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' PRINCIPAL BRIEF

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DEFENDANTS-APPELLANTS-CROSS APPELLEES'[1] PRINCIPAL BRIEF

INTRODUCTION

Plaintiff filed this suit seeking millions of dollars in alleged damages from seven volunteer members of the State of Hawai'i Land Use Commission - Vladimir Devens, Kyle Chock, Thomas Contrades, Lisa Judge, Normand Lezy, Nicholas Teves, and Ronald Heller – because these individuals dared to vote on quasi-judicial Commission business in a way that plaintiff did not like. Plaintiff did not individually sue two other Commissioners who voted in plaintiff's favor.

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

But the district court refused even to consider the motion

[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. The present members of the Land Use Commission (and the dates their terms end) are Kyle Chock (6/30/2014), Ronald I. Heller (6/30/2014), Chad McDonald (6/30/2015), Sheldon Biga (6/30/2016), Tom Contrades (6/30/2013), Lance Inouye(6/30/2016), Jaye Napua Makua (6/30/2014), Ernest Matsumura (6/30/2013), and Nicholas W. Teves, Jr. (6/30/2013). These persons 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 "individual Commissioners."

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.

I. JURISDICTIONAL STATEMENT

A. DISTRICT COURT JURISDICTION

Plaintiff filed its complaint in state court. ER 79.[2] The complaint contained federal law claims, including claims made pursuant to 42 U.S.C. § 1983. Defendants properly removed. ER 69. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and 1441.

B. APPELLATE COURT JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 1292(a)(1).

> Section 1291 of U.S.Code Title 28 grants this court jurisdiction over "final decisions" of the district court. Ordinarily, the denial of a motion under Federal Rule of Civil Procedure 12(b)(6) would not constitute a

[2]Excerpts of the record (ER) exceed 75 pages and will be submitted in two volumes per Circuit rule 30-1.6(a). The first volume contains only the decision to be reviewed. Documents in the second volume are arranged by file date in chronological order beginning with the most recent filing date. The documents are paginated beginning with page 1. 00

> "final decision." The district court's denial of absolute and qualified immunity, however, is a "final decision" for § 1291 purposes because these immunities are immunities from suit, not just from damages. *See Mitchell v. Forsyth,* 472 U.S. 511, 525, 527, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

al-Kidd v. Ashcroft, 580 F.3d 949, 956 (9th Cir. 2009), rev'd on other grounds and remanded, 131 S. Ct. 2074 (2011).

"The district court's decision to abstain under *Pullman* is immediately appealable under 28 U.S.C. §§ 1291 and 1292(a)(1)." *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).

C. FILING DATES ESTABLISHING TIMELINESS OF APPEAL

The district court's order was entered 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).

D. FINALITY OR OTHER BASIS FOR APPEAL

The appeal is from a final order. *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009), rev'd on other grounds and remanded, 131 S. Ct. 2074 (2011). In addition or in the alternative, the order is interlocutory and appealable. *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003).

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred by refusing to rule on individual Commissioners' right to absolute (quasi-judicial) immunity and qualified immunity, thereby consigning the individual Commissioners to years with the shadow of this lawsuit hanging over their heads.

2. Whether individual Commissioners are entitled to absolute (quasi-judicial) immunity with respect to a decision made by way of a contested case hearing where under Hawai‘i law "performing an adjudicatory function [] is inherent in a contested case hearing."

3. Whether individual Commissioners are entitled to qualified immunity.

III. STATEMENT OF THE CASE

A. NATURE OF THE CASE

Haw. Rev. Stat. chapter 205 establishes a statewide zoning regime that is overseen by the Hawai‘i State Land Use Commission. Among its other duties, the Commission considers requests to amend land use district boundaries (i.e. change the zoning) of parcels larger than 15 acres. Haw. Rev. Stat. § 205-3.1 (Cum. Supp. 2012).

More than twenty-four years ago, the Commission conditionally changed the land use district boundary of a 1060 acre parcel of land from agricultural to urban. Compl. ¶ ¶ 8 – 11, ER 79 et seq. The conditions (as modified by the Commission) remain unfulfilled to this day. Compl. ¶ ¶ 12, 13, 23, 26-29, and 37-40, ER 79 et seq.

In 2011, the Commission conducted a multi-day contested hearing pursuant to Haw. Rev. Stat. chapter 91. It ultimately voted to revert the land to its original land use district classification. Compl. ¶ ¶ 81-125, ER 79 et seq.

Plaintiff challenged the Commission's action in a state court administrative appeal and simultaneously brought this action seeking damages and injunctive relief. *See* ER at 4,

B. COURSE OF PROCEEDINGS

Plaintiff filed this action on June 7, 2011, in the Circuit Court of the First Circuit, State of Hawai'i. ER 79. Defendants removed the action to the United States District Court for the District of Hawai'i on June 27, 2011. ER 69.

Defendants filed a motion to dismiss on July 27, 2011. *See* Docket Sheet, ER at 170 (ECF 14). The motion sought dismissal of all claims against the individual Commissioners. The motion also sought dismissal of certain claims against the Commission and abstention as to a few remaining claims against the Commission.

The district court refused to act on the motion at all. Instead, by order filed March 30, 2012, the court stayed "the entirety of the present action pending resolution" in the Hawai'i appellate courts of the state court challenge to the LUC's action. ER at 3.

Defendants timely appealed. ER 24.

C. DISPOSITION BELOW

The district court refused to rule on individual Commissioners' claims to absolute (quasi-judicial) immunity and qualified immunity. ER 1.

