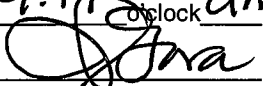


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APR 10 2019

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Clerk, Sixth Division

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY, )	CIVIL NO. 1CC 18-1-960 (JPC)
)	)
Appellant, )	(Agency Appeal)
)	)
vs. )	ORDER AFFIRMING BLNR'S
)	DECISION; NOTICE OF ENTRY
BOARD OF LAND AND NATURAL )	Judge: Hon. Jeffrey P. Crabtree
RESOURCES, the DEPARTMENT OF )	Hearing: 12/5/18
LAND AND NATURAL RESOURCES, )	Trial Week: N/A (agency appeal)
SUZANNE D.CASE in her official capacity )	)
as Chairperson of the Board of Land and )	)
Natural Resources and NA PUA MAKANI )	)
POWER PARTNERS, LLC, )	)
)	)
Appellees. )	)

ORDER AFFIRMING BLNR'S DECISION

1. Since this is an agency appeal, where this court applies standards of review and serves as an appellate court reviewing the decision from the BLNR, the court believes this order is a sufficient summary of the court's decision. In view of the voluminous record, and in order to issue its decision sooner, the court has not written a thorough and detailed review of all the arguments and factual and legal issues presented, complete with record references. If any party believes further detail or conclusions are required under HRCP Rule 72, HRS Section 91-14, or other applicable authority, the court requests a filing detailing what further findings or conclusions are

required, and by what authority, along with proposed findings and conclusions. This is not an invitation to re-argue the case. The court has made its decision. However, the court is willing to expand on its reasoning and bases decision if it is required. Any such request shall be filed and a courtesy copy delivered to this Division by noon on Friday, April 26, 2019.

2. Following the hearing on December 5, 2018, the court ordered the parties to participate in a Settlement Conference, which was held with Judge Dean E. Ochiai. Judge Ochiai later informed this court that the Settlement Conference was unsuccessful and this court could go ahead and decide the motion. This court assures the parties it is not aware of any position that any party took during the Settlement Conference, and this court has not considered or relied on any information that is not part of the record in this case.

3. The court has reviewed all of the 9300+ page record on appeal, with particular emphasis on the Hearing Officer's findings and conclusions and record references (ROA at 8760 et seq), BLNR's findings and conclusions and record references (ROA at 9134 et seq) and the parties' briefs and all record references therein.

4. The applicable legal authority and standards of review are clear. Agency appeals are primarily governed by HRS Section 91-14. Findings of fact are reviewed under the clearly erroneous standard. Conclusions of law are freely reviewable. Mixed determinations of law and fact are decided under the clearly erroneous standard. Dao v. Zoning Board of Appeals, 144 Haw. 28, 39 (App. 2019) (citations omitted). The court's analysis includes but is not limited to the following.

5. Na Pua Makani seeks to construct wind turbines in Kahuku. This will likely kill certain birds and bats which are endangered species. Therefore, Na Pua Makani needs an incidental take license (“ITL”) which authorizes it to “take” or cause these deaths. The ITL in turn requires a Habitat Conservation Plan (“HCP”). The BLNR is responsible for approving or disapproving the ITL and HCP.

6. Plaintiff Keep the North Shore Country objected to the ITL and HCP and requested and received a contested case hearing. Plaintiff focused its efforts on the ‘ōpe‘ape‘a, also known as the Hawaiian hoary bat. Information on the ‘ōpe‘ape‘a is not as developed as with many other endangered species, largely because of their relatively small numbers and limited distribution in certain areas on certain islands. In order to base its decision on the HRS Section 91-14 criteria, BLNR turned to its statutorily designated (HRS Section 195D-25) science consultant, the Endangered Species Recovery Committee (“ESRC”). The ESRC is composed of members with special expertise, training, and experience on issues relevant to the Board’s approval of the ITL and HCP. It did substantial work culminating in its “Bat Guidance” report (ROA at 4761-4799). Reviewing the Bat Guidance report, this court was struck by how much effort and thought went into it. In its own way, it is a remarkable document, and a testament to the serious efforts made to collect information and have that information inform and guide decision-making to preserve and protect ‘ōpe‘ape‘a. The BLNR essentially adopted the factual findings of the ESRC. While the Hearings Officer eventually recommended against the project, the Hearings Officer agreed with the essential factual findings of the ESRC. The court finds no fault in the BLNR relying on

and adopting the ESRC's expertise in general, and its findings and conclusions on 'ōpe'ape'a specifically.

