

ORIGINAL

NO. 27407

IN THE SUPREME COURT OF THE STATE OF HAWAII

AND

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

THE SIERRA CLUB, a California)
non-profit corporation registered to)
do business in the State of Hawai'i;)
MAUI TOMORROW, INC., a Hawai'i)
non-profit corporation; and the)
KAHULUI HARBOR COALITION, an)
unincorporated association;)

Plaintiffs-Appellants,)

vs.)

THE DEPARTMENT OF)
TRANSPORTATION OF THE STATE)
OF HAWAII; RODNEY HARAGA, in)
his capacity as Director of the)
DEPARTMENT OF)
TRANSPORTATION OF THE STATE)
OF HAWAII; BARRY FUKUNAGA, in)
his capacity as Director of Harbors of)
the DEPARTMENT OF)
TRANSPORTATION OF THE STATE)
OF HAWAII and HAWAII)
SUPERFERRY, INC.)

Defendants-Appellees.)

khc/supct/replybrf

Civil No. 05-1-0114 (3)

(Declaratory Judgment)

APPEAL FROM FINAL JUDGMENT
FILED JULY 12, 2005 AND ORDER
GRANTING (1) DEFENDANT STATE
OF HAWAII'S MOTION TO DISMISS
OR, IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT, FILED MAY
12, 2005; AND (2) DEFENDANT
HAWAII SUPERFERRY, INC.'S
MOTION TO DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY
JUDGMENT, FILED MAY 12, 2005,
FILED JULY 12, 2005

CIRCUIT COURT OF THE SECOND
CIRCUIT, STATE OF HAWAII

The Honorable Joseph E. Cardoza,
Judge

REPLY BRIEF OF APPELLANTS
and
CERTIFICATE OF SERVICE

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STATE OF HAWAII

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TABLE OF CONTENTS

i.	TABLE OF CONTENTS.....	i
ii.	TABLE OF AUTHORITIES.....	ii
I.	INTRODUCTION	1
II.	HDOT ERRED AS A MATTER OF LAW IN ISSUING THE EXEMPTION DETERMINATIONS	1
A.	Exemption Determinations must be Based upon “the Totality of the Circumstances”	1, 2
B.	HDOT Committed a Reversible Error of Law by Failing to Apply HAR §11-200-7	2, 3
C.	HDOT Committed a Reversible Error of Law by Failing to Review Secondary Impacts	3, 4, 5
D.	HDOT Committed a Reversible Error of Law by Failing to Review Cumulative Impacts.....	5, 6
E.	Consultation Requirements	6
III.	APPELLANTS HAVE STANDING TO CHALLENGE THE EXEMPTION DETERMINATION OF HDOT AND TO REQUIRE THE PREPARATION OF AN EA.....	6, 7
A.	Appellants Satisfied the Liberal Tests for Standing...	7, 8, 9
B.	Appellants Are Entitled to Procedural Standing.....	9, 10
VI.	CONCLUSION/RELIEF REQUESTED.....	10

TABLE OF AUTHORITIES

CASES

Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982)----- 8, 9

Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i,
91 Haw. 94, 100, 979 P.2d 1120, 1126 (1999) ----- 9

Downtown Traffic Planning v. Royer, 26 Wash.App.156, 612 P2d 430 (1980) -- 2

Kepoo v. Kane (“Kepoo II”), 106 Haw. 270, 103 P.3d 939 (2005)----- 9

KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997)-----1, 2, 3, 6

Life of the Land v. Land Use Commission, 63 Haw. 166, 175-176,
623 P.2d 431 (1981)----- 7

McGlone v. Inaba, 67 Haw. 27, 636 P. 2d 158 (1981)----- 2, 3, 4, 5

Molokai Homesteaders Coop. Ass’n v. Cobb 63 Haw. 453, 629 P.2d 1134
(1981)----- 4

Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846
(9th Cir. 2005) ----- 3, 5, 6

