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CAAP-13-0005781

IN THE SUPREME COURT OF THE STATE OF HAWAII

SURFRIDER FOUNDATION; HAWAII'S  
THOUSAND FRIENDS; KA IWI  
COALITION; and KAHEA – THE  
HAWAIIAN-ENVIRONMENTAL  
ALLIANCE,

Plaintiffs-Appellants,

vs.

ZONING BOARD OF APPEALS, CITY &  
COUNTY OF HONOLULU; DIRECTOR  
OF THE DEPARTMENT OF PLANNING  
& PERMITTING, CITY & COUNTY OF  
HONOLULU; KYO-YA HOTELS &  
RESORTS, LP; and 20,000 FRIENDS OF  
LABOR,

Defendants-Appellees.

CIVIL NO. 13-1-0874-03 (RAN)

ON APPEAL FROM THE

1) FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
DECISION AND ORDER AFFIRMING  
DECISION AND ORDER OF THE  
ZONING BOARD OF APPEALS IN  
CASE NO. 2001-ZBA-1 FILED  
HEREIN ON OCTOBER 16, 2013;

2) FINAL JUDGMENT, FILED  
HEREIN ON OCTOBER 30, 2013

HONORABLE RHONDA A.  
NISHIMURA, JUDGE

**DEFENDANT-APPELLEE KYO-YA HOTELS & RESORTS, LP'S  
MEMORANDUM IN OPPOSITION TO PETITIONERS'-  
APPELLANTS' REQUEST FOR TRANSFER TO THE HAWAII  
SUPREME COURT, FILED APRIL 10, 2014**

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**DEFENDANT-APPELLEE KYO-YA HOTELS & RESORTS, LP'S  
MEMORANDUM IN OPPOSITION TO PETITIONERS'-  
APPELLANTS' REQUEST FOR TRANSFER TO THE HAWAII  
SUPREME COURT, FILED APRIL 10, 2014**

**I. INTRODUCTION**

The Request for Transfer filed by Appellants Surfrider Foundation, Hawaii's Thousand Friends, Ka Iwi Coalition, and Kahea-The Hawaiian-Environmental Alliance (collectively, "Appellants") should be denied because the issues that purportedly support transfer do not come close to satisfying the high burden set by Hawai'i Revised Statutes ("HRS") § 602-58.

Appellants first argue that transfer is appropriate under HRS § 602-58(a)(1) because two of their appellate issues are of "[i]mperative or fundamental public importance." This argument fails from the outset, however, because **neither of the issues was raised** before the Circuit Court, and they are therefore waived. But even if that was not the case, these issues do not meet the high standard required by HRS § 602-58(a)(1). The **first issue relates to the interpretation of a small portion** of a Land Use Ordinance ("LUO") **establishing design guidelines for the Waikiki Special District ("WSD")**. The interpretation of this LUO cannot be an issue of "[i]mperative or fundamental public importance" because the **LUOs expressly** recognize that there are already "a large number of nonconforming uses and structures" in the WSD, that the application of the design guidelines is meant to be flexible, and that the guidelines should not act "as barriers to desirable restoration and redevelopment." *See* LUO § 21-9.80-1(f). The

second appellate issue relates to the evidence that can be considered by a Circuit Court addressing an agency appeal. This issue has already been thoroughly addressed by other cases (and a statute), and Appellants do not identify any aspect of their appeal that would affect these well-settled precedents.

Appellants also contend that transfer is appropriate under HRS § 602-58(b)(1). Appellants claim that a 1965 agreement between the State and the parent company of Appellee Kyo-Ya Hotels & Resorts, LP (“Kyo-ya”) presents “[a] question of first impression or a novel legal question” because the agreement has not been previously interpreted by the courts. But the fact that an agreement has not been previously litigated does not create a “novel legal question.” If it did, every contract appeal would qualify for discretionary transfer.

