

Appeal Nos. 12-15971 and 12-16076

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIDGE AINA LE'A, LLC,

Plaintiff-Appellee-Cross Appellant,

vs.

STATE OF HAWAII LAND USE COMMISSION, et al.,

Defendants-Appellants-Cross Appellees.

Appeal from the United States District Court
for the District of Hawaii
Case No. 11-00414 SOM BMK

APPELLEE-CROSS APPELLANT BRIDGE AINA LE'A, LLC'S
SECOND BRIEF ON CROSS-APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee-Cross Appellant Bridge Aina Le`a, LLC (“Bridge”) hereby submits this Corporate Disclosure Statement. Bridge has no parent corporation, and no publicly held corporation owns 10% or more of its outstanding stock.

DATED: Honolulu, Hawaii, April 18, 2013.

/s/ Matthew C. Shannon

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APPELLEE-CROSS APPELLANT BRIDGE AINA LE'A, LLC'S
SECOND BRIEF ON CROSS-APPEAL

I. INTRODUCTION

This case arises out of a repeated, coordinated effort by the State of Hawaii Land Use Commission ("Commission"), and some of its individual Commissioners, to unlawfully amend the land use boundaries for 1,060 acres of real property located in South Kohala, County and State of Hawaii, and owned in part by Appellee-Cross Appellant Bridge Aina Le'a, LLC ("Bridge"). In reclassifying the Property from urban use to agricultural, the Commission violated almost every applicable statute, administrative rule, and constitutional safeguard. The Commission's unlawful actions were eventually reversed and rescinded by the Hawaii state court in an administrative appeal.

Bridge brought this action against the Commission and individual Commissioners to recover damages for the unconstitutional taking of Bridge's property and clear violations of Bridge's constitutional rights. Despite the state court's ruling of egregious procedural, substantive and constitutional violations, the individual Commissioners filed a motion to dismiss in district court seeking absolute and qualified immunity. However, the district court abstained pursuant to Pullman Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), and declined to rule on the individual Commissioners' immunity defenses. Instead, the district court stayed the entire case pending final resolution of the administrative appeal in

state appellate courts. The Commissioners' immunity defenses are meritless given their egregious conduct and willful violations of Bridge's constitutional rights, as described below. Regardless, after invoking Pullman abstention, the district court should have remanded the case to state court to provide some forum to Bridge to begin its takings litigation for just compensation.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Bridge's Cross-Appeal is based on a single point of error by the district court:

- After abstaining pursuant to Pullman, whether the district court erred by failing to either (i) stay the federal claims and remand the state claims, or (ii) remand the entire case back to state court.

2. This court can rule on Bridge's Cross-Appeal and remand to state court without ruling on the issues raised by the individual Commissioners' purported immunity defenses. However, if this court is inclined to address the merits of the Commissioners' immunity arguments, Bridge's issues on appeal respond to those raised by the Commissioners:

- Whether the individual Commissioners are entitled to absolute quasi-judicial immunity based on the allegations pled in the Complaint and supported by the state court administrative appeal ruling, which found that the Commission violated Hawaii Revised Statutes ("HRS") Chapters 205 and 91, as

well as Bridge's due process and equal protection rights under the United States Constitution and Hawaii Constitution.

- Whether the individual Commissioners are entitled to qualified immunity given their unlawful conduct pled in the Complaint and supported by the state court administrative appeal ruling.

III. STATEMENT OF THE CASE

A. Nature of the Case

The project that is subject of this lawsuit consists of a mixed-use residential and retail development, commonly known as Aina Le`a, planned and approved for the Property. The project envisions a regional shopping center and some 2,000 housing units, providing workforce housing for employees who work in and around the South Kohala resorts.

For the first time in its 50-year history, the Commission changed the land use district boundaries of a property from urban use to agricultural use while affordable housing was being constructed on the Property.¹ In their rush to take unprecedeted action to kill the project, the Commissioners violated almost every applicable statute, administrative rule, and constitutional provision governing the Commission's amendment of land use district boundaries. Bridge brought this

¹ Bridge Aina Le`a, LLC still owns approximately 1,000 acres of the Property, as the Commission's unlawful action has effectively blocked Bridge's phased sale of the Property to DW Aina Le`a Development, LLC.

lawsuit for damages against Commission for an unconstitutional taking, and against the individual Commissioners under 42 U.S.C. § 1983.

B. Course of Proceedings

On April 25, 2011, the Commission executed its final order amending the Property from urban land use district to the agricultural land use district (“final order”). On May 12, 2011, Bridge filed an administrative appeal of the Commission’s action, which was transferred to the Circuit Court of the Third Circuit, State of Hawaii.² Subsequently, Bridge filed this action in state court, alleging various state and federal constitutional claims, as well as claims based on other state law grounds, and for declaratory and injunctive relief. Defendants removed the case to federal court and filed a motion to dismiss all claims.

On December 19, 2011, the district court held a hearing on the motion to dismiss. At that hearing, the parties informed the district court that the state court had verbally ruled in favor of Bridge in the administrative appeal. Accordingly, the district court set a further briefing schedule and hearing in light of state court’s administrative appeal ruling. On March 19, 2012, the district court held a continued hearing on the motion to dismiss.

² Honorable Elizabeth A. Strance presided over the consolidated administrative appeal in state court.

C. **Disposition Below**

On March 30, 2012, the district court issued its order staying the entire case, including all state and federal claims, pending resolution of the state administrative appeal. (ER 1).³ The district court did not remand the state law takings and damages claims back to the state court for resolution. In effect, the district court deprived Bridge of all remedies and access to injunctive or declaratory relief pending final resolution of the administrative appeal in Hawaii state appellate courts, which may take several years. The Commission timely appealed and Bridge filed its cross-appeal.

IV. **JURISDICTIONAL STATEMENT**

The district court below had federal question jurisdiction over Bridge's complaint pursuant to 28 U.S.C. § 1331, 1343, and 1441. This court has jurisdiction because the district court abstained pursuant to Pullman, which is immediately appealable. See Porter v. Jones, 319 F.3d 483, 489 (9th Cir. 2003).

Defendants appealed on April 25, 2012. Bridge filed its cross-appeal on May 4, 2012, therefore, the cross-appeal was timely pursuant to Federal Rules of Appellate Procedure, Rule 4(a)(3). (SER 39).⁴

³ Excerpts of the record ("ER"), volumes 1-2, refer to those excerpts filed by the Commission with the principal brief.

⁴ Supplemental excerpts of the record ("SER") refer to those excerpts filed herein by Bridge.

V. STANDARD OF REVIEW

The district court's decision to abstain and stay the case under Pullman is reviewed for abuse of discretion. Porter, 319 F.3d at 491 (citing Cinema Arts, Inc. v. Clark County, 722 F.3d 579, 580 (9th Cir. 1983)). On review of the Commissioners' motion to dismiss, as well as the district court's decision to abstain, the allegations contained in the complaint are taken as true. See id. at 489, 491.

VI. STATEMENT OF THE FACTS

A. Property Reclassified to Urban Land Use District

The history of this project goes back almost 25 years. On January 17, 1989, the Commission reclassified the Property from the state agricultural land use district into the state urban land use district. The 1989 order imposed a 60 percent affordable housing requirement on the project, but did not contain any specific time frame for completion. (SER 3).⁵

On July 9, 1991, the Commission issued an Amended Findings of Fact, Conclusions of Law and Decision and Order ("1991 order") that reduced the project's density but mandated a minimum of 1,000 affordable units. (SER 3).

⁵ Judge Strance's Amended Findings of Fact, Conclusions of Law and Order Reversing and Vacating the State of Hawaii Land Use Commission's Final Order, entered June 15, 2012, is subject to Bridge's Motion to Supplement Record on Appeal, filed herein on March 6, 2013. The findings of fact and conclusions of law contained therein are not substantively different from Judge Strance's original order, filed April 25, 2012, and located at ER 30-66.

