SCWC-13-0003065

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

KILAKILA 'O HALEAKALĀ, Appellant, vs. BOARD OF LAND AND NATURAL RESOURCES, the DEPARTMENT OF LAND AND NATURAL RESOURCES, and WILLIAM AILA, in his official capacity as Chairperson of the Board of Land and Natural Resources, UNIVERSITY OF HAWAI'I Appellees.	CIVIL NO. 12-1-3070-12 RAN (Agency Appeal) 1) FINAL JUDGMENT, Filed 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 HON. RHONDA A. NISHIMURA, Judge

RESPONSE OF APPELLEE UNIVERSITY OF HAWAI'I
TO APPELLANT'S APPLICATION FOR WRIT OF CERTIORARI

APPENDIX A

DAROLYN H. LENDIO 3577-0
University General Counsel
BRUCE Y. MATSUI 3721-0
Office of the General Counsel
University of Hawai‘i
2444 Dole Street
Bachman Hall 110
Honolulu, Hawai‘i 96822
Telephone: (808) 956-9545
Facsimile: (808) 956-2109
E-Mail: lendio@hawaii.edu
bymatsui@hawaii.edu

GOODSILL ANDERSON QUINN & STIFEL
A Limited Liability Law Partnership LLP
LISA WOODS MUNGER 3858-0
LISA A. BAIL 6021-0
CHRISTINE A. TERADA 10004-0
First Hawaiian Center, Suite 1600
999 Bishop Street
Honolulu, Hawai‘i 96813
Telephone: (808) 547-5600
Facsimile: (808) 547-5880
E-Mail: lmunger@goodsill.com
lbail@goodsill.com
cterada@goodsill.com

Attorneys for Appellee
UNIVERSITY OF HAWAI‘I

RESPONSE OF APPELLEE UNIVERSITY OF HAWAIʻI
TO APPELLANT'S APPLICATION FOR WRIT OF CERTIORARI

Appellee UNIVERSITY OF HAWAIʻI ("University") hereby 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 ("App."), filed by Appellant KILAKILA ʻO HALEAKALĀ ("Appellant") on December 1, 2014. Appellant seeks review of the ICA's unpublished memorandum opinion in *Kilakila ʻO Haleakalā v. Board of Land and Natural Resources, et al.*, ICA No. 13-0003065 (App. Oct. 17, 2014) ("ICA Op.").

This appeal involves a project with monumental significance to the future of astronomy in Hawaiʻi and throughout the world. Appellant takes issue with the conservation district use permit ("CDUP") granted by the Board of Land and Natural Resources ("BLNR" or "Board") in November 2012 for the construction of the Advanced Technology Solar Telescope ("ATST") at the summit of Haleakalā. The ATST is a large aperture solar telescope which will study the sun at a level greatly exceeding any other instrument on the ground or in space and which is part of a vital effort to understand solar physics, space weather and global warming.

Despite the importance of this project, this case does not raise novel legal issues. Rather, it is an agency appeal challenging a decision to grant a permit after a contested case spanning nearly two years. The BLNR carefully considered a very well developed record[1] and all required Hawaiʻi Administrative Rules ("HAR") § 13-5-30(c) criteria, when it issued its 92-page decision ("Decision"). Many decisions by State agencies concerning land use laws involve important public projects in areas with historical or cultural significance. That alone does not mean that the decision necessitates review. Here, the ICA applied the well-established tests of Hawaiʻi Revised Statutes ("HRS") Chapters 91 and 183C (conservation district law) that have been thoroughly examined in Hawaiʻi case law. Appellant simply does not like the result, and now misstates the record, contorts the ICA's conclusions and invents wholly new arguments in yet another series of attacks on this public project.

[1] The record here is voluminous, spanning more than fifty volumes of JEFS files. It contains nearly a decade of public review and comment on the ATST, culminating in the Findings of Fact, Conclusions of Law, Decision and Order filed on November 9, 2012. This document, ROA 115 at 348-444, is cited herein as "FOF," "COL," or "Decision" and is attached as Appendix A.