IV. STANDARDS OF REVIEW

> "We review *de novo* the district court's refusal to grant immunity at the pleading stage in a § 1983 action." *Morley v. Walker,* 175 F.3d 756, 759 (9th Cir.1999). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See id.* The burden of showing that immunity is available is upon the official who seeks it. *See id.* A complaint should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief. *See id.*

Mishler v. Clift, 191 F.3d 998, 1002 (9th Cir. 1999).

> We review a decision to abstain and stay proceedings under *Pullman* for abuse of discretion. *Cinema Arts, Inc. v. Clark County,* 722 F.2d 579, 580 (9th Cir.1983). Abstaining under *Pullman* constitutes an abuse of discretion when the requirements for *Pullman* abstention are not met. *Id.* at 582; *C-Y Dev. Co. v. City of Redlands,* 703 F.2d 375, 377 (9th Cir.1983).

Porter v. Jones, 319 F.3d 483, 491-92 (9th Cir. 2003).

V. STATEMENT OF THE FACTS

On November 25, 1987, Signal Puako Corporation (SPC) filed a petition to reclassify approximately 1060 acres of land in Waikoloa on the Big Island (the Property) from the agricultural district into the urban district. Compl. ¶ ¶ 8 and 9, ER 79 et seq.

Under Hawai'i law, the Commission is charged to consider such a request. Pursuant to that authority, the Commission approved the petition on January 17, 1989. Its approval was

subject to various conditions. Among other things, the Commission required that 60% of the proposed 2760 housing units (i.e. 1656 units) be "affordable." Compl. ¶ 11, ER 79 et seq.

SPC transferred the Property to Puako Hawai'i Properties (PHP) which filed a motion to amend the Commission's original order and reduce the total number of housing units to 1550. The Commission approved the motion on July 9, 1991. Among other conditions, the Commission required that the development include at least 1000 affordable units. Compl. ¶ ¶ 12 and 13, ER 79 et seq.

The project basically went nowhere for a decade or more. At some point PHP transferred the Property to plaintiff. On September 1, 2005, plaintiff filed a motion to amend the 1991 order, seeking again to reduce the affordable housing component. Compl. ¶ 23, ER 79 et seq.

The Commission granted the motion and filed its amended order on November 25, 2005. The order was conditioned on plaintiff submitting certificates of occupancy for at least 385 new affordable units no later than November 17, 2010. Compl. ¶ ¶ 26-29, ER 79 et seq.

Plaintiff informed the Commission that it could not and would not timely meet this condition. The Commission therefore issued an order directing plaintiff to show cause why the Property should not revert to its former land use classification for failure to comply with conditions. Compl. ¶ ¶ 37-40, ER 79

et seq. The Commission's action was specifically authorized by Haw. Rev. Stat. § 205-4(g) (2001):

> The commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification.

After extensive hearings, motions practice, and meetings, Compl. ¶ ¶ 44 and 45, ER 79 et seq, the Commission orally adopted the OSC at its April 30, 2009, meeting. Compl. ¶ 50, ER 79 et seq. But, before entering a written order the Commission conditionally rescinded the OSC by order dated September 28, 2009. Compl. ¶ ¶ 60 and 61, ER 79 et seq.

On July 1, 2010, the Commission voted to keep the OSC in place and hold additional hearings with respect to it. Compl. ¶ 75, ER 79 et seq.

After months of additional filings, motions, meetings, hearings, testimony, and evidence (Compl. ¶ ¶ 81-124, ER 79 et seq), the Commission adopted its Apri1 25, 2011, order reverting the Property to its original agricultural classification for violation of conditions. Compl. ¶ 125, ER 79 et seq.

Plaintiff sought state court judicial review of the Commission's decision to revert. ER at 4. State court Judge Elizabeth Strance ruled in favor of plaintiff on March 6, 2012. ER at 5. As explained in her written order and findings of fact and conclusions of law, Judge Strance reversed and vacated the

Commission's decision to reclassify plaintiff's land back to agricultural use. She concluded that the Commission's decision violated chapters 205 and 91 of the Hawaii Revised Statutes; plaintiff's right to due process under the Fourteenth Amendment of the United States Constitution and article I, section 5, of the Hawaii constitution; and plaintiff's right to equal protection under the United States Constitution and the Hawaii constitution. *See* Judge Mollway's analysis of Judge Strance's ruling. ER at 5.

Defendants appealed the ruling. However, the Hawai'i Intermediate Court determined that the judgment was not final under Hawai'i law and procedure. The ICA's unpublished order, dated October 18, 2012, may be accessed at http://www.courts.state.hi.us/opinions_and_orders/opinions/2012//oct.html

A final judgment was entered in the state case on February 8, 2013. Defendants appealed on February 14, 2013.

VI. SUMMARY OF THE ARGUMENT

Pullman abstention is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy. None of the factors needed to apply it are present here. The district court deprived individual Commissioners of the benefit of their immunity defenses by refusing even to consider those defenses.

Individual Commissioners are entitled to quasi-judicial

absolute immunity. It is undisputed that they acted by way of a contested case hearing which under Hawai‘i law is a judicial type of proceeding.

In addition or in the alternative, individual Commissioners are entitled to qualified immunity because they were not plainly incompetent in deciding the judicial issues before them.

State law principles of absolute immunity are the same or similar to federal law so that individual Commissioners are entitled to absolute immunity as to all state law claims against them personally.

Hawai‘i state law affords individual Commissioners a qualified privilege pursuant to both statute and case law that covers any claim against them unless they acted with a malicious or improper purpose. There is and can be no plausible allegation of such a purpose. The individual Commissioners are entitled to prevail based on state law qualified privilege.

VII. ARGUMENT

A. THE DISTRICT COURT ERRED BY INVOKING PULLMAN ABSTENTION AS TO CLAIMS AGAINST INDIVIDUAL COMMISSIONERS

Pullman[3] abstention “is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy.” *Wolfson v. Brammer*, 616 F.3d 1045, 1066 (9th Cir. 2010) (citations and punctuation omitted).