Sierra Club v. Hawai'i Tourism Auth. (“HTA”), 100 Haw. 242, 59 P.3d 877
(2002), ----- 6, 8, 9, 10

United States v. SCRAP, 412 U.S. 669, 688-689 (1973) ----- 7

RULES

HAR § 11-200-7 ----- 2, 3

HAR § 11-200-8(b) ----- 5

HAR § 11-200-8(c) ----- 5

STATUTES

H.R.S. Chapter 343 -----7, 10

200

REPLY BRIEF

Plaintiffs-Appellants (“Appellants”) The Sierra Club, Maui Tomorrow, Inc. and the Kahului Harbor Coalition file their Reply Brief in response to the joint Answering Brief of Defendants-Appellees (“Appellees”) Hawaii Superferry, Inc. and the State of Hawaii (“HDOT”). Due to the ten page limitation, Appellants have been unable to reply to all of the issues raised by Appellees and therefore Appellants, in response, incorporate their Opening Brief.

I. INTRODUCTION

Appellees are wrong when they argue in their Answering Briefs that HDOT committed no reversible errors in entering the exemption determination for the Hawaii Superferry project and are equally wrong when they argue that Appellants lacked standing to challenge these errors in Court.

Any statewide project using state lands by spending approximately \$40,000,000 to improve all of Hawaii’s major harbors as a condition precedent to the implementation of an entirely new interisland transportation system cannot qualify for an exemption from Chapter 343 intended only for “very minor projects”.

II. HDOT ERRED AS A MATTER OF LAW IN ISSUING THE EXEMPTION DETERMINATIONS

Appellees are unable to mount viable arguments to support the exemption determinations issued by HDOT. Appellees acknowledge that the determinations by HDOT and by the Trial Court that the exemptions were issued in compliance with Chapter 343 are matters of law freely reviewable by this Court. KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997). The significant errors of law committed by HDOT in the exemption determinations require reversal of the Trial Court’s decision.

A. Exemption Determinations must be Based upon “The Totality of the Circumstances

Exemptions are available in Chapter 343 for specific types of actions which will probably have minimal or no significant effects on the environment. HRS § 343-6(a)(7). The EIS regulations set out these specific types of actions. HAR § 11-200-8. The Hawaii Supreme Court ruled in KSOA at p.72:

It is apparent from the context of the exemptions that the regulations intend to exempt only **very minor projects** from the ambit of HEPA. (Emphasis added)

Chapter 343 and the EIS regulations contain “checks” to ensure that only “very minor projects” qualify for exemptions. The Hawaii Supreme Court ruled in McGlone v. Inaba, 64 Haw. 27, 636 P.2d 158 (1981) (Footnote 12) at p.37:

Merely because the proposed activities here are listed as exempt does not make it so. The building of a house and support facilities are only deemed exempt because it will probably not have a significant effect under **the totality of circumstances**. See Downtown Traffic Planning v. Royer, 26 Wash.App. 156, 612 P2d 430 (1980). (Emphasis added)

This means that it is legally insufficient to rely on a stated exempt activity without reviewing it within “the totality of circumstances”. Any purported exempt activity must, by law, include an analysis of that activity’s potential connected actions, secondary impacts, significant effects and cumulative impacts. If the “totality of circumstances”, as described above, have not been reviewed, as here, the exemption is illegal and void.

B. HDOT Committed A Reversible Error of Law By Failing to Apply HAR §11-200-7

Appellees wrongfully attempt to distinguish KSOA by claiming, on p. 26 of their Answering Brief, that the exemption in that case was for a new drainage system for over 300 residences whereas in this case the claimed exemption is only for minor improvements to an existing harbor. This misconstrues KSOA. In making this argument, however, Appellees are addressing an “exempt class of action”, based upon **HAR §11-200-8**, for minor improvements to existing facilities. The expenditure of \$40,000,000 in State funds to improve State harbors to facilitate an entirely new interisland transportation system cannot possibly constitute a “very minor project”.

