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PLANNING COMMISSION OF THE COUNTY OF KAUAI

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

KAUAI SPRINGS, INC.,	)	CIVIL NO. 07-1-0042
	)	(Agency Appeal)
Plaintiff-Appellant,	)	
	)	DEFENDANT-APPELLEE
vs.	)	PLANNING COMMISSION OF THE
	)	COUNTY OF KAUAI'S ANSWERING
PLANNING COMMISSION OF THE	)	BRIEF; CERTIFICATE OF SERVICE
COUNTY OF KAUAI,	)	
	)	<u>Hearing:</u>
Defendant-Appellee.	)	Date: August 20, 2008
	)	Time: 1:00 p.m.
	)	Judge: Hon. Kathleen N.A.
	)	Watanabe
	)	
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DEFENDANT-APPELLEE PLANNING COMMISSION OF  
THE COUNTY OF KAUAI'S ANSWERING BRIEF

Defendant-Appellee Planning Commission of the County of Kaua'i ("County"), by and through its attorneys, Matthew S.K. Pyun, Jr. and McCorriston Miller Mukai MacKinnon LLP, hereby submits its Answering Brief to Appellant Kauai Spring's Opening Brief, filed April 25, 2008 ("Opening Brief").

**I. INTRODUCTION**

This case presented several important issues of first impression to Appellee County of Kaua'i Planning Commission ("Planning Commission"). Appellant Kauai Springs, Inc. ("Kauai Springs") applied for land use permits to process and bottle water on land zoned for agricultural use. Kauai Springs sought permission to use agricultural land to process and bottle water for profit. Kauai Springs invites this Court to evaluate narrowly its proposed use of the land, to envision a simple structure where water is bottled, with no impact on neighbors in a sparsely populated location, and with no other implications to the Planning Commission's obligations pursuant to law.

Kauai Springs argues that the Planning Commission exceeded its jurisdiction in its permit evaluation process by raising issues concerning water rights, water ownership, water preservation, the sale of water, duties and responsibilities toward water protection, and future preservation of natural resources. Kauai Springs characterizes these concerns as an "inquisition" by the Planning Commission, outside its jurisdiction, while deciding whether to issue the permits sought by Kauai Springs.

To the contrary, not only was the Planning Commission fulfilling its duty pursuant to the Kaua'i County Code and Hawai'i law, but pursuant to its fiduciary duty to protect public trust water resources mandated by the Hawai'i State Constitution and the Hawai'i Supreme Court. The extraction, processing, bottling, distribution, and sale of water, the core of Kauai Spring's proposed use of the land, is at the heart of this matter and was properly reviewed by the Planning Commission, bound by the principles set forth by the public trust doctrine.

**II. COUNTER-STATEMENT OF THE CASE**

Located in Koloa, the majority of the subject property is designated "Agricultural" by the Kaua'i General Plan with a portion of it also zoned "Open District (O)." Record on Appeal ("RA") at 605-607. Kauai Springs operates a water processing, bottling, and distribution business on the property. RA at 605-607. The water used by Kauai Springs originates as spring water from Kahili Mountain, several miles away. RA at 605-607. The spring is owned by EAK Knudsen Trust, and the water reaches the subject property by a gravity-fed system owned by Grove Farm Company ("Grove Farm"), which was once used to irrigate the Koloa ahupua'a. RA at 261-262. The water reaches Kauai Springs' processing and bottling facility by a pipe that crosses its property, through a tap into the pipe. RA at 605. Although Kauai Springs purchased the water from Grove Farm, Kauai Springs never asked Grove Farm about Grove Farms' legal rights to the water. RA at 134-135.

Once the water is extracted from the pipe, it is purified and then bottled into five gallon plastic containers, loaded into vans, and transported to customers on Kaua'i who purchase the water from Kauai Springs. RA at 606. Excess water tapped from the pipe which is not bottled is released into Waihohonu Stream and flows to the ocean. RA at 187.

