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 FOURTH BRIEF ON CROSS-APPEAL

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

I. INTRODUCTION

After unlawfully reclassifying Bridge Aina Le'a, LLC's Property[1] from urban to agriculture, and in the process violating almost every applicable statute, regulation and constitutional provision since 2005, it is beyond ironic for the Commissioners to now be complaining about the unfairness of this litigation. The Commissioners utterly fail to acknowledge the damage they caused Bridge by creating a shadow over the Property and the project for almost the past decade. To be sure, Bridge has been asserting that the Commission's conduct has been unlawful since at least 2007, but the Commission continually chose to ignore Bridge's arguments and instead sought to punish Bridge and enforce "consequences."

Simply put, the applicable case law is clear that the federal courts should not unnecessarily meddle in local issues such as land use. The district court correctly invoked Pullman abstention and declined to rule on the Commissioners' immunity claims based on the motion to dismiss. See Pullman Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). But the district court erred by refusing to remand all or part of the case back to state court after invoking Pullman.

[1] Unless stated otherwise, terms used herein have the same meaning as defined in Bridge's second brief.

Therefore, this court should affirm the district court's Pullman abstention but reverse and remand the case back to state court for Bridge to pursue its state law takings and declaratory judgment claims.

Remand of this case back to state court does not require this court to rule on the Commissioners' immunity claims. However, if the court is inclined to rule, it should deny immunity based on the allegations in the complaint. Because the Commission assumed multiple roles as rule maker, monitor of compliance, prosecutor, and arbiter, the Commissioners are not entitled to immunity. Despite the Commissioners' worn and overused analogy in the briefs, they acted unlike any judge in the country. Therefore, the Commissioners are not entitled to immunity.

II. ARGUMENT

A. *Pullman* Abstention Is Appropriate

The district court was correct to abstain and stay the federal claims pursuant to Pullman.[2] Pullman abstention is an *equitable* and *discretionary* doctrine that may be invoked by the district court so long as the underlying three criteria are satisfied:

[2] The Commissioners' argument that Bridge waived its abstention argument is unfounded. See Third Brief, pp. 2-3. The Commissioners' citation to Gerlaugh v. Stewart, 129 F.3d 1027, 1051 (9th Cir. 1997) (Reinhardt J. concurring and dissenting), is unpersuasive because that case dealt with a ineffective counsel dispute where defense counsel failed to make closing arguments during the penalty phase of a murder trial. Id. Here, Bridge asserted the Pullman abstention arguments at the district court below and then referenced and incorporated the district court's analysis into Bridge's Second Brief.

(1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.

(2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.

(3) The possibly determinative issue of state law is doubtful.

See VH Property Corp. v. City of Rancho Palos Verdes, 622 F. Supp. 2d 958, 962 (C.D. Cal. 2009) (quoting Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996)).

Courts throughout this circuit have repeatedly held that local land use disputes satisfy the criteria for Pullman. See, e.g., Sinclair Oil Corp., 96 F.3d at 409 (citing Kollsman v. Los Angeles, 737 F.2d 830, 836 n. 18 (9th Cir. 1984)) ("Abstention often will be appropriate when state land use regulations are challenged on state and federal grounds.").[3] Although Bridge would prefer for the litigation to commence as soon as possible, the relevant case law is clear that Pullman abstention is proper in this case. Accordingly, the Commissioners' arguments are inadequate because the district court correctly ruled that the Pullman criteria were satisfied and it had the power to abstain.

[3] The applicable standard of review for Pullman abstention is abuse of discretion. See Kollsman, 737 F.2d at 833.

1. Sensitive Area Of State's Social Policy

"The Ninth Circuit has consistently and repeatedly held that land use planning is a sensitive area of social policy that meets the first requirements for Pullman abstention." VH Property Corp., 622 F. Supp. 2d at 962 (quoting e.g. Sinclair Oil Corp., 96 F.3d at 401) (internal quotations omitted). There is nothing about the 42 U.S.C. § 1983 claims against the Commissioners or their alleged immunity defenses that compel deviation from this rule. Any ruling on the Commissioners' immunity defenses would clearly require the court to enter into the area of state land use law, including analysis of the purpose of the Commission, its role under Hawaii law, and Bridge's factual allegations underlying the § 1983 claims. The Commission is a creation of state law, with members appointed by the Governor, construed by cases decided by the Hawaii Supreme Court, and with the sole purpose of administering land use planning in the state. The Commissioners' defenses also cited to several Hawaii Supreme Court cases and state statutes regarding the Commission's supposed role and function (which Bridge contests the individual Commissioners utterly failed to comply with).[4] See Principal Brief, pg. 25; Third Brief, pp. 7-8.

[4] The Commissioners' briefs heavily rely on analysis of Hawaii Revised Statutes Chapters 91 and 205, as well as opinions from Hawaii appellate courts: Lanai Co., Inc. v. Land Use Com'n, 97 P.3d 372 (Haw. 2004), and Kaniakapupu v. Land Use Com'n, 111, Haw 124, 139 P.3d 712 (Haw. 2006).

Moreover, the Commissioners cannot explain how their immunity defenses do not involve or affect issues of state land use law. Indeed, the allegations in the complaint heavily rely on how the Commissioners repeatedly and maliciously failed to comply with the procedural and substantive requirements of the state law governing the Commission's conduct, despite concrete notice that their conduct was unconstitutional. (2ER 114-131). As such, these state issues cannot be separated or analyzed independently from the Commissioners' immunity defenses. Therefore, the district court properly ruled the first factor was satisfied based on the applicable case law and the allegations in the complaint.

2. Constitutional Adjudication Can Be Narrowed By State Ruling

It is clear that the administrative appeal could alter or narrow some of the constitutional claims alleged in the complaint. As such, the district court's analysis was consistent with other land use decisions in this circuit. The district court correctly relied on VH Property Corp., Sinclair Oil Corp. and C-Y Dev. Co. v. City of Redlands, 703 F.2d 375 (9th Cir. 1983), all of which addressed challenges to land use decisions and found that the second requirement of Pullman abstention had been met. For Pullman to apply, the state court action need not absolutely decide the constitutional issues, but merely narrow them. (ER 14) (citing Sinclair Oil, 96 F.3d at 409). The district court's opinion gives examples of how each of the federal claims asserted in the complaint would be altered or

narrowed by the eventual outcome of the administrative appeal, including (i) Bridge's due process claims that allege Bridge did not receive a full and fair hearing under Hawaii law, and (ii) whether a temporary taking or permanent taking occurred. (ER 9-14).