Moreover, even if this appeal presented a novel issue, the Court should decline transfer because it is better addressed in the first instance by the Intermediate Court of Appeals (“ICA”). This case involves four separate appellate issues—one of which has three subparts—and a complex agency record with over two years of agency proceedings. There is also a second appeal arising from the same underlying case that is currently pending in the ICA and that could produce inconsistent rulings. If this case is not transferred, Kyo-ya will move to consolidate the two appeals, ensuring they are evaluated consistently and efficiently. For all of the foregoing reasons, this Court should decline Appellants’ Request for Transfer.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. The Director of the Department of Planning and Permitting Approves Kyo-ya's Variance Application for a New Diamond Head Tower

The Moana Surfrider resort is comprised of three adjacent buildings along Waikiki Beach: the historic Banyan Wing is located in the center of the property, the 21-story Surfrider Tower is on the Ewa side of the property, and the eight-story Diamond Head Tower is on the Diamond Head side of the property. Record on Appeal (“ROA”),<sup>1</sup> Vol. 6, 171-72 (Memo. in Supp. of App. for Variance). The Banyan Wing was originally built in 1901, and it is the only structure in the WSD listed on the National and State Registers of Historic Places. *Id.* Although the Banyan Wing is one of the most recognizable buildings in Hawai‘i, its historic status and the unique shape of the underlying parcel have created substantial challenges for Kyo-ya’s ability to develop the property. *Id.*

Over four years ago, in March 2010, Kyo-ya applied for a zoning variance under Section 6-1517 of the Revised Charter of the City and County of Honolulu (“Charter”),<sup>2</sup> asking for relief from the setback requirements contained in Land Use

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<sup>1</sup> All page number references contained herein are to the PDF page numbers in the JEFS version of the Record on Appeal.

<sup>2</sup> Section 6-1517 of the Charter states: “The director shall hear and determine petitions for varying the application of the zoning code with respect to a specific parcel of land and may grant such a variance upon the ground of unnecessary hardship if the record shows that (1) the applicant would be deprived of the reasonable use of such land or building if the provisions of the zoning code were strictly applicable; (2) the request of the applicant is due to unique circumstances and not the general conditions in the neighborhood, so that the reasonableness of the neighborhood zoning is not drawn into question; and (3) the request, if approved, will not alter the essential character of the neighborhood nor be

Ordinance (“LUO”) section 21-9.80-4(g)(2). *See* ROA, Vol. 6, 167-200 (Memo. in Supp. of App. for Variance). Kyo-ya proposed to replace the existing Diamond Head Tower with a 26-story hotel and residential tower that would encroach into the 100-foot coastal setback and coastal height setback. *See id.* As the Director of the Department of Planning and Permitting (the “Department”) pointed out, the current Diamond Head Tower, is an “already aging structure” that if “not allowed to be redeveloped, . . . would continue to deteriorate.” *Id.* at 151. The new tower will be taller than the one it would replace, but it has a smaller footprint that would create significantly improved ocean views for pedestrians, increase public open space, and create new public beach access. *See id.* at 178 (diagram). It also will not impact the historic Banyan Wing. *See id.*

On September 23, 2010, the Department held its public hearing on the Application. ROA, Vol. 6, 259-70 (Findings of Fact, Conclusions of Law, and Decision and Order). On December 1, 2010, the Director granted partial approval of the variance application. *Id.* In his Findings of Fact, Conclusions of Law, and Decision and Order, the Director entered detailed findings related to the three-part variance test contained in section 6-1517 of the Charter, including that: (1) if the variance was not approved, Kyo-ya would be deprived of the reasonable use of the land or building because, among other things, “the Applicant would not be able to develop in accordance with the Planned Development-Resort permit provisions,” *id.* at 264-66; (2) the shape of the property, the

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contrary to the intent and purpose of the zoning ordinance. Prior to the granting of any variance, the director shall hold a public hearing thereon. The director shall specify the particular evidence which supports the granting of a variance.”

existence of the historic Banyan Wing, and other factors created unique circumstances and are not among the general conditions in the neighborhood, *id.* at 266-68; and (3) the new tower would not alter the essential character of the neighborhood, but would instead “replace an aging, declining structure with a new, more attractive and functional structure, which will enhance Waikiki as a visitor destination, and also allow the Applicant to preserve the historic Banyan Wing,” *id.* at 268-69.

