Vanishing Sands: Comprehensive Planning and the Public Interest in Hawaii

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"Hawaiian soul," they sing, heads lifted to the mountain wind, "how could you leave us?" The silence dyes scarlet down the ridges, like the turgid waters of the Alalakeiki Channel in the dusk. And the innocent plump girls are dancing, twirling their feathered gourds almost in synchrony, the electric guitars vigorous, not plaintive. The night's questions drowned in their graceful routines. "Enjoy it," the men say. "This is our culture."¹

—Frank Stewart

INTRODUCTION

Sometimes at a popular cove on the Kona coast of the Big Island of Hawaii, there is a white sand beach. The beach exhibits such rapid avulsion in response to the action of waves, currents, and tides that local residents call it Vanishing Sands. Perhaps partly because white sand is scarce on the Big Island, the ambulatory beach is also known as Magic Sands. During a strong sea swell the entire beach may relocate overnight, leaving behind bare black lava rock that is far less hospitable to residents and visitors who come hoping for a day of sun and surf. In time the beach returns, as if by magic.²

¹. Frank Stewart, Alalakeiki Channel, in Reunion 17, 18 (1986).
². See John R.K. Clark, Beaches of the Big Island 104 (1985).
During the past two decades, people have altered the coasts of the Hawaiian Islands in ways no less dramatic. These changes have brought prosperity to the Islands, but residents are increasingly aware that what they traded for that prosperity is unlikely to return. With stunning swiftness, miles of coast have become high density concentrations of resort hotels, time share condominiums, convenience stores, retail shops, and fast food outlets, beleaguered by traffic jams, high prices, pollution, and crime. Within these newly urbanized coastal enclaves, values that made Hawaii unique have been transformed by economic growth. Loss of cultural values and natural resources, concern for the future, and a failure of the infrastructure to accommodate the rapid increase in density have caused many residents to question whether government policies promoting controlled growth actually benefit the people of Hawaii.

This comment surveys Hawaii statutes enacted to plan for controlled development while preserving natural and historic resources, and reviews decisions of the Hawaii Supreme Court that set the boundaries of citizen involvement in procedures affecting resource allocation in Hawaii. This examination seeks to determine how Hawaii residents, as individuals and as a community, can influence the shaping of the place where they live.

Hawaii government planning is intended to serve the public interest. In 1989, however, two decisions of the State Supreme Court limited citizen involvement in government planning. Restrictions on citizen participation in planning processes present one facet of a broad question faced by communities everywhere: is there a public interest underlying natural resource allocation decisions, or does each decision merely involve a competition of individual interests where the strongest prevails? This comment advocates the view that if an identifiable public interest does

3. Hawaii's magic is becoming ever more scarce. On Maui, for example, condominiums that block off the ocean view in the leeward coastal community of Kihei have been described by a travel writer in a Chicago newspaper as "monuments to obscenity" and by a major Maui political figure as a "necessary evil." GEORGE COOPER & GAVAN DAWS, LAND AND POWER IN HAWAII 281-82, 299 (1990); see also Bill Dietrich, Fast Growing Maui Moves to Slow Down Development, SEATTLE TIMES, Sept. 15, 1991, at J11 (describing the ills of development on Maui).

4. See Thomas Kaser, Cost of Living, Ecology Top the Worry List, HONOLULU ADVERTISER, Aug. 1, 1990, at C5 (phone survey showing Hawaii residents' concerns about traffic, housing, and undesirable effects of growth); Tom Brislın, At Top of Isle Wish List: A Lid on Development, HONOLULU STAR-BULL. & ADVERTISER, Feb. 26, 1989, at A3 (television poll demonstrating Hawaii residents' desire to stop new development); cf. FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 19 (1972) (poll conducted in 1969 showed that 93% of Hawaii's residents favored strong emphasis on natural resource preservation in land use planning). With some justification, many Hawaii residents question government's capacity to accomplish the residents' goals. Cf. Richard Borreca, Voters Worry About Political Machine's Grip, HONOLULU STAR-BULL., Aug. 9, 1990, at A1 (poll showing that 43% of likely voters believe that Hawaii's Democratic Party "machine" is generally "bad" for the state, 18% think the machine is "good," with the rest of voters unsure).
exist, it is best served where members of the public are afforded maximum opportunity to participate in decisions that affect their lives.

The Hawaii Supreme Court's 1989 decision in *Kaiser Hawaii Kai Development Company v. City and County of Honolulu* illustrates the growing rift between Hawaii citizens and their government. In *Kaiser*, the court stayed an injunction prohibiting a ballot initiative to downzone a tract of land from residential to preservation. The initiative passed by a two-to-one majority in the 1988 Oahu general election. The court then reversed the express will of Oahu's voters and invalidated the initiative; in the court's view, zoning by initiative is inconsistent with comprehensive long-range planning, and therefore impermissible. In sum, the court allowed voters to express their disapproval of the county government's growth management policies, waited until the votes were counted, and then held that zoning by initiative is unlawful.

Voters may have something to say about that. The *Kaiser* court's reasoning is consistent with decisions in other jurisdictions that have held zoning by initiative unlawful, but the court leaves important questions unanswered. Above all, the decision does not address the problems created by rapid development of a small and very desirable land area which is dominated by powerful private interests. The court struck down the result of the *Kaiser* initiative because it was inconsistent with the comprehensive long-range planning language of Hawaii's Zoning Enabling Act of 1957, but the court did not address the actual success of such planning in Hawaii during the decades since the zoning statute was enacted.

While an evaluation of Hawaii's planning scheme was beyond the scope of the facts presented in *Kaiser*, the initiative's outcome demonstrated just such an assessment by the voters. A two-to-one majority of the electorate opposed development of residential homes, and chose instead to slow growth and preserve open space. By invalidating citizens' initiative power over zoning, however, the *Kaiser* decision requires that citizens lobby or litigate their zoning concerns. This disposition substantially increases the transaction costs for citizen participation in zoning

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5. 777 P.2d 244 (Haw. 1989).
6. Id. at 246.
8. 777 P.2d at 246-47.
11. See supra note 7 and accompanying text.
decisions and thus reduces the likelihood that zoning decisions will reflect the choice of the majority of citizens.

Only two months before the Hawaii Supreme Court handed down the Kaiser opinion, the court had decided another case involving the same housing development at issue in Kaiser. In Sandy Beach Defense Fund v. City Council, the court held that due process does not require a contested case hearing on an application for a special management area use permit granted under the Hawaii Coastal Zone Management Act (the HCZMA). The due process issue arose because the Honolulu City Council decides all HCZMA permit applications for the island of Oahu, and the Council does not hold contested case hearings on applications for special management area use permits. In Hawaii's three other counties, the HCZMA permitting authorities are the county planning commissions. Unlike the Honolulu City Council, the planning commissions of the neighbor island counties are subject to the contested case requirements of the Hawaii Administrative Procedure Act (HAPA).

The Sandy Beach decision has far-reaching implications because development in Hawaii continues to be concentrated in coastal locations that are subject to special management area permits. As a result of the court's decision, the county governments of the neighbor islands may be encouraged to shift HCZMA permitting authority to legislative bodies that are not subject to the HAPA requirement for contested case hearings. Thus, the holding in Sandy Beach conceivably allows a streamlining of permit procedures governing major development in Hawaii. The effect of this streamlining would be a significant loss of opportunities for citizen participation in planning decisions.

On Oahu, where approximately eighty percent of Hawaii's citizens live, growth management is plainly inadequate. Access routes to Honolulu are constantly under construction, but the rapidly increasing traffic

13. Id. at 262; see also HAW. REV. STAT. ANN. § 205A-21 to -33 (Michie 1988 & Supp. 1991) (defining and regulating "special management areas").
14. Id. at 254; see also HAW. REV. STAT. ANN. § 205A-22 (Michie Supp. 1991) (defining "authority" under HCZMA to mean a county planning commission or, in some instances, a county council or other governing body).
15. See HAW. REV. STAT. ANN. § 91-1(1) (Michie 1988) (defining "agency" to include county commissions and boards).
16. See DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII 87-95 (1984) (discussing federal and Hawaii governments' coastal zone management and, in particular, Hawaii governments' use of "special management areas").
congestion remains a major concern. Mass transit has been debated in election campaigns for three decades with no tangible result until recently. Kaiser's restriction of the initiative power is likely to encourage the state government to continue supporting industrial development on the island of Hawaii. Current development proposals include geothermal energy production in Hawaii's last large tropical rain forest, a civil spaceport on Hawaii's coast, and a manganese processing facility that would impact air quality and generate significant quantities of hazardous wastes. Although many Big Island residents vehemently oppose these developments, the Kaiser decision effectively precludes citizen initiative power to prevent state and county agencies from promoting unwanted development.

Despite the loss of the initiative power to overrule county zoning and the absence of contested case hearings on applications for special management area use permits on Oahu, other procedures exist that do allow Hawaii citizens to participate in resource allocation decisions. The Hawaii Constitution guarantees environmental rights to Hawaii citizens. The Hawaii Environmental Impact Statement law (the HEIS) requires informed governmental decisionmaking and provides for judicial review of the decisionmaking process. Contested case hearings give citizens whose rights are substantially affected by government action certain procedural safeguards to help ensure that government agencies comply with statutory mandates. Where there is no contested case hearing, the HCZMA allows aggrieved citizens to challenge agency action in a circuit court if the agency acted in a manner inconsistent with substantive mandates of the HCZMA to preserve coastal resources. These avenues of recourse notwithstanding, three decades of controlled growth policy in Hawaii have undermined voter confidence in comprehensive long-range

26. See infra notes 137-38 and accompanying text.
27. See HAW. REV. STAT. ANN. § 91-1(5) (Michie 1988) (defining "contested case").
planning. To restore that confidence, the Hawaii legislature will need to take bold initiatives in the coming decade.

Land use in Hawaii is subject to the most complex state regulatory scheme in the nation. This is not surprising, since land is Hawaii's most valuable resource. Section I of this comment surveys Hawaii's statutory scheme for controlled growth. This section presents an overview of the Hawaii legislature's approach to natural resource allocation, and discusses specific statutory provisions in the context of current controversies over resource management.

Section II surveys decisions of the Hawaii Supreme Court that interpret provisions of this statutory scheme and determine the requirements for citizen involvement in government planning. The survey of cases in Section II includes a review of the Sandy Beach and Kaiser decisions. Section III summarizes and discusses the legal rights of persons who may be substantially affected by government decisions. Section IV proposes an amendment to the HCZMA to require contested case hearings on applications for special management area use permits, thus ensuring uniform statewide procedures that provide safeguards for persons whose rights may be substantially affected. Section IV also proposes an amendment to the Hawaii Constitution to improve direct participation in Hawaii natural resource allocation decisions by restoring initiative and referendum powers over county zoning.

1 THE STATUTORY SCHEME

Statutes governing controlled economic growth in Hawaii were enacted to preserve natural resources for the benefit of Hawaii's people. Each Hawaii citizen enjoys environmental rights guaranteed by the Hawaii State Constitution. Article XI, section 9 of the State Constitution provides that:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

In keeping with this constitutional mandate, the Hawaii legislature has enacted statutes that protect these environmental rights. The statutes also reflect the intent of Hawaii's Democratic legislators to diversify Hawaii's poststatehood economy, in order to redistribute the wealth and

29. Daniel R. Mandelker & Annette B. Kolis, Whither Hawaii? Land Use Management in an Island State, 1 U. HAW. L. REV. 48, 48 (1979) (claiming that Hawaii may be "the most land-regulated domain in the entire world").

30. HAW. CONST. art. XI, § 9.
power that for decades had been concentrated among a small group of major landowners. The first such statute enacted was Hawaii's Land Use Law.

A. Land Use Law

The Hawaii legislature enacted the nation's first comprehensive state land use statute (Land Use Law) in 1961, two years after Hawaii became a state. The Land Use Law was a product of the economic and political forces at work in Hawaii at the time of statehood. During the 1950's, Hawaii Democrats wrested control of the legislature from Republican legislators representing major landowners whose sugar and pineapple plantations formed the backbone of Hawaii's prestatehood economy and whose dominance of Hawaii politics dated from the late nineteenth century.

The Democrats saw that, with the advent of the new passenger jet, Hawaii's future lay in tourism. At the same time, they set out to control growth so as to benefit the broad-based working-class coalition that had carried the Democrats to power. Although the major landowners suddenly found themselves contending with a legislature overwhelmingly dominated by union backed reformers, the landowners nevertheless possessed both clout and persuasive arguments. This small group of corporations and estates still held titles to the vast majority of Hawaii's privately owned land, and controlled a large segment of the state's economy. They argued persuasively that as much private land as possible should remain in agriculture. Union leaders who favored development of a strong tourist industry also favored protection of agricultural lands, a major source of union jobs.

This uneasy alignment of interests yielded a law intended to: (1) preserve agricultural lands; (2) encourage growth in the tourist industry while maintaining natural resources; and (3) provide for affordable hous-

33. Bosselman & Callies, supra note 4, at 5-7.
34. Gavan Daws, Shoal of Time: A History of the Hawaiian Islands 380 (1968). Between 1900 and 1940, 80% of the men elected to the territorial legislature were Republicans. Id. at 313-14.
35. See generally Cooper & Daws, supra note 3, at 35-46 (describing tax and land reforms pushed by Democrats).
36. See Daws, supra note 34, at 377-80 (discussing the relationship between the Democratic Party and union leaders).
37. Bosselman & Callies, supra note 4, at 13-14; see also Cooper & Daws, supra note 3, at 2-4 (describing landholder dominance of politics and economics).
38. Bosselman & Callies, supra note 4, at 6.
39. Id. at 18-19.
HAWAI'I COASTS: VANISHING SANDS

ing in contained, livable cities and suburbs.\(^{40}\) Hawaii's novel experiment in centralized land use law has been extensively studied.\(^{41}\) This comment limits its examination to a broad overview of essential components of the Land Use Law that provide for districting and zoning.

1. Districts

The Land Use Law divides Hawaii's lands into four classes of districts: urban, agricultural, conservation, and rural.\(^{42}\) Most of Hawaii's land is classified as agricultural or conservation.\(^{43}\) Urban districts include lands reserved for future urban use, subject to county permits.\(^{44}\) Agricultural lands are those suited to a range of agricultural uses, and prime agricultural lands are not reclassified unless such reclassification is "reasonably necessary for urban growth."\(^{45}\) Special permits may be granted for nonagricultural uses within an agricultural district, but such permits have been controversial. In one case, the Hawaii Supreme Court voided a permit that it found incompatible with agricultural use.\(^{46}\) Rural lands are few, are mostly on Maui and Kauai, and are mainly small farms and house lots that do not fit into the other classifications.\(^{47}\) Zoning in these three districts is left to individual counties.\(^{48}\)

In contrast, conservation districts are mainly "park, watershed, floodplain (coastal and stream), wildlife reserve, historic/scenic sites, mountains, and offshore outlying islands."\(^{49}\) These include both public and private lands. Conservation lands are administered by the state's Department of Land and Natural Resources (the DLNR), whose Board grants permits for land use in conservation districts.\(^{50}\) Such permitted uses also have given rise to considerable controversy.\(^{51}\)

The boundaries of these districts are determined by the Land Use Commission (LUC).\(^{52}\) The LUC is made up of nine Hawaii citizens appointed by the governor. At least one commissioner must come from each of Hawaii's four counties.\(^{53}\) The Land Use Law as first enacted

\(^{40}\) Id. at 12-13.

\(^{41}\) CALLIES, supra note 16, at 6.

\(^{42}\) Id. at 7.

\(^{43}\) Id.

\(^{44}\) Id.

\(^{45}\) Id. at 8.


\(^{47}\) CALLIES, supra note 16, at 9-10.

\(^{48}\) HAW. REV. STAT. ANN. § 205-5(a) (Michie 1991).

\(^{49}\) CALLIES, supra note 16, at 9.

\(^{50}\) Id.

\(^{51}\) Id.

\(^{52}\) Id. at 7.

\(^{53}\) Id. at 10. The counties are the City and County of Honolulu, which includes Oahu and the northern atolls; Maui County, which includes the islands of Maui, Lanai, Molokai and Kahoolawe; Kauai County, which includes the islands of Kauai and Niihau; and Hawaii County, whose one island comprises more land area than the rest of the state combined and is
required the commission to conduct a review of district boundaries every five years. In 1975, however, this requirement was repealed. Currently, the main business of the commission is to act on landowners’ petitions for reclassifications of district lands.

The LUC’s decisions on boundary questions are frequently controversial. Boundary changes from agricultural or conservation to urban have a major impact on permitted uses and thus on the value of the land in Hawaii’s extremely active real estate market. Under the 1974 Hawaii Supreme Court case, Town v. Land Use Commission, district boundary disputes are quasi-judicial contested cases, rather than quasi-legislative rulemakings. The court held that contested cases involve the rights of specific individuals, not any interest of the public as a whole, so exercise of referendum or initiative power is inappropriate in a contested case. Although the Town decision itself involved a small amount of land, its implications are far-reaching, because it means that the commission’s boundary decisions are not subject to review by popular initiative or referendum. Under Town, district reclassifications which effect major changes in island communities are now insulated from direct participation by the electorate.

