**No. SCWC-29440**

IN THE SUPREME COURT OF THE STATE OF HAWAII

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| KAUAI SPRINGS, INC., | ) | ON APPLICATION FOR A WRIT OF |
| | ) | CERTIORARI TO THE |
| Petitioner/Appellee-Appellant, | ) | INTERMEDIATE COURT OF APPEALS |
| | ) | |
| vs. | ) | ICA Opinion: Apr. 30, 2013 |
| | ) | ICA Judgment: May 30, 2013 |
| PLANNING COMMISSION OF THE | ) | |
| COUNTY OF KAUAI, | ) | Circuit Court: |
| | ) | Civil No. 07-1-0042 |
| Respondent/Appellant-Appellee. | ) | Circuit Court of the Fifth Circuit |
| | ) | Hon. Kathleen N.A. Watanabe |
| | ) | Judgment: September 23, 2008 |

**APPLICATION FOR A WRIT OF CERTIORARI**

**APPENDICES 1 - 5**

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**APPLICATION FOR A WRIT OF CERTIORARI**

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**CASES**



**STATUTES, ORDINANCES AND RULES**

## TABLE OF AUTHORITIES — CONTINUED

**Page**



**OTHER AUTHORITIES**

## INDEX TO APPENDICES

## APPLICATION FOR A WRIT OF CERTIORARI

Petitioner/Appellee-Appellant Kauai Springs, Inc. (Kauai Springs) respectfully seeks a writ of certiorari to correct two grave errors in the opinion of the Intermediate Court of Appeals (ICA) (App. 1).

Kauai Springs sought three zoning permits from the Kauai Planning Commission (KPC). The Use and Class IV permits were automatically approved when KPC's statutorily-required denial deadlines lapsed. The Special permit application was pending when KPC realized its 210-day automatic approval deadline would expire in a few days, so it cobbled together a denial that both the circuit court and ICA concluded was unreasonable, arbitrary, and capricious. The circuit court found that KPC was entitled to all three permits.

The ICA, however, held that by adopting the "shall be deemed approved" statute, Haw. Rev. Stat. § 91-13.5 (App. 2), the legislature was more concerned with agencies' flexibility than requiring they adhere to deadlines for permit decisions. It held Kauai Springs had *impliedly* forfeited its right to the Use and Class IV permits that had already been approved, merely by cooperating as KPC processed the Special permit. It remanded, allowing KPC to revisit the Use and Class IV permits indefinitely. The ICA transformed a strict "deemed approved" limitation on agency power into a process in which deadlines are not clearly established and may be ignored by the very agencies whose authority the legislature intended to limit. It should have concluded the Use and Class IV permits were automatically approved.

The ICA also remanded because even though KPC "took seriously its public trust duty" under *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 228, 140 P.3d 985, 1008 (2006), App. 1 at 44, it should done even more. App. 1 at 48. In other words, KPC prevailed based on its *own* claimed errors. Remand is futile, however, because KPC cannot lawfully convene a hearing to consider the Special permit. Only eight days remain before the 210-day automatic approval deadline expires, and KPC's rules require a minimum of 20 days' notice for hearings. Moreover, KPC already had every opportunity to make *Kelly* assessments during its extensive months-long public process to consider the permits. And it made those assessments. It subjected Kauai Springs to multiple hearings and an investigation of the water source and its building. *See* App. 3 (photo of Kauai Springs). It obtained input from numerous County and State agencies, all of which disclaimed interest.

This application should be granted to definitively resolve the issue of whether the time

limits in section 91-13.5 are mandatory and cannot be waived, *see Town v. Land Use Comm'n*, 55 Haw. 538, 524 P.2d 84 (1974); *Perry v. Planning Comm'n*, 62 Haw. 666, 619 P.2d 95 (1980), and whether an agency can prevail by relying on its own supposed omissions. But much more is at stake here than theoretical legal questions, because the ICA's grave errors also perpetuate a grave injustice only this Court can correct. Kauai Springs is a modest family-owned-and-operated business run by Jim and Denise Satterfield which has suffered during KPC's protracted process and the years it took the ICA to resolve this appeal. They have been devastated by the delays and the unrelenting uncertainty.

