APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIDGE AINA LE'A, LLC, *Plaintiff-Appellant/Cross-Appellee*, v. STATE OF HAWAII LAND USE COMMISSION; VLADIMIR P. DEVENS, in his individual and official capacity; KYLE CHOCK, in his individual and official capacity; NORMAND ROBERT LEZY, in his individual and official capacity; DUANE KANUHA, in his official capacity; CHARLES JENCKS, in his official capacity; LISA M. JUDGE, in her individual and official capacity; NICHOLAS W. TEVES, JR., in his individual and official capacity; RONALD I. HELLER, in his individual and official capacity, *Defendants-Appellees/Cross-Appellants.*	Nos. 18-15738 18-15817 D.C. No. 1:11-cv-00414-SOM-KJM OPINION

Appeal from the United States District Court
for the District of Hawaii
Susan O. Mollway, District Judge, Presiding

Argued and Submitted October 21, 2019
Honolulu, Hawaii

Filed February 19, 2020

Before: SUSAN P. GRABER, MILAN D. SMITH, JR., and PAUL J. WATFORD, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

COUNSEL

Bruce D. Voss (argued), Matthew C. Shannon, and John D. Ferry III, Bays Lung Rose & Holma, Honolulu, Hawaii, for Plaintiff-Appellant/Cross-Appellee.

Ewan C. Rayner (argued), Deputy Solicitor General; David D. Day, Deputy Attorney General; William J. Wynhoff, Supervising Deputy Attorney General; Clyde J. Wadsworth, Solicitor General; Department of the Attorney General, Honolulu, Hawaii; for Defendants-Appellees/Cross-Appellants.

OPINION

M. SMITH, Circuit Judge:

This case stems from the reversion of the land use classification of 1,060 acres of largely vacant and barren, rocky lava flow land in South Kohala, on the island of Hawaii. In 2011, Defendant-Appellee and Cross-Appellant the State of Hawaii Land Use Commission (the Commission) ordered the land's reversion from its conditional urban use classification to its prior agricultural use classification. This reversion followed some twenty-two years during which various landowners

made unfulfilled development representations to the Commission to obtain and maintain the land's urban use classification. Plaintiff-Appellant and Cross-Appellee Bridge Aina Le'a, LLC (Bridge), one of the landowners at the time of the reversion, challenged the reversion's legality and constitutionality in a state agency appeal, and in this case.

The cross-appeals here come to us following a final judgment in a jury trial with a verdict for Bridge and the district court's denial of a post-judgment motion for judgment as a matter of law (JMOL). Although the parties raise several issues, we need decide only two. First, we must decide whether the State[1] was entitled to JMOL on Bridge's claims that the reversion was a regulatory taking in violation of the Fifth Amendment. After an eight-day jury trial, the jury found that the reversion was such a taking. The State urges us to reverse on the ground that Bridge's evidence did not establish a taking. Second, we must decide whether the Hawaii Supreme Court's adjudication of Bridge's equal protection challenge in the state agency appeal barred

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[1] We use the term "the State" to refer collectively to the Commission and the commissioners whom Bridge sued in their official capacities. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity . . . should be treated as suits against the State."). The commissioners whom Bridge named in their official capacities are: Vladimir P. Devens, Kyle Chock, Normand R. Lezy, Lisa M. Judge, Nicholas W. Teves, Jr., Ronald I. Heller, Duane Kanuha, Thomas Contrades, and Charles Jencks. Bridge sued all but the last two commissioners—neither of whom voted for the reversion—in their individual capacities as well. Commissioner Contrades died during the pendency of this litigation before the district court.

the same issue Bridge alleged here. *See DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 339 P.3d 685 (Haw. 2014). Bridge contends that the Hawaii Supreme Court neither decided the same equal protection issue Bridge raised in this lawsuit, nor issued a final judgment on the merits in which Bridge had a full and fair opportunity to litigate the issue.

We reverse the denial of the State's renewed JMOL motion because, as a matter of law, the evidence did not establish an unconstitutional regulatory taking. We vacate the judgment and remand. We affirm the district court's dismissal of Bridge's equal protection claim.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Reclassification History of the 1,060 Acres

A. The Conditional Urban Reclassification

For over forty years before the reclassification, the 1,060 acres at issue were vacant and part of a larger 3,000 acre-parcel zoned for agricultural use. This classification generally restricted the landowner to certain statutorily specified uses. *See* Haw. Rev. Stat. § 205-2(d)(1)–(16) (setting forth the general uses for agricultural land); *see also id.* § 205-4.5 (elaborating on permissible uses of agricultural land depending on soil ratings). The landowner also could petition to obtain a permit for "certain unusual and reasonable uses." *Id.* § 205-6(a).

In 1987, non-party Signal Puako Corporation (Signal), the then-landowner, decided that it would seek to develop a mixed residential community on the 1,060 acres as the first phase of a development project on the entire 3,000 acres. To do so, Signal petitioned the Commission to reclassify 1,060 acres as urban pursuant to Hawaii's land use reclassification procedure. *See* Haw. Rev. Stat. § 205-4(a). If the land were zoned for urban use, Signal could pursue "activities or uses as provided by ordinances or regulations of the county within which the urban district is situated." *Id.* § 205-2(b).

The Commission approved the petition in a January 1989 order (the 1989 Order). In doing so, the Commission exercised its authority to "modify the petition by imposing conditions necessary . . . to assure substantial compliance with representations made by the petitioner in seeking a boundary change." *Id.* § 205-4(g). In relevant part, Condition One required Signal to make 60% of the proposed 2,760 residential units affordable, for a total of 1,656 affordable housing units. Condition Nine required Signal to develop the land in substantial compliance with representations made to obtain reclassification. The 1989 Order did not specify any deadlines, nor did the order specify any penalties for noncompliance. Nevertheless, the conditions the Commission imposed ran with the title to the land. *Id.*

At some point, non-party Puako Hawaii Properties (Puako), an entity in which Signal was a partner, took title to the 3,000 acres. Puako proposed a mixed

residential community which would have fewer total housing units than Signal's proposal and for which construction would end by 1999. Puako therefore petitioned to modify the 1989 Order.

The Commission approved Puako's petition in a July 1991 order (the 1991 Order) with conditions. Like the 1989 Order, the 1991 Order required Puako to make 60% of the residential units affordable housing. But the 1991 Order reduced the required affordable housing units to 1,000 units given the reduction to the proposed development's total number of units. The 1991 Order again imposed a condition requiring Puako to develop the land in substantial compliance with its representations. This time, the Commission specified that "[f]ailure to so develop the Property may result in reversion of the Property to its former classification or change to a more appropriate classification."[2]

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[2] This language tracked a 1990 amendment to the Commission's statutory authority to impose reclassification conditions pursuant to Hawaii Revised Statute § 205-4(g). The statute specifies that "[t]he commission may provide by condition that absent substantial commencement of use of the land in accordance with such representations, the commission shall issue and serve upon the party bound by the condition an order to show cause why the property should not revert to its former land use classification or be changed to a more appropriate classification." Haw. Rev. Stat. § 205-4(g); *see also DW Aina Le'a Dev.*, 339 P.3d at 709 ("This sentence was added to [] § 205-4(g) in 1990. The legislative history indicates that the legislature sought to empower the [Commission] to void a district boundary amendment where the petitioner does not substantially commence use of the land in accordance with representations made to the [Commission]." (citations and emphasis omitted)).

Notwithstanding Puako's representations, the 1,060 acres remained undeveloped by 1999. Bridge acquired the entire 3,000 acres at this time—inclusive of the 1,060 acres of conditionally reclassified urban land—for $5.2 million plus closing costs under its then-name Bridge Puako, LLC.

B. The Post-Acquisition Amendments to the Conditions

In September 2005, nearly six years after acquiring the land, Bridge moved to amend the 1991 Order in part. Like the prior landowners, Bridge proposed a mixed residential community. Bridge, however, argued that the cost of complying with the 1991 Order's affordable housing condition was too high. According to Bridge, it would be economically infeasible to develop the property without a lower level of required affordable housing units. Bridge contended that an appropriate benchmark would be the 20% level set by a then-recent County of Hawaii affordable housing ordinance.

The Commission amended the affordable housing condition in a November 2005 order (the 2005 Order). Condition One set the affordable housing unit requirement at 20%, requiring Bridge to build a minimum of 385 units. For the first time, the Commission set a deadline for the condition. Specifically, Bridge had to provide occupancy certificates for all affordable housing units by November 17, 2010. The Commission affirmed all other conditions of the 1989 Order, as amended by the 1991 Order.

Throughout 2006 and 2007, Bridge appeared before the Commission to assure the Commission of its compliance with the conditions, including through the apparent construction of wells, roads, and other infrastructure. According to Bridge, however, further progress "was hampered somewhat" by the requirement that Bridge prepare an environmental impact statement for the project in accordance with *Sierra Club v. Department of Transportation*, 167 P.3d 292 (Haw. 2007).

C. The Order to Show Cause (OSC)

As early as September 2008, several commissioners expressed concerns that Bridge's status reports "showed 'no activity' with respect to the conditions imposed by the 1991 decision and order, as amended in 2005." *DW Aina Le'a Dev.*, 339 P.3d at 693. In December 2008, the Commission ordered Bridge to show cause why the land should not revert to its prior agricultural use classification. The Commission explained that it had reason to believe that Bridge and its predecessors had failed to satisfy multiple reclassification conditions and had not fulfilled various representations.

The Commission held the first OSC hearing in January 2009. Notwithstanding the potential impact ongoing OSC proceedings might have on the use of the land, Bridge agreed to sell the 1,060 acres to non-party DW Aina Le'a Development, LLC (DW). Pursuant to a February 2009 written agreement, Bridge was to convey the land in three phases in exchange for a total of

$40.7 million.[3] Bridge and DW would enter into a joint agreement, in which Bridge would develop the nearly 2,000 agricultural use acres remaining in its possession. Bridge would retain the right to plan for the overall 3,000 acres, including the placement of a sewage treatment plant, school, and park on the agricultural land.

On April 30, 2009, the Commission reconvened to discuss the OSC. Bridge represented to the Commission that it was in the process of transferring the 1,060 acres to DW, which would assume the responsibility of constructing the 385 affordable housing units. The State Office of Planning advocated for reversion, noting that Bridge indicated that it could not complete the 385 affordable housing units by the November 2010 deadline. Various commissioners expressed dismay at what they viewed as unfulfilled promises made to obtain the reclassification.

At the conclusion of the hearing, the Commission held a voice vote on the OSC (the 2009 Voice Vote), in which seven commissioners voted to revert the zoning of the 1,060 acres to agricultural use. The Commission never put the result of the vote into a final written order.

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[3] This agreement replaced the prior 2008 sale agreement between Bridge and non-party Relco Corporation (Relco). Bridge and Relco amended that agreement before it closed so that Relco could give its interest to DW. Relco, however, was DW's managing entity.

After the 2009 Voice Vote, DW did not make any payments due pursuant to the February 2009 sale agreement. Nevertheless, in the month following the vote, DW intervened in the OSC proceedings and advised the Commission that any reversion would make development impossible, including providing the 385 affordable housing units. DW moved to stay any decision and order pending consideration of additional information, including an overall conceptual plan for the project and an affordable housing unit site plan. The Commission agreed to stay the proceedings in June 2009.

In August 2009, Bridge and DW co-petitioned the Commission to rescind the OSC, contending that they had performed, or were in the process of performing, all the conditions the OSC cited. They also contended that the 2009 Voice Vote "put an immediate and substantial cloud over the Project, making it extremely difficult in this economic environment to secure short-term or long-term financing to develop and complete the Project." Nevertheless, Bridge and DW represented that DW would still pursue completion of the 385 units by November 17, 2010, and that the units "will be provided" if the Commission rescinded the OSC. The Commission rescinded the OSC in September 2009, subject to the single "condition precedent" of requiring the construction of sixteen affordable units by March 31, 2010.

Following the OSC's rescission, Bridge and DW modified their sale agreement in December 2009 to change the timing of purchases but they retained the previously agreed-upon $40.7 million price. DW would

buy a 60-acre affordable housing parcel for $5 million, effective December 11, 2009. DW also would pay Bridge "development expenses" of some $1.191 million for that parcel. The final closing date for the remaining 1,000 acres was set for February 28, 2010, by which point DW would have paid Bridge an additional $35.7 million. Consistent with this agreement, DW purchased the 60-acre parcel from Bridge in December 2009.

D. The Resumption of OSC Proceedings and the Reversion Order

On June 10, 2010, DW informed the Commission that it had completed the sixteen affordable housing units by the March 2010 deadline. In response, the State Office of Planning informed the Commission that the units were not habitable because they lacked water, a sewage system, electricity, and paved road access.

The Commission held a compliance hearing in July 2010, at which both Bridge and DW appeared. DW admitted that it lacked the money to build on the remaining 1,000 acres. The State Office of Planning requested that the Commission reopen the OSC and advocated for reversion so that a "bona fide developer" could make a new proposal. All commissioners voted to reinstate the OSC, scheduled an OSC hearing, and entered a finding that the condition precedent had not been satisfied. About two weeks thereafter, the Commission issued an order reinstating the OSC and reiterating the 2005 Order's November 17, 2010 deadline

to obtain 385 affordable housing unit occupancy certificates. Bridge contends that after the reinstatement, DW failed to make the additional $35.7 million in payments for the remaining urban land as contemplated by the modified December 2009 agreement.

Bridge and DW moved to bar action on the OSC, arguing that the Commission's enforcement actions, starting with the OSC, violated various Hawaii statutes and administrative rules. At the conclusion of a second OSC hearing, however, five commissioners voted to revert the land. With the approval of a sixth commissioner, the Commission issued a final reversion order (the Reversion Order) on April 25, 2011.

The Reversion Order found that Bridge and DW had failed to comply with the 2005 Order's affordable housing condition, specifically noting that Bridge and DW had not completed 385 affordable housing units by the deadline and were unlikely to do so in the near future. Although the order acknowledged that Bridge and DW had constructed sixteen affordable housing units, the order determined that there was no infrastructure connected to them. The order outlined violations of the 1991 Order's substantial compliance condition based on representations made to the Commission between 2005 and 2010. The order also found that Bridge's and DW's procedural due process rights were not violated because they had received a full and fair opportunity to present their case. The order declined to resolve Bridge's equal protection challenge.

At the time of the Reversion Order, DW had purchased only the 60-acre affordable housing parcel while Bridge still owned the remaining 1,000 acres. The closing dates for the remaining 1,000 urban acres had passed several months earlier without DW making the additional $35.7 million in agreed-upon payments to Bridge.

II. The Direct Agency Appeal of the Reversion Order

Bridge and DW appealed the Reversion Order to a Hawaii circuit court. Although the court declined to preliminarily stay the Reversion Order, the court issued an amended final judgment in June 2012 in Bridge's favor. The court determined that the Commission had violated various Hawaii statutory procedural requirements in issuing the Reversion Order. The court also determined that the process by which the Commission issued the order violated Bridge's and DW's federal and state constitutional due process and equal protection rights. Thus, the circuit court vacated the Reversion Order and voided the OSC.

On appeal, the Hawaii Supreme Court affirmed in part and vacated in part the circuit court's judgment. The Hawaii Supreme Court acknowledged the Commission's authority to revert the land use classification, as well as the propriety of the December 2008 OSC. *DW Aina Le'a Dev.*, 339 P.3d at 711, 713. The court, however, affirmed the circuit court's determination

that the Reversion Order violated applicable statutory procedural requirements.

The Hawaii Supreme Court explained that a reversion may or may not be subject to certain procedural requirements. *Id.* at 709–10. If a petitioner fails to substantially commence use of the land in accordance with its representations, then the Commission may revert a land use classification pursuant to Hawaii Revised Statute § 205-4(g) subject to a limited procedure. *Id.* at 710. However, if a petitioner has substantially commenced use, the Commission must follow the requirements of Hawaii Revised Statute § 205-4(h). *Id.* at 689, 714. The court determined that Bridge and DW had substantially commenced use after the Commission rescinded the OSC because DW actively prepared development plans and constructed sixteen affordable housing units by March 31, 2010. *Id.* at 712–14. Thus, the Commission had to find within 365 days of the OSC's initial issuance and by a "clear preponderance of the evidence" that reversion was reasonable, did not violate Hawaii Revised Statute § 205-2 and was otherwise consistent with the policies and criteria set forth in Hawaii Revised Statute §§ 205-16 and 205-17. *Id.* at 714; *see also* Haw. Rev. Stat. § 205-4(h). The Commission had failed to do so. *DW Aina Le'a Dev.*, 339 P.3d. at 714.

The Hawaii Supreme Court vacated the remainder of the circuit court's judgment. With respect to the due process ruling, the Hawaii Supreme Court concluded that Bridge and DW had received notice and a meaningful opportunity to be heard before the

reversion. *Id.* at 716. Noting that "the land had changed hands numerous times," that the Commission "had amended the original reclassification order on multiple occasions," and the "long history of unfulfilled promises made in connection with the development of this property," the court determined that the reversion was not "arbitrary and unreasonable." *Id.* at 717. With respect to equal protection, the court could not find that the Commission lacked a rational basis for its treatment of Bridge and DW "[g]iven the long history of this property and the [Commission's] dealings with the landowners over the course of many years." *Id.* at 718. The court otherwise reasoned that the Commission acted pursuant to its broad statutory authority to impose conditions and its related authority to enforce such conditions. *Id.* The court remanded for proceedings consistent with its decision. *Id.*

III. The Proceedings in this Case

Although Bridge and DW together pursued the agency appeal, Bridge alone sued the Commission and commissioners in Hawaii state court in June 2011.[4] Bridge's eleven-count complaint for declaratory, injunctive, and monetary relief raised federal and state

[4] DW sued the Commission in Hawaii state court in 2017, asserting federal and state constitutional taking claims. After the case's removal to federal court, a district court dismissed DW's claims as barred by the Hawaii statute of limitations. Our court has certified to the Hawaii Supreme Court a question regarding the proper statute of limitations for a taking claim raised pursuant to Hawaii law. *See DW Aina Le'a Dev., LLC v. Haw. Land Use Comm'n*, 918 F.3d 602, 609 (9th Cir. 2019) (certification order).

constitutional due process, equal protection, and taking claims. Bridge sued all commissioners in their official capacities and sued the six commissioners who had voted for the Reversion Order in their individual capacities as well. Alleging that the $40.7 million DW agreed to pay for the 1,060 acres was the land's fair market value, Bridge claimed "not less" than $35.7 million in damages.

The State removed the case to federal court and moved to dismiss. Before ruling on that motion, the district court ordered a stay of the proceedings pending the agency appeal, an order which the parties cross-appealed to our court. After the Hawaii Supreme Court's decision, we remanded to the district court. *Bridge Aina Le'a, LLC v. Chock*, 590 F. App'x 705 (9th Cir. 2015) (unpublished).

On remand, the district court granted the State's motion to dismiss, which concerned only some of Bridge's claims. The court dismissed Bridge's due process and equal protection claims, reasoning that the Hawaii Supreme Court's decision barred re-litigation of the same issues. Applying the doctrine of quasi-judicial immunity, the court dismissed Bridge's individual capacity claims against the commissioners who voted for reversion. Ultimately, only Bridge's taking claims proceeded to trial on the theory that the reversion was an unconstitutional regulatory taking pursuant to the analyses in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978).

