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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
THE STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY, a	)	Civil No. 1CCV-20-0001574
nonprofit corporation, and KAHUKU	)	(Agency Appeal No. 2019/ZBA-7)
COMMUNITY ASSOCIATION, a nonprofit	)	
corporation,	)	APPELLANTS KEEP THE NORTH SHORE
	)	COUNTRY AND KAHUKU COMMUNITY
Plaintiffs/Appellants,	)	ASSOCIATION'S REPLY BRIEF TO
vs.	)	APPELLEE DIRECTOR OF THE
	)	DEPARTMENT OF PLANNING AND
ZONING BOARD OF APPEALS, City and	)	PERMITTING'S ANSWERING BRIEF;
County of Honolulu; DIRECTOR OF THE	)	CERTIFICATE OF SERVICE
DEPARTMENT OF PLANNING AND	)	
PERMITTING, City and County of Honolulu;	)	
NA PUA MAKANI POWER PARTNERS, a	)	
limited liability company,	)	
	)	
Defendants/ Appellees.	)	

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APPELLANTS KEEP THE NORTH SHORE COUNTRY AND KAHUKU COMMUNITY
ASSOCIATION'S REPLY BRIEF TO APPELLEE DIRECTOR OF THE DEPARTMENT OF
PLANNING AND PERMITTING'S ANSWERING BRIEF

Plaintiffs/ Appellants KEEP THE NORTH SHORE COUNTRY, a nonprofit corporation (KNSC), and KAHUKU COMMUNITY ASSOCIATION, a nonprofit corporation (KCA) (collectively, “Appellants”), by and through their undersigned counsel, respectfully submit this Reply Brief to Defendant/ Appellee the DIRECTOR OF THE DEPARTMENT OF PLANNING AND PERMITTING, City and County of Honolulu’s (Director) Answering Brief, filed April 12, 2021 (Director AB), pursuant to Rules 2 and 72 of the Hawai‘i Rules of Civil Procedure (HRCP) and Hawai‘i Revised Statutes (HRS) §§91-8, 91-14, and 632-1. Appellants appeal the Findings of Fact, Conclusions of Law, and Decision and Order of Defendant/Appellee ZONING BOARD OF APPEALS OF THE CITY AND COUNTY OF HONOLULU, STATE OF HAWAII (ZBA), adopted on November 6, 2020 and dated November 17, 2020 (ZBA Order).

I. ARGUMENT

A. The ZBA reversibly erred by dismissing Appellants’ contested case.

The Director contends the ZBA’s jurisdiction is limited by the City and County of Honolulu Land Use Ordinance (LUO) § 21-1.40 and §§ 22-2 and 22-7 of the Rules of the Zoning Board of Appeals (ZBA Rules). Director AB at 14. LUO §21-1.40 requires an appeal be “filed within 30 days of the mailing or service of the director’s decision.” Based on these rules, the Director contends Appellants were not entitled to a contested case hearing to protect their property rights to a clean and healthful environment. Director AB at 19-21.

First, under the plain reading of the rule, the time for appeal does not begin to run until 30 days of the “date of mailing or personal service of the director’s written decision” and neither Appellant received such notice.¹ See 21 ROA V.2 at 23 (Riviere Decl. ¶¶13-17); 28-29 (Ka‘ili Decl. ¶¶18-25). Therefore, Appellants’ petitions for appeal are timely filed. ZBA Rule §22-2.

¹ ZBA Rule § 22-2 provides in relevant part:

- (a) A written petition appealing an action of the director must be received at the department of land utilization within 30 days of the date of mailing or personal service of the director’s written decision. . . .
- (b) If the appeal is not timely filed, it shall be dismissed by the board upon the board’s own motion or the motion of any party to the proceeding.