2. Zoning

The Land Use Law incorporates county zoning provisions from the Zoning Enabling Act of 1957. The zoning statute requires that “[z]oning in all counties shall be accomplished within the framework of a long-range, comprehensive general plan prepared or being prepared to guide the overall future development of the county.” Hawaii, Oregon, California, and Florida are the only states where conformance to such comprehensive county planning is mandatory. In other states, such plans are merely advisory.
The structure of planning and zoning varies in each of Hawaii's four counties. The charter of the City and County of Honolulu calls for a general plan that sets forth broad policy goals, and also for detailed development plans to implement the goals of the general plan. Zoning ordinances must conform to the development plans. Kauai's charter specifies a general plan setting forth all specific county functions and services. The plan serves as a guide to local zoning regulations without expressly requiring conformance to specific provisions. The Hawaii County charter mandates a general plan establishing the requirements to which zoning regulations must conform. Maui's County Charter does not require conformance, but a separate ordinance enacted to adopt Maui's general plan requires that zoning comply with guidelines set forth in the general plan. The county governments of Maui, Kauai and Hawaii each have a planning commission that reviews building permit applications. On Oahu, the city council decides on permit applications.

Zoning in urban, agricultural, and rural land use districts must comport with each county's comprehensive development plan. Such planning requires coordination of state and county agencies. The following section examines a companion statute to the Land Use Law, the Hawaii State Plan.

B. Hawaii State Plan

The Hawaii State Plan (the Plan) was enacted to provide a framework for comprehensive planning throughout the Islands by establishing planning goals and implementation procedures. In 1978, the legislature enacted the three-part Plan. The lawmakers found that:

there is a need to improve the planning process in this State, to increase the effectiveness of government and private actions, to improve coordination among different agencies and levels of government, to provide for wise use of Hawaii's resources and to guide the future development of the State. . . . [The Plan] shall serve as a guide for the future long-range development of the State . . . [and] provide for an integration of all major state and county activities.

65. Id. at 26.
66. Id.
67. Id. at 28-29.
68. Id. at 29.
69. Id. at 27-28.
70. Id. at 44-45, 49-50, 52 (describing the role of each county's planning commission).
71. Id. at 39-40.
72. Id. at 25.
73. HAW. REV. STAT. ANN. § 226-1 (Michie 1988).
75. HAW. REV. STAT. ANN. § 226-1 (Michie 1988).
Part I sets out the overall theme, goals, objectives, and policies of the Plan. Part II provides for planning coordination and implementation. Part III defines priority guidelines.

Part I of the Plan sets forth the three principal goals of the State: (1) a strong, viable economy; (2) a desirable physical environment; and (3) physical, social, and economic well-being for individuals and families in Hawaii. Implementation of these goals, however, raises two difficult questions. First, how can continuation of a strong, viable economy be reconciled with preservation of scarce resources essential to a desirable physical environment so as to provide physical, social, and economic well-being for Hawaii's citizens? Second, how can the overall goals of the state be reconciled with the concerns of the individual counties, and what is the proper role in the planning process for the citizens who live in those counties?

These questions are addressed in turn below. In order to maintain a strong, viable economy to provide for the social and economic well-being of families in Hawaii, the Plan sets out guidelines for economic growth.

I. Economic Development

Part III of the Plan sets out "[e]conomic priority guidelines" to "provide needed jobs for Hawaii's people and achieve a stable and diversified economy . . . ." The guidelines call for assistance and support for such local industries as sugar, pineapple, diversified agriculture, aquaculture, information services, and tourism. The guidelines encourage new industries that are clean and have minimal impact on Hawaii's environment. In general, the Plan seeks to "[p]romote Hawaii as an attractive market for environmentally and socially sound investment activities that benefit Hawaii's people."

Although provisions in the Plan for economic development have been cited by Hawaii's courts in decisions involving LUC boundary changes and county zoning designations, the guidelines do not address one form of investment activity that is a major destructive force in Hawaii's economy: rampant real estate speculation. There is no lack of

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77. Id. §§ 226-51 to -63.
78. Id. §§ 226-101 to -107.
79. Id. § 226-4 (Michie 1988).
80. Id. § 226-103(a) (Michie Supp. 1991).
81. Id. § 226-103(b)-(g).
82. Id. § 226-103(a)(8)(B).
83. Id. § 226-6(b)(2) (Michie 1988).
84. See Kilauea Neighborhood Ass'n v. Land Use Comm'n, 751 P.2d 1031, 1034 n.4 (Haw. Ct. App. 1988); see also Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 777 P.2d 244, 248 n.2 (Haw. 1989) (zoning by initiative is inconsistent with long-range comprehensive planning goals and was not intended by the legislature).
money flowing into the Islands. At present, speculators who never set foot in the Islands have a strong incentive to buy Hawaii real estate and sell it for large profits. While such speculative transactions produce significant short-term benefits for a few investors, these transactions contribute to inflated land prices that are beyond the earning capacities of many Hawaii residents.

The scarcity of land in Hawaii, the concentration of land ownership among a few corporations and estates, and the inability of Hawaii residents to compete with outside investors have escalated Hawaii's housing shortage to a crisis. Already young Hawaii residents come of age, encounter prices for housing that are far beyond their earning capacities, and leave the Islands to find places where they can afford to live. The lack of affordable housing creates pressures for additional urban land use districts and increased residential county zoning, and thus affects government efforts to conserve natural resources. Newly created urban and residential properties are in turn subject to speculative investment. The ongoing development generated by this cycle profoundly impacts the quality of life in Hawaii and produces few cognizable long-term benefits for Hawaii residents.

Speculators' investments produce windfall profits, inflate land prices, aggravate the housing shortage, and spur additional residential development to the detriment of Hawaii's natural environment. The Hawaii legislature must enact measures to remove incentives for such specu-

86. The Japanese account for 80% of foreign investment in Hawaii. Id. Japanese investors like Hawaii's potential for growth. In addition, depreciation of the U.S. dollar against the yen has spurred a buying spree. Id. at 16, 29.
87. The Hawaii legislature has previously noted that, "[i]nadequate controls have caused many of Hawaii's limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in a long-term loss to the income and growth potential of our economy." Neighborhood Bd. No. 24 v. Land Use Comm'n, 639 P.2d 1097, 1103 (Haw. 1982) (quoting Act 187, 1961 Haw. Sess. Laws 299) (The court cited this language to evidence the intent of the Hawaii legislature in enacting the Land Use Law, HAW. REV. STAT. ANN. §§ 205-1 to -18 (Michie 1988 & Supp. 1991)).
89. Hawaii's housing costs lead the nation. The average price for a single-family home is $275,000. The Value of the Land, HAW. BUS., Apr. 1990, at 40, 40.
90. Jerry Burris, Voters Raising the Roof Over Affordable Housing, HONOLULU ADVERTISER, Aug. 6, 1990, at A3 (poll showing affordable housing at the top of problems facing Hawaii); Jerry Burris, Housing Has Worsened, 84% of Isle Voters Say, HONOLULU ADVERTISER, Aug. 7, 1990, at A1 (84% of a poll of 800 likely Hawaii voters stating that Hawaii is doing worse that four years ago in providing housing). But see Jerry Burris, Most Opt to Stay Despite Housing Costs, HONOLULU ADVERTISER, Aug. 8, 1990, at A1 (noting only 11% of some 800 Hawaii voters might move away due to housing costs).
lation. If the state is to correct the imbalance in Hawaii's economy, the market for Hawaii land must be stabilized before any movement toward diversification of Hawaii's economy by development of clean new industries can be effective. However, it is difficult to attract these industries to the state, largely because high land prices make operating costs prohibitive.\(^{91}\) In addition, Hawaii's existing agricultural industries face competition from regions where operating costs are substantially lower.\(^{92}\) The sugar industry, once the mainstay of Hawaii's economy, is in severe decline.\(^{93}\) Hawaii's sugar lands are currently in transition to diversified agriculture and resort use.\(^{94}\) For such industries to thrive, the people who work in them need affordable housing. But housing costs will continue to outstrip the wages of Hawaii's working people as long as speculators continue to drive up prices by riding the demand for Hawaii's land.

The most obvious solution to the speculation problem is to tax it out of existence. Placing a capital gains tax on windfall profits from real estate sales will discourage indiscriminate speculation. The state can set aside tax assessments against windfall real estate profits in a special fund, and can use such funds to compensate private parties whose property rights are taken by regulation.\(^{95}\) In assessing capital gains, factors such as reasonable improvements can be considered, and appropriate appreciations in value can be allowed. Devises of real property should be exempt from the tax. The goal of such regulation would be neither to restrict alienation of land nor to prevent development of raw land, but rather to eliminate windfall profits from speculative investment. Such legislative action would likely bring the state's economy closer to the goals and economic priority guidelines set forth in the Hawaii State Plan.

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92. COOPER & DAWS, supra note 3, at 206. Hawaii sugar producers are hard-pressed to compete with Third World producers, who use cheap labor. Id.

93. See id. (describing competitive pressures on sugar industry); Nancy Yoshihara, Hawaii's Chocolate Experiment: Cocoa Could Provide Alternative for Troubled Sugar Growers, LOS ANGELES TIMES, Feb. 27, 1989, § 4, at 3 (listing foreign competition, use of artificial sweeteners, and depressed prices as incentives for sugars growers to diversify).

94. See, e.g., Rod Thompson, Plan OK'd to Rezone Hamakua Land, HONOLULU STAR-BULL., Nov. 30, 1990, at A8 (sugar plantation rezoned for resort development).

95. The Hawaii legislature has begun considering such an approach to the real estate speculation problem. In 1990, a bill was introduced in the Hawaii legislature that would impose a 45% surcharge on gains from sales of real property occurring less than one year following acquisition of the property, and a 25% surcharge on gains from sales more than one year but less than two years after acquisition. Income Taxes: Hawaii, 52 STATE TAX REV. (CCH) 4 (Feb. 5, 1991). For a detailed discussion of balancing benefit and loss by land use regulation, see generally DONALD G. HAGMAN & DEAN J. MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978).
2. **County Home Rule**

While stabilizing the land market may allow for development of the clean new industries envisioned in the Plan, where such industries should be located is a separate issue that involves tension between the state's authority and that of the individual county governments. Article VIII, section 2 of the Hawaii Constitution provides for county home rule. Each county may adopt a charter for its own self-governance, and "[c]harter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions." Thus, county home rule is limited and does not restrict the state legislature's power to enact laws of statewide concern.97

In 1984, the state legislature addressed the requirement that county general plans conform to state functional plans.98 The legislature amended the Hawaii State Plan, with the result that state functional plans are no longer strict mandates that counties must follow. Rather, they are "guidelines" that must be "taken into consideration" in each county's planning process.99 Thus, the legislature acknowledged each county's autonomy with regard to statewide comprehensive long-range planning.

The legislature may, however, enact laws of statewide concern that override county planning. One prominent example of this legislative override occurred in geothermal subzoning. The statewide concern addressed by the geothermal subzones is dependence on imported sources of energy production.100 In 1983, the legislature amended the Land Use Law to require that "the board of land and natural resources shall conduct a county-by-county assessment of areas with geothermal potential for the purpose of designating geothermal resource subzones."101 For example, the Board of Land and Natural Resources (BLNR) designated

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96. **HAW. CONST. art. VIII, § 2.**
99. *Id.* at 53.
100. **HAWAII DEP'T OF BUS. AND ECON. DEV., STATE ENERGY RESOURCES COORDINATOR'S ANNUAL REPORT, FISCAL YEAR 1988-1989,** at 4-6.
geothermal resource subzones on the Big Island in the east rift of Kilalea, the world’s most active volcano.\footnote{102}

In designating geothermal subzones, the BLNR does not have to provide environmental impact statements as defined by the HEIS.\footnote{103} However, public hearings are required following preliminary designation of geothermal subzones.\footnote{104}

After designating subzones, the BLNR has the power to issue permits for geothermal development activities in subzones located in conservation districts.\footnote{105} In agricultural, rural, and urban districts, the appropriate county authorities are responsible for issuing permits.\footnote{106} As amended in 1984, the geothermal subzone provisions required the BLNR or county planning commission to conduct a contested case hearing for permit applications upon appropriate request.\footnote{107}

The geothermal subzone provisions governing permit applications were again amended in 1987, however, to exempt geothermal subzone permit applications from contested case hearing requirements.\footnote{108} The statute now provides that, in place of formal adjudications, the BLNR shall conduct public hearings recorded by a court reporter.\footnote{109} Upon appropriate request, the BLNR or county authority shall appoint a mediator to resolve issues raised at the public hearing.\footnote{110} Under the current legislation, the BLNR:

shall grant a conservation district use permit if it finds that applicant has demonstrated that:

(1) The desired uses would not have unreasonable adverse health, environmental, or socioeconomic effects on residents or surrounding property; and

(2) The desired uses would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, and police and fire protection; or

(3) That there are reasonable measures available to mitigate the unreasonable adverse effects or burdens referred to above.\footnote{111}

\footnote{102. See Medeiros v. Hawaii County Planning Comm'n, 797 P.2d 59, 64 (Haw. Ct. App. 1990).}
\footnote{104. Id. § 205-5.2(d). Furthermore, the statute provides that "[c]ontested case procedures are not applicable to these hearings." Id.}
\footnote{105. Id. § 205-5.1(c)-(d) (Michie 1988).}
\footnote{106. Id. § 205-5.1(c), (e).}
\footnote{110. Id. § 205-5.1(d)-(e).}
\footnote{111. Id. § 205-5.1(d). Similar language governs county authorities. Id. § 205-5.1(e).}
As amended in 1985, the geothermal subzone provisions governing permit applications mandated that until April 30, 1990, any appeal of a contested case hearing related to a geothermal subzone be made on the record directly to the Hawaii Supreme Court for final decision. Following that date, judicial review was by appeal to a circuit court pursuant to HAPA. The 1987 amendments removed the time limitation on direct appeals to the state supreme court. Instead, the statute currently requires that any appeal from a decision by the BLNR or county authority shall be made on the record directly to the Hawaii Supreme Court for final decision.

The two 1987 statutory amendments make plain that the legislature viewed geothermal power as a matter of urgent statewide concern. The amendments preempt the planning functions of the Hawaii County government and provide for swift disposition of legal claims raised by Big Island citizens. Big Islanders responded by staging mass protests. Hawaii County police arrested demonstrators at drilling sites. Opponents also formed citizens' groups to apply political pressure on both state and Hawaii County governments, and participated in hearings, mediations, and appeals.

In 1987, the Hawaii Supreme Court consolidated two suits brought in opposition to geothermal drilling permits. Two Native Hawaiian activists, Ralph Palikapu Dedman and Dr. Emmett Aluli, claimed that proposed drilling infringed on their worship of Pele, the volcano goddess, in violation of their right to freely exercise their religion. The court held that the drilling did not regulate or directly burden the activists' religious beliefs, nor inhibit their religious speech. Dedman and Aluli, along with the Volcano Community Association, also alleged that the statutory criteria for assessing subzones were too vague to meet due process requirements, and they challenged the BLNR's findings of fact in designating the geothermal subzones. The court held that, by resorting to personal experience and their best judgment, state officials com-

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113. Id.; see also HAW. REV. STAT. ANN. § 91-14(b), (g) (Michie 1988) (applicable HAPA provisions).
115. HAW. REV. STAT. ANN. § 205-5.1(g) (Michie 1988).
117. See Teresa Black, The Man in the Middle, HONOLULU, June 1990, at 98, 98.
120. Id. at 31.
121. Id. at 33.
122. Id. at 34-35.
plied with the statutory command to exercise discretion, and that the statutory criteria for assessing subzones were sufficiently clear to comport with due process.\textsuperscript{123}

In 1990, the Hawaii Intermediate Court of Appeals considered two claims opposing geothermal development. In the first, owners of property adjoining the permitted area appealed a Hawaii County Planning Commission decision allowing drilling of geothermal observation holes.\textsuperscript{124} First, the court found that denying the adjoining owners a contested case hearing did not violate due process because the owners had been afforded a meaningful opportunity to be heard.\textsuperscript{125} Second, the court found that the commission's findings adequately described the scope of the planned activities.\textsuperscript{126} In the second suit, the Pele Defense Fund challenged the sufficiency of conditions attached to a county geothermal permit.\textsuperscript{127} The court held that prospective conditions in the permit did not affect the finality of the commission's decision, and that the opponents lacked standing to challenge the adequacy of the permit.\textsuperscript{128}

Pele, the ancient Hawaiian fire goddess who has inspired legends for centuries with her incendiary temper and intolerance toward lack of humility in mortals, responded to all of this in her own inimitable manner. A major eruption began in the east rift of Kilauea in the same year that the legislature enacted the geothermal subzone amendments. Volcanic activity has continued for the duration of the geothermal controversy. Molten lava has inundated state and private land, including an artesian spring popular with bathers, a renowned black sand beach, roads, and one proposed geothermal drilling site.\textsuperscript{129} The lava has destroyed more than a hundred homes, a national park ranger station, a historic church, a state park, and the town of Kalapana.\textsuperscript{130} A second

\begin{itemize}
\item \textsuperscript{123} See id. at 35.
\item \textsuperscript{125} Id. at 66-67.
\item \textsuperscript{126} Id. at 68 (permit application required a description of the immediate environmental impact of the project, but did not require description of potential private industry development).
\item \textsuperscript{128} Id.
\item \textsuperscript{129} These events were covered extensively by media in Hawaii and occasionally were reported in the national media. See, e.g., \textit{Hawaii Lava Flow Closes Black Sand Beach}, N.Y. TIMES, Aug. 4, 1990, § 1, at 24 (discussing lava inundation across one of Hawaii's most popular beaches); \textit{Hawaii: Lava or Leave It}, \textit{TIME}, May 14, 1990, at 35 (discussing destruction of roads by lava); Hugh Clark, \textit{Small Park Overrun by Molten Lava}, \textit{HONOLULU ADVERTISER}, Apr. 1, 1987, at A1 (artesian spring overrun by lava); Rod Thompson, \textit{Board Okays Geothermal Power Project}, \textit{HONOLULU STAR-BULL.}, Apr. 14, 1986, at A11 (geothermal exploration site covered in lava).
\item \textsuperscript{130} See, e.g., \textit{Hawaii Lava Flow Closes Black Sand Beach}, supra note 129, at 24 (discussing lava's destruction of homes, a church, and a park); Jim Borg & Ann Botticelli, \textit{With No Letup of Lava, Town Declared Disaster Area: Hawaiian Governor Seeks Emergency Assistance
historic church was saved when county workers disassembled it and removed it from the oncoming lava’s path.131 Pele is unpredictable, but after several years of continuous activity, the eruption shows no signs of abating. As the lava continues to flow inexorably forward, the likelihood increases that Pele’s comments on allocation of geothermal resources will be determinative and final. She will probably demonstrate a primal doctrine of preemption, giving new meaning to the familiar phrase, “not in my backyard.”132

The legislature’s effort to preempt county home rule in planning for geothermal development on the Big Island already has undermined citizen confidence in state planning.133 The destruction caused by lava flows has been the subject of extensive coverage in the national news media.134 Many Hawaii citizens will question the effectiveness of state efforts to provide for wise use of Hawaii’s resources and to guide future development in the Islands in light of events in the east rift of Kilauea. Such assessment does not bode well for statewide planning. Already many Big Island residents and citizens in other island communities seek to prevent implementation of comprehensive planning by state and county agencies.135

On the Big Island, it appears that the Hawaii legislature may have underestimated nature’s impact on statewide planning. Exempting geothermal subzones from environmental impact statement (EIS) requirements streamlined the permit process, but may have deprived the state, Hawaii County, and Hawaii citizens of useful information. Although such environmental review focuses on the effects of development on the environment rather than the effects of the environment on the proposed development, a thorough environmental study of the east rift would have been helpful in the planning process. The following section surveys the existing statutory provisions for informed decisionmaking.