Regarding the Commissioners' immunity claims, the district court also correctly observed that it should refrain from ruling on the immunity claims because "the administrative appeal could also affect judicial and qualified immunity issues." (ER 12). Issues regarding immunity from suit would necessarily involve analysis of the role of the Commissioners under state law, as well as the conduct of Commissioners as alleged in the complaint. Despite the Commissioners' argument that their immunity defenses do not involve a state law question at all, see Principal Brief pg. 14, whole sections of their briefs are devoted to analyzing the Commission's governing statutes, applicable Hawaii case law, and contested case hearings under state law. Therefore, the immunity defenses could be greatly altered or narrowed by the state court ruling in the administrative appeal.[5]

[5] Although the administrative appeal does not adequately address Bridge's takings and declaratory claims, it will decide the other statutory and constitutional claims to potentially narrow and alter the applicability of the immunity defenses.

3. State Law Issues Are Uncertain

The state law claims and defenses at issue in this case are uncertain. In fact, other cases in this circuit have consistently held that claims related to land use law satisfy this third Pullman requirement. See, e.g., Sinclair Oil Corp., 96 F.3d at 410; VH Property Corp., 622 F. Supp. 2d at 694; Kollsman v. Los Angeles, 737 F.2d 830, 836 n.18 (9th Cir. 1984) (abstaining under Pullman to allow state court to decide questions of state land use planning); Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838, 841 (9th Cir. 1979) (affirming district court's Pullman abstention of land use lawsuit against city for down-zoning oceanfront property).

The Commissioners do not dispute that the question of whether the Commission acted unlawfully presents uncertain issues of state law; instead, they argue that there are no uncertain state law claims regarding their immunity defenses. Principal Brief, pg. 16. Once again, the Commissioners are simply wrong. Bridge's complaint sufficiently pleads (with the support of the state court administrative appeal order), egregious and repeated violations of state law governing the role, purpose and function of the Commission. As such, the district court was correct to find that there is no way to rule on the immunity claims without a detailed analysis of the state law issues regarding the Commission. Further, the immunity claims themselves are uncertain under state law, and the

Commissioners admit no appellate authority in Hawaii exists for finding immunity for the land use commissioners. Principal Brief, pg. 37.

Based on the above, all three requirements of Pullman doctrine are met and the district court's abstention is appropriate.

B. The Court Should Remand the Case Back to State Court

The underlying basis for Bridge's cross-appeal is that the district court was correct to abstain under Pullman, but should have remanded all or part of the case back to state court. Respectfully, the district court and the Commissioners fail to show why remand would not be appropriate in this situation.

The Commissioners contend that there is no precedent for Bridge's proposed remand. However, applicable case law indicates that remand of the case back to state court is consistent with VH Property Corp. and Ganz v. City of Belvedere, as well as other district court cases that have analyzed this issue.

1. *VH Property Corp.* and *Ganz* Support Remand

In VH Property Corp., Judge Morrow stayed the federal claims pursuant to Pullman and then remanded the remaining state law claims back to state court. 622 F. Supp. 2d at 969-970. Here, the district court was incorrect to conclude that Bridge's state law claims are already before a state court in the administrative appeal, when Bridge's most important claim—the regulatory takings—is not part of the administrative appeal. (SER 1-38). As such, Bridge's

reliance on VH Property Corp. is proper because the administrative appeal is not an adequate parallel proceeding that allows Bridge to pursue its takings, declaratory judgment and injunctive relief claims. The administrative appeal does not provide for damages or injunctive and declaratory relief. Further, the administrative appeal does not include the early pretrial discovery that is necessary in complex takings litigation.[6] Therefore, the district court was incorrect to distinguish VH Property Corp., because it is persuasive and can instruct this court to remand back to state court.

Further, the Ganz case is highly instructive and shows how remand to state court is appropriate to provide a proper forum to litigate state law claims. Ganz v. City of Belvedere, 739 F. Supp. 507 (N.D. Cal. 1990). In Ganz, the district court remanded the entire case back to state court, rather than stay the federal claims and split the lawsuit. 739 F. Supp. at 510. Ganz further explains how the federal claims, specifically the § 1983 claims, can be reserved in state court so that the defendant is not deprived of a federal forum. See id. (citing England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 421 (1964)).

[6] Even if the Commission is successful in its administrative appeal, the takings pretrial discovery will still be necessary. The administrative appeal will essentially only determine if the taking was a temporary one or a permanent one.

The Commissioners attempt to distinguish Ganz by claiming that such reservation of federal jurisdiction is no longer valid under San Remo Hotel, L.P. v. City & Cnty. of San Francisco, 545 U.S. 323 (2005). The Commissioners claim they would be barred by issue preclusion from later defending their § 1983 claims in federal court. See Third Brief, pg. 22. However, the Commissioners' reliance on Sam Remo is misplaced, and there is nothing to prevent them from reserving their defenses for federal court. San Remo can be distinguished because there, the plaintiff, not the defendants, initially attempted to reserve certain claims in state court after the federal court abstained. Id. at 331. However, once in state court, the plaintiff waived its reserved rights and actively pursued the federal constitutional claims in state court. Id. at 331, 341. Therefore, under San Remo, so long as the federal claims or defenses are reserved and not litigated, issue preclusion will not apply.

Here, on the other hand, the Commissioners can reserve their defenses to the § 1983 and other federal law claims in state court so long as they refrain from litigating their immunity defenses. Therefore, remand to state court would not deprive or preclude the Commissioners of an eventual federal forum to defend the federal claims.

2. Remand Provides Bridge With Necessary Remedies

The Commissioners fail to adequately rebut Bridge's two critical reasons for requesting remand back to state court.

First, the Commissioners do not directly discuss the most important reason for Bridge's request to remand to state court: the eventual takings litigation in this case, whether temporary or permanent, must begin. Bridge has been repeatedly harmed over the past decade, and is finally in the position to seek compensation for its losses. Regardless of the decision to abstain on the federal claims, or the outcome of the administrative appeal, the pre-trial litigation should commence to avoid further prejudice to Bridge. In fact, starting the takings pre-litigation now in state court will save further delay and move this case toward a quicker resolution without undue risk of piecemeal litigation or prejudice to the Commissioners.

Whether in state or federal court, the critical pretrial and discovery components of the takings litigation can and should commence. For example, the parties must retain appraisal experts to value the property and compute the damages for the regulatory takings. Experts and party representatives must be deposed, documents must be produced, and interrogatories must be propounded. Further, there are multiple third-parties who will be necessary witnesses, including but not limited to: DW Aina Le'a Development, LLC, the County of Hawaii,

various financial institutions, and the Office of Planning. Indeed, this litigation involves tens of millions of dollars in damages and decades of proceedings. Bridge should not be prejudiced by several more years of delays before litigation can even begin. Instead, the court should remand and allow the pretrial discovery to commence while the administrative appeal winds its way through Hawaii's appellate courts.

Second, Bridge's need for injunctive and declaratory relief is concrete. The Commission's unlawful conduct and subsequent state court appeal created a dark cloud of litigation over the project, which was exacerbated by the Commission's refusal to re-open the docket and incorporate Bridge's successful administrative appeal ruling. (SER 37). The Commission is clearly attempting to achieve through litigation tactics what it was unable to do in the underlying docket—kill this project. Given the Commission's history of unlawful conduct toward Bridge, combined with the animus and malice shown by the individual Commissioners in the past, it is essential that Bridge maintain an ability to seek declaratory and injunctive relief. Without such injunctive and declaratory relief, Bridge would have to file a whole new action if the Commission acted unlawfully while the administrative appeal is pending.