## QUESTIONS PRESENTED

**1. Deemed approved or deemed waived?** Did the ICA gravely err by concluding that Kauai Springs impliedly assented to forego its rights to two permits already issued in accordance with the "shall be deemed approved" statute (Haw. Rev. Stat. § 91-13.5) and KPC's own ordinances and rules, simply because Kauai Springs cooperated with KPC as it processed a third permit? Did it gravely err by extending the deadlines for the Use and Class IV permits indefinitely? Is remanding to KPC futile when it has eight days to consider the Special permit application and its own rules require 20 days' notice?

**2. KPC's own process.**[1] When an agency controls the process and has the opportunity to make every inquiry of an applicant that it desires, can it deny permits for reasons every court concluded were unreasonable, arbitrary and capricious, and if challenged, claim that its own process was lacking?

## PRIOR PROCEEDINGS

KPC accepted Kauai Springs' applications for three zoning permits on July 5, 2006, triggering the County's deadlines under which the permits were deemed granted if KPC did not properly deny them.[2] The Use permit was deemed approved on October 18, 2006; the Class IV permit on November 2, 2006. On January 25, 2007, shortly before the deadline for the Special permit was to expire, KPC entered its Findings of Fact, Conclusions of Law, Decision and Order (KPC Order) denying it. App. 4.

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[1] This Court need not address the second Question Presented if it concludes Kauai Springs did not assent to Use and Class IV extensions and it is futile to remand the Special permit.

[2] Use Permits (105 days) (Kauai County Code § 8-20.6; *id.* § 8-19.5); Class IV Zoning Permits (120 days) (*Id.* § 8-19.6); and Special Permits (210 days) (Rules of Practice and Procedure of the Kauai County Planning Commission (KPC Rules) §§ 13-7, -8).

Kauai Springs appealed to the circuit court. Shortly thereafter, the Planning Department ordered Kauai Springs shut down. KPC R. at 000326. When it refused to stay the order pending resolution of the appeal, the circuit court enjoined the Planning Department and KPC from summarily driving Kauai Springs out of business. R. at 86-87, 228-31. The circuit court entered its FOF/COL and Order on September 17, 2008. App. 5. It held KPC failed to deny the Use and Class IV applications within the deemed approved deadlines, and that KPC fulfilled its duty to make "appropriate assessments" and take "reasonable measures" under *Kelly*. It concluded that KPC's Order was unreasonable, arbitrary and capricious.

More than four and one-half years later, the ICA vacated the circuit court's judgment and remanded the case to KPC, even though it also concluded that KPC's denial was unreasonable, arbitrary and capricious.[3] The ICA held Kauai Springs impliedly and retroactively assented to an indefinite extension of the deadlines for the two already-approved permits, and that KPC should have another chance to ask more public trust questions.

## STATEMENT OF THE CASE

Kauai Springs is like every other business statewide that purchases water from someone else.[4] It controls neither the gravity-fed source owned by EAK Knudsen Trust (Knudsen) which

[3] The ICA concluded:

> Second, under the circumstances of this case, it was not a reasonable measure for the Planning Commission to require that Kauai Springs prove that "the proposed use and sale of the water does not violate any applicable law administered by [the Water Commission], the PUC or any other applicable regulatory agency." This requirement creates an obscure and indefinite burden of proof because it is completely open-ended as to the "applicable law" that is of concern to the Planning Commission and completely open-ended as to "any other applicable regulatory agency" that the Planning Commission believes would have jurisdiction relevant to its permit review. Without making its requirements clear, the Planning Commission Order was arbitrary and capricious in denying the permits.

App. 1 at 45. It also held "it was not a reasonable measure for [KPC] to require Kauai Springs to undertake regulatory action to establish and confirm that other parties . . . were in compliance with 'all applicable requirements and regulatory processes.'" App. 1 at 45-6.

[4] Hawaii has many water companies: Menehune, Hawaiian Springs, Kona Deep, Springs of Waiakea, Mahalo Deep Sea Water, Hawaii Deep Blue. Kauai Springs is perhaps the smallest. The ICA based its ruling on an illusory distinction—it tried to distinguish between an obvious "commercial" user like a water company, and other businesses that commercialize water. Hotels commercialize public trust resources (swimming pools, beaches, showers, restrooms), as do

sells the water to Kauai Springs, nor the plantation-era system of tunnels and pipes owned by Grove Farm Company (Grove Farm) by which the water reaches its building. R. at 169, 261-262. The Satterfields fill 5-gallon water bottles, which are delivered to homes, businesses, and offices (including County offices) across Kauai. Their applications for the three zoning permits did not seek KPC's approval to take or "extract" water, because Kauai Springs does not control the source or the transmission system.

