UNIVERSITY OF HAWAII LAW REVIEW

VOLUME 7

1985

University of Hawaii Law Review

Volume 7 / Number 1 / Spring 1985

ARTICLES

COMMENTS

NOTE

RECENT DEVELOPMENT

Subscriptions

THE UNIVERSITY OF HAWAII LAW REVIEW is published semi-annually. Subscriptions are given for the entire year only and are payable in advance. Subscriptions in the United States are $16 for two issues in 1985 if remitted before March 31, 1985 (elsewhere, $17 per year). Remit payment only for the current year. Subscriptions are renewed automatically unless timely notice of termination is received.

Send subscription orders to: University of Hawaii Law Review, William S. Richardson School of Law, 2515 Dole Street, Honolulu, Hawaii 96822. Make checks payable to: R.C.U.H.—Law Review.

Manuscripts

Unsolicited manuscripts submitted for publication are welcomed but must be accompanied by return postage if return of the manuscript is desired.

Uniquely Hawaii: A Property Professor Looks at Hawaii's Land Law

by Allan F. Smith

The following is the text of a lecture delivered by Dr. Allan F. Smith at the University of Hawaii on December 6, 1984.

Professor Smith is Professor Emeritus at the University of Michigan Law School, where he was a member of the faculty from 1947 until his retirement in 1982. While at the University of Michigan, Professor Smith served as Director of Legal Research and Chairman of the Graduate Committee of the Law School from 1954 through 1960; as Dean of the Law School from 1960 through 1965; as Vice President for Academic Affairs of the University from 1965 through 1974; and as Interim President of the University in 1979.

Professor Smith teaches in the area of property law. He has authored Personal Life Insurance Trusts *(1950);* Cases and Materials on the Law of Property *(with Aigler and Taft, 1951);* Handbook of the Law of Future Interests *(with Simes, 1956); and* Basic Property Law *(with Browder, Cunningham & Julin, 1984).*

As first holder of the Wallace S. Fujiyama Distinguished Visiting Professorship, Professor Smith taught Real Property during the fall 1984 semester at the University of Hawaii at Manoa William S. Richardson School of Law.

Professor Smith received his LL.B. degree from the University of Nebraska Law School, an S.J.D. and an honorary LL.D. from the University of Michigan, and an honorary D.C.L. from the University of New Brunswick. He is a member of the Order of the Coif, Phi Kappa Phi, and Pi Kappa Delta.

I am not at all certain that a visitor from the mainland has any business talking to lawyers in Hawaii about Hawaii property law. It is surely a fact that many of you here know a great deal more about the subject than I do, or ever will. But, having taught Property to freshman law students for thirty-seven years, I have had occasion to read a fair number of cases and a fair amount of historical writing. In all that time, however, and I hope you will forgive me, I had really not looked at the history of Hawaii's land law or the unique problems that its island status produces. Since the time it became clear that I

would be here this fall, I have sought to remedy that situation, and I have been fascinated with that exposure. I want to talk briefly today about three aspects of what I have seen. First, about some remarkable historical parallels between the development of Hawaii land law and the development of the feudal land system of England. Second, to say a few words about two or three of your more celebrated cases relating to water rights. And finally, I want to compare the posture of Hawaii law related to the regulation of land use with that of other parts of the nation.

First, the bit of history. In England, after the Battle of Hastings, King William the Conqueror declared himself the owner of all the land of England, by right of conquest, and he used land to consolidate his governmental authority. He parceled out large tracts of land to his loyal barons and, in return, required that they supply him with those things a king requires. Of great importance, then, was his need to keep the peace and enforce the claim of his governance. Accordingly, one of the important incidents of feudal tenure was "knight service," or "military service," by virtue of which the King's lords were required to supply armored knights to serve the King. Money, produce, animal stock, and food were also paid in tribute.

The barons used their land in the same way the King had done and parceled it out to lesser lords in return for services by which they met their own needs and their obligation to the King. This process of subinfeudation might go through a number of steps before it reached the tenant who actually tilled the soil and cared for the stock. But the point is: *land was power.* The feudal system did not arise as an abstract notion that this is a good way to own or manage land. It arose because it met the needs of the times, and the most acute need was to consolidate the King's governmental power.

Some 200 years later, the system ceased to function, and, with the advent of the fee tail estate, land became the basis for the family wealth of the English aristocracy. It was not until the nineteenth century that land law reflected the fact that land was now an article of commerce to be exploited for the values that the burgeoning industrial society demanded. And now, as we approach the twenty-first century, the new direction in England and America lies in public controls over land use through planning agencies and restrictive legislation.

The fascinating aspect of this is that in Hawaii, halfway around the world, a very similar feudal system arose in lands with no seeming connection with England and apparently for exactly the same societal purpose: land was governmental power, and it was used for that purpose.

Kamehameha I (1758? - 1819) by conquest became monarch of all the islands and, by conquest, the owner of all land. One author indicates that he followed the example of his predecessors

> and divided out the land among his principal warrior chiefs, retaining, however,

> a portion of his lands, to be cultivated or managed by his own immediate servants or attendants. Each principal chief divided his lands anew, and gave them out to an inferior order of chiefs or persons of rank, by whom they were subdivided again and again, after passing through the hands of 4, 5, or six persons from the King down to the lowest class of tenants.[1]

One striking difference should be noted. In Hawaii there was no "military service." Produce or labor were the ingredients of the tax system—the tribute paid to the chiefs.

It is not unfair to note also that after the Great Mahele[2] in the mid-nineteenth century, when a portion of Hawaii's land was turned to private ownership, there followed a period, though it may turn out to be much shorter than the 500-year period in England, when land represented family wealth. The United States Supreme Court had to decide an important case this year,[3] in a factual setting that showed that forty-seven percent of the land was owned by seventy-two families, only four percent by other private individuals, and the balance of forty-nine percent was owned by state and federal governments. It is, of course, still too early to know whether the Land Reform Act[4] will produce a widely dispersed ownership of land, though there is evidence that it may well do so with respect to housing land.

As in England, after commercial growth in Hawaii, it is now time to address the next great change. That change is the fact that the institution of private property, through which we allocated the uses to which land resources should be put, is under attack, because large segments of our population no longer believe that private developers are making the right decisions about land use. Public control of land use has mounted rapidly and extensively, and private property in lands is correspondingly diminished.[5]

As one author notes, our traditional law viewed a swamp as a worthless piece of land that ought to be developed, and we encouraged the filling of swamp land for commercial and industrial development. He goes on to say:

> Obviously, as more swamps have been "improved," people have begun to wonder why adjoining fisheries suffer, why floods become more severe, and why adjoining bodies of water become more polluted. Gradually, as the problems resulting from land abuse have increased, our awareness of the interrelatedness of all land has extended beyond the primitive concept of nuisance. . . . We begin to

---

[1] L. CANNELORA, THE ORIGIN OF HAWAII LAND TITLES AND OF THE RIGHTS OF NATIVE HAWAIIANS 1 (1974).

[2] *See generally* J. CHINEN, THE GREAT MAHELE; HAWAII'S LAND DIVISION OF 1848 (1958).

[3] HAWAII HOUS. AUTH. V. MIDKIFF, 104 S. Ct. 2321 (1984).

[4] HAWAII REV. STAT. § 516 (Supp. 1982).

[5] *See generally* Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983).

> realize that a swamp serves adjoining fisheries as a breeding and feeding ground and that it reduces flooding and pollution of adjoining waterways by acting both as a sponge and a filter.[6]

I shall say more about regulation later.

Let me turn for a moment to my exposure to Hawaii decisions with reference to water rights—that part of "property" in land which deals with problems associated with allocating water resources. States on the mainland have pursued either a doctrine of riparian rights or a system based on prior appropriation of water. The former is largely a judge-made regime—a product of decisions in specific cases over the years. The latter has been adopted primarily in arid or semi-arid states, where the supply of water is admittedly inadequate to meet all demands. The appropriation doctrine is always accompanied by administrative machinery to handle applications from prospective users and to grant licenses or permits to the successful applicants. The power to grant or withhold permits is obviously an awesome power affecting land use.[7] But it is also obvious that such machinery does provide a forum in which competing demands may be weighed against societal needs, and allocations deliberately made to foster those values deemed paramount.

Hawaii has in recent years some decisions from its supreme court, two of which are still pending on appeal, that have purported to look at the ancient Hawaiian law and practices, to interpret relevant statutes, and to lay down some guiding principles by which water rights may be determined. I am delighted to know that a commission is presently engaged in work looking forward to introducing a Water Code in the Hawaii Legislature for its consideration.

I am delighted, because I think the judicial decisions in their present posture have produced a legal milieu that is not likely to permit or make maximum use of available water supplies. Moreover, it presents an uncertain theoretical basis for the allocation problems that are sure to arise between competing owners. I suggest that legislative action is needed to resolve some of these matters in a way that will achieve those objectives that this society wants.

Let me be more specific. You have, here in Hawaii, a species of water rights, the so-called "appurtenant rights," which seem to be unique. As you know, these rights purport to give the owner of land the right to a fixed quantity of water, the amount of which is calculated by determining how much water was being used on that land for taro cultivation at the time of the Land Commis-

---

[6] Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 WIS. L. REV. 1039, 1047 (1973) (footnote omitted).

[7] No city in Arizona can grow unless water for the inhabitants can be found and supplied. *See generally* Arizona's Groundwater Code, ARIZ. REV. STAT. ANN. §§ 45-401 to -631 (1984). *See also* Arizona County Planning and Zoning Code, ARIZ. REV. STAT. ANN. §§ 11-801 to -808 (1977).

sion Awards, perhaps 135 years ago. The supreme court itself, while sustaining the right of the landowner to such a quantity, observed in a footnote: "It does seem a bit quaint in this age to be determining water rights on the basis of what land happened to be in taro cultivation in 1848. Surely any other system must be more sensible."[8] The court went on to invite the legislature to conduct a thorough re-examination of the area. Hopefully the new proposed Code can find a way to improve the system.

The court itself took one step that in fact seems to look to the elimination of this species of water rights. In the *Reppun*[9] case, it held that such rights, though non-transferable, were *destructible*. To the extent that the "appurtenant rights" are eliminated, we are left with a doctrine of riparian water rights—rights that do not involve fixed quantities of water, but rather a right of user shared among owners of all riparian lands on the stream.

With respect to riparian rights, the Hawaii Supreme Court, like the courts of many other states, has not articulated a consistent or certain theoretical basis for determining these rights. It has declared both a theory of "natural flow" and a theory of correlative rights of reasonable use. These theories are inconsistent. For example, the court, in articulating the "natural flow" theory, declares that owners of riparian land have a "right to the natural flow of the stream without substantial diminution and in the shape and size given it by nature."[10] Such a doctrine is essentially non-utilitarian. The water cannot be used if it substantially alters the flow or affects the quality. Under this theory, too, any diversion of water to non-riparian land, for example, would be an actionable wrong even though no harm or damage to any other owner could be shown. Failure to act could produce a prescriptive right to divert.

No court has been able to live with the natural flow theory with its non-utilitarian result and its potential for obviously premature litigation. Thus, in the same decision from which the quoted declaration of "natural flow" rights was taken, the court declared that each proprietor has an equal right to use water flowing in a natural stream, without prejudicing the rights of others.[11] It has also specifically held that there is no cause of action for diversion of water from a stream unless a plaintiff can "demonstrate actual harm to his own reasonable use of those waters."[12] The court has also held that as between an upper *ahupua'a* and a lower riparian *ahupua'a*,[13] the rule of reasonable use

---

[8] McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 189 n.15, 504 P.2d 1330, 1340 n.15 (1973), *aff'd on rehearing*, 55 Hawaii 260, 517 P.2d 26 (1973), *cert. denied*, 417 U.S. 976, *appeal dismissed*, 417 U.S. 962 (1974).

[9] Reppun v. Bd. of Water Supply, 65 Hawaii 531, 656 P.2d 57 (1982).

[10] McBryde Sugar Co. v. Robinson, 54 Hawaii at 198, 504 P.2d at 1344.

[11] *Id.* at 187 n.13, 504 P.2d at 1339 n.13.

[12] Reppun v. Bd. of Water Supply, 65 Hawaii at 553, 656 P.2d at 72.

[13] An *ahupua'a* is the traditional Hawaiian land division extending from the uplands to the

applies.[14]

It is probably fair to say that the court is actually committed to the "reasonable use" doctrine when it comes to the settlement of allocation disputes between competing riparian owners. To this extent, if the prospective Water Code can develop a permit system that continues a flexible mode of distribution by putting time limits or conditions upon any permit that authorizes use of specific quantities of water, it will not cause disruption of uses.

There are still two troublesome matters: First, the court has held that these riparian rights cannot be severed from the riparian land;[15] and second, the persistent reference to both the "natural flow" theory and to the desire to effectuate what is deemed to be the attitude toward water in ancient Hawaiian custom.[16]

The court has recognized that common law riparian rights were severable, but found Hawaiian riparian rights to be statutory in origin and declared that they were thus made non-severable.[17] The conclusion was buttressed by an argument that water in ancient times was supposed to be used for the common good and not as an independent source of income. And so, only the riparian land can use riparian rights.

Obviously, if the doctrine of non-severability is carried to its extreme, it can produce a situation in which available water that could be used for arid land may not be used and would simply flow unused into the ocean. In conditions of water shortage, such a state of the law would produce serious tensions. Perhaps, however, there is an explanation.

We are often guilty of thinking that the "use of water" consists of drinking it, irrigating with it, cooling industrial plants, and so forth. Perhaps the court is saying that one "use" of water is merely letting it flow in a stream. Environmentalists, supporters of public recreation such as canoeing, swimming, and those who simply enjoy the aesthetic quality of flowing streams will surely embrace that proposition. Today, we now know that some actions with reference to our land and our water that we called "development" were actually harmful to other values and interests that should perhaps have outweighed the values we got by development.

For example, we could pose a simple situation in which a riparian owner wanted to build housing on his land and would need all the water of the stream to supply the housing. We must now choose between having a flowing stream or having more housing. Perhaps our society would prefer the flowing stream as the proper use of that water. Perhaps, then, the court in its decisions gropes

---

sea. M. PUKUI & S. ELBERT, HAWAIIAN DICTIONARY 8 (1965).

[14] *Id.*

[15] *Id.* at 550, 656 P.2d at 70.

[16] *See generally* McBryde Sugar Co. v. Robinson, 54 Hawaii 174, 504 P.2d 1330 (1973); Reppun v. Bd. of Water Supply, 65 Hawaii 531, 656 P.2d 57 (1982).

[17] Reppun v. Bd. of Water Supply, 65 Hawaii at 550, 656 P.2d at 70.

toward a posture in which a natural flow of a stream must be allowed to compete as a *use* of water with those more traditional uses of supplying cities, irrigating crops, running industrial plants, and so forth. If so, and if that idea conforms to the policy that the legislature uses to guide the language of the Water Code, accommodation could probably be achieved.

I suggest, however, that the doctrine of non-severance may prove a deterrent to the development of a rational code. For example, a state's power of eminent domain surely should include the capacity to acquire water rights separated from land ownership, if that should turn out to be the most efficient and effective mode of resource allocation.

One more thing about water. There is enough handwriting on the wall even at this date to indicate that water shortages will occur in the foreseeable future. Surely the situation here is thus one that cries out for a substantial and sustained state investment and a sustained program in research and development of desalinization capacity. I do not know the status of the present efforts, but if one foresees for Hawaii any population growth or economic growth, it is likely that more water will be needed.

My final subject: How does Hawaii compare with other states in its posture with reference to land use controls? Again I must confess how little I can say compared with what has already been said. Professor David Callies has just published a book with the intriguing title "Regulating Paradise," which is an extraordinarily comprehensive and lucid description of land use regulation in Hawaii.[18] It goes far beyond mere legal description, however, and provides an incisive analysis of the problems that face the state and some provocative proposals concerning steps that may be required if Hawaiian paradise is to be preserved.

The State of Hawaii is small in terms of total territory. It is surely unique in its terrain and in the very finite boundary which the Pacific Ocean provides for each island of the state. Each of the mainland states, of course, has geographical boundaries, but in each case there is other land just across some of the boundaries, where residents or entrepreneurs may seek land resources for whatever purpose they may desire them. A General Motors assembly plant may be in Michigan, Ohio, Indiana, Illinois or even California. Restrictions on the use of land for industrial development, housing development, recreational development or conservation are still non-existent in large areas of most states. Allocation to a particular use is still a matter of private choice in very large areas.

Hawaii represents the only state in the union in which *all* of its land is subjected to use regulation and control. The enactment of Act 187 in 1961—the State Land Use Law[19]—and the supplemental Hawaii State Plan of

---

[18] D. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII (1984).

[19] HAWAII REV. STAT. § 205 (1961).

1978,[20] have produced that condition. It is perhaps appropriate that this unique state should be the place where an effort at total control should be made, for the multiple demands for land use are all present here, and there is no place in the country where the clash between conservation of natural environment and development for housing or commercial purposes is more sharply drawn.

Almost any development, anywhere, raises questions of what society wants for the future. The condition of total regulation, therefore, is one that is fraught with both promise and with problems. It is full of promise, because the potential arising from a wise exercise of the total control available could balance the competing demands for land allocation in such a way as to produce a model land use community. It is full of promise, because in theory the control could produce maximum benefits for all citizens from this unique resource. It could produce benefits that attend economic growth; benefits that flow from having an adequate supply of housing; benefits that arise when there is enough land for agricultural production; benefits that arise when there is enough land for all present and future recreational needs and desires of the public; benefits that arise for posterity when historical and cultural monuments are preserved; and benefits that arise when sheer topographic beauty is preserved and enhanced, and wildlife thrives in a natural environment. This theoretical promise presents an enormous challenge to all concerned with implementation of regulatory schemes as they seek attainment of something not yet achieved in our country, or any country.

It is full of problems, because the wisdom required for decision is not always found in the right place at the right time. Indeed, the data and information needed for wisdom is often lacking, because our science is not yet so perfect as to enable us to predict the future result of present decisions on land use. Nor do we accurately foretell the future demands of our society. It is fraught with problems, because the various levels of government which exercise public control—local, county, state, federal—cannot always agree upon the proper situs for making particular decisions. It is fraught with problems, because total socialization of land use decisions runs contrary to long-held doctrines that private ownership of land carries with it the right to determine use. And there is the related constitutional question as to when regulation becomes a taking of property that requires compensation to the deprived owner. It is fraught with problems, because the economic impact of land use decisions will often inevitably favor Citizen A at the expense of Citizen B, and avarice has not yet been eliminated from the human condition, and the politics of avarice can sometimes override wisdom in most unseemly fashion.

To what extent do legal developments in Hawaii parallel those in other

---

[20] HAWAII REV. STAT. § 226 (Supp. 1984).

states? Obviously, the coastal areas should be a prime concern. In 1968, in *Application of Ashford*,[21] the Supreme Court of Hawaii, in a decision that startled many property lawyers, declared the tidal beaches of the state to be owned by the state and not by abutting private owners. It held, moreover, that the upland boundary was not the mean high water mark, which is usually the accepted boundary in common law regimes, but rather a higher line, "the upper reaches of the wash of the waves, usually evidenced by the edge of vegetation or by the line of debris. . . ."[22] In so holding, the court acquired for the state, without compensation, a greater dimension of tideland beaches than has been done in any other state. Clearly, the opportunity for preservation of these beach resources for use by the general public is extraordinarily large. Other coastal states have, by legislation and by regulation, managed partial control and denied developmental rights without compensation, but with perhaps one exception, none on such a sweeping scale.

The California Supreme Court performed some judicial gymnastics in two cases (in 1980 and 1981) that had the effect of depriving some landowners, whose land bordered on water, of developmental rights, unless the development was consistent with the public trust in which the land was held. Prospective residential, industrial or agricultural uses were not consistent with the public trust. The first of the decisions[23] upset 100 years of expectations, reinterpreted a statute and overruled two earlier supreme court decisions with respect to that statute's effect on tidal waters. The second of the decisions[24] extended the "public trust" doctrine to the banks of *all* navigable waters in the state, even though they were not tidal waters.

The Hawaii decision, buttressed also by the protection that federal laws give to coastal zones,[25] gives Hawaii unparalleled opportunity for preserving and enhancing this part of its land resources.

A second subject that in recent years has received more and more popular support lies in the field of historic preservation. The federal government has added its strengths to the preservation movement, including the passing of the National Historic Preservation Act.[26] Although it does not guarantee preserva-

---

[21] 50 Hawaii 314, 440 P.2d 76 (1968).

[22] *Id.* at 315, 440 P.2d at 77.

[23] City of Berkeley v. Superior Ct. of Alameda County, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. (1980), *cert. denied* Santa Fe Land Improvement Co. v. Berkeley, 449 U.S. 840 (1980).

[24] Cal. v. Superior Ct. of Lake County, 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981), *cert. denied*, Lyon v. Cal., 454 U.S. 865, *rehearing denied*, Lyon v. Cal., 454 U.S. 1094 (1981).

[25] *See, e.g.*, Coastal Zone Management Act of 1972, Pub. L. No. 89-454, tit. III, § 302, as added Pub. L. No. 92-583, 86 Stat. 1280 (1972) (codified at 16 U.S.C. §§ 1451-1464).

[26] National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 1, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. §§ 470 to 470w-6).

tion, the Act creates an Advisory Council that acts as a guardian to assure adequate consideration of the impact of federal programs on listed historic sites. Hawaii has recently seen this Act and the companion National Environmental Policy Act[27] in action, when the proposed H-3 highway was stopped, and it remains a project in limbo. Perhaps this local incident will remind you that not everyone in the world always agrees with restraints designed to ensure historic preservation. If we assume, however, that such preservation is indeed a value that should be encouraged, Hawaii is in an excellent position to act effectively.

One of the major legal arguments that flows from governmental attempts to prevent alteration or destruction of a historic site, or even to require an owner to maintain it, is whether such regulation is a taking that requires compensation. The Constitution of Hawaii contains a specific provision which reads: "The State shall have the power to conserve and develop objects and places of historic or cultural interest and provide for public sightliness and physical good order. For these purposes, private property shall be subject to reasonable regulation."[28] Many modern courts have evinced a sympathetic attitude toward historic preservation, and the Supreme Court of the United States in the famous *Penn Central*[29] case has given a boost to the constitutionality of properly drawn programs. The Hawaii courts already seem to have a general disposition to accept regulation deemed to be in the public interest, and with the express constitutional authorization, it is highly probable that there can be no claim for compensation in this state as a result of reasonable historical preservation controls. In turn, it means that wise action by state and county governments can preserve for this state its many historic sites.

Professor Callies intimates in his book that the state program is relatively weak, and that the primary responsibility for implementing an effective program of land use control rests with the county governments. It is not at all clear that this is the best allocation of power, because local county governments are always subject to extreme pressure for actions that produce economic development, and the way in which the conflict between preservation and use is resolved is at the heart of a successful preservation program. It is urged by some that state decisions may be better.

Finally, let me revert to the general subject of land use controls and to the problems that Hawaii faces along with all other states. I shall speak briefly of only two problems: first, who decides what use shall be made of particular land; and second, who pays for the public benefits that are believed to flow from particular allocations.

---

[27] National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 21, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370a).

[28] HAWAII CONST. art. IX, § 7.

[29] Penn Central Transp. Co. v. City of New York, 439 U.S. 883 (1978).

My colleague at the University of Michigan Law School, Joseph Sax, has suggested some terms that I think are useful in discussing the first question.[30] He points out a difference between "exclusive consumption benefits" and "non-exclusive consumption benefits" that flow from property. Our traditional system of property deals very largely with and is geared to the production of *exclusive* consumption benefits. We let persons bid for land that they may use as they choose—to build homes, to build a shopping center, or an office building. We are willing to let that system of private ownership produce these benefits. These he calls "exclusive" because nearly all of the benefits that flow from such an allocation of use flow only to the persons who occupy and use the land. Our system has operated on the assumption that maximum societal values will be produced in that way. However, let us suppose the "competitors" bidding for the use of the land include those who would benefit from the maintenance of an historic building. Now, he would call that consumption benefit "non-exclusive." The number of people who potentially benefit from such use is very much larger and is not limited to actual occupants of the land. But this larger group will ordinarily not enter the buying market. As a group, they are unlikely to organize to buy the land to preserve the historic building. In the same way, the benefits of a hiking trail through a wilderness, or of a scenic stream for canoeing, fishing or swimming are all non-exclusive consumption benefits.

As we think about this difference, then, two things seem clear: first, that our traditional allocation system that leaves the choice of use to the private owner is not likely to produce the non-exclusive benefits; and second, as a society we are noticeably more interested in producing those values and those non-exclusive benefits than at any time in the past. In that light, it follows that we are busily engaged in shifting our system to achieve those values through law—through legal control of land use. Decisions about land use are to be made by planners, not by private owners. The massive growth of "planning" legislation and planning agencies in the United States attests to a shifting emphasis in our society. So, too, do all of the specific laws calling for historic preservation and environmental protection.

We must remember, of course, that every time we allocate land in such a way, we forfeit other values we have prized. Preserving wilderness means no economic activity, no jobs, no housing, no mineral extraction and the *public* does not always respond consistently when faced with an immediate choice. Moreover, when a government acts, through planning and restrictions, to achieve non-exclusive benefits, it runs the risk that the economic losses will be unacceptably large to the voters. Accordingly, even though we may recognize that society is turning more and more of the control of land use to public agencies, we have not eliminated the tensions that allocation decisions create.

---

[30] Sax, *supra* note 4, at 488.

Is Hawaii prepared? The fact seems to be that despite the framework provided by the State Land Use Law of 1961 and the State Plan of 1978, there is not yet a coherent system by which the required decisions are being made. Some five years ago, Professor Daniel Mandelker of Washington University surveyed the laws and procedures in force and found them wanting in many particulars.[31] No significant modifications have taken place since then. There are differing levels of regulations, and specific developmental plans are subject to a variety of approval requirements, but it is not clear that the policy basis for decisions is articulated adequately for decisionmakers' guidance, and it is not clear that the procedures will secure wise decisions. Considering the fact that Hawaii has such a limited amount of land, that it has a peculiarly fragile environment; that the pressures of economic development and population growth are very large; and that pressures for insuring "non-exclusive" benefits in the islands are also growing, it would be well if further steps could be taken to strengthen the potential for wise resolution of the conflict. Those steps require legislation to clarify and organize the planning process.

One final comment: When a wise planner determines that Parcel A is best used and must be used for agricultural uses; that Parcel B should provide low cost housing; that Parcel C should provide houses on lots no smaller than three acres; that Parcel D should provide a dense commercial development; and that Parcel E should remain an undeveloped wilderness for animal refuge, that planner has determined the economic value of the five tracts and the profit that each owner will make from his tract. The owner of Parcel D will command more per acre than owners of A, B, and C. The owner of Parcel E will not command a large price. We have asked that owner to bear almost the total cost for obtaining the societal benefits we seek from preserving wilderness, and we have given Owner D a windfall by assigning the most lucrative of developmental rights.

Should society pay Owner E for the loss of developmental rights? The tendency of the decisions is more and more to find that the particular regulation does not require compensation. Many find this unfair, and there are still some decisions that award compensation, but I suspect the trend toward no compensation will continue. Should there be a way to recapture from Owner D those windfall profits which arise solely from the allocation of development rights? If so, could they be used to compensate E? To date, we have no such capacity, and I see little prospect that a satisfactory scheme will emerge in the near future. Perhaps Hawaii could lead the way.

---

[31] Mandelker & Kolis, *Whither Hawaii? Land Use Management in an Island State*, 1 U. HAWAII L. REV. 48 (1979).

Regulating Paradise: Is Land Use a Right or a Privilege?*

by David L. Callies**

Regulating Paradise: Is Land Use a Right or a Privilege? is the concluding chapter in David L. Callies' recent book, Regulating Paradise: Land Use Controls in Hawaii. *The book provides a comprehensive guide through the plethora of plans, laws, and regulations that help determine land use in Hawaii. The basic elements that underlie each regulatory scheme, as well as the philosophies, purposes, and application of the various land use control systems are thoroughly examined in* Regulating Paradise. *This last analytical chapter explores the right to use land, the proliferation of plans as law, and vested development rights. Additionally the permit explosion, the competing demands made upon rapidly diminishing agricultural lands, and the pervasive effect of federal land policies in Hawaii are addressed.*

The totality of land regulation in Hawaii raises an increasingly common philosophical issue: Is the use of land in Hawaii a right or a privilege? The issue is unique neither to Hawaii nor any other state. The United States has been blessed with a surplus of undeveloped land from its inception, and its history is virtually a history of land acquisition and development, throughout the eighteenth, nineteenth and twentieth centuries. Indeed, the plentiful supply of undeveloped land was a critical factor in the population and settlement of the nation.[1]

It has been over a hundred years, however, since Frederick Jackson Turner implicitly raised the question: What happens when we run out of new lands to

---

* Adapted from *Regulating Paradise: Land Use Controls in Hawaii,* by David L. Callies.

** Professor of Law, William S. Richardson School of Law, University of Hawaii. A.B., De Pauw University, 1965; J.D., University of Michigan, 1968; L.L.M., Nottingham University (England), 1969.

[1] A. STRONG, LAND BANKING: EUROPEAN REALITY, AMERICAN PROSPECT 24-36 (1979); B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1965).

settle?[2] As many parts of the United States became highly developed (urbanized) and uses of land overlapped, the question of competing land uses became critical. Thus, while controls had always been a part of our land management philosophy, they became increasingly prevalent in the mid-twentieth century.[3] Disputes over whether land use is a right or a privilege characterize much of the thought-provoking literature of the past decade. Some commentators preferred to see the development of land continue as a right of ownership.[4] Others expressed a desire to move toward other Anglo-American systems of land development. In these systems if the right to develop had not yet metamorphosed into a privilege dispensed by government, it at least was subject to special scrutiny as "affected with a public interest." Otherwise the right was paid for outright as a "windfall" to compensate those whose development rights were "wiped out" by public land use control decisions.[5]

In Hawaii, Western land ownership and development patterns commenced during the latter half of the nineteenth and early part of the twentieth centuries. This system evolved into the present pattern of urban land development in the state only in the mid-twentieth century.[6] The plethora of land use regulations at every level of government, however, leads inescapably to the conclusion that Hawaii is fast embracing a "privilege" rather than a "right" theory of land development. It takes but a brief comparison of Hawaii with another island-state with scarce land resources and rampant urbanization—England—to demonstrate the speed with which such a changeover occurs.

Land Use Development in England

The completion of several land use studies coupled with the physical destruction and turmoil resulting from World War II led England to adopt in 1947 a sweeping land use planning law that abolished the private right to develop land.[7] Extending to every acre of the British Isles, the law required a landowner

---

[2] F. Turner, The Frontier in American History (1920).

[3] F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control 1-4 (1972); F. Bosselman, D. Callies, & J. Banta, The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control 82-104 (1973).

[4] F. Bosselman, D. Callies, & J. Banta, The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control 124-140 (1973).

[5] Babcock and Feurer, *Land as a Commodity Affected with a Public Interest*, 52 Wash. L. Rev. 289 (1977); D. Hagman & D. Misezynski, Windfalls for Wipeouts: Land Value Capture and Compensation (1979).

[6] A virtually Norman-feudal tenure system prevailed under King Kamehameha I, the first monarch to unite the Hawaiian Islands. Even in the early nineteenth century the King was the ultimate owner of all land and his nobles or *ali'i* "held of" him, and their loyal followers of them. F. Bosselman & D. Callies, The Quiet Revolution in Land Use Control 5-7 (1972).

[7] Town and Country Planning Act, 41 Halsbury's Statutes 1571 (3d ed. 1971) (originally

to seek local government permission to undertake any form of land development. Development was broadly defined as the carrying out of building, engineering, mining, or other operation in, on, over, or under land or the making of any material change in the use of any buildings or land.[8] The same law provided for the drawing up of both general and area-specific development plans which would characterize certain lands as appropriate for development. The owners of such land nonetheless had to seek permission from local government before commencing development. Moreover, a local government could legally deny an application for development even though its own development plans showed the land to be in a development category.[9] While the same law purported to nationalize or condemn existing development rights by establishing a multimillion dollar fund against which landowners denied development permission could claim, no one in England doubts the law would be valid without such "just" compensation.[10]

COMPARISON TO HAWAII

The parallels with Hawaii are, up to a point, striking. Though spared the urban destruction of World War II, Hawaii also developed its state land use law after a series of studies and reports, which law also covers every acre of land in Hawaii.[11] Moreover, each of Hawaii's four counties has local laws that do the same, and all developable land falls in the jurisdiction of one of these counties.[12] Therefore, all developable land is subject at least to these two levels—state and local—of control. While there are still areas where the owner of land appropriately classified under the state law and zoned under the county codes for development may build without further ado, they are diminishing rapidly with the overlay of various special permit requirements such as shoreland management,

---

enacted in 1947); THE BARLOW REPORT: REPORT OF THE ROYAL COMMISSION ON THE DISTRIBUTION OF THE INDUSTRIAL POPULATION, CMD. NO. 6153 (1940); THE SCOTT REPORT: REPORT OF THE COMMITTEE ON LAND UTILIZATION IN RURAL AREAS, CMD. NO. 6378 (1942); THE UTHWATT REPORT: REPORT OF THE EXPERT COMMITTEE ON COMPENSATION AND BETTERMENT, CMD. NO. 6386 (1942).

[8] Town and Country Planning Act, 41 Halsbury's Statutes 1571 §§ 22, 290 (3d ed. 1971).

[9] D. HEAP, AN OUTLINE OF PLANNING LAW 88 (1977).

[10] J. CULLINGWORTH, TOWN AND COUNTRY PLANNING IN ENGLAND AND WALES 15-33, 110-31 (1967). Moreover, the British tax laws levy a development tax on new, permitted development, which, since 1947, has ranged from 30% to 100% of the value of the development "increment" upon land value.

[11] Hawaii State Planning Act (Act 100), 1978 Hawaii Sess. Laws 136 (codified at HAWAII REV. STAT. ch. 226 (Supp. 1980)).

[12] Honolulu, Hawaii, General Plan: City and County of Honolulu (1977); Hilo, Hawaii, County of Hawaii: The General Plan (1971); Lihue, Hawaii, A General Plan for the Island of Kauai (1970); Kahului, Hawaii, Maui County General Plan (1980).

historic preservation, and design-aesthetics. Unlike England, however, Hawaii has not formally either abolished or nationalized the right to develop land nor has it yet decided whether land development is a private right, subject to regulation for health, safety, and welfare of the people at large, or a privilege, for which a private landowner must seek permission and/or pay. How Hawaii deals with the issues of plans as laws, vested rights, and its plethora of land use controls, against a backdrop of federal and federally mandated land use controls, may well decide the question in the next decade.

THE PLAN AS LAW AND THE PROLIFERATION OF PLANS

The linking of plans to development control of land is not, of course, restricted to England. Aside from early standard zoning enabling statutory provisions requiring that zoning be in accordance with a comprehensive plan, fourteen states now require that land use regulations be "consistent with" or "conform to" local land use plans.[13] Some courts have treated such consistency or conformance requirements so stringently that failure of a city to bring its entire zoning scheme into conformance with a new comprehensive plan voids the zoning law.[14] These decisions have moved one expert to comment that zoning ordinances are fast becoming mere administrative arms of the comprehensive planning process.[15]

While Hawaii state courts have not gone nearly so far, there is no doubt that, on several levels, plans indeed have the force of law in Hawaii. Moreover, there are a great many land use plans, most of which are linked not only to each other but also to state land regulatory agencies and county ordinances, such as those dealing with zoning and subdivision control. This is particularly relevant in the relationship between the state plan—Act 100—and the county plans and land regulation ordinances.

THE CONSISTENCY REQUIREMENT

From 1978 to 1984, Hawaii's four counties were required to have their general and, if any, development plans conform to Act 100. Even after the 1984 amendments to Act 100 (the State Plan), county general and development plans must "define the overall theme, goals, objectives, policies and priority guidelines

---

[13] Garner and Callies, *Planning Law in England and Wales and in the United States*, 1 ANGLO-AM. L. REV. 305, 310-11 (1972); Callies, *Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls*, 14 URB. LAW. 798 (1982).

[14] *E.g.*, Fasano v. Board of County Comm'r, 489 Or. 693, 507 P.2d 23 (1973).

[15] J. DIMENTO, THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING (1980).

contained within this chapter."[16] This, of course, has a more direct effect on land use than is apparent on the face of the requirement, since in at least three of Hawaii's four counties, local land use regulations such as zoning and subdivision codes must conform to, or be consistent with, these county plans. Therefore, by requiring some measure of county plan relationship to the goals, policies, objectives, and priority guidelines of the State Plan, the state, through Act 100, has essentially made at least prospective land use regulations and changes (rezonings, subdivision approvals) subject to at least a relationship with its overall themes, goals, objectives, and priority guidelines. This is coupled with the Act 100 requirements that state land use management and control agencies like the Land Use Commission (boundary amendments) and Board of Land and Natural Resources (land use in the conservation district) must still *conform* to Act 100's overall theme, goals, objectives, and policies and use as guidelines the new "priority guidelines."[17] Thus, to the extent that Act 100's provisions provide direction for land use decision-making, arguably all the public regulatory and management aspects of land use in Hawaii are guided by the state through Act 100.

Finally, there is the matter of the ten functional plans and their role as laws. The 1984 revisions to Act 100 manage at least to fulfill a state goal of converting the functional plans to guidance documents. Counties are directed only to "take into consideration" statewide objectives, policies, and programs in the functional plans.[18] State agencies need only "utilize as guidelines" adopted state functional plans.[19] It is only to Act 100 that they must continue to *conform*.

But Act 100 is very general, as it should be. Its land use provisions are more expressions of policy than specific directives for use in particular situations. For specifics, Act 100 directs attention to the aforesaid twelve functional plans, ten of which are now law.[20] This raises an interesting question as to purpose and content. A cursory reading of the functional plans discloses more specificity than Act 100 itself but not enough to provide a basis for land use decision-making at the county level. Even to the extent that the functional plans are principally refinements to and extensions of Act 100's substantive provisions, there is not the level of detail contemplated at most county development plan levels to guide land use decision-making in individual cases. Thus, although Act 100's original requirement that county plans conform to Act 100 by January of 1982 was deleted in 1984, it is still arguable that the county plans read together, are

---

[16] HAWAII REV. STAT. § 226-52(a)(4) (amended 1984).

[17] HAWAII REV. STAT. § 226-52(a)(5) (amended 1984).

[18] HAWAII REV. STAT. § 226-61(a) (amended 1984).

[19] HAWAII REV. STAT. § 226-52(a)(5) (amended 1984).

[20] The ten functional plans which passed the 1984 legislature by concurrent resolution are: conservation lands, historic preservation, tourism, energy, health, higher education, housing, recreation, transportation, and water resources development.

land use plans for the state. Where else will state agencies look for specific guidance on land policy? Neither Act 100 nor the functional plans establish priorities among Act 100's goals, objectives, themes, policies, and guidelines. At least the counties have made such decisions.

The above consistency debate is but one aspect of a large issue that increasingly divides state and county governments: home rule. At bottom, the question of who ultimately controls the use of land in Hawaii depends upon whether the Hawaii Constitution's home rule provisions are broadly or narrowly read.[21]

However, the ability of the counties to exercise their own land controls in the face of conflicting state regulations is made more difficult by the recent Hawaii Supreme Court decision in *City and County of Honolulu v. State*.[22] In deciding that the setting of certain county salaries is of statewide concern and so beyond the home-rule authority of the counties which employ those individuals, the court's narrow majority substantially weakens the home-rule article of the state constitution and departs from earlier decisions of the court suggesting a greater role for the counties. The chief justice in his persuasive and well-reasoned dissent rightly observes that "what is at stake in the outcome of the constitutionality of [the pay limit statute] is 'home rule' for the counties." Correctly observing that the court majority has misinterpreted previous case law on home rule in Hawaii, the chief justice characterizes the state attempt to regulate county salaries as "an unconstitutional infringement by the legislature upon the structure and organization of the county governments" which "strikes at the heart of the structure and organization of county governments."[23] It also decides which level of government is going to win in a contest over conflicting land use regulations. In this and other respects, the decision is too broad.

As the foregoing suggests, the counties would prefer that those constitutional provisions be read broadly. However, this might not be entirely to the counties' advantage. In 1978, the U.S. Supreme Court stripped local governments of their traditional immunity from prosecution under national antitrust laws when they conspire to act in "restraint of trade" in various of their governmental activities. Such activities include the awarding of exclusive franchises (stadium concessions, garbage collection contracts, and the like) and zoning land for commercial purposes that favor one landowner/developer over others—or downtown merchants over proposed regional shopping center developers.[24] The principal exception: when local government was acting pursuant to a clearly articulated state policy, required and supervised by the state. The courts then

---

[21] HAWAII CONST. art. VII, § 2.

[22] No. 9459 slip op. (Oct. 17, 1984).

[23] *Id.* at 3 (Lum, C.J., dissenting).

[24] City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389 (1978).

decided in 1982 that a local government's home-rule status—like that of Hawaii's four counties—was not sufficiently statelike to extend state immunity to home-rule local governments.[25] As a result, local governments throughout the United States are increasingly put to the considerable expense of defending complicated lawsuits, a large percentage of which result from their land use decision-making. The irony for Hawaii's counties is that the more successfully they are able to free their land use decision-making from the state, the less available may be the defense that they are merely enforcing required and supervised state land use policies.

THE RELATIONSHIP OF LOCAL PLANS TO TRADITIONAL LAND USE CONTROL ORDINANCES

Honolulu will probably be the first county to deal with the effect of charter-mandated detailed development plans on land use regulations. Honolulu's charter forbids even the initiation of zoning or subdivision amendments that do not conform to the new county development plans.[26] There has already been one confrontation over whether height limits expressed as "guidelines" in those plans have a different effect from such limits expressed as "standards": Does a proposed 100-foot high building fail the conformance test if the applicable development plan contains a height *guideline* of fifty feet maximum rather than a *standard* of fifty feet? Yes, probably so. However, what about a *guideline* (rather than a *standard*) of seventy-five feet? Maybe not—but does the extra twenty-five feet make any real difference? There is some question whether the Hawaii Supreme Court is willing to apply any plan guideline so stringently, having in 1981 held a detailed plan ineffective as against a conflicting zoning ordinance because the ordinance adopting it "did not state that the subject therein was zoning."[27] Of course, few such ordinances do, and the proper reference is to the charter requirements for the relationship of plans to zoning.

This bodes ill as well for efforts to apply any height limit, whether guide or standard, to a building that needs no rezoning to proceed. While courts in other jurisdictions have required existing zoning ordinances to be brought into conformity with new plans (even without specific statutory or charter direction), the Hawaii Supreme Court has never done so. Moreover, currently a 100-foot building could conceivably be built even in a zoning district with a seventy-five-foot limit—with a special or conditional use permit or a variance. These

---

[25] Community Communications Inc. v. City of Boulder, 455 U.S. 40 (1982).

[26] HONOLULU, HI., REVISED CHARTER OF THE CITY AND COUNTY OF HONOLULU § 5-412(3) (1973).

[27] Nuuanu Neighborhood Ass'n v. Department of Land Utilization, 63 Hawaii 444, 630 P.2d 107 (1981).

devices—all of which have been used at one time or another to grant substantial relief from bulk zoning requirements like height limitations—are nowhere required to conform to development plans in the Honolulu charter. The charter limits itself to zoning amendments and subdivision changes. Special uses, conditional uses, and variances are neither. Indeed, the permitting of development in special design districts; historic, cultural, and scenic districts; and planned development districts is an administrative action in Honolulu, not a zoning amendment. Therefore, effecting district height "relief" by pointing to lack of conformance with a development plan guideline or standard is likely to be fruitless.

VESTED RIGHTS AND DEVELOPMENT RIGHTS

If the right to develop land that has been appropriately zoned and planned for development exists at all, then it must be assumed that a development once legally commenced is entitled to completion—that is, the owner's development right has vested. The question is, in this age (and state) of multiple permits, how far along the development continuum must a landowner progress before he has obtained vested rights? The question is usually a judicial one in the absence of state statutes permitting landowners and local governments to "freeze" zoning and other laws for a period of years during which, presumably, a legally permissible development is both commenced and completed.[28]

The vesting of development rights has come before the Hawaii Supreme Court but five times in the past decade, most recently in the *Nukolii* case.[29] Whatever the law was before, the *Nukolii* case puts Hawaii squarely in the camp of states like California, which require a developer to be very far along indeed in the development process to be safe from a change in law that makes it illegal for him to proceed.[30]

The landowners in the *Nukolii* case had obtained both state and local land use reclassification to zones that permitted resort development. While they were in the process of obtaining other necessary development permits—primarily

---

[28] *See* C. SIEMON, W. LARSEN, & D. PORTER, VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS (1982); Hagman, *Estoppel and Vesting in the Age of Multi-Use Permits*, SW. L.J. 545 (1979).

[29] Graham Beach Partnership v. Save Nukolii Coalition, 65 Hawaii 318, 653 P.2d 766 (1982), *cert. denied*, 103 S.Ct. 1762 (1984); Life of the Land v. City Council, 61 Hawaii 390, 606 P.2d 866 (1980); Life of the Land v. City Council, 60 Hawaii 446, 592 P.2d 26 (1979); Allen v. City and County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977); Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971). *See* Kudo, *Nukolii: Private Development Rights and Public Interest*, 16 URB. LAW. 279 (1984).

[30] *See* Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 168 (1979).

shoreland management under local coastal zone regulations—citizen opposition culminated in a referendum petition drive under Kauai's county charter, which permits rezoning of property by referendum provided vested rights are not affected.[31] The petition requiring the referendum on the county zoning was certified about three months before the permits were granted and about six months before building permits (for condominiums) were issued. Three months after the building permits were issued and construction began—and ten months after the petition was certified—the referendum overwhelmingly overturned the landowners' resort zoning.[32] Did the landowners have a vested right to proceed?

Not according to the Hawaii Supreme Court. Reversing the court below, the state supreme court held that the certification of a referendum petition automatically creates one more "discretionary" permit (beyond the shoreland permit the developer-landowner already had). Without securing that last discretionary permit, a landowner would proceed entirely at his own risk and no rights to develop would vest.[33]

While originally a victory for direct citizen participation in land use decisions (the developer won a second referendum and has asked for his building permits back), the decision is troublesome for landowners' rights. It is difficult to see how a landowner can rely on any land use development permit short of a building permit where referenda of the Kauai sort are certified, even though certification requires only a percentage of the signatures needed to win a referendum. During the interim between certification and referendum, many laws pertaining to a particular development may change. Even if a landowner wins the referendum and retains his zoning, new and different permits may be necessary before a development can commence.[34] This actually occurred in California. New shoreland development permits were added to that state's already long list of land development permits just before a landowner obtained his final building permits and had already begun rough-grading and had expended millions of dollars in (legal) reliance on his permits thus far. All for naught: the California courts held he had no vested rights to proceed until that final discretionary permit—not necessary when he began his land development permit applications—was obtained.[35]

This result led California to adopt a developers' agreement law, a course of action that may well presage a similar attempt in Hawaii.[36] Essentially, such

---

[31] KAUAI, HAWAII, KAUAI COUNTY CHARTER art. V (1969).

[32] *Graham Beach Partnership*, 65 Hawaii 318, 653 P.2d 766 (1982).

[33] *Id.*

[34] Callies, *Nukolii Ruling Cleans Up Numerous Questions*, Sunday Honolulu Star-Bulletin and Advertiser, Oct. 17, 1982, at H3, col. 1.

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

[36] CAL. GOV'T CODE §§ 65864-65869.5 (West 1979). *See* Holliman, *Development Agreements*

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 generally approved these kinds of agreements provided what is bargained away is not too extensive.[37]

How Hawaii ultimately resolves the issue of vested rights may determine the extent to which anything remains of development rights even in properly classified lands. 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 multi-permit state such as Hawaii.

Land Development in a Multi-Permit State: The Permit Explosion

According to one study, at least thirty sets of development regulations may apply to a modest shoreland development, even if it is properly classified under the state land use law and zoned for development under county zoning.[38] The time and effort necessary to obtain development permission is enormous, stifling development both good and bad. Attempts at simplification of the process have been both sporadic and ineffective.[39]

While the problem is not unique to Hawaii, Hawaii does appear to have one of the country's worst cases of "permit explosion."[40] The problem needs to be approached from at least two perspectives: (1) guarantee of development rights

---

and Vested Rights in California, 13 Urb. Law. 44 (1980). Hawaii rejected such a bill in 1982 and 1984, *see* Comment, *Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U. Hawaii L. Rev. 169 (1985).

[37] *E.g.*, Windsor and Maidenhead Royal Borough Council v. Brandrose Inv., [1981] 3 All E.R. 38.

[38] Policies, Plans and Ordinances as of February 1979, Hawaii Community Development Authority J-3B (1979).

[39] Address by Francis Oda, President, American Institute of Architects—Hawaii Chapter, Honolulu City Council Conference on Growth Management (Oct. 1982); F. Bosselman, D. Feurer, & C. Siemon, The Permit Explosion 7-37 (1976).

[40] F. Bosselman, D. Feurer, & C. Siemon, The Permit Explosion 7-37 (1976).

so that the rules are not changed in midstream, and (2) development permission simplification. The first perspective has been discussed above. An agreement between landowner and county would do much to add certainty to the development process. However, some mechanism whereby the state is brought into the process is worth considering. It will profit a landowner very little if Honolulu guarantees that its zoning, subdivision, special management area (SMA), development plans, and other land development regulations will not change for five years with respect to a given parcel, should the state Land Use Commission reclassify the land from urban to conservation, or should the Board of Land and Natural Resources eliminate altogether what little subsidiary development it does permit on urban-adjacent conservation land by means of a rule change.

Simplifying the permit process is a more difficult problem, one that may initially be approachable by one governmental level at a time. A "master permit" might well serve to unite zoning, subdivision, and SMA permits, for example. At the state level, it is worth considering whether, from a permit simplification perspective, drastically reducing or changing the role of the Land Use Commission so that it only considers petitions in which the state has a vital land use interest, would be helpful.[41] For some projects, especially those jointly commenced by both public and private sectors, negotiated development should perhaps replace existing planning and land use controls altogether.

Whatever is ultimately done, no permit simplification, coordination, or streamlining will be effective unless the multitude of plans under which land use labors is also both coordinated and simplified. As previously noted, Hawaii's plans at both the state and local level have the force of law and often supersede inconsistent land use regulation of the more traditional sort (such as zoning and subdivision codes). It is therefore critical that any attempt at simplifying Hawaii's land use regulatory process specifically include state and local plans.

STATE AND LOCAL LAND USE POLICY IN A FEDERAL SYSTEM

There are some land use regulations about which neither the state nor Hawaii's four counties can do very much. These are the land use management and control programs imposed as a result of participation in federal programs. Either required by federal law or promulgated in response to a federal grant program, these "federalized" state and local land use controls touch virtually every aspect of state and local land use regulation in Hawaii.[42] County zoning and subdivi-

---

[41] *See, e.g.*, Daley and Associates, State Land Use Management Study (1981) (unpublished report to the State of Hawaii Department of Planning and Economic Development).

[42] A favorite characterization of the late Professor Donald Hagman of the UCLA Law School.

sion regulations implement both the federal coastal zone management and flood disaster protection acts both in and out of the immediate shoreline areas.[43] State laws relating to critical areas, especially those enforced by the Board of Land and Natural Resources, are shaped in part in response to the Coastal Zone Management Act.[44] Indeed, a separate state coastal zone statute is drawn to meet that federal statute's program and implementation requirements. Location of wells, wastewater treatment plants, and accompanying development are guided by the Clean Water Act.[45] So is the granting of dredge and fill permits from the U.S. Army Corps of Engineers, which are necessary for any significant shoreland development.[46] Transportation links and new stationary sources of pollution must meet Clean Air Act pollutant standards and/or fall into air quality zones that are neither too clean nor too dirty.[47] Any land use that involves the federal government is subject to an environmental impact analysis under the National Environmental Policy Act.[48]

While there is some flexibility in drafting these land use controls, the state has little choice but to adopt something responsive to standards and criteria in these federal laws. Well-intentioned as they are, the federal laws add yet another series of land use regulations that restrict the use of land, a series of regulations that is difficult to coordinate, much less prune or delete.

Of equal concern is the use of federally held land in Hawaii, whether owned outright or, as in the case of ceded lands, held conditionally. State and local land use controls do not extend to federal lands without the permission of the federal government.[49] Indeed, one of the advantages of state participation in the federal coastal zone management program was the review afforded state and local officials of federal actions affecting the coastal zone that might be inconsistent with a coastal zone management program.[50] With large and critical areas owned by the federal government, how the federal government uses these lands critically affects land use at their periphery. Indeed, federal land use can so change the character of an area that inconsistent state and local controls on nearby land might be rendered subject to attack in court.

Of equal significance is the disposal of federal lands. A number of proposals

---

See F. BOSSELMAN, D. FEURER, & D. CALLIES, EPA AUTHORITY AFFECTING LAND USE (1974).

[43] *E.g.*, Honolulu, Hawaii, An Ordinance to Establish the Area and Rules and Regulations For an Interim Shoreline Protection District for Oahu, Ord. 4529 (amended 1977).

[44] *E.g.*, 16 U.S.C. §§ 1451-1464 (1972); HAWAII REV. STAT. § 205A (Supp. 1979).

[45] 33 U.S.C. §§ 1251-1376 (1976).

[46] *Id.*

[47] 42 U.S.C. § 1857 (1970).

[48] 42 U.S.C. §§ 4321-4370 (1969).

[49] Kleppe v. New Mexico, 426 U.S. 529 (1976); Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979).

[50] Comment, *Federal Consistency Under the Coastal Zone Management Act*, 7 U. HAWAII L. REV. 131 (1985).

in the early 1980s to sell off "surplus" federal lands to help ease the national budget deficit has resulted in considerable adverse comment and concern both nationally and locally.[51] While the federal government is obligated to return surplus ceded lands to the state, it is under no obligation to give back lands it purchased or condemned. Disposing of these last categories of land to private parties for development would in many instances run directly contrary to state and local land use policy. To the extent they are embodied in land use regulations like Honolulu's development plans, zoning, and subdivision codes and the state's land use law and state plan, such policies would prevent much of the development that would make the land desirable to the private sector in the first place while some of the more strict state and county regulatory policies might be a bit strained legally if enforced against private landowners in an area as highly and densely developed as Waikiki. It hardly follows that the *only* legally defensible use for such property is a parade of intensely developed high-rise projects. The federal government would do better to sell its surplus lands to the state and to Hawaii's counties for open space and other public uses, and at a price far lower than their maximum economic development potential might suggest.

HOUSING, DEVELOPMENT, AND AGRICULTURE: A NEED FOR RECONCILIATION

The conflict between assuring an adequate supply of housing and land use controls directed toward preserving the environment and agricultural land is both real and, if each "virtue" is pushed to its furthest conclusion, irreconcilable.[52] Land use expert and critic Richard Babcock has observed:

> It is not that the poor don't care about environment; it is just that environment to them does not mean keeping the fishing holes free of beer cans or of saving Lake Michigan "for all of us," but of finding decent shelter reasonably accessible to a job. . . . [In Hawaii] [t]hese "preserve" and "improve" restrictions have contributed to one of the nation's most appalling shortages of housing and a substantial increase in the cost of what housing there is.[53]

Another commentator has put it more pungently:

> Stop growing? But growing is the secret of our success. We have mass affluence, to the extent we have it, not because we took from the rich and gave to the

---

[51] Shabecoff, *Transferring Public Property to Private Control*, Honolulu Star-Bulletin, July 13, 1982, at A11, col. 1.

[52] Babcock and Callies, *Ecology and Housing: Virtues in Conflict*, in MODERNIZING URBAN LAND POLICY 205 (M. Clawson ed. 1973).

[53] R. BABCOCK, GLASS HOUSES AND THE LAW AND OTHER LAND USE FABLES 149-50 (1977).

> poor but because we became—*we grew*—so much richer that even most of the poor live tolerably. They still get the short end of the stick, but the stick is so long now that one can get at least a fingerhold on that end . . . .
>
> [F]or the nation as a whole, for the economy, the conservationist's dichotomy remains, and he has not faced up to it: if we do not stop expanding, we ruin the environment; if we do, we condemn the lower middle classes to their present fate.[54]

The foregoing section has already commented on the regulations governing the development of land. The conclusion is inescapable that the preservation of values upon which many of these controls are based adversely affects the goals set out in Act 100 relating to providing decent housing for all of Hawaii's people.

This is not to imply that either the state or the counties have ignored the problem. Hawaii participates in a variety of programs aimed at alleviating what is an increasing shortfall in affordable housing, even providing for a limited "override" of local land use controls for high-density low- and moderate-income housing projects.[55] While one might question the wisdom of such a provision from the perspective of sound land use planning (a high-rise is a high-rise regardless of who lives in it, and its appropriateness at any given location from a land use policy perspective should depend upon factors other than who lives in it), it certainly has the potential of moderately expanding the construction of low- and moderate-income housing. Providing shelter, especially for those of limited means, is a social goal of an increasingly critical nature.

But there is also the question of agriculture's future in Hawaii. Preserving agricultural land is by itself a worthwhile goal not only from a statewide perspective; it is important at a national and international level as well. What is not so clear is just how much land should be preserved, and where. Clearly, some undeveloped land is needed for housing. Just as clearly, some of that land—especially around new communities such as Mililani in Central Oahu—may well be prime agricultural land. Yet the state Land Use Commission is directed to encourage urban development in and around existing urban centers. Given the urban infrastructure investment (roads, sewers, water, police/fire protection, schools, parks) in and around existing developments, this is a sensible goal, but one that may on occasion conflict with policies on agricultural preservation. Yet if the advertised prices for simple, two-bedroom "ohana" units on "owners' land" with all utilities available is any guide, units can be built for sale by the private sector for less than $40,000, whether the "average"

---

[54] Margolis, *Our Country 'Tis of Thee, Land of Ecology*, 73 ESQUIRE 124 (March 1970).

[55] *E.g.*, HAWAII REV. STAT. § 356-15b (1976) which empowers the Hawaii Housing Authority to develop land at levels and densities unavailable to the private sector.

citizen would want to live there—or indeed want them "next door"—is not the issue. Simple shelter for a substantial minority of our citizens is. For this—if it is important—some space and beauty compromising may have to be made.

In this connection, renewed interest in land banking should be applauded as a useful tool in preserving agricultural land and other open space as well as potential sites for housing.[56] By publicly acquiring land or development rights in land the state as owner can decide within the limits of public policy precisely what prime agricultural land should be preserved, regardless of current economic need, and precisely what land should be used for low- and moderate-income housing. It could even write off the land costs for such housing, thereby substantially reducing the cost of housing to the first purchaser and, through restrictive covenants on the land, subsequent purchasers. Indeed, it is only through selective state intervention through purchase of land and rights in land that there is long-term hope of providing for both the housing and agricultural needs of the state.

REGULATING PARADISE: FOR WHOM

In sum, it is possible to bring most development to a screeching halt in Hawaii, given the plethora of land use plans and controls applicable to even the most modest of land use proposals. This would unquestionably result in the preservation of most if not all open space, beaches, agricultural land, historic and cultural sites, views, and other natural and built amenities in the state. It would also result in the exacerbation of the state's housing problem, a major shift in the state's economy, and a considerable reordering of state and local government priorities. Such a far-reaching set of decisions would affect every aspect of life in Hawaii and therefore should be made openly, intentionally, and consciously by the entire Hawaiian community and not accidentally, reactively, and covertly by a particular segment of the broad-based society that makes up today's Hawaii. Conserve and preserve we should and must, or we lose what is uniquely Hawaiian in any and every sense. But provide we must for that use and development of land required for a sophisticated Pacific island state in the last quarter of the twentieth century. Paradise once lost is not easily regained, but paradise preserved, museumlike, by relegating it to the past for the benefit of less than all of its people is neither likely nor laudable. Better 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

---

[56] *See* OAHU DEVELOPMENT CONFERENCE, LAND BANKING IN HAWAII (1973); Callies, *Commonwealth of Puerto Rico v. Rosso: Land Banking and the Expanded Concept of Public Use*, 2 MICH. J. L. REFORM 199 (1968).

absolute land development will always conflict absolutely. Only by a judicious mix of the two will we successfully regulate this island paradise.

The Hawaii State Plan Revisited

by Kent M. Keith*

---

* B.A., Harvard University, 1970; B.A., 1972, M.A., 1977, Oxford University; J.D., University of Hawaii, 1977. Member, Hawaii and District of Columbia Bars. The author is the State of Hawaii Director of Planning and Economic Development. The author would like to thank the following individuals for their review and comments: Murray E. Towill, Deputy Director; Shoji Kato, Planning Division Head; and Ralph Ukishima, State Plan Branch Chief, at the Department of Planning and Economic Development; Annette Chock, Deputy Attorney General; and David Callies, Professor of Law, University of Hawaii. The author would also like to thank Anthony Oliver for research assistance, and Linda Kaneshiro for manuscript preparation.

I. INTRODUCTION

The Hawaii State Plan[1] is the only state plan in the nation written into law. Governor George R. Ariyoshi signed the plan into law on May 22, 1978. It remained substantially unchanged until Governor Ariyoshi signed Acts 236 and 237 into law on June 4, 1984.[2] This article will review the origin and content of the state plan, the state plan process, the amendments to the state plan made by the 1984 legislature, and the uses of the plan.

The purpose of the article is to clarify the use of the state plan in the government decision-making process. Although the state plan has often been misunderstood as a land use plan, land use is only one of the areas to which it applies. It often has been deemed to be a regulation, when it was designed to be a plan and a planning process. It has been attacked as an instrument of central planning, when it has in fact democratized state planning. This article should be of use to citizens, community groups, business persons, and planners who interact with state government officials, since the actions of state government officials must fall within the framework of the state plan.

II. THE ORIGIN AND CONTENT OF THE HAWAII STATE PLAN UNDER ACT 100

A. The Origin of the Hawaii State Plan

Why is there a Hawaii State Plan? It was born of concern over the future. Hawaii experienced an economic boom from statehood in 1959 through the late 1970's. This boom was accompanied by significant social and political change. By the middle 1970's, Governor Ariyoshi and legislative leaders stood back and began to ask: Where do we go next? Rather than merely reacting to events, can we identify our preferred future, and plan for it? The answer was yes, and the result was the Hawaii State Plan.[3] It passed by a vote of forty-nine

---

[1] HAWAII REV. STAT. § 226 (Supp. 1984).

[2] Act of June 4, 1984, Act 236, 1984 Hawaii Sess. Laws 489 (codified as amended at HAWAII REV. STAT. ch. 226); Act of June 4, 1984, Act 237, 1984 Hawaii Sess. Laws 506 (codified as amended at HAWAII REV. STAT. ch. 226).

In 1980, Act 225 amended procedures for the appointment of members of the policy council and advisory committees. Act of June 7, 1980, Act 225, 1980 Hawaii Sess. Laws 376 (codified as amended at HAWAII REV. STAT. ch. 226).

[3] Senator Francis Wong, then Chairman of the Senate Interim Committee on the Hawaii State Plan, stated in support of the passage of the Hawaii State Plan (H.B. No. 2173-78, H.D. 3, S.D. 3, C.D. 1) on final reading:

> It was obvious in 1975 that we desperately needed a better planning process for our

to two in the State House of Representatives, and by a unanimous vote in the

---

State. In that year we reconstituted the land use commission and in doing so enacted interim land use guidance policies which will fall upon the enactment of the Hawaii State Plan. Later, we enacted an interim tourism policy act which was used to guide the development of tourism in the State of Hawaii which will also fall upon the enactment of this Plan. Last year we struggled with the issues relating to coastal zone management and found that without a blueprint it was becoming increasingly difficult for us to understand and appreciate the various governmental relationships and the priorities for our State.

Mr. President, in the last three years I have been convinced more than ever that the Hawaii State Plan is long overdue. There is a need for us to plan comprehensively for Hawaii's future rather than reacting to brush fires which oftentime become roaring forest fires. We need to establish an orderly process whereby the Legislature in exercising its constitutional responsibility will act as the chief policy making body in the State.

The Hawaii State Plan is a bold step in this direction. It balances well the interest of the State and the County governments as well as being sensitive to the needs of the residents and people of Hawaii.

H.B. 2173-78, 9th Hawaii Leg., Reg. Sess., 1978 SEN. J. 668 (statement of Senator Wong). In his 1982 State-of-the-State Address, Governor George R. Ariyoshi said:

I've been in office for some time now, long enough to get the feeling for what's called "the sweep of history," and I can tell you that nothing we have done gives me a better sense of solid achievement than the *Hawaii State Plan*, which is now the law of the land. Although it is not yet fully implemented, its presence is reassuring to me.

I see the *State Plan* primarily as a great gift to our children. Our state is the first and only state in the union to legislatively adopt a "blueprint for the future," and that is because our own experience has given us a view of how fragile these beautiful islands really are.

When I returned home from law school in 1952, I came home to a plantation economy—the basic old historic Hawaiian economy. And one of the things most clear to me as I began to build a career as a lawyer in Honolulu was that if the economy had a wider base, we would all be better off.

Along with many citizens, I was a strong proponent of the diversification and growth of Hawaii's economic base. And, though that growth was useful and necessary in the 60's and early 70's, after a decade of uncontrolled growth, we saw that it could not continue indefinitely along these avenues. We were losing our balance. We were losing our way.

When my Administration proposed the *State Plan* concept four years ago, it was a revolutionary idea to many. And yet, I think we all came to understand that adopting it was a necessity if we were to avoid a thousand more complex problems a decade from now. We came to understand that the government of Hawaii was going to have to deal with the future of Hawaii. As I have said before, it was necessary for us to become the masters of our destiny, rather than the unwilling victims of circumstance. And so, today, we have our skeleton *State Plan*. But there is still more work for tomorrow. I have here in my hand, a copy of each of the 12 Functional Plans, and I strongly urge you to adopt them in the coming session. . . .

The people themselves have spoken, in a 1981 survey, about our future path. They supported substantially—93 per cent, in fact—the concept of the state having a major role in planning for the future. And they also support the concept of having the state and the counties come together to share that planning role.

State of the State Address by Governor George R. Ariyoshi at 85-88 (1982).

State Senate, during the 1978 session of the legislature.

The development and adoption of the Hawaii State Plan involved a large number of citizens and groups over several years. Its contents are based on research[4] and thorough surveys of public opinion throughout the state, distilled in workshops, seminars, and the state legislature.[5] It describes the values, goals and aspirations of the people of the state.[6] Governor Ariyoshi believes it is second in importance only to the Hawaii Constitution.[7]

B. The Content of the Hawaii State Plan

The legislature established the Hawaii State Plan by the Hawaii State Planning Act, Act 100 (Act 100).[8] It consisted of three parts. Part I set forth the overall theme, goals, objectives, and policies of the state.[9] Part II established an implementation and coordination system,[10] and called for the preparation and adoption by the state legislature of twelve functional plans.[11] Part III set forth a priority direction and a set of priority actions, together referred to as "priority directions."[12]

---

[4] *See, e.g.*, DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, THE HAWAII STATE PLAN: *The Economy, Population, Environmental Concerns, Facility Systems, and Socio-Cultural Advancement* (1977) (in five volumes); SURVEY AND MARKETING SERVICES, INC., THE HAWAII STATE PLAN SURVEY (1976); DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, PRELIMINARY INVENTORY OF EXISTING GOALS, OBJECTIVES AND POLICIES—STATE PLAN (1976).

