in Murr v. Wisconsin, the USSCT claims to have decided one of the two remaining issues in determining when a regulation of land goes "too far" resulting in a constitutionally-protected Fifth Amendment taking of property without compensation: what is the relevant parcel upon which to apply regulatory taking analysis (total, as in Lucas, or partial, as in Penn Central)? The issue is nicely illustrated in a Lucas footnote: if a landowner's 100-acre parcel has 95% of its land area restricted to no development, but 5% developable, is this a partial taking of the 100% or a total taking of the 95%? The issue in front of the US Supreme Court was whether, in a regulatory taking case, the "parcel as a whole" concept as described in Penn Central Transportation Company v. City of New York, establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes. While the decision does provide some guidance on what factors to consider in deciding the relevant parcel, or denominator issue, the criteria are badly-flawed. Not only are they imprecise, they also incorporate regulatory taking criteria-mainly from Penn Central, into the relevant parcel analysis, in which they have no place. Furthermore, the Court ignores precise and more relevant criteria used for decades by many state and lower federal courts in determining relevant parcel, and throwing basic property law out of kilter as well, while sub silentio overruling parts of several previous USSCT takings decisions which most have regarded as settled law for at least the past 20 years.

II. The Issue in Detail

To assess a regulation’s impact on a property, a court must first answer the threshold question of what property is at issue. Lost Tree Village. The Court has said the property at issue must be the “parcel as a whole,” but the lower courts have struggled to determine what that
means. *Penn Central.* This is what courts and scholars have termed the “denominator problem” which asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. *Palazzalo.* That is, whether the portion of property alleged to be taken (the numerator) must be viewed in relation to the property as a “whole” (the denominator) or whether that portion may be severed from the whole and addressed separately, in effect making the numerator and the denominator one and the same. The focus must be on the extent to which the regulation affects “the parcel as a whole” both physically and temporally. See *Tahoe Sierra* (*the court rejected as "circular" the property owners' argument that Lucas should be read to allow the 32-month segment to be severed from each landowner's fee simple estate "and then ask whether the segment has been taken in its entirety by the moratoria.").

In *Penn Central,* the Court stated that a landowner may not “divide a parcel into discrete segments and then attempt to determine whether rights in a particular segment have been abrogated.” In other words, *Penn Central* could not base its takings claim solely on its rights to the airspace above the terminal. This so-called “segmentation issue” can be extremely important to the outcome of a takings claim. In addressing the relevant parcel or “denominator,” a number of considerations can have a bearing, including: (1) the degree of contiguity, (2) the dates of acquisition, (3) the extent to which a common development scheme applied to the parcel, (4) the extent to which the parcel has been treated as a single economic unit (also known as the “unity of use,” a concept which assesses whether the properties “are used as a unit so that each is dependent and related to the use of the other, or [whether they are] … devoted to separate and distinct uses, so as to constitute independent properties.” See Jonas, 19 Wis.2d at 642, 121 N.W.2d 235; Lippert, 170 Wis. at 431–32, 175 N.W. 781; see also Spiegelberg v. State, 2006 WI 75, ¶ 14, 291 Wis.2d 601, 717 N.W.2d 641 (“The unity of use rule permits a condemnee to receive compensation when a taking from one property must be considered in terms of its effect on another property, in order for those affected … to be fully compensated.”); Bigelow v. West Wis. Ry. Co., 27 Wis. 478, 487 (1871)), (5) the extent to which the regulated lands enhance the value of the remaining lands, and (6) the extent any earlier development had reached completion and closure. *Lost Tree Village Corp. v. U.S.* 717-718 (2010) (where the court concluded that because the landowner had treated the parcels as a single parcel for purposes of purchase and financing, the court held that the individual lots should not be treated as separate parcels).
Although the factors considered vary, the underlying principle is one of fairness and justice. XXXX.

While *Penn Central* may have caused confusion by defining the “parcel as a whole” as “the city tax block designated as the ‘landmark site,’” the Court did not explicitly suggest that the properties comprising the tax block were aggregated simply because they were contiguous parcels under common ownership. In contrast, *Penn Central’s* language emphasizes the relevant parcel is a “single parcel” rather than the aggregation of parcels.

III. The Case

In *Murr v. Wisconsin*, 859 N.W.2d 628 (2014) the owners of two contiguous parcels brought action against the State of Wisconsin and county, alleging that an ordinance preventing them from separately using and selling their parcels resulted in an uncompensated taking under the 5th Amendment, after county board of adjustment's denial of owners' application for a variance was affirmed on appeal.

The parents of Joseph P. Murr and his siblings (the Murrs) purchased two contiguous lots (Lots E and F) in St. Croix County in 1960. The two lots together made up approximately .98 acres. In 1994 and 1995 respectively, the Murrs’ parents transferred Lot F and Lot E to their children. In 1995, the two lots were merged pursuant to St. Croix County’s code of ordinances. The relevant ordinance prohibits the individual development or sale of contiguous lots under common ownership, unless an individual lot was at least one acre. The ordinance further specified that if each lot is not at least one acre, the lots may be measured together to equal one acre. Seven years later, the Murrs wanted to sell Lot E and not Lot F. The St. Croix County Board of Adjustment denied the Murrs’ application to sell the lots separately.

The Murrs sued the state and county and claimed the ordinance in question resulted in an uncompensated taking of their property and deprived them of “all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.” The Murrs allege Lot E was purchased as an investment property, with the intention of developing it separate from Lot F or selling it to a third party. The circuit court granted summary judgement to the state and county.
The Court of Appeals of Wisconsin affirmed and held that the Murrs were not deprived of their practical use of the property.

The court of Appeals held that: 1) the owners were not denied all or substantially all beneficial and practical use of their parcels under *Lucas*, 2) contiguous parcels under common ownership is considered as a whole for a regulatory taking analysis, regardless of the number of parcels contained therein, 3) owners were not entitled to compensation for an alleged partial regulatory taking, based on an ordinance that prohibited development or sale of contiguous lots under common ownership unless individual lot had at least one acre of net project area; even if owners intended one parcel to be developed or sold individually, ordinance was part of effort to protect national wild and scenic rivers system, and owners knew or should have known that parcels were heavily regulated and were merged when brought under common ownership. The issue in front of the US Supreme Court was supposed to be whether, in a regulatory taking case, the “parcel as a whole” concept as described in *Penn Central Transportation Company v. City of New York*, establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes.

