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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRIDGE AINA LE'A, LLC, Plaintiff, vs. STATE OF HAWAII LAND USE COMMISSION, VLADIMIR P. DEVENS, in his individual and official capacity, KYLE CHOCK, in his individual and official capacity, THOMAS CONTRADES, in his individual and official capacity, LISA M. JUDGE, in her individual and official capacity, NORMAND R. LEZY, in his individual and official capacity, NICHOLAS W. TEVES, JR., in his individual and official capacity, RONALD I. HELLER, in his individual and official capacity, DUANE KANUHA, in his official capacity, and CHARLES JENCKS, in his official capacity, JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10, DOE CORPORATIONS 1-10, DOE ENTITIES 2-10 and DOE	Civil No. 11-00414 SOM BMK REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT FILED JUNE 7, 2011 (ECF 14) CERTIFICATE OF COMPLIANCE CERTIFICATE OF SERVICE DATE: DECEMBER 19, 2011 TIME: 9:00 A.M. JUDGE: SUSAN O. MOLLWAY

GOVERNMENTAL UNITS 1-10,)
)
Defendants.)
_____)

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS COMPLAINT FILED JUNE 7, 2011 (ECF 14)

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I. FEDERAL CLAIMS[1]

A. Absolute immunity

Plaintiff sole reliance on *Zamsky v. Hansell,* 933 F.2d 677 (9th Cir. 1991) is misplaced. The Commission is not comparable to the Oregon Land Conservation and Development Commission (LCDC) which:

> has two primary functions. First, it adopts "goals" which become the mandatory state-wide planning standards with which all local land use plans must comply. It also reviews the comprehensive land use plans which local governments are required to create and adopt, for conformity with the state-wide goals. A local land use plan becomes effective if and only if the LCDC "acknowledges" that it meets the state-wide goals. If the plan does not conform with the state-wide goals, the LCDC may issue a continuance order and explain how to bring the plan into compliance.

933 F.2d at 678 (statutory references omitted).

In 1984, Klamath County (not the LCDC) re-zoned Zamsky's land "in response to an LCDC continuance order." Zamsky sued the LCDC. The district court determined that LCDC members were entitled to absolute immunity because they were acting in a legislative capacity.

Zamsky rejected this ruling because:

[1]Vladimir Devens, Duane Kanuha, and Charles Jencks have been replaced as commissioners by Jaye Napua Makua, Ernest Matsumura, and Chad McDonald. The new commissioners should be substituted as official capacity defendants.

> In determining whether to issue an acknowledgment order, the LCDC Commissioners were ruling on whether the county's proposed plan complied with existing regulations, namely the "goals" with which all local comprehensive plans must comply. They were not exercising independent legislative judgment. Thus, this case closely resembles *Cinevision Corp. v. City of Burbank,* 745 F.2d 560, 580 (9th Cir.1984), *cert. denied,* 471 U.S. 1054, 105 S.Ct. 2115, 85 L.Ed.2d 480 (1985). In *Cinevision,* the defendants monitored compliance with a contract; here the LCDC monitors compliance with LCDC goals. Monitoring compliance with established laws or regulations and offering recommendations on how compliance may be achieved is an executive function, involving "ad hoc decisionmaking" rather than "formulation of policy." *See id.* Because the LCDC Commissioners and staff member Ross acted in an executive function in suggesting or demanding changes to local plans, they are not entitled to absolute immunity. *Id.*

933 F.2d at 679.

The court also held that LCDC commissioners did not act in a judicial function for three reasons.

> To begin with, their proceedings often are not adversarial. Second, the LCDC Commissioners do not simply decide whether to acknowledge the plan but may explain how to bring the plan into compliance. Offering recommendations on how to comply with the law is an executive, not judicial function. And finally, unlike the professional administrative law judges in *Butz,* the LCDC Commissioners are not insulated from the agency that promulgates the rules to be applied. Instead, they are the same individuals who promulgate the "goals" in the first place; they combine the functions of lawmaker and monitor of compliance.