A jury trial was held between March 13 and 23, 2018. After Bridge put on its case-in-chief, the State moved for JMOL on the grounds that Bridge had not established either a *Lucas* or *Penn Central* taking and, even if it had, Bridge should receive only nominal damages because Bridge lacked admissible evidence of just compensation. The district court granted the motion as to nominal damages but denied it as to taking liability. Using the 1,060 acres subject to the Reversion Order as the relevant property denominator at the court's instruction, the jury found that a taking occurred pursuant to both *Lucas* and *Penn Central*. The district court entered judgment for Bridge and awarded $1 in nominal damages.

Following the entry of judgment, the State renewed its JMOL motion and alternatively requested a new trial using 3,000 acres as the property denominator. The parties cross-appealed the judgment during the pendency of the renewed motion, and the appeals became effective upon the district court's denial of that motion. The State timely appealed the denial.

JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction over the appeals from the final judgment pursuant to 28 U.S.C. § 1291. We also have jurisdiction over the appeal from the previously nonfinal orders that have merged with the final judgment, *Hall v. City of Los Angeles*, 697 F.3d 1059, 1070–71 (9th Cir. 2012), and over the denial of the renewed

JMOL motion, *Wadler v. Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1185 (9th Cir. 2019).

We review de novo the denial of a renewed JMOL motion. *Reese v. County of Sacramento*, 888 F.3d 1030, 1036 (9th Cir. 2018). "'[W]hen reviewing a motion for judgment as a matter of law, we apply the law as it should be, rather than the law as it was read to the jury,' even if the party did not object to the jury instructions." *Fisher v. City of San Jose*, 558 F.3d 1069, 1074 (9th Cir. 2009) (en banc) (alteration in original) (quoting *Pincay v. Andrews*, 238 F.3d 1106, 1109 n.4 (9th Cir. 2001)). A renewed JMOL motion "is properly granted only if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict." *Castro v. County of Los Angeles*, 833 F.3d 1060, 1066 (9th Cir. 2016) (en banc) (internal quotations and citation omitted). "A jury's verdict must be upheld if it is supported by . . . evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion." *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002).

We review de novo the dismissal of a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), *United States ex rel. Anita Silingo v. WellPoint, Inc.*, 904 F.3d 667, 676 (9th Cir. 2018), as well as the district court's issue preclusion ruling, *Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 854 (9th Cir. 2016) (citation omitted).

ANALYSIS

I. The State's Renewed JMOL Motion on Bridge's Taking Claims

Our core focus in this appeal is the district court's denial of the State's renewed JMOL motion on Bridge's *Lucas* and *Penn Central* taking challenges to the reversion pursuant to the Fifth Amendment's Takings Clause.[5] As we explain, as matter of law, Bridge's evidence failed to establish a taking pursuant to either. Accordingly, it is unnecessary for us to consider the other taking issues that the parties raise on appeal.

A. The Fifth Amendment Regulatory Takings Framework

"The Takings Clause of the Fifth Amendment states that 'private property [shall not] be taken for public use, without just compensation." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) (alterations in original). By its terms, the clause "does not prohibit the

[5] Bridge also asserted takings claims pursuant to the Hawaii Constitution, which provides that "[p]rivate property shall not be taken or damaged for public use without just compensation." Haw. Const. art. 1, § 20. The Hawaii Supreme Court has endorsed federal regulatory takings jurisprudence in determining whether government action is a taking in violation of the Hawaii Constitution. *Leone v. County of Maui*, 404 P.3d 1257, 1270–71 (Haw. 2017) (acknowledging the *Lucas* and *Penn Central* tests). Because Bridge raises no distinct and separate arguments regarding its state law takings claims and given the Hawaii Supreme Court's reliance on the federal regulatory takings framework, our *Lucas* and *Penn Central* analyses apply equally to Bridge's state law takings claims.

taking of private property," but instead requires "compensation in the event of [an] otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314, 315 (1987). A classic taking occurs when the "government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005).

Beyond a classic taking, the Supreme Court has recognized that "if regulation goes too far it will be recognized as a taking." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). There are three types of regulatory action the Court has recognized, "each of which 'aims to identify regulatory actions that are functionally equivalent to the classic taking.'" *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 530–31 (9th Cir. 2019) (quoting *Lingle*, 544 U.S. at 539). Two types of regulatory actions—*Loretto* and *Lucas* takings—are *per se* takings.[6] *Id.* at 531. *Penn Central* takings are the third type of regulatory taking. *Id.*

Generally, courts determine whether a regulatory action is functionally equivalent to the classic taking using "essentially ad hoc, factual inquiries, designed to

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[6] A *Loretto* taking occurs "where government requires an owner to suffer a permanent physical invasion of her property." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). This "relatively narrow" *per se* rule requires the government to provide compensation, however minor the physical invasion. *Id.* Bridge's land did not suffer a permanent physical invasion, and thus *Loretto* does not apply.

allow careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (citations and internal quotation marks omitted). These inquiries are set forth in the three *Penn Central* factors: (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." *Penn Central*, 438 U.S. at 124.

Certain regulatory actions, however, are treated categorically as a taking without the necessity of the *Penn Central* inquiry. The *Lucas* rule "applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (alteration in original) (quoting *Lucas*, 505 U.S. at 1019). Government regulations that constitute such a taking are typically those that require land to be left substantially in its natural state. *Lucas*, 505 U.S. at 1018. This is a "relatively narrow" and relatively rare taking category, *Lingle*, 544 U.S. at 538, confined to the "extraordinary circumstance when *no* productive or economically beneficial use of land is permitted," *Lucas*, 505 U.S. at 1017 (emphasis in original).[7] Compensation is required in such a case unless the government can show that underlying principles of

[7] One review of some 1,700 taking cases in state and federal courts decided over 25 years identified only 27 cases in which a landowner successfully brought a *Lucas* claim, *i.e.* 1.6%. *See* Carol N. Brown & Dwight H. Merriam, *On the Twenty-Fifth Anniversary of Lucas: Making or Breaking the Takings Claim*, 102 IOWA L. REV. 1847, 1849-50 (2017).

state property or nuisance law would have led to the same outcome as the challenged regulation. *See Tahoe-Sierra*, 535 U.S. at 330; *Lucas*, 505 U.S. at 1029.

Here, the jury made dual findings that there was an unconstitutional taking of Bridge's property pursuant to both *Lucas* and *Penn Central*. The district court determined that either finding independently supported the verdict.

We underscore at the outset that when "a regulation 'denies all economically beneficial or productive use of land,' the multi-factor analysis established in *Penn Central* is not applied" because *Lucas* supplies the relevant rule. *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 984 (9th Cir. 2002) (quoting *Lucas*, 505 U.S. at 1027). When "a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on" the *Penn Central* framework. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Penn Central*, 438 U.S. at 124). Thus, if the jury could find that the reversion deprived Bridge of *all* economically beneficial uses of the 1,060 acres, then *Penn Central* was inapplicable. Only if the reversion fell short of a total taking was application of *Penn Central* necessary. We apply this approach in considering the State's arguments.

B. *Lucas* Taking

Although the State raises several challenges to the jury's *Lucas* finding, the State's core challenges to

that finding are that the land retained substantial residual value in its agricultural use classification and that this classification still allowed Bridge to use the land in economically beneficial ways. We agree and thus decline to reach the State's alternative challenges to the jury's *Lucas* finding.

We recognize that shortly after the Supreme Court announced the *Lucas* rule, we remarked that "the term 'economically viable use' has yet to be defined with much precision." *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 616 (9th Cir. 1993). Acknowledging the lack of precision in this concept, we stated that "the value of the subject property" is "relevant" to the *Lucas* inquiry, but we rejected "focusing solely on property values." *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999). Pointing to this passage in *Del Monte Dunes*, Bridge urges us to reject the State's arguments regarding the role of value in the *Lucas* context.

Subsequent developments in the Supreme Court's takings decisions, however, lead to three observations that guide our resolution of the parties' arguments here. First, the Court has made clear that "[i]n the *Lucas* context, . . . the complete elimination of a property's value is the *determinative* factor." *Lingle*, 544 U.S. at 539 (emphasis added). As the Court has underscored, "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value." *Tahoe-Sierra*, 535 U.S. at 332. "Anything less than a 'complete elimination of value,' or a 'total loss' . . . would require the

kind of analysis applied in *Penn Central*." *Id.* at 330 (quoting *Lucas*, 505 U.S. at 1019 n.8). Second, although value is determinative, use is still relevant. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017) (concluding that the challenged regulations did not deprive the landowners of all economically beneficial use because "[t]hey can use the property for residential purposes" and "[t]he property has not lost all economic value"). Finally, the Court has clarified that a token interest will not defeat a *Lucas* claim. *See Palazzolo*, 533 U.S. at 631 ("Assuming a taking is otherwise established, a State may not evade the duty to compensate on the premise that the landowner is left with a token interest."). Guided by these observations, we conclude that Bridge's evidence did not satisfy *Lucas*.

1. The Land Retained Substantial Economic Value

We turn first to the land's value. Bridge relied on the expert testimony of Steven Chee to opine on the fair market value of the 1,060 acres in the urban and agricultural land use classifications before and after reversion. Chee expressly assumed that the 2009 Voice Vote on April 30, 2009 reverted the land. Although this assumption is demonstrably wrong, this testimony is the only valuation evidence in the record. We therefore address the argument as Bridge frames it.

Chee appraised the fair market value of the 1,060 acres by determining the highest and best use of the land in each classification, a metric "shaped by the

competitive forces within the market where the property is located." First, Chee opined that the land 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. Second, Chee opined that the land had a value of $6.36 million on April 30, 2009 in an agricultural classification. Although Chee did not presume that reclassification would be obtained, the agricultural use valuation accounted for land banking while simultaneously attempting to regain the former urban classification.[8] The difference reflects an 83.4% diminution in value.

The State contends that this evidence shows that the land retained substantial residual value in an agricultural use classification and that any diminution in value was less than the land's total value. We agree. Absent more, there is no *Lucas* liability for this less than total deprivation of value. *See Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004) (concluding that a 92% loss of value in one part of the land and a 78% loss in another part "is manifestly insufficient" under *Lucas*); *Cienega Gardens v. United States*, 331 F.3d 1319, 1344 (Fed. Cir. 2003) (concluding

[8] We understand Chee's evidence to account for a realistic probability that the urban classification would be regained based on Chee's trial testimony that an appraiser will consider the possibility of rezoning if it "looks highly realistic." In actuality, we also know that Bridge did regain the conditional urban classification roughly a year after the reversion because of the circuit court's judgment.

that *Lucas* requires a loss of "100% of a property interest's value"); *Cooley v. United States*, 324 F.3d 1297, 1305 (Fed. Cir. 2003) ("Contrary to the trial court's holding, the record shows that the 1993 denial apparently destroyed less than all of Cooley's property's value, which constitutes a non-categorical taking. The categorical takings directives of *Lucas* do not apply.").

In rejecting the State's arguments, the district court reasoned that value was relevant to but not dispositive of the *Lucas* inquiry by relying on our discussion on value versus use in *Del Monte Dunes.* This was error because, as we have explained, the Supreme Court's precedents underscore that value is determinative. *See Lingle*, 544 U.S. at 539; *Tahoe-Sierra*, 535 U.S. at 330. We have stated as much in a decision that the district court acknowledged but interpreted as irrelevant. *See Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1141 n.17 (9th Cir. 2014) ("*Lucas* plainly applies only when the owner is deprived of *all* economic benefit of the property. If the property retains any residual value after the regulation's application, *Penn Central* applies." (citation omitted) (emphasis in original)), *overruled on other grounds by Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015).

The district court also wrote off the substantial residual value that Bridge's evidence found in the land's agricultural use classification by pointing to our observation in *Del Monte Dunes* that if "no competitive market exists for the property without the possibility of development, a taking may have occurred." 95 F.3d at 1433. The district court read this passage to mean that

the jury could find that *Lucas* applied here if no competitive market existed for the land without a change in the regulation. Bridge reprises this reasoning here.

Del Monte Dunes does not control here. There, we determined that "the mere fact that there is one willing buyer of the subject property, especially where that buyer is the government, does not, as a matter of law, defeat a taking claim" when the "government action relegates permissible uses of property to those consistent with leaving the property in its natural state (e.g., nature preserve or public space)." *Id.* at 1433. Thus, the fact that the government purchased the land subject to the challenged regulation that the government put in place did not defeat a *Lucas* theory. Unlike in *Del Monte Dunes*, the Commission neither attempted to buy the subject property, nor was Bridge captive to a single buyer exercising its regulatory power. Moreover, the Commission thought that reversion would encourage Bridge to sell the property so that a new developer could make a new proposal, suggesting that Bridge could have sold the land in a competitive market with a possibility of a regulatory change.

In the end, the relevant inquiry for us is whether the land's residual value reflected a token interest or was attributable to noneconomic use. *See Palazzolo*, 533 U.S. at 631 (concluding that a 93% loss in value was insufficient for *Lucas* because the value was attributable to economic use, specifically residential use); *Lost Tree Vill. Corp. v. United States*, 787 F.3d 1111, 1115–17 (Fed. Cir. 2015) (concluding that the *Lucas*

rule applied to a 99.4% deprivation because the residual value was attributable to noneconomic uses). We do not think either situation applies here.

The land's $6.36 million value in an agricultural use classification 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. *Lucas* does not apply when "substantial present value" stems from "future use" of the land. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 781 n.26 (9th Cir. 2000), *overruled on other grounds by Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012). Thus, the land's value in the agricultural use classification precludes a *Lucas* finding here.

2. The Reversion Did Not Deprive Bridge of All Economically Viable Uses of the Land

As a secondary matter, the permissible uses of land classified as agricultural reinforce our conclusion that the reversion did not completely deprive Bridge of all economically viable uses of the 1,060 acres as a matter of law. "[T]he *existence* of permissible uses determines whether a development restriction denies a property owner economically viable use of his property." *Del Monte Dunes*, 95 F.3d at 1432 (emphasis added); *Outdoor Systems*, 997 F.2d at 616. "[W]here an

owner is denied *only some* economically viable uses, a taking still may have occurred" pursuant to the *Penn Central* analysis, but not pursuant to the *Lucas* rule. *Del Monte Dunes*, 95 F.3d at 1432 (emphasis added).

Hawaii law permits an array of uses for land classified as agricultural. *See* Haw. Rev. Stat. § 205-2(d)(1)–(16).[9] In addition, a landowner may obtain a permit for "certain unusual and reasonable uses within agricultural . . . districts other than those for which the district is classified." *Id.* § 205-6(a). There are no express limitations on such specially permitted uses.[10]

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[9] These uses include: (1) crop cultivation activities and uses; (2) farming activities or uses related to animal husbandry and game and fish propagation; (3) aquaculture (*i.e.*, the production of aquatic plant and animal life within ponds); (4) wind-generated energy production for public, private, and commercial use; (5) biofuel production for public, private, and commercial use; (6) solar energy facilities; (7) bona fide agricultural activities and uses that support such activities, including accessory buildings; (8) wind machines and wind farms; (9) small-scale meteorological, air quality, noise, and other scientific and environmental data collection; (10) agricultural parks; (11) agricultural tourism conducted on a working farm, or a farming operation; (12) agricultural tourism activities; (13) open area recreational facilities, (14) geothermal resources exploration, (15) agricultural-based commercial operations registered in Hawaii; and (16) hydroelectric facilities. *See* Haw. Rev. Stat. § 205-2(d).

[10] Trial testimony showed that prior examples of specially permitted uses in an agricultural district included: rock quarrying operations; cinder and sand mining facilities; concrete batching plants; construction waste facilities; landfills; public and private sewage treatment plants; gardens and zoos; schools (prekindergarten to college); memorial parks, including crematoria, commercial facilities, including post offices and gas stations; private storage facilities; construction yards; maintenance facilities; and telecommunications facilities and structures.

Against this statutory backdrop, we do not see how this case is like *Lucas*. The mere reclassification of the 1,060 acres from urban use to an agricultural use did not prohibit all development, nor did it require leaving the land in an idle state. *See Lucas*, 505 U.S. at 1008.

Although Bridge offered evidence suggesting that many of the statutorily permitted uses 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. Some of the specially permitted uses may have been especially suitable for this land. Bridge intended to place a sewage treatment plant on the adjacent 2,000 acres of agriculturally zoned land. Bridge's own witnesses also recognized that the land was "good for growing rocks." Based on the evidence that Bridge presented, we do not think that the jury could have reasonably found that the reversion deprived Bridge of *all* economically feasible uses of the land.

Bridge otherwise draws our attention to the Commission's findings in the 1989 and 1991 Orders that the soils were rated poorly and were not adequate for grazing to suggest that there were no viable uses in an agricultural use zone. By definition, however, "[a]gricultural districts include areas that are not used for, or that are not suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics." Haw. Rev. Stat. § 205-2(d). Thus, the Commission's findings are simply not evidence that

the land lacked economically viable uses in an agricultural classification.

Ultimately, we think that the notion underlying Bridge's *Lucas* theory is that the inability to pursue a particular development and to obtain its value was a total taking. This view is unsupported by the law. *See Palm Beach Isles Assocs. v. United States*, 231 F.3d 1354, 1364 (Fed. Cir. 2000) (order) ("[M]ost land use restrictions do not deny the owner of the regulated property all economically viable uses of it."); *Hoehne v. County of San Benito*, 870 F.2d 529, 532–33 (9th Cir. 1989) ("A government entity is not required to permit a landowner to develop property to the full extent it may desire. Denial of the intensive development desired by a landowner does not preclude less intensive, but still valuable development."). Accordingly, we conclude that the State was entitled to judgment as a matter of law on Bridge's *Lucas* theory, and we turn to the *Penn Central* analysis.

C. Penn Central Taking

Penn Central requires that we consider: (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." 438 U.S. at 124. Our consideration of these factors aims "to determine whether a regulatory action is functionally equivalent to the classic taking." *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc) (internal

quotation marks omitted). The first and second *Penn Central* factors are the primary factors. *Lingle*, 544 U.S. at 538–39. "The outcome [of this inquiry] . . . depends largely upon the particular circumstances [in the] case" at hand. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) (quoting *Penn Central*, 438 U.S. at 124) (internal quotation marks omitted). When we apply the *Penn Central* factors to the trial evidence, we conclude that the jury could not reasonably find for Bridge.

1. The Reversion Order's Economic Impact

Our first consideration is the challenged regulation's economic impact on the property owner. *Lingle*, 544 U.S. at 528. "[W]e 'compare the value that has been taken from the property with the value that remains in the property.'" *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018) (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987)), *cert. denied.* 139 S. Ct. 917 (2019). Although there is "no litmus test," *id.* at 451, our value comparison again aims "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain," *Lingle*, 544 U.S. at 539.

Bridge attempted to show the reversion's economic impact by relying on Chee's valuation testimony and on testimony regarding the disruption to the sale

agreements between Bridge and DW. We address each in turn.

a. The Valuation Opinion

As we have explained, Chee calculated the fair market value of the land using the day of the 2009 Voice Vote as the relevant point at which the land reverted. Chee calculated the land's value as $40 million on the day before the vote and as $6.36 million on the day of the vote. The parties agree, uncritically, that Chee's opinion shows that the land suffered an 83.4% diminution in fair market value. On this account, the reversion would have resulted in a loss of $33.6 million in the land's value. We conclude, however, that, as a matter of law, Chee's calculation suffers from a number of defects for the purposes of Bridge's taking claim.