7. There are factual issues where the decision-making or analysis could reasonably vary from what the ESRC and BLNR concluded. Key examples of this include 1) the degree to which the Kawaihoa bat deaths data should have been considered compared to the data from the neighboring Kahuku WTG facility; 2) the efficacy of increasing the cut-in speed from 5 m/s to 6.5 m/s for Low-Wind Speed Curtailment ("LWSC") (the idea is to reduce the giant rotor blade's operation in lower-speed wind, because of the belief that 'ōpe'ape'a are more active in low winds; 3) whether the HCP would increase the likelihood that 'ōpe'ape'a will survive and recover; 4) the cumulative impact of the project on Oahu's population of 'ōpe'ape'a; and 5) the change in height and rotor sweep area for the WTGs. But it is not for this court to decide who had the better argument or how this court would have decided those issues. The question for this court is limited to whether BLNR's factual findings and mixed questions of fact and law on those issues were clearly erroneous. This court is satisfied that those decisions were made on the best available data, and the ITL (the estimate of 'ōpe'ape'a deaths from the project) were reasonably adjusted to account for ambiguity or uncertainty on these factors.

8. The court also notes that especially where the Hearing Officer had different conclusions, the BLNR added or confirmed numerous conditions to the HCP which provide for increased monitoring, better mitigation, research and funding, and adaptive measures in the future if 'ōpe'ape'a deaths from the WTGs exceed estimates. The HCP as approved by the BLNR requires adaptive management throughout the 20-

year permit term, including bat death mitigation, monitoring, reports, and operational changes, including the higher cut-in speed for LWSC if 'ōpe'ape'a bat deaths are higher than initially expected. In other words, if the essential facts relied on in approving the HCP and ITL turn out to be wrong, the adaptive measures which are part of the HCP license should step in and provide further protection for the 'ōpe'ape'a.

9. Regarding conclusions of law, Plaintiff does not seem to identify any specific conclusion of law by the BLNR which Plaintiff argues is erroneous. The appeal is focused on whether there is sufficient factual evidence in the record. At most, Plaintiff seems to argue a mixed question of law and fact on whether the BLNR's findings comply with HRS Section 195 regarding the likelihood that 'ōpe'ape'a deaths are minimized as a result of the HCP, and the likelihood that the 'ōpe'ape'a population will increase as a result of the HCP. Applying the clearly erroneous standard to a mixed question of law and fact, this court does not have a firm and definite conviction that a factual mistake has been made, or that BLNR's factual findings are otherwise clearly erroneous.

10. Disqualification or recusal of Sam Gon, III.

A. BLNR Board member Sam Gon, III served as a member of the ESRC, and recommended that the ESRC support the ITL and HCP in this case. He was also a voting member of the BLNR Board which decided the issue. This resulted in two recusal or disqualification arguments by Keep the North Shore Country: 1) Mr. Gon as an ESRC member had and relied on information that is not in the record when he acted as a BLNR member, and 2) he should have been disqualified from voting as a BLNR member on the ITL and HCP issue he "prejudged" as an ESRC member.

B. This court does not agree with Na Pua Makani that Plaintiff KNSC waived this issue by not appealing before the BLNR issued its decision. Plaintiff's motion to recuse Mr. Gon was denied before the BLNR made its decision, but in this court's view that did not trigger the right to appeal an order which was interlocutory in nature.

