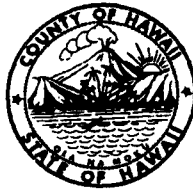


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January 13, 2006

Fred C. Holschuh, M.D., Councilmember
Hawai'i County Council
25 Aupuni Street
Hilo, Hawai'i 96720

Dear Dr. Holschuh:

RE: Pepe`eoko Point Coal-burning Powerplant, Whether Council Action to Prevent Restart Might Be A Constitutional "Taking" Requiring Compensation
(Corporation Counsel WRK No. 05-11202)

This is in response to the referenced question you posed, noting that many residents of Pepe`eoko oppose the restart of operations at the Pepe`eoko Point powerplant. You asked whether the County Council might be in jeopardy of legal "takings claims" if the Council somehow prevented the restart.

Your question did not propose any specific Council action. Hence, it is not possible for us to provide a specific answer at this time, since constitutional takings claims are highly dependent on the particular facts of each case, and indeed on the weighing of factors by judges. However, you did ask for an explanation of the general legal principles which should be considered in such a discussion, which you might share with your constituents. To that end, we attempt to provide for your information a non-privileged summary of general legal principles. Please bear in mind that this is not meant to be relied on as legal advice for any specific action that the Council (or any other persons) might take. Should the Council require such action-specific advice, please send us a detailed request.

I. Constitutional Takings Claims

"Takings" questions arise under the Fifth Amendment of the United States Constitution, which states in part: ". . . nor shall private property be taken for public use, without just compensation." Article I, Section 20 of the Hawai'i State Constitution provides similarly.

The obvious “paradigmatic taking requiring just compensation is direct government appropriation or physical invasion of private property.” Lingle v. Chevron U.S.A. Inc., 125 S.Ct. 2074, 2081 (2005). Here, we do not understand that the Council would be considering an actual condemnation of the powerplant, or other actual taking of the property.

The U.S. Supreme Court has also “recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and that such ‘regulatory takings’ may be compensable under the Fifth Amendment. . . . if regulation goes too far it will be recognized as a taking.” *Id.*

Supreme Court precedent has staked out “two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes.” *Id.* They are: (1) Where government requires an owner to suffer a permanent physical invasion of the property, however minor; and (2) Where regulations completely deprive an owner of “all economically beneficial use of her property.”

The Supreme Court has sometimes recognized takings claims where government requires dedications of easements or the like, as conditions of permit approval. Such exactions must relate to the impacts of the proposed development. Such exactions may be “takings” where the easements do not “substantially advance” government permitting interests, and the dedication is not “roughly proportional” to mitigate the nature and extent of development impacts. Nollan v. California Coastal Commission, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

Further, the U.S. Supreme Court has stated some general factors for courts to consider in deciding whether regulatory taking has occurred: (1) The economic impact of the regulation; (2) The extent to which regulation has interfered with distinct investment-backed expectations; (3) the “character of the governmental action”, i.e., whether it amounts to a physical invasion, or “adjusts the benefits and burdens of economic life for the common good.” Penn Central Transportation Co., v. New York City, 438 U.S. 104 (1978), cited in Lingle at 2081.

However, the Supreme Court has also “upheld land-use regulations that destroyed or adversely affected recognized real-property interests” where it could be reasonably concluded that the health, safety, morals or general welfare would be promoted by prohibiting particular contemplated uses of land. “Zoning laws are, of course, the classic example . . . which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property.” Penn Central, 438 U.S. at 125.

Again, bear in mind that even the U.S. Supreme Court refuses to set forth a definite “taking” formula. “[T]his Court, quite simply, has been unable to develop any “set

formula” for determining when ‘justice and fairness’ require that” compensation be paid for alleged takings. “Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses . . . depends largely upon the particular circumstances in that case.” Penn Central, 438 U.S. at 124.

For discussion purposes, to broadly summarize the foregoing, takings claims have been asserted in many contexts where government regulation has blocked development or commercial uses. Success of such claims depends on the courts’ weighing of various factors such as the foregoing. Generally speaking, rezoning has not been considered taking. However, any regulation which destroys all economically beneficial use, or actually invades property, will likely be considered a *per se* taking, requiring compensation.

II. Zoning Estoppel or Vested Rights

Aside from takings claims, the Council should also consider whether an attempted rezoning or other change in land use entitlements could be challenged as unfair and inequitable, after the powerplant operator has invested substantially, in reliance upon existing county zoning and permitting. Such claims are called “zoning estoppel” or “vested rights” claims.

The Hawai‘i Supreme Court has recognized such claims. Basically, once an investor has made “substantial expenditures” in “good faith” reliance on “official assurances” of rights to develop or use the land in the intended way, courts will block the government’s attempts to change the rules to the detriment of the investor. “Official assurances” may be in the form of zoning or permit approvals, if they are the “last discretionary action” on the specific project. County of Kaua‘i v. Pacific Standard Life Insurance Company, Committee to Save Nukoli‘i, 65 Haw. 318 (1982).

Here, we understand generally that the County Planning Department’s position is that the Pepe‘ekeo powerplant already has all required zoning and permits, including an HRS Chapter 205 special permit. Thus, if the operator can prove substantial investments made in good faith reliance on such land use entitlements, the operator may well challenge in court any Council attempts to change any such entitlements.

The Hawai‘i Supreme Court has held that the remedy for such zoning estoppel claims against the government is not monetary damages, but that the developer should be allowed to go forward. See, Allen v. City and County of Honolulu, 58 Haw. 432 (1977). However, bear in mind that in the Kelly v. 1250 Oceanside Partners case in Kona, State Circuit Court Judge Ibarra awarded substantial attorneys’ fees and costs against the County, based on the County’s role in zoning and permitting.

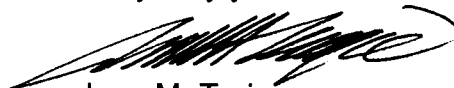
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III. Other Potential Issues, and Conclusion

Again, because we do not have any specific proposed Council actions to review, we cannot foresee other legal issues that may arise. Suffice to say that any action proposed may have to be examined for other possible legal issues, such as might arise under principles of due process and equal protection of the laws.

We hope that this general discussion meets your current needs. Again, please send us a more specific request for advice should you wish to explore particular proposed Council actions. This letter is for general information only, and is not intended to provide legal advice to be relied upon by any persons for any particular acts or forbearance. Certainly any of your constituents should consult their own legal counsel should they have any legal questions. Thank you.

Very truly yours,



Ivan M. Torigoe
Deputy Corporation Counsel

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c: Council Members

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