132. The Hawaii Supreme Court included Aluli’s discussion of Pele and her domain in the court’s opinion deciding Dedman and Aluli’s free exercise claim. Dedman v. Board of Land and Nat. Resources, 740 P.2d 28, 31 (Haw. 1987), cert. denied, 485 U.S. 1020 (1988). The court cited the BLNR’s findings that geothermal drilling would be located away from sites “where tradition suggests Pele to reside” and “away from the volcanic phenomena associated with Pele.” Id. at 33.

133. See supra notes 116-18 and accompanying text.
134. See supra notes 129-31 and accompanying text.
135. See supra notes 116-18 and accompanying text.
C. Environmental Review

The Hawaii legislature enacted the Hawaii Environmental Impact Statement law (the HEIS) in 1979.136 The purpose of the HEIS is "to establish a system of environmental review which will ensure that environmental concerns are given appropriate consideration in decisionmaking along with economic and technical considerations."137 The legislature found that:

an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. . . . [This] is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.138

Applied to permits required by other Hawaii statutes and regulations, the HEIS effectively integrates environmental review with state and county planning processes.

The State Office of Environmental Quality Control (OEQC) facilitates public participation in the review process by informing the public of proposed actions. The OEQC publishes a bulletin containing determinations by agencies on whether proposals require environmental impact statements (EIS's), information regarding the availability of EIS's for public review, and the acceptance or nonacceptance of EIS's by appropriate authorities.139 The bulletin is sent to persons requesting it and furnished to public libraries.140

The HEIS provides that "[w]henever an action is subject to both the National Environmental Policy Act . . . and the requirements of this chapter, the office [OEQC] and agencies shall cooperate with federal agencies to the fullest extent possible to reduce duplication between federal and state requirements."141 Although there are areas of potential duplication, the HEIS differs from NEPA. Where section 102 of NEPA applies only to "major federal actions significantly affecting the quality of the human environment,"142 the HEIS expressly provides for environmental review of specific proposed private actions.143 In addition, unlike

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138. Id.
139. Id. §§ 343-2 to -3.
140. Id. § 343-3.
143. HAW. REV. STAT. ANN. § 343-5(a) (Michie 1991).
NEPA, the HEIS requires an EIS to disclose the proposed action's effects on economic and social welfare.144

The State Environmental Policy law (SEP), the companion statute to the HEIS, sets out the underlying policies of the HEIS in much the same way section 101 of NEPA declares national environmental policy. The SEP guidelines are more specific than the coordination policies set out in section 101 of NEPA, but the statutes are similar in that the policy statements lack the force of substantive mandates.145 In NEPA, section 101 states general policies that underlie the action-forcing information and disclosure provisions of section 102.146 The SEP guidelines set out specific state concerns that agencies are directed to consider insofar as practicable in the document preparation.147

The HEIS explicitly defines the types of private actions that require environmental impact statements. "Action" is defined by the HEIS as "any program or project to be initiated by any agency or applicant."148 "Applicant" means "any person who, pursuant to statute, ordinance, or rule, officially requests approval for a proposed action."149 Thus, an application for a building permit constitutes a request for approval of a proposed action.150 Actions expressly requiring an environmental assessment include any proposed action in Waikiki, any proposed action in any conservation district or shoreline area or within any historic site, any expansion or modification of existing helicopter facilities or construction of a new helicopter facility, and any proposed use of state or county lands or funds other than for the acquisition of unimproved real property.151 A proposed amendment to a county general plan that would result in zoning other than agriculture, conservation, or preservation is subject to the HEIS's environmental assessment requirement unless the county government proposes the amendment.152 Actions that have minimal effect on the environment are categorically exempt from EIS requirements pursuant to rules promulgated by the Environmental Council.153

144. Id. § 343-2 (defining "Environmental Impact Statement" as "an informational document . . . which discloses the . . . effects of a proposed action on the economic and social welfare of the community . . . ").
148. Id. § 343-2.
149. Id.
152. Id. § 343-5(a)(6).
153. Id. §§ 343-2, -6(a)(7). Specific exempt actions are set out in HAW. ADMIN. RULES. § 11-200-8 (1985). For instance, minor alterations in the condition of land, water, or vegetation are exempt. HAW. ADMIN. RULES § 11-200-8(a)(4) (1985). The Environmental Council is made up of 15 members appointed by the governor. Council members typically represent a cross section of Hawaii's major interest groups and professions. The Council serves as an appellate board for applicant appeals from agency nonacceptance of final EIS's, and Council
Where an agency or applicant proposes an action that is not categorically exempt from the EIS requirement, the agency or applicant must prepare an environmental assessment (EA) to determine whether the proposed action will have a significant impact.\textsuperscript{154} Significance criteria for environmental effects are set out by Environmental Council rules.\textsuperscript{155} Where the impact is significant, the agency or applicant must prepare an EIS.\textsuperscript{156} If the reviewing agency determines that the impact of the proposed action is not significant, the agency approving the proposed action must file a Negative Declaration based on the EA and stating that an EIS is not required.\textsuperscript{157}

The HEIS provides for public review and comment. The OEQC makes each draft EIS available for public comment for a period of forty-five days.\textsuperscript{158} The agency or applicant proposing the action must respond in writing to comments received during the review process, and must prepare a final EIS.\textsuperscript{159} Where a state agency initiates the action, or where an action proposes the use of state lands or funds, approval of the final EIS is granted by the governor's authorized representative.\textsuperscript{160} Where an action proposes the use of county land or funds, approval of the final EIS is granted by the authorized representative of that county's mayor.\textsuperscript{161} Where a private applicant initiates the proposed action requiring state or county agency approval, the agency must provide the applicant with specific findings or reasons for accepting or rejecting the final EIS.\textsuperscript{162} If the agency rejects a private applicant's final EIS, the applicant may appeal to the Environmental Council.\textsuperscript{163}

The HEIS also sets time limits for judicial review of agency compliance with its provisions.\textsuperscript{164} Any judicial proceeding that challenges the lack of an EA must be brought within 120 days after the proposed action is started.\textsuperscript{165} Any judicial proceeding that challenges a Negative Declaration must be commenced within sixty days after the OEQC provides notice to the public that no EIS is required.\textsuperscript{166} Finally, any judicial pro-

decisions on such appeals are binding on the agencies. Callies, supra note 16, at 127.
\begin{thebibliography}{9}
\bibitem{159} Id.
\bibitem{160} Id. § 343-5(b).
\bibitem{161} Id.
\bibitem{162} Id. § 343-5(c).
\bibitem{163} Id.
\bibitem{164} Id. § 343-7.
\bibitem{165} Id. § 343-7(a).
\bibitem{166} Id. § 343-7(b).
\end{thebibliography}
ceeding challenging the acceptance of a final EIS must be brought within sixty days of its acceptance.167

D. Coastal Zone Management

Shoreline management in Hawaii is governed by both federal and state law. Congress enacted the federal Coastal Zone Management Act (CZMA) in 1972.168 The CZMA contains two major incentives for coastal states to develop their own coastal zone management programs: states doing so receive federal funds, and federal agencies must function "to the maximum extent practicable" in ways that are consistent with state programs.169

The Hawaii legislature enacted the Hawaii Coastal Zone Management Act (the HCZMA) to supplement the HEIS's provisions governing land use within shoreline areas. The HCZMA, enacted in 1975, provides substantive mandates for protecting, preserving, and restoring natural resources and historic sites.170 The statute provides policies for state and county agencies to follow in planning decisions.171 Even in the state with the most comprehensive land use regulation system in the country, the advantages of this law are evident. With passage of the HCZMA, the state receives federal subsidies for coastal protection, and the CZMA's consistency provisions allow state officials to review certain proposed federal actions.172 This comment will focus not on consistency of federal and state programs, but rather on the HCZMA's impact on state and county agency decisions involving development in Hawaii's coastal zone.

I. Protect, Preserve, and Restore

Through a list of policies and objectives, the HCZMA carries over the purposes of the CZMA, which are to prevent coastal development from destroying "marine resources, wildlife, open space, and other important ecological, cultural, historic, and esthetic values."173 Listed among its objectives, the HCZMA provides for public access to recreational resources, and requires that the State protect, preserve, and, where

167. Id. § 343-7(c).
172. CALLIES, supra note 16, at 87-88, 99-100. Federal activities and projects must be consistent "to the maximum extent practicable" with mandatory policies of the Hawaii management program, unless a federal law governing the federal agency's activities prohibits such consistency. Id. at 100.
desirable, restore historic, scenic, and open space resources.\textsuperscript{174} The HCZMA requires protection of valuable coastal ecosystems, and mandates that the state provide public or private facilities and improvements important to the state's economy in suitable locations.\textsuperscript{175} The HCZMA also demands reduction of hazards to life and property from natural occurrences, and requires a review process for effective coastal resource management.\textsuperscript{176} In addition to this list of objectives, the HCZMA details specific policies for implementing the objectives.\textsuperscript{177}

The HCZMA establishes the duties of the lead agency, the Office of State Planning (the OSP).\textsuperscript{178} Those duties include: preparing guidelines to clarify the objectives and policies of the HCZMA;\textsuperscript{179} managing all federal funds allocated for Hawaii's coastal zone management program;\textsuperscript{180} and reviewing consistency with federal programs, permits, licenses, and proposals, and state and county agency compliance with HCZMA policies.\textsuperscript{181} Among the most critical areas of concern is compliance with provisions for special management areas.

\section{2. Special Management Areas}

The Hawaii legislature, recognizing the need for controls on shoreline area development, authorized the creation of special management areas (SMA's).\textsuperscript{182} Because visitors and residents alike find Hawaii's beaches and coastlines most attractive, development tends to be concentrated in areas subject to SMA designation. In apparent response to this phenomenon, the legislature stated that "[n]o development shall be allowed in any county within the special management area without obtaining a permit in accordance with this part."\textsuperscript{183}

County governments designate SMA's.\textsuperscript{184} In Kauai, Maui, and Hawaii counties, maps designating SMA's within the counties are filed with the respective county's planning commission.\textsuperscript{185} Each county's planning commission reviews and decides on permit applications for development in SMA's.\textsuperscript{186} In the City and County of Honolulu, the county Depart-

\begin{footnotes}
\footnote{174. HAW. REV. STAT. ANN. § 205A-2(b) (Michie 1988).}
\footnote{175. Id.}
\footnote{176. Id.}
\footnote{177. Id. § 205A-2(c).}
\footnote{178. Id. §§ 205A-1, -3 (Michie Supp. 1991).}
\footnote{179. See id. § 205A-3(4).}
\footnote{180. Id. § 205A-3(3), (5).}
\footnote{181. Id. § 205A-3.}
\footnote{182. Id. § 205A-21 (Michie 1988).}
\footnote{183. Id. § 205A-28.}
\footnote{184. HAW. REV. STAT. ANN. §§ 205A-22 to -23 (Michie 1988 & Supp. 1991).}
\footnote{185. See id. § 215A-23(a) (Michie 1988).}
\footnote{186. HAW. REV. STAT. ANN. §§ 205A-22, -29, -30 (Michie 1988 & Supp. 1991); see also CALLIES, supra note 16, at 93-95 (discussing the different permit application procedures of each county).}
\end{footnotes}
ment of Land Utilization is responsible for the administration of SMA's, and the city council decides on SMA permit applications.¹⁸⁷

The HCZMA specifies the types of SMA permits available to developers, as well as the types of use that are categorically exempt from the permit requirement. There are three types of SMA permits: (1) an emergency permit, granted to prevent substantial physical harm to persons or property or allow reconstruction of structures damaged by natural hazards; (2) a minor permit, authorizing development valued at less than $125,000 that has no substantial adverse environmental impact; and (3) a use permit, authorizing development valued in excess of $125,000 or that may have substantial adverse environmental effects, including potential cumulative effects.¹⁸⁸ County permitting authorities must consider the effect of the proposed development on beach access, and must minimize adverse environmental impacts.¹⁸⁹ Certain uses are exempt from SMA permits because those uses do not constitute developments. Exempt uses include construction of a single family dwelling; maintenance of existing roads, structures, and utility facilities; transfer of title to land; and subdivision of land into lots larger than twenty acres.¹⁹⁰

In 1986, the Hawai'i legislature amended the HCZMA to include requirements for shoreline setbacks in SMA's.¹⁹¹ As mandated by the SMA amendments, the Board of Land and Natural Resources must adopt rules governing procedures for determining shorelines.¹⁹² A shoreline is defined as the upper reaches of the highest seasonal wash of waves, as evidenced by the edge of vegetation growth or debris left by the waves.¹⁹³ Setbacks incorporated in SMA permits must be between twenty and forty feet from the shoreline.¹⁹⁴ Developments subject to SMA permits may not encroach seaward from these setback lines.¹⁹⁵

The OSP reviews county permitting authorities' implementations of the HCZMA provisions for SMA's.¹⁹⁶ The OSP also keeps maps of SMA boundaries that include updated boundary amendments.¹⁹⁷

¹⁸⁷. CALLIES, supra note 16, at 93.
¹⁸⁹. Id. §§ 205A-22, -26.
¹⁹². Id. § 205A-42 (Michie 1988).
¹⁹³. HAW. REV. STAT. ANN. §§ 205A-1, -42 (Michie 1988 & Supp. 1990). Shorelines are designated by normal wave action, not the wash of extraordinary storm waves or seismic waves, and are subject to annual review and redesignation. Id.
¹⁹⁵. Id. § 205A-44(b). Some variances are allowed. See id. § 205A-46
¹⁹⁷. Id. § 205A-23(b) (Michie 1988).
3. **The HCZMA's Express Cause of Action**

In addition to provisions for OSP review of SMA programs, the HCZMA contains a provision that allows enforcement of an express cause of action. Under the HCZMA, any person or agency may bring a civil action against any agency that has not complied with objectives, policies, guidelines, or provisions of the HCZMA, or that has failed to perform a duty required by the statute. This is an express cause of action for failure to protect and preserve historic, scenic, and open space resources within Hawaii's coastal zone.

**E. Administrative Hearings**

In the counties of Maui, Kauai, and Hawaii, the county planning commissions serve as the permitting authorities, and they are subject to provisions of the Hawaii Administrative Procedure Act (HAPA). In those counties, HAPA provides administrative remedies for noncompliance with the HCZMA. One of those remedies is the contested case hearing. A contested case is a "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." Notice of a contested case hearing must be provided to all parties at least fifteen days before the hearing by certified or registered mail. In a contested case hearing, oral and documentary evidence is received, all parties have the right to such cross-examination as may be required for full and true disclosure of reliable probative facts, all parties have the right to present rebuttal evidence, the party initiating the contested case carries the burden of production and the burden of persuasion, and proof is by a preponderance of the evidence.

HAPA makes judicial review of contested cases available to "[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief." The court may reverse or modify the agency's decision if the "substantial rights of the petitioners may have been prejudiced." Such prejudice

198. *Id.* § 205A-6.
199. *Id.* §§ 205A-2, -6.
200. Oahu (Honolulu County) uses a different approach. *See supra* note 187 and accompanying text.
202. *Id.*
203. *Id.* § 91-9 (Michie 1988).
204. *Id.* § 91-1(5).
205. *Id.* § 91-9.5(a).
206. *Id.* § 91-10.
207. *Id.* § 91-14(a).
208. *Id.* § 91-14(g).
occurs when the decision violates constitutional or statutory provisions, exceeds the statutory authority or jurisdiction of the agency, is made upon unlawful procedure, or is affected by other error of law.209 Prejudice also occurs when the agency's decision is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; is arbitrary or capricious; or is characterized by abuse of discretion, or a clearly unwarranted exercise of discretion.210

The standard of review mandated by HAPA provides several yardsticks for Hawaii's courts to use in reviewing agency decisions. The majority of claims decided by Hawaii's courts under the HCZMA, the Land Use Law, the Hawaii State Plan, and the HEIS have been appeals from administrative hearings of the county planning commissions or state agencies.211 In an important 1989 decision, the Hawaii Supreme Court held that the Honolulu City Council is not an agency subject to HAPA, and that due process does not require a contested case hearing prior to the grant of an SMA permit by the city council.212 Section II below reviews significant holdings of the Hawaii Supreme Court interpreting provisions of Hawaii's statutory scheme for planning and regulation. As will be discussed, these decisions are important because they determine the manner of citizen participation in Hawaii resource allocation decisions.