On May 15, 2006, the Kaua'i Planning Department, after receiving a complaint concerning Kauai Spring's activities on the subject property, issued a cease and desist letter to Makana Properties, LLC, which leases the subject property to Kauai Springs. The cease and desist letter stated that violations were found, including "processing and packaging without the proper permits" and "[i]ndustrial processing and packaging" in an agricultural district. RA at 245; May 15, 2006 Cease and Desist Letter, attached as Exhibit "1" to Appellant's Opening Brief. The letter advised Kauai Springs to "cease and desist such use and relocate to an appropriate land use district." Prior to receiving this letter, Kauai Springs had been extracting, processing, bottling, and distributing water on the property without the required use permits for nearly two years. RA at 245.

On July 5, 2006, after receiving the cease and desist letter, Kauai Springs applied for three permits from the Kaua'i Planning Department: (1) Use Permit U-2007-1, (2) Special Permit SP-2007-1, and (3) Class IV Zoning Permit Z-IV-2007. RA at 647, 682.

From August 8, 2006, until January 23, 2007, five public hearings before the Planning Commission were conducted. Testimony was heard from



numerous speakers, including residents and officials from the State of Hawai'i ("State") and Kaua'i County, and written documents and statements from State and Kaua'i County agencies, as well as residents and other interested parties, was received and reviewed. RA at 1-264. The Planning Commission posed several questions and raised numerous concerns surrounding Kauai Spring's use of the property and its use and sale of the water entering its property, including inquiries to the Commission on Water Resource Management ("CWRM"), RA at 554-555, and the Public Utilities Commission ("PUC"), RA at 426-429. The Planning Commission also clarified its duties and responsibilities to the people of Kaua'i to protect Kaua'i's water resources for future generations pursuant to the constitutionally mandated public trust doctrine. RA at 182-187.

On January 24, 2007, after the final hearing on January 23, 2007, the Planning Commission issued its Findings of Fact, Conclusions of Law, Decision and Order ("Decision and Order"), denying all three permits. RA at 342-347. Kauai Springs appealed the denial of the permits and filed its Opening Brief, to which the Planning Commission now responds.

### **III. STANDARDS OF REVIEW**

The standards of review for an agency appeal are set forth in Hawai'i Revised Statutes ("HRS") Section 91-14(g) (1993):

Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Curtis v. Board of Appeals, County of Hawai'i, 90 Hawai'i 384, 393, 978 P.2d 822, 831 (1999). An agency's findings of fact may be reviewed to determine if its decision was clearly erroneous after considering the whole record, id. at 831, and the agency's conclusions of law are reviewable "to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law." Id.; Ka Pa'akai O Ka'Aina v. Land Use Comm'n, State of Hawai'i, 94 Hawai'i 31, 41, 7 P.3d 1068, 1078 (2000) (citations omitted). A conclusion of law which contains both questions of fact and law is reviewed under the clearly erroneous standard and an appellate court "must give deference to the agency's expertise and experience in the particular field." Curtis, 90 Hawai'i at 393, 978 P.2d at 831. An agency's decision affecting public trust resources carries a *presumption of validity*, and the appellant has "the heavy burden of making a convincing showing that the agency's decision is invalid because it is unjust and unreasonable in its consequences." In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 421, 83 P.3d 664, 684 (2004), Gatri v. Blane, 88 Hawai'i 108, 112, 962 P.2d 367, 371 (1998).

#### IV. ARGUMENT

##### A. The Record Contains Substantial Evidence to Support the Findings of Fact

1. The Kaua'i Planning Commission Must Apply the Public Trust Doctrine.

Originating in common law, the public trust doctrine was embraced in Hawai'i in 1899. King v. Oahu Railway & Land Co., 11 Haw. 717, 725 (1899). The public trust specifically in water resources was also derived from common law. In re Water use Permit Applications, 94 Hawai'i 97, 130, 9 P.3d 409, 422 (2000) (hereinafter "Waiahole I"). Pursuant to the State Constitution and the public trust doctrine, "the State's first duty is to protect the fresh water resources (surface and ground) which are part of the public trust res." Id. at 425, 9 P.3d at 113.

In 1978 Hawai'i added several provisions to the State Constitution specifically relating to water resources. Article XI Section 1 of the Constitution states, in part:

For the benefit of present and future generations, the State *and its political subdivisions* shall conserve and protect Hawai'i's ... natural resources, including...water... and shall promote the development and utilization of these resources in a manner consistent with their conservation ... All public natural resources are held in trust by the State for the benefit of the people.

