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CAAP-21-0000396

IN THE INTERMEDIATE COURT OF APPEALS

STATE 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 APPELLEE NA PUA MAKANI PARTNERS

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PLAINTIFFS/APPELLANTS' REPLY TO APPELLEE NA PUA MAKANI PARTNERS

Plaintiffs/Appellants-Appellants KEEP THE NORTH SHORE COUNTRY, a nonprofit corporation (KNSC), and KAHUKU COMMUNITY ASSOCIATION, a nonprofit corporation (KCA) (collectively, "Appellants") respectfully submit their reply to Intervenor/ Appellee NA PUA MAKANI POWER PARTNERS, a limited liability company's (NPM or Applicant) answering brief, filed December 1, 2021 (NPM AB). [JEFS CAAP-21-0000396] [Docket No.] 46 pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(c). This appeal is taken from the circuit court's Summary Disposition Order Affirming Agency Decision and Judgment, both filed on June 30, 21. 09 Record on Appeal (ROA), [circuit court] (CC) Dkt. 56 at [PDF page] 1.

The circuit court reversibly erred by affirming 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). The ZBA Order dismissed Appellants' challenge to Defendant/ Appellee the DIRECTOR OF THE DEPARTMENT OF PLANNING AND PERMITTING, City and County of Honolulu's (Director) decision to NPM's applications for permits in violation of Hawai'i Revised Statutes (HRS) chapter 91, articles I §5, XI §§1 and 9, and XII §7 of the Hawai'i Constitution.

I. INTRODUCTION

Each time it applied for permits, and modifications of those permits, to install the largest wind turbine project in Hawai'i on 684.7 acres in the rural neighborhood of O'ahu, Applicant NPM notified no one. 09 ROA CC Dkt. 20 at 35. When Defendant/ Appellee the DIRECTOR OF THE DEPARTMENT OF PLANNING AND PERMITTING, City and County of Honolulu's (Director) approved those permits and modifications, no one other than Applicant NPM was notified. Appellees concede Appellants had visibly engaged NPM's public-facing actions, but insist it was not feasible for Appellees to have even constructively notified Appellants of the Director's actions. Rather, Appellees insist Appellants were required to ascertain the existence of Appellees permitting actions by requesting, in advance, specific notification of NPM's application submittal and the Director's decisions. This position is not tenable because Appellants could not have known when NPM would apply for permits or when the Director would issue their decision on them. More egregiously, the Director was not lawfully permitted to modify the permits and therefore

Appellants could not have anticipated needing to require notification of such unlawful action.

The issues here are fact specific. They show a patent unfairness in the Director's procedures and a surfeit of injury consequent to these flawed procedures. In 2019, the Hawai'i Supreme Court's decision in *Unite Here! Local 5 v. Department of Planning and Permitting*, 145 Hawai'i 453, 454 P.3d 394 (2019) ("*PACREP*") clarified the limits of the Director's ability to rely of their overly restrictive procedures and vindicates Appellants' rights to bring their claims despite those procedures.

II. ARGUMENT

A. Appellants did not appeal the Directors' decisions within thirty days because it was not notified of these decisions.

1. *The City's rules of procedure are not here sufficient for due process protections.*

NPM contends Appellants property rights were not "preserve[d]" by filing an appeal within thirty days pursuant to ZBA Rule §22-2 and LUO § 21-1.40. NPM AB at 14. NPM cites no authority for the proposition that property rights exist only through compliance with agency rules. However, *PACREP* clarified the Director's rules do not form the outer boundary of constitutional due process requirements for the protection of property rights. *PACREP*, 145 Hawai'i at 456, 454 P.3d at 397 (concluding Local 5's right to due process was violated by failure to provide notice and sustaining the appeal). As in *PACREP*, Appellants "did not appeal the Director's 'modification' [and permit approvals] to the ZBA within thirty days as required by ROH § 21-1.40 because [they were] not notified[.]" *PACREP*, 145 Hawai'i at 458, 454 P.3d at 399.

2. *CARD did not hold the City's rules of procedure are sufficient for due process protections.*

