



Circuit Court of the Third Circuit - THE JUDICIARY • STATE OF HAWAII

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April 1, 2014

TO: RICHARD WURDEMAN, ATTORNEY FOR APPELLANT
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/ J. DOUGLAS ING, ATTORNEY FOR TMT OBSERVATORY CORP

FROM: JUNETTE NAKAMURA, CLERK TO JUDGE GREG K. NAKAMURA *jn*

RE: CIV. 13-1-349 - MAUNA KEA ANAINA HOU vs. BOARD OF LAND & NATURAL RESOURCES, et al.

Please find attached the Court's decision pursuant to hearings held on January 16 and February 20, 2014.

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Mauna Kea Anaina Hou v. Board of Land and Natural Resources
Civil No. 13-1-0349

The Findings of Fact (“FOF”), Conclusions of Law (“COC”) and Decision and Order (the “Decision and Order”), dated April 12, 2013, entered by Appellee Board of Land and Natural Resources, State of Hawai‘i (the “BLNR”) are AFFIRMED.

This decision is based upon the following:

I. THE BLNR’S APPROVAL OF CDUA HA-3568 (THE “CDUA”) PRIOR TO THE CONTESTED CASE HEARING DOES NOT WARRANT REVERSAL OF THE DECISION AND ORDER.

Ultimately, this point involves the application of *Kilakila `O Haleakala v. Board of Land and Natural Resources*, 131 Hawai‘i 193 (2013).

The *Kilakila* case addresses the specific question of:

whether a circuit court has jurisdiction over an HRS § 91-14 appeal when an agency makes a final decision on a given matter - in this case, an application for a conservation district use permit - without either granting or denying an interested party’s request for a contested case hearing on the matter.

Id., at 195.

In *Kilakila*, the BLNR approved a conservation district use permit after a public board meeting without granting or denying appellant’s request for a contested case hearing. *Kilakila `O Haleakala* (“KOH”) appealed to the circuit court. The circuit court dismissed the agency appeal for lack of jurisdiction because a contested case hearing had not been held. Also, the circuit court determined that KOH’s appeal was moot because the BLNR subsequently allowed a contested case hearing. A consequence of this decision was that construction under the conservation district use permit was allowed even though KOH lacked the ability to apply to the circuit court for a stay.

The Hawai‘i Supreme Court concluded that:

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[b]ecause BLNR voted to grant the permit without having held a contested case hearing as requested by KOH prior to taking that vote, BLNR effectively rendered a final decision and order within the meaning of HRS § 91-14, and KOH at that point had the right to appeal to circuit court.

Id., at 196.

Thus, the focus of *Kilakila* was the issue of the finality of the BLNR decision and order.

If the decision and order were final, then KOH would have had the right to appeal it to the circuit court.

Of particular concern to the Hawai'i Supreme Court was the fact that unless KOH had the right to appeal, it would not have had the opportunity to seek effective relief. This is evident in the context of the Hawai'i Supreme Court's discussion of mootness. Here, the Hawai'i Supreme Court stated:

Crucially, BLNR has neither stayed nor revoked the permit, not even when KOH appealed or BLNR granted KOH a contested case hearing on the already issued permit. Because the permit remains in effect despite BLNR's failure to hold a contested case hearing before voting to grant the permit, UH can still build on Haleakala and KOH can still seek effective relief against UH. Consequently, we agree with KOH's position and conclude that this case is not moot. As a result, we now turn to the substance of KOH's appeal.

Id., at 199.

The present case is distinguishable from *Kilakila*. In this case, the BLNR granted a contested case hearing essentially simultaneously with the preliminary grant of the CDUA. The continued viability of the preliminary grant of the CDUA depended upon a final grant of the application after a contested hearing. Unless and until there was a final grant of the CDUA after a contested case hearing, construction under the CDUA was not to occur.

In this case, the preliminary grant of the CDUA did not have such a legal consequence

that a contested case hearing was required prior to this action being taken. The BLNR contemplated and did actually afford a contested case hearing prior to the entry of a final decision order. Moreover, Appellants were not prejudiced during the pendency of the contested case hearing because construction under the CDUA was prohibited.

In summary, in *Kilakila*, the Hawai'i Supreme Court determined that a final decision and order was entered because the BLNR failed to afford a contested case hearing. In this case, the BLNR entered a final decision and order after a contested case hearing.

Further, the preliminary grant of the CDUA did not alter the burden of proof placed on the Appellee University of Hawaii at Hilo under Hawaii Administrative Rule § 13-5-30(c). See COC, No. 29.

For these reasons, *Kilakila* does not require a reversal of the Decision and Order.

II. THE FOF AND COC RELATING TO THE CRITERIA SET FORTH UNDER HAWAII ADMINISTRATIVE RULE ("HAR") § 13-5-30(c) DO NOT WARRANT REVERSAL UNDER HRS § 91-14(g).

The clear inference from Appellants' arguments is that Appellants' premise is that the use of land for astronomy facilities inherently violates the criteria identified in HAR § 13-5-30(c). However, HAR § 13-5-24(c) makes clear that astronomy facilities under an approved management plan are an appropriate use in the subject subzone. Therefore, the HAR § 13-5-30(c) criteria must be addressed with this reality in mind. Based upon the FOF and COC relating to these criteria and the record, a reversal of the Decision and Order under the standards set forth under HRS § 91-14(g) is not warranted.

III. THE FOF AND COC RELATING TO NATIVE HAWAIIAN CUSTOMARY AND TRADITIONAL PRACTICES DO NOT WARRANT REVERSAL UNDER HRS § 91-14(g).

Based upon the FOF and COC and the record relating to native Hawaiian cultural practices and resources, reversal of the Decision and Order is not warranted under the standards set forth under HRS § 91-14(g).

Appellants argue that a stipulation that certain witnesses were expert witnesses in the area of native Hawaiian cultural practices misled them and had an adverse effect. Appellants apparently argue that the stipulation resulted in certain evidence not being presented and that it was assumed that, based upon the stipulation, certain expert opinion testimony would be deemed conclusive as to particular facts. However, clearly, the presentation of expert opinion testimony does not mean that it is conclusive as to the existence of a fact.

IV. THE CDUA IS SUBJECT TO A SUFFICIENT MANAGEMENT PLAN.

Appellants argue that, under HAR § 13-5-24, the CDUA can be granted only with an “approved management plan”, that the management plan must be comprehensive and that the applicable management plan is or applicable management plans are inadequate.

HAR § 13-5-24(c) R-3 (D-1) (2011) allows for a land use of “[a]stronomy facilities under a management plan approved simultaneously with the permit”. Under HAR §13-5-2 (2011), a “management plan” is defined as a “project or site based plan to protect and conserve natural and cultural resources” and not a “comprehensive plan”.

However, the TMT Management Plan relates to the TMT Project, but incorporates components of the Mauna Kea Comprehensive Management Plan and the four subplans. The TMT Management Plan and the plans that it incorporates are clearly sufficient for the TMT

Project.

Appellees' counsel are to submit forms of the decision and judgment.