First, Chee's valuation opinion did not properly ascertain economic impact for the purposes of Bridge's taking claim because it assumed that the April 30, 2009 Voice Vote reverted the land.[11] We have already explained that it is not proper to measure economic impact based on a "hypothetical economic result" that

[11] We observe that it appears that Chee's calculation of the land's value prior to voice vote failed to account for Bridge's November 2010 deadline to complete the 385 affordable housing units. Chee calculated the land's urban value as $40 million based on the "highest and best use" of " 'land banking' the property until overall market conditions improved," specifically waiting to gauge "the full fallout of the Great Recession." Thus, Chee's highest and best use valuation of the land in its urban classification also appears to have inflated the land's value.

assumes a state of affairs that did not exist. *See MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (rejecting the district court's comparison of the effect of a 1999 rent control ordinance with a "hypothetical economic result assuming that there was no rent control ordinance in effect at all"). The reversion did not occur until some two years after the 2009 Voice Vote and thus the vote could not be the proper reference point.

Second, the vote's effect on the land's fair market value during the ongoing OSC proceedings is not evidence of a taking. We understand that Bridge could account for what it contends cast a "dark cloud" over the project by using the vote as the reference point for its valuation calculation. Nevertheless, "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are incidents of ownership. They cannot be considered as a taking in the constitutional sense." *Tahoe-Sierra*, 535 U.S. at 332 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 263 n.9 (1980)); *First English*, 482 U.S. at 320 (same). Chee's valuation evidence falters for this reason as well.

Third, even if we assume that Chee properly calculated the land's value, the asserted 83.4% diminution in value substantially overstates the relevant diminution in value Bridge could have suffered for the purposes of weighing this factor. *See MHC Fin.*, 714 F.3d at 1127 (taking issue with valuation evidence based on a hypothetical state of affairs but nevertheless assuming it could show economic impact). "[T]he

duration of the restriction is one of the important factors that a court must consider in the appraisal of a regulatory takings claim." *Tahoe-Sierra*, 535 U.S. at 342. When we account for the reversion's temporary duration, the resulting relevant diminution is much smaller than 83.4%.

We observe that, consistent with the nature of its temporary taking claim, Bridge did not attempt to pursue at trial damages that would reflect the full 83.4% diminution it asserted.[12] Instead, Bridge sought damages by taking (1) the diminution in the land's value attributed to the government action, (2) multiplied by the time period of the temporary taking, and (3) further multiplied by Bridge's rate of return. Using an overstated taking period from the date of the 2009 Voice Vote to the Hawaii Supreme Court's November 2014 decision, Bridge asserted that the relevant time period for its damages was 5.68 years. Seeking to apply a 10.12% rate of return to the $40 million valuation,

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[12] In a temporary regulatory taking case, just compensation damages are modified because "the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit," not the loss of the property itself. *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987). In these circumstances, "[t]he landowner's compensable interest . . . is the return on the portion of fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction." *Id.* (citing *Nemmers v. City of Dubuque*, 764 F.2d 502, 505 (8th Cir. 1985)).

Bridge claimed damages of $19.54 million. That is a roughly 48% diminution in value.

More critically, Bridge's claimed damages still overstate the relevant diminution in value for the purposes of this factor. The reversion lasted roughly a year, from the Reversion Order's issuance in April 2011 until the Hawaii state circuit court's judgment vacating the order in June 2012.[13] *See DW Aina Le'a Dev.*, 339 P.3d at 704. When we account for the reversion's actual one-year duration, Bridge's damages are at most $6.72 million if we use the higher 20% rate of return that Bridge hoped to receive on its total investment (an issue we discuss in further detail below). Bridge's loss thus amounts to an approximately 16.8% diminution in value, a number far lower than the 83.4% figure on which it relied at trial. This economic impact weighs against the conclusion that the reversion constituted a taking. *See Colony Cove Props.*, 888 F.3d at 451 (concluding that a 24.8% diminution was "far too small to establish a regulatory taking"); *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1189 (9th Cir. 2012) (finding that a "less than 15%" economic loss with respect to one property and no effect on two other properties "does not support a takings claim").

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[13] Bridge treats the Hawaii Supreme Court's decision as *the* decision that invalidated the Reversion Order. We know of no principle of Hawaii law that would render ineffective the Hawaii circuit court's judgment vacating the Reversion Order. The general rule is that "an appeal does not vacate the judgment appealed from." *Solarana v. Indus. Elecs., Inc.*, 428 P.2d 411, 417 (Haw. 1967). Thus, the circuit court's judgment is the relevant end point.

For these reasons, we conclude that the valuation evidence, properly understood, weighs strongly against a taking pursuant to the first *Penn Central* factor.

b. The Disrupted Sale Agreements

Bridge also relied on the disruption of the land sale agreements between it and DW to show economic impact. John Baldwin, the CEO of Bridge Capital and Bridge's parent company as well as Bridge's manager, testified that DW failed to purchase the remaining 1,000 acres for the $35.7 million price stated in the February 2009 sale agreement because of the vote. Apparently, the vote affected DW's ability to borrow money to finance the purchase. Baldwin further testified that DW failed to make any more payments to Bridge pursuant to the modified December 2009 agreement—which retained the same $35.7 million price for the remaining 1,000 acres—after the OSC's reinstatement.

There is a fundamental problem with using the claimed disruptions to the February 2009 and December 2009 sale agreements as evidence of the Reversion Order's economic impact. DW's contractual default under the February 2009 agreement after the 2009 Voice Vote occurred some two years *before* the 2011 Reversion Order. DW's default under the modified December 2009 agreement also occurred after the OSC's reinstatement in July 2010, several months *before* the Reversion Order's issuance. The Reversion Order thus could not have caused the contractual defaults that

pre-dated it by several months. *See Esplanade Props.*, 307 F.3d at 984 (citing *Tahoe-Sierra*, 216 F.3d at 783 & n.33) (recognizing that a regulatory taking plaintiff must establish both causation-in-fact and proximate causation). Moreover, the record otherwise shows that Bridge's focus on the disruptions to these agreements overstated the reversion's impact on its contractual relationship with DW. After the Hawaii Supreme Court's decision, DW agreed to pay Bridge $14 million more than the previously agreed upon $40.7 million to purchase the land. Thus, the contractual defaults during the reversion's temporary duration do not affect our economic impact analysis.

2. The Extent of Any Interference with Any Reasonable Investment-Backed Expectations

We must consider next "the extent to which the regulation has interfered with distinct investment-backed expectations," *Penn Central*, 438 U.S. at 124, that Bridge had for the 1,060 acres at the time of its acquisition, *see Colony Cove Props.*, 888 F.3d at 452; *Laurel Park Cmty.*, 698 F.3d at 1189. Although this factor raises "vexing subsidiary questions" about its proper scope and application, *Lingle*, 544 U.S. at 539, certain principles guide us.

For one, we must "use 'an objective analysis to determine the reasonable investment-backed expectations of the [o]wners.'" *Colony Cove Props.*, 888 F.3d at 452 (quoting *Chancellor Manor v. United States*, 331

F.3d 891, 907 (Fed. Cir. 2003)). Our focus is on interference with reasonable expectations. *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 646; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). "'Distinct investment-backed expectations' implies reasonable probability, . . . not starry eyed hope of winning the jackpot if the law changes." *Guggenheim*, 638 F.3d at 1120 (quoting *Penn Central*, 438 U.S. at 124). Thus, "unilateral expectation[s]" or "abstract need[s]" cannot form the basis of a claim that the government has interfered with property rights. *Ruckelshaus*, 467 U.S. at 1005 (citation omitted).

Second, "what is 'relevant and important in judging reasonable expectations' is 'the regulatory environment at the time of the acquisition of the property.'" *Love Terminal Partners, L.P. v. United States*, 889 F.3d 1331, 1345 (Fed. Cir. 2018) (quoting *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.23 (Fed. Cir. 2001) (en banc)). "[T]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end[.]" *Concrete Pipe & Prods.*, 508 U.S. at 645 (quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958)).

With these principles in mind, we must determine what reasonable investment-backed expectations Bridge had and to what degree the Reversion Order interfered with them.

The record shows that Baldwin testified that Bridge hoped to make annually at least 20% from "the total investment," meaning every dollar put into the property.[14] Even if this hoped-for return was reasonable, the reversion could not have meaningfully interfered with it during the reversion's one-year duration. Bridge did not expect any profit from its purchase of the property unless and until the Commission amended the 1991 Order's affordable housing condition. Bridge also did not expect that an amendment to the affordable housing condition would translate into immediate profits. Indeed, Bridge represented to the Commission that $86 million in initial infrastructure costs and over $200 million in total development costs had to be spent before the construction and sale of any housing units could begin. At the time of the reversion, the project was nowhere near this level of investment—indeed only sixteen affordable housing units existed—and thus Bridge could have had no reasonable expectation of making the 20% annual return on the total investment at that time.

The State and Bridge largely focus on whether Bridge could have reasonably expected that the Commission would amend the 1991 Order's affordable housing condition requiring the construction of 1,000

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[14] The district court denied the State's JMOL motion in part by relying on evidence that Bridge anticipated receiving a 20% return on its initial investment. On appeal, Bridge passingly refers to this in the factual background of its answering brief to the State's cross-appeal and does not argue it in its *Penn Central* analysis. Nevertheless, we address it here.

affordable housing units.[15] Pointing to our distinction in *Guggenheim*, 638 F.3d at 1120–21, between reasonable expectations and speculative possibilities, both sides find support for the (un)reasonableness of Bridge's expectation in the $5.2 million that Bridge paid for the 1,060 acres. We will assume that Bridge reasonably expected an amendment to the 1991 Order's affordable housing condition, but we do not see what it proves. The Commission did not predicate the Reversion Order on a purported failure to build the 1,000 affordable housing units that the 1991 Order required prior to amendment, but instead on the reclassification conditions that Bridge conspicuously ignores.

Bridge further argues that the jury was entitled to find that Bridge had a reasonable expectation that the Commission would not revert the land to its prior zoning for agricultural use once Bridge purchased the property, obtained the amendment, and substantially commenced use of the land. The substantial commencement of use point stems from the Hawaii Supreme Court's determination that DW's active preparations for the land and completion of sixteen affordable housing units by March 2010 was substantial commencement of use. But again, we do not see what this proves. Substantial commencement of use did

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[15] The propriety of the Commission's affordable housing conditions is not at issue in this case. As Bridge avers on appeal, "the 'challenged regulation' giving rise to Bridge's takings claim is *not* the affordable housing condition in effect when Bridge purchased the Property."

not eliminate the possibility of reversion; it simply changed the circumstances pursuant to which the Commission could exercise its reversion authority. *See DW Aina Le'a Dev.*, 339 P.3d at 714.

What we find dispositive are the conditions of the 1989 and 1991 Orders requiring the landowner to substantially comply with representations made to obtain reclassification. The 1991 Order made clear that the Commission might issue an OSC why the land should not revert for failure to substantially comply with representations made to obtain reclassification. Hawaii law expressly authorized the Commission to impose this condition, and such conditions ran with title to the land. Haw. Rev. Stat. § 205-4(g). Critically, the substantial compliance condition turned on the *landowner's* own representations to the Commission.

Bridge expressly committed to build 385 affordable housing units as a part of the amendment to the order governing the land's conditional urban use classification. Based on Bridge's representations to the Commission, the 2005 Order required Bridge to build these units by November 2010. At no point in arguments before us does Bridge acknowledge this deadline, let alone Bridge's and DW's repeated representations to the Commission as part of seeking the OSC's rescission that they would complete the 385 affordable housing units.

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. *See MHC Fin.*, 714 F.3d at 1127–28 (finding that plaintiff could not satisfy this factor in the context of challenging a 1999 rent control ordinance because the plaintiff "had even less reason to expect that the rent control regime would disappear altogether" given a prior 1993 rent control ordinance in effect when plaintiff bought its property). The Commission properly issued the OSC based on the suspicion that Bridge would not meet the conditions. *See DW Aina Le'a, Dev.*, 339 P.3d at 713 ("The [Commission] did not err in issuing the OSC. Bridge and DW do not contend otherwise." (citation omitted)). 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.

3. The Character of the Government's Action

Finally, we consider the Reversion Order's character. "[T]he character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred."

Lingle, 544 U.S. at 539 (internal quotation marks omitted). The government generally cannot "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 537 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Even if this factor weighs in favor of finding a taking, this factor is not alone a sufficient basis to find that a taking occurred. *See Laurel Park Cmty.*, 698 F.3d at 1191.

The district court concluded that Bridge's evidence provided the jury with an ample basis to find for Bridge on this factor. The court reasoned that the Reversion Order's effect was concentrated because it directly affected the owners of the 1,060 acres. The court also reasoned that credible testimony showed that the Commission intended to cause Bridge to sell the property. In addition, the court observed that the "decision to revert the Property's classification was the first time in the [Commission's] 50-year history that it had taken such action," and that the Hawaii Supreme Court ultimately invalidated the reversion. Much of this evidence was insufficient to establish that this factor weighed in Bridge's favor.

For one, we recognize that government action that singles out a landowner from similarly situated landowners raises the specter of a taking. *See Lingle*, 544 U.S. at 542–44. The concentrated effect of the reversion here, however, was reflective of the confines of a generally applicable Hawaii law land use reclassification procedure. *See* Haw. Rev. Stat. § 205-4(a) (permitting a landowner to petition). We cannot find in this generally

applicable scheme that this factor weighed in Bridge's favor.

Second, the Hawaii Supreme Court's invalidation of the reversion as a matter of Hawaii *statutory procedural* requirements does not carry the constitutional significance that either Bridge or the district court ascribed to it. The reclassification history is critical to the reversion challenged here. *See Buckles v. King County*, 191 F.3d 1127, 1139 (9th Cir. 1999) (observing that a taking claim must be considered "'in light of the context and . . . history' of the land use decisions related to [the] property." (ellipsis in original) (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 721 (1999))).

As the Hawaii Supreme Court observed when it rejected Bridge's assertion that the Commission violated Bridge's substantive due process rights, 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." *DW Aina Le'a Dev.*, 339 P.3d at 689, 717. The court otherwise acknowledged that, despite their repeated assurances to the Commission that they would complete the 385 affordable housing units by November 2010, "Bridge and DW did not satisfy the affordable housing condition, and did not comply with numerous other representations made to the [Commission]." *Id.* at 717. The Hawaii Supreme Court's rejection of Bridge's equal protection challenge echoed this reasoning. *Id.* at 718. The same underlying

history blunts the force of Bridge's assertion that the reversion's character established a taking.

4. The Balance of the *Penn Central* Factors

Although we construe the evidence in the light most favorable to the jury's verdict, we conclude that no reasonable jury could find that Bridge's evidence satisfied the *Penn Central* test. Even if we assume that the character of the government's action weighs in favor of finding a taking, the first and second factors weigh decisively against such a finding. Because Bridge's own evidence established a diminution in value that is proportionately too small and because the reversion did not interfere with Bridge's reasonable investment-backed expectations for the land, no reasonable jury could conclude that the reversion effected a taking pursuant to the *Penn Central* analysis.

D. The Outcome of the Taking Liability Analysis

Our analysis of Bridge's taking theories requires us to reverse the district court's denial of the State's renewed JMOL motion. Bridge's evidence could not establish that a taking occurred pursuant to either *Lucas* or *Penn Central*. Thus, the district court should have granted the State's motion. We vacate the judgment for Bridge and the nominal damages award and remand with instructions for the district court to enter judgment for the State. As a consequence of this

determination, we need not address any other taking issues the parties raise on appeal.

II. The Dismissal of Bridge's Equal Protection Claim

Next, we must determine whether the Hawaii Supreme Court's decision in Bridge's agency appeal barred Bridge's equal protection claim in this case. Hawaii law governs whether we afford preclusive effect to the Hawaii Supreme Court's decision. *See Hiser v. Franklin*, 94 F.3d 1287, 1290 (9th Cir. 1996) ("[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.* 465 U.S. 75, 81 (1984))). Thus, if Hawaii law precludes Bridge from litigating the equal protection claim in state court, then Bridge cannot pursue the same claim here. *Caldeira v. County of Kauai*, 866 F.2d 1175, 1178 (9th Cir. 1989).

Pursuant to Hawaii law, the "judgment of a court of competent jurisdiction is a bar to a new action in another court between the same parties or their privies concerning the same subject matter." *Santos v. State Dep't of Transp.*, 646 P.2d 962, 965 (Haw. 1982) (per curiam). A judgment has preclusive effect pursuant to the doctrine of issue preclusion if four requirements are met:

> (1) the issue decided in the prior adjudication is identical to the one presented in the action

> in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom [issue preclusion] is asserted was a party or in privity with a party to the prior adjudication.

Bremer v. Weeks, 85 P.3d 150, 161 (Haw. 2004) (alteration in original); *see also Dorrance v. Lee*, 976 P.2d 904, 909 (Haw. 1999).

The district court determined that all requirements were met. Bridge disputes the first and second requirements and further argues that it did not have a full and fair opportunity to litigate its equal protection challenge in the agency appeal. We reject each argument in turn.

A. Identical Issues

We can find no material difference between the equal protection issue Bridge raised in the agency appeal and the one raised in this suit. In the agency appeal, Bridge asserted that the Commission violated its equal protection rights because the Commission did not treat other developers the same way it treated Bridge. In its complaint here, Bridge alleged that the Commission lacked a rational basis to treat Bridge differently than it treated other developers. These are undoubtedly the same issue. Bridge's further contention that the Hawaii Supreme Court decided only whether the Commission had a rational basis to enforce the reclassification conditions ignores that the

court determined that any differential treatment did not lack a rational basis. *See DW Aina Le'a Dev.*, 339 P.3d at 717–18.

Furthermore, we disagree with Bridge that Hawaii law requires the availability of identical remedies in both proceedings for an earlier judgment to have preclusive effect. In *Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i*, 979 P.2d 1120 (Haw. 1999), the Hawaii Supreme Court decided that issue preclusion did not bar the suit there because different standards governed the issue of standing to challenge an agency action pursuant to different Hawaii statutory provisions. *See Tax Found. of Haw. v. State*, 439 P.3d 127, 149 (Haw. 2019) ("[I]n *Citizens*, we pointed out the difference between standing requirements for HRS § 91-14 agency appeals and HRS § 632-1 declaratory judgment actions[.]"). The court observed that the statutory provisions provided different forms of relief to bolster the conclusion that issue preclusion did not bar the later suit, not to fashion a new identical remedies requirement for Hawaii issue preclusion law. *See Citizens for the Protection of the North Kohala Coastline*, 979 P.2d at 1128 (citing *Pele Def. Fund v. Puna Geothermal Venture*, 881 P.2d 1210, 1216 n.13 (Haw. 1994) (further explaining that in a § 91-14 agency appeal, "the court only has power to grant relief in accordance with HRS 91-14(g)")). Thus, we reject Bridge's challenge to the identical issue requirement.

B. Final Judgment on the Merits

We also reject Bridge's contention that the Hawaii Supreme Court's decision was not a final judgment on the merits. Insofar as the decision concerned Bridge's federal equal protection rights, the decision became final when the time expired for Bridge to seek review by the United States Supreme Court. *See E. Sav. Bank, FSB v. Esteban*, 296 P.3d 1062, 1068 (Haw. 2013); *see also* 28 U.S.C. § 2101 (setting 90-day time period within which to file a writ of certiorari with the United States Supreme Court). We are not aware of Bridge ever pursuing any such appeal.

