Appeal Nos. 12-15971 and 12-16076

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIDGE AINA LE'A, Plaintiff-Appellee-Cross Appellant,

vs.

KYLE CHOCK, in his individual and official capacity et al,
Defendants-Appellants-Cross Appellees,

On Appeal From the United States District Court
for the District of Hawai`i
Honorable Susan O. Mollway

Case No. 11-00414 SOM BMK

DEFENDANTS-APPELLANTS-CROSS APPELLEES' LETTER BRIEF RE EFFECT OF *WILLIAMSON COUNTY REG'L PLANNING COMM'N V. HAMILTON BANK OF JOHNSON CITY*, 473 U.S. 172 (1985)

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I. INTRODUCTION

Vladimir Devens, Kyle Chock, Thomas Contrades, Lisa Judge, Normand Lezy, Nicholas Teves, and Ronald Heller are or were volunteer members of the Land Use Commission of the State of Hawai'i. Plaintiff sued them personally because of a decision they reached as members of the State of Hawai'i Land use Commission acting pursuant to law in a quasi judicial proceeding.

In that proceeding, the Commission came to a final, definite decision that could be – and was – appealed to the State courts. Unlike the government action in *Williamson County*, the Commission's decision was final, not subject to reconsideration

[1] The complaint named as defendants: STATE OF HAWAII LAND USE COMMISSION, VLADIMIR P. DEVENS, in his individual and official capacity, KYLE CHOCK, in his individual and official capacity, THOMAS CONTRADES, in his individual and official capacity, LISA M. JUDGE, in her individual and official capacity, NORMAND R. LEZY, in his individual and official capacity, NICHOLAS W. TEVES, JR., in his individual and official capacity, RONALD I. HELLER, in his individual and official capacity, DUANE KANUHA, in his official capacity, and CHARLES JENCKS, in his official capacity. Of these persons only Kyle Chock and Ronald I. Heller are still on the Land Use Commission. Their present terms end on June 30, 2014. New commissioners are automatically substituted for official capacity defendants. The State Land Use Commission and official capacity defendants are collectively referred to as the "Commission" or the "LUC." Individual capacity defendants are collectively referred to as "the individual Commissioners."

and not subject to amelioration by variances. The first prong[2] of *Williamson County* ripeness is therefore inapplicable to this appeal.

Application of the second prong of *Williamson County* is less straightforward. But, as discussed below, that prong likewise has no effect on this appeal, except in one relatively minor respect.

II. BACKGROUND

In 1989, the Commission conditionally approved a petition to reclassify approximately 1060 acres of land from the agricultural district into the urban district.

Twenty years later the conditions remained unfulfilled. The Commission considered whether to revert the property to its prior status as agricultural land. By Hawai‘i law, the Commission was required to and did make that consideration by way of a contested case. By Hawai‘i law, the contested case was a quasi judicial

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[2] *Williamson County* sets forth a two-prong test for ripeness for takings claims: first, an owner must obtain a final decision regarding how it will be allowed to develop its property, and second, a plaintiff must have sought compensation for the alleged taking through available state procedures. If a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

MHC Financing Ltd. Partnership v. City of San Rafael, 714 F.3d 1118, 1130 (9th Cir. 2013), *cert. denied*, 134 S.Ct. 900 (2014) (citations and internal punctuation omitted). We discuss *Williamson County* and its prongs in more detail below.

proceeding.

The Commission decided in the contested case that the property – then owned by plaintiff - should be reverted to the agricultural district. Seven Commissioners joined this decision. Plaintiff sued them personally. Two Commissioners dissented. Plaintiff did not sue them.

The individual Commissioners are entitled to absolute quasi-judicial immunity and qualified immunity. They filed a motion to dismiss on that basis.

The district court refused to consider the motion on the merits. Instead the court declined to rule based on *Pullman* abstention, thereby consigning the seven individual Commissioners to years with the shadow of this lawsuit hanging over their heads.

This decision was and is wrong. The federal courts should not abstain. The district court should have ruled - and this Court should rule - that individual Commissioners are immune from personal liability and entitled to dismissal of all claims against them personally.