**B. The Zoning Board of Appeals Upholds the Director’s Variance**

On or about January 3, 2011, Appellants filed a Petition to the Zoning Board of Appeals (“ZBA”) regarding the Director’s decision. Under the Charter, “[a]n appeal shall be sustained only if the board finds that the director’s action was based on an erroneous finding of a material fact, or that the director had acted in an arbitrary or capricious manner or had manifestly abused discretion.” Charter § 6-1516. As the parties initiating the appeal, Appellants had the sole burden of proof in those proceedings, regardless of the grounds claimed for their appeal. HRS § 91-10(5).

In a series of filings and oral representations over the next year, Appellants repeatedly took the position that their appeal was based solely on the first prong of section 6-1516, *i.e.*, “the director’s action was based on an erroneous finding of a material fact.” *See generally* ROA Vol. 1, 277-83 (Kyo-ya’s Answering Brief) (collecting representations). As just one of many examples, Appellants’ Position Statement defined the “Question Presented” as “Was the Director’s conclusion that the Kyo-ya project

satisfied the 3-part hardship test required for a zoning variance based on erroneous findings of material facts?” *Id.* (emphasis added).

Kyo-ya moved to dismiss the appeal, and the ZBA partially granted the motion on May 3, 2012. The ZBA ruled, among other things, that (i) Appellants failed to challenge the Director’s decision as arbitrary, capricious, or a manifest abuse of discretion; and (ii) the single issue on appeal was whether the Director’s decision was based upon erroneous findings of material fact. ROA Vol. 7, 350-55.

The ZBA heard opening arguments on March 22, 2012, and Appellants began their case in chief shortly thereafter. There was substantial witness testimony throughout the hearing: Appellants called five witnesses, including four expert witnesses; Kyo-ya called the project architect; and the Director testified. *See generally* ROA, Vol. 1, 283-91 (Kyo-ya’s Answering Brief) (summarizing witness testimony). On February 14, 2013, the Board issued its Findings of Fact, Conclusions of Law, and Decision and Order denying the appeal in its entirety. ROA, Vol. 8, 514-48.

### **C. Appeal to Circuit Court**

On March 21, 2013, Appellants filed their Notice of Appeal and Statement of the Case to the Circuit Court. Appellants’ Statement of the Case presented three questions:

(1) Whether the ZBA breached its duty to enforce the WSD zoning ordinance and abused its discretion when it denied the appeal of the Director’s clearly erroneous Decision of December 1, 2010, which granted Kyo-ya a variance to construct a new 26-floor tower to encroach into the 100-foot coastal setback provided that:

Prior to the issuance of a development permit, the applicant shall submit revised plans to the Director of the DPP, for review and approval, which show the new DHT shall comply with the 1-to-1 (45-degree angle) coastal height setback as measured from the face of the existing concrete seawall/walkway structure (Line A in the Agreement) 180 feet seaward (the approximate beach width intended in the 1965 Agreement).

(2) Whether the ZBA's Findings of Fact, Conclusions of Law, Decision and Order are clearly erroneous and an arbitrary, capricious, and a clearly unwarranted exercise of discretion given that the Director's Decision on its face:

a) fails to address all parts of all three prongs of the Honolulu City Council's mandatory "unnecessary hardship" test for a variance;

b) fails to support any of the prongs with sufficient, substantial and non erroneous material facts as required by the Hawaii Supreme Court in multiple zoning cases;

c) is conditional upon compliance with an imaginary line 180 feet out to sea from the certified shoreline, which has no basis in law; and

(3) Whether the ZBA decision to deny Petitioners' appeal is clearly erroneous and arbitrary, capricious and an abuse of discretion given that the plain language in the Director's Decision of December 1, 2010, the reliable, probative, and substantial evidence in the complete administrative record, and applicable statutes, ordinances and case law indicate that the Director should not have granted Kyo-ya's application for a coastal setback variance.

