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CAAP-13-0003065

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

KILAKILA ‘O HALEAKALĀ,	)	Civil No. 12-1-3070-12 (RAN)
	)	(Agency Appeal)
Appellant - Appellant,)	
	)	APPEAL FROM THE
vs.)	
	)	1) FINAL JUDGMENT, filed herein on
BOARD OF LAND AND NATURAL	)	August 20, 2013
RESOURCES, DEPARTMENT OF LAND)	
AND NATURAL RESOURCES,	)	2) ORDER AFFIRMING THE BOARD OF
WILLIAM AILA, Jr., in his official	)	LAND AND NATURAL RESOURCES’
capacity as Chairperson of the Board of	)	FINDINGS OF FACT, CONCLUSIONS OF
Land and Natural Resources, and	)	LAW, DECISION AND ORDER IN DLNR
UNIVERSITY OF HAWAII,	)	File No. MA-11-04, filed on July 11, 2013
)	
Appellees - Appellees.	)	FIRST CIRCUIT COURT
)	
	)	HONORABLE RHONDA A. NISHIMURA
	)	Judge
)	

**RESPONSE OF APPELLEES BOARD OF LAND
AND NATURAL RESOURCES, DEPARTMENT OF LAND
AND NATURAL RESOURCES, AND WILLIAM AILA, JR.'S
TO APPELLANT'S APPLICATION FOR WRIT OF CERTIORARI**

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**RESPONSE OF APPELLEES BOARD OF LAND
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Appellees Board of Land and Natural Resources (Board), Department of Land and Natural Resources, and William Aila, Jr., in his official capacity as Chairperson of the Board of Land and Natural Resources (collectively the State), responds to the Application for Writ of Certiorari from the Judgment on Appeal of the Intermediate Court of Appeals (ICA) entered on November 13, 2014, filed by Appellant Kilakila 'O Halekalā (Kilakila) on December 1, 2014). Appellant seeks review of the ICA's unpublished memorandum opinion in *Kilakila 'O Haleakalā v. Bd. of Land and Natural Resources, et al.*, ICA No. 13-0003065, JEFS 312.¹

The Board, in the contested case held below, granted a conservation district use permit to the Appellee University of Hawaii (UH) for the construction of a solar telescope on Haleakalā. In evaluating the merits of a proposed land use the Board applied the eight criteria contained in Haw. Admin. R. (HAR) § 13-5-30(c) and found that the proposed solar telescope met the criteria for the issuance of a conservation district use permit (CDUP). JEFS 115 at 348-444.

The Circuit Court affirmed the Board's Findings of Fact, Conclusions of Law, Decision and Order (Board Decision) in which the Board granted UH's application for a conservation district use permit (CDUA). JEFS 23 at 349-55. The Circuit Court found that the Board did not engage in improper procedure in granting or holding the contested case hearing and agreed with the Board that the Advanced Technology Solar Telescope project (ATST Project) met the requirements for the project to be located within the conservation district on Haleakalā. *Id.*

¹ The records filed in ICA No. 13-0003065 will be referred to as "JEFS" with a citation to the page number of the pdf document. A citation to "SCt JEFS" will be a reference to the records filed in SCWC - 13-0003065.

The ICA affirmed the Circuit Court’s decision. JEFS 312 at 1-39. In affirming the Circuit Court’s decision, not only did the ICA find that an astronomy facility is an authorized use within the conservation district, but it also found that the specific proposed project met all of the criteria for the issuance of a conservation district use permit. *Id.* The ICA agreed that a conclusion in the Final Environmental Impact Statement (FEIS) that an impact was a “major” adverse impact was not binding on the Board and that it is within the Board’s discretion to determine whether an impact on natural resources is substantial and requires denial of a CDUP. JEFS 312 at 20-21.