III. PROCEDURAL HISTORY AND THIS COURT'S ORDER

The district court entered its order on March 30, 2012. ER 1. Defendants appealed on April 25, 2012. ER 24. The appeal was timely pursuant to FRAP 4(a)(1)(A). The ONLY issue on this appeal is whether the district court erred by failing to dismiss the case as to individual Commissioners. Denial of the motion as

to the Commission itself is NOT on appeal.

Plaintiffs cross appealed.

The case is fully briefed. ECF 013, 022, 027, and 029. Oral argument is set for June 10, 2014. ECF 037. On May 23, 2014, this Court ordered filing of briefs regarding the effect on this case of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). ECF 041.

The short answer to this question is *Williamson County* has no effect on this appeal, except in one relatively minor respect noted below.

IV. DISCUSSION

A. *WILLIAMSON COUNTY*

The *Williamson County* case arose from a dispute over development of a residential cluster subdivision outside Nashville, Tennessee. After the developer constructed a portion of the approved subdivision, Williamson County altered the zoning rules, lowering allowable building densities. 473 U.S. at 178.

This undercut the final phases of the project and required the developer to resubmit its plat for review under the new rules. The county planning commission (County) rejected the resubmitted plan as inconsistent with its new, reduced density standards. 473 U.S. at 179-180. The developer then went bankrupt. Its interests were acquired by Hamilton Bank. 473 U.S. at 181.

The Bank resubmitted a plat for the final phase of the subdivision. That too was rejected. *Id*. The Bank then sued the County in federal court, alleging that denial of the plat caused a taking without just compensation and violated the Bank's due process rights. 473 U.S. at 182. A jury invalidated the plat denial, and awarded the Bank damages for a temporary taking of its property interests. 473 U.S. at 182-183. The trial judge granted judgment for the County notwithstanding the jury verdict. 473 U.S. at 183. The Sixth Circuit subsequently reversed the lower court, upholding the jury verdict. *Hamilton Bank of Johnson City v. Williamson Cnty. Reg'l Planning Comm'n*, 729 F.2d 402 (6th Cir. 1984).

The County successfully petitioned for certiorari.

The Court, in an opinion authored by Justice Blackmun, held that the Bank's federal takings claim was not ripe because the County had not reached a "final decision" as to application of its restrictions to the Bank's property. 473 U.S. at 186. The Court said the Bank could have sought exceptions (variances) to soften the County’s subdivision restrictions. 473 U.S. at 187-188. Because the Bank did not do so, the County’s restrictions were not final. Without such finality the Court held it could not apply federal takings standards to the County’s decisions to determine if they violated the Bank's rights under the Takings Clause. 473 U.S. at 191.

The Court went on to apply a second ripeness barrier to the

Bank's claim. 473 U.S. at 194. The Bank's federal takings claim was also unripe because the Bank failed to use state procedures potentially capable of providing it with just compensation. *Id*.

Starting from the premise that the Fifth Amendment does not prohibit takings of property, but only takings "without just compensation," the Court concluded that a property owner cannot claim a violation of the Takings Clause "until it has used the [state's] procedure[s] and been denied just compensation." 473 U.S. at 194-195. The Bank's federal takings claim was premature because it had failed to use Tennessee's judicial inverse condemnation procedure. 473 U.S. at 196-197.

B. EFFECT AS TO THE INDIVIDUAL COMMISSIONERS' APPEAL

Plaintiff's lawsuit claims the Commission and the individual Commissioners personally violated plaintiff's constitutional rights to due process, equal protection, and just compensation.

The individual Commissioners sought to dismiss the claims as to them personally. There were and are two bases for their motion: first, the individual Commissioners are entitled to quasi-judicial absolute immunity and second, the individual Commissioners are entitled to qualified immunity.

The district court refused to rule on the individual Commissioners' motion. Instead the court invoked *Pullman* abstention.

The first prong of *Williamson County* has no bearing on this appeal. The Commission's decision in the contested case was final and definite. The decision was not subject to reconsideration. The Commission had no authority to consider variances or any similar ameliorating actions. Because the decision was final, plaintiff had the right to – and did – appeal the decision to the Hawai'i state courts. Haw. Rev. Stat. § 91-14(2012). Indeed finality and right to appeal are two (of many) aspects that mark the Commission's actions as quasi judicial.