Once again, however, there was no deadline for compliance with the 1991 order. (SER 4). The 1991 order contained critical findings of fact to support urban classification: (i) the Property was designated by the County of Hawaii for urban expansion; (ii) urban use conforms to various state and county planning guidelines and objectives; (iii) “[t]he Property is not suitable for agriculture and there are no agricultural activities on site[]”; and (iv) “[t]he Land Study Bureau rated the soils of the Property as Class E (very poor).” (SER 3-4).

The Property’s owner at the time, Puako Hawaii Properties, subsequently constructed 107 affordable housing units at other locations located in the County of Hawaii, in order to satisfy the Commission’s affordable housing requirements for the Property. (2ER 86).

By the mid-1990’s, Hawaii’s economy began a lengthy recession that drastically affected the housing market. (2ER 87). Recognizing that its draconian affordable housing requirement was financially unreasonable, the Commission began approving modifications and reductions in the affordable housing requirements for pending projects. *Id.* In at least seven other pending dockets, the Commission removed its affordable housing requirement and *assigned responsibility to the respective counties to implement the affordable housing conditions for those projects.* (SER 5).

B. Commission Amends the 1991 Order Contrary to Established Precedent

On September 1, 2005, Bridge, as successor owner of the Property, filed with the Commission a Motion to Amend Conditions 1 and 8 of the 1991 order. (SER 4). Bridge requested that the affordable housing conditions be reduced in order to be “consistent and coincide with County of Hawaii affordable housing requirements.” (SER 5). The Commission had clear precedent in granting similar requests for other projects, and Bridge’s motion had the strong support of County and State agencies. (SER 6-7). However, the Commission refused to accept Bridge’s proposed amendments to the 1991 order to make the affordable housing requirements “consistent” with the County’s requirements. (SER 7).

Instead, the Commission insisted that Bridge construct a minimum of 385 units of affordable housing units and obtain certificates of occupancy within five years. (SER 7). On November 25, 2005, the Commission entered its decision and order (“2005 order”) amending condition No. 1 to read as follows:

1. Petitioner shall provide housing opportunities for low, low-moderate, and moderate income residents of the State of Hawaii by offering at least twenty percent (20%) of the Project’s residential units at prices determined to be affordable by the County of Hawaii Office of Housing and Community Development, provided, however, in no event shall the gross number of affordable housing units within the Petition Area be less than 385 units. The affordable housing units shall meet or exceed all applicable County of Hawaii affordable housing standards, and shall be completed in substantial compliance with the representations made to the Commission.

1b. Petitioner shall obtain, and provide copies to the Commission, the certificates of occupancy for all of the Project's affordable housing units within five (5) years of November 17, 2005.

(SER 7-8). Other than this project, the Commission has never included a condition that the petitioner obtain certificates of occupancy for all of a project's affordable housing units by a specified date. (SER 8).

The 2005 order's finding of fact recognized that "... it is reasonable to obtain the certificate of occupancy for the 385 affordable housing units within five (5) years of the issuance of such order, **taking into account possible delays for permitting and other contingencies.**" (2ER 11) (emphasis added). The order also recognized that the affordable units "would be built on a slower time table" if Bridge were not able to secure suitable financing. Id.

Regardless of the Commission's unprecedented conditions imposed on this project, Bridge commenced substantial work, including the construction of wells, roads, grading, grubbing, and the construction of necessary related infrastructure. (SER 8).

On October 11, 2007, the County of Hawaii informed Bridge that based on the recent decision Sierra Club v. Department of Transportation, 115 Hawaii 299, 167 P.3d 292 (Haw. 2007) (known as the Superferry case), an Environmental Impact Statement ("EIS") would now be required for the project. (SER 8). The newly imposed EIS requirement caused an unforeseen delay and

costs increases in the project. Id. Despite this substantial and unforeseen setback, Bridge began the lengthy EIS process and continued to move forward with the project in good faith to satisfy the Commission's affordable housing deadline. Id.

C. **Commission Enters Order To Show Cause**

On December 9, 2008, the Commission entered a written order to show cause for alleged failure “. . . to perform according to the conditions imposed and to the representations and commitments made to the Commission in obtaining reclassification of the Subject Area and in obtaining amendments to conditions of reclassification.” (SER 9). The order to show cause alleged that Bridge failed “. . . to provide no fewer than 385 affordable housing units within the Petition Area that meet or exceed all applicable County of Hawaii affordable housing standards and substantially comply with representations made to the Commission.” Id. 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.”⁶ Id.

In at least seven other major Commission dockets, the petitioners/developers have failed to fulfill all their representations to the

⁶ HRS Chapter 91, Subchapters 1-18, is Hawaii's adoption of the Uniform State Administrative Procedure Act (1961). Hawaii Administrative Rules Chapter 15-15- governs the practice and procedure before the Commission.

Commission; have failed to meet their projected development timeframes; and have failed to build so much as a single affordable housing unit. (SER 34-35; 2ER 93). However, unlike Bridge's project, the Commission in those dockets has not taken any action to change the projects' land use boundaries to agricultural use, even though most of the projects have no financing or construction activity. Id.

On January 9, 2009, the hearing on the order to show cause commenced before the Commission, which was a "contested case" under HRS Chapter 91. (2ER 93).

On March 20, 2009, Bridge notified the Commission of its intent to assign the Project to DW Aina Le`a Development, LLC ("DW"). (SER 10). Bridge's Purchase and Sale Agreement with DW provided that Bridge would transfer all of its interest in the Project to DW in several phases, for a total purchase price of \$40.7 million. (2ER 113).

On April 28, 2009, the County issued final subdivision approval for the affordable housing portion of the project, which consists of approximately sixty (60) acres. (SER 10). The County strongly supported the project and argued that "the public interest would be best served by allowing it to move forward." Id.

On April 30, 2009, the continued hearing on the order to show cause reconvened. (SER 10). The County opposed the order to show cause and requested the Commission allow the project to proceed because it is "appropriate

and consistent with the County's General Plan." (SER 9). However, in blatant violation of the applicable procedural rules, the Commission refused to allow DW the opportunity to participate in the hearing and refused to hear Bridge's response to the order to show cause. (SER 10). Instead, the Commission by "voice vote" purported to amend the Property's land use district boundary from urban to the agricultural. The Commission's verbal motion did not even specify exactly which condition(s) Bridge and DW had failed to satisfy. (SER 10; 2ER 94-95). Bridge strongly objected to the voice vote procedure because it took place without allowing Bridge or DW the opportunity to present evidence, and violated Bridge and DW's due process rights. Id. The Commission has never moved in any other docket to change a project's land use classification without permitting the petitioner to present evidence. (2ER 16). The Commission's action—in clear violation of the Commission's own rules and procedures—cast an immediate and substantial cloud over the project, delaying the project and making it extremely difficult for DW to obtain financing. (2ER 95).

Following the April 30, 2009 hearing, DW continued design and construction of the project's affordable housing, spending approximately \$4.5 million in actual costs (excluding legal fees). (SER 11). Moreover, Bridge submitted to the Commission a detailed itemization of millions of dollars Bridge had spent on the project, including engineering work, planning and architectural

work, on-site grading work, conducting environmental studies and obtaining permits, and drilling and outfitting wells. (2ER 96).

On September 28, 2009, the Commission filed its Order Rescinding Order to Show Cause Upon Condition Precedent and Accepting DW Aina Le 'a Development, LLC as Co-Petitioner (“2009 order”). (SER 11). The 2009 order found: “With DW Aina Le'a Development, LLC **much progress has been made within the last four months.** Both the affordable housing component and the anticipated construction jobs are desirable.” Id. (emphasis added). Under the 2009 order, the Commission ordered the following:

Rescind and vacate the Order to Show Cause adopted on April 30, 2009, provided that as a condition precedent, the Petitioner completes 16 affordable units by March 31, 2010. Further, that the County of Hawaii shall provide quarterly reports to the Land Use Commission in connection with the status of Petitioner's progress in complying with this condition. (emphasis added).

Id.

The 2009 order did not define the term “complete,” nor did the Commission specify its supposed intention that the term “complete” required certificates of occupancy. Id. Also, the order's deadline and condition precedent were unilaterally imposed by the Commission, without any evidence or support in the record. (2ER 99).