Moreover, Bridge may need relief from the Commission or need re-open the docket to obtain approval for certain development while the

administrative appeal is pending. Also, the County of Hawaii may require Bridge or the Commission to provide certain approvals that will not be possible without judicial action. As such, Bridge may require declaratory or injunctive relief while the administrative appeal is pending.

3. Additional Case Law Supports Remand

There is ample precedent for remand to state court after invoking Pullman abstention. In addition to VH Property Corp. and Ganz, there are several other cases with similar facts and claims where the district court abstained under Pullman and then remanded the claims back to state court. See, e.g., Palmer Trinity Private School v. Village of Palmetto Bay, 802 F. Supp. 2d 1322, 1327 (S.D. Fla. 2011) (invoking Pullman abstention and remanding lawsuit over violation of zoning application that included § 1983 claims against the defendant city); Moheb, Inc. v. City of Miami, 756 F. Supp. 2d 1370, 1374 (S.D. Fla. 2010) (Pullman abstention and remand to state court after defendants removed lawsuit regarding local land use zoning); Palivos v. City of Chicago, 901 F. Supp. 271, 273 (N.D. Ill. 1995) (remanding zoning application lawsuit that contained § 1983 claim based on satisfaction of Pullman criteria and denial of supplemental jurisdiction); Adminstaff, Inc. v. Kaiser, 799 F. Supp. 685, 690 (W.D. Tex. 1992) (Pullman abstention and remand to state court for lawsuit that included § 1983 claims); 10 Palm v. City of Miami Beach, 2011 U.S. Dist. LEXIS 36330, 2011 WL

1102791 (S.D. Fla. 2011) (invoking Pullman abstention and remanding back to state court land use lawsuit that was previously removed); Project Patch Family Therapy Ctr. v. Klickitat County Bd. of Adjustment, 2008 U.S. Dist. LEXIS 122335, 2008 WL 906078 (W.D. Wash. 2008) (abstaining under Pullman and remanding lawsuit that includes state law claims and federal § 1983 claims); Clark v. City of Gig Harbor, 2009 U.S. Dist. LEXIS 38524, 2009 WL 1046032 (W.D. Wash. 2009) (applying Pullman abstention and remanding state law claims to state court while retaining jurisdiction over federal claims).[7] Accordingly, precedent supports remand of Pullman abstention cases that lack adequate state court proceedings.

Further, the Commissioners' incorrectly rely on Fireman's Fund Ins. Co. v. Lodi, 302 F.3d 928 (9th Cir. 2002), for the argument that remand is not available. Third Brief, pg. 19. The discussion of remand in Lodi was dicta and should be ignored because the court found that Pullman abstention was **not** applicable, therefore, it never conducted a full analysis of whether remand was appropriate. Id. at 941; see United States v. Westland Water Dist., 134 F. Supp. 2d 1111, 1133 (E.D. Cal. 2001) (citing Sarnoff v. American Home Prods. Corp., 798 F.2d 1075, 1084 (7th Cir. 1986) (Posner, J.)). Accordingly, the Commissioners'

[7] Pursuant to Federal Rule of Appellate Procedure 32.1, unpublished opinions and memoranda orders decided after 2007 may be cited. These opinions are attached hereto as part of the Addendum of Unpublished Decisions.

reliance on Lodi is misplaced and should not distract from the other cases that remanded to state court after Pullman abstention.

This court should look to Bridge's proposed stipulation to dismiss the federal claims as a guide for how the federal claims can be stayed and the state claims remanded. (SER 67-72). This stipulation was drafted by Bridge at the behest of the district court, (SER 105), but the Commissioners would not agree to Bridge dismissing the § 1983 claims without prejudice. (SER 74). Regardless, this stipulation provides a guide to how the case should be remanded to state court, specifically what claims should be included in the remand if this court follows VH Property Corp. Therefore, all state law claims asserted in the Complaint, and specifically enumerated below, should be remanded to state court for adjudication:

1. Count I alleging Denial of Due Process of Law; Procedural Due Process, Substantive Due Process, and Due Process Taking in violation of Article 1, Section 5 and 20 of the Hawaii Constitution.

2. Court II alleging Inverse Condemnation in violation of Article 1, Section 5 and 20 of the Hawaii Constitution.

3. Count III Discrimination In Application of Land Regulation Laws; Denial of Equal Protection in violation of Article 1, Section 5 of the Hawaii Constitution.

4. Count IV Common Law Deprivation of Vested Rights.

5. Count V Equitable Estoppel.

6. Count VII Violation of Hawaii Revised Statutes Chapters 91, 92 and 205 and Chapter 15-15 of the Hawaii Administrative Rules and Declaratory and Injunctive Relief.

7. Count VIII Unconstitutional Land Development Conditions in violation of Article 1, Section 5 and 20 of the Hawaii Constitution.

8. Count IX Injunctive and Declaratory Relief based on the above state law claims.

9. Count X Declaratory Relief pursuant to HRS § 632-1 and Hawaii Rules of Civil Procedure, Rule 57.

Therefore, this court should remand all or part of this case back to state court so that at the litigation can proceed.

C. Remand Would Obviate The Need For This Court To Rule On Commissioners' Immunity Defenses

Based on the above, it is unnecessary to rule on the Commissioners' immunity defenses at this time. This court can simply remand to state court after abstaining, without reaching the immunity issues. The state court is more than capable of ruling on the land use, zoning, and constitutional issues in dispute:

> State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.

San Remo, 545 U.S. at 347.

To avoid remand, the Commissioners awkwardly attempt to separate the immunity issues from the rest of case, claiming that they are independent and should be decided by this court. However, these issues cannot be separated because Commissioners' unlawful conduct was so extreme that it intertwined with the underlying facts upheld by the administrative appeal ruling.

Further, the state court is in the best position to rule on the Commissioners' immunity defenses that heavily rely on state statutes and case law that govern the Commission. If this court remanded the entire case back to state court, there is no reason to doubt that the state court is more than capable of ruling on the Commissioners' conduct in light of the applicable Hawaii state case law and governing statutes. Hawaii courts have not yet ruled on immunity for the Land Use Commission, and there is no clear state law precedent regarding the Commissioners' clearly unlawful conduct. Therefore, it would be appropriate for the state court to decide issues of first impression regarding the Commissioners' immunity defenses and their violations of state statutes, regulations and constitutional provisions.