Second, the Director incorrectly presumes Appellants' rights are defined by the same rules that deprived Appellant of notice and due process. In support of this position, the Director cites, *In re Application of Maui Elec. Co.*, 141 Hawai'i 249, 408 P.3d 1 (2017) which stated:

Developing a body of case law defining the content of the right could involve confusion and inconsistencies. On the other hand, legislatures, county councils and administrative agencies can adopt, modify or repeal environmental laws or regulation laws in light of the latest scientific evidence and federal requirements and opportunities. Thus, the right can be reshaped and redefined through statute, ordinance and administrative rule-making procedures and not inflexibly fixed.

Id., 141 Hawai'i at 261, 408 P.3d at 13 (2017) (quoting Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawaii 1978, at 689). The Director incorrectly interprets *MECO's* reliance on historical drafters to assert constitutional rights under article XI, §9 can be limited by DPP rules that fail to provide notice and due process. *See e.g.* Director AB at 22 ("Art. XI, § 9 rights should be determined 'through statute, ordinance **and administrative rule-making**' rather than the development of a body of inconsistent and confusing case law.") (emphasis in Director's quotation).

The City's rules do not apply where their strict application violates an appellants' due process rights. *See Unite Here! Local 5 v. Dep't of Planning & Permitting*, 145 Hawai'i 453, 455-56, 454 P.3d 394, 396-97 (2019) (*PACREP*) (City rules did not bar appeal in light of appellant's due process protections for a 2015 appeal from the Director's approval on September 6, 2013); *see infra* Part I.C. The principle of due process:

is not a fixed concept requiring a specific procedural course in every situation. Rather, due process is flexible and calls for such procedural protections as the particular situation demands. The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

Permitting, 145 Hawai'i at 466, 454 P.3d at 407 *quoting Price v. Zoning Bd. of Appeals*, 77 Hawai'i 168, 172, 883 P.2d 629, 633 (1994) (citations omitted). Applying the City's thirty-day limitation on appeals violated Appellants' rights because Appellants did not receive any notice of the Director's actions. Fewer procedural protections exist in the instant case than in *PACREP*. *PACREP* rejected the Director's contention that the union-appellant's failure to request notice of the Director's decisions pursuant to DPP Rule §6-2 relieved the Director of providing any notice to the union that was an "interested party" who had "actively participated in the public hearing" on the Director's permitting actions. *PACREP*, 145 Hawai'i at 467, 454 P.3d at 408.

In support of their position that the ZBA was required to dismiss Appellants' petition for contested cases, the Director incorrectly asserts, "[t]he right of appeal is purely statutory and must be limited as legislatively promulgated." Director AB at 14 citing *In re Lower Mapunapuna Tenants Ass'n*, 73 Haw. 63, 69, 828 P.2d 263, 266 (1992) and *Mauna Kea Anaina Hou v. Univ. of Hawai'i*, No. 30397 (App. Jan. 25, 2012) (mem.).² *In re Lower Mapunapuna* addressed whether taxpayers who failed to file notices of appeal from assessments subsequent to a first appeal may be excused from statutory deadlines for appealing multiple years' assessments where a statute expressly excused filing notice of a "second appeal." *Id.*, 73 Haw. at 65, 828 P.2d at 265 citing HRS §232-4 (titled, "Second appeal"). *In re Lower Mapunapuna* dismissed taxpayers' subsequent appeals under the plain language of HRS §232-4, which limited automatic appeal to the "second appeal", and because "the statutory time for perfecting appeals, tax appeals in particular is generally mandatory[.]" *Id.*, 73 Haw. at 66, 828 P.2d at 266 quoting *In re Fasi*, 63 Haw. 624, 626, 634 P.2d 98, 101 (1981). *Mauna Kea Anaina Hou* is a memorandum opinion and not controlling authority and, at issue in that case was whether the challenged management plan approval affected *Mauna Kea* petitioners' property interests and rights where the plan's "management actions' are nothing more than considerations for the future." *Id.*, No. 30397 at *21.