Contrary to Bridge's view, the Hawaii Supreme Court's remand for further proceedings consistent with its opinion does not render the judgment nonfinal. The Hawaii Supreme Court expressly vacated the circuit court's judgment on the issue of equal protection, and remanded for the circuit court to effectuate that vacatur. That remand could not have resulted in a different resolution of Bridge's equal protection challenge because no issue of law or fact regarding that challenge remained unresolved. *See Robinson v. Ariyoshi*, 658 P.2d 287, 297 (Haw. 1982). Moreover, Bridge has never identified any further agency appeal proceedings in the more than five years since the Hawaii Supreme Court's judgment. Thus, the court's decision was a final judgment on the merits.

C. Full and Fair Opportunity to Litigate

As a final matter, we consider whether Bridge lacked a full and fair opportunity to litigate its equal protection challenge in the agency appeal. Federal courts will not afford preclusive effect to a prior state court judgment if the party lacked a full and fair opportunity to litigate the issue on the merits. *See Allen v. McCurry*, 449 U.S. 90, 101 (1980); *Ross v. Alaska*, 189 F.3d 1107, 1112–13 (9th Cir. 1999).[16] "[N]o single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 483 (1982). Instead, "'state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law.'" *Ross*, 189 F.3d at 1112 (quoting *Kremer*, 456 U.S. at 481). The proceedings at issue here met that standard.

Bridge contends that it lacked a full and fair opportunity to litigate its equal protection challenge in the agency appeal because the Hawaii Supreme Court excluded from the evidence the dockets from the Commission's proceedings involving other property owners on which Bridge sought to rely to show differential treatment. *DW Aina Le'a Dev.*, 339 P.3d at 689, 714–15.

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[16] This parallels a requirement of Hawaii issue preclusion law, pursuant to which the plaintiff must have had a full and fair opportunity to litigate the relevant issue on the merits in the earlier case. *Dorrance*, 976 P.2d at 911; *Foytik v. Chandler*, 966 P.2d 619, 627 (Haw. 1998).

Bridge did not lack the opportunity to present this evidence, but instead failed to properly introduce this evidence into the agency appeal record. *Id.* at 715 & n.18 (finding that Bridge and DW failed to request judicial notice). Bridge's failure to do so does not undermine the judgment's fairness. *See Kremer*, 456 U.S. at 483, 485 (having "little doubt" that the state's procedures were constitutionality sufficient and concluding that the plaintiff's "fail[ure] to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy").

It is otherwise clear that Bridge received a full and fair opportunity to raise the equal protection challenge in the agency appeal. Bridge raised, briefed, and argued the challenge during the proceedings before the Commission and on appeal before the circuit court and defended the issue before the Hawaii Supreme Court. *See DW Aina Le'a Dev.*, 339 P.3d at 689, 704–06, 717–18. Bridge thus received a full and fair opportunity pursuant to both Hawaii law and the federal exception to issue preclusion. *See Ross*, 189 F.3d at 1112–13 (finding that the plaintiff received a full and fair opportunity to litigate an issue in a prior Alaska state court proceeding when the plaintiff was able to raise as well as fully brief and argue the issue); *Dorrance*, 976 P.2d at 911 (making a similar finding under Hawaii law). We therefore affirm the district court's issue preclusion ruling that bars Bridge from re-litigating the equal protection issue in this case.

With no remaining viable claims, it is unnecessary for us to address Bridge's appeal from the district

court's dismissal of the individual capacity claims Bridge raised against the commissioners who voted to revert. *Trans-Canada Enters., Ltd. v. Muckleshoot Indian Tribe*, 634 F.2d 474, 476 n.2 (9th Cir. 1980) (declining to address judicial immunity "[i]n view of our holding that no claim for federal relief" existed).

CONCLUSION

The district court erred in denying the State's JMOL motion because Bridge's evidence did not establish a taking pursuant to either *Lucas* or *Penn Central*, and we reverse the denial. Consequently, we vacate the judgment for Bridge on the taking claims and remand with instructions for the district court to enter judgment for the State. We affirm the dismissal of Bridge's equal protection claim. We decline to address all other issues raised on appeal as unnecessary.

AFFIRMED IN PART, REVERSED AND VACATED IN PART, and **REMANDED** with instructions to enter judgment for Defendants-Appellees/Cross-Appellants. Costs are awarded to Defendants-Appellees/Cross-Appellants.

APPENDIX B

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
——————— DISTRICT OF HAWAII ———————

Bridge Aina Le'a, LLC

Plaintiff(s),

V.

Hawaii, State of , Land Use Commission et al

Defendant(s).

AMENDED JUDGMENT IN A CIVIL CASE

Case: CV 11-00414-SOM-KJM

FILED IN THE UNITED STATES DISTRICT COURT DISTRICT OF HAWAII

March 30, 2018

At 12 o'clock and 17 min p.m.
SUE BEITIA, CLERK

[✓] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS HEREBY ORDERED and ADJUDGED that Plaintiff is awarded $1 in nominal damages with respect to the takings claims in Count I and II **AGAINST** Defendants Land Use Commission

and the Individual Defendants in their Official Capacities.

March 30, 2018	SUE BEITIA
Date	Clerk
	/s/ Sue Beitia by CB
	(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIDGE AINA LE'A, LLC, Plaintiff, vs. STATE OF HAWAII LAND USE COMMISSION; VLADIMIR P. DEVENS, in his individual and official capacity; KYLE CHOCK, in his individual and official capacity; THOMAS CONTRADES, in his individual and official capacity; LISA M. JUDGE, in her individual and official capacity; NORMAND R. LEZY, in his individual and official capacity; NICHOLAS W. TEVES, JR., in his individual and official capacity; RONALD I. HELLER, in his individual and official capacity; DUANE KANUHA, in his official capacity; CHARLES JENCKS, in his official capacity; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; DOE ENTITIES 2-10; and DOE GOVERNMENTAL UNITS 1-10, Defendants.	Civ. No. 11-00414 SOM-KJM ORDER DENYING STATE OF HAWAII'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

ORDER DENYING STATE OF HAWAII'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

(Filed Jun. 27, 2018)

I. INTRODUCTION.

Defendant State of Hawaii Land Use Commission (the "State" or "Land Use Commission") has renewed its request for judgment as a matter of law, alternatively requesting a new trial. For the reasons that follow, the court denies these requests.

II. BACKGROUND.

The factual background of this case has been discussed in the court's previous orders and is incorporated by reference. *See*, *e.g.*, ECF No. 131; ECF No. 283; ECF No. 318.

On March 19, 2018, at the close of Bridge Aina Le'a's case-in-chief, the State moved for judgment as a matter of law. ECF No. 361. On March 20, 2018, the court orally granted the motion in part, agreeing to limit any recovery by Bridge Aina Le'a to nominal damages given court rulings excluding proffered evidence on just compensation. *See* ECF No. 365. The court denied the motion in all other respects. *See id.* Ultimately, the jury found that the State had taken Bridge Aina Le'a's property without just compensation under both *Lucas* and *Penn Central* analyses. *See* ECF No. 373. The court entered judgment awarding

nominal damages to Bridge Aina Le‘a on March 30, 2018. ECF No. 377.

On April 20, 2018, the State filed a Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial ("Renewed Motion"). ECF No. 385. The State claims it is entitled to judgment as a matter of law on four grounds: (1) the Land Use Commission's reversion order did not affect Bridge Aina Le‘a's limited property interests; (2) there cannot be a taking stemming from an erroneous finding of fact by an agency in a quasi-judicial proceeding; (3) the evidence does not establish a *Lucas* taking as a matter of law; and (4) the evidence does not establish a *Penn Central* taking as a matter of law. *See id.* at PageID #s 9293-9313. In the alternative, the State requests a new trial on two grounds: (1) the court's jury instruction concerning the appropriate denominator was erroneous; and (2) the verdict is against the great weight of the evidence. *See id.* at PageID #s 9213-16. Bridge Aina Le‘a filed a Memorandum in Opposition on May 18, 2018, ECF No. 401, and the State filed a Reply on June 1, 2018, ECF No. 403.

III. LEGAL STANDARD.

A. Rule 50(b) (Renewed Motion for Judgment as a Matter of Law).

If a portion of party's motion for judgment as a matter of law is not granted by the court, then, "[n]o later than 28 days after the entry of judgment, . . . the movant may file a renewed motion for judgment as a

matter of law." Fed. R. Civ. P. 50(b). "Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation [] motion." *EEOC v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009); *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003).

The standard for granting judgment as a matter of law under Rule 50 "mirrors" the standard for granting summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)). "A district court can grant a Rule 50[] motion for judgment as a matter of law only if 'there is no legally sufficient basis for a reasonable jury to find for that party on that issue.' " *Krechman v. Cty. of Riverside*, 723 F.3d 1104, 1109 (9th Cir. 2013) (quoting *Jorgensen v. Cassiday*, 320 F.3d 906, 917 (9th Cir. 2003)). The moving party must show that the evidence, construed in the light most favorable to the nonmoving party, permitted only one reasonable conclusion, and that conclusion is contrary to jury's verdict. *See Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002); *Enovsys LLC v. AT&T Mobility LLC*, No. CV 11-5210 SS, 2015 WL 11089498, at *4 n.5 (C.D. Cal. Nov. 16, 2015) (explaining that "the moving party bears th[is] burden" even when the non-movant "had the burden [of proof] at trial" (citing *Anderson*, 477 U.S. at 250)).

The court may not assess the credibility of witnesses and must draw all reasonable inferences in the nonmovant's favor. *See Krechman*, 723 F.3d at 1110. The court's "job at this stage is not to determine

whether the jury believed the right people, but only to assure that it was presented with a legally sufficient basis to support the verdict." *Berry v. Hawaii Exp. Serv., Inc.*, No. 03-00385 SOM/LEK, 2006 WL 1519996, at *2 (D. Haw. May 24, 2006) (quoting *Harvey v. Office of Banks & Real Estate*, 377 F.3d 698, 707 (7th Cir. 2004)).

B. Rule 59(a) (Motion for a New Trial).

Rule 59(a) of the Federal Rules of Civil Procedure provides that a court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). The court is "bound by those grounds that have been historically recognized." *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1035 (9th Cir. 2003). Precedential grounds for a new trial include a verdict that "is contrary to the clear weight of the evidence, is based upon false or perjurious evidence, or [implicates] a miscarriage of justice." *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quoting *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 510 n.15 (9th Cir. 2000)). In ruling on a motion for a new trial, "[t]he judge can weigh the evidence and assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1371 (9th Cir. 1987) (quoting *Air-Sea Forwarders, Inc. v. Air Asia Co.*, 880 F.2d 176, 190 (9th Cir. 1989)). A new trial can be granted due to an erroneous evidentiary ruling only if the ruling

"substantially prejudiced" the complaining party. *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995).

IV. ANALYSIS.

A. The State Is Not Entitled to Judgment as a Matter of Law.

The State is not entitled to judgment as a matter of law on any of the grounds put forward in its Renewed Motion.

1. The State Has Not Identified Evidence Indicating that Bridge Aina Le'a Possessed Only a Token Property Interest Unaffected by the Reversion.

The Ninth Circuit uses "a two-step analysis to determine whether a 'taking' has occurred: first, we determine whether the subject matter is 'property' within the meaning of the Fifth Amendment and, second, we establish whether there has been a taking of that property, for which compensation is due." *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 1002 (9th Cir. 2007). This analysis begins with the factual question of what property rights, if any, a plaintiff owns. *See Philips v. Marion Cty. Sheriff's Office*, 494 Fed. App'x 797, 799 (9th Cir. 2012). On this antecedent issue, the court instructed the jury as follows:

> The first step in deciding whether Bridge Aina Le‘a’s property has been taken is to determine what property rights Bridge Aina Le‘a owns.
>
> Think of property rights as a bundle of sticks. One stick represents, for example, the right to possess land. One stick represents the right to use the land. One stick represents the right to sell one’s interest in the land. One stick represents the right to develop the land, and so on. A person may possess one stick, but not the whole bundle. Your job is to determine what sticks Bridge Aina Le‘a owns.
>
> I instruct you that Bridge Aina Le‘a owns the right of title to the land in issue. You may consider whether Bridge Aina Le‘a owns any other rights.
>
> Once you have determined what rights Bridge Aina Le‘a owns, you must consider whether those rights have been taken. In making your determination, you must consider only Bridge Aina Le‘a’s interests in the property. You may not base your decision on a determination that the Land Use Commission’s action affected a third party’s property interests, except insofar as the impact on the third party’s interests also materially affected Bridge Aina Le‘a’s interests in the property.

ECF No. 372, PageID #s 7453-54. This instruction was given with the agreement of the parties.

According to the State, the evidence presented at trial is susceptible to only one reasonable conclusion: that Bridge Aina Le‘a’s property interests were so

"limited" that they could "not [have been] affected by the reversion" of the 1,060-acre property from urban use to agricultural use. ECF No. 385-1, PageID # 9293. In making this argument, the State notes that Bridge Aina Le'a "sold the 1,060 acres and its development rights to [separate] entities owned by Robert Wessel[s] prior to the reversion of the property in 2011." *Id.* at PageID # 9294 (citation omitted). If Bridge Aina Le'a had indeed completely "sold the property," the Land Use Commission's reversion order presumably could not have affected Bridge Aina Le'a's property interests. *Id. But see* ECF No. 401, PageID #s 9602-03 (arguing otherwise).

The jury was not persuaded. After deliberating, the jury found that Bridge Aina Le'a's property interests were taken and, in so doing, necessarily determined that Bridge Aina Le'a retained more than a token interest in the 1,060-acre property at the time of the reversion. *See* ECF No. 373. The jury's determination is supported by adequate evidence.

The State's position that Bridge Aina Le'a "sold the property" is, absent qualification, factually unsupported. Nothing in the record indicates that the property was completely sold. In fact, the State *concedes* that Bridge Aina Le'a owned the "right of title to the land in issue" at all relevant times. *See* ECF No. 385-1, PageID # 9294 (citation omitted). That concession directly contradicts the State's position that Bridge Aina Le'a's sale of the property left it with nothing that could have been affected by the reversion. *See id.*

The State's real claim seems to be that Bridge Aina Le'a sold *some* of its property interests, and the remaining interests were not adversely affected by the Land Use Commission's reversion order. The State refers to testimony indicating that DW Aina Le'a, a separate entity, executed a purchase and sale agreement under which it "gained possession of the property and had all development rights prior to the reversion." *Id.* Even taking the State's characterizations of the record at face value, they support, at most, the conclusion that Bridge Aina Le'a sold two sticks out of its ownership bundle: the right to develop the property and the right to exclude DW Aina Le'a. Even assuming that this conclusion is correct, the jury could have reasonably concluded that Bridge Aina Le'a retained other property rights, including title to the land; the right to exclude entities other than DW Aina Le'a; and the right to sell these residual interests. The jury, moreover, could have reasonably inferred that the reversion order diminished the value of Bridge Aina Le'a's residual interests. For example, if otherwise barren property cannot be developed, it is not a stretch to think that the right to exclude someone from the land is close to worthless.

The State has failed to demonstrate an entitlement to judgment as a matter of law based on the idea that the State had no property interest affected by the reversion. It has not identified evidence indicating that Bridge Aina Le'a sold its ownership of the property outright, or that its residual property interests following the transaction with DW Aina Le'a were so "limited" as to be immune from the reversion order, or that

the State's view of the record is the only reasonable view. *See Mathis v. Pacific Gas & Elec. Co.*, 75 F.3d 498, 501 (9th Cir. 1996) ("Judgment as a matter of law is appropriate 'if the evidence and its inferences considered as a whole and viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion – that the moving party is entitled to judgment not withstanding the verdict.'" (quoting *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 775 (9th Cir. 1990))).

2. Bridge Aina Le'a Properly Asserted a Temporary Regulatory Takings Claim.

Bridge Aina Le'a's takings claim, which concerns a zoning order later invalidated in state court, appears to fit comfortably within the Supreme Court's established jurisprudence on temporary regulatory takings. *See*, *e.g.*, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008-14 (1992); *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 310, 318 (1987); *see also Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447, 468-69, 480-84 (2009). The State, however, argues that takings claims are defective when based on erroneous findings of fact by administrative agencies that sit in a "quasi-judicial capacity." ECF No. 385-1, PageID #s 9294-25. The State's argument is not entirely clear, but as this court understands it, it is without merit.

The State may be attempting to mischaracterize Bridge Aina Le'a's takings claim. *See* ECF No. 401, PageID # 9604. According to the State, the "situation

here is that the Land Use Commission, in reverting the property, found that there was no 'substantial commencement' on the project. . . . The Supreme Court of Hawaii held that the finding of fact was erroneous. Plaintiff [wrongly] contends this is a taking." ECF No. 385-1, PageID #s 9294-95. But Bridge Aina Le'a's takings claim is not simply based on an erroneous factual finding; it is based on a reversion *order* issued by the Land Use Commission. *See* ECF No. 1-2, PageID #s 44, 48-50; *cf. Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (explaining that an "inquiry" into a "regulation's underlying validity" "is logically prior to and distinct from the question whether a regulation effects a taking"). The State conflates the reasoning behind the order – the subject of separate litigation – with the effect of the order itself. It is the effect of the order that is the focus of takings analysis; if the Land Use Commission had engaged in the same fact-finding but decided not to issue the reversion order, there would be no takings claim. *See*, *e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (asking if government action "goes too far" and is unduly "burdensome" in its impact on property, not whether the action is factually supported and properly reasoned); *cf.* ECF No. 385-1, PageID # 9296 (conceding on behalf of the State that "there is no difference for [] takings analysis between the reversion being upheld or vacated"). There is nothing unusual or improper about Bridge Aina Le'a's temporary regulatory takings claim.

Alternatively, the State may be arguing that agencies should be immune from takings claims whenever

their actions are based on erroneous findings of fact. *See* ECF No. 385-1, PageID # 9295. Neither precedent nor common sense supports such a rule, which would validate shoddy fact-finding by agencies. Takings claims can be brought regardless of whether government action is improperly reasoned or has been judicially nullified. *See First English*, 482 U.S. at 318; *Res. Invs.*, 85 Fed. Cl. at 468-69, 480-84; *see also* ECF No. 401, PageID # 9605 ("[T]he LUC cannot leverage its wrong . . . 'substantial commencement' determination into an absolution for violating Bridge's constitutional rights.").

Finally, the State may be attempting to extend to the sovereign the "quasi-judicial immunity" given to agency officials "who perform functions closely associated with the judicial process." *See Bridge Aina Le'a, LLC v. State of Hawaii Land Use Comm'n*, 125 F. Supp. 3d 1051, 1074 (D. Haw. 2015) (quoting *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1133 (9th Cir. 2001)); *see also* ECF No. 401, PageID # 9603 (so interpreting the State's argument). The law does not recognize such an extension, as the State appeared to recognize earlier in this litigation. In its Motion to Dismiss filed on July 27, 2011, the State, while arguing that the Land Use *Commissioners* could invoke quasi-judicial immunity, seemed cognizant that the liability of the Land Use *Commission* (and thus the State) was governed by a different immunity doctrine. *See* ECF No. 14-1, PageID #s 165, 194 (arguing that "the Commissioners in their

individual capacity are entitled to absolute quasi[-] judicial immunity" and that "the LUC, as an agency of the State, has sovereign immunity").