Id. (citations omitted).

The Commission's statutory function is quite different from the LCDC's. The Commission's major task is to determine whether a proposed reclassification of property is appropriate. It does so only when it "finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17." Haw. Rev. Stat. § 205-4(h) (Cum. Supp. 2010).

The Commission is specifically authorized as part of the process to "impos[e] conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17." Haw. Rev. Stat. § 205-4(g) (2001). The Commission may enforce those conditions by way of "order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification. *Id.*

None of the *Zamsky* factors are present as to the Commission. First, the Commission's actions to fulfill its duties are explicitly quasi judicial. Both the legislature and the Hawai'i supreme court have so stated. Haw. Rev. Stat. § 92-6 (1993); *Kaniakapupu v. Land Use Com'n*, 111 Haw. 124, 139 P.3d

712 (2006). Plaintiff's own complaint acknowledges the point. Compl. ¶ 40.

The Commission's opening memorandum described the processes and procedures associated with its quasi judicial function.

Second, the Commission does not "explain how to bring the plan into compliance." Here it simply decided (whether rightly or wrongly is on appeal in state court) that BAL had not met conditions.

Third, the Commission acts in accordance with goals set by the legislature. The Commission is only authorized to impose and enforce conditions that are "necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17." Haw. Rev. Stat. § 205-4(g) (2001).

Zamsky aside, none of plaintiff's other arguments (Opp. Memo. at 11 et seq) have merit. Plaintiff received plenty of quasi judicial process. Plaintiff disagreed with the way the process was conducted. It wanted more process (not to mention a different result). But those complaints are familiar to any court. They are no indication that the process was other than quasi judicial.

The claim that commissioners communicated among themselves is completely unsubstantiated. In any event, doing so would be illegal only pursuant to Hawai'i Sunshine Law. There is nothing

unjudicial about it – judges on every Ninth Circuit panel for example are free to communicate about pending cases.

That Commissioner Devens refused to recuse himself because of a eight year old case that he did not even remember raises a common judicial issue. So does the claim that Commissioner Devens's actions and ruling during the case exhibit bias.

Commissioners are not subject to political pressure just because the executive branch opposed the project. The governor has no power to remove commissioners or shorten their term of office except "for cause . . . after due notice and public hearing." Haw. Rev. Stat. § 26-34(d) (2009).

This is a striking contrast to *Cleavinger v. Saxner*, 474 U.S. 193 (1985), the only case plaintiff cites for this argument. In *Cleavinger*, the members of a prison's discipline committee were prison officials temporarily diverted from their usual duties. "They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate." That is why the *Cleavinger* commissioners were "under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee." *Id.* at 204. None of those factors are present in our case.

As for "disregarding precedent," that is simply a judgment call. The commissioners did not believe the other dockets were similarly situated to this one. Their decision is the very stuff of judicial action. Like the other matters raised by plaintiff, it is under review in the state court administrative appeal. Like those other matters it does not militate against absolute immunity.

B. Qualified immunity

Of course, plaintiff's rights to equal protection and due process are "clearly established" at a general level. But:

> In *al-Kidd,* the Court emphasized that it has "repeatedly told courts not to define clearly established law at a high level of generality. The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." 131 S.Ct. at 2084 (citations omitted).

Mattos v. Agarano, 2011 WL 4908374, 7 (9th Cir. 2011).

In our case, applicable law was not such that "*every* 'reasonable official would have understood' ... *beyond debate*" that reverting the property would violate constitutional mandates. Id. at 12 (emphasis in original).

A statement from plaintiff's hired expert (David Callies) is the exact equivalent of plaintiff's lawyer saying the same thing.

Moreover, the Commissioners could not have clearly understood that they had no quasi judicial immunity. They were entitled to rely on *Buckles v. King County*, 191 F.3d 1127 (9th Cir. 1999); *Mishler v. Clift*, 191 F.3d 998, 1003 (9th Cir. 1999); *Hale O Kaula Church v. Maui Planning Com'n*, 229 F.Supp.2d 1056 (D.Haw. 2002); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 918 -919 (9th Cir. 2004); and *Romano v. Bible*, 169 F.3d 1182 (9th Cir. 1999).

