast too wide a net. For decades standard local zoning theory held that so-called map amendments were legislative in character.¹⁸⁸ Not only did this usually render local administrative procedure acts inapplicable (therefore requiring courts to hear most cases contesting such rezonings in lengthy de novo proceedings rather than abbreviated administrative appeals), it also made such activities subject to initiative and referendum, where such procedures were available. It is, however, generally agreed that neither is available for the recall of a quasi-judicial decision, by whatever manner or agency made, on the ground the general public has no legitimate interest in the outcome of a contested case.¹⁸⁹ Under this theory, then, the court has virtually insulated *all* the land use decisions involving boundary changes (translate: map amendments, which are identical to zoning map changes at the local level) from initiative and referendum. *Should* they be so exempt? It is, one would expect, perfectly reasonable to insulate as contested cases those decisions involving land areas so small that no one but the immediate parties should be concerned. But what of *major* boundary changes? Can it really be said that a reclassification of, say, upwards of 100 acres for an industrial park, a college campus, a theme park, or a new community is merely a contested case, quasi-judicial in nature and beyond any applicable referendum or recall? It is likely the court did not have in mind such a situation when it rendered its decision in *Town*. Perhaps the opinion should be restricted only to the class of cases similar to the case before the court in *Town*, that is cases which involve small land area and lack issues of real public interest.¹⁹⁰

¹⁸⁷ 55 Hawaii at 549, 524 P.2d at 91-92.

¹⁸⁸ See, e.g., *Fasano v. Board of County Comm'rs*, 264 Or. 576, 579, 507 P.2d 23, 26 (1973); 1 WILLIAMS, *supra* note 5, at §§ 33.02, 16.03.

¹⁸⁹ See Callies, *The Supreme Court is Wrong About Zoning by Popular Vote*, 42 PLANNING 17 (1976). See also *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (upholding a mandatory referendum procedure applicable to all zoning decisions. The character of the zoning decision, which involved an eight-acre parcel, was only an issue for dissenting Justice Stevens, who viewed it as "administrative," *id.* at 692, and therefore inappropriate for referendum procedures); *Fasano v. Board of County Comm'rs*, 264 Or. 576, 507 P.2d 23 (1973) (rezoning of a 32-acre parcel is "quasi-judicial" in nature). *But cf.* *Neuberger v. City of Portland*, — Or. —, 603 P.2d 771 (1979) (rezoning of 601 acre parcel, owned by relatively few individuals and involving application of existing policy to specific facts, was quasi-judicial function).

¹⁹⁰ The implications of an unmodified *Town* decision for initiative and referendum in Hawaii are, of course, conjectural. Hawaii does not presently have initiative or referendum at the state level, although the possibility has been considered in recent years. See, e.g., S.B. 390, 10th Hawaii Leg., 1st Sess. (1979). The immediate implication of the *Town* quasi-judicial characterization of the LUC decisions is in the procedures followed by the commission. In fact, the case led to a revision in 1975 of the State Land Use Law to incorporate the contested case provisions of HAPA. Act 193, 1975 Hawaii Sess. Laws 441, 443 (codified at

Another major recent case affecting state land use decisionmaking is *Save Hawaii Iloa Ridge Association v. Land Use Commission*¹⁹¹ where the procedural issue of standing was raised. The issue is a critical one, given the predilection of citizens' groups to raise important land use and environmental issues which often extend beyond the narrow interests of the applicant for a boundary change. The court held that owners of land on the periphery of property which such owners sought to have "reclassified" had no standing to so petition.¹⁹² The court reasoned that the statutory language "any property owner"¹⁹³ meant any property owner of the parcel in question.¹⁹⁴ The court noted this accorded with a subsequent amendment clarifying this interpretation.¹⁹⁵ The result was a somewhat chilling effect upon such citizens' group actions on behalf of the environment.

The court may have had second thoughts on the standing question in the recently decided *Life of the Land, Inc. v. Land Use Commission*.¹⁹⁶ Life of the Land (LOL) had sought to challenge a LUC boundary reclassification of some 532 acres of land from the agricultural to the urban district classification under the State Land Use Law.¹⁹⁷ The court noted that both HAPA¹⁹⁸ and its own prior decisions¹⁹⁹ demonstrated a trend towards a permissive definition of standing, especially when the environment is at issue:

As illustrated by the above cases, this court has in recent years recognized the importance of aesthetic and environmental interests and has allowed those who show aesthetic and environmental injury standing to sue where their aesthetic and environmental interests are "personal" and "special", or where a property interest is also affected.²⁰⁰

With this meaningful preface, the court found that LOL did indeed have

HAWAII REV. STAT. § 205-4 (1976)). For a discussion of the procedural and substantive changes wrought by Act 193, see MANDELKER, *supra* note 1, at 308-12.

