No. SCWC-12-0000266

IN THE SUPREME COURT OF THE STATE OF HAWAII

MARK C. KELLBERG, Petitioner/Plaintiff-Appellant, vs. CHRISTOPHER J. YUEN in his capacity as the Planning Director, County of Hawaii, and COUNTY OF HAWAII, Respondents/Defendants-Appellees.	ON APPLICATION FOR A WRIT OF CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS ICA Opinion: June 20, 2013 ICA Judgment: July 19, 2013 Circuit Court: Civil No. 07-1-0157 Circuit Court of the Third Circuit Hon. Glenn S. Hara, Hon. Ronald Ibarra Judgment: Feb. 28, 2012

APPLICATION FOR A WRIT OF CERTIORARI

APPENDICES 1-4

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APPLICATION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONS. STATUTES, CHARTERS, AND RULES

TABLE OF AUTHORITIES — CONTINUED

Page

OTHER AUTHORITIES

INDEX TO APPENDICES

APPLICATION FOR A WRIT OF CERTIORARI

Petitioner/Plaintiff-Appellant Mark C. Kellberg (Kellberg) respectfully seeks a writ of certiorari to correct grave errors and obvious inconsistencies in the memorandum opinion of the Intermediate Court of Appeals (ICA) (App. 1).

For more than eight years, County of Hawaii Planning Director Christopher J. Yuen and his successor (Director) have run Kellberg through a Sisyphean process, shielding from judicial review a subdivision of adjoining property which the Director admits he should not have approved. Kellberg was not given the required notice of the adjoining property owner's application, nor of the Director's final decision approving the subdivision, and therefore could not challenge it in the Board of Appeals (BOA). Consequently, the ICA did not disturb the circuit court's conclusion that Kellberg was entitled to turn directly to the courts for declaratory and other relief.

But the ICA dismissed anyway, because Kellberg had not separately appealed a letter which the Director sent 15 months *after* final subdivision approval. In that letter, which responded to Kellberg's original objection that the subdivision was illegal, the Director acknowledged he had approved it in error, but stated he was "not going to do anything to undo the situation at this time." The ICA concluded Kellberg must have appealed the Director's "decision" to do nothing, and consequently concluded Kellberg could not maintain his original jurisdiction action challenging the subdivision approval. To reach this conclusion, the ICA misapprehended the BOA's jurisdiction. The court ruled that the BOA hears appeals from "*all* decisions of the director," when the Hawaii County Charter limits its jurisdiction to "final decisions" only.

This Court should accept certiorari and reverse. Nothing the Director decided 15 months after final subdivision approval constituted a new "final decision" that must have been appealed by Kellberg to protect his existing right to judicial review of the earlier subdivision approval. However, if the Director's subsequent letter must have been appealed to the BOA, due process required the Director to have notified Kellberg that this letter represented an appealable decision and that Kellberg had only 30 days to go to the BOA or lose his existing right to judicial review of the subdivision approval. As a practical matter, the ICA's ruling invites administrative and judicial chaos by requiring piecemeal appeals of every action taken by the Director, regardless of its finality. The ICA endorsed a remarkably citizen-hostile administrative process in which agencies have the incentive to be opaque when they should be transparent, for remaining silent when they should inform, and are encouraged—indeed rewarded—for playing hide-the-ball.

QUESTIONS PRESENTED

1. Final Decision. Does the Director's letter conceding that 15 months earlier he erroneously approved a subdivision, but which states "I am not going to do anything to undo this situation at this time," constitute a new final decision that must be appealed to the BOA, and which supplants the existing right to judicial review of the original final decision approving the subdivision?