Following a complaint believed to have been instituted by an Oahu competitor, the Planning Department accepted Kauai Springs' application for three zoning permits. It requested input from numerous State and County agencies. R. at 170, 172. None recommended denial. KPC also sought input from the Water Commission and the PUC multiple times. Both confirmed they had no objections; rather, the Water Commission informed KPC that Kauai Springs required "no permits" if "the Applicant's use of the water is not affecting the source in any way (i.e., not inducing more water to come out of the source or tunnel),"[5] "the existing source has been registered and is basically grandfathered, and there is an agreement between the new user (Applicant) and the operator of the system," and "there is a closed line from the tunnel to the tank." R. at 170-71; KPC R. at 000344 (FOF #19.a). The PUC also confirmed that Kauai Springs, like every other water bottling company in Hawaii, is not a public utility, and "[t]he commission does not currently exercise jurisdiction over any water bottling facilities in the State." R. at 171.

Throughout the summer and fall of 2006, KPC held several public hearings. As the ICA concluded, KPC "took seriously its public trust duty." App. 1 at 44. R. at 172. KPC's own record reveals it addressed concerns about whether Kauai Springs had the right to "draw water" (as noted earlier, Kauai Springs does not extract or divert water, it simply purchases it from

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restaurants (incorporating water into drinks and food, washing dishes) and car washes. Literally every business statewide commercializes water. Consequently, KPC's continued mantra that Kauai Springs was seeking permission from KPC to sell water is flatly wrong, because all parties agreed that Knudsen and Grove Farm have the right to use the water even for "commercial" purposes, and they are within their rights to sell it to Kauai Springs. By basing its ruling on an illusory distinction, the ICA reinforced the perception that when "public trust" is invoked, courts may be enforcing certain value judgments and not engaging in analysis based on plain statutory construction and existing law.

[5] The source is gravity-fed, and thus nothing Kauai Springs does "induces more water to come out of the source or tunnel."

Knudsen), whether it made a profit, and whether it should be selling bottled water at all. R. at 173; KPC R. at 000135-000138. It inquired whether Knudsen had the right to the ground water and whether Grove Farm had the right to transport it (both do). KPC visited the source and Kauai Springs' facility. KPC searched for what one KPC member called "the perpetrator," KPC R. at 000135-000138, and "the big dog."[6] Staff informed KPC the Water Commission was not concerned with Kauai Springs. *See* KPC R. at 000195 (Tr. 11/14/2006). At another hearing, KPC was again informed that although Grove Farm may be within the PUC's jurisdiction, Kauai Springs was not. KPC R. at 000168 (Tr. 11/28/2006). But at another hearing, the lead staffer recommended denial because his "comfort level" was not satisfied that "other requirements" of the Water Commission were met, so KPC sought more information. R. at 173.[7] KPC also flexed its rules to accept into testimony a backdated letter from the Office of Hawaiian Affairs after the close of the hearings. *See* Kauai Springs' Ans. Br. (Dkt 38 at 7-8). But KPC missed its own deadlines for the Use and Class IV permit, which were deemed approved on October 18, 2006, and November 2, 2006, respectively.[8] In January 2007, with only eight days remaining before its 210-day deadline on the Special permit expired, KPC denied all three permits because it professed to not know whether to grant them:

> As evidenced by additional testimony provided by the Office of Hawaiian Affairs and concerned parties, the Planning Commission is being requested to *exercise caution and deny* the Applicant's request in its role as decision makers in the land use permit process.

[6] KPC R. at 0005, 00017 (Tr. 2/13/2007) ("Mr. Hollinger: WE are going after a small dog, I want the big dog and he's [Satterfield] the small dog. It doesn't do anything and it disappears and we haven't done anything to address the situation of where that source is coming from. . . . Mr. Aiu: None the less I feel the water rights issue is more important. . . . I am terribly afraid of doing anything that commercializes our water systems.").

[7] He did not clarify what he believed those "other requirements" might be. KPC R. 000136 (Tr. 1/23/2007) ("So, um, I didn't just have, you know . . . we didn't have that comfort level, in saying that, ah, other requirements from CWRM [Water Commission] … so … I know it's a land use issue. But I think we, we taking a look at the whole now, the whole system of, um, the Applicant's effort in getting the water.").