### III. The Murr Criteria for Determining Relevant Parcel

The Court set out essentially three factors to be considered in deciding the relevant parcel issue:

**A. State and Local Law**

The Court says that the treatment of the subject parcel under state and local law indicates whether the parcel should be treated as one. Given it is the state and local regulation is usually the subject of the takings challenge, this criteria is either circular or is using regulatory taking criteria to decide the relevant parcel issue - putting the cart before the horse. The Court held that the local merger provision militates in favor of treating the two separate parcels here as one, particularly because the owners "voluntarily" brought the lot under common ownership. "As a result, the valid merger of the lots under state law Informs (!?) the reasonable expectation (a Penn Central TAKINGS criteria!) they will be treated as a single parcel."

**B. Physical Characteristics**

The Court here emphasizes that not only are the lots contiguous along their longest edge, but their "rough terrain and narrow shape make it reasonable to expect their range of potentiall uses might be limited." Moreover "the land's location along the rivers is also significant. Petitioners could have
anticipated public regulation might affect their enjoyment of their property" since this lower river area is regulated under state, local and federal law. What this has to do with merger and relevant parcel is unclear, tho clearly these would be considerations under Penn Central's distinct investment-backed expectations test.

C. Prospective Value One Lot Brings to the Adjoining Lot

The Court here finds the restriction on building on both lots is "mitigated by the benefits of using the property as an integrated whole, allowing increased privacy and recreational space". Apparently the Court buys the notion that merger results in an elevated level of privacy because the owners do not have close neighbors and are able to swim and play volleyball on the property. Again, a regulatory taking factor, not a relevant parcel factor. Moreover, the Court accepts the notion that the lots are worth more combined than each separately - again, a relevant regulatory taking factor, but not a relevant parcel factor.

IV. The Problem

What the Kennedy majority opinion has done is insert partial regulatory taking analysis into the pre determination of relevant parcel, resulting in "Penn Central squared" as one commentator has observed. Penn Central is a regulatory taking case that sets out standards for determining when a partial taking by regulation occurs, the relevant factors being the economic effect of the challenged regulation on the landowner and in particular the landowner's distinct (later reasonable) investment-backed expectations. The issue of what a landowner could reasonably expect is therefore important in determining whether there has been a partial regulatory taking - not in determining the relevant parcel. Thus, for example, the "rough terrain" coupled the location along a scenic river might affect a landowner's reasonable investment-backed expectations, but has nothing at all to do with relevant parcel determination. Indeed, if a landowner must consider such limitations at all, the Court is close to rendering any regulatory taking challenge in any environmentally sensitive, coastal or historic district virtually impossible. The effect in Kansas and Nebraska of such a limitation may be marginally relevant, but how about states like Hawaii where the entire state is in a designated coastal zone or part of a mountain range? Such notice would also apply to virtually all of California west of the Sierra Nevadas. The whole point of regulatory takings doctrine is to give the landowner a shot at just compensation when government decides such areas shall be preserved through regulation. The Court's language suggests that existing regulation might be irrelevant if the landowner should know of and expect regulation in these areas. The whole point is not to foist on one landowner a burden that should be shared by the public generally, paraphrasing Justice Holmes in Pennsylvania Coal v. Mahon.

Largely the same sorts of concerns apply to the state and local law deference standard. If applicable at all - and bear in mind that most regulatory takings challenges are to local and state laws - it is a regulatory takings factor, not a factor in determining relevant parcel. While it is certainly true the Court
has repeatedly held that a state may pretty much enact its own property laws, the 14th and 5th Amendments to the US Constitution provide bases for challenging such laws if they result in a total or partial taking by regulation. Again, part of the regulatory taking analysis, not part of the relevant parcel analysis. The Court has never before imported regulatory takings into relevant parcel determination.

The result is a complicated, multi-factor and often circular analysis for determining relevant parcel, as opposed to a relatively straight-forward test easily found in relevant state and federal relevant parcel cases (see below). In the process, the Court ignores (or some have argued overturned) the rules of law set out in Palazzolo and Lucas.

V. What the Court Should have Done

What is particularly both stunning and disturbing about the decision is that few if any state and lower federal courts have used any of these factors in determining relevant parcel over the past 290-40 years. An excellent example is the supreme court of Michigan's 4-factor analysis in KK Construction which, incidentally, found against the landowner and in favor of the state of Michigan - and is in the far more important context of how to decide relevant parcel when large portions of the property are restricted for natural resource preservation purposes. Likewise, the factors in the more recent federal appeals court decision in Lost Tree are relevant and instructive.

A. Lost Tree

In Lost Tree, the Federal Circuit decided a relevant parcel case in the more typical dispute reaching the courts: a denial of a government agency - here the Corp s of Engineers - denied permission to fill wetlands on a roughly 5 acre parcel which it had acquired as part of a larger parcel. It was recorded as a separate parcel. Nor was it developed at the same time other parts of the peninsular property was developed in the 1990's. The landowner sought permission to fill and develop the 5 acre wetland parcel in 2004. The Court of Claims found that the relevant parcel for regulatory takings purposes was the 5 acre parcel together with several others nearby, including one that was contiguous. The Federal Circuit reversed, setting out three factors to consider, based on its reading of Penn Central and other USSCT cases:

1. Whether the landowner treats several legally distinct parcels as a single economic unit
2. Whether the parcels were all purchased at the same time
3. Whether the landowner develops distinct parcels at different times and treats the parcels as distinct economic units

B. KK Construction
Once again, the issue before the court - this time the Michigan supreme court - was the determination of a relevant parcel among four contiguous, defined parcels, some of which were covered in all or in part by wetlands, for which the landowner needed a state Department of Natural Resources permit to fill in the course of development. Courts below had determined that only one of the four parcels was the relevant parcel and since denial of the permit would render it undevelopable, the landowners had suffered a regulatory taking. Correctly holding that the determination of the relevant parcel was necessary BEFORE reaching the regulatory takings issue, the court set out four distinct and clear tests for determining the relevant parcel:

1. The degree of contiguity among the parcels
2. The dates of acquisition of the distinct parcels
3. The extent to which the parcel(s) had been treated as a single unit, and
4. The extent to which the protected lands enhance the value of the remaining lands

Applying this four-factor test, the supreme court found that other parcels should be included in the relevant parcel for regulatory taking purposes, and remanded the case accordingly.