2. Due Process Notice. If the Director's letter was a new final decision supplanting the original final subdivision decision that must have been appealed to the BOA within 30 days in order to preserve the right to judicial review, did the Director have a due process obligation to give Kellberg notice? [1]

PRIOR PROCEEDINGS AND STATEMENT OF THE CASE

The Director approved what he now acknowledges is an illegal subdivision of a 49-acre A-20a zoned (agricultural uses, 20-acre minimum lot size) vacant parcel into seven nonconforming lots on July 11, 2005. Under the zoning, the parcel could be subdivided into no more than two lots, so the owner sought a variance under the County's subdivision and zoning codes.[2] Kellberg owns an adjoining parcel, but was prevented from timely challenging the approval in the BOA because neither the owner of the subdivided parcel nor the Director provided notice of the application or of the decision approving it, as required by the County Code. *See* Haw. Cnty. Code § 23-17(a) (subdivision variance applicant must provide notice to owners within 300 feet within three days); *id*. § 25-2-4 (notice of pending application under the zoning code); *id*. § 25-2-53(a) (zoning variance notice requirement). The Charter gives the BOA administrative jurisdiction to review "final decisions of the planning director or the director of public works regarding matters within their respective jurisdictions." Charter of the County of Hawaii § 6-9.2 (2012). Thus, the Director's final subdivision approval started the 30-day period under the BOA's rules for objectors to appeal, but

[1] The Court need not address the second Question Presented if it concludes the Director's "do nothing" decision 15 months after the subdivision approval did not affect Kellberg's right to challenge the subdivision approval. In other words, even if the Director's subsequent decision must have been appealed in order to challenge his decision to do nothing, Kellberg need not have done so to preserve his challenge to the earlier subdivision approval.

[2] The reasons why the subdivision violates the code are set out in Kellberg's ICA Opening Brief, Dkt 104 at 2-3. Rather than a maximum of *two* adjacent parcels, Kellberg has *seven*.

Kellberg only learned of the approval the *day after* the appeal period expired when the subdividing owner's real estate agent telephoned him to offer to sell one of the seven newly created neighboring lots, ostensibly to protect Kellberg's view. Kellberg asked the Director, the Planning Department, and others what he could do to challenge the illegal subdivision, only to repeatedly be told it was already too late and he had no administrative remedy.[3] On October 23, 2006, more than 15 months after the Director's final decision approving the subdivision, the Director first responded to Kellberg's original August 16, 2005 letter of complaint with a letter stating, "I am not going to do anything to undo this situation at this time," even though he acknowledged "there was a mistake in the approval of the subdivision." App. 2 at 1-2.

On May 11, 2007, Kellberg sought declaratory and injunctive relief in circuit court to invalidate the subdivision approval. *See* Complaint (App. 3); App. 1 at 3. The Director moved to dismiss, asserting the court lacked jurisdiction because Kellberg had not exhausted administrative remedies by appealing the subdivision approval to the BOA. The circuit court concluded it had original jurisdiction, finding it was impossible for Kellberg to have appealed to the BOA because he had not been notified of the pending subdivision application or its approval. The court held Kellberg had no administrative remedies to exhaust. The court "remanded" the case to the BOA and ordered it to hear Kellberg's administrative appeal even though the 30-day window to appeal had closed. *See* App. 1 at 4.[4] Kellberg prepared and filed his BOA appeal, but ignoring the court's order, the

[3] The day after receiving notice, Kellberg went to the Planning Department office and was told that an appeal of the Director's approval of the subdivision was no longer possible. Six months later, at the suggestion of Corporation Counsel Ashida, Kellberg wrote the BOA asking to appeal the subdivision. He received a written reply stating that no appeal of the subdivision was possible because the 30-day appeal period had expired.

[4] Kellberg invoked the circuit court's original jurisdiction pursuant to Haw. Rev. Stat. §§ 603-21.5(a)(3) (general civil jurisdiction), 603-21.7(b) (actions in the nature of mandamus), and 632-1 (declaratory judgment), and not administrative appellate jurisdiction under Haw. Rev. Stat. § 91-14. Thus, once the circuit court concluded Kellberg did not have administrative remedies to exhaust, it should not have "remanded" the case to the BOA. The lawsuit was not an appeal of a BOA decision in a contested case, so it could not be "sent back" to a forum from which it had not come. Having determined that the failure to provide notice obviated the need for BOA review, the court should have resolved Kellberg's challenge to the Director's 2005 final subdivision approval on the merits. *See Cnty. of Hawaii v. Ala Loop Homeowners*, 123 Haw. 391, 408, 235 P.3d 1103, 1120 (2010) (recognizing private action and original jurisdiction to enforce land use laws which relate to environmental quality). *Cf. Curtis v. Bd. of Appeals*, 90 Haw. 384, 394, 978 P.2d 822, 832 (1999) (objectors who filed untimely BOA appeal may invoke court's administrative appellate jurisdiction upon discovery).