The State's initial understanding was correct. Sovereign immunity, not quasi-judicial immunity, governs whether State agencies can be sued for Takings Clause violations. In extending quasi-judicial immunity to certain "agency *officials,*" the Ninth Circuit has observed that "[p]ermitting suits against [] quasi-judicial decision makers would discourage knowledgeable *individuals* from serving" their government, as the threat of individual liability might undermine *their* "independent and impartial exercise of judgment." *Buckles v. King Cty.*, 191 F.3d 1127, 1133, 1137 (9th Cir. 1999) (emphases added) (quoting *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-36 (1993)). These observations do not translate to a suit against a State *agency.*

Moreover, the Ninth Circuit has held that State agencies cannot invoke sovereign immunity when they are sued in state court for Takings Clause violations. *See Jachetta v. United States*, 653 F.3d 898, 909 (9th Cir. 2011) (explaining that, under the Takings Clause, a State is constitutionally "required to provide" just compensation "notwithstanding sovereign immunity" (quoting *DLX, Inc. v. Kentucky*, 381 F.3d 511, 528 (6th Cir. 2004))). The present action was removed from the state court it originated in to the federal forum by the State. *See* ECF No. 1, PageID # 2.

This court will not announce a novel doctrine of "quasi-judicial sovereign immunity" that would permit

an end-run around this constitutional guarantee. *See* ECF No. 401, PageID # 9603 ("The State's proposed, legally unsupported expansion of judicial or quasi-judicial immunity to the LUC as an entity, and therefore to the State itself, would destroy the rights that the self-executing Takings Clause . . . [is] supposed to guarantee.").

The State draws a tenuous analogy between an agency's factual error and a court's mistaken "findings of fact," which the State says cannot "effect[uate] a taking." *See* ECF No. 385-1, PageID # 9295. This analogy is unhelpful for three reasons.

First, as noted, Bridge Aina Le'a's takings claim concerns the effect of an administrative order, not any erroneous fact-finding that preceded it.

Second, the State assumes that an open legal question – whether judicial orders can effectuate takings – will be resolved against takings plaintiffs. But "[t]he contours and viability of the theory of so-called 'judicial takings' – where a court decision may be deemed to have effectively taken property rights from an individual – [remain] unclear even in the courts of this country." *Jonna Corp. v. City of Sunnyvale*, No. 17-CV-00956-LHK, 2017 WL 2617983, at *6 (N.D. Cal. June 16, 2017) (quoting *Eliahu v. Israel*, No. 14-cv-01636-BLF, 2015 WL 981517, at *5 n.5 (N.D. Cal. Mar. 3, 2015)).

Third, even if a court agreed with the State's argument that judicial takings are impossible, the agreement would almost certainly be with respect to actual

courts. A broader holding extending to administrative or other nonjudicial actions would clash with numerous decisions explaining, for example, that the denial of an individual's permit application can effectuate a taking. *See*, *e.g.*, *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1500 (9th Cir. 1990); *see also MacLeod v. Santa Clara Cty.*, 749 F.2d 541, 544-45 (9th Cir. 1984) ("The law is well settled [] that the application of a general zoning law to particular property effects a taking if 'the ordinance . . . denies an owner economically viable use of his land." (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980))).

The State fails to show that it is entitled to judgment as a matter of law on this ground.

3. The Jury's Finding of a *Lucas* Taking Is Supported by Adequate Evidence.

According to the State, the evidence at trial failed to show a *Lucas* taking. *See* ECF No. 385-1, PageID # 9296. The jury had good grounds for disagreeing. *See* ECF No. 373.

A *Lucas* taking occurs when "a regulation [] 'denies all economically beneficial or productive use of land.'" *Murr*, 137 S. Ct. at 1942 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 505, 617 (2001)). By contrast, there is no *Lucas* taking when "a regulation impedes the use of property without depriving the owner of *all* economically beneficial use." *Id.* at 1943 (emphasis added); *see also*, *e.g.*, *Sierra Med. Servs. Alliance v.*

Kent, 883 F.3d 1216, 1226 (9th Cir. 2018). On the issue of *Lucas* takings, this court instructed the jury as follows:

> Under Taking Analysis No. 1, you must determine whether the action of the Land Use Commission, before it was invalidated in the state courts, denied Bridge Aina Le‘a all economically beneficial or productive use of its land.
>
> If you find that, while the Land Use Commission's reversion order was in effect, Bridge Aina Le‘a would not have been able to make any economically viable use of its property without a change in the law, you must find for Bridge Aina Le‘a with respect to Taking Analysis No. 1. However, if you find that there were permissible uses of Bridge Aina Le‘a's property even with the development restriction in place, and if you further find that those uses were economically beneficial or productive, then you must find in favor of the Land Use Commission with respect to Taking Analysis No. 1.
>
> Evidence that the land had positive economic value notwithstanding the action of the Land Use Commission may be strong evidence of the availability of economically beneficial or productive uses. However, a determination that the land had positive economic value does not, on its own, necessarily mean that no taking has occurred under Taking Analysis No. 1. For example, a taking may occur when a regulation forbids development on a

> property and no competitive market exists for that property without the possibility of development, or if a landowner cannot sell the property to someone to use in accordance with the regulation.

ECF No. 372, PageID #s 7457-58. This instruction was given with the agreement of the parties.

The State asserts five reasons that no *Lucas* taking occurred as a matter of law. None has merit.

a. Bridge Aina Le‘a Satisfied Its Burden of Proof Under *Lucas* with Respect to the Economic Impact of the Reversion.

According to the State, a *Lucas* plaintiff must present evidence demonstrating the economic nonviability of every possible permissible use of its land. *See* ECF No. 385-1, PageID #s 9298-99. The State claims that Bridge Aina Le‘a did not meet this burden, because at trial it "failed to consider" the economic value of "approximately 200" "unusual uses" that might be permitted in the agricultural district pursuant to "special permits." *See id.* Such "unusual uses" included:

> rock quarrying operations; cinder and sand mining facilities; concrete batching plants; construction waste facilities; landfills; public and private sewage treatment plants; gardens and zoos; schools; memorial parks; crematoriums; agricultural tourism facilities; commercial facilities; offices; gas stations; solid waste recycling facilities; private storage facilities;

> telecommunication facilities and structures; and power generation facilities (fossil fuel and renewable, including solar, wind, geothermal, hydropower, and biofuel[])].

Id. at PageID #s 9298-99. Bridge Aina Le‘a did not present evidence specifically addressing the economic value of each of these potentially permissible uses; the State claims Bridge Aina Le‘a therefore "failed to meet its burden of proof of showing the non-existence of economically beneficial uses." *Id.* at PageID # 9298.

The State would saddle Bridge Aina Le‘a with a Sisyphean task. Takings law requires less. Bridge Aina Le‘a presented evidence that a wide variety of potential permissible uses were not economically viable, including uses expressly permitted by statute or common or prevalent within the geographic area. *See* ECF No. 401, PageID #s 9607-09. Its expert, Bruce Plash, testified that "all uses permitted in the Agricultural District" by statute were not economically viable. *See id.* at PageID # 9608 (describing Plash's testimony). He also testified that "there were no agricultural operations on site or anywhere near the Property." *See id.* Bridge Aina Le‘a also put forward general evidence concerning the nature of the land. That evidence indicated that the land was akin to "a giant asphalt parking lot covered with big rocks," that it had "very poor" soil, and that it was "not suitable for agriculture." *See id.* at PageID #s 9607-08 (quoting ECF No. 382-10, PageID #s 7998, 8040). This presentation of evidence was sufficient.

When a party has the burden of proving a negative, it is not unusual for a court to accept a less-than-exhaustive showing. *See*, *e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (holding that the burden of providing the absence of genuine issues of material fact may "be discharged by 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party's case"); *United States v. Chevron Corp.*, No. C 94-1885 SBA, 1996 WL 444597, at *3 (N.D. Cal. May 30, 1996) (adopting a "shared burden" approach to an attorney-client waiver issue to "alleviat[e] the onerous burden . . . to prove a negative"). To require more would, in many circumstances, be to demand the impossible. *See Weimerskirch v. Comm'r of Internal Revenue*, 596 F.2d 358, 361 (9th Cir. 1979) (recognizing the "practical" difficulty of attempting "to prove a negative" (quoting *Elkins v. United States*, 364 U.S. 206, 218 (1960))); *United States v. Fei Lin*, 139 F.3d 1303, 1308 (9th Cir. 1998) (noting "the difficulties inherent in requiring [a party] to prove a negative" (citing *United States v. Dominquez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991))).

Of course, if a takings defendant believes that a permissible and economically viable use has been overlooked, it may present evidence concerning that use. *See*, *e.g.*, *Res. Invs.*, 85 Fed. Cl. at 490. If that presentation is successful, the plaintiff's *Lucas* claim will fail. *See*, *e.g.*, *Sierra Med. Servs. Alliance*, 883 F.3d at 1226 (holding that there was no *Lucas* taking because the regulation at issue did not "require the Plaintiffs `to sacrifice *all* economically beneficial uses' of their

property" (quoting *Lucas*, 505 U.S. at 1019-20)). In this case, however, the State put forward no evidence concerning the economic viability of any alternative use. It merely observed that "Hawaii law allows owners of agricultural land to obtain permits for unusual uses" and that Bridge Aina Le'a "failed to consider" them. *See* ECF No. 385-1, PageID # 9298 (emphasis omitted) (citing Haw. Rev. Stat. § 205-6). The State presented no evidence, whether by expert or lay testimony, that *any* of these hypothetical uses was "economically viable." *See* ECF No. 401, PageID # 9606; *see also Res. Invs.*, 85 Fed. Cl. at 490 (faulting the defendant's failure "to establish that its proposed alternatives were economically viable for plaintiffs, *i.e.*, that these uses would be profitable rather than result in a net loss").

The State's reference to special permits does not, as the State would have it, "destroy[] plaintiff's *Lucas* claim." *See* ECF No. 385-1, PageID # 9298. Bridge Aina Le'a's presentation of evidence concerning the economic nonviability of all statutorily permitted uses, in combination with the State's failure to present *any* evidence concerning the economic viability of potential "unusual" uses, adequately supports the jury's finding of a *Lucas* taking. *Cf. Res. Invs.*, 85 Fed. Cl. at 489 (rejecting the defendant's proffer of "nominal uses" and "uses in name" only, which "turn out to be mere attorney argument without support in the record," and noting that "this court is bound to 'discount proposed [economically viable] uses that do not meet a showing of reasonable probability that the land is both physically adaptable for such use *and* that there is a

demand for such use in the reasonably near future'" (alteration in original) (quoting *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153, 158 (1990))).

b. *Lucas* Claims Are Not Negated by the Existence Of Permissible Uses that Could Generate Revenue Only at a Net Loss.

According to the State, *Lucas* claims fail if there are any "permissible uses" that can "generate revenue and be productive," regardless of whether the uses are also "profitable." ECF No. 385-1, PageID # 9297, 9299. The State's proposal makes a nullity of the *Lucas* test.

According to the State, Bridge Aina Le'a's *Lucas* claim should fail in the wake of Bruce Plash's uncontradicted testimony that some permissible uses in the agricultural district, like wind farming, could "generate[] revenue" while losing money. *Id.* at PageID #s 9297-99. But uses resulting in losses are not automatically "economically *beneficial* uses." *See Sierra Med. Servs. Alliance*, 883 F.3d at 1226 (emphasis added) (quoting *Lucas*, 505 U.S. at 1019-20)); *see also*, *e.g.*, *Murr*, 137 S. Ct. at 1943 (describing *Lucas* takings as regulations that deprive "the owner of all economically *beneficial* use" (emphasis added)); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (similar); *Palazzolo*, 533 U.S. at 617 (similar); *Res. Invs.*, 85 Fed. Cl. at 490 (faulting the defendant for failing "to establish that its proposed

alternative[uses] . . . would be profitable rather than result in a net loss").

It is hard to imagine any zoning ordinance that would run afoul of the State's test. Consider an ordinance that banned the "construction of occupiable improvements" on land, *see Lucas*, 505 U.S. at 1008-09, and also prohibited living on the land. Even in this highly restricted situation, there might be some "permissible" uses that could "generate revenue." *See* ECF No. 385-1, PageID # 9297. The landowner, for example, might purchase rare Picasso paintings to lay on the land and sell viewing rights for one dollar. This "Picasso use" would generate ticket revenue, probably at an enormous net loss. Under the State's view of *Lucas*, the landowner would have no *Lucas* claim. This reading of *Lucas* would make a nullity of the very concept of a *Lucas* taking. Even if *Lucas* claims are rarely viable, they cannot be impossible to establish.

"[T]he term 'economically viable use' has yet to be defined with much precision." *Del Monte Dunes at Monterey, Ltd. V. City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996) (quoting *Outdoor Sys., Inc. v. City of Mesa*, 997 F.2d 604, 616 (1993)), *aff'd*, 526 U.S. 687 (1999). The Ninth Circuit, however, has consistently understood the term to imply positive market value. For example, the Ninth Circuit has adopted a test applied by the Second Circuit that asks "whether the property use allowed by the regulation is sufficiently desirable *to permit property owners to sell the property to someone for that use.*" *Id.* at 1433 (emphasis added) (quoting *Park Ave. Tower Assocs. v. City of New York*,

746 F.2d 135, 139 (2d Cir. 1984)). Put another way, the key question is whether a "competitive market exists" for the present uses. *Id.* at 1433; *see also Park Ave. Tower Assocs.*, 746 F.2d at 139. The Ninth Circuit's focus on positive market value strongly implies that it does not understand "economically beneficial use" to include a use resulting in an economic loss. Nothing the Supreme Court has said disrupts this basic understanding. *See City of Monterey v. Del Monte Dunes, Ltd.*, 535 U.S. 687 (1999).

In advancing its view of *Lucas* law, the State cites *Palazzolo v. Rhode Island*, 505 U.S. 606 (2001). In *Palazzolo*, the Supreme Court allowed dismissal of a *Lucas* takings claim involving Rhode Island's wetlands regulations on the ground that the regulations did not deprive Palazzolo of "all economically beneficial use" of his property. *Id.* at 630. The Court noted that Palazzolo retained the ability "to build a substantial residence on [his] 18-acre parcel," and accepted the lower court's finding that this "development value" was worth "$200,000." *Id.* at 630-31. The State attempts to recast *Palazzolo* as nullifying a *Lucas* claim on the sole ground that "houses could have been built on property." *See* ECF No. 385-1, PageID # 9298 (citing *Palazzolo*, 533 U.S. at 631). The State overlooks the positive economic value of the use – some $200,000 – that the Supreme Court expressly observed was more than "a token interest." *See Palazzolo*, 533 U.S. at 631.

Palazzolo in no way suggests that the ability to build a home, at whatever cost, will invariably defeat a *Lucas* claim. The State points out that Bridge Aina

Le'a may have been able to construct a number of residences on the 1,060-acre property despite the agricultural classification. *See* ECF No. 385-1, PageID # 9298. *But see* ECF No. 401, PageID #s 9610-11 (arguing otherwise). Even if that is so, other evidence (as the State concedes) indicated that the construction of such residences "would not be profitable." *See* ECF No. 385-1, PageID # 9298 (discussing the testimony of Bruce Plasch). Putting in power, water, and sewer lines would have been costly, and cutting through solid lava rock to lay a foundation would not have been easy. The jury could have reasonably believed that the cost of constructing houses would have been prohibitive. The State is not entitled to judgment as a matter of law on this issue.

c. *Lucas* Does Not Require that Property Be Left Entirely Without Value.

The State also claims that Bridge Aina Le'a's *Lucas* claim fails because the evidence demonstrated "that the property retained millions of dollars of worth in the agricultural district." ECF No. 385-1, PageID # 9300. The State's argument rests on another mischaracterization of takings law: a false belief that *Lucas* takings *demand* "a 'complete elimination of [economic] value.'" *See id.* (quoting *Tahoe-Sierra*, 535 U.S. at 330).

Economic worthlessness is undoubtedly sufficient to establish a *Lucas* taking. *See Lucas*, 505 U.S. at 1007, 1016 n.7. As the Supreme Court explained in

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002), "compensation is required when a regulation deprives an owner of '*all* economically beneficial uses' of his land." 535 U.S. at 330. "Under that rule, a statute that 'wholly eliminate[s] the value' of [a] fee simple title clearly qualifie[s] as a taking." *Id.* (quoting *Lucas*, 535 U.S. at 330).

But demonstrating economic worthlessness is not necessary to stake out a *Lucas* claim. *See* ECF No. 401, PageID # 9606. The Ninth Circuit has explained that "[f]ocusing the economically viable use inquiry solely on market value or on the fact that a landowner sold his property for more than he paid" is "inappropriate." *Del Monte Dunes at Monterey*, 95 F.3d at 1432-33. "Although the value of the subject property is relevant to the economically viable use inquiry, our focus is primarily on use, not value." *Id.*; *see also*, *e.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 780 (9th Cir. 2000) (explaining that positive economic value "provides strong evidence of the availability of 'economically beneficial or productive uses'"), *aff'd*, 535 U.S. 302 (2002).[1] "Indeed, several courts have found a taking even where the 'taken'

[1] A portion of the Ninth Circuit's *Tahoe-Sierra* decision was later overruled on other grounds by the en banc decision in *Gonzalez v. Arizona*, 677 F.3d 383 (9th Cir. 2012). That portion does not affect the analysis relied on here. *See id.* at 390 n.4 (overruling *Tahoe-Sierra*, 216 F.3d at 786-88, to the extent it suggested a position contrary to *Gonzalez* with respect to the doctrine of law of the case).

property retained significant value." *Del Monte Dunes at Monterey*, 95 F.3d at 1433 (citations omitted).

Economic value can be positive despite the absence of an economically beneficial use if there is no possibility for development absent a change in the law. That is why the Ninth Circuit maintains that the ability to sell property is an economically beneficial use only when "*the property use allowed by the regulation* is sufficiently desirable to permit property owners to sell the property to someone for *that* use"; if "no competitive market exists for the property *without the possibility of [a legal change permitting] development*, a taking may have occurred." *Del Monte Dunes at Monterey*, 95 F.3d at 1433 (emphases added) (quoting *Park Ave. Tower Assocs.*, 746 F.2d at 139). In this case, the jury could have reasonably concluded that any residual market value was not the result of some extant, permissible, and economically beneficial use, but derived instead from the chance that the land would be reclassified as urban. Thus, despite the land's positive market value in the agricultural district, the jury's finding of a *Lucas* taking is still supported by adequate evidence.