Regardless, this court should not grant immunity to the Commissioners at the initial pleading stage. The complaint sufficiently pleads allegations of repeated and knowing unlawful conduct by the Commissioners, as well as animus, bias and malice. (2 ER 101, 102, 106, 110, 111, 113). Also, this is not merely a situation of creative and aggressive pleading because these allegations are supported by the administrative appeal ruling and state court's exhaustive review of the entire record.[8] (SER 1-36). The Commissioners' bias, animus, and knowing violation of the law subjects them to individual liability under § 1983. Therefore, the Commissioners have not met their burden of proof as public officials seeking immunity. See Buckles v. King County, 191 F.3d 1127, 1133 (9th Cir. 1999).

III. CONCLUSION

Bridge respectfully requests that this court affirm the district court's Pullman abstention and remand all or part of the case back to state court. Further, the Commissioners are not entitled to absolute or qualified immunity on the federal or state law claims.

[8] When public officials act as lawmaker, monitor of compliance, prosecutor, and adjudicator, they loses their immunity because they no longer are acting like judges. See Buckles v. King County, 191 F.3d 1127, 1133 (9th Cir. 1999); Lee v. Waters, 4 Fed. Appx. 490 (9th Cir. 2001).

DATED: Honolulu, Hawaii, May 28, 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 3721 words.

DATED: Honolulu, Hawaii, May 28, 2013.

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10 Palm v. City of Miami Beach

United States District Court for the Southern District of Florida
March 23, 2011, Decided; March 23, 2011, Filed
CASE NO. 09-23306-CIV-LENARD/TURNOFF

Reporter: 2011 U.S. Dist. LEXIS 36330; 2011 WL 1102791

10 PALM, LLC and VILLAZZO, LLC, Plaintiffs, vs. CITY OF MIAMI BEACH, FLORIDA, Defendant.

Counsel: [*1] For 10 Palm, LLC, a Florida limited liability company, Villazzo, LLC, a Florida limited liability company, Plaintiffs: David Randall Hazouri, Bilzin Sumberg Baena Price & Axelrod, Miami, FL; John Kressfield Shubin, Shubin & Bass, Miami, FL.

For City of Miami Beach, a Florida municipal corporation, Defendant: Debora Jean Turner, Gary Mark Held, City of Miami Beach, Miami, FL.

Judges: JOAN A. LENARD, UNITED STATES DISTRICT JUDGE.

Opinion by: JOAN A. LENARD

Opinion

ORDER GRANTING PLAINTIFFS' MOTION FOR REMAND (D.E. 7)

THIS CAUSE is before the Court on the Plaintiffs 10 Palm, LLC and Villazo, LLC's ("Plaintiffs") Motion for Remand ("Motion," D.E. 7), filed on November 25, 2009. On December 15, 2009, Defendant City of Miami Beach (the "City") filed its Response in Opposition to Plaintiffs' Motion ("Response," D.E. 9). Plaintiffs filed their Reply to Defendant's Response ("Reply," D.E. 14) on December 30, 2009. Upon review of the Motion, Response, Reply and the record, the Court finds as follows.

I. Factual and Procedural Background

This action stems from the dispute between Plaintiffs and the City over the right of a single-family homeowner to lease his home to a tenant for a period of time that is less than six (6) months [*2] and one (1) day. Plaintiffs are a homeowner and rental agent, respectively, who have a direct interest in renting single-family homes to tenants looking for vacation or short term rentals in Miami Beach, Florida.

On or about February 24, 2000, City Planning Director Jorge Gomez ("Gomez") issued a written Administrative Interpretation ("AI 00-02") which concluded that all rentals of single-family homes in single-family zoned residential areas in the City of Miami Beach for periods of less than six months and one day were prohibited. (Compl. ¶14, D.E. 1.) Gomez allegedly based AI 00-02 on the reading of City Land Development Regulation 142-102 and City Code Section 102. (*Id.* ¶ 15.) The City subsequently enforced AI 00-02 against Plaintiffs, prohibiting them from effecting short-term rentals. (*See id.* ¶ 16.)

On September 17, 2007, Plaintiffs filed suit in the Circuit Court of Miami-Dade County against the City seeking declaratory judgment that Gomez had no legal authority to issue AI 00-02, that AI 00-02 was *ultra vires* and void as a matter of law. (*Id.*) That suit was removed to this Court by the City on October 17, 2007. (*See* Notice of Removal, Civ. Case No. 07-22752-JAL, D.E. 1.) Plaintiffs [*3] did not move to remand the action to state court. On April 8, 2008, upon the Parties' Joint Motion to Stay Proceedings, the case was stayed and administratively closed for the purpose of allowing the Parties to come to a settlement regarding AI 00-02. (*See* April 8, 2008 Order, Civ. Case No. 07-22752-JAL, D.E. 31.)

No such settlement was ever reached. On February 25, 2009, the City enacted Ordinance

No. 2009-3629, entitled "Codification of Director's Interpretation" ("Ordinance"). (Compl. ¶ 18.) The Ordinance made illegal rentals of single-family homes for less than six months and one day. (*Id.*)

Plaintiffs once again filed suit against the City in the Circuit Court of Miami-Dade County. (Notice of Removal ¶ 1, D.E. 1.) The City again removed the action to the District Court for the Southern District of Florida on October 30, 2009. (*See id.*) The instant Complaint contains all three of the claims alleged against the City in the 2007 action, as well as two new counts. (*See generally*, Compl.) Plaintiffs seek a declaration that AI 00-02 is void (Count I), a declaration that the Ordinance violates Florida antitrust laws and appropriate injunctive relief (Count II), a declaration that the Ordinance [*4] violates the Dormant Commerce Clause and appropriate injunctive relief (Count III), damages as a result of the City's unlawful takings pursuant to 42 U.S.C. § 1983 (Count IV) and damages as a result of the City's violation of their substantive due process and unlawful takings under the Florida Constitution (Count V). [1] [2] The 2007 action remains stayed and administratively closed.

Plaintiffs now move to remand this case to state court, arguing that while this Court has jurisdiction over Plaintiffs' claims, it should abstain from doing so under the *Pullman* abstention doctrine. Plaintiffs contend that the dispute over the local zoning law central to this case is an issue properly left to state courts. (Mot. at 7.) Plaintiffs argue that (1) state courts are fully able to adjudicate their claims, (2) state court adjudication of their claims would obviate the need, or narrow the scope of, adjudication of the federal constitutional claims and (3) the proper resolution of the potentially determinative state law issue is uncertain. (*See id.* at 7-9 (citations omitted).) [3]

The City opposes remand on two grounds. First, it argues that the instant action is simply a refiling of the 2007 suit. Plaintiffs' failure to seek remand of the 2007 action should bar their attempts to do so now. (Resp. at 5 (arguing that a motion for remand based on *Pullman* abstention, a non-subject matter jurisdiction basis, must be made within 30 days after the notice of removal).) The City paints the instant suit as Plaintiffs' belated attempt to circumvent the removal of the 2007 action and a "second bite at the remand apple." (*Id.* at 7.) Moreover, the City argues that Plaintiffs have waived their right to remand by participating in motion practice in this Court while the 2007 action remained pending. (*Id.* at 8.) The City requests that the 2007 action and the 2009 action be consolidated and remain in this Court. (*See* Defendant's Mot. to Consolidate Cases 07-22752-CIV and 09-23306-CIV, Civ. Case No. 07-22752-JAL, D.E. 50.) In the alternative, the City argues that application [*6] of the *Pullman* abstention doctrine does not weigh in favor of remand. (*See* Resp. at 11-19.)

