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SCWC-21-00000396

IN THE SUPREME COURT OF OF HAWAII

KEEP THE NORTH SHORE COUNTRY, a	)	CIVIL No. 1CCV-20-0001574
nonprofit corporation, and KAHUKU	)	(Agency Appeal)
COMMUNITY ASSOCIATION, a nonprofit	)	
corporation,	)	APPEAL FROM FINAL JUDGMENT and
	)	SUMMARY DISPOSITION ORDER
Plaintiffs/ Appellants	)	AFFIRMING AGENCY DECISION, both
vs.	)	filed June 30, 2021
	)	
ZONING BOARD OF APPEALS, City and	)	
County of Honolulu, DIRECTOR OF THE	)	
DEPARTMENT OF PLANNING AND	)	Hon. James H. Ashford, First Circuit Court
PERMITTED, City and County of Honolulu, NA	)	
PUA MAKANI PARTNERS, a limited liability	)	
company,	)	
	)	
Defendants/ Appellees	)	

PLAINTIFFS/ APPELLANTS' REPLY TO DEFENDANTS-APPELLEES DIRECTOR OF
THE DEPARTMENT OF PLANNING AND PERMITTING, CITY & COUNTY OF
HONOLULU, AND NA PUA MAKANI POWER PARTNERS, LLC JOINT OPPOSITION TO
APPLICATION FOR WRIT OF CERTIORARI

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PLAINTIFFS/ APPELLANTS' REPLY TO DEFENDANTS-APPELLEES DIRECTOR OF
THE DEPARTMENT OF PLANNING AND PERMITTING, CITY & COUNTY OF
HONOLULU, AND NA PUA MAKANI POWER PARTNERS, LLC JOINT OPPOSITION TO
APPLICATION FOR WRIT OF CERTIORARI

Plaintiffs/Appellants KEEP THE NORTH SHORE COUNTRY, a nonprofit corporation (“KNSC”), and KAHUKU COMMUNITY ASSOCIATION, a nonprofit corporation (“KCA”) (collectively, “Appellants”) hereby file their reply to Defendants/ Appellees DIRECTOR OF THE DEPARTMENT OF PLANNING AND PERMITTING, CITY & COUNTY OF HONOLULU (“Director”) and NA PUA MAKANI POWER PARTNERS, LLC’s (“NPM”) (collectively, “Appellees”) joint opposition to Appellants’ application for writ of certiorari, filed June 23, 2025. [JEF] Dkt. 19.

I. ARGUMENT

A. “Interested persons” of whom Director should have been aware entitled to notice.

Unite Here! Local 5 v. Department of Planning and Permitting, 145 Hawai‘i 453, 454 P.3d 394 (2019) (“*PACREP*”) identified circumstances under which the Director’s limitations on appeals from permitting decisions may be challenged beyond the thirty days provided under the City and County of Honolulu Land Use Ordinance (“LUO”) § 21-1.40. *Keep the North Shore Country et. al v. Zoning Board of Appeals et. al*, No. CAAP-21-0000396 (Haw. App. March 27, 2025) (SDO) (“ICA SDO”) at 10 (“Absent the unique circumstances in *PACREP*, DPP Rules § 6-2 governed notice of the Director's decisions to Appellants”).

Appellees take issue with the applicability of *PACREP* to this appeal, stating: “[Appellants] have no special relationship with these permits so as to entitle them to heightened due process protections: they never submitted any comments of any kind to [the Department of Planning and Permitting (“DPP”)] and never asked DPP to be included in DPP’s decision-making, and DPP’s Director was unaware of Petitioners’ objections.”¹ Dkt. 19 at [PDF page] 7.

Appellees’ statement narrowly defines the scope of the Director’s “decision-making” to those on NPM’s requests for conditional use permit (“CUP”) modifications and waivers. Several of NPM’s requests were unlawful, as were the Director’s approvals of those requests. *See* Dkt. 1 at [PDF page] 8-9 (application for certiorari). Appellants publicly opposed the project through participation in numerous community meetings, agency hearings, city council initiatives, signing

¹ DPP Rule § 6-2 provides: “The director shall mail the written decision to the applicant and, upon request, shall give notice of the decision to other interested persons. The decision shall be available for review by the public at the department of planning and permitting.”

petitions, and by providing comments as part of the environmental impact statement (“EIS”) process under Hawai‘i Revised Statutes (“HRS”) chapter 343 in 2016.