The Ninth Circuit's decision in *Horne v. U.S. Department of Agriculture*, 750 F.3d 1128 (9th Cir. 2014), *rev'd on other grounds, Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), is not to the contrary. *Horne* dealt with a complex regulatory scheme that required raisin producers to divert a portion of their yields to a raisin reserve maintained by the Department of Agriculture. *See id.* at 1132. Whenever the

agency sold these reserves, usually in noncompetitive markets, the producers received a pro rata share of the sales less administrative costs. *See id.* Sometimes that pro rata share was "significant; in other years it [was] zero." *Id.* In a portion of the *Horne* decision that was not reviewed by the Supreme Court, the Ninth Circuit concluded that the raisin regulations did not effectuate a *Lucas* taking.[2] The Ninth Circuit stated in a footnote that "[i]f the property [affected by a regulation] retains any residual value after the regulation's application, *Penn Central* applies." *Id.* at 2419 n.17. This statement came after the Ninth Circuit had already determined that the regulations did not cause the Hornes to "lose all economically valuable *use* of their [] property." *Id.* at 1140 (emphasis added). Consequently, *Horne* is not a case in which the Ninth Circuit relied solely on residual value to deny a *Lucas* taking claim – and the reasoning in *Del Monte Dunes* was binding on the *Horne* panel in any event.

d. Retrospectively Temporary Regulations Can Effectuate *Lucas* Takings.

According to the State, Bridge Aina Le'a's *Lucas* claim also fails because the Hawaii Supreme Court

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[2] The Supreme Court reversed the Ninth Circuit's determination that there was no taking on the ground that the Ninth Circuit had wrongly rejected the plaintiff's *Loretto* theory. *See Horne*, 135 S. Ct. at 2427-28. The Supreme Court did not consider the separate *Lucas* taking theory, which the Hornes had not relied on when petitioning for certiorari. *See id.*

nullified the Land Use Commission's reversion order. *See* ECF No. 385-1, PageID # 9303. This argument is based on the State's broad reading of the Supreme Court's decision in *Tahoe-Sierra*, which the State characterizes as holding that that any "temporary" government regulation cannot be challenged under *Lucas*. *See id.* (citing 535 U.S. at 302).

The State is ignoring an important distinction between facially temporary regulations and retrospectively temporary regulations. In *Tahoe-Sierra*, the Supreme Court held that regulations with built-in expiration dates generally cannot effectuate *Lucas* takings (also known as categorical or *per se* takings). *See* 535 U.S. at 320 (holding that a "temporary moratorium" on development, set to expire on the adoption of a land use plan, could not qualify for *Lucas* treatment). The Ninth Circuit has yet to decide whether, in a post-*Tahoe-Sierra* world, a *temporally unbounded* regulation that is amended, repealed, or annulled in court can effectuate a *Lucas* taking. But the Ninth Circuit's decision in *Tahoe-Sierra* (which was affirmed by the Supreme Court), as well as the Supreme Court's decisions in *First English, Lucas*, and *Tahoe-Sierra*, indicate that such "retrospectively temporary regulations" can still result in categorical takings.

The Supreme Court confronted a retrospectively temporary land-use regulation in *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987). The unusual posture of the case required the Court to assume that the regulation "took" plaintiff's property by denying him "all use" of it. *Id.* at 311-12.

The Court also assumed that the provision remained in effect until it was "ultimately invalidated by the courts." *Id.* at 310. Given these assumptions, *First English* held that the eventual "abandonment by the government [of the regulation, following its judicial invalidation, still] require[d] payment of compensation for the period of time during which [the] regulation[ ] den[ied] [the] landowner all use of his land." *Id.* at 318.

The analysis in *First English* was necessarily restricted to the issue of just compensation. But the Court still suggested that a retrospectively temporary regulation denying "all use" of property would effectuate a categorical taking. Analogizing the land-use regulation at issue to cases such as *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), in which "the government [ ] temporarily exercised its right to use private property," the Court declared that such "'[retrospectively] temporary' takings . . . are not different in kind from permanent takings."[3] *First English*, 482 U.S. at 318.

Five years later, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court once again confronted retrospectively temporary government action, this time expressly holding that

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[3] This court has inserted the bracketed word "retrospectively" in the quotation to match the parlance used in this Order. *First English* defined "'temporary' regulatory takings" as "regulatory takings which are ultimately invalidated by the courts." 482 U.S. at 310. It was not until *Tahoe-Sierra* that *retrospectively* temporary regulations were distinguished from *facially* temporary regulations.

such action effectuated a categorical taking. The challenged statute, at the time it was enacted, "flatly prohibited" the "construction of occupiable improvements" on a barrier island known as the Isle of Palms, where Lucas had property. *Id.* at 1008-09. The lower court determined that this statute rendered Lucas's parcel "valueless"; this finding went unchallenged in the Supreme Court. *Id.* at 1009. While the appeal was pending, the South Carolina legislature amended the statute to permit some future development on the Isle of Palms. The Supreme Court held that the statute still effectuated a categorical taking, explaining that such an amendment had no effect on whether there had been a temporary categorical taking during "the 1988-1990 period" when the original statute was in effect. *Id.* at 1010-14 (citing *First English*, 482 U.S. 304).[4]

The litigation in *Tahoe-Sierra*, unlike *First English* and *Lucas*, involved a facially temporary development moratorium on property near Lake Tahoe. The Ninth Circuit noted that there was "no evidence that owners or purchasers of property in the basin anticipated that the temporary moratorium would continue indefinitely." 216 F.3d at 782. The Ninth Circuit assumed *arguendo* that the temporary moratorium "prevented all development in the period during which it was in effect." *Id.* at 780 n.20. The court held that the moratorium nonetheless "did not effect a categorical

[4] The Supreme Court's citation to *First English* suggests that, had it been asked to consider the issue, it would have held that the retrospectively temporary regulation in that case effectuated a categorical taking.

taking" because it "did not deprive the plaintiffs of all of the [economic] value or use of their property." *Id.* at 782.

In reaching this conclusion, the Ninth Circuit emphasized the limited duration of the regulation, explaining that the "temporary moratorium did not deprive the plaintiffs of all `use' of their property" and had no effect on *future* uses whatsoever. *Id.* Moreover, the temporary moratorium "did not render the plaintiff's property valueless" because the "anticipat[ion]" that the moratorium would end ensured that the property retained "substantial present value" based on the value of the future uses. *Id.* at 781.

The Ninth Circuit then drew a distinction between facially and retrospectively temporary regulations:

> This "economic reality is precisely what differentiates a permanent ban on development, *even if subsequently invalidated*, from a temporary one. . . . [W]hen a permanent development ban (like the one at issue in *Lucas*) is enacted, the value of the affected land plummets, on account of the fact that the ban bars all future development of the property."

Id. at 781 n.26 (emphasis added).

On certiorari, the Supreme Court seemed to rely on the same distinction. The Court described *Lucas* as having held that a "permanent `obliteration of the value' of a fee simple estate constitutes a categorical taking." *Tahoe-Sierra*, 535 U.S. at 331. It noted that *Lucas* could "not answer the question whether a

regulation prohibiting any economic use of land *for a 32-month period* has the same legal effect." *Id.* at 331-32 (emphasis added).

The Court then articulated a professedly "narrow" holding that "a temporary regulation that, while in effect, denies a property owner all viable economic use of her property" does not always effectuate a *Lucas* taking. *Id.* at 307, 320. The Court again distinguished *Lucas*, noting that "[a]s the statute read at the time of trial, it effected a taking that 'was unconditional and permanent.'" *Id.* at 329-30 (citing *Lucas*, 505 U.S. at 1012).[5] But "[l]ogically, a fee simple estate cannot be rendered valueless by a *temporary* prohibition on economic use, because the property will recover value as soon as the prohibition" lapses. *Id.* at 332 (emphasis added). To permit recovery on a categorical theory would mean violating the parcel-as-a-whole-rule; i.e., the rule that a regulation should be analyzed based on its effect on the parcel "in its [temporal] entirety." *Id.* at 327.

The reasoning driving *Tahoe-Sierra* applies only to facially temporary regulations, not to regulations that are temporary only in retrospect. Setting aside

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[5] The Court focused on how the statute read "at the time of trial." *Tahoe-Sierra*, 535 U.S. at 329. *But see Res. Invs.*, 85 Fed. Cl. at 484 (holding in the context of a challenge to a permit denial that was later invalidated that whether there was "a categorical taking of the parcel as a whole, a partial taking [under *Penn Central*], or no taking at all depends *only* on the effect of that particular denial on plaintiffs' property interests *at the time of the denial*" (second emphasis added)).

regulations with outlandish time horizons, it is impossible for a facially temporary regulation to destroy all economically beneficial use of property, as future uses will retain some present value. *See id.* at 332; *Tahoe-Sierra*, 216 F.3d at 728. Thus, *Tahoe-Sierra*'s "narrow" holding makes sense. The situation changes, however, when a regulation is facially unbounded. Because such a regulation will affect the permissibility of present *and* future uses, it is possible that the landowner has retained *no* permissible economically beneficial uses, and a categorical takings claim may be viable. *See Tahoe-Sierra*, 216 F.3d at 781 n.26; *see also Res. Invs.*, 85 Fed. Cl. at 480-84.

The Supreme Court has recognized that a later amendment to a regulation or a judicial invalidation cannot erase any taking "for the period of time during which regulations deny a landowner all use of his land." *First English*, 482 U.S. at 318; *see also Lucas*, 505 U.S. at 1010-14; *cf. Tahoe-Sierra*, 535 U.S. at 328 ("[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (quoting *First English*, 482 U.S. at 321)).

Similarly, only facially temporary regulations can trigger violations of the parcel-as-a-whole rule. As the Supreme Court explained in *Tahoe-Sierra*, a regulation with a 32-month duration can effectuate a categorical taking only if a court were to "effectively sever a 32-month segment from the remainder [of the fee],

and then ask whether that segment has been taken in its entirety." 535 U.S. at 331. Such "conceptual severance," the Supreme Court observed, would violate the parcel-as-a-whole rule. *Id.* By contrast, an unbounded regulation "extinguish[es] present *and future* use interests." *Res. Invs.*, 85 Fed. Cl. at 481; *see also Tahoe-Sierra*, 216 F.3d at 781 n.26. Accordingly, one need not slice the parcel into temporal segments to conclude that a categorical taking took place while the regulation was in effect.

In sum, *Tahoe-Sierra* is properly understood as creating an exception to the rule outlined in *First English* and *Lucas*. The amendment, repeal, or nullification of government action cannot nullify the duty of the government to provide compensation "for the period of time during which regulations deny a landowner all use of his land." *See First English*, 482 U.S. at 318. But since facially temporary regulations cannot, by definition, destroy the economic viability of future uses, they cannot be *Lucas* takings.

The only other federal court to have articulated a definitive position on this issue reached a similar conclusion.[6] In *Resource Investments, Inc. v. United States*,

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[6] The Federal Circuit has addressed this issue in dicta, "refrain[ing] from ruling out the rare possibility that a temporary categorical taking could exist." *Sartori v. United* States, 67 Fed. Cl. 263, 275 (2005); *see also Seiber v. United States*, 364 F.3d 1356, 1368 (Fed. Cir. 2004) ("[O]ur case law suggests that a temporary categorical taking may be possible. In *Boise Cascade*[,] we explained that the Supreme Court may have only 'rejected [the] application of the per se rule articulated in *Lucas* to temporary development moratoria.'" (third alteration in original) (internal

85 Fed. Cl. 447 (2009), the plaintiffs argued that a permit denial constituted a categorical taking under *Lucas*, even though the denial had been overturned in court. *See id.* at 484. The defendants, like the State in this case, replied that "there is no such thing as a temporary categorical taking." *Id.* at 468. The court in *Resource Investments* sided with the plaintiffs. It drew a distinction between facially temporary regulations and retrospectively temporary regulations, holding that the latter can still undergird a *Lucas* claim:

> [In *Tahoe-Sierra*, the regulations at issue] were expressly temporary when enacted. . . . This, as the Supreme Court explained, was not a taking of the parcel of the whole because the landowners' future interests, though diminished in value, always remained intact. Thus, at the moment the moratorium took effect, it effected a taking of property values for a finite and limited segment of time rather than permanently and indefinitely.
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> In contract, when [the statute at issue] took effect in *Lucas*, it prohibited any and all further development of the affected property, extinguishing the present *and future* use interests rather than merely diminishing their value. Although the South Carolina Legislature might have abrogated the [statute] by subsequent statute or amended it, . . . the [statute] was not temporary at the time it was enacted. . . . [Thus, the statute] would and

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citations omitted) (quoting *Boise Cascade v. United States*, 296 F.3d 1339, 1350 (Fed. Cir. 2002))).

> could only be temporary *in retrospect*, as it was permanent by its own text.

Id. at 480-81 (internal citations omitted) (emphases in original). Because "subsequent events cannot change what property interests the taking took when it accrued[,]" the court held that "applying *Lucas* to plaintiffs' [retrospectively] temporary regulatory takings claim would [not] violate *Tahoe-Sierra*." *Id.* at 469, 484.

The reversion order at issue here, like the statute in *Lucas* and the permit denial in *Resource Investments*, "was permanent by its own text." *See Res. Invs.*, 85 Fed. Cl. at 481. It became "temporary in retrospect" only after the Hawaii Supreme Court intervened. *See id.* (emphasis omitted); *see also* ECF No. 401, PageID # 9615. Bridge Aina Le'a is not precluded from litigating its *Lucas* claim solely because the reversion order was overturned in court.

e. The Court Properly Instructed the Jury that the Denominator Was the 1,060-Acre Parcel.

The State's final argument concerning Bridge Aina Le'a's *Lucas* claim is that this court "erred in instructing the jury" that it should examine the impact of the reversion order on the reclassified 1,060-acre tract, rather than assessing whether the "entire 3,000 acre tract" owned by Bridge Aina Le'a was deprived of any economically viable use. ECF No. 385-1, PageID # 9301. This argument requires some unpacking, but is similarly without merit.

The State's argument implicates what is known as the "denominator problem" in takings law, which asks what "the proper unit of property [is] against which to assess the effect of the challenged governmental action." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1938 (2017). In *Murr*, the Supreme Court articulated a number of factors that a court should weigh in setting the proper denominator.[7] *See id.* at 1946-49. After considering these factors, this court instructed the jury, over the State's objection, as follows:

> In determining whether the Land Use Commission's action amounted to a taking, you should restrict your analysis to the parcel of land that was the subject of the Land Use Commission's reversion order (approximately 1060 acres). You should not examine what, if any, impact the Land Use Commission's action had on any other parcel of land.

ECF No. 372, PageID # 7454.

The above instruction was this court's modification, over the State's objection, of the following instruction submitted by the State:

> When performing your taking analyses, you must first determine "whether reasonable

[7] The denominator issue was not expressly discussed in the State's earlier motion for judgment as a matter of law, but the State presents the issue as subsumed in the portion of its motion challenging the State's *Lucas* claim. The court's recollection is that the denominator issue was first actually discussed when jury instructions were settled. The State had included in its proposed instructions its suggested denominator instruction.

> expectations about property ownership would lead the plaintiff to anticipate that its land should be treated as one parcel, or, instead, as separate tracts." To make this determination, you should consider three factors.
>
> First, you must "give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law. The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property."
>
> Second, you "must look to the physical characteristics of the" plaintiff's []property. These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment." You may consider whether "the property is located in an area that is subject to, or likely to become subject to, environmental or other regulations."
>
> Third, you "should assess the value of the property under the challenged regulation, with special attention to the effect of the burdended land on the value of other holdings. Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty."

ECF No. 323, PageID #s 6786-87 (quoting *Murr*, 137 S. Ct. at 1945-46.)

The State believes that the court erred by either 1) failing to submit the denominator question and the *Murr* factors to the jury, or 2) by not holding that the denominator as a matter of law was the "entire 3,000 acre" parcel owned by Bridge Aina Le'a, approximately 2,000 acres of which is classified as agricultural land. *See* ECF No. 385-1, PageID #s 9302, 9314-15. The State asks the court "to rectify [these] error[s]" by either declaring that the entire 3,000 acres is the proper denominator – which the State believes would negate Bridge Aina Le'a's *Lucas* claim – or by ordering a new trial and submitting the *Murr* factors to the jury. *Id.*

The court is not persuaded that it erred. The court resolved the denominator question itself, rather than submitting it to the jury because the "relevant parcel determination is a question of law based on underlying facts." *See Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1292 (Fed. Cir. 2013) (citing *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1380 (Fed. Cir. 2000)). In *Murr*, the Supreme Court described the denominator question as an issue for courts to resolve, and indeed resolved the question itself. *See* 137 S. Ct. at 1950. *Murr* further analogized the denominator problem to the issue of defining "property rights under the Takings Clause." *Id.* at 1944-45. That is another "question of law for the judge" that is based on underlying facts. *Phillips v. Marion Cty. Sherriff's Office*, 494 Fed. App'x 797, 799 (9th Cir. 2012); *see also Sierra Med. Servs. Alliance v. Kent*, 883 F.3d at 1223-25 (holding in a takings case and as a matter of law that an interest in reimbursement is a Fifth Amendment property

interest). This court did not err in declining to submit the ultimate *Murr* balance to the jury. *See* ECF No. 385-1, PageID # 9315.

The State also complains that this court resolved the denominator question "without any motion by plaintiff." ECF No. 385-1, PageID # 9314. When a case implicates a denominator problem, the timing of its resolution will sometimes depend on the nature of any factual disputes in the case. In some cases, it will be possible for a court to resolve denominator issues before evidence is presented at trial. *See*, *e.g.*, *Kaiser Dev. Co. v. City & Cty. of Honolulu*, 649 F. Supp. 926, 948 (D. Haw. 1986) (holding on summary judgment that in "this case, Queen's Beach is to be considered as a separate parcel for the purposes of determining whether there has been a taking"), *aff'd*, 898 F.2d 112 (9th Cir. 1990) (affirming for the "reasons stated" in the district court's opinion). But because the *Murr* balance depends on underlying facts, it is not always possible to perform that balancing before trial. *Cf. Am. Sav. & Loan Ass'n v. Marin Cty.*, 653 F.2d 364, 367 (9th Cir. 1981) (reversing the district court's denominator decision because there had been no resolution of the underlying "factual issue" of whether the two parcels would have been "treated separately" had plaintiff "submit[ted] a development plan").

In this case, the parties did not raise the denominator issue before trial, and the question came before the court when the court addressed the State's proposed jury instruction on the issue. *See* ECF No. 323, PageID # 6786. By that time, the court had heard

evidence presented at trial. Based on that evidence, the court instructed the jury that the proper denominator was the 1,060-acre parcel. *See* ECF No. 372, PageID # 7454. In so doing, the court followed the procedure outlined by the Seventh Circuit in *United States v. 105.40 Acres of Land, More or Less, in Porter County, State of Indiana*, 471 F.2d 207 (1972), under which "the district judge should – upon proper consideration of evidence – decide the factual question whether the [ ] parcels . . . were functionally separate parcels . . . [and] should then instruct the jury . . . consistent with [her] preliminary factual determination." *Id.* at 212.

Besides questioning the court's decision to select the denominator itself, the State also takes issue with what denominator the court selected. *See* ECF No. 385-1, PageID # 9301 ("Under *Murr*, the denominator of the property is the entire 3,000 acre project area, not merely the 1,060 acre urban portion"). The court is not persuaded that its selection was in error.

In setting the denominator, a court must ultimately decide "whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts." *Murr*, 137 S. Ct. at 1945. "The inquiry is objective, and the reasonable expectations at issue derive from background customs and the whole of our legal tradition." *Id.* The plaintiff bears the burden of showing that parcels "have been, or would be, treated separately[.]" *See Am. Sav. & Loan Ass'n*, 653 F.2d at 372.