As detailed below, the Application should be rejected because it fails to demonstrate that (1) the ICA committed grave errors of law or fact or (2) the ICA Opinion is inconsistent with state or federal decisions. HRS § 602-59. The ICA correctly decided the issues before it.[2]

I. BACKGROUND

A. Haleakalā High Altitude Observatory Site ("HO") and the ATST Project

In 1961, by Executive Order, Governor William Quinn transferred 18.166 acres on Haleakalā, a parcel referred to as the "HO," to the University on the condition that it only be used for observatory purposes. FOF 28-29. For the past 50 years the University has used the HO for observatory research. FOF 32. The HO is located in the conservation district general subzone, which specifically permits astronomy facilities, and has housed numerous such facilities since the early 1950s. FOF 32, 37; HAR §§ 13-5-25(a) and 13-5-24(c).

The ATST is the result of a grassroots proposal to the National Science Foundation ("NSF"). FOF 56. Two decadal surveys of astronomical needs identified the necessity for a large aperture solar telescope. FOF 57. The solar science community (22 institutions including the University) developed the proposal that led to the ATST. FOF 57. It will be the world's premier ground-based facility for observing and studying the Sun. FOF 100, 106, 108. Because of the small land area available for development at the HO site, the University reserves the limited sites to facilities that can make the greatest scientific use of its excellent site attributes and to those that will play a major role in the University's programs of education and public outreach.[3] FOF 74.

B. The ATST Project Had Extensive Public Outreach and Comment

Over the past decade, the ATST project team has engaged in three review processes. First, starting in 2005, consultation was undertaken pursuant to Section 106 of the National Historic Preservation Act ("NHPA") with state and federal agencies and native Hawaiian organizations. FOF 111 – 139. Over 30 consultation meetings were held and more than 141 persons and entities were consulted, including Appellant. FOF 124, 126-27. Written proposals

---

[2] A full statement of the facts, standards of review, and argument is set forth in the University's Answering Brief ("AB"). This brief cites to the record on appeal as ROA __ at ___, the first space indicating the JEFS document number, the second indicating the page within that PDF.

[3] The University's ATST project is a public use, as education and scientific study are integral parts of its educational mission; it is not a private or commercial use of conservation district resources. FOF 2, 28-29, 44-45, 74.

for mitigation were submitted from 2006 to 2009 and a Programmatic Agreement was signed in November 2009. FOF 129-30, 132, 134.

Next, the environmental review process resulting in the Final Environmental Impact Statement ("FEIS") released in July 2009 included multiple public scoping and community meetings in which Appellant participated. Appellant also commented on the draft documents. *See* ROA 45 at 137; ROA 91 at 197, 346.

Finally, with respect to the permit application, the Department of Land and Natural Resources ("DLNR") held a public meeting in August 2010 that was attended by 150 members of the public, including Appellant. FOF 6; ROA 99 at 279; ROA 71 at 46. The BLNR heard comments from the public, including Appellant, at its November 22, 2010 and December 1, 2010 public meetings. FOF 7; ROA 73 at 181. A contested case followed, which was a *de novo* review of the University's application for a CDUP, at which the University had the burden of proof. FOF 10-20; COL 1-5; ROA 71 at 370. The Hearing Officer conducted site visits, a standing hearing and a four-day contested case hearing. FOF 16-20. Appellant's declarations, testimony and exhibits were received into evidence. ROA 111 at 11. Following proposed findings and conclusions, the parties argued to the Board. The Board then issued its Decision.

C. The ATST Mitigation Measures

Mitigation measures are discussed in 26 pages of the Board's Decision (FOF 227-341), and were made permit conditions by the Board (Decision at 90-91). Appellant did not challenge a single finding of fact concerning the mitigation measures. FOF 227-341.