C. Injunctive relief for the "taking"[2]

Plaintiff's insistence that they are entitled to injunctive relief for the alleged taking mixes up two distinct concepts: whether the taking is for a public use and whether the government action is "so arbitrary or irrational that it runs afoul of the Due Process Clause." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

Plaintiff's complaint does not allege the Commission's action is a "private taking" not for a public use. The language of ¶ 142 comes directly from the Supreme Court's historic decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (no substantive due process right where state

[2] The discussion in section C1 of the opposition, pages 17 – 18, is superfluous. Defendants do not dispute that plaintiff could bring its taking claim in state court. See Memo. in Supp. fn. 6. Defendants do not dispute they waived the protections of the Eleventh Amendment by removing to this court.

action was not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *See also Nectow v. Cambridge*, 277 U.S. 183, 187-188 (1928). The phrases "public use" and "public purpose" do not appear in the complaint (except at ¶ 223 relating to fees).

The due process inquiry is not the same as whether the taking serves a public use. Indeed, the Supreme Court has been to some pains to separate the concepts. *Lingle*, *supra*, 544 U.S. at 542 points out that the due process claim assumes a valid public use, then asks whether there is any rational way that the taking could advance that use.

Plaintiff's cases do not support it. *Madison v. Graham*, 316 F.3d 867, 871 (9th Cir. 2002) is a pre *Lingle* case since disavowed by the Ninth Circuit. *Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851, 854 (9th Cir. 2007).

In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal.*, 482 U.S. 304 (1987), the Court was faced with California state law "the remedy for a taking [is limited] to nonmonetary relief ...." The Court did not (of course) decide whether this was a correct application of state law and did not adopt it as federal law. On the contrary, the Court reiterated that the Takings clause does not prohibit the taking of private property, but rather requires compensation for

such a taking. *Id.* at 314-315. The Court held that California improperly "truncated the rule by disallowing damages that occurred prior to the ultimate invalidation of the challenged regulation." *Id.* at 317.

Plaintiff's out-of-circuit cases do not support its contention that substantive due process is the same as no public use.

Plaintiff has not stated a claim for private taking. Nor could it do so even if the court gave it leave to amend. The public use requirement is coterminous with the scope of a sovereign's police powers. The court should give deference to state determination of a public use "until it is shown to involve an impossibility." As the Court explained in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-241 (1984) (citation omitted), "In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.*

There is no issue here of a private to private transfer by way of eminent domain. Plaintiff makes no plausible, non conclusory allegations of punishment based on personal animus. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067-1068 (9th Cir. 2011).

As to the claim that the alleged taking violates substantive due process, it remains the law that substantive due process provides no basis for overturning state action unless the action is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Spoklie v. Montana*, 411 F.3d 1051, 1059 (9th Cir. 2005) (quoting *Village of Euclid, supra*). If the state actor "could have concluded rationally" that certain facts supporting its decision were true, courts may not question its judgment. *Id.*

D. Injunctive relief for "constitutional violations"

The parties agree plaintiff can pursue injunctive relief in a proper case pursuant to section 1983 and *Ex Parte Young*. *See* Memo. in Supp. at 38 and Opp. Memo. at 21.[3]

The problem with plaintiff's claim for injunctive relief is not lack of remedy but rather that there is nothing to enjoin. The Commission is not going to take additional action. Memo. in Supp. at 39-40.

Plaintiff does not address this point other than to again mix in its substantive due process. To be clear, defendants agree that if plaintiff stated a claim based on substantive due

[3] Defendants do not necessarily agree with plaintiff's discussion of a direct cause of action under the Constitution but the issue is irrelevant for purposes of this memorandum.

process (it does not, supra) and if the court will not abstain (it should, infra) then a potential remedy is to declare that the Commission's action was invalid.