Following the 2009 order, DW continued the design and construction of the project, as well as the EIS. (SER 12). On March 3, 2010, the County's

status report recognized that DW “has done substantial work on Phase I of this project which includes the improvements for the affordable housing area.” Id.

D. Commission Refuses to Rescind Order to Show Cause Despite the Project’s Substantial Progress

On June 2, 2010, the Commission asked for a “current written status report” on the progress of the project. (2ER 99). The Commission did not ask for a “current written status report” in any of the other pending projects located in the County of Hawaii, including many projects where no work had been done for years. Id. On June 10, 2010, DW provided a written status report detailing extensive design and construction work on the project, **including completed interiors and exteriors of 16 townhouse units by March 31, 2010.** (SER 12). The County of Hawaii corroborated DW’s substantial progress on the overall project, and specifically the affordable housing units. (SER 13).

On July 1, 2010, the Commission conducted a meeting and heard testimony in support of the progress of the project. The extensive progress on the project specifically included the following:

- Completed construction of 16 townhouse units;
- Substantial and partial construction of an additional 72 townhouse units; and
- Construction pads for an additional 24 townhouse complexes.

(SER 13). Once again, the County of Hawaii spoke strongly in support of the project, which is consistent with the County's general plan. (2ER 100).

After all parties had stated their positions at the July 1, 2010 hearing, Office of Planning Director Abbey Mayer testified in reference to the Commission's 2009 order rescinding the order to show cause. (2 ER 100). Mayer stated: "Typically I'm a good loser . . . but this one stuck with me." Id. Mayer urged the Commission to go back and change the land to agricultural use, so the land could be sold or transferred to another developer. (2 ER 100-101). Specifically, Mayer said:

And I would -- I don't say it lightly. I say it with full knowledge of the severe economic conditions on the Island of Hawai'i, the severe unemployment in the construction industry. I know this is the only major project goin' on there. I know this is a good place for a project to happen.

What we suggest is revert. We get a bona fide landowner, a bona fide petitioner, a bona fide developer to come back, make a bona fide proposal and move forward in a way that we can all feel comfortable with.

Id. The Office of Planning has never before publicly advocated that the Commission kill an ongoing project, with the express purpose that the land for the project be sold or transferred to another developer who could build a different project on the land. (2ER 101).

After Mayer spoke, and just minutes before the Commission was set to break for lunch, Commissioner Devens made a verbal motion to keep the order

to show cause pending and “. . . enter a finding that the condition precedent requiring 16 affordable homes be complete by March 31, 2010 has not been met.” (SER 13). Commissioner Devens made the motion, which was seconded by Commissioner Chock, knowing that it violated due process: The commission conducted no discussion on the oral motion, did not restate the motion for the record, and did not give Bridge and DW an opportunity to respond. (2ER 101-102). Further, Commissioner did not define what was meant by “complete,” nor was there any legal or evidentiary basis to maintain the order to show cause given the progress of construction. (SER 14; 2ER 102). The Commission voted 8-0 in favor of the motion, then went to lunch. (2ER 101). Based on information and belief, Commissioners Devens and Chock discussed their motion prior to the meeting, in violation of the Commission’s rules forbidding ex parte communications. (2ER 102).

On July 26, 2010, the LUC entered an Order Finding Failure to Meet Condition Precedent for Rescinding Order To Show Cause, which ruled that “Sixteen affordable units have been constructed, but no certificates of occupancy have been obtained.” (SER 14). The order also ruled:

- (1) The order to show cause shall remain pending;
- (2) A hearing on the order to show cause shall be scheduled on or after September 17, 2010;
- (3) The November 17, 2010 date for obtaining certificates of occupancy for 385 affordable homes established in the 2005 order is a deadline not a goal; and

(4) The condition precedent for the rescission of the order to show cause has not been met.

(SER 14).

E. Co-Petitioner DW Files Motion to Amend Conditions

On August 30, 2010, DW filed a Motion to Amend Conditions 1, 5, and 7 of the 2005 order. (SER 14). The motion to amend detailed \$20 million spent by DW since 2010 to move the project forward. (SER 15). DW also summarized the difficulty in obtaining financing for the project given the recession and the cloud created over the project caused by the Commission's voice votes to amend the Property's land use boundary. (SER 15-16).

On November 12, 2010, Bridge filed a motion to invalidate the order to show cause, alleging multiple violations of the relevant statutes and administrative rules by the Commission, including (1) issuing orders adverse to Bridge without considering the decision making criteria under HRS § 205-17, (2) failing to establish that Bridge did not substantially commence the use of the land, in violation of HRS § 205-4, and (3) improperly holding a hearing on a two-year-old order to show cause in violation of the 365 day limit under HRS 205-4(g) and Hawaii Administrative Rules ("HAR") § 15-15-51(e). (SER 15).

On November 18, 2010, the Commission held a further hearing on the order to show cause. Id. At the hearing, DW's principal Robert Wessels testified that the two-year-old order to show cause had been a deterrent to financing for the

project. (SER 15-16). No one disputed Mr. Wessels' testimony on that issue. (2ER 104). Further, the Office of Planning testified that the area of the Property "is appropriate for urban expansion" and there was a "need for jobs" that the Project would provide. *Id.* However, Commission Chairman Devens—who advocated changing the Property's land use boundaries to agricultural use—unilaterally decided that the Commission would not take action at the November 18 hearing because he wanted to defer the order to show cause until he felt he had enough votes to support his proposed illegal action. This deferment contradicted the pre-hearing agenda, which listed the project docket for "Hearing **and Action**." (2ER 104) (emphasis added).

F. The Commission Votes to Amend the Property's Land Use District to Agricultural Use

On January 20, 2011, the Commission held another hearing regarding the project. (SER 16). By this time, the order to show cause had been pending for 772 days, more than twice the statutory maximum of 365 days. (2ER 105). Throughout the hearing, Commissioner Devens sought to develop evidence in favor of changing the Property to agricultural use, in blatant violation of his duties to act as an impartial arbiter of the facts. *Id.* Commissioner Devens, as Chairman, also violated his impartial duties as neutral arbiter and prevented the Commission from voting on DW's motion to amend or Bridge's motion to invalidate the order to show cause. *Id.* At the conclusion of the hearing, Commissioner Lezy orally

moved that the Property be changed to agricultural use. *Id.* However, only five Commissioners voted in favor of a motion to amend the Property's land use district boundary to agriculture use, one vote short of the six affirmative votes required to effect any land use district boundary amendment under Hawaii law.⁷ (SER 16). The Commission nonetheless took the position that its voice vote amended the Property's boundary and refused to consider DW's and Bridge's motions challenging the Commission's many procedural irregularities, claiming the motions were now "moot." *Id.* In so doing, the Commission purported to change the Property's land use boundaries to agricultural use **without ever considering or ruling upon the many procedural or substantive violations in the order to show cause proceeding.** (2ER 106).

Further, the Commission made no finding that its vote was based on a preponderance of the evidence as required by HRS § 205-4(h), nor did the Commission reference the factors to be considered for reclassification of district boundaries pursuant to HRS § 205-17. (2ER 106). Indeed, the Commission's conduct was purely results driven and made no effort to comply with Bridge's due process rights or the Commission's procedural requirements.

On the March 10, 2011, the Commission met to consider the proposed written order drafted by the state Attorney General's Office, which circulated

⁷ HRS 205-4(h) states unambiguously: "Six affirmative votes of the commission shall be necessary for any boundary amendment under this section."

drafts of the proposed order to Commission members prior to the March 10, 2011 meeting. (2ER 107). However, neither the Commission nor the Attorney General's Office provided drafts of the proposed order to Bridge and DW. Id. As such, Bridge and DW were prevented from substantively responding to the proposed written order because they were not given copies of it at any time prior to the meeting. Id.

The Commission voted six to two in favor of adopting the proposed order. (2ER 107-108). One of the six votes in favor of adopting the proposed order was Commissioner Teves, who was not present at the January 20, 2011 meeting and did not vote in favor of the oral boundary amendment motion. Id.

