No. SCWC-29440

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Kauai Planning Commission's (KPC) Response avoids the two bedrock principles at the heart of this case. *First*, waivers of rights—particularly waivers derived from conduct alone—are not lightly inferred. *See, e.g.*, *State v. Brezee*, 66 Haw. 162, 164, 657 P.2d 1044, 1046 (1983) (accused in criminal investigation); *Fireman's Fund Ins. Co. v. AIG Hawaii Ins. Co.*, 109 Haw. 343, 354, 126 P.3d 386, 397 (2006) (waiver of arbitration rights). Second, a party cannot prevail on the basis of its own claimed errors. *See, e.g.*, *Ass'n of Apt. Owners of Waikoloa Beach Villas v. Sunstone Waikoloa, LLC*, No SCWC-0000998, slip op. at 16, n.14 (Haw. June 28, 2013) (citing *Roxas v. Marcos*, 89 Haw. 91, 124, 969 P.2d 1209, 1242 (1998) (judicial estoppel prevents party from taking inconsistent positions)).

Instead of addressing these principles, to defend a ruling both the ICA and the circuit court concluded is arbitrary and capricious, KPC is forced to make attenuated arguments masking two fundamental flaws in the ICA's opinion. *First*, it asks this Court to accept the ICA's transformation of a statute designed to improve Hawaii's business climate by *limiting* agency discretion into a measure *protecting* agency "rule-making flexibility." *Second*, KPC seeks to shift to Kauai Springs its burden to make "appropriate assessments" and take "reasonable measures" under *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 228, 140 P.3d 985, 1008 (2006).

I. WITH "NO TIME REMAINING," KPC DENIED THE PERMITS.

KPC acknowledges it denied the permits because it had "no time remaining." KPC Resp. at 5. However, it never directly addresses our arguments that its deadlines for the Use and Class IV permits had already expired by the time KPC inferred Kauai Springs assented to extensions, or that it would violate due process to allow it to infer Kauai Springs waived its rights to these already-approved permits without some kind of notice and opportunity to object. Instead, KPC emphasizes only that a Kauai ordinance enumerates "assent" as a reason to extend automatic approval deadlines. Our point, however, was not whether Kauai ordinances permit extension because an applicant assents, but whether basing an extension on assent exceeds the authority in Haw. Rev. Stat. § 91-13.5. The statute lists only three reasons for extending the deadlines, and the list does not include assent (particularly *implied* assent where one party merely claims it believes the other silently assented). KPC does not address, much less refute, the authority cited in Kauai Springs' certiorari application that the deadlines established pursuant to section 91-13.5 are mandatory and cannot be waived. *See Perry v. Planning Comm'n*, 62 Haw. 666, 676, 619

P.2d 95, 103 (1980) (discussing differences between mandatory and directory statutes; "[w]here there is a *manifest necessity for strict compliance* or a clear expectancy thereof, the provision is accorded mandatory status and the administrative agency's power to act may hinge upon precise adherence to the law. Notice and hearing requirements are within the foregoing category because of obvious due process considerations.") (emphasis added) (citation omitted); *Town v. Land Use Comm'n*, 55 Haw. 538, 543, 524 P.2d 84, 88 (1974) ("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."); 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[.]").

In its closely tailored list of reasons to extend the deadline (unlike "assent," all three are circumstances beyond both an applicant's and an agency's control), the legislature demonstrated a "manifest necessity for strict compliance," not a concern for "rule-making flexibility" as KPC argues:

> 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. The only "strong signal" the ICA sent here was that permit applicants appear before agencies such as KPC at their own peril because automatic approval deadlines in the agency's own ordinances and rules as a practical matter mean nothing. This is hardly the "constructive step" or "[s]ubstantive change" the legislature envisioned. This is business as usual. KPC's lack of response on this point alone underscores the need for review by this Court.

KPC also has no response to the argument that even if waiver or assent is allowable, then only *express* assent is consistent with due process. KPC makes a circular argument that the two permits for which the deadlines had already expired were not property (meaning that presumably KPC had no obligation to provide any due process prior to extending its deadlines) because KPC inferred Kauai Springs assented to an extension. KPC does not confront the authorities cited by

Kauai Springs at pages 9-10 of its certiorari application that the plain meaning of "deemed approved" means that the Use and Class IV permits were automatically and immediately issued. *DeJetley v. Kahoohalahala*, 122 Haw. 251, 262, 226 P.3d 421, 423 (2010). Nor does it address whether the two deemed approved permits were property that "[could not] be taken away by government regulation" without some kind of process. *Allen v. City and Cnty of Honolulu*, 58 Haw. 432, 435, 571 P.2d 328, 329 (1977).