The ICA also expounded, in detail, the facts which Kilakila claims shows that the contested case hearing was procedurally flawed. JEFS 312 at 4-11. The ICA determined that all of these claims were without merit as the procedures did not violate the rules (i.e. *ex parte* communications pursuant to HAR § 13-1-37), that the Board took appropriate action to cure any potential impropriety (discharge of the hearings officer, striking the first hearings officer’s filings, and appointment of a new hearings officer), or that there was no basis for a claim of conflict (representation of the Board both at circuit court and in the contested case by the same deputy attorney general). *Id.* at 37-39.

I. BACKGROUND

A. Nature of the Case

On December 1, 2010 the at a regular Board meeting, the Board granted the CDUA submitted by UH for a telescope facility on Haleakalā. JEFS 115 at 351-52, FOF 1, 2 and 4.² The application was challenged by Kilakila. *Id.* at 352, FOF 9. On February 11, 2011, the Board

² When referring to the Board of Land and Natural Resources’ Findings of Fact, Conclusions of Law, Decision and Order, the citation will also include a reference to specific Findings of Fact (FOF) or Conclusions of Law (COL) as appropriate.

authorized the hiring of a hearing officer and the holding of a contested case hearing. *Id.* at 352, FOF 10. On November 9, 2012, the Board issued Findings of Fact, Conclusions of Law, Decision and Order granting UH a conditional conservation district use permit. *Id.* at 348-443.

This case is an administrative appeal pursuant to Haw. Rev. Stat. chapter 91, concerning the Board's Findings of Fact, Conclusions of Law, Decision and Order.

B. Facts Material to this Appeal

1. Haleakalā

The summit of Haleakalā is made up of three volcanic cones. The tallest of the cones, Pu'u Ula'ula, is the site of one of Haleakalā National Park's most popular overlooks. Next to Pu'u Ula'ula is Pu'u Kolekole, the volcanic cone where the Haleakalā High Altitude Observatories site (HO) is located. The third volcanic cone houses county, state and federal telecommunications and other facilities. There is a mixture of uses of land within the summit area which include, among others, wilderness area, scenic overlooks, visitor centers, astronomy facilities, space surveillance and research facilities, air traffic control repeater stations, broadcast and relay substations and a U.S. Department of Energy research facility. JEFS 115 at 354, FOF 21-22.

The largest of the land divisions on Haleakalā is the Haleakalā National Park which encompasses approximately 33,230 acres. Haleakalā National Park is made up of three primary visitor areas that include the Summit Area containing two visitor facilities, the Haleakalā Visitor Center and the Pu'u Ula'ula overlook; the Wilderness Area, containing hiking trails from two major trailheads, the Leleiwi and Kalahaku Overlooks, and the Park Headquarters Visitor Center; and the Wilderness Area near the coast known as Kipahulu where hiking, swimming and camping are available. *Id.* at 354-55, FOF 23. Approximately 1.7 million people visit Haleakalā

National Park's various lookouts and vantage points annually. Most of these visitors arrive by vehicle, an estimated 600 passenger cars and 16 buses each day. *Id.* at 355, FOF 27.

The HO site comprises 18.166 acres in Haleakalā. The HO has been exclusively dedicated to astronomy for more than 50 years. It was set aside on December 12, 1961, by Governor William Quinn under Executive Order No. 1987 for the University of Hawaii Haleakalā High Altitude Observatory Site. *Id.*, FOF 28. Executive Order No. 1987 was subject to the condition that the lands set aside shall be used for the Haleakalā High Altitude Observatory Site purposes only. The HO site is closed to the general public with the exception of native Hawaiian cultural practitioners who are welcomed to the HO site by a sign posted in the Hawaiian language. *Id.* at 357, FOF 36.