E. Abstention

Pullman abstention "involves an inquiry focused on the possibility that the state courts may interpret a challenged state statute so as to eliminate or at least to alter materially, the constitutional question presented." *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 477 (1977).

The parties agree that *Pullman* abstention is governed by a three part test. As to the first test, the sensitive issue of social policy is whether the COMMISSION can ever enforce conditions it has put in place in connection with a change to land use classification. This is purely a matter of state law as to land use planning which turns on the interpretation of Haw. Rev. Stat. § 205-4 (2001 and Cum. Supp. 2010).

The issue in our case is nothing like *Fireman's Fund Ins. Co. v. City of Lodi, California*, 302 F.3d 928, 940 (9th Cir. 2002) which involved the constitutionality of a local ordinance enacted to remedy hazardous waste contamination in Lodi.

As to the second factor, the constitutional issue will unquestionably be eliminated or at least materially altered

depending on resolution of the state case. If BAL prevails, the entire issue of injunctive relief will be eliminated at a stroke. At most it will have a temporary taking claim which will be orders of magnitude less than its present claim.

There is no "speculation" involved. *Ohio Bureau, supra.* BAL already filed its appeal in state court. Briefing is completed. The state will hear oral argument on December 16, 2011. Whichever side loses will likely appeal, but at a minimum this federal case should not proceed pending a ruling in the circuit court.

Plaintiff's own brief shows that the third *Pullman* factor is present. As plaintiff puts it:

> Uncertainty for purposes of *Pullman* abstention means that a federal court cannot predict with any confidence how the state's highest court would decide an issue of state law." Pearl Inv. Co. v. City and County of San Francisco, 774 F.2d 1460, 1465 (9th Cir. 1985) A state law issue can be uncertain because a particular statute is ambiguous, precedent conflicts, or the question is novel and of sufficient importance that it should be addressed by a state court first. Id.

Memo. in Opp. at 28.

That is exactly the situation here. Of course, defendants believe that section 205-4(g) allows the Commission to do exactly what it did and that *Lanai Co., Inc. v. Land Use Com'n*, 105 Haw. 296, 318, 97 P.3d 372, 394 (2004) supports this

interpretation. But plaintiff denies those points in state court and cannot candidly deny in this court that the "particular statute is ambiguous, precedent conflicts, or the question is novel."

As to *Younger* abstention, plaintiff makes no argument other than to claim that removal waives the right even to ask for it. Only one out-of-circuit district court case supports that argument. In *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D.Ga. 2003)[4] the court found, citing to *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.,* 535 U.S. 613 (2002) that it would be unfair to for defendants "to avoid the federal jurisdiction they themselves have invoked by asking the Court to abstain."

This misapplies *Lapides*. Defendants waived their Eleventh Amendment rights by removal but reserved all other defenses and rights. If defendants had not removed, they would have asked for the same relief from Judge Sakamoto – wait until Judge Strance decides the administrative appeal before proceeding with constitutional claims. *Dantz v. American Apple Group, LLC.*, 123

[4]*Perdue* is cited by several dozen other cases, but usually for its alternative holding that Younger is not applicable on the merits. *Cummings v. Husted*, 2011 WL 2375282, 12 (S.D.Ohio 2011) discussed the holding but ruled it "does not directly apply to the action brought by the LetOhioVote.org Plaintiffs, as they initiated this action in this Court."

Fed.Appx. 702, 707, 2005 WL 465253, 4 (6th Cir. 2005) is a better reasoned case:

> We refuse to extend *Lapides* beyond the sovereign immunity context. Even if *Lapides* did apply, the potentially unfair litigation tactics the Court was concerned with in *Lapides* are not present in this case. There is no evidence that an Ohio state court would have treated this case any differently than the federal court would have.