Three factors affect the appropriate denominator. "First, courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state law." *Murr*, 137 S. Ct. at 1945. In so doing, courts should look to "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution" and further weigh whether the State's treatment of the land "accord[s] with other indicia of reasonable expectations about property." *Id.* at 1946-47. Whether the land was treated separately and how any boundary lines were drawn prior to the "landowner's acquisition . . . [are among] the objective factors that most landowners would reasonably consider in forming fair expectations about their property." *Id.* at 1946. If the State law differentiates between parcels, that weighs in favor of narrowing the denominator; if the State treats them as an undifferentiated whole, that weighs in favor of expanding the denominator. *See id.* at 1948.

"Second, courts must look to the physical characteristics of the landowner's property." *Id.* at 1946. "These include the physical relationship of any distinguishable tracts, the parcel's topography, and the surrounding human and ecological environment." *Id.* The more physical similarity, the more a landowner might reasonably "anticipate that his holdings would be treated as one parcel" rather than as separate parcels. *Id.* at 1946, 1948-49.

"Third, courts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings." *Id.* at 1946. If "the market value of the [surrounding] properties may well increase . . . [due to] development restraints," that "may counsel in favor of treatment as a single parcel." *Id.* In other words, a court should ask if there is "a special relationship between the holdings" such that "the regulated lands add value to the remaining property" by, for example, "increasing privacy, expanding recreational space, or preserving surrounding natural beauty." *Id.*

These factors, especially the first requirement that a court give "substantial weight to the treatment of land . . . under state law," *id.* at 1946, coincide with how the Ninth Circuit has historically resolved denominator issues. One touchstone in Ninth Circuit precedent has been that a denominator should be split if 1) state law "adopt[s] different zoning designations for each parcel" and 2) the parcels are "treated separately" when "development plans are submitted and considered." *Am. Sav. & Loan Ass'n*, 653 F.2d at 370-71. *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981), drew this rule-of-thumb from the Supreme Court's 1928 decision in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), in which:

> a landowner owned a tract of 140,000 square feet. Of that, 29,000 square feet were zoned residential and the rest were unrestricted. The landowner contended the residentially zoned land had been taken. In judging the

> validity of the ordinance as a police power measure, the court considered the smaller tract separately from the larger tract.

Am. Sav. & Loan Ass'n, 653 F.2d at 370 (discussing *Nectow*).

The Ninth Circuit applied the *American Savings* rule in *Kaiser Development Co. v. City & Cty. of Honolulu*, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990).[8] Recognizing that "differential zoning tend[s] to require [] separate evaluation for takings purposes," the Ninth Circuit agreed with the district court's conclusion that, "under the facts of this case, Queen's Beach is to be considered as a separate parcel for the purposes of determining whether there has been a taking." 649 F. Supp. at 947 n.30, 948 (citing *Am. Sav. & Loan Ass'n*, 653 F.2d at 371). The district court explained:

> Queen's Beach is non-contiguous since it is separated from the rest of Hawaii Kai by a road; Queen's Beach has not been developed by Bishop as part of the residential community of Hawaii Kai; Bishop and Kaiser have always considered Queen's Beach a separate area on which they seek to build a resort. *Most importantly, the City has treated Queen's Beach separately for zoning and planning purposes.* The City has zoned Queen's Beach for preservation uses, while most of the rest of

[8] The citations refer to the district court's opinion because the Ninth Circuit affirmed "for the reasons stated by Judge King." *See Kaiser Dev. Co.*, 898 F.3d at 113.

> Hawaii Kai is zoned residential, and Queen's Beach has consistently had a different land use designation from the rest of Hawaii Kai. Under the General Plans of 1960 and 1964, under the DLUMs of 1964 and 1966, under the 1973 revised City Charter, and under the 1983 Development Plan, for example, Queen's Beach has been designated either commercial/resort or park/preservation, while the rest of Hawaii Kai has been designated primarily for residential use. In summary, under the facts of this case, Queen's Beach is to be considered a separate parcel. . . .

Id. at 947-48 (emphasis added).

Under *Murr, American Savings*, and *Kaiser Development*, the appropriate denominator is the 1,060 acres classified as urban, not also the 2,000 or so acres that was classified as agricultural. The State, for periods relevant here, had adopted "different zoning designations for each parcel." *See Am. Sav. & Loan Ass'n*, 653 F.2d at 370-71. The parties agree that the 1,060-acre parcel was "the only part classified for Urban use when Bridge [Aina Le'a] bought the [3,000-acre] Property." ECF No. 401, PageID # 9613; ECF No. 385-1, PageID # 9302 ("[O]nly [the] 1,060 acres of land [w]as urban"). The Land Use Commission's sole attempt to shift its classification was nullified by the Hawaii Supreme Court. *See DW Aina Lea Dev., LLC v. Bridge Aina Lea, LLC.*, 134 Haw. 187, 213-216 (2014). Thus, the 1,060-acre parcel has been deemed separable from the rest of the acreage. *See Kaiser Dev. Co.*, 659 F. Supp. at 948.

The two parcels have also been "treated separately" when "development plans are submitted and considered." *See Am. Sav. & Loan Ass'n*, 653 F.2d at 370-71. Bridge Aina Le'a's development plans, its filings with the Land Use Commission, and the Land Use Commission's decisions and orders consistently distinguished between the two parcels and evinced a plan to develop the 1,060-acre parcel separately. *See* ECF No. 382-11, PageID # 8063 (discussing Bridge Aina Le'a's development plan pursuant to which "[t]he areas outside of the State Land Use 'Urban' District, which are designated as 'Agricultural' by the State Land Use Commission, will be developed as future phases and therefore remain, for the most part, in their current zoning and land use configuration" while the development in the urban district proceeds); *see also*, *e.g.*, ECF No. 382-1, PageID #s 7740, 7742; ECF No. 382-3, PageID # 7773; ECF No. 382-6, PageID #s 7891-95; ECF No. 382-11, PageID #s 8058-59. Based on the evidence presented at trial, it is clear that the urban lands were treated "separately" for "planning purposes." *See Kaiser Dev. Co.*, 649 F. Supp. at 948.

The State's submission of "[n]ewly discovered evidence" in the form of an Environmental Impact Statement Preparation Notice ("EISPN") submitted by Bridge Aina Le'a to the County of Hawaii Planning Department only serves to confirm these conclusions. *See* ECF No. 385-1, PageID # 9315. The EISPN again distinguishes between the "approximately 1,933 acres of the Project Area designated Agriculture" and the "1,060 acres . . . in the Urban District." *See* ECF No.

385-2, PageID #s 9326, 9330. It describes development plans that will "focus first on the Urban lands, and later on the area [] in the Agricultural district." *See* ECF No. 385-2, PageID # 9329 ("[It is hoped] that development of the Urban area can proceed subject to County approvals. The EIS can also serve as a source of information for a petition to the State Land to reclassify land owned by Bridge in the Agricultural District to Rural, after which a petition to the County may request zoning changes for that land.").

The State emphasizes that the EISPN says that there must be an *Environmental Impact Statement* that "cover[s] the entire 3,000 acres." ECF No. 385-1, PageID # 9315 (citing ECF No. 385-2, PageID # 9326). However, because the State differentiated the 1,060-acre parcel from a *zoning* and *developmental* perspective, the Ninth Circuit's decision in *American Savings* indicates that it "*must* be analyzed as a separate parcel." *See* 653 F.2d at 372 (emphasis added); *cf. also Murr*, 137 S. Ct. at 1945 ("[C]ourts should give *substantial weight* to the treatment of the land . . . under state law." (emphasis added)).

An examination of the additional *Murr* factors confirms this conclusion. The third *Murr* factor asks whether the challenged regulation would "add value to the [adjoining] property." *Murr*, 137 S. Ct. at 1946. The State points to no evidence in the record that it would. This is not a case in which maintaining "development restraints" on the 1,060-acre parcel will protect "unobstructed skyline views" on the adjoining 2,000 acres. *See id.* at 1946, 1949. Because the adjoining acreage is

largely undeveloped and classified as agricultural land, *see* ECF No. 385-2, PageID # 9329, its market value likely either *decreased* or *remained unchanged* given the reversion order. Undeveloped property is presumably worth more (in economic terms) when it is next to developed property than when it is next to undeveloped property. Individuals in a development may value neighboring undeveloped land as "recreational space." *See Murr*, 137 S. Ct. at 1946; *cf.* ECF No. 382-11, PageID #s 8059 (discussing Bridge Aina Le'a's plan to install a "residential community" on the urban acreage and to install "golf courses" on the "agricultural lots"). The third factor, like the first factor, weighs in favor of splitting the denominator – or is at the very least neutral.

The only *Murr* factor that may weigh in favor of the State is the second factor, which looks at the physical characteristics of the landowner's property. As the State points out, the "entire 3,000 acres are contiguous and constitute one area of land." ECF No. 385-1, PageID # 9302. The State also notes that there "is no difference in the geographic or topological characteristics between the urban and agricultural portions." *Id.* Bridge Aina Le'a did not dispute these characterizations of the evidence in the record in its Memorandum in Opposition. *See* ECF No. ECF No. 401, PageID #s 9612-13. But contiguity and topological similarity do not, without more, justify expanding the denominator. *Murr, American Savings*, and *Kaiser Development* emphasize differential zoning and planning treatment. This case remains one in which "reasonable

expectations about property ownership would lead a landowner to anticipate that his holdings would be treated . . . as separate tracts." *Murr*, 137 S. Ct. at 1945; *see also Lost Tree Vill. Corp.*, 707 F.3d at 1293-95 ("[E]ven when contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the original purchase where the owner develops distinct parcels at different times and treats the parcel as distinct economic units.").

At points, the State's Renewed Motion attempts to recast *Murr*'s analysis into an inquiry about what "the project area" is. *See*, *e.g.*, ECF No. 385-1, PageID # 9302 (arguing that the correct denominator is the "3,000 acres" because Bridge Aina Le'a "purchased the entire 3,000 acres" and its "plans to develop the area viewed the project area as consisting of 3,000 acres"). But the lodestar of denominator analysis is not what the "project area" is; it is whether a reasonable landowner would anticipate that his holdings would be *treated separately. See Murr*, 137 S. Ct. at 1945. A reasonable landowner in Bridge Aina Le'a's position certainly would.

The court did not err in instructing the jury that the 1,060-acre parcel was the proper denominator. The jury's finding of a *Lucas* taking is supported by adequate evidence as a result.[9]

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[9] The State also argues that the Ninth Circuit's decision in *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445 (2018), is "instructive" vis-à-vis Bridge Aina Le'a's *Lucas* claim. *See* ECF No. 392, PageID # 9413. The court cannot discern how

4. Bridge Aina Le‘a’s Finding of a *Penn Central* Taking Is Supported by Adequate Evidence.

The jury’s verdict is independently supported by its finding that a taking occurred under a *Penn Central* analysis. *See Palazzolo*, 533 U.S. at 632-33 (discussing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978)); ECF No. 373. The court instructed the jury concerning *Penn Central* as follows:

> To determine whether the Land Use Commission’s action was a taking under Taking Analysis No. 2, you should consider three factors:
>
> (1) The economic impact of the regulation on Bridge Aina Le‘a,
>
> (2) The extent to which the regulation has interfered with distinct investment-backed expectations, and
>
> (3) The character of the governmental action.
>
> You must weigh these three factors to decide whether the Land Use Commission’s action went too far in its impact on Bridge Aina Le‘a’s property. If, after considering these factors, you find by a preponderance of the evidence that the action went too far, you should resolve Taking Analysis No. 2 in favor of Bridge Aina Le‘a. If, on the other hand, you do

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that might be so. *Colony Cove* concerned a takings claim under *Penn Central* and does not appear to have any bearing on the validity of the jury’s *Lucas* verdict. *See* 888 F.3d at 450-55.

> not find by a preponderance of the evidence that the action went too far, you should resolve Taking Analysis No. 2 in favor of the Land Use Commission.
>
> These are factors, not a set formula. No factor by itself is necessarily determinative or conclusive. Primary among these factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.

ECF No. 372, PageID # 7459. This instruction was given with the agreement of the parties.

Contrary to the State's assertions, *see* ECF No. 385-1, PageID #s 9304-13, the jury reasonably concluded that all three *Penn Central* factors weigh in favor of Bridge Aina Le'a.

a. Economic Impact.

The first *Penn Central* factor concerns the "economic impact of the regulation on the claimant." *Penn Central*, 438 U.S. at 124. The court instructed the jury:

> you must consider the economic impact of the Land Use Commission's action in reverting the property on Bridge Aina Le'a.
>
> Diminution in property value, standing alone, cannot establish a taking under Taking Analysis No. 2.
>
> The economic impact of the regulation on Bridge Aina Le'a may be measured by the

> change, if any, in the fair market value to Bridge Aina Le‘a’s interest in the property caused by the regulatory imposition.
>
> Bridge Aina Le‘a must show that the Land Use Commission’s action caused the economic impact, not Bridge Aina Le‘a itself, a third party, or independent circumstances.

ECF No. 372, PageID # 7461. This instruction was given with the agreement of the parties.

The State claims that the evidence failed to show a "legally sufficient economic impact." ECF No. 385-1, PageID # 9306. According to the State, "there is no evidence that the [Land Use Commission's] action affected Bridge in any way." *Id.* The State is mistaken on multiple levels.

First, the State appears to rely, at least in part, on its prior assertion that Bridge Aina Le‘a "sold the property" and retained only a token interest in the land. ECF No. 385-1, PageID # 9293. As the court has already explained, the jury could have reasonably concluded that Bridge Aina Le‘a's property interests in the land were substantial and that its interests were adversely affected by the reversion. Even if Bridge Aina Le‘a had sold its right to develop the property, the reversion order could have adversely affected the value of other rights Bridge Aina Le‘a retained.

Second, as the State concedes, testimony at trial indicated that the 1,060-acre property was "worth $40 million" if "in the urban district" and "$6.63 million" if "in the agricultural district." *See* ECF No. 392, PageID

9412; ECF No. 401, PageID # 9617. That represents an 83.5% diminution in value, and, as noted, there is no reason to think that this diminution only concerned alienated property interests. After hearing this evidence, the jury could have reasonably determined that the economic impact of the regulation weighed in favor of a taking under *Penn Central*.[10]

The Ninth Circuit's recent decision in *Colony Cove Properties, LLC v. City of Carson*, 888 F.3d 445 (2018), is not to the contrary. According to the State, *Colony Cove* held that an "83.5% diminution in value" can never "be a taking." ECF No. 392, PageID # 9412. *Colony Cove* did not so hold.

In discussing the economic impact prong of *Penn Central, Colony Cove* noted that a diminution in value "ranging from 75% to 92.5% does not constitute a

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[10] Because the evidence concerning the diminution of the property value suffices to support the jury's verdict, the court need not address the legal import of additional evidence presented concerning contractual, property tax, and insurance payments. *See* ECF No. 392, PageID #s 9412-13; ECF No. 401, PageID #s 9617-18. Such evidence may not be relevant in divining the economic impact of a regulation. *See Colony Cove Props.*, 888 F.3d at 451 (stating only that "economic impact is determined by comparing the total value of the affected property"). The State asserts in a footnote that DW Aina Le'a's "[in]ability to perform [] contracts with Bridge" is not relevant to takings analysis. ECF No. 385-1, PageID # 9306 n.1. The State does not cite law indicating that a contractual default is neither an "economic impact" nor evidence of disruption to "investment-backed expectations." Nor did the State ask that the court's jury instructions concerning *Penn Central*'s first and second prongs tell the jury not to consider such evidence. *See* ECF No. 372, PageID #s 7460-61.

taking" without evidence concerning the additional *Penn Central* factors. 888 F.3d at 451. *Colony Cove* further observed that "[t]he Federal Circuit has noted that it is 'aware of no case in which a court has found a taking where diminution in value was less than 50%.'" *Id.* (quoting *CCA Assocs. V. United States*, 667 F.3d 1239, 1246 (Fed. Cir. 2011)). Thus, *Colony Cove* indicates only that a diminution in property value of less than 50% will weigh heavily against a taking, and that a diminution in value ranging between 75% and 92.5% will not necessarily establish a taking. *See id.*; *see also*, *e.g.*, *Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1189 (9th Cir. 2012) (explaining that "Supreme Court cases uniformly reject the proposition that diminution in property value, standing alone, can establish a taking," and further explaining that "[a]lthough there is no precise minimum threshold, [evidence of an economic loss of less than 15%] is of very little persuasive value in the context of a federal takings challenge" (internal quotation marks and citations omitted)). The case does not suggest that an 83.5% diminution in value automatically makes the first factor weigh against a takings claimant.

The State's remaining arguments are equally unpersuasive. The State points to a rebound in the value of the land after the reversion order, and to the profit BAL eventually turned relative to its initial investment. *See* ECF No. 385-1, PageID #s 9308-09. These circumstances do not negate Bridge Aina Le'a's temporary takings claim. While relevant to a just compensation calculation, they do not speak to the question of

takings liability during the period in which the reversion order was in effect. *See*, *e.g.*, *First English*, 482 U.S. at 310; *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 183 n.6 (1985); *Herrington v. Cty. of Sonoma*, 834 F.2d 1488, 1504-06 (9th Cir. 1987); *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 271 (11th Cir. 1987); *cf. Tahoe-Sierra*, 535 U.S. at 328 ("[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." (emphasis omitted) (quoting *First English*, 482 U.S. at 321)).

Nor does it matter whether development on the property was or was not proceeding apace. *Cf. Tahoe-Sierra*, 216 F.3d at 783 n.33 ("[I]n most regulatory takings cases, there is no doubt whatsoever about whether the government's action was the cause of the alleged taking."). The State is mistaken in asserting that the reversion could not have had an adverse economic impact on the property because development could not "proceed for a variety of [independent] reasons." *See* ECF No. 385-1, PageID # 9309. Property can retain value as a potential site for future development, regardless of whether antecedent obligations – like the need to "obtain final subdivision approval" and to prepare an EIS – must be satisfied. *See id.* And a facially permanent zoning reclassification can undoubtedly harm such future development value by forbidding any such development outright.

The State's argument may indeed relate to whether the reversion order harmed Bridge Aina Le'a in a specific manner, i.e., by causing a delay in the opening of the proposed residential community. *Cf.* ECF No. 385-1, PageID # 9310 (arguing that "Bridge's claim to economic impact depends . . . on the magical thinking that if only the reversion had not occurred somehow the development would have succeeded"). But that was not the adverse economic impact before the jury. *See Colony Cove Props.*, 888 F.3d at 451 ("[E]conomic impact is determined by comparing the total value of the affected property before and after the government action."). The evidence at trial focused on the effect of the reversion on the value of the property, not on whether the reversion forestalled the receipt of revenue from future housing sales. The evidence established that the reversion caused the decrease in *value.*

Finally, the State's reply adds that "the economic-impact factor, if not satisfied, is case dispositive." ECF No. 403, PageID #9663. As discussed above, the jury could have reasonably found that the economic impact factor *was* satisfied, but the court further notes that the State's characterization of the *Penn Central* factors is incorrect. As stated in the court's *Penn Central* jury instructions, "[n]o factor by itself is necessarily determinative or conclusive." ECF No. 372, PageID # 7459. Further, the cases cited by the State make clear that *Penn Central* did not establish a "set formula" such that any one factor is dispositive. *See*, *e.g.*, *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1121 (9th Cir. 2010).

b. Distinct Investment-Backed Expectations.