¹⁹¹ 57 Hawaii 84, 549 P.2d 737 (1976).

¹⁹² *Id.* at 86, 549 P.2d at 738.

¹⁹³ HAWAII REV. STAT. § 205-4(a) (1968 & Supp. 1972) (amended 1975, 1976).

¹⁹⁴ 57 Hawaii at 85, 549 P.2d at 738.

¹⁹⁵ *Id.*; HAWAII REV. STAT. § 205-4(a) (1976) now provides, in part: "[A]ny person with a property interest in the land sought to be reclassified, may petition the land use commission for a change in the boundary of a district."

¹⁹⁶ 61 Hawaii —, 594 P.2d 1079 (1979).

¹⁹⁷ HAWAII REV. STAT. ch. 205 (1968 & Supp. 1974) (amended each year thereafter). The reclassification decision arose under the LUC's periodic review of districts, see HAWAII REV. STAT. § 205-11 (1968) (repealed 1975). The commission no longer conducts periodic reviews.

¹⁹⁸ *Id.* § 91-14(a) (1968 & Supp. 1975).

¹⁹⁹ *In re Hawaiian Elec. Co.*, 56 Hawaii 260, 535 P.2d 1102 (1975); *Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu*, 55 Hawaii 40, 514 P.2d 861 (1973); *East Diamond Head Ass'n v. Zoning Bd. of Appeals*, 52 Hawaii 518, 479 P.2d 796 (1971); *Dalton v. City & County of Honolulu*, 51 Hawaii 400, 462 P.2d 199 (1969).

²⁰⁰ 61 Hawaii at —, 594 P.2d at 1082 (emphasis added).

standing both as an "aggrieved party" and in a "contested case," as required under HAPA.

The fact that some of LOL's members lived in an area adjoining the subject property was sufficient to establish LOL as a party "specifically, personally and adversely affected by the agency's action."²⁰¹ Two of those members owned residences in the area. The court also noted that LOL's members generally used the area for diving, swimming, hiking, camping, sightseeing, exploring, and hunting, and that:

[F]uture urbanization will destroy beaches and open space now enjoyed by members and decrease agricultural land presently used for the production of needed food supplies. Appellant contends that construction will have an adverse effect on its members and on the environment, and that pursuits presently enjoyed will be irrevocably lost.²⁰²

The court held that the proceedings in which LOL participated also qualified for "contested case" status, despite the fact it did not participate in the so-called judicial portion of the hearings, since the LUC did not permit any property owners to so appear and participate: "We hold that, given the LUC's restrictions on access to the judicial portion of its hearings, appellant should not be penalized for failing to participate in the judicial portion. Therefore we hold that in each of these cases appellant's participation amounted to participation in a contested case."²⁰³ This decision has clearly expanded judicial notions of what is necessary to surmount the standing hurdle for citizens' action and environmental organizations who cannot show a direct property interest in a land use dispute governed by HAPA.²⁰⁴

IV. THE ROLE OF THE FEDERAL COURTS: OF COASTAL ZONES AND NAVIGABLE WATERS

This survey would be incomplete without reference to two significant

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*, 594 P.2d at 1083.

²⁰⁴ Indeed, my colleague Jon Van Dyke, a constitutional law scholar, has been moved to note that:

This recent decision thus puts Hawaii law in close conformity with Federal law, relaxing the standing requirement in suits involving the environment because of a recognition of the important public interest involved in decisions affecting the environment. Only a token formal inquiry is now needed to permit a plaintiff to challenge actions that affect our fragile environment.

Hearings before the House Committees on the Judiciary and on Ecology and Environmental Protection, August 27, 10th Hawaii Leg., 1st Sess. (1979) (interim hearing) (statement of Jon Van Dyke).