II
DECISIONAL LAW

Hawaii's statutes explicitly provide for citizen participation in government planning. One of the HCZMA's purposes is to "[c]ommunicate the potential short[-] and long-term impacts of proposed significant coastal developments early in their life-cycle and in terms understandable to the general public to facilitate public participation in the planning and review process."213 In the State Environmental Policy (SEP), the legislature declared its environmental policy to include "a commitment on the part of each person to protect and enhance Hawaii’s environment and reduce the drain on nonrenewable resources."214 The Hawaii State Plan seeks to "[e]nsure equal opportunities for individual participation in society."215 Most of the Hawaii Supreme Court decisions discussed below involve claims brought by individuals or citizens' groups seeking to par-

209. Id. § 91-14(g)(1)-(4).
210. Id. § 91-14(g)(5)-(6).
211. See infra part II.
214. Id. § 344-3(2)(D) (Michie 1991).
215. Id. § 226-24(b)(4) (Michie 1988).
participate in planning decisions by applying statutory provisions to prevent or to invalidate permits for proposed developments.

A. Standing

Current Hawaii doctrine grants citizens broad standing rights in permit cases, generally parallel to federal standing in environmental cases. In a series of cases, the Hawaii Supreme Court has explicitly defined state standing law. Adjoining property owners have an interest in the zoning for a proposed highrise building. Allegations of individualized harm brought by a welfare and environmental advocacy group were sufficient to challenge a building permit. The court has also declared that a citizens' group was an aggrieved person under HAPA and that the group members' recreational use of agricultural lands, combined with "the important fact that some of [the group's] members live in the area adjoining the reclassified properties," established the group as a party personally and adversely affected by proposed urbanization. In a later case, the court maintained that this same citizens' group had a sufficient stake to challenge Land Use Commission boundary reclassifications of approximately 66,670 acres of land even though no members owned adjoining lands. Finally, the court has decided that to appeal an administrative hearing, an aggrieved person must have participated as an adversary in the hearing, but need not have formally intervened. Based on these holdings, the court has not shown any inclination to restrict citizen standing in the planning and environmental arenas.

B. Environmental Review Under the Hawaii Environmental Impact Statement Law

In 1978, the court was confronted for the first time with a case challenging the adequacy of an EIS prepared pursuant to the HEIS. In Life of the Land v. Ariyoshi, the court analogized to federal construction of NEPA in arriving at a deferential interpretation of the EIS's validity. In this case, a citizens' group challenged the adequacy of an EIS prepared for the construction of a system that would carry water from

216. Life of the Land v. Land Use Comm'n, 623 P.2d 431, 439 (Haw. 1981) ("Granting textual dissimilarities, the Hawaii decisions have paralleled, in substance, the evolution of federal doctrine.").
223. Id. at 1120-21.
central Maui to a resort development on Maui's southeast coast. The court found that the EIS was not rendered facially inadequate by its lack of a quantified cost-benefit analysis. Rather, the EIS need only be compiled in good faith and contain sufficient information to enable the permitting authority to make a reasoned decision, balancing the environmental risks against the project's benefits. The court declined to evaluate the executive branch's interpretation of the public interest in water allocation on Maui.

Two years later, in Molokai Homesteaders Cooperative Ass'n v. Cobb, another case involving a water transmission project, the court distinguished the HEIS from NEPA. A group of Molokai homesteaders challenged an agreement between the Board of Land and Natural Resources and a private corporation for use of water transmission lines, alleging, inter alia, that prior to the agreement, the Board failed to adopt guidelines in conformity with SEP, and that the agreement required an EIS pursuant to the HEIS. The court looked at both the HEIS and SEP and held that neither applied retroactively.

The court interpreted SEP as a nonmandatory declaration of concerns and goals, and interpreted its guidelines as a foundation for further legislation and for developing and evaluating agency programs. The court interpreted the absence of sanctions for failure to observe the guidelines as an indication that the guidelines were merely hortatory. The court cited legislative history in support of its conclusion that SEP merely provides a policy foundation for government programs.

In interpreting the HEIS, the court found it to be wider in scope than NEPA because the HEIS covers specified private actions. The court stated that "[t]he Hawaii law, 'by particularizing the subjects of inquiry, calls for a broader range of information than NEPA' . . . [N]evertheless, the prescribed role of the EIS in the state environmental protection scheme is informational." The court further stated that if the agreement had not predated the statute, the court would have inter-

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224. *Id.* at 1117.
225. *Id.* at 1121.
226. *Id.* (citing County of Suffolk v. Secretary of Interior, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978)).
227. *Id.* at 1122.
229. *Id.* at 1141.
230. *Id.* at 1140-42.
231. *Id.* at 1141.
232. *Id.*
233. *Id.*
234. *Id.* at 1143.
235. *Id.* (quoting *Life of the Land* v. *Ariyoshi*, 577 P.2d 1116, 1121 (Haw. 1978)).
interpreted the HEIS as mandating an EIS for the Molokai water transmission.236

Despite listing the circumstances warranting an EIS, the court has deferred to agency interpretation.237 In McGlone v. Inaba, the court held that a BLNR finding was not clearly erroneous.238 A citizens' group challenged a BLNR finding that proposed underground utility lines crossing a wildlife sanctuary to reach a proposed single family dwelling would have no significant effect on the environment.239 The citizens' group alleged that the wildlife sanctuary, a lagoon on conservation land, was a habitat for Hawaiian stilt, a species that the BLNR acknowledged was in severe decline.240 The BLNR found, however, that the decline of the stilt had nothing to do with the proposed activity, that the stilt had never nested at the lagoon, and that it was doubtful that the birds could be induced to nest there.241 The court on appeal held that the BLNR's determination was not clearly erroneous in view of the record,242 and that there was ample evidence in the record to support the BLNR's finding that installing underground utilities would have a minimal and temporary effect on the sanctuary.243

Although installation of utility lines for a single family dwelling is categorically exempt from HEIS requirements, this exemption does not apply under Environmental Council rules "when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment."244 The court in Inaba was unable to determine from the record whether the BLNR considered the wildlife

236. Id. at 1144 ("The use of a government pipeline, the implicit commitment of prime natural resources to a particular purpose, perhaps irrevocably, and the substantial social and economic consequences of the governmental approval of the proposal would dictate the preparation of an EIS.").
237. The court declared:

It is a well established rule of statutory construction that, where an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous.

Waikiki Resort Hotel, Inc. v. City and County of Honolulu, 624 P.2d 1353, 1368 (Haw. 1981); see also Maha'ulepu v. Land Use Comm'n, 790 P.2d 906, 908, 910 (Haw. 1990) (deference given to administrative agencies acting in the areas of their expertise and interpreting their own rules).
239. Id. at 160.
240. Id. at 166.
241. Id.
242. Id. at 165.
243. Id.
244. Id. at 165 (quoting EIS Regulation 1:33(b) promulgated by the Environmental Council pursuant to Haw. Rev. Stat. Ann. § 343-6 (Michie 1991)).
sanctuary to be particularly sensitive.\textsuperscript{245} Despite the record’s deficiency, the court deferred to the agency’s decision.\textsuperscript{246}

One year later, however, in\textit{Pearl Ridge Estates Community Ass’n v. Lear Siegler, Inc.}, the court found error because the Land Use Commission (the LUC) failed to complete an environmental assessment pursuant to the HEIS in a boundary change, involving 8.4 acres on a ridge in Central Oahu, from a conservation classification to an urban classification.\textsuperscript{247} A community association challenged the boundary amendment, and the court held that an environmental assessment (EA) must be completed before the LUC can reclassify land from conservation to other uses.\textsuperscript{248} The court pointed out that the HEIS requires an EA for actions that “[p]ropose any use within any land classified as conservation district by the state land use commission under chapter 205.”\textsuperscript{249} The court reasoned that excluding boundary reclassifications from EA requirements would provide incentive for an applicant to seek a boundary change for a specific use, rather than apply for the same use on conservation land and be bound by both the HEIS and the BLNR’s restrictive use regulations on conservation land.\textsuperscript{250} In view of the policies set out in SEP, the court interpreted legislative intent as contrary to allowing this type of result.\textsuperscript{251}

The concurring opinion agreed that the boundary change was invalid, but not because it failed to comply with the HEIS. In Justice Nakamura’s view, the LUC failed to observe its mandate under the Land Use Law that “‘[i]nsofar as practicable conservation lands shall not be reclassified as urban lands.’”\textsuperscript{252} The concurrence noted that the record of the LUC’s decision established the applicant’s acknowledgement of the practicability of retaining the conservation classification, and concluded that “[a]n obligation to engage in an environmental assessment pales in comparison with these stringent preconditions for the approval of a boundary amendment.”\textsuperscript{253} Justice Nakamura cited the major United States Supreme Court decisions interpreting NEPA, and he cited the Hawaii court’s interpretation of the HEIS in the\textit{Molokai Homesteaders} case to support the proposition that the HEIS guarantees that an agency will consider environmental concerns before making a deci-

\textsuperscript{245} Id.
\textsuperscript{246} Id. (“[W]e do not find clearly erroneous the BLNR’s conclusion that the proposed construction would probably not have a significant effect on the sanctuary.”).
\textsuperscript{247} 648 P.2d 702, 704 (Haw. 1982).
\textsuperscript{248} Id.
\textsuperscript{249} Id. at 703 (quoting HAW. REV. STAT. § 343-5(a)(2) (Michie 1991)).
\textsuperscript{250} Id. at 704.
\textsuperscript{251} Id.
\textsuperscript{252} Id. at 706 n.5 (Nakamura, J., concurring) (quoting HAW. REV. STAT. § 205-16.1(7) (1976) (repealed 1985)).
\textsuperscript{253} Id. at 708.
In contrast to the HEIS, the court has held that provisions of the HCZMA are substantive, and therefore require that the agency hold a contested case hearing to allow aggrieved parties to participate in reviewing the permits proposed to county planning commissions.

1. Contested Cases

"Contested cases" are defined with reference to the Hawaii Administrative Procedures Act (HAPA). The Hawaii Supreme Court has held that a public hearing pursuant to public notice is a contested case within the meaning of HAPA. An SMA permit application proceeding is also a contested case within the meaning of HAPA. In two appeals from planning commission grants of SMA permits, the court has ad-

254. Id. (citing Molokai Homesteaders Coop. Ass'n v. Cobb, 629 P.2d 1134, 1143 (Haw. 1981)); see also Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 228 (1980) (holding that HUD did consider the environmental consequences of its decision to redesignate the proposed site and that NEPA requires no more); Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976) (when government agency is evaluating different courses of action, the environmental consequences of all pending proposals must be considered together); cf. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (NEPA's "mandate to the agencies is essentially procedural").


256. HAW. REV. STAT. ANN. § 343-5(b)-(c) (Michie 1991).

257. Id.; see also supra text accompanying notes 216-21.

258. See Molokai Homesteaders, 629 P.2d at 1144 ("[G]overnmental approval of the proposal would dictate the preparation of an EIS.").


dressed the avenues available to aggrieved parties for the exercise of their rights.

2. **Substantive Mandates**

In a landmark 1982 opinion, *Mahuiki v. Kauai Planning Commission*, the court held that CZMA guidelines to preserve and protect coastal resources were "paramount in any determination involving the use of land in a special management area."261 The court invalidated the commission's approval of the application for an SMA use permit.262 In this case, a California limited partnership sought an SMA use permit to build a condominium at Haena, Kauai. The Kauai Planning Commission granted the permit despite the commissioners' expressed misgivings as to the wisdom of allowing such development in Haena.263 The record showed that the commissioners were reluctant to refuse the permit because the property had been upzoned previously and refusing the permit would amount to a downzoning.264

The court ruled that a letter, timely sent to the commission by adjacent landowners opposing the permit, was sufficient to constitute adversary participation in a contested case.265 The court found that the planning commission had failed to establish that the proposed development would meet HCZMA guidelines — that it would have no substantial environmental or ecological effect, or that concern for public health and safety outweighed these effects.266 In invalidating the commission's approval of the SMA use permit application, the court scolded the commissioners, stating that "[w]e discover . . . serious misgivings . . . about the proposal's compatibility with a policy to preserve and protect the environment and resources of the coastal zone. Furthermore, their mis-

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261. 654 P.2d 874, 882-83 (Haw. 1982).
262. *Id.* at 883. The court has also held that the agency may not delegate to an SMA use permit applicant the agency's duty to determine, before granting the use permit, whether the proposed development will have an adverse impact. *See* Alaloa v. Planning Comm'n, 705 P.2d 1042, 1044 (Haw. 1985).
263. *See* Mahuiki, 654 P.2d at 877 n.3 (statement of the Planning Director) ("The proposed development consists of some alterations to existing land forms and vegetation, and, in our opinion, due to the density of use will cause some impact to the scenic and environmental character of the area."). Haena is a pristine area of deep valleys, sheer mountain ridges, and long white sand beaches, and has been used as a location in numerous films including the Bali Hai scenes in *South Pacific* and the closing scene in *Body Heat*.
264. *Id.* at 882 n.13. The statement of one commissioner read in part:

Way back we probably had intelligent choices but the choice was already made when it was upzoned to R-4. For the future, however, when we have cases where there is a definite error, if the zoning is wrong, if it takes Commission initiative to require a change, I think we should have the guts to do it.

*Id.*
265. *Id.* at 880.
266. *Id.* at 878.
apprehensions regarding the relationship of county zoning ordinances and the CZMA are patent."\(^{267}\)

3. Substantial Rights

In a second case decided in the same year, *Chang v. Planning Commission*, the court upheld the grant of a use permit where commissioners did not express misgivings on the record and where the aggrieved person failed to show prejudice to his substantial rights.\(^{268}\) In *Chang*, the court held that despite the Maui Planning Commission's violation of its own procedural rules in granting an SMA permit, the commission's decision could not be reversed because the aggrieved person failed to allege or otherwise establish that the procedural violation prejudiced his substantial rights.\(^ {269}\) *Chang* involved a proposed resort development in Makena, Maui. An adjoining landowner received timely notice of a special management hearing by certified mail, met with representatives of the Maui Planning Department and Corporation Counsel, and established himself as an aggrieved person opposing the grant of the SMA use permit.\(^ {270}\)

After attempting to review HAPA procedures for a contested case hearing at the meeting, the county officials advised the aggrieved person to obtain counsel, but he chose to represent himself.\(^ {271}\) At the hearing, the complainant asked few questions, and only of the developer's representative.\(^ {272}\) The planning commission later approved the permit application in closed deliberations, in violation of its own rules requiring that official action be taken at a meeting open to the public.\(^ {273}\)

The aggrieved person was represented by counsel on appeal, but his arguments were entirely procedural.\(^ {274}\) Nothing on the hearing's record showed that the planning commission had not properly considered SMA guidelines in granting the permit.\(^ {275}\) The *Chang* court acknowledged that the planning commission had violated a Hawaii statutory law by failing to state in its published notice of the hearing that any party could be represented by counsel, but noted that the aggrieved person had been informed of this right by county officials.\(^ {276}\) The court acknowledged that the planning commission had contravened the Maui County Charter and its own rules by holding closed deliberations, but found that, in the absence of any allegation that some impropriety during the deliberations

\(^{267}\) Id. at 882.
\(^{268}\) 643 P.2d 55 (Haw. 1982).
\(^{269}\) Id. at 64-65.
\(^{270}\) Id. at 59.
\(^{271}\) Id.
\(^{272}\) Id.
\(^{273}\) Id. at 63.
\(^{274}\) See id. at 58.
\(^{275}\) Id. at 65.
\(^{276}\) Id. at 62.
contributed to the decision or prejudiced the substantial rights of the aggrieved person, the procedural violations were not sufficient to reverse the planning commission's decision.277

The Mahuiki and Chang holdings on the HCZMA's substantive mandates and aggrieved persons' substantial rights establish that although Hawaii's coastal environment must be protected, any aggrieved persons seeking to challenge agency decisions must show prejudice to their right to enjoy an SMA free from adverse impacts. Unlawful procedure must be prejudicial to be redressed. These holdings further demonstrate the significance of the agency's record and the importance of establishing claims at the required hearing.

D. The HCZMA's Express Cause of Action

The HCZMA provides any person or agency an express civil cause of action against any agency that fails to comply with objectives, policies, and guidelines for SMAs, or that fails to perform a required duty.278 This express cause of action further declares that none of its provisions shall restrict any person's right to assert other claims or actions.279 The court interpreted these provisions in two recent decisions.

