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**Bridge Aina Le‘a, LLC v. Hawaii Land Use Commission**—Ninth Circuit rejects regulatory takings claim based upon land’s reversion from conditional urban use classification to its prior agricultural use classification

In 1989, a landowner petitioned the Hawaii Land Use Commission to reclassify 1060 acres of a 3000-acre parcel zoned for agricultural use to urban use with the objective of developing a mixed residential community. The Commission granted the request on the condition that the landowner make 60% of the proposed development affordable housing units. Title to the property passed to another company and then to Bridge Aina Le‘a, LLC in 1999. During that period, no housing development occurred on the 1060 acres. In 2005, the Commission amended its prior orders at Bridge’s request by reducing the affordable housing unit requirement to 20%, with a minimum of 385 units, and established a deadline (November 17, 2010) for the developer to provide occupancy certificates for all affordable housing units. Concerned over the development’s inactivity, the Commission issued an order in late 2008 for Bridge to show cause why the land should not revert to its original agricultural use classification. During the course of the subsequent show cause proceeding, Bridge agreed, *inter alia*, to sell the 1060 acres to DW Aina Le‘a Development, LLC in three phases for \$40.7 million. The Commission, however, voted orally to revert the land to an agricultural use classification. Bridge and DW sought rescission of that oral order, which the Commission granted in September 2009 “subject to the single ‘condition precedent’ of requiring the construction of sixteen affordable units by March 31, 2010.” Bridge and DW revised their agreement, retaining the \$40.7 million purchase price but modifying other terms and setting a final closing date for February 28, 2010. After Bridge and DW failed to make adequate process on the residential housing development, the Commission reinstated the order to show cause, reaffirmed the November 2010 deadline and later issued a final reversion order in April 2011. Before the rescission, DW had paid Bridge only \$5 million of \$40.7 million purchase price for the 1060 acres.

Bridge and DW sought judicial review of the reversion order. They eventually succeeded in part before the Hawaii Supreme Court that held the reversion order violated certain state law procedural requirements but rejected other arguments, including due process and equal protection claims under the United States and Hawaii Constitutions. *DW Aina Le‘a Dev., LLC v. Bridge Aina Le‘a, LLC*, 134 Hawai‘i 187, 339 P.3d 685 (2014). Bridge responded by suing the Commission in state court for declaratory and prospective relief on due process, equal protection and takings claims. It alleged that the \$40.7 million agreed to be paid by DW was the 1060 acres’ fair market value and claimed not less than \$35.7 million in damages—the difference being \$5 million paid to it by DW in December 2009. The Commission removed the case to federal court where the due process and equal protection claims were dismissed on preclusion grounds. The taking claim proceeded to trial with the court denying the Commission’s motion for judgment as a matter of

law following close of Bridge's case. The trial continued; the jury found a regulatory taking; and the court awarded nominal damages in the amount of one dollar. Both parties appealed.

The Ninth Circuit panel reversed the district court's denial of a judgment as a matter of law on the taking claim and affirmed dismissal of the equal protection claim on preclusion grounds. *Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n*, Nos. 18-15738 & 18-15817, 2020 WL 812918 (9th Cir. Feb. 19, 2020). In reversing, it first applied the standard identified in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that a *per se* regulatory taking can occur only “to regulations that completely deprive an owner of “all economically beneficial us[e]” of her property.” The panel reasoned that “the relevant inquiry for us is whether the land’s residual value reflected a token interest or was attributable to noneconomic use.” Here, it relied on Bridge’s expert who opined that, while the 1060 acres “had a value of \$40 million on April 29, 2009 in an urban classification based on land banking until market conditions improved given the significant off-site work necessary before the land could be developed and the ongoing impacts of the Great Recession” but “had a value of \$6.36 million on April 30, 2009 in an agricultural classification.” The latter value “was neither *de minimis*, nor did the value derive from noneconomic uses. Bridge’s expert valued the land in a competitive market using pricing for similarly situated properties, and expressly accounted for the possibility of regaining the urban use classification.” The panel further held that “[a]lthough Bridge offered evidence suggesting that many of the statutorily permitted uses [for agricultural use land under Hawaii law] would not have been economically feasible, Bridge did not address all of the statute’s permitted uses or account for any of the uses for which the Commission had granted special permits in the past, such as a sewage treatment plant or rock quarrying.”

The panel therefore turned to several factors set out in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), for determining whether a regulatory taking exists notwithstanding the fact that the land retains economically beneficial use: “(1) ‘[t]he economic impact of the regulation on the claimant,’ (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations,’ and (3) ‘the character of the governmental action.’” As to the economic impact factor, it rejected the Bridge expert’s loss-in-value estimate of \$33.6 million (83.4% of \$40.7 million), finding the diminution actually to be \$6.72 million (16.8%). The panel next concluded that Bridge’s realistic investment-backed expectations were not abridged:

The operative conditions in place at the time of the OSC and the Reversion Order, and Bridge’s failure to meet them, dispel the notion that Bridge could reasonably expect that the Commission would not enforce the conditions. ... The Commission properly issued the OSC based on the suspicion that Bridge would not meet the conditions. ... And, in fact, Bridge did not complete the 385 affordable housing units by the deadline to do so, which lapsed several months before the Reversion Order’s issuance. Thus, we do not see how the Reversion Order interfered with any reasonable expectations that Bridge could have formed regarding enforcement or reversion. Accordingly, we conclude that, as a matter of law, this factor weighs strongly against finding a taking.

The third *Penn Central* factor did not lend support to Bridge’s taking claim given the fact that “[t]he concentrated effect of the reversion here ... was reflective of the confines of a generally applicable Hawaii law land use reclassification procedure” and the Hawaii Supreme Court’s rejection of Bridge’s substantive due process claim because “the ‘reversion was not “clearly arbitrary and unreasonable,” given the project’s long history, the various representations made to the [Commission], and the petitioners’ failure to meet deadlines.’”

The panel, finally, rejected Bridge's challenge to issue preclusion being afforded to the Hawaii Supreme Court's decision with respect to the equal protection claim. Applying Hawaii law, it found the claim to present the identical issue determined in the state appeal, a final judgment on the claim's merits, and a full and fair opportunity to litigate it.

Decision link: <http://cdn.ca9.uscourts.gov/datastore/opinions/2020/02/19/18-15738.pdf>