(emphasis added). "Political subdivisions" of the State include the County of Kaua'i. Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 224, 140 P.3d 985, 1004 (2006).

Article XI, Section 7 further provides, in pertinent part:

*The State has an obligation to protect, control and regulate the use of Hawai'i's water resources for the benefit of its people.*

The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation...and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities...and establish procedures for regulating all uses of Hawai'i's water resources.

In 1987, pursuant to Article XI Section 7 above, the legislature enacted Hawai'i Revised Statutes Chapter 174C, the State Water Code ("Code"). In enacting the Code, however, the legislature did not intend to abolish the public trust doctrine: "To the contrary ... the legislature appears to have engrafted the doctrine wholesale in the Code." Waiahole I, 90 Hawai'i at 130, 9 P.3d at 442.

In Waiahole I the Hawai'i Supreme Court further stated:

The Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous. Even with the enactment and any future development of the Code, the doctrine continues to inform the Code's interpretation, define its permissible "outer limits," and justify its existence. To this end, although we regard the public trust and Code as sharing similar core principles, we hold that the Code does not supplant the protections of the public trust doctrine.

Id. at 133, 9 P.3d at 445.

Pursuant to the Code, unless otherwise exempted, "[a]ll waters of the State are subject to regulation under [the Code]", HRS section 174C-4 (1993), and are held for the benefit of the citizens of the State. HRS section 174C-5 (1993). The Code shall be administered by the CWRM, HRS section 174C-5, 7 (1993), which shall designate certain water management areas for regulation under the Code. HRS section 174C-5(2) (1993).

Water rights in areas *outside* water management areas are governed by the common law, Waiahole I, 94 Hawai'i at 130, 9 P.3d at 442; Ko'olau Agric. Co., Ltd. v. Comm' Water Res. Mgmt., 83 Hawai'i 484, 491, 927 P.2d 1367, 1374 (1996); In re Wai'ola O Moloka'i, Inc., 103 Hawai'i at 433, 83 P.3d at 696, and under the common law the public trust doctrine applies to *all* water resources, without regard to any surface-ground distinction, "given the vital importance of all waters to the public welfare." Waiahole I, 94 Hawai'i at 135, 9 P.3d at 447. Since the island of Kaua'i is not designated a water management area by the Code, the common law, public trust doctrine prevails, and Kauai Springs was not required to apply for a permit from the CWRM since permits for the CWRM are only required in designated water management areas. Waiahole I, 94 Hawai'i at 130, 9 P.3d at 442.

Chapter 7 of the Kaua'i County Code is the General Plan, which "establishes policy for the long-range development, conservation, use and allocation of land, water, and other resources in the County of Kaua'i. Kaua'i County Code § 7-2.2 (1987).

Pursuant to the Kaua'i Comprehensive Zoning Ordinance ("CZO"), which is a part of the Kaua'i County Code, Kauai Springs was required to apply for a Use Permit and Class IV Zoning Permit, and for a Special Permit pursuant to Hawai'i Revised Statutes Section 205-6. In deciding whether or not to grant these permits, the Kaua'i Planning Director and the Planning Commission were obligated to abide by the public trust doctrine and common law principles regarding water resources. Kelly, 111 Hawai'i at 224, 140 P.3d at 1004 (Public

trust duties imposed on the State are also imposed upon the counties as political subdivisions of the State.).

Based upon the foregoing, the Planning Commission is obligated by law to apply the public trust doctrine.

2. The Application for the Use Permit Was Properly Denied.

Chapter 8 of the Kaua'i County Code is the CZO, which establishes Use Districts, and sets forth standards for the issuance of permits for specific uses within each Use District. Kaua'i County Code § 8-2.1 (1987).

The Planning Commission relied upon sections 8-20.1 and 8-20.5 of the CZO when considering Kauai Spring's application for a Use Permit. These sections provide, in pertinent part, that a Use Permit may be granted only if the Planning Commission finds that the activity or use is "compatible" and "will not cause any substantial harmful environmental consequences on the land of the applicant or on other lands or waters ...." RA at 343; see also Kaua'i County Code §§ 8-20.1, 8-20.5 (1987).