FAIR HOUSING AND DISCRIMINATION AFTER INCLUSIVE COMMUNITIES

One of the most effective means for combating housing discrimination is statutory prohibitions for protected minority classes. The U.S. Federal Fair Housing Act (“FHA”) represents a model for such statutory prohibitions. The FHA prohibits such discrimination by either public (state and local government agencies) or private (landlords) actors on the basis of race, religion, national origin, sex, family status or disability. Following a U.S. Supreme Court decision in the 1970's, proof of intent to discriminate became necessary to bring an action under the U.S. Constitution's 14th Amendment Due Process and Equal Protection clauses. However, no such intent need be demonstrated to sue under the FHA. For decades, the federal circuit courts of appeals have sustained dozens of lawsuits claiming discrimination based simply on the disparate impact of government or private actions on one of the
aforementioned protected classes. In 2015, the Supreme Court affirmed the use of disparate impact claims under the FHA in *Inclusive Communities Project v. Texas Department of Housing and Community Affairs* ("Inclusive Communities") notwithstanding that disparate impact or effect is not explicitly mentioned in the FHA. However, the Court hedged application of disparate impact claims with so many caveats and restrictions that many federal courts have now ruled against parties bringing disparate impact claims that may have otherwise prevailed prior to *Inclusive Communities*. This article addresses the problem of discrimination in housing and the use of the FHA as a remedy. There follows a summary of how federal courts have addressed disparate impact claims following *Inclusive Communities*.

The FHA protects the following classes, and no others (in particular, there is no *per se* protection for economic status):

a. Race;

b. Color;

c. Religion;

d. Sex (but not sexual orientation);

e. Family status.

f. National origin;

g. Handicapped status.
1. Supreme Court Decision: Disparate Impact Saved? Maybe

That the Court found disparate impact claims cognizable under the FHA is no particular surprise since eleven federal circuit courts of appeals had previously done so, and itself had similarly done so in cases brought under the ADEA, ADA, and VII. What is particularly significant, however, is the likely lasting effect the Court’s decision will have on the ability of plaintiffs to prevail on such claims. Under Inclusive Communities, substantiating a violation of the FHA through a disparate impact claim requires satisfying the following three-prong analysis:

First, the plaintiff must show that a policy or practice has a disparate impact on a class of persons protected under the FHA: race, religion, national origin, family status, handicapped status;

Second, the defendant must be given an opportunity to rebut the charge of discrimination by demonstrating that the practice or policy is not for discriminatory purposes, but for a benign and neutral public goal or purpose or polity, such as protection of the health, safety and welfare of the community;

Third, the plaintiff alleging discrimination may still succeed if the plaintiff can show there are other, less burdensome methods to accomplish the benign and neutral goals the defendant claims for the purposes of the challenged public policy.

Justice Kennedy’s opinion in Inclusive Communities concentrated primarily on the first prong, under which a plaintiff must set forth a prima facie violation of the FHA.

First, there is no liability if the allegation of disparate impact is based solely on a showing of statistical disparity. Second, that statistical disparity must also fail if plaintiffs cannot point to a policy of the offending government, rather than a single instance of an action having such a

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1 See Section II.c supra.
2 Inclusive Communities, 135 S. Ct. at 2522.
statistical disparate impact. “Racial imbalance alone does not without more establish a *prima facie* case of disparate impact” and a “fiscal disparity must fail if plaintiff cannot point a defendant’s policy causing disparity.”³ The Court characterized this as a “robust causality requirement.”⁴

In considering the second and third prongs, the Court said that it would be “paradoxical to construe the FHA to impose onerous costs on actors who encourage revitalization of dilapidated housing merely because some other priority might seem preferable.”⁵ According to Justice Kennedy, “disparate-impact liability has always been properly limited in key respects that avoid the serious constitutional questions that might arise under the FHA, for instance, if such liability were imposed based solely on a showing of a statistical disparity.”⁶ Further, “[d]isparate-impact liability mandates the ‘removal of artificial, arbitrary, and unnecessary barriers,’ not the displacement of valid governmental policies.”⁷ Accordingly, “[t]he FHA is not an instrument to force housing authorities to reorder their priorities, [but rather,] aims to ensure that those priorities can be achieved without arbitrarily creating discriminatory effects on perpetuating segregation.”⁸ Similarly, “[i]t may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units . . . .”⁹ Therefore, while the Court upheld the use of disparate impact

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³ *Id.*
⁴ *Id.*
⁵ *Id.* at 2512.
⁶ *Id.*
⁷ *Id.* at 2522.
⁸ *Id.*
⁹ *Id.* at 2523-24.
claims under the FHA, it also unquestionably elevated a plaintiff’s burden for substantiating such claims.

2. Disparate Impact after Inclusive Communities

   a. Inclusive Communities on Remand and Rehearing

The district court’s treatment of Inclusive Communities on remand from the Supreme Court best illustrates how lower courts are construing Inclusive Communities as elevating the burden for plaintiffs, particularly at the prima facie stage. The court reconsidered whether ICP had established a prima facie case, noting that it had previously granted ICP partial summary judgment “without the benefit of the Supreme Court’s opinion.”

Relying upon Justice Kennedy’s “cautionary language,” the court concluded that it had not previously “give[n] the prima facie requirement the same emphasis the Supreme Court had given it.” The court noted that, while ICP had not relied solely on evidence of statistical evidence alone, many of the other sources ICP cited also largely relied upon statistical evidence, and thus the court arguably had “not analyze[d] ICP’s evidence through the prism of the ‘robust causality requirement’ envisioned by the Supreme Court.”