ROA, Vol. 1, 20-21.

Appellants' Designation of the Record on Appeal included "all records and files in 2011/ZBA-1," *i.e.*, the appeal to the ZBA of the Director's decision on the variance for the Diamond Head Tower. ROA, Vol. 1, 37. However, Appellants also

tried to designate “every Kyo-ya application submitted for a zoning variance and/or permit to build a new Diamond Head Tower,” documents from the Department and City Council, “the administrative record on the history, intent and purpose of the WSD,” and other documents that were never before the ZBA. ROA, Vol. 1, 37-38. On April 1, 2013, Kyo-ya filed a short objection noting that the “issues in this appeal relate to a single development entitlement - Zoning Variance No. 2010/VAR-9,” and the ROA should be limited “to the record of the administrative proceedings below.” ROA, Vol. 1, 82-84. Appellants filed a response on April 8, 2013, ROA, Vol. 1, 87-96, and the ROA was submitted by the ZBA shortly thereafter, on April 10, 2013, ROA, Vol. 1, 97-116. At no point after the record was submitted did Appellants ever seek to correct or supplement the ROA. *See* ROA, Vol. 1, 10-13.

A hearing was held on September 20, 2013, and on October 16, 2013 the Circuit Court issued its Findings of Fact, Conclusions of Law and Decision and Order Affirming the Decision and Order of the Zoning Board of Appeals. ROA, Vol. 1, 351-62. The Court affirmed the decision of the ZBA in its entirety, finding:

1. . . . No party to this action requested corrections or additions to the ROA under Section 91-14(d), Hawaii Revised Statutes, or requested leave to present additional evidence under Section 91-14(e), Hawaii Revised Statutes.

\* \* \*

4. Petitioners, in the underlying proceeding before the Board, waived any argument that the Director acted in an arbitrary or capricious manner or had manifestly abused his discretion.

5. The single issue on appeal before this Court is as to

whether or not a particular finding of fact, or more than one finding of fact, was material and was clearly erroneous as a basis for the Director's Decision.

\* \* \*

8. Appellants failed to satisfy their burden to demonstrate that the Director's action in partially approving the Variance Application was based upon any erroneous findings of material fact.

ROA, Vol. 1, 357-59.

**D. Kyo-ya's Motion for Attorneys' Fees**

On November 13, 2013, Kyo-ya filed its Motion for Attorneys' Fees and Costs Under HRS § 607-14.5. ROA, Vol. 1, 371-414. Section 607-14.5 permits the recovery of attorneys' fees where "all or a portion of the claims or defenses made by the party are frivolous and are not reasonably supported by the facts and the law in the civil action." The motion argued that Appellants' opening brief was in bad faith because (1) the questions presented to the Circuit Court all involved "abuse of discretion arguments," but the only issues considered by the ZBA related to erroneous findings of material fact; and (2) Appellants misrepresented to the Court that the ZBA had improperly prevented them from arguing or presenting evidence that the Director acted in an arbitrary or capricious manner or had manifestly abused his discretion. *Id.* at 383.

The Circuit Court agreed that Appellants had misrepresented that the ZBA had improperly prevented them from presenting evidence that the Director's decision was arbitrary or capricious. ROA, Vol. 2, 485-86. The Court held:

[T]he Record indicates that Appellants' counsel's statements

were untrue and/or inaccurate. The Record is replete with references that Appellants' counsel had full and fair opportunity to present her appeal to the ZBA and voluntarily agreed to limit her appeal on the issue as to whether the Director's conclusion that the Kyo-ya project satisfied the 3-part hardship test required for a zoning variance was based on erroneous findings of material fact, not an abuse of discretion.