II. STATE CLAIMS

A. Quasi judicial immunity

Plaintiff essentially concedes that quasi judicial immunity should apply to the state claims the same as to the federal claims. Plaintiff does not address or dispute Hawai‘i state court case law extending quasi judicial immunity to court-appointed psychiatrists, probation officers, prosecutors, and court appointed receivers on federal law reasoning. Because there is no Hawai‘i supreme court case directly on point, this court must do its best to predict the supreme court’s ruling. *Estate of Rogers v. American Reliable Ins. Co.*, 2011 WL 2693355, 3 (D.Haw. 2011).

Based on the cases cited in defendants’ memorandum, the most reasonable prediction is that quasi judicial immunity will apply to state claims the same as it does to federal claims.

B. Statutory and common law qualified privilege

Haw. Rev. Stat. § 26-35.5(b) (2009) provides immunity "in any civil action founded upon a statute or the case law of this State." Even if there was a direct cause of action for violation of the state constitution, that claim would have to be implied by case law and is thus covered by the statute.

As for allegations of "malicious or improper purpose," there are none. Plaintiff's memorandum refers to allegations that do not fit the bill:

- Paragraph 73 discusses statements by the Office of Planning Director, Abbey Mayer. Mr. Mayer is not a defendant. But in any event, the paragraph reflects his belief – based on the facts of the case – that the project needs to move forward with a different developer. There is nothing malicious or improper about that.
- Paragraphs 76 and 96 imply, but do not say, that the commissioners did not take their action thoughtfully or seriously.
- Paragraph 97. A commissioner asked BAL to withdraw a motion (the pejorative "bully" adds nothing).
- Paragraphs 101 and 102. BAL was allegedly not allowed to review or comment on orders.
- Paragraph 118. During discussion of the action, certain commissioners argued in favor of it. Importantly, Haw.

Rev. Stat. § 92-6(b) (1993) requires the commissioners to deliberate in public. Being in favor of the action and arguing for it hardly constitute malice or an improper purpose.

- Paragraph 121. Commissioner Devens refused to recuse himself based on case eight years ago that he (Devens) did not even remember.
- Paragraphs 131 and 132. A commissioner was allegedly upset by BAL's threats to sue the commissioners personally.
- Paragraphs 139. Defendants' decision was allegedly wrong, violated BAL's rights, and was based on improper procedure.
- Paragraph 140. Commissioners allegedly communicated in violation of the State Sunshine Law. Plaintiff cites absolutely no details of or evidence for this claim.
- Paragraphs 162 and 163. Defendants allegedly treated BAL differently from other developers.

Paragraph 192 is the closest plaintiff comes to actually saying that defendants acted maliciously and with an improper purpose:

> 192. The 1983 Commissioners' motivations were personal and political, and their statements and conduct evinced an irrational and malicious bias against Bridge and the Project. The 1983 Commissioners acted in a manner so arbitrary and unreasonable, having no substantial relation to the public health,

> safety, morals, or general welfare, so as to shock the conscience.

.

There is, however, no basis for this naked claim and it is not supported by any plausible, non conclusory facts as required by *Ashcroft v. Iqbal,* 129 S.Ct. 1937 (2009). Indeed, this case shares (on a smaller scale) some interesting similarities to *Ashcroft*. In that case, a post 9/11 detainee claimed that Attorney General Ashcroft conspired with others to subject the detainee to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."

The Supreme Court rejected these allegations because they were mere conclusions:

> To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a "'contract, combination or conspiracy to prevent competitive entry,'" *id.,* at 551, 127 S.Ct. 1955, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

129 S.Ct. at 1951.

Turning next to the factual allegations allegedly supporting the claim, the Court held that the allegations were "consistent" with the illegal scheme. But given the existence

of other "more likely explanations, they do not plausibly establish this purpose."

Similarly here, the commissioners' actions might arguably be "consistent" with a claim they have some malicious desire to harm BAL for unstated extraneous reasons. BAL does not state the reasons or explain why that would be so. It is far more plausible that the commissioners simply did what they thought was right on the facts before them. "As between that 'obvious alternative explanation' for the [action], *Twombly, supra,* at 567, 127 S.Ct. 1955, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion." 129 S.Ct. at 1951 -1952.