Also noting that TDHCA “essentially d[id] not contest ICP’s prima facie case,” the court concluded that “TDHCA should be permitted to challenge ICP’s prima facie showing based on a clearer understanding of the requirements and consequences of ICP’s establishing a prima facie

11 Id. at *3; see also id. (in its order granting partial summary judgment, the district court had previously stated that “ICP’s prima facie burden is not a heavy one,” explaining that “ICP need only provide evidence that raises an inference of discrimination” because “we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.” (citation omitted).
12 Id.
Upon rebriefing and a fresh round of oral arguments, the district court held that ICP had failed to establish a *prima facie* violation of the FHA and dismissed the entirety of ICP’s disparate impact claim. The court’s decision was not based on a single deficiency in ICP’s claims, but rather, ICP’s wholesale failure to satisfy the newly-informed disparate impact standard.

First, ICP “failed to point to a specific, facially neutral policy that purportedly caused a racially disparate impact.” Specifically, “[b]y relying simply on TDHCA’s exercise of discretion in awarding tax credits, ICP has not isolated and identified the specific practice that caused the disparity in the location of low-income housing.” ICP’s failure to identify a specific, facially neutral policy also became apparent when considering what potential remedy would be available in the event that ICP were to prevail. Justice Kennedy’s opinion requires that “[r]emedial orders in disparate-impact cases . . . concentrate on the elimination of the offending practice, and courts should strive to design race-neutral remedies,” and that “lower courts should be careful not to “impose racial targets or quotas,” because doing so “might raise difficult constitutional questions.” Yet, “[a]lthough ICP complains of TDHCA’s exercise of discretion in housing decisions, it does not ask the court to prohibit TDHCA from using its discretion.

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13 Id.
15 Id. at *6.
16 Id.
17 Id. (citing Inclusive Communities, 135 S. Ct. at 2512).
discretion; rather, it asks the court to require that TDHCA exercise its discretion in a specific way: to desegregate housing.”\textsuperscript{18} Such a remedy, therefore, would not be race-neutral.

Second, the court found that ICP’s claim must be dismissed because, “regardless of the label ICP places on its claim, it [wa]s actually complaining about \textit{disparate treatment}, not disparate impact.”\textsuperscript{19} Because ICP was not complaining of the existence of TDHCA’s discretion, but rather, how TDHCA was exercising such discretion, its claims was actually one of disparate treatment.\textsuperscript{20}

Third, the court found that even if TDHCA’s use of its discretion is a specific, facially neutral policy, ICP nevertheless failed to establish a causal relationship between the exercise of that discretion caused racial disparity complained of.\textsuperscript{21} The court concluded that “ICP has not proved that TDHCA’s exercise of discretion—and not other factors—caused the statistical disparity.”\textsuperscript{22}

Finally, further buttressing its conclusion, the court found that, even if ICP was able to establish that a specific, facially neutral policy caused the disparity it complained of, ICP failed to prove a statistically significant disparity warranting the imposition of FHA liability.\textsuperscript{23}

b. \textit{Other Cases Focusing on ICP’s Cautionary Language}

The decisions of a significant number of courts that have confronted FHA disparate impact claims subsequent to the Supreme Court’s decision in \textit{Inclusive Communities} similarly

\textsuperscript{18} \textit{Id}.
\textsuperscript{19} \textit{Id}. (emphasis added).
\textsuperscript{20} \textit{Id}.
\textsuperscript{21} \textit{Id}. at *8
\textsuperscript{22} \textit{Id}. at *9 (alterations in original).
\textsuperscript{23} \textit{See id}. at *10.
demonstrate that plaintiffs now must carry undeniably heightened burdens simply to proceed past the *prima facie* stage. Generally, plaintiffs’ claims in these cases fail for one or more of the following reasons: (1) failure to satisfy the robust causality requirement; (2) inadequate evidence to demonstrate a statistical disparity; and (3) failure to identify a specific, facially neutral policy.

Perhaps the most frequent identified deficiency is the failure to satisfy Justice Kennedy’s “robust causality” requirement. For example, in *Azam v. City of Columbia Heights*, the plaintiff alleged that the city’s enforcement of its health and safety codes with respect to his rental properties “ha[d] the effect of making affordable rental dwellings unavailable . . . [resulting in] a disparate impact [on] persons intended to be protected by the [FHA].” In granting the defendant’s motion for summary judgment, the court found that the plaintiff failed to establish a prima facie case of disparate impact, particularly the “robust causality requirement” and, in any event, failed to submit an alternative practice with a lesser impact.

With regard to a plaintiff’s failure to proffer sufficient evidence demonstrating a statistical disparity, *City of Los Angeles v. Wells Fargo & Co.*, is illustrative. In that case, the city alleged

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25 Id. at 10 (some alterations in original).
that Wells Fargo’s issuance of “high-cost loans,” that is, loans with an interest rate three percentage points or more above the federally established benchmark, was having a disparate impact on racial minorities.28 The city submitted evidence demonstrating “that an [sic] Hispanic Wells Fargo borrower with average non-race characteristics had a 0.0033% likelihood of receiving a High–Cost Loan, a similarly situated African–American Wells Fargo borrower had a 0.0067% likelihood of receiving a High–Cost Loan, while a similarly situated non-Hispanic white borrower face only a 0.0008% likelihood of receiving a High–Cost Loan.”29 While the court noted that evidence is not to be weighed at summary judgment, it also pointed out that the Supreme Court’s “recent guidance in Inclusive Communities precludes the City’s statistical disparity evidence from creating a genuine dispute regarding a prima facie case.”30 Therefore, the court concluded, the “difference between 0.0033 percent and 0.0008 percent does not create a genuine dispute such that a jury must decide this issue,” and “comparing thousandths of a percentage fails to meet the minimum threshold of Inclusive Communities.”31

Similar to the district court on rehearing in Inclusive Communities, in City of Joliet, Illinois v. New W., L.P., the Seventh Circuit Court of Appeals upheld the district court’s dismissal of the plaintiff’s claim for, inter alia, failing to identify a specific, facially neutral policy.32 In that case, the city commenced condemnation proceedings against an allegedly dilapidated, crime-ridden apartment complex that was comprised of approximately 95% African-Americans.33 Noting Inclusive Communities’ caution that “a one-time decision may not be a policy at all,” the