Thus federal law would appear to be, as Professor Van Dyke notes, *United States v. SCRAP*, 412 U.S. 669 (1973), as it modifies *Sierra Club v. Morton*, 405 U.S. 727 (1972).

cases from Hawaii finding their resolution in the federal courts. While each deals with subjects on the periphery of land use management and control, they are, as federal cases, worth at least brief mention, particularly the litigation recently culminated in the Supreme Court decision in *Kaiser-Aetna v. United States*.²⁰⁵

A. United States v. Kaiser-Aetna: *The "Publicizing" of a Private Pond*

During the 1960's the late Henry J. Kaiser conceived the development of 6000 acres of leased land²⁰⁶ into a new residential community approximately twelve miles from downtown Honolulu. The proposed development, called Hawaii Kai, fronts for hundreds of yards on Maunalua Bay. Much of the land area is, however, separated from the ocean by what remains of an ancient Hawaiian fishpond known as Kuapa Pond.²⁰⁷ In its

²⁰⁵ 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738), *rev'g*, 584 F.2d 378 (9th Cir. 1978), *aff'g and rev'g in part*, 408 F. Supp. 42 (D. Hawaii 1976).

²⁰⁶ The land, including the pond discussed below, was and is owned in fee simple by the Bernice P. Bishop Estate, a charitable trust whose income supports the local Kamehameha Schools for Hawaiians. As the name of the trust implies, its res consists of the estate of Princess Bernice Pauahi Bishop as a descendent of the recipient of large trusts of land (known as *ahupua'a*) granted by King Kamehameha III at the 1848 land division known as the Great Mahele. *United States v. Kaiser-Aetna*, 408 F. Supp. 42, 47, *aff'd and rev'd in part*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738). See generally J. CHINEN, *THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848* (1958).

²⁰⁷ The ponds were a part of early Hawaiian fishing, as discussed below by the district court:

Kuapā Pond covered 523 acres and extended approximately 2 miles inland from Maunalua Bay and the Pacific Ocean on the island of Oahu, Hawaii. The pond was contiguous to Maunalua Bay, the latter being navigable water of the United States.

A not uncommon barrier beach delineated Kuapā Pond from the bay. The area probably was a stream mouth prior to the end of the ice age, at which time the rise in sea level caused the shoreline to retreat from a position that is now submerged by Maunalua Bay, and is marked by the reef edge. Partial erosion of the headlands adjacent to the bay formed sediment which accreted to form the barrier beach at the mouth of the pond, creating a lagoon.

Early Hawaiians used that lagoon as a fishpond and reinforced the natural sand bar with stone walls where the tidal flows in and out of the ancient lagoon occurred. Approximately two-thirds of the pond's water came from the sea. Runoff waters from the surrounding mountains provided the balance. Part of the seawater present in the pond percolated through the barrier beach. As indicated above, for the area's use as a fishpond the barrier was incomplete in its normal state. Wave and tidal action from the sea and occasional heavy fresh water flow breached the sand barrier and allowed the ocean tides to flood the pond.

Recorded history prior to annexation of Hawaii and geological evidence indicate two openings from the pond to Maunalua Bay. The fishpond's managers placed removable sluice gates in the stone walls across these openings. During high tide, water from the bay and ocean entered the pond through the gates. During low tide, the current flow reversed toward the ocean.

The Hawaiians utilized the tidal action in the pond to raise and catch fish, primarily

natural state, the pond is closed to the ocean. However, in the course of development, Kaiser-Aetna dredged a channel from the ocean through the coral "wall" into the pond and widened it to permit access to the pond for "pleasure" boats.²⁰⁸ The "shore" of the pond is now lined with 1500 residential lots, many having their own boat docking facilities.²⁰⁹

It is this improvement to the pond that gave rise to litigation. As the federal district court found, Hawaiian fishponds always have been considered private property both by landowners and by the State of Hawaii.²¹⁰ However, having made Kuapa Pond navigable, Kaiser-Aetna found the United States Army Corps of Engineers not only asserting federal jurisdiction over it as navigable waters of the United States but also claiming a public navigational easement had thus been created, which gave the public rights to enter the pond without the consent of Kaiser-Aetna.²¹¹

The Federal District Court for the District of Hawaii, after a long discourse on Hawaiian history as it related to fishponds and the current dispute,²¹² found that Kaiser-Aetna had indeed made the pond navigable waters of the United States.²¹³ However, it refused to grant the United States an injunction to prevent Kaiser-Aetna from denying public access thereto.²¹⁴ Both sides appealed.