[5] The Department of Planning and Economic Development (DPED) conducted a series of nine informational meetings and workshops in 1976, one each on Maui, Lanai, Molokai, Kauai, and one at East Hawaii, West Hawaii, Windward Oahu, Leeward Oahu, and the State Capitol. These informational meetings were attended by a total of 238 citizens. In 1977, a tenth site was added, East Honolulu, and 532 citizens attended the new set of 10 meetings. In 1978, the original nine sites were used again, and 218 citizens attended. Also, public hearings were held on the State Plan in 1977 at the above nine locations, with total attendance of 345 citizens. Attendance at all the meetings and hearings totaled 1,333. Hearings were also held at the state legislature in 1977 and 1978. *See also* Kiyabu, *The State Functional Plans*, Honolulu Star-Bull., Apr. 19, 1982, at A16, cols. 3-5.

[6] "The State Plan is apt to have a force beyond the force of law. It will be recognized as a document, tested in dozens of meetings, many hearings, and finally by legislative enactment, as a compilation of the goals and aspirations that the people of Hawaii agree on." Honolulu Star-Bull., June 5, 1978, at A14, col. 1.

[7] DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, THE HAWAII STATE PLAN 3 (1978).

[8] HAWAII REV. STAT. § 226 (Supp. 1984).

[9] HAWAII REV. STAT. §§ 226-1 to -28 (Supp. 1984).

[10] *Id.* at §§ 226-51 to -63.

[11] *Id.* at §§ 226-57, -58.

[12] *Id.* at §§ 226-101 to -105. Act 100 was internally inconsistent in referring to "priority directions" in Part II, and "priority actions" in Part III. They are commonly referred to as priority directions.

Part I of the state plan set forth the legislative findings:

> The legislature finds that there is a need to improve the planning process in this State, to increase the effectiveness of public 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 purpose of this chapter is to set forth the Hawaii state plan that shall serve as a guide for future long-range development of the State; identify the goals, objectives, policies, and priorities for the State of Hawaii; provide a basis for determining priorities and allocating limited resources, such as public funds, services, manpower, land, energy, water, and other resources; and assure coordination of state and county plans, policies, programs, projects, and regulatory activities.[13]

The overall theme was that "Hawaii's people, as both individuals and groups, generally accept and live by a number of principles or values which are an integral part of society."[14] The principles or values detailed in the plan were individual and family self-sufficiency; social and economic mobility; and community or social well-being.[15] The plan next set forth three state goals:

> In order to guarantee those elements of choice and mobility that insure that individuals and groups may approach their desired levels of self-reliance and self-determination, it shall be the goal of the State to achieve:
>
> (1) A strong, viable economy, characterized by stability, diversity, and growth, that enables the fulfillment of the needs and expectations of Hawaii's present and future generations.
>
> (2) A desired physical environment, characterized by beauty, cleanliness, quiet, stable natural systems, and uniqueness, that enhances the mental and physical well-being of the people.
>
> (3) Physical, social, and economic well-being, for individuals and families in Hawaii, that nourishes a sense of community responsibility, of caring and of participation in community life.[16]

There followed thirty-five objectives, and 167 policies to implement the objectives.[17]

---

[13] *Id.* at § 226-1.

[14] *Id.* at § 226-3.

[15] *Id.*

[16] *Id.* at § 226-4.

[17] The objectives and policies address population; the economy in general; agriculture; the visitor industry; federal expenditures; potential growth activities; landbased, shoreline, and marine resources; scenic, natural beauty, and historic resources; land, air, and water quality; facility systems, in general; solid and liquid wastes; water; transportation; energy/utilities; housing; health; education; social services; leisure; individual rights and personal well-being; culture; public safety;

Part III established a priority direction and priority actions. The purpose was "to establish an overall priority direction and implementing actions to address areas of statewide concern."[18] The overall direction was that "[t]he State of Hawaii shall strive to ensure the availability of desired employment opportunities for Hawaii's present and future population in an environmentally and socially sound manner through the fostering of a balanced population and economic growth rate."[19] There were eighty-two priority actions.[20]

Part II called for the preparation of state functional plans, which were to define, implement, and be in conformance with the overall theme, goals, objectives, policies, and priority directions.[21] The statute called for functional plans in the areas of agriculture, conservation lands, education, energy, higher education, health, historic preservation, housing, recreation, tourism, transportation, and water resources development. While calling for these twelve functional plans, the statewide planning system was not limited to only twelve.[22]

Act 100 thus set forth the following hierarchy of concepts, from the more general to the more specific: overall theme, goals, objectives, policies, priority directions, and functional plan implementing actions. This conceptual hierarchy can best be understood by looking at one of the subjects addressed by Act 100. These subjects were not affected by Act 236.

Part I includes two objectives and seven policies for energy and energy utilities. The two *objectives* are (1) dependable, efficient, and economical statewide energy and communication systems capable of supporting the needs of the people, and (2) increased energy self-sufficiency.[23] In regard to the importance of an "efficient and economical" energy system mentioned in the first objective, one of the *policies* is to "promote prudent use of power and fuel supplies through education, conservation, and energy-efficient practices."[24]

As we move toward greater specificity, we find that *priority actions* for energy use and development include the following: (1) encourage development of a program to promote conservation of energy use in the state; (2) encourage future urbanization into easily serviceable, more compact, concentrated developments in existing urban areas wherever feasible to maximize energy conserva-

---

government; and fiscal management for government. *Id.* at §§ 226-5 to -28.

[18] *Id.* at § 226-101.

[19] *Id.* at § 226-102.

[20] The priority actions were addressed to general business and finance; the visitor industry; the sugar and pineapple industries; diversified agriculture and aquaculture; the development of industries which promise long-term growth potentials; the construction industry; the shipping industry; water use and development; energy use and development; manpower training and development; and population growth and distribution. *Id.* at §§ 226-103 to -105.

[21] *Id.* at § 226-52(a)(3).

[22] *Id.*

[23] *Id.* at § 226-18(a).

[24] *Id.* at § 226-18(b)(4).

tion; (3) encourage consumer education programs to reduce energy waste and to increase awareness for the need to conserve energy; and (4) encourage the use of energy conserving technology and appliances in homes and other buildings.[25]

Finally, the State Energy Functional Plan has ten specific *implementing actions* in support of energy conservation. Two of these implementing actions are addressed to consumer awareness; four relate to transportation; and four relate to energy conservation in buildings. One of those implementing actions states, in its entirety:

> C(2)(c). *IMPLEMENTING ACTION*: BUILDINGS - Develop specific energy consumption reduction targets for State government buildings and support facility systems. Reinstitute energy savings reporting in order to monitor implementation.
>
> Lead Organization(s):DAGS; UH; DOT; Dept. of Education; DLNR; Dept. of Social Services and Housing; Dept. of Hawaiian Home Lands
>
> Assisting Organization(s): DPED
>
> Time Frame: FY 1984-86
>
> Comments: This proposed action will assist State agencies in responding to a 1980 legislative resolution to reduce energy consumption by 10 percent and in meeting further goals. Required reporting of savings will provide the needed data base to evaluate progress. The respective lead organizations each have jurisdiction over particular facilities.[26]

Further information on each functional plan and its implementing actions is found in its Technical Reference Document, which provides background information but was not adopted as part of the functional plan.

III. THE STATE PLAN PROCESS

A. The Linkages in the Process

Part II established the state plan process. The process focuses on planning coordination and implementation. Part II provided that the statewide planning system shall consist of the overall theme, goals, objectives and policies of Part I; the priority directions in Part III; the state functional plans; the county general plans and development plans; and state programs.[27]

Figure 1 shows the linkages under Act 100. The right side of the figure

---

[25] *Id.* at § 226-103(i).

[26] DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, STATE ENERGY FUNCTIONAL PLAN 23-24 (1984).

[27] HAWAII REV. STAT. § 226-52 (Supp. 1984).

refers to state activities, while the left side refers to the counties.

On the state side of the Act 100 system, the functional plans were to define, implement, and be in conformance with Parts I and III. However, the functional plans did not cover all areas in which there are state programs. Where functional plans applied, state programs were to define, implement, and conform to the functional plans. Where there were no functional plans which were applicable, the state programs were to look directly to Parts I and III, and were to define, implement, and be in conformance with the overall theme, goals, objectives, policies, and priority directions. On the county side of the system, the county general plans and development plans were to define, implement, and be in conformance with Parts I and III.

Part II described the relationship between the county plans and the functional plans. "County plans" include county general plans and development plans. The general plans set forth objectives for the county in a broad, policy-oriented manner. General plans are conceptual. Development plans are more detailed, and are geographic, actually mapping different portions of a county by allowable use.[28] Part II of Act 100 stated that "[c]ounty general plans and development plans shall be used as a basis in the formulation of state functional plans."[29] At the same time, the "[s]tate functional plans which have been adopted by concurrent resolution by the legislature shall be utilized as guidelines in amending the county general plans to be in conformance with the overall theme, goals, objectives, and priority directions."[30]

B. The Role of the Policy Council

Part II also established a policy council, consisting of twenty-six members, including the four county planning directors, thirteen state government members, and nine members from the general public.[31] The policy council oversees the state plan process, including review of the functional plans.[32] The Director of Planning and Economic Development chairs the council, and the Department of Planning and Economic Development (DPED) provides staff assistance to the

---

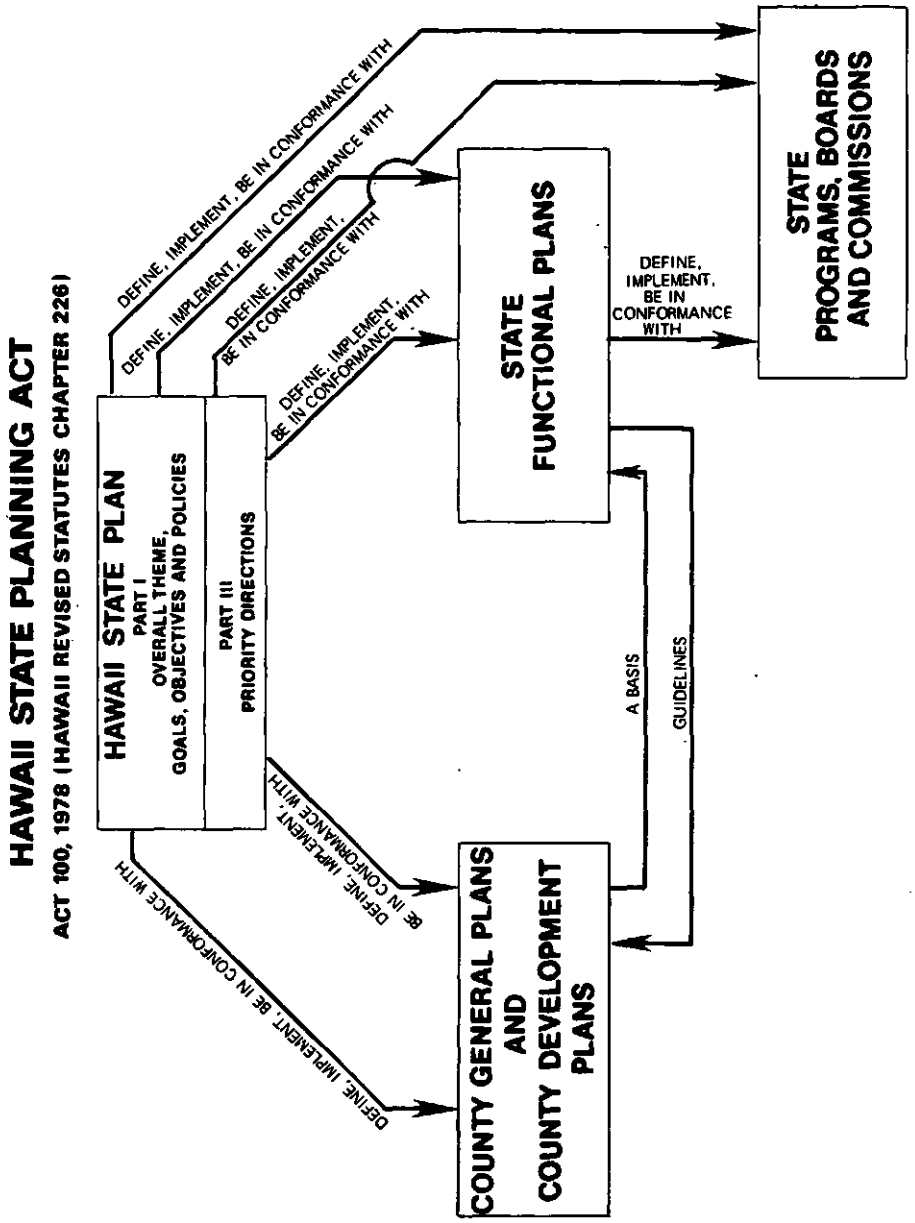
[28] Survey, *The Honolulu Development Plans: An Analysis of Land Use Implications for Oahu*, 6 U. HAWAII L. REV. 33, 42 (1984).

[29] HAWAII REV. STAT. § 226-52(a)(3).

[30] *Id.* at § 226-52(a)(4). A "concurrent resolution" is a resolution which is passed by both houses of the state legislature.

[31] *Id.* at § 226-53.

[32] *Id.* at § 226-54.


HAWAII STATE PLANNING ACT
ACT 100, 1978 (HAWAII REVISED STATUTES CHAPTER 226)
HAWAII STATE PLAN
PART I
OVERALL THEME, GOALS, OBJECTIVES AND POLICIES
PART III
PRIORITY DIRECTIONS
STATE FUNCTIONAL PLANS
STATE PROGRAMS, BOARDS AND COMMISSIONS
COUNTY GENERAL PLANS AND COUNTY DEVELOPMENT PLANS
DEFINE, IMPLEMENT, BE IN CONFORMANCE WITH
DEFINE, IMPLEMENT, BE IN CONFORMANCE WITH
DEFINE, IMPLEMENT, BE IN CONFORMANCE WITH
DEFINE, IMPLEMENT, BE IN CONFORMANCE WITH
DEFINE, IMPLEMENT, BE IN CONFORMANCE WITH
DEFINE, IMPLEMENT, BE IN CONFORMANCE WITH
DEFINE, IMPLEMENT, BE IN CONFORMANCE WITH
A BASIS
GUIDELINES

policy council.[33] As of December, 1984, the policy council had held sixty-six meetings. The timetable of policy council activities has been developed by a Process Committee of the council, and substantive matters have been assigned to the Annual Report Committee for first review.

The policy council issued administrative guidelines in September, 1980, in regard to the council's role, responsibilities, administrative practices, and operating procedures.[34] The overall responsibility of the policy council is to advise the legislature on the administration, amendment, and review of Act 100. In so doing, it is to serve as a forum for discussion of statewide concerns.

In regard to the functional plans, the policy council is to review and evaluate the functional plans and make recommendations to the legislature; seek to resolve conflicts between the functional plans and county plans prior to submission to the legislature; and prepare guidelines for the development of the functional plans.[35] The policy council provides input into the annual review of Act 100 activities conducted by DPED, and approves the annual report on these activities which is required for submission to the legislature.[36] The policy council also provides input into the comprehensive review and final report prepared by DPED as required by Act 100.

All recommendations to the legislature require the vote of two-thirds of all the voting members of the council.[37] The council guidelines allow any member of the council to file a minority report on any action, decision, or order of the council, or on any report submitted to the legislature in lieu of an action.[38]

The council has also adopted rules to provide procedures for public input in making amendments to Act 100.[39] These rules provide that, beginning in 1982, and every four years thereafter, DPED shall assist the policy council in conducting a comprehensive review of the overall theme, goals, objectives, and policies of the Hawaii State Plan. Beginning in 1983, and every two years thereafter, DPED shall assist the council in conducting a comprehensive review of the priority directions.[40] There are provisions for the public solicitation of written proposals for amendments, as well as public hearings to receive testimony.[41]

The purpose of the annual review and comprehensive reviews is to continu-

---

[33] *Id.* at § 226-53, -55.

[34] DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT, STATE PLAN POLICY COUNCIL ADMINISTRATIVE GUIDELINES (1980).

[35] *Id.* at I-2.

[36] *Id.* at I-3.

[37] *Id.* at I-9.

[38] *Id.* at I-10.

[39] HAWAII ADMIN. RULES § 15-13-4 (1982).

[40] *Id.* at § 15-13-7(a), (b).

[41] *Id.* at §§ 15-13-7 to -9.

ally update Parts I and III of Act 100 so that they reflect the goals, objectives, and values of the community and its policy-making body, the state legislature. Delays in the adoption of the functional plans led to delays in the first comprehensive review, which began in 1984.

IV. CONFORMANCE WITH THE HAWAII STATE PLAN: SOME PROBLEMS UNDER ACT 100

After the enactment of Act 100 in 1978, the state administration developed the twelve functional plans. The first four were submitted in 1979, but were not adopted. The full twelve were submitted in 1980, 1981, 1982, and 1983 without being adopted. Ten of the twelve were adopted by the 1984 Legislature.[42]

During the eight-year effort to pass the state plan and obtain adoption of the functional plans, a number of issues arose. Some of the issues were political, some were legal, and some were both.

Politically, there was concern over the impact on county home rule,[43] fear by

---

[42] HAWAII REV. STAT. § 226-58(c) mandated the submittal of 12 State Functional Plans to the legislature. It called for the transmittal of the Agriculture Plan, Housing Plan, Tourism Plan and Transportation Plan in 1979. However, the lead legislative committees considered it appropriate to defer action on these plans until 1980, at which time all 12 plans were to be submitted. The concern focused on the need to examine the interrelationship among the 12 plans to avoid conflicts. In 1980, all 12 plans were submitted to the legislature. The State House of Representatives approved six plans (Agriculture, Housing, Recreation, Tourism, Transportation and Water Resources Development) which they considered appropriate to serve as the basic foundation upon which the others could be developed. The Senate did not take action on any of the plans. In 1981 and 1982, each plan consisted of two documents—the functional plan and its technical reference document. (During the previous year, each plan and its technical reference document were framed as one document.) No action was taken by either House; the plans were held up in legislative committees. In 1982, all 12 functional plans, with conditional requirements, were approved by the Senate. The House approved revised versions of the Senate drafts. In the Conference Committee, a compromise version could not be reached. In 1983, all 12 functional plans were approved by the House of Representatives. Due to the reorganization of the Senate late in the session, the plans were held up in the Senate and no action was taken on any functional plans. In 1984, all 12 functional plans were resubmitted in accordance with statutory provisions. Twelve plans were approved by the House of Representatives and revised versions of all 12 plans were approved by the Senate. In the Conference Committee, agreement could only be reached on 10 plans. As a result, the Legislature adopted the 10 functional plans on Conservation Lands, Energy, Health, Higher Education, Historic Preservation, Housing, Recreation, Tourism, Transportation and Water Resources Development. Since the State Agriculture and Education Functional Plans were not adopted, they had to be resubmitted to the legislature for its consideration in the 1985 Legislative Session. Interview with Ralph Ukishima, Branch Chief, State Plan Branch, Department of Planning and Economic Development, in Honolulu (Oct. 22, 1984).

[43] Representative Poepoe, in speaking against the state plan bill in 1978 stated: "This bill breaks faith with home rule and subjects the counties to conform to detailed plans made by the

some citizens that the functional plans would increase the size, cost, and amount of red tape in government,[44] fear by some citizens that the functional plans would slow down the economy,[45] concern that the goals, objectives, and policies were too broad to be meaningful,[46] and concern that the priority directions and functional plans were too specific to allow for flexibility.[47]

Legally, there were questions: What did it mean to conform? In particular,

---

State. This document, as it stands now, does not permit the individual counties to meet their unique needs on their own terms." H.B. 2173-78, 9th Leg., Reg. Sess., 1978 HOUSE J. 454. An active participant in adoption of the functional plans noted in 1984 that "[t]here was concern that state plans would supersede county plans, particularly when it was stipulated that county general plans were to be brought into conformity with state plans. That raised the 'home-rule' issue. It made the state plans unacceptable to those who recognize the need for state overview and coordination but do not want the state to dominate county planning." Levine, *A Look at the Hawaii Legislature and Planning Issues*, Honolulu Star-Bull., & Advertiser, Apr. 29, 1984, at H3, col. 1. *See also* Honolulu Advertiser, Dec. 16, 1980, at A20, col. 1.

[44] Hawaii Tribune-Herald, Mar. 30, 1983, at 10, col. 5; *Editorial*, Honolulu Star-Bull., Sept. 13, 1982, at A16, col. 1.

[45] Hill, *Chamber on Planning*, Honolulu Star-Bull., Sept. 28, 1982, at A21, col. 1 (Letter to the Editor).

[46] In expressing reservations about the state plan in 1978, Representative Carroll stated: "The reservation that I have with this measure, Mr. Speaker, is that it is too general. It sets priorities. It has excellent language, goals and so forth, but I do not see within this measure the kind of specificity that I would like to see in this particular plan . . . . I think, Mr. Speaker, this particular measure is a step in the right direction, but it is not specific enough. I do not think it has the teeth in it to do what it wants to do . . . ." H.B. 2173-78, 9th Leg., Reg. Sess., 1978 HOUSE J. 456. Representative Charles Toguchi, while supporting the state plan, stated: "Even if we look at the priority directions beginning on page 56, we find objectives hardly approaching the level of detail required to really set priorities in decision making." H.B. 2173-78, 9th Leg., Reg. Sess., 1978 HOUSE J. 461. *See also* Honolulu Advertiser, Jan. 17, 1983, at A3, col. 3.

[47] Representative Evans, although supporting the state plan in 1978, stated:

> My concerns with House Bill No. 2173-78, House Draft 3, is that it goes beyond providing a set of long range goals and an administrative apparatus with which to work towards such goals, and it involves itself with shorter-term specifics that should not be legislated into a single statute of this kind. The problem arises from the inclusion into the bill of an earlier resolution on "priority directions."
>
> With the inclusion of this new section, the long range State Plan will include the agenda of what is of immediate concern and the priorities under which resources should be allocated. I feel that the agenda of what is of immediate concern to the State cannot be put into the law in this way, simply because circumstances are constantly changing—sometimes radically changing—and the State government must have the flexibility to react to these changes effectively and to refocus priorities when necessary, rather than waiting for formal changes in the statutes to be made.
>
> Priority directions should be a tool of the lasting, statutory State Plan, and not a part of the statute itself. Adding them to the State Plan is a bit like adding a specific law to the Constitution.

H.B. 2173-78, 9th Leg., Reg. Sess., 1978 HOUSE J. 455-56. *See also* Honolulu Star-Bull., Sept. 28, 1982, at A21, col. 1.

what did it mean for the county general plans and development plans to conform to Parts I and III? What was the legal relationship between the functional plans and county plans? What did it mean for a state agency to conform to Parts I and III and the functional plans? Were the functional plans legal mandates or guidelines? Could a government decision be overturned if it did not conform to all parts of the state plan? Act 100 did not clearly answer these questions.

A. County Home Rule Problems[48]

The question of conformance was debated in the State House of Representatives at the time of passage of Act 100. Representative Abercrombie argued:

> In this instance, 'conform' is to bring into harmony or agreement. I'm quite aware of the fact that if you wished to, you can define conform as obedience or compliance . . . . It is precisely the opposite that this plan is addressed—the opposite direction . . . . That is to say, to bring into harmony or agreement. It doesn't guarantee it—it says to bring into—to give birth to. To create it—harmony and agreement. There is disharmony. There is no agreement at this time.
>
> That is precisely the question that the Committee addresses—how can we do this? How can we take all the various plans, formulations, individual emotions and commitments, counties, individuals, neighborhood boards, State bodies, et cetera, administrative bodies—how can we bring them into harmony and agreement? This has been the conviction of the Committee right straight through. It has most certainly been the conviction of the Legislature in giving us the opportunity to follow through. It has been the conviction that it is our responsibility, at this time in our history, to do this.[49]

Under Act 100, the policy council was to review the question of conformance, with all problems forwarded to the legislature. During the 1978 debate, Representative Medeiros stated: "I think the most important thing is your safety valve that we have incorporated in this bill, and that is your Policy Council. The duties of the Policy Council will take care of the concerns that have been voiced this morning on the floor of this House."[50] Act 100 provided that the policy council shall:

> (1) Provide a forum for the discussion of conflicts between and among this chapter, functional plans either adopted by the legislature or to be sub-

---

[48] Home rule is "in Constitutional and statutory law, local self-government, or the right thereof." BLACK'S LAW DICTIONARY 866 (4th ed. 1968).

[49] H.B. 2173-78, 9th Leg., Reg. Sess., 1978 HOUSE J. 457.

[50] *Id.* at 460.

> mitted to the legislature for adoption, county general plans and development plans, and state programs;
> (2) Transmit to the governor, legislature, and the mayors and legislative bodies of the respective counties its findings and recommendations on all conflicts as described above, and on the resolution of conflicts;
> (3) Review and evaluate state functional plans for conformance with the provisions of this chapter, seek to resolve any identified conflicts, and transmit its findings and recommendations to the legislature at the time of submission of the functional plan.[51]

Conflicts, or lack of conformance, would thus be identified and forwarded to the legislature. What action should the legislature take? Act 100 does not say. Of course, the legislature could resolve a conflict by changing Act 100 or a functional plan. However, there was a question as to whether the legislature could change a county general plan or development plan. There was one relevant provision in Act 100. It provided:

> The legislature, upon a finding of overriding statewide concern, may determine in any given instance that the site for a specific project may be other than that designated on the county general plan; provided that any proposed facility or project contained in a county general plan shall not require the actual development or implementation of said facility or project or the inclusion of the same in any state functional plan by any state agency. The implementation of functional plans shall conform to existing laws, rules, and standards, and the provisions of this chapter.[52]

Thus, the legislature could override a specific project site. If the legislature did not find an overriding statewide concern to be at stake in the designation of a specific project site, then what? Presumably, conflict could only be resolved if the state legislature changed Act 100 or a functional plan to agree with the county position. This respected home rule. However, it meant that the state could only resolve a conflict by conforming with the counties. This, no doubt, was not the intention of Act 100.

The question of conformance by the counties was raised in 1979 by Senator Richard S.H. Wong in regard to the functional plans. Wong wrote to the Attorney General and inquired "[w]hether general and development plans adopted by county ordinances can be required to conform to state functional plans adopted by concurrent resolution?"[53]

The Department of the Attorney General responded on March 7, 1980, not-

---

[51] HAWAII REV. STAT. § 226-54(1) to (3) (Supp. 1984).

[52] *Id.* at § 226-59(b).

[53] Letter from Senator Richard S.H. Wong, President of the Hawaii State Senate to the Honorable Wayne Minami, Attorney General (Aug. 8, 1979).

ing the ambiguity and stating that "we find it difficult to conclude that the functional plan adopted through a concurrent resolution takes precedence over a county general plan adopted by ordinance."[54]

This was also the conclusion of the Chicago law firm of Ross, Hardies, O'Keefe, Babcock & Parsons in a report to George Akahane, Chairman of the

---

[54] The letter stated in part:

Preliminarily, we note there are no specific provisions requiring conformance of county general and development plans with state functional plans. The pertinent sections of the State Plan (emphasis supplied) state:

Sec. 52(a)(3)	County general plans and development plans shall be used as a *basis* in the formulation of state functional plans.
Sec. 52(a)	The formulation and amendment of a state functional plan shall conform to the state plan and use as a *basis* the county general plans.
Sec. 52(a)(4)	County general plans or development plans shall further define, implement, and be in *conformance* with the overall theme, goals, objectives, policies, and priority directions contained within this chapter.
Sec. 61(c)	The county general plans and development plans shall be in *conformance* with the overall theme, goals, objectives, policies, and priority directions contained in this chapter by January, 1982.
Sec. 52(a)(4)	State functional plans which have been adopted by concurrent resolution by the legislature shall be utilized as *guidelines* in amending the county general plans to be in conformance with the overall theme, goals, objectives, and priority directions.
Sec. 61(a)	The formulation, amendment, and implementation of county general plans or development plans shall utilize as *guidelines*, statewide objectives, policies, and programs stipulated in state functional plans adopted in consonance with this chapter.

From a practical point of view, it appears that an ambiguity exists as to how implementation is to be achieved because there is no mechanism within the State Plan to resolve conflicts, if any, between county general and development plans and state functional plans. Section 226-54(1) and (2), HRS, suggests that the Policy Council would discuss and make findings and recommendations to resolve some of the conflicts between county general plans and development plans, and state programs, but this is not followed by a clear resolution process.

Section 226-59(b), HRS, seems to state that the Legislature makes the final decision. However, this provision is limited to cases involving "overriding statewide concern" and in cases where it has been determined that county general plans have designated a site for a specific project not compatible with "overriding statewide concern."

In view of this ambiguity, we find it difficult to conclude that the functional plan adopted through a concurrent resolution takes precedence over a county general plan adopted by ordinance.

Letter from Annette Chock, Deputy Attorney General, to Senator Richard S.H. Wong, President of the Senate (Mar. 7, 1980).

City Council Planning and Zoning Committee, dated March 1, 1982.[55] The firm was asked to clarify the potential impact of provisions in the proposed functional plans on the land use policies, plans and regulatory activities of the county. They concluded:

> [I]t seems reasonable to conclude that the term 'conformance' as used in that section [Hawaii Revised Statutes section 226-52(4)] would require conformance of county general plans and development plans with the goals, objectives and priority directions of the state plan only. Under this interpretation, the role of the functional plans would be limited to providing guidelines for the formulation, amendment and implementation of county general plans and development plans, as stated in Section 226-61 . . . .[56]

Thus, Act 100 required county conformance with Parts I and III, but not the functional plans called for in Part II. What it meant to conform to Parts I and III, however, was also not clear. The issue went unaddressed.

In the meantime, the relationship between the county plans and the functional plans was an issue for planners and politicians.[57] In formulating the functional plans, the county plans were to be used as a basis; in formulating the county plans, the functional plans were to be used as guidelines. This placed greater emphasis on the county plans, which were a basis for the functional plans, whereas the functional plans only served as guidelines for the county plans. But which was to take precedence? Logically, whichever county plan or functional plan was to be altered would look to the other as a guideline or a basis. Under Act 100, however, there remained this inequality of "basis" versus "guidelines" in the county plan-functional plan relationship.

While this created some uncertainty, the fact is that the plans in question are different kinds of plans. The functional plans, as they evolved, focused on functions—activities to be undertaken, needs to be filled, projects to be completed, programs to be implemented. The functional plans are lists. The county development plans, on the other hand, focused on locations—where there should be housing, where there should be parks, and where there should be commercial activities. The development plans are maps. Thus, there is no inevitable conflict. The functional plans can encourage functions, the *what*. The counties can still decide *where*, consistent with their development plans.[58]

---

[55] F. Bosselman and B. Blaesser, Issues for Clarification in the Draft State Functional Plans Having Potential Impact on County Operations (1982).

[56] *Id.* at 4.

[57] *See, e.g.*, Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 195-96 (1979); Medina, Honolulu Advertiser, June 15, 1981, at A7, col. 2 (Letter to the Editor).

[58] *See, e.g.*, Honolulu Advertiser, Apr. 7, 1982, at A6, col. 1; Honolulu Advertiser, Apr. 8, 1982, at A6, col. 1. *See* Sunday Star-Bull., & Advertiser, July 12, 1981, at B3, col. 1.

A look at the State Housing Plan[59] can serve as an example. The State Housing Plan consists of policies and implementing actions which could be applied anywhere in a county, in accordance with county development plans. No mention is made in any implementing action in the State Housing Plan of any particular geographic area or site. The functional plan includes implementing actions aimed at meeting the needs of the elderly; expediting the development permit process; increasing home ownership and rental opportunities; increasing financial assistance for private home rehabilitation; and increasing the supply of publicly-owned land for housing development. The relevant implementing action establishes the counties as lead agencies for assessing and delineating lands suitable for future housing development, and states that "identification of lands suitable for Future Housing Development would be made by the counties as a continuation of general and development plans . . . ."[60] The functional plans, which are oriented toward issues and actions, need not conflict directly with the development plans, which are oriented toward geographical areas or sites.

B. The "Mandate" or "Guideline" Problem

Another legal issue which received significant attention over the years was the question of whether the functional plans were legal mandates or guidelines. It was the intent of the state administration that they be guidelines. Their status as guidelines is consistent with their adoption by resolution.

Resolutions are commonly used by the legislature to honor individuals or organizations, make requests, and provide guidance to the state administration. Each year, the legislature passes hundreds of resolutions asking state departments and other agencies to take certain actions.[61]

Resolutions may be passed by either the House of Representatives or the Senate separately, or Concurrent Resolutions originating from either House can be adopted jointly. In recent years, the legislature has begun using special certificates, rather than resolutions, to honor individuals. Resolutions thus tend more and more to address substantive areas of legislative interest and concern.[62]

---

[59] DEPARTMENT OF SOCIAL SERVICES AND HOUSING, HAWAII HOUSING AUTHORITY, STATE HOUSING FUNCTIONAL PLAN (1984).

[60] *Id.* at 22.

[61] From 1959 through 1982, the House of Representatives adopted 6,432 resolutions, an average of 268 resolutions per year. During the same time period, the Senate adopted 4,392 resolutions, an average of 183 per year. In addition, during that same time period the House adopted 775 concurrent resolutions, while the Senate adopted 650. R. KAHLE, HAWAII LEGISLATORS' HANDBOOK 97 (8th ed. 1983).

[62] For example, the Department of Planning and Economic Development was named in 31 resolutions adopted by the 1984 Session of the State Legislature. One resolution requested a feasibility study on the establishment of a convention center; one requested a study of the world-

These resolutions ask for action. The administration understands that they are only resolutions, not mandates, and they cannot be enforced. However, they express the interest of the legislature, and they are given serious attention. If the action requested cannot be undertaken, a full and reasonable explanation is expected from the department or agency involved. This is accepted practice and protocol.

This practice and protocol is appropriate to the role and uses of the functional plans. Each plan is a series of implementing actions. Each of these implementing actions is similar to a resolution by the legislature giving guidance or asking for action. Each functional plan could thus be seen as a coordinated, comprehensive set of resolutions on specific subjects such as agriculture, tourism, and housing. Since resolutions are used to provide guidance to the state administration, it was appropriate that the administration maintained that the functional plans, adopted by resolution, were guidelines.

In 1978, the legislature made the distinction between a statutory mandate and guidance by resolution in the process of passing the state plan bill. The House proposal was that the functional plans would be passed as law and become statutory. The Senate Committee on Economic Development rejected this approach, stating:

> In dealing with the question of the enactment of the functional plans by statute, your Committee is in accord with the Committee on Ecology, Environment and Recreation that such statutory enactment is not advisable. Your Committee feels that to do so would elevate functional plans over all county general and/or development plans. This would destroy the fabric of home rule and be contrary to the balance arrived at in this chapter. . . .[83]

The Department of the Attorney General provided two letters on these points. The first one, dated April 9, 1980, was in response to questions raised by Representative Ken Kiyabu, then chairman of the Committee on State General Planning. The primary question was whether the functional plans constituted a mandate to the political subdivisions of the state. If so, the state could be required under article VIII of the Hawaii Constitution to provide the counties with sufficient funds to carry out the implementing actions found in the functional plans. The Attorney General argued that a "mandate" is an authoritative command or order, and a functional plan adopted by resolution does not

---

wide greenhouse effect on Hawaii's coastal development; one requested a study of the feasibility of establishing nuclear-free zones in the State of Hawaii; one requested a study of the concept of shifting reliance in existing state loan programs from direct loans by the state to the guarantee of loans made by private lenders; one called for the encouragement of the homeporting of a larger segment of the U.S. fleet at Pearl Harbor.

[83] S. STAND. COMM. REP. NO. 692, 9th Hawaii Leg., Reg. Sess., 1978 SEN. J. 1075.

constitute an authoritative command. Thus, a functional plan is not a mandate within the meaning of article VIII.[64]

Hideto Kono, then chairman of the Policy Council, referred to this opinion in his testimony before the legislature two years later, on March 11, 1982. He argued as follows:

---

[64] The letter stated in part:

"Mandate" has been defined as:

> an authoritative command, order, or injunction: a clear instruction, authorization, or direction . . . .

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1373 (unabridged, 1967).

We do not believe that a functional plan "adopted" by way of concurrent resolution constitutes an authoritative command.

Generally, a resolution is a formal expression of the opinion or will of an official body or a public assembly, adopted by vote. *Scudder v. Smith*, 331 Pa. 165, 200 A. 601 (1938). The term is usually employed to denote the adoption of a motion, the subject matter of which would not properly constitute a statute, such as a mere expression of opinion, an alteration of the rules, a vote of thanks or censure. *McDowell v. People*, 204 Ill. 499, 68 N.E. 379 (1903); *Conley v. Texas Division of United Daughters of the Confederacy*, Tex. Civ. App., 164 S.W. 24 (1913). The chief distinction between a "resolution" and a "law" is that the former is used whenever the legislative body passing it wishes merely to express an opinion as to some given matter or thing and is only to have a temporary effect on such particular thing, while by a 'law' it is intended to permanently direct and control matters applying to persons or things in general. *Ex parte Hague*, 104 N.J. Eq. 31, 144 A. 546 (1929).

By definition, concurrent resolution is an expression of legislative policy from both houses but does not constitute a command. It is without legislative quality of any coercive or operational effect and is used chiefly for administrative purposes of a local or temporary character. Article III, Section 14, Constitution of the State of Hawaii; 50 AM. JUR., *Statutes*, 4; 82 C.J.S., *Statutes*, § 1 and § 20; 2 Sutherland, *Statutory Construction*, (3d ed. 1943) § 3801, *et. seq.*

Finally, we note that each county is responsible for its own planning to promote orderly development in accordance with a general plan. Honolulu Charter §§ 5-401 to 5-413, §§ 6-1001 to 6-1010; Maui Charter §§ 8-8.1 to 8-8.5; Hawaii Charter §§ 5-4.1 to 5-4.4; Kauai Charter §§ 15.01 to 15.12. In light of this duty it seems clear that implementation of the State Plan could not be interpreted as a new program or increase in the level of service under an existing program. Moreover, neither the State Plan nor the functional plan requires any transfer of a state function to the county or requires the county to undertake any new program. Therefore, even if a functional plan were a mandate within the meaning of Article VIII, Section 5 of the Hawaii State Constitution, it would be difficult to view a functional plan as a new program or increase in the level of service under an existing program.

In summary, we do not find that a functional plan as adopted by concurrent resolution is such a mandate within the meaning of Article VIII, Section 5 of the Hawaii State Constitution.

Letter from Annette Chock, Deputy Attorney General, to Representative Ken Kiyabu, Chairman of the Committee on State General Planning (Apr. 9, 1980).

> I would like to clarify the State Administration's position regarding the effect of State Functional Plans that are adopted by the Legislature by concurrent resolution. Based on a legal opinion of the Attorney General's Office dated April 9, 1980, it was clearly stated that a functional plan adopted by concurrent resolution is an expression of legislative policy from both houses of the Legislature but does not constitute a mandate and does not have the force and effect of law. On this basis, I would like to inform you that within each functional plan there is a statement that reads as follows:
>
> '*Plans as Legislative Policy*
> The State [Functional] Plan does not mandate County or private sector actions. Rather, it is a guide to coordinate the various sectors of government and private industry toward achieving the Statewide objectives of The Hawaii State Plan. Through its adoption by concurrent resolution, the State [Functional] Plan will be an expression of legislative policy but is not to be interpreted as law or statutory mandate.'

This statement was incorporated into each functional plan to specifically address concerns raised by the Legislature last year regarding the effect of functional plans on County plans and activities.[65]

Mr. Kono sought another opinion from the Attorney General. In a letter dated March 31, 1982 the Department of the Attorney General again concluded that the functional plans were guidelines, not legal mandates. The Department of the Attorney General said:

> Preliminarily, we note that the legal effect of functional plans, as stated in our earlier opinion,[66] is not a mandate and is without the force and effect of law. In

---

[65] The Hawaii State Planning Act: Hearing on S.B. No. 2720, S. D. 1. Before the Senate Committee on Economic Development (March 11, 1982) (Statement of Hideto Kono, Director of Department of Planning and Economic Development). Bosselman and Blaesser, in their report for the City and County of Honolulu, referred to this statement to be incorporated into each functional plan, and stated:

> If the state legislature should adopt the functional plans with this statement in its present form, this would be a clear expression of legislative intent that the functional plans should serve as broad policy guidelines for helping county governments and private industry establish a general level of coordination with the State toward achievement of statewide objectives. Such a statement of legislative intent would make it difficult to interpret the State Planning Act as mandating county action to amend its general plan or development plans to be consistent with specific functional plan objectives, policies and implementing actions.

Bosselman and Blaesser, *supra* note 55, at 6-7.

[66] The letter cited the letter from the Department of the Attorney General dated April 9, 1980, in response to the letter from Representative Ken Kiyabu dated September 24, 1979.

addition, we note that in another previous opinion[67] general and development plans adopted by county ordinances cannot be required to conform to State Functional Plans adopted by concurrent resolution.

In support of our opinion we point out the explicit repetitiousness of provisions that functional plans are to be adopted by concurrent resolution[68] and that functional plans are to be used as bases, guides or guidelines in formulating, amending, and implementing county general plans or development plans.[69] These provisions have not been amended and our opinion remains unchanged.[70]

Kono again testified at the legislature on this issue on April 6, 1982. He said:

I realize that there have been many concerns raised regarding the role of State Functional Plans. To resolve these concerns, I requested an opinion from the Attorney General. I am pleased to report to you that we have received a letter from the Department of the Attorney General, dated March 31, 1982, which clarifies the role of the State Functional Plans . . . .

The opinion of the Attorney General finds that the legal effect of State Functional Plans is not a mandate; they are without the force and effect of law. Further, County General Plans and Development Plans adopted by County Ordinances are not required to conform to State Functional Plans adopted by Concurrent Resolution.[71]

Still, the functional plans were not adopted in the 1982 session. The administration introduced a bill in the 1983 session to resolve the issue. This bill, H.B. 177, was supported by the policy council. During the 1983 session, the House Committee on State General Planning, chaired by Representative Mark Andrews, amended the bill to establish a two-tier system. Under this proposed system, the functional plans were "statements of policy to guide" state agencies and programs, and "guidelines" for the counties. A higher degree of conformance was thus proposed for state agencies than for the counties.[72] This bill was

---

[67] The letter cited the letter from the Department of the Attorney General dated March 7, 1980, in response to the letter from Senator Richard S.H. Wong dated August 14, 1979.

[68] The letter cited HAWAII REV. STAT. §§ 226-52(a)(4), 226-57(a), 226-58(d), 226-58(e), and 226-60.

[69] The letter cited HAWAII REV. STAT. §§ 226-52(a)(3), 226-52(a)(4), 226-57(a), 226-59(a), and 226-61(a).

[70] Letter from Deputy Attorney General Annette Chock to Hideto Kono, Director of Planning and Economic Development (Mar. 31, 1982) (discussing the functional plans as guidelines).

[71] Hearings on S. Con. Res. Rep. No. 13-14, before the Senate Committee on Economic Development (Apr. 6, 1982) (Statement of Hideto Kono, Director of the Department of Planning and Economic Development).

[72] The committee report stated:

Since the Hawaii State Planning Act frames the overall theme, goals, objectives, policies, and priority directions which have been duly enacted into law by the state legislative and executive branches, state agencies should give greater weight to the functional plans than

taken up in the Senate in the 1984 session and eventually became Act 236.

C. The Judicial Invalidation Problem

One concern expressed in community discussions and in testimony at the state legislature was that there are conflicts in the objectives, policies, priority directions and functional plan implementing actions.[73] These conflicts could be used to overturn an administrative decision. For example, if a developer received a favorable decision from the Land Use Commission, the goals, objectives, policies, priority directions, or implementing actions of the functional plans could be the basis for an appeal by opponents. This was a concern because the state plan and functional plans cover a broad variety of goals and objectives, and for every goal or objective which could be cited to support a government decision, another could be found which would appear to support the opposite or at least a different decision. A common example put forward was the redistricting of land from agricultural to urban use. The state plan supports both the preservation of agriculture and the provision of adequate housing.[74] It was thus

---

> the weight required to be given by the counties. Thus, your Committee has made amendments to the bill, as received, to reflect this intention. Basically, the term "guidelines" in the bill, as received, when used to describe the relationship of the state functional plans to state agencies, has been replaced with the phrase "statements of policy to guide in decision-making." While the change may appear to some as only a difference in semantics with no actual practical difference, your Committee feels that the new phrase connotes a standard which requires greater thought and reflection on the part of state agencies when determining whether their state programs complement the functional plans than the "guideline" standards presently applicable to the counties.

H.R. STAND. COMM. REP. NO. 350, 11th Leg., Reg. Sess., 1983 SEN. J. 2-3.

[73] *See, e.g.*, Hearings on S. Stand. Comm. Rep. No. 3-14, before the Senate Committee on Economic Development, 11th Leg., Reg. Sess. (Apr. 6, 1982) (Statement of Rory H. Hahn, Executive Director of the Land Use Research Foundation of Hawaii); letter from Robert B. Robinson, President of the Chamber of Commerce of Hawaii, to Hideto Kono, Chairman of the State Plan Policy Council (Dec. 12, 1980).

[74] One of the policies for agriculture in Part I of Act 100 was to "[a]ssure the availability of agriculturally suitable lands with adequate water to accommodate present and future needs." HAWAII REV. STAT. § 226-7(b)(6). One of the priority actions was to "[s]eek to protect prime agricultural and aquacultural lands through affirmative and comprehensive programs." *Id.* at § 226-103(d)(1). One of the policies for housing in Part I of Act 100 was to "[f]acilitate the use of available urban lands to accommodate the housing needs in various communities." *Id.* at § 226-19(b)(6).

The conflict between these policies was not direct, since the housing policy did not urge the redistricting of agricultural land into urban for housing, but rather the use of land already in the urban district. The conflict appeared to be greater between the implementing actions of the State Agriculture Plan and the State Housing Plan. Randolph G. Moore, Executive Vice President of Oceanic Properties, Inc., and a member of the Housing Plan Advisory Committee, testified in regard to the State Housing Plan:

argued that the state plan and functional plans are internally self-contradictory, and one could always find a conflicting objective or policy to use in attempting to overturn any administrative decision in court.

V. CONFORMANCE WITH THE HAWAII STATE PLAN: SOME SOLUTIONS UNDER ACT 236

The administration bill, H.B. 177, was passed by the 1984 Legislature as Act 236. It provided several significant amendments to Act 100. These changes were: (1) a redefinition of the relationship of Parts I and III to the county plans; (2) equality in the relationship between the county plans and the functional plans; (3) the renaming of the priority directions as priority guidelines; (4) establishing by law that the functional plans shall be utilized as guidelines; and (5) new definitions of conformance with Parts I and III and the functional plans.

A. County Home Rule

Figure 2 shows the new relationships established by Act 236. The new configuration emphasizes state programs. The county plans, instead of defining, implementing, and being in conformance with Parts I and III, now simply "define" Parts I and III. This is set forth in section 4(4) in regard to county general plans. In the following passage, the old Act 100 language is in brackets, and the new Act 236 language is italicized:

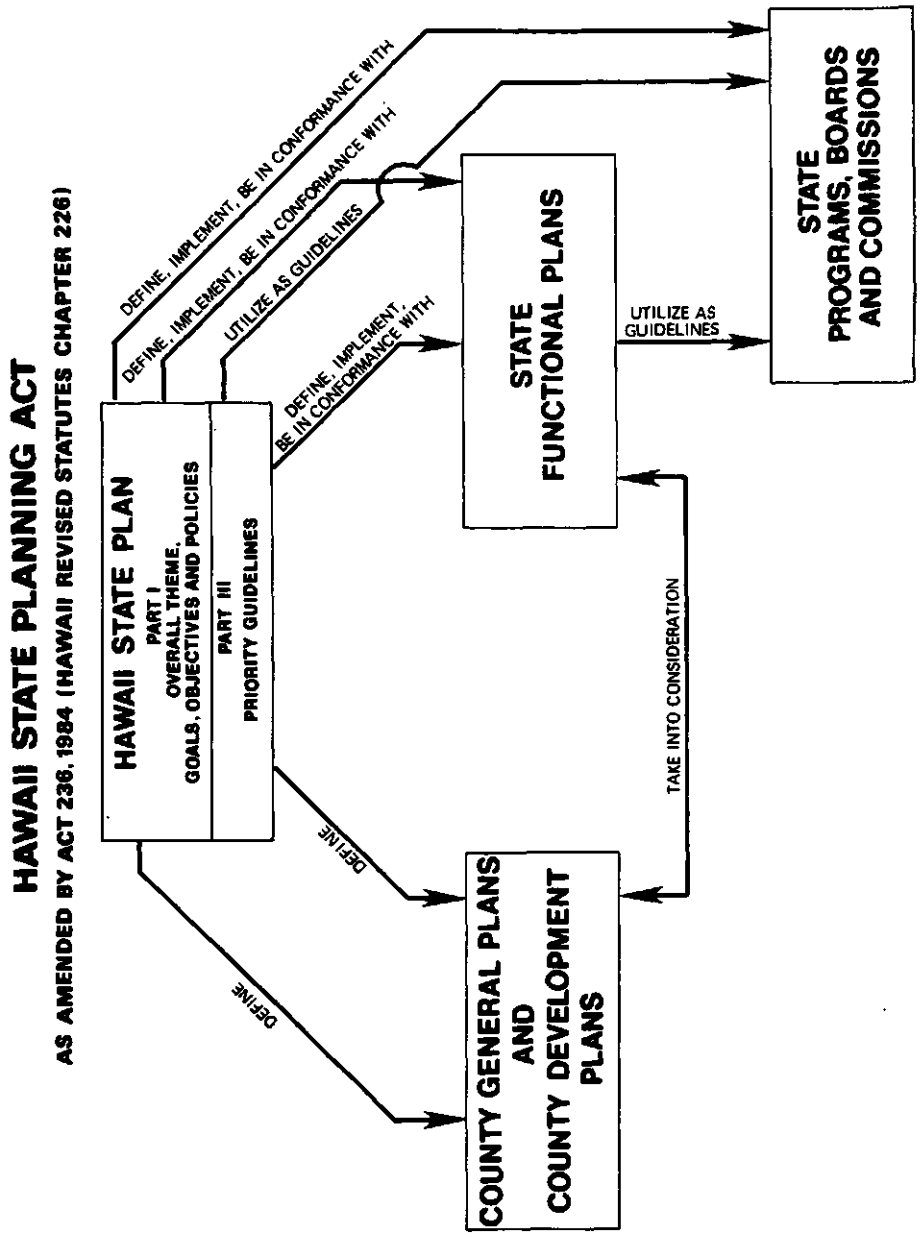
> (4) County general plans shall indicate desired population and physical de-

---

I want to point out to you a potentially serious barrier to the achievement of the objectives of the proposed State Housing Plan. The goal of implementing action B(1)(a) "assess and delineate lands suitable for future housing development" is to assure that sufficient land is available for housing. Implementing action B(5)(c) in the proposed State Agriculture Plan states: "in implementing the state land use law and county zoning ordinances, important agricultural lands shall be classified in the state agricultural district and shall be zoned for agricultural use, except where substantial injustice or inequity will result, or where overriding public interest exists." Neither "substantial justice or inequity" nor "overriding public interest" is defined. If the proposed State Agricultural Plan is adopted without the amendment of this implementing action, it is highly probable that the goal of the State Housing Plan implementing action discussed above will be frustrated and that there will continue to be insufficient quantities of residential land to satisfy the demand for housing, resulting in continuing increases in housing values that price too many of our residents out of the home ownership market.

Letter from Randolph G. Moore to Representative Mark J. Andrews, Chairman, and Members of the Committee on State General Planning, and Mazie Hirono, Chairperson, and Members of the Committee on Housing, regarding the State Housing Plan (Feb. 3, 1983).

velopment patterns for each county and regions within each county. In addition, county general plans or development plans shall address the unique



> problems and needs of each county and regions within each county. County general plans or development plans shall further define, [implement, and be in conformance with] the overall theme, goals, objectives, policies, and priority [directions] *guidelines* contained within this chapter. State functional plans which have been adopted by concurrent resolution by the legislature shall be [utilized as guidelines] *taken into consideration* in amending the county general plans [to be in conformance with the overall theme, goals, objectives, policies, and priority directions].[75]

This loosens the links with the counties, in recognition of county home rule. The problem of county conformance is solved because conformance is no longer required. The state plan process is now predominantly a state process, requiring conformance by state agencies only.

B. Guidelines

Act 236 also resolved the "mandate" or "guideline" question. It is clearly stated that the functional plans shall be utilized as guidelines. Also, the priority directions became priority guidelines, and are now guidelines for State programs which are not covered by a functional plan. Section 4(5) of Act 236 makes this clear. In the following passage, the old Act 100 language is in brackets, and the new Act 236 language is italicized:

> State programs shall further define, implement, and be in conformance with the overall theme, goals, objectives, *and* policies, and *shall utilize as guidelines the* priority [directions] *guidelines* contained within this chapter, and the state functional plans adopted pursuant to this chapter.[76]

This new language is repeated throughout subsequent sections which cover the state budgetary process, capital improvement project appropriations process, land use decision-making processes, and all other regulatory and administrative decision-making processes of state agencies.[77] In each case, the decisions are to be in conformance with the overall theme, goals, objectives, and policies of Part I, and shall utilize as guidelines the priority guidelines of Part III and the state functional plans.

C. Judicial Invalidation

The judicial invalidation dilemma was resolved in Act 236 and the accompa-

---

[75] H.R. 171, 11th Hawaii Leg., Reg. Sess., 1983 SEN. J. 39, 61.

[76] *Id.* at 9.

[77] *Id.* at 10-12.

nying committee report.[78] Two definitions were added to the Hawaii State Planning Act to clarify "conformance" and remove the problem of judicial invalidation due to conflicting goals, objectives, policies, priority guidelines, or implementing actions in functional plans. The Committee Report states:

> Your Committee has carefully reviewed the relationships among the overall theme, goals, objectives, and policies; the priority directions; the functional plans; county general plans and development plans; and state programs. The primary concern in this review was the meaning of "be in conformance with the overall theme, goals, objectives, policies, and priority directions," as stated in existing law, and "shall utilize as guidelines," as proposed to apply to the functional plans. There is a concern that a decision or state program will be subject to legal attack and judicial invalidation if one or more, but not all, goals, objectives, and policies are acted upon in the decision or program. This could occur when different goals, objectives, or policies appear to be in conflict, as applied to a specific case or program. Your Committee has thus included a definition of "be in conformance" as follows:
>
> (14) For the purposes of sections 226-52, 226-57, and 226-62, "conform," "in conformance with this chapter," or "be in conformance with the overall theme, goals, objectives and policies" means the weighing of the overall theme, goals, objectives and policies of this chapter and a determination that an action, decision, rule or state program is consistent with the overall theme, and fulfills one or more of the goals, objectives

---

[78] *Contra* D. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII 2 (1984). Callies argues that the concurrent resolution procedure for making functional plans binding upon those agencies and officers contemplated by Act 100, is entirely legal, notwithstanding the opinion of the attorney general. This, however, may be a misstatement of the issue. There is no doubt that the concurrent resolution procedure is entirely legal. When the state plan statute calls for the adoption of functional plans by concurrent resolution, it is clearly legal for the legislature to do so. That the adoption of a resolution is legal, however, does not mean that the resolution itself is a mandate which is binding the way a law would be binding. Taken *a priori*, if resolutions were legally enforceable as laws, there would be no distinction between resolutions and laws, and therefore no need for resolutions. Resolutions exist, however, because they are useful for providing legislative policy guidance, stating legislative intent, and requesting action. They are also easier to amend than statutes. The State Constitution provides that "[n]o law shall be passed except by bill." When the legislature decides to adopt a resolution instead of passing a bill, it is deciding to not pass a law, and only laws are legally enforceable.

In the case mentioned by Callies, Life of the Land v. City Council of the City and County of Honolulu, 61 Hawaii 390, 606 P.2d 866 (1980), the court did not address the question of whether the resolution had the force and effect of law, only that it was not defective as a non-legislative act. The Department of the Attorney General also held that adoption of the functional plans by concurrent resolution was not defective, and as resolutions, did not have the force and effect of law. After all, what makes the functional plans binding on state agencies is not the fact that they are adopted by concurrent resolution, but the fact that Act 236 says that state agencies shall utilize the functional plans. The enforceable law is the statute, not the concurrent resolution. And the use of the functional plans, however binding, is as guidelines.

or policies of this chapter.

Under this definition, the decision-maker must take two steps to be in conformance: (1) weigh the overall theme, goals, objectives, and policies as they apply to the particular decision; and (2) make a determination that the decision is consistent with the overall theme, and also fulfills one or more of the goals, objectives, or policies of the chapter. The fact that there are other goals, objectives, or policies which might have been fulfilled, but were not, does not subject the decision to legal challenges based on the provisions of Chapter 226.

Similarly, there is concern that the functional plans will be interpreted to be legal mandates. It is the position of your Committee that the functional plans are not legal mandates, nor legal standards of performance. It is the position of your Committee that a decision or program which does not follow a functional plan, or which appears to be in conflict with a functional plan, is not therefore subject to legal attack or judicial invalidation based on the provisions of Chapter 226. Your Committee has thus defined "guidelines" as follows:

(15) For the purposes of this chapter, "guidelines" means a stated course of action which is desirable and should be followed unless a determination is made that it is not the most desirable in a particular case; thus, a guideline may be deviated from without penalty or sanction.

Under this definition, functional plans describe courses of action which are desirable and should be followed. However, the decision-maker may make a determination that in a particular case, that course of action is not the most desirable. This determination must be made openly, and it must include an explanation as to why the deviation is necessary. Such a deviation, however, is not subject to legal attack or judicial invalidation based on the provisions of Chapter 226.[79]

These changes made by Act 236 were negotiated as a prerequisite to the adoption of the functional plans.[80] With the passage of the bill, adoption of ten of the twelve functional plans was achieved.

---

[79] H.R. CONF. COMM. REP. NO. 35, 12th Hawaii Leg., Reg. Sess., 1984 HOUSE J. 1-2.

[80] The resolutions by which the 10 functional plans were adopted all included language making their adoption conditional upon the passage of H.B. No. 177. For example, House Concurrent Resolution No. 26 Relating to the State Tourism Functional Plan, stated in part:

BE IT FURTHER RESOLVED that the adoption of the State Tourism Functional Plan, as amended by this Concurrent Resolution, is effective upon the passage of H.B. No. 177, H.D. 1, S.D. 1, C.D. 1, by both Houses of the Hawaii State Legislature and upon signature of H.B. No. 177, H.D. 1, S.D. 1, C.D. 1, into law by the Governor of the State of Hawaii or upon H.B. No. 177, H.D. 1, S.D. 1, C.D. 1, becoming law without the signature of the Governor. . . .

BE IT FURTHER RESOLVED that should H.B. No. 177, H.D. 1, S.D. 1, C.D. 1, not be enacted into law, then this Concurrent Resolution shall be void. . . .

H.R. CON. RES. NO. 26, 12th Hawaii Leg., Reg. Sess., 1984 HOUSE J. 3-4.

VI. A Process, Not A Regulation

The concerns over home rule, mandates versus guidelines, and judicial invalidation reveal a misunderstanding of the basic role of the Hawaii State Plan. The Hawaii State Plan is a law, but it is more than that. It is a plan and a planning process.

This was clearly the legislative intent. Representative Kenneth Kiyabu, then Chairman of the House Committee on General Planning argued during the final debate on the state plan in 1978 that "[t]he most important thing this bill does . . . is set into law a planning process for the State."[81] Francis Wong, then Chairman of the Senate Interim Committee on the Hawaii State Plan, argued in the final debate in the Senate in 1978 for "a better planning process for our State."[82] The Conference Committee report stated: "The purpose of this bill is to establish a statewide planning process as a means toward setting a quality future for the State of Hawaii."[83]

Act 236 further bolsters the view that the state plan is a planning process, not a regulation. An analogy may help. The process established by Act 100 and amended by Act 236 resembles in some ways the process established by the federal National Environmental Policy Act (NEPA).[84] In the NEPA process, the environmental impacts of a project or proposal are analyzed, and the costs and benefits are weighed, before a government decision is made. NEPA and the environmental impact statement (EIS) which is produced do not require or mandate a particular decision or result. If all the relevant factors have been considered, the substance of the decision is usually upheld by the courts. Environmentalists attacking decisions have been successful in overturning decisions which did not follow the process, or which were based on incomplete EIS's.[85] However, the courts have generally upheld the substance of a decision if the procedure is correct. As one commentator explains:

> NEPA's ultimate purpose may be environmental protection, but the measures which it prescribes to reach this goal are similar to those provided by the Administrative Procedure Act and recent case law expanding judicial review, especially the Supreme Court decisions in *Overton Park* and *Pitts v. Camp*. Both NEPA and the evolving standards of judicial review call for the establishment by the agencies of procedures for principled decision making, for ground rules for informed

---

[81] 1978 House J. 1179 (9th Hawaii Leg.) (statement of Rep. Kenneth Kiyabu).

[82] 1978 Sen. J. 668 (9th Hawaii Leg.) (statement of Sen. Francis Wong).

[83] H.R. Conf. Comm. Rep. No. 60, 9th Hawaii Leg., Reg. Sess., 1978 House J. 1395. *See also*, Honolulu Star-Bull., Feb. 17, 1981, at 2, col. 1.

[84] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4331-4347 (1970)).

[85] *See generally* W. Rodgers, Handbook on Environmental Law 716-25 (1977).

> agency decision making, for the articulation in the record of the reasoning which supports the decision taken, for the elaboration of the risks which proposed action entails, for discussion and consideration of alternatives as a test of the soundness of decisions taken, for greater public accessibility to the process, for a broader view of the public interest under long-standing agency missions, and for increased public participation.[86]

The overall theme, goals, objectives, policies, priority guidelines, and functional plan implementing actions form a checklist which government decision-makers should analyze and use to weigh the costs and benefits before a decision is made. The state plan does not require or mandate a particular decision or result. The assumption behind both NEPA and the state plan is that by analyzing and weighing, government officials will make better decisions. The state plan also assumes that by analyzing and weighing the established goals and objectives of the state, government officials will make decisions which tend to fulfill the goals and objectives set forth. The state plan will serve as a reference point, or a value base, for decisions. It is a framework within which to act.

Act 100, of course, is more comprehensive in its goals and objectives than NEPA. It goes further in setting forth substance in addition to process. But the analogy is suggestive. Act 100 established a planning process, and the standard of review is the Hawaii Administrative Procedure Act, the same standard which applies to other state government decisions. That standard is that a decision can be overturned if it is in violation of constitutional or statutory provisions, is in excess of statutory authority, is made upon unlawful procedure, is clearly erroneous in view of the evidence, or is arbitrary and capricious.[87] A decision is not likely to be overturned if the state plan process, as amended by Act 236, is followed.

In specific cases, the goals, objectives, policies, priority guidelines, and functional plans may conflict. This is because every community has many values, and in specific cases, not all values and goals can be fulfilled. However, it is better to have all these values and goals out on the table, and be reminded of them in the planning process, than to ignore many of the values and fulfill only a few of the goals which the community holds to be important. There are no inherent conflicts in the *process*; if the goals and objectives conflict in a particular case, then the process simply requires that the weighing be open and obvious. This means accountability to the public. As Representative Kiyabu argued in 1978 in the final debates on the passage of the state plan: "With this particular bill, and in developing the functional plan, we would bring sunshine to government. For the first time, I think the people of this State will know what direc-

---

[86] Anderson, *The National Environmental Policy Act*, FED. ENVTL. L. 279-80 (1974).

[87] HAWAII REV. STAT. § 91-14(g) (1976).

tion the State is going. . . ."[88]

VII. The Democratization of the Administrative Process and Act 237

Part II of Act 100 provided for the establishment of an advisory committee for each functional plan. The twelve advisory committees are composed of one government official from each county, members of the general public, experts in the field for which a functional plan is being prepared, and state officials.[89] The members are appointed by the Governor. County officials are nominated by their respective Mayors and appointed by the Governor.

The purpose of each advisory committee is to advise the state agency which is preparing a functional plan, so that the functional plan is in conformance with the overall theme, goals, objectives, policies, and priority guidelines.[90] Advisory committee members provide input on the implementing actions in each functional plan, recommending the inclusion of new implementing actions, the deletion of old ones, and the setting of priorities. Under Act 100, the committees were to serve until each functional plan was adopted by the legislature.

Because of the importance of these committees, the administration prepared legislation which would make them permanent. The administration bill was introduced as H.B. 271 in 1983. It passed as H.B. No. 271, H.D. 1, S.D. 2, C.D. 1, in the 1984 session, and became Act 237. It provides that "[a]fter the functional plan is adopted by the legislature, the committee shall advise the state agency in the implementation, monitoring and future updating of the plan."[91] The terms for members from the general public and experts in the field were set at four years, with a limit of two consecutive terms.

With permanent advisory committees, plus the policy council, the state plan process represents an extremely important innovation. It is the democratization of the administrative process.

Administrative agencies normally draw up plans on their own and submit budgets for review by the Governor and adoption by the legislature. But if an administrative officer draws up plans, he or she will want to know if the plans are really the best. To find out, he or she may talk with other government agencies, with members of the general public, with businesspersons, and with citizen groups. When the officer gets feedback, he or she may change and adjust the plans as a result.

This interaction and feedback are formally established under the state plan process. Each of the twelve functional plans has an advisory committee, which

---

[88] 1978 House J. 461-62 (9th Hawaii Leg.) (statement of Rep. Kenneth Kiyabu).

[89] Hawaii Rev. Stat. § 226-57(c) (Supp. 1984).

[90] *Id.*

[91] *Id.*

develops implementing actions in close cooperation with the state agency involved. The policy council subsequently reviews all twelve of the plans. More than 200 people are involved in the advisory committees and policy council. Half of these people are from the general public. Many of them would not otherwise be involved in the administrative process. Thus with the state plan process, the public is directly involved in formulating and recommending priorities for specific administrative action. The people have now been given a voice in the administrative process.

VIII. CONCLUSION

Problems under Act 100 were resolved in the 1984 session. Act 236 resolved problems relating to county home rule, and made it clear that the functional plans are guidelines, not mandates. It also clarified "conformance," so that the state plan is more clearly a process, not a regulation. Act 237 established the advisory committees on a permanent basis.

Act 100, as amended by Acts 236 and 237, establishes goals and a process for the community and government decision-makers to reach those goals. What are the benefits of using these goals and this process? There are at least six major benefits.

First of all, it enhances the administrative decision-making process, by keeping the values and goals of the community foremost in the minds of its public servants. Second, it democratizes the administrative process, by obtaining public input through advisory committees and the policy council.

Third, it will improve coordination between and among government agencies. The policy council is composed of state and county officials, as well as citizens and experts in various areas. In particular, it includes the state and county planning directors, who participate in reviewing the state plan and the state planning process. Important state-county issues are placed on the table, and points of view are exchanged openly. The coordination function is even more obvious in regard to state agencies, thirteen of which are represented on the council by their directors or chairpersons.

Fourth, it will assist the state legislature in overseeing the activities of the administration and measuring its performance. The administration makes progress reports on the implementation of the state plan, including the priority guidelines and the functional plans. This may be the shortest, quickest, most effective means for the legislature to learn about the status of state programs. The state plan provides a focus, and establishes a means of measuring action or inaction.[92]

---

[92] At present, legislators and their staff members learn about state programs through agency publications, meetings, hearings, and requests for information. The functional plans can provide a

Fifth, the state plan will provide for continuity in the midst of change. Developed in the community and revised from time to time to reflect new circumstances, the state plan can serve as a benchmark and can provide a general sense of direction for the body politic. This is especially important in light of the turnover in public leadership. The average citizen will see between four and eight governors come and go, and as many as 500 legislators come and go, during his or her voting lifetime. The state plan can provide a mechanism which can lead to the fulfillment of the community's goals in the midst of this democratic change in public leadership.[93]

Sixth, the state plan can provide the basis for new partnerships. The goals, objectives, policies and implementing actions apply to government, not the general public. However, they provide the general public with a clear idea of where the government intends to go. Businesses, community groups, charitable organizations, and individuals can use the same goals and objectives in working together with government to reach Hawaii's preferred future.