1. Timing

In 1987, a citizens' group challenged the grant of an SMA minor use permit for consolidation of two lots, installation of utility lines, and resubdivision into four residential lots.280 The citizens' group in Kona Old Hawaiian Trails Group v. Lyman sought to prevent the loss of public access and to preserve an ancient Hawaiian trail across shoreline properties on the Kona coast. The group alleged that Hawaii County procedures did not provide for a hearing at which the group could present its opposition to the permit.281 The court held that judicial intervention in the permit granting procedure pursuant to the HCZMA's express cause of action "should not have preceded the resolution by the Board of Appeals of the question of whether the planning director's action in issuing the minor permit was proper."282

The court first held that the question was not mooted simply because work under the "grubbing permit" was complete.283 The court noted that one question was whether other work remained to be com-

277. Id. at 64-65.
278. HAW. REV. STAT. ANN. § 205A-6(a) (Michie 1988).
279. Id. § 205A-6(e).
281. Id. at 167.
282. Id. at 169.
283. Id. at 165.
pleted under the permit. Even if all the permitted work was complete, the court ruled that the claim would still retain vitality.\textsuperscript{284}

The court found that the Hawaii County Charter allowed administrative review of the planning commission’s permitting decision, and provided for a hearing pursuant to HAPA.\textsuperscript{285} Because the citizens’ group had not participated in any hearing, the court found the claim untimely under the HCZMA’s express cause of action. The court stated that “we are reluctant to read the language literally and say Kona Old’s purported reliance on HRS § 205A-6 and allegations of the planning director’s breach of the CZMA were sufficient to vest the circuit court with authority to decide the controversy.”\textsuperscript{286} The court noted that the cause of action provision does not mandate judicial review in a strict sense, but seemingly describes a claim originally cognizable by the courts.\textsuperscript{287} The court also noted that the granting of an SMA minor permit was specially committed to the Hawaii County Planning Department. The court briefly analyzed the judicial doctrines of primary jurisdiction and exhaustion of administrative remedies, and held that the claim before the court was untimely because the claim preceded resolution by the Hawaii County Board of Appeals.\textsuperscript{288}

\section*{2. Nonpreclusion}

Despite the court’s holding in \textit{Lyman} that the HCZMA express cause of action provision was inapplicable where untimely, the judiciary may nevertheless intervene in certain circumstances. Exceptions to the exhaustion doctrine include futility of administrative remedies, undue agency delay, agency bias, and ultra vires action by the agency.\textsuperscript{289} The court has yet to uphold a claim brought under this section of the HCZMA, however.

In \textit{Akau v. Olohana Corp.}, the court ruled that the HCZMA’s statutory scheme did not preclude a private suit to secure access to the ocean.\textsuperscript{290} A citizen filed a class action suit seeking recognition of a right to use ancient trails crossing privately owned land on the Big Island to reach fishing grounds. The claim rested on various theories of common law easement.

\begin{footnotes}
\item[284] Id. ("‘[W]hen the question involved affects the public interest, and it is likely in the nature of things that similar questions arising in the future would likewise become moot before a needed authoritative determination by an appellate court can be made,’ . . . an exception to the rule is justified.") (quoting Johnston v. Ing, 441 P.2d 138, 140 (Haw. 1968)).
\item[285] Id. at 167-68.
\item[286] Id. at 168.
\item[287] Id. at 169.
\item[288] Id. at 168-69.
\item[289] See BERNAIRD SCHWARTZ, ADMINISTRATIVE LAW §§ 8.31, 10.25 (2d ed. 1984).
\item[290] 652 P.2d 1130, 1136 (Haw. 1982).
\end{footnotes}
The defendant landowner argued that the Hawaii legislature intended the HCZMA's statutory scheme to secure beach access, and that therefore the HCZMA precluded private suits to enforce public access. The court disposed of this argument abruptly. Quoting language of the HCZMA, the court noted that, "[n]othing in this section shall restrict any right that any person may have to assert any other claim or bring any other action." \(^{291}\)

3. Notice and Comment Hearings

In 1989, the court decided the landmark case of *Sandy Beach Defense Fund v. City Council*, another suit based on the HCZMA's express cause of action. \(^{292}\) The plaintiff charged that the HCZMA required the Honolulu City Council to conduct contested case hearings pursuant to HAPA before granting an SMA permit. The plaintiff also alleged that the city council's permitting procedures violated constitutional due process and equal protection rights. The *Sandy Beach* court addressed these issues of statewide concern, but the court's resolution of these issues created additional problematic questions.

The claims in *Sandy Beach* arose from the granting of an SMA use permit. \(^{293}\) This proposed development of approximately 200 single family homes shook Hawaii's scheme for controlled growth and protection of shoreline resources to its foundations. In the end, it touched off a controversy that likely will have both legal and political ramifications for some time to come in Hawaii. \(^{294}\)

It is worth noting at this point that all but one of the cases discussed thus far were decided by an undivided court; the single exception included a concurring opinion. In the two cases arising from the proposed development near Sandy Beach, only Associate Justice Edward H. Nakamura dissented, vigorously and at length. \(^{295}\)

The controversy in *Sandy Beach* and the later *Kaiser Hawaii Kai Development Co. v. City and County of Honolulu* \(^{296}\) involved a proposal

\(^{291}\)  *Id.* at 1135 (quoting HAW. REV. STAT. § 205A-6(e) (Michie 1988)). The court noted that "the State in its brief explains that it welcomes private actions to complement the State's activities in securing public beach access because the State lacks the resources to pursue vigorously all possible claims." *Id.* at 1136.

\(^{292}\)  773 P.2d 250 (Haw. 1989).

\(^{293}\)  *Id.* at 253.

\(^{294}\)  See *Hong*, *supra* note 17, at 530-31 (discussing impact of *Sandy Beach* on administration of the HCZMA and on the initiative process).

\(^{295}\)  *Id.* at 263 (Nakamura, J., dissenting). Justice Nakamura was the author of numerous opinions cited above, including *Mahuiki* and *Molokai Homesteaders*. His dissent in *Sandy Beach* and *Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu*, 777 P.2d 244 (Haw. 1989) mark a significant shift in Hawaii's environmental jurisprudence, as evidenced by the 1990 Intermediate Court of Appeals opinion in the Medeiros case. See *infra* text accompanying note 389.

\(^{296}\)  777 P.2d 244 (Haw. 1989).
to develop land near the eastern tip of Oahu, across the highway from Sandy Beach Park. The Kaiser Hawaii Kai Development Company had leased the land, which had been zoned residential since 1954, from the Bishop Estate. Because part of the parcel was within an SMA, Kaiser needed an SMA use permit to carry out its plans.²⁹⁷

The city council published a notice that public hearings would be held on Kaiser’s application for an SMA use permit.²⁹⁸ Although the notice stated that speakers would be limited to three minutes, at the actual hearings many persons were allowed to testify at length.²⁹⁹ The claims before the court in Sandy Beach arose because the city council did not allow an owner of property in proximity to the proposed development and other persons who alleged that they were aggrieved to exercise procedural rights set out in HAPA for contested case hearings.³⁰⁰

a. The HCZMA Claim

The court first decided whether the HCZMA required contested case hearings. The HCZMA required that “[t]he authority in each county, upon consultation with the central coordinating agency, shall establish and may amend pursuant to chapter 91 [HAPA], by rule or regulation the special management area use permit application procedures. . . .”³⁰¹ Sandy Beach Defense Fund argued that although the city council did not fit HAPA’s definition of an agency, the HCZMA nonetheless required the Council to conduct contested case hearings when granting an SMA permit, because the Council was performing a nonlegislative function. The court examined the manner in which the city council had adopted its procedures for processing SMA permit applications, and found that the Council had complied with HAPA’s rulemaking provisions.³⁰² Thus, the Council had complied with the “pursuant to chapter 91 [HAPA]” language of the HCZMA.

The court then considered whether HAPA required the Council to conduct contested case hearings when it performed the nonlegislative function of administering the HCZMA. The court relied on legislative history that supported exempting the city council from HAPA’s procedural requirements.³⁰³ Accordingly, the court held that the Council was

²⁹⁷.  Id. at 245; see also Sandy Beach, 773 P.2d at 253.
²⁹⁸.  777 P.2d at 245-46.
²⁹⁹.  773 P.2d at 254.
³⁰⁰.  Id. at 255.
³⁰¹.  Id. at 259 (emphasis in original) (quoting HAW. REV. STAT. ANN. § 205A-29(a) (Michie 1988)). The Hawaii legislature has amended this provision since Sandy Beach, substituting “shall adopt rules under chapter 91 setting” for “shall establish and may amend pursuant to chapter 91, by rule or regulation.” HAW. REV. STAT. ANN. § 205A-29(a) (Michie 1991).
³⁰².  Id. at 259-60.
³⁰³.  Id. at 256.
“not subject to the procedural requirements of HAPA when acting in either a legislative or non-legislative capacity.”\textsuperscript{304}

The court also examined the HCZMA’s legislative history to determine whether the legislature intended that contested case hearings be conducted during the SMA permit process. The court found that the hearings should be “informational in nature in order to permit members of the public to present their views and relevant data as an aid to the administrative decision on the particular application as well as the long-term planning policy for the entire coastal area.”\textsuperscript{305} The court distinguished the \textit{Chang}\textsuperscript{306} and \textit{Mahuiki}\textsuperscript{307} cases where it recognized that hearings before the planning commissions were contested cases, pointing out that those cases involved agency hearings.\textsuperscript{308} The court found that both the HCZMA’s language and its legislative history supported the court’s ruling that the statute “allowed each authority to decide for itself the nature of the hearings it would conduct in reviewing SMA use permit applications.”\textsuperscript{309} The court therefore rejected the HCZMA claim.

\textit{b. Equal Protection}

The court encountered little difficulty in disposing of Sandy Beach Defense Fund’s equal protection claim. The issue arose because contested case hearings are required in other Hawaii counties (where the planning commissions administer the HCZMA) but not in the City and County of Honolulu. Although the court did not expressly rule that no fundamental right or suspect classification was implicated in this appeal, the court applied the rational basis standard of review.\textsuperscript{310}

In applying the rational basis standard, the court relied on a 1985 challenge to a statutory classification. In that case, the court had found that a difference in the Hawaii government’s treatment of citizens is lawful where it is based “upon some ground of difference having a fair and substantial relation to the object of the legislation, and is therefore not arbitrary and capricious.”\textsuperscript{311} The court found that each county has to evaluate its own resources and priorities in choosing hearing procedures which best suit its needs, and that differences between the procedures

\begin{itemize}
\item \textsuperscript{304} \textit{Id.} at 257.
\item \textsuperscript{305} \textit{Id.} at 258 (quoting a Senate Committee Report that called for public hearings to allow public participation in agency decisions affecting the coastal zone).
\item \textsuperscript{306} \textit{Chang v. Planning Comm'n}, 643 P.2d 55, 60 (Haw. 1982) (hearing held in Maui County by planning commission before granting SMA use permit).
\item \textsuperscript{307} \textit{Mahuiki v. Kauai Planning Comm'n}, 654 P.2d 874, 879 (Haw. 1982) (hearing held in Kauai by planning commission before granting SMA use permit).
\item \textsuperscript{308} \textit{Sandy Beach}, 773 P.2d at 258-59.
\item \textsuperscript{309} \textit{Id.} at 258.
\item \textsuperscript{310} \textit{Id.} at 262 (citing Nakano v. Matayoshi, 706 P.2d 814, 821 (Haw. 1985)).
\item \textsuperscript{311} \textit{Id.} (citing Washington v. Fireman's Fund Ins. Cos., 708 P.2d 129, 134 (Haw. 1985), \textit{cert. denied}, 476 U.S. 1169 (1986)).
\end{itemize}
adopted by the various counties do not constitute a denial of equal protection unless clearly arbitrary.\textsuperscript{312}

The court upheld the hearing procedures at issue in \textit{Sandy Beach}. The record showed that more than 100 individuals had testified at the public SMA permit application hearings.\textsuperscript{313} The court found that "the City Council's decision to provide for public hearings may well have been directed towards serving the legislature's goal of maximizing public participation in managing the coastal zone."\textsuperscript{314} Thus, the court found a rational basis to support the difference between procedures adopted in Honolulu and those required in Hawaii's other counties.

c. Due Process

The due process issue was more problematic. The Sandy Beach Defense Fund claimed that due process required formal adjudication of Kaiser Development's application for an SMA permit. In deciding the claim, the court applied the federal due process analysis adopted by the Hawaii courts.\textsuperscript{315} This two-step test required the court to determine first whether a property interest was implicated. If so, the court must balance the government interest against the private interest, while giving due weight to the risk of error in current procedures and to the probable value of additional procedures.

The court found that "the property interests asserted" by the Sandy Beach Defense Fund were "of an aesthetic and environmental nature."\textsuperscript{316} The court stated that "we have not found that such interests rise to the level of 'property' within the meaning of the due process clause, and Appellants refer us to no authorities so holding."\textsuperscript{317}

Despite doubting that the aesthetic and environmental claims rose to the level of property rights, the court nonetheless considered the interests implicated in the appeal. The court stated that several factors required balancing: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative

\textsuperscript{312} \textit{Id.} at 263.
\textsuperscript{313} \textit{Id.}
\textsuperscript{314} \textit{Id.}
\textsuperscript{316} \textit{Sandy Beach}, 773 P.2d at 260-61. A nearby property owner claimed that the development would "affect her view of the ocean and decrease the value of her property." \textit{Id.} at 255.
\textsuperscript{317} \textit{Id.} at 261.
procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.\textsuperscript{318}

The court did not, however, expressly apply each of these factors in its due process analysis.\textsuperscript{319} Instead, the court noted that the record contained the City Clerk's affidavit stating that citizens had been allowed to address the city council at sixteen public meetings or hearings to voice their concerns regarding the proposed permit.\textsuperscript{320} The court further observed that "[a]t no time during the proceedings were [appellants] denied the opportunity to address the Council or to ask questions of other witnesses."\textsuperscript{321} The volume of testimony allowed, the absence of restraints on that testimony, and the lack of any "evidence of procedural impropriety or other corruption of the hearing and decisionmaking processes," were, in the majority's view, determinative.\textsuperscript{322}

The court observed that "[d]ue process is not a fixed concept requiring a specific procedural course in every situation,"\textsuperscript{323} and stated that "[t]he full rights of due process present in a court of law, including presentation of witnesses and cross-examination, do not automatically attach to a quasi-judicial hearing."\textsuperscript{324} Finally, "[t]he basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner . . . ."\textsuperscript{325} Based on the record, the court concluded that the city council satisfied procedural due process requirements.\textsuperscript{326}

The majority's opinion on this issue leaves a question as to exactly what procedure is required when a significant property interest is at stake. The majority hedged on whether an aesthetic or environmental claim may rise to the level of a property right, so arguably an express analysis of each element of the due process analysis was unnecessary. Exactly what the court held, other than that due process is flexible and that the city council's procedures were adequate in this case, is unclear.

\textsuperscript{318} Id. (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Silver v. Castle Memorial Hosp., 497 P.2d 564, 571 (Haw.), cert. denied, 409 U.S. 1048 (1972)).

\textsuperscript{319} See id. One commentator has suggested, however, that [The court] may have implicitly weighed [the esthetic or environmental private interest of the citizens group] in its previous discussion of whether a constitutionally cognizable property interest existed. . . . [It may have found it] to be less significant than the private interests for which the court had required contested case or trial-type proceedings in the past. Those prior cases involved basic needs such as housing and employment.

Hong, supra note 17, at 521 (citing Sandy Beach, 773 P.2d at 261).

\textsuperscript{320} 773 P.2d at 261-62.

\textsuperscript{321} Id. at 262.

\textsuperscript{322} Id.

\textsuperscript{323} Id. at 261 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

\textsuperscript{324} Id. (citing Goss v. Lopez, 419 U.S. 565 (1975); Arnett v. Kennedy, 416 U.S. 134 (1974)).

\textsuperscript{325} Id. (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605-06 (1975)).

\textsuperscript{326} Id. at 262.
**d. Dissent**

The dissenting opinion took issue with several elements of the majority's analysis. In Justice Nakamura's view, the court's ruling that the city council was not an agency and was exempt from the procedural requirements of HAPA was irrelevant: "[t]he Council acted in a quasi-judicial capacity in administering a State law; it therefore was subject to the requirements of due process." He criticized the majority for gratuitously concluding that the requirements of due process were satisfied after having held that no constitutional property interest was implicated.

In Justice Nakamura's view, a significant property interest was at stake. The hearings should not be merely informational, he reasoned, because the HCZMA's substantive mandates to preserve, protect, and restore coastal resources created a property interest in those resources that is owned by the public. He pointed out that "we are expounding legislatively created interests in natural resources deemed worthy of protection through judicial processes invocable by 'any person or agency.'" Moreover, Justice Nakamura was troubled that developers' property rights would not be protected either. He wrote that "the court's decision consigns anyone seeking a special management area use permit, as well as anyone objecting to its issuance, to the vagaries of the political process where the decision will not 'rest solely on the legal rules and evidence adduced at hearing.'"

