

CARLSMITH BALL LLP

JOHN P. MANAUT 3989
PUANANIONAONA P. THOENE 10005
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842

Attorneys for Appellee
NA PUA MAKANI POWER PARTNERS, LLC

FIRST CIRCUIT COURT
STATE OF HAWAII
FILED

2019 MAY -1 AM 10:17

N. MIYATA
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

KEEP THE NORTH SHORE COUNTRY,

Appellant,

vs.

BOARD OF LAND AND NATURAL
RESOURCES, the DEPARTMENT OF LAND
AND NATURAL RESOURCES, 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.

CIVIL NO. 18-1-0960-06 JPC
(AGENCY APPEAL)

APPELLEE NA PUA MAKANI POWER
PARTNERS, LLC'S STATEMENT OF
POSITION IN RESPONSE TO
APPELLANT'S REQUEST FOR
FURTHER FINDINGS AND
CONCLUSIONS FILED APRIL 26, 2019;
CERTIFICATE OF SERVICE

NON-HEARING MOTION

JUDGE: HON. JEFFREY P. CRABTREE
HEARING: DECEMBER 5, 2018
TRIAL WEEK: N/A (AGENCY APPEAL)

**APPELLEE NA PUA MAKANI POWER PARTNERS, LLC'S
STATEMENT OF POSITION IN RESPONSE TO APPELLANT'S REQUEST
FOR FURTHER FINDINGS AND CONCLUSIONS FILED APRIL 26, 2019**

Appellee NA PUA MAKANI POWER PARTNERS, LLC ("**Appellee**" or "**NPM**")

submits this Statement of Position to Appellant KEEP THE NORTH SHORE COUNTRY'S

("Appellant" or "**KNSC**") Request for Further Findings and Conclusions, filed April 26, 2019.

KNSC makes two primary points: (1) Haw. R. Civ. P. Rule 52(a) requires the reviewing court in an agency appeal to enter its own detailed findings of fact and conclusions of law, and (2) KNSC questions whether it must appeal from the Court's April 10, 2019 order. NPM offers the following for clarity.

On the first point, KNSC failed to cite the Hawai'i Supreme Court case on point that is dispositive of its request for the court to enter its own detailed findings of fact and conclusions of law. This reviewing court is not the trier of fact, but performs an appellate function under Haw. R. Stat. § 91-14. The controlling law under those circumstances is addressed in *Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai'i 296, 307-08, 97 P.3d 372, 383-84 (2004), which distinguishes and does not support Appellant's citation to the older Intermediate Court of Appeals decision in *Scott v. Contractors License Bd.*, 2 Haw.App. 92, 626 P.2d 199 (1981).

Lanai Co. is dispositive of the issue:

Initially we address Sensible Growth's point on appeal that the court violated HRCF Rule 52(a) by failing to give a reasoned explanation for its reversal of the 1996 Order to cease and desist. "Review of a decision made by the circuit court upon review of an agency's decision is a secondary appeal. The standard of review is one in which the court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) [(1993)] to the agency's decision." *Morgan v. Planning Dep't, County of Kauai*, 104 Hawai'i 173, 179, 86 P.3d 982, 988 (2004).

Sensible Growth argues that the court violated HRCF Rule 52(a), because it "failed to provide the required... explanation of its reversal of the LUC's action...." LCI correctly notes that HRCF Rule 52(a) only requires a statement of facts in "actions tried upon the facts." **When a court reviews the decision of an administrative agency, HRS § 91-14(g) governs.**

According to HRS § 91-14(g), the court could either affirm, remand, reverse, or modify the administrative agency decision after reviewing the record. The administrative agency creates the record, and the circuit court reviews it. In this case, LUC was the initial trier of fact, and the court acted in an appellate capacity in reviewing the LUC's findings and conclusions. **Hence, the matter was not an "action tried upon the facts" within the meaning of HRCF Rule 52(a) because the court reviewed the record rather than tried the facts. HRCF**

Rule 52(a) therefore does not apply to the court's determinations.