The state plan will thus continue to enhance government decision-making, by reminding decision-makers of the goals and objectives of the community which they serve, and by improving inter-agency coordination. It will improve the legislative oversight function, by providing a checklist of priority and implementing actions. It will be a source of continuity admidst changes in political

---

checklist for the legislature to use in evaluating where the administration is, and where it plans to go. There are 362 implementing actions in the 10 functional plans already adopted by resolution, and 72 implementing actions in the two functional plans awaiting adoption. While this seems like a large number, it is less than the average number of resolutions adopted by the legislature each year, and it is an average of only 36 items per functional plan.

[93] There are 38 Directors and Deputy Directors in the 15 main departments of the state government, excluding the Department of Education and the University of Hawaii, both of which have their own governing boards. Between 1974 and 1982, these 30 positions were held by 65 people, for a 72 percent turnover rate. As of the summer of 1982, the average length of service of the state cabinet members was 4.4 years. This steady turnover has continued. During the period from April, 1983 to April, 1984, five of the 15 department heads retired or resigned. Survey by the author, August, 1982.

The picture is more diverse in the state legislature. There are 25 members of the State Senate and 51 members of the State House of Representatives. The total number of legislators holding these positions in the 10-year period from 1974 through the summer of 1984 was 146, a 92 percent turnover. Of the 76 who held office in 1974, only 23 were still in office in the summer of 1984—24 percent of the Senators, and 21 percent of the Representatives. Twenty new Representatives took office in 1982—a 39 percent turnover in one election.

The difference in length of service of the members of the legislature is quite large. As of the summer of 1984, there were four Representatives and seven Senators who had served 14 years or more. However, 30 Representatives—a clear majority—had served four years or less. Fifteen Senators—again, a majority—had served 10 years or less. The average length of service for the House was 5.6 years; for the Senate, it was 10.4 years. Information compiled by the library of the Department of Economic Planning and Development, December, 1982.

leadership, and it will privide a basis for partnerships between citizens and their government which will enhance the quality of life of Hawaii's people.

The Constitutionality of the Office of Hawaiian Affairs

by Jon Van Dyke*

The following piece by Professor Jon Van Dyke is a memorandum in opposition to the State of Hawaii's motion to dismiss in pending litigation, in which the constitutionality of the Office of Hawaiian Affairs was inferentially questioned. The memorandum has been edited slightly for purposes of publication.

I. INTRODUCTION

The question of the constitutional legitimacy of the Office of Hawaiian Affairs (OHA)[1] and other special programs and preferences for native Hawaiians[2] has been raised in several contexts since 1978 when the voters of Hawaii approved the proposal of the Constitutional Convention to create OHA.[3]

During the period when the Hawaii State Legislature was drafting OHA's implementing legislation, Senators Duke Kawasaki and Neil Abercrombie

---

* Professor of Law, Richardson School of Law, University of Hawaii at Manoa. B.A., Yale University, 1964; J.D., Harvard Law School, 1967. Member of the Hawaii, California, and District of Columbia Bars. The author would like to express appreciation to Debra Lee who helped with some of the research of this article and to the many other native Hawaiian students at the Richardson School of Law who have helped during the past decade to develop and refine the legal issues that affect the Hawaiian community. This analysis, prepared for the Office of Hawaiian Affairs in connection with current litigation, is based on long-established legal principles that have evolved during the past two hundred years of our nation's history.

[1] The Office of Hawaiian Affairs is described at *infra* text accompanying notes 26-35. *See generally* HAWAII CONST. arts. XII, XIII, *and* HAWAII REV. STAT. ch. 10 (Supp. 1984).

[2] In this article the term "native Hawaiian" is used broadly to refer to all persons who have descended from the aboriginal peoples who inhabited the Hawaiian Islands prior to 1778. The term is thus used to link and compare these people to native Americans inhabiting other parts of the United States, and not to refer to any specific blood quantum requirement. See *infra* notes 44, 159, and 162 and accompanying text for some of the more specific statutory definitions.

[3] Many of the instances in the first half of this century when constitutional questions relating to Hawaiian programs were raised are discussed in this article. *See infra* notes 55-61, 149-53 and accompanying text.

asked the attorney general of Hawaii for an opinion of OHA's constitutionality. The attorney general concluded after a twenty-two-page, single-spaced analysis that restricting OHA's electorate and trustees to persons of Hawaiian descent did not violate the United States or Hawaii Constitutions.[4]

The question was then raised by eleven residents of Hawaii and a taxpayers' advocacy group known as the Tax Payers' Union in a federal court case titled *Hoohuli v. Ariyoshi*.[5] Judge King dismissed this case on September 25, 1981, on the grounds that (1) the action did not fall within 42 U.S.C. § 1983 because it was essentially against the State of Hawaii rather than the individually named defendants, (2) injunctive relief was barred by the eleventh amendment, and (3) the named defendants were protected by the doctrine of qualified immunity.[6] The United States Court of Appeals for the Ninth Circuit reversed this decision,[7] concluding that the case falls within the *Ex Parte Young*[8] exception to the eleventh amendment, that a federal court would therefore have the power to issue an injunction in an appropriate case, and that the doctrine of qualified immunity did not protect the defendants from an injunctive suit.[9] The reviewing court ruled that plaintiffs did not have standing to request an accounting and repayment of funds because they would not be the direct beneficiaries of such funds, but also concluded that the plaintiffs (except for the Tax Payers Union) did have standing to seek injunctive relief, either as taxpayers or as affected native Hawaiians.[10] The case has been remanded to the district court, which will have to deal with the constitutional questions on the merits.

In 1983, this issue was again raised, this time by lawyers in the state attorney general's office who contended—in a case involving the proper distribution of proceeds from the lands ceded to the United States government in 1898—that the creation of the Office of Hawaiian Affairs violated the due process clauses of the fifth and fourteenth amendments and the equal protection and privileges and immunities clauses of the fourteenth amendment to the United States Constitution.[11] The state later modified its position in 1984 to argue that OHA must be a state entity of lower stature than a cabinet-level department like the Department of Transportation. If OHA were to have the same status as the other departments, the state argued, it would be unconstitu-

---

[4] Hawaii Op. Att'y Gen. 80-8 (July 8, 1980).

[5] 741 F.2d 1169 (9th Cir. 1984).

[6] *Id.* at 1171-73.

[7] Hoohuli v. Ariyoshi, 741 F.2d 1169 (9th Cir. 1984).

[8] 209 U.S. 123 (1908).

[9] 741 F.2d at 1176.

[10] *Id.* at 1180-81.

[11] Defendant's Answering Memorandum at 3-4, Trustees of the Office of Hawaiian Affairs v. Hong, Civ. No. 79260 (Hawaii 1st Cir. Sept. 28, 1983).

tional in violation of the previously listed constitutional provisions.[12] The litigation in this case is also continuing.

Finally, also in 1984, when the Hawaii State Legislature was considering a bill to allow native Hawaiians to have a "live-in" park at Sand Island, the attorney general's office argued that it "may violate the equal protection clause of both state and federal Constitutions" to provide such a preference for native

---

[12] *See* Defendant's Reply Memorandum at 32, Trustees of the Office of Hawaiian Affairs v. Hong, Civ. No 79260 (Hawaii 1st Cir. Apr. 12, 1984). This argument is made in the context of the attorney general's contention that the Department of Transportation is entitled to sovereign immunity in the case brought by OHA because cabinet level agencies are superior in governmental stature to OHA. Defendants have made this argument because one governmental department is not normally permitted to claim sovereign immunity in a suit brought by another governmental department. *See, e.g.*, Rocky Mountain Oil and Gas Ass'n v. State of Wyoming, 645 P.2d 1163, 1166 (Wyo. 1982); City of East Orange v. Palmer, 220 A.2d 679, 692 (N.J. 1966).

The link between this contention and the contention that OHA would be unconstitutional if it were found to be of equal status as cabinet-level departments is difficult to follow. *See infra* Dannenberg, *The Office of Hawaiian Affairs and the Issue of Sovereign Immunity*, 7 U. HAWAII L. REV. 93, 95-100 (1985). The attorney general concedes that the Supreme Court has permitted deviations from the one-person one-vote approach in certain cases, citing Salyer Land Co. v. Tulare Water District, 410 U.S. 719 (1973) and Ball v. James, 451 U.S. 355 (1981). *See* Dannenberg, *infra* pp. 99-100. We also permit governments to impose logical restrictions on voting eligibility for all governmental entities—such as actual residency and minimum age requirements. These restrictions are designed to ensure the requisite link between the electorate and the purposes for which the governmental entity is created. Restricting the electorate of the Office of Hawaiian Affairs to persons of Hawaiian ancestry fits into such a logical framework and is constitutional based on precedents analyzed and applied in this article.

Whether OHA is of the same governmental stature as the cabinet-level departments is a separate legal issue that must be resolved by analyzing the structure created in Hawaii's Constitution rather than by looking at the manner in which OHA's trustees are elected by native Hawaiians. HAWAII CONST., art. XII, § 5. The commissioners of the Hawaiian Homes Commission are appointed by the governor; four out of seven must be of native Hawaiian ancestry. Hawaiian Homes Commission Act, § 202(a), 42 Stat. 108 (1920). According to the argument put forward by the attorney general, the Department of Hawaiian Homes would appear to be a cabinet-level department and is constitutional because the appointment of the commissioners is made by the governor, who is elected by all qualified residents, even though four of these appointments must be persons of Hawaiian ancestry. If OHA were deemed to be a cabinet-level department, according to this argument, it would be unconstitutional because its trustees are elected by an electorate restricted to persons of Hawaiian ancestry.

This distinction appears to be too delicate to bear the weight that the attorney general has imposed upon it. The Department of Hawaiian Home Lands and the Office of Hawaiian Affairs are both state entities created to benefit native Hawaiians and both are constructed so that native Hawaiians can assume leadership roles in their governance. Because OHA was established over 50 years after the Department of Hawaiian Home Lands, and after Hawaii had achieved statehood and self-governance, democratic principles were drawn upon to permit direct election of its officers. Surely that progressive decision should not lead to the conclusion that OHA has less stature than the Department of Hawaiian Home Lands and the other cabinet-level departments or would be unconstitutional if it had that same stature.

Hawaiians and not for other groups.[13]

The implications of these arguments are immense, because if it is unconstitutional to establish OHA, then the Hawaiian Homes Commission[14]—which has been serving the Hawaiian community since 1921—would appear also to be unconstitutional, along with a number of programs recently enacted by Congress to aid native Hawaiians.[15]

Nonetheless, these legal opinions opposing Hawaiian rights are frequently received with sympathy among many sectors of our community because they seem to be consistent with the constitutional principle that we should treat and evaluate each person as an individual rather than as a member of a group.[16] We have a strong national commitment to grant or deny benefits on the basis of individual evaluations, without regard to race, creed or color. We are therefore naturally wary of programs that appear to single out one group for particular benefits.

This view fails to recognize, however, that special programs and preferences for native Hawaiians—and other native Americans on the mainland—are enacted and upheld not for *racial* reasons, but rather because of the *legal and political status* that native groups have in American law.[17] The United States Constitution recognizes the special status of native groups,[18] and the United States Supreme Court has repeatedly reaffirmed this unique legal status in recent years.[19] The Court has explained that this unique status developed not as an attempt to elevate one group over others solely for racial reasons, but rather because of the "special relationship" that exists between the United States government and native peoples as a result of the historical events whereby the United States and its citizens overcame the natives and took possession of their lands.[20]

The fact that native Hawaiians are ethnically distinct from mainland "Indians" is of no legal importance. Federal courts have extended the special status of

---

[13] Letter from Deputy Attorney General Chelun Huang and approved by Attorney General Tany S. Hong to Sen. Joseph T. Kuroda (Mar. 21, 1984) discussing H.B. 1319-84, House Draft 2, Live-In Cultural Parks. The letter stated: "any legislation which favors one race or group of people over another is inherently a constitutional subject." The letter does not mention any of the many special programs provided to natives in Hawaii and on the mainland and indicates that programs for native Hawaiians are legally no different than programs for any other single ethnic group. This legislation was not enacted.

[14] *See infra* notes 36-42 and accompanying text.

[15] *See infra* notes 154-66 and accompanying text.

[16] *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

[17] *See infra* notes 67-107 and accompanying text.

[18] U.S. CONST. art. I, § 8, cl. 3 and amend. 14 § 2.

[19] *See infra* notes 73-76, 84-107 and accompanying text.

[20] Morton v. Mancari, 417 U.S. 535 (1974). *See infra* notes 73-76 and accompanying text.

native groups to all the diverse natives on the mainland and Alaska.[21] Many of these groups were not organized into formal tribes, and many had no treaties with the United States. The only factors that link all these peoples together and give them their special legal status are first, that their ancestors were in what is now the United States before Westerners arrived, and second, that their culture was affected and their land holdings reduced as a result of their contact with Westerners.[22] These factors link native Hawaiians to other native Americans. In 1982 the Hawaii Supreme Court specifically analogized the native Hawaiians to other native Americans and drew upon the rich body of federal cases involving mainland natives to determine the trust duties owed to native Hawaiian homesteaders.[23]

The distinction between a program based on political "status" and one based on race can be made clear with some examples. The United States does not grant special privileges to "Indians" from Canada, Mexico, or Guatemala who have moved to and become citizens of the United States, even though they may be members of the same racial group as American Indians. The many programs and preferences given to American Indians through the Bureau of Indian Affairs are based on a political or status relationship with the federal government and its citizens rather than on a preference for one race over others.

Similarly, the preferences granted to native Hawaiians through the Office of Hawaiian Affairs do not extend to other Polynesians in Hawaii, such as the Tongans and Maoris, who are members of the same "race" as Hawaiians but who do not fit the political or status classification of descendants of persons who resided here prior to 1778.

The United States and the Hawaii Supreme Courts have made it clear that because of historical and political relationships, our governments owe a "unique obligation" to natives who descend from peoples who resided in the United States when Westerners arrived.[24] This special obligation does not, however, extend to persons who are of the same race as these natives but come from outside the United States.

The legal conclusion that native peoples can be given preferences and special programs is also supported by sound policy reasons that remain persuasive today.[25] This article reviews these legal and policy arguments in some detail to reassure the people and the legislators of Hawaii that the creation of the Office of Hawaiian Affairs does not violate the Constitution and that the state and federal constitutions present no bar to the enactment of new programs that

---

[21] *See infra* notes 167-71 and accompanying text.

[22] *See infra* notes 168-70 and accompanying text.

[23] Ahuna v. Dept. of Hawaiian Home Lands, 64 Hawaii 327, 640 P.2d 1161 (1982). *See infra* notes 45-54 and accompanying text.

[24] *See infra* notes 45-54 and 67-107 and accompanying text.

[25] *See infra* notes 186-87 and accompanying text.

benefit native Hawaiians or single them out for unique treatment. Court decisions over two centuries have recognized the legitimacy of special programs and preferences for natives.

II. The Office of Hawaiian Affairs

The Office of Hawaiian Affairs was established in 1978 by the Constitutional Convention (Con Con) and the voters of Hawaii for the purpose of establishing a public trust entity for the benefit of the people of Hawaiian ancestry.[26] The delegates to the 1978 Con Con expected that OHA would "provide Hawaiians the right to determine priorities which [would] effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it [would] unite Hawaiians as a people."[27] The delegates intended to "provide a receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians, and to create a body that could formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to native Hawaiians."[28] Moreover, in looking to the future, the delegates determined that "the office [would] be able to receive and administer any reparations money, which [would] probably be awarded to all native Hawaiians regardless of blood quantum."[29]

The Con Con's Committee on Hawaiian Affairs closely examined rights granted to other native peoples such as American Indians. The committee found that American Indians had "traditionally enjoyed self-determination and self-government," that they retained the "power to make their own substantive rules in internal matters," and that "they remain a separate people with the power of regulation over their internal and social problems, although no longer possessed of the full attribution of sovereignty." The delegates intended OHA "to grant similar rights to Hawaiians," to further "the cause of Hawaiian self-government," and to make OHA "more responsive to the needs of its constituents." Citing the "unique legal status of Hawaiians," the delegates justified the qualification that one had to be of Hawaiian blood in order to vote or run for office as a trustee: the qualification did not constitute discrimination but rather was "directed to participation by the governed in the governing agency."[30]

The voters of Hawaii approved the constitutional amendments establishing

---

[26] *See* Hawaii Const. art. XII, §§ 5-6; Hawaii Rev. Stat. §§ 10-1 to -16 (Supp. 1984).

[27] Comm. of the Whole Rep. No. 13, 1 Proceedings of the Const. Convention of Hawaii of 1978 at 1018 (1980).

[28] Stand. Comm. Rep. No. 59, 1 Proceedings of the Const. Convention of Hawaii of 1978 at 644 (1980).

[29] *Id.*

[30] Comm. of the Whole Rep. No. 13, 1 Proceedings of the Const. Convention of Hawaii of 1978 at 1019 (1980).

the Office of Hawaiian Affairs in November 1978,[31] and in 1979 and 1980, the Hawaii State Legislature enacted legislation implementing the constitutional provisions.[32] Hawaii Revised Statutes section 10-13.5—which is central to the current litigation between OHA and the state[33]—provides that twenty percent of all funds derived from "the public land trust" shall be expended by OHA for the betterment of conditions of native Hawaiians.[34] The public land trust comes from the federal lands obtained at the time of annexation (1898) that were transferred to the state at the time of statehood (1959). When it received these lands from the federal government in 1959, the State of Hawaii agreed to use them for several specified purposes, including "the betterment of the conditions of native Hawaiians."[35] The establishment of OHA and the grant to it of twenty percent of the funds derived from the public land trust are efforts by the State of Hawaii to fulfill these obligations toward native Hawaiians.

III. Decisions of the State Courts of Hawaii Clearly Support the Constitutionality of Programs to Benefit Native Hawaiians

Although no case has yet focused on the recently-created Office of Hawaiian Affairs, the Hawaii Supreme Court has considered issues relating to the Hawaiian Homes Commission on a number of occasions. These decisions contain no doubts about the constitutionality of the Commission's structure or its mission to aid native Hawaiians.

---

[31] Hawaii Const. art. XII, §§ 5-6.

[32] Hawaii Rev. Stat. §§ 10-1 to -16 (Supp. 1984).

[33] Trustees of the Office of Hawaiian Affairs v. Hong, Civ. No. 79260 (Hawaii 1st Cir. filed April 12, 1984). This case concerns how to define the revenues that constitute the fund from which OHA is entitled to 20 percent.

[34] The "public land trust" is defined as follows:

> For the purpose of this chapter, the public land trust shall be all proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and conveyed to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 4, the Admissions Act), (excluding therefrom lands and all proceeds and income from the sale, lease, or disposition of lands defined as available lands by section 203 of the Hawaiian Homes Commission Act, 1920, as amended), and all proceeds and income from the sale, lease, or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act of March 18, 1959, later conveyed to the State under section 5(e). . . .

Hawaii Rev. Stat. § 10-3(1) (Supp. 1984).

[35] Admissions Act of March 18, 1959 (Admissions Act), § 5(f), Pub. L. No. 86-3, 73 Stat. 4 (1959) (codified at 48 U.S.C. ch. 3 (1982).

A. The Hawaiian Homes Commission

In 1921, the United States Congress passed the Hawaiian Homes Commission Act (HHCA) setting aside more than 200,000 acres of land in Hawaii specifically for the benefit of native Hawaiians.[36] The title to these lands, which remained with the United States prior to statehood, passed to the State of Hawaii upon its admission into the union in 1959.[37] The HHCA was adopted as state law at the time of statehood in the Hawaii State Constitution.[38] This federal-state statute established the Hawaiian Homes Commission to oversee the Department of Hawaiian Home Lands, which administers these lands.[39] The United States Congress required that at least four of the seven members of the Commission "shall be descendants of not less than one-fourth part of the blood of the races inhabiting the Hawaiian islands previous to 1778."[40] The primary responsibility of the Department of Hawaiian Home Lands is to lease the tracts of its lands to native Hawaiians,[41] who are defined in this statute as the descendants "of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778."[42]

Similarly, OHA is also charged with "the betterment of conditions of native Hawaiians and Hawaiians."[43] The Hawaii legislators adopted the HHCA definition of "native Hawaiians" in defining the beneficiaries of the funds from the public land trust that are administered by OHA.[44]

---

[36] Hawaiian Homes Commission Act of 1920 [hereinafter cited as HHCA], Pub. L. No. 34, 42 Stat. 108 (1921).

[37] *See* Admissions Act, *supra* note 35, § 4.

[38] HAWAII CONST. art. XII(1).

[39] HHCA, *supra* note 36, § 202(a).

[40] *Id.*

[41] *Id.* at §§ 207-08.

[42] *Id.* at § 201(7).

[43] HAWAII REV. STAT.]§ 10-]3(1)-(2) (1984).

[44] *See* HAWAII REV. STAT. §§ 10-2(4), -3, and -13.5 (Supp. 1984).

The definition adopted by the legislature in 1979 for OHA adopts the HHCA definition but adds some extra language to avoid any ambiguities. HAWAII REV. STAT. § 10-2(4) (Supp. 1984) defines "native Hawaiians" as:

> any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended, provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

OHA is also charged with the "betterment of conditions of Hawaiians." HAWAII REV. STAT. § 10-3(2). HAWAII REV. STAT. § 10-2(5) defines "Hawaiians" as:

> any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii . . . .

B. *Ahuna v. Department of Hawaiian Home Lands*

The most recent Hawaii Supreme Court case involving the Hawaiian Homes Commission Act is *Ahuna v. Department of Hawaiian Home Lands*,[45] in which a unanimous court gave a broad reading of the trust obligation that the Department of Hawaiian Home Lands and the Hawaiian Homes Commission owes to native Hawaiians.[46] This case is particularly important to the current litigation because the court specifically analogized native Hawaiians to other native Americans and drew upon the federal decisions involving mainland natives to determine the trust duties owed to native Hawaiian homesteaders.[47]

Ahuna involved an appeal by the Department of Hawaiian Home Lands from an order directing it to issue a full ten-acre lease. The court affirmed the judgment of the lower court and held that the Department had the obligation to administer the home lands trust *solely* in the interest of the native Hawaiian beneficiaries.[48] The court reviewed the history of the Hawaiian Homes Commission Act and concluded that the Act was passed by the federal government to fulfill in part its obligation as trustee toward the aboriginal native Hawaiian people.[49] The State of Hawaii accepted this responsibility at the time of statehood and therefore "must adhere to high fiduciary duties normally owed by a trustee to its beneficiaries."[50]

To determine the breadth of this trust responsibility, the court turned to mainland federal decisions involving American Indians, Eskimos, and Alaska natives: "Essentially, we are dealing with relationships between the government and aboriginal people. *Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.*"[51] After surveying the applicable mainland analogies, the court concluded that conduct of the Department of Hawaiian Home Lands should be measured by "the same strict standards applicable to private trustees,"[52] and that this obligation requires that the trust be administered "solely in the interest of the beneficiary" and with

---

The constitutional question is the same for both missions of OHA—to assist "native Hawaiians" and "Hawaiians." Both groups are descendants of aboriginal peoples and thus both have the special political status under U.S. law described in the text. The trust fund involved in the current litigation is, however, intended solely for the benefit of "native Hawaiians"—those with 50 percent or more Hawaiian blood—which is precisely the same group benefited by the Hawaiian Homes Commission Act.

[45] 64 Hawaii 327, 640 P.2d 1161 (1982).

[46] *Id.* at 338, 640 P.2d at 1168.

[47] *Id.* at 339-40, 640 P.2d at 1168-69.

[48] *Id.* at 340-41, 640 P.2d at 1169-70.

[49] *Id.* at 336-37, 640 P.2d at 1167-68.

[50] *Id.* at 338, 640 P.2d at 1168.

[51] *Id.* at 339, 640 P.2d at 1169 (emphasis added).

[52] *Id.*

such "reasonable skill and care to make trust property productive."[53] The *Ahuna* court emphasized that the primary purpose of "the Hawaiian Homes Commission Act was the rehabilitation of native Hawaiians."[54]

C. Other Federal, Territorial and State Opinions Conclude that Special Programs for Native Hawaiians are Constitutional

The federal government acknowledged its continued trust responsibility toward native Hawaiians in the 1959 Admissions Act,[55] when it transferred some of the ceded lands to the State of Hawaii. Section 5(f) of this Act identified "the betterment of the condition of native Hawaiians" as one of the five specified purposes for which the proceeds of these ceded lands are to be used. The State of Hawaii was therefore fulfilling the trust obligation it inherited from the federal government when it created OHA and determined that it should administer twenty percent of the proceeds from the public land trust for the benefit of native Hawaiians.[56]

Prior to statehood, officials of the Territory of Hawaii repeatedly recognized the constitutionality of special programs for native Hawaiians when questions were occasionally raised about the Hawaiian Homes program. During the 1920 Congressional hearings, for instance, Harry Irwin, the Attorney General of the Territory, surveyed various constitutional theories and concluded that Congress could set aside lands "for the exclusive use of members of the Hawaiian race . . . for the purpose of rehabilitating the race and preventing its ultimate extinction."[57]

The question arose again at Hawaii's 1950 Con Con, and the committee charged with reviewing the HHCA reaffirmed the 1920 conclusion that it was constitutional: "The Act is not discriminatory. It is a very progressive piece of legislation designed to aid an aboriginal people survive the sudden impact of a

---

[53] *Id.* at 340, 640 P.2d at 1169.

[54] *Id.* at 336, 640 P.2d at 1167. *See also* In re Ainoa, 60 Hawaii 487, 488, 591 P.2d 607 (1979); Hawaiian Homes Comm'n v. Bush, 43 Hawaii 281 (1959); and Yuen v. Kimikaua, 37 Hawaii 8 (1944), which deal with the Hawaiian Homes Commission. All four cases recognize the Hawaiian Homes Commission as a legitimate constitutional body which has the obligation to administer the homelands trust solely in the interest of native Hawaiian beneficiaries.

[55] Admissions Act, *supra* note 35.

[56] *See* HAWAII REV. STAT. § 10-1(a) (Supp. 1984) which explicitly acknowledges this obligation.

[57] H. DOI, LEGAL ASPECTS OF THE HAWAIIAN HOMES PROGRAM, LEG. REFERENCE BUREAU REP. 1a (1964), *citing Act to Provide a Government for the Territory of Hawaii, to Establish an Hawaiian Homes Commission, and for Other Purposes: Hearings on H.R. 13500 before the Senate Committee on Territories*, 66th Cong., 2d Sess. 134-36 (1920). *See also infra* notes 151-53 and accompanying text.

new highly complex civilization on their lives. . . . It would be more discriminatory to repeal the Act."[58]

The delegates to the 1950 Con Con also considered whether the anti-discrimination provision in the Bill of Rights section[59] conflicted with the Hawaiian Homes provisions and concluded that "the Bill of Rights section on discrimination was not applicable to the Hawaiian Homes section. . . ."[60]

"The expressed opinion of . . . the majority of the delegates to the [1950] state Constitutional Convention who spoke on aspects of the problem is that the Hawaiian Homes program is constitutional."[61] The Convention delegates subsequently agreed to include the Act in the state Constitution, which "may be interpreted as affirming the constitutionality of the Hawaiian Homes program."[62]

More recently, the attorney general of the State of Hawaii has explicitly recognized this trust obligation and the constitutional validity of the special political status of native Hawaiians in the context of the creation of OHA on at least two occasions: Attorney General's Opinion No. 80-8,[63] and Defendant's Motion to Dismiss Complaint or in the Alternative for Summary Judgment in *Hoohuli v. Ariyoshi*.[64] On October 19, 1983, Governor George Ariyoshi stated that he personally feels that OHA is constitutional, despite the attorney general's arguments in the current litigation:[65] "I had nothing to do with that representation. . . . I have no intention of raising the constitutional question. So far as I am concerned, I see it [OHA] as constitutional."[66]

IV. FEDERAL DECISIONS ARE UNEQUIVOCAL IN RECOGNIZING THAT SPECIAL PROGRAMS FOR NATIVE PEOPLES ARE CONSTITUTIONAL

A. *Federal Decisions Have Upheld Special Programs for Native Americans Repeatedly in a Wide Variety of Situations*

The United States Supreme Court has consistently upheld special programs

---

[58] STAND. COMM. REP. NO. 33, HAWAII CONST. CONVENTION OF 1950, 1 PROCEEDINGS 171 (1952).

[59] HAWAII CONST. art. I, § 5.

[60] H. DOI, *supra*, note 57, at 51, summarizing debate at 2 Hawaii Constitutional Convention of 1950, *Proceedings* 34-38.

[61] H. DOI, *supra* note 57, at 54.

[62] LEGISLATIVE REFERENCE BUREAU, *Hawaii Constitutional Convention Studies 1978, Article X: Conservation and Development of Resources; Article XI: Hawaiian Home Lands* 95 (1978).

[63] July 8, 1980 (regarding the constitutionality of the Office of Hawaiian Affairs).

[64] Civ. No. 81-0182 (Hawaii 1st Cir. Aug. 13, 1981).

[65] *See supra* notes 11-12 and accompanying text; *see generally* Dannenberg, *supra* note 12.

[66] Honolulu Advertiser, Oct. 20, 1983, at A3, col. 5.

to serve native Americans and preferences designed to preserve and promote their culture and economic development. These programs and preferences are enacted and upheld not for racial reasons, but rather because of "the unique legal status" that Indians and other native groups have had in American law.[67] This unique legal status developed as a result of the "special relationship" that exists between the United States government and native peoples, a relationship that arose out of the historical period during which United States citizens moved into areas previously populated solely by natives, overcame the natives, and took possession of their lands.[68]

Early cases described this relationship as one involving "wards" needing protection from their "guardian," the federal government.[69] Courts today avoid this "overly paternalistic approach"[70] but still recognize the importance of the special legal status of natives. The Hawaii Supreme Court in the *Ahuna* case, for instance, built on the paternalistic "ward" concept to develop the idea that the government stands in the role of "trustee" toward native Hawaiians.[71] Special programs and preferences for native groups are now upheld by the federal courts as long as they "can be tied rationally to the fulfillment" of the government's "unique obligation" toward its native peoples.[72]

Morton v. Mancari[73] upheld a hiring preference for Indians for positions in the Bureau of Indian Affairs (BIA) legislatively mandated in 25 U.S.C. § 472. This preference is similar to the requirement in article XIII, section 5, of the Hawaii Constitution that only persons of Hawaiian ancestry can serve as trustees of OHA. The United States Supreme Court, in an opinion written by Justice Blackmun, viewed this hiring preference not as a "racial" preference but as "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency."[74] In a footnote,[75] Justice Blackmun stated that further evidence for the view that the employment preference was "political" rather than "racial" could be found by observing that the preference did not apply to all Indians, but only those in "federally recognized tribes."[76]

---

[67] Morton v. Mancari, 417 U.S. 535, 551 (1974).

[68] *Id.* at 552 (quoting Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943)).

[69] *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[70] 417 U.S. at 553.

[71] Ahuna v. Department of Hawaiian Home Lands, 64 Hawaii 327, 336-38, 640 P.2d 1161, 1167-68 (1982).

[72] 417 U.S. at 555. *See also* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 85 (1977).

[73] 417 U.S. 535 (1974).

[74] *Id.* at 554.

[75] *Id.* at 553 n.24.

[76] The Court reached the conclusion that the classification was "political" and not "racial"

Some commentators have referred to the Court's distinction between "political" classifications and "racial" classifications as a "legal fiction."[77] Indeed some decisions involving preferences for Indians have referred to the Indians in racial terms.[78] The legitimacy and importance of the political-racial distinction becomes clear, however, when one realizes that the United States does not grant any special privileges to or have a trust relationship with Canadian, Mexican, or Guatemalan Indians residing in the United States, even though they are members of the same "race" as American Indians.[79] Similarly, the preference involved in OHA does not extend to native Hawaiians not residing in Hawaii, nor does it apply to other Polynesians in Hawaii, such as Tongans and Samoans, who are members of the same "race" as Hawaiians but who do not fit the "political" classification of being descendants of persons who resided here prior to 1778.[80]

The preferences granted to persons native to areas that now constitute the United States are therefore, *political* in the sense that they arise out of a specific set of political and historical relationships and are not an attempt to elevate one

---

even though persons had to have "one fourth or more degree Indian blood" to qualify for preference. 417 U.S. at 553 n.24 (quoting 44 BIAM 335, 3:1). Although this racial criteria was *necessary*, it was not *sufficient*, because persons *also* had to be members of federally recognized tribes to qualify. *Id. See also* Alaska Chapter, Associated Gen. Contractors of America v. Pierce, 694 F.2d 1162, 1168 n.10 (9th Cir. 1982).

[77] *See, e.g.*, Note, *Supreme Court Upholds the Validity of Preferential Treatment of Indians in Land Disputes*, 13 CREIGHTON L. REV. 619, 631 (1979).

[78] *See, e.g.*, United States v. John, 437 U.S. 634 (1978); Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 (E.D. Wash. 1965), *aff'd mem.*, 384 U.S. 209 (1966); United States v. Celestine, 215 U.S. 278, 290 (1909); Montoya v. United States, 180 U.S. 261, 266 (1901); Felix v. Patrick, 145 U.S. 317, 330 (1892); United States v. Rogers, 45 U.S. (4 How.) 567, 573 (1846).

[79] *See generally* Johnson and Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 598 n.80 (1979).

[80] *See generally, The Prehistory of Polynesia* 6, 167 (J. Jennings ed. 1979). Some critics have argued that preferences for native groups must be viewed as "racial" rather than "status" preferences because, even though not all members of the race receive the benefit, no one who is not a member of the race is eligible for the benefit. It is true that programs for natives are a "closed class" in this sense and that certain persons are excluded from eligibility. We have many closed classes in our legal system, however, so this closed class should not be viewed as unique or unusual. Benefit programs for veterans and the social security program are examples of programs from which many people are excluded. The government created these programs for reasons not unlike the reason that has led the government to create benefit programs for native people: a perception that a debt is owed to a group of persons because of a previous relationship between these persons and the government. In the case of veteran's benefits, these programs tend to exclude a large sector of the population (in this case, women) solely by virtue of the accident of birth, like the benefit programs for natives which exclude persons of non-native racial backgrounds. Despite the discriminatory aspects of veteran's programs, the U.S. Supreme Court has recently upheld their legitimacy. *See* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979).

race over another solely for racial reasons. Indeed, the United States Supreme Court included a footnote in its opinion in *University of California Regents v. Bakke*[81] specifically exempting native groups from the analysis of that opinion.[82] The 1982 edition of Felix S. Cohen's *Handbook of Federal Indian Law*—which is the most definitive sourcebook on this subject—explains this situation by saying that "the Court's reliance on a political-racial distinction may be no more than *an imprecise reference to the special status of Indian tribes under the Constitution and the laws.*"[83]

United States Supreme Court and federal appeals court decisions since *Morton* have consistently upheld other preferences for native groups. These cases are direct precedents for the constitutionality of OHA:

1. *Antoine v. Washington.*[84] This decision reversed a ruling of the Washington Supreme Court that had upheld the conviction of an Indian for violating a state hunting statute. The Court reaffirmed a federal agreement guaranteeing Indian hunting rights and the legitimacy of governmental preferences for Indians in general. In an opinion written by Justice Brennan, the Court also reaffirmed the "canon of construction applied over a century and a half by this Court . . . that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice."[85]

2. *Fisher v. District County Court.*[86] In a per curiam opinion, the Court upheld the legitimacy of the separate status of natives in ruling that Montana state courts have no jurisdiction over adoption proceedings involving tribal members living on the reservation:

> [W]e reject the argument that denying respondents access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the tribal court does not derive from the race of the plaintiff but rather from the

---

[81] 438 U.S. 265 (1978).

[82] 438 U.S. at 304 n.42:

> Petitioner also cites our decision in *Morton v. Mancari*, 417 U.S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In *Mancari*, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is *sui generis*. *Id.* at 554. Indeed we found that the preference was *not racial at all* but "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion" *Ibid.* (Emphasis added).

[83] F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 656 (2d ed. 1982) (emphasis added). *See also* Johnson and Crystal, *supra* note 79, at 594-607.

[84] 420 U.S. 194 (1975).

[85] *Id.* at 199.

[86] 424 U.S. 382 (1976).

quasi-sovereign status of the Northern Cheyenne Tribe under Federal Law.[87]

3. *Moe v. Confederated Salish and Kootanai Tribes of Flathead Indian Reservation.*[88] The Court rejected Arizona's argument that an immunity from state taxes granted to the Indians by the federal government constituted "an invidious discrimination against non-Indians on the basis of race. . . ."[89] The Court's opinion, written by Justice Rehnquist, said that "[w]e need not dwell at length on this constitutional argument," because "we think it is foreclosed by our recent decision in *Morton v. Mancari*. . . ."[90]

4. *Delaware Tribal Business Committee v. Weeks.*[91] In this decision, written by Justice Brennan, the Court upheld a distribution of property to certain Indians that excluded other Indians, concluding that:

> Congress may choose to differentiate among groups of Indians in the same tribe in making a distribution. . . . The standard of review most recently expressed is that *the legislative judgments should not be disturbed "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' 'unique obligation toward the Indians*. . . .' "[92]

5. *United States v. Antelope.*[93] In an opinion written by Chief Justice Burger, the Court rejected the defendant's argument that the separate criminal jurisdiction that applies only to Indians (and which was harsher on this Indian defendant than the state laws would have been) constitutes invidious racial discrimination:

> The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, *classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.*[94]
>
> . . . .
>
> . . . federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of tribes, therefore, is governance of once-sovereign political communities; it is not to be

---

[87] *Id.* at 390.
[88] 425 U.S. 463 (1976).
[89] *Id.* at 479.
[90] *Id.* at 479-80.
[91] 430 U.S. 73 (1977).
[92] *Id.* at 84-85 (emphasis added) (citing Morton v. Mancari, 417 U.S. 535, 555 (1974)).
[93] 430 U.S. 641 (1977).
[94] *Id.* at 645 (emphasis added; footnote omitted).

viewed as legislation of a " 'racial' group consisting of 'Indians' . . . ."[95]

6. *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation.*[96] The Indian tribes challenged a State of Washington statute that retained jurisdiction over eight subjects while transferring civil and criminal jurisdiction over all other subjects to the tribes, unless a tribe petitioned the state to retain all jurisdiction. The Court rejected the challenge, seven-to-two, holding that the state's action was authorized by Congress[97] and that it met the "rationality" review appropriate for constitutional review of statutes affecting Indians. In the course of his opinion for the majority, Justice Stewart said: "It is settled that the unique legal status of Indian tribes under federal law permits the Federal government to enact legislation that might otherwise be constitutionally offensive."[98] Justices Marshall and Brennan dissented on the grounds that the statute was ambiguous and that it should be construed in favor of the Indians.

7. *Wilson v. Omaha Indian Tribe.*[99] The Court interpreted and held applicable to a boundary controversy a venerable statute[100] that granted a preference to Indians in the following terms:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession in ownership.[101]

The United States Court of Appeals for the Eighth Circuit had summarily rejected a constitutional challenge to this preference when it considered this case,[102] and the challenge apparently was not even raised at the Supreme Court level. In an opinion written by Justice White, the Supreme Court reaffirmed the canon of construction that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of Indians."[103]

8. *Washington v. Washington State Commercial Fishing Vessel Association.*[104]

---

[95] *Id.* at 646 (citing Morton v. Mancari, 417 U.S. 535, 552 (1974)).

[96] 439 U.S. 463 (1979).

[97] *Id.* at 498 (referring to Pub. L. No. 280).

[98] 439 U.S. at 500-501 (citing Morton v. Mancari, 417 U.S. at 551-52).

[99] 442 U.S. 653 (1979).

[100] 25 U.S.C. § 194 (1982).

[101] 442 U.S. at 658.

[102] 575 F.2d 620, 631 n.18.

[103] 442 U.S. at 666 (quoting Bryan v. Itasca County, 426 U.S. 373, 392 (1976) and Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918)). *See* Note, *Supreme Court Upholds the Validity of Preferential Treatment of Indians in Land Dispute*, 13 CREIGHTON L. REV. 619 (1979).

[104] 443 U.S. 658 (1979).

The Court upheld treaties granting fishing rights to the Indians and interpreted these rights in the Indians' favor. In the process of reaching these conclusions, the Court reversed a ruling of the Washington State Supreme Court "that recognizing special rights for the Indians would violate the Equal Protection Clause of the Fourteenth Amendment."[105] The Court's opinion, written by Justice Stevens, summarily rejected the state court's conclusion in a footnote stating:

> The simplest answer to this argument is that this Court . . . has repeatedly held that *the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment* on their behalves when rationally related to the Government's unique obligation toward the Indians.[106]

These decisions were all unanimous on the issue of importance to the status of OHA: *special treatment for native groups is permitted as long as the special program is rationally related to the government's "unique obligation" to these native groups.*[107]

B. Federal Decisions also Recognize the Legitimacy of State Programs Granting Preference to Native Groups

Hawaii's creation of OHA fulfills in part the obligation Hawaii accepted from the federal government at the time of statehood.[108] Hence, this action has the same constitutional legitimacy as if OHA had been created directly by the federal government. Even if this lineage could not be shown, however, it would be appropriate and constitutional for a state acting on its own to grant a preference to its native groups for the purpose of maintaining and developing the native culture.

The leading recent case recognizing this principle is *Livingston v. Ewing.*[109] A Caucasian couple challenged a regulation of the State Museum of New Mexico that permitted only Pueblo Indians to sell craft items at the portal outside the state-owned Palace of the Governors, adjacent to Santa Fe's tourist-filled plaza. The Caucasian couple, represented by the American Civil Liberties Union, argued that the decision to use state property for the benefit of only Indians constituted "an unjustified classification based on race" in violation of the equal

---

[105] *Id.* at 672.

[106] *Id.* at 673 n.20 (emphasis added) (citing Morton v. Mancari, 417 U.S. 535, 555 (1974) and discussing United States v. Antelope, 430 U.S. 641 (1977) and Antoine v. Washington, 420 U.S. 194 (1975)).

[107] *See generally* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1009-18 (1981).

[108] *See supra* note 35 and accompanying text.

[109] 601 F.2d 1110 (10th Cir. 1979), *aff'g* 455 F. Supp. 825 (D.N.M. 1978).

protection clause of the fourteenth amendment.[110]

The district court rejected this argument, concluding that the preference met the test in *Morton v. Mancari* that it be "reasonably and directly related to a legitimate nonracially based goal."[111] The district court stated that the museum's Indian-only policy endeavored to promote the "very legitimate, racially neutral state interest"[112] of preserving the Pueblo culture and tradition, aiding the economic survival of the Indian merchants, protecting them from "forced assimilation,"[113] and promoting tourism as well. The district court explained the status of Indians as follows:

> Because of their unique cultural, legal, and political status, *Indians have consistently received special or preferential treatment, from the federal and state governments*. . . . The list of special laws, and cases giving preferential treatment to Indians is considerable, and the justification for all this lies in the appreciation of the uniqueness of Indian communities, their wish to maintain a separate way of life, and the benefit that the preservation of such will confer upon society.[114]

The United States Court of Appeals for the Tenth Circuit affirmed the decision, viewing it as governed by *Morton* and the statute involved in that case.[115] The court also noted strong reasons that exist for providing a separate place for the Pueblos: "a valuable state interest, that of acquiring, preserving, and exhibiting historical, archeological, and ethnological interest in fine arts."[116] The court ruled that the rights claimed by the Caucasian complainants were "far outweighed by the educational, cultural, and artistic interests which the state is fostering."[117] The decision thus clearly recognized the legitimacy of state action taken to preserve and promote the cultural integrity of its native groups.[118]

---

[110] 455 F. Supp. at 827.

[111] *Id.* at 832 (citing Morton v. Mancari, 417 U.S. at 554).

[112] *Id.* at 832.

[113] *Id.* at 831.

[114] *Id.* at 830 (emphasis added).

[115] 42 U.S.C. § 2000e-2(i) (1982).

[116] 601 F.2d at 1115.

[117] *Id.*

[118] Other cases that recognize the power of states to protect natives include New York *ex rel.* Cutler v. Dibble, 62 U.S. (21 How.) 366 (1859) (state statute that protects Indian lands against white intruders upheld); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 672 n.7 (1974) (note mentions *Dibble* holding in dicta); and State v. Forge, 262 N.W.2d 341 (Minn. 1977), *appeal dismissed*, 435 U.S. 919 (1978) (state statute requiring special fishing license fee for anyone not a member of the Minnesota Chippewa Tribe to fish on the Leech Lake Indian Reservation upheld).

C. *Many States Have Established Special Programs for their Native Groups*

Other evidence of the legitimacy of such steps can be found in the many state statutes and constitutional provisions that establish state agencies comparable to OHA, designed to assist native groups in their separate cultural development:

Alabama: The Southeast Alabama Indian Affairs Commission, composed of Creek Indian leaders living in Alabama, is designed to assist Indians and promote recognition of their right to pursue cultural and religious traditions.[119]

Alaska: Alaska has a number of statutory provisions specifically designed for its native populations, including provisions creating the Alaska Native Language Center,[120] protecting native handicrafts,[121] and creating regional native housing authorities.[122]

Arizona: The Commission of Indian Affairs, composed of four ex-officio members, two non-Indians, and seven Indians is designed to study Indian conditions and to make recommendations.[123]

California: The Native American Heritage Commission, composed of nine members, at least five of whom must be "elders, traditional people, or spiritual leaders of California Native American tribes," is designed to identify and to protect places sacred to California's native American groups.[124] California's Department of Education also has a Bureau of Indian Education whose mission is to "study and identify the cultural and educational disadvantages affecting American Indian children in the present existing public school system."[125]

Colorado: The Commission of Indian Affairs, composed of five ex-officio members, four representatives of the Ute tribes, and two at-large members, is designed to study and to serve the Indian communities and was established in recognition of "the special governmental relationships and unique political status of these tribes. . . ."[126]

Louisiana: The Governor's Commission on Indian Affairs, composed of nine Indian members is designed to coordinate state services for Indians and to administer the Indian Education Assistance Fund.[127] The Louisiana Indian Housing Authority, composed of nine persons of Indian descent or heritage, is "empowered to use state's fiscal powers to develop housing for the state's Indian

---

[119] ALA. CODE § 41-9-700 *et seq.* (1975).
[120] ALASKA STAT. § 14.40.117 (1983).
[121] *Id.* § 45:65020 *et seq.*
[122] *Id.* § 18.55.995 *et seq.*
[123] ARIZ. REV. STAT. ANN. § 41-541 *et seq.* (1974).
[124] CAL. PUB. RES. CODE § 5097.91 *et seq.* (West 1983).
[125] CAL. EDUC. CODE § 33370 (West 1978).
[126] COLO. REV. STAT. § 24-44-01 *et seq.* (Supp. 1981).
[127] LA. REV. STAT. ANN. § 2301 *et seq.* (West 1982).

population."[128]

Maine: The Maine Indian Tribal-State Commission, composed of four gubernatorial appointees and four Indians selected by the Passamaquoddy Tribe and Penobscot Nation with a chair selected from among the retired judiciary by these eight, is designed to review the social, economic and legal relationships between the tribes and the state.[129]

Maryland: The Commission on Indian Affairs, composed of nine members "a majority of whom shall be members of the native American Indian communities" of the state, is designed to study the status and economic and social needs of the Indians and to make recommendations to improve their situation.[130]

Michigan: The Commission on Indian Affairs, composed of eleven members, nine of whom "shall have not less than ¼ quantum Indian blood," is designed to assist Indian organizations with regard to rights or services due to them.[131]

Minnesota: The Indian Affairs Board, composed of sixteen ex-officio members and thirteen Indian members, including two elected by Indian residents of the state, is designed to assist state and local governments in serving the Indian communities.[132]

Montana: The State Coordinator of Indian Affairs is a state official in the State Department of Commerce who serves as an advocate and coordinator for Indian needs within the state government.[133]

Nebraska: The Commission on Indian Affairs, composed of fifteen members from the different tribes in Nebraska, is designed to provide a forum to discuss problems common to all Indians and to work with governmental entities to coordinate Indian needs.[134]

Nevada: The Nevada Indian Commission, composed of five members, three of whom are Indians, with a paid executive director and staff, is designed to make recommendations to assist Nevada Indians.[135]

New Mexico: The New Mexico Office of Indian Affairs Commission, composed of ten members, eight of whom are Indians, is designed to study Indian conditions related to health, economy, and education, and to propose legislation to the local, state, and federal governments.[136]

North Carolina: The North Carolina State Commission of Indian Affairs is

---

[128] *Id.* § 40-581.1 *et seq.* (West 1982).
[129] ME. REV. STAT. § 6212 (1982-83).
[130] MD. CODE ANN. § 409-I *et seq.* (1982).
[131] MICH. COMP. LAWS § 16.711 *et seq.* (1979).
[132] MINN. STAT. § 3-922 *et seq.* (1983).
[133] MONT. CODE ANN. § 90-11-101 *et seq.* (1983).
[134] NEB. REV. STAT. § 81-1214 *et seq.* (1981).
[135] NEV. REV. STAT. § 233A.010 *et seq.* (1977).
[136] N.M. STAT. ANN. § 28-12-4 *et seq.* (1978).

designed to assist Indians and to promote recognition of the rights of Indians to pursue their cultural and religious traditions.[137]

North Dakota: The North Dakota Indian Affairs Commission, composed of eight ex-officio and eleven Indian members, is designed to assist the four tribal councils to develop their economic potential.[138]

Oklahoma: The Oklahoma Indian Affairs Commission, composed of nine members appointed by the Governor who represent the geographic areas of the state and the various tribes in the state, plus a Director who must be at least one-fourth Indian, is designed to promote unity, purpose, and understanding among the Indians of Oklahoma.[139]

Oregon: The Commission on Indian Services, composed of two legislators and eight Indians, is designed to develop programs for Indians and to promote legislation for their benefit.[140]

Rhode Island: The Narragansett Indian Land Management Corporation is designed to receive the settlement lands designated in a 1978 law suit won by the Indians for lands previously lost.[141]

South Dakota: The State Commission of Indian Affairs, composed of eight ex-officio members, four legislators, and twelve Indians, is designed "to help solve Indian problems and to serve as an advocate of the Indian people." South Dakota also has a State Indian Business Development Organization to promote Indian business development.[142]

Tennessee: The Commission of Indian Affairs, composed of two non-Indians and three Indians, is designed to assist Indians and to promote recognition of Indian rights to pursue their cultural and religious traditions.[143]

Utah: The Board of Indian Affairs is composed of seven members appointed by the governor, including at least one Navaho and one Ute, with a Division of Indian Affairs to promote Indian advancement.[144]

Virginia: The Commission on Indians, composed of ten members, at least half of whom must be Indians, is designed to suggest ways of promoting Indian development.[145]

This long list of state statutes demonstrates the strong national commitment to the special status of native groups. Because the federal government has the

---

[137] N.C. GEN. STAT. § 143B-404 *et seq.* (1983).

[138] N.D. CENT. CODE § 54-36-01 *et seq.* (1982).

[139] OKLA. STAT. tit. 74 § 201 *et seq.* (1983).

[140] OR. REV. STAT. § 172.100 *et seq.* (1981).

[141] R.I. GEN. LAWS § 37-18-1 *et seq.* (1982).

[142] S.D. CODIFIED LAWS ANN. § 1-4-1 *et seq.* (1980).

[143] TENN. CODE ANN. § 4-34-101 *et seq.* (1983).

[144] UTAH CODE ANN. § 63-36-1 *et seq.* (1981).

[145] VA. CODE § 9-138.1 *et seq.* (1983).

primary responsibility toward Indians, working through the BIA,[146] many of these state organizations are advisory in nature. Because in Hawaii the federal responsibility was largely passed to the state at the time of statehood, OHA has both advisory and program-oriented responsibilities, combining the roles of the BIA and the state advisory commissions.

D. Native Hawaiians are Clearly Covered by the Federal Decisions on the Constitutionality of Special Programs for Native Americans

The inclusion of native Hawaiians in the category of native Americans who are granted a special political status under our constitutional scheme is recognized and supported by the decisions of the Hawaii Supreme Court, the many acts of the United States Congress granting a special status to native Hawaiians, and the language and logic of the many federal court decisions that recognize and define the special political status for native Americans.

1. The Hawaii Supreme Court Has Recognized that Native Hawaiians Are Native Americans

As discussed earlier,[147] the Hawaii Supreme Court in *Ahuna v. Department of Hawaiian Home Lands* recognized that questions involving native Hawaiians should be analyzed in the same manner as questions involving other native Americans:

> In our opinion, the extent or nature of the trust obligations of the appellant [Department of Hawaiian Home Lands] toward beneficiaries such as the appellee may be determined by examining well-settled principles enunciated by the federal courts regarding lands set aside by Congress in trust for the benefit of other native Americans, *i.e.*, American Indians, Eskimos, and Alaska natives. In *Pence v. Kleppe*, 529 F.2d 135 (9th Cir. 1976), the circuit court recognized that the word "Indian" is commonly used in the United States to mean "the aborigines of America." *Id.* at 138-39 n.5; *see also* 42 C.J.S. *Indians* Sec. 1 (1944). Congress recently passed a religious freedom act which specifically included native Hawaiians among the American Indians. *See* American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. Sec. 1996 (Supp. III 1979)). ***Essentially we are dealing with relationships between the government and aboriginal people. Reason thus dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans.***[148]

---

[146] *See generally* D. GETCHES, D. ROSENFELT, C. WILKINSON, FEDERAL INDIAN LAW 120-42 (1979).

[147] *See supra* notes 45-54 and accompanying text.

[148] 64 Hawaii 327, 339, 640 P.2d 1161, 1168-69 (1982) (emphasis added).

2. The United States Congress Has Repeatedly Recognized the Special Status of Native Hawaiians and Has Included Native Hawaiians in Many Programs for Other Native Americans

Among the congressional statutes singling out native Hawaiians for special treatment and preferences are the Hawaiian Homes Commission Act of 1920[149] and the Admissions Act of 1959.[150] After questions were raised in 1920 about the constitutionality of the Hawaiian Homes program, the federal solicitor of the Department of the Interior submitted an opinion arguing strongly in favor of its constitutionality. The opinion refers to congressional enactments that set aside lands for Indians[151] as precedents.[152] The House Committee on Territories agreed with this conclusion and stated that the legislation was based on "a reasonable and not an arbitrary classification" with "numerous congressional precedents for such legislation in previous enactments granting Indians [and other groups] special privileges in obtaining and using the public lands."[153]

In recent years, Congress has enacted additional statutes for the specific benefit of native Hawaiians. In 1980, Congress passed three statutes all identifying native Hawaiians as subjects of special federal attention:

a. *The Native Hawaiian Education Study*[154] states that "Congress declares its commitment to assist in providing the educational services and opportunities which Native Hawaiians need" and then establishes a seven-member Advisory Council to make recommendations to the Secretary of Education about how the Department of Education can better serve native Hawaiians.

b. *Kalaupapa National Historical Park*[155] establishes a national park at Kalaupapa on Molokai and provides employment preferences and training opportunities for Native Hawaiians (as well as qualified patients) for "positions

---

[149] Act of July 9, 1921, 42 Stat. 108 (1921); *see supra* notes 36-42 and accompanying text.

[150] Pub. L. No. 86-3, 73 Stat. 4 (1959) (codified at 48 U.S.C. 491 (1976)); *see supra* notes 35 and 55 and accompanying text.

[151] Act of Feb. 28, 1891, ch. 383 § 1, 26 Stat. 794 (1910) (codified at 25 U.S.C. 331 (1982)).

[152] H. DOI, LEGAL ASPECTS OF THE HAWAIIAN HOMES PROGRAM 43, LEG. REFERENCE BUREAU REP. 1a (1964), citing *Organic Act of the Territory of Hawaii: Hearings on Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments and on the Proposed Transfer of the Buildings on the Federal Leprosy Investigation Station at Kalawao on the Island of Molokai Before the House Committee on Territories*, 66th Cong., 2d Sess., 130-31 (1920).

[153] H.R. REP. NO. 839, 66th Cong., 2d Sess. (1920). This report discusses the rehabilitation of native Hawaiians.

[154] Pub. L. No. 96-374, § 1331, 94 Stat. 1499 (1980) (codified at 20 U.S.C. § 1221-1 (1982)).

[155] Pub. L. No. 96-565, tit. I, 94 Stat. 3321 (1980) (codified at 16 U.S.C. § 410jj (Supp. 1980)).

established for the administration of the park."[156] The statute also establishes the Kalaupapa National Historical Park Advisory Commission of eleven members. Seven must be patients or former patients elected by the patient community and four are "appointed from recommendations submitted by the Governor of Hawaii, *at least one of whom shall be a Native Hawaiian.*"[157]

c. *The Native Hawaiians Study Commission Act*[158] establishes a nine-member commission to "conduct a study of the culture, needs and concerns of the Native Hawaiians" and to prepare a report on this subject.[159] As used in this statute, "the term 'Native Hawaiian' means any individual whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778."

One recent federal action taken at the administrative level also recognizes the continuing federal responsibility for native Hawaiians. On January 21, 1983, United States Secretary of the Interior James G. Watt established the *Federal-State Task Force on the Hawaiian Homes Commission Act*, which prepared a report released in August, 1983, "on ways to better effectuate the purposes of the Hawaiian Homes Commission Act." Three members of this Task Force were appointed by the Secretary of the Interior, and seven were appointed by the Governor of Hawaii. Funding and staffing were similarly shared.

In addition to these statutes and administrative actions recognizing the special political status of native Hawaiians, Congress has specifically included native Hawaiians in a number of its recent enactments designed to benefit native Americans generally:

a. *The Native American Programs Act of 1974*[160] is designed "to promote the goal of economic and social self-sufficiency for American Indians, Hawaiian Natives and Alaskan Natives" by providing financial assistance to public and nonprofit agencies serving the native groups.[161] As used in this statute, " 'Native Hawaiian' means any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778."[162] This program has provided funding for Alu Like, a non-profit organization designed to promote the economic development of native Hawaiians.

b. *American Indian Religious Freedom*[163] states that:

> [I]t shall be the policy of the United States to protect and preserve for American

---

[156] *Id.* at § 107, 16 U.S.C. § 410jj-6 (1980).

[157] *Id.* at § 108(a), 16 U.S.C. § 410jj-7(a) (1980) (emphasis added).

[158] Pub. L. No. 96-565, 94 Stat. 3324 (Supp. 1980) (codified at 42 U.S.C. § 2991 (1976)).

[159] *Id.* at § 303.

[160] Pub. L. No. 93-644, 88 Stat. 2324 (1975) (codified at 42 U.S.C. § 2991 (1976)).

[161] *Id.* at §§ 802-03, 42 U.S.C. § 2991 a-b (1976).

[162] *Id.* at § 813(3), 42 U.S.C. § 2992 c(3) (1976).

[163] Pub. L. No. 95-341, 92 Stat. 469 (1978) (codified at 42 U.S.C. § 1996 (1978)).

> Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The President is directed to implement this policy by working with the various federal departments. In this statute, the first time the words "American Indians" are used, they are used in the broad sense of applying to all native Americans.

c. *The Native American Employment and Training Programs* in the *Comprehensive Employment and Training Act Amendments of 1978*[164] states that "serious unemployment and economic disadvantage exist among members of . . . Hawaiian native communities" and directs the Secretary of Labor to "arrange for programs to meet the employment and training needs of Hawaiian natives through such public agencies or private nonprofit organizations as the Secretary determines will best meet their needs."

d. *The Drug Abuse Prevention, Treatment, and Rehabilitation Act*[165] states that "Native Americans (including Native Hawaiians and Native American Pacific Islanders)" are to be given "special consideration" (along with other target groups) by the federal government for funding of programs to prevent, treat, and rehabilitate drug abusers.

e. *The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act*[166] states that the National Commission on Alcoholism and Other Alcohol-Related Problems should evaluate "the needs of special and underserved population groups, including American Indians, Alaskan Natives, Native Hawaiians, Native American Pacific Islanders . . ." and that "Native Americans (including Native Hawaiians and Native American Pacific Islanders)" are to be given "special consideration" (along with other target groups) by the federal government for funding of programs to prevent, treat, and rehabilitate alcohol abusers.

3. Federal Courts Have Consistently Recognized that the Special Political Status Accorded to Native Americans Applies to All Native Groups

Although the different native groups in the United States have different traditions and needs which have led Congress to provide different programs for them, the courts have recognized that the capacity of Congress to grant preferences for these different groups is the same under our constitutional scheme. In

---

[164] Pub. L. No. 95-524 § 302, 92 Stat. 1909 (1962) (codified at 29 U.S.C. § 872 (1978)).
[165] Pub. L. No. 98-24 § 5(a)(3), 97 Stat. 183 (1983) (codified at 21 U.S.C. § 1177 (1983)).
[166] Pub. L. No. 98-24 § 5(a)(2), 97 Stat. 183 (1983) (codified at 42 U.S.C. § 4577 (1983)).

several cases, the federal courts have interpreted statutes broadly to include additional native groups, assuming that, unless otherwise stated, Congress intended to treat all native groups similarly situated in a similar manner.[167]

These cases, extending rights already granted to Indians in the forty-eight states to Alaskan native groups, are strong precedents that these or comparable rights can also be extended to native Hawaiians because the Alaskan natives differ significantly from natives in the "lower 48" — and from each other:

> Alaskan Natives have not historically been organized into reservations or into tribal units. . . . Alaskan Natives, unlike other American Indians, never entered into treaties with the United States designating reservation lands which Natives were entitled to occupy . . . .[168]

Although native Hawaiians differ culturally from mainland natives, their historical relationships with the United States have been similar in many respects.[169] United States officials have used language describing native Hawaiians that is similar to the language used to describe other native groups, referring to the native Hawaiians as "wards . . . for whom in a sense we are trustees."[170] To rule that the legislature could not provide native Hawaiians with a special political status similar to that given other native groups would, therefore, raise serious equal protection questions.[171]

E. The Office of Hawaiian Affairs Meets the Requirement that Special Programs for Natives "Be Tied Rationally to the Fulfillment" of the Government's Unique Obligations Toward Native Hawaiians

The United States Supreme Court ruled in *Morton v. Mancari* that special

---

[167] *See, e.g.*, Pence v. Kleppe, 529 F.2d 135, 139 n.5 (9th Cir. 1976); United States v. Native Village of Unalakleet, 411 F.2d 1255 (Ct. Cl. 1969); Alaska v. Annette Island Packing Co., 289 F. 671 (9th Cir. 1923); Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918), *aff'g* 240 F. 274 (9th Cir. 1917).

[168] Alaska Chapter, Associated Gen. Contractors of America v. Pierce, 694 F.2d 1162, 1169 n.10 (9th Cir. 1982).

[169] *See generally* Blondin, *A Case for Reparations for Native Hawaiians*, 16 HAWAII BAR J. 13 (1981).

[170] *Compare* this statement of ex-Secretary of the Interior Franklin K. Lane in 1920, *quoted in* Ahuna v. Department of Hawaiian Homes Lands, 64 Hawaii 327, 336, 640 P.2d 1161, 1167 (1982), *with* language in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (the relation of the Indians "to the United States resembles that of a ward to his guardian"). *See also* the analogy drawn by the solicitor to the Department of the Interior comparing Hawaiians and Indians, discussed *supra* at notes 151-53 and in accompanying text.

[171] *See, e.g.*, United States v. Native Village of Unalakleet, 411 F.2d 1255, 1260-61 (Ct. Cl. 1969); Levy, *Native Hawaiian Land Rights*, 63 CALIF. L. REV. 848, 875 (1975).

programs for native groups would satisfy constitutional requirements if they were "tied rationally to the fulfillment" of the government's unique obligation to the native population.[172] This rationality test requires a reviewing court to examine the goals of a special program and the means devised to achieve the goals, and then to uphold the program if it appears to be a rational means of assisting the native population.

OHA easily meets this test. OHA was created to carry forth the government's obligation toward the native Hawaiians that has been repeatedly recognized by the federal government[173] and was transferred to and accepted by the state government at the time of statehood.[174]

OHA is designed to enable native Hawaiians to have a forum within which they can discuss their community problems and devise agreed-upon solutions for them. It is designed to serve as an entity for holding title to land and other property in trust for the Hawaiian community. It is empowered to collect revenues from trust lands and to develop and fund programs to improve the conditions of persons of Hawaiian ancestry.[175] In short, OHA is designed to respond directly to the problems that the Hawaiian community has faced and to begin the process of solving these problems.

V. International Law Also Recognizes That Special Protections Should be Given to Native Groups

The United States Supreme Court has recognized that "[i]nternational law is part of our law."[176] United States courts are bound by treaties made "under the Authority of the United States,"[177] and they traditionally try to interpret federal statutes to conform to international customary law, assuming that Congress intends its legislation to conform to principles of international comity.[178]

The International Covenant on Civil and Political Rights, adopted unanimously by the United Nations General Assembly in 1966, now ratified by over fifty nations, and signed but not yet ratified[179] by the United States, states in article 27 that all minority ethnic groups have the right to preserve their

---

[172] 417 U.S. 535, 555 (1974).

[173] *See supra* notes 149-66 and accompanying text.

[174] *See supra* note 35 and accompanying text.

[175] *See supra* notes 26-35 and accompanying text; HAWAII CONST. art. XII, §§ 5-6; HAWAII REV. STAT. § 10-1 to 10-16 (Supp. 1984).

[176] The Paquete Habana, 175 U.S. 677, 700 (1900).

[177] U.S. CONST. art. VI.

[178] *See, e.g.*, The Over the Top, 5 F.2d 838, 842 (D. Conn. 1925).

[179] By signing this treaty, the United States becomes "obliged to refrain from acts which would defeat the object and purpose of [the] treaty . . . ." Vienna Convention on the Law Treaties (1969), art. 18 (U.N. Doc. A/CONF. 39/27).

cultures:

> In those States in which ethnic, religious or linguistic minorities exist, *persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture*, to profess and practice their own religion, or to use their own language.[180]

Other international conventions and declarations provide more specific protections for native groups. Convention 107 of the International Labor Organization,[181] for instance, protects the cultural and political autonomy of native peoples, urging nations to adopt special measures to preserve native institutions, including the protection of traditional land ownership patterns, methods of social control, and customary law.[182] The Convention has been ratified by twenty-one nations, including eleven in Latin America. Although the United States has not ratified the Convention, it provides the framework of customary international law that is binding on all nations.[183]

The United Nations has continued to work in a number of ways to increase the protection accorded to native groups.[184] In addition, the Inter-American Commission on Human Rights, a body that includes representation from the United States, has stated that "special protection for indigenous populations constitutes a sacred commitment" of all members of the Organization of American States.[185] The principles developed by the international community in recent years thus state without contradiction that it is appropriate to protect the cultures of all minority groups and in particular to provide protections and special programs for native people.

VI. Sound Policy Reasons Support Providing Special Protection and Preferences for Native Groups

Concerns persist about recognizing the special status of native groups because such recognition appears to be inconsistent with our usual constitutional principle that we should treat and evaluate each person as an individual, rather than

---

[180] International Covenant on Civil and Political Rights, art. 27 (emphasis added), 21 U.N. GAOR Supp. (No. 16) at 53, U.N. Doc. A/6316 (1966).

[181] Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, 328 U.N.T.S. 247 (1959).

[182] *Id.*, arts. 8, 11-13.

[183] *See generally*, Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self Government*, 39 Stan. L. Rev. 979, 1054-57 (1981); G. Bennett, Aboriginal Rights in International Laws 16-48 (1978).

[184] *See* Clinton, *supra* note 183, at 1059-60; G. Bennett *supra* note 183 at 49-60.

[185] G. Bennett, *supra* note 183 at 61.

grant or deny benefits based solely on a person's race or ethnic origin. Our Constitution, however, also recognizes the special status of native groups[186] and recognizes the rights of these groups just as it also recognizes the importance of individual rights in other contexts.