Director moved for dismissal on the grounds it was untimely. The BOA agreed and dismissed Kellberg's appeal (just as it had said it would do from the beginning). But when Kellberg returned to circuit court, the court inexplicably rejected his motion for summary judgment, and eventually upheld the BOA's dismissal.

Kellberg, appealing *pro se* to the ICA, raised several points. The court, however, addressed only a single issue. It concluded the County provided an administrative remedy, and that Kellberg had not exhausted it. However, it did not disturb the circuit court's conclusion that Kellberg was prevented from seeking timely BOA review of the Director's July 2005 final subdivision approval. Instead, the ICA shifted its focus to the Director's October 23, 2006 letter, concluding the circuit court had no jurisdiction over Kellberg's lawsuit challenging the final subdivision approval because he was required to have appealed the decision reflected in the subsequent letter ("I am not going to do anything to undo this situation at this time"). The ICA treated this letter as a response to a request for reconsideration, even though there is no procedure for the Director to reconsider a decision finalized nearly a year and a half earlier, and even though Kellberg had not asked for reconsideration. The ICA, however, concluded "it was clear" that the letter, which "refused to reconsider the subdivision approval despite the error, constituted an appealable decision from which Kellberg should have appealed to the BOA." App. 1 at 6. The ICA remanded to the circuit court to dismiss the entire case.

ARGUMENT

Exhaustion of administrative remedies is required "where a claim is cognizable in the first instance by an administrative agency alone." *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 93, 734 P.2d 161, 168 (1987). In other words, the courts are deprived of jurisdiction until the agency delegated the power to hear a case has considered it. To earn the extreme judicial deference paid to the administrative review process, that process must be apparent, straightforward, and understandable to the people required to utilize it. A doctrine founded on the principles of judicial economy and comity should not be a game of "gotcha" where each stage represents a potential fatal misstep for the unwary, or in which administrative requirements are employed to insulate an illegal action from review. Administrative requirements should be obvious, not unfathomable.

The ICA committed two grave errors. *First*, the BOA has jurisdiction to review only "final decisions" by the Director, and by definition there can be only a single "final" decision approving a subdivision application that can be appealed to the BOA. Here, it was the Director's approval of the

subdivision in 2005. Decisions the Director makes long after this final decision need not be appealed to the BOA. Moreover, not appealing a subsequent decision does not retroactively wipe out the already-accrued right to judicial review of the final subdivision approval. Thus, Kellberg's deciding to not appeal the Director's letter 15 months after that final decision which stated he was "not going to do anything" to remedy the situation of too many lots, did not, as the ICA concluded, deprive the circuit court of jurisdiction to review the subdivision approval. *Second*, even if the October 2006 letter was a new final subdivision decision requiring Kellberg surrender his already-vested challenge and to appeal anew to the BOA, after having previously been informed by both the Planning Department and the BOA that no appeal of the subdivision approval was possible, the Director had a due process obligation to inform Kellberg of his right to appeal this new decision.

I. THE DIRECTOR'S OCTOBER 2006 LETTER WAS NOT A FINAL DECISION SUPPLANTING THE FINAL DECISION APPROVING THE SUBDIVISION 15 MONTHS EARLIER

The ICA failed to recognize that the Director's July 2005 decision approving the subdivision was the one true "final decision" challenged by Kellberg, erroneously substituting in its stead the Director's October 2006 decision to "do nothing" as the decision to which Kellberg objected. This Court need only recognize that in order to reverse the ICA. Kellberg's lawsuit challenges the Director's July 11, 2005 final decision which wrongly approved the subdivision of adjacent property. Both courts below agreed that he was deprived of the opportunity for administrative review of this decision for lack of notice. Thus, the circuit court had original jurisdiction. The ICA, however, concluded that in order to maintain his lawsuit objecting to the subdivision approval, Kellberg must have appealed to the BOA the Director's October 2006 letter, effectively concluding that it—and not the July 2005 approval—was the true final decision on the matter, or that there can be more than one final decision. Neither conclusion holds up.