On April 8, 2011, the Commission met in Honolulu to consider finalizing and adopting the proposed order as a final decision and order. (2ER 108). Prior to the hearing, Bridge submitted to the Commission a report from University of Hawaii Law School Professor David L. Callies. Id. Professor Callies is a nationally recognized expert on land use regulation, and has authored 17 books on land use law. Id. Professor Callies reviewed the entire record of the order to show cause proceeding and opined that the Commission violated various statutes, administrative rules, and due process in the manner they had conducted this contested case hearing and boundary amendment proceeding. Id. Professor Callies also found that the 2005 affordable housing condition was an

unconstitutional (and thus unenforceable) land development condition. Id.

Therefore, the Commissioner had actual knowledge that their proposed boundary amendment was unlawful and unconstitutional.

At the April 8, 2011 meeting, the Commission heard extensive public testimony in support of the Project. **No one spoke in favor of changing the Property to agricultural use.** (SER 17; 2ER 109). At the conclusion of the April 8, 2011 meeting, the Commission deferred ruling on either the final adoption of the proposed order or DW's motion to amend (which was still pending). (2ER 109). Commissioner Devens had already left the meeting without even bothering to listen to Bridge and DW's arguments. Id.

On April 21, 2010, the Commission held another meeting to vote on DW's motion to amend and whether to adopt the proposed order as a final order. (SER 17; 2ER 109). Once again, the Commission heard extensive public testimony in favor of the project. Id. Commissioner Kanuha then stated that based on his review of Commission files, the Commission over the years had consistently deferred to the respective counties regarding fulfillment of projects' affordable housing conditions. (2ER 110). Commissioner Kanuha cited numerous recent dockets in which the Commission had assigned affordable housing regulation to the counties. Id. Commissioner Kahuna, joined by Commissioner Jenks, argued that the Commission should let the County of Hawaii oversee the affordable

housing development, consistent with the Commission's extensive precedent. Id.

However, Commissioners Heller and Chairperson Devens responded that the County's zoning and authority were not relevant, and that they wanted to impose "consequences" on the petitioners for failing to build all 385 affordable housing units by the deadline imposed by the Commission.

(SER 17; 2ER 110).

Prior to the Commission's vote on the adoption of the proposed order as a final decision and order, Bridge verbally requested that Commissioner Devens disqualify himself from voting based on a conflict of interest. (2ER 111). Bridge explained that during the 2001-2003 time period covered by the proposed order, Commissioner Devens' law firm, then known as Winer Meheula Devens & Bush, LLP, sued Bridge over certain water rights to the project. Id. This lawsuit, entitled Hale Wailani Partners, LP v. Bridge Aina Le`a, et al., Civ. No. 1-1-000465, caused significant delay to the project, as well as cost Bridge substantial financial resources to defend the lawsuit that spanned several years. Id.

The request for Commissioner Devens to disqualify himself had four bases: (1) Commissioner Devens, as a partner in his law firm, received a direct financial benefit from the litigation against Bridge; (2) Commissioner Devens' client, Hale Wailani Partners, LP, would benefit from the reclassification of the project to agriculture and Bridge's reduced need for water for the project; (3) the

Commission's order to show cause was based on Bridge's failure to adequately proceed with the project, which ability was significantly curtailed by the lawsuit filed by Commissioner Devens' firm on behalf of Hale Wailani Partners, LP; and (4) Devens' law firm's direct involvement in litigation regarding the Project created an appearance of impropriety that warranted Commissioner Devens' disqualification on voting to remove the project's entitlements. Id.

However, Devens stated on the record that he did not have a conflict and would not disqualify himself from voting. (2ER 112). Devens did not seek an advisory opinion from the State of Hawaii Ethics Commission. Id.

On April 25, 2011, the Commission entered its final order amending the Property's land use designation from urban to agricultural. (SER 17). The Commission also denied Bridge's motion to invalidate the order to show cause as "moot" without considering its merits.

On May 13, 2011, the Commission held a further hearing due to its failure to vote on DW's motion to amend prior to adopting the final order. (2ER 113). At the May 13, 2011 hearing, Commissioner Devens verbally attacked counsel for Bridge. Id. In a heated voice, Commissioner Devens berated Bridge's counsel; demanded to know what claims Bridge had against the Commissioners; and interrogated Bridge's counsel regarding Bridge's litigation strategy. Id.

Commissioner Devens' conduct was outrageously inappropriate, and demonstrated his animus, bias, and irrational behavior towards Bridge and the project.

G. Bridge Files Both Administrative Appeal and Separate Takings Action in State Court

On May 12, 2011, Bridge filed a timely administrative appeal of the final order in state court. (SER 18; ER4). On March 6, 2012, the state court entered its Findings of Fact and Conclusions of Law, and Order Reversing and Vacating the State of Hawaii Land Use Commission's Final Order. (ER 5). The state court concluded that the Commission violated the following statutes, rules and constitutional provisions:

- (1) Commission "lost sight of its mission" and violated HRS Chapter 205 by sanctioning Bridge and DW without considering the factors required for land use district boundary changes pursuant to HRS §§ 205-16 and 205-17 (SER 20-21);
- (2) Commission violated HRS § 205-4(h) by failing to find beyond a preponderance of the evidence that the boundary amendment was reasonable and by failing to obtain six affirmative votes in favor of boundary amendment (SER 22);
- (3) Commission violated HRS § 205-16 by failing to consider the Hawaii state plan during the order to show cause proceeding (SER 23-24);

(4) Commission violated HRS § 205-17 by failing to consider any of the factors required for a boundary amendment, especially given the evidence that the property was not suitable for agricultural use (SER 25-26);

(5) Commission violated HRS § 205-4(g) by failing to conclude the order to show cause proceeding within 365 days (SER 26-27);

(6) Commission violated HRS Chapters 91 and 205 and HAR Chapter 15-15 based on improper procedures, “creat[ing] new procedures that were not already established” and creating ambiguity as to the meaning of “completed” (SER 29-31);

(7) Commission violated Bridge’s procedural and substantive due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 5 and 20, of the Hawaii Constitution (SER 31-33); and

(8) Commission violated Bridge’s Equal Protection Rights because it treated Bridge differently, and less favorably, than other petitioners in cases involving facts and circumstances substantially similar to this case. (SER 33-35).

The state court reversed and vacated the final order, and remanded the proceeding back to the Commission to rescind and void its unlawful actions. (SER 36). However, rather than schedule a hearing to remedy its gross violations of law, the Commission filed a motion to amend the state court judgment to prevent the

matter from being remanded back to the Commission. (SER 109). Bridge opposed the Commission's motion to amend and sought remand back to the Commission to adopt the state court's order, incorporate it into the underlying docket, and allow the project to proceed. (SER 45). The Commissioners' failure to accept remand and correct the docket further exemplifies their animus and bias toward Bridge and the project.

On June 15, 2012, the state court granted the Commission's motion to amend, which prevented Bridge from appearing in front of the Commission. (SER 1, 37). Accordingly, the failure to correct the underlying docket has left a dark cloud of uncertainty over the project, despite the state court favorable ruling that the Commission's conduct was unlawful. Therefore, the project has been shut down and cannot proceed during the administrative appeal.

On June 7, 2011, Bridge filed this action in state court, asserting various federal and state constitutional claims. (2ER 79). The constitutional claims include procedural and substantive due process violations, equal protection violations, and unconstitutional takings under both the United States Constitution and Hawaii Constitution. (2ER 114-131). Bridge also asserts 42 U.S.C. § 1983 claims against the Commissioners in their individual capacity, (2ER 125), as well as claims for declaratory and injunctive relief. (2ER 132, 134). Based on Bridge's inability to complete the sale to DW due to the Commission's unlawful boundary

amendment, Bridge alleges damages, jointly and severally against all defendants, of not less than \$35.7 million, plus other compensatory, consequential, and punitive damages. (2ER 139). Commissioners removed the case to federal court and filed their motion to dismiss all claims. (ER 4; 2ER 69).

On March 30, 2012, the district court entered its order staying case pending resolution of the state court administrative appeal. (ER 1). The Commission timely appealed, and Bridge cross-appealed. (SER 39).

