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SCWC-13-0003065

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

**PETITIONER/APPELLANT-APPELLANT'S REPLY TO THE RESPONSE OF  
APPELLEE UNIVERSITY OF HAWAII TO APPLICANT'S APPLICATION FOR  
WRIT OF CERTIORARI**

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The response of the University of Hawai‘i (UH) to the application for writ of certiorari of Petitioner/Appellant-Appellant Kilakila 'O Haleakalā (“**Appellant**”) fails to justify the errors made by the Intermediate Court of Appeals (ICA).

I. The ICA Improperly Approved the Use of Unwritten Criteria in Decisionmaking.

This Court recently observed,

"[p]arties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies." *Lanai Co.*, 105 Hawai‘i at 314, 97 P.3d at 390.

*DW Aina Le'a Dev., LLC v. Bridge Aina Le'a, LLC*, 2014 Haw. LEXIS 340 (Nov. 25, 2014).

Although applied in a different context, this Court’s recent recitation is consistent with the cases Appellant cited. These cases prohibit agencies from using unwritten criteria in decisionmaking.

Rather than defend the ICA’s holding that the Board of Land and Natural Resources (BLNR) decisionmaking authority was not constrained by its own rules and could rely on unwritten criteria, UH changes the subject. It argues that the unwritten criteria are written elsewhere. UH’s response is flawed.

First, the BLNR’s consideration of economic factors took place within the context of applying HAR § 13-5-30(c)(4), which excludes economic factors. JEFS #115 RA:433-34.

Second, HAR § 13-5-30(c)(8) does **not** call for consideration of economic benefits. It states that a land use cannot be approved if it is “materially **detrimental** to the public health, safety and welfare.” The impacts must be “material” – i.e., relevant – and the only impacts that are to be considered are those that are detrimental. The rule does **not** read, “The proposed land use is in the public interest,” as is found in the Water Code. HRS § 174C-49(a)(4).

Third, HAR § 13-5-1 does not call for consideration of economic benefits. It calls for “conserving protecting and preserving the important natural resources of the State” – not ruining them. Nothing in HAR § 13-5-1 calls for sacrificing resources to obtain economic benefits.

Fourth, legislative history demonstrates that consideration of economic benefits is inconsistent with the legislative intent of the conservation district. Over the years, the State legislature has fine-tuned the conservation district law to highlight its importance in protecting

natural resources. Five decades ago, the legislature directed the department of land and natural resources to “allow **and encourage the highest economic use**” of conservation district land with some caveats. HRS § 183-41(1) (1968). In 1992, the legislature amended HRS § 183-41 to eliminate this requirement. Act 59 Haw., 1992 Sess. Laws of Haw. at 92; SCRep. 1058-92, 1992 House J at 1301. The new language required the department to “allow the economic use” of conservation district land. *Id.* Then, in 1994, when the conservation statute was recodified as HRS 183C, the principle of encouraging highest economic use in the conservation district was completely removed from the law. Act 270, 1994 Sess. Laws of Haw. at 834-7; HRS Chapter 183C. The legislature specifically added new language highlighting the purpose of the conservation district “to conserve, protect, and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.” HRS § 183C-1. A few years later, it repealed the former version of the conservation district rules which authorized government uses of conservation district land “where the public benefit outweighs the impact on the conservation district.” Act 283, 2000 Sess. Laws of Haw. repealing HAR Title 13 chapter 2, including HAR § 13-2-11(c)(8) (1991).

Fifth, HAR § 13-5-30(c)(3) does not call for weighing of economic benefits. All that it requires is that this project complies with the provisions of HRS chapter 205A. One such provision is that the project “protect . . . historic and prehistoric resources in the coastal zone management area that are significant in Hawaiian and American history and culture.” HRS § 205A-2(b)(2)(A). In fact, the summit area, including the site where the ATST is being built, is listed on the National Register of Historic Places. JEFS #203 SR:210-11; JEFS #205 SR:1271. HRS § 205A-2(b)(5)(A) must be read *in pari materia* with the other objectives. A **suitable** location for facilities is obviously one that does not damage a significant cultural site. If the site is not a suitable one, it does not matter how important the facility is to the State’s economy.