1. BOA's Jurisdiction Limited To "Final Decisions." The ICA misapprehended the scope of the BOA's jurisdiction. The plain language of both the Charter and the Rules of Practice and Procedure (BOA Rules) reflect that there can be but a single "final decision" approving a subdivision, and that decision was the 2005 approval, not a letter sent 15 months later that by its own terms does nothing. The ICA's conclusion rests on the erroneous foundation that *all* decisions of the Director must be appealed to the BOA. The ICA, however, overlooked the plain language of the county charter. *Hawaii's Thousand Friends v. City and Cnty. of Honolulu*, 75 Haw. 237, 244, 858 P.2d 726, 730 (1993) (only required to administratively appeal agency decisions as required by

the charter). The BOA's jurisdiction under the Hawaii County Charter is limited to the Director's "*final* decisions," and the Charter gives the BOA the authority to:

> Hear and determine appeals from final decisions of the planning director or the director of public works regarding matters within their respective jurisdictions.

Charter of the County of Hawaii § 6-9.2(a) (2012). Thus, contrary to the ICA's conclusion, Kellberg was under no obligation to appeal *every* decision by the Director.[5] The ICA wrongly held that the BOA Rules "define the BOA's jurisdiction," and that they do so "broadly, allowing for appeals of *any* 'decision of the Director in the administration of the Zoning, Subdivision, and Advertising and Sign chapters of the Code[.]'' App. 1 at 7 (emphasis added). The ICA's opinion failed to reflect that it is the Charter—not administrative rules—that defines an agency's jurisdiction, and under the Charter, the BOA's jurisdiction is much more narrowly circumscribed.

2. There Can Be Only One "Final" Decision Approving A Subdivision. The plain meaning of "final" is:

> Last; conclusive; decisive; definitive; terminated; completed. In its use in reference to legal actions, this word is generally contrasted with "interlocutory."

Black's Law Dictionary 567 (5th ed. 1979).[6] The Director's 2005 approval of the illegal subdivision was "conclusive" and not "interlocutory," and the last step in the process of approving subdivisions, and nothing remained for the Director to do. We know because the Director said so. *See* App. 2 at 2

[5] The Charter's text was markedly different in 2006 than at the time of *Kona Old*, where this Court noted the Charter gave the BOA jurisdiction to "*hear and determine all appeals from the actions of the planning director and planning commission*." *Kona Old*, 69 Haw. at 91 n.11, 734 P.2d at 167 n.11 (quoting Charter of the County of Hawaii § 5-6.3 (1980)). *See also Hawaii's Thousand Friends*, 75 Haw. at 244, 858 P.3d at 730 (noting the Charter at the time of *Kona Old* "specifically provided an administrative procedure under with *all* actions of the planning director were appealable to the county Board of Appeals"). That language ("the actions of the planning director"), subsequently removed from the Charter, confers much broader jurisdiction than the power to review "final decisions." The language in the current version of the Charter (2012) was in effect in October 2006. The BOA apparently did not comprehend this: its order dismissing Kellberg's court-ordered appeal (Dkt 66 at 184) stated its jurisdiction was defined by "Section 6-10-2-20(a) of the Hawaii County Charter," a nonexistent charter section.

[6] The meaning of "final decision" is equally plain: "[o]ne which leaves nothing open to further dispute and which sets at rest cause of action between parties." *Id*. *See, e.g*., Haw. Rev. Stat. § 91-14(a) (contrasting "final decision" with "preliminary ruling"); *Jenkins v. Cades Schutte Fleming & Wright*, 76 Haw. 115, 117-18, 869 P.2d 1334, 1336-37 (1994) ("an order is not final if the rights of a party remain undetermined or if the matter is retained for further action").

("Sub. 05-00064 has received final subdivision approval. . . ."). By contrast, the Director's 2006 letter—coming months after subdivision approval—was not the final decision on the subdivision. It wasn't final, and it wasn't even a decision. By its own terms it was not "final" because it left open the possibility of future action ("I am not going to do anything to undo this situation *at this time*"), and it wasn't a "decision" regarding the subdivision since it was simply a statement 15 months after the fact that the Director was going to do nothing. It was akin to the "check off" which this Court in *Swire Properties (Hawaii), Ltd. v. Zoning Bd. of Appeals*, 73 Haw. 1, 826 P.2d 876 (1992) held was not a "decision" or "action" that needed to be administratively appealed.