Native groups have been given a special status in our constitutional scheme because the people in these groups have had a distinct historical relationship with the United States and have specific political claims against the federal government. These themes have appeared in the cases discussed in earlier sections, but it may be useful to summarize the policy considerations at this point.

Three reasons help explain why native peoples are given preferences in our legal system:

First, all ethnic groups except for native peoples (and blacks)[187] agreed voluntarily to participate in the multi-ethnic society that we have in the United States. Every other immigrant group came to the United States understanding that this new country consisted of a multi-ethnic community and implicitly agreeing to participate in such a culture. The native peoples made no such commitment. They were never asked if they wanted to participate in our melting pot and they have never specifically agreed to do so. Native peoples were largely conquered by other ethnic groups and have generally been excluded from many of their original land areas. Legislatures and courts have felt that in view of this history, native peoples should be given a special status under our legal system.

Second, and equally important, native peoples have no "mother culture" elsewhere to which they may tie themselves. Every other ethnic group in the United States can look to some other location where their historical and cultural traditions are maintained. They face, therefore, no total loss of their historical roots if they become assimilated into the dominant multi-ethnic culture. Native peoples, on the other hand, have no place to look for this protection of their culture and heritage except their place of origin in the United States. If they are not permitted to maintain some unique and special status here, their culture and traditions will be lost forever. In that sense, therefore, native peoples are something like an endangered species deserving of special protection.

Finally, native peoples frequently have strong claims to reparations and land, based on treaties and other early dealings with the federal government. Preferences granted to native Americans are, therefore, sometimes viewed as partial responses based on obligations owed to these peoples.

These policies and legislative and judicial actions amply support the decision

---

[186] Art. I, § 8, cl. 3, and amend. XIV, § 2.

[187] This rationale does not, of course, include blacks who were forcefully brought to North America and kept as slaves during the early years of our country's history. The second policy reason does distinguish blacks from native Americans.

of the people and legislature of Hawaii to create OHA, to maintain the historical and cultural traditions of the Hawaiian people and to promote their economic prosperity.

VII. If an Additional Argument is Needed, the Constitutionality of the Office of Hawaiian Affairs Can Also be Justified as a Legislatively-Established Affirmative Action Program

The United States Supreme Court has held in *Fullilove v. Klutznick*[188] that legislative bodies can use racial and ethnic criteria in fashioning a "narrowly tailored" program "to accomplish the objective of remedying the present effects of past discrimination."[189] Although the Court did not join in a single majority opinion, six of the nine justices agreed that Congress had acted constitutionally when it enacted a statute that required that ten percent of the funds authorized for local public works projects be used to procure services or supplies from businesses owned by minority group members. Because this affirmative action program was enacted by a *legislative* body, the *Fullilove* program was distinguished by the Court from the admissions program struck down in *University of California Regents v. Bakke*,[190] where there had been "no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts."[191]

The legislative action that established OHA took place at the 1978 Con Con and on November 7, 1978, when the voters of Hawaii approved the proposed amendments. The discussions and deliberations at the Con Con demonstrate that OHA was established to help redress the effects of two centuries of discrimination against the native Hawaiians. Adelaide "Frenchie" De Soto, Chair of the Committee on Hawaiian Affairs, introduced the provision on OHA to the Committee of the Whole, saying: "The goal of the Office of Hawaiian Affairs is to address the modern-day problems of Hawaiians *which are rooted in as dark and sad a history as will ever mark the annals of time.*"[192] After this session, the Committee of the Whole approved the proposal to create OHA, justifying the decision along the following lines:

> The present Hawaiian population is a young one. . . . The Hawaiian people today should be given the opportunity *to provide for the betterment of the conditions and well-being of these young Hawaiians and to address the contemporary*

---

[188] 448 U.S. 448 (1980).

[189] *Id.* at 480 (Burger, C.J.).

[190] 438 U.S. 265 (1978).

[191] *Id.* at 305 (Powell, J.).

[192] Committee of the Whole Debates (Sept. 2, 1978), 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 457 (emphasis added).

> *problems that Hawaiians face — crime, inadequate housing conditions, welfare rolls and education.* This proposal gives Hawaiians, a great and proud people, the opportunity and the means to do so. Your Committee feels that it is time the Hawaiians have more impact on their future.[193]

The Hawaii State Legislature also recognized this remedial purpose of OHA when it implemented the constitutional provision in 1979 and stated directly that the primary purpose of OHA is "The betterment of conditions of native Hawaiians [and] Hawaiians."[194] This legislative authorization for an entity appropriately designed to remedy the effects of past discrimination thus clearly meets the constitutional standards identified in *Fullilove*[195] and *Bakke*.[196]

VIII. SUMMARY AND CONCLUSION

OHA is a legitimate state response to the obligation the State of Hawaii inherited in 1959 from the federal government to improve the conditions of the native people of the state. OHA is a flexible and innovative entity designed to handle the real and personal property held in trust for the benefit of the descendants of the aboriginal people who inhabited the Hawaiian islands prior to 1778. It also provides a forum for resolving disputes among the Hawaiian community and a mechanism for charting a course for its future.

OHA is comparable in its legal status to the federal BIA and to the many state agencies other states have established to promote and protect their native populations. These entities and the preferences they grant to native people are constitutional under a long line of federal cases that hold that the government can grant preferences to native groups because of their "unique legal status" that developed from the historical and political relationships between the government and the native people.[197]

These cases require simply that programs and preferences for native groups "be tied rationally to the fulfillment" of the government's "unique obligation" to the native groups.[198] OHA is certainly a reasonable and rational attempt to meet the needs of the native Hawaiians. The state would independently have the power to protect and promote the culture of its native groups—as many states do. Hawaii's power to act on behalf of native Hawaiians is particularly strong because this responsibility was transferred to the state by the federal government at the time of statehood in 1959.

---

[193] 1 *Proceedings of the Constitutional Convention of Hawaii of 1978* at 1018 (emphasis added).

[194] HAWAII REV. STAT. § 10-3(1) to (2) (Supp. 1984).

[195] 448 U.S. 448 (1980).

[196] 438 U.S. 265 (1978).

[197] *See* Morton v. Mancari, 417 U.S. 535, 551-55 (1974).

[198] *Id.* at 555.

The Supreme Court of Hawaii stated explicitly in 1982 that the state's relationship with native Hawaiians should be evaluated by analogy to the federal government's relationship with other native Americans.[199] The United States Congress has also recently included native Hawaiians in a number of statutory programs benefiting the native Americans and has enacted several statutes specifically benefiting native Hawaiians. The precedents that govern native Americans generally thus apply also to native Hawaiians.

Any constitutional question about the legitimacy of OHA would also apply to the Hawaiian Home Lands program, which is also designed to benefit descendants of the aboriginal peoples of these islands. Since 1920, all officials who have been asked about the constitutional legitimacy of the Hawaiian Home Lands have concluded that this program meets constitutional requirements. Congress and Hawaii's Con Con and Legislature have also reached this conclusion. Since OHA was created, state officials and attorneys have repeatedly stated that they view this new entity as constitutional and legitimate.

Persuasive policy reasons support special programs and protections for native people. Unlike other ethnic groups, native people never left their homes to migrate to a new land, implicitly accepting a multicultural society. Unlike other ethnic groups, native people have no "mother culture" elsewhere, where their traditions, religion, and language are preserved and developed. Native groups also may have unresolved claims against the government that justify both a special political status and preferences for them.

Developing international norms also recognize the appropriateness of protecting native populations. If a final argument is needed, legislatively enacted preferences for native groups can be justified under the affirmative action principles of *Fullilove v. Klutznick*.[200]

For all these reasons, under our constitutional scheme, the people and legislature of Hawaii acted properly in creating OHA. OHA is an appropriate and constitutionally legitimate entity with broad statutory powers to act on behalf of the native Hawaiian population.

---

[199] Ahuna v. Department of Hawaiian Home Lands, 64 Hawaii 327, 640 P.2d 1161 (1982).
[200] 448 U.S. 448 (1980).

The Office of Hawaiian Affairs and the Issue of Sovereign Immunity

by James H. Dannenberg*

The following piece by Deputy Attorney General James H. Dannenberg reflects the position presented by the State of Hawaii in a memorandum which responds to the position of the Office of Hawaiian Affairs. The memorandum has been edited for publication.

I. INTRODUCTION

As of this writing, the claims made by Office of Hawaiian Affairs against the State of Hawaii are still pending before the Hawaii courts, so extensive comment upon the state's memoranda or positions would be inappropriate. Nevertheless, since this article's focus is on the broader issue of the constitutionality of the Office of Hawaiian Affairs (OHA), a few comments aimed at defining the context of the excerpted memorandum are in order.

The State of Hawaii has not challenged the constitutionality of OHA. Much has been said about the fact that the eighth of eight defenses in the state's answer to *Trustees of the Office of Hawaiian Affairs v. Hong*[1] raised and preserved possible constitutional challenges, but it is clear that the state has always assumed that OHA itself is constitutional.

It is only the attempted transmogrification of OHA by its attorneys that has forced the state to point out possible constitutional limitations on OHA's form and functions. While OHA is certainly constitutional if it retains the shape given it by the legislature and Constitutional Convention, attempts to usurp broader governmental powers and functions would require constitutional re-evaluation. The excerpted memorandum merely points out that "the equal pro-

---

* B.S., 1965; M.S. 1967; J.D. 1969, University of Wisconsin. Member, Wisconsin, California and Hawaii Bars. The author is an adjunct faculty member at the William S. Richardson School of Law, University of Hawaii and is the head of the Appellate Division and Civil Rights Division of the Hawaii Attorney General's Office.

[1] Civ. No. 79260 (Hawaii 1st Cir. Sept. 28, 1983).

tection clause of the fourteenth amendment . . . requires adherence to the principle of one-person, one-vote in elections of officials exercising governmental powers." Under Hawaii law, and pursuant, I believe, to the reasonable expectations of the legislature, the Constitutional Convention, and the public, OHA simply does not and cannot exercise general "governmental" powers.

This is not to say that OHA's role as a public corporation formed to address the needs of the aboriginal class of people in Hawaii is unimportant. The state argues only that OHA may not lawfully assume a role different from that set out in the constitution or statutes.

In addition, I wish to comment briefly on Professor Van Dyke's analysis, especially that in footnote 11. Professor Van Dyke mischaracterizes the state's argument in *Trustees of the Office of Hawaiian Affairs v. Hong.*[2] The gravamen of the state's argument is not simply that OHA is of lesser "governmental stature" or rank than the Department of Transportation, or that one is a cabinet-level department while the other is not, but instead that OHA does not and cannot exercise general governmental powers at all. OHA argued that it was an arm or branch of the state government with sovereignty equal to that of the state, such that it could by itself waive the state's sovereign immunity. The state merely *responded* by saying that such a position would have the effect of unconstitutionality, disenfranchising those who are forbidden by law from voting for OHA trustees. It would clearly violate the constitution if OHA were able, for example, to exercise power over the state treasury or if OHA trustees were placed within the line of succession for governorship. Government officials with such general powers must clearly be elected by all the people, or appointed by officials who are, and not by a racially or ethnically limited electorate. Those limitations on the one-person, one-vote doctrine suggested in *Salyer Land Co. v. Tulare Water District,*[3] and *Ball v. James,*[4] are entirely consistent with the state's position.

OHA was created for limited purposes, and within the context of those purposes it is assuredly lawful. Only when it—or its lawyers—attempt to usurp greater powers than originally intended does OHA place itself in a position of constitutional vulnerability.

In addition, Professor Van Dyke is also incorrect in stating that the Ninth Circuit Court of Appeals in *Hoohuli v. Ariyoshi*[5] concluded that "plaintiffs (except for the Taxpayers Union) did have standing to seek injunctive relief either as taxpayers or as affected Native Hawaiians."[6] The two plaintiffs who were not

---

[2] *Id.*

[3] 410 U.S. 719 (1973).

[4] 451 U.S. 355 (1981).

[5] 741 F.2d 1169 (9th Cir. 1984).

[6] Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. HAWAII L. REV. 62, 62 (1985).

descendants of the original island inhabitants were indeed found to have had standing as taxpayers to bring the action. However, the native Hawaiian plaintiffs only "may" have standing as either taxpayers or native Hawaiians: "The standing of this group is to be determined on remand."[7]

Nevertheless, it may be said that I agree generally with Professor Van Dyke's characterization of the constitutionality of OHA, even if I do not agree with all of his corollary contentions. Professor Van Dyke and the state agree that OHA *in its present form* is constitutional. Nothing in Professor Van Dyke's analysis deals with the question of an expansion of OHA's function to the point where OHA could exercise general governmental powers.

To be fair, his article was not written in response to the state's memorandum or the specific argument raised in response to Professor Van Dyke's. I cannot say with any certainty that he agrees with my arguments, but it does appear at present that the two views are somewhat consistent with each other.

II. OHA CANNOT CONSTITUTIONALLY BE CHARACTERIZED AS AN "ARM OF THE STATE"

It is ironic that plaintiffs resort to the argument that "the doctrine of sovereign immunity does not apply to an action . . . between arms of the state." On page 28 of plaintiffs' memorandum it is stated:

> Plaintiff was created by the same constitution which established the executive branch of government of which Defendants are a part. As a result both OHA and Defendants are of equal constitutional stature and dignity. Neither is superior, i.e. "sovereign" over the other. The statutes which spell out Defendants' rights and obligations are no more or less important than those which affect OHA and its beneficiaries. Because of the equality between Plaintiffs and Defendants status, there is not even a theoretical basis for the application of the doctrine of sovereign immunity in this case.[8]

If plaintiffs' description of OHA is accurate, then OHA is unconstitutional.

There is no question that the defendant state agencies are "arms or branches of the state." They are true "state agencies," clothed with and exercising governmental powers. They are part of the state, having and exercising sovereign powers. The department heads are appointed by the governor, who is elected by *all* the voters of the State of Hawaii. Most significantly, if any of the departments incur liability, it is the liability of the state.

---

[7] 741 F.2d at 1181.

[8] *See* Plaintiffs' Memorandum in Opposition to Motion for Judgment on the Pleadings, at 28-29, Trustees of the Office of Hawaiian Affairs v. Hong, Civ. No. 79260 (Hawaii 1st Cir. Mar. 15, 1984).

It is settled law that the characterization of an agency as an "arm of the state," partaking of the state's sovereign immunity, does *not* depend upon whether the agency is created by the same law as other agencies; whether it is subject to control by the legislature; nor whether it receives significant amounts of money from the state to perform the functions for which it was created.[9]

The crucial factor in determining whether an agency of the state has sovereign powers is whether the liability of the agency is the liability of the state. Thus, if the liability of OHA is the liability of the state, it can then be considered an "arm of the state" of equal sovereignty to other branches of the state government and endowed with sovereign immunity coextensive with that of the other state defendants. This principle of law is illustrated in *Anthony v. Cleveland*.[10] The court was faced squarely with the question of whether the University of Hawaii was endowed with the sovereign immunity of the state for the purposes of an action brought under 42 U.S.C. § 1983. In concluding that the University of Hawaii was endowed with the sovereign immunity of the state, and therefore that a section 1983 action could not be maintained against it, the court noted that pursuant to statute, any liability incurred by the university would be the liability of the state. The court stated, with emphasis:

> Moreover, section 304-6 of the Hawaii Rev. Stat. (1968) provides, in pertinent part, that:
>
> > The university may sue and be sued in its corporate name: *however, it shall be subject to suit only in the manner provided for suits against the State, and any liability incurred by the university in such a suit shall be the liability of the State* (emphasis added).
>
> Thus if the Plaintiff is successful in this suit, the state will have to pay his judgment and the result is the same as suing the state. . . .[11]

It is readily apparent that, in creating OHA, the legislature arrived at the exact opposite result as far as the responsibility of the state for any liability incurred by OHA.

Chapter 10 of the Hawaii Revised Statutes provides in pertinent part:

> *Suits.* (a) The office may sue and be sued in its corporate name. *The State shall not be liable for any acts or omissions of the office, its officers, employees, and the members of the board of trustees*, except as provided under subsection (b).
>
> (b) In matters of tort, the office, its officers and employees, and the members

---

[9] *See* Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977) (the school board under Ohio law was *not* an "arm of the state" entitled to partake of the state's eleventh amendment immunity).

[10] 355 F. Supp. 789 (D. Hawaii 1973).

[11] *Id.* at 791 (emphasis in original).

> of the board shall be subject to suit only in the manner provided for suits against the State under chapter 662.[12]

Thus the state's disclaimer of liability for any acts of OHA, except in matters of tort, renders plaintiffs' rhetoric as to the equal "sovereignty" of OHA and the state defendants legally unsupportable.

Additionally, an examination of the nature of the entity that the state created when it established OHA undermines the very foundation upon which plaintiffs' argument is based.

Before examining the nature of OHA, as set forth in article XII of the Hawaii constitution and the implementing legislation contained in chapter 10, it is instructive to consider a case in which an appellate court was required to determine whether the University of Illinois, created by law; operated by public funds; and not permitted to own property in its own right,[13] was a "state agency" clothed with and exercising governmental powers or an agent of the state created for a particular purpose but lacking any coercive governmental power.

In concluding that the University of Illinois functioned as an agency of the state and could exercise no sovereign powers, the court in *Decker v. University Civil Service*[14] described an agency very similar in nature to OHA.

The court reasoned:

> Both plaintiffs and defendants rely on *People v. Barrett*, in which the supreme court examined at length the nature of the University of Illinois. The opinion is exhaustive and learned and is concerned with some matters not material to the instant case. *The court's ultimate conclusion was that the university is not a State agency but an agent for the State. The distinction, while subtle, is very real. A State agency is an element of government, clothed with, and exercising, governmental powers.* Examples are the so-called "Code Departments," created in chapter 127 (Ill. Rev. Statutes. 1977, ch. 127, par. 3). *An agent for the State is an entity created by the State for a particular purpose but lacking any coercive governmental power.* These are of a greater variety, extending across a broad spectrum of activities. At one end stand huge public corporations, like the University of Illinois (Ill. Rev. Statutes. 1977, ch. 144, par. 22); at the other stand small advisory boards, like the Board of Sponsors of Governor's Scholars (Ill. Rev. Statutes. 1977, ch. 127, par. 63b131). *Both State agencies and agents for the State are created by the legislature, but the former are governmental in nature while the latter are proprietary or administrative.*[15]

---

[12] HAWAII REV. STAT. § 10-16 (Supp. 1984) (emphasis added).

[13] *See* People v. Barrett, 382 Ill. 321, 341-42, 46 N.E.2d 951, 962 (1943).

[14] 85 Ill. App. 3d 208, 406 N.E.2d 173 (1980).

[15] *Id.* at 213-14, 406 N.E.2d at 177 (citations omitted) (emphasis added).

The *Barrett* court made this very clear in saying:

> *It is a public corporation*, created for the specific purpose of the operation and administration of the university. *As such, it may exercise all corporate powers necessary to perform the functions for which it was created.*
>
> . . . .
>
> *It functions solely as an agency of the State for the purpose of the operation and administration of the university, for the State.* In doing this, *it functions as a corporation, separate and distinct from the State and as a public corporate entity with all the powers enumerated in the applicable statutes, or necessarily incident thereto. It has and can exercise no sovereign powers. It is no part of the State or State Government.*[16]

The nature of OHA is reflected in article XII of the Hawaii Constitution and chapter 10 of the Hawaii Revised Statutes. The similarity to the entity described in *Decker* is apparent when the following factors are considered:

1. OHA is a public corporation, and a separate entity independent of the executive branch.[17]

2. The specific purpose for which OHA was formed was to address the needs of the aboriginal class of people of Hawaii.[18]

3. OHA holds title to all property, real and personal, *set aside or conveyed to it*, or *set aside and transferred to it*, which it holds in trust for the limited and specific purpose for which OHA was established.[19]

4. OHA may exercise all corporate powers necessary to perform the functions for which it was created.[20]

5. The trustees of OHA were elected by qualified voters who are Hawaiian and the board members are required to be Hawaiian.[21]

6. The state is not liable for any acts of OHA except in matters of tort.[22]

The only logical conclusion from a review of the laws establishing OHA is that (1) OHA was created for a particular purpose; (2) OHA's powers are proprietary or administrative; (3) OHA functions solely for the purpose of addressing the needs of the aboriginal class of people of Hawaii with funds set aside and transferred to it for the limited purpose for which OHA has been created; (4) the state is not liable for OHA's activities except in matters of tort; (5) OHA is not part of the state or state government; (6) it *has and can exercise*

---

[16] *Id.* (citations omitted) (ellipsis in original).

[17] HAWAII REV. STAT. § 10-4 (Supp. 1984).

[18] HAWAII REV. STAT. § 10-1 (Supp. 1984).

[19] HAWAII CONST. art. XII, §§ 5, 6 (amended 1978); HAWAII REV. STAT. § 10-5(2) (Supp. 1984).

[20] HAWAII REV. STAT. §§ 10-5 and 10-6 (Supp. 1984).

[21] HAWAII CONST. art. XII, § 5 (amended 1978).

[22] HAWAII REV. STAT. § 10-16(a) (Supp. 1984).

no governmental powers; and (7) neither article XII of the state constitution nor chapter 10 of the Hawaii Revised Statutes authorizes OHA to sue the state or waive the state's sovereign immunity. Thus, the doctrine of sovereign immunity is available against OHA as it is against any individual or group of individuals, corporate or otherwise, who sue the state for an interest in state lands or public funds.[23]

It is incredible that plaintiffs urge upon the court that OHA is an "arm of the state" and of equal sovereignty to the state defendants, because that argument would render OHA unconstitutional.

The law is clear that the equal protection clause of the fourteenth amendment to the United States Constitution requires adherence to the principle of one-person, one-vote in elections of officials exercising governmental powers.[24]

The state defendants in the case at bar are appointed by the Governor. The election of the appointing authority of officials exercising governmental powers, or the election of the officials themselves, as in the case of the State Board of Education, must comply with the rigid strictures of *Reynolds* or be in violation of the equal protection clause of the fourteenth amendment to the federal constitution and article I, section 5 of the state constitution.

Since all the "arms of the state" are sovereign and all the officials administering the various "arms of the state" exercise governmental powers, the strict demands of *Reynolds* must be complied with. Thus, the State of Hawaii satisfies the mandate of *Reynolds* by affording all qualified voters the right to vote in elections of the appointing authority or boards exercising sovereign powers.

A very narrow and limited exception to the principles of *Reynolds* was found to exist in *Salyer Land Co. v. Tulare Water District*[25] and *Ball v. James*.[26] The United States Supreme Court in these cases held that a popular election in compliance with *Reynolds* was not required because of the nature of the govern-

---

[23] None of the cases cited by plaintiffs concern a suit by a public corporation whose board is elected by a distinct racial group, which corporation lacks sovereign powers, exercises limited functions, is not part of the sovereign entity, yet sues the sovereign itself.

While plaintiffs' out-of-state authorities must be disregarded even if they state the correct rulings of the court, it is to be noted that several cases do not. For example, in Terrebonne Parish School Bd. v. St. Mary Parish School Bd., 138 So.2d 104 (La. 1962), the court held that immunity of parish school boards from suit had been waived by the legislature. In Rocky Mountain Oil & Gas Ass'n v. State, 645 P.2d 1163 (Wyo. 1982), the court stated that its holding was applicable *when a money judgment was not involved. See* Plaintiff's Memorandum at 29, Trustees of Office of Hawaiian Affairs, Civ. No. 79260 (Hawaii 1st Cir., Apr. 12, 1984).

[24] Avery v. Midland County, 390 U.S. 474 (1978); Hill v. Stone, 421 U.S. 289 (1975); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Hadley v. Junior College District, 397 U.S. 50 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969) (*per curiam*); Kramer v. Union Free School District, 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1963).

[25] 410 U.S. 719 (1973).

[26] 451 U.S. 355 (1981).

mental entities involved.

The Supreme Court stressed the fact that the Water Storage District in *Salyer* did not provide general public services ordinarily attributed to a governmental body;[27] that the activities of the district were narrowly confined to the landowners as a group of the Water Storage District;[28] and that the activities of the district fell so disproportionately on the landowners of the district,[29] that the limitation of the franchise to landowners of the Water District's Board of Directors comported with equal protection requirements.

Again in *Ball v. James*,[30] the Supreme Court noted that the purpose for the creation of the power district was specialized and narrow and its activities bore on landowners so disproportionately as to release the election of the district's directors from the strict demands of the *Reynolds* principle.[31] The Court again stressed that the district does not exercise the sort of governmental powers that invoke the strict demands of *Reynolds* and does not administer normal government functions.[32]

Applying these principles to "arms of the state" and "equally sovereign officials" of the state, it is obvious that all government officials provide general public services ordinarily attributed to a government body; that the activities of all officials, administering "arms of the state" are not narrowly confined to a particular group of individuals; and the activities of the department heads or boards exercising governmental powers do not fall so disproportionately on one group of persons so that the rigid demands of *Reynolds* need not be complied with.

III. Conclusion

Article XII, section 5 of the Hawaii constitution limits the election of the Board of Trustees of OHA to Hawaiians. OHA cannot have it both ways. They cannot consider themselves an "arm of the state" of equal sovereignty to the state defendants, which would require them to adhere to the principles of *Reynolds* in the election of its governing body, the Board of Trustees of OHA, and at the same time claim that they fall within the exceptions discussed in *Salyer* and *Ball* in order to avoid the principle of *Reynolds*. If they fall within the exceptions discussed in *Salyer* and *Ball*, then, of course, they do not comprise an "arm of the state" of "equal sovereignty" to the state, as defendants believe,

---

[27] 410 U.S. at 728-29.
[28] *Id.* at 728 & n.7.
[29] *Id.* at 729.
[30] 451 U.S. 355 (1981).
[31] *Id.* at 362-71.
[32] *Id.* at 365-66 & n.11.

and the doctrine of sovereign immunity is applicable to OHA as well as to any other public or private corporation asserting claims against the sovereign.

On the other hand, if this court concludes that this action involves two equally sovereign "arms of the state" as plaintiffs contend then the court also must conclude that OHA is unconstitutional since the voting public cannot be denied the right to participate in the election of government officials who comprise "arms of the state." In such case, of course, it would be immaterial whether the state could assert its sovereign immunity against OHA because OHA would be unconstitutional.[33]

---

[33] The views expressed herein are consistent with the views expressed in Hawaii Op. Att'y Gen. 80-8 and Hawaii Op. Att'y Gen. 83-2.

The Sale of Fort DeRussy: An Analysis of the Reagan Administration's Federal Land Sales Program

INTRODUCTION

In early 1982, the Reagan Administration (Administration) initiated a large-

scale federal land sales program in order to increase the efficiency of federal land use management and reduce the national debt. The potential impact of this program on those states such as Hawaii which contain large tracts of federal land has generated much controversy and local opposition.

Two major federal statutes regulate the management and disposal of the approximately 738 million acres of land owned by the federal government in the United States.[1] Some 398 million acres are administered by the Bureau of Land Management (BLM) pursuant to the Federal Land Management and Policy Act of 1976 (FLMPA).[2] The General Services Administration (GSA) monitors the disposal and transfer of approximately forty-one million acres under the guidelines established by the Federal Property and Administrative Services Act of 1949 (FPASA).[3] The remaining 299 million acres, at present, are not subject to transfer or disposal.[4]

Opponents of the Administration's land sales program contend that this extensive sale of federal land contravenes the Congressional policy set forth in the FLMPA. These opponents argue that the FLMPA represents a shift in Congressional policy away from disposal and towards a new scheme favoring retention of public lands and the development of a more comprehensive public lands planning process.[5] Indeed, the declared policy of the Act is that "the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest."[6] The Act establishes rigorous guidelines for the development of comprehensive land use plans, including specific provisions for long range goals and increased coordination between federal and state land use planning agencies,[7] and specifically limits disposal of public land to the following three situations:

---

[1] *See generally* Note, *Sales of Public Land: A Problem in Legislative and Judicial Control of Administrative Action*, 96 HARV. L. REV. 927 (1983) [hereinafter cited as Note, *Sales of Public Land*].

[2] Pub. L. No. 94-579, 90 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782 (1976)). *See also* Note, *Sales of Public Land*, *supra* note 1.

"Public lands" is defined as follows in 43 U.S.C. § 1702(e) (1976):

> The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership except—
>
> (1) lands located on the Outer Continental Shelf; and
>
> (2) lands held for the benefit of Indians, Aleuts, and Eskimos.

[3] 40 U.S.C. §§ 471-492 (1976).

[4] *See* Note, *Sales of Public Land*, *supra* note 1, at 927 n.11.

[5] *See generally* Note, *Sales of Public Land*, *supra* note 1.

[6] 43 U.S.C. § 1701(a)(1) (1976).

[7] *See* 43 U.S.C. § 1712(c) (1976).

> (1) such tract because of its location or other characteristics is difficult and uneconomic to manage as part of the public lands, and is not suitable for management by another Federal department or agency; or
>
> (2) such tract was acquired for a specific purpose and the tract is no longer required for that or any other Federal purpose; or
>
> (3) disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development, which cannot be achieved prudently or feasibly on land other than public land and which outweigh other public objectives and values, including, but not limited to, recreation and scenic values, which would be served by maintaining such tract in Federal ownership.[8]

Furthermore, to ensure compliance with these and other Congressional directives, the Act provides for increased judicial review of all administrative decisions.[9] Finally, the statute requires that all sales of large tracts of public land first be approved by Congress.[10]

Concerned communities may legitimately argue that the sale of federal land to reduce the national debt is inconsistent with the guidelines set forth in the FLMPA.[11] However, as indicated, a significant portion of federally held property, including all military land, is administered under the provisions of the FPASA.[12] It was pursuant to this Act that President Reagan initiated his land sales program and it is this Act which sets forth the guidelines which will control the disposal of Fort DeRussy. As a consequence it is this Act that will be the focus for analysis of the disposal program's impact on Hawaii.

Fort DeRussy, a seventy-two acre parcel of federal land located on the beach in Waikiki, Hawaii, is administered by the Department of Defense. At present the parcel is one of the last large undeveloped tracts of land remaining in this popular resort area. As such it has been recognized as a unique asset. A controversy surrounding Fort DeRussy arose in 1982 when the Administration recommended that it be sold to offset the national debt. Many concerned parties, including the Honolulu City Council, felt that if the Administration sold Fort DeRussy, this valuable recreational resource would be lost in the rush to develop the property. Consequently, both state and local governments have opposed the sale.[13]

In order to establish exactly what options are available to the government and

---

[8] 43 U.S.C. § 1713(a) (1976).

[9] 43 U.S.C. § 1701(a)(6) (1976).

[10] 43 U.S.C. § 1713(c) (1976).

[11] *See* Note, *Sales of Public Land*, *supra* note 1, at 927.

[12] 40 U.S.C. §§ 471-492 (1976).

[13] City Council, City & County of Honolulu, Chair's Message No. 32 (Oct. 5, 1983). *See also* Policy Statement, from the Mayor and Governor submitted to the City Council on September 13, 1983.

people of Hawaii in opposing the sale of Fort DeRussy, this article examines the transfer and disposal process for federal lands set forth in FPASA.[14] It also discusses the relevant judicial decisions that construe the Act, and assesses the present status of any political obstacles to the sale.

Specifically, Part I examines the details of the Administration's land and sales program, the authority by which Congress and the President can institute such a program, and the federal lands in Hawaii which have been affected by the program. Part II analyzes each step in the transfer and disposal process established in FPASA and discusses its relevance to the sale of Fort DeRussy.

I. Federal Land Sales Program

The Federal Property and Administrative Services Act of 1949 arose out of the confusion and lack of centralized control over the management and disposal of Government property which followed World War II.[15] The Act's main purpose is the "maximum utilization of excess property"[16] through the establishment of an "economical and efficient system" for the procurement, utilization and disposal of real and personal property.[17] In order to achieve this goal the FPASA established a single centralized administrative body—the GSA—headed by an administrator, who is answerable directly to the President.[18] Pursuant to

---

[14] Note that just prior to publication it was announced that the Administration had dropped all plans to sell Fort DeRussy and that the Property Review Board had been disbanded. *See Reagan's Land-Sales Program Fights to Stay Alive*, Honolulu Advertiser, June 6, 1984, at A-14, col. 1. This, of course, makes a part of the following discussion moot. For the most part, however, the bulk of the discussion concerning the federal government's control over federal lands remains relevant, particularly in Hawaii where approximately 300,000 acres are owned by the federal government.

[15] *See* 1949 U.S. Code Cong. & Ad. News 1475.

[16] *Id.* at 1478.

[17] See 40 U.S.C. § 472 (1976) which defines the term "property" as follows:

> (d) The term "property" means any interest in property except (1) the public domain; lands reserved or dedicated for national forest or national park purposes; minerals in lands or portions of lands withdrawn or reserved from the public domain which the Secretary of the Interior determines are suitable for disposition under the public land mining and mineral leasing laws; and lands withdrawn or reserved from the public domain except lands or portions of land so withdrawn or reserved which the Secretary of the Interior, with the concurrences of the Administrator, determines are not suitable for return to the public domain for disposition under the general public-land laws because such lands are substantially changed in character by improvements or otherwise; (2) naval vessels of the following categories: Battleships, cruisers, aircraft carriers, destroyers, and submarines; and (3) records of the Federal Government.

See also Rhode Island Committee on Energy v. General Services Administration, 561 F.2d 397, 401 (1st Cir. 1977).

[18] *See* 1949 U.S. Code Cong. & Ad. News 1476.

guidelines set forth in the Act and under the guidance of the President, the GSA develops government-wide policies for the utilization and disposal of excess[19] and surplus[20] federal real property.[21]

In February of 1982, pursuant to the powers granted him under the FPASA, the President of the United States issued Executive Order No. 12,348, thereby reestablishing the Property Review Board and initiating a potentially massive sale of federal lands.[22] The basic purposes of the land sales program were to increase the efficiency of federal land management and to reduce the national debt.[23]

This section examines this land disposal program by focusing on four main topics. The first deals with Congressional authority over federal lands concentrating on the property clause of the United States Constitution and Congress' power to delegate its authority over federal lands to the President. The second concerns the scope of the President's power under FPASA. The third involves an examination of the land sales program itself with an emphasis upon the Property Review Board which administers the program. Finally, the fourth topic centers on federal lands in Hawaii which the Property Review Board has recommended selling, focusing in particular upon Fort DeRussy.

A. Congressional Authority Over Federal Land

Congress' power to retain, sell, grant or lease public lands is firmly rooted in the Constitution. The property clause provides:

---

[19] "Excess property" is defined as follows: "The term 'excess property' means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof." 40 U.S.C. § 472(e) (1976).

[20] "Surplus property" is defined as follows: "The term 'surplus property' means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator." 40 U.S.C. § 472(g) (1976).

[21] 40 U.S.C. § 483 (1976).

[22] Exec. Order No. 12,348 § 1, 47 Fed. Reg. 8547, 8547 (1982). As indicated, President Reagan is not the first President to institute federal land management policies through the creation of an advisory body such as the Property Review Board. In fact, President Nixon first created the Property Review Board in 1970 to insure that the GSA instituted a complete and vigorous survey of all federal property. Exec. Order No. 11,508, 35 Fed. Reg. 2855 (1970). Later, President Nixon created the Federal Property Council, giving it the power to develop and review federal real property policies. Exec. Order No. 11,724, 41 C.F.R. § 47.4914 (1975). President Ford reinstated the Federal Property Council. Exec. Order No. 11,954, 42 Fed. Reg. 7 (1977). President Carter terminated the Federal Property Council and shifted the power of review to the Office of Management and Budget. Exec. Order No. 12,030, 42 Fed. Reg. 243 (1977).

[23] City Council, City & County of Honolulu, Report on Fort DeRussy, Chair's Message No. 31, at 31-32 (Sept. 1983) [hereinafter cited as Report on Fort DeRussy].

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any claims of the United States, or of any particular State.[24]

The United States Supreme Court has broadly construed this Congressional power over public lands. As early as 1878, the Court recognized the "plenary" nature of Congress' power to regulate and dispose of public lands.[25] In the recent case of *Kleppe v. New Mexico*,[26] the Court reaffirmed this position, stating that "while the furthest reaches of the power granted by this Property Clause have not yet been definitely resolved, we have repeatedly observed that the power over the public lands thus entrusted is without limitations."[27] The Court further held that Congressional legislation must preempt conflicting state laws by virtue of the supremacy clause.[28]

The Supreme Court has also ruled that nothing in the property clause pre-

---

[24] U.S. CONST. art. IV, § 3, cl. 2. Note also U.S. CONST. art. I, § 8, cl. 17 which provides:

> To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful Buildings . . . .

Article I property is distinguished from article IV property by its use and by a state consent to its acquisition. In other words, two criteria must be met before federal property will be treated as article I property. First, the property must be used as the seat of government or a fort, magazine, arsenal, etc. Second, the state must consent to a cession of its jurisdiction. Under classical analysis the result is the formation of what has been termed a "federal enclave" where Congress' jurisdiction is exclusive. In essence the United States enjoyed complete sovereignty over these tracts of land. *See* James v. Dravo Contracting Co., 302 U.S. 134, 141 (1937). Recent decisions, however, have placed this interpretation in doubt. *See* Evans v. Comman, 398 U.S. 419 (1970). For a more complete discussion of both article I and article IV property clauses, see Engdahl, *State and Federal Power Over Federal Property*, 18 ARIZ. L. REV. 283 (1976).

[25] American Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511 (1828). Of course "plenary" may not be read in its literal meaning since Congress is subject to the limitations enumerated in the Constitution. Binns v. United States, 194 U.S. 486 (1904).

[26] 426 U.S. 529 (1976).

[27] *Id.* at 539 (quoting United States v. San Francisco, 310 U.S. 16 (1940)). In *Kleppe*, the State of New Mexico challenged the constitutionality of the Wild Free Roaming Horses & Burros Act, 16 U.S.C §§ 1331-1340 (1970), enacted by Congress to protect these animals. The Supreme Court denied relief reasoning that the animals are an integral part of the natural system of the public lands and that their protection is necessary to maintain an ecological balance. The decision even suggests that Congress may regulate private or state activity on private or state land so as to preserve the ecological balance on public lands (thus the reference in the above quote to the "furthest reaches of the property clause"). At least one circuit court has followed this dicta, thereby establishing a precedent for allowing federal control of non-federal lands under the property clause. *See* United States v. Brown, 552 F.2d 817 (8th Cir. 1977).

[28] 426 U.S. at 542-43.

vents Congress from delegating its powers under the clause to the executive branch. Thus in *United States v. Midwest Oil Co.*,[29] the Court held that Congress, in exercising its proprietary and legislative authority over the public lands, had made an implied grant of power to the President of the United States to withdraw large tracts of oil land in Wyoming and California from public accessibility. The presidential authority to withdraw federal land was later reaffirmed in *Sioux Tribe of Indians v. United States.*[30]

In summary, Congress has complete power to administer federal lands and may, at its discretion, delegate this authority to the executive branch.

B. Presidential Authority Under the FPASA

Under the FPASA the President has the final authority to determine the disposal policy of the GSA. The Act states in relevant part:

> (a) The President may prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator [of the GSA] and executive agencies in carrying out their respective functions hereunder.[31]

Although the language seems clear and unambiguous, delimiting the scope of the President's powers in light of such a Congressional authorization has not been a simple matter. Generally, determining whether a President has exceeded his statutory or constitutional authority is a problem which the courts approach with great caution.[32] The courts give great deference to executive orders issued pursuant to a congressional statute.[33] However, when Congress has enacted legislation granting the President specific powers, he must exercise these powers in accordance with the underlying congressional purpose.[34] Indeed, if the statute contains any express or implied limitations they are binding upon the President.[35] On the other hand, if the President issues an executive order pursuant

---

[29] 236 U.S. 459 (1915).

[30] 316 U.S. 317 (1942).

[31] 40 U.S.C. § 486(a) (1976).

[32] American Fed'n of Labor and Congress of Indus. Org. v. Kahn, 472 F. Supp. 88, 93 (D.D.C. 1979). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). In the latter case, Justice Jackson states, "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." 343 U.S. at 635.

[33] Liberty Mut. Ins. Co. v. Friedman, 485 F. Supp. 695, 716 (D.Md. 1979).

[34] American Fed'n of Gov't Employees, AFL-CIO v. Freeman, 510 F. Supp. 596, 598 (D.D.C. 1981), *rev'd on other grounds*, 669 F.2d 815 (D.C. Cir. 1981).

[35] *Id.*

to legitimate authority, the order has the force of law.[36] Furthermore, reasonable regulations promulgated pursuant to the order likewise have the force and effect of law.[37]

Executive orders issued pursuant to the congressional authorization contained in FPASA have been the subject of numerous challenges. The issues have ranged from the President's authority to implement an anti-discrimination policy to his power to discontinue federal employment parking subsidies.[38] Resolution of these cases have all, in the end, turned upon a determination of congressional purpose. Generally, the courts have held that the purpose of the FPASA is the promotion of "economy" and "efficiency."[39] More specifically, courts have upheld the President's authority under section 486(a) of FPASA to "direct the various governmental agencies within the Executive Branch in the exercise of their discretion with respect to federal property management."[40] Indeed, several courts have concluded that an executive order does not become invalid merely because, in addition to promoting economy and efficiency, it serves some other, not impermissible end.[41]

Therefore, the President, in accordance with his broad authority under FPASA to control the management of federal lands, may initiate the disposal of federal surplus lands. In addition, although opponents of the sales program argue that reducing the national debt is not a legitimate end,[42] as long as the program also promotes "economy" and "efficiency," the courts will not question the President's power to implement such a policy.

C. The Federal Land Sales Program—Property Review Board

On February 25, 1982, the President reestablished the Property Review Board (Board) in order to improve management of federal real property.[43] The basic function of the Board is to act as a watchdog for the President to insure

---

[36] Uniroyal, Inc. v. Marshall, 482 F. Supp. 364, 368 (D.D.C. 1979).

[37] *Id.*

[38] *Id.* (anti-discrimination); Liberty Mut. Ins. Co. v. Friedman, 485 F. Supp. 695 (D.Md. 1979) (affirmative action programs); American Fed'n of Labor v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (wage and price controls); American Fed'n of Gov't Employees, AFL-CIO v. Carmen, 669 F.2d 815 (D.C. Cir. 1981) (employee parking).

[39] *See Kahn*, 472 F. Supp. at 94.

[40] *See Freeman*, 510 F. Supp. at 600.

[41] American Fed'n of Gov't Employees, AFL-CIO v. Carmen, 669 F.2d 815, 821 (D.C. Cir. 1981).

[42] *See also* Note, *Sales of Public Land*, *supra* note 1, at 933.

[43] Exec. Order No. 12,348, 47 Fed. Reg. 8547, 8547 (1982). The Board consists mainly of top White House advisors, including the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisors, the Counselor to the President, and the Assistant to the President for National Security Affairs. *Id.* at 8547 § 1(b).

that federal executive agencies declare as excess any property not essential to their needs. Thereafter the Board oversees the GSA to ensure that the property is made "available for its most beneficial use under the various laws of the United States affecting such property."[44]

Pursuant to an Executive order the Board develops federal land management policies, advises the Administrator of the GSA (Administrator) with respect to the standards and procedures necessary to implement these policies, establishes target amounts for identification of excess property, and ensures that property previously conveyed with public benefit discounts is being used for the purpose for which it was conveyed.[45] Furthermore, the Board provides "guidance" to the Administrator prior to his making any new public benefit discount conveyances.[46] Finally, the Board ensures that the Administrator report to the Board any property which he feels should be reported as excess but which has not been so reported by the holding federal agency.[47]

Pursuant to these Presidential directives, the Board has instituted a massive land sales program.[48] The Board has recommended 307 parcels totaling 60,000 acres for disposal.[49] This is merely the beginning, however, because the program has a disposal goal of over thirty-five million acres of land over the next five years.[50]

The declared policy of the program is that the lands will be more productive if held by the private sector and that federal lands must be sold to reduce the national debt.[51] In accordance with these policies the Board has stressed that, with minor exceptions, property is to be sold at fair market values[52] and public benefit discount conveyances for parks or recreational purposes are to be

---

[44] *Id.* § 4.

[45] *Id.* § 2(a), (b), (c), (f).

[46] *Id.* § 2(e).

[47] Id. §§ 2, 5, 6. It has been suggested that the Board's "guidance" will actually result in the President's advisors (i.e., the Board members) actually making the public benefit discount conveyance decisions. Report on Fort DeRussy, *supra* note 23, at 30-31.

[48] Shabecoff, *U.S. Plans Biggest Land Shift Since Frontier Times*, N.Y. Times, July 3, 1982, at 1, col. 1 [hereinafter cited as Shabecoff]. It should be noted that an action challenging the land-sales program has been filed in the U.S. District Court for the District of Massachusetts. Conservation Law Found. v. Harper, No. 82-2899-c (D. Mass. filed Sept. 30, 1982), *cited in* Note, *Sales of Public Land*, *supra* note 1, at 931 n.37.

[49] *See* Note, *Sales of Public Land*, *supra* note 1, at 932. Note that the Department of Interior has also submitted a summary earmarking some 4.5 million acres of Bureau of Land Management land for sale. *Id. See also* Property Review Board, Fact Sheet (Aug. 17, 1982).

[50] *See* Note, *Sales of Public Land*, *supra* note 1, at 932. Note that although this initial estimate seems high, subsequent goals have been lowered.

[51] *Id.*

[52] *Id.* Fair market value is based on an appraisal of the land's highest and best use. *See infra* note 81.

eliminated.[53]

While the overall program as presented would seem to suggest massive sales of federal property to the private sector, the effectiveness of the program has fallen below Board expectations. For the fiscal year ending in September 1983, the Board has given the GSA a goal of $643 million in sales. In fact the GSA sold only 242 parcels for a total price of $225 million.[54]

D. Federal Lands in Hawaii Affected by the Federal Land Sales Program—Fort DeRussy

The Chairman of the Property Review Board initially identified five parcels of federal property in Hawaii for sale as surplus.[55] The most controversial of these proposed sales was that of Fort DeRussy.

The Fort DeRussy Military Reservation actually consists of approximately seventy-two acres of beach front property in Waikiki. Bisected laterally by Kalia Road, it consists of a military reserve training area mauka (towards the mountains) of Kalia and an Armed Forces Recreation Center makai (towards the ocean) of the road. The federal government acquired the majority of the property through fee purchases and condemnation between 1904 and 1916.[56] In 1919, 1.657 acres were added pursuant to an executive order setting aside this portion of the Territory's public land.[57] This parcel ran the whole length of the Fort's ocean boundary.[58]

Both Hawaii state and local government officials have recognized that because of its location on the beach in Waikiki, Fort DeRussy is a unique recreational asset whose present open space character should be preserved. Officials of both government bodies fear that if sold to the private sector, the land will be developed immediately. Consequently, both the state and local governments oppose the sale.[59]

---

[53] *See* Note, *Sales of Public Land*, *supra* note 1, at 932.

[54] Report on Fort DeRussy, *supra* note 23, at 31.

[55] *See* Shabecoff, *supra* note 48, at 1, col. 1. Totaling approximately 715 acres of property, the preliminary list included Keehi Lagoon Building 240 (two acres), Naval Magazine Lualualei (689 acres), Public Works Center—Pearl Harbor (two acres), National Bureau of Standards—Kekaha (five acres), and Fort DeRussy (17 acres).

[56] City Council, City & County of Honolulu, Chair's Message No. 25 (Aug. 1983) [hereinafter cited as Chair's Message No. 25]. Congressional authority for the purchase and condemnation is found in the War Purposes Act of 1890, ch. 797, 26 Stat. 315, 316 (1890).

[57] President Wilson issued Exec. Order No. 3067, dated March 25, 1919. Title to the land was acquired pursuant to the Jt. Resolution of Annexation of 1898. Chair's Message No. 25, *supra* note 56.

[58] Battery Randolf, now a U.S. army museum, was constructed in 1911. The Hale Koa Hotel was completed and opened in 1975 and the Army Reserve Center was dedicated in 1977. *Id.*

[59] *See* Report on Fort DeRussy, *supra* note 23, at 13.

In summary, it is clear that Congress has plenary authority over federal lands, that Congress may delegate this authority to the President and therefore the President may initiate a land sales program through the Property Review Board. Therefore, opposition at this level will prove fruitless. However, the above analysis just as clearly indicates that the disposal program must comply with the provisions of the FPASA. Consequently, in order to determine whether the FPASA provides any grounds for opposition to the sale of Fort DeRussy, Part II examines the transfer and disposal process as set forth in the Act.

II. THE DISPOSAL OF FEDERAL LANDS UNDER FPASA: THE SALE OF FORT DERUSSY

This section examines the applicable laws and judicial decisions which the GSA follows in the transfer of excess real property between federal agencies and the disposal of surplus real property to state and local governments and the general public. Each of the major steps in the transfer and disposal process is shown in Diagram 1. This section includes a separate analysis for each step, combining a general explanation of the statutory requirements with a discussion of their relevance to the sale of Fort DeRussy.

Subsection A examines the status of federal property prior to a federal agency declaring it excess (labeled pre-excess in Diagram 1). Subsection B explains the screening and the transfer process performed by the GSA after a federal agency has declared the property excess. Subsection C discusses the initial step in the disposal process once the GSA has declared property surplus. Subsection D provides an overview of the three principal methods of disposal—public benefit conveyances, negotiated sales, and public bid or auction sales. This subsection also explains the federal government's compromise proposal concerning the disposal of Fort DeRussy and assesses the State's options in opposing the sale. Finally, Subsection E briefly examines the award and closing process.

GSA TRANSFER AND
DISPOSAL PROCESS

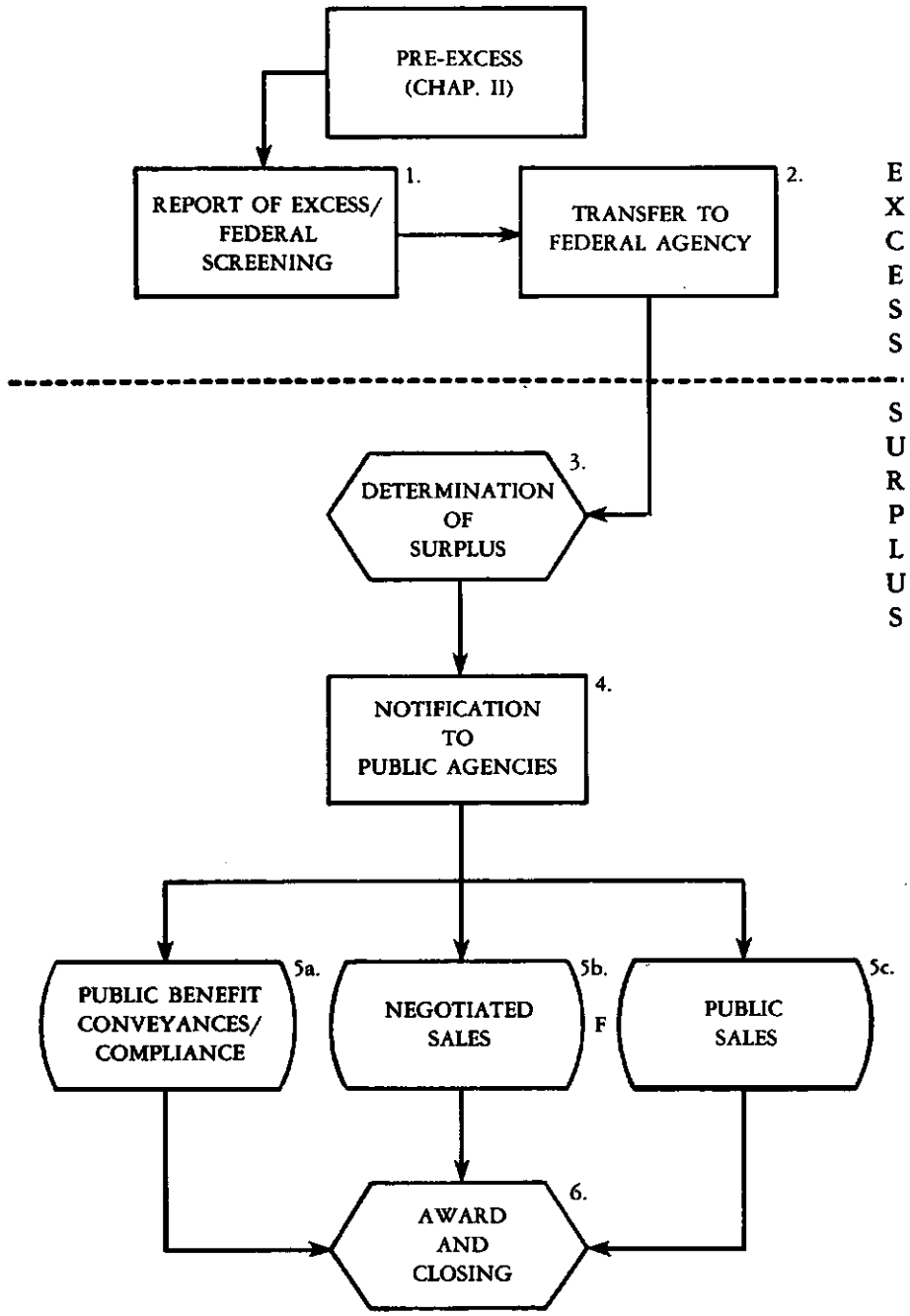


DIAGRAM 1

A. *Pre-Excess*

1. *General Considerations*

Pre-excess refers to the status of federal real property held by an executive agency prior to said agency declaring the property as excess to its needs.[60] The FPASA requires that during this period all executive agencies continuously survey their real property holdings so as to insure that any property which is no longer needed for agency programs is promptly reported as excess to the Administrator.[61] (See Box A, Diagram 1). The Act also empowers the Administrator to establish specific guidelines and procedures for the implementation of these surveys.[62] However, the President retains final authority under the statute to establish policy for the identification of excess property.[63] In accordance with this authority the President has delegated this policy-making power to the Property Review Board.

2. *Fort DeRussy*

Fort DeRussy presently falls within the pre-excess category. The United States Department of Defense (DOD), headed by the Secretary of Defense, owns Fort DeRussy in fee.[64] The DOD has not yet submitted a Report of Excess for Fort DeRussy nor has the GSA received any formal notice that such a report is forthcoming.[65] Indeed, the Assistant Secretary for the United States Department of the Army has stated categorically that the Army has no plans to declare Fort DeRussy excess.[66]

---

[60] Federal Property Reserve Services, General Services Administration, *How to Acquire Federal Real Property*, 21 (1980) [hereinafter cited as *GSA Guide*].

[61] 40 U.S.C. § 483(b) (1976).

[62] 40 U.S.C. § 486(c) (1976). Pursuant to this authority the Administrator has promulgated the Federal Property Management Regulations, 41 C.F.R. § 101 (1983).

[63] 40 U.S.C. § 486(a) (1976). It is pursuant to this authority that President Reagan has reasserted a strong policy towards disposal of federally held surplus property. *See* Exec. Order No. 12,348, 47 Fed. Reg. 8547 (1982).

[64] City & County of Honolulu, Real Estate Handbook, 1st Tax Division, Vol. 2, Zone 2 (17th ed. 1983).

[65] Letter from Gwendolyn M. Cornell, Director, Disposal Division, Public Buildings and Real Property, General Services Administration (Jan. 19, 1984).

[66] *See* Report on Fort DeRussy, *supra* note 23, at 16. While it is clear that the Department of the Army has no plans to declare Fort DeRussy excess, the decision in this matter actually rests with the Secretary of the Defense. Skokomish Indian Tribe v. General Servs. Admin., 587 F.2d 428 (9th Cir. 1978). Since the Secretary is a member of the President's Cabinet, the final decision to declare Fort DeRussy excess rests ultimately with the President and his top advisors, i.e.,

In contrast, the Chairman of the Property Review Board has included Fort DeRussy on a list of federal properties recommended for sale.[67] Moreover, the Executive Director of the Board has stated that he will recommend disposal of the property.[68] However, before the Board can implement its plan to sell Fort DeRussy, it must overcome several political obstacles. One is a short provision in the Military Construction Act of 1968,[69] which prohibits the sale of Fort DeRussy without Congressional approval. Another is that if proceeds from the sale of Fort DeRussy are to be used to reduce the national debt as proposed by the Administration, the FPASA must be amended by Congress. These obstacles are examined in the following two subsections.

a. Military Construction Act of 1968

Concerned that the federal government might attempt to dispose of Fort DeRussy, Senator Daniel Inouye inserted a short provision in the Military Construction Act of 1968 prohibiting such action without Congressional approval.[70] Section 809 of the Act provides: "Notwithstanding any provision of law, none of the lands constituting Fort DeRussy, Hawaii, may be sold, leased, transferred, or otherwise disposed of by the Department of Defense unless hereafter authorized by law."[71]

This obscure provision in a military spending bill enacted sixteen years ago represents the threshold requirement which must be satisfied prior to the DOD declaring the property excess. Attempts to repeal this section to date have failed.[72] The question, though, is how much longer will it continue to remain a viable obstacle to the Administration's proposed sale.

The most direct method for the Administration to overcome the obstacle provided by Section 809 is to take its case directly to Congress. In order to determine whether Section 809 will be repealed, one must consider such factors

---

the Property Review Board.

[67] *See* Shabecoff, *supra* note 48, at 1, col. 1.

[68] *See* Report on Fort DeRussy, *supra* note 23, at 34.

[69] Pub. L. No. 90-110, § 809, 81 Stat. 279 (1968).

[70] *Id.* Concern over the future disposition of Fort DeRussy might be traced to a Report to the Congress of the United States issued by the Comptroller General in April, 1965. In essence the report stated that the Army was unnecessarily retaining Fort DeRussy and that the land should be declared excess. At the same time, then Governor John Burns suggested that only that portion of the Fort necessary for recreation should be retained, arguing that the rest should be sold for development purposes. *See* Report on Fort DeRussy, *supra* note 23, 4-5.

[71] In addition to this provision similar wording may be found in several yearly military appropriations bills. Furthermore, Senator Inouye has added the same proviso into Section 2809 of the Military Construction Authorization bill for fiscal year 1984. *See* Report on Fort DeRussy, *supra* note 23, at 2-3.

[72] *Id.* at 9.

as political influence and expediency. While assessing such factors is beyond the scope of this comment, the opponents to the sale note that Congress recently has appropriated $2.8 million for additions to the military reserve facilities.[73] In contrast, the Executive Director of the Property Review Board had indicated that there is sufficient support in Congress to be able to complete the disposal prior to the 1984 presidential elections.[74]

b. Debt Reduction Act

The FPASA as it stands today requires that all proceeds from the sale of federal surplus real property be placed into a special depository called the Land and Water Conservation Fund.[75] Therefore in order to use the sale proceeds as a means of reducing the national debt, one of the basic underlying policies of the present Administration's land sales program, the Administration must convince Congress to amend the FPASA so as to allow the sale proceeds to be deposited directly into the federal treasury. A bill commonly known as the "Debt Reduction Act" has been submitted to Congress with this exact purpose in mind. The bill, in effect, would allow the Administration to channel all monies received from the sale of surplus military lands directly into the treasury.[76]

While the passage of the bill in the present session seems doubtful and assessing the bill's chances for passage in the future is beyond the scope of this comment, it is clear that the Administration is attempting to garner support in Congress for its position.[77] The Secretary of Defense, in a recent letter to a United States Senator, stated:

> So, the Defense Department is prepared to make the open land at Fort DeRussy available for sale if the proceeds of that sale are actually used to reduce the national debt.
>
> As you know under existing statutes, including Public Law 88-233, [the sale of] the land at Fort DeRussy would not bring one cent into the Federal Treasury.
>
> So, it is not enough to sell this land and other properties we will be identifying in the future. We must have full support of the Congress to make it possible for us to sell these properties at fair market value and for the proceeds to be used to reduce the burden of the national debt.[78]

---

[73] *Id.* at 19.

[74] *Id.* at 35.

[75] *See* discussion under FPASA analysis *id.* at 37-38.

[76] *See* Report on Fort DeRussy, *supra* note 23, at 21.

[77] *Id.* at 40-41.

[78] Letter from Secretary of Defense, Caspar Weinberger, to Senator Charles Percy (Mar. 8, 1982).

Therefore, in order to achieve its policy goal of reducing the national debt from proceeds of the sale of Fort DeRussy, the Administration must not only convince Congress to repeal Section 809 of the Military Construction Act of 1968, thereby allowing the DOD to declare Fort DeRussy excess, but also must convince Congress to amend FPASA by passing the Debt Reduction Act.[79]

B. Screening and Transfer of Federal Property

Once a federal agency has declared property excess, the GSA, in accord with FPASA, begins a multi-step screening process.[80] First, the GSA informs all other federal real property holding agencies that the excess property is available for transfer. Second, the GSA conducts an on-site inspection and appraisal to determine the property's fair market value based upon its "highest and best use."[81] Third, interested federal agencies submit a request for the property to the GSA which then evaluates the request based on program requirements and duration of time the property is needed. Finally, based upon the Administrator's determination of what use will best serve the interests of the government, the GSA either transfers the property in fee to one of the requesting agencies or declares the property surplus, thereby making it available to the general public.[82] The Office of Management and Budget must also approve any transfer if the value of the property exceeds one million dollars.[83]

Several federal judicial decisions have indicated that the Administration's discretion is severely limited in deciding whether to transfer federal property to a

---

[79] It should be noted, however, that debt reduction is not the sole policy justification for the sale of this property. The Administration has also advanced more efficient real property asset management and disposal of unneeded federal property as legitimate goals for the sales program. Congress need only repeal Section 809 to achieve these goals.

[80] 40 U.S.C. § 483 (1976).

[81] Appraisals of fair market value of the property are based upon determination of the property's "highest and best use." *GSA Guide*, *supra* note 60. Section VIIIA defines "highest and best use" as follows:

> A. Highest and best use is the most likely program or use to which a property can be put, so as to produce the highest monetary return from the property, promote its maximum value, or serve a public or institutional purpose. The highest and best use determination must be based on the property's economic potential, qualitative values (social or environmental) inherent in the property itself, and other utilization factors controlling or directly affecting land use (e.g. zoning, property physical characteristics, private and public uses in the vicinity, neighboring improvements, utility services, access/roads/location, and environmental and historical considerations). Projected highest and best use should not be remote, speculative, or conjectural. Any determination as to highest and best use should be limited by the probability of achievement.

[82] *See* 41 C.F.R. § 101-47.2 (1983); *GSA Guide*, *supra* note 60, at 21-22.

[83] *GSA Guide*, *supra* note 60, at 22.

requesting federal agency or to declare the property surplus and sell it to the general public. Recently in *Skokomish Indian Tribe v. General Services Administration*,[84] the Ninth Circuit Court of Appeals concluded that before the GSA can declare property surplus it must determine that no other federal agency has need of it for the "discharge of its responsibilities."[85] This means that the Administrator does not have the option of choosing between a local government or private purchaser and a requesting federal agency. If a federal agency has made a legitimate request, the Administrator must transfer the property to it.[86]

This conclusion was reaffirmed in *New England Power Company v. Goulding*.[87] The controversy in that case arose when an electric utility company challenged the transfer of some 600 acres of excess federal land to the Department of the Interior (DOI) and the Environmental Protection Agency (EPA). Upon reviewing the transfer of excess property to the DOI and EPA the court concluded that the Administrator is required to satisfy the needs of other federal agencies prior to considering disposal to non-federal entities.[88]

The National Environmental Policy Act (NEPA) also affects the Administrator's decision to either transfer the property or declare it surplus.[89] Basically the Act requires the Administrator to produce an Environmental Impact Statement (EIS) that adequately assesses the environmental consequences of potential reuses of the land.

In *New England Power Company*, the utility company argued that the EIS produced by the GSA failed to meet the NEPA requirements.[90] Relying on a recent Supreme Court decision[91] the court held that NEPA does not require an exhaustive analysis of all alternatives but only the compilation of sufficient information to permit a reasonable decision.[92] With this in mind the court concluded that the voluminous EIS produced prior to the conveyance adequately fulfilled these requirements.[93]

In *Conservation Law Foundation of New England, Inc. v. General Services Administration*,[94] the court reaffirmed the premise that the Administrator must consider the environmental consequences prior to deciding upon disposal of ex-

---

[84] 587 F.2d 428 (9th Cir. 1978).

[85] *Id.* at 431 n.5.

[86] Note, however, that the Administrator has the discretion to decide between conflicting requests from federal agencies. *See* 40 U.S.C. § 483 (1976).

[87] 486 F. Supp. 18 (D.D.C. 1979).

[88] *See supra* note 81.

[89] 42 U.S.C. §§ 4321, 4331-4335, 4341-4347 (1976).

[90] 486 F. Supp. 18 (D.D.C. 1979).

[91] Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519, 551 (1978).

[92] 486 F. Supp. at 19. *See* Vermont Yankee Nuclear Power Corp. v. N.R.D.C., 435 U.S. 519 (1978); N.R.D.C. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972).

[93] 486 F. Supp. at 20.

[94] 707 F.2d 626 (1st Cir. 1983).

cess property. In *Conservation Law Foundation* various environmental groups sought to enjoin the sale of surplus property, arguing that the GSA had failed to comply with NEPA requirements in compiling the applicable EIS. The First Circuit Court of Appeals upheld the district court's findings that prior to disposal the GSA must compile an EIS which contains site specific observations concerning the environmental consequences of potential reuses of the land.[95] However, the court rejected the lower court's conclusion that NEPA also required the GSA to supplement the EIS with the highest bidder's development plans.[96] In other words, once the threshold decision to dispose of the property has been made, the GSA need not revise the EIS in light of the final purchaser's specific development plans. In reaching this conclusion the court reasoned that the GSA has no control over the use to which the land was put subsequent to the sale. In addition the court explained "[a]ny reuse of the surplus lands by successful bidders will be fully subject to the substantive constraints of local zoning laws and local and federal environmental standards."[97]

Therefore, before the GSA may declare any property surplus, no other federal agency can have submitted a reasonable request for the land and the Administrator of the GSA must have prepared and considered an EIS concerning the environmental effects of the proposed sale. In the case of Fort DeRussy, even assuming all NEPA requirements were satisfied when the DOD declared the property excess and all necessary congressional approvals were obtained, it is highly unlikely that another federal agency would submit a request for the property in the face of a strong Administration policy favoring disposal. Under these circumstances there would be no further statutory obstacles to the GSA declaring the property surplus and disposing of it. However, a Hawaii Congressman,[98] having foreseen this possibility, has attempted to block any potential sale and retain the property's open space character by introducing a bill (H.R. 3642) in the House of Representatives which would establish Kamehameha the Great National Monument at the present site of Fort DeRussy.[99] Submitted in order to "preserve the unique cultural, historical, natural, and recreational values of Fort DeRussy" the law would basically require that the Secretary of Defense transfer the property to the Secretary of the Interior so that it may be administered in accordance with laws applicable to the national park system.[100]

The monument would incorporate only a portion of Fort DeRussy. However, the law contains a provision that if at any point in the future the DOD declares

---

[95] *Id.* at 633.
[96] *Id.* at 635.
[97] *Id.* at 636.
[98] Cecil Heftel.
[99] H.R. Rep. No. 3642, 98th Cong., 1st Sess. 2 (1983).
[100] *Id.*

the remaining land excess, the GSA must transfer said excess property to the Secretary of the Interior for incorporation into the Monument.[101] Designation of the property as a national monument would effectively assure that the land was retained as open space and never commercially developed.

As of December, 1983, the bill had 258 co-sponsors in the House.[102] While this seems to suggest solid support of the bill, a true assessment of its implications lies in the political arena and therefore beyond the scope of this article.

C. Determination of Surplus and Notification Requirements

If the GSA receives no executive requests, or determines that all such requests are unjustified, the Administrator declares the property surplus.[103] (See Box 3 Diagram 1). Once declared surplus, the real property is available for disposal to local public or private bodies.

The fundamental policies underlying the disposal of surplus federal property are efficiency, economy, and maximum utilization of resources.[104] The end result of this policy is that the GSA endeavors to obtain the highest price for the property.