Appellants rely upon KSOA for a different legal principle which is that a separate section of the EIS regulations, **HAR § 11-200-7**, must be applied in making exemption determinations. According to **HAR § 11-200-7**, it is irrelevant whether the proposed improvements are to an existing harbor. What is critical is that these improvements are a “condition precedent” to a larger action.

In KSOA, the Court ruled, on p. 74, applying HAR §11-200-7, that the assessment of the impacts of a project cannot be confined to the impacts of the drain line in a county road and required an analysis of the impacts of the project as a whole. As in KSOA, the improvements to be constructed at Kahului Harbor on state lands with state funds are a “**necessary precedent**” for the Hawai’i Superferry project and would not be constructed except as part of the whole Hawai’i Superferry project. Hawai’i Superferry admits that the HDOT harbor improvements “are a prerequisite to Superferry’s commencement of its operations”. See paragraph 5; ROA; p. 1493. HDOT committed an error of law by failing to review the impacts of the Hawai’i Superferry project as a whole, and as “single action”.

Appellees have lost track of why Appellants cited Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846 (9th Cir. 2005). Appellants never made any argument, as suggested by Appellees on p. 27 of their Answering Brief, that an EA must be prepared before an exemption determination is made. There was no indication in the opinion that any EA had been prepared. This case is important, however, because of its recognition of the same type of legal analysis required by HAR § 11-200-7. The platform added to the pier in that case would increase the berthing capacity for an oil refinery and the Army Corps failed to consider the environmental impacts resulting from the increased tanker traffic that the extension of the pier would facilitate. Appellees ignore this vital holding.

C. HDOT Committed a Reversible Error of Law by Failing to Review Secondary Impacts

McGlone is an important Chapter 343 exemption case. Appellees attempt to dispose of McGlone, on p. 26 of their Answering Brief, by stating that it is based upon a pre-1979 version of HEPA which did not include the concept of EA’s or draft EA’s. Instead, McGlone includes holdings critical to this case which are based upon a definition of “significant effect” and exemption regulations which are similar to those which exist today.

In McGlone, the triggering event for a CDUA application and environmental review pursuant to Chapter 343 was the installation of underground utilities on State-owned Lot 715 in the conservation district to

facilitate the construction of a house located upon another private parcel, Lot 718, not within the conservation district. The Paiko Lagoon and the State-owned lands around the Lagoon were part of the Paiko Lagoon Wildlife Sanctuary. Among the birds protected were the Hawaiian Black-necked Stilt, an endangered Hawaiian waterbird which uses Paiko Lagoon as a feeding and nesting area. The applicants and BLNR claimed that the underground utilities on Lot 715 were exempt from the requirement to prepare an EA. Interested individuals claimed that an EA was required.

The Hawaii Supreme Court noted that an EIS must be prepared for all actions “which will probably have significant environmental effects”, citing Molokai Homesteaders Coop. Ass’n v. Cobb, 63 Haw. 453, 629 P.2d 1137 (1981). The Court held in McGlone that in determining whether a proposed action has a “significant effect”, the definition of “significant effect” in HRS §343-1 must be applied and on p. 35 that:

. . . an agency making such a determination must consider every phase and every expected consequence of the proposed action.

The interested parties asserted that the Wildlife Sanctuary, the habitat of the Stilt, is a “particularly sensitive environment” which would be significantly effected, first, by the construction of the underground utilities on Lot 715 and, second, by the construction, use and occupancy of the house on Lot 718.

The Hawaii Supreme Court notes in footnote 14 on p. 37 that the construction of underground utilities on Lot 715 is designated as “the primary impact”. In footnote 15 on p. 38, the Court recognized that the construction, use and occupancy of the house on lot 718 is a “secondary impact” because this activity is incident to and a consequence of the primary impact, the construction of the underground utilities. The Hawaii Supreme Court was clear in determining on p. 38 that:

The effects of such ‘secondary impacts’, like ‘primary impacts’, must be considered in determining the relative environmental effects.

