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Via Electronic Filing

Clerk of the Court
United States Court of Appeals
For the Ninth Circuit

Re: Letter Brief *Bridge Aina, LLC v. Kyle Chock, et al.*,
Appeals Nos. 12-15971 & 16076

Honorable Ninth Circuit Court:

Per this court's May 23, 2014 Order, Plaintiff Appellee Cross-Appellant Bridge Aina Le'a, LLC ("Bridge") hereby provides the following letter brief addressing the effect of Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1984).

I. INTRODUCTION

A. Bridge's Complaint Is Ripe To Proceed On The Merits

Williamson does not prevent this court from addressing the district court's order and providing the relief requested by Bridge. This dispute is ripe for adjudication because (1) a final decision has occurred to trigger a regulatory taking, and (2) this lawsuit was filed by Bridge to obtain just compensation from

the state. The only uncertainties are the length of time of the taking (temporary versus permanent) and the amount of damages. Unlike Williamson, Bridge's complaint was filed in state court and includes claims for just compensation and regulatory takings in addition to the federal §1983 and §1988 claims against the individual commissioners. It was the Land Use Commission ("Commission") that removed this case to federal court. Also, the Commission's final order reclassifying the property¹ to agricultural use is a final decision, and there is no variance procedure available for Bridge. See Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001). Therefore, this lawsuit satisfies the ripeness requirements of Williamson.

B. This Court Should Remand Bridge's Lawsuit, In Whole Or Part, Back To State Court Without Further Delay

The ripeness of this lawsuit and Bridge's urgency to begin the litigation process are exemplified by the lengthy procedural history of this dispute. On April 25, 2011, the Commission entered its final order amending the property's land use designation from urban to agricultural use. More than three years later, a dark cloud remains over the project despite the state court's reversal of the Commission's final order. There is no variance or other procedure available to Bridge to re-start the development on any scale, and the Commission has simply refused to be bound by the administrative appeal ruling and allow the project to go

¹ The subject property consists of approximately 1,060 acres of land located in the State and County of Hawaii.

forward. (SER 37). In that time period, Bridge continues to suffer damages as a result of the Commission's regulatory taking and the individual Commissioners' willful and wanton violation of state and federal law. By staying Bridge's claim for just compensation, as well as the other state law claims, the district court has improperly delayed the beginning of the pretrial and discovery portions of this lawsuit by two years. No further delay is necessary. Therefore, this court should either remand the entire case back to state court, or stay the federal claims and remand the state law claims back to state court. Compare Ganz v. City of Belvedere, 739 F. Supp. 507, 510 (N.D. Cal. 1990) with VH Property Corp. v. City of Rancho Palos Verdes, 622 F. Supp. 958, 970 (C.D. Cal. 2009).

II. DISCUSSION

A. Description Of The Commission's Unlawful Conduct Relating To The Ripeness Issue

The Commission is a state administrative body charged with designating land use boundaries and classifications in the state of Hawaii—urban, rural, agricultural, and conservation. See Haw. Rev. Stat. § 205-2. The Commission does not issue permits, variances, or perform any of the other functions normally performed by local land use or zoning boards. All land use boundary amendments before the Commission are treated as a contested case and evidentiary proceeding pursuant to Haw. Rev. Stat. Chapter 91 and Haw. Admin. Rules § 15-15, subchapter 7.

On January 17, 1989, the Commission reclassified the property from agricultural to urban use. (SER 3). In so doing, the Commission expressly found that the “Property is not suitable for agriculture...” (SER 4). The property was subsequently sold to Bridge. In late 2008, the Commission unilaterally began a process to reclassify the property from urban to agricultural use, despite the fact that Bridge had expended millions of dollars improving the property and preparing it for development. (SER 6-8). On April 25, 2011, the Commission entered a final order reclassifying the property back to the agricultural land use district. (SER 17). The Commission’s final order ignored that the property was already partially developed and had secured various zoning, subdivision, and building permits from the County of Hawaii. (SER 12-13). In the Commission’s more than fifty year history, it had never reclassified a project during construction.

B. Procedural Background Of This Lawsuit And The Administrative Appeal

Bridge subsequently filed this lawsuit in state court alleging various state and federal constitutional claims, including claims for declaratory and injunctive relief, just compensation, regulatory takings, and § 1983 and § 1988 claims against certain individual Commissioners. Bridge included all of its claims related to the property in the single action to promote efficiency, allow declaratory and injunctive relief against the Commission’s unprecedented conduct, and

preserve any statute of limitations as to claims against the individual Commissioners.

Bridge also filed an administrative appeal of the Commission's final order, which the state court reversed and vacated. The state court found that the Commission and its final order violated almost every applicable statute, administrative rule, and constitutional safeguard. That administrative appeal is coming for hearing before the Hawaii Supreme Court on June 25, 2014.

In this lawsuit, the Commission filed a motion to dismiss the claims against the individual Commissioners based on qualified and absolute immunity defenses. On March 30, 2012, the district issued its order staying "the present case pending the appeal of [state court] Judge Strance's order reversing and vacating the Commission's decision to reclassify the property in issue from urban use to agricultural use." (ER 22). The district court stayed Bridge's federal claims pursuant to Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 (1941), and also stayed Bridge's "state claims in the interest of sensible management of this case." (ER 22). The district court declined to remand Bridge's state claims (including its just compensation claim), and did not substantively rule on the Commissioners' immunity defenses. Neither the district court nor any of the parties raised ripeness as part of the motion to dismiss. The district court's order

ruled that the stay would be lifted once the administrative appeal was concluded.²

The Commission filed this appeal objecting to the stay and the district court's refusal to substantively rule on the Commission's immunity defenses raised in the motion to dismiss. The Commission apparently argues that this court should decide the immunity issues *de novo* even though they were not ruled upon by the district court.

