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LEGAL LESSONS

WHAT CONSTITUTES A LOSS?

A recent federal circuit court decision on a Hawaii case reveals a growing split in the evaluation of takings claims. *By Robert H. Thomas*

LAST SUMMER, the U.S. Supreme Court's decision in *Knick v. Township of Scott* held that property owners may raise takings claims in federal court without first seeking compensation through state courts (read "Takings Precedent Overruled," *Planning*: bit.ly/knickscott). A recent decision by the U.S. Court of Appeals for the Ninth Circuit reveals the potential need for further clarification in such cases.



A lava field on the island of Hawaii became the subject of a long-contested federal takings claim after its zoning was reverted from Urban to Agricultural.

In *Bridge Aina Lea v. Hawaii Land Use Commission*, a three-judge panel ended nearly a decade of litigation by overturning a rare jury verdict under both takings analyses approved by the Supreme Court. The decision reaffirms the Ninth Circuit's consistent siding with land-use regulators—and adds to a growing lower court split on whether these cases should be evaluated by loss of use or value.

Years in the making

The land at the center of the Ninth Circuit's new ruling is 1,060 acres of a lava field near the Island of Hawaii's western shoreline. Originally zoned as Agricultural, the land is not really viable for such uses; like many other parcels that did not fit one of the state's other three land classifications—Urban, Rural,

or Conservation—it defaulted to Agriculture when the Hawaii Land Use Commission categorized all land in the state decades ago. After a residential developer purchased the land, the commission agreed to reclassify it as Urban in 1989 under one condition: that a certain number of affordable housing units be built.

Over the following decades, ownership of the property changed hands several times until it was acquired by developer Bridge Aina Lea. Critically, the owners built only a few of the required affordable units. The commission eventually lost patience and reverted the land to its former Agricultural classification.

Bridge responded with two lawsuits. The first—that reverting the land reclassification to Agriculture was not in compliance with Hawaii's statutory requirements and constituted a taking under the Hawaii Constitution—was considered by the Hawaii Supreme Court, which eventually held that the commission wrongly reclassified the land, but no taking had occurred.

The second suit asserted federal claims, most importantly that the

reclassification resulted in a regulatory taking under the U.S. Constitution's Fifth and Fourteenth Amendments.

Takings take-back

Under federal precedents, land-use regulations are an unconstitutional taking if their impact results in the functional equivalent of an exercise of eminent domain. To analyze that question, the Supreme Court has adopted two tests.

A *Lucas v. South Carolina Coastal Council* taking occurs when a regulation prevents the owner from making any “economically beneficial use” of her land, while the *Penn Central Transportation Co. v. New York City* test depends on a combination of factors, including the economic impact of the regulation, the

regulation's interference with the owner's investment-backed expectations, and the nature of the government action.

In 2018, the federal jury heard testimony about the difference between the market value of Bridge's land in Urban classification versus Agricultural. According to Bridge's appraiser, the difference was an 83 percent loss. The jury determined that the case satisfied both the *Lucas* and *Penn Central* takings tests; meanwhile, the district judge—unbeknownst to the jury—had already concluded that Bridge suffered only “nominal” damages of \$1.

After the court entered judgment in favor of Bridge, both sides appealed to the Ninth Circuit: Bridge objected to the \$1 compensation, while the commission asserted that the evidence could not support the takings verdict. The Ninth Circuit then overturned the jury verdict.

First, it concluded that the 83 percent loss of market value was not enough to qualify for a *Lucas* taking—which, according to the Ninth Circuit, requires a 100 percent loss. While reversion to Agricultural classification prohibited residential

development of the property as planned, it did not foreclose all economically beneficial uses. The panel determined that, in theory, Bridge could use its land for agricultural purposes—though one look at the old lava field would tell you that this is a very theoretical proposition.

Second, the panel held that the evidence did not support the jury's conclusion that Bridge suffered a *Penn Central* taking. The economic impact of the reversion was great, but not catastrophic, they decided. If the affordable housing condition remained unsatisfied, Bridge could not develop the land.

Use or value

So what does this decision tell us about the takings doctrine?

On the one hand, not much. It doubles down on the Ninth Circuit's well-known regulatory-favorable approach to takings. For decades, the court has acknowledged the ability of government to control the use and development of land without serious judicial oversight.

On the other hand, this case could lead to some necessary clarification. The Ninth Circuit's focus on the 83 percent loss of value adds to a growing lower court split on how courts evaluate these cases. The Supreme Court has long emphasized that analysis of these cases should not focus on the property's retention of value, but on whether a regulation deprives an owner of all economically beneficial use of property. However, some courts, including the Ninth Circuit, focus on residual value, while others examine what actual uses an owner can make of their property under the challenged regulations.

Therefore, the Supreme Court could view this case as an opportunity to clarify whether massive losses of use and value need not be compensated unless owners prove that a regulation has deprived them of all uses—even the most theoretical.

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The Ninth Circuit's decision adds to a growing split on how takings cases should be evaluated: by loss of use or loss of value.