Based upon this reasoning, the Hawaii Supreme Court ruled that in determining whether an exemption was appropriate or not the environmental review could not be lawfully limited to just the infrastructural improvements or

the impacts on Lot 715. The infrastructural improvements facilitated the construction of the house so that the impacts of the use and occupancy of the house were required to be addressed. Likewise, the harbor improvements are a condition precedent to the Hawaii Superferry project and the impacts of the Hawaii Superferry project must also be addressed.

D. HDOT Committed a Reversible Error of Law by Failing to Review Cumulative Impacts

Appellees argue, in one paragraph, on p. 27 of their Answering Brief, that the “exemptions to the exemptions” provision in the EIS regulations, HAR § 11-200-8(b), is inapplicable. This section provides that all exemptions are inapplicable when (a) the cumulative impact of planned successive actions in the same place, over time, is significant or (b) when an action that is normally insignificant in its effect on the environment may be significant in a particularly sensitive environment. HAR § 11-200-8(b).

Appellees first argue that Hawaii Superferry is not a planned successive action. This argument is absurd. An interisland ferry system through which boats repeatedly travel, every day of the year, between islands, dock and load and unload passengers and vehicles is assuredly a planned successive action.

Appellees then argue, without merit, that no “particularly sensitive environment” is involved because Kahului Harbor is an industrial commercial harbor. In McGlone, 67 Haw. 27, 636 P. 2d 158 (1981) the Hawai'i Supreme Court held that the impacts upon endangered species whose habitats were environmentally sensitive areas were required to be addressed in Chapter 343 exemption determinations and could not be limited to “particularly sensitive environments” which existed on the same property as the infrastructural improvements. Based upon this precedent, it does not matter that the “particularly sensitive environment” affected by the Hawaii Superferry project does not lie within Kahului Harbor, as argued by Appellees. What matters is that the “particularly sensitive environment” is within the anticipated routes of the Hawaii Superferry, the project facilitated by the harbor improvements.

This was also the precise point of Ocean Advocates. The Army Corps failed to address the impacts upon threatened and endangered species that live and thrive in an offshore ecologically sensitive area resulting from an increase

in the berthing capacity -- and consequent increase in tanker traffic -- that a pier extension would facilitate. The environmental review could not be legally restricted to the immediate harbor area itself. The “ecologically sensitive area” was located offshore in that case, as is also the case here. The point is that endangered species may be harmed by the new high-speed ferries which can only operate in these “particularly sensitive environments” when and if HDOT constructs its harbor improvements. Bernard Decl.; ROA; pp. 1321-1323. As in Ocean Advocates, these “particularly sensitive environments” offshore were within the required scope of review pursuant to a proper application of HAR § 11-200-12(b).

E. Consultation Requirements

Appellees argue, on pp. 3, 6-7, 21-23 of their Answering Brief, that the comment they received from OEQC that under certain circumstances an exemption from Chapter 343 was appropriate for minor harbor improvements was entitled to deference. This argument fails for multiple reasons. First, the freely reviewable errors of law described in detail above overcome any deference to OEQC on the matter of the exemptions. See KSOA. Second, OEQC is not entitled to deference for all of the reasons given in Appellants’ Opening Brief.

Third, HDOT wrote to OEQC on November 15, 2004, describing a different project than the one that is the subject of the exemptions. This letter does not describe any particular exemption upon which HDOT might rely. ROA 817-822. The response of OEQC on November 23, 2004 addresses Exemption Classes 6 and 8, with qualifications that required future factual development. ROA 826-827. HDOT did not rely upon one of the two exemption classes discussed by OEQC. ROA 1175. As a matter of fact, this consultation cannot be considered definitive advice upon which HDOT could rely upon or did in fact rely upon.