VII. SUMMARY OF THE ARGUMENTS

The district court was correct to invoke Pullman abstention, and the appropriate requirements were satisfied. However, the district court should have either remanded the entire case back to state court, or else stayed the federal claims and remanded the state claims. Remand to state court is consistent with district court precedent in this circuit. See VH Property Corp. v. City of Rancho Palos Verdes, 622 F. Supp. 2d 958, 970 (C.D. Cal. 2009) (staying federal claims and remanding state law claims); see also Ganz v. City of Belvedere, 739 F. Supp. 507, 510 (N.D. Cal. 1990) (remanding entire case back to state court). By staying the entire case, the district court caused prejudicial delays to Bridge's takings litigation, and left Bridge with no avenue for an interim remedy against the Commission.

This court should avoid a direct ruling on the Commissioners' immunity claims and remand the entire case back to state court, or at least the state law claims. If this court is inclined to rule, then the Commissioners' immunity defenses should be rejected at this stage of the proceedings. The allegations contained in the Complaint, which are strongly supported by the administrative appeal ruling, are sufficiently pled to defeat the Commissioners' motion to dismiss. Bridge alleges, and the state court agreed, that the Commissioners acted unlawfully when they sanctioned Bridge by amending the Property's land use classification.

The individual Commissioners are not entitled to any form of immunity on the federal or state law claims. The Commissioners are not entitled to quasi-judicial absolute immunity because their conduct was far outside the statutory, procedural, and constitutional constraints of a legitimate quasi-judicial proceeding. For the same reasons, the Commissioners are not entitled to qualified immunity based on the pled allegations and state court ruling.

Further, the Commissioners are not entitled to immunity as to the state law claims because no such immunity exists under Hawaii law. The Complaint adequately pleads that the Commissioners acted with a malicious and improper purpose to treat Bridge differently than similarly situated petitioners, and then sanctioned Bridge through an unlawful taking.

VIII. CROSS-APPEAL ARGUMENT

A. Pullman Abstention Requires Remand to State Court

Bridge does not contest the district court's decision to invoke Pullman abstention to stay the federal law claims against Defendants pending resolution of the state court administrative appeal. However, the district court erred by not (1) staying the federal claims and remanding the state law claims pending exhaustion of the administrative appeal; or (2) remanding the entire case back to state court. Compare VH Property Corp., 622 F. Supp. 2d at 970 with Ganz, 739 F. Supp. at 510. By staying the entire case, the district court left Bridge without any interim remedy against the Commission, and prejudiced Bridge's efforts to proceed with the underlying takings litigation. Simply put, Bridge is entitled to claims for relief under state (and federal) law that are not available in the administrative appeal.

Abstention is a "threshold issue" that should be addressed prior to any substantive ruling on the merits of the defendants' motion to dismiss. Woodfeathers, Inc. v. Washington County, Or., 180 F.3d 1017, 1020 (9th Cir. 1999). "Unlike Younger [abstention], which requires dismissal of the federal action where all four conditions are met, Pullman is a discretionary doctrine that flows from the court's equity powers." Potrero Hills Landfill, Inc. v. County of Solano, 657 F.3d 876, 889 (9th Cir. 2011). Bridge recognizes that the district court

had the inherent authority to exercise its discretionary powers and abstain under Pullman. Bridge does not contest the district court's ruling that the three conditions of Pullman are satisfied with respect to Bridge's federal claims.⁸

This court should remand the state claims pursuant to VH Property, 622 F.Supp. 2d 958. In VH Property, plaintiffs filed a lawsuit in California state court alleging the City of Palos Verdes violated plaintiffs' rights under the California and United States Constitutions by denying plaintiffs' land development applications. Id. at 960. The defendant city removed the case to federal court pursuant to 28 U.S.C. §§ 1331 and 1441(b) (federal question jurisdiction). On plaintiffs' motion for remand, district court U.S. District Court Judge Margaret M. Morrow invoked Pullman abstention, stayed the federal law claims, and correctly remanded the state law claims back to state court for adjudication.

In the alternative, this court should remand the entire case back to state court pursuant to Ganz, 739 F. Supp. 507. In Ganz, plaintiff property owner filed suit against the City of Belvedere for temporary takings of property and individual members of the city council for § 1983 claims based on denial of a variance. Defendant city removed to federal court and requested the court abstain

⁸ The district court's order properly found that the three requirements of Pullman abstention were satisfied by the claims against the individual Commissioners. (ER 7-17). The Commissioners' principal brief falls flat in countering the district court's well-reasoned written order. Accordingly, Bridge hereby incorporates by reference the district court's arguments finding the application of Pullman to the individual Commissioners. Id.

under Pullman after the court denied the city's motion to dismiss. The Court found that if the plaintiff had filed its original complaint in federal court, the district court would abstain and stay the action pending resolution of the state law issues. **But because plaintiff filed in state court and defendant removed**, the court found it "inequitable for the Court now, because it finds abstention appropriate, merely to stay the action and not remand because such action would require plaintiff to initiate yet another state lawsuit" Id. at 510. The Court, therefore, remanded the entire proceeding back to state court.⁹ See Palmer Trinity Private School v. Village of Palmetto Bay, 803 F.Supp.2d 1322 (S.D. Fla. 2011) (invoking Pullman abstention in zoning litigation containing § 1983 claims that was removed to federal court, and remanding entire case back to state court); see also Patsy v. Florida Board of Regents, 457 U.S. 496, 516 (1981) (exhaustion of administrative remedies not required as a prerequisite to bringing an action pursuant to § 1983).

Here, the district court declined to remand either the state law claims or the entire action "in the interest of sensible management of this case." (ER 22). The district court distinguished VH Property, claiming there it was necessary to put the case before the state court, whereas here Bridge already has its pending

⁹ The court in Ganz, in response to defendants' concern that they would lose their statutory right under 28 U.S.C. 1441(b), instructed that defendants can preserve their rights to federal court adjudication of plaintiff's federal claims by making a reservation on the state court record pursuant to England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 421 (1964).

administrative appeal to provide the necessary state court relief. (ER 19). However, the district court's reasoning was misplaced because (1) the pretrial and discovery portions of the takings litigation should proceed without further delay and prejudice to Bridge, and (2) Bridge has no injunctive or declaratory relief remedy in the administrative appeal. See Patsy, 457 U.S. at 516.

1. Takings litigation should proceed in state court without further delay

First, Bridge's claims inherently rely on state law issues not part of the administrative appeal, namely the just compensation takings litigation. The right to damages for a temporary taking is constitutionally mandated. First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318-319 (1987) (recognizing that while a state may acquiesce to a judicial declaration that an ordinance has effected an unconstitutional taking, the landowner is then entitled to recover damages for the temporary taking). The state court administrative ruling makes clear that Bridge has a claim for a temporary taking of Bridge's property, and that the Commission violated Bridge's statutory and constitutional rights. (SER 18-35). In fact, regardless of the outcome in the administrative appeal, an unlawful taking had occurred. The only question is whether it was a temporary taking or a permanent one.¹⁰

¹⁰ The Commission's ultimate success in the administrative appeal would trigger a permanent taking because the record is clear that the Property has no economically viable use as agricultural. (2ER 85). See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

The just compensation litigation must commence sooner rather than later, particularly the pretrial proceedings that can take up to several years. Factual discovery, deposition, expert reports, and other pre-trial matters will take significant time, and it is prejudicial to Bridge to delay those pretrial proceedings for several years while the administrative appeal makes its way through the Hawaii courts.¹¹ Time is of the essence for such a large and complicated action. There is no reason why the state court cannot adjudicate the claims in this case, as shown by the court in Ganz. Therefore, the state court should begin the takings litigation while the administrative appeal is pending.

2. Bridge is entitled to injunctive and declaratory relief in state court

The district court's stay of the entire case also deprived Bridge of its claims for injunctive or declaratory relief. Bridge should be entitled to pursue its claims for declaratory/injunctive relief to enjoin any action by the Commissioners to further violate Bridge's constitutional rights. These claims are clearly necessary based on the conduct by the Commissioners in the underlying docket, which the state court found was unconstitutional.

¹¹ Indeed, the Commission's principal brief admits that a recent administrative appeal took **six years** to be decided by Hawaii's Intermediate Court of Appeals, and that the case is not even concluded yet. See Principal Brief, pg. 14, n. 5.