The testimony at the hearings raised numerous concerns regarding whether the extraction and processing of water would have "environmental consequences" on "other lands or waters" and whether the extraction and processing of water was a compatible use or activity pursuant to section 8-20.5 of the CZO and Chapter 7 of the Kaua'i County Plan, which encompasses long-range development, conservation, use and allocation of land, water, and other resources on Kaua'i. The hearings testimony also shows that the Planning Commission examined its fiduciary responsibilities to the public trust's

protection of water resources. Significantly, this was the first time the Planning Commission addressed the extraction, bottling, sale, and commercialization of natural water, and the members posed questions while assessing the ramifications of their decisions:

Mr. Aiu: ... I too have my concerns about basically taking the water and bottling it for profit ... is it public or is it private ...?

....

Mr. Mike Matsukawa (Counsel for the Planning Commission):  
About 2 months ago the Hawai'i Supreme Court rendered a decision on the Public Trust Doctrine ... looking at the narrow issue of water and the Public's trust responsibility that the County as a political subdivision of the State has .... [W]hat the court said is that the County agencies like this Commission its self [sic] shares in that responsibility, a trust responsibility to answer the questions that you raise.

RA at 231.

Mr. Aiu: ...what are the ramifications of my decision making...on the water rights and if I do say yes has then all water rights been abdicated for this source? Since it is ground water how big can we say the source is and whatnot...

Mr. Matsukawa: The land based issue is one thing but if you approve the land based activity it directly suggests or approves the transport and consumption of the water.

Mr. Aiu: Yes and that is what I am afraid of. I am afraid of that being the interpretation.

RA at 184.

The testimony continues to reveal that the Planning Commission needed more information regarding the relationship between Kauai Springs and Grove Farm, from whom Kauai Springs was buying the water it then bottled and resold:

Mr. Weinstein: [I]f the Planning Commission granted the permit and then later on through the Supreme Court Action in their ruling said that Grove Farm cannot sell water like this.

Mr. Matsukawa: ...[S]ince the courts have said that the County's have some burden as a fiduciary when it comes to water without defining exactly what your role is, can you just grant a permit to allow the land based activity because the criteria for the land based activity is met, have you fulfilled...that undefined responsibility that the court said you have to act as a fiduciary towards the resource.

RA at 185.

The Planning Commission wanted to know whether Kauai Springs made any efforts to obtain information from Grove Farms concerning Grove Farm's rights to water. RA at 134. Kauai Springs stated that it never discussed water rights with Grove Farm. Id.

The Planning Commission finally discussed seeking a declaratory ruling from the CWRM regarding the relationship between Kauai Springs and Grove Farm, but determined there was no time before rendering its decision. RA at 188-190.

Kauai Springs states that CWRM had "no interest" in its permit applications. Opening Brief at 26. This is not supported by the record. In fact, a statement contained in CWRM's response to the Planning Commission's inquiry provides that "all waters of the State are held in trust for the benefit of the citizens of the State, therefore, all water use is subject to legally protected water rights. CWRM strongly promotes the efficient use of Hawai'i's water resources through conservation measures and appropriate resource management." RA at 554. This statement illustrates CWRM's



acknowledgement that the public trust doctrine must be followed in all decisions regarding the use of water from any source on Kaua`i, and that it is certainly interested in any use of water even though Kauai Springs was not required to obtain a permit from CWRM since Kaua`i is not a designated water management area.

The Planning Commission requested guidance from the CWRM relating to Kauai Spring's use of the water for commercial purposes. RA at 554-555. Although CWRM responded that Kauai Springs did not require a water use permit, CWRM cautioned: "Ground-water withdrawals from this project may affect streamflows, which may require an instream flow standard amendment[,]” and that “if the source needs to be modified in any way, a well modification permit from the [CWRM] may be required.” RA at 555. CWRM's response further warned that “[i]f the source is modified to induce additional water flow, and the modification results in impacts to surface waters, a petition to amend the interim instream flow standard for affected surface waters must be made and approved prior to use of the water.” RA at 555.

Thus, CWRM advised that additional water flow requirements may require future modifications to the source of water, and there was ample testimony regarding future plans to increase extraction of water by Kauai Springs:

Mr. Daligdig; Knowing that the trend for bottled water here on Kaua`i...has really grown and there may be the potential for expansion because the demand is so high today?