Approximately forty percent of the HO site is currently developed with roads, buildings, parking areas, and walkways. *Id.* at 356, FOF 30. 31. Since the early 1950's, the HO site has housed numerous astronomical facilities including: Reber Circle (1951); Mees Solar Observatory (1957 to 1976; 1964 to present); Airglow and Zodiacal Light Programs (1962); Airglow Facility (1972); Lunar Ranging Experiment (LURE) Observatory (1974 to 2004); Cosmic Ray Neutron Monitor Station (1991 to 2007); Multi-color Active Galactic Nuclei Monitor Project (MAGNUM) (1998 to 2008); Faulkes Telescope Facility (2004); Maui Space Surveillance Complex (1963 to present); Panoramic-Survey Telescope and Rapid Response System (Pan-STARRS) (2006; 2010). Current observatories include the U.S. Air Force Maui Space Surveillance Complex; the Ground-based Electro-optical Deep Space Surveillance (GEODSS); C. E. Kenneth Mees Solar Observatory; the Zodiacal Observatory; the Panoramic-Survey Telescope and Rapid Response System; the Faulkes Telescope Facility; and the Haleakalā Amateur Astronomers. *Id.* at 356, FOF 32 and 34.

The Advanced Technology Solar Telescope (ATST) Project site is in close proximity to other previously developed facilities for astronomy and advanced space surveillance. *Id.*, FOF 38.

2. The ATST Project

The ATST Project is the result of a grass-roots proposal to the National Science Foundation (NSF), an agency established by Congress in 1950, based on the solar physics community's perceived need for a large aperture solar telescope. The NSF is providing the funding for the ATST. *Id.* at 361, FOF 58. Haleakalā is a unique site that met or exceeded all primary scientific evaluation criteria. *Id.* at 370, FOF 94. Although there are other solar telescopes, none can achieve the science objectives of the ATST. *Id.* at 372, FOF 106.

The ATST represents an unparalleled opportunity for scientists to study the closest and most important star to the Earth. It will allow scientists to significantly increase their understanding of the Sun and to predict major solar events that could have a profound impact on life on Earth. The ability to predict events such as a severe geomagnetic storm would place the world in a far better position to prepare for these types of solar events and address the consequences. *Id.* at 423, FOF 342.

The NSF prepared a joint federal and state Final Environmental Impact Statement (FEIS) for the ATST Project. The purpose of the FEIS was to identify the environmental impacts and cumulative environmental impacts associated with the construction and operation of the ATST. The FEIS also proposes measures to mitigate the impacts of the construction and operation of the ATST. *Id.* at 379, FOF 140-42.

The FEIS considered impacts in the following areas: cultural³, archaeological, and historic resources; visual resources and viewplanes; noise; visitor experience; biological resources; topography, geology, and soils; water resources; hazardous materials and solid waste; and air quality. JEFS 203 at 23 to JEFS 207 at 716. The FEIS also reviewed proposed mitigation measures. *Id.*

Additional mitigation measures for the impacts from the ATST Project are contained in the HO Long Range Development Plan, the HO Management Plan, the Section 106 Programmatic Agreement and the NSF's Record of Decision. Mitigation measures are intended to reduce the duration, intensity or scale of impacts or to compensate for the impact by replacing or providing substitute resources or environments. JEFS 115 at 397, FOF 227. UH and NSF have committed to mitigation measures to reduce impacts to all resources. *Id.*, FOF 228. The Board incorporated all of the proposed mitigation measures into the Board's Decision. *Id.* at 440, D&O 6.

III. ARGUMENT

A. The ICA Correctly Determined that Determination of Whether Impacts are Substantial are Within the Discretion of the Board

An EIS is intended as an informational document to be used by the decision-maker. An EIS is intended to provide "sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives." *Life of the Land v. Ariyoshi*, 59 Haw. 156, 164-

³ The NSF commissioned two cultural assessments for the ATST Project, the Cultural Resources Assessment and the Supplemental Cultural Impact Assessment (SCIA). The SCIA was commissioned as a result of specific concerns raised by the commenting public as to the cultural and historical evaluation included in the Draft Environmental Impact Statement. JEFS 115 at 380, FOF 148.

65, 577 P.2d 1116, 1121 (1978). An EIS is meant to inform, not restrict a decisionmaker. As indicated by the ICA, regardless of how an informational document, either an environmental impact statement or a conservation district use application, may characterize a project and its impacts, it is the Board that has the sole discretion and authority to decide whether an impact on natural resources is substantial under the conservation district criteria. To decide otherwise would give too much influence to the drafters of environmental assessments and conservation district applications to pre-determine the Board's decision.