Under Hawaii law, state courts may enjoin enforcement of a land use decision that results in a violation of a plaintiff's constitutional rights. See Aged Hawaiians v. Hawaiian Homes Com'n, 78 Hawaii 192, 213, 891 P.2d 279, 300 (1995) (holding that Native Hawaiians were not required to exhaust their administrative remedies in challenging award of pastoral lands prior to bringing lawsuit against Land Use Commission). Further, Bridge is entitled to declaratory and injunctive relief with respect to its constitutional claims directly under the federal Due Process and Equal Protection Clauses. See Lingle v. Chevron, 544 U.S. 528, 532 (2005) (recognizing that if a "government action" is "impermissible" because it is so "arbitrary as to violate due process," no amount of compensation can authorize such action). However, injunctive and declaratory are **not** available under an HRS Chapter 91 appeal of an administrative agency decision and Bridge can only obtain such relief in this action.

If the Commission takes steps to further interfere with the project, Bridge would have no venue for relief and would therefore be forced to file an entire new action. By cutting off access to potential injunctive relief, the district court allowed the dark cloud of uncertainty to continue to hang over the Property with no end in sight. That only seems to further the Commissioners' underlying malicious intent—to kill this project one way or another.

Therefore, the district court erred by depriving Bridge of these claims and remedies by refusing to either remand the entire case or only the state claims.

B. Remand Does Not Unduly Burden the Parties

The district court also expressed concern that splitting the case might be inefficient and “force the parties to litigate overlapping issues in two forums, increasing the costs and burdens on them.” (ER 22). However, this argument misses the bigger picture: it is much more inefficient to delay Bridge’s legitimate state law takings claims and drag on, for potentially several more years, the Commission’s unlawful actions. Regardless, Bridge has already been grossly burdened (to the costs of tens of millions of dollars) by its attempts over the past eight years to convince the Commissioners that their actions were unlawful. Any overlap of claims caused by remand would pale in comparison to the amount of time and money the Commissioners’ unlawful actions have cost the project. Further, the current stay deprives Bridge of injunctive relief, and may force Bridge to file a whole new lawsuit if the Commission takes additional unlawful action. The district court’s attempt to stay the entire case to purportedly increase short-term efficiency would be “penny wise, pound foolish.”

Indeed, at the hearing below the district court was inclined to stay the federal claims, particularly the § 1983 claims, and remand the remaining case back to state court. (SER 94-95). The district court even encouraged the parties to

agree to dismiss the federal claims without prejudice, which would then cut off federal question jurisdiction and require remand of the surviving state claims back to state court. (SER 66, 105-106). Bridge drafted and provided the Commission with a stipulation to dismiss its federal claims without prejudice. (SER 64). However, the Commissioners refused to agree to allow Bridge to dismiss its federal claims without prejudice. (SER 62).

Once the district court decided to invoke Pullman abstention, the choice was clear under applicable law: either stay the federal claims and remand the state law claims only, or remand the entire case back to state court.

IX. ARGUMENT RESPONDING TO PRINCIPAL BRIEF

A. The Commissioners Are Not Entitled to Absolute Quasi-Judicial Immunity

If this court is inclined to reach the merits of the Commissioners' claims for immunity on this motion, the administrative appeal ruling makes clear that the "Commissioners are not insulated from the agency that promulgates the rules to be applied." Zamsky v. Hansell, 933 F.2d 677, 679 (9th Cir. 1991).

To plead a claim under § 1983, the plaintiff only needs to allege (1) that some person has deprived him of a federal right; and (2) that the person so depriving him acted under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980). "[A] public official seeking 'absolute exemption from personal liability

for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.” Buckles, 191 F.3d at 1133.

Here, the Commissioners have failed to satisfy their burden of proof because their actions were wholly “inconsistent with the judicial role and judicial immunity”. Id. The Commissioners repeatedly combined the functions of “lawmaker,” “monitor of compliance,” and “adjudicator”. Id. In so doing, **they lost their absolute judicial immunity, because they are not acting like judges.**¹² Id.; cf. Lee v. Walters, 1999 WL 694015 (D. Ore. 1999), aff’d, 4 Fed. Appx. 490 (9th Cir. 2001) (rejecting judicial immunity because commissioners’ issuance of order enforcing regulations that commissioners themselves promulgated was not functionally analogous to a judicial act).

The two primary cases in this circuit addressing quasi-judicial absolute immunity are Zamsky, 933 F.2d 677, and Buckles, 191 F.3d 1127. As shown below, both of these cases support Bridge’s position that the individual Commissioners are not entitled to absolute quasi-judicial immunity as to Bridge’s federal claims against them personally.

¹² The Commissioners’ claim for absolute judicial immunity is especially troubling in light of their motion to amend the administrative appeal ruling in order to avoid remand. (SER 109). The Commission never held a meeting to rescind the final order, acknowledge their wrongdoing, and allow the project to proceed. If the Commissioners were truly “acting like judges,” they certainly would not feel so free to ignore a state judge’s ruling and allow a cloud of legal uncertainty to hang over the Property.

In Zamsky, the 9th Circuit Court of Appeals rejected judicial immunity for members of the Oregon Land Conservation and Development Commission (the “LCDC”). Similar to what the Hawaii Land Use Commissioners did in this case, the Oregon LCDC 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, and second, it reviews the comprehensive land use plans which local governments are required to create and adopt for conformity with the LCDC’s state-wide goals. Id. at 678. If the local government’s land use plan does not conform with the LCDC’s state-wide goals, the LCDC may issue a “continuance order” stating how to bring the plan into compliance. Id.

Plaintiff Zamsky owned 1,950 acres of undeveloped land in Klamath County, Oregon. In 1984, Klamath County rezoned Zamsky’s land, in response to an LCDC “continuance order” that approved parts of Klamath County’s land use plan but required the county to rezone or make additional findings with respect to Zamsky’s property. Id. Zamsky sued the individual LCDC commissioners, claiming they violated his constitutional rights under the equal protection, due process, and takings clauses. Id. As in this case, the LCDC commissioners claimed they were entitled to absolute immunity. The magistrate judge agreed with the LCDC commissioners, but the Ninth Circuit reversed.

In rejecting the LCDC commissioners' claims for judicial immunity, the Ninth Circuit noted that "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. Such combined functions are not uncommon at the local level, but they are inconsistent with the judicial role and judicial immunity.

Zamsky, 933 F.2d at 679 (emphasis added); see also Guru Nanak Sikh Society of Yuba City v. County of Sutter, 326 F. Supp. 2d 1128, 1136 (E.D. Cal. 2003) (finding that County Board of Supervisors is not entitled to judicial immunity because the Board serves both the functions of lawmaker and compliance enforcement).

Here, the Commissioners clearly "combine[d] the functions of lawmaker and monitor of compliance[,"] and were not "insulated from the agency that promulgates the rules to be applied." Zamsky, 933 F.2d at 679. In fact, the Commissioners at various times wore at least four hats: lawmaker, compliance monitor, prosecutor, and executioner, all the while disregarding any semblance of due process or equal protection:

First, the Commissioners created the administrative rules that apply to all petitioners in any proceeding before the Commission. See HAR § 15-15.

Second, the Commissioners then created all of the requirements and conditions for the project, in the original 1991 order; the 2005 order imposing the affordable housing deadline; and the 2009 order (conditionally) rescinding the order to show cause.

Third, having promulgated all the rules, conditions, and requirements applicable to the project “in the first place,” Zamsky, 933 F.2d at 679, the Commissioners then actively monitored compliance with their 2005 order and 2009 order. The Commissioners’ order to show cause, which grossly exceeded the statutory maximum 365-day maximum for such an order to be pending, was based upon the Commissioners’ self-assumed monitoring role. (SER 27).

Fourth, the Commissioners sanctioned Bridge by amending the property’s land use boundary to agricultural use, despite its numerous procedural violations and failure to obtain six affirmative votes to sustain the “voice vote.” (SER 22).