“In order to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal

constitutional claims, *Pullman* abstention should rarely be applied." *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) (citation and punctuation omitted). The Ninth Circuit applies a three factor test. The court may "abstain under *Pullman* only if each of the following three factors is present":

> "(1) the case touches on a sensitive area of social policy upon which the federal courts ought not enter unless no alternative to its adjudication is open, (2) constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy, and (3) [the proper resolution of] the possible determinative issue of state law is uncertain." *Confederated Salish,* 29 F.3d at 1407; *accord Canton,* 498 F.2d at 845.

Id. "[T]the absence of any one of these three factors is sufficient to prevent the application of *Pullman* abstention." *Id.*

In our case none of these factors supports abstention as to individual Commissioners in their individual capacity.

The district court discussed the first factor as follows:

> The Ninth Circuit has consistently held that "land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention." *San Remo Hotel*, 145 F.3d at 1105 (quoting *Sinclair Oil Corp. v. Cnty. of Santa Barbara*, 96 F.3d 401, 409 (9th Cir. 1996), and citing *Sederquist v. City of Tiburon*, 590 F.2d 278, 281-82 (9th Cir. 1978), and *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1094-95 (9th Cir. 1976)). See also *VH Prop.*, 622 F. Supp. 2d at 962. This case directly implicates land use planning,

[3] *Pullman Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

> as Bridge is asking this court to determine whether an action taken by the Hawaii Land Use Commission violated various federal constitutional rights. The first *Pullman* requirement is therefore satisfied.

This correctly states Ninth Circuit precedent. Indeed, defendants themselves made that exact point when arguing that the court ought to abstain as to the taking claim.[4] But a ruling on absolute immunity did not require the district court to "enter" the "sensitive area" of land use planning. A ruling on absolute immunity does not address the merits of the issue. Whether the Commission was right or wrong makes no difference. The only thing that matters is whether - as a matter of federal law – individual Commissioners' functions are sufficiently analogous to those performed by judges to warrant absolute immunity.

The point may be sharpened by imagining the decision to revert the land to agricultural designation had been made by a state judge after trial. Certainly the district court would not

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[4] Defendants invoked *Pullman* but only as to the takings claim against the State. Defendants never suggested *Pullman* abstention as to claims against the individual Commissioners. The district court clearly understood the limited scope of defendants' argument. She stated the limits correctly in her decision:

> Defendants argued in their motion to dismiss that, among other things, this court should abstain and stay Bridge's federal takings claim pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), given the pending administrative appeal. Then, after Judge Strance ruled, Defendants argued that *Pullman* abstention no longer applied.

Decision at 6.

have paused to consider what kind of case the state court judge was ruling on. It would be beyond dispute that the state judge was entitled to absolute immunity and the district court would have so ruled.

In our case it may not be beyond doubt that the individual Commissioners are entitled to absolute immunity (we argue that below). But they – just like a state court judge – are entitled to a ruling. "Judges have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Butz v. Economou*, 438 U.S. 478, 511 (1978). The district court erred by refusing to rule.

There is another reason that the first *Pullman* factor is not present. Here "no alternative to its adjudication is open." Absolute and qualified immunities "are immunities from suit, not just from damages. *See Mitchell v. Forsyth,* 472 U.S. 511, 525, 527, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)." *al-Kidd v. Ashcroft*, 580 F.3d 949, 956 (9th Cir. 2009), rev'd on other grounds and remanded, 131 S. Ct. 2074 (2011).

The only way these immunities can be given effect is by ruling on them now. A decision to defer means that the immunities are "effectively lost." *Mitchell,* 472 U.S. at 526. By subjecting individual Commissioners to this suit – potentially

for years[5] – abstention strips them of the critical benefit of immunity. This is not simply hypothetical. At least one individual Commissioner has already been denied mortgage refinancing because of the pendency of this suit.

The second *Pullman* factor requires that "constitutional adjudication plainly can be avoided if a definite ruling on the state issue would terminate the controversy." That factor is also not present. Plaintiff sued individual Commissioners before Judge Strance ruled in its favor. There is no basis whatsoever to believe that plaintiff would simply give up if the Hawai'i appellate courts reversed that ruling.

The district court relied on an older Ninth Circuit case that it read to state a more relaxed version of this second factor. In *C-Y Dev. Co. v. City of Redlands*, 703 F.2d 375, 377-78 (9th Cir. 1983) this court said:

> In analyzing the second requirement, we have explained that "[t]he assumption which justifies abstention is that a federal court's erroneous determination of a state law issue may result in premature or unnecessary constitutional adjudication, and unwarranted interference with state programs and statutes." *Pue v. Sillas, supra,* 632 F.2d at 79. **A state law question that has the potential of at least altering the nature of the federal constitutional questions is thus an essential element of *Pullman* abstention.**

[5] Many factors affect how long it might take for the State appellate courts to rule, but it could be a long time. A recent administrative law case took just shy of six years from appeal to decision by the ICA. *Pila'a 400 LLC v. Board of Land and Natural Resources*, 2012 WL 6680477, 4 -5 (Haw.App. 2012). And that case is still not over. Pila'a intends to ask the Hawai'i supreme court to review.

The district court cited the bolded part of this quotation and relied on this case. ER at 9. Like the court in *VH Prop. Corp. v. City of Rancho Palos Verdes*, 622 F. Supp. 2d 958 (C.D. Cal. 2009) (another case the district court cited), the district court believed that it was "possible" that a decision in state court would avoid constitutional questions.