When disposing of surplus property located in an urban area, however, the Federal Urban Land Use Act (FULUA) requires the Administrator to consider additional factors. FULUA amended the FPASA in 1968 by adding the following provision:

> It is the purpose of this subchapter to promote more harmonious intergovernmental relations and to encourage sound planning, zoning, and land use practices by prescribing uniform policies and procedures whereby the Administrator shall acquire, use, and dispose of land in urban areas in order that urban land transactions entered into for the General Services Administration or on behalf of other Federal agencies shall, to the greatest extent practicable, be consistent with zoning and land-use practices and shall be made to the greatest extent practicable in accordance with planning and development objectives of the local governments and local planning agencies concerned.[105]

---

[101] Subcommittee substitute amendment to H.R. 3642 at 111839. Letter from Chuck Izumoto, Staff Assistant to Congressman Cecil Heftel (Dec. 1983).

[102] Letter from Chuck Izumoto, Staff Assistant to Congressman Cecil Heftel (Dec. 1983).

[103] 41 C.F.R. § 101-47.204-1 (1983).

[104] Federal Property Management Regulations, § 101-47.301-1 states:

It is the policy of the Administrator of General Services:

(a) That surplus real property shall be disposed of in the most economical manner consistent with the best interests of the Government.

(b) That surplus real property shall ordinarily be disposed of for cash consistent with the best interests of the Government.

[105] Pub. L. No. 90-577, 82 Stat. 1104 (1968) (codified at 40 U.S.C. § 531 (1976)).

In order to implement this policy of intergovernmental cooperation, Congress requires that before the Administrator disposes of surplus property within an urban area he must notify those public agencies which have jurisdiction over zoning and land use regulations.[106] In this way the GSA gives local agencies the opportunity to plan for the zoning of such property in accordance with local land development plans.[107]

Independent of the FULUA notification requirements, the FPASA also requires the Administrator to notify state governors, county boards, mayors, city managers and all potential sponsoring federal agencies that the property is now available as surplus.[108] The Administrator also solicits comments concerning the proposed disposal's compatibility with state, regional, and local development plans at the same time.[109]

Once the GSA has made the requisite notifications, any local public agency interested in obtaining the surplus property must notify the GSA within twenty days.[110] Thereafter the responding agencies have "a reasonable period of time" within which to submit a comprehensive use plan and formal application.[111]

D. Methods of Disposal: The Choice Between Negotiated, Competitive Public or Public Benefit Discount Conveyances

The next step in the disposal process is for the GSA to review all formal applications to determine which of three methods of disposal is most consistent with the general policies of economy, efficiency, intergovernmental cooperation and maximum government benefit.[112] Although disposals for cash are preferred,[113] there are several possibilities for public benefit discount conveyances. In other words, along with negotiated and competitive public sales, both of which use the fair market value as a basis for the sales price, public benefit discount sales are considered in the areas of education, health, parks and recreations, historic monuments, public airports, highways, wildlife conservation areas, and low or moderate income housing.[114]

---

[106] 40 U.S.C. § 532 (1976).

[107] *Id.*

[108] 41 C.F.R. § 101-47.303-2 (1983).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] Any difficulties which arise as a result of adverse comments received from affected public agencies are dealt with by the GSA in a manner "consistent with its statutory responsibilities." 41 C.F.R. § 101-47.303-2(i). Note that all NEPA requirements must be satisfied at this time also. *See* discussion in text at 20-22.

[113] 41 C.F.R. § 101-47.301-1(b) (1984).

[114] *GSA Guide*, *supra* note 60, at 25.

1. *Public Benefit Discount Conveyances*

Generally speaking, if an eligible state or local government body desires a public benefit conveyance, the local body must submit its application to the appropriate federal sponsoring agency as set forth in the statute.[115] The sponsoring agency reviews the application and an assessment of the environmental impact of the proposed use is made.[116] If approved, the sponsoring agency recommends the proposed use to the GSA. Upon the discretionary approval of the Administrator, the GSA either transfers the property to the sponsoring agency for conveyance to the applicant or conveys it directly to the applicant itself.[117]

More specifically, under section 203(k)(1) of the FPASA the Administrator may transfer properties to the Secretary of Health and Human Services to promote the public health or to the Secretary of Education for schools or other educational purposes.[118] Pursuant to section 203(k)(2)-(3) the Administrator may assign property to the Secretary of the Interior, who in turn may convey the property to state or local government agencies for use as public parks, recreational areas, or historical monuments.[119] Section 602(a) permits the GSA to convey surplus property to state and local governments for use as public airports if the application is approved by the Federal Aviation Administration.[120] Applications may also be made to the Federal Highway Administrator, Department of Transportation, for surplus property to be used in federally aided highway projects.[121] State conservation agencies may apply to GSA for surplus property to be used for wildlife conservation purposes.[122] Finally, discount conveyances of surplus property are available to state and local government agencies for low to moderate income housing. The Department of Housing and Urban Develop-

---

[115] *Id.* at 20-21. For a more detailed discussion of the Administrator's discretion, see *id.* at 33-35.

[116] 40 U.S.C. §§ 484(h),(j),(k) (1976); 41 C.F.R. § 47.308.

Sponsoring agency is defined as follows:

> 10. Sponsoring Agency—A Federal agency participating in the SURPLUS real property disposal which (1) determines the eligibility of states, local governmental bodies, or certain health or educational nonprofit organizations to acquire SURPLUS real property for public benefit purposes, (2) approves the applicant's program of utilization for the property, (3) establishes the monetary discount for the property, and (4) monitors compliance by the grantee of the property with the use restrictions contained in the deed of conveyance.

GSA Guide, supra note 60, at 11.

[117] An environmental assessment or impact statement is required under the provisions of the National Environmental Policy Act of 1969. Under the FPASA either the GSA or the sponsoring agency may perform the assessment. *GSA Guide, supra* note 60, at 26.

[118] *Id.*

[119] 40 U.S.C. § 484(k)(2)-(3) (1976); *see also GSA Guide, supra* note 60, at 30.

[120] 50 U.S.C. § 1662(g)(1) (1976).

[121] 40 U.S.C. § 345(c) (1976).

[122] 40 U.S.C. § 484b(1) (1976).

ment is the sponsoring agency.[123]

Most public benefit conveyances are completely "discounted." In other words, the GSA conveys the property at no cost to the public agency based upon the Administrator's determination that the public benefit occurring from such a conveyance is equivalent to the cash which would otherwise be realized. However, all such conveyances are made subject to specific covenants concerning the use of the property. If the grantee violates these covenants title to the property will revert back to the federal government.[124] For example when the GSA has conveyed property for use as a public park it must be continuously used or maintained for such a purpose. If all or any portion of the property ceases to be so used it will revert to the United States.[125]

Sponsoring federal agencies are responsible for insuring that the grantees comply with these covenants. For this reason, the agencies hold periodic inspections of the property.[126]

2. *Negotiated Sales*

The GSA negotiates sales (Box 5, Diagram 1) with state and local governments pursuant to section (e)(3)(H) of the FPASA.[127] Such disposals are made only if it is in the best interest of the federal government and for a price not less than the fair market value of the property.[128] In addition, the GSA makes such sales to state and local governments only if the property is to be used for a direct public purpose or controlled community development.[129]

Final approval or rejection of negotiated sales lies within the discretion of the Administrator based upon his determination of what best serves the public interest.[130] However, prior to disposal the Administrator must submit an explan-

---

[123] 16 U.S.C. § 667(b)-(d) (1976). The application is reviewed by the Fish and Wildlife Service for the Department of the Interior to ascertain suitability of requested land.

[124] 40 U.S.C. §§ 484(k)(2)(C)(i); 484b(b) (1976).

[125] *GSA Guide, supra* note 60, at 26.

[126] 41 C.F.R. § 101-47.308-7(m) (1983).

[127] *GSA Guide, supra* note 60, at 27.

[128] 40 U.S.C. § 484(e)(3)(H) (1976). *See also* C.F.R. 101-47.304-9 and -12.

[129] Both the statute and the regulations attempt to ensure that the government obtains the highest possible price by stipulating that negotiated sales are "subject to obtaining such competition as is feasible under the circumstances." 40 U.S.C. § 484(e)(3) (1976); 41 C.F.R. § 101.304-9 (1983). In addition, the sales price is also subject to the threshold amount of fair market value. *See* 41 C.F.R. 47.305-1 (1983).

[130] *GSA Guide, supra* note 60, at 43. Under extraordinary circumstances private parties may also acquire surplus property through a negotiated sale. 40 U.S.C. § 483(e)(3) (1976); 41 C.F.R. § 101-47.301-2 (1983). It should also be noted that such private sales are subject to antitrust clearance by the Department of Justice when the fair market value is $1,000,000 or more. 41 C.F.R. § 101-47.301-2 (1983).

atory statement of the circumstances of negotiated sales to the Senate Committee on Governmental Affairs and the House of Representatives Committee on Government Operations for review. These committees review the Administrator's decision not to approve or disapprove, but rather to raise an objection when the proposed sale is not in the best interest of the government.[131]

3. *Public Competitive Sales*

Finally, the GSA may dispose of surplus real property by competitive public sales in the form of public auctions or sealed bids (Box 5, Diagram 1). As before, fair market value must be the basis for all sales. The GSA gives notice of such sales at least thirty days in advance by advertisement in local publications, in addition to announcement in the *Commerce Business Daily*, a federal government publication.[132]

4. *Property Review Board Proposed Terms for the Disposal of Fort DeRussy: What Options Does the State Have?*

The Property Review Board submitted to the City Council of the City and County of Honolulu a compromise agreement concerning the terms and method of disposal for Fort DeRussy once the GSA has declared it surplus. Hand-carried to the Council by Senator Inouye on August 1, 1983, this Memorandum of Agreement on Fort DeRussy offers a three step partition of the property.[133]

First, the twenty-six acres which make up the land area makai of Kalia Road, including the Hale Koa and the U.S. Army Museum, would continue to be held in fee by the Department of Defense. The majority of this property (seventeen acres) would retain its open space character and continue to be open to the public for recreational purposes.[134] In other words, the most scenic and desirable section of the property would remain unchanged under the terms of the compromise agreement. Second, one-half of the remaining forty-three acres

---

[131] 41 C.F.R. § 101-47.305-1(a) (1983). Legislative history suggests that the "best interest of the government" means obtaining the best price. *See* 1958 U.S. CODE CONG. & AD. NEWS 2861, 2866.

[132] *See* 1958 U.S. CODE CONG. & AD. NEWS 2861, 2867. Objections are usually based upon the Committee's opinion that a higher price may be obtained for the property.

[133] Chair's Message No. 25, *supra* note 56. Note that it is unclear at this point whether the Property Review Board or GSA has made any environmental assessment of the proposed disposal in reaching the terms of this Memoranda. Case law clearly indicates that this assessment must be made prior to any final decision to dispose of the property, in order to comply with NEPA requirements.

[134] *Id.*

located mauka of Kalia Road would be conveyed at 100% public benefit discount to the City and County of Honolulu. In other words, the City Council may, at its option, maintain the property's open space character by using it for a public park or recreational facility.[135] Finally, the remaining 21.5 acres would be sold to the private sector.

After reviewing this proposal the Mayor, City Council of Honolulu, and Governor of Hawaii concurred on a policy regarding Fort DeRussy.[136] Basically, they stated that: (1) the sale of federally-owned lands in order to reduce the national debt is not in the best interests of the public; (2) any portion of Fort DeRussy no longer needed by the federal government should be granted to the state or local government of Hawaii at a 100% discount so as to be made "available for the use of the people of Hawaii for other than resort/hotel purposes in accordance with local law;" (3) the City Council will support H.R. 3642; and (4) if all legal and political steps taken to oppose the sale fail, the City Council will enter into negotiations to purchase the property.[137]

In opposing the sale the state and local governments thus far have limited themselves to the political alternatives already discussed. Another option is to institute an action in federal court challenging the Administrator's choice as to the method of sale—that is, his choice of a negotiated or public competitive sale rather than a discounted public benefit conveyance of the remaining 21.5 acres.[138]

---

[135] *Id.* However, it should be remembered that all public benefit conveyances are subject to specific covenants to ensure the property's continued use for the public benefit. Property conveyed for public parks or recreational purposes must continue to be used as such in perpetuity or the land reverts to the federal government. *See id.* at 27-28.

[136] City Council of Honolulu, Chair's Message No. 32 (Oct. 5, 1983).

[137] *Id.*

[138] 40 U.S.C. § 531 (1976). The first step in pursuing this alternative is for the complainant (i.e., Honolulu City Council) to establish that it has standing to be heard in federal court.

The U.S. Supreme Court in Valley Forge Christian College v. Americans United, 454 U.S. 464 (1982), has recently enumerated the requirements for standing to sue in federal court under FPASA. The Court concluded that article III of the U.S. Constitution requires a party suing in federal court to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Id.* at 472 (citing Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)). In addition, article III requires that it be likely that the injury will be redressed by a favorable decision. 454 U.S. at 472. Beyond the constitutional requirements, the Court has adopted a few of its own criteria. First, the plaintiff must assert his own legal rights and not those of a third party. 454 U.S. at 475-76. Second, the Court will not adjudicate "general grievances pervasively shared and most appropriately addressed in the representative branches." *Id.* Finally, the plaintiff's complaint must fall within "the scope of interest to be protected or regulated by statute or constitutional guarantee in question." *Id.*

In the recent First Circuit case of Rhode Island Committee on Energy v. General Svcs. Admin., 561 F.2d 397 (1st Cir. 1977), the court applied the above criteria when an abutting land owner challenged the sale of surplus federal property to a utility company. Concluding that the abutting

In its challenge on the merits, the City Council's strongest argument would be based upon the Federal Urban Land Use Act (FULUA). The Council could argue that the Administrator of the GSA has abused his discretion by refusing to convey all forty-three acres to the city for use as a park or recreation area. FULUA states that "urban land transactions entered into for the General Services Administration . . . shall be made to the greatest extent practicable in accordance with planning and development objectives of the local governments and local planning agencies concerned."[139] In addition, at least one court has reasoned that in enacting the provisions allowing public benefit conveyances for parks or recreational purposes, Congress meant for the Administrator to "give particular attention to the conservation and recreational values and to the needs and requests of state and local governments."[140]

There are two fundamental weaknesses with these arguments. First, FULUA only requires that prior to disposing of federal land within an urban area, the Administrator must give reasonable notice to all local government bodies having jurisdiction over zoning and land use regulations. This insures that the local governments may zone for the use of such land in accordance with local comprehensive planning.[141] Once the GSA conveys federal surplus property to a private party it is "fully subject to the substantive constraints of local zoning laws."[142] Therefore, FULUA's prior notice requirements insure that disposal of federal surplus property will "to the extent practical, be consistent with [local] zoning and land use practices."[143] Second, legislative history indicates, and most courts have concluded, that the Administrator has broad discretionary power to determine what method of sale best serves the interests of the federal government. The House Committee on Interior and Insular Affairs specifically stated:

> It should be emphasized that the provisions of H.R. 15913[144] [which amended

---

owner had no standing, the court reasoned however, that a disappointed bidder would conceivably have standing to challenge the sale. *Id.* at 402. *Accord* Tenth St. Bldg. Corp. v. Administrator of GSA, 387 F. Supp. 727 (D.Pa. 1975). Note also, that the court held that the appellants had standing to sue under the National Environmental Policy Act for failing to comply with the environmental assessment requirements. 561 F.2d at 403.

Therefore the Honolulu City Council, as a disappointed bidder on the property, would have standing to challenge the method of disposal.

[139] 40 U.S.C. § 531 (1976).

[140] 486 F. Supp. 18, 21 (D.D.C. 1979). *See also* H.R. Rep. No. 91-1225, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4300, 4304.

[141] 40 U.S.C. § 532 (1976).

[142] *Supra* note 99.

[143] 486 F. Supp. at 21. The majority of FULUA provisions deal with use or acquisition of land by the federal government.

[144] Land and Water Conservation Fund, Pub. L. No. 91-483, 84 Stat. 1084 (1970).

> the FPASA to empower the Administrator to make public benefit discount conveyances for park or recreational purposes] do not diminish the discretionary authority of the Administrator of General Services with respect to the disposition of excess or surplus Federal lands. He retains the authority to determine whether or not a particular tract of excess land should be used for park and recreational purposes. Only if he makes an affirmative determination may the property be transferred to the Secretary of the Interior for conveyance to the State or local government.[145]

In *New England Power Company v. Goulding*,[146] the district court applied the standards of review enunciated in the Administrative Procedure Act (APA)[147] to the Administrator's decision on how to dispose of surplus federal property. The court concluded that its review was limited to determining whether the agency has "demonstrably . . . given reasonable consideration to the issues, and has reached a result which rationally flows from its conclusions."[148] In other words, so long as the Administrator makes a rational decision, the court will not intervene and substitute its judgment.

More recently, in *Government Land Bank v. General Services Administration*,[149] the Fifth Circuit Court of Appeals held that the Administrator's discretion as to whether to dispose of surplus property via public bidding or negotiated sale was permissive and not mandatory. The action was filed under the Freedom of Information Act. The main issue in the case was whether a state governmental agency negotiating for a tract of surplus property could force the GSA to disclose its appraisal report on the fair market value of the land. The court decided that such appraisals need not be disclosed as they were covered by the exemption for interagency memoranda.[150] More importantly, however, upon construing FPASA with respect to disposals, the court concluded that "the use of the auxiliary verb 'may,' rather than 'shall,' confirms the Administrator's authority to reject a negotiated disposal, even if the state offers to pay the estimated fair market value of the property."[151]

---

[145] 1970 U.S. CODE CONG. & AD. NEWS 4300, 4304.

[146] 486 F. Supp. 18 (D.D.C. 1979).

[147] 5 U.S.C. § 704 (1976).

[148] 486 F. Supp. at 20.

[149] 671 F.2d 663, 667 (5th Cir. 1982).

[150] *Id.* at 666.

[151] *Id.* at 667. *See also* H. R. Rep. No. 1763, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & AD. NEWS 2861, 2866; 41 C.F.R. § 101-47.303-2. The early case of Dover Sand & Gravel, Inc. v. Jones, 227 F. Supp. 88 (D.N.H. 1963), involved an attempt to compel a Regional Director of the GSA to negotiate with a local company for the sale of surplus land. In analyzing FPASA with respect to negotiated sales, the court found that the only limitation upon the Administrator's authority was that he follow his own regulations and "obtain such competition as is feasible under the circumstances." *Id.* at 92. The court concluded that what constituted feasible competition lay within the independent judgment of the Director. *Id.* at 92. 40 U.S.C. §

In light of the above it is unlikely that the City Council could successfully argue that the Administrator had abused his discretion by not making a discount conveyance to the city. Neither could the city preclude the Administrator from negotiating a sale with a private party or disposing of the property by public bid or auction. So long as the Administrator rationally assesses the alternatives, the final decision regarding the method of disposal lies within his discretion.

Therefore, assuming all political obstacles are removed and the City Council is unsuccessful in opposing the sale on legal grounds, the only remaining point of contention would be the cost or price for the 21.5 acres. As indicated earlier, the GSA is required under the FPASA to obtain the fair market value for the property as determined by its appraisal of the property's "highest and best use."[152] One factor in this calculation is the zoning restrictions placed upon the property. At present the property is zoned for low density apartment use,[153] but the City Council has indicated that if Fort DeRussy is sold to the private sector the Council will rezone the property to ensure that it retains its open space character.[154] Clearly, such action would have a decided effect upon the fair market value of the property. One Councilperson, taking this into consideration, has estimated the value of the 21.5 acres at approximately $40 million.[155]

The Executive Director of the Property Review Board agreed that the ap-

---

484 (1976) states in part:

40 U.S.C. § 484 Disposal of Surplus Property

(a) . . . the Administrator shall have supervision and direction over the disposition of surplus property. . . .

. . . .

(e)(1) All disposals or contracts for disposal of surplus property . . . made or authorized by the Administrator shall be made after publicly advertising for bids . . . except as provided in paragraphs (3) and (5) of this subsection.

. . . .

(3) Disposals and contracts may be negotiated, under regulations prescribed by the Administrator, without regard to paragraphs (1) and (2) of this subsection but subject to obtaining such competition as is feasible under the circumstances, if—

. . . .

(H) the disposal will be to States, Territories, possessions, political subdivisions thereof, or tax-supported agencies therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation;

. . . .

[152] *See supra* note 81.

[153] City & County of Honolulu, Real Estate Handbook, 1st Tax Division, Vol. 2, Zone 2 (17th ed. 1983). The recent case of Ventura County v. Gulf Oil Corp., 601 F.2d 108 (1979), *aff'd.* 445 U.S. 947 (1980) strongly suggests that local zoning ordinances are not applicable to federally held lands.

[154] Report on Fort DeRussy, *supra* note 23, at 11.

[155] Council Committee of the Whole Report No. 56, adopted by the City Council on Oct. 5, 1983.

praisal will consider all valid zoning laws affecting the property, but nonetheless stated that the proposed rezoning by the City Council constitutes illegal "spot zoning."[156] It seems, however, that the Board will not press this issue for the Executive Director has conceded that the sale will be consummated on either one of two bases: "(1) an agreed to land use agreement concurred in by city and state authorities wherein convenants in the deed could control the height of buildings, open spaces, parking, etc.; or (2) a sale where the buyer took all the risks as to what his permitted uses would be."[157]

E. Award and Closing

Once the GSA has completed its review and the sale is approved, the GSA awards the property to the prospective purchaser (Box 6, Diagram 1). Title is usually transferred by a quitclaim deed which recites all reservations, restrictions, or conditions that the conveyance is subject to.[158]

As earlier indicated, proceeds from any sale of surplus real property, rather than being credited to miscellaneous receipts in the U.S. Treasury, must be deposited into a special Land and Water Conservation Fund within the Treasury.[159] The fund, established in 1965, is used to support the National Parks System and other programs initiated by the Department of the Interior.

In analyzing the transfer and disposal process for federal lands as set forth in

---

[156] *Id.* at 34. "Spot zoning" has been variously defined but normally means "the improper permission to use an 'island' of land for a more intensive use than permitted on adjacent properties." D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 168 (1971). Although such an island usually involves more intensive use, an island of less intensive use might also constitute spot zoning. *Id.* at 168-69.

For such zoning to be invalid, however, normally three factors must be present: (1) a small parcel which received special treatment; (2) such special treatment is not in the public's best interest; and (3) the zoning is not in accord with a comprehensive plan. *Id.* at 169. With respect to Fort DeRussy it is arguable that none of these factors are present. First, 21.5 acres is arguably not a small parcel of land. Second, the City Council has determined that keeping the property in open space will help preserve the aesthetic appeal, recreational value, and overall public benefit to be derived from the land use. Finally, the Development Plan for the Primary Urban Center recently adopted by the City Council specifically states that "The open space character of Fort DeRussy . . . shall be preserved." Honolulu, Hi., Ordinance No. 83-25, § 15(2)(b)(8) (June 8, 1983).

In addition land use restrictions, if reasonably related to the promotion of health, safety, and general welfare, have repeatedly been upheld even though they arguably destroyed or flatly prohibited the most beneficial use of the property. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

[157] Report on Fort DeRussy, *supra* note 23, at 35.

[158] 41 C.F.R. § 101-47.307 (1983).

[159] *See* Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-518, 78 Stat. 897 (1964) (codified at 16 U.S.C. § 460(d) (1983)); *see also* 41 C.F.R. § 47.307.6 (1983).

FPASA, it is apparent that the Act provides little hope as the basis for effective opposition to the sale of Fort DeRussy. Under FPASA the Administrator has been granted broad discretionary powers. Once the GSA declares federal property surplus, the Administrator determines the final outcome of the disposal process based upon what he concludes best serves the government's interests. The Administrator may decide upon the most advantageous method of sale—that is, public benefit discount conveyances, negotiated sales, public bids or auctions. So long as there exists a rational basis for his decisions the courts will not interpose and substitute their judgment.

III. CONCLUSION

Congress has plenary authority to regulate the use of federal property under the property clause of the U.S. Constitution. Pursuant to this authority and in order to eliminate the confusion and lack of centralized control over the management and disposal of government property following World War II, Congress enacted the Federal Property and Administrative Services Act of 1949. Although since amended to incorporate NEPA requirements and promote intergovernmental cooperation, the FPASA's underlying policies remain efficiency, economy and the disposal of excess federal property.

The Act establishes the General Services Administration, headed by an Administrator, who in turn is answerable directly to the President. Under the Act the President has broad authority to establish land use policies that ensure the maximum utilization of federal real property. Pursuant to this power the President has reestablished the Property Review Board and initiated a federal land sales program. Fort DeRussy, a seventy-two acre parcel located in Waikiki, Hawaii, is one of the parcels of land that the Property Review Board has recommended for disposal. This proposal has generated a significant local opposition to the sale based mainly upon the fear that if the property is sold it will be developed, and if developed, the recreational attributes of its present open-space character will be lost.

The initial decision to declare Fort DeRussy excess lies with the Secretary of Defense as head of the Department of Defense (DOD). Once the DOD has declared the property excess, the present Administration's strong policy favoring disposal will effectively block any other executive agency from requesting a transfer of the property. In the absence of such requests the GSA will declare Fort DeRussy surplus, thereby making it available for disposal to local government or private bodies. Furthermore, although the Administrator of the GSA must prepare and consider a site specific environmental assessment of potential reuses of the property, the courts will not question his final decision as to the method of disposal as long as it is rational in light of all alternatives.

The FPASA provisions provide few grounds upon which to base an effective

opposition to the Property Review Board's recommendation to sell Fort DeRussy. Thus, the only effective means for the state and local governments to oppose the sale of Fort DeRussy lie in the political process.

Section 809 of the Military Construction Act of 1968 presently provides an effective prohibition to sale without Congressional approval. Furthermore, without the passage of the Debt Reduction Act it will be impossible for the Administration to use the proceeds of any sale to reduce the national debt. Clearly, effective opposition in either of these areas will deter if not prohibit the federal government from vigorously pursuing its land disposal policy. Finally, if the Administration succeeds in overcoming these two hurdles and the DOD declares the property excess, passage of a bill such as H.R. 3642 (a bill to establish Kamehameha the Great National Monument) would insure that the property will never be commercially developed.

A comprehensive assessment of these political alternatives is beyond the scope of this comment but one result seems clear. The federal government is now willing to compromise. The Property Review Board has submitted a Memoranda of Agreement to the Honolulu City Council that sets forth the federal government's proposed terms for disposal of Fort DeRussy. Under this Agreement the DOD would retain all of the beachfront property and maintain it as open space recreational areas for the public. The GSA would donate approximately 21.5 acres to the City and County of Honolulu for use as a park and recreational area, leaving only 21.5 acres to be sold to the private sector. In the end over two-thirds of the property would be guaranteed to retain its open space character at no cost to the city or state. If either government wished to insure the open-space character of the remaining 21.5 acres, it would have to purchase the property at a public sale for fair market value.

One final lesson may be drawn from the above analysis. In a situation as complex as this the statutory guidelines are only one factor in resolving the problem at issue. In a democratic system such as ours, final recourse lies in the political process.

Robert J. Lombardi

Federal Consistency Under the Coastal Zone Management Act

I. INTRODUCTION

The Coastal Zone Management Act of 1972[1] authorizes a federal program for the effective management, beneficial use, protection and development of the coastal zone.[2] An important component of the Act is the role given to the coastal states in managing their own coastal zones. The Coastal Zone Management Act (CZMA) seeks to accomplish this goal by encouraging the development and implementation of comprehensive management programs by each eligible coastal state.[3] In return, CZMA requires that each management program first be submitted to the Secretary of Commerce for approval. The Secretary's approval is not forthcoming unless he determines that the views of all the federal agencies principally affected by the submitted program are adequately

---

[1] 16 U.S.C. § 1451 (1982).

[2] The "coastal zone" is defined as:

> the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas, seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

16 U.S.C. § 1453(1) (1982).

[3] 16 U.S.C. § 1452(2) (1982). The term "coastal state" is defined as:

> a state of the United States in, or bordering on, the Atlantic, Pacific or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of this chapter, the term also includes Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and the Trust Territories of the Pacific Islands, and American Samoa.

16 U.S.C. § 1453(4) (1982).

considered.[4]

The CZMA provides two primary inducements for the thirty states eligible under the Act to develop their own coastal management programs. One very attractive incentive is the generous federal grants-in-aid of implementation and administration of the programs—up to 80% of the total cost.[5] Once a state is locked into the federal scheme, the second, and perhaps more enticing, benefit is the prospect of federal consistency under section 307 of the Act.[6] Generally, federal consistency gives a state the rare opportunity to require that federal activities conducted within or affecting the coastal zone be consistent with the policies and guidelines set forth in a state Coastal Zone Management Program (CZMP).

The CZMA is a relative newcomer to the ecology wars, still seeking to define its niche in the intricate skein of national environmental policies. At the end of 1978, only thirteen state programs had received federal approval.[7] By 1982, there were a total of twenty-eight coastal states with approved programs.[8] One can assume that federal consistency influenced the states in their decisions. Legislative history of the CZMA suggests that Congress did not have a clear idea of what federal consistency would entail.[9] Congress wanted to increase state participation in matters that would affect state coastal zones but did not specify to what extent. This inevitably produced disputes over the precise scope of the

---

[4] 16 U.S.C. § 1456(b) (1982).

[5] The Secretary is authorized to make annual grants to a coastal state to assist in developing a coastal zone management program. The initial grant is limited to 80% of such costs, and lasts only up to four years or until the state program receives federal approval. 16 U.S.C. § 1454(c) (1982). Once a program is approved, the state is eligible to receive grants to cover the costs of administering the program. Such grants shall not exceed 80% of the administration costs. 16 U.S.C. § 1455(a) (1982). NOAA has pursued a policy of gradually phasing out federal grant assistance while encouraging increased funding by state legislatures. One alternative is legislation requiring the federal government to share Outer Continental Shelf (OCS) revenues with coastal states. *Coastal Zone Management: Program at a Crossroads*, ENV'T REP. (BNA) Monograph No. 30, at 23 (Sept. 17, 1982). OCS revenue sharing is an important issue lurking behind litigation over federal oil and gas leases in cases like *California v. Watt*. *See* text accompanying notes 87-92.

[6] 16 U.S.C. § 1456(c) (1982).

[7] Between 1976 and 1978, CZMA federal approval was given to Puerto Rico and twelve states: Washington, Oregon, California, Massachusetts, Wisconsin, Rhode Island, Michigan, North Carolina, Hawaii, Maine, Maryland, and New Jersey. *Coastal Zone Management: Program at a Crossroads*, ENV'T REP. (BNA) Monograph No. 30, at 24-25 (Sept. 17, 1982).

[8] Between 1979 and 1982, the following states and territories joined the CZMA program: Alaska, the Virgin Islands, Guam, Delaware, Alabama, South Carolina, Louisiana, Mississippi, Connecticut, Pennsylvania, Northern Marianas, American Samoa, Florida, and New Hampshire. *Id.* at 25.

[9] Legislative History, Coastal Zone Management Act of 1972, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4776. For example, Congress nowhere defines key phrases such as "directly affecting the coastal zone" and "consistent to the maximum extent practicable with approved state management programs."

federal consistency provision in CZMA. It is quite clear, however, that Congress anticipated substantial state involvement.[10]

For a time, it seemed that CZMA was well on its way toward exerting a reach almost as broad as the National Environmental Policy Act.[11] Keeping the purpose of CZMA well in mind, the federal courts and the National Oceanic and Atmospheric Administration[12] applied federal consistency very liberally.[13]

However, in the past few years, the Reagan Administration has made sharp cutbacks in the area of CZMA federal grants. The Administration has even made proposals to eliminate all such funding.[14] The cuts have caused some apprehension on the part of the states as to the viability of maintaining their CZMP's.[15] If the cuts continue, the only reason for remaining with CZMA is

---

[10] CZMA states "it is the national policy . . . to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone. . . ." 16 U.S.C. § 1452(2) (1982).

The Act also calls for state-federal cooperation:

> The key to more effective protection and use of . . . the coastal zone is to encourage the states to exercise their full authority over the . . . coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone. . . .

16 U.S.C. § 1451(i) (1982).

[11] National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370 (1982).

[12] The Secretary of Commerce delegated responsibility for the Act to the Administrator of the National Oceanic and Atmospheric Administration (NOAA). 15 C.F.R. § 923.2(b) (1984).

[13] In Puerto Rico v. Muskie, 507 F. Supp. 1035 (D.P.R. 1981), *federal consistency* was successfully used to block the relocation of Cuban and Haitian refugees. Another instance where a broad application of federal consistency occurred was when the district court allowed the city of San Francisco to challenge the General Services Administration's planned disposal of an Air Force base. California *ex rel.* BCDC v. United States, Civil No. C-80-3132 RPA (N.D. Cal., filed July 30, 1980). In that case, the parties reached an out of court settlement. *See* Greenberg, *Federal Consistency Under the Coastal Zone Management Act: An Emerging Focus of Environmental Controversy in the 1980's*, 11 ENVTL. L. REP. (ENVTL. L. INST.) 50001, 50007 (1981).

[14] The Office of Management and Budget proposed a termination of all funding in fiscal 1982 and thereafter for CZMA state grants. [11 Current Developments] ENV'T REP. (BNA) 1947 (Feb. 13, 1981). Fortunately, Congress has refused to submit to such proposals. For example, President Reagan's fiscal 1985 budget proposed eliminating $13.8 million in grants to states for coastal zone plan administration. [14 Current Developments] ENV'T REP. (BNA) 1720 (Feb. 3, 1984). In response, the House passed a fiscal 1985 appropriations bill providing $42 million in grants to states for administering coastal zone management plans. [15 Current Developments] ENV'T REP. (BNA) 173 (June 8, 1984).

[15] If federal funding is discontinued without OCS revenue sharing as a replacement, NOAA officials estimate approximately one-third of CZM programs will be absorbed by other state programs and lose their identity. Another one-third would become severely reduced programs faced with increased workloads. The final one-third would remain well funded by state legislatures. *Coastal Zone Management: Program at a Crossroads*, *supra* note 5, at 24. James Ross of the Coastal States Organization told congressional committees that if CZMA grants were withdrawn,

federal consistency.

Concurrent with the cuts in federal money, the Reagan Administration also accelerated schedules for oil and gas leasing on the outer continental shelf (hereinafter OCS).[16] Unfortunately, precisely when federal consistency would have been most useful, the recent United States Supreme Court decision in *Secretary of the Interior v. California*,[17] dealt a heavy blow to the coastal states. The most consequential portion of the case lies in the majority's ruling that CZMA was not intended to reach federal activities conducted outside the coastal zone. This narrow interpretation of the federal consistency provision dims the bright prospects previously anticipated in lower courts.[18] If the Supreme Court decision is given vigorous precedential effect, the states may lose all desire to remain with the federal program.

This comment seeks first, to provide a broad overview of the federal consistency provisions of CZMA. Federal consistency is mapped out as a federally created scheme giving states a strong voice on how federal activities that affect the coastal zone should comply with the requirements contained in a state coastal zone management program. In exchange, the state CZMP's are subject to final approval by a federal agency.

The second part of the comment, given the relative youth of CZMA, delves into the few cases construing federal consistency in order to provide some idea of the effective potential of CZMA once it reaches its prime. Another important reason for examining the early cases is to show how the courts evolved a broad interpretation of the consistency provisions of CZMA.

The paper then shifts to the Supreme Court decision in *Secretary of the Interior v. California*. Attention is first given to the liberal interpretation of CZMA by both the district court[19] and the appellate court.[20] The Supreme Court's decision represents almost a complete rejection of the broad reading which the lower courts had seemingly established for two key phrases in the federal consis-

---

most states would shut down or drastically curtail their programs, and states not yet participating would lose any federal incentive to join. *Id.* at 8.

[16] Yi, *Application of the Coastal Zone Management Act to Outer Continental Shelf Lease Sales*, 6 HARV. ENVTL. L. REV. 159, 168 (1982) [hereinafter cited as Yi].

[17] ___ U.S. ___, 104 S.Ct. 656 (1984), holding that the sale of oil and gas leases on the Outer Continental Shelf by the Secretary of the Interior was not subject to CZMA's federal consistency requirements because it did not *directly affect* the coastal zone. This was a five to four decision with Justices Stevens, Brennan, Marshall and Blackmun dissenting.

[18] *See* text accompanying notes 42-79.

[19] California *ex rel.* Brown v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981), holding that the sale of federal oil and gas leases off the California coast was an activity *directly affecting* the coastal zone.

[20] California v. Watt, 683 F.2d 1253 (9th Cir. 1982), affirming the district court, held that the Secretary of the Interior must make a consistency determination for the sale of OCS oil and gas leases.

tency provisions: *directly affecting* and *maximum extent practicable.*

Even if courts continue to read *maximum extent practicable* to favor states, it is a meaningless salve if the phrase *directly affecting* is read narrowly. With the Supreme Court's judicial hatchet lodged in its back, CZMA faces a heavy task in staggering toward its promised primacy. This paper concludes that, since the Supreme Court opinion hinged on legislative history and congressional intent, explicit action on the part of Congress is required to counter the rigidity of the Supreme Court. Three possible alternatives are: (1) strengthening the *directly affecting* language, (2) increasing state-federal agency mediation and (3) creating an entirely new statute to govern oil and gas leasing. If Congress wants to retain the original broad vision of CZMA, the first choice is the most attractive. Whichever appears the most viable alternative, Congress must act promptly or else it could face a fourth possibility: the states may decide to escape from a federal scheme that demands state compliance with federal guidelines that offer nothing in return.

II. Overview of Federal Consistency Provisions

Under the terms of the Act, administration of CZMA is the responsibility of the Secretary of Commerce.[21] Actual administration is delegated to the National Oceanic and Atmospheric Administration (NOAA).[22] No state is eligible for benefits unless its CZMP is approved by the Secretary of Commerce according to specific criteria.[23] The Secretary cannot approve a management program submitted by a coastal state unless he adequately considers the views of all the federal agencies principally affected by such a program.[24] Upon receipt of the Secretary of Commerce's approval, a state not only becomes eligible to receive federal grants-in-aid but is entitled to invoke the federal consistency provisions embodied in section 307 of CZMA.[25]

Under section 307 of the Act, there are essentially four classes of activities which may require federal consistency. First, section 307(c)(1) states: "Each federal agency conducting or supporting activities *directly affecting* the coastal zone is required to conduct or support those activities in a manner which is, to the *maximum extent practicable*, consistent with approved state management programs."[26] Second, section 307(c)(2) states: "Any federal agency undertak-

---

[21] *See* 16 U.S.C. §§ 1453(16), 1454(a), 1455(a), and 1456(a)(1) (1982).

[22] *See supra* note 12.

[23] 16 U.S.C. § 1455(c), (d), and (e) (1982).

[24] 16 U.S.C. § 1456(b) (1982).

[25] 16 U.S.C. § 1456(c) (1982).

[26] 16 U.S.C. § 1456(c)(1) (1982) (emphasis added). The *federal consistency* requirements under § 307 of CZMA are codified at 16 U.S.C. § 1456(c) (1982).

ing any development project in a state coastal zone is required to insure that the project is, to the *maximum extent practicable*, consistent with approved state management programs."[27] The thrust of the controversy over federal consistency is centered on subsections 307(c)(1) and (2), above. Third, any applicant for a required federal license or permit to conduct an activity affecting land or water uses in the coastal zone is required to provide certification that the proposed activity will be conducted in a manner consistent with the program.[28] Fourth, any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act, with respect to exploration, development or production affecting any land or water use in the coastal zone shall attach certification that such plan complies with and will be carried out consistently with the state's management program.[29] It seems section 307 covers a wide array of activities. However, this is not the case.

Several obstacles confront any state trying to make effective use of section 307. The use of varying language for the different types of activities subject to federal consistency inevitably produces disputes between the states and federal agencies involved as to the exact meaning. Section 307(c)(1) raises the most recent controversy—which activities *directly affect* the coastal zone?

The federal agency makes the initial determination whether an activity affects the coastal zone. If the federal agency determines that the activity will *directly affect* the coastal zone it must provide the state with a consistency determination indicating whether the proposed activity will be undertaken in a manner conforming with the state's CZMP "to the maximum extent practicable." If, on the other hand, the federal agency determines that the activity has *no direct effects*, it then provides the state with a negative determination. A concomitant question concerns the actual degree of compliance with the state CZMP required by the term *maximum extent practicable* as used in sections 307(c)(1) and (2).

Another dispute centers on whether federal lands are excluded from state coastal zones. The statutory definition of the coastal zone excludes lands "the use of which is by law solely subject to the discretion of or which is held in trust by the Federal Government, its officers or agents."[30] The state coastal zone extends inland "only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters."[31] This means federal lands such as national parks, forests, wildlife refuges, Indian reservations

---

[27] 16 U.S.C. § 1456(c)(2) (1982).
[28] 16 U.S.C. § 1456(c)(3)(A) (1982).
[29] 16 U.S.C. § 1456(c)(3)(B) (1982).
[30] 16 U.S.C. § 1453(1) (1982).
[31] *Id.*

and defense establishments situated within the coastal zone are not subject to CZMA unless they affect the coastal zone.[32] Furthermore, the Secretary of Commerce can still approve any of the activities under section 307 if he finds them consistent with the objectives of CZMA or otherwise necessary in the interest of national security.[33] National security could conceivably extend beyond national defense to encompass energy development.[34]

In case of serious disagreements between any federal agency and a coastal state, mediation procedures are available with the cooperation of the Secretary of Commerce.[35] However, any party other than the Secretary of the Interior can still resort to judicial review without having first exhausted the mediation process.[36] Even with mediation, there is no assurance that the parties will find grounds for conciliation. Thus, CZMA disputes have increasingly gone to court for resolution.

III. EARLY CASES

One could postulate a trend in recent years whereby the federal government has retreated from a strong regulatory position on ecology and the states have responded with more aggressive environmental policies. CZMA would be the most prominent harbinger of such a trend. Both private industry and federal agencies (notably the Department of the Interior) challenged the coastal states that sought to exert their authority under CZMA. In response, almost every court facing the question supported the states by giving CZMA a broad interpretation.

A visible line of cases has expanded and defined the scope of federal consistency. In one of the earliest cases construing CZMA, *American Petroleum Institute v. Knecht*, the district court found that CZMA primarily importuned environmental concerns.[37] The courts also amply stressed the consideration to be given each state's CZMP. Even in a case where the federal interest prevailed,

---

[32] Barcelo v. Brown, 478 F. Supp. 646, 681 (D.P.R. 1979).

[33] 16 U.S.C. § 1456(d) (1982).

[34] Hildreth, *The Operation of the Federal Coastal Zone Management Act as Amended*, 10 NATURAL RES. LAW. 211, 219 n.44 (1977).

[35] 16 U.S.C. § 1456(h) (1982).

[36] 15 C.F.R. § 930.116 (1984).

[37] In American Petroleum Institute v. Knecht, 456 F. Supp. 889, 919 (C.D. Cal. 1978), *aff'd* 609 F.2d 1306 (9th Cir. 1979), the court held that NOAA's findings to support its approval of California's Coastal Zone Management Program were neither arbitrary nor capricious. An association of petroleum companies unsuccessfully attempted to block NOAA's approval of the California Coastal Zone Management Program, partly on the ground that it did not make an "affirmative commitment" to energy development. The district court rejected the plaintiffs' argument that affirmative accommodation of energy facilities was made a *quid pro quo* for approval under § 306 of the 1976 Amendments to the Act. *Id.* at 924.

one court went to great pains to insure *de minimus* environmental harm.[38]

Moreover, courts have held the federal government to an increasingly strict standard of compliance with the procedural and policy requirements of CZMA. For example, the same court in *Puerto Rico v. Muskie*[39] subjected the federal government to a much more rigorous analysis than it had a few years earlier in *Barcelo v. Brown*.[40] This careful evolution of a policy so dedicated to state concerns can be traced to the earliest cases dealing with CZMA.

A. Precedent for Broad Application of CZMA Guidelines

The earliest significant case on CZMA set a strong precedent for giving federal consistency a broad interpretation. *American Petroleum Institute v. Knecht* was an action brought by oil company association members against federal officials to enjoin final approval of California's coastal zone management program.[41] Though the case did not specifically involve section 307, the Ninth Circuit Court of Appeals held that the CZMP is not required to contain criteria so detailed that private users could predict the fate of their projects without interaction between state agencies and the user.[42] The state's standards need only be sufficiently specific to guide public and private users, and the Secretary of Commerce had considerable discretion in making such a determination.[43] This meant that California could require consistency not just with substantive state law but with more general policy guidelines contained in its CZMP.

The circuit court agreed with the district court that even though CZMA called for "adequate consideration" of the national interest in the planning for and siting of energy facilities, the Act required that high priority be accorded the protection of natural systems.[44] This case was cited with approval by later courts wishing to give a broad interpretation to CZMA federal consistency provisions. The tone was set that CZMA, because of its purpose, should be given a liberal reading to accomodate environmental concerns.

---

[38] Barcelo v. Brown, 478 F. Supp. 646 (D.P.R. 1979). Though the district court questioned how federal lands could be included within a state's coastal zone, it still went on to discuss whether the Federal activity was consistent with the Puerto Rico CZMP.

[39] *See infra* notes 57-72.

[40] *See infra* notes 45-56.

[41] *See supra* note 37.

[42] American Petroleum Institute v. Knecht, 609 F.2d 1306, 1312 (9th Cir. 1979).

[43] *Id.*

[44] *Id.* at 1314-15.

B. *Evolution of a Stricter Analysis of Federal Activities under Section 307*

Two cases help to illustrate how the courts moved toward a more demanding analysis of federal activities under CZMA. In *Barcelo v. Brown*, the district court used a relatively unsophisticated analysis when it decided that the United States Navy's activities complied with Puerto Rico's CZMP to the *maximum extent practicable.*[45] A few years later in *Puerto Rico v. Muskie*, the same court applied a much more thorough analysis of the procedural requirements of CZMA.[46]

Barcelo v. Brown was an action brought by Puerto Rico to enjoin the United States Navy from using any portion of the lands it owned on the island of Vieques for naval training operations.[47] Puerto Rico's complaint alleged that the Navy's shelling and demolition work harmed the fishing and agricultural industries and certain endangered species.[48]

Puerto Rico claimed the Navy's activities were inconsistent with the Commonwealth's CZMP. The Navy defended on the ground that it had complied to the *maximum extent practicable.* Though the district court agreed that the Navy was conducting activities covered by section 307(c)(1), its examination was conducted more in the light of matters under the Endangered Species Act and the Marine Mammal Protection Act.[49]

The court did not apply the *directly affecting* threshold test that was later used in *Brown v. Watt.*[50] Nor did it attempt to scrutinize the sufficiency of the Navy's consistency determination in the manner that was later done by a Massachusetts district court.[51] As such, *Barcelo v. Brown* should be seen as an early seminal case in the development of federal consistency.

The court interpreted the federal lands exclusion of section 304(a) as prohibiting the extension of state authority over defense establishments.[52] However, the court had trouble reconciling this with a NOAA regulation stating: "Federal activities outside of the coastal zone (e.g., on excluded Federal lands . . .

---

[45] *See* Barcelo v. Brown, 478 F. Supp. at 706-07.

[46] *Muskie*, 507 F. Supp. at 1058.

[47] *See* Barcelo v. Brown, 478 F. Supp. at 651.

[48] *Id.*

[49] *Id.* at 680.

[50] Brown v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981). The district court used a two-part test to determine federal consistency. First, there was a threshold test asking whether the particular activity *directly affected* the coastal zone. Once the threshold test was passed, the court proceeded to determine whether the proposed activity was consistent to the maximum extent practicable with the state CZMP.

[51] Conservation Law Foundation v. Watt, 560 F. Supp. 561 (D. Mass. 1983), holding that the burden of establishing compliance with a state CZMP is on the federal agency proposing the contemplated action, and not on the state.

[52] Barcelo v. Brown, 478 F. Supp. at 681.

or landward of the coastal zone) are subject to Federal agency review to determine whether they significantly affect the coastal zone."[53] At that time, no one raised the explanation that the legislative history demonstrated that Congress meant to include "excluded Federal lands" under section 307(c)(1) if the activity directly affected the coastal zone.

The court shunned these questions and went directly to what it saw as the *maximum extent practicable* controversy. It made no reference to the NOAA regulations defining the phrase *maximum extent practicable.* Instead, the court based its decisions on studies that compared the ecosystem surrounding Vieques with that of the Virgin Islands.[54] It diagnosed the coral reefs, the sea-grass communities, mangrove wetlands, beaches and wildlife. It concluded that any adverse effects resulting from the naval bombardment were inappreciable. The court said that: "Although the nature of Defendant Navy's activities have a tendency towards provoking dramatic conclusions, a dispassionate analysis of the scientific evidence leads us to the conclusion that the negative impact . . . is negligible, and if the truth be said . . . constitutes a positive factor in its over all ecology."[55]

If *Barcelo v. Brown* were to be decided today, the court would presumably engage in a more exacting analysis. This is because the current NOAA regulation states that consistent to the *maximum extent practicable* calls for full consistency unless prohibited by existing law.[56] The district court opinion did not make it clear whether the Navy had satisfied the procedural requirements for a consistency determination. About a year later, the same court clarified its analytical process in *Puerto Rico v. Muskie.*[57]

Following the sudden influx of Cuban and Haitian refugees in 1980 under President Carter, the federal government proposed a plan to transfer several thousand of them from Florida to Fort Allen, Puerto Rico to await processing. The district court in *Puerto Rico v. Muskie* found that the proposed transfers violated the Solid Waste Disposal Act, the National Environmental Policy Act, the National Historic Preservation Act and CZMA among others.[58]

In November of 1980, the federal government sent a letter to the Secretary

---

[53] *Id.* The district court construed the exclusion in 16 U.S.C. § 1453(1) (1982). *See also supra* text accompanying notes 30-32. The court looked at the regulations promulgated by NOAA in 15 C.F.R. § 930.33(c) (1979). After receipt of the Department of Justice opinion letter discussed *infra* at notes 79-80 and accompanying text, NOAA amended the regulation to read: "Federal activities outside of the coastal zone (e.g. on excluded Federal lands . . . or landward of the coastal zone) are subject to Federal agency review to determine whether they directly affect the coastal zone." 15 C.F.R. § 930.33(c) (1980).

[54] Barcelo v. Brown, 478 F. Supp. at 682.

[55] *Id.*

[56] 15 C.F.R. § 930.32(a) (1984).

[57] 507 F. Supp. 1035 (D.P.R. 1981).

[58] *Id.* at 1064.

of the Puerto Rico Department of Natural Resources purporting to eliminate the consistency requirement under CZMA. The letter asserted that the planned operations at Fort Allen were consistent with the Puerto Rican CZMP and would have no adverse effects on the coastal zone.[59]

The district court held that the mere filing of a statement claiming consistency for the activity was not enough to fulfill CZMA's procedural requirements.[60] This time, the court applied the NOAA requirements for consistency determinations:

> The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement. The amount of detail in the statement evaluation, activity description and supporting information shall be commensurate with the expected effects of the activity on the coastal zone.[61]

Using this criteria, the court found the government letter to be inadequate. The government letter did not mention, much less describe, the refugee operations contemplated for Fort Allen.[62] Even if the letter had been sufficiently detailed, it did not meet the other procedural requirements: the state must be given forty-five days in which to evaluate the statement and decide whether it agrees with the determination;[63] in addition, the state is entitled to a fifteen-day extension for further review;[64] and final federal agency action is not to be taken sooner than ninety days after issuance of the consistency determination.[65]

A solid policy argument justified these procedural demands. CZMA intended to encourage state participation. This can only be done through discussions between the state and the federal agency—after the state is first presented with all the information needed to make an informed decision, and then given time to digest it.[66]

The federal government argued that Fort Allen as a military facility was an excluded federal land under 16 U.S.C. § 1453(1).[67] The court referred to its decision in *Barcelo v. Brown*, which defined the federal exclusions as covering such things as national parks, wildlife refuges, Indian reservations and defense establishments. The court ruled that Fort Allen was not covered by any of these

---

[59] *Id.* at 1058.
[60] *Id.*
[61] 15 C.F.R. § 930.39(a) (1981).
[62] *Muskie*, 507 F. Supp. at 1059.
[63] 15 C.F.R. § 930.41(a) (1981).
[64] 15 C.F.R. § 930.41(b) (1981).
[65] 15 C.F.R. § 930.41(c) (1981).
[66] *Muskie*, 507 F. Supp. at 1059.
[67] *Id.*

definitions because it was no longer being operated as a defense facility.[68] This narrow definition discounted the actual wording of the statute, which applied the exclusion to *any* lands "subject solely to the discretion of or which is held in trust by the Federal government. . . ."[69]

The court seemed to realize it was on tenuous ground. It recognized that *Barcelo v. Brown* had not really resolved the question of excluded federal lands.[70] The court disposed of this potential quagmire when it held that the exclusion did not apply when federal activities on federal lands have an effect on the surrounding non-federal coastal zone. The court supported its conclusion with the NOAA regulation which states that "the exclusion of federal lands does not remove federal agencies from the obligation of complying with the consistency provisions of section 307 of the Act when federal actions on these excluded lands have spillover impacts that significantly affect coastal zone areas."[71]

In this case, the *direct effect* on the coastal zone would have been the discharge of waste water into the coastal zone. The court estimated that Fort Allen would generate approximately 15,000 pounds of solid waste each day. The landfill operation was already severely overloaded. It had difficulties with flooding and sometimes permitted solid waste to be carried downstream to the Caribbean Sea. The court concluded that the evidence supported a finding that such effects would be adverse to the environment.[72]

Although the court enjoined the relocation of the refugees, it did not indicate whether lack of a consistency determination in and of itself would have been sufficient to halt construction. Or was a showing of a *direct effect* upon the coastal zone also needed? This point was rendered moot after the federal government signed a consent agreement with Puerto Rico establishing certain conditions for the Fort Allen operation.[73]

---

[68] *Id.* at 1060.

[69] 16 U.S.C. § 1453 (1982).

[70] *Muskie*, 507 F. Supp. at 1060.

[71] 15 C.F.R. § 923.33(c)(1) (1981).

[72] *Muskie*, 507 F. Supp. at 1060-61.

[73] Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981). The federal government and Puerto Rico reached a consent agreement stating that the combined total of aliens housed at Fort Allen and permanent employees would not exceed 1500, with the number of aliens limited to 800; that no solid waste would be disposed of in Juana Diaz, and that disposal elsewhere should be in accordance with Puerto Rico statutes and regulations; and that the government would undertake thorough and adequate medical screening and other steps to prevent the outbreak of contagious disease. The government further agreed that Fort Allen would not be used as a detention center for longer than one year. In exchange, Puerto Rico concurred in the government's consistency determination under CZMA.

C. *Inclination of Courts Toward Greater State Participation*

When the first state programs began receiving federal approval, a timing question arose—whether federal consistency applied to federal projects planned prior to certification of a CZMP. The next two cases do not specifically deal with section 307, but they serve to demonstrate the deference given to state CZMP's.

In *People's Counsel for Baltimore County v. Alexander* federal consistency requirements blocked construction of a marina at the headwaters of Dark Head Creek.[74] Even though the government had submitted applications prior to certification of Maryland's CZMP, the district court still required a consistency review by the Maryland Department of Natural Resources.[75]

In contrast, the *Hoe v. Alexander* court did not require a consistency determination for phased federal development projects which were specifically described, considered and approved prior to management program approval.[76] The district court based this finding on a specific NOAA regulation.[77] The court abstained from ruling on the plaintiff's other claims of consistency violations because it would have required the court to interpret state statutes and decide when state permits are required.

These two cases serve to emphasize the accommodation of the courts in helping to foster state involvement. The plaintiff in *People's Counsel* was a quasi-governmental entity. *Hoe v. Alexander*, on the other hand, was an action brought by private parties against the United States Army Corps of Engineers, the City and County of Honolulu's Department of Land Utilization, and the State of Hawaii's Department of Land and Natural Resources and Department of Planning and Economic Development. While private parties have standing to sue under CZMA, it is apparent that, given the purposes of the Act, the courts are more accommodating if the state joins in the action.[78]

The earlier cases, from *American Petroleum Institute v. Knecht* to *Hoe v. Alexander*, demonstrate a definite willingness on the part of the courts to give a broad reading to the federal consistency provisions of CZMA. Additionally, from *Barcelo v. Brown* to *Puerto Rico v. Muskie*, the courts assented to a higher standard of compliance with state CZMP's. *Puerto Rico v. Muskie*, however, involved a facility that was physically situated within the coastal zone. The next

---

[74] 17 ENV'T REP. CAS. (BNA) 1963 (D. Md. 1980).

[75] *Id.*

[76] 483 F. Supp. 746 (D. Hawaii 1980).

[77] "This provision shall not apply to phased Federal decisions which were specifically described, considered and approved prior to management program approval (in a final environmental impact statement issued pursuant to the National Environmental Policy Act). . . ." 15 C.F.R. § 930.38(b) (1980).

[78] *See* Yi, *supra* note 16, at 181.

skirmish debated the extension of federal consistency to activities lying outside the coastal zone. Such a move necessarily depended on the courts' conception of what types of activities *directly affect* the coastal zone.

IV. Interpreting the "Directly Affecting" Threshold Test

At the time of *Puerto Rico v. Muskie*, NOAA attempted to propagate a definition whereby any activity significantly affecting the coastal zone required a consistency determination. NOAA did not differentiate between *directly affecting* in section 307(c)(l) and merely "affecting" in section 307(c)(3).[79] The "significantly affecting" definition was retracted after a written opinion from the Department of Justice categorically denied that "significantly" was synonymous with the term *directly*.[80] NOAA still encouraged federal agencies to liberally construe the *directly affecting* test in borderline cases to favor inclusion of federal activities subject to consistency review.[81] This confusion signalled that the courts would be forced to decide the full implications of the phrase *directly affecting* in section 307(c)(1).

California v. Watt is undoubtedly the most significant case construing the phrase *directly affecting*. Moreover, it is a valuable indication of how far CZMA can extend its authority. The fanciful thinking inspired by *California v. Watt* lasted only a few months. The recent reversal by the United States Supreme Court in *Secretary of the Interior v. California* inevitably leads to speculation that any future interpretations of federal consistency will be tightly constrained.

A. *The Leading Case:* California v. Watt

The earlier CZMA cases did not specifically address the precise meaning of *directly affecting*. NOAA itself had wavered over a definition that equated "directly" with "significantly."[82] *Puerto Rico v. Muskie* sanctioned the application of federal consistency to federal activities occurring within the coastal zone.[83] In

---

[79] Behr, *Implementing Federal Consistency Under the Coastal Zone Management Act of 1972*, 3 N.Y. Sea Grant L. & Pol'y J. 1, 47-48 (1979).

[80] *Id.* The Department of Justice also rejected the Department of Interior's contention that § 307(c)(1) did not apply to OCS leasing activities because those activities do not *directly affect* the coastal zone. The Department of Justice found this to be essentially a question of fact which it had no authority to answer. At that time, NOAA also declined to define *directly affecting*, based on the view that precise definitions were impossible to create.

[81] 44 Fed. Reg. 37,142 (1979).

[82] *See id.* See also Shapiro, *Coastal Zone Management and Excluded Federal Lands*, 7 Ecology L.Q. 1011, 1021 (1979) for a discussion of the "significantly affecting" test.

[83] *See Muskie*, 507 F. Supp. at 1061.

California v. Watt,[84] California and various environmental groups sought to extend federal consistency to activities located beyond the state's coastal zone.

The early cases usually dealt with CZMA in conjunction with other environmental laws, such as the National Environmental Policy Act and National Historic Preservation Act. *California v. Watt* is notable for deciding a state/federal conflict based primarily on CZMA history and policy.[85] Simply stated, *California v. Watt* is the most significant case to date in extrapolating the potential latitude of CZMA.

In May 1981, the California District Court held that the sale of oil and gas leases for the outer continental shelf required a consistency determination.[86] The Ninth Circuit Court of Appeals' affirmance in August 1982 seemed to presage an array of opportunities for applying federal consistency. The courts embraced a broad conception of federal consistency, deferential toward the vital role imparted to the coastal states by CZMA.

California v. Watt centered on the Department of Interior's proposed sale of leases to drill for and extract oil and gas in the outer continental shelf off the coast of California.[87] It was known as Lease Sale 53, and consisted of a maximum offering of 243 designated tracts in five different basins located in the OCS. In November 1977, the Bureau of Land Management issued a Call for Nominations for Lease Sale 53. The Call requested that the petroleum industry indicate the tracts on which it would be interested in bidding if a sale were held. It also asked federal, state, and local governments, universities, environmental associations and the public to identify any tracts they wished to see excluded or leased with particular restrictions.[88]

On July 6, 1980, the California Coastal Commission requested a consistency determination from the Secretary at the time of the issuance of the proposed notice of sale. In a letter of October 22, 1980, the Secretary notified the California Coastal Commission of his negative determination— that the preleasing activities of Lease Sale 53 would have *no direct effects* on the California coastal zone. The letter therefore concluded that a consistency determination was unnecessary.[89]

---

[84] The district court case was called California *ex.rel.* Brown v. Watt, 520 F. Supp. 1359 (C.D. Cal. 1981). The Ninth Circuit case was called California v. Watt, 683 F.2d 1253 (9th Cir. 1982). The Supreme Court case was called Secretary of the Interior v. California, ____ U.S. ____, 104 S.Ct. 656 (1984).

[85] Brown v. Watt, 520 F. Supp. at 1368-78.

[86] *See id.*

[87] *Id.* at 1367.

[88] *Id.* at 1366. The Department of Interior released its final Environmental Impact Statement in September 1980. A Secretary Issue Document (SID)—an internal document to aid the Secretary of the Interior (referred to as the Secretary in this case) in making his decisions on the lease sales—was released in October of 1980.

[89] *Id.* at 1367.

In response, the California Coastal Commission adopted a resolution stating that the deletion of twenty-nine tracts in the northern portion of the Santa Maria Basin was necessary for Lease Sale 53 to be consistent with the California Coastal Management Plan. The Governor of California then recommended the deletion of thirty-two tracts from the Santa Maria Basin in answer to the Interior Secretary's proposed notice of sale.[90]

On February 10, 1981, a new Secretary issued a revised proposed notice of sale. Four basins previously deleted by the former Secretary were once more included in Lease Sale 53. In a letter dated May 1, 1981, the Secretary notified the Governor that he was rejecting the Governor's recommendations for the Santa Maria Basin. On April 29, 1981, California sought an injunction against the lease sale. The district court granted summary judgment for California. It held that the Secretary had violated section 307(c)(1) of CZMA by selling oil and gas leases for the OCS without a determination of consistency with California's CZMP.[91] The court declared all bids and leases null and void.

1. *Analysis of the District Court Opinion*

In previous cases, the CZMA issue was decided in connection with other acts like NEPA and the National Historic Preservation Act (NHPA). However, in this case, because the district court ruled against the plaintiffs on all the other environmental issues,[92] CZMA had to stand or fall on its own merits. The district court ultimately gave federal consistency a broad reading.

On the federal consistency issue, the district court first articulated a *threshold test*[93] for application of section 307(c)(l): whether the activity in question would have a direct effect on the coastal zone. Turning first to the "plain meaning" rule, the court found the language of section 307(c)(l) to be unclear and ambiguous as to the meaning of the phrase *directly affecting*.[94] This freed the court to look at the stated purpose of the Act, its legislative history, and regulations of the agency charged with administering the Act.

a. Statutory Purpose

The purpose of CZMA is "to preserve, protect, develop and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and

---

[90] *Id.*
[91] *Id.* at 1374.
[92] *Id.* at 1382-88.
[93] *Id.* at 1368.
[94] *Id.* at 1368-69.

succeeding generations."[95] The district court was primarily concerned with effectuating the stated purpose of the Act.[96] The role of the states under CZMA provided the tool for proper construction. The court found the primary authority in the management scheme lay with the coastal states which had developed and implemented their own comprehensive management programs.[97]

Before the state can obtain final approval of its CZMP, CZMA provides that the Secretary of Commerce must have adequately considered the views of the federal agencies principally affected by such programs. The Secretary must also find that the program provides for adequate consideration of the national interest.[98]

In exchange, the state becomes eligible for federal funding. The court saw an even larger inducement in the requirement of consistency review. The court envisioned a sort of *quid pro quo*. In return for state agency participation in CZMA, the federal agencies are required to conduct their activities in a manner which is "to the maximum extent possible consistent with the state program."[99] It is doubtful that the court mistakenly stated a standard of "maximum extent possible" instead of *maximum extent practicable*. Rather, it signaled the strict standard CZMA imposed upon federal agencies.

The court found that Congress intended CZMA to be comprehensive, anticipating federal-state consultation procedures extending to all phases of the management of coastal resources. The court concluded that by directing the states both "to identify potential problems with respect to marine and coastal areas and to prevent unavoidable losses of any valuable environmental or recreational resources," Congress clearly intended state involvement at the initial stages of the decision-making process.[100]

Unlike the later Supreme Court opinion, the district court saw the state and federal governments as equal partners.[101] This view is consistent with the mediation scheme under 16 U.S.C. § 1456(h).[102] Congress had full knowledge of the Department of Interior's role in national environmental policy, but it gave the Secretary no overriding authority over CZMA. Rather, Congress sought to

---

[95] 16 U.S.C. § 1452(1) (Supp. V 1981).

[96] Brown v. Watt, 520 F. Supp. at 1369.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 1370.

[100] "In order to anticipate impacts and prevent unnecessary losses in the coastal zone, it is manifest that the consultation process was intended to begin at the earliest possible time." *Id.*

[101] "It would be anomalous to impute to the Congress which induced the states to formulate these plans an intention to permit the federal government to proceed with critical decision-making in total disregard of them." *Id.* at 1371.

[102] In case of serious disagreement between a federal agency and a coastal state over the development or administration of a CZMP, the Secretary of Commerce is to mediate the differences. The federal agency is not given an overriding power. 16 U.S.C. § 1456(h) (1982).

encourage disputing parties to have their grievances mediated before the more neutral auspices of the Secretary of Commerce. Furthermore, legislative history shows that although the House seriously considered placing administration of CZMA under the Secretary of the Interior instead of Commerce, its final choice was the Secretary of Commerce.[103]

The court emphasized that pre-leasing activities were a critical part of the decision-making process that must include the state.[104] The court envisioned leases as only one component in a crucial chain of events. The Secretary of the Interior's final selection of tracts determines where the oil company lessee can explore and produce. The Secretary's decision to offer or delete a tract determines which estuaries, reefs, wetlands, beaches or barrier islands are exposed to the threat of oil spills. The designation of each particular tract available for exploitation along with the lessor's stipulated conditions would influence the flow of vessel traffic, the placement of platforms and drilling structures, and the sites for onshore construction. The lease stipulations determine the equipment to be used and the type of training to be provided to the workers. "Thus, the leasing sets in motion the entire chain of events which culminates in oil and gas development."[105]

Therein lies the main point of contention. Did *direct effects* mean one in a chain of events, or must *cause* and *effect* cleave closer than that? None of the courts that decided the case arrived at a conclusive definition for *directly affecting*. It is clear, however, that the district court and the appellate court favored the "chain of events" interpretation.[106] The appellate court stated:

---

[103] CON. REP. NO. 1544, 92nd Cong., 2d Sess. 1, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4822-23. The Conference Report stated that when the House bill was considered on the Floor, an amendment was proposed and adopted which would place responsibility for administration of CZMA with the Secretary of the Interior rather than the Secretary of Commerce. The rationale was that the land use aspects of coastal zone legislation should be readily coordinated with other national legislation by a single department. However, NOAA's technical expertise in managing coastal areas swayed the conferees. They finally agreed upon a program administered by the Secretary of Commerce, but required full coordination with and concurrence of the Secretary of the Interior.