[8] The "deemed approved" deadlines were in the forefront of KPC's thoughts (even though it assumed only the 210-day deadline for Special permits governed, and it did not recognize it had already missed its own deadlines for the Use and Class IV permits). KPC R. at 000135-000138; R. at 173 ("Staff: Actually we are dealing with a 210 days under the Special Permit rules and regulations so the actual deadline for action is today. The absolute deadline is next week Tuesday on January 31st. . . . Mr. Chaffin: I would like to see this deferred with the applicants permission? Chair: We cannot.").

App. 3 at 5 (emphasis added).[9] The KPC Order makes clear that it undertook a public trust investigation, and that any delay in consideration was KPC's sole responsibility:

> 18. The delay in reaching a decision on this proceeding was attributed to staff's effort in obtaining additional information relating to the Applicant's authority and right to obtain and extract the water for commercial purposes.

App. 4 at 3 (FOF #18). KPC, however, ignored this input and its own staff and concluded: "In view of the foregoing, there may be outstanding regulatory processes with CWRM that the Applicant must satisfy." App. 4 at 4.[10]

## ARGUMENT

### I. POST-APPROVAL COOPERATION DOES NOT IMPLY ASSENT.

Hawaii is reputed to have among the most hostile business environments in the nation [11]

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[9] KPC's Order (App. 3 at 5) set forth only two substantive Conclusions of Law:

> 3. In view of the comments received from CWRM and PUC the land use permit process should insure that all applicable requirements and regulatory processes relating to water rights, usage, and sale are satisfactorily complied with prior to taking action on the subject permits. The Applicant, as a party to this proceeding should also carry the burden of proof that the proposed use and sale of the water does not violate any applicable law administered by CWRM, the PUC or any other applicable regulatory agency.
>
> 4. There is no substantive evidence that the Applicant has any legal standing and authority to extract and sell the water on a commercial basis.

[10] KPC also concluded:

> Based on the comments provided by CWRM and staff observations during the field trip, it should be the Applicant's responsibility to confirm and determine the need for any permits that may be required for the construction of the concrete stem wall and the steel panel mounted over the tunnel entrance.

[11] *See, e.g.*, CNBC, *America's Top States for Business 2013*, http://www.cnbc.com/id/46414199/ (Hawaii ranked 49); Honolulu Star-Advertiser, *Do more to fix business climate*, July 13, 2013, http://www.staradvertiser.com/editorialspremium/20130713_Do_more_to_fix_business_climate.html?id=215343281&c=n ("By now Hawaii residents have grown used to hearing that their state is a tough place to do business, but sinking to the very bottom of the list—any list—still stings."); West Hawaii Today, *Key to Hawaii's future is business climate*, Mar. 17, 2013, http://westhawaiitoday.com/sections/news/local-features/key-hawaii%E2%80%99s-future-business-climate.html ("Hawaii's track record has not been business friendly. At every twist and turn, public policy has taken its due out of the entrepreneurial environment so important to economic well-being."); Anita Hofschneider, *Hawaii Ranks Near Bottom for Doing Business—But Does It Matter?*, Honolulu Civil Beat, Aug. 16, 2012,

To remedy this problem, the legislature adopted Haw. Rev. Stat. § 91-13.5, requiring that all state and county agencies adopt rules establishing maximum times during which a business or development-related permit application may be considered:

> The legislature recognizes the need to take constructive steps to improve Hawaii's business climate. Businesses inside and outside of the State have described the lengthy and indeterminate time required for business and development-related regulatory approvals . . . Substantive changes to these processes must be made in order to send a strong signal to the business community of the State's intent to improve the overall regulatory climate.

1998 Haw. Sess. Laws Act 164, § 1, at 613. If an agency fails to grant or deny an application in the time limits it establishes, it "shall be deemed approved." Haw. Rev. Stat. § 91-13.5(c). Subsection (e) lists only three circumstances in which the deadlines shall be extended: "national disaster, state emergency, or union strike." *Id*. § 91-13.5(e). Each of these is an external physical circumstance preventing a timely agency decision. By contrast, an applicant's non-assent does not prevent the agency from deciding. By concluding that Kauai Springs *impliedly* assented to an indefinite extension of the permit deadlines *after they had already lapsed* and the permits had been approved by operation of law, the ICA judicially expanded the list of extensions in subsection (e). The ICA concluded Kauai Springs impliedly waived its rights to its already automatically-approved Use and Class IV permits merely by cooperating as KPC continued to process the Special permit. App. 1 at 23 (Kauai Springs impliedly assented by participating in hearings, asking for a continuance, negotiating, and seeking reconsideration, all of which occurred *after* the permits already approved).[12] But with two permits already approved but a third still being processed, any reasonable applicant would act as Kauai Springs did.[13] In addition