Sixth, UH cites to no legal authority that allows BLNR to consider whether limited alternatives outweigh the impacts. JEFS #115 RA:431.

Finally, nothing in the State constitution requires that agencies consider the economic implications of their decisions. UH’s bizarre interpretation of the public trust doctrine eviscerates the trust’s basic purpose.

The BLNR improperly considered factors that are not found in its rules, or any other

legal authority. The ICA erred in allowing the BLNR to do so.

II. The ICA Failed to Read BLNR's Rules *In Pari Materia*.

Ignoring the thrust of Appellant's argument, UH insists that so long as astronomy facilities are identified as a use allowed in the conservation district, any astronomy facility is consistent with the purposes of the conservation district. In so arguing, UH – like the ICA – assumes that HAR § 13-5-25 renders HAR §§ 13-5-1, 13-5-14, 13-5-30(c)(1) and (c)(2) obsolete. It does not and cannot. The rules need to be read in context and be applied to the specific proposal to use conservation district land. The ICA failed to properly consider whether this specific project (given its unprecedented height, mass, and scale; industrial appearance; use of hazardous materials, location in “Science City”, location in an area that is already 40% developed, and substantial impacts) is consistent with the purposes of the state land use law and the conservation district. And the ICA failed to consider the relevant case law.

III. The ICA Erred in Rubberstamping the BLNR's Findings Regarding Impacts.

The ICA failed to take a hard look at the record when it affirmed the BLNR's conclusion that the impacts would not be substantial.<sup>1</sup> In its response, UH completely ignores the admissions it made in its conservation district use application that its project would have substantial impacts. The ICA's and the BLNR's disregard of these admissions was improper. Furthermore, UH fails to point to any evidence in the record that shows that cultural impacts would not be substantial, or that the mitigation measures would actually reduce the intensity of the impact. A finding cannot stand if there is no evidence to support it. *In re Kauai Elec. Div.*, 60 Haw. 166, 184, 590 P.2d 524, 537 (1978). Finally, the ICA failed to properly apply this Court's holding that when the record “demonstrates considerable conflict or uncertainty in the evidence, the agency must articulate its factual analysis with reasonable clarity, giving some reason for discounting the evidence rejected.” *In re Water Use Permit Applications*, 94 Hawai'i 97, 163-4, 9 P.3d 409, 475-6 (2000). It is arbitrary and capricious for the BLNR to rely on the FEIS to reach certain conclusions, but reject other portions the FEIS without explanation.

IV. The ICA Erred in Interpreting and Applying the BLNR's Rules.

The ICA's interpretation and application of the BLNR's rules is inconsistent with the

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<sup>1</sup> UH does not dispute that this Court has engaged in a closer look at agency decisions that involve public trust natural resources. Those resources comprise our environment. *See* Hawai'i State Constitution Article XI §§ 1 and 9.

BLNR's interpretation and the evidence in the record. There is no evidence that the project is compatible with Haleakalā National Park or the summit's cultural resources. Natural beauty and open space will be marred – not preserved or improved upon.

V. The ICA Erred in Assuming the Lease of a Portion of Land Does Not Subdivide It.

UH fails to understand that it is not the leasing of a lot that subdivides it; it is the leasing of a portion of the parcel that subdivides it. Case law recognizes this.

VI. The ICA Erred in Relying on HRS § 171-6(20)

UH fails to defend the ICA's incorrect reliance on HRS § 171-6(20) on page 37 of the opinion. HRS chapter 183C is **not** a part of HRS chapter 171.

VII. Conclusion

The resources of the conservation district are too important to allow the BLNR to act with unfettered discretion – particularly in the face of overwhelming political pressure. The courts must ensure that BLNR acts pursuant to its own written rules; consistently with the purposes of the land use law and the conservation district law; and based on the substantial evidence. Appellant respectfully requests that this Court accept its application for a writ of certiorari.

Dated: Honolulu, Hawai'i, December 17, 2014.

/s /DAVID KIMO FRANKEL

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