[104] "Pre-leasing activities, including the call for nominations, the publication and circulation of an environmental impact statement, and the publication of a final notice of lease sale, define and establish the basic parameters for subsequent development and production. During the pre-leasing stage which culminates in the final notice of lease sale, critical decisions are made as to the size and location of the tracts, the timing of the sale and the stipulations to which the leases are subject. Each of these are key [OCS] planning decisions." Brown v. Watt, 520 F. Supp. at 1371.

[105] *Id.*

[106] "Only a definition which provides for the application of § 307(c)(1) at the decision-making stage of the leasing process will effectuate the congressional intent and give proper meaning and focus to the Act. Clearly, the consistency requirement should apply when a federal agency initiates a *series of events* which have consequences in the coastal zone. Any other interpretation would thwart the purposes of the Act." *Id.* at 1374 (emphasis added).

> Lease Sale 53 established the first link in a *chain of events* which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(3).[107]

The court finally stated that if California was consulted only after the drawing of plans and the setting of parameters for development, CZMA would be rendered a far weaker statute than Congress intended. The state would be relegated to a defensive position, objecting to the proposals on every single tract only as they were presented by individual lessees.[108] Furthermore, an early consistency determination would likewise benefit lessees by giving them notice of potential conflicts at the earliest possible moment.[109]

b. Legislative History

In addition to examining the states' role under CZMA, both the district court and Supreme Court devoted exceptionally detailed analyses to the legislative history of CZMA. Both courts acknowledged that this was uncommon, but justified such probing in light of the statute's ambiguous language. The original Senate and House reports were silent as to the specific question whether lease sales are subject to federal consistency.[110] However, both courts still found some advantage in looking at congressional purpose. Each opinion was a bit selective in piecing together the admittedly jumbled history of revisions and amendments to the original draft of the Act. Even though it acknowledged that the legislative history was inconclusive on the matter, the district court still referred to the history in order to gather some idea of congressional intent.[111]

Of all the revisions to the original draft of the Act, the court found the most significant change in the final version prepared by the Joint Conference Committee. Both the House and Senate bills originally said that federal activities "in the coastal zone" were subject to section 307(c)(1). Without any explanation for the change, the Committee had substituted *directly affecting* for the word "in."[112] The court took this to mean that, on balance, Congress intended to expand the original scope of the provision.

The court then looked at subsequent legislative history for further enlighten-

---

[107] California v. Watt, 683 F.2d at 1260 (emphasis added).

[108] Brown v. Watt, 520 F. Supp. at 1371.

[109] *See* Yi, *supra* note 16, at 182.

[110] *Id.* at 175.

[111] Brown v. Watt, 520 F. Supp. at 1371.

[112] *Id.*

ment. In 1976, Congress made certain amendments to CZMA, but left section 307(c)(1) unchanged.[113] However, an amendment was proposed to include federal leases for offshore oil and gas exploration, in addition to federal licenses and permits, under section 307(c)(3). The House excluded this explicit amendment from the final version of section 307(c)(3).[114] Defendants unsuccessfully argued that this evidenced Congress' clear intent to exclude leasing from all consistency review.

The court handily dismissed such an inference. Rather, it referred to the cardinal rule in *Morton v. Mancari* that repeals by implication are not favored.[115] Absent a showing of affirmative intent to repeal, a court must give effect to every section of the statute. This is especially so when no "positive repugnancy" exists between the two provisions.[116]

The court resolved this conflict by concluding that section 307(c)(1) applied only to the federal government while section 307(c)(3) imposed obligations on private sector applicants for federal licenses and permits. This cast section 307(c)(1) in the role of a residuary clause applying to categories of federal actions dealing neither with development projects nor with licenses and permits. If that is so, one must ask why it is enumerated first among the consistency provisions rather than last. On the other hand, given the "positive repugnancy" rule, the court's explanation seems plausible.[117]

Congress re-authorized CZMA in 1980. Though once again no changes were made to section 307(c)(1), both the House and Senate committees attempted to clarify their positions. The Senate Committee said:

> The Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of section (c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the

---

[113] *Id.*

[114] *Id.* at 1372.

[115] Morton v. Mancari, 417 U.S. 535, 549-51 (1974), decided whether the employment preference for qualified Indians under the Indian Reorganization Act of 1934 was repealed by the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972. The Supreme Court ruled that in the absence of some affirmative showing of an intention to repeal, the only permissible justification for repeal by implication is when the earlier and later statutes are irreconcilable.

[116] United States v. Borden Co., 308 U.S. 188, 198-99 (1939) stated the "positive repugnancy" rule:

> It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . There must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy". . . .

[117] *Id.*

> Interior sets in motion a *series of events* which have consequences in the coastal zone.[118]

The House Committee offered two alternative definitions of the *directly affecting* phrase: (1) whenever a federal activity has a *functional interrelationship* from an economic, geographic or social standpoint with a state coastal program's land or water policies. . .;[119] and (2) when a federal agency *initiates a series of events* of coastal management consequence.[120]

Defendants attempted to counter these statements by arguing that no deference is due the statements of a post-enactment Congress.[121] The court stated that while subsequent legislative history generally is not controlling, neither should it be rejected completely out of hand.[122]

c. *Reference to Related Statutes*

The court next confronted the defendant's argument that an expansive construction of section 307(c)(1) would necessarily conflict with the Secretary's duties under section 19 of the Outer Continental Shelf Lands Act (OCSLA). Under OCSLA, the Secretary has authority to direct development in the OCS. Section 19 provides that while he should consider the recommendations of a state governor, the Secretary has the final power to override the decision.[123]

The court noted at the outset that CZMA has rather different prerogatives from other statutes like NEPA and OCSLA. Only CZMA encourages active participation by state and local governments. Furthermore, OCSLA emphasizes mineral development while CZMA is "more solicitous of environmental concerns."[124]

Courts have an obligation, whenever possible, to construe statutes so that they are consistent with each other.[125] With this in mind, the court attempted to give each provision effect even though they seemed to overlap. This was accomplished by reference to the "savings clause" in section 608 of the 1978

---

[118] S. REP. NO. 783, 96th Cong., 2d Sess. 11 (1980).

[119] H.R. REP. NO. 1012, 96th Cong., 2d Sess. 34, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4382.

[120] *Id.*

[121] Defendants cited United States v. Price, 361 U.S. 304, 313 (1960) which stated: "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." The district court noted that United States v. Price only applied to Congressional inaction rather than explicit statements.

[122] Brown v. Watt, 520 F. Supp. at 1373.

[123] Outer Continental Shelf Lands Act Amendment of 1978, Pub. L. No. 95-372, § 208, 92 Stat. 629, 652-53, codified as amended at 43 U.S.C. § 1345 (1982).

[124] Brown v. Watt, 520 F. Supp. at 1375.

[125] *Id.*

amendments to OCSLA: "Except as otherwise expressly provided in this Act, nothing in this Act shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972. . . ."[126]

Using this as a starting point, the court demonstrated that the two statutes could co-exist. OCSLA calls for recommendations directly from the governor, while the frame of reference for CZMA is the state CZMP. The Secretary's decision whether to accept or reject the governor's recommendations is final. In contrast, CZMA allows for far more interaction, with the possibility of mediation in case of serious disagreements. CZMA does not abolish the Secretary's hefty voice in regulating the size, timing and location of proposed OCS lease sales. While the Act gives the states a greater say than under OCSLA, states still do not have absolute veto power.

d. NOAA's Interpretation

The court acknowledged that ordinarily, as the administrative body, NOAA's regulations would be given considerable weight by the court.[127] While agreeing that NOAA definitely had technical expertise, the court refused to give NOAA's current regulation any special deference. This was because NOAA, which had consistently taken a liberal view on the scope of federal consistency, had abruptly switched its position just before trial.

NOAA started out with a broad interpretation of CZMA. In the course of the 1976 amendments to CZMA, Congress called on NOAA to clarify certain provisions, especially section 307. This indicated the deference of Congress to federal agency opinions. In 1977, NOAA stated that it was "considering a position which treats the Department of the Interior's pre-lease sale decisions, such as tract selections and choice of lease stipulations, as a 'Federal activity' subject to the requirements of 307(c)(1). . . ."[128] However, NOAA never established a firm position.

The 1978 regulations called for a more liberal application of CZMA.[129] The proposed regulation said consistency would apply when:

> [T]he Federal agency . . . or the State agency . . . responsible for reviewing the actions determines that the actions cause *significant*
>
> (1) *Changes* in the manner in which land, water, or other coastal zone natural

---

[126] Outer Continental Shelf Lands Act Amendment of 1978, Pub. L. No. 95-372, § 608, 92 Stat. 629, 698, codified as amended at 43 U.S.C. § 1866 (1982).

[127] Brown v. Watt, 520 F. Supp. at 1376. Federal agencies are usually only subject to the "arbitrary and capricious" standard of review.

[128] 42 Fed. Reg. 43,586, 43,591 (1977).

[129] These regulations were analyzed by the Puerto Rico district court in Barcelo v. Brown. *See supra* notes 52-53 and accompanying text.

resources are used;

(2) Limitations on the range of uses of coastal zone natural resources; or

(3) Changes in the quality of coastal zone natural resources.

The significance of the changes or limitations caused by the Federal action must be considered in terms of primary, secondary and cumulative effects. . . .[130]

NOAA wanted to apply the same "significantly affecting" criteria to all the subsections under section 307.[131] NOAA recanted its view after a Department of Justice opinion letter rejected the substitution of "significantly" for *directly* as to 307(c)(1).[132] NOAA, however, continued to adhere to a liberal reading of the statute, encouraging a broad construction to favor inclusion of most federal activities. For example, a 1980 letter from the Assistant Administrator of NOAA to state CZMP directors stated its view that final notices of OCS sales were subject to federal consistency.[133]

NOAA made an inapposite shift in its position just two weeks after the complaints were filed in *California v. Watt*. The new regulations proposed a definition of *directly affecting* whereby a federal activity affects the coastal zone only "if the Federal agency finds that the conduct of the activity itself produces a *measurable physical alteration* in the coastal zone or that the activity initiates a chain of events reasonably certain to result in such alteration, *without further required agency approval*."[134]

The comment to the NOAA regulation specifically cited lease issuance as an example of an activity not subject to a consistency determination because it did not *directly affect* the coastal zone.[135] The court gave no special deference to this new regulation because the Secretary had made his decision long before NOAA issued its new regulations. As such, the new definition had no bearing on the validity of the Secretary's interpretation. The court also found that the new regulation was inconsistent with the broad goals of CZMA. The court noted that its rejection of the regulation did not mean it was discounting the Agency's position in general.[136]

e. Dictionary Definition

Referring to Webster's New International Dictionary and purporting to use the *plain meaning* rule, defendants advocated a definition of *directly affecting* as

---

[130] 43 Fed. Reg. 10,510, 10,519 (1978) (emphasis added).

[131] *Id.* at 10,518-19.

[132] *See* Behr, *supra* note 81, at 47.

[133] Brown v. Watt, 520 F. Supp. at 1377.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 1377 n.13.

"effects resulting from an activity without an intervening cause."[137] The court rejected this definition, pointing out that it was not identical to the one in Webster's, but that it merely incorporated portions from two of the six possible definitions of the word "*directly*."

Perhaps the court should have rested on the fact that the plain meaning was simply not readily apparent. The court instead referred to a Commentary on Statutory Construction which stated that reliance on the plain meaning rule is often a device to reinforce confidence in an interpretation arrived at on other grounds.[138]

Demonstrating a desire to deal with every issue thoroughly, the court went on to distinguish the concept of intervening cause as used in tort and lessor-lessee cases from its present context.[139] It concluded that acceptance of defendant's narrow dictionary definition would confound the objectives of CZMA.

f. Opinion Letter of the Department of Justice

The district court noted the Department of Justice letter concluding that NOAA was wrong to equate "significantly" with the term *directly affecting*.[140] The letter did not pursue the question of whether lease sales would *directly affect* the coastal zone. The Justice Department chose to pass, saying that it had no authority to answer such a question of fact. However, the letter expressly repudiated the Secretary's contention that pre-lease activities were *per se* exempt from section 307(c)(1).[141]

g. Direct Effects of Lease Sale 53

The court declined to hold that the final notice of lease sale was a generic category of federal activity *directly affecting* the coastal zone under section 307(c)(1). The determination whether a final notice of lease sale *directly affects* the coastal zone must be made on a case by case basis.[142]

In this specific situation, the court found enough evidence in the record to conclude that Lease Sale 53 satisfied the threshold test.[143] The activities permitted and/or required by the stipulations contained in Notice of Oil and Gas Lease Sale No. 53 resulted in several direct effects. For example, Stipulation No.

---

[137] *Id.* at 1378.

[138] 2A SANDS, SUTHERLAND STATUTORY CONSTRUCTION §46.01 at 49 (3d ed. 1973).

[139] Brown v. Watt, 520 F. Supp. at 1379.

[140] *Id.* at 1380.

[141] *See supra* notes 79-80 and accompanying text.

[142] Brown v. Watt, 520 F. Supp. at 1380.

[143] *Id.* at 1380-82. (The threshold test of *directly affecting* is discussed *supra* note 50).

4 set the conditions for lessee's operation of boats and aircraft, and Stipulation No. 6 stated the conditions for laying pipelines.[144]

The Secretary Issue Document and the environmental impact statement listed a multitude of impacts that would arise from operations in the tracts. Pipelaying, drilling and construction plus oil spills and sewage discharge from the platforms would contribute to the degradation of water quality in the area. Muds from drilling and cuttings would affect fish and invertebrate populations, harming commercial fisheries. The laying of pipelines would disrupt recreational activities. The inmigration of labor would also have certain inevitable impacts. The Secretary Issue Document showed that the overall probability of oil spills impacting on the sea otter range was 52%. The southern sea otter and the gray whale were endangered species that might be affected by development and production activities. Finally, there were artifacts and archaeological sites of historic interest in the Santa Maria Basin.

The district court concluded that a single *direct effect* upon the coastal zone would be sufficient to trigger section 307(c)(1). Throughout its analysis, the court persistently asserted the purpose of CZMA. Previous courts had given it a broad reading and this court was no different. To have done otherwise would have failed to effectuate the statutory purpose.

2. *Analysis of the Ninth Circuit's Decision*

The Ninth Circuit Court of Appeals affirmed the district court's requirement of consistency review.[145] The circuit court basically followed the district court's line of reasoning concerning the purpose of CZMA, legislative history, NOAA interpretation, and consistency with section 19 of OCSLA. The court noted approvingly that in August of 1981, both houses of Congress introduced resolutions disapproving the newly proposed NOAA regulations.[146] After the district court decision, the House Merchant Marine and Fisheries Committee voted to disapprove the regulations. NOAA subsequently moved to withdraw the regulation from the Federal Register.[147]

The circuit court said nothing concerning the plain meaning rule, the dictionary definition, or the Justice Department opinion letter. Its holding placed primary emphasis on the statute's intent to involve the coastal states in matters of critical decision-making. "To effectuate this purpose, the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact

---

[144] *Id.* at 1381.

[145] California v. Watt, 683 F.2d at 1267.

[146] *See supra* text accompanying notes 134-36.

[147] 46 Fed. Reg. 50,937-76 (1981).

on the coastal zone."[148] The court concluded that the Secretary of the Interior's narrow definition of *directly affecting*[149] would preclude such early involvement.

3. Supreme Court Opinion

In *Secretary of the Interior v. California*, on January 11, 1984, the United States Supreme Court overruled the Ninth Circuit Court of Appeals in a five to four decision.[150] The Court held that the Department of the Interior's sale of OCS oil and gas leases was not an activity *directly affecting* the coastal zone, and therefore did not require a consistency review before such sales were made. The Court based its reversal primarily on what it saw as Congress' intent not to subject OCS lease sales to federal consistency. As would be expected, the majority opinion written by Justice O'Connor did not dwell upon the purposes of CZMA. Although the specific holding was that OCS oil and gas lease sales were not covered by section 307(c)(1), the Court's reasoning carried a strong implication that all federal activities taking place outside the coastal zone were excluded from required consistency with a state's CZMP.

a. Legislative History

The Court first stated that the plain language of section 307(c)(1) did not explain which federal activities were seen as *directly affecting* the coastal zone. It therefore delved into the legislative history. First, it focused on the 1972 Conference Committee's switch from "in the coastal zone" to *directly affecting* the coastal zone. Although there was no explanation for the change in the congressional reports, the district court and circuit court accepted this change as an indication that Congress clearly intended to broaden the scope of section 307(c)(1).[151]

The Supreme Court conjured up a completely different explanation. The Senate bill had defined the coastal zone as excluding "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers, or agents."[152] This definition would have exempted federal lands lying within a state coastal zone from consistency review. On the other hand, the House bill defined coastal zone as including even the lands already under federal jurisdiction.[153]

---

[148] California v. Watt, 683 F.2d at 1261.

[149] *See supra* text accompanying note 137.

[150] Secretary of the Interior v. California, ___ U.S. ___, 104 S. Ct. 656 (1984).

[151] California v. Watt, 683 F.2d at 1261.

[152] 16 U.S.C. § 1453(1) (1976).

[153] Secretary of the Interior v. California, ___ U.S. at ___, 104 S. Ct. at 662.

The Court concluded that this had all the markings of a compromise. The Court's theory was that the Committee accepted the Senate's narrow definition but expanded section 307(c)(1) to cover activities on federal lands not in but still *directly affecting* the coastal zone.[154] The Conference Committee Report does not necessarily lead to the Court's desired inference. The report made no clear distinction between federal lands situated within and without the coastal zone. There was nothing to imply that lands lying outside the coastal zone could not also be subject to the provisions of section 307(c).[155] Furthermore, the report referred to section 307(c) as a whole, not just section 307(c)(1). If it were truly the result of a compromise, one must ask why *directly affecting* was used only in section 307(c)(1) and not the other sections.

A better explanation is that Congress was only emphasizing that the government still retained federal jurisdiction over federal enclaves. As to federal lands, whether inside or outside the boundaries of the coastal zone, section 307(c) was to apply as broadly as needed when the coastal zone was affected. The Court claimed further support from other sections of the original CZMA bill, or more precisely, from their exclusion.

A proposed House amendment to require consistency from federal programs managing the area between three and twelve miles off the coast was ultimately rejected from the final version of CZMA.[156] The Court found it significant that Congress had rejected a proposal that would have given the state appellees the protection they wanted. According to the report, the Committee deleted the amendment because "the provisions relating thereto did not prescribe sufficient standards or criteria and would create potential conflicts with legislation already in existence concerning Continental Shelf resources."[157] Justice Stevens' dissent-

---

[154] Cong. Conf. Rep. No. 1544, 92nd Cong., 2d Sess. 1 *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4822. The Conference Committee Report of Section 304 stated that: "The Conferees also adopted the Senate language in this section which made it clear that Federal lands are not included within a state's coastal zone. As to the use of such lands which would affect a state's coastal zone, the provisions of section 307(c) apply."

[155] *Id.*

[156] *Secretary of the Interior v. California* discussed a proposed amendment in § 313 of the House bill which provided that:

> The Secretary shall develop . . . a program for the management of the area outside the coastal zone and within twelve miles of the (coast). . . . To the extent that any part of the management program . . . shall apply to any high seas area, the subjacent seabed and subsoil of which lies within the seaward boundary of a coastal state, . . . the program shall be coordinated with the state involved. . . .
>
> The Secretary shall, to the maximum extent practicable, apply the program . . . to waters which are adjacent to specific areas in the coastal zone which have been designated by the states for the purpose of preserving or restoring such areas. . . .

____ U.S. at ____, 104 S. Ct. at 663.

[157] CONG. CONF. REP. NO. 1544, *supra* note 154, at 4825.

ing opinion suggested that the House bill did not extend the zone seaward because it already required the Secretary of Commerce to develop a management program for activities on the OCS consistent with the management program of the adjacent state.[158]

The Court also referred to a proposed amendment to section 312 which would have invited the Secretary of Commerce to extend coastal zone marine sanctuaries established by the states into the OCS region, but it was later rejected by the Conference Committee.[159] Justice Stevens, in his dissent, countered with the argument that sections 312 and 313 were deleted precisely because section 307(c)(1) had been strengthened to cover federal OCS activities.[160]

The strongest reason for not accepting the Court's convoluted explanation is that it cited the comments in the Conference Committee Reports on section 304 but not those on section 307. Had it done so, these comments would have revealed that any federal activity is covered so long as it *directly affects* the coastal zone: "[A]s to Federal agencies involved in *any* activities *directly affecting* the state coastal zone and *any* Federal participation in development projects in the coastal zone, the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management programs."[161] This directly refutes the Court's statement that it is clear beyond peradventure that Congress believed that the purposes of CZMA could be adequately effectuated without reaching federal activities conducted outside the coastal zone.[162]

b. Structure of CZMA

The second part of the Court's opinion centered on a close examination of the structure of section 307(c). The Court held that section 307(c)(3) was more pertinent than section 307(c)(1) because section 307(c)(3) required consistency when federal licenses and permits were issued to private applicants but said nothing about leases.[163] This seemed to be aimed at the district court's finding that section 307(c)(1) was not repugnant to section 307(c)(3) because the former imposed obligations on the federal government while the latter only applied to private sector applicants.[164] The Court held that OCS lease sales are

---

[158] Secretary of the Interior v. California, ____ U.S. at ____, 104 S. Ct. at 675.

[159] *Id.* at 664.

[160] *Id.* at 677.

[161] CONG. CONF. REP. NO. 1544, *supra* note 154, at 4824 (emphasis added).

[162] Secretary of the Interior v. California, ____ U.S. at ____, 104 S. Ct. at 666-67.

[163] *Id.* at 667.

[164] *See* Brown v. Watt, 520 F. Supp. at 1372.

covered solely by section 307(c)(3) because sections 307(c)(1) and (2) only reach activities where the federal agency is itself the principal actor.[165] The Court chose to single-mindedly apply only section 307(c)(3) to federally approved activities of third parties. This construction ignored the *Morton v. Mancari* rule used by the district court: in the absence of an affirmative showing of an intention to repeal, effect must be given to each section of the statute.[166] The Court offered no words from Congress demonstrating any intent to diminish the power of section 307(c)(1). Furthermore, the Court was presuming that no federal agency was a principal actor in a situation where the Secretary of the Interior issued the Call for Nominations and would make the final decision on which leases were sold to which particular bidder.[167]

The Court instead went to a great deal of trouble to show how section 307(c)(3) did not apply to OCS lease sales. It detailed the various steps involved in developing an offshore well—from preparation of a leasing program by the Secretary of the Interior, to the lease sale process, to exploration by the lessees, then to development and production. It found that section 307(c)(3)(B) did not apply until the exploration stage.[168]

The appellees did not dispute this. It was never raised as an issue in the lower courts. In fact, one of the main reasons for an early consistency determination under section 307(c)(1) was that section 307(c)(3)(B) was too little, too late.[169] The Court refused to construe the two sections in such a way that they could co-exist. It also failed to establish that section 307(c)(1) and (c)(3)(B) were by nature statutory antagonists.

The Court avoided applying section 307(c)(1) by speciously claiming that section 307(c)(1) was irrelevant to OCS lease sales because drilling for oil or gas on the OCS is neither conducted nor supported by a federal agency.[170] The Court offered nothing from the record to support or explain this statement. In reaching this conclusion, the Court ignored the essential role that the Secretary of the Interior plays in selecting tracts and issuing notices for lease sales. Fur-

---

[165] Secretary of the Interior v. California, ____ U.S. at ____, 104 S. Ct. at 667.

[166] *See supra* note 115 and accompanying text.

[167] *See* Brown v. Watt, 520 F. Supp. at 1371.

[168] Secretary of the Interior v. California, ____ U.S. at ____, 104 S. Ct. at 667-68. See *supra* note 29 and accompanying text for a short summary of § 307(c)(3)(B).

[169] *See* Brown v. Watt, 520 F. Supp. at 1371. The district court obviously addressed the argument that the state would be involved during the exploration and development stage under the auspices of § 307(c)(3)(B), when it stated:

> If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual lessees as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for . . . orderly decision-making. . . .

[170] Secretary of the Interior v. California, ____ U.S. at ____, 104 S. Ct. at 667.

thermore, it was the United States Geological Survey that provided the initial estimates on oil reserves in the Santa Maria Basin.

The last statement thrown in by the Court was that even if OCS lease sales involved an activity conducted or supported by a federal agency, they could not be characterized as *directly affecting* the coastal zone. The Court held that "the sale of a lease grants the lessee the right to conduct only very limited 'preliminary activities' on the OCS. It does not authorize full-scale exploration, development or production. Those activities may not begin until separate federal approval has been obtained. . . ."[171]

The Court could have saved itself a lot of trouble if it had stated this at the start of its opinion. It indicates the Court's fundamental disagreement with the lower court decisions. While the district court and circuit court took the broad guidelines to heart and liberally construed CZMA, the Supreme Court hammered out its own definition: *directly affecting* does not extend to federal activities beyond the coastal zone. The Supreme Court refused to use the "chain of events" test.[172] It failed to mention any of the direct effects foreseen by the district court, such as oil spills, drilling, and sewage discharge.

The question to be asked now is whether this was a narrow holding applicable only to OCS pre-leasing. The coastal states would surely find it helpful if the Court had agreed with the circuit court that federal consistency should be applied on a case by case basis. However, it did not. Rather, the Court unequivocally stated that, despite broad arguments about the structure of CZMA to encourage state-federal cooperation and the Act's incentives for the development of state management programs, Congress never intended CZMA to reach federal activities outside the coastal zone.[173] This portends a definite reluctance to allow any broad interpretation of CZMA.

B. Less Than Directly Affecting

An underlying reason for the rigid ruling in *Secretary of the Interior v. California* may have been the fear that the *directly affecting* standard would be carried too far. Two cases decided after *California v. Watt* shed some light on the potential scope of section 307(c)(1).

The first of these cases, *Kean v. Watt*,[174] arose from the State of New

---

[171] *Id.* at 672. The Court stated: "In these circumstances, the possible effects on the coastal zone that may eventually result from the sale of a lease cannot be termed 'direct.'"

[172] *See* text accompanying notes 106-107.

[173] Secretary of the Interior v. California, ___ U.S. at ___, 104 S. Ct. at 666-67.

[174] Kean v. Watt, No. 82-2420, 18 ENV'T REP. CAS. (BNA) 1927 (D.N.J. 1982). This was an oral opinion of the New Jersey district court. *See also* text accompanying note 26. All these cases concerning OCS lease sales are now partially moot because they were decided before *Secretary of the Interior v. California*.

Jersey's disagreement with the Secretary of the Interior over whether the sale of certain OCS oil leases *directly affected* New Jersey's coastal zone under section 307(c)(1). There were two substantive issues dealing with *direct effects*. The first issue under section 307(c)(1) was: When the Secretary determines whether a proposed lease sale on the OCS *directly affects* a state's coastal zone should the Secretary consider only the effects of the pre-leasing activities, or must he also consider the likely effects upon the coastal zone of exploration, development and production activities which may flow from any leases which are granted? The second issue was: Do the potential destruction of the tilefish and other fish habitats on the OCS, the potential interference with fishing nets and lines on the OCS, and the consequent financial injury inflicted on commercial activities conducted within the coastal zone fall within the meaning of *direct effects* in section 307(c)(1)?

The district court's answer to the first question was that the likely effects of the leases must be considered. It agreed with the Ninth Circuit Court of Appeals and quoted the opinion from *California v. Watt* extensively:

> I think the California District Court and the Ninth Circuit correctly concluded . . . that when the Secretary of the Interior determines . . . whether a proposed lease sale directly affects the state's coastal zone, he must consider all the likely effects upon the coastal zone of leasing, exploration, development and production activities. To do otherwise would render a Section 307(c)(1) review a nullity.[175]

Acknowledging that it must consider likely effects, the district court continued with its analysis.

On the second issue, the court concluded that impacts on fishing were not *direct effects* covered by section 307(c)(1). The court reasoned that these effects were mainly economic in nature and had no proven physical impact on the natural order within the coastal zone.[176] The tilefish habitat lay outside the coastal zone, and consequently most of the fishing took place outside the coastal zone. New Jersey argued that the coastal zone was *directly affected* since the fishing industry was headquartered within the coastal zone, and in addition that summer flounder, sea bass, and scup migrated between the OCS and the coastal zone. However, the state conceded that no one presently knew the direct biological impacts of oil and gas leasing on those particular species.[177]

Thus, the court found the only significant effect upon which the state could rely was the *financial impact* that the destruction of OCS fish and impediments to OCS fishing would have on the New Jersey fishing industry. The court found nothing in CZMA to suggest that it was concerned with the economic

---

[175] *Id.* at 1933.

[176] *Id.* at 1934-35.

[177] *Id.* at 1934.

health of a particular industry located within the coastal zone.[178] The court's principal reason for thinking that CZMA was meant to protect natural rather than economic resources was that section 304 limited the "coastal zone" to the "coastal waters within the territorial jurisdiction of the United States."[179] The court inexplicably gathered from this definition of the "coastal zone" that CZMA protected only natural resources such as wetlands, flood plains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife whose habitat was within the coastal zone.[180]

This was an improper reading of section 304, which was only intended to define "coastal resource of national significance."[181] The court should have paid more attention to the stated purposes of CZMA. In developing their management plans, the coastal states were encouraged to give "full consideration to ecological, cultural, historic, and aesthetic values *as well as to needs for economic development*. . . ."[182] Strangely enough, the court defended its narrow reading by claiming such was Congress' intent:

> The consequence of adopting New Jersey's construction of the Act would be an extraordinary extension of the Act's reach. If each Federal action affecting an industry conducted within the coastal zone were to be subjected to a consistency determination and had to be accomplished in a way which is, to the maximum extent practicable, consistent with the state management programs, all manner of Federal actions, not just those on the Outer Continental Shelf, would be subjected to the Act's rather severe inhibitions on Federal activities.[183]

It should be remembered that *Kean v. Watt* was only an oral opinion.

Even though the New Jersey court rejected the state's argument that *directly affecting* extended to economic effects even absent physical impacts, *California v. Watt*'s general holding that CZMA extended to the OCS was undisputed. In *Conservation Law Foundation v. Watt*,[184] a Massachusetts court, also dealing with OCS oil and gas lease sales, saw no reason to differentiate economic from physical effects. *Conservation Law Foundation v. Watt* held that not only ecological but also social and economic effects of a proposed agency action were in-

---

[178] *Id.* at 1935. The court noted a potential exception when the management of the physical resources of the coastal zone *itself* would adversely affect the economic health of an industry.

[179] *Id.* See also note 2 for the statutory definition of "coastal zone."

[180] Kean v. Watt, 18 ENV'T REP. CAS. (BNA) at 1935.

[181] The court opinion incorrectly cited "16 U.S.C. § 1453(a)." There is no such statute. The proper statute discussing coastal wetlands, beaches, dunes, barrier islands, reefs, estuaries, and fish and wildlife habitats is 16 U.S.C. § 1453(2) (1982) defining "coastal resource of national significance."

[182] 16 U.S.C. § 1452(2) (1982) (emphasis added).

[183] Kean v. Watt, 18 ENV'T REP. CAS. (BNA) at 1935.

[184] 560 F. Supp. 561 (D. Mass. 1983).

cluded within the scope of the Act.[185] The Massachusetts court respectfully disagreed with the New Jersey holding. Among its reasons was the explicit directive of CZMA to protect and preserve ecological, cultural, historic and aesthetic values as well as economic development. Such a divergence between the two courts seemed perfectly acceptable in light of the district court's call for case by case analyses based on specific situations.[186]

The Massachusetts district court cited a House report that said CZMA was meant to empower coastal states to protect, preserve, and where possible, enhance its resources. These include natural, commercial, recreational, industrial and aesthetic resources.[187] More importantly, the broad holding of *California v. Watt* upheld the state's voice in matters of critical decision-making.[188] Indeed, it seems rather ludicrous to agree with the *directly affecting* test in *California v. Watt* and then to limit it only to physical impacts on the coastal zone.

Once the full gales of *Secretary of the Interior v. California* have blown across this nation's courts, there may be little but chaff remaining of such cases as *Conservation Law Foundation*. *Conservation Law Foundation* leaves a little thatch of comfort to coastal states hoping that once they surmount the *directly affecting* plateau, they can hold federal agencies accountable to the state's CZMP under the strict standard of *maximum extent practicable.*

V. STRICT STANDARD EMBODIED BY *Maximum Extent Practicable*

Section 307(c)(1) requires federal activities *directly affecting* the coastal zone to be consistent to the *maximum extent practicable* with approved state management programs.[189] *California v. Watt* only addressed the *directly affecting* part of the test. *Directly affecting* can be viewed as a threshold test leading to a second inquiry: whether there exists consistency to the *maximum extent practicable.*

An early NOAA regulation interpreted *maximum extent practicable* as a rather lenient requirement. It allowed for "substantial consistency," (as opposed to "total consistency"), where unforeseen circumstances rendered total consistency impractical, due to cost or inconvenience, and where the burden on the agency outweighed the benefit to the state.[190]

---

[185] *Id.* at 575.

[186] Brown v. Watt, 520 F. Supp. at 1380.

[187] Conservation Law Foundation v. Watt, 560 F. Supp. at 575.

[188] *See* California v. Watt, 683 F.2d at 1260-61.

[189] 16 U.S.C. § 1456(c)(1) (1982). *See supra* text accompanying note 26.

[190] The regulation stated:

> [W]here circumstances unforeseen at the time of program approval make total consistency impractical in terms of either cost or inconvenience, and the benefit to the states from consistency is not more important than the cost or inconvenience to the federal agencies,

In 1979, this "practical" standard was substantially revised to the current, much stricter standard in a regulation requiring full consistency unless compliance is prohibited by existing laws applicable to the federal agency's operations.[191] Deviation from full consistency is only justified by unforeseen circumstances that present the federal agency with a substantial obstacle that prevents complete adherence. Presumably, the courts will give more deference to the current regulations than the previous regulations on *directly affecting* since NOAA has made no abrupt administrative turnabouts on the matter.[192]

The circuit court in *California v. Watt* vacated the portion of the district court opinion holding lease sales null and void because such a ruling would have to await a determination whether the leases were consistent to the *maximum extent practicable.*[193] The court noted that the state did not have an absolute veto.[194] Mediation procedures were still available under sections 307(c) and (h). The Secretary of Commerce could still allow the activity to commence if he found the activity necessary in the interests of national security. Furthermore, the Secretary of the Interior still had to make his consistency determination for Lease Sale 53, so it was premature to assume that the state would necessarily disagree that it reflected consistency with the state CZMP to the *maximum extent practicable.*

Conservation Law Foundation v. Watt is one of the few cases examining the stringent demands of consistency to the *maximum extent practicable.* Because courts reach this analysis only after passing the *directly affecting* threshold test, it may be relegated to the status of dicta in light of *Secretary of the Interior v. California.* In *Conservation Law Foundation v. Watt*, the court agreed with the state that the OCS leasing activities *directly affected* the state coastal zone.[195] The Secretary made a consistency determination, but the state disagreed that it was consistent to the *maximum extent practicable.* Massachusetts claimed that in order for there to be consistency, the Secretary would have to delete ninety-eight tracts from Lease Sale 52. The state also demanded that the Secretary extend

---

then merely "substantial consistency" as opposed to "total consistency" will satisfy Section 307(c)(1) and (2). . . .

Behr, *supra* note 81, at 39.

[191] The current regulation states:

The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations.

15 C.F.R. § 930.32(a) (1979).

[192] *See supra* notes 127-36 and accompanying text.

[193] *See* California v. Watt, 683 F.2d at 1265-66.

[194] *See* text following note 126.

[195] *See* text accompanying notes 184-88.

the Biological Task Force study to the entire sale area, and that he add supplemental language to the lease stipulations concerning the transport of hydrocarbons. The Secretary adopted most of these recommendations but decided to delete only forty-one of the ninety-eight suggested tracts.[196]

These actions satisfied the Secretary's obligations under OCSLA, but were insufficient for CZMA purposes. The Secretary claimed the leasing procedures would have actual consistency with the Massachusetts CZMP.[197] He pointed to the similar goals and requirements of the federal OCSLA and the state CZMP: minimizing possible adverse environmental effects, resolving use conflicts, and eliminating harm to coastal and marine environments. The Secretary said that in the future there would be opportunities for state review and consultation during the OCS development process. These included the licensing of pipelines and related facilities, local zoning regulation of support facilities for offshore development, and the ongoing monitoring of leasing activities. Further, the state could still exercise consistency review of any future offshore and onshore development.[198] It appears the Secretary presented no other evidence to support his finding of consistency.

Massachusetts claimed these promises were not enough. The court agreed. It said that the Secretary could not base a finding of consistency on similar aims and goals and the admittedly significant amount of state participation to come *in the future*. NOAA required that the consistency determination contain a detailed description of the activity, its associated facilities and their coastal zone effects, plus comprehensive data and information sufficient to support those statements.[199]

The court did not hold that the sale failed to be consistent to the *maximum extent practicable,* but held merely that the Secretary did not articulate a proper basis for his finding. However, the case still indicates a very high standard. The court relied heavily on the NOAA regulations.[200] The Secretary must demonstrate "national interest" or "unforeseen circumstances constituting a substantial obstacle" in order to justify not complying fully with the Massachusetts CZMP.

---

[196] Conservation Law Foundation v. Watt, 560 F. Supp. at 576.

[197] *Id.* at 577. *See* notes 190-91 and accompanying text for discussion of requirement of full consistency unless prohibited by existing law.

[198] Conservation Law Foundation v. Watt, 560 F. Supp. at 577.

[199] 15 C.F.R. § 930.39(a) (1983).

[200] Conservation Law Foundation v. Watt, 560 F. Supp. at 575-77, cited NOAA regulations contained in 15 C.F.R. § 930.34(b) (federal agencies are to provide a consistency determination at the earliest practicable time once there is sufficient information to reasonably determine consistency with the state CZMP; however, it must be before the federal agency reaches a significant point in decision-making), § 930.39(a) (the consistency determination must contain a detailed description of the activity, its associated facilities and their coastal zone effects, and detailed findings to support the claim of consistency), and § 930.32 (the proposed action must be fully consistent with the state CZMP unless prohibited by law).

One might conclude that once the *directly affecting* threshold test is passed, the state can hold federal agencies to a very high standard of compliance. However, cases like *Massachusetts v. Watt* have little precedential value after the Supreme Court's decision in *Secretary of the Interior v. California.*

VI. CONCLUSION

Can a spark still be struck that will provide some gleam of hope for the coastal states? It has been suggested that a more effective conflict resolution mechanism would lead toward more cooperative federalism.[201] One proposed solution is an ad-hoc five person OCS bargaining panel whose decisions would be subject to limited judicial review.[202] Given the stubborn manner in which each federal agency jealously clings to its own crag of authority, it seems doubtful that such a scheme would significantly increase the coastal states' impact on federal decision-making. Furthermore, the present NOAA regulations already provide for judicial review.[203]

Another suggested solution is that an entirely new statute should be developed to handle the environmental, social, economic and cultural problems linked with trying to extract mineral resources from the outer continental shelf.[204] The Outer Continental Shelf Lands Act itself stands merely as a one-dimensional tool for the exploitation of natural resources on the outer continental shelf under the jurisdiction of the federal government. Be that as it may, Congress will probably resist the erection of yet another environmental protection statute. Furthermore, there is no guarantee that the Supreme Court cannot gut the new law as easily as it has CZMA. Both the bargaining panel and the OCS resource management statute were suggested prior to *Secretary of the Interior v. California.*

From the method in which the Supreme Court framed its opinion in *Secretary of the Interior v. California*, it is clear that the chimeric creation of the courts, congressional intent, tipped the final balance against the states. Thus, the most effective and unequivocal manner for Congress to reassert the original role envisioned for the coastal states is through a legislative amendment to CZMA clarifying that the sale of leases *directly affects* the coastal zone. Now, it may be argued that such a remedy is merely a quick fix, rendering the Act too specific

---

[201] Mitchell, *Cooperative Federalism for the Coastal Zone and the Outer Continental Shelf: A Legislative Proposal*, 1983 B.Y.U. L. REV. 123 (1983).

[202] The proposed bargaining panel would consist of one representative each from the state coastal agency, the governor's executive office, the Department of the Interior, the Department of Commerce, and a developer. *Id.* at 145.

[203] 15 C.F.R. § 930.116 (1984).

[204] Sinclair, *Offshore Mineral Resource Exploitation: The State and Federal Response*, 1 N.Y. SEA GRANT L. & POL'Y J. 385, 411-12 (1976).

for unforeseen circumstances. And as a consequence, all future challenges would require legislative action.

This criticism is unfounded. First of all, such an amendment was already contemplated by earlier sessions of Congress, especially during debates over the 1976 and 1980 amendments. More importantly, it would serve to dispel the crabbed interpretation that the Supreme Court seeks to impose upon the CZMA. Given the liberality embodied in the earlier line of cases, it seems that the Act requires some affirmative action on the part of the Act's creators to set the praiseworthy vehicle of federal consistency back on track.[205]

When the Supreme Court reversed *California v. Watt*, it broadsided a trend that seemed headed toward giving CZMA the broadest construction possible. In doing so, it ignored the statutory purpose and the priority given to state participation by CZMA. By focusing on a narrow definition, the Court implied that federal consistency did not apply to activities outside the coastal zone.

The once bright prospects under CZMA have suddenly turned alarmingly bleak. Federal grants have decreased noticeably for the past few years. By unreasonably adopting a narrow interpretation of Congress' intentions for CZMA, the Supreme Court may have extinguished the only other reason for states to stay with CZMA. Frustration may lead the states to abandon CZMA and depend on their own state laws for enforcement of their CZMP's.

Dwight C.H. Lum

---

[205] In May of 1984, Sen. Robert Packwood (R-Ore), of the Senate Commerce, Science and Transportation Committee, introduced a bill (S. 2324) to amend the Coastal Zone Management Act to ensure that all federal actions, including leasing of OCS oil and gas exploration and development rights, are "fully consistent" with state CZMP's. On May 3, 1984, the House Merchant Marine and Fisheries Subcommittee on Oceanography approved a bill (H.R. 4589) that would require all federal agencies to make a consistency determination when their actions would "significantly affect" the three-mile zone off the coastal states. Both bills would have amended the *directly affecting* language of section 307(c)(1) [15 Current Developments] ENV'T REP. (BNA) 40 (May 11, 1984). Neither bill was passed before Congress adjourned on October 12, 1984. *Id.* at 1013 (Oct. 19, 1984).

The Senate bill will probably be re-introduced during the next session of Congress (99th Cong., 1st Sess.). The Act itself, however, is up for re-authorization in 1985. Given the Reagan Administration's hostile attitude toward CZMA, the Act's proponents face a strenuous battle just getting CZMA re-authorized. It may turn out that the consistency bill is sacrificed as a bargaining tool. Telephone interview with Peter Simon, Legislative Assistant to Sen. Daniel Inouye (Feb. 25, 1985).

Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty

I. INTRODUCTION

On October 14, 1982, the Supreme Court of Hawaii decided *County of Kauai v. Pacific Standard Life Insurance Co.*,[1] commonly referred to as *Nukolii*. The court held that a developer who had only obtained government permits and approvals for a proposed development had no vested right to develop. In *Nukolii*, the developer secured all necessary preliminary permits and approvals to begin construction of a large hotel-condominium project. Prior to the developer's securing of a final building permit, however, an environmental concerns group filed a referendum petition alleging that the county council improperly rezoned the land which encompassed the developer's property. Months after the developer commenced construction, the county council placed the referendum question on the 1980 general election ballot. Shortly thereafter, the general public voted to repeal the resort zoning ordinance which in effect halted construction.

The *Nukolii* decision stunned many developers.[2] They felt the court took an extremely harsh, anti-development stance by denying the *Nukolii* developers a vested right to continue their project. The developers expressed concern because

---

[1] County of Kauai v. Pacific Standard Life Ins. Co., 65 Hawaii 318, 653 P.2d 766 (1982), *cert. denied*, 460 U.S. 1077 (1983) [hereinafter cited as *Nukolii*]. The case is commonly referred to as *Nukolii* because the developer intended to build the project on Nukolii beach on the island of Kauai. See *infra* note 26 for a discussion of timing for vesting of rights when a petition for referendum circulates while the developer obtains various construction permits.

[2] Interview with Randolph G. Moore, Executive Vice President of Castle and Cooke, Inc. (February 14, 1984) [hereinafter cited as Moore Interview]; Interview with Harvey Goth, Executive Vice President, Blackfield, Hawaii, Inc. (March 26, 1984) [hereinafter cited as Goth Interview]. Both developers indicated that they thought the court would have resolved the *Nukolii* case by allowing the developer to continue his project. They were stunned because the court held that the developer could not complete his project after he had obtained all necessary approvals, complied with all preliminary permits, and expended substantial sums to reach the construction phase of the project.

of the court's inability to provide assurances for the developer.[3] The developers therefore looked to the legislative branch for assistance.

The development community drafted and submitted for introduction to the 1983 session of the Hawaii Legislature three vested rights bills.[4] Each bill attempted to delineate the time when a developer obtained a vested right to proceed with a project without subsequent governmental intervention. None of the bills survived review by the Senate Committee on Housing and Urban Development in 1983, primarily because of confusion concerning the *Nukolii* decision.[5]

Understanding the importance of vested rights legislation, the senate committee condensed and revised the bills between the 1983 and 1984 legislative

---

[3] The *Nukolii* decision was not the Hawaii Supreme Court's first attempt to resolve the issue of vested rights. Rather, *Nukolii* was the impetus which carried the development community over the boiling point in terms of waiting for the courts to resolve the problem. The court had previously attempted to resolve the issue in four cases: Life of the Land v. City Council of Honolulu, 61 Hawaii 390, 606 P.2d 866 (1980); Life of the Land v. City Council of Honolulu, 60 Hawaii 446, 592 P.2d 26 (1980); Allen v. City and County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977); Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971). In each of the cases the court consistently applied the same test. Specifically, the test provides that a local government exercising its zoning powers will be estopped from rezoning when a property owner: (1) relies in good faith, (2) upon some act or omission of the government, (3) and has made a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired. Unfortunately, this broad test failed to provide developers with any standards or guidelines for how to proceed with developments, and did not delineate a point in the development process the developer had to reach before the government was precluded from making subsequent zone changes.

[4] The three vested rights bills proposed by developers in 1983 included: (1) Senate Bill 639 entitled "A Bill For An Act Relating To Subdivisions" (this bill would have allowed a developer to continue with his project without being subject to subsequent zoning changes if the developer received preliminary or tentative approval of his subdivision, as defined in the applicable county ordinance. As proposed, the bill only applied to subdivision developers); (2) Senate Bill 642 entitled "A Bill For An Act Relating To Vested Rights" (this bill preceded the current bill. It would permit the county and developers to enter development agreements); and (3) Senate Bill 1081 entitled "Relating To Subdivisions" (this bill attempted to resolve the vesting issue by allowing a subdivision developer a five-year period to complete his project, ensuring no change in zoning or other governmental interference after approval of the developer's subdivision map).

[5] Letter from Lucy S. Ahn, Administrative Assistant for State Senator Patsy K. Young, to David L. Callies, Professor of Law, Richardson School of Law, University of Hawaii (September 30, 1983). Ms. Ahn's letter requested review and analysis of the three bills, Senate Bills 639, 642 and 1081, which had been introduced during the 1983 legislative session. In her request, she stated that the Senate Committee on Housing and Urban Development "held" the bills because of "confusion over the *Nukolii* decision." Although *Nukolii* was decided in October of 1982, the status of the case remained undetermined when the legislature convened in 1983 because of the developer's appeal. Besides the status of the appeal, the Senate Committee was unsure of the substance of the *Nukolii* decision itself. Specifically, the court did not set forth a test for when a developer's right to complete his project vested.

sessions.[6] When the legislature reconvened in 1984, the senate committee introduced the bill titled "Relating to Counties."[7] This Bill would allow developers and the relevant county to enter into contracts called development agreements. Through this contractual relationship with a county, developers receive assurances that they can proceed with their project without government intervention, provided that they comply with the terms of the agreement.

A similar scenario had unfolded in California in 1976 when the California Supreme Court decided *Avco Community Developers Inc. v. South Coast Regional Commission*.[8] The *Avco* case did not clearly set forth standards for when a developer's rights vest. As a result of the uncertainty created by the *Avco* decision, California developers urged the legislature to pass a development agreement bill similar to the Bill proposed in the Hawaii legislature. In 1979, the California legislature passed the development bill.[9] The success of the legislation remains uncertain. Few developers have entered into development agreements[10] and, to

---

[6] Interview with Lucy S. Ahn, Administrative Assistant for State Senator Patsy K. Young, Chairperson of the Senate Committee on Housing and Urban Development (January 25, 1984) [hereinafter cited as Ahn Interview]. Ms. Ahn explained that she reviewed the testimony elicited during the hearings on the three proposed vested rights bills (Senate Bills 639, 642 and 1081). She also gathered written opinion letters about the bills from developers, county officials, environmental concerns representatives and legal scholars. After reviewing these sources, she revised and condensed the bills for the 1984 legislative session.

[7] S.B. 1588, 13th Leg., Reg. Sess. (1984), entitled "Relating to Counties" [hereinafter cited as the Bill or Hawaii Bill]. The Bill is often referred to as the "development agreement bill."

[8] 17 Cal. 3d 385, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977) [hereinafter cited as *Avco*]. In *Avco*, the California Supreme Court held that a developer will not obtain a vested right to complete his project unless he performed *substantial work* and incurred *substantial liabilities* in *good faith* reliance upon a permit issued by the government. The developer in the *Avco* case spent over two million dollars and incurred liabilities of three-quarters of a million dollars in developing a subdivision in Orange County, California. The county had issued and approved a grading permit and the developer proceeded to subdivide and grade the property, constructing storm drains, culverts, street improvements, utilities and other infrastructure. The county, however, denied the developer's application for a building permit, stating that in order to comply with California's Coastal Zone Conservation Act of 1972, such a permit could not issue unless the developer had previously obtained a vested right to develop or had completed grading.

[9] CAL. GOV'T CODE, §§ 65864-65869.5 (West Supp. 1980) (A.B. 853, ch. 934, 1979 Cal. Stat. 3231) [hereinafter cited as the California Act]. For an analysis and review of the legislative history of these sections, see Holliman, *Development Agreements and Vested Rights in California*, 13 URBAN LAW. 44 (1981).

[10] Goth Interview, *supra* note 2. Mr. Goth explained that he had been a California developer for many years and still deals extensively in California. He stated that he knew about development agreements. He has, however, never entered or attempted to enter such an agreement; and he has not heard of any other California developers who have opted for such an arrangement. Mr. Goth surmised that the reason most developers have not entered into such agreements is because of the developers' unfamiliarity with and uncertainty about the California Act.

date, the law has not given rise to any judicial opinion construing such agreements.

This comment analyzes the language used in the Hawaii Bill and seeks to determine the effectiveness of development agreements in solving the vested rights issue. Because of similarities in the evolution of the California Act and the Hawaii Bill, this comment often compares the two. California and Hawaii are the only states which have attempted development agreement legislation. One other state, Illinois, enacted an annexation agreement statute which is analogous to development agreement legislation because it allows the local government to enter directly into contracts with developers.[11] This comment also discusses the Illinois statute and the cases arising under it to suggest possible arguments by analogy to challenge the Hawaii Bill. Furthermore, this comment discusses the possible legal issues surrounding development agreements and potential challenges to the Bill, if enacted. This comment will not present a comprehensive review of either case law or legal literature concerning vested rights.[12]

II. THE HAWAII BILL

A. *The Findings and Purpose Section*

The Hawaii Bill and the California Act contain nearly identical findings and purpose sections.[13] This section seeks to balance public and private interests and

---

[11] ILL. REV. STAT., ch. 24, §§ 11-15.1-1 to 11-15.1-5 (1963).

[12] *See* Tom, *Development Rights in Hawaii*, 6 U. HAWAII L. REV. 437 (1984). *See also* C. SIEMON, W. LARSEN & D. PORTER, VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS (1982); Callies, *Land Use: Herein of Vested Rights, Plans and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 167 (1979); Heeter, *Zoning Estoppel Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URBAN L. ANN. 63; Kudo, *Nukolii: Private Development Rights and the Public Interest*, 16 URBAN LAW. 279 (1984).

[13] *Compare* CAL. GOV'T CODE, § 65864 (West Supp. 1980) (A.B. 853, ch. 934, 1979 Cal. Stat. 3231):

> The Legislature finds and declares that:
>
> (a) The *lack of certainty* in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.
>
> (b) *Assurance to the applicant* for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development. (emphasis added).

with The Hawaii Bill *supra* note 7:

determine the stage in the complex development process where the private developer's interests should vest.[14] A developer's vested interest would be immunized from any subsequent prohibitory legislation. The section also mentions that developers in Hawaii currently face an increasingly complicated permit process for their projects. Steps required of developers today include: complying with land use laws, zoning ordinances and building codes, as well as securing advance financial commitments. This often requires the expenditure of substantial resources. In light of these burdens, the legislature concluded that the developers face a lack of certainty in the approval of development projects even after fulfilling conditions precedent and spending substantial sums of money. This results in a waste of resources, escalates the cost of housing and other development to the consumer, discourages investment and eviscerates commitment to comprehensive planning.

Senate Bill 1588-84. *Findings and purpose.* The legislature finds that with land use laws taking on refinements that make the development of land complex, time consuming, and requiring advance financial commitments, it is no simple matter for a developer to reach the actual construction state. The requirements of various land use laws such as those calling for environmental protection, coastal zone management, zoning ordinances and building codes, are strict and detailed so that even to make an application for a building permit involves the expenditure of considerable sums of money and, generally speaking, the larger the project contemplated, the greater the expenses and more time involved in complying with the conditions precedent to filing for a building permit.

The *lack of certainty* in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies as set forth in statutes, ordinances and rules and regulations, and, subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic cost of development.

At issue is the stage at which an individual's property rights vest and should be immunized from subsequently enacted prohibitory legislation. *A balance must be struck between the interests of the individual owner or developer* in seeking reasonable certainty as to the lawful requirements which must be met, *and the right and duty of the government* through land planning and the implementation of that planning to make, enact and establish reasonable laws as may be deemed to be in the public interest and for the health, safety and welfare of the people. The purpose of this Act is to provide a means by which an individual may be assured at a specific point in time that having met all existing requirements, his right to develop a property in a certain manner is vested (emphasis added).

[14] Neither the California Act nor the Hawaii Bill specifically defines a vested right. In the context of this paper, a vested right gives an owner or developer permission or allowance to proceed with a project without a possibility of revocation by a subsequent governmental act. For example, if a developer obtained a vested right to construct a six-story building, a subsequent zoning change could not force the developer to reduce his plans to a three-story building. *See* C. SIEMON, W. LARSEN & D. PORTER, *supra* note 12 at 12-13.

The findings and purpose section adequately identifies and defines the problems associated with vested rights. The section concentrates on the benefits to a developer of a contractual determination of when rights vest. It should also define a development agreement and emphasize the manner in which development agreements can benefit the community as a whole.[15]

B. *The General Authorization Section*

The Hawaii Bill enables any county, by ordinance, to authorize the county executive branch to enter into development agreements with developers.[16] Such an ordinance must establish the procedures and requirements which both the developer and the designated county agency must fulfill before a development agreement could be executed. This section sets forth the possible parties to a development agreement: (1) the county executive branch and (2) any developer or person with either a legal or equitable interest in real property. The general authorization section raises four points: (1) it *enables* local governments to enter development agreements; (2) it allows, by ordinance, delegation of the contracting power from the county solely to its executive branch; (3) it emphasizes distinctions between the counties within the state; and (4) it provides a mechanism for entering such agreements which differs from California's statute.

Both the Hawaii Bill and the California Act are enabling statutes;[17] they

---

[15] Instead of stating only that development agreements benefit the developer, by assuring him a right to continue with his project as long as he complies with the terms of the agreement, the findings and purpose section should state that development agreements provide local governments with a flexible means of promoting joint public and private financing of both municipal services and subdivision infrastructure, orderly development, and comprehensive planning. One point of significance to Hawaiian consumers would be the resulting decrease in housing costs with the elimination of the developer's economic risk of starting a project and then being forced to modify or abandon it. *See* Holliman, *supra* note 9, at 63-64. *See also* written testimony submitted by Kathryn Albu of Hawaii's Thousand Friends to the Senate Committee on Housing and Urban Development hearing on February 29, 1984.

[16] *See generally* the Hawaii Bill, *supra* note 7.

> *General Authorization.* Any county *may* by ordinance authorize the executive branch to enter into a development agreement with any person having a legal or equitable interest in real property, for the development of such property in accordance with this part; provided that such an ordinance shall establish procedures and requirements for the consideration of development agreements upon application by or on behalf of persons having a legal or equitable interest in the property, in accordance with this part. The ordinance shall designate a county executive agency to administer the agreements after such agreements become effective (emphasis added).

[17] *See* the Hawaii Bill, *supra* note 7, general authorization section which states, "Any county *may* by ordinance authorize. . . ." (emphasis added). *Compare* CAL. GOV'T CODE § 65865 (West Supp. 1980) which states, "Any city, county, or city and county, *may* enter into a development agreement. . . ." (emphasis added). Use of the term "may" indicates the enabling nature of the

authorize the executive branch to enter into development agreements. Due to the enabling character of the legislation, the county retains discretionary power.[18] Specifically, the county decides whether or not a development agreement should be entered. The state legislature, however, could ensure statewide consistency for small projects by determining which development projects could be the subject of a development agreement. The senate committee might consider drafting a set of minimal criteria required for a developer's project before it could be the subject of an agreement.

The general authorization section allows the county, by passing an ordinance, to authorize only the executive branch to enter a development agreement. The section could be broadened to include delegation to additional contracting authorities such as the State Land Use Commission and the Department of Land and Natural Resources.[19] Since these agencies deal with land regulations which affect private property development, they should be allowed input on the decision whether a development agreement is appropriate.[20]

Additionally, the general authorization section could create problems within the counties. In each of the counties in the State of Hawaii, the administrative or executive branch and the county council may not have the same goals. This could cause disagreement on both land use and planning matters.[21] As such, problems could appear in a county's attempt to adopt development agreement

---

state's delegation of power to the local governments.

[18] Opinion letter from David L. Callies to Lucy S. Ahn, Administrative Assistant for State Senator Patsy K. Young (October 12, 1983) [hereinafter cited as Callies Opinion Letter]. In his letter, Professor Callies discussed Hawaii's proposed vested rights legislation. Specifically, he pointed out that the Senate Committee's use of the term "may" created enabling legislation which meant that the county was not required to enter such agreements.

[19] *Id.*

[20] See D. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII at 7, 9 (1984), where the author sets forth the roles of the State Land Use Commission (LUC) and the State Department of Land and Natural Resources (DLNR) in regulating private property development. More specifically, Act 187, enacted in 1963, divided all land in Hawaii into four districts: urban, agricultural, rural and conservation. Since then, control over land use within each district has been as follows: (1) shared control over agricultural and rural districts has been split between state and local government agencies; (2) sole control over conservation districts has been by the state, through the DLNR; and (3) exclusive control over the urban district has been by county governments. Thus, because the LUC and DLNR have the power to regulate land use, their input with respect to development agreements may be desirable. If such state agencies were encompassed by the Bill to oversee development agreements, it would provide an additional competent reviewing body, a consistent review and a more efficient administration.

[21] Interview with Mike McElroy, Director of the Department of Land Utilization for the City and County of Honolulu (March 28, 1984). Mr. McElroy mentioned that all of the counties might not benefit from development agreement legislation. He suggested that requiring both the executive and the county council to agree on whether or not to enter into a development agreement may substantially hinder the effectiveness of the bill because the land use and planning goals of the two branches of government may not always be congruent.

ordinances; the general authorization section requires the council to adopt the ordinance and then calls for executive branch approval. Thus, if the two branches had conflicting opinions over a development project, one branch could prevent the execution of a development agreement.

Finally, the general authorization section requires the county to pass an ordinance in order to authorize the executive branch to enter into development agreements.[22] On the contrary, the California Act allows the county to pass either an ordinance or a resolution to authorize development agreement execution by the executive branch.[23] The distinction is significant because passage of a resolution giving authorization to the executive branch gives the executive no ability to veto the agreement.[24] Hawaii's Bill is therefore less susceptible to constitutional challenge.

C. *The Negotiating Development Agreements Section*

The 1984 rendition of the Hawaii Bill contains a new section titled "Negotiating Development Agreements."[25] This section has no California counterpart. As drafted, it permits either the mayor or the county executive agency to negotiate with a developer and create preliminary drafts of agreements. It then provides for review by the county legislative body and requires approval of the agreement's final draft by a majority of the council's membership. After ap-

---

[22] *See* the Hawaii Bill, *supra* note 7, general authorization section, which states, "Any county may by *ordinance* authorize the executive branch to enter into a development agreement. . . ." (emphasis added).

[23] *See* CAL. GOV'T CODE § 65865 (West Supp. 1980), which states, "Every city, county or city and county, may, by *resolution or ordinance*, establish procedures and requirements for the consideration of development agreements. . . ."(emphasis added).

[24] *See* O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW § 61 (1982), which states in part:

> What if, for instance, the city council attempts to avoid the mayor's power to veto an ordinance (which he has in many communities) by enacting a "resolution"?
>
> . . . Three main distinctions between "ordinances" and "resolutions" have been noted. (1) An ordinance is an act of legislation, while a resolution is a mere expression of the sense or will of the local legislative body. . . . (2) An ordinance usually prescribes a continuing rule or restriction, while a resolution more often is utilized to deal with a temporary matter. . . . (3) Ordinances deal mostly with legislative matters, while resolutions concern matters of administrative detail or of a ministerial nature.

Id. at 181-82 (footnotes omitted).

[25] *See* the Hawaii Bill, *supra* note 7, which provides:

> §46- *Negotiating Development Agreements.* The mayor or the county executive agency designated to administer development agreements may make such arrangements as may be necessary or proper to enter into development agreements, including negotiating and drafting individual development agreements; provided that the county has adopted an ordinance under General Authorization Section.

proval, the council submits the agreement for execution by the mayor on behalf of the county.

The negotiation section does not resolve two issues. First, it does not state which governing agency will implement and administer development agreements. Second, the section fails to state whether development agreements are subject to the power of referendum.

The first issue involves basic procedural problems. Assuming a development agreement is approved and signed, the Bill specifies no particular avenue of appeal if the government subsequently intervenes or the developer cannot comply with the terms of the agreement. The Bill should explicitly delineate the agency to administer the development agreements, and include the procedure the agency and the developer must follow if questions about the development agreements arise.

Furthermore, the Hawaii Bill omits any declaration that development agreements are legislative acts and are therefore subject to referendum. This omission is particularly suspect because the *Nukolii* decision, which was largely responsible for the birth of vested rights legislation, arose solely in response to a referendum.[26] Thus, the Hawaii Bill should specifically cover the applicability of referenda to development agreements.[27]

D. *The Periodic Review Section*

After approval of the development agreement, the periodic review section requires that the county executive agency review the developer's project at least every eighteen months.[28] Where the executive agency determines, by substantial

---

[26] *See Nukolii*, 65 Hawaii at 320, 653 P.2d at 769, where the court noted that the issue was to determine the effect of a county referendum nullifying a zoning ordinance that had authorized resort development. Timing of referenda procedures was critical: the petition drive for the referendum and the *certification* of the petition occurred prior to the issuance of a government building permit, but the election defeating the zoning ordinance occurred after the issuance of a valid building permit. The *act of certifying* the petition for referendum precluded any vesting of a right to build in a subsequently issued building permit. *Id.* at 339, 653 P.2d at 781.

[27] *See Moore*, *supra* note 2. In order for development agreement legislation to be successful, it is imperative that a developer who complies with the terms of the agreement be allowed to continue his project uninterrupted. Therefore, subsequent to the execution of the agreement, the Bill should not allow the public to intervene with its power of referendum. On the other hand, however, the public should be allowed to use its voting power initially to determine whether or not to execute a development agreement for any given project.

[28] *See generally*, the Hawaii Bill, *supra* note 7, periodic review section, which states:

> §46- *Periodic Review.* (a) Procedures and requirements established pursuant to the Negotiating Development Agreements section shall include provisions requiring periodic review at least every eighteen months, at which time the applicant, or successor in interest shall be required to demonstrate good faith compliance with the terms of the agreement.

evidence, that a developer has not complied in good faith with the terms of the agreement, the executive agency can terminate or modify the agreement using a resolution which must be adopted by a majority of the members of the county legislative body. Where the executive agency finds that the developer has not complied with the terms of the agreement, it must give notice of its findings and determinations within fifteen days of such a review and specify with reasonable particularity the evidence supporting such a finding and determination. The section states that no termination or modification of the agreement can be made until the developer has had an opportunity to rebut the findings and determination.

The Hawaii Bill contains much more thorough and detailed language than its California counterpart.[29] A reader, while exploring the differences between the Hawaii Bill and the California Act, would note three possible problems with the Hawaii Bill: (1) the standard of proof which the executive agency must apply; (2) the necessity of the notice requirement and the developer's opportunity to rebut; and (3) the proper review period.

First, the Hawaii Bill and the California Act establish different standards for review by the executive agency. The Hawaii Bill indicates that the executive agency can terminate or modify a development agreement where the developer fails to comply in *good faith* with the terms of that agreement. By comparison, the California Act specifies that when a developer fails to comply, the local

---

If, as a result of such periodic review, the county executive agency finds and determines, on the basis of substantial evidence, that the applicant or the applicant's successor in interest has not complied in good faith with the terms or conditions of the agreement, the county legislative body by resolution adopted by a majority of the membership of the county legislative body, may terminate or modify the agreement.

Such finding and determination shall be made within fifteen days after the periodic review and shall be made and delivered to the applicant or the applicant's successor in interest, in writing, setting forth with reasonable particularity the evidence supporting such finding and determination that the applicant or applicant's successor in interest, has not complied in good faith with terms or conditions of the agreement.

(b) No termination or modification of the agreement shall be made by the local legislative body on the basis of the finding and determination made by the local executive agency until the applicant or the applicant's successor in interest shall first be given the opportunity to rebut the finding and determination that the agreement should be terminated, or to modify the agreement in order to meet the concerns of the local executive agency with respect to the agency's finding and determination.

[29] *See* CAL. GOV'T CODE § 65865 (West Supp. 1980), which provides:

Any city, county, or city and county, may enter into a development agreement with any person having a legal or equitable interest in real property for the development of such property as provided in this article. Every city, county, or city and county, may, by resolution or ordinance, establish procedures and requirements for the consideration of development agreements upon application by, or on behalf of, the property owner or other person having a legal or equitable interest in the property.

executive agency may terminate or modify the agreement. Thus, the California Act appears to allow the reviewing agency the discretion to determine the standard for reviewing the developer's project. It appears to favor the interest of the government because the reviewing body can intervene at its own discretion. In contrast, the Hawaii Bill may create tension between the government and the developer.

Specifically, the Bill would encourage litigation because it does not define the term *good faith*.[30] To resolve potential good faith questions, and therefore avoid litigation, the Bill should set forth minimal conditions with which a developer must comply before asserting good faith. Such conditions could include a developer's expected degree of completion in his project before the time for review occurs. It should also allow provisions to estimate effects of variables such as strikes, drastic market changes or acts of God which would impair the developer's ability to reach a particular phase in his project.

Additionally, while the Hawaii Bill requires the executive agency to give the developer written notice and an opportunity to rebut its findings and determinations before modifying or terminating the agreement, the California Act omits any requirement of notice or opportunity to rebut agency findings prior to such termination or modification. The California Act favors the governmental interest by basing the termination or modification of an agreement solely on a single review by one government agency. Both developers and county officials in Hawaii agree that written notice and an opportunity to rebut are essential to the success of the periodic review section.[31] Moreover, they both agree that the Bill should set forth an appeal procedure in the event that the developer's rebuttal attempts fail.