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http://www.civilbeat.com/articles/2012/08/16/16742-hawaii-ranks-near-bottom-for-doing-business-but-does-it-matter/ ("'We always rank at the bottom. It's not something new,' said Eugene Tian, the economic research administrator at the Hawaii Department of Business, Economic Development & Tourism.").

[12] KPC could not later claim that it relied on these actions, since at the time it didn't think the Special permit deadline could be extended. *See* KPC R. at 000003-000004 (Counsel: "Your rule on Special Permits has an automatic approval procedure and from what I have been told the legislative history behind this rule is even if the applicant were to request it wouldn't apply.").

[13] *See October Twenty-Four, Inc. v. Planning and Zoning Comm'n*, 646 A.2d 926, 931 (Conn. App. 1994) ("It was reasonable for [the applicant] to await the commission's decision rather than to risk alienating the commission and being subjected to the strict judicial standards applicable to mandamus actions.").

to the reasons set out in Kauai Springs' Answering Brief (Dkt 38 at 19-25), the ICA gravely erred for three reasons.

**1. Section 91-13.5(e) is not "ambiguous."** The statute is not ambiguous merely because it does not specify that the three reasons for extending deadlines listed in subsection (e) are exclusive. *Compare* App. 1 at 20-21 *with Ass'n of Apt. Owners of Waikoloa Beach Villas v. Sunstone Waikoloa, LLC*, No SCWC-0000998, slip op. at 13 (Haw. June 28, 2013) (statute is ambiguous if text is susceptible to different meanings and needs "further interpretation"). Under this Court's canons of statutory construction, "the express mention of a particular provision may imply the exclusion of that which is not included," which means that if the legislature had intended to include assent as a reason—implied or otherwise—it would have done so. *Hawaiian Ass'n of Seventh-Day Adventists v. Wong*, No. SCWC-28592, slip op. at 22 (Haw. June 28, 2013). *See Hawaii Elec. Light Co., Inc. v. Dep't of Land and Nat. Res.*, 102 Haw. 257, 270-71, 75 P.3d 160, 173-74 (2003) (DLNR failed to make a decision within 180-day deadline and a court's "sole duty is to give effect" to the statute's plain meaning, . . . [i]f the legislature had intended a contrary result then it could have."); Mark J. Rosen, *Hawaii's Automatic Permit Approval Law* 113-14 (Leg. Ref. Bureau 2000) (applying *Perry*, "it seems fairly clear that the Legislature intended the maximum time provisions in [section 91-13.5] to be *mandatory* rather than directory. . . . [and] extensions other than those specifically listed in the section would presumably be prohibited[.]"). The legislature did not include "assent," despite amending the statute three times recently. In 2006 the legislature even allowed counties to opt out entirely, but it left the three reasons for extension in subsection (e) untouched. Haw. Rev. Stat. § 91-13.5(f)(2); 2006 Haw. Sess. Laws Act 280, § 1, at 1155-56. *See Hawaii Elec.*, 102 Haw. at 271, 75 P.3d at 174. Thus, the ICA should have concluded that implied assent is not a ground to extend. *See Town*, 55 Haw. at 543, 524 P.2d at 88 ("We are of the opinion that the time period requiring a decision to be rendered after 45 days and before 90 days has elapsed following the public hearing clearly is a mandatory requirement and not merely directory, subject to the waiver by the applicant.").

This principle is particularly applicable when a court has expanded a statute the legislature intended to *limit* an agency's processing times by "send[ing] a strong signal" of the State's taking "constructive steps to improve Hawaii's business climate" by making "[s]ubstantive changes . . . to improve the overall regulatory climate." 1998 Haw. Sess. Laws Act

164, § 1, at 613. By *implying* assent to extend already-expired deadlines by citing only to post-approval conduct or Kauai Springs' silence, the ICA cast aside the operative impact of section 91-13.5. It should not have created an additional extension not enumerated in the statute. *See Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 926 (Minn. App. 2002) (autoapproval statute is unambiguous and requires city to request an extension).