Justice Nakamura was particularly troubled by a concession during oral argument that ex parte contacts had occurred between parties interested in the permit and city council members. He wrote that "[i]f the Council were acting in its customary role, this would have posed no problem; but it was not." Because the Council administered a law already in existence, he reasoned, the Council was required to observe principles governing administrative law. The decisionmaker must, he wrote, base his conclusions "solely on the evidence adduced at the hear-

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327. *Id.* at 266 (Nakamura, J., dissenting).
328. *See id.*
329. *See id.* at 267.
330. *Id.* One commentator has noted that "[a]lthough the dissent's approach to the property interest issue may seem novel, it is consistent with the Town/East Diamond Head/Dalton line of cases which used a standing analysis to determine whether a property interest existed that required HAPA protection." *Hong, supra* note 17, at 527-28 (referring to *Town v. Land Use Comm'n*, 524 P.2d 84 (Haw. 1974); *East Diamond Head Ass'n v. Zoning Bd. of Appeals*, 479 P.2d 796 (Haw. 1971); *Dalton v. City and County of Honolulu*, 462 P.2d 199 (Haw. 1969)).
332. *Id.* at 268.
333. *See id.* at 265.
Justice Nakamura believed that a proceeding "more in the nature of a judicial, rather than a legislative, hearing was in order." He did not believe that the fundamental fairness requirement of due process was met where the Council had designated itself as the permitting authority, where substantial property interests were at stake, and where the procedures employed were essentially political in nature.

e. Impacts

The majority's analysis of procedural due process suggests that it would hold that notice and comment hearings are sufficient where there is infringement only of an aesthetic or environmental property interest. The majority hinted that it might find such an interest where a party opposing a permit owns land contiguous to that affected by the permit application. As Justice Nakamura pointed out, however, property owners seeking SMA permits, as well as adjacent property owners opposing such permits, are deprived of significant procedural safeguards under the majority's decision. These and other likely problematic impacts of the Sandy Beach decision are addressed in section IV of this comment.

E. Initiative and Referendum

In addition to intervening in the permit process, citizens can affect natural resource allocations through the use of popular ballot measures. Initiative and referendum powers are not reserved in the Hawaii Constitution, nor provided pursuant to Hawaii statute. Rather, the charters of each of Hawaii's counties contain provisions for initiative and referendum. The Hawaii Supreme Court has decided two cases where citizens used municipal ballot procedures to make resource allocation decisions. The first, decided in 1982, upheld a Kauai referendum nullifying a zoning ordinance which would have allowed a resort development at Nukolii on Kauai's east coast.

The second case was the Kaiser decision of 1989, which held that an initiative's downzoning of a tract was inconsistent with comprehensive long-range planning, and therefore unlawful. Although the Kaiser ma-

334. Id. at 268 (quoting SCHWARTZ, supra note 289, § 7.13 (footnote omitted)).
335. Id. at 266.
336. See id. at 263-68.
337. See id. at 261 n.10 (citing Horn v. County of Ventura, 596 P.2d 1134, 1139 (Cal. 1979); Scott v. City of Indian Wells, 492 P.2d 1137 (Cal. 1972)).
338. See Eddins & Hall, supra note 7, at 189-90 nn.68-71 (quoting initiative and referendum provisions of the charters of each of Hawaii's four counties).
jority distinguished the Pacific Standard Life decision and did not expressly overrule it, the two holdings are inconsistent. The Pacific Standard Life decision likely retains precedential force only for its analysis of when a property right for development pursuant to an SMA use permit vests.

1. Referendum and Vested Rights

In the Pacific Standard Life case, the developer gained approval of an SMA use permit from the Kauai Planning Commission approximately ten weeks after the referendum petition was certified for inclusion on the ballot in a general election.\(^{341}\) The developer claimed that the county was estopped from invalidating the permit because the developer had made substantial expenditures in reliance upon the permit's validity.\(^{342}\) The developer also argued that in view of these expenditures, enforcement of the referendum would constitute a taking.\(^{343}\) In response, the court noted that the developer knew of the pending referendum before making the expenditures.\(^{344}\) County officials had warned the developer that his rights were subject to the pending referendum; "tokens of governmental assurance were tarnished and could not give rise to reasonable expectations upon which to base investments."\(^{345}\)

Thus, the court concluded that the "expenditures and site preparation work constituted business risks rather than a basis for constitutional claims."\(^{346}\) The court held that a permit issued after an opposing referendum was put on the ballot does "not constitute official assurance on which the developer has a right to rely."\(^{347}\)

In the Pacific Standard Life case, the validity of using the referendum power as a means to effect zoning and to void an SMA permit was never in doubt. The referendum petition only had to be certified prior to the last discretionary act of the county government, which was the granting of the SMA permit.\(^{348}\) The court stated that the "referendum process is 'a basic instrument of democratic government.'"\(^{349}\)

\(^{341}\) Pacific Standard Life, 653 P.2d at 770.
\(^{342}\) Id. at 769.
\(^{343}\) Id. at 779.
\(^{344}\) Id. at 777. The court found that "[t]he expenditures made toward commencing construction before the referendum vote were not only speculative but also fell short of good faith as manifestations of a race of diligence to undermine the referendum process." Id. at 778. The court further held that there was "no estoppel effect to deny permit revocation where the claimed substantial 'expenditures are not made in good faith.'" Id. at 776-77 (quoting 8 Eugene McQuillan, Municipal Corporations § 25.157, at 462 (3d rev. ed. 1976) (footnote omitted)).
\(^{345}\) Id. at 780.
\(^{346}\) Id.
\(^{347}\) Id. at 776.
\(^{348}\) Id.
\(^{349}\) Id. at 771-72 (quoting City of Eastlake v. Forest City Enter., 426 U.S. 668, 679
2. Initiative and Comprehensive Long-Range Planning

The second case, *Kaiser*, dealt with citizen attempts to control zoning through the initiative process. Initiative is another method of direct legislation, related to referendum. Whereas a zoning referendum is commenced by the electorate after a government authority passes a zoning amendment, an initiative is commenced by the electorate in the first instance, independent of government action. As noted above, the charters of all of Hawaii's counties contain provisions for initiative.

In the *Kaiser* case, the court held that "zoning by initiative" is precluded by Hawaii's Zoning Enabling Act calling for comprehensive long-range planning. The initiative at issue in that case would have changed zoning that had been in effect for decades by downzoning from residential to preservation a subdivided tract of land near Sandy Beach commonly identified as Golf Courses 5 and 6.

a. Majority Opinion

The majority concluded its opinion by stating that "[i]n view of legislative history and clear legislative intent, we declare that the amendments which downzoned the tract of land designated as Golf Course 5 and Golf Course 6 from residential to preservation through the initiative process are invalid." The majority found that the legislative history of the Zoning Enabling Act made "abundantly clear that the legislature in its wisdom established a public policy of not effectuating land use zoning through the initiative process."

The majority did not expressly state where it found this clear legislative intent to preclude zoning by initiative. One passage from the legislative history cited by the majority emphasized the need for "[a]dequate controls . . . established, maintained and enforced by responsible agencies of government to reduce waste and put all of our limited land area, and the resources found thereon, to their most beneficial use." The passage also stated that zoning ordinances and regulations should comport with a long-range comprehensive general plan. Apparently, the majority found that the references to government controls and comprehensive planning precluded direct citizen enactment of a zoning ordinance to

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350. Eddins & Hall, supra note 7, at 187 n.51.
351. See supra note 338.
353. See Eddins & Hall, supra note 7, at 183 n.32 (setting out entire text of initiative ordinance).
354. 777 P.2d at 250.
355. Id. at 246.
govern a single specific land parcel. The majority noted that "the concept of legislation by initiative was debated and rejected at the Constitutional Conventions of 1950, 1968 and 1978." 358 If the legislature had intended to allow for zoning by initiative, the majority reasoned, then the legislature "would have so legislated." 359

In reaching its conclusion, the majority also relied on cases from New Jersey and Washington, and distinguished the only existing Hawaii precedent. 360 The Washington court reasoned that zoning by initiative would create precisely the chaos that uniform zoning was designed to prevent. 361 The New Jersey court believed that the overriding concept of comprehensive planning should not be discarded simply because the planning authorities "may not always have acted in the best interest of the public and may not, in every case, have demonstrated the expertise which they might be expected to develop." 362 The majority also distinguished the Pacific Standard Life decision, stating that "the court in the Nukolii [Pacific Standard Life] case was not faced with the issue of whether zoning by referendum is permissible in light of HRS § 46-4(a) [Zoning Enabling Act]." 363

The appellants also argued that the Hawaii Constitution's county home rule provisions gave county initiatives supremacy over the Zoning Enabling Act (ZEA). 364 This claim rested on the theory that the initiative provisions were part of the City and County's political organization and structure. The majority found that the purpose of the ZEA was "not to dictate the manner in which zoning ordinances are promulgated, but to assure that, however enacted, those ordinances comport with that long-range general plan, 'and to insure the greatest benefit for the State as a whole.'" 365 The majority held that the Zoning Enabling Act did not attempt to regulate the City and County's executive, legislative, and administrative structure and organization. Therefore, the ZEA controlled the Charter provision. 366 On that basis, the court held that zoning by initiative was inconsistent with the ZEA, and therefore impermissible. 367

358. Id. at 248.
359. Id.
360. See id. at 247-48.
361. Id. at 247 (citing Leonard v. City of Bothell, 557 P.2d 1306, 1309-10 (Wash. 1976)).
363. Id. at 248.
364. Id. at 249.
365. Id. at 250 (quoting HAW. REV. STAT. ANN. § 46-4(a) (Michie Supp. 1991)).
366. Id.
367. Id.
Justice Nakamura did not find that the intent of the legislature was clear. He noted that the legislature nowhere mentioned initiative or referendum.\textsuperscript{368} He wrote that "[h]aving read what is proffered as proof of abundant clarity of intent I cannot, even after viewing HRS § 46-4 and its legislative history in a light most favorable to the cause of legislative wisdom, ascribe such prescience to the legislature."\textsuperscript{369}

Justice Nakamura agreed with the majority that the court's task was to discover and effectuate the legislature's intent, but stated that "[t]he citation of decisions rendered by courts elsewhere in giving effect to dissimilar statutory language or in applying a rule of law we do not follow impedes rather than furthers the task."\textsuperscript{370} He further observed that "[i]t is not 'our practice to decide important questions of law by dicta from unrelated cases.'"\textsuperscript{371} Justice Nakamura then distinguished the issues presented in the Washington and New Jersey cases cited by the majority.\textsuperscript{372} He also rebuked the majority for "skipping lightly" over the Nukolii decision, writing that "if it is so clear now that [initiative or referendum] is interdicted by [the Zoning Enabling Act], it would have been clear too in 1982. . . . Zoning by referendum was no less a matter of great public import then than zoning by initiative is now."\textsuperscript{373}

In Justice Nakamura's view, the majority's reasoning that if the legislature had intended to allow zoning by initiative then it would have expressly so provided was "nothing more than unfounded conjecture."\textsuperscript{374} On the contrary, "[i]f intent is to be inferred at all from legislative inaction, a more logical premise from which to proceed would be the inaction following the referendum on Nukolii and our decision in [the Pacific Standard Life Case]."\textsuperscript{375} He was likewise reluctant to attach any significance to the rejection of proposals for legislation by initiative at the Hawaii Constitutional Conventions.\textsuperscript{376}

The core of Justice Nakamura's dissent was his view of the role of the courts and the legislature in the administration of Hawaii's counties. In his view, in enacting the Zoning Enabling Act the legislature recognized that zoning was primarily a matter of county concern.\textsuperscript{377} In Justice Nakamura's opinion, the language of the Zoning Enabling Act was
clear, and the court’s only role was to “give effect to the law according to its plain and obvious meaning.”

He believed that the circuit court “erred by engaging in construction where none was required and concluding that zoning is a power to be exercised exclusively by the county’s legislative body.”

In Justice Nakamura’s view, the majority substituted its own “notion of what constitutes good planning . . . [for] a decision made by the people of the City and County of Honolulu when they adopted the city charter that a zoning ordinance could be passed by the direct vote of the people.” He acknowledged that a zoning amendment by initiative might be inconsistent with the city’s general plan, but noted that the city council might also fail to meet planning objectives: “‘there is no more advance assurance that a legislative body will act by conscientiously applying consistent standards than there is with respect to voters.’”

Justice Nakamura believed that popular democracy should govern county zoning. He felt the majority’s decision violated the Hawaii Constitution’s county home rule provisions because the legislative structure of the City and County of Honolulu included the power to enact legislation by initiative, and because “the legislature has not exercised its authority to pass a general law reallocating this power where zoning amendments are concerned . . . .” Justice Nakamura wrote that “I neither share the majority’s distrust of democracy nor subscribe to the notion that political decisions rendered directly by the electorate invariably are devoid of civic virtue . . . .”

c. Kaiser’s Effect

Justice Nakamura’s dissent in Kaiser was both legally and politically astute. By striking down zoning by initiative not only on Oahu, but throughout Hawaii’s counties, Kaiser reflected the view that government authority over zoning is a statewide rather than a county concern. Unfortunately, the Kaiser majority construed a meaning in the words “comprehensive long-range planning” that many Hawaii citizens doubt exists. Although concentrations of development in Hawaii reflect the success of the Land Use Law in preventing unregulated urban sprawl, the benefits of any comprehensive design for Hawaii’s future are more difficult to discern.

378. Id. (quoting In re Hawaiian Tel. Co., 608 P.2d 383, 387 (Haw. 1980)).
379. Id.
380. Id.
381. Id. at 254 (quoting Eastlake v. Forest City Enter., 426 U.S. 668, 675 n.10 (1976)).
382. Id. at 253-54.
383. Id. at 250.
384. Id. at 246-47.
385. See supra note 4 and accompanying text.
Despite the best efforts of Hawaii government, one need only drive across Honolulu in order to surmise that government "comprehensive long-range planning" is problematic. Honolulu's highway system is a bewildering maze of temporary entrances and exits to and from partially completed highways that are overburdened with traffic. In some areas, during peak traffic hours, city crews place road cones to reverse the flow of traffic in marked lanes, so that the direction one may travel on a given stretch of pavement changes several times a day. Unfortunately, the Kaiser majority's interpretation of a statute enacted in 1957 bears little relation to the daily events Honolulu citizens must cope with more than thirty years later. The gap between planning and growth has been widening for decades.

Cognizable benefits of "comprehensive long-range planning" may yet exist in the future. In the meantime, however, Kaiser's restriction of citizen authority, together with the government's current inability to achieve tangible results, will probably further erode citizen confidence in government.

III

LEGAL RIGHTS

A review of the legal rights of persons affected by Hawaii's land use regulatory scheme must distinguish development rights from preservation rights. Hawaii law intends that these conflicting interests be reconciled within the framework of comprehensive planning. These rights will always be in tension, however. As one commentator has observed, "[b]etter we plan for the development we collectively decide we need and preserve what we collectively decide we want, and agree at the outset that absolute land preservation and absolute land development will always conflict absolutely."  

A. Development Rights

The same commentator also observed that "Hawaii may be well along the path to accepting land development as a privilege only, unless some method for fixing vested rights pending final development permission is found—especially in a multipermit state such as Hawaii."  

He based this observation on the holding in the Nukolii case that a right to develop land does not vest until the last discretionary act in the permit process has been completed. The problem for the developer is that following a substantial investment in preparation for development, a

386. CALLIES, supra note 16, at 175.
387. Id. at 170.
change in law may require additional permit review or may even prevent the project from going forward altogether. Expenditures made prior to the last discretionary act are not compensable where the last permit is denied. The developer proceeds at his own risk.

The Hawaii Supreme Court’s decision in Kaiser helped to alleviate this predicament somewhat, because it insulates developers from direct participation by the electorate in zoning decisions and thereby prevents the kind of invalidation that occurred at Nukolii in the Pacific Standard Life decision. In addition, the earlier Town decision probably precludes the use of initiative or referendum in land use district boundary amendments.

Nonetheless, the victory in Kaiser was somewhat hollow for Kaiser Hawaii Kai Development Company. One week after the court’s ruling, the Honolulu City Council approved an amendment to the Development Plan that changed the zoning of the disputed tract from residential to preservation. The Council subsequently voted unanimously to reclassify the land as preservation. This disposition underscores Justice Nakamura’s observation in his Sandy Beach dissent that both developers and preservationists are consigned by the Sandy Beach decision to “the vagaries of the political process where the decision will not ‘rest solely on the legal rules and evidence adduced at hearing.’”

B. Preservation Rights

Preservation rights are diminished in the wake of the court’s ruling in Sandy Beach. As one commentator observed, the court’s ruling opens the door for county governments on Kauai, Maui, and the Big Island to shift permit authority from the planning commissions to the county legislative bodies, thereby eliminating HAPA’s requirement for contested case hearings on proposed permits. Such public hearings would be less expensive for the counties to administer than contested case hearings, because public hearings do not require discovery, development of a formal record, or the opportunity to cross-examine witnesses. Elimination of contested case hearings substantially diminishes procedural

389. See id. at 169.
390. Id.
391. See supra text accompanying notes 57-60; CALLIES, supra note 16, at 10 (noting that “in light of recent decisions elsewhere, it [the Town court] may have inadvertently decided whether such boundary amendments will ever be subject to binding initiative and referendum”).
392. Eddins & Hall, supra note 7, at 186.
393. Id.
395. Hong, supra note 17, at 530.
396. Id.
preservation rights, particularly where county authorities limit aggrieved persons to as little as three minutes to speak. As Justice Nakamura observed in his Sandy Beach dissent, "[j]ust being 'allowed to show up and be heard' is not enough." 397

In 1990, the Hawaii Intermediate Court of Appeals followed Sandy Beach in holding that public hearings and mediation procedures constituted sufficient due process afforded to adjacent landowners opposing geothermal drilling in the east rift of Kilauea. 398 In view of events in the east rift, one need not be a believer in Pele to recognize that common sense requires serious scrutiny of safety issues raised by geothermal development. 399 The information generated by such scrutiny could both determine the safety of the project and provide help in protecting the homes and communities of neighbors. Nevertheless, under Hawaii law, adjacent property owners may be denied the procedural safeguards of contested case hearings.