II. Timeliness of the Remand Motion

This case presents a unique procedural history. It is undoubtedly related to the parties' 2007 action, currently stayed and administratively closed. [4] Only the Ordinance and two additional claims distinguish this action from its predecessor. Yet, the right of a single-family homeowner in Miami Beach to lease his home to a tenant for a period of time that is less than six (6) months and one (1) day remains at the core of both actions.

The City accuses Plaintiffs of improper forum shopping, taking a "second bite at the remand apple." (Resp. at 7.) It urges the Court to

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[1] Counts II and III were not pled in the 2007 action.

[2] Counts IV and V are mistakenly labeled as "Count IV" in the Complaint.

[3] Plaintiffs [*5] reserve their right to return to this Court for adjudication of their federal claims, if necessary, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 415, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964). (Mot. at 6.)

[4] Although not exactly the "mirror image" of the 2007 action, the parties acknowledge that following the disposition of the Motion to Remand, the earlier action will not proceed independently.

view the instant action as an amendment to the complaint in the 2007 action. Plaintiffs counter by accusing the City of enacting the Ordinance in bad faith, essentially to gain leverage in settlement negotiations while the 2007 action was stayed. However, the Court need not consider each party's alleged bad faith [*7] and procedural machinations upon its conclusion that Plaintiffs' Motion for Remand could have been made in the 2007 action, as well as in the instant case.

A motion for remand based on abstention or supplemental jurisdiction is not a motion based on "defect" in removal procedure and therefore is not subject to the thirty-day time limit of 28 U.S.C. § 1447(c). *Snapper, Inc. v. Redan*, 171 F.3d 1249, 1256-57, 1260 (11th Cir. 1999) (footnote omitted); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 711-12, 116 S. Ct. 1712, 135 L. Ed. 2d 1 (1996). In *Snapper*, the Eleventh Circuit reached this conclusion based on a historical analysis and legislative history of § 1447(c), noting that "[i]t is unlikely that a remand on [the basis of abstention or supplemental jurisdiction] would be ripe within such a short time frame." 171 F.3d at 1257 (footnote omitted).

Freed from the thirty-day time limit, a non-§ 1447(c) motion to remand still must be brought within a reasonable time frame. *Id.* at 1257, n.18; *see Foster v. Chesapeake*, 933 F.2d 1207, 1213, n.8 (3d Cir. 1991) ("a district court in the proper exercise of discretion may deny as untimely a non-procedural defect, non-jurisdictional motion to remand if made at an unreasonably [*8] late stage of the federal litigation"). Here, Plaintiffs filed their Motion thirty-nine (39) days after the City's Notice of Removal. In the 2007 action, nearly six months elapsed from the notice of removal until the case was stayed and administratively closed. Considering the total time elapsed in both actions (approximately seven months) and ignoring the period of the stay for the sake of this analysis, the Court finds that Plaintiffs did not wait an unreasonable time to file their Motion. *Compare Foster*, 933 F.2d at 1213, n.8 (affirming remand where plaintiff waited fifty four (54) days to move for non-§ 1447(c) remand) and *Ayers v. Watson*, 113 U.S. 594, 596-99, 5 S. Ct. 641, 28 L. Ed. 1093 (1888) (upholding denial of remand as untimely because moving party did not move until after the Supreme Court issued a writ of error).

Moreover, during the six-month period in which the 2007 action was pending, the parties briefed a motion to dismiss, attended mediation and complied with several Court-ordered filings. The Court did not make any rulings on the merits of the action. The Court finds that this cumulative activity is not so significant and the litigation(s) so developed as to make the instant non-§ 1447(c) Motion [*9] untimely.

Accordingly, the City's arguments that Plaintiffs' Motion is untimely and that Plaintiffs have waived their right to move for remand are unavailing. The Court now turns to Plaintiffs' Motion to Remand based on *Pullman* abstention.

III. *Pullman* Abstention

Pullman abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." *Abell v. Frank*, 625 F.2d 653, 656-57 (5th Cir. 1980); *see Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941). The rationale for the doctrine is that a federal court should avoid an unnecessary federal constitutional decision where interpretation of state law may dispose of a case short of federal constitutional scrutiny." *BT Inv. Managers, Inc. v. Lewis*, 559 F.2d 950, 953 (5th Cir. 1977). The prerequisites for *Pullman* abstention are (1) there must be an unsettled issue of state law; and (2) there must be a possibility that the state law determination will moot or present in a different posture the federal constitutional questions raised. *Siegel v. LePore*, 234 F.3d 1163, 1174 (11th Cir. 2000). Several factors also inform [*10] a court's exercise of discretion of whether to abstain:

> [D]elay, cost, doubt as to the adequacy of state procedures for having

> the state law question resolved, the existence of factual disputes, . . . the fact that the case has already been in litigation for a long time[,] . . . . availability of "easy and ample means" for determining the state law question, the existence of a pending state court action that may resolve the issue, or the availability of a certification procedure, whereby the federal court can secure an expeditious answer.

Duke v. James, 713 F.2d 1506, 1510 (11th Cir. 1983).

The first and most critical prong of the *Pullman* test requires an unsettled question of state law. Although the City cites two state court cases which apply state antitrust laws to municipalities, the parties have not presented any case law interpreting Ordinance No. 2009-3629 or AI 00-02 or otherwise argued that Florida law is settled as to this ordinance. [5] *See Moheb, Inc. v. City of Miami*, 756 F. Supp. 2d 1370, 2010 U.S. Dist. LEXIS 136730, *6 (S.D. Fla. Dec. 16, 2010) (Gold, J.) (granting remand of case involving application of local zoning ordinance to a local business). Nor have the parties addressed the interpretation [*11] of the City's Code and Land Development Regulations or the legality of the City's actions in light of Florida Statutes §§ 163.3194 and 166.041 which govern adoption of land development regulations.

The City argues that the analysis under the first prong of *Pullman* is whether the state law may be applied to the Ordinance or AI 00-02, not whether the Ordinance actually violates the Florida antitrust statute. (Resp. at 13, citing *Pullman*, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971, *Siegel*, 234 F.3d 1163 and *Duke*, 713 F.2d 1506.) The Court disagrees. "The test of uncertainty is typically said to be that the state law must be fairly subject to an avoiding construction." *Duke*, 713 F.2d at 1510. Put another way, the question of state law must be susceptible to interpretation that would avoid adjudication of the constitutional question. *Siegel*, 234 F.3d at 1174.