The ICA then compounded the error by isolating a bit of legislative history to conclude lawmakers were more concerned with "flexibility in rule-making" than restricting agency discretion by streamlining the application process. *See* App. 1 at 20. The ICA failed to recognize the fact that any concerns for flexible rulemaking was accounted for by the legislature giving agencies the power to set their own deadlines, and by allowing counties to opt out entirely. Consequently, rulemaking flexibility does not support judicial expansion of the list of exceptions in such a manner that nullifies the legislature's plain intent to limit an agency's ability to take an infinite amount of time to process a permit. *See E & J Lounge Operating Co., Inc. v. Liquor Comm'n of the City and Cnty of Honolulu*, 118 Haw. 320, 349, 189 P.3d 432, 461 (2008) (section 91-13.5 should not be interpreted to "violate the well-established tenet of statutory construction that 'an interpreting court should not fashion a construction of statutory text that effectively renders the statute a nullity or creates an absurd or unjust result.'").

**2. Vested property cannot be retroactively taken by implication.** In the absence of *express* assent, the owner of permits cannot be deemed retroactively to have abandoned them. Section 91-13.5's "shall be deemed approved" command means the Use and Class IV permits were automatically approved and vested the moment the 105- and 120-day deadlines expired, and became Kauai Springs' property without the need for further action.[14] Thus, when Kauai Springs supposedly subsequently impliedly agreed to an extension by conduct, the two permits had *already* been deemed approved and nothing it did short of knowingly and expressly abandoning its property could divest it retroactively of its rights. *Cf. Perry*, 62 Haw. at 678, 619 P.2d at 104 (delay occurred prior to action advantageous to the applicant). The Use and Class IV permits "[could not] be taken away by government regulation."[15] Kauai Springs was not required

[14] *See DeJetley v. Kahoohalahala*, 122 Haw. 251, 262, 226 P.3d 421, 423 (2010) (the plain meaning of language requiring that elected official "shall immediately forfeit" office upon non-residence is that the office is "automatically lost" without the need for further action).

[15] *Allen v. City and Cnty of Honolulu*, 58 Haw. 432, 435, 571 P.2d 328, 329 (1977) (vested land use permit is property).

to make any demand. It did not need to bring a mandamus action. It did not need to stop cooperating while KPC considered the third permit. The permits especially could not be "impliedly" taken away, particularly without due process notice and the opportunity to object. *Brown v. Thompson*, 91 Haw. 1, 11, 979 P.2d 586, 596 (1999) (state-issued permits are "property" within the meaning of the U.S. and Hawaii Constitutions, and permit holder entitled to predeprivation due process). Thus, even if allowed by section 91-13.5, the burden was on KPC to expressly ask *before* the permits were automatically issued, because as a matter of law assent cannot be implied, especially *post hoc*. *See Perry*, 62 Haw. at 675-76, 619 P.2d at 102-03 (time deadlines are for the benefit of applicants).[16]

**3. Infinite and futile remand.** The ICA's indefinite remand illustrates its fallacy. How much additional time did the ICA give KPC to revisit the Use and Class IV permits, given that the 105- and 120-day deadlines expired months earlier? A day, a week, a month? Apparently *forever*, since its opinion does not note *any* limitation. This highlights the unbridgeable gap between the ICA's conclusion and the legislature's intent to abandon "the lengthy and indeterminate time required for business and development-related regulatory approvals." 1998 Haw. Sess. Laws Act 164, § 1, at 613. Instead of clear deadlines, KPC now can take as much time as it wants. Moreover, remand of the Special permit is futile: with eight days remaining before the deadline expires, KPC has no time to do anything but issue the permit. *See* KPC Rules § 1-13-5(a) (minimum 20 days' notice before KPC hearing in Special permit applications).