Hawaii citizens seeking to preserve natural resources nonetheless retain certain rights to ensure that government authorities make informed and rational decisions. These are the rights mandated by HEIS and the HCZMA, and based upon the Hawaii Constitution's guarantee of a clean and healthful environment. One commentator has suggested that advocates for additional procedural safeguards under due process could be more persuasive by arguing that the environmental rights provided by the Hawaii Constitution afford "greater constitutional protection to environmental interests than [does] the United States Constitution." 400 Under current Hawaii law, the substantive mandates of the HCZMA require a developer to obtain an SMA use permit if the value of the development exceeds $65,000 or may have "substantial adverse environmental or ecological effects." 401

Access to Hawaii's courts for enforcement of preservation rights has not been restricted. Hawaii's standing requirements remain consistent with the Hawaii Supreme Court's 1981 dictum that "our basic position has been that standing requirements should not be barriers to justice." 402 In addition, the court has hinted that a landowner's aesthetic or environmental concerns regarding substantial effects of development on adjacent land could constitute a property right. 403 How best to enforce these

397. 773 P.2d at 268 (Nakamura, J., dissenting).
399. See Rod Thompson, Geothermal Well Blast Rocks Puna Area, HONOLULU STAR-BULL., June 22, 1991, at A1 (describing a geothermal well explosion that caused dozens of nearby residents to evacuate).
400. Hong, supra note 17, at 528.
403. See Sandy Beach Defense Fund v. City Council, 773 P.2d 250, 261 & n.10 (Haw.
rights remains unclear, however. Litigation under HEIS is in its infancy. Challenges to the sufficiency of negative declarations (exempting projects from EIS requirements) probably will make their way through Hawaii's courts, guided to some extent by decisions of the federal courts under NEPA.

C. Overview

Despite a comprehensive statutory scheme designed to encourage public participation in controlling Hawaii's development for the long-term benefit of its people, recent Hawaii Supreme Court decisions have limited preservation rights as well as development rights. Hawaii's government may exercise broad discretionary authority over developers and preservation advocates alike. Developers are subject to a permit process that leaves them uncertain as to whether projects may proceed, and government can severely limit the participation of preservation advocates in permit decisions even where property rights are implicated.

Natural resource allocation decisions in Hawaii are increasingly political in the worst sense, because they are increasingly the exclusive province of government. Developers are at the mercy of government permitting authorities, and preservation advocates seeking to discover material facts and establish on the record violations of substantial rights can be foreclosed by a lack of procedural opportunities. In addition, the Town and Kaiser decisions effectively insulated two critical areas of decisionmaking, district boundary amendments and county zoning, from direct review by the electorate. The current status of Hawaii natural resources law creates the potential for government abuse of power and for increased citizen distrust of government.

In addition to allowing Hawaii government excessive discretionary authority, the present Hawaii natural resources law inconsistently distinguishes between quasi-judicial and quasi-legislative actions. In the

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404. See CALLIES, supra note 16, at 169.
405. See supra notes 395-403 and accompanying text.
406. A footnote to Justice Nakamura's dissent in Kaiser quoted the following:

One of the major functions of any system of law is to assure its own acceptance in the society it governs, and this is part of the job of each judicial opinion. Law that is rejected by the people it undertakes to control, or that is received by them with doubts and misgivings, is not good law, and may not even be accepted as law at all.

To a great extent the validity of law for a people depends on their confidence in it.


407. For a discussion of the distinction between quasi-legislative and quasi-judicial proceedings as applied in the Town and Sandy Beach decisions, see Hong, supra note 17, at 504-
Town decision, the Hawaii Supreme Court found that a boundary amendment was a quasi-judicial act because it called for "the interpretation of facts applied to rules that have already been promulgated by the legislature."\textsuperscript{408} The court therefore found that a boundary amendment hearing constituted a contested case under HAPA.\textsuperscript{409} In the Sandy Beach case, the court applied HAPA's exemption for legislative bodies and held that no contested case hearing was required.\textsuperscript{410} The city council's consideration of an SMA permit application, however, clearly fits the description in Town of a quasi-judicial act: the Council was required to interpret facts presented in the SMA permit application in light of guidelines set out in the HCZMA.

Because county home rule allows the county governments to shift permit authority to legislative bodies, the exception swallows the rule. Moreover, the holding in Kaiser likely means that planning decisions in the counties cannot be accomplished by initiative or referendum. The net effect of these recent turns in Hawaii law is, with some exceptions, that direct citizen participation in planning decisions can be limited to three minutes of testimony at a public hearing. The exceptions include contested case hearings on LUC district boundary amendments, claims brought pursuant to the HCZMA's cause of action provisions for violations of HCZMA mandates, and judicial review of hearings where substantial rights are affected. Although litigation is not the least costly or most effective way for private citizens to participate in government, these exceptions at least offer alternatives to three minutes at a public hearing. As evidenced by recent demonstrations at proposed sites of geothermal drilling, Hawaii citizens are not inclined to sit quietly while their government makes questionable decisions that it asserts serve the public interest.\textsuperscript{411} Hawaii's resources are too scarce, its values too cherished. There is a growing sense among Hawaii's people that time is running out on the way of life that they know.\textsuperscript{412}

Law that is inconsistent and that deprives citizens of procedural safeguards and opportunities for direct participation in decisions that affect their lives is not good law. The Hawaii legislature has mandated that Hawaii's citizens have opportunities to participate in planning decisions.\textsuperscript{413} The legislature should act to eliminate inconsistencies in the law and to maximize opportunities for public participation. The legislature also should enact provisions that allow for a binding commitment

\textsuperscript{408} Town v. Land Use Comm'n, 524 P.2d 84, 91 (Haw. 1974).
\textsuperscript{409} Id.
\textsuperscript{410} Sandy Beach Defense Fund v. City Council, 773 P.2d 250, 263 (Haw. 1989).
\textsuperscript{411} See supra notes 116-18 and accompanying text.
\textsuperscript{412} For a brief list of major disputes over environmental issues affecting change in Hawaii over the past decade, see Cooper & Daws, supra note 3, at 369.
\textsuperscript{413} See supra text accompanying notes 213-15.
from government earlier in the permit process that a proposed development will be allowed to go forward. In addition, the legislature should enact a means to limit inflation of land prices caused by speculation in Hawaii real estate. The following section presents proposals for legislative amendments to increase opportunities for citizen participation in government planning, and to bolster Hawaii citizens' confidence in their government.

IV 
LEGISLATIVE AMENDMENTS

The current status of Hawaii natural resource law is problematic for developers, citizens advocating preservation, and government. The Hawaii legislature should adopt amendments that will address these problems. Measures to provide uniformity in HCZMA hearing procedures, to provide for direct citizen participation in planning decisions, and to address developers' concerns are each discussed below.

A. HCZMA Hearings

The Hawaii Supreme Court's analysis of due process in the Sandy Beach case set out, but did not expressly apply, a multifactor balancing test. An ex post facto application of the "risk of error" and "probable value of additional procedure" elements of the test helps to demonstrate why legislative amendments are needed. The Sandy Beach majority

414. In 1986, the Hawaii County (Big Island) Council considered a development agreement bill providing that government may not change the "rules" if the developer performs public improvements and construction on schedule. The bill was still under review in 1991. Opponents claimed the bill would circumvent normal planning processes and would preclude use of the initiative power over zoning should the Hawaii legislature restore it. Hugh Clark, Critics Blast Stalled Hamakua Bill, HONOLULU SUNDAY STAR-BULL. & ADVERTISER, June 16, 1991, at A30.

415. See Sandy Beach Defense Fund v. City Council, 773 P.2d 250, 261 (Haw. 1989) (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Silver v. Castle Memorial Hosp., 497 P.2d 564, 571 (Haw.), cert. denied, 409 U.S. 1048 (1972)). The court's test weighed three factors to determine whether specific procedures met due process: "(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail." Id. In applying this balancing test to the facts of the case, the Sandy Beach court did not thoroughly analyze these factors, but summarily stated:

[We must weigh those [Appellants'] interests against the risk of erroneous deprivation through the procedures actually provided by the Council, the probable value of providing an adjudicatory-type hearing, and the Council's interest in adhering to its current procedures. We find, in considering these factors . . . that the due process clause does not require the additional procedures sought by Appellants.]

Id.

416. Before applying these test factors, two points must be established regarding risk of error and probable value. First, hindsight is much superior to any attempt at prediction in establishing facts and the meaning of facts. Second, legal formulations of risk and probable value must be distinguished from statistical analysis of probability, which is the application of
cannot be faulted for failing to predict political events subsequent to its
decision. The majority's choice to forego analyzing risk of error\textsuperscript{417} was
proper, and its holding was amply supported by federal constitutional
law.\textsuperscript{418}

That said, the risk of error in the procedures applied by the Hono-
lulu City Council in deciding on Kaiser Hawaii Kai Development Com-
pany's application for an SMA use permit was substantial. The Council
proved how substantial this risk was by effectively reversing itself one
week after the court's final disposition of issues in the dispute.\textsuperscript{419} Viewed
in a light most favorable to the Council, its decision to reverse itself de-
ferred to the political will of the electorate. Viewed in light of bare prag-
matism, the Council could not have failed to recognize that the two-to-
one majority of voters who made their preference known comprise the
same electorate that Council members must face when they run for re-
election.\textsuperscript{420} Viewing the entire dispute from a nakedly political perspec-
tive, the Hawaii Supreme Court took the heat for the Honolulu City
Council's inability to reach a sustainable decision.

It may be that the risk of error in existing procedures was simply too
high for the Honolulu City Council to deal with in a consistent manner.
This risk of error also produced harsh disagreement among the Hawaii
Supreme Court justices who previously had been undivided in setting out
a substantial body of Hawaii natural resources law. The dispute pro-
duced enduring results. One is a well-reasoned judicial dissent in \textit{Sandy
Beach} that, despite its virtues, permits consignment of citizen participa-
tion in planning decisions throughout Hawaii to hearings that are "not
judicial, at least in any adequate sense, unless the evidence can be

\begin{itemize}
  \item mathematical principles to empirical data. Statistics yield degrees of mathematical certainty
  regarding future occurrences arising from the same set of variables as the data analyzed. Legal
  risk, in contrast, attempts to balance empirically indeterminable values in order to arrive at
  reasoned judgments regarding government policy.
  
  One example of a legal approach to risk is the judicial doctrine of risk assessment in the
  context of environmental health and safety. Risk assessment, which grew out of the common
  law, requires the balancing of the utility of conduct against the gravity of harm. \textit{See}, \textit{e.g.},
  Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.), \textit{cert. denied}, 426 U.S. 941 (1976) (weighing dam-
gages of lead against its use as an antiknocking compound in gasoline); Reserve Mining Co. v.
  EPA, 514 F.2d 492 (8th Cir. 1975), \textit{modified}, 529 F.2d 181 (8th Cir. 176) (weighing harm of
  water pollution against closing of a plant employing 3000 workers); Village of Wilsonville v.
  SCA Services, 426 N.E.2d 824 (Ill. 1981) (balancing the utility of a chemical waste disposal
  site against potential harm to public health).


418. U.S. Supreme Court decisions cited by the \textit{Sandy Beach} court to support its analysis of
due process were Morrisey v. Brewer, 408 U.S. 471 (1972); Goss v. Lopez, 419 U.S. 565
(1975); Arnett v. Kennedy, 416 U.S. 134 (1974); Mathews v. Eldridge, 424 U.S. 319 (1976);
at 261.

419. Lucy Young, Rule Changes Irk Development, HONOLULU STAR-BULL., Aug. 3, 1989,
at A8.

420. \textit{See supra} note 7.
known.' "421 Another is a judicial decision in *Kaiser* that elevates government planning authority above the express will of the people whose interests government exists to serve.422

The probable, as distinguished from probabilistic, value of additional or alternative procedures to replace restricted testimony at public hearings and the prospect of needless litigation is also substantial. The most effective procedure would be contested case hearings. The Hawaii legislature should amend the HCZMA to ensure that contested case hearings are available to owners of property adjacent to development proposed in applications for SMA use permits for two reasons. First, as Justice Nakamura pointed out in his *Sandy Beach* dissent, important decisions that turn on questions of fact require opportunities to confront and cross-examine adverse witnesses, and to require disclosure of adverse evidence on the record so as to disprove the adverse evidence.423 The record produced at a contested case hearing also aids a reviewing court in ensuring that material facts support the decision.424 A second probable value of mandating contested case hearings for SMA permits is remedial. Ex parte contacts and influence "'discredit the administrative process and undermine public confidence in government.' "425 Contested case hearings are a safeguard against "'capture' of permit authorities by powerful interest groups. "'Attempts to assert influence are unfortunately a normal part of government.... The realities of political life make it unlikely that any legal prohibitions can eliminate these ex parte approaches—at least not until agencies acquire the status and insulation of courts.' "426

Because political realities arguably make it unlikely that the intrusion of influence into the decisionmaking process can be eliminated altogether, it actually may be desirable to vest permitting authority in legislative bodies, which, unlike agencies, are directly accountable to the public. The Honolulu City Council's awkward reversal of its position on the *Kaiser* zoning issue supports this argument that legislative bodies should make permit decisions. The Hawaii legislature can, however, address the need for contested case hearings on SMA use permits without disturbing county home rule in county government determinations of

424. *Id*.
426. *Id.* at 374.
whether planning commissions or legislative bodies should exercise permitting authority.\textsuperscript{427}

A further advantage of mandating contested case hearings on SMA use permits is that the amendment will resolve the current inconsistency in Hawaii natural resources law regarding quasi-judicial actions.\textsuperscript{428} Finally, because many controversial developments in Hawaii require SMA use permits, an explicit requirement in the HCZMA for contested case hearings will provide procedural safeguards governing a substantial number of development disputes.\textsuperscript{429}

A mandate that affected persons whose substantial rights are implicated in permit decisions shall have all of the procedural safeguards of contested case hearings will help to assure that important decisions are made on the basis of evidence on the record at those hearings. The above proposed Amendment would ensure uniformity in procedural requirements for county hearings on proposed SMA use permits. This uniformity is likely to improve decisionmaking, and also bolster citizen confidence that Hawaii's government exists to serve the people.

B. Initiative and Referendum

Contested case hearings on SMA use permits will protect the substantial rights of adjacent property owners and others aggrieved by proposed development in SMA's, but will not address the concerns of Hawaii citizens who seek direct participation in comprehensive long-range planning decisions. The Hawaii Constitution grants to all Hawaii citizens the rights of conservation, protection, and enhancement of Hawaii's natural resources.\textsuperscript{430} The Hawaii legislature should address direct citizen participation in natural resource allocation decisions by initiative and referendum.

\textsuperscript{427} HCZMA provisions for SMA use permit procedure could be amended to read as follows:

The authority in each county, upon consultation with the central coordinating agency, shall adopt rules under chapter 91 setting the special management area use permit application procedures, conditions under which [contested case] hearings must be held, and the time periods within which the [contested case] hearing and action for special management area use permits shall occur.

\textsuperscript{428} See supra text accompanying notes 407-12.

\textsuperscript{429} See supra parts II.C-D.

\textsuperscript{430} HAW. CONST. art. XI, § 9; see supra text accompanying note 30 for the full text of art. XI, § 9.
Nearly a century ago, in the context of express legislative concern over powerful forces at work in the United States economy, Justice Holmes described the difficulty in deciding a case that generates intense emotions:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words.\textsuperscript{431}

According to this description, the \textit{Kaiser} case was a great case: development in Hawaii has taken on an urgency that inflames passions, and the \textit{Kaiser} case was decided in the context of increasing public concern over the success of government planning for Hawaii's future. The words the \textit{Kaiser} majority appeared to find dispositive were "adequate controls" and "a long range comprehensive plan."\textsuperscript{432} What was previously clear in the \textit{Pacific Standard Life} case seemed doubtful to the \textit{Kaiser} majority, and well settled principles regarding "a basic instrument of democratic government"\textsuperscript{433} bowed to legislative clarity and wisdom.\textsuperscript{434} The dissent, however, did not find the words difficult: "the history only confirms that the plain wording of the section accurately reflects legislative intention, which simply is to have zoning 'accomplished [by ordinance] within the framework of a long-range, comprehensive general plan.' "\textsuperscript{435}

The \textit{Kaiser} majority cited proceedings of Hawaii's Constitutional Conventions in support of its holding striking down the initiative power over county zoning.\textsuperscript{436} One of the cited proceedings states in part that initiative and referendum were excluded from the Hawaii Constitution "[i]n the absence of a clear showing of great popular demand for any such measures."\textsuperscript{437} Another of the cited proceedings states that "[i]n the absence of clear and convincing evidence demonstrating the necessity, effectiveness or merits of initiative in any form and/or referendum, the

\textsuperscript{431} Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting).
\textsuperscript{434} See Kaiser, 777 P.2d at 246 ("[I]t is abundantly clear that the legislature in its wisdom established a public policy of not effectuating land use zoning through the initiative process.")
\textsuperscript{435} Id. at 251 (Nakamura, J., dissenting) (quoting HAW. REV. STAT. ANN. § 46-4(a) (Michie 1991) (bracketed words in original).
\textsuperscript{436} Id. at 248. The Hawaii Constitutional Conventions of 1950, 1968, and 1978 all debated and rejected the concept of legislation by initiative. Id.
\textsuperscript{437} See Eddins and Hall, \textit{supra} note 7, at 188 n.59.
Committee recommends against the inclusion of statutory initiative and/or referendum, and constitutional initiative in the constitution." 438 These assessments were made in 1950 and 1978. Hawaii has changed dramatically even since 1978. As evidenced by the Hawaii Supreme Court cases reviewed in section II above, citizen concern over the effects of government planning has grown considerably since Hawaii’s last Constitutional Convention.