Nor does the Director's assertion establish Appellants lacked a right to a contested case as defined by the requirements of procedural due process. "A contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties." *Mauna Kea Anaina Hou v. Bd. of Land & Natural Res.*, 136 Hawai'i 376, 390, 363 P.3d 224, 238 (2015) quoting *Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994); see HRS § 91-1. "An agency hearing that is required by law 'may be required by (1) agency rule, (2) statute, or (3) constitutional due process.'" *Id.* quoting *Kaniakapupu v. Land Use Comm'n*, 111 Hawai'i 124, 132, 139 P.3d 712, 720 (2006). Here, the Director incorrectly interpreted *Kaniakapupu* as requiring the ZBA to dismiss a contested case where it is required by constitutional due process. Director AB at 16. As discussed *infra* Part I.C, Appellants' rights to due process demanded notice, including constructive notice, of decisions affecting their rights and interests. ZBA Rules and the Land Use Ordinance do not deprive this Board of jurisdiction over this appeal because Appellants met the three-part test determining Appellants' right to a hearing.

² The Director's citation "*Mauna Kea Anaina Hou v. Univ. of Hawai'i*, 126 Hawai'i 265, 269 P.3d 800 (App. 2012)" incorrectly indicates a published authority, but it is rather a memorandum opinion that is to be appended pursuant to Rule 35 of the Hawai'i Rules of Appellate Procedure.

B. The City Land Use Ordinance is a law relating to environmental quality as defined in Appellants’ constitutional rights to a clean and healthful environment.

The Director contends the LUO is not a law relating to environmental quality defining the scope of article XI, §9 rights to a clean and healthful environment because LUO “provisions governing conditional use permits and waivers . . . do not require the Director to apply criteria or standards related to environmental health in deciding a Director’s Action.” Director AB at 25.

In holding HRS chapter 205, the Hawai’i Land Use statute, “is a law relating to the conservation, protection and enhancement of natural resources, and thus falls within the scope the enforcement right established by article XI, section 9[.]” *County of Hawai’i v. Ala Loop Homeowners*, 123 Hawai’i 391, 235 P.3d 1103 (2010) *abrogated on other grounds*, *Tax Foundation of Hawai’i v. State*, 144 Hawai’i 175, 439 P.3d 127 (2019), looked to the legislative purpose of HRS chapter 205: “to preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare [.]” *Ala Loop*, 123 Hawai’i at 410, 235 P.3d at 1122 *quoting* 1961 Haw. Sess. Laws Act 187, § 1. The purpose of the City LUO is similar: “to regulate land use in a manner that will encourage orderly development in accordance with adopted land use policies, including the city’s general plan, and development and sustainable communities plans, and, as may be appropriate, adopted neighborhood plans, and to promote and protect the public health, safety and welfare . . .” LUO §21-1.20(a).

The Director further refused to consider the LUO a law relating to environmental quality because the purpose statement, LUO §21-2.20, is not “actionable” as it “does not provide Appellants with any specific entitlements or guarantees.” Director AB at 24-25. Appellants, however, specified other LUO provisions for permits, standards, and procedures that give substance and applicability to their rights to a clean and healthful environment. Appellants’ OB at 13 citing LUO §§21-2.40-1 (procedures for CUP-minor permits), 21-2.90 et seq. (purpose and procedures for CUP permits), 21-5.700 (zoning and siting requirements for wind machines), and 21-4.60 (providing for heights of structures).

Ala Loop further examined HRS § 607-25 in support of its conclusion that HRS chapter 205 is an environmental quality law “since article XI, section 9 does not itself define the substantive content of the right to a clean and healthful environment, but rather leaves it to the legislature to determine.” *Ala Loop*, 123 Hawai’i at 410, 235 P.3d at 1122.