B. The ICA was Correct that the Board Could Consider Economic and Other Benefits of the Project

The Board is not constrained in its review of a conservation district use application to only consider the criteria set forth in HAR § 13-5-30(c). Although the administrative rules provide that the Board “in evaluating the merits of a proposed land use, the department or board shall apply the following criteria,” the rule does not state that the Board may not consider other factors. As noted by the ICA the rules pertaining to the conservation district have a broad purpose. In particular, HAR § 13-5-1 which provides that the purpose of the conservation district is “conserving, protecting and preserving the important natural and cultural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare” appears to support the Board's consideration of factors outside of the stated criteria.

In fact, the courts have imposed a duty on the Board to look beyond the Board's regulations in reviewing applications and actions. Limiting the Board's review only to the conservation district criteria would be irresponsible.

Article XI, section 1, of the Hawai'i State Constitution provides in part:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

This provision has been interpreted to require a balance between the dictates of protection and use that promotes “the best economic and social interests of the people of this state.” *In re Water Use Permit Applications*, 94 Hawai‘i 97, 141, 9 P.3d 409, 453 (2000)(*Waiahole*). The result is “a controlled development of resources rather than no development.” *Id.*

In balancing competing uses, both protection and development, the Board must consider more than just the criteria contained in the rules. Determination of the “best economic and social interests of the people of the state” requires the Board to look at both the impacts of the proposed project and the benefits of the project. As part of that inquiry, it was appropriate for the Board to consider the economic and other benefits as well as the impacts associated with the ATST Project.

Similarly, Kilakila has not objected to the Board’s examination of the ATST project for consistency with *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*, 79 Hawai‘i 425, 903 P.2nd 1246 (1995), (hereafter “*PASH*”) or *Ka Pa‘akai O Ka ‘Aina v. Land Use Commission* (hereafter “*Ka Pa‘akai*”), 94 Hawai‘i 31, 7 P.3d 1068 (2000). The considerations required by these cases are not within the conservation district criteria, as set forth in rules, but Kilakila cannot say that the Board should not or cannot consider these cases in making its decision.

Lastly, as explained by the ICA, the ATST is subject to environmental review, which requires that the state and county ensure that environmental concerns are given appropriate consideration in decision making along with economic and technical considerations. HAR § 11-200-1.

C. Astronomy Facilities Are Consistent with the Purposes of the Conservation District

Kilakila argues that the ICA erred in confusing an “as applied” challenge with a “facial” challenge to the ATST project in the conservation district in this case. SCt JEFS 1 at 8. In fact, the ICA appropriately engaged in the two step analysis required to determine the propriety of the ATST project in the conservation district.

First, the ICA points out that HAR § 13-5-25 expressly allows astronomy facilities to be built in the resource subzone and that there is no limitation in the rule regarding the size, appearance, or other characteristics an astronomy facility may have. JEFS 312 at 13. Second, the ICA noted that the authorization for an astronomy facility in the conservation district was also contingent on the facility meeting the other requirements for a land use within the conservation district. *Id.* In applying the conservation district criteria to the ATST, the Board was required to decide specifically whether the ATST project, not just an astronomy facility, was consistent with the purpose of the conservation district. HAR § 13-5-30(c). In its review of the Board’s application of the CDUP criteria contained in HAR § 13-5-30(c), the ICA affirmed that the ATST was consistent with the purpose of the conservation district.

D. The Board's Procedures Did Not Violate Due Process

The ICA decision addresses Kilakila’s claim that it was denied due process by the prejudging of the contested case by the Board. Kilakila based its argument of denial of due process on two premises. The first is that the decision by the Board, prior to the grant of the contested case hearing, prevented Kilakila from presenting its full case before the CDUP was approved. As the ICA aptly points out, that issue had previously been addressed by this Court and that the matter before the ICA was the actual contested case hearing. JEFS 312 at 36. Kilakila has never indicated that it was constrained in any way from presenting evidence in the

contested case hearing. *Id.* The contested case hearing that was held did not violate Kilakila's right to present evidence or to engage in a full hearing.