The Court of Appeals for the Ninth Circuit upheld in part and reversed in part, agreeing in full with the contentions of the Federal Government. First, it reviewed the contention of Kaiser-Aetna as to navigability. Citing previous federal cases defining navigability, the court noted that the pre-

mullet. During ebb tides, the sluice gates allowed water but not large fish to escape, thus "flushing" and enriching the pond while preserving the crop. Water depths in the pond varied up to 2 feet at high tide. Large areas of land at the inland end were completely exposed at low tide. The fishermen harvested the pond with the aid of shallowdraft canoes or boats, but the barrier beach and stone walls prevented boat travel directly therefrom to the open bay.

United States v. Kaiser-Aetna, 408 F. Supp. 42, 46, *aff'd and rev'd in part*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738). For a discussion of ancient Hawaiian water rights, see Van Dyke, Chang, Aipa, Higham, Marsden, Sur, Tagamori & Yukumoto, *Water Rights in Hawaii*, in *LAND AND WATER RESOURCE MANAGEMENT IN HAWAII* 141, 146-75 (Hawaii Institute for Management and Analysis in Government 1979) [hereinafter cited as *Water Rights in Hawaii*].

²⁰⁸ 408 F. Supp. at 47.

²⁰⁹ *Id.* at 48.

²¹⁰ *Id.* at 46.

²¹¹ United States v. Kaiser-Aetna, 584 F.2d 378, 380 (9th Cir. 1978), *rev'd*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738); 408 F. Supp. at 52.

²¹² 408 F. Supp. at 46-47.

²¹³ *Id.* at 49-51.

²¹⁴ *Id.* at 51-54. The court implies that whereas Kaiser-Aetna could not necessarily exclude the public, given its use of the property as a marina, it had the right, as owner of the pond, to regulate that public use and charge tolls and fees. The court denied the claim that the public automatically acquired a servitude over the pond by virtue of its new character as navigable waters of the United States. For such a servitude the United States would have to pay compensation. *Id.* at 53-54.

vious status of the pond and the land thereunder could have no bearing on the jurisdiction of the United States over navigable waters.²¹⁵ The sole question was whether the waterway in question is *presently* navigable.²¹⁶ *How* it became so, whether naturally or, as here, by artificial means, was irrelevant,²¹⁷ even if the Engineers “acquiesced” in the improvements making it navigable.²¹⁸ As to the question of navigability, the court held that there was little doubt that the pond became navigable since over 600 boats were using the waterway.²¹⁹

The court next turned to the question of public use of the pond. Emphasizing the loss of character as a fishpond once Kaiser-Aetna transformed the pond into a marina,²²⁰ the court first refused to separate federal regulatory authority over navigable waters and the right of public use because “[i]t is the public right of navigational use that renders regulatory control necessary in the public interest.”²²¹

Therefore, it followed that the public right of use is a characteristic which attaches automatically to all navigable waters of the United States, and it does not represent an independent taking or seizure for which Kaiser-Aetna would be entitled to compensation:

Secondly, the federal navigational servitude and the public right of use are not imposed or appropriated by action of the government in the nature of seizure. They exist as characteristics of all navigable waters of the United States. [citations omitted.] Land underlying navigable water differs from fast

²¹⁵ United States v. Kaiser-Aetna, 584 F.2d 378, 382 (9th Cir. 1978), *rev'd*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738).

²¹⁶ *Id.* at 382-83.

²¹⁷ *Id.* at 383.

²¹⁸ *Id.*

²¹⁹ *Id.* at 381.

²²⁰ *Id.* at 383. See also the district court's findings of fact on this issue, 408 F. Supp. at 47-48:

Since development of the marina, 668 boats have been registered and authorized to use the pond. Kaiser-Aetna oversees the operations of the marina and has generally excluded all “commercial” vessels, although it has not yet decided whether or not businesses in the shopping center that abuts the marina may operate commercial vessels.

Kaiser-Aetna owns and operates a small vessel within the marina, the “Marina Queen”, which can carry up to 25 persons. During 1967-72, Kaiser-Aetna operated the Marina Queen primarily to show Hawaii-Kai to possible subdevelopers and purchasers of homes or homesites. On Sundays, they invited the general public to join the cruises. During 1973, the marina shopping center merchants' association took over operation of the Marina Queen. The ship ran six or seven times a day for the purpose of attracting people to the marina shoreside and adjoining shopping facilities. As a part of the general promotion, Kaiser-Aetna chartered buses to pick up tourists at various points in Waikiki and transport them to the marina area. The tourists were given a special package of shop discounts and a ride on the Marina Queen, for which they paid \$1 and later \$2 per person for the package. During the period, 18,254 tourists and a total of 38,821 persons rode the Marina Queen. The boat ride was available without charge to anyone who came to the marina.