*Id.* The Court nevertheless found that “untrue and/or inaccurate statements” do not, in and of themselves, demonstrate that Appellants' claim is ‘manifestly and palpably without merit’ . . . .” *Id.* at 486.

### **E. The Instant Appeals**

Appellants' current appeal raises four issues.

- First, Appellants contend that a variance can never be granted to the coastal setbacks and coastal height setbacks contained in LUO § 21-9.80-4(g)(2) because the language of the statute uses the term “shall.” Petitioners'/Appellants' Opening Brief at 9-10 (Apr. 4, 2014) (“Opening Brief”); Petitioners'/Appellants' Request for Transfer to the Hawaii Supreme Court at 16 (Apr. 10, 2014) (“Request for Transfer”).
- Second, Appellants argue that it was improper for the Director to partially rely on a 1965 agreement between Kyo-ya's parent company and the State when the Director made his decision to grant the variance. Opening Brief at 10; Request for Transfer at 23-25.
- Third, Appellants allege that the “ZBA essentially got the burdens wrong” when “the ZBA put the burden on the Appellants to point to a discreet ‘erroneous finding of fact.’” Opening Brief at 11. Appellants do not argue that this issue provides a basis for transferring the case.
- Fourth, Appellants contend that the ZBA “failed to consider and review the whole record,” which “includes all DPP staff memoranda reviewed by the Director prior to making his decision to grant a partial variance.” Opening Brief at 12; Request for Transfer at 19-22.

In addition, Kyo-ya has filed an appeal of the Circuit Court’s decision on Kyo-ya’s motion for attorneys’ fees (Case No. ICA CAAP-14-0000379). Kyo-ya’s opening brief in that appeal is due May 14, 2014.

### **III. LEGAL STANDARD**

Under HRS § 602-58(a), transfer to the Supreme Court is mandatory where the case involves a “question of imperative or fundamental public importance”; the invalidation of a Constitutional amendment, state statute, or similar law; or “[a] sentence of life imprisonment without the possibility of parole.” Transfer may also be granted under HRS § 602-58(b)—in the Court’s discretion—if the case involves “[a] question of first impression or a novel legal question,” or conflicting decisions among the Courts.

Here, Appellants argue that two of their appellate issues meet the “imperative or fundamental public importance” requirement for mandatory transfer, and one of their issues meets the “novel legal question” requirement for discretionary transfer. As discussed at length below, Appellants have failed to demonstrate either basis for transfer. Moreover, even if Appellants could somehow demonstrate a “novel legal question,” the Court should decline jurisdiction to allow the ICA to evaluate and develop the record on this complicated agency appeal.

#### **IV. ARGUMENT**

##### **A. There Is No Basis for Mandatory Transfer Under HRS § 602-58(a)(1)**

##### **1. The Two Issues That Appellants Assert in Support of Their Request for Mandatory Transfer Were Waived**

As an initial matter, Appellants' request for mandatory transfer should be denied because the two issues that Appellants claim support mandatory transfer were not raised before the Circuit Court and are therefore waived. *See, e.g., State v. Honolulu Univ. of Arts, Sciences & Humanities*, 110 Hawai'i 504, 518, 135 P.3d 113, 127 (2006) (“[F]ailure to raise or properly preserve issues at the trial level would be deemed waived[.]”) (citing *Enoka v. AIG Hawaii Ins. Co.*, 109 Hawai'i 537, 546, 128 P.3d 850, 859 (2006)).