Mr. Satterfield: We know the trend is no longer a trend but it is a matter of fact that bottled water is a daily used agricultural,

mineral, natural resource. And we know that there will be growth and we are seeking future property...we are also going to seek another location on the spring line source because it has to be bottled at the source and that will be the location where we intend on doing the expansion.

RA at 239. There is no indication in the record that Kauai Springs attempted to obtain a declaratory ruling from CWRM at any time concerning its rights to the water obtained from Grove Farm.

In addition to seeking guidance from the CWRM, the Planning Commission contacted the PUC relating to Kauai Spring's use of the water for commercial purposes. Although the PUC's response stated that Kauai Springs was not a public utility it expressed an "interest" in Grove Farm's capacity as the *seller* of water to Kauai Springs, and *its* status with the PUC. RA at 426-429. The PUC cautioned that its response was only "informal", and that a more "formal" opinion could be obtained by submitting a petition for a declaratory ruling and a more diligent review. RA at 346, 429. Again, the record does not indicate that Kauai Springs attempted to obtain a formal opinion from the PUC to clarify its rights to water obtained from Grove Farm.

Referring to the "qualifying remarks" in CWRM's response, the PUC's response, the observations made during a Planning Commission site visit, and the testimony received at the hearings, the Planning Commission concluded that there may be "outstanding regulatory processes" that Kauai Springs must satisfy. RA at 461-464. It was not the responsibility of the Planning Commission to satisfy these outstanding regulatory processes for Kauai Springs. Kauai Springs had the burden of justifying its proposed use and

should have proactively sought a declaratory ruling from the PUC and CWRM prior to the hearings. See In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai'i 481, 490, 174 P.3d 320, 329 (2007), In re Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 421, 83 P.3d 664, 684 (2004), Gatri v. Blane, 88 Hawai'i 108, 112, 962 P.2d 367, 371 (1998).

A use which the Planning Commission fears could compromise water resources certainly is not a use which can be properly integrated into the community. The Planning Commission expressed concerns concerning whether any "harmful environmental consequences" could occur as a result of Kauai Springs' extraction of water and subsequent release of unused water, pursuant to the criteria set forth by sections 8-20.1 and 8-20.5 of the Kaua'i CZO. RA at 187-188. The Planning Commission therefore properly denied the use permit application.

3. The Application for the Special Use Permit Was Properly Denied.

Pursuant to HRS section 205-6(a) concerning applications for special permits:

The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use...may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired.

Section 13-6 of the Rules of Practice and Procedures of the Planning Commission for the County of Kaua'i ("Planning Commission Rules") entitled "Guidelines for Issuance of Special Permit" ("Guidelines") states that the

Planning Commission may approve a special permit if it finds that the proposed use:

(a) Is an unusual and reasonable use of land situated within the Agricultural or Rural District, whichever the case may be. The Planning Commission shall consider the following *guidelines* in determining unusual and reasonable use:

(1) Such use shall not be contrary to the objectives sought to be accomplished by Chapters 205 and 205A, HRS, and the rules of the Land Use Commission;

(2) The desired use would not adversely affect surrounding property;

(3) The use would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection;

(4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and

(5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district; and

(b) Would promote the effectiveness and objectives of Chapter 205, HRS, as amended.

(Emphasis added).

Much of the testimony from the five hearings focused on the effect of the extraction of water upon the area streams now and in the future, which could “adversely affect surrounding property”, see Guidelines § 13-6(a)(2), or “unreasonably burden public agencies to provide...water, [and] drainage....”, Guidelines § 13-6(a)(3):

Mr. Aiu: And as I understand it the tank then has overflow and that does back into Waihohonu stream. And so Waihohonu stream today functions with that capacity that can be taken out with the 5,000 gallons. And that is what I am concerned about that when [Kauai Springs] reaches max capacity that then the ecosystem can be disturbed. Because that overflow then is taken out of the stream.

RA at 187-188. In addition, the Office of Hawaiian Affairs submitted letter testimony which correctly stated that the Planning Commission has an affirmative duty to preserve and protect the public trust natural water resources, and expressed its concern about the effect of Kauai Spring's activities upon streamflow. RA at 239, 348-350.