KPC avoids both points, instead staking its entire case on three actions. KPC argues it was entitled to infer assent because Kauai Springs: (1) attended and participated in KPC meetings, (2) negotiated with KPC "regarding the nature of any approved permits," and (3) amended its applications. KPC Resp. at 4. Nothing else.

The first and the second actions cannot be the basis for an inference of assent because they are subject to several interpretations other than Kauai Springs was silently agreeing to deadline extensions for the Use and Class IV permits. These are things any reasonable applicant would have done if a third permit was still under consideration. Did KPC expect Kauai Springs to not show up or to simply stop dealing with it? That would be foolish of course, because it would only guarantee that KPC denied the Special permit. Besides, attending and participating in meetings, and negotiating with agencies are actions that applicants do regularly, and it cannot be held against them for doing so. KPC also repeats its tired claim that Kauai Springs not demanding the permits the moment the deadlines expired allowed KPC to infer Kauai Springs had assented to an unlimited amount of extra time. But the deemed approved deadlines exist substantially for benefit of applicants, and Kauai Springs was not required to do anything to keep its rights. *Perry*, 62 Haw. at 675-76, 619 P.2d at 102-03 (time deadlines are for the benefit of applicants). KPC's "silence" argument turns the due process burden upside down: if it believed that Kauai Springs' conduct was it waiving its rights, it was KPC's duty to ask. Not the other way around.

And what of KPC's claim that Kauai Springs "amend[ed] and re-amend[ed] its application?" KPC Resp. at 4. First, the operative event triggering deadlines is an agency's "acceptance" of an application. If Kauai Springs "reapplied" as KPC claims, then it was KPC's obligation to "accept" the amended application and start the time clock running again. It never did so. Second, KPC avoids the fact that at all the times it mentions, it was still considering the Special permit application, and Kauai Springs' "reapplications" could be applied only to that permit, and not to the already deemed approved Use and Class IV permits. Instead, KPC's

Response lumps them all together and fails to consider each permit separately. This appears to be exactly how it has approached the three applications from the beginning. KPC considered the only deadline it was bound by was the 210-day deadline for the Special permit, and that it could simply ignore the 105-day and 120-day deadlines for the Use and Class IV permits. This is precisely what the record reveals, and KPC even admits it denied the permits "with no time remaining," emphasizing what the circuit court concluded: that with its time running out on the third permit, KPC slapped together a denial that was not based on a lack of information, or questions unanswered by Kauai Springs, but on reasons so vague and amorphous ("there may be outstanding regulatory processes with CWRM that the Applicant must satisfy") both of the courts below concluded KPC was unreasonable, arbitrary, and capricious. This pattern continued in the ICA: it appears that when searching for some reason to overturn the circuit court's conclusion, KPC scoured the record to find anything that could support its *post hoc* claim that Kauai Springs had "led [KPC] to believe" it had surrendered its rights by conduct. *See* KPC Resp. at 5. However, this Court has long recognized that after-the-fact claims of inferred assent are easy to make and difficult to disprove. *See, e.g.*, *Hew v. Aruda*, 51 Haw. 451, 458, 462 P.2d 476, 481 (1969) ("Trial courts should be very careful to keep the concept of an account stated from beginning a legal artifice enabling the crafty to fabricate imaginary claims and the dilatory to redeem unenforceable debts. We must further observe that 'courts are more loath to infer assent from acts or omissions in response to an account rendered by a fiduciary.'") (quoting 6 Samuel Williston, *A Treatise on the Law of Contracts* § 1862A, at 5230 (Rev. ed. 1938)). Thus, when Hawaii courts have recognized inferred assent, they have done so only where there was no question that the party benefitted, and its "assent" continued for a long period of time. *See, e.g.*, *Dudoit v. Spencer*, 2 Haw. 493 (Haw. Kingdom 1862) (party retained benefits for one-and-a-half years with no objection); *Barwick Pac. Carpet Co. v. Kam Hawaii Constr. Inc*., 2 Haw. App. 253, 257, 630 P.2d 638, 641 (1981) (party signed nine bills of lading over one year, and accepted the benefits of the agreement). Here by contrast, Kauai Springs received no benefit (KPC purported to deny all three permits), and the conduct KPC now claims induced its belief took place over a short period of time, and not the months and years as in the above examples.