But even if a mere possibility is enough under the Ninth Circuit's test as now stated in *Porter* and *Wolfson* (requiring that "constitutional adjudication could be avoided by a state ruling"), the district court overlooked the first part of the *C-Y Dev.* quotation. That language considers the policy basis for *Pullman* abstention – avoiding "premature or unnecessary constitutional adjudication, and unwarranted interference with state programs and statutes."

As to constitutional adjudication, we pointed out above that a ruling as to individual Commissioners' immunity from suit in federal court does not involve a state law question at all.

As to "unwarranted interference with state programs and statutes," that interference arises from failing to rule. By failing to rule as to individual Commissioner's immunity, the district court stood the rationale of abstention on its head. Instead of respecting state law and state law programs, the very pendency of this suit is interfering with those interests. Any Commissioner, no matter how loyal and diligent, cannot help but be influenced by knowing that a decision adverse to a

developer opens him or her to a lawsuit seeking personal liability for millions of dollars under federal law. This is especially so where the Commissioner knows that – no matter what – the federal claims will remain pending for years.

Moreover, the same thought cannot help but deter citizens from volunteering in the first place to join the Commission or numerous other volunteer state boards that conduct contested cases.

The third *Pullman* factor is whether proper resolution of the possible determinative issue of state law is uncertain. Again this factor is not present given the proper focus on the claim against the individual Commissioners. The district court erred because it lost that focus.

The "determinative issue" as to individual Commissioners is not whether their decision as to state land use law and policy was correct. Rather, the determinative issue is whether their role in making the decision was sufficiently analogous to those performed by judges to warrant absolute immunity. There is no uncertainty as to state law. Even plaintiff admits the individual Commissioners made their decision in a contested case. And in doing so, the individual Commissioners indisputably acted in a judicial capacity.

None of the *Pullman* factors are present. The district court erred by refusing even to consider the motion on its merits. We now turn to those merits and show that the district

court should have – and this court should – grant the motion.

B. INDIVIDUAL COMMISSIONERS ARE ENTITLED TO ABSOLUTE QUASI-JUDICIAL IMMUNITY AND QUALIFIED IMMUNITY AS TO ALL FEDERAL CLAIMS AGAINST THEM PERSONALLY

a. Individual Commissioners are entitled to absolute quasi-judicial immunity as to all federal law claims against them personally

The State of Hawai‘i Land Use Commission is an agency of the State, created by state statute. Haw. Rev. Stat. § 205-1 (Cum. Supp. 2012). Commissioners are “nominated and, by and with the advice and consent of the senate, appointed by the governor” for a term of four years. Haw. Rev. Stat. § 26-34(a) (2009). The governor has no power to remove commissioners or shorten their term of office except “for cause . . . after due notice and public hearing.” Haw. Rev. Stat. § 26-34(d) (2009).

The Commission was originally created in 1963. It was tasked with setting the boundaries of the “four major land use districts in which all lands in the State [are] placed: urban, rural, agricultural, and conservation.” Haw. Rev. Stat. § 205-2(a) (2001). That task was completed long ago. *See e.g.* Haw. Rev. Stat. § 205-3 (2001). Since then the Commission’s most important job is to decide petitions for a change in the boundary of a district. Haw. Rev. Stat. § 205-4 (2001 and Cum. Supp. 2012).

The Commission considers all boundary changes by way of a contested case hearing conducted pursuant to the Hawai‘i Administrative Procedure Act, Haw. Rev. Stat. chapter 91. Haw.

Rev. Stat. § 205-4(b) (2001). In considering petitions for a boundary change, the Commission can grant or deny the petition. It can also grant the petition subject to conditions. *See* Haw. Rev. Stat. § 205-4(g) (2001):

> [Commission shall] act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change.

If the landowner does not comply with conditions, section 205-4(g) also provides that the Commission may issue "an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification." The Commission's authority to revert is endorsed in *Lanai Co., Inc. v. Land Use Com'n*, 105 Haw. 296, 318, 97 P.3d 372, 394 (2004):

> But the legislature granted the LUC the authority to impose conditions and to down-zone land for the violation of such conditions for the purpose of "uphold[ing] the intent and spirit" of HRS chapter 205, and for "assur[ing] substantial compliance with representations made" by petitioners. HRS § 205-4(g) . . . Consequently, the LUC must necessarily be able to order that a condition it imposed be complied with, and that violation of a condition cease.

See also Kaniakapupu v. Land Use Com'n, 111 Haw. 124, 127, 139 P.3d 712, 715 (2006) ("The Hui sought to have the LUC issue an order to show cause as to why the classification of the

Midkiff/Myers Parcel should not be reverted to conservation district.").

The Commission instituted and decided the proceedings described in the complaint pursuant to this statute and case law. The individual Commissioners are entitled to quasi-judicial immunity for their role in doing so.

Judicial immunity applies no matter how "erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Ashelman v. Pope,* 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc) (citing *Cleavinger v. Saxner,* 474 U.S. 193, 199–200 (1985) (quotations omitted)). Judicial immunity is not affected "by the motives with which their judicial acts are performed." *Id.* at 1077–78. Judicial immunity is an immunity from suit, not just from ultimate assessment of damages. *Mireles v. Waco,* 502 U.S. 9, 11 (1991), "Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial." *Id.*

Judicial immunity "is not limited to immunity from damages, but extends to actions for declaratory, injunctive and other equitable relief." *Moore v. Brewster,* 96 F.3d 1240, 1243 (9th Cir. 1996), *superseded by statute on other grounds.*

The public policy that underlies judicial immunity is the furtherance of independent and disinterested judicial decision making. *Ashelman,* 793 F.2d at 1078. To effectuate this policy,

the Ninth Circuit broadly construes the scope of judicial immunity, which applies even if there are allegations that a judicial decision resulted from a bribe or a conspiracy. *Id.*

The leading Ninth Circuit case discussing judicial immunity for "agency officials when they perform functions analogous to those performed by judges" is *Buckles v. King County*, 191 F.3d 1127 (9th Cir. 1999).