III. APPELLANTS HAVE STANDING TO CHALLENGE THE EXEMPTION DETERMINATION OF HDOT AND TO REQUIRE THE PREPARATION OF AN EA

Appellees rely heavily upon this Court’s rulings in Sierra Club v. Hawai’i Tourism Auth. (“HTA”), 100 Haw. 242, 59 P.3d 877 (2002) to argue that

Appellees lacked standing to challenge the Chapter 343 exemption determination of HDOT. This reliance is misplaced.

A. Appellants Satisfied the Liberal Tests for Standing

Appellees argue in their Answering Brief that no evidence of any (1) actual or threatened injuries or (2) causal connection of the injuries to the harbor improvements or to the Hawaii Superferry or (3) that favorable relief is available. On the contrary, Appellants have satisfied the injury-in-fact requirements.

For the purpose of acting on a Motion to Dismiss, the factual allegations set out in the Declarations must be taken to be true. United States v. SCRAP, 412 U.S. 669, 688-689 (1973); Life of the Land v. Land Use Commission, 63 Haw. 166, 175-176, 623 P.2d 431 (1981). In this instance, Appellees have ignored these standards of review and the allegations in the Complaint and Declarations.

Appellees admit that this project will have environmental impacts capable of injuring Appellants by agreeing to conduct environmental analyses, outside of Chapter 343, on: (a) **inspections necessary to prevent the introduction of alien species**; (b) **an analysis of the traffic impacts of the project**; and (c) **the development and implementation of mitigation measures to assure that whales are not harmed by the high-speed ferries**. ROA; p. 1347. Appellees can hardly argue that this project is not anticipated to have any (1) alien species impacts, (2) traffic impacts or (3) impacts on endangered whales which could cause an actual or threatened injury to Appellants.

Appellants demonstrated threatened injury to endangered species caused by these high-speed ferries. Declaration of Hannah Bernard. ROA; pp. 1319-1325. The Superferries travel at high speeds through "environmentally sensitive areas" -- the habitats for endangered species studied by Ms. Bernard, as a marine biologist. Through vessel strikes, the ferries will increase the risk of harm to whales and other marine life resulting in death or injury.

Appellants demonstrated threatened injury through the increase in the introduction of alien species through the implementation of the Hawai'i Superferry project. Declarations of Jeffrey Parker and Ann Fielding. ROA; pp.

1334-1339 and 1330-1333. These Declarations allege the potential for actual economic harm to the businesses of these individuals directly resulting from the increase in alien species introductions from the Superferry project.

Appellants demonstrated threatened injury to recreational interests caused by the Superferry project. Declarations of Karen Chun and Gregory Westcott. ROA; pp. 1326-1329 and 1340-1341. The limited security zones and the infrastructural needs of the Superferry project could destroy the surf breaks that Westcott enjoys. Akau v. Olohana Corp., 65 Haw. 383, 652 P.2d 1130 (1982).

Appellants demonstrated threatened injury through adverse traffic impacts caused by the Superferry project. Declaration of Karen Chun. ROA; pp. 1326-1329. A large number of vehicles and passengers will be loaded and unloaded in the middle of an already congested area on a daily basis. Traffic impacts generated by the use of the road to and from the ferry will cause adverse impacts to canoe racing activities and increase adverse traffic impacts in the center of Kahului at the intersection of Kaahumanu and Puunene Avenues.

This case is not “virtually identical” to HTA. Appellants have not speculated that the project will bring an increased number of visitor arrivals to the islands, as in that case. See Answering Brief, p. 12. Instead, Appellants have taken the data presented by Appellees in the PUC application that each ferry can carry as many as 900 passengers, 290 cars or trucks or a combination of 26 trucks/buses and 65 cars (Am. Comp.; para. 66; ROA; p. 70; ROA; p. 385) and searched for information and analysis from Appellees on the impacts of loading and unloading these vehicles and passengers in State harbors and within the areas surrounding the harbors.