Bridge's cross-appeal argues that the district court should have followed the holdings in either Ganz or VH Property Corp. and remanded all or part of the lawsuit back to state court. Specifically, in VH Property Corp., just as here, plaintiff asserted a just compensation claim against the city defendant, and the only open issue was whether plaintiff would allege a temporary or permanent taking. As such, the court recognized that the just compensation litigation and other state law claims should proceed in state court, including discovery, pretrial schedules, expert appraisals, etc. Therefore, here this court can remand the claims to state court without reaching the substantive basis of the Commissioners' purported immunity defenses.

III. BRIDGE'S LAWSUIT IS RIPE PURSUANT TO WILLIAMSON

In Williamson, the Court held that a plaintiff's claims for regulatory takings and § 1983 claims were premature because (1) the land use authority did

² Accordingly, the federal district court's stay will likely be lifted once that state court ruling is entered later this year.

not reach “a final decision regarding the application of the regulations to the property at issue”; and (2) the plaintiff did not “seek compensation through the procedures the State has provided for doing so.” Id. at 186-88, 194. Here, Bridge’s lawsuit is ripe because the Commission’s reclassification of the property was a final order, and Bridge is seeking just compensation from the state.

A. The Commission’s Reclassification Of The Property From Urban To Agricultural Use Was A Final Decision

First, the Commission’s final order was a final decision in compliance with Williamson. Unlike a more typical land use regulatory body, such as a zoning board, the Commission’s reclassification of the property changed the allowable use of the *entire* property from urban to agricultural. There is no variance or other similar procedure for Bridge to proceed with a modified version of the project—only agricultural uses would be allowed.³ Indeed, the Commission has previously admitted that “[t]he Property is not suitable for agriculture and there are no agriculture activities on the site.” (SER 004).

Second, the Commission’s final order was a final decision because it derived from a contested case hearing subject to Haw. Rev. Stat. Chapter 91. As such, the commission’s final order does not “leave[] open the possibility that respondent may develop the subdivision...” Williamson, 473 U.S. at 193. “A final

³ The eleven allowable uses in agricultural land use designation are listed in Haw. Rev. Stat. § 205-2. None of the allowable uses include residential or commercial real estate development, or anything close to resembling the proposed project.

decision does not occur until the responsible agency determines the extent of permitted development on the land.” Palazzolo v. Rhode Island, 533 U.S. 606, 607 (2001), citing MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 351(1986). In Palazzolo, the Supreme Court addressed what constitutes a “final decision” for a land use takings claim to become ripe:

While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, **or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.** The case is quite unlike those upon which respondents place principal reliance, which arose when an owner challenged a land-use authority's denial of a substantial project, leaving doubt whether a more modest submission or an application for a variance would be accepted.

Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001) (emphasis added); see also Vacation Village, Inc. v. Clark County, 497 F.3d 902, 912 (9th Cir. 2007). Here, there is no doubt that a different or “more modest” urban development would not be approved because the Commission reclassified the land use designation of the entire property to agricultural use. Only those agriculture uses listed in Haw. Rev. Stat. § 205-2(d) would be allowed on the subject property, which could not include any version of a real estate development project. Given the Commission’s prior admission that the property is not suitable for agriculture use, the reclassification to that land use designation clearly deprived Bridge of all economically viable use of the property. Accordingly, the permissible uses of the property are known to a

“reasonable degree of certainty,” and are limited to only the agricultural uses listed in Haw. Rev. Stat. § 205-2(d). Palazzolo, 533 U.S. at 620. Therefore, Bridge’s claims satisfy the first prong of the Williamson test.

B. Bridge Has Sought Just Compensation Against The State

Bridge filed its state court action for just compensation as part of this lawsuit, which the Commission removed to federal court. (ER 4). Bridge properly combined its just compensation, regulatory taking, and federal civil rights claims into one single lawsuit that is entirely ripe for adjudication now. See San Remo Hotel v. City and County of San Francisco, 545 U.S. 323, 346 (2005) (Williamson ripeness “does not preclude state courts from hearing simultaneously a plaintiff’s request for compensation under state law and the claim that, in the alternative, the denial of compensation would violate the Fifth Amendment of the Constitution.”). Accordingly, this lawsuit properly raises the just compensation and the regulatory takings claims consistent with Williamson.⁴ Therefore, the relief sought by Bridge in its cross-appeal to remand the state law claims back to state court is entirely consistent with Williamson, and is precisely what the court ruled in VH Property.

Further, it should be noted that Bridge is not required to exhaust its administrative appeal remedies prior to filing its just compensation, regulatory takings, or federal civil rights claims. See Williamson, 473 U.S. at 191; see

⁴ The Commission also rejected Bridge’s offer to dismiss the federal claims without prejudice while the state law claims are litigated. (SER 64-74).

Wiltzius v. Town of New Milford, 453 F. Supp. 2d 421, 430-431(D.Conn. 2006); see also Murphy v. New Milford Zoning Com'n, 402 F.2d 342, 349 (2nd Cir. 2005).

The district court properly recognized that the existence of Bridge's takings claim would not be significantly affected by the state court administrative appeal, regardless of the outcome. "...Bridge points out that the state appeal will not determine the takings claim (as that is not before the state court)." ER 21. The only issue to be decided by the administrative appeal is the extent of the taking (either temporary or permanent), which will subsequently affect the amount of just compensation damages to be award. Therefore, this action is ripe because the underlying taking has already occurred—it is just now a matter of determining damages.

IV. CONCLUSION

For the reasons stated above, this lawsuit is ripe for adjudication. Therefore, Bridge respectful requests that this court reverse the stay imposed by the district court and remand this case back to state court consistent with Ganz and/or VH Property Corp.

Respectfully submitted,
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