The ATST project has been advised by an experienced cultural specialist who is a native Hawaiian, a kupuna (elder) and a kahu (clergyman, caretaker) with personal knowledge of the spiritual and cultural significance and protocol of Haleakalā. FOF 247. He conducts "Sense of Place" training for all workers, monitors construction activities, has the authority to order that work be stopped, and mitigates the effects of the construction and operation of the ATST by providing oversight of all construction and the exclusive use of the set-aside areas by native Hawaiians to practice cultural and spiritual ceremonies. FOF 255-257. The Programmatic Agreement established the Native Hawaiian Working Group ("NHWG"), a valuable source of continuing input from the native Hawaiian community on the construction and operation of the ATST. FOF 231-239. As a condition to the CDUP, the BLNR required annual reporting regarding development of additional mitigation by the NHWG. Decision at 90.

NSF is providing $20 million ($2 million per fiscal year) to the University's Maui College to support an educational initiative to foster a better understanding of the intersection and relationship between traditional native Hawaiian culture and science. ROA 109 at 20. The desire is to see a significant portion of the ATST staff be native Hawaiian. *Id*. Up to 2% of total ATST usage time is reserved for qualified native Hawaiian scientists. FOF 267-69.

The general public is not allowed in the HO, but native Hawaiians are welcome to use two ahus (altars or shrines) constructed by the University in 2005 and 2006 for religious and cultural purposes. FOF 158-161, 230, 294-296; ROA 73 at 174-75. The BLNR found the only traditional and customary practice at the HO site shown by Appellant was the use of the two ahu, and Appellant does not dispute this finding. FOF 166. The BLNR required the University to maintain access to the ahu during and after construction and also required a new ahu to be constructed if requested by Appellant. Decision at 91-92; FOF 293.

Other mitigation measures adopted by the BLNR, not challenged by Appellant, include: acknowledgement of the significance of Haleakalā in all scientific publications and scholarly work derived from the ATST, determining the feasibility of a shelter at the HO site for native Hawaiian cultural practitioners, training for all construction and telescope personnel about the cultural importance and sensitivity of Haleakalā, regular reassessment of new types of exterior coatings to make the ATST structures less noticeable, removal of unused facilities at the HO site, pursuit of renaming of the road within the HO site, representing Hawaiian culture in the ATST exterior design artwork, and shortening the construction schedule by one year to reduce the impacts from construction noise, traffic and other disturbances. FOF 258-66, 275-86, 291. The Board also adopted mitigation measures for visual resources, noise, and biological resources, and required that the ATST be decommissioned and deconstructed at the end of its productive lifetime. FOF 297-341, 270-74; ROA 51 at 11; ROA 73 at 50-51. The mitigation measures were considered by the Board in reaching its Decision. COL 22, 27.

II. ARGUMENT

A. The ICA Correctly Held that the BLNR May Consider Economic Factors

The ICA never held, as Appellant alleges, that the BLNR may rely upon any "unwritten criteria" of its choosing when deciding whether to grant a CDUP. App. at 7. Rather, the ICA recognized that the BLNR properly considered certain economic factors, such as economic benefits, job creation and benefits to the community.

In fact, consideration of economic benefits is mandatory under the conservation district rules. HAR §§ 13-5-30(c)(8) and 13-5-1 both allow the use of the conservation district for the "public health, safety and welfare[,]" of which economic benefits are a part. HAR § 13-5-30(c)(3) requires land uses to comply with the provisions of HRS Chapter 205A, Coastal Zone Management. HRS § 205A-2(b)(5)(a) identifies "economic uses" as an objective, and explicitly seeks to "[p]rovide public or private facilities and improvements important to the State's economy in suitable locations." Further, the ATST was subject to environmental review under HRS Chapter 343. HRS § 343-2 provides that an EIS must disclose the "effects of a proposed action on the economic welfare" of the community and State.[4]