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28 Id.
29 Id. at *7
30 Id. at *8
31 Id.
32 825 F.3d 827, 830 (7th Cir.).
33 Id. at 829.
Seventh Circuit upheld the “district court’s findings . . . that the condemnation of [the complex wa]s a specific decision, not part of a policy to close minority housing in Joliet.”34 The court further noted “governmental entities . . . must not be prevented from achieving legitimate objectives,” and that the city’s condemnation was in furtherance goals approved by the Court in *Inclusive Communities*.35

II. Conclusion

Federal remedies for housing discrimination have a long history in the United States. After the Supreme Court required a showing of intentional discrimination as a prerequisite for a Constitutional challenge, the emphasis for challenging housing discrimination shifted to the FHA. In a series of federal appellate court decisions over the past 40 years, federal courts established the theory of disparate impact: no need to show intent to discriminate but only that the complained-of action has a discriminatory effect on a class (race, religion, gender, family status, disabilities) protected by the FHA. It is not particularly surprising, therefore, that the Supreme Court upheld theory in *Inclusive Communities*. However, the Court hedged its application with so many conditions and expressed so many concerns that arguably it has become significantly more difficult for plaintiffs alleging discrimination to succeed than it was before the Court weighed in. Such difficulty is apparent in the wave of federal district cases approving government actions and dismissing discrimination claims over the past two years. This trend is nowhere more apparent than in the district court’s decision in *Inclusive

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34 *Id.* at 830.
35 *Id.*
Communities on remand from the Supreme Court to reverse its previous finding of
discrimination after the “guidance” from the Supreme Court.

Other Federal Cases

9TH CIRCUIT LAND USE REPORTED CASES (AUGUST 2016-SEPTEMBER 2017)

COURT OF APPEALS, NINTH CIRCUIT

1. Real v. City of Long Beach, 852 F.3d 929 (9th Cir. 2017)
   a. Summary = The Plaintiff brought suit to challenge the City of Long Beach’s zoning
      ordinances as in violation of the First Amendment because they unreasonably restricted his
      ability to open a tattoo business.
   b. Holding = The 9th Circuit Court of Appeals reversed the district court’s holdings for the City
      and remanded the case on the grounds that the City’s zoning ordinances were unlawful prior
      restraints on speech.

DISTRICT COURTS WITHIN THE NINTH CIRCUIT

   a. Summary = Yvon (Plaintiff), sought the City of Oceanside’s approval to operate a tattoo
      studio but was informed there were specific regulations he must follow under the City’s 1986
      Zoning Ordinance.
   b. Issues
      i. Whether the buffer zone regulation for tattoo businesses constitutes a constitutional
         time, place, and manner restriction?
      ii. Whether the conditional use permit regulation under the 1986 Zoning Ordinance is an
         unconstitutional prior restraint?
   c. Ordinance = The location of the proposed tattoo studio is governed by § 1500 of a 1986
      Zoning Ordinance, which requires persons seeking a business license to operate a tattoo
      business in Oceanside to obtain a conditional use permit.
   d. Holding = The Court granted Plaintiff’s request for a preliminary injunction.
      i. The City is prohibited from enforcing §§ 1501-1506 of Article 15 and the entire
         Article 15.2 of the 1986 Zoning Ordinance.

a. **Summary** = The City of Yuma (“Defendant”) denied the Hall Company’s (Plaintiff) application to rezone its property from R-1-8 to R-1-6 (both considered low-density). Plaintiff then filed suit against the City alleging violation of their equal protection and substantive Due Process rights under 42 U.S.C. §1983; claims of discriminatory intent and disparate impact under the federal Fair Housing Act (FHA); and violations of Arizona constitutional and statutory law because the City denied Plaintiff’s rezoning application.

b. **Procedural History**
   i. The trial court granted the City’s motion to dismiss on all claims except the disparate impact claim under the FHA.
   ii. The trial court later granted the City summary judgment on the disparate impact claim under the FHA.
   iii. On appeal, the 9th Circuit reversed the trial court’s initial dismissal of Plaintiff’s discriminatory intent claim under the FHA and reversed the court’s finding of summary judgment in favor of the City as to Plaintiffs’ disparate impact claim under the FHA.
   iv. On remand, the City renewed its motion for summary judgment.

c. **Holding** = The Court denied the City’s motion for summary judgment as to Plaintiff’s disparate impact claim under the FHA.

a. **Summary** = The United States Postal Service (“USPS”) brought suit to declare unlawful and enjoin the application of a zoning ordinance enacted by the City of Berkeley (“City”). The USPS seeks declaratory and injunctive relief on the bases that (1) the Overlay violates the Supremacy Clause and (2) is preempted by the Postal Clause, Property Clause, and Postal Reorganization Act. The City moved to dismiss on the bases that (1) the action is unripe, (2) the action is time-barred, and (3) the complaint fails to state a claim for relief because the Overlay has only an indirect effect on the USPS.

b. **Overlay** = The City Council passed Berkeley Municipal Code Chapter 23E.98, Civic Center District Overlay, restricting nine parcels of land, including the post office, to civic or nonprofit uses.

c. **Holding** = The City’s motion to dismiss was denied.

a. **Summary** = Aids Healthcare Foundation (“AHF”) claims that in retaliation for taking a public and unpopular position in opposition to a HIV/AIDS medication, San Francisco city legislators then passed new zoning rules to delay AHF’s proposed building project. AHF had also previously sued the City in a related case alleging a violation of its constitutional rights, but the Court dismissed that complaint. In addition, AHF claims the Planning Commission acted unconstitutionally by denying its conditional use application. The City moved to dismiss on the grounds that AHF’s state law claim is barred by the statute of limitations and the doctrine of exhaustion of administrative remedies and its constitutional law claim is barred by res judicata.

b. **Holding** = The Court granted the City’s motion in full as to AHF’s state law claim and in part as to its constitutional law claim.

a. **Summary** = The City of Las Vegas adopted an ordinance, which regulated packaged liquor sales along the Fremont Street Experience (“FSE”). The plaintiffs are property owners that own shops that sell packaged liquor on the FSE. The property owners filed the suit and now
they move for partial summary judgment while the defendant also moves for summary judgment.

b. **Holding** = The Court granted the City’s motion for summary judgment on the claims of substantive due process, void for vagueness, procedural due process, equal protection, the Sherman Act, bill of attainder, and the issue of inverse condemnation. The Court, however, denied both parties motion for summary judgment as it relates to the First Amendment claim.