The first allegedly mandatory issue is Appellants' argument that a variance to LUO § 21-9.80-4(g)(2) can simply never be granted because the statute uses the term “shall.” *See* Request for Transfer at 16 (“LUO Section 21-9.80-4(g)(2) contains no discretionary or ambiguous language that gives the Director the discretion to approve a variance from the WSD coastal setback and coastal height setback requirements[.]”). In their ICA Opening Brief, Appellants claim they made this argument in their Circuit Court Opening Brief, but none of the sections they cite address this issue. *See* Opening Brief at 10. Instead, the cited pages contain a general argument that the Director failed to properly apply the three-part variance test, *see* ROA, Vol. 1, 180-81, and failed to properly measure or compute the setback because he relied on a “undetermined future shoreline,” *see, e.g.,* ROA, Vol. 1, 181-84. Nor was this issue contained in Appellants'

Statement of the Case. *See* ROA, Vol. 1, 14-41.<sup>3</sup> Because this issue was not in Appellants' Statement of the Case or Opening Brief, it cannot be raised for the first time in the ICA or the Supreme Court.

The second allegedly mandatory issue was similarly waived. Appellants claim the ZBA "failed to consider and review the whole record," which "includes all DPP staff memoranda reviewed by the Director prior to making his decision to grant a partial variance." Opening Brief at 12-13; Request for Transfer at 19-22. However, Appellants never sought to correct or supplement the record before the Circuit Court, nor did they ever identify an instance where the ZBA refused to consider particular documents. *See generally Life of the Land v. Land Use Comm'n*, 58 Haw. 292, 296, 568 P.2d 1189, 1193 (1977) ("The circuit court is limited to reviewing the record of the proceedings before, and decision of the agency as designated by the parties. If a party wishes to introduce additional material evidence it must petition the court to reopen the proceeding before the agency for this purpose.") (citations omitted). Because these allegedly dispositive documents were never before the Circuit Court, they cannot form the basis for a further appeal.

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<sup>3</sup> Appellants did include a short reference to this idea in one of their reply briefs, *see, e.g.*, ROA, Vol. 1, 312-13, but it is well established that an Appellant cannot raise new issues in a reply brief. *See, e.g., In re Hawaiian Flour Mills, Inc.*, 76 Hawai'i 1, 14 n.5, 868 P.2d 419, 432 n.5 (1994) (holding that arguments raised for the first time in the reply briefs on appeal were deemed waived).

**2. Neither of Appellants' Issues Come Close to Rising to the Level of "Imperative or Fundamental Public Importance"**

But even if these two issues had not been waived, they cannot support an application for transfer to the Supreme Court.

The requirement of "imperative or fundamental public importance" creates a high burden that excludes the overwhelming majority of issues. First, the plain language of the statute makes clear that the issue must be both of "imperative or fundamental" importance, and the issue must be of importance to the public, not just the appellant.

Second, the types of issues that will meet this requirement are exemplified by the other two prongs of HRS § 602-58(a), which require transfer where (1) a decision invalidates a constitutional amendment, statute, or similar law, or (2) a decision involves "[a] sentence of life imprisonment without the possibility of parole." *See State v. DeLeon*, 72 Haw. 241, 244, 813 P.2d 1382, 1384 (1991) ("There is a rule of construction embodying the words *noscitur a sociis* which may be freely translated as 'words of a feather flock together,' that is, the meaning of a word is to be judged by the company it keeps.") (citation and quotation omitted). In other words, the types of decisions that qualify for mandatory transfer must be similar in kind to the invalidation of a widely applicable law or the deprivation of an individual of all liberty.

Third, the legislative history plainly demonstrates that the "imperative or fundamental public importance" requirement was added to substantially reduce the number of appeals transferred to the Supreme Court. The requirement was added to HRS

§ 602-58 in 2004 as part of the Legislature’s efforts to address serious issues of judicial efficiency impacting the Hawai‘i courts. Importantly, the legislative history references the increased burdens of agency appeals from contested cases as one of the underlying cause for the changes:

The purpose of this bill is to change the appellate structure of the state courts to require appeals from the circuit courts and decisions of administrative agencies to be heard by the intermediate appellate court. . . .

Your Committee further finds that while Hawaii’s court system was established over a hundred years ago, its structure has not been reviewed substantively for over 30 years. Changes in laws during that time have created additional burdens on the judicial system, with dramatic increases in contested proceedings.