C. No direct right of action under the State constitution

In *Figueroa v. State*, 61 Haw. 369, 382, 604 P.2d 1198, 1206 (1979), the Hawai'i supreme court refused to find a private right of action in damages directly from the State Constitution for alleged violations of constitutional rights. This case concerned a claim directly against the State and involved the State's sovereign immunity. The court noted, however:

> The self-executing clause [Article XIV, Section 15 of the State Constitution] only means that the rights therein established or recognized do not depend upon further legislative action in order to become operative. No case has construed the term "self-executing" as allowing money damages for constitutional violations.

61 Haw. at 382, 604 P.2d at 1206 (citations omitted). It remains true today that no Hawai‘i appellate court case has found such a right. This court should predict that the Hawai‘i supreme court will not do so.

D. **Zoning estoppel**

The issue with respect to zoning estoppel is whether BAL expended substantial funds:

> not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.

Life of the Land, Inc. v. City Council of City and County of Honolulu, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980).

Defendants say “no” because BAL’s right to proceed was always specifically subject to certain conditions. BAL was told, “Your development will be permitted provided that you meet conditions relating to affordable housing.” It defies logic to argue that BAL had a “good faith expectancy” that the development would be permitted if those conditions are not met.

Plaintiff does not really address this simple point. The only case plaintiff cites does not support its argument. *Life of Land* related to development of the Admiral Thomas condominium project in Kakaako. The City issued a building permit to the

developer. Plaintiffs sued to contest the validity of the permit. The developers won the case on summary judgment. Plaintiffs appealed. *Life of the Land, Inc. v. City Council of City and County of Honolulu*, 60 Haw. 446, 451, 592 P.2d 26, 27 (1979) (*Life I*).

There are two supreme court opinions relating the case. *Life I* denied plaintiffs' motion for a temporary injunction on development pending appeal. This decision explained the background of the case.[5]

A 1976 ordinance established a moratorium on the issuance of building permits in Kakaako. In September 1977, the city council, subject to three conditions, approved the developers' application for an exception to the moratorium. In November 1977, the city council imposed additional or alternate conditions. The developers submitted an application for a building permit on January 24, 1978. Plaintiffs filed suit on May 2, 1978. "Presumably because of the pending litigation, the city council withheld final action on the application. . . After the circuit court ruled in favor of developers, the city council on October 25, 1978, determined that all of the conditions it had imposed had been met, and this left the

[5]*Life of the Land, Inc. v. City Council of City and County of Honolulu*, 61 Haw. 390, 606 P.2d 866 (1980) (*Life II*) provides additional detail.

building department free to issue the building permit." 60 Haw. at 449, 592 P.2d at 27 (emphasis added).

The court also noted that developers made substantial expenditures "in reliance upon the implicit assurance that if the special construction conditions imposed by the council were met, a building permit would issue." 60 Haw. 450, 592 P.2d 29 (emphasis added).

Plaintiff refers to page 401 in *Life II*, apparently because that page lists conditions originally applicable to the project. But plaintiff neglects to mention that the conditions were met. The case does not support its claim.

III. CONCLUSION

For the reasons stated in the moving papers and this memorandum, the motion should be granted.

DATED: Honolulu, Hawai'i, December 5, 2011.

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

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

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

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.5(e), I certify this memorandum complies with the applicable word limitation. This memorandum uses a monospaced typeface (Courier New 12 point). According to

the word processing system used to produce this memorandum, the portion of the memorandum to be counted contains 4450 words.

DATED: Honolulu, Hawai‘i, December 5, 2011.

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

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CERTIFICATE OF SERVICE

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

Bruce D. Voss, Esq.

Michael C. Carroll, Esq.

Matthew C. Shannon, Esq.

E. Diane Erickson, Esq.

DATED: Honolulu, Hawai‘i, December 5, 2011.

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