State of Hawaii Cases

- *County of Kauai v. Hanalei River Holdings Limited*, 139 Hawaii 511 (May 16, 2017)
- *‘O Haleakala v. Board of Land*, 138 Hawaii 383 (October 6, 2016)
- *Umberger v. Department of Land and Natural Resources*, 138 Hawaii 508 (August 31, 2016)
- *Robert D. Ferris Trust v. Planning Com’n of County of Kauai*, 138 Hawaii 307 (August 9, 2016)

Case Notes:

- Kauai County adopted Ordinance Number 864, which prohibited new transient vacation rentals outside land designated as a Visitor Destination Area, and required the registration of lawfully existing Transient Vacation Rentals within six months after the enactment of the Ordinance. The Ferris Trust owned a parcel of land within the Agricultural District, and rented a single family dwelling on their property to vacationers since 2003. The Ferris Trust applied for a nonconforming use application, but was denied. The Planning Department informed the Ferris Trust that its application was incomplete because the Property was within a Condominium Property Regime, and the Ferris Trust needed 75% of the owners of the lot to consent, and the Ferris Trust only owned 50% of the lots. The Planning Commission ultimately denied the application.

- The Ferris Trust filed its notice of appeal to the circuit court, which affirmed the Planning Commission’s denial. On appeal, the Ferris Trust contended the circuit court erred in upholding the interpretation of the Kauai Planning Department (Planning Department) of the Kauai County Comprehensive Zoning Ordinance as requiring an applicant for a nonconforming use certificate to have authorization from at least a seventy-five percent interest of the equitable and legal title of the lot. The ICA agreed with the Ferris Trust based on its interpretation of the Kauai County Ordinance as permitting the “owner, operator, or proprietor of any single family transient vacation rental” who had been operating before March 7, 2008, to apply for a nonconforming use certificate.

Umberger v. Department of Land and Natural Resources, 138 Hawaii 508 (2016)

- This case concerned whether the Department of Land and Natural Resources (DLNR) must require each applicant for an aquarium fish permit to comply with the environmental review procedures set forth in Haw. Rev. Stat. chapter 343 before DLNR issues a permit pursuant to Haw. Rev. Stat. § 188-31(a). The ICA concluded that to interpret “program or project” so sweepingly as to require individual aquarium fish permit applicants to undertake the EA process is not a rational, sensible and practicable interpretation of the Hawaii Environmental Policy Act (HEPA) and would create an unreasonable, impractical, and absurd result. Therefore, the ICA held that aquarium collection under an aquarium fish permit issued by DLNR pursuant to Haw. Rev. Stat. § 188-31 is not an “applicant action” under HEPA.


- Recktenwald, C.J. with McKenna, J. concurring separately and Pollack, J., dissenting separately, with Wilson, J., joining in part and Wilson, J., dissenting separately.

- This case concerned a conservation district use permit for construction of the Advanced Technology Solar Telescope (“ATST”) on Maui in an area at the summit of Haleakala that was set aside for astronomical observatories in 1961. BLNR granted a permit for UH to construct the ATST. Kilakila O Haleakala (“Kilakila”) challenged BLNR's approval of the permit to construct the ATST. Kilakila appealed to the Circuit Court of the First Circuit and the ICA, and both courts affirmed BLNR's decision. The Hawaii Supreme Court granted certiorari review, concluding that the permit approval process was not procedurally flawed by prejudgment because
BLNR's initial permit was voided. Nor was it flawed by impermissible ex parte communication because BLNR removed the original hearing officer after he communicated with a party, and the BLNR Chairperson's meeting with non-parties did not address the merits of the permit approval process. The Hawaii Supreme Court further concluded that BLNR validly determined that the ATST met the applicable permit criteria and was consistent with the purposes of the conservation district.

- Mckenna, J., concurred separately, stating that in approving conservation district use ("CDU") permits before contested case hearings, the process initially followed by the BLNR for the ATST before the Hawaii Supreme Court's remand in Kilakila I and for the Thirty Meter Telescope ("TMT") on Mauna Kea before remand in Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., was a major departure from BLNR's prior CDU permitting procedure. BLNR's new procedure of approving CDU permits before conducting contested case hearings was based on its mistaken interpretation of what was allowed by the 2009 amendments to its administrative rules. Thus, in Kilakila I, the Hawaii Supreme Court held “that a contested case hearing should have been held, as required by law and properly requested by KOH on UH's application prior to BLNR's vote on the [CDU permit] application.” 131 Hawaii at 206, 317 P.3d at 40. Then in Mauna Kea, a majority of the Hawaii Supreme Court also held that approval of a CDU permit before a contested case hearing violated the due process rights of parties with standing to assert Native Hawaiian traditional and customary rights. Mauna Kea, 136 Hawaii 387, 363 P3d 224.

- The first permit in this case, issued before a contested case hearing, was effectively invalidated by the ruling in Kilakila I. A second permit was issued in late 2012, after a contested case hearing and report by the second hearing officer. and a new vote by a reconstituted BLNR, which had several new members, including a new Chair. This second permit superseded the first permit improperly issued before a contested case hearing. Thus, although the process was less than ideal, the second permit minimally comported with Mauna Kea's, procedural due process requirement.

- The dissent focused on the pressure placed on the first hearing officer to hurry up and issue his report due to apparent concerns regarding possible loss of funding for the ATST. The pressure apparently started after about five months had elapsed after the first contested case hearing had finished. There was no suggestion of any attempt at direct contact with the hearing officer by staff from Senator Inouye or the Governor's offices. Rather, the hearing officer's administrative supervisors from the state executive branch asked the hearing officer when the report would issue, and later requested daily reports. It is not unusual for adjudicative officers, including judges, to report to administrative supervisors regarding the status of decisions that remain outstanding. Requests for updates as to when a decision will be forthcoming are not improper, as long as the administrative supervisor does not comment at all on the substance of the decision. The first hearing officer was clear that the pressure never included any suggestion that he should reach a particular result. Although the hearing officer was apparently told at some point that these requests for updates had come from persons other than his administrative supervisors, there was no indication that there was any request to convey that information to the hearing officer. In other words, there was no indication that there was an actual attempt to effectuate ex parte communications with the first hearing officer, even if only on procedural matters.
• Whether or not such pressure should have been placed on the first hearing officer, as noted in the majority opinion, any concern of impropriety in this regard was removed when the first hearing officer was replaced. This was the relief requested by Kilakila, and it was granted. Therefore, these allegations regarding pressure on the first hearing officer are not directly relevant to the legal issues in this case.