Appellant forgets that there was more before the BLNR than the HAR § 13-5-30(c) criteria. Appellant asked the BLNR to consider the factors enumerated in *Ka Paʻakai O Kaʻaina v. Land Use Comm'n*, 94 Hawai'i 31, 7 P.3d 1068 (2000), the public trust doctrine and constitutional issues. *See* ROA 69 at 6-9. The BLNR had an independent obligation to perform a *Ka Paʻakai* analysis, which it did. COL 18, 29. Appellant also asked the BLNR to consider the public trust doctrine, which itself requires consideration of economic benefits. *In re Water Use Permit Applications ("Waiāhole"),* 94 Hawai'i 97, 138, 9 P.3d 409, 450 (2000) ("'economic development' may produce important public benefits"). Where multiple public uses can co-exist – as they do here – they must be allowed because the public trust assigns no priorities or presumptions in the balancing of public trust purposes. *Id.* at 142 n.43, 9 P.3d at 454 n.43. Article X, section 5 of the Constitution created the University and provided that the University's real and personal property "shall be held in public trust for its purposes…." The HO was conveyed to the University on the condition it only be used for observatory purposes. FOF 28-29. Having presented these issues to the BLNR, Appellant abandoned these points on appeal to the Circuit Court and the ICA. Answering Brief ("AB") at 3 n.2, 24.

The BLNR recognized the multiple important public benefits of the ATST project. *See* FOF 342-57. Appellant did not challenge COL 30 or 31, regarding the public benefits of the

[4] The BLNR ultimately concluded that when considering the "minimization and mitigation" measures and permit conditions, the ATST project will not cause substantial adverse impacts to existing natural resources. *See* COL 28.d. This illustrates that the economic benefits of the ATST project, although considered as part of the larger picture, were not considered to minimize or mitigate impacts to natural resources under HAR § 13-5-30(c)(4).

ATST. The ICA did not err in holding that the BLNR can and must consider economic factors when considering a CDUA.

Appellant cites to inapposite cases which it claims support the argument that the BLNR cannot consider factors other than those explicitly set forth in its rules. As one example, *Aluli v. Lewin*, 73 Haw. 56, 828 P.2d 802 (1992) found it was rulemaking to regulate H_2S emissions when there were no rules governing the emission of H_2S into the air. *Id.* at 59, 828 P.2d at 804. There is no such concern here, as clearly the BLNR has rules in place (HAR § 13-5-30(c)). It cannot be said that the BLNR engaged in improper "rulemaking" by considering economic factors when its rules obligate it do so, and when Appellant in fact asked it to do so.[5]

B. The ICA Correctly Concluded that the Project is Consistent With the Purposes of the Conservation District and General Subzone

The ICA did not hold, as Appellant alleges, that "the ATST project is *per se* consistent" with the purposes of the conservation district. App. at 8. The ICA recognized 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 a facility may have, as long as the construction and operation of the facility otherwise complies with HAR Chapter 13, Section 5." ICA Op. at 13 (emphases added). The ATST satisfies subsections (c)(1) and (2). To hold otherwise would rewrite the plain language of the rule.

The ICA properly refused to reject the express language of HAR § 13-5-25. *Curtis v. Bd. of Appeals*, 90 Hawai'i 384, 978 P.2d 822 (1999) does not permit the court to invalidate rules. Appellant's position that astronomy is an "urban" use, not suited to the conservation district, is part of its attack on all telescopes at the summit.[6] The presence of astronomy facilities in the HO pre-dates the establishment of conservation districts in 1961 and has been consistent with the purposes of such districts since that time.[7] "The use of an already developed area promotes protection, preservation and long-term sustainability of the surrounding areas within the

---

[5] *Aguiar v. Hawai'i Housing Authority*, 55 Haw. 478, 522 P.2d 1255 (1974) involved a challenge to the Housing Authority's adoption of a system for charging rent for public housing without rulemaking. *Id.* at 482-89, 522 P.2d at 1259-63. There are no comparable circumstances here.

[6] Appellant is well aware that astronomy facilities cannot be located in urban settings given their scientific objectives.