The second *Penn Central* factor goes to "the extent to which the regulation has interfered with distinct investment-backed expectations." *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013). The court instructed the jury:

> The primary factor is the extent to which the regulation has interfered with Bridge Aina Le'a's reasonable distinct investment-backed expectations.
>
> In deciding whether (and to what extent) this factor weighs in favor of Bridge Aina Le'a or the Land Use Commission, you should ask: (1) Did Bridge Aina Le'a have an expectation that the government's action interfered with? (2) If so, was that expectation settled? (3) Was that expectation reasonable? (4) Was that expectation investment-backed? Distinct investment-backed expectations are measured at the time the claimant acquires the property.
>
> "Distinct investment-backed expectations" implies reasonable probability. Whether a particular expectation is reasonable is judged from the point of view of a reasonable investor in Bridge Aina Le'a's position at the time of its investment.
>
> A distinct investment-backed expectation must be probable enough to materially affect the price or value of the property.

ECF No. 372, PageID # 7461. This instruction was given with the agreement of the parties.

The State asserts that this factor does not support a verdict in Bridge Aina Le'a's favor. *See* ECF No. 385-1, PageID # 9305. The State relies on the Ninth Circuit's 2010 *Guggenheim* decision, which held:

> "Distinct investment-backed expectations" implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes. . . . Speculative possibilities of windfalls do not amount to "distinct investment-backed expectations," unless they are shown to be probable enough materially to affect the price.

638 F.3d at 1120.

In *Guggenheim*, the Ninth Circuit determined that the plaintiffs' expectations were not "reasonably probable" because they "bought a trailer park burdened by rent control, and had no concrete reason to believe that they would get something much more valuable, because of hoped-for legal changes, than what they had." *Id.* at 1120-21; *see also*, *e.g.*, *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 987 (9th Cir. 2002) ("Esplanade . . . took the risk, when it purchased this large tract of tidelands in 1991 for only $40,000, that, despite extensive federal, state, and local regulations restricting shoreline development, it could nonetheless overcome those numerous hurdles to complete its project and realize a substantial return on

its limited initial investment." (internal quotation markets omitted)).

There is ample evidence concerning Bridge Aina Le'a's investment-backed expectations for the property. *See* ECF No. 401, PageID #s 9620-21. But according to the State, Bridge Aina Le'a's investment-backed expectations were not reasonable, as they were allegedly grounded on a "starry eyed hope" of a change in the law. *See* ECF No. 385-1, PageID #s 9305-06. The State points to Bridge Aina Le'a's purchase of property "with an affordable-housing condition attached that [Bridge Aina Le'a] admitted would render the development of the property economically unviable." *Id.* The State then argues that at the time of the acquisition the likelihood that this condition would be amended was not a "reasonable probability" but rather a "mere 'starry eyed hope.'" *Id.* at PageID #s 9605-06 (quoting *Guggenheim*, 638 F.3d at 1120).

The State has failed to carry its burden of showing that the evidence requires a conclusion contrary to the jury's verdict. *See Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002); *Enovsys LLC v. AT&T Mobility LLC*, No. CV 11-5210 SS, 2015 WL 11089498, at *4 n.5 (C.D. Cal. Nov. 16, 2015). The record itself, moreover, belies any contention that Bridge Aina Le'a lacked a "reasonable probability" that the law would be amended. There was evidence that similar amendments had been obtained by other developers in six other instances. *See* ECF No. 382-12, PageID #s 8125-26; ECF No. 401, PageID # 9619 (referencing testimony by Baldwin and Paoa). Bridge Aina Le'a paid $5,000,000

for the land despite the affordable-housing condition, a sum that suggests an expectation that the "economically unviable" land-use condition would be amended. *See* ECF No. 382, PageID # 8464; *Guggenheim*, 638 F.3d at 1120 (explaining that conditions are reasonably probable when they are "probable enough materially to affect the price"); *cf. Esplanade Props.*, 307 F.3d at 987 (reasoning that an insubstantial "$40,000" purchase price indicated that the plaintiff lacked a reasonable investment-backed expectation).

Bridge Aina Le'a presented evidence that it anticipated receiving a 20% return on its initial investment, which is similarly inconsistent with the presence of an "economically unviable" land-use condition unlikely to be amended. *See* ECF No. 401, PageID # 9619 (describing testimony from Baldwin). And, of course, the condition was, in fact, amended. *See* ECF No. 401, PageID # 9619.

A reasonable jury could have concluded that the second *Penn Central* factor weighed in favor of Bridge Aina Le'a.

c. The Character of the Governmental Action.

The jury's *Penn Central* verdict can likely be sustained solely based on the state of the record as it concerns the first two *Penn Central* factors. *See Laurel Park Cmty.*, 698 F.3d at 1191 (in a parenthetical, stating that "the first two factors are the 'primary' factors to consider; the character of the governmental action

is not on equal footing" (citing *Guggenheim*, 638 F.3d at 1120)); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005) ("[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests."). But the jury could have reasonably concluded that the third factor also weighed in favor of Bridge Aina Le'a.

The court instructed the jury concerning this factor as follows:

> Remember that Taking Analysis No. 2 turns in large part but not exclusively on the first two factors that I just described to you. The third factor, the character of the governmental action, may also be relevant in discerning whether a taking has occurred.
>
> In determining the character of the government action, you may look to a number of factors, including whether the Land Use Commission acted improperly in that its regulation was calculated to discriminate against Bridge Aina Lea or singled out Bridge Aina Lea for differential treatment in an arbitrary manner. You may also decide whether the action is akin to a physical invasion of land, or if it instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good.
>
> In deciding whether this third factor weighs overall in favor of Bridge Aina Lea or the

> Land Use Commission, you may rely on as many or as few of the above considerations as you find applicable.

ECF No. 372, PageID # 7462. This instruction was given with the agreement of the parties.

The jury could have reasonably concluded that the character of the government action weighed in favor of a taking. The reversion order was an adjudicative decision that directly affected the owners of the property. Credible testimony indicated that the Land Use Commission intended the reversion to "force Bridge to sell the Property to another owner/developer." *See* ECF No. 401, PageID #s 9622-23 (discussing Meyer's testimony). Additional evidence indicated that the Land Use Commission had not taken adverse action against other developers whose projects suffered from even longer delays, which a reasonable jury could view as establishing that Bridge Aina Le'a had been treated unfairly and differently from other similarly situated developers. *See id.* at PageID # 9624 (discussing Devens's testimony concerning other developers, and further noting that there is "no dispute that the LUC's decision to revert the Property's classification was the first time in its 50 year history that it had taken such action"); ECF No. 382-7, PageID #s 7928-31. Finally, under Hawaii law, the reversion of the property was unlawful. *See DW Aina Le'a, LLC v. Bridge Aina Le'a, LLC*, 134 Haw. 187, 213-16 (2014) (holding that the Land Use Commission acted illegally by failing to follow applicable procedures in Haw. Rev. Stat. § 205-4).

There was, in short, ample evidence supporting a finding that the reversion was not akin to "some public program adjusting the benefits and burdens of economic life to promote the common good." *See Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124); *see also*, *e.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014) ("In this case, the Town's actions are not part of a public program adjusting the benefits and burdens of public life. Rather, the Town singled out Sherman's development, suffocating him with red tape to make sure he could never succeed in developing MareBrook."); *Heitman v. City of Spokane Valley*, No. CV-09-0070-FVS, 2010 WL 816727, at *5 (E.D. Wash. Mar. 5, 2010) (indicating that proper character considerations include whether the government "acted improperly" and whether the landowner had been unfairly "singled out for differential treatment"), *aff'd sub nom. Conklin Dev. v. City of Spokane Valley*, 448 F. App'x 687 (9th Cir. 2011); Thomas Merrill, *Character of Government Action*, 36 Vt. L. Rev. 649, 664-67 (2012) (explaining that many courts understand the distributional impact of governmental action – i.e., whether its burdens are concentrated or diffuse – as speaking to the "character" of the action).

The State's arguments to the contrary are unpersuasive. The State takes issue with Bridge Aina Le'a's failure to offer additional evidence concerning the "other [Land Use Commission] dockets" involving the other developers. *See* ECF No. 385-1, PageID # 9312 (describing the Hawaii Supreme Court's holding that Bridge Aina Le'a failed to "demonstrate[] that they

were treated differently than other similarly situated developers because the documents from the LUC cases involving the other developers were not properly included in the record on appeal" (quoting *DW Aina Le'a*, 134 Haw. at 220)). But the evidence that Bridge Aina Le'a *did* offer already suffices to support the jury's verdict. The absence of *additional* proof related to certain Land Use Commission dockets does not undermine the evidence presented.

The State also asserts that the character prong weighs against a taking because the Hawaii Supreme Court denied Bridge Aina Le'a's equal protection claim. *See id.* (discussing *DW Aina Le'a*, 134 Haw. 187). The State asserts that this negates Bridge Aina Le'a's proof "that it was treated differently or unfairly." *Id.* The State's reliance on the Hawaii Supreme Court's opinion is unpersuasive on multiple levels.

First, the Hawaii Supreme Court's opinion concerned a different standard, under which Bridge Aina Le'a was required to prove that it had "been intentionally treated differently from others similarly situated and that there [wa]s no rational basis for the difference in treatment." *DW Aina Le'a*, 134 Haw. at 220 (quoting *Vill. Of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). The Hawaii Supreme Court was unable to say that the Land Use Commission's actions were "irrational." *Id.*

While there is little case law speaking directly to this issue, it does not make sense to require a takings plaintiff to establish a violation of the Equal Protection Clause to prove that the character of the governmental

action weighs in favor of a taking. It is not clear why a plaintiff would always be barred from showing unfair and unequal treatment on the ground that such differential treatment is not so out of bounds as to be considered irrational. *Cf. McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008) (finding that the character prong favored the government in part because the facts of the case did not involve "an adjudicative determination applicable solely to the McClungs"), *abrogated on other grounds, Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 861 (9th Cir. 2001) (explaining that the character prong favored the government in part because "neither Brown nor Hayes is being singled out to bear a burden that should be borne by the public as a whole"), *aff'd on other grounds sub nom. Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003).

Second, the evidence before the jury differs from the evidence that was before the Hawaii Supreme Court. The Hawaii Supreme Court's decision was based in part on a lack of evidence speaking to whether Bridge Aina Le'a was "treated differently," after Bridge Aina Le'a had tried unsuccessfully to introduce "documents from the LUC cases involving the other developers." *DW Aina Le'a*, 134 Haw. at 217, 220. At trial, Bridge Aina Le'a did not offer "exhibits as to other dockets." ECF No. 385-1, PageID # 9312. Its proof concerning the alleged differential treatment took the form of different documents and live testimony. *See* ECF No. 401, PageID # 9624. Ultimately, the Hawaii

Supreme Court's opinion did not preclude the jury from reaching its own conclusion regarding the distinguishable issue of the character of the governmental action. The jury in *this* case had evidence supporting a finding of unfair and differential treatment.

Finally, the Hawaii Supreme Court's opinion does not address a variety of additional considerations under the character prong – including, as noted, whether the Land Use Commission suffocated Bridge Aina Le'a in "red tape," "acted improperly," or made "an adjudicative determination" involving concentrated rather than diffuse costs. *See Sherman*, 752 F.3d at 565; *McClung*, 548 F.3d at 1227; *Heitman*, 2010 WL 816727, at *5.

Shifting tactics, the State argues that the character prong must cut in its favor because the governmental action involved the enforcement of a "long-standing condition" that was "requested" by Bridge Aina Le'a. *See* ECF No. 385-1, PageID # 9310 (citing *Guggenheim*, 638 F.3d at 1120). The State overreads *Guggenheim.* That case does not support the proposition that when a State *unlawfully* attempts to enforce an "old" and "requested" land-use condition, the character of its action will invariably weigh against a taking. *See Guggenheim*, 638 F.3d at 1120.

The State similarly fails to cite any case supporting its position that the character prong weighs in its favor when there is "no physical invasion, occupation, or restraint placed on the property, and [the] plaintiff [i]s permitted to use the property in many different

ways." ECF No. 385-1, PageID # 9311. Whether there has been an actual physical invasion of property is not the test; if it were, the character inquiry would be superfluous. *See Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015) (discussing a takings analysis under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), pursuant to which "a physical appropriation of property . . . g[ives] rise to a *per se* taking" (emphasis omitted)). Similarly, whether some uses of property are "permitted" may be relevant to a *Lucas* analysis, but that inquiry does not address whether government action is akin to "a public program adjusting the benefits and burdens of economic life to promote the common good." *See Lingle*, 544 U.S. at 539 (quoting *Penn Central*, 438 U.S. at 124).

The jury could have reasonably concluded that all three *Penn Central* factors weighed in favor of a taking.

B. The State Is Not Entitled to a New Trial.

The State claims that it is entitled to a new trial on three grounds. None has merit.

First, the State argues that the court erroneously removed the denominator question from the jury. *See* ECF No. 385-1, PageID #s 9314-16. For the reasons already discussed, the court did not err in resolving that issue itself.

Second, the State insists that the court erroneously instructed the jury that Bridge Aina Le'a's

takings claim is based upon "the U.S. Constitution" and also asserts that opposing counsel "abused this instruction at closing argument." *Id.; see also* ECF No. 339, PageID # 7099 (arguing that the "jury does not need to know that the law emerges from the [C]onstitution, a statute, or the common law, only what the law is"). This argument is unpersuasive. There is no bar on referring to the Constitution in United States courtrooms. In any event, the State fails to discuss, let alone demonstrate, how the court's reference to the Constitution or opposing counsel's discussion of it caused any prejudice. A new trial requires more than a bald assertion of error. *See Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1328 (9th Cir. 1995).

Finally, the State claims that the verdict is "against the great weight of the evidence" for "all of the reasons stated" earlier in its motion. ECF No. 385-1, PageID # 9314. This court has earlier in this Order addressed those reasons. *Cf. Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, No. 09-CV-05235-MMC, 2016 WL 4446991, at *11 (N.D. Cal. Aug. 24, 2016) (denying a motion for new trial when "Fairchild makes no attempt, apart from essentially incorporating by reference the arguments addressed above, to show the verdict is 'contrary to the clear weight of the evidence,' based on 'evidence which is false,' or a 'miscarriage of justice'" (quoting *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976))).

The State does raise one additional specific argument in support of its view that the verdict is against "the great weight of the evidence," but the argument is

unsupported. The State claims that Bridge Aina Le'a's "expert Stephen Chee was not reliable because he was not using an actual plan, was not aware of the data, and was using numbers based upon a fictitious development in the subdivision method, which is notoriously sensitive to small changes." ECF No. 385-1, PageID # 9314. The State does not explain its reasoning further, cite to anything in the record, or discuss how a rejection of Chee's testimony might have affected the adequacy of the jury's verdict. *See id.*

The court is not convinced that Chee's opinion was so lacking in reliability that a new trial is warranted. Quite simply, the State has "not demonstrated its entitlement to a new trial." *S. Tahoe Pub. Util. Dist. v. 1442.92 Acres or Land in Alpine Cty.*, No. 2:02-CV-0238-MCE-JFM, 2006 WL 2308288, at *2 (E.D. Cal. Aug. 9, 2006); *see also Gonzales v. Arrow Fin. Servs. LLC*, No. 05CV0171 JAH(RBB), 2010 WL 11508991, at *5 (S.D. Cal. Feb. 18, 2010).

V. CONCLUSION.

The Renewed Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial, is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, June 27, 2018.

[SEAL]

/s/ Susan Oki Mollway

Susan Oki Mollway
United States District Judge

Bridge Aina Le'a, LLC v. Hawaii Land Use Comm'n et al., Civ No. 11-00414 SOM-KJM; ORDER DENYING STATE OF HAWAII'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A NEW TRIAL.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

BRIDGE AINA LE'A, LLC, Plaintiff, vs. STATE OF HAWAII LAND USE COMMISSION; VLADIMIR P. DEVENS, in his individual and official capacity; KYLE CHOCK, in his individual and official capacity; THOMAS CONTRADES, in his individual and official capacity; LISA M. JUDGE, in her individual and official capacity; NORMAND R. LEVI, in his individual and official capacity; NICHOLAS W. TEVES, JR., in his individual and official capacity; RONALD I, HELLER, in his individual and official capacity; DUANE KANURA, in his official capacity; CHARLES JENCKS, it his official capacity; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10.; DOE CORPORATIONS 1-10; DOE ENTITIES 2-10; and DOE GOVERNMENTAL UNITS 1-10, Defendants.	Civ. No. 11-00414 SOM-KJM VERDICT FORM (Filed Mar. 23, 2018)

VERDICT FORM

Please answer both questions below. Each answer must be unanimous.

We, the jury, answer the questions submitted to us as follows:

1. Has Bridge Aina Le‘a proved by a preponderance of the evidence that a taking occurred under Taking Analysis No. 1?

   Answer: YES _X_ NO ___

Proceed to Question 2.

2. Has Bridge Aina Le‘a proved by a preponderance of the evidence that a taking occurred under Taking Analysis No 2?

   Answer: YES _X_ NO ___

The foreperson should sign and date the back of this verdict form.

/s/ Jack Shockly 3/23/2018

Foreperson Date

APPENDIX E

Hawaii Revised Statutes.

§ 205-4.5. Permissible uses within the agricultural districts.

(a) Within the agricultural district, all lands with soil classified by the land study bureau's detailed land classification as overall (master) productivity rating class A or B and for solar energy facilities, class B or C, shall be restricted to the following permitted uses:

(1) Cultivation of crops, including crops for bioenergy, flowers, vegetables, foliage, fruits, forage, and timber;

(2) Game and fish propagation;

(3) Raising of livestock, including poultry, bees, fish, or other animal or aquatic life that are propagated for economic or personal use;

(4) Farm dwellings, employee housing, farm buildings, or activities or uses related to farming and animal husbandry. "Farm dwelling", as used in this paragraph, means a single-family dwelling located on and used in connection with a farm, including clusters of single-family farm dwellings permitted within agricultural parks developed by the State, or where agricultural activity provides income to the family occupying the dwelling;

(5) Public institutions and buildings that are necessary for agricultural practices;

(6) Public and private open area types of recreational uses, including day camps, picnic grounds,

parks, and riding stables, but not including drag-strips, airports, drive-in theaters, golf courses, golf driving ranges, country clubs, and overnight camps;

(7) Public, private, and quasi-public utility lines and roadways, transformer stations, communications equipment buildings, solid waste transfer stations, major water storage tanks, and appurtenant small buildings such as booster pumping stations, but not including offices or yards for equipment, material, vehicle storage, repair or maintenance, treatment plants, corporation yards, or other similar structures;

(8) Retention, restoration, rehabilitation, or improvement of buildings or sites of historic or scenic interest;

(9) Agricultural-based commercial operations as described in section 205-2(d)(15);

(10) Buildings and uses, including mills, storage, and processing facilities, maintenance facilities, photovoltaic, biogas, and other small-scale renewable energy systems producing energy solely for use in the agricultural activities of the fee or leasehold owner of the property, and vehicle and equipment storage areas that are normally considered directly accessory to the above-mentioned uses and are permitted under section 205-2(d);

(11) Agricultural parks;

(12) Plantation community subdivisions, which as used in this chapter means an established subdivision or cluster of employee housing, community buildings, and agricultural support buildings

on land currently or formerly owned, leased, or operated by a sugar or pineapple plantation; provided that

* * *