SCWC-13-0003065

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

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

PETITIONER/APPELLANT-APPELLANT'S REPLY TO THE RESPONSE OF APPELLEES BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND WILLIAM AILA, JR. TO APPLICANT'S APPLICATION FOR WRIT OF CERTIORARI

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PETITIONER/APPELLANT-APPELLANT'S REPLY TO THE RESPONSE OF APPELLEES BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, AND WILLIAM AILA, JR. TO APPLICANT'S APPLICATION FOR WRIT OF CERTIORARI

The board of land and natural resources, the department of land and natural resources and William Aila, Jr. (collectively herein "**BLNR**") responded to only some of the issues raised in the application for writ. The decision of the Intermediate Court of Appeals (**ICA**) includes many grave errors and is inconsistent with this Court's decisions.

I. The ICA Erred in Allowing BLNR to Consider Economic Factors.

The BLNR argues on page 7 of its response that it is free to consider factors other than those found in its rules.[1] The BLNR's position is untenable.

First, the BLNR ignores all the cases cited in the application for writ of certiorari and the opening brief. These cases prohibit agencies from using unwritten criteria in decisionmaking.

Second, the BLNR overlooks its own changes to its rules. Prior to 1994, BLNR's rules specifically authorized government uses of conservation district land "where the public benefit outweighs the impact on the conservation district."[2] The current version of the rules, however, omitted that language after the legislature enacted HRS chapter 183C in 1994. By deleting this language, the BLNR made it very clear that benefits outside the conservation district could not be weighed against impacts on the conservation district.

Third, its reading of HAR § 13-5-1 is inconsistent with the legislative purpose of enacting HRS chapter 183C (and its legislative history). Nor does that language call for the BLNR to consider economic factors in applying HAR § 13-5-30(c)(4).

Fourth because the conservation district tolerates the least degree of development, *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 170 n.3, 623 P.2d 421, 437 n.3 (1981), the conservation district rules are stricter than the criteria that, for example the land use commission (**LUC**) uses. HRS § 205-17(3)(D) requires the LUC to consider "[p]rovision for employment opportunities and economic development." No such language is found in BLNR's rules.

Fifth, the BLNR's consideration of economic factors took place within the context of

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[1] The BLNR does not defend its consideration of the criterion regarding the lack of alternative locations for the project.

[2] HAR § 13-2-11(c)(8) (1991). This repealed version of the conservation district rules is found at the Supreme Court law library. It was repealed by Act 283, 2000 Sess. Laws of Haw.

applying HAR § 13-5-30(c)(4), which excludes economic factors. JEFS #115 RA:433-34.

Finally, there is no doubt that the BLNR must abide by the State Constitution. It must, for example "preserve and protect customary and traditional practices of native Hawaiians." *Ka Pa'akai O Ka`aina v. Land Use Comm'n*, 94 Hawai`i 31, 45, 7 P.3d. 1068, 1082 (2000). But the BLNR's reliance on Article XI §1 of the Hawai`i State Constitution goes too far. Its reading would turn public trust jurisprudence on its head and "eviscerates the trust's basic purpose." *In re Water Use Permit Applications,* 94 Hawai'i 97, 138, 9 P.3d 409, 450 (2000) (*Waiāhole*"). The constitution does not mandate that economic interests be factored into all government decisionmaking. In applying the constitutional provision, the legislature has already determined that balanced development takes place by concentrating development in the urban district, thereby allowing for greater protection of resources in the conservation district.

II. The ICA Misread the BLNR's Rules.

On page 9 of its response, the BLNR defends the ICA's determination that the advanced technology solar telescope (**ATST**) project is consistent with the purposes of the conservation district. The ICA relied exclusively on HAR §13-5-25. The plain language of that rule does not say that all identified potential uses automatically satisfy the criteria in HAR § 13-5-30(c)(1) and (2). And reading that rule in such a manner would render HAR §§ 13-5-30(c)(1) and (2) obsolete (as well as HAR §§ 13-5-1 and 13-5-14). *Cf. Kaleikini v. Yoshioka*, 128 Hawai`i 53, 67, 283 P.3d 60, 74 (2012) ("If an administrative rule's language is unambiguous, and its literal application is neither inconsistent with the policies of the statute the rule implements nor produces an absurd or unjust result, courts enforce the rule's plain meaning. . . . [T]his court does not defer to agency interpretations that are "plainly erroneous or inconsistent with the underlying legislative purpose."). The ICA's reading is unsupportable.

The issue is whether this specific project (given its unprecedented height, mass, and scale; industrial appearance; use of hazardous materials, location in "Science City", location in an area that is already 40% developed[3], and substantial impacts), is consistent with the purposes of the

[3] In the related proceeding *Kilakila 'O Haleakalā v. Univ. of Haw.,* SCWC-13-0000182, at the recent oral argument, counsel for the University of Hawai`i incorrectly claimed that sixty percent of the Haleakalā High Altitude Observatory Site has been set aside for preservation. *See* http://www.courts.state.hi.us/courts/oral_arguments/recordings_archive.html, December 18, 2014 8:45 a.m. at 35:40—36:00. Actually, forty percent of the area has already been developed – without even counting the area to be taken up by the ATST project. JEFS #115 RA:356 FOF 30.

conservation district and the state land use law.

III. The ICA's Review of the Record Gave BLNR Unfettered Discretion.

All parties agree that the conclusions of an environmental impact statement are not binding, *Mauna Kea Power v. BLNR*, 259, 265, 874 P.2d 1084, 1090 (1994). But to reject those conclusions (a) there must be some evidence to rebut those conclusions, *In re Kauai Elec. Div.*, 60 Haw. 166, 184, 590 P.2d 524, 537 (1978) and (b) the BLNR must give "some reason for discounting the evidence rejected," *Waiāhole,* 94 Hawai'i at 164, 9 P.3d at 476. It is also arbitrary and capricious for the BLNR to rely on the FEIS to reach certain conclusions, but reject other portions the FEIS without explanation. These principles do not give extraordinary influence on those who draft environmental documents. Rather, they ensure that the BLNR renders a decision based on the evidence in the record (rather than political pressure). Furthermore, the ICA's discounting of the admissions in the conservation district use application – admissions against the applicant's interest and admissions that were relied on by another party – is too cavalier.

IV. The ICA Should Not Have Tolerated the Procedural Problems.

By voting to approve the conservation district use permit before hearing the relevant evidence, the BLNR "pre-judged" the issue in this case. The BLNR's action is the very definition of what it is to prejudge an issue. Furthermore, the BLNR's authorization of some of the construction sought in the application for the ATST project demonstrates that approval of the project was a foregone conclusion.[4] Its action was not surprising given the *ex parte* meetings between the BLNR chair and Senator Inouye's Chief of Staff Jennifer Sabas, acting on behalf of the University, to discuss the telescope and funding issue. JEFS #113 RA:259 and JEFS #115 RA:299. Furthermore, the role of a deputy attorney general, and arbitrary omission of key findings of the hearing officer (who actually visited the site, unlike the BLNR members) should give this Court pause.

V. Conclusion

Petitioner/Appellant-Appellant Kilakila 'O Haleakalā respectfully requests that this

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[4] Removal of Reber Circle required a conservation district use permit. HAR § 13-5-30-2 (definition of "land use") and HAR § 13-5-30(b). The applicant informed BLNR of its intent to commence construction "[i]n accordance with Conservation District Use Permit MA-3542", JEFS #113 RA:49, the conservation district use application that was the subject of the contested case hearing. *See also id.* at 50.

Court accept its application for a writ of certiorari.

Dated: Honolulu, Hawai`i, December 22, 2014.

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