• With respect to the communications with the Chair of BLNR, the Chair is a member of the Governor's Cabinet, and represents the BLNR and DLNR. The Chair is the obvious person to respond to the Governor and to the community regarding the procedural status of the work of the BLNR, even on adjudicative matters. Hawaii Administrative Rules §13-1-37 (effective 1982) recognizes as much, by allowing ex parte communications on procedural matters.

• With respect to the assertions or questions whether Senator Inouye's chief of staff was acting as a representative of UH at the March 2012 meeting, Mckenna, J. noted that the January 2012 e-mail from the Senator's chief of staff to the UH representative offering to “carry the uh message” was before the first hearing officer issued his preliminary report in February. The urgent need for issuance of that report was the “message” to be conveyed. By the time the meeting took place in March, however, the first hearing officer had already issued his report the month before. Therefore, the reason to “carry the uh message” no longer existed. Although the March meeting should have been avoided due to the questions it raised, it was not improper just because it was undisclosed. As the Chair was not meeting with a party and because the subject matter concerned procedural matters, it did not constitute an ex parte communication prohibited by Haw. Rev. Stat. § 91-9(g) and/or Haw. Admin. R. § 13-1-77. The Attorney General of the State of Hawaii was present at the meeting. The Attorney General is a member of the Hawaii bar and Senator Inouye's chief of staff is also a lawyer. Lawyers are well aware of prohibitions on ex parte communications with adjudicators, except on procedural questions.

• Finally, it is important to note that despite Kilakila's knowledge of communications and the meeting involving the Chair well before issuance of the second hearing officer's report and the BLNR's vote granting the second permit, it did not request that the Chair be disqualified, as it had with the first hearing officer. Despite her analysis, Pollack, J. does not in any way condone meetings and discussions with administrative adjudicators. Haw. Rev. Stat. § 171-4(b) prohibits BLNR members from participating in or voting on any matters in which they have a direct or indirect interest, and BLNR rule Haw. Admin. R. § 13-1-37 prohibits ex parte communications by parties with BLNR members concerning the substance of and during the pendency of potential or actual contested case matters. Due process considerations, however, prohibit administrative adjudicators from discussing the substance of contested case matters during the pendency of potential or actual contested case matters, whether with parties or with others. It is therefore preferable and indeed advisable that procedural questions be raised and responded to in writing, so that questions do not linger whether improper communications took place regarding the substance of contested matters. Thus, although BLNR members differ from judges, as administrative adjudicators, they must not allow ex parte communications on substantive matters during the pendency of potential or actual contested case matters and would be well
advised to ensure that any communications regarding procedural matters are disclosed in writing to all parties.

- In *Mauna Kea*, in addition to the due process holding, a majority of the Hawaii Supreme Court held that a state agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawaii constitution. 136 Hawaii at 414, 363 P.3d at 262 (Pollack, J., concurring). Applying this second holding, McKenna, J. believed the BLNR performed its functions in a manner that fulfilled the State's affirmative obligations under the Hawaii constitution. In this case, those duties included considering and applying the State's obligations under Article XI, section 1 and Article XII, section 7 of the Constitution of the State of Hawaii, to native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. Although not necessarily couched in the language of these constitutional provisions; the findings and conclusions of the BLNR, as outlined in the majority opinion, illustrate that the BLNR carefully considered and applied the applicable constitutional considerations. Therefore, as to the CDU permit for the ATST at Haleakala, the requirements set out by the majority opinions in *Mauna Kea* were met.

- Pollack, J. dissented, with Wilson, J. joining as to Parts IA and II, stating that when an administrative agency acting in a quasi-judicial capacity makes or receives (1) substantive ex parte communications, (2) procedural ex parte communications that have the potential to influence the agency adjudicator, or (3) ex parte contacts with interested persons or parties in the case, due process under the Hawaii Constitution requires disclosure of the communications. Due process also prohibits the insertion of external political pressure into a quasi-judicial administrative proceeding. The state of the record prevented the Hawaii Supreme Court from fulfilling its responsibility to independently review whether inappropriate ex parte communications affected the validity of the ATST permit issued by BLNR. Similarly, the record was inadequate for the Hawaii Supreme Court to conclude that external political pressure was not made an ingredient in the BLNR Chair's decision-making process. In order for the Hawaii Supreme Court to resolve these issues, this case should have been temporarily remanded to BLNR for a detailed disclosure of certain ex parte communications that occurred in the case and an adversarial hearing regarding the matters disclosed, instead of relying, as the majority did, on a decidedly incomplete record. Moreover, Pollack, J. stated, the consequences of the majority's decision should not be understated. It means that during the decisional phase of contested case proceedings, the decision makers can meet in private with interested persons strongly supporting one side or a particular outcome in the case. These interested persons can be representatives of a United States Senator or the Governor, members of advocacy groups, or employees of companies that may gain an economic advantage by the decision. Neither the existence nor the substance of the meeting needs to be disclosed to any other party in the case if the meeting is characterized by the decision makers of the contested hearing as a meeting related to procedural matters. If by some fortuitous circumstance the existence of the meeting is discovered by another party in the case, then the decision makers need only state that the meeting was procedural in nature to obviate the need for further disclosure. Lacking any other information about the meeting, courts will be unable to independently review the “procedural”
characterization offered by the agency. Consequently as the majority has done in this case, the agency's characterization will be accepted without any objective analysis and despite indications pointing to a contrary conclusion. Because Pollack, J. believed that slate law provides a higher degree of procedural fairness in contested case proceedings, he dissented.