Your Committee finds that a three-tiered system of review as proposed by the Judiciary is a sound approach to meet the increased burdens on the courts.

H. Stand. Comm. Rep. No. 672-04, in 2004 House Journal (emphasis added).

Neither of the issues identified here come close to satisfying these requirements. Appellants’ first issue of allegedly “imperative or fundamental public importance” is its claim that variances to LUO § 21-9.80-4(g)(2) can never be granted because the statute uses the term “shall.” *See* Request for Transfer at 16. Nowhere do Appellants attempt to explain how this issue could satisfy the “public importance” standard, nor could they. The statutory provision at issue, LUO § 21-9.80-4(g)(2), is simply one of many design guidelines that have been implemented for the WSD. While these guidelines admittedly relate to an important area of Honolulu, they also recognize

that there are already “a large number of nonconforming uses and structures,” and that the application of these guidelines must be flexible. LUO § 21-9.80-1(f). Indeed, the LUO expressly states: “The zoning requirements of this special district should not, therefore, function as barriers to desirable restoration and redevelopment lest the physical decline of structures in Waikiki jeopardize the desire to have a healthy, vibrant, attractive and well-designed visitor destination.” *Id.* (emphasis added). As Appellants point out, the Diamond Head Tower is itself already a non-conforming building, *see* ROA, Vol. 1, 193, and its replacement with a new nonconforming tower—which better addresses many of the WSD objectives, such as better beach access and view planes—is not of “imperative or fundamental public importance.” To the contrary, it is directly in line with the overall objectives of the LUO.<sup>4</sup>

Nor is Appellants’ second issue of “imperative or fundamental public importance.” The issue of what evidence should be considered by the Circuit Court on an agency appeal, and the procedures for how to supplement the record, are well-

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<sup>4</sup> As the Director made clear in his position statement before the ZBA: “If the [Diamond Head Tower] is not allowed to be redeveloped, the already aging structure would continue to deteriorate. Kyo-ya’s current proposal is necessary to maintain economic viability. The coastal height setbacks, if strictly applied to this property would discourage the redevelopment of the site and may result in the development of a massive and wide building that would surely jeopardize the desire to have a healthy, vibrant, attractive and well-designed visitor destination.” ROA, Vol. 6, 151. It should also be noted that “[p]ortions of many existing hotels along Waikiki Beach already encroach into the coastal setback, including the Waikiki Shores Hotel, the Outrigger Reef Hotel, the Halekulani, the Sheraton Waikiki, the Royal Hawaiian Hotel, the Outrigger Waikiki, and the Moana Surfrider (both the Surfrider Tower and the Banayan Wing). ... Therefore, allowing the proposed Diamond Head Tower to encroach into the coastal height setback would not alter the essential character of the locality.” ROA, Vol. 6, 174.

established. *See generally Life of the Land*, 58 Haw. at 296, 568 P.2d at 1193; *HOH Corp. v. Motor Vehicle Industry Licensing Bd.*, 69 Haw. 135, 141, 736 P.2d 1271, 1274 (1987) (“Nor do we have reason to question the pronouncement that judicial review of an agency determination must be ‘confined to issues properly raised in the record on the administrative proceedings below.’ For under the Hawaii Administrative Procedure Act, ‘the review is conducted by the appropriate court without a jury and is confined to the record.’”) (alterations omitted). Because neither of the allegedly mandatory issues is of “imperative or fundamental public importance,” they cannot serve as a basis for transfer.

**B. There Is No Basis for Discretionary Transfer Under HRS § 602-58(b)(1)**

**1. Appellants Have Not Identified Any Novel Issue of Law Related to the Surfrider-Royal Hawaiian Sector Beach Agreement**

Appellants also argue that transfer should be granted because this case presents “[a] question of first impression or a novel legal question”:

In this appeal the question of first impression, and a novel one, is whether an unfulfilled 1965 agreement between the Applicant and the State to extend the beach in front of the Applicant’s property seaward 180 feet provides a legal basis for a variance from LUO § 21-9.80-4(g)(2), which requires building setbacks to be measured from the current certified shoreline.