The problem the Court had in HTA was establishing a “nexus” between spending money on an advertising campaign and visitors traveling to any particular locations which could cause threatened harms to Plaintiffs. It was a geographic problem because the program was not “project specific” or to take place in specific geographic locations. This was the particular “causality” problem addressed in which the majority would find no nexus between the alleged threatened injuries and the expenditure of advertising funds. Unlike

HTA, this is a “project specific” case. This case has to do with the specific impacts of specific improvements to the Kahului Harbor as these improvements facilitate the Hawai’i Superferry project and the impacts that result from both.

In their zeal to attempt to make this case appear to be similar to HTA, Appellees neglect to analyze standing in two other Chapter 343 cases which parallel more closely this case. Appellees forget that the Court found that the liberal Chapter 343 standing rules still apply in “project specific” cases, such as this one. HTA at p. 252; Citizens for the Protection of the North Kohala Coastline v. County of Hawai’i, 91 Haw. 94, 100, 979 P.2d 1120, 1126 (1999).

Appellees also ignore the Hawaii Supreme Court’s most recent opinion on Chapter 343 standing in Kepoo v. Kane (“Kepoo II”), 106 Haw. 270, 103 P.3d 939 (2005). In that case, on pp. 284-285, Growney and Mauna Kea were adjudged “aggrieved parties” which entitled them to challenge an environmental determination. Appellees never raised the issue of whether Appellants were “aggrieved parties” in the Trial Court and may not raise this issue now. In any event, in Kepoo II, the Supreme Court applied the liberal tests for standing in determining that the parties were “aggrieved”.

The subject matter of Kepoo II was a proposed power plant. The interested parties lived two miles away from its proposed site. Growney surfs and swims in coastal waters immediately makai of the proposed plant and believed that the proposed plant may adversely affect his ability to enjoy these recreational activities. Growney and Mauna Kea were “concerned” that the proposed plant would cause air and water pollution which would injure their health and diminish their property values and attract heavy industry which could further aggravate these problems. The Court ruled that: “Such factors would appear to satisfy the injury-in-fact requirement”, relying upon Akau. These factors are similar to, if not less compelling than, those set out in the Complaint and Declarations of Appellants in this case. By this most recent precedent Appellants are aggrieved and have standing.

B. Appellants Are Entitled to Procedural Standing

Appellants are entitled to be accorded procedural standing because this is a “project specific” case. In HTA a three Justice majority (Chief Justice Moon and Justices Levinson and Nakayama), still sitting on the Court held, together,

that in a "project specific" case, like this one, procedural standing is appropriate in HEPA cases to permit Appellants who allege a procedural violation to challenge an action before it results in a substantive violation. See Appellants' Opening Brief. Entitlement to procedural standing and the HTA case were presented by Appellants and Appellees respectively to the Trial Court. ROA 973, 1317-1318, 1415. Appellants have standing on these grounds as well.

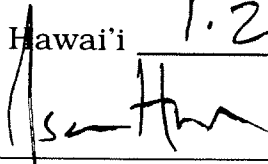
IV. CONCLUSION/RELIEF REQUESTED

When the Appellate Courts are ready to decide this case, effective and meaningful relief can still be afforded to Appellants should the Trial Court decision be reversed. Appellees have proceeded at their own risk in the face of a timely filed appeal. The first ferry is not scheduled to begin service until 2007 and the second ferry is not scheduled to begin service until 2008. ROA p. 1182.

Most importantly, Hawaii Superferry's right to operate in State waters is conditioned upon compliance with Chapter 343, according to the Certificate of Public Need issued by the Public Utilities Commission. Any entitlement to use State lands or State harbors or the harbor improvements constructed with State funds is also conditioned upon compliance with Chapter 343. In short, should the Appellate Courts rule, as requested by Appellants, that the exemption is void, that Chapter 343 requires, at a minimum, the preparation of an Environmental Assessment ("EA"), a further order can be issued that the Hawaii Superferry is enjoined from traveling in State waters as granted by the Public Utilities Commission and from using the State harbors and State harbor improvements as granted by HDOT until and unless full compliance has been achieved with Chapter 343.

DATED: Wailuku, Maui, Hawai'i

1.20.06



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