²²¹ 584 F.2d at 383.

land in its servient characteristics which result from the dominant property characteristics of the navigable water by which it is submerged. If fast land is to be subjected to public use for transportation, it must voluntarily be dedicated to the public by the owner, or must be acquired by the public with due compensation to the owner. But land underlying navigable water underlies an existing public roadway. By virtue of the water's presence it is burdened with a public servitude. If the water body is interstate or forms part of an interstate waterway the navigational servitude runs to the federal government.²²²

This was so regardless of any applicable principles of Hawaii property law:

Hawaii property law at most relates to any servitude the state may claim. If the state chooses to relieve land underlying fishponds such as Kuapa Pond from any navigational servitude otherwise owing to the *state* (even after the pond's transformation into a marina), that is the state's business. The effect of Hawaii law on *state rights*, however, is not before us. No matter what those rights may be they can have no effect on the *federal interest* in interstate commerce nor the rights and obligations of the federal government in this respect under the Constitution. *When the waters of the pond became navigable waters of the United States, the federal navigational servitude attached.*²²³

In December of 1979 the United States Supreme Court reversed the Ninth Circuit opinion in part, agreeing for the most part with the district court.²²⁴ While concurring that the navigability of the pond-marina subjected it to the regulatory authority of the corps, it held that the corps had not thereby acquired a navigational servitude permitting free public access.²²⁵ It did so by invoking the taking issue: At what point does a regulation go so far as to amount to a taking for which just compensation must be paid?²²⁶

As to the matter of regulatory authority, the Court had no doubts at all!

With respect to the Hawaii Kai Marina, for example, there is no doubt that Congress may prescribe the rules of the road, define conditions under which running lights shall be displayed, require the removal of obstructions to navigation, and exercise its authority for such other reason as may seem to it in the interests of furthering navigation or commerce.²²⁷

But with respect to the navigational servitude, whether it could be asserted without payment of compensation for thus removing some sticks

²²² *Id.* at 383-84.

²²³ *Id.* at 384 (emphasis added).

²²⁴ *Kaiser-Aetna v. United States*, 48 U.S.L.W. 4045 (U.S. Dec. 4, 1979) (No. 78-738).

²²⁵ *Id.* at 4047-48.

²²⁶ *Id.* at 4049-50; see BOSSELMAN, CALLIES & BANTA, *THE TAKING ISSUE* (1973).

²²⁷ 48 U.S.L.W. at 4048.

from the bundle of property rights held by Kaiser-Aetna (Justice Rehnquist's words)²²⁸ was a question to be decided on the particular facts of this case, rather than by reviewing "the shifting back and forth of the Court in this area" which "bears the sound of 'Old, unhappy, far off things, and battles long ago.'"²²⁹

First, the Court observed that Kuapa Pond was not navigable in fact before improvement²³⁰ (a factor the dissent regarded as irrelevant).²³¹ Second, it noted that the pond "has always been considered to be private property under Hawaiian law. Thus, the interest of petitioners in the now dredged marina is strikingly similar to that of owners of fast land adjacent to navigable water."²³² Third, the Court observed that the corps had specifically granted Kaiser-Aetna the right to dredge, which, said the Court, it could have refused to do on the ground it would have impaired navigation in the bay.²³³ Therefore, reasoned the Court, (emphasizing again the private property nature of the pond under Hawaiian law) the corps' consent led to the fruition of an expectancy embodied in the concept of property; namely, the right to exclude, which is so fundamental a property right that the corps cannot take it by compelling Kaiser-Aetna to open the marina to the general public without payment of compensation.²³⁴

The decision of the United States Supreme Court in this case may have significance for Hawaii well beyond determining the limits of private ownership of waters made navigable by improvements such as those made by Kaiser-Aetna to Kuapa Pond. A more critical, though presumably more parochial, issue is the extent to which federal courts will interfere in local land use decisions which, while arguably raising federal questions, are based on uniquely Hawaiian property concepts dating back to its independent days under a monarchy with feudal tenurial incidents.²³⁵ While carving out a special niche for Hawaii may be difficult, it is virtually the only way in which uniquely Hawaiian concepts which survive in modern Hawaiian property law generally (and upon which many transactions tend to be wholly or partially founded) will be preserved in the federal system of which Hawaii is a part. Just how important the staking out of such a "uniquely Hawaiian" area in the law of real property can be is

²²⁸ *Id.*

²²⁹ *Id.* at 4049. The Court earlier in the opinion had made much of its inability in *Penn Central Transp. Co. v. City of New York*, 98 S. Ct. 2646 (1978), to come up with a "set formula" in deciding takings cases.