## II. AN AGENCY CANNOT REBOOT BASED ON ITS OWN PURPORTED INADEQUATE INQUIRY.

The ICA vacated the circuit court's order and sent the case for a KPC do-over even

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[16] *See also Northern States*, 646 N.W.2d at 926 ("[T]he burden was on the city to act within the statutory deadline or to request an additional extension from Xcel. To rule otherwise would be contrary to the plain language of section 15.99 and would add confusion to the interpretation of this statute. The underlying purpose of this statute is to establish clear deadlines for local governments to take action on zoning applications. 'When courts start to interpret the subtle movements of the players for any evidence of implicit waiver of the deadlines, the purpose behind the automatic approval statutes is diminished.' Acceptance of the city's claim of waiver 'would nullify the time frame established by the legislature and is therefore directly contrary to the plain language of the statute.' We therefore conclude that, as a matter of law, Xcel has not waived its rights . . . .") (quoting Gregory G. Brooker & Karen R. Cole, *Automatic Approval Statutes: Escape Hatches and Pitfalls*, 29 Urban Lawyer 439, 466 (1997); *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312-13 (Minn. 2001)).

though it agreed KPC's reasons for denying the permits were unreasonable, arbitrary and capricious, solely because it agreed KPC had not done enough during the months of hearings and investigations. App. 1 at 45. The ICA's remand rests on its incorrect conclusion the circuit court did not recognize KPC's *Kelly* duties, and turns on a single word: "may."

> . . . . apparently suggesting in COLs 71 and 72 that the Planning Commission "may" have public trust duties in this case. We conclude that the circuit court's COLs 63, 71 and 72 are incorrect in that they do not recognize the Planning Commission's public trust duty to consider and review Kauai Springs' water usage in its water bottling operation.

App. 1 at 27. The ICA's conclusion is grave error for two reasons.

**1. The circuit court recognized KPC's *Kelly* duty.** The circuit court's Order also shows plainly that it recognized KPC's *Kelly* duties, and held it fulfilled them:

> 61. The State of Hawaii and its political subdivisions have duties under the public trust. Haw. Const. art. IX; *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006).
>
> . . . .
>
> 63. Decisions on permit applications must be grounded in fact and the Record, not speculation, and the Record in this case is devoid of any evidence that Kauai Springs existing or proposed uses might affect water resources subject to the public trust.
>
> . . . .
>
> 71. The Planning Commission did not identify any other outstanding regulatory processes that it claimed must have been fulfilled in order to satisfy any duty under the public trust that it may have had.
>
> 72. There is nothing in the Record of this case to show that the Planning Commission did not fulfill any duty it may have under the public trust. *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006).

App. 5 at 23-24. The ICA's conclusion is also internally contradictory. *See* App. 1 at 26 ("The parties do not dispute that the public trust duties required under article XI, section 1 of the Hawai'i Constitution apply to the County.").

**2. KPC argued its own process was inadequate.** It was not necessary for the circuit court to make a finding that KPC had public trust duties because this Court already had definitively established that principle in *Kelly*. The circuit court was reviewing KPC's Order in an administrative appeal, and was not making original findings. Thus, the court's use of "may" was correct because it was not its duty to define the exact extent of KPC's *Kelly* duties, only to determine as in *Kelly* whether KPC's record showed that it made "appropriate assessments" and

had taken "reasonable measures" under the circumstances and within the time limits set by the deemed approved statute and the County's own rules, and whether the resulting denial was unreasonable, arbitrary, or capricious. It was incumbent on KPC—which was in exclusive control of its inquiries—to define what the public trust required, and to accomplish it. It told Kauai Springs what information it needed. Kauai Springs was 100% cooperative. KPC had every opportunity to do what it only later claimed in the ICA it should have done during its own process. *See* App. 1 at 25-26. The public trust doctrine imposes a duty to assess, but does not empower an agency to deny an application simply because it claims it lacks information within its power to obtain, thus shifting the burden to the applicant. *Cf.* App.1 at 48 ("Kauai Springs must show that its use of the water for economic gain is justifiable given the public trust purposes."). An agency basing a denial on amorphous trepidations or on a purported lack of information—rather than concrete facts—and then if appealed arguing that it should have asked more, is the essence of arbitrary and capricious action because an applicant can never muster enough information to meet it.

## CONCLUSION

If left unreviewed, the ICA's opinion serves as a blueprint for agency abuse under the guise of the public trust in every case. All agencies have public trust duties, all businesses impact public trust resources in some way, and every agency has 91-13.5 deadlines. The ICA rewarded KPC for hedging its bets when it was staring at a looming autoapprove deadline, by allowing it to issue an unreasonable and arbitrary denial, and then, when successfully challenged, arguing that its own Order was lacking because KPC itself had not sought the right information. This Court should accept certiorari and reverse the ICA's opinion and judgment.

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Respectfully submitted.

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