B. Appellants seek actual or constructive notice calculated to notify interested parties.

Appellees assert: “Under Petitioners’ expansive view of *PACREP*[], DPP would be required to proactively (1) find and (2) provide actual notice to thousands of commenters, signatories to petitions, and participants in community meetings[.]” Dkt. 19 at 8. This is incorrect.

Appellant’s position is as follows. The Director’s notification procedures entail a high risk of erroneous deprivation of due process, particularly where, as here, the Director approves unlawful modifications and waivers of the LUO. Appellants should be permitted, as were the *PACREP* petitioners, to proceed with their petition to intervene beyond thirty days under these circumstances. *See* LUO § 21-1.40 (“[a]ppeals from the actions of the director in the administration of the provisions of the LUO . . . shall be filed within 30 days of the mailing or service of the director's decision”); ZBA Rules § 22-2 (“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”). This would not admit or require actual notice to further persons.

Constructive notice would have been appropriate, which Appellants pointed out could occur through inclusion of the Director’s decision on meeting agendas or reporting at a public meeting. *See* [JEFS CAAP Dkt.] Record on Appeal (ROA) dkt. 21 at 12-13 (comparing the Director’s rules to Maui Planning Commission rules); *id.* at 538 (Tr. 8/6/2020 at 27 methods of constructive notice).

Appellees use too broad a brush in characterizing Appellants’ position, stating: “[t]here is little, if anything, to distinguish Petitioners from any of the hundreds or thousands of people who, at one point or another, expressed support for or opposition to the Project.” Dkt. 19 at 8 (joint opposition). Appellants are and include residents of Kahuku, including those whose constitutionally protected spiritual and cultural practices and rights to a clean and healthful environment are impacted by the unlawfully increased proximity of the wind turbine project. *See* 21 ROA V.2 at 25-26 (Ka‘ili Decl.); 21 ROA V.2 at 21 (Riviere Decl.). Such injuries constitute “substantial prejudice”, which Appellees do not demonstrate are shared with “hundreds or thousands of people” who opposed or supported the project. Dkt. 19 at 7-8.

C. Jurisdiction is proper pursuant to HRS § 632-1 as well as HRS § 91-14.

In response to Appellants’ point that NPM’s requests, and the Director’s approvals of the same, are unlawful on their face, Appellees assert: “[n]early every lawsuit alleges that someone acted unlawfully, yet statutes of limitations still exist and are regularly enforced.” Dkt. 19 at 10. Appellees

apparently refer to a thirty day “statute” of limitations in LUO § 21-1.40, which is neither a statute nor a limitation on the ability of this Court to review matters before it.

Of note, the applicable statute of limitations is HRS § 657-1, which required actions to be brought within six years. *See DW Aina Le'a Dev., LLC v. Land Use Comm'n*, 148 Hawai'i 396, 406, 477 P.3d 836, 846 (2020) (applying HRS § 657-1 as a “catch-all statute of limitations” to constitutional claim).

In any case, Appellants sought judicial review pursuant to both HRS §§ 91-14 and 632-1, the latter of which provides for judicial declaratory judgment in cases of actual controversy. 9 ROA Dkt. 1 at 4 (statement of the case). Therefore, the circuit court (and ICA) reversibly erred by concluding it lacked jurisdiction to grant Appellants’ requested declaratory relief. *Compare Hui Ho‘opulapula Nā Wai o Puna v. Department of Land and Natural Resources*, CAAP-23-0000070 (Haw. Ct. App. Jun. 6, 2025) (SDO) (circuit court erred by concluding it lacked jurisdiction over a complaint for declaratory relief against agency decision pursuant to HRS § 632-1 where plaintiffs filed suit on May 4, 2022, more than thirty days after agency’s December 10, 2021 decision, as required under HRS § 91-14). “[R]equesting a contested case is not a prerequisite to seeking declaratory relief under HRS § 632-1.” *Id.* at *6 n. 5.

Likewise in this case, the circuit court had jurisdiction to enter requested declaratory relief concerning the Director’s and Defendant/ Appellee ZONING BOARD OF APPEALS, City and County of Honolulu’s violations of HRS chapter 91 and article I §5 of the Hawai‘i Constitution through their disposition and processing of Appellants’ appeal.

II. CONCLUSION

For the foregoing reasons, Appellants pray this Court issues a writ of certiorari.