C. Regarding Mr. Gon's alleged "outside the record" information, the state of the record is not crystal clear. That said, obviously, the members of the ESRC have their own information, training, education, and experience, which they are expected to apply to the task at hand. But to the extent an ESRC member also sits as a voting BLNR member, potential problems arise with the voting BLNR member relying on matters outside the record, or pre-judging the issue he or she decided as an ESRC member. This is clearly a potential problem. The court believes there is a legitimate question whether best practices standards include opining as an ESRC member and then voting on the same issue as a BLNR member. That said, the court is not aware of any legal authority which prohibits an ESRC member from voting as a BLNR member. Further, Mr. Gon stated he was impartial and would consider all the evidence. And the conflicts of interest statute, HRS Section 84-14, does not appear to prohibit what occurred here. The court also notes, parenthetically, that the vote differential was not so close that Mr. Gon's vote could be considered the deciding vote. In any event, this court does not find that Plaintiff carried its burden on these recusal issues.

11. Attempted support by State Senator Lorraine Inouye. The record shows that during BLNR's deliberations, Senator Inouye called several BLNR board members to support this project, and sent a letter to BLNR voicing support for the project. One

BLNR board member recused himself as a result of Senator Inouye's phone call. Another board member declined to talk with Senator Inouye regarding the project. BLNR Chair Suzanne Case represented on the record that the Senator's letter was intercepted before it was read by the other board members, and the record shows no other board members spoke with the Senator. The court does not find that Plaintiff has met its burden. It appears that KNSC did not object to these events at the time, and only raised it for the first time on appeal to this court. Therefore, the issue is waived. In the alternative, considering the issue on its merits, the record does not show any actual direct contact with the board members, other than the two contacts described above, one of which resulted in recusal, and the other in no substantive communication. The court finds this limited contact is not sufficient to warrant reversal, and is not sufficient to justify a remand for further fact-finding on the issue.


12. This case can be thought of as "green vs. green." On the one hand, we have a project which per its supporters will reduce Hawai'i's CO2 emissions by 1 million tons over its 20 year life, reduce Hawai'i's dependence on imported fossil fuels, spend up to \$4.6 million to minimize negative impacts, increase the likelihood of protected species' survival, and contribute substantial funds to benefit the Kahuku community. On the other hand, we have an endangered species of native bat, or 'ōpe'ape'a, which is legally entitled to strong protection under Hawai'i and federal laws, as part of a larger effort not to extinguish species, not reduce biodiversity, and not contribute to a cascading series of events if a tipping point in species eradication is reached. The court's hope and expectation, based on the evidence presented, is that rather than

seeing this case as “green vs. green,” by applying and enforcing Hawai’i’s strong environmental protections, the result will be a win-win, rather than a win-lose.

THEREFORE, FOR REASONS INCLUDING BUT NOT LIMITED TO THOSE SHOWN ABOVE, THE DECISION OF THE BOARD OF THE BUREAU OF LAND AND NATURAL RESOURCES ENTERED IN THIS MATTER ON MAY 16, 2018, IS HEREBY AFFIRMED.

APR 10 2019

DATED: Honolulu, Hawai’i:

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Jeffrey P. Crabtree  
Judge of the above-entitled court

Keep the North Shore Country v. BLNR, et al.; Civil No. 1CC 18-960 (JPC);  
First Circuit Court; ORDER AFFIRMING BLNR’S DECISION; NOTICE OF ENTRY



NOTICE OF ENTRY

The above ORDER AFFIRMING BLNR'S DECISION; NOTICE OF ENTRY has been entered and copies served on the above-identified parties by:

1.  Delivery to the court jackets of attorneys;

Maxx E. Phillips, Esq. (firm: The Center for Biological Diversity)  
*Attorney for Appellant*

John Manaut, Esq. and Puananionaona Thoene, Esq. (firm: Carlsmith Ball LLP)  
*Attorneys for Appellee Na Pua Makani, LLC*

William Wynhoff, Esq. and Cindy Young, Esq. (Dept. of the Attorney General)  
*Attorneys for Appellee Board of Land and Natural Resources*

2.  Via e-mail to;

Maxx E. Phillips, Esq.  
John P. Manaut, Esq.  
Puananionaona Thoene, Esq.  
William Wynhoff, Esq.  
Cindy Young, Esq.

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Clerk, 6<sup>th</sup> Division

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