Finally, the Hawaii Bill requires periodic review at a minimum of every eighteen months, compared to California's twelve month requirement. Both review periods are arbitrary. Different projects would require different review periods because of their size, complexity and location. Both developers and county

---

[30] Goth Interview and Moore Interview, *supra* note 2. Both Mr. Goth and Mr. Moore stated that terms such as "good faith" cause problems when they are used in legislation. Mr. Moore pointed out that whether a developer has complied in good faith is generally a question of fact. He continued that without some guidelines establishing what is meant by "good faith," developers and the county would not be able to interpret the language of the statute, forcing the parties to litigate the issue in court.

[31] Ahn Interview, *supra* note 2. Ms. Ahn stated that after reviewing the testimony submitted by all those who attended the Senate Committee on Housing and Urban Development Committee hearing on February 29, 1984, she began to redraft the bill. She conferred with Mr. Mike McElroy, Director of the Department of Land Utilization for the City and County of Honolulu and Mr. Harvey Goth, a Hawaii developer with extensive dealings in California. She stated that both Mr. McElroy and Mr. Goth generally agreed that the periodic review section was important. Specifically, they felt that the notice requirement and the developers' opportunity to rebut the findings were essential in balancing the governmental and developers' interests.

officials agree that the Bill should require a set time for review in each development agreement, which length is decided on a case by case basis.[32] The Hawaii Bill clearly allows such a case by case determination; it merely designates the longest time that can pass before review.

E. *The Development Agreement Provisions Section*

The Hawaii Bill and the California Act contain provisions sections which set forth the terms and conditions of development agreements.[33] The sections di-

---

[32] *Id.* Both Mr. McElroy and Mr. Goth agreed that review periods could be incorporated in the agreement itself, so that the established time for review could be adjusted to different projects. They felt that it was unnecessary and improper to have a review period at the same intervals for each project, given that the size and scope of each project will differ.

[33] *Compare* the Hawaii Bill, *supra* note 7, development agreement provisions section (emphasis supplied):

> *Development agreement; provisions.* (a) A development agreement shall:
>
> (1) Describe the land subject to the development agreement;
>
> (2) Specify the duration of the agreement;
>
> (3) Specify the permitted uses of the property relating to the density or intensity of use, the maximum height and size of proposed buildings; and
>
> (4) Provide, *where appropriate*, for reservation or dedication of land for public purposes as may be permitted pursuant to laws, ordinances, resolutions, rules, regulations, or policies in effect at the time of entering into the agreement.
>
> (b) The agreement *may provide* that construction shall be commenced within a specified time and that the project or any phase thereof be completed within a specified time; provided that such time limitations as may be set forth in the agreement may be extended at the discretion of the county legislative body at the request of the applicant or the applicant's successor in interest upon good cause shown.
>
> (c) The development agreement also *may provide* that the county shall change zoning classifications and amend land use ordinance texts within a specified time or times; provided that such time limitations as may be set forth in the agreement may be extended at the discretion of the applicant or the applicant's successor in interest at the request of the county legislative body upon good cause shown subject to subsection (e).
>
> (d) The development agreement also may cover zoning, subdivision approval and exactions, utility requirements, tap-on and connection charges, and the extent and timing of public utility service, as well as other things.
>
> (e) A development agreement, regardless of whether extensions have been given, or amendments or modifications have been made, shall be invalid ten years after the individual agreement's initial effective date. This subsection shall not preclude the parties to an expired development agreement from entering subsequent development agreements (emphasis added).

with CAL. GOV'T CODE § 65865.2 (West Supp. 1980):

> A development agreement shall specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes. The development agreement may include conditions, terms, restrictions, and re-

vide into two groups: "essential" terms and conditions, meaning that without these terms the agreement would be void; and "non-essential" terms and conditions. The section requires that each development agreement contain three essential terms: (1) a description of the land; (2) the duration of the agreement; and (3) the permitted uses of the property.

The provisions section also lists non-essential or optional terms and conditions. When initially drafted, the Hawaii Bill omitted many possible non-essential terms that development agreements could incorporate. Three subsections, however, now provide nearly all possible terms that development agreements might embrace.[34] For example, one subsection states that the development agreements may cover zoning, subdivision exactions and approval, tap-on and connection charges, utility requirements and the extent and timing of public utility services.

The legislature should reinforce a demand for comprehensive agreements by including language suggesting that the county and the developer incorporate as many non-essential terms and conditions into their agreements as possible. If the parties include as many terms as possible, it would avoid misunderstandings and prevent breached expectations, therefore limiting reneging on the part of either party to the agreement.[35]

The provisions section also provides a maximum time limit of ten years for a valid development agreement.[36] As initially drafted, the Hawaii Bill did not contain a maximum year limitation. Upon revision, the legislature included an arbitrary ten-year period when an agreement would expire. Through this time limit, the legislature sought to protect the police power of the state.[37]

In spite of the ten year limitation of a development agreement's efficacy, the Bill allows the parties to enter a new contract. It states: "This section shall not preclude the parties to an expired development agreement from entering a sub-

---

quirements for subsequent discretionary actions, provided that such conditions, terms, restrictions, and requirements for subsequent discretionary actions shall not prevent development of the land for the uses and to the density or intensity of development set forth in the agreement. The agreement may provide that construction shall be commenced within a specified time and that the project or any phase thereof be completed within a specified time.

[34] *See* Hawaii Bill, *supra* note 33, at subsections (a)(4), (b), and (c).

[35] Callies Opinion Letter, *supra* note 17, at 2.

[36] *See* Hawaii Bill, *supra* note 33, at subsection (e).

[37] State police power exists to protect public safety, health, morals, or general welfare. "The police power, to the extent it resides in municipal governments, is delegated from the state; and most 'police power matters' are considered of statewide concern." O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW § 39 at 107 (1982). Therefore, the legislature intended only to allow a county to delegate its police power in development agreements for a maximum duration of ten years.

sequent development agreement."[38] The language could also state that upon expiration of an agreement, if the developer had complied with the terms of that agreement, he should be entitled to an agreement with similar terms without any subsequent governmental changes.[39] This would protect the large-scale developer, whose project would need more than ten years to complete, from subsequent government actions being applied to the project when the agreement expires. It would also preserve the terms of the previous agreement, thereby preventing the government from substantially changing the terms midway through the construction of the project.

F. *The Enforceability and Applicability Sections*

The Hawaii Bill contains separate sections on the enforceability and the applicability of development agreements.[40] Together, they are the heart of the

---

[38] *See* Hawaii Bill, *supra* note 33, at subsection (e).

[39] Goth Interview, *supra* note 2. Mr. Goth was opposed to parts of the bill which implied that the county had the discretion to alter, amend or terminate an agreement. He specifically stated that the maximum ten-year expiration period would probably cause problems. Because many large developments take longer than ten years to complete, he felt that when reapplying for a subsequent agreement, the county could change any laws, ordinances, regulations and adversely affect construction of the project.

[40] Hawaii Bill, *supra* note 7, enforceability and applicability sections:

§46- *Enforceability*. Unless terminated pursuant to section 46- or unless cancelled pursuant to section 46- , a development agreement or amended development agreement, once entered into, shall be *enforceable by any party thereto*, or their successor in interest, *notwithstanding any subsequent change* in any applicable general plan or other laws adopted by the State, or any general plan, development plan, zoning, subdivision, or building rules or regulations adopted by any county entering into such agreement, which alter or amend the laws, ordinances, resolutions, rules, regulations, or policies specified in this part; *provided that the county may impose* conditions or requirements *upon the issuance of a building permit* or equivalent permit which could have been lawfully imposed as a condition to the final approval if the county finds it necessary to impose the condition or requirement because a failure to do *so would place the residents of the subdivision* or of the immediate community, or both, *in a condition perilous to their health or safety*, or both.

§46- *Applicability*. All laws, ordinances, resolutions, rules, regulations, and policies governing permitted uses of the land that is the subject of the development agreement, including but not limited to density, design, height, size, and built of proposed buildings, construction standards and specifications, and water utilization requirements applicable to the development of the property subject to a development agreement, shall be those laws, ordinances, resolutions, rules, regulations, and policies in force at the time of execution of the agreement. *A development agreement shall not prevent a county from requiring the applicant, or successor in interest, from complying with laws*, ordinances, resolutions, rules, regulations, and policies of general applicability *enacted subsequent to the date of the development agreement* if they could have been applied to the property which is the subject of the development agreement had it not been for the agreement, if they are *necessary to and also*

Bill. They set forth a standard for when the administering body can change terms of an executed agreement. The two sections are analyzed together because of both their similarities and their conflicting standards for allowing intervention.

The sections in both the California Act and the Hawaii Bill start with the basic premise that once a developer enters a development agreement, he has a vested right to continue his project notwithstanding subsequent changes in land use plans, regulations and zoning. The California Act does not explicitly permit any intervention by the administering body once the parties finalize a development agreement.[41] It does, however, imply by omission that the state could intervene if necessary. In stark contrast, the Hawaii Bill allows the county administering body to intervene and impose subsequent conditions or make changes if the failure to do so would place the residents of a community in a condition *perilous to their health and safety*. The provision was inserted to protect the police power delegated to the county. A similar provision also exists in the applicability section. It obligates the developer to comply with all laws and ordinances regulating land use which exist at the time he enters the agreement. Additionally, it allows the county to enforce laws enacted subsequent to the execution of the development agreement when such laws are *necessary to and also directly protect public health and safety*.

As drafted, the *perilous* standard used in the enforceability section is much more stringent than the *directly protect* criterion in the applicability section. The two sections should merge, using only the stricter perilous standard.[42] One purpose of the Bill is to give some certainty to the developer when his rights to proceed with his project vest. Because the government had previously used its police power to intervene in a development, developers had uncertainty recognizing when their rights vest. This quandary is particularly pronounced when a county is empowered to exercise its police power to protect the health and safety of the public. The applicability section seems to maintain this unpredictable standard with its *directly protect* terminology. This language offers a developer no benefit in entering a development agreement and may really be a threat,

---

directly protect public health or safety, or both (emphasis added).

[41] *See* CAL. GOV'T CODE § 65865.4 (West Supp. 1980):

> Unless amended or canceled pursuant to Section 65868, a development agreement shall be *enforceable by any party thereto* notwithstanding any change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the city, county, or city and county entering such agreement, which alters or amends the rules, regulations or policies specified in Section 65866 (emphasis added).

[42] Moore Interview, *supra* note 2. Mr. Moore indicated that he saw no reason why the applicability and enforceability sections were written independently. He was in favor of having the two sections be put together and the standard heightened to the "perilous" language used in the enforceability section.

depending on its construction. Therefore, in order to give substance to the Bill, the standard of the applicability section should be heightened to the *perilous* language. The *perilous* measure would protect the community while giving substance to the development agreement.

These sections have created one additional problem: Whether or not the process of entering development agreements supersedes or merely supplements the currently existing land use processes.[43] Despite much confusion, the Bill is clear that the two processes coexist.[44] Specifically, the developer must still go through the process of securing government approvals, permits, etc. The development agreement process merely provides that subsequent changes in zoning and land use laws will not adversely affect the developer as long as he complies with the terms of the agreement.

G. *Additional Provisions of the Bill*

The Hawaii Bill also contains four self-explanatory sections. These include provisions insisting on a public hearing before a county may enter or amend a development agreement, requiring consistency of a development agreement with the county's general plan and development plan, allowing cancellation of a development agreement by mutual consent, and requiring filing of the development agreement in the appropriate office to ensure notice of interests in property.[45] These sections have posed no problems for the drafters of the Bill.

---

[43] Written testimony submitted by various interest groups to the Senate Committee on Housing and Urban Development for its hearing on February 29, 1984, indicated a concern and confusion over the issue. For example, testimony submitted by the League of Women Voters stated, "We opposed this bill because developers would not have to show that they spent time or money needed to make detailed plans and specifications and go through the usual steps of the permit process."

[44] Hawaii Bill, *supra* note 33. It states that the laws, ordinances, resolutions and policies applicable to the developer are those which exist at the time he enters the development agreement. Furthermore, changes in laws affecting the developer's property can be applied to him if they are consistent and do not adversely affect him.

[45] Hawaii Bill, *supra* note 7:

> §46- *Public Hearing.* No development agreement shall be entered into unless a public hearing on the application therefor first shall have been held by the county legislative body.
>
> §46- *County general plan and development plans.* No development agreement shall be entered into unless the county legislative body finds that the provisions of the proposed development agreement are consistent with the county's general plan and any applicable development plan, effective as of the effective date of the development agreement.
>
> §46- *Amendment or Cancellation.* A development agreement may be amended, or canceled, in whole or in part, by mutual consent of the parties to the agreement, or their successors in interest; provided that the county legislative body consents to such amendment or cancellation in and by way of a resolution adopted by a majority of the member-

III. POSSIBLE CHALLENGES TO THE DEVELOPMENT AGREEMENT LEGISLATION

The previous section analyzed the Hawaii Bill in terms of balancing the interests of the government against those of the developer. It demonstrates possible weaknesses in the language of the Bill and points to areas of potential litigation. This section sets forth a possible challenge to the Bill as a whole. Specifically, the Bill may be challenged as contracting away the government's police power.

To date, the California Act has not faced such a constitutional challenge. With no case law directly on point with the proposed challenge, one can only speculate on the outcome of such a challenge. One commentator, William Holliman,[46] a California land use law expert, had anticipated this challenge to the California Act.[47] He concluded that the development agreements would be upheld as valid and reasonable contracts against subsequent governmental acts based upon police power. In order to arrive at his conclusion, Mr. Holliman analyzed cases involving California annexation agreements[48] and redevelopment and housing authority agreements[49] where the local government contracted with landowners. It must be pointed out that these cases only provide an argument by analogy. Annexation, redevelopment and housing authority agreements are not the same as development agreements. However, they are similar as contracts between local governments and private landowners. Therefore, cases cited by Mr. Holliman which upheld contracts between local governments and private

---

ship of the legislative body; provided further that if the county legislative body, by majority vote, determines that a proposed amendment would substantially alter the original development agreement, a public hearing on the amendment shall be held by the legislative body before the county legislative body consents to the proposed amendment.

§46- *Filing or recordation.* No later than twenty days after a county enters into a development agreement, the clerk of the legislative body thereof shall file or record a copy of the development agreement in the office of the assistant registrar of the land court of the State of Hawaii or in the bureau of conveyances, or both, whichever is appropriate. The burdens of the agreement shall be binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement.

[46] The author is William G. Holliman, Jr. of McDonough, Holland and Allen, Sacramento and Newport Beach, California; A.B., M.C., University of California; J.D., University of San Francisco School of Law.

[47] Holliman, *supra* note 9, at 49-58. Mr. Holliman asserted that a development agreement will be considered a contract. After analyzing and comparing two United States Supreme Court cases, United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1 (1977), *reh. denied*, 431 U.S. 975 and Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), Mr. Holliman concluded that they stood for the proposition that the contract and police power clauses of the constitution coexist, and to determine which prevails where a public contract is involved depends on the balancing of the impairment of contract against the need for police power.

[48] Holliman, *supra* note 9, at 59.

[49] *Id.* at 56.

landowners, despite challenges that the government contracted away its police power, provide persuasive authority for Hawaii courts to follow in the face of such a challenge.

Similarly, Illinois annexation agreement statutes which permit municipalities to enter contracts with developers have survived the same constitutional challenges.[50] By analogy, it would appear that the Hawaii Bill would be upheld if confronted by a constitutional challenge that the government had contracted away its police power. The Hawaii Bill's development agreement limitation of ten years additionally limits the county's ability to contract away its police power.[51]

IV. CONCLUSION

Development agreements work to benefit the entire community. Where they aim to protect developers from unfair applications of our land use laws, they also promote comprehensive planning and ensure orderly growth. However, their use is not without some risk. The agreements must not become a vehicle for evading or subverting the currently existing planning and land use process.

The concept of giving a developer assurance to continue with his project without subsequent unfair county intervention is fundamentally sound. Both the county and developers recognize the compelling value of this theory. However, the county is apprehensive and uncertain about the mechanics of the Bill once enacted. Its trepidation is based on the lack of precedent, lack of information and innate aversion to risk. Developers, on the other hand, readily advocate enactment of the legislation. The developers strongly support the Bill because they are looking for answers to the perplexing question of when their development rights vest. They are anxious for solutions to this question because the courts have not rendered a sufficiently definite answer.

With the county and developers at odds regarding their desire for the passage of the Bill, it will undoubtedly be left to the legislature to draft the Bill in a manner to assure effective development agreements for both sides. One stumbling block that will have to be cleared before the Bill can be enacted is the issue of whether the development agreement legislation would supersede currently existing planning and land use processes. Both the government represent-

---

[50] Meegan v. Village of Tinley Park, 52 Ill. 2d 354, 288 N.E.2d 423 (1972) (upheld Illinois Annexation Agreements as a valid contract against subsequent exercises of police power). *See* Brodner v. City of Elgin, 96 Ill. App. 3d 224, 420 N.E.2d 1176 (1981); Contemporary Music Group, Inc. v. Chicago Park Dist., 511 Ill. App. 3d 182, 372 N.E.2d 982 (1978); and Tri-County Landfill Co. v. Illinois Pollution Control Bd., 41 Ill. App. 3d 299, 353 N.E.2d 316 (1976).

[51] *See supra* notes 36-39 and accompanying text.

atives and developers who have testified at various senate committee hearings conveyed a misconception about this superseding issue. Indeed, it appeared that many who testified to oppose the Bill believed that the current process would be cut short by development agreements.

It must be assured that current planning and land use processes will not be superseded. Rather, the proposed legislation intends the integration of development agreements with the current process. Developers must still apply for and receive traditional approvals. However, once a developer receives such ratification and complies with the terms of the agreement the government can not obliterate the developer's right to continue. This will ensure both orderly growth in the community and good faith reliance on government procedures.

If Hawaii's legislature enacts the Bill it would become the second state in the nation to use development agreement legislation to guide developers in knowing when their development rights had vested. It is difficult to predict the success of development agreements in accomplishing this vesting of rights. Since the California Act remains unchallenged, one can only anticipate possible problems and challenges to the Hawaii Bill. Regardless of such potential problems, development legislation should relieve some of the uncertainty that currently faces developers.

Lyle S. Hosoda

First Insurance v. International Harvester: Government Liability for Negligent Issuance of Drivers' Licenses

I. INTRODUCTION

The Hawaii Supreme Court, in *First Insurance Co. of Hawaii v. International Harvester Co.*,[1] decided the question of whether the City and County of Honolulu was liable in contribution for damages arising from its negligent licensing of a truck driver. The resolution of this issue depended on an analysis of two sub-issues: whether a court could hold the city liable in the first place;[2] and, more importantly, whether the city owed and breached a duty to the injured parties in this particular case.[3] The Hawaii Supreme Court answered both ques-

---

[1] 66 Hawaii 185, 659 P.2d 64 (1983) (*First Insurance*).

The Hawaii Supreme Court handed down a per curiam opinion in this case. Considering the importance and future consequences of the decision, attorneys and students might have been better served if one of the justices had penned the opinion himself.

One possible explanation for the per curiam opinion is that Justice Nakamura was the only presiding member of the court who took part in the decision. Retired Justices Ogata and Menor were temporarily assigned, and Circuit Judge Acoba sat in place of Justice Lum, who disqualified himself. Chief Justice Richardson, who heard oral arguments, retired before the court rendered the opinion. *Id.* at 185, 659 P.2d at 66.

[2] *Id.* at 188, 659 P.2d at 67. This sub-issue dealt with the general question of governmental immunity. *See infra* text accompanying notes 17-23.

[3] 66 Hawaii at 188-92, 659 P.2d at 67-69. The Hawaii Supreme Court also determined that the trial court did not err in excluding certain evidence at trial.

First, the City and County of Honolulu attempted to introduce deposition testimony of Derwyn M. Severy, Hartford Insurance Group's expert, concerning a "belt disruption monitor system" that supposedly would have alerted the driver of the truck that the air brakes were malfunctioning. The circuit court excluded the evidence. Severy himself admitted that he was unaware whether such a system was in actual use. The Hawaii Supreme Court found "no abuse of discretion in the trial court's rejection of the foregoing evidence on grounds that a proper foundation for its introduction was lacking." *Id.* at 192, 659 P.2d at 69. *See* Friedrich v. Department of Transportation, 60 Hawaii 32, 38, 586 P.2d 1037, 1041 (1978).

Second, the city tried to introduce deposition testimony from another expert, Tolerton Vaughn,

tions affirmatively and held that there was a legal basis for compelling the city to contribute to Hartford Insurance Group, the insurer, amounts commensurate with the city's liability.[4]

This note examines the Hawaii Supreme Court's analysis of government tort liability as it relates to negligence in the motor vehicle drivers' licensing process.[5] This note also analyzes the impact the decision has and will continue to have on such licensing procedures.

II. Facts of the Case

On August 3, 1971, Anthony Tekare, a truck driver employed by Oahu Turf and Sprinkler Company, drove a heavy truck-trailer combination on Likelike Highway, from the Koolau mountains toward Honolulu.[6] After clearing the Wilson Tunnel, the brakes on the rig failed, and Tekare could not control or stop the truck-trailer combination.[7] The rig crashed into an automobile driven by Frances Thomas, resulting in fatalities and serious injuries.[8]

Several lawsuits against Oahu Turf and Sprinkler Company, the owner of the

---

pertaining to "how a human error in handling the air brakes of the truck could not have caused a loss of air sufficient to result in a negative effect on the braking of the truck." The Hawaii Supreme Court affirmed the trial court's exclusion since the record did not prove an operational braking system. 66 Hawaii at 193, 659 P.2d at 69.

Third, the city objected to the trial court's exclusion of Vaughn's opinion that "the accident would not have occurred had the emergency valve been operating." The Hawaii Supreme Court held that the evidence was speculative and would have invaded the "jury's province." *Id.* at 193, 659 P.2d at 70. *See* Friedrich v. Department of Transportation, 60 Hawaii at 38, 586 P.2d at 1041; Bachran v. Morishige, 52 Hawaii 61, 67, 469 P.2d 808, 812 (1970).

[4] The contribution suits were tried before a jury in the First Circuit Court. The jury determined that the city and county was responsible for 50% of the amounts Hartford Insurance Group expended in its settlement of the suit against Hawaiian Equipment Company, its insured. 66 Hawaii at 188, 659 P.2d at 67. Since Hartford paid $110,230.69 in the settlement, the city was liable for one half that amount, or $55,115.35. *Id.* at 188 n.1, 659 P.2d at 67 n.1.

[5] This case deals with the initial issuance of a driver's license, as opposed to the revocation, suspension, or renewal of an already-granted license. However, the bulk of the cases decided in other jurisdictions involves the state's failure to revoke or its negligence in renewing a driver's license. *See generally infra* text accompanying notes 73-100.

[6] Oahu Turf and Sprinkler Company owned the truck that was manufactured by International Harvester Company. Oahu Turf leased the trailer from Hawaiian Equipment Company. Koolau Nursery and Landscaping Company and Oahu Turf agreed to have Oahu Turf haul material for Koolau Nursery. At the time of the accident, Oahu Turf was using the rig for just such a purpose. 66 Hawaii at 187, 659 P.2d at 66-67.

[7] The portion of the Likelike Highway at issue, from the Wilson Tunnel toward Honolulu, slopes upward for a short distance, then gradually slopes downward until the highway merges with Kamehameha IV Road.

[8] Thomas, two passengers in her car, two pedestrians, and Tekare all died. Two others suffered severe injuries from the crash. 66 Hawaii at 187, 659 P.2d at 66.

truck, and Hawaiian Equipment Company, the owner of the trailer, arose from this accident.[9] Hartford Insurance Group eventually settled tort actions against Hawaiian Equipment, its insured, and subsequently sought contribution from both the city and International Harvester.[10] Evidence adduced at the trial disclosed that the City and County of Honolulu issued a Category 7 license[11] to Tekare without any examination of his competence as a truck-trailer operator. The city granted the license "a day or so" before the accident based solely on a letter vouching for Tekare's qualifications.[12] Regulations in force at the time of the accident arguably allowed the city and county to issue drivers' licenses on the strength of a "certificate of competency."[13] A person purporting to be a

---

[9] See, e.g., Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii 204, 532 P.2d 673 (1975), where the Hawaii Supreme Court held that the appellees, Oahu Turf and others, owed no duty of care to Theodore Richard Kelley, Frances Thomas' father, regarding negligent infliction of emotional distress. Kelley apparently suffered a heart attack in California when informed by telephone of the deaths of his daughter and granddaughter in Hawaii. The court held that the appellees could not have reasonably foreseen Kelley's reactions and resulting death.

[10] 66 Hawaii at 188, 659 P.2d at 67. *See* Uniform Contribution Among Tortfeasors Act, HAWAII REV. STAT. §§ 663-11 to -17 (1976).

[11] A Category 7 license qualifies a driver to operate passenger cars, buses, trucks, tractor-semitrailers, and truck-trailer combinations. STATE OF HAWAII DEP'T OF TRANSP., HAWAII DRIVERS' MANUAL 10 (1984).

HAWAII REV. STAT. § 286-102 (1968) listed the various specific categories of licenses the counties issued. Tekare had a Category 7 license. The statute provided in part:

> (a) No person, except one exempted under section 286-105 or one who holds an instruction permit under section 286-110, shall operate a category of motor vehicles listed below without first being examined as provided in section 286-108 and being duly licensed by the examiner of chauffeurs as a qualified operator of that category of motor vehicles:
>
> . . .
>
> (3) Passenger cars of any gross weight and trucks having a registered gross weight of less than six thousand pounds;
>
> (4) All of the motor vehicles in category (3) and trucks having a registered gross weight of six thousand pounds or more, other than tractor-semitrailer combinations and truck-trailer combinations;
>
> (5) All of the motor vehicles in categories (3) and (4) and buses;
>
> (6) All of the motor vehicles in categories (3), (4), and (5) and tractor-semitrailer combinations; and
>
> (7) All of the motor vehicles in categories (3), (4), (5) and (6) and truck-trailer combinations.

[12] 66 Hawaii at 191, 659 P.2d at 68.

[13] The regulation provided:

> No operator's license shall be issued to an applicant therefor unless the applicant presents a valid instruction permit, issued to him, appropriate for the category of motor vehicle for which he desires to be licensed, presents proof of his age and passes a practical test or tests appropriate for the category of motor vehicles for which he desires to be licensed or, when so directed by the examiner of chauffeurs, *files a certificate of competency, which attests to the applicant's capability to operate the category of motor vehicles for which he desires to be*

legitimate examiner wrote the letter.[14] This examiner, however, was not qualified to test Tekare's driving and admitted that he never did evaluate Tekare's driving competence.[15]

A jury in the First Circuit Court heard the contribution suits and found the city liable for fifty percent of the damages. The court entered judgment accordingly. The city then appealed this decision to the Hawaii Supreme Court.[16]

III. History of the Law

A. *Municipal Tort Liability*

As the Hawaii Supreme Court intimated,[17] the old rule of municipal tort liability was that a city is liable only for torts committed by its employees in "the performance of its private or proprietary functions," not for torts committed in "the performance of governmental functions."[18] *Kamau v. Hawaii*

---

licensed.

Part IIB, Rules and Regulations Governing the Examinations of Applicants for Issuance and Renewal of Motor Vehicle Operators' and Chauffeurs' Licenses (promulgated by the State Highway Safety Coordinator, 1968) (emphasis added).

[14] Erling Hedeman, the owner of Koolau Nursery, signed the letter to the city and county stating that George Kenney, a Koolau Nursery mechanic, examined Tekare and found him qualified to operate the truck-trailer rig. Kenney did not have the authority to examine and certify drivers seeking a Category 7 license. Answering Brief for Plaintiff-Appellee at 3-4, First Insurance Co. of Hawaii v. International Harvester Co., 66 Hawaii 185, 659 P.2d 64 (1983) [hereinafter cited as Answering Brief].

The purported examiner, therefore, did not work for the city. Rather, he held himself out to be one of the many independent examiners from the private sector.

[15] 66 Hawaii at 191, 659 P.2d at 69.

[16] The principal question on appeal was whether the city and county's breach of duty in issuing a Category 7 license to Anthony Tekare constituted actionable negligence. The other issues involved the discretionary function exception, liability for an administrative official's interpretation of a statute, and matters concerning evidence and procedure. Opening Brief for Defendant-Appellant at 1-2, First Insurance Co. of Hawaii v. International Harvester Co., 66 Hawaii 185, 659 P.2d 64 (1983)[hereinafter cited as Opening Brief].

[17] 66 Hawaii at 188, 659 P.2d at 67.

[18] The Hawaii Supreme Court, in Kamau v. Hawaii County, 41 Hawaii 527, 546-48 (1957), cataloged the earlier cases where the court wrestled with the different rules and criteria under which the government could be held liable.

In Maki v. City & County of Honolulu, 33 Hawaii 167 (1934), plaintiff collided with the rear end of a garbage truck owned and operated by the City and County of Honolulu. The supreme court drew a distinction between a "governmental function" and a "corporate or ministerial" function. *Id.* at 175. A city would be liable in the latter case, but would be immune in the former instance. Ultimately, the court decided that the City and County of Honolulu was liable in a negligence action since it removed "dry rubbish," but would not have been liable for the

County[19] dispensed with this rule and determined instead that, where the city's "agents are negligent in the performance of their duties so that damage results to an individual, it is immaterial that the duty being performed is a public one from which the municipality derives no profit or that it is a duty imposed upon it by the legislature."[20]

The State Tort Liability Act,[21] which the Hawaii Territorial Legislature promulgated in 1957, codified the emerging rule of governmental tort liability.[22] According to the act, the state and its political subdivisions, including the

---

removal of "wet garbage." *Id.* at 178. Since the removal of "dry rubbish" did not fall within the prescribed legal duties of the city's garbage department, the city was merely performing a corporate function. Hence, the court denied government immunity and imposed liability. *Id.* at 179.

In Mark, Moo & Cartet v. City & County of Honolulu, 40 Hawaii 338 (1953), an electric current traveled from the city's electric-light system to plaintiffs' houses and caused fires that damaged those homes. The Hawaii Supreme Court noted the hopelessness of the governmental/proprietary dichotomy. *Id.* at 346.

> [I]n the undertaking of an affirmative course of conduct it should be immaterial that the duty being performed is a public one from which the municipality derives no profit or that it is a duty imposed upon it by the legislature or for the several other reasons which are often given for holding a municipality not liable for the negligent acts of its employees and servants in so-called governmental functions.

Id. at 347-48. The court, however, felt bound by the governmental function rule. *Id.* at 348. Ultimately, the court held the city liable since the city's construction and maintenance of the lighting system was not a governmental function. *Id.* at 349.

Thus, the court often employed a convoluted analysis in order to impose liability within the constraints of the old rule. It termed certain functions private or proprietary rather than governmental based on some special quirk in the facts of the case.

[19] 41 Hawaii 527 (1957). In *Kamau*, the Hawaii Supreme Court consolidated two cases for review. The first case involved plaintiff Kamau, who died after suffering an adverse reaction caused by the county hospital's negligent employee. The employee carelessly cross-matched blood samples and supplied Kamau with the wrong blood type. This led to an "anaphylactic reaction" and eventual death. *Id.* at 528.

In the second case, plaintiff Cushnie alleged that a county caretaker negligently and contrary to express regulations permitted a bonfire to burn on park grounds. Cushnie, a two-year-old child, ran along the sand and burned herself in the coals. *Id.* at 528-29.

The supreme court imposed liability on the county in both instances. It held that it was the duty of the county to exercise "ordinary care" to prevent injury. *Id.* at 552-53.

[20] *Id.* at 552. The problem with the old governmental/proprietary distinction was that one jurisdiction's governmental function might be another jurisdiction's proprietary function. *Id.* at 530-52. *See* Maki v. City & County of Honolulu, 33 Hawaii at 178 (the city was liable since the truck contained "dry rubbish," which the city was not obligated to remove; if the truck contained "wet garbage," the governmental function would have been invoked, and the county would have been immune).

[21] HAWAII REV. STAT. ch. 662 (1968). Section 1 of Act 312 stated that the "[t]erritory hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." *See* Oakley v. State, 54 Hawaii 210, 222, 505 P.2d 1182, 1188-89 (1973) (Abe, J., concurring).

[22] The development of this statutory governmental tort liability was consonant with two poli-

city and the counties, are now liable for the torts of government employees "in the same manner and to the same extent as a private individual under like circumstances."[23]

B. Public Duty

The public duty doctrine, as it has evolved along with the increasing willingness of the Hawaii Supreme Court to relax governmental immunity,[24] is amor-

---

cies the Hawaii Supreme Court subsequently articulated. First, "the State as well as its political subdivisions should be held accountable for the misfeasances of their employees, like all private parties." Oakley v. State, 54 Hawaii at 222, 505 P.2d at 1189 (Abe, J., concurring). Second, the government should be required to compensate victims of governmental negligence. *See, e.g.*, Rogers v. State, 51 Hawaii 293, 459 P.2d 378 (1969) (state was liable for negligently placing road signs and painting center stripings).

The Hawaii Supreme Court, in *Rogers*, noted that the legislature modeled the State Tort Liability Act after the Federal Tort Claims Act, which is "liberally construed to effectuate its purpose." *Id.* at 296, 459 P.2d at 381. The federal act seeks "to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws." *Id.* at 296, 459 P.2d at 381 (citing Indian Towing Co. v. United States, 350 U.S. 61, 68 (1955)).

[23] The full text of the statute provides:

> The State hereby waives its immunity for liability for the torts of its employees and shall be liable *in the same manner and to the same extent as a private individual under like circumstances*, but shall not be liable for interest prior to judgment or for punitive damages.

HAWAII REV. STAT. § 662-2 (1976) (emphasis added).

The Hawaii Supreme Court, in Salavea v. City & County of Honolulu, 55 Hawaii 216, 220, 517 P.2d 51, 54 (1973), took "note of one of the most consistent trends in modern American tort law: the steady eradication of sovereign immunity." The court also observed that several legislative enactments have "slowly broadened the tort liability of government in a number of ways." *Id. See generally* W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 131, at 1051-55 (5th ed. 1984).

Salavea held that HAWAII REV. STAT. § 662-4 was the applicable statute of limitations in claims involving the City and County of Honolulu. ("A tort claim against the State shall be forever barred unless action is begun within two years after the claim accrues.") 55 Hawaii at 221, 517 P.2d at 54. *See* Oakley v. State, 54 Hawaii at 220, 505 P.2d at 1189 (Abe, J., concurring).

The Hawaii Supreme Court, in *Salavea*, also defined the test for municipal liability based on the language of HAWAII REV. STAT. § 662-2. 55 Hawaii at 220, 517 P.2d at 54. This test was dictum, however, for the holding of the case merely extended HAWAII REV. STAT. § 662-4 to the city and county. In fact, the Hawaii Supreme Court, in Orso v. City & County of Honolulu, 56 Hawaii 241, 245-47, 534 P.2d 489, 492-93 (1975), expressly held that HAWAII REV. STAT. § 662-2 does not apply to the city.

[24] Hawaii courts did not have to reach the issue of duty in negligence cases when the doctrine of sovereign immunity precluded suits against the state and counties. Courts did not have to

phous. In *Kelley v. Kokua Sales and Supply, Ltd.*,[25] the Hawaii Supreme Court stated:

> [I]t should be recognized that "duty" is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.[26]

The *Kelley* court then said that, in determining whether a duty is owed in any particular case, the policy considerations in favor of plaintiffs' recovery must be balanced against the arguments elicited in favor of limiting the defendants' liability.[27] The weight accorded to either side of the balance and to each fact is not easily delineated.[28] Rather, the court suggested that it must examine the "sum total"[29] of all facts in each case.[30]

---

analyze duty in such cases because immunity proved to be the effective bright line beyond which the courts did not have to journey.

[25] 56 Hawaii 204, 532 P.2d 673 (1975).

[26] *Id.* at 207, 532 P.2d at 675. The court cited W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53, at 325-26 (4th ed. 1971). In referring to the concept of "relative duty," Prosser observed:

> Its artificial character is readily apparent; in the ordinary case, if the court should desire to find liability, it would be quite easy to find the necessary "relation" in the position of the parties toward one another, and hence to extend the defendant's duty to the plaintiff. The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not sseveral legislative enactments have "slowly broadened the tort liability of government in a number of ways." *Id.*r has been formulated.

Id., § 53, at 325.

[27] Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii at 207, 532 P.2d at 675. *See also* Ajirogi v. State, 59 Hawaii 515, 583 P.2d 980 (1978). In *Ajirogi*, the Hawaii Supreme Court determined that the state was not liable for the acts of an attendant at the state hospital who negligently allowed a patient with mental disorders to escape. A few days later, the patient drove "a stolen car at an excessive speed on the wrong side of the roadway" and crashed into plaintiffs' car. *Id.* at 519, 583 P.2d at 984. In denying liability because of a lack of duty, the court reasoned that the

> duty of care which is imposed upon the administrators of the State hospital should be one which arises out of an appropriate *balancing* of the interest in protection of individuals from foreseeable harms and the interest in use of therapeutic procedures which afford hope of returning mental patients to the community as useful members of society.

Id. at 523, 583 P.2d at 988-89 (emphasis added).

[28] *See* Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii at 207, 532 P.2d at 675 (the court noted that the "scope of the duty" still "remains for resolution").

[29] *See supra* text accompanying note 26.

[30] Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii at 207, 532 P.2d at 675. The supreme court examined two prior cases that dealt with mental distress and that found a duty and liability on the part of the defendants. In both cases, the court "concluded that the scale of justice tipped in favor of the plaintiffs." *Id. See generally* Koshiba, *Negligent Infliction of Mental Distress: Rodri-*

A key element in determining the existence of a duty is the question of foreseeability—whether the defendant should reasonably have foreseen the injuries to a particular plaintiff.[31] In *Rodrigues v. State*,[32] the Hawaii Supreme Court analyzed two factors in the foreseeability formula: a defendant owes a duty (1) "only to those who are foreseeably endangered by the conduct," and (2) "only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous."[33]

Another vital consideration is based on policy[34]—whether the government can be expected to bear the burden of safeguarding the public from harm. The Hawaii Supreme Court, in *Pickering v. State*,[35] recognized that the state "is not

---

gues v. State and Leong v. Takasaki, 11 HAWAII B.J. 29 (1974).

In Rodrigues v. State, 52 Hawaii 156, 472 P.2d 509 (1970), plaintiff-property owner suffered mental anguish when her home was flooded due to a state employee's negligent failure to clear a drain culvert.

The court in Leong v. Takasaki, 55 Hawaii 398, 520 P.2d 758 (1974) found a duty and liability on the defendant's part. Plaintiff was a 10-year-old child who witnessed the death of an old woman whom he loved. Regardless of the lack of blood relation and physical impact, the court awarded damages for the negligent infliction of mental distress.

[31] *See* Ajirogi v. State, 59 Hawaii at 522, 583 P.2d at 985. The Hawaii Supreme Court determined that the plaintiffs failed to prove that a duty existed on two counts. First, the orders not to release a mental patient from the hospital created an obligation; but the hospital worker owed that obligation to his superiors, not to the plaintiffs. Second, any duty that the hospital owed was to the court that issued a commitment order, not to the plaintiffs. *Id.*

Plaintiffs also were not reasonably foreseeable as potential victims of the patient's actions. As the court held, the "negligent operation of an automobile by an escapee from a penal or mental institution has . . . been held to be so remote or unforeseeable a consequence of the negligence which permitted the escape that no liability has been imposed on the escapee's custodian for the resultant injuries." *Id.* at 527, 583 P.2d at 988.

See also Freitas v. City & County of Honolulu, 58 Hawaii 587, 574 P.2d 529 (1978). The Hawaii Supreme Court held that the failure of the police to provide protection was not actionable absent an affirmative act by the police. Plaintiffs' reliance on the argument that the harm to them was "foreseeable" was without merit. *Id.* at 590-91, 574 P.2d at 532.

See generally Comment, *Municipal Tort Liability for Erroneous Issuance of Building Permits: A National Survey*, 58 WASH. L. REV. 537, 552-54 (1983) (if a government employee's negligent violation of a statutory duty would foreseeably injure a person, then the municipality would be liable)[hereinafter cited as Comment, *Municipal Tort Liability*].

[32] 52 Hawaii 156, 472 P.2d 509 (1970).

[33] *Id.* at 174, 472 P.2d at 521.

[34] The policy factor refers to the balance of plaintiffs' injuries against the government's costs as outlined in *Kelley*. *See supra* text accompanying notes 25-30.

[35] 57 Hawaii 405, 557 P.2d 125 (1976). In this case, the plaintiffs alleged that the state's negligent design and construction of a highway medial strip and barrier caused a collision with another car and their subsequent injuries. *Id.* at 406-07, 557 P.2d at 127. In affirming the trial court's summary judgment for the state, the Hawaii Supreme Court noted that the state was not "required to build a barrier strong enough and high enough to withstand the impact, as well as to contain, a fast-moving vehicle completely out of control as a result of its driver having fallen

bound to provide for every possible happening on its highways," nor is it "required to exercise extraordinary care to guard against unusual accidents."[36] In *Ajirogi v. State*,[37] the court argued that government action itself should not expand government responsibility.[38] If the risk of harm to an individual is not increased by the failure of a public official to prevent injury to that individual above and beyond the risk of harm that would have existed had no governmental action existed, then there may be "strong policy considerations against recognizing governmental tort liability" in such cases.[39]

The existence of a duty under a statute or regulation takes on a different light.[40] *Namauu v. City & County of Honolulu*[41] involved a suit by an administrator of a decedent's estate and by others who alleged that the police departments of the City and County of Honolulu and the County of Hawaii negligently failed to prevent an escaped patient from attacking the decedent because the police did not apprehend the escapee. The Hawaii Supreme Court held that the counties owed no duty of care to the decedent.[42] In reaching this decision, the court first noted that the statute in question,[43] regarding the duty of the

---

asleep at the wheel." *Id.* at 409, 557 P.2d at 128.

[36] *Pickering* demonstrates the government prevailing in the *Kelley* balance, which determines the existence or nonexistence of a duty. Here, the court decided that it would be too burdensome for the state to virtually guarantee the public's safety by implementing extraordinary means. *Id.*

[37] 59 Hawaii 515, 583 P.2d 980 (1978) (state not liable for negligence of its employee in allowing mental patient to escape from state hospital).

[38] The Hawaii Supreme Court argued that the "present is a period of expanding expectations of government action." *Id.* at 522 n.3, 583 P.2d at 985 n.3. *Cf.* Freitas v. City & County of Honolulu, 58 Hawaii at 590-91, 574 P.2d at 532. The Hawaii Supreme Court acknowledged the rule that the police may be held liable for negligent action that increases or enhances the danger to an individual. In order for liability to be imposed, however, plaintiffs must show a duty of affirmative action and a failure to take that action. *But cf.* Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958) (city owed a special duty to exercise reasonable care in protecting a police informant who actively sought police protection).

[39] Ajirogi v. State, 59 Hawaii at 522 n.3, 583 P.2d at 985 n.3. The supreme court, however, did not define what "strong policy considerations" would militate against the imposition of government liability.

[40] Note that "compliance with established statutory and administrative standards are not necessarily conclusive on the issue of negligence." Pickering v. State, 57 Hawaii at 408, 557 P.2d at 127. In *Pickering*, there were no federal standards regarding the construction of a median guardrail for the particular section of the highway where the accident occurred. *Id.* at 409, 557 P.2d at 128. The court stated that even if standards governing guardrails existed, a violation of that regulation would not be *per se* negligent. *Id.* at 408, 557 P.2d at 127. *See also* Char v. Honolulu Rapid Transit Co., 31 Hawaii 53 (1929) (violation of municipal ordinance is not negligence as a matter of law, but a factor the jury must consider).

[41] 62 Hawaii 358, 614 P.2d 943 (1980).

[42] *Id.* at 363, 614 P.2d at 946.

[43] The statute provided that:

The police shall assist in transporting the patient to the [psychiatric] facility for admission

police to return a psychiatric patient to the hospital, "contained no express provision that a violation of the statute should result in potential tort liability."[44] The court then sought to "determine whether the legislature intended to impose tort liability for its nonperformance."[45] *Namauu* held that the statute imposed a duty on the police to benefit the administrators of the psychiatric facilities only, and not any general class of persons.[46] Therefore, the legislature never intended the court to find the city and county liable in a case such as this.

The duty issue, then, involves considerations of foreseeability, policy, and statutory language. But as a commentator notes[47] and as Hawaii case law has demonstrated,[48] there are no established criteria or rules that define the circumstances under which a court will find and impose a duty on the government.[49]

IV. ANALYSIS

The Hawaii Supreme Court in *First Insurance* based its decision on a two-tiered analysis: municipal tort liability and the existence and breach of a duty.[50] The court made short work of the first issue by concluding that the prevailing doctrine is that the state and counties are liable for the torts of government employees "in the same manner and to the same extent as a private individual under like circumstances."[51]

---

or in returning him to the facility if he is absent therefrom after admission, at the request of the administrator of a public psychiatric facility or at the request of the physician assuming medical responsibility for the patient.

HAWAII REV. STAT. § 334-53 (1968), *cited in* Namauu v. City & County of Honolulu, 62 Hawaii at 362, 614 P.2d at 946.

[44] 62 Hawaii at 362, 614 P.2d at 946.

[45] *Id.* The court noted: "The duty extends only to those persons for whose protection or benefit the statute was enacted for injuries of a character it was designed to protect against." *Id.*

[46] *Id. See also* Ajirogi v. State, 59 Hawaii at 522, 583 P.2d at 985 (the workers owed a duty to their supervisors and to the court, not to the plaintiffs).

[47] W. KEETON, *supra* note 23, § 53, at 356-58.

[48] *See, e.g.*, Kelley v. Kokua Sales & Supply, Ltd., 56 Hawaii at 207, 532 P.2d at 675. ("Therefore, in determining whether or not a duty is owed by the appellees herein, we must weigh the considerations of policy which favor the appellants' recovery against those which favor limiting the appellees' liability.").

[49] This note is primarily concerned with liability imposed upon the county (or city and county). Presumably, however, the same analysis could be applied against the state in deciding whether a duty to the public exists.

[50] 66 Hawaii at 188-93, 659 P.2d at 67-69.

[51] *Id.* at 189, 659 P.2d at 67. *See supra* note 23 for text of HAWAII REV. STAT. § 662-2 (1976).

The Hawaii Supreme Court treated the issue of government immunity in a brief historical fashion. This summary treatment of municipal tort liability failed to examine two areas. First, the court did not reconcile its holding in Orso v. City & County of Honolulu, 56 Hawaii at 246-47,

The negligence issue—whether there was a duty and a breach of that duty—presented the court with greater problems. The court answered this question in the affirmative.[52] It also analyzed the various elements of a cause of action in negligence.[53] Citing *Namauu v. City & County of Honolulu*,[54] the court recognized that a requisite factor in any determination of negligence is "the existence of a duty owed by the . . . [putative tortfeasor] to the . . . [injured

---

534 P.2d at 493, with its citation of Salavea v. City & County of Honolulu, 55 Hawaii at 220, 517 P.2d at 54. *Orso* held that "we see no valid reason to extend the applicability of any other provision of HRS Chapter 662 to the City and County of Honolulu, and hereby specifically limit the holding of *Salavea* to the applicability of only HRS Sec. 662-4 to the City and County of Honolulu." 56 Hawaii at 247, 534 P.2d at 493. If *Orso* limited *Salavea* to the applicable statute of limitations under HAWAII REV. STAT. § 662-4, the *First Insurance* court failed to explain how the liability standard of HAWAII REV. STAT. § 662-2 (1976) can be applied to the city.

Granted, the Hawaii Supreme Court in the present case acknowledged that *Salavea* "does not apply to those actions exempted from coverage under the State Tort Liability Act" and that the act "has limited application where the City is concerned." 66 Hawaii at 189 n.2, 659 P.2d at 67 n.2. However, the court did not specify what actions are "exempted from coverage," nor did it explain what "limited application" means. Is the liability principle more expansive or restrictive than before? Is *Orso*'s narrow holding overruled? In what other cases will the court impute the State Tort Liability Act to the counties?

Second, the Hawaii Supreme Court failed to explain how the city's issuance of a driver's license to Tekare is comparable to the actions of "a private individual under like circumstances." The court did not say to whom or against what the "private individual" standard was compared. Was the Motor Vehicle Registration Department compared to the "individual," or was it the examiner or the purported examiner?

HAWAII REV. STAT. § 286-101 (1968) provided: "The chief of police of each county shall appoint one or more persons, residing in such county, each of whom shall be a competent operator of motor vehicles, to be known as the examiner of chauffeurs . . . ." Therefore, private individuals are not authorized to issue drivers' licenses. If the obligations differ, how can the liability be comparable? *See* Dalehite v. United States, 346 U.S. 15, 43-44 (1952) (the Federal Tort Claims Act does not create new causes of action against the government where no private analogue exists).

[52] The Hawaii Supreme Court affirmed the trial court's determination that the city was liable in contribution. It reasoned that "as the City's egregious conduct enhanced the possibility of harm befalling the victims of the accident, there was negligence that could give rise to recovery." 66 Hawaii at 192, 659 P.2d at 69.

[53] The traditional elements necessary to prove a negligence cause of action are as follows:

1. A duty, or obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
2. A failure on the person's part to conform to the standard required: a breach of the duty . . . .
3. A reasonably close causal connection between the conduct and the resulting injury . . . .
4. Actual loss or damage resulting to the interests of another. . . .

W. KEETON, *supra* note 23, § 30, at 164-65.

[54] 62 Hawaii 358, 614 P.2d 943 (1980).

person]."[55] The court dealt with the elements of breach of duty, causation,[56] and damages[57] in a superficial manner.

A. *Public Duty*

First Insurance defined duty by balancing the interests of individual and public safety against the interest of strictly limiting the city's liability in tort actions.[58] Presumably, when a particular plaintiff's injuries are serious enough so that the public interest in safety overrides any concerns regarding infringement upon the city's activities, a court will create a duty and impose liability.

The Hawaii Supreme Court also noted that there is a compelling public interest in the proper licensing of a motor vehicle operator.[59] This interest, cou-

---

[55] 66 Hawaii at 189, 659 P.2d at 67.

[56] *Id.* at 188-93, 659 P.2d at 67-69. The Hawaii Supreme Court did not analyze the issue of causation in any depth. Its only reference to causation was the statement concerning the "City's egregious conduct." *Id.* at 192, 659 P.2d at 69. The court, on the other hand, excluded various expert testimony regarding the possible defect of the truck's components. *Id.* at 193, 659 P.2d at 69-70. Admission of this evidence might have made causation a more defined issue.

By its silence, the Hawaii Supreme Court implied that the causation issue was well settled. Although states do not exercise direct control over motor vehicles, they "do in a very real sense make it possible for particular drivers and vehicles to be on the highways, through licensing and registration procedures." Annot., 79 A.L.R.3d 955 (1977). Therefore, the issuance of a license can be deemed a cause of the resulting accident.

However, at least one jurisdiction, New York, has held that there is no causal connection between the issuance of a license and the accident:

> The irresponsibility of one driver cannot be predicated upon the discretion of the individual who issued or revoked a license as such risk is not reasonably perceivable. The issuance or revocation of a license is not proof of a driver's ability or carefulness on the road. Additionally, the revocation of a license would not prevent the use of the roads by someone without the moral regard for the sanction of the law.

Guy v. New York, 50 Misc. 2d 29, ___, 269 N.Y.S.2d 504, 507 (1966).

In Southworth v. New York, 47 N.Y.2d 874, 877, 392 N.E.2d 1254, 1255, 419 N.Y.S.2d 71, 72 (1979), the New York Court of Appeals noted that "when State officials negligently issue a license or fail to revoke it, the State action is generally held not to be the proximate cause of the injury inflicted by the licensee." The gist of this line of reasoning seems to be that the cause of the accident is the driver's incompetence, not the government's carelessness.

[57] Damages were not at issue because the several deaths and injuries resulting from the accident were serious and manifest. A total of six people died and two were seriously injured as a result of the crash. 66 Hawaii at 187, 659 P.2d at 66.

[58] The court said, "Our initial task then is to weigh the considerations supporting recovery by the injured person against those favoring a limitation of the City's liability." *Id.* at 189, 659 P.2d at 67.

[59] The supreme court merely stated that a "very substantial public interest in highway safety compels the licensing of motor vehicle operators." *Id.* at 190, 659 P.2d at 68. It did not define or delimit the bounds of that public interest.

pled with the statutory language embodied in Hawaii Revised Statutes section 286-101,[60] creates a rather specific duty. The court observed that "as a statutory duty becomes more specific and narrow, it becomes more likely that the duty has been narrowed to one owed an individual."[61] Therefore, in this case, the city and county owed a duty "to the public and pedestrians not to validate the truck-trailer driver's presence on the highways without an examination of his competence."[62]

However, the court was quick to caution that this determination does not, in any way, make the city absolutely liable as an insurer of the public's safety. The examiner of drivers "can do no more than test a person's minimal competence to drive a motor vehicle."[63] When the city does not conform to a standard of care and uphold its duty, however, it can be held liable in tort.

This holding is consistent with the apparent statutory intent that the 1937 Committee on Judiciary of the Territorial House articulated with respect to licensing of motor vehicle operators:

> The seriousness of the highway accident problem calls for definite and immediate action by all legislative bodies for the establishment of proper discipline and control to insure the safety, comfort and convenience of lawful and prudent drivers and to provide that the privileges of the users [sic] of the public highways be

---

[60] HAWAII REV. STAT. § 286-101 (1968) explicitly placed a duty on the county examiner of chauffeurs to test the qualifications of any applicant. The statute provided in pertinent part that one or more persons shall be known as the "examiner of chauffeurs . . . whose *duty* it shall be to examine into the qualifications and fitness of any person desiring to secure a license to operate a motor vehicle as in this part provided." (emphasis added).

[61] 66 Hawaii at 192, 659 P.2d at 69 (citing Oleszczuk v. Arizona, 124 Ariz. 373, 376-77, 604 P.2d 637, 640-41 (1979)).

[62] 66 Hawaii at 192, 659 P.2d at 69. The Hawaii Supreme Court, however, did not define the standard of care that courts must demand of the city and county in the future—whether due care, reasonable care, ordinary care, or extraordinary care. *Cf.* Kamau v. Hawaii County, 41 Hawaii at 552-53 (county's duty to exercise "ordinary care" to prevent injury).

[63] 66 Hawaii at 190, 659 P.2d at 68. *See* Pickering v. State, 57 Hawaii at 409, 557 P.2d at 128; RESTATEMENT (SECOND) OF TORTS § 288C comment a (1965) ("This section . . . states the conditions under which the courts will not adopt the legislative or administrative standard of conduct as that of a reasonable man for the purposes of a negligence action."). *But see* RESTATEMENT (SECOND) OF TORTS § 286 (1965):

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part
>
> (a) to protect a class of persons which includes the one whose interest is invaded, and
>
> (b) to protect the particular interest which is invaded, and
>
> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

> denied to reckless, incompetent and willful drivers who by their records have shown their unfitness to enjoy these rights.[64]

The Territorial Legislature thus enacted the statute to protect the public against dangerous, incompetent drivers. The court advanced this purpose by its holding in *First Insurance*.

Although the Hawaii Supreme Court's ruling seems consistent with this expression of legislative intent, the court failed to address adequately the duty question in two respects. First, it never specified the components of the "sum total of those considerations of policy"[65] that formed the duty the city owed the plaintiffs in this case.[66] The court did not list its reasons for allowing recovery, nor did it explain why the injured parties' interests outweighed the city's interest in limiting liability.[67] In effect, the court's opinion laid out a balancing test and concluded that the city was liable without any accompanying substantiation.

Secondly, the Hawaii Supreme Court did not adequately address cases in other jurisdictions dealing with governmental liability in motor vehicle drivers' licensing procedures.[68] Courts in other jurisdictions[69] have drawn important dis-

---

[64] H.R. STAND. COMM. REP. NO. 277, 19th Hawaii Territorial Leg., Reg. Sess., 1937 H.J. 1356. The court in *First Insurance* did not quote or deal with this expression of legislative intent.

[65] 66 Hawaii at 189, 659 P.2d at 67 (citing W. PROSSER, *supra* note 26, § 53, at 325-26).

[66] *See generally* M. SHAPO, THE DUTY TO ACT xi-xxi (1970). Shapo defines duty by the concept of power: the "physical force and the ability to use various forms of energy in ways that exercise effective control of people's destinies in particular transactions or circumstances." *Id.* at xiii. He categorizes three levels of the uses of or failures to use power: (1) "abuse," (2) "mismanagement," and (3) "default in the use of power." *Id.* at xvi-xvii. In all three cases, the holder of the power may be held liable to the individual whose personal rights and freedoms were violated.

In this case, the city and county retained the power to grant or deny a driver's license. It possessed "control and transactional superiority," such that its failure to evaluate Tekare's driving ability worked a disadvantage to the injured parties. As Shapo suggests, "liability may be imposed for reasons that often blend elements of humanitarian concern with efficiency factors." *Id.* at xiv-xv. Here, there were severe injuries and deaths and a failure to follow departmental rules and regulations. The Hawaii Supreme Court therefore seemed to balance the scales and imposed liability on the City and County of Honolulu.

[67] The court's explanation of the balancing test it used to discover the presence or lack of a duty the city and county owed to the injured parties was manifestly inadequate. To merely say that a "very substantial public interest" existed, 66 Hawaii at 190, 659 P.2d at 68, was to beg the question. The Hawaii Supreme Court did not specify what facts it weighed and how much weight it awarded to each factor.

[68] Granted, the court did note that it was aware of the line of cases holding that, regardless of the state's negligence in issuing a license, that action was deemed not to be the proximate cause of the damages the licensee suffered. The court cited Southworth v. New York, 47 N.Y.2d 874, 392 N.E.2d 1254, 419 N.Y.S.2d 71 (1979) and Annot. 79 A.L.R.3d 955 (1977) and the cases contained therein. 66 Hawaii at 190 n.4, 659 P.2d at 68 n.4.

tinctions in determining municipal liability, such as whether the duty is general to the public at large, or specific to a particular individual.[70] In *First Insurance*, the court mentioned both a duty to the "motoring public and pedestrians," on the one hand, and a "specific and narrow" duty, on the other hand.[71] This is ambiguous at best.[72]

The court did cite *Oleszczuk v. Arizona*[73] in support of its holding.[74] In *Oleszczuk*, the plaintiff sued the State of Arizona, which was authorized by statute to issue motor vehicle operator licenses, for negligently granting a license to an individual with a known history of psychomotor seizures.[75] The state

---

The Hawaii Supreme Court, however, did not confront, much less refute, the reasoning behind that line of cases and demonstrate why its reasoning was superior. More specifically, it did not examine how the courts in the annotated cases resolved the duty issue.

[69] *See, e.g.*, Cady v. Arizona, 129 Ariz. 258, 630 P.2d 554 (1981); Southworth v. New York, 47 N.Y.2d at 876, 392 N.E.2d at 1255, 419 N.Y.S.2d at 72; Ryan v. Rhode Island, ____ R.I. ____, 420 A.2d 841 (1980). In all cases, the courts determined that the state did not owe a duty to the plaintiffs. *But cf.* Alessi v. Allstate Insurance Co., 400 So.2d 1089, 1091 (La. Ct. App. 1981) (appellate court reversed lower court's holding of no cause of action and remanded the case since there may be cases where the state can be held liable for negligently licensing a driver).

[70] *See* Survey, *Public Duty Doctrine Bars Negligence Actions Against Governmental Units, Annual Survey of Rhode Island Law for the 1980-1981 Term*, 16 SUFFOLK U.L. REV. 626, 628-29 (1982) [hereinafter cited as Survey, *Public Duty Doctrine*]. The survey noted: "Courts also employ the *public duty doctrine* to shield public entities from tort liability. These courts hold that the negligent performance of a duty owed to the general public, rather than to an individual, cannot become the basis for tort liability." *Id.* at 629 (emphasis added).

[71] 66 Hawaii at 192, 659 P.2d at 69.

[72] The RESTATEMENT (SECOND) OF TORTS (1965) is illustrative of the uncertainty in the area of a duty to act. For example:

> § 314. Duty to Act for Protection of Others
>
> The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.
>
> § 315. General Principle [Duty to Control Conduct of Third Persons]
>
> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

[73] 124 Ariz. 373, 604 P.2d 637 (1979). The case dealt with the revocation and renewal of a driver's license, not with the initial licensing procedure. But, as the Hawaii Supreme Court implied by its citation of *Oleszczuk*, this distinction is not a distinguishing factor in determining the presence or absence of a duty.

[74] 66 Hawaii at 192, 659 P.2d at 69.

[75] The plaintiff claimed the State of Arizona breached a duty in three ways: (a) in failing to keep a record of the driver's previous accident and license record; (b) in failing to create a medical advisory board; and (c) in filling in false answers on the applicant's license request form. 124

answered that any duty it owed was to the public generally and not to the individual plaintiff.[76] The Arizona Supreme Court, however, held that the statutes in question were specific enough to create a specific duty to the plaintiff.[77] In essence, the statutes mandated that the state maintain an index of the names of people whose licenses it revoked, a file of traffic convictions and accidents, and a Medical Advisory Board to give medical advice regarding driver licensing.[78] The court concluded that these "duties are quite specific and obviously designed to protect that portion of the public using the highways."[79]

In *First Insurance*, the applicable statute[80] was equally specific. It required the examiner of chauffeurs to test the applicant's physical well-being, understanding and knowledge of traffic laws, and actual driving ability. Most impor-

---

Ariz. at 375, 604 P.2d at 639.

[76] *Id.* The trial court agreed with this argument and granted summary judgment for the state.

[77] The statutes at issue were as follows:

> A. The department shall file every application for a license received by it and shall maintain suitable indexes containing, in alphabetical order:
>
> . . .
>
> 3. The name of every licensee whose license has been suspended or revoked by the department and after each name note the reasons for the action.
>
> B. [A]n individual record of each licensee showing the convictions of the licensee and the traffic accidents in which he has been involved . . . .

ARIZ. REV. STAT. § 28-428. ARIZ. REV. STAT. § 28-432 required the state "to establish a Medical Advisory Board to advise the department on medical standards for driver licensing," *cited in* Oleszczuk v. Arizona, 124 Ariz. at 375, 604 P.2d at 639.

[78] The Arizona Supreme Court decided that ARIZ. REV. STAT. § 28-428 "was designed to find and identify those drivers who, because of past history, might be dangerous to other users of the highway such as plaintiffs." ARIZ. REV. STAT. § 28-432 was designed to "assist in identifying the types of medical problems that might result in unsafe drivers." 124 Ariz. at 376, 604 P.2d at 640.

[79] 124 Ariz. at 376, 604 P.2d at 640. In comparing the duty of police officers to the duty of driver examiners, the Arizona Supreme Court concluded that the obligation of the latter is more specific. "It is the specific duty of issuing driver's licenses." *Id.* at 377, 604 P.2d at 641.

[80] The statute outlined the procedures for the examination of applicants. It provided:

> The examiners of chauffeurs shall examine every applicant for an operator's or chauffeur's license, except as otherwise provided in this part. The examination shall be held in the county where the applicant resides within ten days from the date of the filing of the application. It shall include a test of the applicant's eyesight and such further physical and mental examination as the examiner of chauffeurs finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways; the applicant's ability to understand highway signs regulating, warning, and directing traffic; his knowledge of the traffic laws of the State and the traffic regulations of the county where he resides or where he intends to operate a motor vehicle; and actual demonstration of ability to exercise ordinary and reasonable control in the operation of the motor vehicle. *The examinations shall be appropriate to the operation of the category of motor vehicle for which the applicant seeks to be licensed and shall be conducted as required by the state highway safety coordinator.*

HAWAII REV. STAT. § 286-108 (1968) (emphasis added).

tantly, the statute stipulated that the examinations should be "appropriate to the operation of the category of motor vehicles for which the applicant seeks to be licensed."[81] Therefore, as the *Oleszczuk* court observed, "the more specific and narrow the duty required by the statute, the more likely it is that the duty has been narrowed from a general duty to the public to a specific duty to an individual."[82]

The Hawaii Supreme Court, however, neglected to discuss a line of cases across the country that reached the contrary result.[83] The Arizona Court of Appeals' decision in *Cady v. Arizona*[84] is a notable case on point. It analyzed all relevant case law on the subject of public duty within the state and ultimately concluded that *Oleszczuk* was an "aberration in the law of public duty."[85] The court held that the better rule was that a duty created for the benefit of the public at large may be extended to an individual "only when it can be established that by reason of previous conduct a relationship was established between the state and the individual such that failure to perform that duty or its negligent performance would actively work to the special injury of that individual."[86]

Cady articulated a two-pronged test to determine whether a "special duty" exists that would allow an individual to enforce performance against the state. The first prong is whether the statute created an obligation to protect the general public. If such an obligation exists, the second prong is whether a prior relationship was established between the state and the plaintiff such that any failure to perform by the state would act as a special detriment to that plain-

---

[81] HAWAII REV. STAT. § 286-108 (1968).

[82] 124 Ariz. at 377, 604 P.2d at 641.

[83] Granted, Hawaii courts need not follow the country's lead in deciding cases, and, in fact, Hawaii has often been at the forefront of change. When it does not address and refute the arguments of the other courts, however, the Hawaii Supreme Court fails to provide a convincing rationale behind its opinion.

[84] 129 Ariz. 258, 630 P.2d 554 (1981). Plaintiff was abducted and held captive by an escaped prisoner for six days. She alleged that the state negligently breached a duty to keep convicted felons in custody. The Arizona Court of Appeals held that, although a general public duty existed, the plaintiff could not prove that the state owed her a special obligation. Therefore, the state was not liable.

[85] *Id.* at 264, 630 P.2d at 560. But, as this was a decision by the Arizona Court of Appeals, the court could not overrule the supreme court's holding in *Oleszczuk*. In fact, the court acknowledged that "in the final analysis the question of whether a 'duty' is to be imposed is a policy decision that rests, in this case, with the Arizona Supreme Court." *Id.* The Supreme Court of Arizona subsequently decided to eliminate the general or specific duty debate and, instead, define duty by the same standard that applies to private individuals, thereby making the *Oleszczuk* and *Cady* distinction moot. Ryan v. Arizona, 134 Ariz. 308, 310, 656 P.2d 597, 599 (1982).

The Hawaii Supreme Court did not cite either *Cady* or *Ryan*. By citing *Oleszczuk*, therefore, it impliedly rejected the Arizona court's decision to eliminate the general/specific duty dichotomy.

[86] 129 Ariz. at 263, 630 P.2d at 559.

tiff.[87] Only if the second inquiry can be answered affirmatively will the court impose a duty on the state.

The *Cady* test, when applied to the facts of the present case, does not seem to create a duty of care for the City and County of Honolulu. It can be argued justifiably that the first test is met—namely, that the statutes create an obligation to protect the general motoring public.[88] However, the facts of the case do not reveal any special relationship that existed between the aggrieved parties and the city's motor vehicle registration department.[89] Hence, the second prong of the test cannot be fulfilled.

Southworth v. New York[90] is consistent with the holding in *Cady*. The New York Court of Appeals held that the state was not negligent in issuing an interim driver's license. The court noted that "the driver was not ineligible under the statutes in effect when the license was issued."[91] More importantly, the court stated that, even if the state were negligent in initiating and administering its driver rehabilitation program, the state would not have been liable

---

[87] *Id.* The court of appeals noted that *Oleszczuk* was "not supportable under this analysis" because

> the statutory scheme of issuing driver's licenses does not create a justifiable reliance on the part of the motoring public that all licensed drivers are either safe drivers or free from medical problems, nor was the injured plaintiff able to establish a relationship based upon conduct between the state and himself.

Id. at 263 n.3, 630 P.2d at 559 n.3.

[88] HAWAII REV. STAT. §§ 286-101, -108 (1968).