Last, the individual Commissioners cannot escape the specific and integral role they played in this process. For example, Commission Chairman Devens played the role of prosecutor rather than neutral arbiter, manipulating the Commission agenda and developing evidence in favor of changing the Property’s land use classification. Indeed, several individual Commissioners admitted their intent to impose “consequences” on Bridge, based on an alleged failure to comply

with unlawful conditions the Commissioners created. Therefore, these combined functions as alleged in the Complaint, and supported by the administrative appeal ruling, are the precise circumstances exemplified in Zamsky that would prevent judicial immunity.

In response, the Commission's opening brief incorrectly argues that Zamsky is inapposite because the Commission is not comparable to the Oregon LCDC. See Principal Brief, pp. 30-31. However, the Commissioners' argument fundamentally fails because it tries to hide behind the statutory guidelines and administrative rules that they clearly violated. The Commissioners cannot now use for protection the same procedural statutes and rules that they repeatedly ignored toward Bridge.

The Commission points out that it may only reclassify property when it "finds upon the clear preponderance of the evidence that the proposed boundary was 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." See Principal Brief, pg. 32 (citing HRS § 205-4(h)). The Commissioners argue that they are specifically authorized to impose conditions and enforce them by way of an order to show cause. They contend that unlike the Oregon LCDC, the Commission is constrained by rules regarding how it can and cannot operate to reclassify land use boundaries.

However, the Commission's reliance on HRS § 205-4 is misguided for several reasons. Most importantly, the Complaint sufficiently pleads that the Commissioners clearly violated HRS § 205-2, § 205-4, § 205-16, § 205-17, and HRS Chapter 91. The administrative appeal ruling found the Commission violated these same regulations. The Complaint alleges, and discovery will eventually reveal, that the Commissioners created new ad hoc rules and procedures along the way in this proceeding, and did so illegally without regard to due process. (SER 29-33).¹³ The Commissioners also created conditions and orders that they interpreted to have the force of law, requiring immediate reclassification of the Property's land use district boundaries if those conditions and orders were not met to the Commissioners' satisfaction. (SER 7-8). The Commissioners subsequently monitored compliance with the unlawful rules, procedures, and conditions they created. (SER 9-10). Finally, the Commissioners enforced their own rules, procedures, and conditions—including rules and conditions the Commissioners never expressly defined—and did so without regard to the Hawaii land use statute, HRS Chapter 205, and the United States and Hawaii State Constitutions. (SER 20-35).

¹³ See SER 29 at ¶ 54 ("Instead of following these statutes and rules, the LUC implemented a rolling and continuing Order to Show Cause procedure that not only extended far beyond the 365-day period required by HRS § 205-4(g), but also **ignored the required procedures, and created new procedures that were not already established.**") (emphasis added).

Further, the Oregon LCDC and Hawaii Land Use Commission similarly function with multiple roles. “LCDC Commissioners are not insulated from the agency that promulgates the rules to be applied . . . they combine the functions of lawmaker and monitor of compliance.” Zamsky, 933 F.2d at 679. Similarly, as described in detail above, the Commission creates the rules for boundary amendment procedures, imposed the conditions and “deadlines” on Bridge for urban classification, monitored compliance with those same conditions, created ad hoc rules, and ultimately sanctioned Bridge by reclassifying the land for allegedly violating those conditions. Both in this matter and Zamsky share the same underlying problem: **one single commission—multiple functions.** “Such combined functions . . . are inconsistent with the judicial role and judicial immunity.” Id.

The Commission’s principal brief also heavily relies on Buckles to support the argument that the Commissioners are entitled to absolute immunity. Buckles, 191 F.3d 1127. However, the Commission’s reliance on Buckles is misplaced. Similar to Zamsky, the Ninth Circuit recognized in Buckles that land use commissioners who act in a “dual role” as both “lawmakers and monitors of compliance” are not entitled to judicial immunity. Id. at 1136.

The Court in Buckles adopted several factors to determine whether absolute immunity should be granted:

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 at 1133-1134.

Here, the Commission does not satisfy these factors to warrant judicial immunity based on their conduct, as alleged in the Complaint and found by the state court.

First, the Commission's order to show cause did not have the characteristics of a traditional adversarial proceeding. Perhaps if the Commission would have followed its procedural requirements under HRS Chapters 91 and 205, and HAR Chapter 15-15, it may have been more similar to an adversarial proceeding. But that is not what occurred. Rather than adversarial parties before a neutral decision maker, the Commission acted as both adversary and arbiter. Even worse, the Commission constantly violated the procedural and substantive safeguards that exist to protect petitioners before the Commission. The Commission's conduct here would be similar to a criminal trial where the judge acted as prosecutor and jury—all the while making ad hoc changes to the rules of criminal procedure. Accordingly, in this bizarre multi-year proceeding, the

Commissioners' role was in no way equivalent to a traditional adversarial proceeding.

Second, the Commission's proceedings in this case had few if any "characteristics of the judicial process." Buckles, 191 F.3d at 1134. Simply put, the Commissioners changed the rules and created new rules that applied only to Bridge. (SER 29). The Commissioners refused to hear Bridge's evidence before voting to change the Property's land use classification. (2ER 94). The Commissioners later reinstated the order to show cause without any discussion or citation to any evidence. (2ER 101-102). The Commissioners engaged in illegal *ex parte* communications among themselves, to produce a pre-determined result. (2ER 102). Commission Chairman Devens was permitted to preside over the proceeding, and manipulate the agenda, even though his law firm previously sued Bridge in a dispute over water rights to the project. (2ER 111). Commissioner Devens actively sought to develop evidence in favor of changing the Property's land use classification, and then tried to bully the parties into withdrawing a pending motion. (2ER 106). The Commissioners purported to change the Property's land use boundaries to agricultural use based on the order to show cause without ever considering or ruling upon the many procedural or substantive violations in the proceeding. Id. None of that, obviously, is characteristic of a true judicial process.

Third, the Commissioners are not “insulated from political influence.”

The Commissioners are appointed by the Governor. HRS § 26-34(a). The Director of the State Office of Planning is appointed by the Governor. HRS § 225M-2. Both the Commission and the Office of Planning are administratively under the Governor’s Department of Business, Economic Development and Tourism. HRS § 205-2. In this case, for the first time ever, the Governor’s Office of Planning was publicly advocating that the Commissioners kill an ongoing affordable housing project, with the express purpose that the land for the project be sold to another developer who could build a different project on the land. (2ER 101). The Commissioners were “under obvious pressure to resolve (the) dispute in favor of” the position of the Governor, who appointed them. Cleavinger v. Saxner, 474 U.S. 193, 204 (1985). That relationship “hardly is conducive to a truly adjudicatory performance.” Id.

Last, unlike a judge, the Commissioners willfully disregarded their own longstanding precedent throughout the proceeding:

- Other than this project, the Commission had never before included a condition that a developer obtain certificates of occupancy for all of a project’s affordable housing units by a specified date. (2ER 90).

- The Commissioners have not initiated orders to show cause for at least seven other dockets that are similar to the project, where absolutely no construction was ongoing. (SER 34).
- The Commission demanded that Bridge provide a “current written status report” in 2010, despite not requesting a similar report in any other pending projects. (2ER 94).
- At the January 20, 2011 meeting, Commissioner Devens sought to develop evidence in favor of changing the Property to agricultural use, in blatant violation of his duties to act as an impartial arbiter of the facts. (2ER 105).
- Despite the clear language of the statute, the Commissioners took the position that five affirmative “voice votes” changed the Property’s land use classification to agricultural use. (2ER 106).
- Commissioners Heller and Devens argued that County authority over the project was not relevant, that they wanted to impose “consequences” on Bridge and DW for failing to comply with conditions. (2ER 110).
- After the Commission adopted the final order, Commissioner Devens verbally attacked counsel for Bridge; demanded to know what claims Bridge had against the Commissioners; and interrogated Bridge’s counsel regarding Bridge’s litigation strategy. (2ER 113).