The current controversy over geothermal development in the east rift of Kilauea Volcano is the most visible instance of citizen discontent with government planning. 439 As another example, in 1982, a Deputy Director of the State Department of Planning and Economic Development published a law review article in which he detailed the advantages of placing a manganese nodule processing facility on the Big Island. 440

The author adopted the view that where environmental laws exist, environmental problems will not, and blithely dismissed the hazards the project posed. 441 The plant would require hundreds of acres of land and create substantial waste. 442 The facility would produce three percent usable refined ore; waste would constitute roughly ninety-seven percent of the plant’s output by dry weight. 443 The slag waste produced would contain arsenic, cadmium, lead, mercury, and other harmful minerals, and would probably be deemed hazardous by the Environmental Protection

438. See id. at 188 n.61.

439. For a discussion of the geothermal controversy, see generally Edmunds, supra note 101. For a summary of recent disputes over development in Hawaii, see COOPER & DAWS, supra note 3, at 369.


441. Keith discounts the difficulty of enforcing environmental statutes when discussing the potential environmental concerns a manganese processing facility would generate:

[t]here exists concern that a processing plant will consist of a smelter with tall smokestacks billowing black smoke. This would not be allowed under the Federal Clean Air Act or state regulations, which require electrostatic precipitators or baghouses, proven effective in eliminating smoke and controlling particulates. Another concern is that ocean disposal will kill whales and dolphins and destroy the food chain. This would not be allowed under the FWPCA and Marine Protection Act. Still another fear is that waste disposal on land could poison the water table. This is unlikely given the strict precautions which are required by the Resource Conservation Act to prevent such occurrences. Id. at 313 (citation omitted).

442. Id. at 299, 300. Economic benefits of this use of hundreds of acres of Big Island land are predicted: “A manganese nodule processing industry would be a boost to the state’s economy. . . . [E]stimated annual revenues of a processing plant on the island of Hawaii would range from $485 million to $767 million, depending upon the location of the plant and the number of metals processed.” Id. at 297 (citation omitted).

443. Id. at 300. In comparison with the three-metal processing facility, however, waste from a four-metal processing facility is estimated at only 70% of total production by dry weight. Id. at 300 n.374. “A four-metal process will extract manganese in addition to nickel, copper and cobalt. However, the waste material from a pyrometallurgical four-metal plant will still be significant. It will consist of a coarse granulated slag, which could be disposed of either on land or at sea.” Id. at 300 (citations omitted).
Agency. Disposal could be by ocean dumping or by the preferred method of land disposal in “properly constructed containment ponds.” The article explained that the Resource Conservation Act encourages the recycling of solid wastes; that Hawaii law emphasizes possible agricultural uses for recycled waste; and that commercial use of nodule waste for land fill or fertilizer mix “would thus fulfill federal and state legislative goals.”

According to the article, a significant impediment to the benefits of manganese processing under the current regulatory scheme on the Big Island is that complex permit procedures will slow development and discourage investment. The article suggests that in order to address this problem,

[s]ubstantive requirements and agency reviews should not be eliminated; rather, they should be coordinated and streamlined. Fortunately, the state and its counties have taken steps to improve permit procedures. An early decision ‘on the merits’ can protect the people of Hawaii while making Hawaii attractive as a potential site for clean industry.

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444. Id. at 310. Although not all solid waste is classified as hazardous [under federal regulations], manganese nodule processing waste may not be excluded from such a classification. A solid waste may also be listed as hazardous waste if it contains arsenic, beryllium, cadmium, lead, mercury, selenium, thallium and their respective compounds. All of these elements are found in manganese nodules in their natural state. Id. (citations omitted).

445. Id. at 312. The alternative disposal methods the author discusses include disposal on the high seas, ocean outfall, and land disposal. Id. at 301-12.


447. Keith, supra note 23, at 312; see also HAW. REV. STAT. ANN. §§ 3426-1 to -3 (Michie 1991) (listing conversion of solid wastes into fertilizer, feeds, etc. as a goal of solid waste management).

448. Keith, supra note 23, at 313.

449. Id.

[T]here are still two impediments to the establishment of a manganese nodule industry in Hawaii under the current regulatory regime. First, the regime is so complex and requires so many permits and procedural steps, that even a company proposing a clean, desirable industry may become impatient and decide to locate elsewhere. . . . The second problem with the regulatory regime is that it focuses only upon threats to the natural environment—the flora and fauna, water, air and land. Because environmental laws and regulations are comprehensive and strict, no major negative environmental impacts of this kind are likely. Actually, the potential socio-economic impact upon the people of Hawaii is an area of greater concern. Puna and Kohala are rural areas which could benefit from an expanded commercial base, accompanied by more jobs, increased per capita income and eventually, better public services."

450. Id. at 314-15 (citations omitted).

451. Id. at 314. The article does acknowledge, however, that citizen participation in decisionmaking is desirable:

Community planning and inter-governmental cooperation must supplement the regulatory regime to control, mitigate, or eliminate negative social impacts. This means that the public must be informed and involved in the decision-making process. To this end, the state environmental policy urges all state agencies, when developing programs, to provide for the expansion of citizen participation in the decision-making process.
Is a proposed industry whose production consists of ninety-seven percent hazardous waste a "clean industry?" Is slag from mineral smelting operations containing arsenic, cadmium, lead, and mercury the preferred material for landfill and agricultural fertilizer? Is the mere existence of environmental laws conclusive proof that environmental problems have been solved? Have electrostatic precipitators and baghouses eliminated industrial air pollution in the United States?

This kind of planning probably would not be well received by Hawaii citizens. To the extent that the article quoted above represents the perspective of comprehensive long-range planning in Hawaii, citizens indeed have cause for great concern. The article's importance to this comment, however, is not with respect to the proposed project itself, but rather the project's use as an example of why it is imperative that Hawaii citizens be given avenues to participate in decisionmaking on proposed development.

The quoted article is correct in one respect: Hawaii government has streamlined permit procedures. Procedures enacted for geothermal development demonstrate the Hawaii legislature's willingness to eliminate procedural safeguards for citizens opposed to planning by the Hawaii government. The Hawaii Supreme Court decisions in Sandy Beach and Kaiser severely limited citizen participation in government planning.

The Hawaii legislature should reconsider the source of its authority, and should restore "a basic instrument of democratic government": initiative and referendum. Hawaii citizens should have the means to prevent implementation of such ill-conceived planning as is demonstrated in the above arguments in favor of manganese nodule processing on the Big Island. Such planning is inconsistent with every Hawaii citizen's constitutionally guaranteed environmental rights.

The legislature should amend the Hawaii Constitution to restore the electorate's ability to protect Hawaii's environment. An amendment to the county home rule provisions of article VIII, section 2 of the Hawaii Constitution can integrate initiative and referendum powers into the

Id. at 315 (citation omitted).

451. See supra text accompanying notes 103-16 for examples of the legislature's action.

452. "All political power of this State is inherent in the people and the responsibility for the exercise thereof rests with the people. All government is founded on this authority." HAW. CONST. art. I, § 1.


454. HAW. CONST. art. XI, § 9; see supra text accompanying note 30 for the full text of this section.

455. During Hawaii's 1987 legislative session, legislators introduced at least three House bills and five Senate bills proposing a constitutional amendment to include provisions for initiative and referendum. None of these bills passed, and no such bills were introduced the following year. Eddins & Hall, supra note 7, at 188.
legislative structure of government in each of Hawaii's counties.\textsuperscript{456} Such an amendment would not preempt the legislature's power to enact laws of statewide concern, but would enable each Hawaii county's electorate to implement controls directly where the legislature has not occupied the field.\textsuperscript{457}

C. Development Rights

Great cases, like old soldiers, never die. The dispute in \textit{Sandy Beach} and \textit{Kaiser} retained vitality in federal court under a separate set of issues, and reached the Ninth Circuit Court of Appeals in 1990 (\textit{Kaiser II}).\textsuperscript{458} There Kaiser Development revealed plans to build a resort complex at Queen's Beach, near Sandy Beach. Kaiser considered the project to be the "crown jewel" of development in east Oahu, and the developer's just economic reward for its efforts to provide infrastructure for the vast residential community at Hawaii Kai.\textsuperscript{459} Kaiser Development argued that the Honolulu City Council's zoning of the land as preservation and the City Development Plan's designation of Queen's Beach for park use constituted an inequitable precondemnation proceeding.\textsuperscript{460} Kaiser Development further argued that the district court in Honolulu abused its discretion by refusing to allow the developer to introduce evidence at trial of "what they [city officials] discussed in the back room on a lower level."\textsuperscript{461}

The Ninth Circuit would have none of it. "Crown jewel" or not, the court ruled that the claim was for a regulatory taking, and that "the government does not take an individual's property unless it has 'denie[d] [him] economically viable use of his land.'"\textsuperscript{462} The court further ob-

\begin{footnotesize}
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\item[456.] The first paragraph of the section could be amended in the following manner: Each political subdivision shall have the power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be provided by general law. Such procedures, however, [including direct legislation by initiative and referendum,] shall not require the approval of a charter by a legislative body.

\textit{HAW. CONST.} art. VIII, § 2 (with proposed amendment in brackets).

\item[457.] The Hawaii legislature would retain its power to enact general laws of statewide concern that supersede initiatives or referenda enacted within Hawaii's counties. \textit{See} City and County of Honolulu v. Ariyoshi, 689 P.2d 757, 761 (Haw. 1984) (finding that ordinances enacted by counties are superior to conflicting state statutes, but are still subject to the legislature's authority to enact laws of statewide concern). For a discussion of federal preemption of state legislation where Congress occupies the field, see NOWAK \textit{ET AL.}, supra note 315, § 9.2, at 296-97.


\item[459.] \textit{Id.} at 574.

\item[460.] \textit{Id.} at 575.

\item[461.] \textit{Id.} at 576 (referring to Reporter's Transcript at 151 (July 7, 1987)) (brackets in original).

\item[462.] \textit{Id.} at 575 (quoting Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (brackets in original) (citation omitted)).
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served that "'[i]n the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment.'"463 The appellate court further found that the district court had properly excluded evidence of city planning decisions "as not relevant to the inequitable precondemnation activities claim."464

Kaiser II's resolution demonstrates the difficulties faced by developers in Hawaii. Kaiser Development asserted in Kaiser II that it had envisioned the resort/hotel complex to be its "crown jewel" when it entered into the lease agreement with Bishop Estate in 1961, and that the 1960 and 1964 General Plans for development of Honolulu designated Queen's Beach as a resort and commercial area.465 Subsequent amendments to the Development Plan rezoned Queen's Beach for preservation and park use.466 The Hawaii Supreme Court's holding in the Nukolii case that development rights do not vest until the last discretionary act of government is completed increases the difficulties for developers who expend capital in anticipation of a favorable government determination.467 In addition, if the Hawaii legislature should reinstate initiative and referendum powers over county zoning, developers will face the prospect of zoning changes made by an unsympathetic electorate before government approval of the final necessary permit.

One commentator has suggested a legislative remedy for this problem based on a California developer's agreement law:

Essentially, such statutes permit but don't require local governments to agree with a landowner that all (or certain) of the local land use regulations applicable to a particular parcel will remain as they are (or as modified by the local government) for, say, five years. Thus, any subsequently enacted land use regulation of the kind frozen by the agreement will be inapplicable to the subject property, even if passed by a later—and different—city council. In return, a landowner often agrees to dedicate land or easements, or to build extra infrastructure or other improvements, beyond what a local government could otherwise require as a condition of development permission. Although such an agreement thus binds future legislative bodies in a way normally impermissible under standard local government law, courts in both the United States and England have gen-

463. Id. (quoting Kirby Forest Indus. v. United States, 467 U.S. 1, 15 (1984)).
464. Id. at 576.
465. Id. at 574.
466. Id. at 574-75.
erally approved these kinds of agreements provided what is bargained away is not too extensive.\textsuperscript{468}

By enacting such a developer's agreement law, the Hawaii legislature can balance the need for initiative and referendum with the protection of developers' reasonable investment-backed expectations. A developer's agreement law can provide for government reimbursement of specific developer expenditures where the electorate enacts legislation that effectively deprives the developer of a "crown jewel" or lesser expectation. Provisions also should ensure that prior to enacting direct preservation legislation, the electorate is informed of government reimbursement costs that preservation will entail. In addition, a developer's agreement law can provide protection of reasonable investment-backed expectations from government action such as occurred in the \textit{Kaiser II} case.

The demands of Hawaii's economy are complex. Enactment of a developer's agreement law requires more study than can be put forth in this comment. Likewise, legislation to prevent speculative investment from further inflating land prices demands careful study. Hawaii needs development, but it does not need the rising prices caused by speculators who make no productive use of Hawaii's natural resources. Such speculation impairs goals set out in the Hawaii State Plan.\footnote{See supra text accompanying notes 80-95 for a discussion of the economic development goals of the Hawaii State Plan.} Legislation is needed to stabilize the Hawaii land market by removing the incentive to buy and sell property in Hawaii without making improvements to that property. Such legislation, perhaps in the form of a severe surtax on speculative transactions where no improvements are made, would aid developers of clean industries as well as citizens seeking homes. This problem must be carefully addressed, however, so as not to restrict alienation of land or unconstitutionally discriminate against out-of-state purchasers.

The dimensions of the difficulties posed by Hawaii's housing shortage exceed the scope of this comment. Rapidly escalating land prices in Hawaii pose a serious social problem. The Hawaii legislature enacted the Land Use Law in 1961 because "[i]nadequate controls have caused many of Hawaii's limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in a long-term loss to the income and growth potential of our economy."\footnote{Neighborhood Bd. No. 24 v. Land Use Comm'n, 639 P.2d 1097, 1103 (Haw. 1982) (brackets in original) (quoting Act 187, § 1, 1961 Haw. Sess. Laws 299, 299).} Thirty years later, Hawaii's resources are under considerably more stress, and the problem remains.

\textsuperscript{468} Callies, supra note 16, at 169.
\textsuperscript{469} See supra text accompanying notes 80-95 for a discussion of the economic development goals of the Hawaii State Plan.
CONCLUSION

Nothing noble is done without risk. Thirty years ago, the Hawaii legislature set out on a course to regulate Hawaii's bounty of natural resources for the benefit of Hawaii's people. Hawaii's current regulatory scheme of natural resources law rivals any in the nation for comprehensive coverage and formidable complexity.

Planning for Hawaii's future is every Hawaii citizen's concern. The Hawaii legislature should act to increase opportunities for public participation in planning processes by restoring initiative and referendum powers over county zoning. The compatibility of direct legislation with government planning is reviewable by Hawaii's courts.471 Perhaps the majority in Kaiser did not want to assume that role, and preferred to avoid such consistency determinations in the future. By striking down the initiative power over zoning, the court effectively deferred to the executive and legislative branches of Hawaii government in zoning decisions. Deference to the more politically accountable branches of government has much to commend it, but the loss of participatory democracy in zoning decisions is too high a price to pay for a court's unwillingness to decide politically charged issues. "It is emphatically the province and duty of the judicial department to say what the law is."472 Hawaii's courts are the proper forums in which to determine whether zoning initiatives by Hawaii's citizens are consistent with government planning.

The Hawaii legislature should require contested case hearings on applications for SMA use permits pursuant to the HCZMA. Coastal lands are Hawaii's most valuable resources. How Hawaii's coastal lands are allocated during the next decade will determine what Hawaii will be like for generations to come. Cultural values that shape a way of life are at risk. The procedural safeguards of contested case hearings will help to ensure well-reasoned decisions by government authorities in regulating these increasingly valuable lands, and thus will bolster the confidence of Hawaii citizens in their government.

What is the public interest? Can any interest of the public be more compelling than an interest in democratic government that allows individual citizens maximum opportunities to decide how they will live? People will disagree. That is the nature not only of democracy and American law, but of all human endeavor. Perhaps the public interest is nothing more than an ongoing dialectic of competing individual interests.

471. "A zoning amendment enacted by the city council is subject to judicial review for conformity with standards enunciated in the general plan, and so is a zoning amendment enacted by initiative. That the amendment was adopted by popular vote does not immunize it from judicial review." Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu, 777 P.2d 244, 254 (Haw. 1989) (Nakamura, J., dissenting).
If this is true, then the government that allows the most opportunities for competing points of view is strongest and best serves the public interest. Comprehensive planning is most comprehensive where it avails itself of maximum citizen participation. What is needed is an open process that allows the dialectic of competing individual interests to take place.

In the spring of 1989, the Hawaii Supreme Court was faced with two difficult cases involving land adjacent to one of greater Honolulu's last remaining undeveloped beaches. The court's decisions in those cases swept away the rights of Hawaii citizens to participate in government planning the way a strong sea swell out of the Pacific sweeps away the beach at Kona's Vanishing Sands. By amending the HCZMA to require that applications for special management area use permits be subject to contested case hearings, and by amending the Hawaii Constitution to allow the county governments to incorporate the initiative and referendum powers into the legislative structures of the counties, the Hawaii legislature can work some political magic. Then like the sands at Laalooa, those vanished rights of Hawaii citizens to participate in planning for Hawaii's future can return.

473. Laaloa is the Hawaiian name for the land division on the Big Island where Vanishing Sands or Magic Sands Beach is located. The name originates from a nearby ancient Hawaiian place of worship, and literally translates into "very sacred." See CLARK, supra note 2, at 103-04.