Request for Transfer at 23. Appellant is technically correct that the “Surfrider-Royal Hawaiian Sector Beach Agreement,” entered into between the State and Kyo-ya’s parent company on May 28, 1965, has not previously been addressed by the Courts, but this cannot serve as the basis for establishing a “novel” issue. If it could, then every contract

between two parties that has not previously been the subject of litigation could support a transfer to the Supreme Court. We respectfully submit that this was not the Legislature's intent when it drafted HRS § 602-58 with the aim of reducing the number of appeals that proceed directly to the Supreme Court.

**2. Even If There Was Some Basis for Discretionary Transfer, the Court Should Decline to Do so to Allow This Case to Be Developed by the ICA and in Conjunction With Kyo-ya's Appeal of its Motion for Attorneys' Fees**

But even if there was some basis for discretionary transfer, the Court should decline to do so here. Appellant's Opening Brief presents four lengthy appellate issues, one of which contains three sub-parts. Indeed, Appellants' "Points of Error" span three and a half pages. *See* Opening Brief at 9-13. Analyzing these issues will require a thorough review of the record, including more than two years of proceedings before the ZBA. This review will be burdensome, and the Legislature has made clear that the burden should fall in the first instance to the ICA.

The issues here are further complicated by the existence of Kyo-ya's appeal of the Circuit Court's ruling on its motion for attorneys' fees. That case is currently pending before the ICA, and transfer of this case to the Supreme Court could create substantial procedural issues if, for instance, the ICA and Supreme Court were to reach different conclusions regarding the facts of this case. If the Supreme Court declines transfer of the instant appeal, Kyo-ya intends to move to have the two cases consolidated. The two cases present substantial overlapping issues, including whether the Appellants had a full and fair opportunity to present their appeal to the ZBA, whether Appellants

voluntarily limited their appeal to the issue of whether the Director's decision was based on erroneous findings of material fact, not an abuse of discretion, and whether the appeal to the Circuit Court was frivolous. Accordingly, the most efficient way to address these two cases is to consolidate them both before the ICA.

**V. CONCLUSION**

For the reasons stated above, mandatory transfer is not applicable to this case and permissive transfer should not be granted. Denial of a transfer will not prejudice Appellant, but will instead aid in the analysis of this record and the resolution of this agency appeal.

DATED: Honolulu, Hawai'i, April 17, 2014.

/s/ Lisa Woods Munger

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CAAP-13-0005781

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

SURFRIDER FOUNDATION; HAWAII’S  
THOUSAND FRIENDS; KA IWI  
COALITION; and KAHEA – THE  
HAWAIIAN-ENVIRONMENTAL  
ALLIANCE,

Plaintiffs-Appellants,

vs.

ZONING BOARD OF APPEALS, CITY &  
COUNTY OF HONOLULU; DIRECTOR  
OF THE DEPARTMENT OF PLANNING  
& PERMITTING, CITY & COUNTY OF  
HONOLULU; KYO-YA HOTELS &  
RESORTS, LP; and 20,000 FRIENDS OF  
LABOR,

Defendants-Appellees.

CIVIL NO. 13-1-0874-03 (RAN)

ON APPEAL FROM THE

1) FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
DECISION AND ORDER AFFIRMING  
DECISION AND ORDER OF THE  
ZONING BOARD OF APPEALS IN  
CASE NO. 2001-ZBA-1 FILED  
HEREIN ON OCTOBER 16, 2013;

2) FINAL JUDGMENT, FILED  
HEREIN ON OCTOBER 30, 2013

HONORABLE RHONDA A.  
NISHIMURA, JUDGE

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that an unfiled copy of the foregoing document was duly served upon the following parties and individuals electronically by the JEFS system on the date indicated below:

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DATED: Honolulu, Hawai‘i, April 17, 2014.

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