HRS § 607-25 is a fee recovery statute that authorizes the recovery of attorneys’ fees and costs by private parties against other private parties who undertake development without “obtaining all permits or approvals required by law from government agencies[.]” HRS §

607-25(c). HRS § 607-25(c) provides that “[f]or purposes of this section, the permits or approvals required by law shall include compliance with the requirements for permits or approvals established by chapter[] . . . 205 . . . and ordinances or rules adopted pursuant thereto under chapter 91.” Thus, permits or approvals required by chapter 205 are expressly covered by the statute.

Ala Loop, 123 Hawai‘i at 410, 235 P.3d at 1122. HRS §607-25 also applies to permits and approvals required under HRS chapter 46, which is the statute authorizing the counties, including the Director, to issue permits. See HRS §46-4 (“County zoning”); also *Parsek v. Sandvold*, 127 Hawai‘i 390, 397, 279 P.3d 55, 62 (App. 2012) (“HRS § 46-4(a), by its plain language, creates a private right of action that entitles [plaintiffs] to bring suit to enforce the LUO.”); *Kahana Sunset Owners Ass’n v. Maui County Council*, 86 Hawai‘i 132, 135, 948 P.2d 122, 125 (1997) (analyzing application of HRS §607-25 to a claim brought under HRS §46-4 by a defending party). *Ala Loop* relied on the legislative explanation for the purpose of HRS § 607-25:

The legislature finds that article XI, section 9, of the Constitution of the State of Hawaii has given the public standing to use the courts to enforce laws intended to protect the environment. However, the legislature finds that the public has rarely used this right and that there have been increasing numbers of after-the-fact permits for illegal private development. Although the legislature notes that some government agencies are having difficulty with the full and timely enforcement of permit requirements against private parties, after-the-fact permits are not a desirable form of permit streamlining. For these reasons, the legislature concludes that to improve the implementation of laws to protect health, environmental quality, and natural resources, the impediment of high legal costs must be reduced for public interest groups by allowing the award of attorneys' fees, in cases involving illegal development by private parties.

Ala Loop, 123 Hawai‘i at 410, 235 P.3d at 1122 *quoting* 1986 Haw. Sess. Laws Act 80, § 1 at 104-105 (emphasis added). Just as HRS chapter 205 is a “law [] relating to environmental quality” within the meaning of article XI, section 9, so are HRS chapter 46 and the City LUO “ordinances or rules adopted pursuant thereto under chapter 91.” HRS §607-25(c).

C. The Director incorrectly interprets *PACREP*’s application of existing law concerning due process rights to a hearing.

The Director incorrectly interpreted *PACREP* as applying only to the specific facts presented in that case to conclude heightened protection is unavailable to Appellants:

KNSC and KCA did not participate in public hearings on the Director’s Actions. The Director did not impose conditions in the CUPs or Waiver based on comments from KNSC or KCA. The Director’s modifications of the CUPs and Waiver did not eliminate conditions that were advocated for by KNSC or KCA. And the minor modifications at issue mitigate Appellants concerns rather than deprive them of “hard-fought conditions” that were secured through public comments on the applications.

Director AB at 18; *PACREP*, 145 Hawai‘i 453, 466-467, 454 P.3d 394, 396-97. The issue here, as in *PACREP*, is whether the City’s procedures complied with constitutional due process, which entails considering three factors: “(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.” *In re Hawai‘i Elec. Light Co. (HELCO)*, 145 Hawai‘i 1, 17, 445 P.3d 673, 689 (2019) (concluding a contested case hearing was required) *quoting In re Maui Elec. Co.*, 141 Hawai‘i 249, 265, 408 P.3d 1, 17 (2017) (*MECO*) *quoting Sandy Beach Def. Fund v. City Council of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989).

The Director’s procedures risk depriving Appellants’ members’ constitutional rights to a clean and healthful environment under article XI, §9, property right protections for adjacent and nearby property owners, and traditional and customary practices under article XII, §7 of the Hawai‘i Constitution as discussed *supra* Part I.B.