The Buckles owned a 10 acre property in King County, Washington. A 1990 state law required each county to adopt a comprehensive land use plan. In 1994, Buckles received notice that King County was adopting a comprehensive plan of new zoning in compliance with the 1990 law. Buckles' property would be zoned residential, specifically "rural area" with a 5-acres minimum lot size. Buckles petitioned the King County Council ("Council") for a change. Ultimately the comprehensive plan designated the Buckles' property as "rural neighborhood" which allowed for limited retail and commercial use. 191 F.3d at 1131. Various groups appealed the comprehensive plan to the Washington Growth Management Hearings Board ("the Board"). Without giving notice to the Buckles, the Board determined that the comprehensive plan was procedurally defective and remanded to the Council. The Council adopted a new comprehensive plan under which the Buckles' property was designated the less desirable "rural residential." The Buckles appealed to the Board, which rejected the appeal.

Instead of appealing the Board's decision to state court, the Buckles sued the Council and members of the Board, "alleging that they were 'victims of a zoning change,' and stating substantive and procedural due process claims under 42 U.S.C. § 1983." 191 F.3d at 1132. Defendants removed the case to federal court, where the Buckles amended their complaint to add a takings claim under the federal and state constitutions. The district court dismissed the claims against the Board members under the doctrine of quasi-judicial immunity. 191 F.3d at 1132.

On appeal, the Ninth Circuit first "address[ed] whether members of the Washington Growth Management Hearings Board are entitled to absolute immunity from damages," calling that the "threshold matter." The court discussed the leading Supreme Court case on the issue, *Butz v. Economou,* 438 U.S. 478, 506, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978) and noted:

> Acknowledging that some officials perform "special functions [requiring] a full exemption from liability," the Supreme Court has long recognized "the need for absolute immunity to protect judges from lawsuits claiming that their decisions had been tainted by improper motives." This same absolute immunity, often dubbed quasi-judicial immunity, has been extended to agency officials when they perform functions analogous to those performed by judges.

191 F.3d 1133-1134 (citation omitted).

Quoting *Antoine v. Byers & Anderson, Inc.,* 508 U.S. 429, 435-36 (1993), *Buckles* discussed the policy bases for the doctrine and why it applies to officials other than judges:

> [t]he doctrine of judicial immunity is supported by a long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability. Accordingly, the "touchstone" for the doctrine's applicability has been "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." When judicial immunity is extended to officials other than judges, it is because their judgments are "functional[ly] comparab[le]" to those of judges-that is, because they, too, "exercise a discretionary judgment" as part of their function.

Id. (internal citations omitted).

The court continued:

> The principle underlying immunity for government officials performing judicial functions is the same as that for judges: "adjudications invariably produce [ ] at least one losing party," *Butz,* 438 U.S. at 509, 98 S.Ct. 2894, and if the losing party in one forum were allowed to maintain a civil action against the decision-maker in another forum, it would threaten the decision-maker's independence. In evaluating the defense of absolute immunity, the court considers whether the "adjudication within a[n] ... administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suit for damages." *Id.* at 513, 98 S.Ct. 2894.

Id. (emphasis added).

Buckles then identified factors to be considered in determining whether particular officials are entitled to judicial immunity:

> In *Butz,* the Supreme Court identified the following characteristics of the judicial process as sufficient to render the role of

> the administrative law judge "functionally comparable" to that of a judge: an adversarial proceeding, a decision-maker insulated from political influence, a decision based on evidence submitted by the parties, and a decision provided to the parties on all of the issues of fact and law. *Id.* The Court noted other safeguards built into the judicial process, such as the importance of precedent and the right to appeal, but did not identify these safeguards as dispositive. What mattered was that "federal administrative law requires that agency adjudications contain *many* of the same safeguards as are available in the judicial process." *Id.* at 513, 98 S.Ct. 2894 (emphasis added).

191 F.3d 1133-1134. *Cf. Mishler v. Clift*, 191 F.3d 998, 1003 (9th Cir. 1999):

> *Butz* articulated several nonexclusive factors as being characteristic of the judicial process and helpful in determining whether absolute immunity should be granted. These factors -relating to the purpose of § 1983 immunity - include:
>
> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.

The *Buckles* court analyzed these factors and concluded that the Board members were entitled to absolute immunity.

The same result is appropriate in our case, because the individual Commissioners were acting in a quasi-judicial capacity. Their decision to revert plaintiff's property was

required to be and was taken by way of a contested case hearing conducted pursuant to Haw. Rev. Stat. chapter 91 and the Commission's rules implementing that chapter.

There is no dispute as to that fact. Plaintiff specifically alleged it in its complaint at ¶ 40:

> 40. Also, the Order to Show Cause specifically stated that "the Commission will conduct a hearing on this matter in accordance with the requirements of Chapter 91, Hawaii Revised Statutes, and Subchapters 7 and 9 of Chapter 15-15-, Hawaii Administrative Rules."

ER at 92.

It is also clear that the Commission was acting in a quasi judicial capacity in conducting and deciding the contested case. In *Kaniakapupu v. Land Use Com'n*, 111 Haw. 124, 139 P.3d 712 (2006), Aha Hui Malama O Kaniakapupu ("Hui") filed a:

> "Motion for an Order to Show Cause Regarding Enforcement of Conditions, Representations, or Commitments" (motion for an order to show cause) pursuant to Hawai'i Administrative Rules (HAR) §§ 15-15-70 and 15-15-93. The Hui sought to have the LUC issue an order to show cause as to why the classification of the Midkiff/Myers Parcel should not be reverted to conservation district.