²³⁰ 48 U.S.L.W. at 4049.

²³¹ *Id.* at n.9.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See J. CHINEN, *THE GREAT MAHELE: HAWAII'S LAND DIVISION OF 1848* (1958); *Water Rights in Hawaii*, *supra* note 207 at 141-75; T. CREIGHTON, *THE LANDS OF HAWAII: THEIR USE AND MISUSE* chs. 1-4 (1978).

even more starkly illustrated by the current litigation on the constitutionality of Hawaii's Land Reform Act²³⁶ and on shoreland ownership. The latter is discussed briefly below.

B. *Sotomura v. County of Hawaii: Who Owns the Seashore?*

The question of who owns shorelands, and especially beach, is one which increasingly confronts courts as clashes between private ownership and public use become more frequent in this valuable and much sought area.²³⁷ Given the unique geography of Hawaii and the shoreland orientation of much of its resident and visitor population, it is no surprise to find the conflict right here as well. *Sotomura v. County of Hawaii*²³⁸ is the latest in a series of cases in which the Hawaii Supreme Court has attempted to assert public rights over private rights in the area of land adjacent to water.²³⁹

The dispute in *Sotomura* arose over the payment of compensation to the owners of beachfront property, which the County of Hawaii attempted to condemn in 1970 for a public beach park.²⁴⁰ The lower court separated the parcel into two parts for the purposes of valuation: that part *seaward* of the line formed by debris from the highest wash of the waves, for which it awarded \$1.00; and that portion *inland* from the debris line, for which it awarded \$1.20 per square foot or something in excess of \$200,000.²⁴¹

The Hawaii Supreme Court not only affirmed this definition of the seaward boundary, but also held (1) that the owners had lost title to part of the land by erosion and (2) that the seaward boundary should be established by the *vegetation* line, not the debris (or high water) line.²⁴² The

²³⁶ See *Midkiff v. Tom*, No. 79-0096 (D. Hawaii Dec. 19, 1979) (upholding the constitutionality of aspects of the Land Reform Act, HAWAII REV. STAT. ch. 516 (1976 & Supp. 1979)).

²³⁷ See, e.g., *State v. Hay*, 254 Or. 584, 462 P.2d 671 (1969); Note, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970).

²³⁸ 460 F. Supp. 473 (D. Hawaii 1978).

²³⁹ See, e.g., *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Hawaii 1977), *appeal docketed*, Civ. No. 78-2264 (9th Cir., filed Nov. 28, 1978); *McBryde v. Robinson*, 54 Hawaii 174, 504 P.2d 1330 (1973), *cert. denied*, 417 U.S. 976, *cert denied and appeal dismissed sub nom. McBryde Sugar Co. v. Hawaii*, 417 U.S. 962 (1974). The critical specific issues raised by these cases are discussed in detail in *Water Rights in Hawaii*, *supra* note 207, at 176-218. The authors rightfully express grave doubts about the integrity of the state's judicial process with respect to land use and real property if these cases were ultimately sustained. The subject deserves far more extensive treatment in the periodical literature of the law than is warranted in a land use survey to which these cases are but tangentially relevant. For an analysis of the issues raised in the *McBryde* litigation see Chang, *Unraveling Robinson v. Ariyoshi: Can Courts "Take" Property?*, 2 U. HAWAII L. REV. 57 (1979).

²⁴⁰ 460 F. Supp. at 474.

²⁴¹ *Id.* at 475-76.