[7] Appellant again tries to compare the proposed construction of an amusement park in an agricultural district described in *Neighborhood Bd. No. 24 v. Land Use Comm'n*, 64 Haw. 265, 639 P.2d 1097 (1982) with the ATST. App. at 8. The ATST is not in an agricultural district, but rather in the conservation district where astronomy has long been permitted.

conservation district." COL 28.a. Finally, the BLNR did not simply grant the CDUP because the ATST is an astronomy facility; it properly examined the voluminous record and considered whether each of the criteria in § 13-5-30(c) was met.

C. The ICA Did Not "Rubberstamp" the BLNR's Findings Regarding Impacts

Appellant argues that because this project involves consideration of native Hawaiian rights and public trust natural resources, that the courts should disregard Chapter 91 and instead engage in a more "searching judicial inquiry." App. at 9. Appellant forgets that it did not appeal the BLNR's findings and conclusions or the Decision with respect to native Hawaiian rights or public trust resources to either the circuit court or the ICA. This case is limited to the grounds actually appealed under Chapter 91.

Appeals of agency decisions are governed by the standards of review set forth in HRS § 91-14(g). For the few challenged findings of fact, the question is whether they were clearly erroneous. (Appellant objected only to FOFs 167, 169, 176 and 192. Appellant's Opening Brief ("OB") at 7 n.8.) As the challenged conclusions of law presented mixed questions of law and fact, the question again is whether they were clearly erroneous. Appellant asks the court to disregard these standards and to substitute its judgment for that of the agency. The ICA properly declined to consider the weight of the evidence and instead determined whether the agency articulated its factual findings with reasonable clarity. ICA Op. at 20-21. Deference is especially appropriate when it relates to "the findings of an expert agency dealing with a specialized field." *In re Hawaiian Elec. Co.*, 81 Hawai'i 459, 465, 918 P.2d 561, 567 (1996).

Appellant cites to *Diamond v. Dobbin*, 132 Hawai'i 9, 319 P.3d 1017 (2014) for the proposition that BLNR's decision "appears to be a post hoc justification of its earlier decision." App. at 9. In *Diamond*, the agency did not follow the court's instruction on remand to consider historical evidence. *Id*. at 29-30, 319 P.3d at 1037-38. Here, BLNR considered all the evidence presented as demonstrated in the Decision. Appellant cites to *In re Kauai Elec. Div. of Citizen Utilities Co.*, 60 Haw. 166, 590 P.2d 524 (1978) for the proposition that the BLNR and ICA failed to point to any evidence that the impacts to cultural resources would not be substantial. App. at 2, 10. However, there the court noted that "[i]t is not necessary for the [agency] to recite the evidence[.]" 60 Haw. at 184, 590 P.2d at 537 (citations omitted).

Finally, the purpose of the Act establishing the environmental court "is to promote and protect Hawaii's natural environment through consistent and uniform application of

environmental laws," not to authorize the courts to supplant their judgment for that of the agency as suggested by Appellant. 2014 Haw. Sess. Laws Act 218, § 1 at 1. Notably no argument is made as to Appellant's Question Presented #4; there is no reason to abandon Chapter 91 here.

1. Cultural Impacts Are Not Substantial

Appellant attacks the ATST project for taking to heart the dual admonitions that an EIS "shall not be merely a self-serving recitation of benefits" and that it "shall include responsible opposing views." App. at 10; HAR §§ 11-200-14, -16; *see also* 40 C.F.R. § 1502.9(b). The FEIS not only identifies opposing views, it respects and acknowledges them. Such disclosures are not "admissions." *See* HAR § 11-200-2 (defining "acceptance"). The far-reaching, chilling effect of punishing a project for disclosing and respecting opposing views in the EIS process – deeming them admissions that condemn the project – cannot be overstated.[8]

Appellant argues next that there is no evidence that the impacts to cultural resources would not be substantial. App. at 10. However, as the ICA correctly pointed out, this argument "conflates the FEIS conclusion of a major impact on cultural resources with a substantial impact." ICA Op. at 20. The FEIS defines the impact intensities for "cultural resources." A "major" impact in the context of cultural resources is defined as follows:

> Adverse impact — disturbance of a site(s) results in loss of integrity and impact(s) would alter resource conditions. There would be a block to, or great affect on, traditional access, site preservation, or the relationship between the resource and the affiliated group's body of practices and beliefs, to the extent that the survival of a group's practices and/or beliefs would be jeopardized. This is analogous to a determination of *adverse effect* under Section 106 of the [National Historic Preservation Act], and measures to minimize or mitigate adverse effects cannot be agreed upon that would reduce the intensity of impacts under NEPA CEQ 1508.20 from major to moderate.

ROA 27 at 37 (first emphasis in original, second emphasis added). This definition does not equate "major adverse impacts" to "cultural resources" with the HAR § 13-5-30(c)(4) criterion concerning "substantial adverse impacts" to "cultural sites." Appellant took the position that there can be no mitigation for cultural impacts. ROA 109 at 46. As mitigation measures could not be agreed upon, the intensity of impacts remained major. ROA 27 at 37.

[8] Appellant cannot rely on *Lee v. Puamana Cmty. Ass'n*, 109 Hawai'i 561, 128 P.3d 874 (2006) as it applies to judicial admissions in a judicial pleading, not to "quasi-judicial proceedings." Appellant fails to point to any alleged admissions in any proceeding in any event. App. at 10.

The ICA declined to follow Appellant's suggestion that it ignore the FEIS definitions. The Board considered the full record, including the Section 106 process, the Programmatic Agreement and all mitigation measures. COL 28.d (the ATST "when considered together with all minimization and mitigation commitments discussed above and with the additional conditions contained in this Decision, will not cause substantial adverse impact to existing natural resources") is plainly a mixed question of law and fact. The BLNR found that cultural impacts due to the ATST would be "incremental and would exist even without construction of the Solar Telescope[.]" ICA Op. at 15. That is, even if the ATST is not built, the FEIS concluded that there would still be major, adverse, long-term, direct effects to traditional cultural resources. COL 28.d is not clearly erroneous, as the findings of fact that support it are not challenged and deference must be given to the agency's expertise and experience in interpreting its rules. *Mahaʻulepu v. Land Use Comm'n*, 71 Haw. 332, 339, 790 P.2d 906, 910 (1990).

Nor was the ICA's analysis of *Makua v. Rumsfeld*, 163 F. Supp. 2d 1202 (D. Haw. 2001) "cavalier." App. at 10. The ICA found *Rumsfeld* to be apposite "because it reviewed an agency's determination that an EIS was not required, a determination which was based 'almost entirely' on mitigation measures whose effectiveness was not analyzed." ICA Op. at 23.

As a matter of law, mitigation measures must be considered in evaluating the HAR § 13-5-30(c) criteria. HAR § 13-5-42(a)(9) requires that "[a]ll representations relative to mitigation set forth in the accepted environmental assessment or impact statement for the proposed use are incorporated as conditions of the permit[.]" HAR § 13-5-42(a)(17) further mandates appropriate mitigation measures be implemented during construction. This Court's decision in *Morimoto v. Bd. of Land & Natural Res.*, 107 Hawai'i 296, 113 P.3d 172 (2005), affirmed the BLNR's practice of considering mitigation in determining the impacts of an action. COL 27 so noted, citing *Morimoto*, 107 Hawai'i at 303-304, 113 P.3d at 179-80.

Morimoto refutes Appellant's proposition there must be "supporting analytical data" for mitigation measures. App. at 10. Morimoto challenged a mitigation requirement to translocate the Palila bird as there was no guarantee of success. The court rejected this contention, noting that there was more to the mitigation plan, so "even though translocation of the Palila may not succeed, there is substantial evidence that the Palila will benefit in other ways, supporting BLNR's finding that the project will not harm the species." 107 Hawai'i at 308, 113 P.3d at 184.