DATED: Makawao, Hawai‘i

June 25, 2025

/s/ Lance D. Collins
LAW OFFICE OF LANCE D COLLINS
LANCE D. COLLINS

DATED: Honolulu, Hawai‘i

June 25, 2025

/s/ Bianca Isaki
LAW OFFICE OF BIANCA ISAKI
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Appellants/ Cross-Appellees

**Electronically Filed
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NO. CAAP-23-0000070

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

HUI HO'OPULAPULA NĀ WAI O PUNA, Plaintiff-Appellant/
Cross-Appellee, v. DEPARTMENT OF LAND AND NATURAL RESOURCES,
STATE OF HAWAII and BOARD OF LAND AND NATURAL RESOURCES,
STATE OF HAWAII, Defendants-Appellees/Cross-Appellants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 1CCV-22-0000525)

SUMMARY DISPOSITION ORDER

(By: Leonard, Acting Chief Judge, Hiraoka and Wadsworth, JJ.)

Hui Ho'opulapula Nā Wai O Puna appeals, and the Board of Land and Natural Resources (**BLNR**) and Department of Land and Natural Resources (**DLNR**) (together, **State**) cross-appeal, from the *Amended Final Judgment* entered by the Circuit Court of the First Circuit.¹ The circuit court ruled it did not have subject matter jurisdiction over the case. The parties challenge different aspects of the January 9, 2023 *Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment*. We hold the circuit court had subject matter jurisdiction, vacate the Amended Final Judgment, and remand for further proceedings.

¹ The Honorable John M. Tonaki presided.

Background

The Hui sued the State on May 4, 2022. It sought declarations that (1) BLNR violated Hawaii Revised Statutes (**HRS**) § 171-55 and its Haw. Const. art. XI, §§ 1, 7 public trust duties by continuing a one-year revocable permit (**RP 7340**) issued to Kaua'i Island Utility Cooperative (**KIUC**) for calendar year 2022, and (2) the continued RP 7340 was "legally invalid and void."² It also sought "any necessary and appropriate injunctive relief."

The Hui and the State filed cross-motions for summary judgment. The Hui's motion argued that BLNR's continuation of RP 7340 was invalid because BLNR failed to make findings of fact and conclusions of law; failed to require KIUC to show an actual need for stream water; continued the permit for the sake of KIUC's interest in obtaining a long-term water lease; and abdicated its legal duties by not making an independent inquiry or analysis of protection and mitigation measures.

The State's motion argued that the Hui failed to exhaust its administrative remedies by formally requesting a contested case hearing on KIUC's application to continue RP 7340; the Hui's claims were barred under the primary jurisdiction doctrine; and the Hui was afforded due process.

The cross-motions were heard on November 30, 2022. The circuit court took them under advisement. The court entered findings of fact, conclusions of law, and an order denying the Hui's motion for summary judgment and granting the State's motion for summary judgment on January 9, 2023. The court found:

10. On December 10, 2021, [BLNR] considered whether to continue RP 7340 at its publicly noticed meeting.

11. During the meeting, [BLNR] took testimony from KIUC, members of the Hui, and other members of the public concerning continuation of RP 7340.

² The HUI did not name KIUC, the permittee, as a defendant. The State asserted failure to name indispensable parties as an affirmative defense, but the State didn't move for relief under Hawai'i Rules of Civil Procedure Rule 19 (Joinder of Persons Needed for Just Adjudication).

12. [BLNR] voted to renew RP 7340 without first entering any findings of fact and conclusions of law supporting permit renewal, and without issuing any findings that continuing the permit was in the best interests of the State for the 2022 calendar year, and whether continuing the permit complies with the public trust doctrine[.]

13. [BLNR] also denied the Hui's oral request for a contested case hearing.

14. [The Hui] did not avail itself of the statutory process for judicial review of a decision in a contested case provided for under Hawaii Administrative Rules § 13-1-29 and [HRS §] 91-14.

15. Instead, [the Hui] filed an original complaint for declaratory and injunctive relief in the Environmental Court of the First Circuit, in which [it] seeks invalidation of permit RP 7340 issued by the Board on December 10, 2021 for the year 2022.

The court concluded:

3. In order to seek judicial review of [BLNR]'s continuation of RP 7340, it was a requirement that [the Hui] institute proceedings for review in the circuit court or, if applicable, the environmental court, within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency. H.R.S. § 91-14(b).