111 Hawai'i at 127, 139 P.3d at 715.

The Commission denied the motion and did not issue the OSC. The Hui appealed, claiming that the Commission's ruling on the OSC itself constituted a contested case hearing. The Hawai'i supreme court upheld dismissal of the appeal on the basis that denial of the motion to issue an OSC was not a contested case

hearing. However, the court specifically noted that if the motion for an OSC had been granted, then a contested case hearing on the OSC would have been required. 111 Haw. at 134, 139 P.3d at 722.

In his dissenting opinion, Justice Acoba (joined by Justice Duffy) argued that considering the motion was a contested case. And he explicitly noted that a contested case is by its very nature a judicial type proceeding. "[T]he LUC was performing an adjudicatory function which is inherent in a contested case hearing." 111 Hawai'i at 140, 139 P.3d at 728.

This statement is undoubtedly correct. A contested case is designed to be and is an adversarial, quasi-judicial proceeding. The procedural requirements and safeguards of a contested case include (but are not limited to) those identified in *Butz* and discussed in *Buckles* and *Mishler*:

- "All parties shall be afforded an opportunity for hearing after reasonable notice." Haw. Rev. Stat. § 91-9(a) (Cum. Supp. 2012).
- Oral and documentary evidence may be received and "Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence." Haw. Rev. Stat. § 91-10 (Cum. Supp. 2012).
- Witnesses testify under oath. HAR § 15-15-58.

- Subpoenas may be used to compel testimony. HAR § § 15-15-58 and 69.
- Certain protections and procedures are afforded if the Commission members have not personally heard and examined all the evidence. Haw. Rev. Stat. § 91-11 (1993).
- The Commission's decision and order must "be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law." The Commission is required to address findings submitted by the parties and notify all parties of its decision. Haw. Rev. Stat. § 91-12 (1993).
- Ex parte communications are prohibited. "No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law." Haw. Rev. Stat. § 91-13 (1993).
- Any decision is subject to judicial review. Haw. Rev. Stat. § 91-14 (1993 and Cum. Supp. 2012). The reviewing court is charged to ensure that the "agency's findings are not clearly erroneous and [are] supported by reliable, probative and substantial evidence" in the record. *Poe v. Hawai'i Labor Relations Bd.,* 105 Haw. 97, 100, 94 P.3d 652, 655 (2004).

See also various provisions in HAR chapter 15-15:

- 15-15-3 (definition of "contested case")
- 15-15-10 ("meetings")
- 15-15-34 ("quasi-judicial procedures")
- 15-15-36 (decisions signed by those who have heard the evidence)
- 15-15-59 ("conduct of hearing")
- 15-15-60 (administering oaths to witnesses, receiving evidence etc.)
- 15-15-63 ("evidence"; "judicial notice" allowed)
- 15-15-68 ("cross examination")
- 15-15-75 ("appeals")
- 15-15-77 ("clear preponderance of the evidence" standard)
- 15-15-81 ("oral argument")
- 15-15-82 (findings of fact, decision and order)

In this case, the Commission held numerous hearings and considered multiple filings on this contested case. Compl. ¶ ¶ 44-46, 48-50, 52, 53-55, 56, 60, 70-73, 81, 83, 84, 85-89, 90-93, 100, 104, 108-110, 111-119, and 130-133. ER 79 et seq.

As to "insulation from political influence," Commissioners are protected in numerous ways. Members of the Commission are "nominated and, by and with the advice and consent of the senate, appointed by the governor" for a term of four years. Haw. Rev.

Stat. § 26-34(a) (2009). Their terms are staggered. *Id.* The governor has no power to remove commissioners or shorten their term of office except "for cause . . . after due notice and public hearing." Haw. Rev. Stat. § 26-34(d) (2009). *Cf. In re Water Use Permit Applications,* 94 Haw. 97, 124, 9 P.3d 409, 436 (2000) (rejecting claim of political influence as to Water Commission, all members of which are appointed by the Governor including two cabinet members).

Commissioners are barred from holding any other public office. One member is appointed from each of the counties and the rest are appointed at large. Commissioners elect their own chairperson and select and hire their own employees, including administrative personnel and an executive director. Haw. Rev. Stat. § 205-1 (Cum. Supp. 2012).

Hale O Kaula Church v. Maui Planning Com'n, 229 F.Supp.2d 1056 (D.Haw. 2002), is another instructive case. In *Hale*, the Maui Planning Commission denied a special use permit to a church. The church "chose not to file an administrative appeal in state court under Haw. Rev. Stat. § 205-6(e) and Haw. Admin. R. § 15-15-96(c). Instead, they filed the present federal action." *Id.* at 1063. Defendants included the members of the commission. The court (the late Judge Samuel King presiding) ruled that the individual commissioners had judicial immunity, because:

- "The proceedings were certainly adversarial"
- "The proceedings were considered a 'contested case'"

- "A whole host of quasi-judicial procedures applied or are illustrative of the procedures involved. *See* Haw. Admin. R. §§ 15-15-34 to 45 and 15-15-53 to 75; and Maui County Code §§ 12-201-53 to 70 (setting forth applicable pre-hearing and hearing procedures regarding notice, testimony, cross-examination of witnesses, subpoenas, motions, discovery, mediation, evidence, etc.)"
- "The hearing officer issued detailed written recommendations for findings and conclusions."
- "Process was allowed for written and oral objections to such findings and conclusions."
- "There was a right of judicial review to a state circuit court and beyond that to Hawaii's appellate court system. *See* Haw. Rev. Stat. § 205-6(e)."