While the criteria outlined above in the Planning Commission Rules are *guidelines* that the Planning Commission shall *consider*, the Planning Commission is *constitutionally mandated* to follow the public trust duties imposed by Article XI Section 1 of the State Constitution, and has an obligation "to conserve and protect the [S]tate's natural resources." Kelly, 111 Hawai'i at 224-225, 140 P.3d at 1004-1005.

Kauai Springs argues that HRS section 205-6 relates to land use and not water issues, Opening Brief at 23, but this ignores the very use for which it is applying for permits, namely, the land use sought by Kauai Springs, the extraction, processing, bottling, and distribution of water, is the *use of water*, and as such, any decision to grant any requisite permits must follow the public trust doctrine:

The duty to protect public water resources is a *categorical imperative* and the *precondition to all subsequent considerations*, for without such underlying protection the natural environment could, at some point, be irrevocably harmed and the "duty to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses" could be endangered.

Waiahole I, 94 Hawai'i at 113, 9 P.3d at 425. (citation omitted) (emphasis added).

The public trust doctrine does not exclude all commercial uses of water, however: “[w]hile...the public trust may allow grants of private interests in trust resources under certain circumstances, they in no way establish private commercial use as among the public purposes *protected* by the trust.”

Waiahole I, 94 Hawai‘i at 138, P.3d at 450. “Such an interpretation, indeed, eviscerates the trust’s basic purpose of reserving the resource for use and access by the general public without preference or restriction.” Id. Denial of the special use permit was therefore consistent with the Planning Commission’s obligations under the public trust doctrine.

4. The Application for the Class IV Zoning Permit Was Properly Denied.

CZO section 8-7.7 states:

No construction or other development...shall be undertaken within any Agriculture District except in accordance with a valid zoning permit. The following zoning permits, in accordance with Article 19, shall be required for the following activities:

...

(4) ... A Class IV Permit shall be obtained for construction or development on a parcel where...a variance or a use permit is required.

Kauai Springs was required to apply for a Class IV Zoning Permit because the property is in an Agricultural District. Relying on HRS section 205-4.5 (7) and (10), Kauai Springs argues that because it *may* fall within a category not requiring a permit, no Class IV Zoning Permit is required. Opening Brief at 24. A review of the statutory section shows that the extraction, processing, bottling, and distribution of water is not covered by any of the categories described in either (7) or (10) of HRS section 205-4.5. The

“processing facilities” identified in section 205-4.5 (10) refer to the uses “permitted under section 205-2(d)”, none of which approach a water extraction, processing, bottling and distribution facility.

Kauai Springs further asserts that either the Class IV Zoning Permit is not required, or it should automatically be granted since the County previously issued building permits. Kauai Springs relies on Waikiki Marketplace Investment Company v. Zoning Board of Appeals of the City and County of Honolulu, 86 Hawai'i 343, 949 P.2d 183 (Ct. App. 1997), for the proposition that Kauai Springs possesses vested property rights and it would violate due process to deny a Class IV Zoning Permit since it already obtained other building permits. Opening Brief at 25. The Waikiki Marketplace case is inapplicable here and is plainly distinguishable, for it involved the legal construction of a structure pursuant to a building permit, which was later lost, and the subsequent issuance of a violation after the zoning laws changed. The Hawai'i Intermediate Court of Appeals held:

The fact that the current property owner cannot prove that a building permit for the structure was obtained prior to construction will not render the structure automatically unlawful under a zoning ordinance adopted after the structure was constructed.

Waikiki Marketplace, 86 Hawai'i at 353, 949 P.2d at 193.

In the instant matter, Kauai Springs did not properly apply for a Class IV Zoning permit in compliance with CZO section 8-7.7 until after it received the May 15, 2006, Cease and Desist Letter. There is nothing in the record to

suggest Kauai Springs received any official assurances from the County that its application for a Class IV Zoning permit would be approved.