The ICA determined that the second basis for Kilakila's claim of denial of due process, namely the authorization for UH to engage in construction during the pendency of the contested case hearing, was unavailing. JEFS 312 at 36. The ICA noted that Minute Order No. 19, which appears to be the order in controversy, only provided for the removal of Reber Circle, the circular concrete ring that is the remnant for a former radio telescope facility, and unused facilities at the HO site. JEFS 113 at 208-10. As noted by the ICA, the removal of Reber Circle was required both by the Programmatic Agreement, as a mitigation measure, and in an Archaeological Recovery Plan that had been approved in 2006. The findings of fact regarding these independent bases for requiring removal of Reber Circle had not be challenged by Kilakila. JEFS 312 at 37.

E. The Administrative Hearing was Not Procedurally Flawed

The ICA found that Kilakila's claims that procedural irregularities, including political pressure, *ex parte* communication, the dual role of the deputy attorney general, and the arbitrary omission of key findings of the hearing officer violated Kilakila's due process rights were without merit. JEFS 312 at 37-38. The "irregularities" identified by Kilakila did not prejudice any of the parties nor did they affect the integrity of the administrative hearing.

The ICA points out that concern regarding adjudicator impartiality focuses on the relation between the communications and the decision-making process. JEFS 312 at 38. The ICA considered the procedural history of the case, in particular the Board's action to dismiss the hearing officer that was at the heart of the controversy, the striking of the hearing officer's filings, and the appointment of a new hearings officer. Kilakila did not allege that the second

hearing officer was subject to any *ex parte* communication or political pressure. Any impropriety that may have attached to the communications with the first hearing officer, as the decision maker, was necessarily cured when the new hearing officer was appointed and a new proposed decision was presented to the Board for consideration.

When reviewing the allegations of conflict of interest regarding the deputy attorney general advising the Board, the ICA appropriately pointed out the obvious distinction between the current case and the case cited by Kilakila, *White v. Bd of Education*, 54 Haw. 10, 501 P.2d. 358 (1972). In *White* the deputy attorney general represented a party, a superintendent, in an adversarial hearing against a teacher, and then represented the tribunal in related hearings before the Board of Education. In the current case, the deputy attorney general has only represented one party, the Board. There is no conflict of interest in the current situation.

F. The Board Exercised its Own Discretion

Kilakila also criticized the fact that the Board did not accept the hearing officer's proposed findings of fact, conclusions of law, and decision and order and instead adopted significantly different findings. JEFS 215 at 48. However, as the court in *White* noted, "the law authorizes the Board to reach a decision independent of the recommendation of a hearing officer and it does not require that the Board be merely a rubber stamp in reaching the final decision." 54 Haw. at 16, 501 P.2d at 363. The Board should not, and did not, act as a mere rubber stamp in reaching its final decision.

Additionally, although the Board adopted different findings, the decision reached by the Board was consistent with the conclusion recommended by the hearing officer, namely, approval of the CDUP. There was no error in the Board exercising its own discretion and supporting its decision as it deemed appropriate.

III. CONCLUSION

The ICA, and the Circuit Court before it, did a thorough review of the Board's Decision granting UH a CDUP. Each of the reviewing courts discussed the criteria for issuance of the CDUP and the Board's findings and conclusions regarding each criteria. Consistent with prior case law, the ICA gave due deference to the Board's findings of fact as to each criteria. The ICA also recognized the procedural irregularities present in the record of this case, but appropriately determined that when considered together with the corrective measures taken by the Board, Kilakila was not prejudiced by the irregularities in this case. There is no need for further review of this matter. Kilakila's application for writ of certiorari should be denied.

DATED: Honolulu, Hawaii, December 16, 2014.

/s/ Linda L.W. Chow
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