Id. at 1066.

The court noted: "Granting quasi-judicial immunity to the individual Defendants here also serves the primary goal as stated in *Buckles* - prevention of impairing an 'independent and impartial exercise of judgment.'" Indeed, the church had apparently attempted to influence members with threats of personal liability. The commission's counsel urged them not to be swayed by such considerations. *Id.* Similarly, plaintiff in our case unabashedly describes its attempts to intimidate the Commissioners with threats of personal lawsuits. Compl. ¶ ¶ 106-107. ER at 108. The individual Commissioners who ignored these

threats paid the price when plaintiff filed this lawsuit. Plaintiff did not sue Commissioners who agreed with its position.[6]

See also Mishler v. Clift, 191 F.3d 998, 1004 (9th Cir. 1999) (holding that members of a state medical board are entitled to absolute judicial immunity); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 918 -919 (9th Cir. 2004) (members of the Idaho State Board of Medicine and the Idaho State Board of Professional Discipline entitled to absolute judicial immunity); *Romano v. Bible*, 169 F.3d 1182 (9th Cir. 1999) (former members of Nevada Gaming Commission and Nevada Gaming Control Board entitled to absolute judicial immunity).

Plaintiff's opposition to absolute immunity in the district court relied heavily on *Zamsky v. Hansell,* 933 F.2d 677 (9th Cir. 1991). That reliance is misplaced. The Commission is not comparable to the Oregon Land Conservation and Development Commission (LCDC) which:

> has two primary functions. First, it adopts "goals" which become the mandatory state-wide planning standards with which all local land use plans must comply. It also reviews the comprehensive land use plans which local governments are required to create and adopt, for conformity with the state-wide goals. A local land use plan becomes effective if and only if the LCDC "acknowledges" that it meets the state-wide goals. If the plan does not

[6] This in no way implies that other Commissioners were intimidated by plaintiff's threats or voted as they did because of the threats.

> conform with the state-wide goals, the LCDC may issue a continuance order and explain how to bring the plan into compliance.

933 F.2d at 678 (statutory references omitted).

In 1984, Klamath County (not the LCDC) re-zoned Zamsky's land "in response to an LCDC continuance order." Zamsky sued the LCDC. The district court determined that LCDC members were entitled to absolute immunity because they were acting in a legislative capacity.

The Ninth Circuit rejected this ruling because:

> In determining whether to issue an acknowledgment order, the LCDC Commissioners were ruling on whether the county's proposed plan complied with existing regulations, namely the "goals" with which all local comprehensive plans must comply. They were not exercising independent legislative judgment. Thus, this case closely resembles *Cinevision Corp. v. City of Burbank,* 745 F.2d 560, 580 (9th Cir.1984), *cert. denied,* 471 U.S. 1054, 105 S.Ct. 2115, 85 L.Ed.2d 480 (1985). In *Cinevision,* the defendants monitored compliance with a contract; here the LCDC monitors compliance with LCDC goals. Monitoring compliance with established laws or regulations and offering recommendations on how compliance may be achieved is an executive function, involving "ad hoc decisionmaking" rather than "formulation of policy." *See id.* Because the LCDC Commissioners and staff member Ross acted in an executive function in suggesting or demanding changes to local plans, they are not entitled to absolute immunity. *Id.*

933 F.2d at 679.

The court also held that LCDC commissioners did not act in a judicial function for three reasons.

> To begin with, their proceedings often are

> not adversarial. Second, the LCDC Commissioners do not simply decide whether to acknowledge the plan but may explain how to bring the plan into compliance. Offering recommendations on how to comply with the law is an executive, not judicial function. And finally, unlike the professional administrative law judges in *Butz,* the LCDC Commissioners are not insulated from the agency that promulgates the rules to be applied. Instead, they are the same individuals who promulgate the "goals" in the first place; they combine the functions of lawmaker and monitor of compliance.

Id. (citations omitted).

The Commission's statutory function is quite different from the LCDC's. The Commission's major task is to determine whether a proposed reclassification of property is appropriate. It does so only when it "finds upon the clear preponderance of the evidence that the proposed boundary is reasonable, not violative of section 205-2 and part III of this chapter, and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17." Haw. Rev. Stat. § 205-4(h) (Cum. Supp. 2012).

The Commission is specifically authorized as part of the process to "impos[e] conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17." Haw. Rev. Stat. § 205-4(g) (2001). The Commission may enforce those conditions by way of "order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification." *Id.*

None of the *Zamsky* factors are present as to the Commission. First, the Commission's actions to fulfill its duties are explicitly quasi-judicial as discussed above and acknowledged in plaintiff's complaint. Compl. ¶ 40.

Second, the Commission does not "explain how to bring the plan into compliance." Here it simply decided (whether rightly or wrongly is a state court issue) that the developers had not met conditions.

Third, the Commission acts in accordance with goals set by the legislature. The Commission is only authorized to impose and enforce conditions that are "necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17." Haw. Rev. Stat. § 205-4(g) (2001).

In sum, this case perfectly illustrates the problem motivating judicial immunity and predicted in *Buckles*:

> If Board members were not protected by absolute immunity, we predict that many losing parties would turn around and sue the Board members in a damages action instead of appealing the Board's substantive decision to Superior Court. The decision maker rather than the decision would become the target. Land use decisions are often contentious and involve conflicting interests and policies. Permitting suits against the quasi-judicial decision makers would discourage knowledgeable individuals from serving as Board members and thwart the orderly process of judicial review. Absolute immunity for the Board members serves "the broader public interest in having people perform these functions without fear of having to personally defend their actions in civil damages lawsuits." *Romano,* 169 F.3d at 1188.