Here, the germane state law questions are whether the City's administrative interpretation and subsequent ordinance violated Florida antitrust statutes, [*12] the Florida Constitution and statutes governing municipal land development regulations. These questions regarding the legality of local ordinances are unsettled; further, it appears that the Florida law provides ample means to resolve the legality of the City's ordinance and AI 00-02. *See Pullman*, 312 U.S. at 501 (remand appropriate where Texas law appeared to "furnish easy and ample means for determining the [Railroad] Commission's authority" to pass the regulation in dispute); *Pittman v. Cole*, 267 F.3d 1269, 1285 (11th Cir. 2001). The Court finds the analysis of the first prong of *Pullman* favors remand of this action.

As for the second prong of *Pullman*, significant possibility exists that application of state law will moot the two federal constitutional questions raised by Plaintiffs. Specifically, the need for determination of the federal claims will be obviated if the state court finds AI 00-02 was improperly enacted and enforced; or if the Ordinance is in violation of Flordia antitrust statutes; or if enactment of Ordinance No. 2009-3629 constitutes an illegal taking in violation of Articles I, §§ 2 and 9, and Article X, § 6 of the Florida Constitution. *See, e.g. Pullman*, 312 U.S. at 501. [*13] Even if Plaintiffs suffer the adverse determination of all of the aforementioned claims, the state court may nonetheless find that Plaintiffs are entitled to grandfather status and exempt from the City's enforcement of Ordinance No. 2009-3629. Local law issues comprise the majority of this dispute and these are best interpreted and resolved by a Florida court. *See, e.g., Int'l Eateries*, 838 F. Supp. at 585; *Moheb*, 2010 U.S. Dist. LEXIS at * 7. Thus, the second prong of *Pullman* also weighs in favor of remand.

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[5] The City notes that Plaintiffs have not properly pled Count II, violation of Florida antitrust laws. (Resp. at 13, n.6.) This issue is not before the Court and does not affect the determination of the instant motion.

The Court also considers additional factors in this matter, finding that on balance, remand is appropriate. *See, e.g.*, Duke, 713 F.2d at 1510. Florida courts are well qualified to expeditiously and thoroughly resolve the disputed issues in this action. The Court also finds that despite four years having passed since the commencement of the initial suit, the parties have spent relatively little time and expense in litigating the successive actions. Indeed, the record has not been developed, nor has discovery commenced. The factual disputes in this matter will likely be minimal. For all of these reasons, in addition to the "easy and ample" means for determining the state law questions, [*14] the Court finds that remand of this action is a proper exercise of its discretion. *Pullman*, 312 U.S. at 501.

Finally, another relevant consideration in applying *Pullman* abstention is the subject matter of the challenged state law and the constitutional right alleged to have been infringed. *Siegel*, 234 F.3d at 1174; *East Naples Water Systems v. Bd. of Cty. Commissioners*, 627 F. Supp. 1065, 1073 (S.D. Fla. 1986). Courts have often exercised their discretion under *Pullman* to remand, dismiss or stay cases involving disputes arising from local zoning ordinances. *Compare Moheb*, 2010 U.S. Dist. LEXIS at *9 (remand granted where legality of local zoning law in dispute); *Int'l Eateries of America, Inc. v. Bd. of Cty. Commissioners*, 838 F. Supp. 580, 585 (S.D. Fla. 1993) (finding applicability of Florida Statutes, including § 163.3194(2), to local ordinance unsettled); *East Naples Water Systems*, 627 F. Supp. at 1073 (staying case involving unsettled Florida zoning and land regulation law); with *Siegel*, 234 F.3d at 1174 ("voting rights cases are particularly inappropriate for abstention"); *Pittman*, 267 F.3d at 1287 (abstention invoked sparingly in *First Amendment* cases). The Court finds nothing [*15] to distinguish this local zoning and land use case from its predecessors and depart from their established uses of the *Pullman* abstention doctrine.

Where, as here, there are no parallel state court proceedings because the defendant removed the case to federal court, the district court may decide to remand the action in its entirety rather than stay the federal claims. *See, e.g., Administaff, Inc. v. Kaster*, 799 F. Supp. 685, 690 & n.12 (W.D. Tex. 1992) (remanding entire case under *Pullman* abstention). Accordingly, the Court will remand the entire action to state court.

IV. Conclusion

Consistent with the foregoing, it is **ORDERED AND ADJUDGED** that:

1. Plaintiffs 10 Palm, LLC and Villazo, LLC's Motion for Remand (D.E. 7), filed on November 25, 2009, is **GRANTED.**

2. This case is **REMANDED** to the Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida.

3. This case is now **CLOSED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of March, 2011.

/s/ Joan A. Lenard

JOAN A. LENARD

UNITED STATES DISTRICT JUDGE

Project Patch Family Therapy Ctr. v. Klickitat County Bd. of Adjustment

United States District Court for the Western District of Washington
March 25, 2008, Decided; March 31, 2008, Filed
CASE NO. C08-5057BHS

Reporter: 2008 U.S. Dist. LEXIS 122335; 2008 WL 906078

PROJECT PATCH FAMILY THERAPY CENTER, Plaintiff, v. KLICKITAT COUNTY BOARD OF ADJUSTMENT; and KLICKITAT COUNTY, WASHINGTON, Defendants.

Counsel: [*1] For Project Patch Family Therapy Center, Plaintiff: Mark A Erikson, LEAD ATTORNEY, VANCOUVER, WA.

For Klickitat County Board of Adjustment, Klickitat County, Washington, Defendants: Jennifer D Homer, LEAD ATTORNEY, CANFIELD & ASSOC INC, EPHRATA, WA; James E. Baker, JERRY J MOBERG & ASSOCIATES, EPHRATA, WA.

Judges: BENJAMIN H. SETTLE, United States District Judge.

Opinion by: BENJAMIN H. SETTLE

Opinion

ORDER GRANTING PLAINTIFF'S MOTION FOR REMAND

This matter comes before the Court on Plaintiff's Motion for Remand (Dkt. 7) in accordance with 28 U.S.C. § 1447(c) and 28 U.S.C. § 1441. Having considered the Plaintiff's motion, Defendants' response, Plaintiff's reply, and the remainder of the file herein, the Court finds that remand is appropriate pursuant to the *Pullman* abstention doctrine.

Plaintiff's have asked this court to remand the instant matter to state court pursuant to 28 U.S.C. § 1447(c) and 28 U.S.C. § 1441. 28 U.S.C. § 1447(c) authorizes the grant of remand motions for any defect in the removal process other than subject matter jurisdiction when such motion is timely made or when a motion for remand is made for lack of subject matter any time before final judgment. In the instant matter, the case was properly [*2] removed from state court, this Court does have subject matter jurisdiction, and 28 U.S.C. § 1447(c) is not applicable.

28 U.S.C. § 1441(c) states:

> Whenever a *separate and independent claim or cause of action* within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which state law predominates.