Thus, to reach its conclusion the ICA twice erred. First, it misconstrued the language of the BOA Rules. The Rules refer to "*the* decision of the Director" (singular, meaning the final decision), and very plainly do not say "any" decision by the Director as the ICA concluded, or even refer to "decision*s*" (plural):

> Any person aggrieved by *the decision* of the Director in the administration or application of the Zoning, Subdivision, and Advertising and Sign chapters of the Code or in other cases where no direct appeal to court is provided for by statute, Code or Rule, . . . may appeal the decision to the Board.

Rules of Prac. and Proc., Cnty. of Haw. Bd. of App. § 8.2 (emphasis added). Second, the ICA's interpretation of the BOA Rules to mean that any decision of the Director must be appealed conflicts with the controlling language of the Charter. The Charter is the County's organic document, its constitution. Haw. Const. art. VIII, § 2. The Charter limits the BOA's jurisdiction to "final decisions," and it does not allow "any" decision to be appealed to the BOA. In cases of conflict, the Charter's requirements control. *Fasi v. City Council of the City and Cnty. of Honolulu*, 72 Haw. 513, 518, 823 P.2d 742,744 (1992) (ordinances conflicting with a charter are invalid).

3. The Director Has No Power To Reconsider Final Decisions. The ICA concluded the Director's "October 23, 2006 letter in which he refused to reconsider the subdivision approval despite the error, constituted an appealable decision from which Kellberg should have appealed to the BOA." App. 1 at 6. The ICA overlooked its own decision in *Hoku Lele, LLC v. City and Cnty. of Honolulu*, 129 Haw. 164, 169, 296 P.3d 1072, 1077 (Haw. App. 2013), where it rejected a similar assertion, holding that letters from a planning director need not be administratively appealed because they were not responding to either a request for reconsideration or a declaratory ruling. Similarly, Kellberg had not requested reconsideration of the subdivision approval. The "situation" the Director was referring to in his October 2006 letter was the combining of the noncontiguous

seventh lot with some other property owned by the subdividing owner. Here, in addition to misunderstanding the factual context of the Director's letter, the ICA overlooked that the Director has no power to "reconsider" final subdivision decisions, especially those made 15 months earlier. *Cf. McPherson v. Zoning Bd. of Appeals*, 67 Haw. 603, 607, 699 P.2d 26, 29 (1985) (where agency rules permit petition for reconsideration, denial of reconsideration motion is the final decision). In *McPherson*, this Court noted that "[a]ny other holding would lead to administrative chaos." *Id*. The same holds true if this Court does not correct the ICA's ruling here, because the ICA validated a process in which every decision made by the Director potentially must be reviewed by the BOA within 30 days, and no final decision can ever be understood to be truly final because a later decision, even a decision to do nothing must be appealed. This would overwhelm the BOA and the courts with multiple protective appeals, resulting in a fractured decisionmaking and review process. Nor does the ICA's holding reflect the reality of the planning process. *See* App. 1 at 6 ("The fact that Kellberg and his attorney continued to write to the Planning Director after receiving the BOA's letter demonstrates his understanding that administrative remedies remained available to be invoked."). That is hardly the only inference to be drawn, as County planning agencies statewide make literally hundreds of non-final decisions on an application as they negotiate with an applicant, as they clarify the standards and the uses requested, as applicants and others communicate with planning agencies, and as the agencies respond to third-party requests, before, during, and after a final decision to grant or deny an application. Requiring each one of these decisions be appealed as they are made would result in the administrative chaos of which this Court forewarned in *McPherson*. The rule adopted by the ICA also gives a planning director the ability to retroactively eliminate an existing challenge to a final decision simply by deciding "I am not changing my earlier final decision." This would allow agencies at their whim to deprive courts of jurisdiction. It also renders it impossible for a party to know when a truly "final" decision has been made, and even a subdividing owner would not know when she had a decision in hand on which she could rely.