**Palama v. Medeiros, 139 Hawaii 348 (2017)**

- This appeal arises from a long standing dispute regarding property rights between member of the Palama family and members of the Medeiros family. A prior quiet title action brought by members of the Palama family against members of the Medeiros family culminated in a 1968 Hawaii Supreme Court decision in *Palama v. Sheehan.* See 440 P.2d 95 (1968).
- On cross-appeal, the Palamas argued that the Circuit Court erred in finding that the Medeiros family were entitled to access to the Palamas’ property to engage in native Hawaiian gather rights and cultural practices with respect to visiting a heiau in the area adjacent to the mauka end of Nomilo Pond. The Nomilo Pond is an approximately 18 acre fish pond located on the Palama Property.
- The Court vacated and remanded for further proceedings the Circuit Court findings. The Palamas argued that the Medeiros family had failed to provide sufficient evidence to prove their entitlement to exercise traditional and customary native Hawaiian gathering rights and cultural practices (“PASH rights”) in the areas authorized by the Circuit Court. The court stated that there is a three-part test that a person must satisfy, at minimum, to establish that their conduct is constitutionally protected as a native Hawaiian right, as stated in *State v. Hanapai.* See 970 P.2d at 493-94. First a person must qualify as a native Hawaiian within the guidelines set out in PASH. Second the person must establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice. Third, the person must also prove that the exercise of the right occurred on undeveloped or less than fully developed property. The court found that the Medeiros did not present sufficient evidence at trial to support the second factor, as in order for a person to meet his or her burden of satisfying the second factor, there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice. The specific evidence related to the heiau was sparse, as the word was only mentioned three times during the course of the trial, and the testimony lacked detail describing the heiau, and its precise location.

**County of Kauai v. Hanalei River Holdings Ltd., 139 Hawaii 511 (2017)**

- Three parcels of land were condemned by the city for use as a park. Two of the parcels were owned by Hanalei River Holdings, sold to them by Michael G. Sheehan, who also owned the third parcel. Additionally, there was an easement that included land immediately to the east of the land owned by Hanalei River Holdings, which was owned by Patricia Wilcox Sheehan and granted to Michael G. Sheehan.
- This case concerned the condemnation of three parcels of privately-owned property and presented the following three issues:
  - (1) whether two parcels of land must physically abut in order for a condemnee to be entitled to severance damages when one of the parcels is condemned;
(2) whether blight of summons damages only begin to accrue after each condemnnee has established its entitlement thereto and;
(3) whether a condemnor may withdraw a portion of its estimate of just compensation based on an updated estimate of the property's value, after the deposit has been made and the condemnor has taken possession of the property.

The Hawaii Supreme Court held that:
(1) the presence or lack of physical unity is not dispositive of whether a condemnnee is entitled to severance damages;
   - In an analysis of the three unities test, to determine whether parcels of land can be considered contiguous, the three prongs are to be considered as factors and not as essential elements
(2) a deposit of estimated just compensation does not become conditional, and blight of summons damages do not begin to accrue, when a condemning authority objects to a condemnnee's motion to withdraw funds based on the fact that the condemnnee's entitlement to such funds is unclear and;
(3) the court in an eminent domain proceeding has the discretion to permit a governmental entity to withdraw a portion of a deposit of estimated just compensation when the deposit has not been disbursed to the landowner, the government acted in good faith in seeking to adjust the estimate to accurately reflect the value of the property on the date of the summons, and the adjustment will not impair the substantial rights of any party in interest.

Missler v. Board of Appeals of the County of Hawaii, 140 Hawaii 13 (2017)

A Planned Unit Development (PUD) application, concerning approximately 72 acres located in South Kona, Hawaii, was submitted to the Hawaii Planning Department. The property was zoned Agricultural A-5 (requiring a minimum site area of five acres of land). The application requested several variances, one of which was to allow for site areas of less than five acres. The application requested permission to divide the property into fourteen separate lots, one of which would be a bulk lot of approximately 40 acres, and the thirteen others would be approximately 2 or more acres. The Planning Department approved the PUD application, stating that the lots were consistent with the General Plan and the PUD application was consistent with the spirit of the Kona Community Development Plan (Kona CDP).

The Misslers are owners of property adjacent to the land subject to the PUD application in this case, and appealed to the Board of Appeals for the County of Hawaii (BOA) requesting the BOA reverse the Planning Department’s decision to grant the PUD. The BOA denied the Misslers appeal.

The Misslers appealed to the circuit court from the BOA decision. The Circuit Court found that the permit was not valid because the Planning Department and the BOA did not comply with the General Plan and Kona CDP, nor did either party review the PUD application pursuant to their constitutional duties and responsibilities with regard to the public natural resources trust, and the permit was not valid because it did not contain specific measures that require project lots to be used for bona fide agricultural uses.

The Intermediate Court of Appeals stated that the Kona CDP provides a detailed scheme for implementing the General Plan, and because the Kona CDP was adopted
pursuant to the General Plan, and Hawaii County Code § 16-2 adopts and incorporates by reference the Kona CDP as an ordinance, the provisions indicated in the Kona CDP to be legally binding on County agencies hold the force of law.

- Therefore, the PUD application in this case must comply with the legally binding provisions of the Kona CDP

- With regard to the public trust, the circuit court concluded that the County has an affirmative duty under the Constitution of the State of Hawaii, to preserve the public natural resources trust, which includes conserving and protecting “Hawaii’s natural beauty and all natural resources, including…water.” While the PUD permit may not be “a ground disturbing permit,” this does not free the Director from their obligation to protect the public natural resources trust, and therefore by deferring the decision making action to a later date, the Director’s decision violated constitutional provisions.

- The Appellate Court agreed that the County did not fulfill its duty under the public trust doctrine, stating that the Supreme Court established that an agency must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision making process.

- Additionally, the agency must place the burden on the applicant to justify the proposed water use in light of the trust purposes, to show that there is no harm in fact. In this case, the developed would need to fill a ravine on the property in order to build the houses. The filling of the ravine could eventually cause flooding.

  - The applicants did not justify the proposed water use for the PUD project, as the application does not address or analyze the impact the project would have on the ravine. Due to the applicant’s, and the County’s, lack of attention to the potential issues with filling the ravine, the County did not fulfill its duty under the public trust doctrine.