As to the second prong, Hawai'i has a procedure for providing just compensation. *Austin v. City and County of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988). So this prong (unlike the first) is potentially applicable. It is not actually applicable (except as noted in footnote 3) for the following reasons.

First, we note there has been debate as to whether due process and equal protection claims arising from or relating to a taking are in fact independent claims at all. The Ninth Circuit's present answer is "yes" because of *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528 (2005). *See Crown Point Development, Inc. v. City of Sun Valley*, 506 F.3d 851, 852-853 (9th Cir. 2007).

The next question is whether *Williamson County* ripeness requirements apply to due process and equal protection claims arising from an alleged taking. Prior to *Lingle* and *Crown Point*,

the answer apparently was yes. *See Harris v. County of Riverside*, 904 F.2d 497, 500 (9th Cir. 1990) ("Procedural due process claims arising from an alleged taking may be subject to the same ripeness requirements as the taking claim itself depending on the circumstances of the case."); *Herrington v. County of Sonoma*, 857 F.2d 567, 568 -569 (9th Cir. 1988) ("Our decisions in this area have also clarified that we will apply the same ripeness standards to equal protection and substantive due process claims.").

It is unclear whether those cases are still good law. The individual Commissioners have not found a definitive Ninth Circuit case. Two recent district court decisions appear to reach opposite conclusions. *Cf. MHC Financing Ltd. Partnership Two v. City of Santee*, 2012 WL 6675279, 2 (S.D.Cal. 2012) (finding that the first prong does not apply to substantive due process claim citing to *Lingle* and *Equity Lifestyle v. County of San Luis Obispo*, 548 F.3d 1184 (9th Cir.2008)) with *White v. Valley County*, 2011 WL 4583846, 9 (D.Idaho 2011) ("if the alleged due process violation arises from the same facts giving rise to the takings claim, then both claims will be subject to the ripeness inquiry" citing *Harris* and *Herrington*).

This Court need not decide the issue because even if the requirements apply and even if the claim is not ripe, the Ninth Circuit (following the Supreme Court) has held the *Williamson County* ripeness requirements are prudential rather than

jurisdictional. *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1117 (9th Cir. 2010). As in *Guggenheim*, the Court can and should exercise its discretion to decide the case on the merits.

> In this case, we assume without deciding that the claim is ripe, and exercise our discretion not to impose the prudential requirement of exhaustion in state court. . . [W]e reject the Guggenheims' claim on the merits, so it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation.[3]

C. EFFECT ON PLAINTIFF'S CROSS APPEAL

Plaintiff's cross appeal argues that its taking claim should be remanded to state court. Plaintiffs did not articulate a clear reason for the claim and did not cite to or rely on *Williamson County*.

Plaintiff's originally filed their lawsuit in state court. Defendants properly removed. In other taking cases, removal was a prelude to the government seeking dismissal of the federal taking claim based on *Williamson County* ripeness. *See e.g. Koscielski v. City of Minneapolis*, 435 F.3d 898, 903 (8th Cir. 2006); *Rau v. City of Garden Plain*, 76 F. Supp. 2d 1173, 1174-

[3] *Williamson County* affects the individual Commissioners' appeal in one respect. Even if individual Commissioners actions constituted a taking (which we deny), *Williamson County* (and other cases, e.g. *Lingle*) makes plain that the Fifth Amendment does not prohibit takings of property, but only takings "without just compensation." Hawai'i has a procedure for providing just compensation. *Austin v. City and County of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988). Therefore the individual Commissioners' actions CANNOT violate plaintiff's right to just compensation, and they are entitled to qualified immunity.

75 (D. Kan. 1999); *Ohad Assoc. LLC v. Twp. of Marlboro*, 2011 WL 310708 (D.N.J. 2011).

The Commission has not sought to dismiss the federal taking claim on that basis in this case. Whether or not it does so in the future has no effect on this appeal and no affect on the Court's jurisdiction.

Williamson County has no bearing on plaintiff's cross appeal.

DATED: Honolulu, Hawai'i, June 5, 2014.

/s/ William J. Wynhoff
Deputy Attorney General
Attorney for DEFENDANTS-APPELLANTS-CROSS APPELLEES

CERTIFICATE OF SERVICE

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

Bruce D. Voss

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DATED: Honolulu, Hawai‘i, June 5, 2014.

/s/ William J. Wynhoff
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