[89] *Accord* Seibel v. City & County of Honolulu, 61 Hawaii 253, 602 P.2d 532 (1977) (no special relationship between a city prosecuting attorney and a conditionally released defendant). *Contra* Cootey v. Sun Investment, Inc., No. 9168 (Hawaii App. Nov. 5, 1984) (county had a special relationship with developers to prevent them from developing property in such a manner as to damage plaintiffs' property); Schuster v. City of New York, 5 N.Y.2d at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269 ("In our view the public . . . owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration.").

[90] 47 N.Y.2d 874, 392 N.E.2d 1254, 419 N.Y.S.2d 71 (1979). The New York Legislature enacted a law authorizing "the establishment of experimental programs of rehabilitative instruction and direction for drivers with poor driving records." *Id.* at 878, 392 N.E.2d at 1255, 419 N.Y.S.2d at 72 (Jones, J., dissenting).

[91] *Id.* at 877, 392 N.E.2d at 1255, 419 N.Y.S.2d at 72. Vehicle and Traffic Law § 522 was the statute in question. It mandated that an advisory board shall

> (1) establish criteria, subject to the approval of the commissioner, for the selection of those persons to be referred to the commissioner for official participation in the driver rehabilitation programs authorized [and] . . .
>
> (2) based on criteria developed by the board, [shall], select on an impartial basis those persons to be referred to the commissioner for official participation in such driver rehabilitation program.

47 N.Y.2d at 878, 392 N.E.2d at 1256, 419 N.Y.S.2d at 73 (Jones, J., dissenting).

since it did not assume a "special duty" to that particular plaintiff.[92] In *Southworth*, the majority said that there was no duty, even though the state failed to follow a specific, affirmative statute that was above and beyond the normal licensing procedures.[93]

It seems, therefore, that by this reasoning, *First Insurance* could have been decided in the opposite way. The City and County of Honolulu did not create any special program, nor did it act affirmatively such that it created a duty to the individual injured parties.[94]

The Hawaii Supreme Court also did not cite the Rhode Island Supreme Court's holding in *Ryan v. Rhode Island*.[95] In that case, a person holding a valid driver's license struck Ryan's vehicle and caused severe injuries. Ryan alleged that the state registrar negligently failed to investigate the driver's past driving record and therefore did not discover his three license suspensions. In effect, Ryan charged the state with failing to conduct investigations required pursuant to a state statute.[96] The statute authorized renewal of a suspended license on either of two grounds: after the reasons for the revocation have been eliminated, or after expiration of the suspension and an investigation into the applicant's "character, habits and driving ability."[97]

---

[92] 47 N.Y.2d at 877, 392 N.E.2d at 1255, 419 N.Y.S.2d at 72. The New York Court of Appeals cited Evers v. Westerberg, 38 A.D.2d 751, 329 N.Y.S.2d 615 (1972), *aff'd* 32 N.Y.2d 684, 296 N.E.2d 257, 343 N.Y.S.2d 361 (1973) for the proposition that the state and its subdivisions acting "for the protection of the general public, cannot be cast in damages for a mere failure to furnish adequate protection to a particular individual to whom it assumed no special duty."

[93] The dissent, on the other hand, argued that the state should be liable for plaintiff's injuries since there was a "special duty" to the traveling public. The state's affirmative action endangered the public more than if there had been no rehabilitation program. 47 N.Y.2d at 878, 392 N.E.2d at 1255, 419 N.Y.S.2d at 73 (Jones, J., dissenting).

> The State should be held liable for these serious omissions and its failure to comply with the specific statutory commands in implementing a hazardous experimental program authorized by the Legislature which puts back on the highways a motor vehicle operator who because of alcohol-related offenses would otherwise be prohibited from driving, when innocent members of the public are thereby injured in another episode of alcohol abuse on his part.

Id. at 878-79, 392 N.E.2d at 1256, 419 N.Y.S.2d at 73 (Jones, J., dissenting).

[94] The only statutes in question are HAWAII REV. STAT. §§ 286-101 to -108 (1968), which applied to all citizens who wished to secure a driver's license. The case does not deal with any law or regulation specially designed to protect a specific segment of the population. If New York's Driving While Intoxicated (DWI) program did not generate a special duty, Hawaii's licensing laws certainly fall short as well.

[95] R.I. ____, 420 A.2d 841 (1980). For further analysis of Ryan v. Rhode Island, see Survey, *Public Duty Doctrine*, *supra* note 70, at 626-31.

[96] R.I. at ____, 420 A.2d at 842.

[97] *Id.* The Rhode Island statute provided that:

> Any person whose license or privilege to drive a motor vehicle on the public highways has

The Rhode Island court recognized the principle that the state "is liable in all actions of tort in the same manner as a private individual or corporation,"[98] yet the court denied liability because the plaintiff did not prove that the state owed him a duty as an individual and not merely as a member of the general public. The court thus impliedly adopted the reasoning in *Southworth*[99] and expressly rejected the analysis of *Oleszczuk*.[100]

In sum, jurisdictions that limit the tort liability of governmental units in licensing cases rely on one of two different legal theories.[101] Some courts invoke the public duty doctrine. This theory, as exemplified in *Southworth* and *Ryan*, holds that the "negligent performance of a duty owed to the general public, rather than to an individual, cannot become the basis for tort liability."[102] Other courts hold that "acts involving the exercise of an official's judgment invoke immunity, while those acts that must be performed in a prescribed manner may create liability."[103]

---

been revoked or suspended shall not be entitled to have such license or privilege renewed or restored unless the revocation or suspension was for a cause which has been removed, except that after the expiration of the term of the revocation or suspension he may apply to be restored to his right to drive, but the registry shall not grant such application unless and until it is satisfied after investigation of the character, habits and driving ability of such person that it will be safe to license him to drive a motor vehicle in the public highways.

R.I. GEN. LAWS § 31-11-10 (1968 Reenactment).

[98] ____ R.I. at ____, 420 A.2d at 843. This statement is strikingly similar to HAWAII REV. STAT. § 662-2 (1976), relied upon by the Hawaii Supreme Court. *See supra* note 23 for text of statute.

[99] The Rhode Island court noted: "In suits brought against the state, plaintiffs must show a breach of some duty owed them in their individual capacities and not merely a breach of some obligation owed the general public. *Southworth v. State*. . . ." ____ R.I. at ____, 420 A.2d at 843.

[100] "In so ruling we are unable to concur with the decision of the Arizona Supreme Court in *Oleszczuk v. State*." *Id.*

[101] *See* Survey, *Public Duty Doctrine*, *supra* note 70, at 626-31.

[102] *Id.* at 629. *But cf.* Alessi v. Allstate Insurance Co., 400 So.2d at 1091. The Louisiana Court of Appeals explained:

> We think it clear that plaintiff has alleged a cause of action against the State. It is set forth that the State violated a duty imposed on it by law, and that, as a result, plaintiffs were damaged. We do not hold that the State will be liable for injuries inflicted by every person negligently licensed to drive, or that the State will necessarily be liable in this case. However, there are circumstances which fall within the allegations of the petition, evidence of which would be admissible under the pleadings, under which the State would be liable.

Id.

[103] Survey, *Public Duty Doctrine*, *supra* note 70, at 628. *See, e.g.*, California v. Superior Court, 105 Cal. App. 3d 537, 164 Cal. Rptr. 379 (1980) (discretionary revocation and issuance pursuant to statute do not create liability since such actions are not mandatory); Papelian v. California, 65 Cal. App. 3d 958, 135 Cal. Rptr. 665 (1976) (state not liable when licensing statute vests discretion in the Department of Motor Vehicles to issue or deny a license); Brown v. Tatro, 134

From a policy standpoint, the Hawaii Supreme Court's imposition of a duty and liability in *First Insurance* may be the more logical holding.[104] At least one commentator has suggested that government liability in cases such as *First Insurance* and *Oleszczuk* is likely to be the rule, not the exception, in the future.[105] Courts will find state or county officials negligent in issuing drivers' licenses to incompetent drivers, and thereby impose tort liability on the government.[106] The problem is that the *First Insurance* court did not specify the character of duty it found—whether specific or general—and this failure could lead to much uncertainty in the future as lower courts attempt to apply the present holding.[107]

Vt. 248, 356 A.2d 512 (1976) (state not negligent in issuing license to driver, whose license was revoked, after pardon from the Governor and passing the required examination).

See generally the State Tort Liability Act, which codifies the discretionary function exception to the state's waiver of its immunity for tort liability:

> § 662-15 Exceptions. This chapter shall not apply to:
>
> (1) Any claim based upon an act or omission of any employee of the State, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a *discretionary function or duty* on the part of a state officer or employee, whether or not the discretion involved has been abused . . . .

HAWAII REV. STAT. § 662-15 (1976) (emphasis added). The Hawaii Supreme Court draws a distinction between operational and discretionary acts. "[O]perational level acts are those which concern routine, everyday matters, not requiring evaluation of broad policy factors." Rogers v. State, 51 Hawaii at 298, 459 P.2d at 381. These acts invoke state liability if a government employee negligently performs them.

Whether the city officials in the present case had the discretion to determine who should be licensed is not clear. The Hawaii Supreme Court did not pass on this issue. *Contra* Lifer v. Raymond, 80 Wis. 2d 503, 259 N.W.2d 537 (1977) (state road test examiner not personally liable for issuing license to obese woman who negligently caused an accident because decision to issue drivers' licenses is discretionary). The Hawaii statutory language contained hints of both discretion and mandate: "The examiner of chauffeurs *shall* examine every applicant. . . . [The examination] *shall* include a test of the applicant's eyesight and such further physical and mental examination *as the examiner of chauffeurs finds necessary* . . . ." HAWAII REV. STAT. § 286-108 (1968) (emphasis added).

[104] *See infra* text accompanying notes 119-35 (how the accident was one of the contributing factors in the tightening of motor vehicle licensing procedures in the state); M. SHAPO, *supra* note 65, at xiv-xv.

[105] *See* Survey, *Public Duty Doctrine*, *supra* note 70, at 630 n.26 (citing Hricko, *Motor Vehicle Administrators Potential Liability—Licensing of Alcoholics*, 26 FED'N INS. COUNS. Q. 75, 86-87 (1976) (trend will be for courts to impose liability when government officials "routinely or perfunctorily" issue licenses to incompetent drivers)).

[106] *See supra* note 105.

[107] The court implied that it found a specific duty when it cited *Oleszczuk* for the proposition that a narrow statutory obligation suggests an individual duty. However, the court also seemed to say that the population to be protected was the "motoring public and pedestrians." 66 Hawaii at 192, 659 P.2d at 69. It is reasonable, therefore, that the government would owe a duty of care to

B. Breach of Duty

The Hawaii Supreme Court found a breach of duty premised in the "City's authorization of Anthony Tekare's presence behind the steering wheel of the truck-trailer combination that 'barreled' down the Likelike Highway with catastrophic consequences."[108] The city did not produce evidence at trial that it tested Tekare's ability to handle such a rig.[109] The city's failure to certify him constituted the second element in the negligence cause of action—breach of duty.

The city violated two provisions of the licensing statute.[110] Hawaii Revised Statutes section 286-102 required a potential licensee to be appropriately examined and duly licensed as a qualified driver of the specific category of vehicle for which he sought a license.[111] Hawaii Revised Statutes section 286-108 specifically listed the various tests that the examiner of chauffeurs must administer to all applicants.[112] As the court noted, however, the city did not follow the above standards; it merely sanctioned Tekare's competence based on a letter of recommendation from a purported examiner who was neither qualified nor present at the examination.[113]

The Hawaii Supreme Court also based its finding of a breach of duty on a violation of what it called the "City's own procedures."[114] The court's reasoning

---

all plaintiffs, for they most certainly fall within the category of "motoring public and pedestrians."

[108] *Id.* at 190, 659 P.2d at 68.

[109] *Id.* at 191, 659 P.2d at 69.

[110] The court noted: "In 1971 when Tekare was licensed to operate a truck-trailer combination, HRS Sec. 286-102 required that persons operating motor vehicles should be examined as provided in HRS Sec. 286-108 (1968) . . . ." *Id.* at 191 n.5, 659 P.2d at 68 n.5.

[111] See *supra* note 11 for text of statute.

[112] HAWAII REV. STAT. § 286-108 (1968) required that the examiner test the applicant's eyesight, require further physical examinations if necessary, check the individual's understanding of highway warning signs, test the applicant's knowledge of traffic rules, and verify his actual ability to reasonably operate and control the particular vehicle. See *supra* note 80 for text of statute.

[113] A deposition of the purported examiner, which the trial court received in evidence, revealed that he did not actually evaluate Tekare's qualifications. 66 Hawaii at 191, 659 P.2d at 69.

[114] The court reasoned that:

> The licensing procedures in effect during the relevant period called for the issuance of an instruction permit when application for a "Category 7" license was made. The applicant would only be issued a license after his qualifications and fitness to operate the vehicles in this category were certified by someone competent to make such judgments. It was, of course, expected that the necessary certification would be preceded by testing. In Tekare's case no certification of the applicant's competence, as prescribed by the City's own procedures, was ever presented.

Id.

on this point failed to explore two important areas. First, the court did not address or refute the arguably valid position that the city's rules and regulations allowed the examiner of chauffeurs to issue a driver's license in either of two ways: (1) after issuing an instruction permit, receiving proof of age, and administering a practical test, which the applicant passes; *or* (2) after receiving a "certificate of competency" that proves the applicant's abilities.[115]

Second, if the latter procedure were valid,[116] the court did not explain how the city thereby breached a duty.[117] Granted, even though the regulations did not outline any competency standards for the certificate issuer, common sense requires an able examiner and an actual evaluation of the applicant's capabilities. Still, the court's failure to address these issues in any depth will create ambiguities for future licensing cases.[118]

---

[115] *See supra* note 13 (text of applicable section of the 1968 regulations issued by the State Highway Safety Coordinator).

[116] The court hinted at this possibility when it stated that a license would be issued only after the applicant was certified by "someone competent" to make such judgments. 66 Hawaii at 191, 659 P.2d at 69.

At the time of the accident, the city issued Category 7 licenses to individuals who presented the examiner with a letter from someone who possessed a license for the same category of vehicle attesting to the applicant's abilities. Interview with Francine Palama, Supervising Driver Licensing Examiner, in Honolulu (Sept. 13, 1984).

[117] The city argued on appeal that it did not breach a duty on one of two grounds. First, it argued that the issuance of Tekare's license was purely discretionary, and that the courts should not hold the city liable for such acts of city employees. Opening Brief, *supra* note 16, at 18-33. See *supra* note 103 for text of HAWAII REV. STAT. § 662-15 (1976). *Cf.* Olim v. Wakinekona, 461 U.S. 238 (1983) (transfer of a prisoner from Hawaii to California did not implicate the due process clause of the Constitution because Hawaii's prison regulations do not limit official discretion). In *Olim*, the court determined that the prison administrator was the "final decisionmaker" whose discretion was not confined by any standards. *Id.* at 249.

Secondly, the City and County of Honolulu argued that a misinterpretation of an ordinance or statute by a city employee should not constitute actionable negligence. Opening Brief, *supra* note 16, at 33-36. *See* Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu, 55 Hawaii 40, 514 P.2d 861 (1973). The case involved a neighborhood corporation that alleged that the city did not follow Comprehensive Zoning Code § 21-1406, and that therefore the building permit for an apartment hotel, which the city issued, was invalid. In holding for the city and county, the court agreed that an act by an official

> done in good faith and within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance, is no more than an irregularity, and the validity of such act may not be questioned after expenditures have been made and contractual obligations have been incurred in reliance thereon in good faith.

Id. at 44, 514 P.2d at 864. Of course, *First Insurance* did not involve any expenditure or contractual agreement. Nevertheless, the city contended that a good faith misinterpretation of a valid rule does not create liability.

[118] *See infra* text accompanying notes 136-77.

V. IMPACT

A. *Present Consequences*

First Insurance prompted many changes in the counties' drivers' licensing procedures. Although it would be a gross over-simplification to attribute all changes in the licensing procedures to the case,[119] it clearly played a significant role in stimulating those changes.[120]

The present regulations[121] governing the issuance and renewal of drivers' licenses differ from the old regulations in one striking respect: no provision dealing with a "certificate of competence" exists.[122] The current regulations are unequivocal, while the former ones were open to interpretation. At the present time, all applicants must pass various physical examinations[123] and practical tests. These practical tests include an off-street test in which the applicant must provide a workable vehicle, conduct a pre-trip inspection of the vehicle, and execute a drive through an obstacle course.[124] If the applicant passes this first

---

[119] Other factors might include the following: a nation-wide trend toward greater traffic safety, a change in administrators and supervisors within the motor vehicle registration department, and an increasing concern about governmental liability and the large sums of money the state and counties pay out each year for tort claims against the government.

[120] Note that the accident occurred in 1971 and the supreme court rendered the present opinion in 1983. Perhaps it is more accurate to say that the accident itself, and not the court's ultimate decision in *First Insurance*, was the driving force for change. Most of the regulatory and statutory changes discussed herein occurred between 1971 and 1983. Presently, there are runaway truck ramps on the Likelike Highway, both to and from Honolulu. Query whether the *First Insurance* accident was the impetus for the construction.

[121] HAWAII ADMIN. RULES §§ 19-122-1 to -21 (amended Aug. 1982) (Examination of Applicants for Issuance and Renewal of Motor Vehicle Drivers' Licenses and Instruction Permits).

[122] The pertinent regulation provides:

> (a) No Hawaii driver's license shall be issued unless the applicant:
>
> (1) Presents a valid instruction permit for the appropriate category, passes a practical test or tests for the appropriate category of motor vehicle, and surrenders all driver's licenses in his possession.
>
> . . .
>
> (b) The examiner of drivers may require that further physical and mental examinations be conducted upon the applicant as the examiner finds necessary to determine the applicant's fitness to operate a motor vehicle safely upon the highways.

HAWAII ADMIN. RULES § 19-122-1 (amended Aug. 1982) ("*Issuance of Hawaii driver's license*").

[123] HAWAII ADMIN. RULES §§ 19-122-7 to -9 (amended Aug. 1982) list the requirements for vision tests.

[124] The applicable rule provides:

> *Off-street skill tests for a category 4 or above license (motor vehicles and buses of more than ten thousand pounds gross vehicle weight rating).* (a) When required by the examiner of drivers to be examined by a certificated fleet safety examiner who is certified in the category of

test, he or she must then go through an on-street skill test to demonstrate proficiency in starting, stopping, steering, turning, reversing, accelerating, decelerating, and braking. In addition, the city examines the applicant's knowledge of any special equipment contained on the rig for which he or she is seeking a license.[125] The present regulations are thus much more detailed and rigid than the former ones.

The court's decision in *First Insurance* also coincides with a national effort to prevent catastrophic accidents caused by motor vehicles in general and by heavy duty trucks in particular.[126] Suggestions include improving highway and truck construction, upgrading standards for licensing drivers of motor vehicles, and

---

vehicle which the applicant desires to be examined, the applicant shall:

(1) Provide a motor vehicle in serviceable condition for the category for which he desires to be licensed.

(2) Conduct a pre-trip inspection and demonstrate an adequate knowledge of the vehicle to be used in the examination in accordance with standards set by the examiner of drivers.

(3) Successfully execute the applicable off-street skill tests before the applicant shall be allowed to take the "on the road" portion of the examination for a category 4 or above license (motor vehicles and buses of more than ten thousand pounds gross vehicle weight rating).

(b) The off-street tests shall be:

. . .

(6) For truck trailer combinations, the applicant shall drive the vehicle forward through an offset alley in the manner diagrammed in figure "j."

HAWAII ADMIN. RULES § 19-122-15 (amended Aug. 1982). Figure "j" consists of an obstacle course through several painted lines forming a looped course. The vehicle cannot be driven over any painted lines, but only through them, except over the start line.

[125] The rules require the applicant to demonstrate proficiency in the following skill areas:

On-street skill tests for a category 4 or above license. (a) After successful completion of the off-street skill test as provided in Sec. 19-122-15, the applicant shall:

(1) Demonstrate adequate knowledge of the equipment used for the test; drive through a business district; make proper right and left turns; exhibit skill in the use of the clutch or transmission when moving on a slight grade of at least six per cent from a standing start whether proceeding forward or reversing; observe, without hesitation, traffic signs and signals; drive through heavy traffic; exhibit proper braking procedures when coming to a stop and when following or driving through heavy traffic; and exhibit proper signaling or intention to turn or stop.

(2) Demonstrate adequate knowledge of the use of special equipment installed or required to be installed in a motor vehicle of the category for which the applicant seeks to be licensed.

HAWAII ADMIN. RULES § 19-122-16 (amended Aug. 1982).

[126] *See* Hricko, *Drivers of Hazardous Cargoes—Legal Aspects of a Maximum Age and Increased Physical Requirements*, 31 FED'N INS. COUNS. Q. 126 (1981); Hricko, *Piercing the Driver License Veil*, 29 FED'N INS. COUNS. Q. 175 (1979); Slover, *FHWA Seeks Modification of Commercial Driver Qualification Rules*, 50 I.C.C. PRAC. J. 96 (Nov.-Dec. 1982).

requiring certain age limits, strength tests, and proofs of physical prowess.[127] Congress in 1960 authorized the National Driver Register to provide a data base that houses information regarding license revocations and suspensions.[128] States now have the capability to draw on this information before issuing or renewing any driver's license.

Perhaps the most successful proposal in Hawaii is the fleet safety examiner program and its accompanying training/educational program.[129] It is no coincidence that less than two years after the *First Insurance* collision took place,[130] the Hawaii Legislature enacted Hawaii Revised Statutes section 286-108.5, providing for the creation of "certificated fleet safety examiner[s]" to train and license drivers of large trucks of the sort involved in the present case.[131] The Senate Judiciary Committee articulated the following reasons for the new law:

---

[127] Hricko, *Drivers of Hazardous Cargoes—Legal Aspects of a Maximum Age and Increased Physical Requirements*, *supra* note 126, at 126.

[128] The structure of the National Driver Register (NDR) follows:

> The NDR is a voluntary, cooperative federal-state project authorized by Congress in 1960. Its purpose is to provide a source of data which states can draw on to determine if persons applying for or renewing driver licenses have had their driving privileges suspended or revoked in other jurisdictions. State laws prohibit issuing a license to a person while his license is withdrawn by another jurisdiction.
>
> The NDR's computer data currently contains the records of approximately six million drivers whose licenses have been suspended or revoked.

Hricko, *Piercing the Driver License Veil*, *supra* note 126, at 175.

The City and County of Honolulu now routinely submits a form to the National Driver Register Service in Washington, D.C. to determine if another state has revoked or suspended an applicant's truck driving license. Interview with Francine Palama, Supervising Driver Licensing Examiner, in Honolulu (Nov. 19, 1984).

[129] The statute provides in pertinent part that:

> (a) For the purposes of this section, "certificated fleet safety examiner" means a person who is by training and experience capable of assessing a driver's competence to operate the various categories of motor vehicles listed in section 286-102(c) and who is certificated by the state director of transportation in the manner provided in rules and regulations adopted by the state director of transportation pursuant to chapter 91.

HAWAII REV. STAT. § 286-108.5 (Supp. 1984) ("Examination of applicants for driving certain categories of motor vehicles; annual evaluation, etc.").

Some private companies occupy the dual role of driver improvement program (DIP) administrator and "certificated fleet safety examiner." This could create a conflict of interest and lead to lax testing and certification with the same party training and testing. Note that HAWAII REV. STAT. § 286-108.5 does *not* vest the counties solely with the responsibility of examining applicants. The Supervising Driver Licensing Examiner suggests that, in the future, the roles should be separate: the counties should be the only parties responsible for testing, and the private sector should be responsible for training and educating. Interview with Francine Palama, Supervising Driver Licensing Examiner, in Honolulu (Nov. 19, 1984).

[130] *But see supra* note 120.

[131] Act of July 1, 1973, ch. 286, 1973 Hawaii Sess. Laws 437.

> The purpose of the bill as amended is to provide that drivers of heavier categories of motor vehicles including trucks with gross vehicle weight of 10,000 pounds or more, buses, school buses, tractor-semitrailer combinations and truck-trailer combinations be examined for the counties by persons examined and certified as a certificated fleet safety examiner by the State highway safety coordinator. At the present time such drivers are examined for their operator's licenses by persons who are not assessed by such certificators to possess adequate qualifications. Your Committee finds that the present system of licensure is inadequate and *may in some instances have contributed to bad accidents involving trucks and buses.*[132]

The State Highway Safety Coordinator subsequently promulgated a set of rules and regulations listing the criteria for certifying fleet safety examiners.[133] These rules reflect the idea that "[d]rivers of certain categories of vehicles must possess special knowledge and skills concerning the operation of the vehicle, and proper handling of the vehicle loads and the laws and regulations pertaining to the vehicle."[134] The city and county now requires applicants to meet stringent procedures before upgrading drivers' licenses.[135]

---

[132] CONF. COMM. REP. NO. 6, 7th Hawaii Leg., Reg. Sess., 1973 SEN. J. 640 (emphasis added).

[133] Rules and Regulations Governing the Certification of Fleet Safety Examiners; Examination and Qualification for the Licensing of Drivers of Heavy Trucks, Buses, School Buses, Tractor-Semitrailer Combinations and Truck-Trailer Combinations; and the Certification Requirement for the Approval of Heavy Vehicle Driver Improvement Programs (1974).

[134] *Id.* at Part IB. *See* HOFFMAN, DRIVER EVALUATION 9 (1968).

> [E]ven those who have had the privilege of completing a driver education program are at best *enlightened* beginners. They certainly are not equipped to drive for a living or to operate cars, trucks, or other vehicles as sales, service or maintenance representatives. Advanced training comparable to fleet driver safety programs is needed . . . .

Id. (emphasis in original).

[135] The Division of Motor Vehicles and Licensing now requires the following forms to be filled out and submitted to the examiner of drivers. Any private fleet safety examiner must file a "Request to up-grade driver's license" form to the Driver License Section. With this form, he must enclose a valid driver's license, an instruction permit, and a medical certificate. The city will deny this request if any outstanding financial obligations, traffic violations, medical discrepancies, or any other inequities exist. If the city approves the request, the Motor Vehicle Safety Office, State of Hawaii, then monitors the behind-the-wheel examinations.

All fleet safety examiners must then test the applicant's capabilities. The applicant must conduct a pre-trip check; a failure to check any two of four items results in failure. He must then pass an off-street test based on a pass/fail basis. Finally, the applicant must pass an on-road practical test, based on a point system. Interview with Francine Palama, Supervising Driver Licensing Examiner, in Honolulu (Sept. 13, 1984).

Note, however, that "[a]pplicants who possess a valid Hawaii driver's license and make application for a higher category of driver's license shall not be required to take" a written examination on traffic rules, driving practices, and the meaning of traffic signs. HAWAII ADMIN. RULES § 19-122-10(c) (amended Aug. 1982). This could create a dangerous situation in the future.

B. Future Ramifications

The future ramifications of *First Insurance* in the drivers' licensing arena seem clear. Although the case dealt with the initial issuance of a license to operate a truck-trailer combination,[136] it is plausible to extend the holding to the negligent issuance of drivers' licenses in general.[137] The Judiciary Committee of the Territorial House stated that the licensing statute provided a "closer control and better check on drivers (particularly drivers with bad records and guilty of recurrent violations of law)."[138] Hence, the courts would impose a duty on the counties to exercise care in issuing, renewing, revoking, or suspending drivers' licenses.[139]

What *First Insurance* holds for other governmental activities is not quite as clear. First, this uncertainty is due in part to the fact that the Hawaii Supreme Court neglected to specify the kind of duty it imposed on the county.[140] At least one jurisdiction has totally eliminated the public/private duty dichotomy, and instead has said that the conduct of the state will be measured solely against the conduct of private individuals.[141] The Hawaii Supreme Court does

---

[136] HAWAII REV. STAT. ch. 286 and the appropriate county regulations contain standards for issuing licenses to applicants in *all* vehicle categories—ranging from scooters and motorcycles to truck-trailer combinations.

[137] The counties have the authority to issue and renew, HAWAII REV. STAT. § 286-101, as well as to suspend or revoke, HAWAII REV. STAT. § 286-119, drivers' licenses.

[138] H.R. STAND. COMM. REP. NO. 277, *supra* note 64.

[139] Consider Abraham v. Onorato Garages, 50 Hawaii 628, 446 P.2d 821 (1968). In *Abraham*, plaintiff sustained injuries while she was a passenger in a Mustang driven by one McCoy. McCoy, the manager of a garage, drove the Mustang without permission from the owner of the car or from the owner of the garage. McCoy had a valid Hawaii driver's license. Unknown to either the garage owner or to the Hawaii licensing authorities, the California authorities had previously suspended McCoy's California driver's license due to numerous violations of law. Plaintiff sued McCoy and the owners of the car and garage. *Id.* at 629-30, 446 P.2d at 824. Plaintiff did not sue the City and County of Honolulu.

If the case occurred today, after *First Insurance*, and if plaintiff did sue the city, the court would probably find that the city had a duty to check the National Driver Register (NDR) for any previous license suspensions. The city's failure to do so would constitute an actionable breach of duty.

Arguably, the counties have a much greater obligation to exercise care when renewing and investigating possible revocations and suspensions of licenses. *Contra* Lundquist v. Department of Public Safety, 674 P.2d 780 (Alaska 1983) (state not liable for failing to suspend a drunk driver's license in a timely manner since purpose of statute was not to further public safety). In cases of revocation and suspension, the counties are alerted to the driver's past record and should act upon it; in cases of initial issuances, no past driving record exists.

[140] *See supra* text accompanying note 107 (hint of a specific duty).

[141] *See* Ryan v. Arizona, 134 Ariz. at 310, 656 P.2d at 599 ("We shall no longer engage in the speculative exercise of determining whether the tort-feasor has a general duty to the injured party, which spells no recovery, or if he had a specific individual duty which means recov-

not seem to subscribe to this duty standard, for it did not cite this proposition in its opinion. Rather, the court seems to be following the rule that "as a statutory duty becomes more specific and narrow, it becomes more likely that the duty has been narrowed to one owed an individual."[142]

Second, the courts must still deal with the specific facts of each future case. In *First Insurance*, the Hawaii Supreme Court did not specially mention the catastrophic nature of the accident—six deaths and two severe injuries[143]—but these facts may have influenced the court in its decision. In the case, the city and county had a monopoly on the information and power;[144] the public had no say whether Tekare should be licensed.[145] Also, the possible consequences of allowing an unqualified truck-trailer operator on the roads were immediate, foreseeable, and of great magnitude.[146] It is unclear, however, just how much weight the court placed on these factors.

In licensing cases,[147] the general rule seems to be that if the court finds a specific duty, which the state or county owes to a limited segment of the general

---

ery. . . . Thus, the parameters of duty owed by the state will ordinarily be coextensive with those owed by others.").

The Arizona Supreme Court therefore eliminated the need for cases such as *Oleszczuk* and *Cady* in Arizona. The court, however, did keep legislative, judicial, and high-level executive immunity intact. *Id.*

[142] 66 Hawaii at 192, 659 P.2d at 69 (paraphrasing *Oleszczuk*, 124 Ariz. at 376-77, 604 P.2d at 640-41 for the proposition).

[143] 66 Hawaii at 187, 659 P.2d at 66.

[144] *See* M. SHAPO, *supra* note 66, at xii-xiii (public duty should be expanded because of various policy considerations, such as government's control of energy, ability, and information).

[145] In a sense, a small sector of the public did have a direct say. Koolau Nursery's owner signed the letter that purported to certify Tekare's abilities. Answering Brief, *supra* note 14, at 3-4. The population put at risk, namely the "motoring public and pedestrians," however, was powerless.

[146] *See* Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984) (municipality was liable when police negligently failed to arrest a drunk driver who subsequently caused an accident in which plaintiffs were injured). The Supreme Judicial Court of Massachusetts explained that:

> [T]he threat here (intoxicated driving) is immediate; it threatens serious physical injury; the threat is short-lived . . . and the plaintiffs (the motoring public) have no chance to protect themselves. Where the risk created by the negligence of a municipal employee is of *immediate* and *foreseeable* physical injury to persons who cannot reasonably protect themselves from it, a duty of care reasonably should be found.

Id. at ____, 467 N.E.2d at 1300 (emphasis added). See also the commentary contained in Irwin v. Town of Ware, 53 U.S.L.W. 1037, 1039 (Mass. Sept. 11, 1984) ("[T]he court explains, in the case of drunk drivers there is an 'immediate' threat of 'serious physical injury' to members of the public that creates the 'special relationship' with public employees necessary to maintain a tort action against the public employer.").

[147] HAWAII REV. STAT. chs. 436-444, 446-471 list the various licenses that the state issues through its Department of Commerce and Consumer Affairs, Professional and Vocational Licensing Division. HAWAII REV. STAT. ch. 445 lists the licenses that the counties issue.

public, it may find the government liable in tort.[148] The state or county must also owe that duty to the plaintiffs or to the class of people in which plaintiffs belong, and not to another segment of the population.[149]

The potential government liability for negligently issuing a license to an unqualified applicant who later injures another person is great.[150] The Hawaii Supreme Court surely must have intended to draw a line somewhere[151]—but where? The court presented two clues: there must be a "very substantial public interest"[152] and a "specific and narrow" obligation.[153] Neither criterion, however, is quantifiable.

For example, Hawaii Revised Statutes chapters 436 to 471 lists a myriad of professions and occupations that require a license of some kind. Surely, an equally compelling public interest exists in the proper licensing of acupuncturists,[154] chiropractors,[155] dentists,[156] doctors,[157] nurses,[158] and pharmacists.[159] Just as an unqualified truck-trailer driver could kill members of the motoring

---

[148] *See* Irwin v. Town of Ware, 392 Mass. at ____, 467 N.E.2d at 1311 (Nolan, J., dissenting) (police/victim privity and "specific assurances of protection that give rise to justifiable reliance by the victim" must both exist for an actionable special duty). *But see* Freitas v. City & County of Honolulu, 58 Hawaii at 590, 574 P.2d at 532 (generally, failure of police to provide protection is not actionable, unless police action increases the chance of harm and there is negligence in protecting against that danger).

Of course, the court must also find that the government breached the duty and caused damages to the plaintiff.

[149] *See* Ajirogi v. State, 59 Hawaii at 522, 583 P.2d at 985 (duty owed to supervisors and court, not to plaintiffs, so no liability); Namauu v. City & County of Honolulu, 62 Hawaii at 362, 614 P.2d at 946 (police owed duty to hospital administrators, not to plaintiffs, so no liability).

[150] One court has noted that:

> If all statutory duties of governmental officials were held to create a duty to anyone allegedly harmed by the violation of that enactment, the financial resources of the government would seriously be diminished, and the legislature would be disinclined to enact operating procedures for fear of the exposure to liability they might create.

Lundquist v. Department of Public Safety, 674 P.2d at 785.

[151] The court noted that, when the city follows reasonable procedures, there is no reason to find liability. "Otherwise, the City may be saddled with an impossible burden in the exercise of the delegated function." 66 Hawaii at 190, 659 P.2d at 68.

[152] *Id.*

[153] *Id.* at 192, 659 P.2d at 69.

[154] HAWAII REV. STAT. ch. 436D (Supp. 1984) (Acupuncture Practitioners).

[155] HAWAII REV. STAT. ch. 442 (Supp. 1984) (Chiropractic).

[156] HAWAII REV. STAT. chs. 447 (Supp. 1984) (Dental Hygienists) and 448 (Supp. 1984) (Dentistry).

[157] HAWAII REV. STAT. chs. 453 (Supp. 1984) (Medicine and Surgery), 459 (Supp. 1984) (Optometry), 463E (Supp. 1984) (Podiatrists), 465 (Supp. 1984) (Psychologists), and 471 (Supp. 1984) (Veterinary Medicine).

[158] HAWAII REV. STAT. ch. 457 (Supp. 1984) (Nurses).

[159] HAWAII REV. STAT. ch. 461 (Supp. 1984) (Pharmacists and Pharmacy).

public and pedestrian class, an unqualified medical practitioner could maim and kill his or her patients. The goal of these licensing statutes, though unarticulated, is clearly to protect the public from harm.[160] The state and its respective boards and commissions must therefore have a duty to follow the statutory and regulatory procedures in administering examinations and in issuing, renewing, revoking, and suspending licenses.[161] A failure to follow these rules could lead to government liability.

Even negligence in certifying other occupations could foreseeably hurt people and damage property. Hawaii Revised Statutes chapter 437B regulates the certification of motor vehicle repairs. The purpose of the statute is to protect "the welfare of the public and the motor vehicle repair industry."[162] By the reasoning in *First Insurance*, therefore, the state motor vehicle repair industry board has an obligation to follow all laws and rules that outline the licensing procedure. A negligently repaired automobile is at least as dangerous to the public welfare as an incompetent driver.

Other licensing laws also hold as their purpose the "protection of the general public."[163] These laws, however, are aimed at a more limited population—people who require the services of hairdressers, contractors, insect exterminators, private investigators, and guards, for example. Should the courts hold the state liable if a licensed cosmetologist, contractor, exterminator, or security guard negligently injures a plaintiff, and if the plaintiff proves that the state violated its own rules and regulations by certifying an incompetent applicant?[164]

---

[160] Just as the *First Insurance* court logically assumed that the legislature enacted HAWAII REV. STAT. ch. 286 (1968) to protect the "motoring public and pedestrians," courts could decide in the future that the logical purpose of the above statutes is to ensure quality and safe medical care.

[161] For example, HAWAII REV. STAT. § 447-1 (Supp. 1984) stipulates "[w]ho may become dental hygienists" by listing the various education requirements, fee schedules, and examination procedures. HAWAII REV. STAT. § 447-7 (1976) empowers the board of dental examiners to suspend or revoke a hygienist's license when he or she violates the rules or character codes. In addition, the State Department of Commerce and Consumer Affairs promulgated the Rules Relating to Dentists and Dental Hygienists, HAWAII ADMIN. RULES §§ 16-79-1 to 16-79-83 (amended Feb. 13, 1981).

The state presumably would have a duty to follow these laws and regulations. If it follows them without any substantial deviation, there would be no reason to find liability. *See* 66 Hawaii at 190, 659 P.2d at 68.

[162] HAWAII REV. STAT. § 437B-4(1), (2), (4) (1976).

[163] *See, e.g.*, HAWAII REV. STAT. §§ 439-7 (Supp. 1984) (Beauty Culture), 444-4(2) (1976) (Contractors), 460J-3(2) (1976) (Pest Control Operators), and 463-3 (1976) (Private Investigators and Guards).

[164] The question applies to the entire range of state licenses, for example: cable television systems, cemeteries and mortuaries, electricians and plumbers, massage, naturopathy, notaries public, and public accountancy. It applies to county license as well, for instance: ball or marble machines, milk, peddlers, Honolulu steam laundries, and scrap dealers. The above lists are not exhaustive, but show the variety of enterprises that require government licensing.

First Insurance suggests the answer is yes, if the plaintiff is able to prove that the "sum total of those considerations of policy" compels a strong public interest.[165] Other factors may include the severity of the potential and actual injury, the immediacy of the threat, and the extent of the state's misconduct.[166]

Granted, there is a difference between the facts in *First Insurance* and the above hypotheticals. The general public has no control or choice in the driver licensing case; the people are wholly dependent on the counties to examine and certify an applicant's driving abilities.[167] In cases involving hearing aid dealers, elevator mechanics, and others, the people do have a choice. They may patronize only those service providers who are competent. A pedestrian does not have the same options. This difference, however, should not be determinative because the courts cannot expect people to conduct a thorough investigation of every hearing aid dealer or mechanic. Rather, a state or county license should represent at least a minimal level of competency.[168]

The potential liability for the counties' issuance of building permits and supervision of subdivision laws, ordinances, and regulations also seems great. Under the *First Insurance* analysis,[169] the court would impose liability on the county for negligently regulating the construction and development of homes if the plaintiff is able to prove the following: (1) that the county owed a specific duty—either a duty defined by statute or a duty created by a "special relationship"—to the plaintiff;[170] and (2) that considerations of public policy compel the court to hold the county liable.[171] The first requirement is difficult to define

---

[165] The legislature must have felt that there was a strong public interest in each of the activities in order to require its regulation. Perhaps there were many illegitimate practitioners, or maybe the activity was dangerous and subject to much abuse. Courts might consider the mere fact of codification as evidence of a legislatively determined public interest.

[166] *See supra* text accompanying note 146.

[167] HAWAII REV. STAT. § 286-101 (1976) mandates that the "examiner of drivers" test the applicant's driving capabilities.

[168] *See generally* M. SHAPO, *supra* note 66, at xii (government controls energy, ability, and information).

[169] *See supra* text accompanying notes 58-64.

[170] Comment, *Municipal Tort Liability*, *supra* note 31, at 548-52. The public duty doctrine generally means that a municipality is not liable for the negligent issuance of a building permit because the municipality merely owes a general duty to the public, not to any specific individual. There are, however, two exceptions. First, the court may hold the city liable if the plaintiff can demonstrate that "the statute reveals a 'clear intent' to identify and protect a particular class of individuals and the claimant is within the protected class." *Id.* at 549. Second, the court may impose liability if it finds a "special relationship." That relationship may be based on several factors: a city employee's knowledge of a statutory violation, the claimant's reliance on a promise to correct the situation, and the employee's failure to remedy the problem. *Id.* at 550.

[171] *Id.* at 558-60. The comment identifies two policy considerations in favor of imposing liability on the government for negligently issuing building permits. First, tort liability will prevent government employees from acting "frivolously." Second, there is a policy against placing

because the Hawaii Supreme Court in *First Insurance* failed to quantify the measure of duty it imposed on the City and County of Honolulu.[172] The second requirement would seem to implicate public safety, economic necessities, and government care and accountability.[173] Future courts will have to determine just how far the *First Insurance* holding extends in this area.[174]

The implication of *First Insurance* in the breach of duty question seems elementary. If the state or county fails to follow its own rules and regulations, the courts will find a breach of duty.[175] For instance, the state's instructions for taking an auto mechanic's license examination require, among other things, that the applicant attach evidence of meeting the educational and experience requirement of the rules and regulations.[176] If the state fails to notice the absence of a diploma and issues a license to an underqualified applicant, it may be held liable for the licensee's negligence.[177] Government, therefore, will not be infi-

---

the risk on the developers of subdivisions. *Id.* at 558.

The comment argues, however, that neither reason is justifiable. Local governments do not have the resources to intensify their training programs, therefore liability works no deterrence. *Id.* at 559. In addition, placing the risk of liability on the developers is a better policy since the government's role is merely secondary—to encourage voluntary compliance with the building and zoning codes. *Id.* at 560.

[172] *See supra* text accompanying note 107.

[173] *See* Comment, *Municipal Tort Liability*, *supra* note 31, at 558-60.

[174] *See* Cootey v. Sun Investment, Inc., No. 9168 (Hawaii App. Nov. 5, 1984) (county had a duty to control subdivider's action in installing drainage facilities in order not to create an "unreasonable risk of foreseeable harm" to a neighbor). The Hawaii Intermediate Court of Appeals seemed to suggest that *First Insurance* stands for the proposition that it is "clear public policy in Hawaii to hold municipalities liable for the torts of their employees." *Id.* at 12. Such a policy overrides the principles that "municipalities control private subdivision development for the benefit of the public at large" and that "generally no liability is imposed upon a municipality by virtue of its negligent enforcement of subdivision laws, ordinances and regulations." *Id.*

The court cited Comment, *Municipal Tort Liability*, *supra* note 31, with approval. However, as the comment suggests, "courts have construed the exceptions to the public duty doctrine very narrowly," thereby rarely imposing liability in building permit cases. *Id.* at 552. The comment also explains that a policy-based rationale creates new causes of action against the government, an undesirable result. *Id.* at 560.

Query whether, under the *First Insurance* analysis, courts would hold other public entities liable for breaching a duty in negligently administering government regulatory functions, such as: registering corporations and partnerships, recording business trademarks, and regulating securities companies and banks. *See* Izuka v. State, No. 85-0550 (1st Cir., Hawaii filed Feb. 7, 1985) (suit against state for defunct Manoa Finance, an industrial loan company).

[175] *See* 66 Hawaii at 192, 659 P.2d at 69.

[176] State of Hawaii, Dept. of Commerce and Consumer Affairs, Professional and Vocational Licensing Division Form MVR-02 (Application for Exam & License—Auto Mechanics).

[177] This liability assumes that the state board's failure to require proof of education/training was the proximate cause of the accident, i.e., that the applicant, in fact, did not have the required education. If he had the diploma, but merely failed to attach it, the state's neglect probably would not be the cause of the accident.

nitely liable, for even though the court finds a duty, it must also find a breach of that duty.

VI. Conclusion

The Hawaii Supreme Court in *First Insurance* held that the City and County of Honolulu had a duty to the "motoring public and pedestrians" to examine and certify driver license applicants.[178] Although reasonable minds may differ whether the court made the right decision, it is clear that the court's opinion was manifestly inadequate in explaining why and how it reached its holding. The court did not substantiate its balancing test, nor did it distinguish cases in other jurisdictions that held to the contrary.

This inadequacy is especially critical for future licensing cases. How will lower courts know what duty standard to apply and when to apply it? This note attempted to raise some of the major issues, the bounds of which only future cases can settle.

Michael N. Tanoue

---

[178] 66 Hawaii at 192, 659 P.2d at 69.

ELECTRONIC EAVESDROPPING: Which Conversations Are Protected From Interception?—*State v. Okubo*, 67 Hawaii ___, 682 P.2d 79 (1984), and *State v. Lee*, 67 Hawaii ___, 686 P.2d 816 (1984)

I. INTRODUCTION

State v. Okubo[1] and *State v. Lee*[2] have provided the Hawaii Supreme Court with two opportunities to define the parameters of constitutional protection afforded by Article I, § 7 of the Hawaii Constitution[3] in the context of electronic eavesdropping. In both cases, the court has held that a criminal defendant has no reasonable expectation of privacy in a recorded conversation when at least one party to the conversation consents to the recording, and that therefore the constitution does not require suppression of such evidence despite non-compliance with the warrant requirement. The basic rationale underlying this holding is that since the consenting participant is free to testify as to what was said, the defendant in effect "assumes the risk" of such repetition. A recording of the conversation thus serves merely a corroborative function to ensure the accuracy of the consenting party's testimony. *Okubo* and *Lee*, therefore, represent an exception to the warrant requirement in cases of consensual eavesdropping,[4] and suggest that in such cases only privileged conversations[5] will be accorded constitutional protection.

---

[1] 67 Hawaii ___, 682 P.2d 79 (1984).

[2] 67 Hawaii ___, 686 P.2d 816 (1984).

[3] HAWAII CONST. art. I, § 7 provides as follows:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

[4] The term "consensual eavesdropping" refers in this context to three forms of surveillance: (1) where a participant himself records the conversation; (2) where a third party records the conversation with the consent of a participant; and (3) where a third party monitors the conversation with the consent of a participant. State v. Okubo, 3 Hawaii App. 396, 398 n.3, 651 P.2d 494, 497 n.3 (1982).

[5] The "privileges" referred to are those enumerated in Article V of the Hawaii Rules of Evidence, ch. 626, HAWAII REV. STAT. (1980).

Okubo and *Lee* are also significant for their discussions of Hawaii's Wiretap Law[6] and its application in consensual eavesdropping situations. Similar to Article I, § 7, the wiretap statute has been interpreted as expressly allowing the interception of a wire or oral communication if one party to the conversation consents to the interception. Unlike the constitutional provision, however, the statute does not permit consensual eavesdropping in all settings but rather provides greater protection to "private places." If a recording device is installed inside a private place or installed/used outside such a place in order to intercept conversations originating therein, then the wiretap law requires that any recordings obtained be suppressed as evidence. In such cases, even the prior consent of one party to the conversation is not considered sufficient to redeem the eavesdropping activity.

II. THE CASES

In *State v. Okubo*, defendants Roy Okubo and George Yamamoto were indicted for bribery in connection with payments made to two Honolulu police officers in exchange for information on impending police raids on an alleged massage parlor establishment.[7] Prior to trial, the defendants moved to suppress, *inter alia*, audiotapes of approximately forty face-to-face and telephone conversations that had transpired between the defendants and officers over a seven-month period.[8] Of particular significance was a tape of a crucial conversation that had taken place in a public restaurant, in which the defendants had agreed to an amount to be paid for the officers' "assistance."[9] A variety of eavesdropping techniques were used to obtain the evidence,[10] all with the consent of the participating officers. Okubo and Yamamoto, however, had no knowledge that

---

[6] HAWAII REV. STAT. ch. 803, pt. IV (Supp. 1978). This law is described in detail in Bowman, *Hawaii's New Wiretap Law*, 14 HAWAII B.J. 83 (1978).

[7] 3 Hawaii App. 396, 396, 651 P.2d 494, 496.

[8] *Id.* at 398, 651 P.2d at 497.

[9] *Id.*, 651 P.2d at 498.

[10] Four eavesdropping methods were used by the police:

(1) A participant-police officer wore a "Nagra" brand body tape recorder which recorded face-to-face conversations;

(2) A participant-police officer permitted telephone conversations to be recorded with an audio recorder attached to the phone which the officer was using;

(3) A participant-police officer wore a transmitter, which simultaneously broadcasted face-to-face conversations to other police officers who monitored and recorded the conversations, sometimes in conjunction with videotape recordings and sometimes not; and

(4) The monitoring police officers videotape recorded the face-to-face conversations among the participant-police officers and the defendants.

Id., 651 P.2d at 497.

their conversations were being recorded, nor was a warrant obtained prior to any of the recorded encounters.[11]

Finding that the warrantless recordings violated Article I, § 7 of the Hawaii Constitution, the trial court granted the defendants' motion to suppress the audiotapes.[12] On appeal, however, the intermediate court reversed this decision[13] primarily on the authority of *State v. Lester*.[14] The supreme court then summarily affirmed,[15] with two justices dissenting.

In upholding the constitutionality of the recordings, the intermediate court stated that Article I, § 7 guaranteed "freedom from warrantless searches and seizures only to persons who are entitled to a reasonable expectation of privacy."[16] The test to determine whether a person was entitled to such privacy, the court continued, was the two-part test articulated by Justice Harlan in his concurrence in *Katz v. United States*:[17] (1) Whether the person exhibited an actual, subjective expectation of privacy; and (2) whether that expectation was one which society was prepared to recognize as "reasonable."[18] The court then

---

[11] *Id.*, 651 P.2d at 497-98.

[12] *Id.* at 397, 651 P.2d at 497.

[13] *Id.* at 412, 651 P.2d at 505.

[14] 64 Hawaii 659, 649 P.2d 346 (1982). In *Lester*, the Hawaii Supreme Court upheld the admission of a tape recording of a conversation between the defendant and a police accomplice in which the defendant made incriminating statements regarding the murder of his wife. The conversation took place in a public park, and was recorded via a recording device taped to the accomplice's body. The "accomplice" in *Lester* was not an undercover police officer but rather an acquaintance of the defendant who became a police informant.

[15] The court stated, "We affirm the reasoning in the plurality opinion of *Lester*, *supra*, and the ICA's decision in *Okubo*, *supra*, and find the consensual monitoring of the conversation valid under Article I, § 7 of the Hawaii Constitution and HRS § 803-42(b)(3)." 67 Hawaii at ____, 682 P.2d at 81.

[16] 3 Hawaii App. at 403, 651 P.2d at 500.

[17] 389 U.S. 347, 361 (1967).

[18] The applicability of the *Katz* test is based upon the legislative history of Article I, § 7. In COMMITTEE OF THE WHOLE Rep. No. 15, 3d Hawaii Const. Conv., *reprinted in* I PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 1024 (1980), the Committee explained that:

> The privacy provision within Article I, Section 5, should be construed in light of the language in *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), regarding reasonable expectation of privacy. Privacy as used in this sense is not a fundamental right but a test of whether the prohibition against unreasonable searches and seizures applies.

(Note that Article I, § 5 was renumbered to Article I, § 7 in 1978.)

It is important to mention that *Katz* is not unanimously recognized as being the applicable constitutional standard in consensual eavesdropping cases. In his dissenting opinion in *Lester*, Justice Nakamura concluded that the concept of privacy has "attained constitutional dimension in Hawaii *in even a broader sense* than that declared in *Katz*." 64 Hawaii at 684, 649 P.2d at 362 (emphasis added). This argument was continued by Justice Wakatsuki in his dissenting

held that the defendants had failed to satisfy the second part of this Katz test:

> In the case at bar, we hold that defendants Okubo and Yamamoto had no reasonable expectation of privacy. Even if they had exhibited an actual, subjective expectation of privacy, society does not find reasonable their expectation that the other parties to the face-to-face or telephone conversations would not repeat their content to others or could not be compelled to reveal it in court.[19]

In addressing the statutory issue, the intermediate court found the officers' consent to be the determining factor. The court stated, "[W]e hold that there was no violation of HRS Chapter 803, Part IV, since participants to the recorded conversations consented to the monitoring and recording thereof."[20]

In *State v. Lee*, in turn, defendant Dr. Michael Keith Lee was charged with promoting drugs in violation of Hawaii Revised Statutes §§ 712-1242(1)(c) and 712-1245(1)(c). As evidence against the doctor, the state produced recordings of three incriminating conversations that had taken place in Dr. Lee's private office. The recordings had been obtained when a law enforcement officer—posing as a patient—made three visits to the doctor while fitted with a recording device. Similar to *Okubo*, no warrant had been obtained prior to these visits to Dr. Lee's office.[21]

In response to a motion to suppress, the lower court ruled that the recordings violated Article I, § 7 and ordered suppression of all tapes, transcripts and reports made from the audio recordings.[22] This decision, however, was reversed on appeal. Noting that the officer had consented to the recordings, the supreme court—relying upon *Lester* and *Okubo*—held that the defendant doctor had no reasonable expectation of privacy in the recorded conversations that would justify their suppression.[23] The court reached this conclusion notwithstanding the doctor's argument that he was entitled to greater constitutional protection because the conversations had occurred in a "private place"—i.e., his office. The court reasoned:

> The officer consented to the recordings, and was a participant in the conversations. Since the officer was free to testify in court to what was said between him and Dr. Lee, the recordings are merely reliable corroboration of the conversations. Therefore, although the conversations occurred in his office, Dr. Lee cannot have the recordings of them excluded.[24]

---

opinion in *Lee*, 67 Hawaii at ____, 686 P.2d at 822-23.

[19] 3 Hawaii App. at 409, 651 P.2d at 504.

[20] *Id.* at 411, 651 P.2d at 505.

[21] 67 Hawaii at ____, 686 P.2d at 817.

[22] *Id.*, 686 P.2d at 817.

[23] *Id.*, 686 P.2d at 817-18.

[24] *Id.*, 686 P.2d at 818 (citation omitted).

The court also found that the warrantless recordings were not prohibited under the wiretap law because no device had actually been "installed" in the doctor's office; rather, it had been carried in on the person of the undercover officer.[25] Two justices dissented, arguing that the court's decision was contrary to the intent of the framers of Article I, § 7 and that too narrow a construction had been given to the term "installed."[26]

III. THE CONSTITUTIONAL ISSUES

In terms of their constitutional significance, the end product of the *Okubo* and *Lee* cases is a per se exception to the warrant requirement in cases involving consensual eavesdropping. This exception was succinctly stated in the intermediate court opinion in *Okubo*:

> [A]s a per se rule, the state does not need a warrant to record a conversation if it has the prior consent of a participant to record the conversation, provided that the participant who consented cannot legally be silenced by a non-consenting participant.[27]

Consensual eavesdropping is not considered offensive to the constitution because the consenting participant is free to repeat what was said, and the defendant therefore "assumes the risk"[28] that the conversation will be repeated. Under such circumstances, a recording serves merely to bolster the consenting party's credibility by preserving the best and most reliable evidence of the parties' conversation. In embracing this "best evidence" rationale, the intermediate court cited with approval the following language from *Lopez v. United States*:

> [No person] has a constitutional right to rely on possible flaws in the agent's

---

[25] *Id.*, 686 P.2d at 820.

[26] *Id.*, 686 P.2d at 821.

[27] 3 Hawaii App. at 409, 651 P.2d at 504.

[28] This "assumption of risk" approach to consensual eavesdropping was described by the United States Supreme Court in United States v. White, 401 U.S. 745, 752 (1971):

> Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other. Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound.

> memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory. We think the risk that petitioner took in offering a bribe to [the government agent] fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.[29]

Since the defendant is deemed to have no reasonable expectation of privacy, the specific method by which the conversation is recorded is not considered significant. In other words, "[w]here the non-consenting participant does not have a reasonable expectation of privacy, the fact that the conversation was recorded by a participant or monitored and recorded by a third party with the consent of a participant is of no constitutional consequence."[30]

The very nature and effect of electronic recordation, however, is a focal point for much of the criticism directed against the practice of warrantless, consensual eavesdropping. As expressed in Justice Harlan's dissent in *United States v. White*:

> Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record.[31]

A claimed foible in the "assumption of risk" approach is thus that it fails to acknowledge a qualitative difference between the risk of human repetition and the risk of electronic repetition:

> The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the condition of human society. It is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, *the risk changes crucially*. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy.[32]

---

[29] 373 U.S. 427, 439 (1963) (footnote omitted).

[30] 3 Hawaii App. at 408, 651 P.2d at 503.

[31] 401 U.S. 745, 787-88 (1971) (footnotes omitted).

[32] Lopez v. United States, 373 U.S. 427, 465-66 (1963) (Brennan, J., dissenting) (emphasis

Perhaps the most meaningful way of conceptualizing the type of reasoning employed in *Okubo* and *Lee* is to characterize these cases as representing a "special application" of the *Katz* test, which as emphasized in *Okubo* is the proper test for Article I, § 7 analysis. In substance, the court's use of a risk theory appears to be nothing more than a means of circumventing the *Katz* test in cases involving consensual eavesdropping. *Okubo* and *Lee* in effect describe an "absolute standard of reasonableness" for purposes of measuring a person's expectation of privacy under the second part of the test. As long as one party to the conversation consents to the recording, the non-consenting participant's expectation of privacy *automatically* becomes unreasonable, because his fellow conversant's "treachery" was a risk he chose to undertake. With consensual eavesdropping, therefore, it is impossible for the non-consenting participant to satisfy the second part of the *Katz* test in the absence of a valid privilege.

It is important to consider, however, whether this special application of the test is actually incompatible with the true spirit of *Katz*. Taking language from the United States Supreme Court's opinion in that case:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[33]

This language seems to contemplate something beyond mere invocation of the "assumption of risk" rationale to determine whether a defendant was entitled to the protection of the warrant requirement prior to his conversation being recorded. Where did the conversation take place? Did the defendant speak in a hushed tone? Did he try to maintain a "safe" distance from uninvited ears? It is these types of factors that arguably merit consideration under *Katz*. This implicit tension between the risk theory and the more traditional *Katz* analysis was seemingly recognized by the intermediate court in *Okubo*, where the court made the following observation in its discussion of the *Lester* case:

> In concluding that Lester had no reasonable expectation of privacy, the plurality opinion cited the United States Supreme Court decisions in *Lopez*, *White*, and *Caceres*. No mention was made, however, of Lester's actual expectations of privacy nor of any other factors in the case to explain why Lester was not entitled to a reasonable expectation of privacy.[34]

---

added). *See also* Holmes v. Burr, 486 F.2d 55, 72 (9th Cir. 1973) (Hufstedler, J., dissenting); State v. Glass, 583 P.2d 872, 877 (Alaska 1978); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 406-407 (1974).

[33] 389 U.S. at 351-52 (citations omitted).

[34] 3 Hawaii App. at 409, 651 P.2d at 504.

As this excerpt suggests, an adherence to the risk theory requires almost an "on faith" conclusion that the defendant had no reasonable expectation of privacy, notwithstanding a very uncomfortable lack of analysis.[35]

The risk theory is also difficult to reconcile with other key language in the *Katz* opinion. Again quoting from the case:

> No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.[36]

If the person on the other end of the phone line in *Katz* had been an informant or undercover agent, however, it is clear that under the reasoning followed in *Okubo* and *Lee* the defendant would *not* have had a reasonable expectation of privacy and could *not* have suppressed recordings of his phone conversations on constitutional grounds. Herein, however, lies the incongruity: Why should the addition of an unfaithful friend suddenly transform Katz' reasonable expectation of privacy into an *un*reasonable one? Why should Katz suddenly be denied the right to assume that his utterances would not be "broadcast to the world?" From the defendant's perspective, the risk of repetition he supposedly incurs in speaking with a person who is in truth a police informant is no different from the risk he supposedly incurs in speaking with a person who, like the defendant, is ignorant of the surveillance. It seems very questionable, therefore, whether consensual eavesdropping is in fact worthy of the special treatment accorded it in *Okubo* and *Lee*.

IV. The Statutory Issues

In addition to raising these constitutional concerns, *Okubo* and *Lee* also provide varying degrees of clarification regarding Hawaii's Wiretap Law,[37] particu-

---

[35] It has been stated that the United States Supreme Court's decision in *White* and subsequent decisions relying upon the assumption of risk reasoning have done the greatest damage to the viability of *Katz* as a major precedent for the protection of privacy. Guzik, *The Assumption of Risk Doctrine: Erosion of Fourth Amendment Protection Through Fictitious Consent to Search and Seizure*, 22 Santa Clara L. Rev. 1051, 1064 (1982). *See also* Note, *Electronic Eavesdropping and the Right to Privacy*, 52 B.U.L. Rev. 831 (1972).

[36] 389 U.S. at 352. In *Katz*, law enforcement officials recorded the defendant's end of phone conversations by attaching an electronic listening and recording device to the outside of the telephone booth from which the calls were made. The defendant's conviction for transmitting wagering information was later reversed when the Supreme Court held that the warrantless surveillance violated the defendant's Fourth Amendment rights.

[37] Hawaii Rev. Stat. ch. 803, pt. IV (Supp. 1978).

larly Hawaii Revised Statutes § 803-42(b)(3).[38] As *Okubo* indicates, this statutory provision—similar to Article I, § 7—expressly permits the warrantless interception of a conversation where a participant has given prior consent.[39] The statutory protection, however, is more expansive in that it "plainly outlaws the 'bugging' of 'any private place,' unless [all] the parties entitled to privacy therein consent."[40] In a case decided solely on the basis of § 803-42(b)(3), the Hawaii Supreme Court in *State v. Lo*[41] upheld the suppression of evidence obtained by installing a recording device in a hotel room to which the defendant had been lured. In interpreting the statute, the court stated that, "What we are expounding . . . is a statutory right associated with places; we are not dealing with notions of privacy unrelated thereto, which have been incorporated in Fourth Amendment jurisprudence since *Katz v. United States*."[42]

Despite the court's claim that in construing the wiretap law it was not concerned with constitutional notions of privacy, the *Lee* case appears to suggest the contrary. As mentioned earlier, *Lee* involved an undercover officer wearing a tape recorder who recorded three incriminating conversations with the defendant doctor in the latter's private office. Although the court acknowledged that Dr. Lee's office constituted a "private place," it held that there was no violation of § 803-42(b)(3) because the recording device had not been "installed" in the office but rather had been worn in by the officer.[43] The court, therefore, interpreted the term "installed" to require a surreptitious entry and a physical attachment of the recorder to some part of the office. Taking language from the court's opinion:

> We read § 803-42(b)(3) to mean that the use of a recording device to monitor a conversation is allowed, except that (1) "installation in any private place, without consent of the person or persons entitled to privacy therein" is prohibited, and

---

[38] § 803-42(b)(3) reads as follows:

It shall not be unlawful under this part for a person to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State or for the purpose of committing any other injurious act; provided that installation in any private place, without consent of the person or persons entitled to privacy therein, of any device for recording, amplifying, or broadcasting sounds or events in that place, or use of any such unauthorized installation, or installation or use outside a private place of such device to intercept sounds originating in that place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy therein is prohibited.

[39] 3 Hawaii App. at 410, 651 P.2d at 505.

[40] State v. Lo, 66 Hawaii 653, 659, 675 P.2d 754, 758 (1983).

[41] 66 Hawaii 653, 675 P.2d 754 (1983).

[42] *Id.* at 661, 675 P.2d at 760.

[43] 67 Hawaii at ____, 686 P.2d at 820.

> (2) "installation or use outside a private place" without such consent is prohibited.[44]

Significantly, the court in *Lee* concluded its discussion of the statute with the following statement:

> The adversary system of justice is a fact-finding mission to seek the truth. The most accurate and reliable evidence of what was said in the conversation is the tape. Since the undercover agent is not prohibited from testifying to what was said, it would be absurd to exclude the recordings. We do not believe the legislature intended such an absurd result.[45]

It is clear that this language is again a reference to the notion that a criminal suspect "assumes the risk" that his conversations will be repeated, which was discussed earlier in the context of Article I, § 7. It seems equally clear, however, that this type of reasoning is superfluous in the context of § 803-42(b)(3). For statutory purposes, the fact that the recording device was "worn" as opposed to "installed" was alone sufficient to justify admission of the recordings in *Lee*. By making the additional argument that the agent was "not prohibited from testifying to what was said," the court not only added unnecessary verbiage but may also have engendered more confusion than it succeeded in removing.

On a fundamental level, the court implied that whenever a party to a conversation is free to repeat its contents, it would be absurd to suppress a more accurate recording. As pointed out by Justice Wakatsuki in his dissenting opinion in *Lee*, however, even in *Lo* the consenting participant was perfectly free to testify as to the conversation she had with Dr. Lo.[46] Notwithstanding this fact, the court was compelled under § 803-42(b)(3) to suppress a recording of the conversation. Although *Lo* and *Lee* are distinguishable on the "installed" versus "worn" dimension, this distinction appears meaningless in view of the court's "assumption of risk" argument. Indeed, under the court's reasoning in *Lee*, the outcome in *Lo*—while correct under the statute—must be deemed an absurd result. This seeming inconsistency in result, therefore, clearly speaks against the loose interjection of risk language in the context of statutory analyses.

V. CONCLUSION

State v. Okubo and *State v. Lee* demonstrate the Hawaii Supreme Court's willingness to permit the liberal use of electronic eavesdropping by law enforcement officials, provided that at least one party to the target conversation con-

---

[44] *Id.*, 686 P.2d at 818.

[45] *Id.*, 686 P.2d at 820 (footnote omitted).

[46] *Id.*, 686 P.2d at 822.

sents to the recording. From a constitutional perspective, these cases—particularly *Okubo*—confirm that the two-part "reasonable expectation of privacy" test declared in *Katz v. United States* is the appropriate standard for purposes of analysis under Article I, § 7 of the Hawaii Constitution. However, the court has adopted an interpretation of this test that makes a defendant's expectation of privacy automatically unreasonable when (1) there is a consenting participant, and (2) there is no applicable privilege. The result is an exception to the warrant requirement in cases involving consensual eavesdropping.

From a statutory perspective, on the other hand, the protection against indiscriminate eavesdropping is more expansive in that the statute accords special status to "private places." Under § 803-42(b)(3) of Hawaii's Wiretap Law, recorded evidence of a conversation must be suppressed if it was obtained through the "*installation*" of a recording device in a "private place." Otherwise, however, § 803-42(b)(3) is similar to its constitutional counterpart in terms of sanctioning electronic eavesdropping if done with the prior consent of a participant to the conversation.

Okubo and *Lee* also reflect the Hawaii Supreme Court's enthusiastic adoption of the theory that consensual eavesdropping is acceptable because the defendant "assumes the risk" that his conversations will be repeated and a recording merely preserves the "best evidence." Although this theory has found ready application by the court in its constitutional and statutory analyses, it is arguably incompatible with both the *Katz* test and the wiretap law, and seems to provide a convenient basis for decision-making at the expense of more meaningful analysis. Nevertheless, the current state of the law in Hawaii is clearly one which "permits official monitoring of private discussions limited only by the need to locate a willing assistant."[47]

Cindy S. Ikenaga

---

[47] United States v. White, 401 U.S. 745, 789 (1971) (Harlan, J., dissenting).