Under step two, the Director incorrectly represents: “Appellants argue . . . the procedures used to approve the Director’s Actions were constitutionally deficient because they did not provide individual notice to the Appellants (see, O.B. at 16-18 and 21-22)[.]” Director AB at 19. To clarify, “[t]he issue is that no notice, not even constructive notice, was provided.” Opening Brief at 25-26. That is, Appellants were both entitled to notice from the Director because the latter “should have both been aware of their interests so as to have afforded them notice *and* the Director’s rules do not provide for any notice, including at least constructive notice.” OB at 24 (emphasis in original). The Director conflates two issues: whether Appellants were entitled to actual notice and whether the governmental burden of providing any notice, constructive or actual, were met by the DPP’s rules and procedures as they were actually implemented in this case and interpreted to foreclose Appellants’ assertion of their constitutional rights.

Appellants were entitled to both kinds of notice and received neither. By arguing only against one issue, the Director fails to address the second, which is the third prong in establishing whether due process required Appellants be afforded a contested case hearing. *See* Director AB at 22 (“[Appellants] argue that the procedures created by the LUO and ZBA Rules failed to provide them with individual notice[.]”).

D. Director incorrectly assesses the governmental burden of notice.

The Director's failure to address constructive notice also led to an erroneous analysis under the third inquiry concerning the governmental burden of notice. Director AB at 28. The Director contends the governmental burden would necessarily consist in submitting notices of permit application approvals to Appellants and every other interested person, which would include the authors of "public comments and responses to the 2016 FEIS alone consist[ing] of 707 pages that are comprised of 1,612 letters, petitions, emails and other materials." *Id.* at 29 citing ROA V.2 at 462 (FOF ¶22). This is incorrect. Appellants pointed out that constructive notice would have satisfied this prong of the due process analysis. *See* 21 ROA V.2 at 12-13 (comparing the Director's rules to Maui Planning Commission rules, which implement constructive notice for certain permits); 538 (Tr. 8/6/2020 at 27, noting methods of constructive notice). The cost of posting a list of approved permits on a ZBA agenda or on a City website is nominal and would obviate the need for the Director to provide actual notice to all persons who have significant interest in a particular development or property and would not approach the Director's feared-"significant financial costs" of providing notice of every permit application through certified mail to every person who comments on any associated environmental review documents. Director AB at 30.

Appellants pointed to another procedure under which the Director could merely notify a board or commission subject to HRS chapter 92 sunshine requirements so as to ensure constructive notice of the Director's permit approvals. Maui County Rule (MC) §12-202-26(a) provides:

(a) Appeal of the director's decision may be made to the commission by the filing of a notice of appeal with the department not later than ten days after the receipt of the director's written decision, or, where the director's decision is not required by the commission or these rules to be served upon appellant, not later than ten days after the meeting at which the commission received notification of the director's decision. The notice of appeal shall be filed in accordance with section 12-201-20 of the rules of practice and procedure for the Maui planning commission. The department shall notify the commission, at the commission's next regularly scheduled meeting, of the filing of the notice of appeal.

Id. (emphasis added). The Maui Planning Director will notify the Maui Planning Commission of, for instance, issuance of special management area minor permits, "at the commission's next regularly scheduled meeting" and "receipt of which shall be acknowledged by the commission." MC §12-202-14(c). That is, under Maui Planning Commission rules, interested persons who do not receive personal notice, could be notified through publication of the Maui Planning Director's decision as part of the agenda for the Planning Commission's regular meeting or at the meeting itself. The Maui Planning Commission solved this notice issue without having to individually give notice to all people

who provide comments on a project environmental review document. 21 ROA V.2 at 538 (Tr. 8/6/2020 at 28:3-15).

II. CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse and vacate the ZBA's Findings of Fact, Conclusions of Law, and Decision and Order, adopted on November 6, 2020 and dated November 17, 2020, and grant the declaratory relief requested in Appellants' Statement of the Case, filed November 24, 2020.

DATED: Makawao, Hawai'i

April 25, 2021

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was duly served on the following parties via electronic filing (JEFS):

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