Finally, far from merely defending the ICA's infinite remand, KPC doubles down and proclaims that on remand "review necessarily will take time," suggesting it can indeed take as much time as it wants (apparently even exceeding the original time limitations). KPC Resp. at 10. This claim ignores the futility of a remand (8 days remaining to consider the Special permit,

but KPC's own rules require 20-days' notice) and highlights the utter lack of standards to be applied by KPC on remand if this Court does not intervene and right the ICA's errors. This is not a remand "like any other" as KPC claims, because it involves permits that all acknowledge are subject to automatic approval deadlines. KPC would have this Court simply ignore those requirements, again by relying on the circular argument that they do not apply because KPC inferred assent. With a "lengthy and indeterminate" deadline on remand, this case now presents the very problem the legislature was attempting to remedy. 1998 Haw. Sess. Laws Act 164, § 1, at 613 (statute designed to address "lengthy and indeterminate time required for business and development-related regulatory approvals").

II. SHIFTING THE *KELLY* DUTY.

Until the decision below, no Hawaii court had ever expressly concluded in a case involving only a permit applicant and an agency, the agency could prevail on appeal based on its own claimed failure to make the correct inquiries during its own administrative process. The ICA appears to have fundamentally misunderstood the process: it treated KPC as if it were a third-party intervenor in its own process, rather than the primary government actor with the public trust duty. It failed to recognize that unlike other cases from this Court in which an *outsider* to the process claimed an agency did not do enough or did not make the correct inquiry, the situation presented here was critically different as it involved only KPC and Kauai Springs. *Cf. Kelly*, 111 Haw. at 228, 140 P.3d at 1008 (rejecting third-party's claim that agency violated public trust by failing to require a permit applicant do more because the record was "devoid of evidence . . . that there was a lack of reasonable erosion control measures or that the County failed to make appropriate assessments"); *Sierra Club v. Dep't of Trans.*, 115 Haw. 299, 304, 167 P.3d 292, 297 (2007) (third party environmental groups sued agency asserting it failed to undertake required environmental review). In those situations, it makes sense to allow an outsider to challenge an agency's mishandling of the process. But unlike cases where third parties have no control over what demands the agency made of the applicant and the agency refused the third parties' demands to do more, KPC was not some outsider insisting that the law required a more searching inquiry. It was the agency itself. KPC exercised total control over its process, including most critically what inquiries it made of Kauai Springs. It was KPC's show from start-to-finish, and it should not have been rewarded with a "do over" based on its own supposed deficiencies. The public trust does not override the usual rules.

KPC attempts to overcome this by wrongly suggesting—without ever directly claiming so—that it was Kauai Springs' duty to comply with *Kelly*'s requirement to make "appropriate assessments." *See* KPC Resp. at 5 ("Kauai Springs made no attempt to investigate water rights from the beginning."). KPC misapprehends the duty which this Court repeatedly has emphasized the public trust imposes on state and county agencies and not private parties. *See, e.g.*, *Robinson v. Ariyoshi*, 65 Haw. 641, 674, 658 P.2d 287, 310 (1982) (public trust puts duty on the sovereign); *In re Water Use Permit Applications*, 94 Haw. 97, 113, 9 P.3d 409, 425 (2000) (State's duty); *In re Iao Ground Water Mgmt Area*, 128 Haw. 228, 244, 287 P.3d 129, 145 (2012) (State Water Commission has duty). KPC also overlooks the fact that no one—not even KPC—questioned whether Knudsen and Grove Farm's uses are "grandfathered" as the Water Commission noted, and thus no further investigation was necessary.

Finally, KPC presents only a select portion of the circuit court's Order when it asserts "The Circuit Court Did Not Recognize a Duty Under *Kelly*." KPC Resp. at 10. Of course it did. The court's Order shows it expressly recognized KPC's duties:

> 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).

App. 5 at 23. It could not have been plainer. The court simply held, like this Court in *Kelly*, that KPC satisfied that duty. The ICA even acknowledged KPC "took seriously its public trust duty," App. 1 at 44, while at the same time concluding it should have done more. *Id*. at 48. However, if there were any deficiencies in KPC's process, the responsibility for those shortcomings falls squarely on KPC. Maybe KPC should have asked more questions, but this Court need not reach that question in order to reverse the ICA, because it is too late to ask them now. KPC was solely responsible for its process and for drafting its denial order, and it could have asked what it now claims are the right questions, and drafted its order any way it wanted. But it did not, and instead chose to rely on the most amorphous of reasons. It adopted a denial order so vague and impossible to comprehend that the circuit court rejected it, and even the ICA agreed was arbitrary and capricious. It is grossly unfair to punish Kauai Springs years later for KPC's ineptitude, if any, and it is simply too late for KPC to have another go based on its own supposed omissions.

III. CONCLUSION

This Court should accept certiorari and reverse the ICA's opinion and judgment.

DATED: Honolulu, Hawaii, August 15, 2013.

Respectfully submitted.

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