Lanai Co., 105 Hawai'i at 307-08, 97 P.3d at 383-84 (footnotes omitted, emphases added).

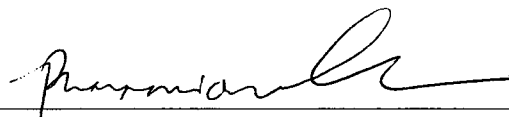
Scott is also distinguishable because it dealt with the Circuit Court *overturning* an agency decision where the Circuit Court insufficiently set forth its reasons for overturning the agency's order and why the agency's decision (which simply adopted the hearing officer's findings and conclusions without adding any additional findings or conclusions of its own) was clearly erroneous or otherwise incorrect. *Scott*, 2 Haw.App. at 94-95, 626 P.2d at 201. The Hawai'i Supreme Court found in *Scott* that the Circuit Court's order overturning the agency's decision "was so vague that the Intermediate Court of Appeals could not determine whether the ruling was based on substantive or procedural grounds." *Lanai Co.*, 105 Hawai'i at 308 n.27, 97 P.3d at 384 n.27. Those circumstances do not exist here as this court has clearly articulated its reasons for affirming the Board of Land and Natural Resources' ("BLNR") decision which included its own detailed findings of fact and conclusions of law, including the court finding no fault with BLNR relying on the Endangered Species Recovery Committee's expertise, that BLNR's decision was based on the best available scientific data, and that BLNR's decision was not wrong or clearly erroneous.

Based on a clear reading of Haw. R. Civ. P Rule 52(a) and the *Lanai Co.* decision, there is no requirement for this Court, as the reviewing body on appeal and not the trier of fact, to enter detailed findings of fact and conclusions of law to affirm the Board's own separate and detailed findings of fact and conclusions of law.

On the second point, an appeal from this Court's decision affirming an agency order is taken from the entry of the Judgment, not the underlying order as entered here on April 10, 2019. The Judgment should be entered once the period of time needed to resolve KNSC's request is

ruled upon so that a final and dispositive Judgment can be entered for purposes of appeal under Haw. R. Civ. P. 72(k). *See Jenkins v. Cades Schutte Fleming & Wright*, 76 Hawai'i 115, 869 P. 2d 1334 (1994).

DATED: Honolulu, Hawai'i, May 1, 2019.



JOHN P. MANAUT
PUANANIONAONA P. THOENE

Attorneys for Appellee
NA PUA MAKANI POWER PARTNERS,
LLC

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

KEEP THE NORTH SHORE COUNTRY,

Appellant,

vs.

BOARD OF LAND AND NATURAL
RESOURCES, the DEPARTMENT OF LAND
AND NATURAL RESOURCES, 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.

CIVIL NO. 18-1-0960-06 JPC
(AGENCY APPEAL)

CERTIFICATE OF SERVICE


CERTIFICATE OF SERVICE

The undersigned certifies that on the date indicated below, a true and correct copy of the foregoing document was served upon the following parties by depositing a copy of the same in the U.S. mail, postage prepaid, to the addresses below (unless otherwise indicated) as follows:

WILLIAM J. WYNHOFF, ESQ.
CINDY Y. YOUNG, ESQ.
Deputy Attorney Generals
Department of the Attorney General
465 South King Street, Room 300
Honolulu, Hawai'i 96813
*Counsel for the BOARD OF LAND AND
NATURAL RESOURCES
(via U.S. mail & hand delivery)*

MAXX PHILLIPS, ESQ.
66-632 Kamehameha Hwy., Suite 102
Hale'iwa, Hawai'i 96712
*Attorney for KEEP THE NORTH SHORE
COUNTRY
(via U.S. mail only)*

DATED: Honolulu, Hawai'i, May 1, 2019.



JOHN P. MANAUT
PUANANIONAONA P. THOENE

Attorneys for Appellee
NA PUA MAKANI POWER PARTNERS,
LLC