NPM further urges comparison with *CARD*, which it interprets as follows: "the Supreme Court reiterated that it is the opportunity for notice and the opportunity to be heard under DPP and ZBA/LUO rules that satisfies the requirements of due process." NPM AB at 17-18 citing *CARD*, 114 Hawai'i at 192, 159 P.3d at 151. However, there was no opportunity for notice and consequently no opportunity to be heard. Likewise, in *PACREP*, the Director similarly argued *CARD* "forecloses [Appellant] Local 5's due process argument because Local 5 did not request notice under DPP Rules § 6.2." *PACREP*, 145 Hawai'i at 466, 454 P.3d at 407. The Hawai'i Supreme Court rejected the Director's argument, stating: "DPP's reliance on *CARD* is misplaced because *CARD* did not involve a denial of due process based on lack of notice, but whether a petition for declaratory ruling can be used to seek review of agency decisions after the fact." *Id.* As discussed further *infra*, Part II.C, the instant case concerns the lack of notice to Appellants

concerning the Director's approvals, including the modification of setback waivers that the Director is not authorized to approve in any case. 09 ROA CC Dkt. 21 at 28 (KNSC Petition ¶34, "The Director's June 7, 2019 modification of 2016/CUP-69 exceeded her authority because she was not permitted to augment the minimum standards for conditional uses pursuant to LUO §21-2.90-2(c)."); 167 (KCA Petition ¶62, (same)).

B. PACREP clarified relevant circumstances under which deadlines for ZBA appeals do not comport with due process rights of Appellants

NPM contends the ZBA properly concluded *PACREP* "does not support the Appellants' request for an exception to the mandatory appeal filing deadlines under ZBA Rules § 22-2 and LUO § 21-1.40 in this case[.]" NPM AB at 22 citing ZBA COL ¶20. *PACREP* identified constitutional limitations to ZBA Rule § 22-2 and LUO § 21-1.40 in circumstances that warrant more procedural protections than are afforded under those rules. Appellants' circumstances are included within the scope of those that are not adequately protected under City rules due to their lack of notice.

1. *Appellants could not have adequate notice of Director's unlawful actions.*

Appellants raised that they lacked notice of the Director's actions because the latter lacked authority to approve modifications of the minimum standards of setbacks for the wind turbine conditional uses under LUO §21-2.90-2(c). OB at 23-24. NPM contends Appellants argument is "non-sensical as the merits of the Director's Actions have no rational relation to whether the procedures employed by DPP adequately protect Appellants' alleged property right." NPM AB at 21 n. 70 (emphasis in original). The Department of Planning and Permitting's Rules of Practice and Procedure (DPP Rule) §6-2¹ requires the Director to give notice to other interested persons "upon request[.]" *Id.* The unlawfulness of the Director's action is related to whether DPP Rule §6-2 provides adequate protections for interested persons. Interested persons would not have reason to request notice of actions that the Director is not authorized to take. Because Appellants could not have been reasonably expected to request notice for the Director's actions, DPP Rule §6-2 did not provide adequate procedures to protect their rights.

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."

2. *The Director's personal knowledge is not dispositive of whether procedures actually applied protect Appellants' rights to due process.*

NPM seeks to distinguish *PACREP* from the instant case because the Director professed to lack actual notice of concerns with permit issuance. NPM AB at 22 (“Director is not personally aware of any public comments that were made to DPP regarding the applications for the DPP Approvals”) (citing ZBA COL ¶25); *id.* at 23 n. 73 (“In *PACREP*, however, it was precisely because there was a public hearing that the court determined the Director was put on actual notice of Local 5’s concerns.”) (citing *PACREP*, 145 Hawai‘i at 467, 454 P.3d at 408). NPM’s contention lacks merit because the Director’s personal knowledge is not dispositive of whether procedures actually applied protect Appellants’ rights to due process.

PACREP states in part:

When the Director removed certain conditions from the 2121 Kuhio Permit, conditions that he knew Local 5 had advocated for, Local 5 should have had an opportunity to challenge the removal of those conditions from the permit. However, Local 5 did not receive notice that the Director had removed these conditions. Under these circumstances, we conclude that Local 5’s right to due process was violated, and pursuant to Hawai‘i Revised Statutes (HRS) § 91-14(g), we remand the Director’s decision to remove these conditions from the 2121 Kuhio Permit to the ZBA so that Local 5 may challenge this decision.

Id., 145 Hawai‘i at 455-56, 454 P.3d at 396-97 (2019). However, the basis for charging the Director in *PACREP* with knowledge of Local 5’s advocacy were the Director’s references to the public hearing on the application, at which a Local 5 representative commented on discrepancies concerning parking spaces, job estimates, and unit types that were addressed in conditions on the permit. *Id.*, 145 Hawai‘i at 456, 454 P.3d 397.