4. Where a statutory avenue for appeal of an agency decision is available, an original action for declaratory judgment does not lie. Ko'olau Agr. Co. v. Commission on Water Res. Mgmt., 83 Haw. 484[], 492-93 (1996).

5. [The Hui]'s failure to proceed under the statutory process for review of an agency decision under H.R.S. Chapter 91 divests the court of authority to issue an order for declaratory and injunctive relief.

A judgment for BLNR and against the Hui was entered on January 25, 2023. This appeal and cross-appeal followed. The Amended Final Judgment for the State and against the Hui was entered on November 29, 2023, on a temporary remand.

Standards of Review

A circuit court's decisions on motions for summary judgment, statutory interpretation, and subject matter jurisdiction are reviewed de novo under the right/wrong standard.

Tax Found. of Haw. v. State, 144 Hawai'i 175, 185-86, 439 P.3d 127, 137-38 (2019).

Discussion

The circuit court concluded it did not have subject matter jurisdiction over the Hui's declaratory judgment action; it did not reach the merits of the Hui's claims. Hawai'i Rules of Civil Procedure (**HRCP**) Rule 12(h)(3) requires dismissal when subject matter jurisdiction is lacking.³ The circuit court should have entered an order dismissing the case rather than an order granting summary judgment and a judgment. Mobley v. Kimura, 146 Hawai'i 311, 325 n.23, 463 P.3d 968, 982 n.23 (2020) (stating that when circuit court dismissed complaint for failure to meet tort threshold, its order should have indicated a "dismissal" rather than a grant of "partial summary judgment").

(1) The Hui contends the circuit court erred by concluding that its "failure to proceed under the statutory process for review of an agency decision under [HRS] Chapter 91 divests the court of authority to issue an order for declaratory and injunctive relief."⁴ The argument has merit.

The circuit court relied on Ko'olau Agricultural Co. v. Commission on Water Resource Management, 83 Hawai'i 484, 927 P.2d 1367 (1996). There, the Commission on Water Resource Management (**CWRM**) had designated five aquifers as water management areas under the State Water Code, HRS Chapter 174C. Ko'olau Ag sued CWRM for a declaration that CWRM misapplied the statutory designation criteria. CWRM moved to dismiss. The circuit court granted the motion. Ko'olau Ag appealed. It "recharacterize[d] its claims as allegations of improper rulemaking" and argued the

³ HRCP Rule 12(h)(3) (eff. 2000) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

⁴ The Hui's statement of the points of error does not identify the circuit court's denial of the Hui's motion for summary judgment as error.

circuit court had jurisdiction under HRS § 91-7, which provided for declaratory judgments "as to the validity of an agency rule[.]" Id. at 489, 927 P.2d at 1372. The supreme court dismissed the argument, noticing that Ko'olau Ag actually sought "invalidation of the [water management area] designation." Id.

The supreme court then analyzed HRS § 174C-46. That statute made CWRM's water management area designations "final *unless judicially appealed*." Id. at 487, 927 P.2d at 1370. The supreme court held that by enacting HRS § 174C-46,

the legislature obviously intended an appeal as the exclusive means of obtaining judicial review of a [water management area] designation decision. It is well established that where a **statutory avenue for appeal of an agency decision** is available, an original action for declaratory judgment does not lie.

Id. at 492-93, 927 P.2d at 1375-76 (emphasis added).

Here, BLNR's decision to continue KIUC's revocable permit was made under HRS § 171-55 in a public meeting. See Carmichael v. Bd. of Land & Nat. Res., 150 Hawai'i 547, 563, 506 P.3d 211, 227 (2022) (stating that "HRS § 171-55 potentially authorized the BLNR to continue the revocable permits"). HRS § 171-55 (2011) provided:

Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which will serve the best interests of the State, subject, however, to those restrictions as may from time to time be expressly imposed by the board. A permit on a month-to-month basis may continue for a period not to exceed one year from the date of its issuance; provided that the board may allow the permit to continue on a month-to-month basis for additional one year periods.

Unlike HRS § 174C-46 (at issue in Ko'olau Ag), HRS § 171-55 does not create a statutory avenue for appealing BLNR's decision to continue a permit. The Hui could not have appealed BLNR's decision under HRS § 91-14 because it was made during a

public meeting, not after a contested case.⁵ Such decisions are subject to declaratory judgments under HRS § 632-1, provided the other statutory elements are met; the HRS § 632-1(b) proviso that "[w]here however, a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed" doesn't apply here.