(Emphasis added.) Plaintiff filed this cause of action seeking review under the *Land Use Petition Act* (LUPA), RCW 36.70C and for damages pursuant to RCW 64.40.020 and 42 USC § 1983 arising from the land use decisions made relating to Plaintiff's property. Under these circumstances the Court finds that Plaintiff's claims are not "separate and independent" and that this Court is not authorized to remand under § 1441(c).

Plaintiff alternatively contends that this court has the authority to remand the instant matter to state court pursuant to the *Pullman* and *Younger* abstention doctrines. Under the *Pullman* abstention doctrine the Court may abstain where:

> (1) The complaint touches a sensitive [*3] area of social policy upon

> which the federal courts ought not to enter unless no alternative to its adjudication is open.
>
> (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.
>
> (3) The possibly determinative issue of state law is doubtful.

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996) (citing *Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460, 1463 (9th Cir. 1985)). The Ninth Circuit has consistently approved of a district court's use of *Pullman* abstention in land use cases. *Sinclair*, 96 F.3d at 409.

"Land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention." *Id.* (citing *Kollsman v. City of Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984). The second criterion is also satisfied here because if Plaintiff's LUPA claims are decided, determination of the issues raised by the 42 U.S.C.§ 1983 claim for damages could be rendered unnecessary. Furthermore, "it is sufficient if the state law issues might 'narrow' the federal constitutional questions." *Sinclair*, 96 F.3d at 409 (citing *Pearl*, 774 F.2d at 1464). Additionally, [*4] the third criterion is also met. As stated in *Sinclair*, "a local government's enactment of land use regulations 'is by nature a question turning on the peculiar facts of each case in light of the many [applicable] local and state-wide land use laws . . . .'" 96 F.3d at 410 (quoting *Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838, 841 (9th Cir. 1979). Plaintiff's claims concern local land use decisions related to Plaintiff's property and the Court finds the above analysis applicable. As the Court stated in *Sinclair*, "Abstention often will be appropriate when state land use regulations are challenged on state and federal grounds." 96 F.3d at 410 (quoting *Kollsman*, 737 F.2d at 836).

Having determined that the present matter should be remanded to state court pursuant to the *Pullman* abstention doctrine, the Court does not need to analyze whether abstention would be appropriate under the *Younger* abstention doctrine. The entire matter should be remanded to state court for further proceedings there. The fact that Plaintiff has raised civil rights violation through the 42 U.S.C.§ 1983 claim does not provide a basis upon which this Court should abstain from exerting jurisdiction [*5] over this matter. *C-Y Development Co. v. City of Redlands*, 703 F.2d 375, 381 (9th Cir. 1982).

Therefore, it is **ORDERED** that Plaintiff's Motion for Remand (Dkt. 7) is hereby **GRANTED.** All matters currently before the Court in this action shall be remanded to state court for further proceedings.

DATED this 25th day of March, 2008.

/s/ Benjamin H. Settle

BENJAMIN H. SETTLE

United States District Judge

Clark v. City of Gig Harbor

United States District Court for the Western District of Washington
April 17, 2009, Decided; April 20, 2009, Filed
Case No. C09-5099 FDB

Reporter: 2009 U.S. Dist. LEXIS 38524; 2009 WL 1046032

LISA CLARK, Petitioner, v. CITY OF GIG HARBOR, a Washington municipal corporation, Respondent.

Counsel: [*1] For Lisa Clark, Plaintiff: Jane Ryan Koler, LEAD ATTORNEY, GIG HARBOR, WA.

For City of Gig Harbor, a Washington Municipal Corporation, Defendant: Carol A Morris, LEAD ATTORNEY, SEABECK, WA.

Judges: FRANKLIN D. BURGESS, UNITED STATES DISTRICT JUDGE.

Opinion by: FRANKLIN D. BURGESS

Opinion

ORDER OF REMAND OF STATE CLAIMS AND STAY OF FEDERAL CLAIMS

This matter comes before the Court on Petitioner Lisa Clark's Motion for Remand of State Claims and to Stay Federal Claim. The Court, after reviewing all materials submitted by the parties and relied upon for authority, is fully informed and hereby grants Petitioner's motion and remands the state law claims to the Pierce County Superior Court and stays consideration of Petitioner's federal claim(s) pending the state court proceeding.

Introduction and Background

Petitioner filed this action in Pierce County Superior Court seeking review under the Land Use Petition Act (LUPA) and for damages pursuant to RCW 64.40.020 and 42 U.S.C. § 1983 arising from land use decisions of Gig Harbor relating to a fence constructed by Plaintiff in the City right-of-way. Respondent, City of Gig Harbor removed the action to this Court pursuant to 28 U.S.C. § 1441(a), which provides that "[e]xcept [*2] as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending." In this case, Petitioner has alleged a cause of action under 42 U.S.C. § 1983, a provision of the Federal Civil Rights Act. Thus, this Court has original jurisdiction.

Under 28 U.S.C. § 1367, a federal court may assume supplemental jurisdiction over all other claims that are so related to claims in the action within the original jurisdiction so that they form part of the same case or controversy. Petitioner does not dispute that this Court has supplemental jurisdiction over her state law claims. Accordingly, Respondent's removal of this action has brought not only the § 1983 claim, but also the related state law zoning claims implicating the Washington State Constitution, Washington statutes and state common law.

Respondent City of Gig Harbor has moved for summary judgment seeking dismissal of Petitioner's claims in their entirety, asserting that [*3] there was no "final land use decision" which would permit LUPA review and/or Petitioner has no constitutionally protected property interest. Asserting that the state law claims raise a novel or complex issue of State law and/or these claims substantially predominates over the claim over which the district court has original jurisdiction, Petitioner moves for remand of the state law claims, if not the entire case, to the state court.

Remand of State Law Claims

Supplemental jurisdiction under 28 U.S.C. § 1367(c) is discretionary, and courts may decline to exercise jurisdiction over supplemental state law claims "[d]epending on a host of factors including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims." City of Chicago v. International College of Surgeons, 522 U.S. 156, 173, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997). This discretion, however, is not unbridled. Pursuant to § 1367(c), a district court may decline to exercise jurisdiction over a state claim if: (1) the claim raises a novel or complex issue of State law; (2) the claim substantially predominates over the claim or claims over which [*4] the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. 1367(c). Deciding whether to exercise supplemental jurisdiction "is a responsibility that district courts are duty-bound to take seriously." Acri v. Varian Associates, 114 F.3d 999, 1001 (9th Cir. 1997).

The categories identified in Section 1367(c) provide the primary basis for a district court's discretion to decline supplemental jurisdiction. Executive Software North America, Inc. v. United States District Court, 24 F.3d 1545, 1555-56 (9th Cir. 1994). "[U]nless a court properly invokes a section 1367(c) category in exercising its discretion to decline to entertain pendant claims, supplemental jurisdiction must be asserted." Id. Once a court identifies a factual predicate which corresponds to one of the subsection 1367(c) categories, the exercise of discretion "is informed by whether remanding the pending state claims comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness, and comity." [*5] Id. at 1557 (internal citations and quotations omitted).