Based on the factors in Buckles, the Commissioners acted unlike any judge in this country and deprived Bridge of any semblance of fair judicial process. The Commission's reliance on the dissent in Kaniakapupu v. Land Use Com'n, 111 Haw. 124, 139 P.3d 712 (2006), is similarly misplaced. Rather than address what the Commission actually did to Bridge, the Commission focuses its arguments on what it *should* have done if it had followed the applicable rules and statutes. See Principal Brief, pp. 24-29. Despite the Commission's exhaustive listing of the procedures that are supposed to provide petitioners with a fair contested case hearing, the fact remains that the Commission in this case "lost sight of its mission" and treated Bridge and DW with malice and animus, as clearly alleged in the Complaint.¹⁴ (2ER 125-127).

Therefore, as public officials the Commissioners have not satisfied their burden to obtain immunity from personal liability. Guru Nanak, 326 F. Supp. 2d at 1135.

¹⁴ Indeed, the Commissioners' extensive reliance on HRS § 205-4 and the Hawaii Supreme Court opinions only further reinforces the need to remand this case back to state court. The Commission is clearly a product of state law, and has been specifically subject to several state court appellate decisions. As such, the state courts would be the most appropriate venue for analysis of the Commissioners' roles, responsibilities, and whether they may receive immunity under state law.

B. The Commissioners Are Not Entitled to Qualified Immunity

Similarly, the individual Commissioners are not entitled to qualified immunity. See Gerhart v. Lake County, Montana, 637 F.3d 1013, 1024-25 (9th Cir. 2011) (denying commissioners' claim for qualified immunity because property owner had a "constitutional right to not be intentionally treated differently than other similarly situated property owners without a rational basis"). The Complaint sufficiently pleads, and the state court found, that the Commissioners intentionally treated Bridge differently, and less favorably, than other land use petitioners in cases involving substantially similar facts and circumstances. (SER 33-35). The Commissioners knowingly and willfully violated Bridge's constitutional rights despite having notice and actual knowledge that their proposed actions were unconstitutional. (2ER 108; SER 31-35).

As they did in the district court below, the Commissioners seek qualified immunity on all claims without discussing the Ninth Circuit precedent directly on point. Gerhart, 637 F.3d 1013; Lazy Y Ranch, Ltd. v. Behrens, 546 F.3d 580, 588-592 (9th Cir. 2008) (denying state officials' claim for qualified immunity on property owner's equal protection claim). In evaluating a claim for qualified immunity, "the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." Gerhart, 637 F.3d at

1024 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)). “A right can be clearly established in a novel factual situation, so long as existing law gives the defendants ‘fair warning’ that their actions are unconstitutional.” Id. (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).

Here, the Commissioners unquestionably knew their conduct was unlawful. Bridge submitted to the Commissioners a report from University of Hawaii Law School Professor David L. Callies, a nationally recognized expert on land use regulation. (2ER 108). Professor Callies reviewed the entire record of the proceeding, including transcripts, and provided his opinions to the Commissioners on the propriety of their actions. Id. Among other things, Professor Callies concluded (1) the Commissioners violated due process in the manner they had conducted the hearing; (2) while the Commissioners may be frustrated with delays in the project, the record is “rife with examples of bias and rancor towards Bridge,” supporting an equal protection claim; and (3) the 2005 affordable housing condition was an unconstitutional (and thus enforceable) land development condition. (2ER 109). Based upon Professor Callies’ report, and the parties’ other submissions, the Commissioners had actual knowledge and notice that their proposed action to change the Property’s land use classification to agricultural use was illegal and unconstitutional. The Commissioners had ample notice of their unlawful conduct, yet willfully ignored their “fair warning.”

Also, Bridge had a clearly established right “not to be intentionally treated differently than other similarly situated property owners without a rational basis.” Gerhart, 637 F.3d at 1024; HRPT Properties Trust v. Lingle, 715 F. Supp. 2d 1115, 1141 (D. Hawaii 2010); Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). The Commissioners willfully violated those rights, and created new ad hoc rules that applied only to Bridge. (SER 29, 33-34).

Bridge had a clearly established right to procedural and substantive due process of law. Richardson v. City & County of Honolulu, 124 F.3d 1150, 1162 (9th Cir. 1997). The Commissioners willfully violated those rights. (SER 31-32).

With regard to any government land development approvals and restrictions on its Property, Bridge has a clearly established right: (1) that there must be a direct connection or nexus between what public facility needs a land development will generate or what public problems it will cause, on the one hand, and the land development conditions government imposes to satisfy those needs or ameliorate those problems, on the other; and (2) that the conditions imposed be proportional to those specific needs and problems generated by the particular project. Dolan v. City of Tigard, 512 U.S. 374 (1994). The Commissioners willfully violated those rights. (2ER 130-132).

For the Commissioners' motion to dismiss subject to this appeal, all factual allegations of the Complaint must be accepted as true. Where a plaintiff has sufficiently "alleged a constitutional violation," (as Bridge has here), and the constitutional rights violated were "clearly established at the time," (which the Commissioners do not and cannot dispute), a defendant is not entitled to dismissal on the ground of qualified immunity. Gerhart, 637 F.3d at 1024; cf. Lazy Y Ranch, 546 F.3d at 592 (Defendants "not entitled to qualified immunity" because "the principle that government actors may not draw irrational or arbitrary classifications . . . is clearly established.").

C. The Commissioners Are Not Entitled To Immunity Under Hawaii Law

The Commissioners ask this court to create new Hawaii law, granting the Commissioners "absolute quasi-judicial immunity as to state law claims." See Principal Brief, pg. 36. That argument fails for numerous reasons. First, as Commissioners admit, "The Hawaii supreme court has not yet discussed absolute quasi-judicial immunity for boards." Id., pg. 37. Second, even if such immunity did exist under Hawaii law, the Commissioners would not be entitled to either absolute or qualified immunity for the reasons stated above. Third, the statute cited by the Commissioners, HRS § 26-35.5(b), by its terms does not apply to claims founded upon a violation of the Hawaii State Constitution. Fourth, even if § 26-35.5(b) did apply to the claims in this case, there is no immunity where "the

member acted with a malicious or improper purpose.” Bridge alleges specific malicious and improper conduct by the individual Commissioners to support its claims. (2ER 101, 106, 107). More importantly, those claims are bolstered by the findings of fact and conclusions of law contained in the administrative appeal ruling. (SER 1).

Further, Hawaii case law supports Bridge’s contention that the Commissioners are not entitled to immunity, and that Bridge must be given an opportunity to obtain discovery on the Commissioners’ malicious or improper conduct as alleged in the Complaint. See Medeiros v. Kondo, 55 Haw. 499, 500, 501, 522 P.2d 1269, 1270 (1974) (reversing trial court’s granting of motion to dismiss by defendant Director of State Department of Taxation, and ruling that non-judicial officers do not have absolute immunity when they act in bad faith or maliciously); see also Awakuni v. Awana, 115 Hawaii 126, 142, 165 P.3d 1027, 1043 (2007) (recognizing that immunity to state commissioners provided by HRS § 26-35.5 would not apply where actions were motivated by ill will or reckless disregard of committing wrongful act).

The Complaint alleges facts to adequately support its claims and negate any potential Hawaii state statutory immunity for the Commissioners. Bridge has pled specific facts of actual malice, ill will, and reckless disregard of the law by the Commissioners. (2ER 100, 101, 106, 107, 110, 111, 113). The

Complaint shows that Bridge has suffered damages as a result of more than a mere policy or enforcement decision by the Commission, but instead a concerted, malicious pattern by the individual Commissioners to strip Bridge of its entitlements in the property and prevent Bridge or its successors from ever developing the project. Id.

X. CONCLUSION

For the reasons stated above, Bridge respectfully requests that this court remand the state claims or entire case back to state court. Further, based on the pleadings and administrative appeal ruling, the Commissioners are not entitled to absolute or qualified immunity on the federal or state law claims.

DATED: Honolulu, Hawaii, April 18, 2013.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Bridge Aina Le'a, LLC states that it is not aware of any related cases pending in this Court.

DATED: Honolulu, Hawaii, April 18, 2013.

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**CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1**

I certify that this brief is proportionately spaced, has a typeface of 14 points, and contains 11,519 words.

DATED: Honolulu, Hawaii, April 18, 2013.

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U.S. Court of Appeals Docket Nos. 12-15971 and 12-16076

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 18, 2013. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. A copy will also be served by U.S. Mail on the following:

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