No public hearing was held on the CUP minor permits CUP-49 or -69. 09 ROA CC Dkt. 20 at 457 (NPM Exh. 2 at 6 ¶II.J (“No Public Hearing was held by the OPP. The CUP minor does not require a Public Hearing.”); *id.* at 548 (NPM Exh. 7 at 6 ¶II.K, “No Public Hearing was held by the DPP. CUPm does not require a Public Hearing.”). As the ZBA chair recognized, the absence of a hearing in the instant circumstances require further scrutiny of the legal principles applied in *PACREP*:

How do you apply that discussion of the Supreme Court from *PACREP* to this case where there is no hearing? There was no hearing. Your clients did not participate because there was no hearing. But to me that is a very point the Supreme Court relies on and that’s why when I look at it, I interpret the reliance on *PACREP* as being an extension to what they decided. To now apply it to a case where there is no hearing, there was no notice, there was no participation, the department did not have actual notice of the opposition of your clients - maybe

they should have known and that argument is made in your documents, but that's very different from actual notice.

09 ROA CC Dkt. 21 at 543 (Tr. 8/6/2020 at 32:2-13). Here, the Director held no hearing on NPM's applications and thus engendered an even higher risk of depriving interested persons of due process. The ZBA incorrectly charged Appellants, which hold no authority over the Director's proceedings, with the burden of establishing actual notice to the Director where no such requirement is imposed by *PACREP*.

The ZBA's determination that the absence of public proceedings in the instance case meant *PACREP*'s heightened due process protections should *not* apply is incorrect and clearly erroneous. 09 ROA CC Dkt. 21 at 468. Had any public hearing been held on *any* of the five Director decisions, the notice and hearing associated with that hearing may have provided constructive notice to Appellants. Rather than considering the Director's lack of personal knowledge of Appellants' interests to be a reason to deny the heightened procedural protections of *PACREP*, the lack of public hearing procedures weighed in favor of applying those heightened protections to Appellants.

C. Appellants did not waive arguments against the insufficiency of notice under the Director's rules of practice and procedure.

NPM contends Appellants waived any challenge to "any of the ZBA's findings of fact on which the D&O was based." NPM AB at 13 citing *Okada Trucking Co., Ltd. v. Bd. of Water Supply*, 97 Hawai'i 450, 459, 40 P.3d 73, 82 (2002); HRAP Rule 28(b)(4); *MPM Hawaiian, Inc. v. Amigos, Inc.*, 63 Haw. 485, 630 P.2d 1075 (1981). NPM does not point to the ways any of ZBA's findings undermine Appellants' arguments and rather specifies COL ¶ 2,² which provides, "[Department Practice and Procedure (DPP)] Rule § 6-2 and the posting of the Director's decisions in DPP's publicly available files provides constructive notice of the Director's decisions to members of the public[.]" *Id.*; 09 ROA CC Dkt. 21 at 465 (ZBA DnO).

First, the applicable HRCF Rule 72 has not adopted HRAP Rule 28 requirements, save for page limits. *Id.* NPM identifies no authority for the application of HRAP Rule 28 to circuit court proceedings.

² Appellants challenged substantively all of ZBA's conclusions of law (COLs), which were commonly premised on the same flawed interpretation of due process requirements. 09 ROA CC Dkt. 24 at 1-4 (circuit court OB, challenging COLs ¶¶3, 10-13, 15, 20-21, 23-30). NPM notes, ZBA COL ¶¶3, 14, and 24 are also "relevant to this appeal" and Appellants challenged these. NPM AB at 7.

Second, NPM incorrectly relies on *Okada Trucking* for the proposition that Appellants waived opposition to ZBA COL ¶2. NPM AB at 13. *Okada Trucking* concerned “unchallenged factual findings” and addressed the impropriety of “*sua sponte* revisit a finding of fact that neither party has challenged on appeal.” *Id.*, 97 Hawai‘i at 459, 40 P.3d at 82. Here, NPM inappropriately fly-specks for minute differences between the ZBA’s legal conclusions (as opposed to factual findings) and overstates the effect of the absence of a pin-cite to ZBA’s COL ¶2. Under *Okada Trucking*, Appellants “expressly or impliedly, challenged” ZBA’s conclusion that DPP Rule §6-2 constituted constructive notice satisfying due process requirements. *Okada Trucking Co.*, 97 Hawai‘i at 455, 40 P.3d at 78. Appellants’ raised the insufficiency of DPP Rule §6-2 to provide notice (09 ROA CC Dkt. 24 at 20 (opening brief)); ZBA’s reversible error in relying DPP Rule §6-2 for due process notice (*id.* at 21); and requirements of compliance with DPP Rule §6-2 are improper where the Director takes unlawful action. *Id.* at 27-28. Appellants pointed to the kinds of constructive notice that would satisfy due process, and contrasted them with those provided under DPP §6-2. 09 ROA CC Dkt. 37 at 9 (reply to City).