191 F.3d at 1136. Plaintiff here seeks to make the decision makers the target rather than the decision. It may not do so; individual Commissioners are entitled to absolute immunity.

b. In addition or in the alternative, individual Commissioners are entitled to qualified immunity as to all federal law claims against them personally

The rule of qualified immunity is a familiar one: public officials are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The Supreme Court has made clear that qualified immunity provides a quite far-reaching protection to government officers. Indeed, qualified immunity safeguards "all but the plainly incompetent or those who knowingly violate the law.... [I]f officers of reasonable competence could disagree on th[e] issue [whether a chosen course of action is constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997) ("Th[e] test allows ample room for reasonable error on the part of the [government official].").

Even if a right is clearly established, a state official is nevertheless entitled to qualified immunity if he or she made a reasonable mistake about the law's requirements. *Center for BioEthical Reform, Inc. v. Los Angeles County Sheriff Dep't*, 533 F.3d 780, 793 (9th Cir. 2008) (quoting *Saucier v. Katz*, 533 U.S.

194, 202 (2001)).

The individual Commissioners here had ample bases to take the action they took. Without repeating everything stated above, plaintiff's complaint clearly establishes that the Property was subject to conditions for decades and that despite modifications by prior Commissions plaintiff had no definite prospect of meeting the conditions. State statute and case law support the individual Commissioners' actions.

The point is that "reasonable persons" in the individual Commissioners' position would have believed that he or she could have decided as the individual Commissioners did. "Officers of reasonable competence could disagree on th[e] issue." The individual Commissioners were not "plainly incompetent" and did not "knowingly violate the law."

The purpose of qualified immunity is to protect officials from undue interference with their duties and from potentially disabling threats of liability. *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 70 F.3d 1095, 1098 (9th Cir. 1994). The Supreme Court has therefore stated that qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Saucier v. Katz,* 533 U.S. 194, 200 (2001). The Supreme Court has cautioned that a ruling on a qualified immunity defense "should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." *Id.*

In this case, the individual Commissioners are entitled to qualified immunity. Any other ruling would mean that anytime someone objects to a Commission action, individual Commissioners cannot act without incurring the risk of potentially crushing personal liability. Any other ruling must inevitably chill the robust exercise of discretion by future officials. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982):

> Claims against public officials impose a cost not only to the defendant officials, but to society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."

C. INDIVIDUAL COMMISSIONERS ARE ENTITLED TO ABSOLUTE JUDICIAL IMMUNITY AND STATUTORY IMMUNITY/QUALIFIED PRIVILEGE AS TO ALL STATE LAW CLAIMS AGAINST THEM FOR DAMAGES, INCLUDING JUST COMPENSATION

Individual Commissioners are entitled to absolute quasi-judicial immunity as to state law claims for the same reasons discussed above as to federal law claims.

Hawai'i law has recognized judicial immunity since at least 1887. *See State v. Taylor*, 49 Haw. 624, 631-632, 425 P.2d 1014, 1019 (1967). The Hawai'i supreme court relied largely on federal law when discussing absolute immunity for court-appointed psychiatrists, *Seibel v. Kemble*, 63 Haw. 516, 631 P.2d 173 (1981), probation officers, *Hulsman v. Hemmeter Development*

Corp., 65 Haw. 58, 65, 647 P.2d 713, 719 (1982), prosecutors, *Bullen v. Derego*, 68 Haw. 587, 592, 724 P.2d 106, 109 (1986), and court appointed receivers, *Hawaii Ventures, LLC v. Otaka, Inc.*, 114 Haw. 438, 486, 164 P.3d 696, 744 (2007).

The Hawai'i supreme court has not yet discussed absolute quasi-judicial immunity for boards. There is, however, no reason that such immunity would not be afforded for the same reasons as prevail in federal law.

As to statutory immunity, Haw. Rev. Stat. § 26-35.5(b) (2009) provides such immunity in very broad terms:

> Notwithstanding any law to the contrary, no member shall be liable in any civil action founded upon a statute or the case law of this State, for damage, injury, or loss caused by or resulting from the member's performing or failing to perform any duty which is required or authorized to be performed by a person holding the position to which the member was appointed, unless the member acted with a malicious or improper purpose, except when the plaintiff in a civil action is the State.

Plaintiff fails even to allege any "malicious or improper purpose" much less support any such allegation by plausible, non conclusory facts. *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

The individual Commissioners are also entitled to basically this same qualified privilege under Hawai'i case law. See *Towse v. State,* 64 Haw. 624, 631, 647 P.2d 696, 702 (1982); *Medeiros v. Kondo,* 55 Haw. 499, 503, 522 P.2d 1269, 1271 (1974) (holding that liability is limited to only the most guilty of officials and can

be imposed only when an official in exercising his authority is motivated by malice, and not by an otherwise proper purpose).

VIII. CONCLUSION

Individual Commissioners ask this court to dismiss all claims filed against them and to enter final judgment in their favor.

STATEMENT OF RELATED CASES

There are no related cases within the meaning of Circuit Court Rule 28-2.6.

DATED: Honolulu, Hawai‘i, February 15, 2013.

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

CERTIFICATE OF COMPLIANCE

I certify that pursuant to FRAP 32(a)(7)(C) the attached answering brief is monospaced, has 10.5 or fewer characters per inch (using Courier New 12 point typeface), and contains 8788 words according to the word processing system used to prepare the brief.

DATED: Honolulu, Hawai‘i, February 15, 2013.

/s/ William J. Wynhoff
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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

Matthew C. Shannon

Michael C. Carroll

DATED: Honolulu, Hawai‘i, February 15, 2013.

/s/ William J. Wynhoff
Deputy Attorney General
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