There was more than a "mere listing" of cultural mitigation measures. The Decision describes the process that led to the Programmatic Agreement and the signatories who agreed to them.[9] The Board found that the "[m]itigation 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." FOF 227. There was no challenge to this finding or to the findings describing the cultural mitigation measures. See section I.C, *supra*.

2. Impacts to Other Natural Resources

Appellant argues that it was arbitrary and capricious for the BLNR to reject portions of the FEIS. App. at 10-11. The ICA correctly found this argument "unavailing." ICA Op. at 19. Appellant has admitted the FEIS is not binding here. OB 13 n.9. *Mauna Kea Power Co. v. Bd. of Land & Natural Res.* confirms that "the EIS is merely an informational document whose acceptance neither implies nor presumes approval of the conservation district use application." 76 Hawai'i 259, 265, 874 P.2d 1084, 1090 (1994) (citing HAR § 11-200-2; HRS § 343-2). Similarly, "the Board is not bound by the conclusions of a conservation district use application (otherwise, applicants could essentially dictate Board action)." ICA Op. at 21. The ICA concluded that, the Board's conclusion that the ATST would not cause a substantial adverse impact "was consistent with *Waiāhole*." ICA Op. at 21. In sum, nothing in Chapter 343 makes the FEIS's assessments dispositive of the HAR criteria,[10] divests the Board of its decision-making authority or requires the Board to explain what it thought of each page of each document in evidence.

D. The ICA Did Not Err in Interpreting and Applying HAR § 13-5-30(c)(5)

HAR § 13-5-30(c)(5) requires the proposed land use to be "compatible with the locality and surrounding areas, appropriate to the physical conditions and capabilities of the specific parcel or parcels." Appellant suggests that the ICA somehow overstepped its bounds by noting that the BLNR may have interpreted this phrase as referencing the HO site. App. at 11; ICA Op. at 29. Appellant's argument misses the mark. As recognized by the ICA, the BLNR's conclusion with respect to §13-5-30(c)(5) notes that the HO site was set aside for observatory

[9] The Programmatic Agreement was signed by the Advisory Council on Historic Preservation, the Hawai'i State Historic Preservation Division, the National Park Service, the native Hawaiian organization, Na Ku'auhau 'o Kahiwakaneikopolei, and a native Hawaiian individual, Verna K. Nahulu, the NSF, AURA and the University. FOF 132, 134; AB at 5.

[10] To equate HRS § 343-2's "significant effect" with HAR § 13-5-30(c)(4)'s "substantial adverse impact" would lead to the absurd result that a CDUP cannot be issued if an FEIS is prepared.

purposes and that other astronomical and observatory facilities have existed at the site since 1951. COL 28.e. However, the ICA further recognized that the BLNR's analysis under § 13-5-30(c)(4) concluded that the ATST would not cause substantial adverse impact to the existing natural resources "within the surrounding area, community, or region," which is broader than the phrase, "locality and surrounding areas."[11] ICA Op. at 30 n.21. The ICA was not judging the BLNR's decision based upon factors not "invoked" or considered by the BLNR. App. at 11.

Nevertheless, Appellant cannot show that BLNR's determination as to § 13-5-30(c)(5) was clearly erroneous. The ATST is in close proximity to other previously developed facilities for astronomy within the HO. FOF 30-34, 38. Appellant argues that there is no evidence that the ATST project is compatible with Haleakalā National Park. App. at 11. However, from close views within the Park, the ATST would be visible "to the point of co-dominance with other nearby structures" and "would not substantially alter the existing visual character visible in any view." FOF 176. Further away in the Park, it would be barely detectible, if visible at all. FOF 177. The record therefore supports the BLNR's conclusion as to § 13-5-30(c)(5).[12]

E. The ICA Did Not Err in Interpreting and Applying HAR § 13-5-30(c)(6)

Appellant's claim that § 13-5-30(c)(6) was not met, App. at 11, ignores the plain language of this criterion, which states: "existing physical and environmental aspects of the land, <u>such as</u> natural beauty and open space characteristics, will be preserved or improved upon, whichever is applicable." (Emphasis added.) The ICA properly recognized that the BLNR could look at existing "physical and environmental aspects." ICA Op. at 30. The ATST sits within the boundaries of the HO among other astronomical and observatory facilities. At the ATST site, no substantial change to the natural topography will occur, and no substantial change to the existing physical and environmental aspects of the land will be made. The BLNR properly concluded that the ATST "will be consistent with and will preserve the existing physical and environmental aspects of the land." COL 28.f (as supported by unchallenged FOF 28-38, 211-12 and 337).