**B. The Conclusions of Law Were Correct**

1. Kauai Springs Had the Burden of Justifying the Proposed Use.

As the applicant for the subject use permits, Kauai Springs had the burden of justifying its proposed use of the water under the public trust doctrine. In re Contested Case Hearing on Water Use Permit Application Filed by Kukui (Molokai), Inc., 116 Hawai'i 481, 490, 174 P.3d 320, 329 (2007) ("Molokai"); In re Wai'ola O Moloka', Inc., 103 Hawai'i 401, 421, 83 P.3d 664, 684 (2004); Gatri v. Blane, 88 Hawai'i 108, 112, 962 P.2d 367, 371 (1998). A higher level of scrutiny will be applied for one seeking a private commercial water usage. Moloka'i, 116 Hawai'i at 490, 174 P.3d at 329. There is a presumption favoring public use, access, and enjoyment over commercial use of a public trust resource. Waiahole I, 94 Hawai'i at 142, 9 P.3d at 454. Further, pursuant to Rule 1-6-17 (b) of the Kaua'i Planning Commission Rules, the applicant has the burden of persuasion.

The Planning Commission stated "it should be [Kauai Spring's] responsibility to confirm and determine the need for any permits that may be required..." by Hawai'i law. RA at 345. This assignment of responsibility was set forth by the Hawai'i Supreme Court in Waiahole I: "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the [public] trust." Waiahole I, 94 Hawai'i at 142, 9 P.3d at 454.



Kauai Springs intended to increase its business and extract more water from another tap on the water line from Kahili Mountain. RA at 239. The public trust doctrine compels the Planning Commission to consider the “cumulative impact of existing and proposed diversions on trust purposes ....” Waiahole I, 94 Hawai‘i at 143, 9 P.3d at 455. Kauai Springs failed to present any evidence of the quantity of water it intended to extract in the future, making it impossible for the Planning Commission to assess the cumulative impact of water diversions from Kahili Mountain.

Kauai Springs failed to meet its burden to justify its proposed extraction, processing, bottling, and distribution of water on the subject property. As is evident from the record, it failed to demonstrate that its proposed use of water meets the stringent standards in place to protect water resources pursuant to the constitutionally mandated public trust doctrine.

2. Kauai Springs Failed to Establish a Legal Right to Use Water Commercially.

Kauai Spring’s use of water for commercial gain is not a public purpose protected by the public trust doctrine; “[a]lthough its purpose has evolved over time, the public trust has never been understood to safeguard rights of exclusive use for private commercial gain.” Waiahole I, 94 Hawai‘i at 138, 9 P.3d at 450. “[U]nderlying every private diversion and application there is...a *superior public interest* in this natural bounty.” Robinson v. Ariyoshi, 65 Haw. 641, 677, 658 P.2d 287, 312 (1992) (emphasis added).

As discussed above, the Planning Commission questioned both Kauai Spring’s and Grove Farm’s commercial water rights, sought both PUC and

CWRM guidance, and questioned whether Kauai Springs itself determined these water rights prior to purchasing water from Grove Farm and then, in turn, bottling and selling water. Kauai Springs had the burden of establishing its ability to legally buy water from Grove Farm and then subsequently sell it. Kauai Springs failed to satisfy its burden and has failed to show that it had any legal standing to commercially extract and sell water.

**C. Kauai Springs Assented to a Delay to Take Action On Its Application For Use Permit and Class IV Zoning Permit**

Kauai Springs argues in its Opening Brief that zoning permits must be processed within a fixed time or they are deemed approved. Opening Brief at 6. HRS section 91-13.5 (1998) requires agencies to set maximum times for decisions on permits and the Kaua'i County Code contains provisions complying with HRS section 91-13.5.

Article 20 of the Kaua'i County Code provides that section 8-19.5 governs the timing for the processing of a use permit application. Further, section 8-19.6 of the Kaua'i County Code governs the timing for the processing of a Class IV Zoning Permit application. Both section 8-19.5 (g) and section 8-19.6 (e) state:

If the Planning Director or the Planning Commission fails to take action within the time limits prescribed in this Article, unless the applicant assents to a delay, the application shall be deemed approved.

(emphasis added).

Section 8-19.5 provides 105 days for the processing of a use permit application and section 8-19.6 provides 120 days for the processing of a Class

IV Zoning permit application, until the time they are deemed automatically approved, unless the applicant assents to a delay. In the instant matter, the 105<sup>th</sup> and 120<sup>th</sup> days occurred while hearings to consider the applications for Use and Class IV Zoning Permits were ongoing.