For these, amongst other reasons, NPM’s reliance on *Paul v. Department of Transportation*, 115 Hawai‘i 416, 168 P.3d 546 (2007) also lacks merit. NPM AB at 34 (“Nowhere in Appellants’ statement of the questions presented for decision nor in their subsequent briefing to the Circuit Court do they challenge the ZBA’s COL ¶ 2”) citing *id.*, 115 Hawai‘i at 428, 168 P.3d at 558. *Paul* discussed whether an appellant’s failure to identify where “she argued that the criminal rather than civil standard for vagueness should apply to the inspection procedures[.]” *Id.*, 115 Hawai‘i at 428, 168 P.3d at 558. Here, Appellants appropriately raised myriad challenges to the lack of notice under DPP rules, including a lack of constructive notice. 09 ROA CC Dkt. 21 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). Appellants raised this error to the circuit court. 09 ROA CC Dkt. 24 (opening brief) at 8.

Assuming *in arguendo*, that Appellants did not oppose the sufficiency of notice under DPP Rule §6-2, Hawai‘i courts may consider an issue not raised below where “justice so requires.” *Paul*, 115 Hawai‘i at 428, 168 P.3d at 558 quoting *Earl M. Jorgensen Co. v. Mark Constr. Inc.*, 56 Haw. 466, 476, 540 P.2d 978, 985 (1975).

In determining whether to address a new issue raised on appeal, this court must decide “whether consideration of the issue requires additional facts; whether the resolution of the question will affect the integrity of the findings of fact of the trial court; and whether the question is of great public importance.”

Id. quoting Hill v. Inouye, 90 Hawai‘i 76, 82, 976 P.2d 390, 396 (1998) *quoting Jorgensen Co.*, 56 Haw. at 476, 540 P.2d at 985 (other cases omitted). Here, as in *Paul*, consideration of whether DPP Rule §6-2 constitutes constructive notice of the Director’s decisions “does not necessitate any additional fact-finding on this court’s part, and our resolution of it will not ‘affect the integrity of the findings of fact of the [circuit] court.’” *Id. quoting Hill v. Inouye*, 90 Hawai‘i at 82, 976 P.2d at 396. The issue is a matter of law. Further, and unlike *Paul*, whether the DPP Rule §6-2 affords sufficient notice, constructively or otherwise, is a matter of public import to especially community and labor groups who are not afforded notice by mailing as a matter of course. See e.g. *PACREP*, 145 Hawai‘i at 463, 454 P.3d at 404 (labor union did not obtain sufficient notice under DPP Rule §6-2); *Citizens Against Reckless Development v. Zoning Board of Appeals*, 114 Hawai‘i 184, 187, 159 P.3d 143, 146 (2007) (“CARD”) (community group missed the thirty-day appeal deadline despite DPP Rule §6-2 provisions); compare *Swire Properties (Hawaii), Ltd. v. Zoning Bd. of Appeals of City and County of Honolulu*, 73 Haw. 1, 6 n.4, 826 P.2d 876, 881 n.4 (1992) (appellee homeowners association received written notice of the Director’s decision but did not timely appeal within thirty days).

Thus, to the extent HRAP Rule 28(b) applied to require Appellants to pincite to the ZBA COL ¶2, this Court has the authority to excuse the technical omission pursuant to HRAP Rule 2.³ Hawai‘i courts have a policy of permitting “litigants to appeal and to have their cases heard on the merits, where possible.” *O’Connor v. Diocese of Honolulu*, 77 Hawai‘i 83, 86, 885 P.2d 361, 364 (1994) citing *Montalvo v. Chang*, 64 Haw. 345, 641 P.2d 1321 (1982); *Jordan v. Hamada*, 62 Haw. 444, 451-2, 616 P.2d 1368, 1373 (1980); *Jones v. Dieker*, 39 Haw. 208, 209 (1952). NPM urges the omission of a pincite operates as a trap door through which the issue of whether the Director’s procedures are sufficient to satisfy due process falls outside of the appeal. This is contrary to this Court’s policy of disposing of appeals on their merits. The absence of a pincite to the ZBA’s COL ¶2 does not shift Appellants’ positions on notice and due process. See *Atl. Coast Builders & Contractors, LLC v. Lewis*, 730 S.E.2d 282, 285 (S.C. 2012) (stating preservation rules are not a “‘gotcha’ game aimed at embarrassing attorneys or harming litigants and noting it is ‘good practice’ to reach the merits when preservation is unclear.”).

³ HRAP Rule 2 provides: “In the interest of expediting a decision, or for other good cause shown, either Hawai‘i appellate court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.”

III. CONCLUSION

For the foregoing reasons, Appellants respectfully request this Court sustain their appeal and reverse and remand the circuit court's judgment with instructions to remand the matter to the ZBA for further contested case proceedings.

DATED: Makawao, Maui, Hawai'i December 27, 2021

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DATED: Honolulu, Hawai'i December 27, 2021

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