²⁴² *County of Hawaii v. Sotomura*, 55 Hawaii 176, 517 P.2d 57 (1973), *cert. denied*, 419

second holding withdrew 31,600 square feet of land between the debris line and the vegetation line from that part of the property hitherto valued at \$1.20 per square foot (a total value of \$37,920). This the federal court reversed. The court first noted that the plaintiffs had neither briefed nor argued the question of land *ownership*. The only issue before the Hawaii Supreme Court on appeal, according to the federal district court, was the manner of valuating the land for compensation. Therefore, having failed to grant Sotomura a hearing before thus depriving him of some 31,600 feet of property without compensation, the Hawaii Supreme Court had denied him due process of law.³⁴³

Procedural due process aside, however, the court held that there had been a denial of *substantive* due process as well.³⁴⁴ Entirely aside from the registered boundaries of the tract,³⁴⁵ the district court could find no precedent for the use of the vegetation line in determining the seaward boundary of Sotomura's land,³⁴⁶ and a good deal of precedent for the use of the high water, or seaweed, or debris line for determining said boundary.³⁴⁷ What particularly troubled the court was the use of what it considered inapposite Oregon precedent to bolster what the Hawaii Supreme Court declared to be a longstanding public use of Hawaii's beaches to an easily recognizable boundary that had ripened into a customary right.³⁴⁸

U.S. 872 (1974).

³⁴³ 460 F. Supp. at 477-78.

³⁴⁴ *Id.* at 478.

³⁴⁵ *Id.*

³⁴⁶ A single decision by the Hawaii Supreme Court, *In re Ashford*, 50 Hawaii 314, 440 P.2d 76 (1968), was noted by the district court but was restricted to the facts of record. The court said:

The Hawaii Supreme Court's opinion in *Sotomura* does not indicate any legal basis for the presumption that the upper reaches of the wash of the waves over the course of a year lies along the line marking the edge of vegetation growth when such a line occurs inland from a debris line marking the wash of the waves. The only basis for the presumption is the Court's statement that "the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves." No evidence of a legal or factual nature supporting the presumption was offered either in the State trial court or in this Court.

460 F. Supp. at 480 (footnotes omitted).

³⁴⁷ 460 F. Supp. at 478-79.

³⁴⁸ *Id.* at 480. The court continued at some length:

Evidence was introduced by the Owners in this Court to show that original grants of title by the government were not limited to dry upland, above the highest wash of the waves, but in some cases extended to low water mark, or to rocks in the sea constituting the termini of lateral boundaries and, in at least one instance, included submerged reef land. There was also expert testimony from a title abstractor with 50 years experience that the monuments "sea," "seashore," "high water mark," "low water mark," "sea at high tide," "sea at low tide," "sea at very low tide" or equivalent expressions in the Hawaiian language were used to describe seaward boundaries, in both original title documents and subsequent conveyances. The same witness testified that monuments such as "debris line," "edge of vegetation" and "highest wash of the waves" were not to be found in these documents. No evidence or claim to the contrary has been offered or asserted in

It said that no evidence was offered to show public use or customary right. On the contrary, evidence offered actually belied the existence of any customary right.²⁴⁹ The court concluded:

This Court fails to find any legal, historical, factual or other precedent or basis for the conclusions of the Hawaii Supreme Court that, following erosion, the monument by which the seaward boundary of seashore land in Hawaii is to be fixed is the upper reaches of the wash of the waves. . . . The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shorelines. A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation. The Fourteenth Amendment to the Constitution forbids it.²⁵⁰

V. CONCLUSION

While the *Sotomura* and *Kaiser-Aetna* cases are clearly on the way to legal significance outside Hawaii, their major impact *within* the State will be the extent to which uniquely Hawaiian land use issues will be decided in uniquely Hawaiian fashion, unencumbered by mainland precedents, regardless of the settling of the particular areas of law to which they relate. Of considerably greater land use significance is the direction the Hawaii Supreme Court will take in the area of vested rights after *Life of the Land* and the implementation of land use plans after *Dalton* and its progeny and the state plan. The planning process may control the development process as never before in Hawaii — indeed, in the nation generally — and the system of reclassification pursuant to those plans in which so-called development rights are reduced or destroyed will likely lead to many a claim of vested rights. Liability for substantial sums must surely affect the decisions of those charged with rezoning in accordance with comprehensive plans. The City and County of Honolulu, at a minimum, is enjoined by charter only to conform *future* rezonings to those plans, and substantial damage awards to the private sector based on vested rights claims cannot help but have a chilling effect on the speed with which such rezonings occur. On the other hand, how long can such a body avoid the presumably rational basis of its own plans? These issues bear consideration as a newly constituted supreme court and newly authorized appellate court consider the increasing number of legal challenges to state and local land use decisions in the coming decade.

this case.

Id.

²⁴⁹ *Id.* at 479-80.

²⁵⁰ *Id.* at 480-81.