Petitioner Clark's argument for remand is premised on an assertion that her state law claims substantially predominate over her federal claim and/or the state law claims involve novel or complex issues of state law. The Respondent counters that it is more appropriate to consider this action in its procedural posture: that there has been no "land use decision" that would subject the City's actions to judicial review and/or that the Petitioner has no protected property interest that would subject the City to a claim for damages.

Regardless of how the Court views the state law claims, the Court finds, pursuant to § 1367(c)(2), that the issues involved in the state law claims predominate over Petitioner's federal claim. The factual findings and legal analysis that are necessarily part of an adjudication of Ms. Clark's state law claims will inform, and possibly control, the findings regarding the § 1983 claim. As Petitioner has acknowledged, her federal claim is merely an alternative device to recover damages arising from the same actions that are at issue in its state law claims.

The Ninth Circuit has repeatedly recognized that local [*6] zoning and land use disputes represent an area "upon which the federal courts ought not to enter unless no alternative to its adjudication is open." Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092, 1094 (9th Cir. 1976); San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095, 1105 (9th Cir. 1998); Hoehne v. County of San Benito, 870 F.2d 529, 532 (9th Cir. 1989).

The crux of Petitioner's state law claim is that the City of Gig Harbor's actions violated the statutory grant of land use governance. The Court finds, pursuant to § 1367(c)(2), that the issues involved in Petitioner's state law claims, namely the propriety and legality of Respondent's actions under Washington's land use statutes and regulations, predominate over the federal claim. The factual findings and legal analysis that are necessarily part of an adjudication of Petitioner's state law claims will inform, and possibly control, many of the findings regarding the § 1983 claim. As Petitioner's argument makes clear, the federal claim is

merely an alternative device to recover damages arising from the same actions that are at issue in its state law claims. Whether the City's action amounted to a "land [*7] use decision" under the LUPA or whether Ms Clark suffered damages to a property interest are issues particularly suited to a state court determination.

An additional basis for remand the instant matter to state court is the application of the *Pullman* abstention doctrine. The *Pullman* abstention doctrine allows a federal court to postpone the exercise of federal jurisdiction when "a federal constitutional issue ... might be mooted or presented in a different posture by a state court determination of pertinent state law." C-Y Development Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983). Under the *Pullman* abstention is appropriate where:

> (1) The complaint touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.
>
> (2) Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy.
>
> (3)The possibly determinative issue of state law is doubtful

Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 409 (9th Cir. 1996).

The Ninth Circuit has consistently approved of a district court's use of *Pullman* abstention in land use cases. Sinclair Oil, at 409. [*8] The Circuit has repeatedly held that "land use planning is a sensitive area of social policy that meets the first requirement for *Pullman* abstention." San Remo Hotel v. City & County of San Francisco, 145 F.3d 1095, 1105 (9th Cir. 1998). It has long been accepted that questions touching on state land use policy and the administrative processes incidental thereto are particularly well suited for disposition in the state courts. Miller v. Carr, 535 F. Supp. 682, 686 (W.D. Wash. 1982).

The second prong of the *Pullman* test is satisfied because if a state court determines that Petitioner lacks standing under the LUPA or has no protected property interest, Petitioner cannot maintain a § 1983 claim, thus eliminating the constitutional question presented here. See Sinclair, 96 F.3d at 409. The second requirement is also satisfied where a favorable decision on a state law claim would provide Petitioner with some or all of the relief requested. Id.; C-Y Development, 703 F.2d at 378.

The Ninth Circuit has required only a minimal showing of uncertainty of the state law determination to satisfy the third *Pullman* factor in land use cases. Sinclair, at 405. Here, the third prong of the *Pullman* test [*9] is satisfied because the answer to the question of whether Petitioner may maintain a LUPA claim under state law is not clear.

Accordingly, the Court finds that *Pullman* abstention is warranted. Because permitting a Washington court to determine the essentially local issues underlying Petitioner's complaint may potentially narrow, or eliminate, the federal constitutional issues presented, the principles of comity and federalism underlying *Pullman* support the court's decision to abstain from hearing the state law claims.

Retention and Stay of Federal Claims

Petitioner's request that the Court remand the entire case is rejected because this Court has an obligation to exercise jurisdiction over federal claims properly before it. 28 U.S.C. § 1441(c) provides:

> Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined by one or more non -removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters in which State law predominates.

The statute only permits remand of state law claims. Properly removed federal claims [*10] of which the Court has original jurisdic-

tion are not subject to remand. See Baker v. Kingsley, 387 F.3d 649, 656-57 (7th Cir. 2004)(It is an abuse of discretion for a district court to remand a federal claim that is properly before it); Green v. Ameritrade, Inc., 279 F.3d 590, 596 (8th Cir. 2002)(A district court has no discretion to remand a claim that states a federal question); Borough of West Mifflin v. Lancaster, 45 F.3d 780, 787 (3rd Cir. 1995)(Nothing in § 1367(c) authorizes a district court to decline to entertain a claim over which it has original jurisdiction and, accordingly, that section clearly does not sanction the district court's remand of this entire case, including the federal civil rights claims, to the state court).

In general, if a court invokes *Pullman* abstention, it should stay the federal constitutional question until the matter has been sent to the state court for a determination of the state law issues. Pearl Investment Co. v. City and County of San Francisco, 774 F.2d 1460, 1462 (9th Cir. 1985).

The Court finds it appropriate to stay the federal claim pending resolution of Petitioner's state law claims in state court, in the interests of comity and judicial [*11] economy, and to avoid the risk of inconsistent adjudications. See West Coast, Inc. v. Snohomish County, 33 F. Supp. 2d 924, 926 (W.D. Wash. 1999) (holding that simultaneously litigating state and federal issues in different forums may result in a "number of unfortunate occurrences").

Conclusion

For the foregoing reasons, the Court declines to exercise its supplemental jurisdiction over the state law claims, remanding those claims and staying the § 1983 claim. Respondent's motion for summary judgment is moot.

ACCORDINGLY;

IT IS ORDERED:

1. Petitioner's Motion for Remand [Dkt. # 8] is **GRANTED.** The state law claims are remanded to Pierce County Superior Court. Petitioner's claims under 42 U.S.C. 1983 are stayed pending the state court proceeding.

2. Respondent's Motion for Summary judgment and to Strike Initial Hearing [Dkt. # 6] is **MOOT.** The motion seeking dismissal of the state law claims may be raised in the state court proceeding. In regards to the federal claim(s), the motion to dismiss may be renewed in this Court at the termination of the state court proceedings, if necessary.

DATED this 17th day of April, 2009.

/s/ Franklin D. Burgess

FRANKLIN D. BURGESS

UNITED STATES DISTRICT JUDGE

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 May 28, 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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