For example, in Carmichael, BLNR approved continuations of permits under HRS § 171-55 in a public meeting. Carmichael sued for a declaration that preparation of an environmental assessment under the Hawai'i Environmental Policy Act, HRS Chapter 343 (**HEPA**) was required. The supreme court declared: "Given the significant environmental impact of the permitted action, the BLNR's authority to issue revocable permits is subject to the environmental review requirements of HEPA." 150 Hawai'i at 553, 506 P.3d at 217. The supreme court was obligated to ensure it had jurisdiction over the case and to dismiss the appeal on its own if it concluded it lacked jurisdiction. See Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003). No issue of jurisdiction was raised at any level of the proceeding, indicating that courts have jurisdiction over declaratory judgment actions concerning BLNR decisions under HRS § 171-55.

The circuit court erred by concluding it did not have jurisdiction over the Hui's action for declaratory and injunctive relief.⁶

(2) The State contends the circuit court erred by making finding of fact no. 12, "finding that [BLNR] did not issue findings that continuing the permit was in the best interests of the state or about whether the permit complies with the public

⁵ The Hui could have appealed BLNR's denial of a formal request for a contested case hearing under HRS § 91-14, Kaleikini v. Thielen, 124 Hawai'i 1, 26, 237 P.3d 1067, 1092 (2010), but requesting a contested case is not a prerequisite to seeking declaratory relief under HRS § 632-1.

⁶ We express no opinion whether KIUC is a necessary or indispensable party to the action below under HRCF Rule 19.

trust doctrine" after concluding it had no jurisdiction over the Hui's lawsuit.

A court deciding a motion for summary judgment for lack of subject matter jurisdiction may resolve factual disputes over the existence of jurisdiction. Cf. Yamane v. Pohlson, 111 Hawai'i 74, 81, 137 P.3d 980, 987 (2006) (discussing procedure on HRCF Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction). Here, finding of fact no. 12 was one of six findings (nos. 10-15) material to the circuit court's conclusions of law nos. 3-5 – that it lacked subject matter jurisdiction because the Hui didn't take the steps necessary to appeal BLNR's decision under HRS § 91-14.

The Hui incorrectly characterizes finding of fact no. 12 as a conclusion of law. The circuit court found:

12. [BLNR] voted to renew RP 7340 without first entering any findings of fact and conclusions of law supporting permit renewal, and without issuing any findings that continuing the permit was in the best interests of the State for the 2022 calendar year, and whether continuing the permit complies with the public trust doctrine[.]

This was not a conclusion of law. It was not even a mixed finding and conclusion. It makes no legal conclusion about BLNR's duties when making decisions during public meetings, or about whether BLNR breached a legal duty under the circumstances of this case.⁷

⁷ The Hui relies on Carmichael to argue that if BLNR doesn't "render specific findings of fact and conclusions of law" it doesn't "comply with HRS § 171-55 or its public trust obligations." But see Frankel v. Bd. of Land & Nat. Res., 155 Hawai'i 358, 379, 564 P.3d 1157, 1178 (App. 2025) ("[E]ven in the absence of explicit public trust findings in the agency's decision, the decision may nonetheless be upheld if the *public record* reflects an application of the public trust principles." (emphasis added) (citing In re Maui Elec. Co., 150 Hawai'i 528, 540, 506 P.3d 192, 204 (2022)), application for cert. filed, No. SCWC-20-0000603 (Haw. May 2, 2025); Sierra Club v. Bd. of Land & Nat. Res., 154 Hawai'i 264, 282 n.19, 550 P.3d 230, 248 n.19 (App. 2024) ("We note that for decisions made during a public meeting, rather than after a contested case hearing, BLNR could refer to its staff submittals or other evidence in the meeting record to support its decision. The meeting record and minutes should be sufficient for an appellate court to track the agency's steps."), cert. granted, No. SCWC-22-0000516, 2024 WL 3378462 (Haw. July 11, 2024).

Conclusion

The circuit court's *Amended Final Judgment*, entered on November 29, 2023, is vacated. This case is remanded to the circuit court for further proceedings consistent with this summary disposition order.

DATED: Honolulu, Hawai'i, June 6, 2025.

On the briefs:

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/s/ Katherine G. Leonard
Acting Chief Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Clyde J. Wadsworth
Associate Judge