---

[11] Appellant cites to FOF 16, App. at 11, but this finding merely described the hearing officer's site visit and did not define the term "surrounding areas" found in HAR § 13-5-30(c)(5).

[12] Appellant asserts that the ATST would adversely impact the Park. If such were the case, the NPS would have made a finding of impairment of park resources under its Organic Act, 16 U.S.C. § 1, but it did not. Instead the NPS agreed to the cultural mitigation measures and signed the Programmatic Agreement. AB at 30 n.31; ROA 97 at 420.

F. The ICA Properly Concluded There is No Proposed Subdivision of Land

Appellant has no authority for the novel claim that leasing land is a subdivision. App. at 11. *In re Taxes of B.P. Bishop Estate*, 27 Haw. 190 (Haw. Terr. 1923) nowhere provides that a lease constitutes a "subdivision" of land as in fact the subdivisions preceded the leases. *Id*. at 197-99. *Brennan v. Stewarts' Pharmacies, Ltd.*, 59 Haw. 207, 579 P.2d 673 (1978) only mentioned "subdivision" as a background fact. *Id.* at 212, 579 P.2d at 676.

G. The ATST is Consistent With a Valid Management Plan

The validity of the Management Plan is not a point of appeal here.[13] As recognized by the ICA, the intent of the Management Plan is to "protect vital environmental resources." ICA Op. at 35. The FAA site contains no vital environmental resources and has been previously graded and compacted. ROA 109 at 74. Thus, the ICA properly concluded that Appellant "does not contend the purported deviation from the Management Plan impacts vital environmental resources nor does the record reflect such." ICA Op. at 35.

H. The ICA Properly Concluded There were no Procedural Irregularities

Finally, Appellant makes the cursory argument that the ICA "turned a blind eye to the BLNR's procedural errors." App. at 12. The ICA did nothing of the sort, and instead reviewed each of Appellant's arguments and explained why they fell short. ICA Op. at 37-39. Each is addressed in our Answering Brief.[14] AB at 35-39. Even if there had been a "procedural irregularity," Appellant failed to demonstrate that its substantial rights were prejudiced. HRS § 91-14(g)(3); *Korean Buddhist Dae Won Sa Temple v. Sullivan*, 87 Hawai'i 217, 241, 953 P.2d 1315, 1339 (1998).

III. CONCLUSION

The ICA's unpublished memorandum opinion demonstrates a thorough review of a voluminous record and careful consideration of the points of error raised in this agency appeal. The ICA did not commit any grave errors of law or fact, nor is its opinion inconsistent with state or federal decisions. The University asks that the application for writ of certiorari be denied.

---

[13] Appellant's attack on the Management Plan is found in *Kilakila 'O Haleakalā v. University of Hawaii, et al*., SCWC-13-0000182.

[14] For example, the BLNR did not authorize construction of the ATST before the contested case concluded. App. at 12. The only "construction" the BLNR permitted was the implementation of a mitigation measure that Appellant had requested. ROA 23 at 267. The University refrained from any construction until the Decision was issued. ROA 113 at 219-20.

DATED: Honolulu, Hawai‘i, December 10, 2014.

/s/ Lisa Woods Munger
DAROLYN H. LENDIO
BRUCE Y. MATSUI
LISA WOODS MUNGER
LISA A. BAIL
CHRISTINE A. TERADA

Attorneys for Appellee
UNIVERSITY OF HAWAI‘I