“Assent” is defined as “verbal or nonverbal conduct reasonably interpreted as willingness.” Black’s Law Dictionary 124 (8<sup>th</sup> ed. 2004). There are several forms of “assent” further defined by Black’s Law Dictionary: actual assent is “given by words or conduct intended to express willingness”; apparent assent is “given by conduct that, while not necessarily intended to express willingness, would be understood by a reasonable person to be so intended and is actually so understood”; constructive assent is “imputed to someone based on conduct”; and implied assent is “inferred from one’s conduct rather than from direct expression.” Id.

Representatives of Kauai Springs and its attorney were present at these hearings. Neither Kauai Springs, nor its attorney, ever stated on the record that Kauai Springs would not waive the statutory time frames to process the Use and Class IV Zoning permits. The respective 105 and 120 day deadlines passed, and no request was ever stated on the record that either of these permits were deemed automatically approved or Kauai Springs reserved its right to so assert.

Even during discussions regarding the deadline for action by the Planning Commission on the Special Permit, no one, including the attorney for

Kauai Springs, made any reference to the deadlines for the Use and Class IV Zoning permits having already passed. RA at 137-138, 190-191.

To the contrary, at the February 13, 2007, Planning Commission meeting during which Kauai Springs asked that the decision of the Planning Commission be reconsidered, the attorney for Kauai Springs specifically stated that he would have assented to an extension of time for a decision on the permits had he known he could have:

Mr. Cohen: (counsel for Kauai Springs) [A]bsolutely we would be willing to execute a document, I'm happy to work with the County Attorney, a waiver of our rights. We are not trying to have you open it up today and then argue that that's an automatic approval ... [w]e believe there are important issues to be resolved.

RA at 3-5.

It was reasonable for the Planning Commission to interpret Kauai Spring's attendance at the hearings, which were held for the purpose of determining whether to grant the Use, Special, and Class IV Zoning permits, as assenting to delay the time periods attached to each permit application so that the hearings could occur, especially without a protest to the contrary or a specific reservation of its right.

Based on its actions, Kauai Springs waived its right to rely upon the automatic approval provisions of the Kaua'i County Code. Bickel v. City of Piedmont, 946 P.2d 427, 431 (Cal. 1997) (Common law doctrine of waiver allowed where automatic approval statute was for applicant's benefit and did not contain language prohibiting waiver). There is no language in the Kaua'i

County Code prohibiting waiver of the automatic approval provisions of sections 8-19.5 and 8-19.6.

Even if this Court finds that Kauai Springs did not assent to an extension of the time limits set forth in the Kaua'i County Code, or did not waive its right to raise timeliness as an argument, this Court's decision must be guided by the public trust doctrine.

As discussed above, the subject matter at the core of the permits is the use of water and water rights, and it is the duty of the Planning Commission as well as this Court to ensure that the public trust doctrine is upheld. The public trust doctrine forms the "outer boundaries of permissible government action", Waiahole I, 94 Hawai'i at 132, 9 P.3d at 444, and based on the record herein, there was "assent" by Kauai Springs to delay the time period to preclude the automatic granting of the applications for the Use and Class IV Zoning permits.

**V. CONCLUSION**

The decision of Planning Commission to deny Kauai Spring's application for a Use Permit, Special Permit, and Class IV Zoning Permit does not meet any of the standards for reversal of an administrative agency decision pursuant to HRS section 91-14(g). For all of the foregoing reasons, the Planning Commission respectfully requests that this Court affirm the January 24, 2007,

Findings of Fact, Conclusions of Law, and Decision and Order of the Planning Commission, and deny Kauai Spring's Agency Appeal.

DATED: Lihu'e, Kaua'i, Hawai'i, May 28, 2008.



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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

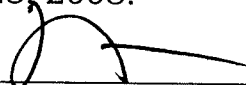
KAUAI SPRINGS, INC.,	)	CIVIL NO. 07-1-0042
	)	(Agency Appeal)
Plaintiff-Appellant,	)	
	)	CERTIFICATE OF SERVICE
vs.	)	
	)	
PLANNING COMMISSION OF THE	)	
COUNTY OF KAUAI,	)	
	)	
Defendant-Appellee.	)	
_____	)	

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES that on this date, a true and correct copy of the foregoing document was duly served upon the following individuals via U.S. mail, first-class postage pre-paid, addressed as follows:

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