II. DUE PROCESS REQUIRED NOTIFICATION OF THE SHORT APPEAL FUSE

If the Director's letter to Kellberg constituted a new "final decision" superseding the earlier final decision approving the subdivision, and an appeal of this subsequent decision was required in order for for Kellberg to preserve his right to challenge the subdivision's approval, the Director's failure to provide Kellberg actual notice of that fact and of the 30-day time limitation for an appeal fell woefully short of the requirements of due process. The BOA's 30-day time limit is "mandatory,

exclusive, and short," *Hoku Lele*, 129 Haw. at 168, 296 P.3d at 1076, and when a statute or rule provides for shortened limitations periods, the Due Process Clauses of both the federal and Hawaii Constitutions require an agency to give express and conspicuous notice of the time period and avenues for redress. *See Brody v. Vill. of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005); *Hoku Lele*, 129 Haw. at 168 n.6, 296 P.3d at 1076 n.6 (and authorities cited). The ICA determined in *Hoku Lele* that "[t]he Director's letter[s] failed to give any notice of the right to appeal or of the thirty-day period. Other jurisdictions have concluded under similar circumstances that statutory notice of the right to appeal was inadequate and that due process required the government to provide affirmative notice." *Id.*

In *Brody*, New York law required a property owner challenging a taking of property by eminent domain object in a special procedure, and do so within 30 days. The Second Circuit held "where, as here, a condemnor provides an *exclusive procedure for challenging* a public use determination, it must also provide notice in accordance with the rule established by *Mullane* [*v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950)] and its progeny. . . . '[R]easonable notice' under these circumstances *must include mention of the commencement of the thirty-day challenge period*." *Brody*, 434 F.3d at 132 (emphases added). *Brody* also held that the notice must contain a "conspicuous mention" of the challenge period. *Id. See also Jones v. Flowers*, 547 U.S. 220 (2006) (property owners are entitled to specific notice, designed to provide actual notice). The court held that the burden on the government to provide notice is "comparatively small," and:

> [t]hus we now hold that "reasonable notice" under these circumstances must include the mention of the commencement of the thirty-day challenge period. Our conclusion rests on two observations. First, the EDPL [New York's Eminent Domain Procedure Law] splits the condemnation process from the proceedings to take title and to determine just compensation. It is not likely that the average landowner would have appreciated that notice of the Determination and Findings began the exclusive period in which to initiate a challenge to the condemnor's determination. Second, at the end of the thirty-day period, the condemnee has lost the right to review the public use determination in state court. Given the constitutional significance of the public use requirement and the brief period allowed for reviewing the condemnor's public use determination, we believe that due process requires more explicit notice than that given to Brody.

Brody, 434 F.3d at 132.[7] The same rationale applies here.

[7] The Second Circuit rejected the argument that specific notice was unnecessary because the condemnee had actual and constructive notice of the taking. The focus in due process is on what efforts the government undertook to provide notice, not what the owner knew. The court also rejected the argument the government had no obligation "to inform the reader of the significance of

1. BOA's Short Limitations Period. The BOA appeal process, like New York's eminent domain law, imposes a short 30-day limitations period, and is separate from an original jurisdiction civil lawsuit and the usual statutes of limitations which apply there. It is therefore not likely that an "average landowner" would have appreciated that the Director's 2006 letter merely stating that he was "not going to do anything" triggered an "exclusive period in which to initiate a challenge to [that] determination," and that a challenge must be instituted in the BOA, the Planning Department's internal administrative process. The letter did not mention either the BOA process or the 30-day limitations period. Instead, it only acknowledged that Kellberg was right about the illegal subdivision and "there was a mistake in the approval of that subdivision . . . and there are now seven lots instead of six." App. 2 at 1-2. The Director apologized for his delay in response, and promised to include Kellberg in "future correspondence" about the subdivision and any revisions. *Id*. But regarding what the ICA concluded was the most critical information—notice that this letter was a "final decision" and that Kellberg needed to appeal it to the BOA within 30 days or forever lose his already-existing right to challenge the subdivision—the Director's letter was utterly silent. Nor did the Director's letter inform Kellberg that the 30-day window to appeal to the BOA had been reopened, contrary to his earlier representations that it was too late to appeal. Yet the ICA concluded not only that the letter represented a decision that must be appealed, but that it eliminated Kellberg's existing right to judicial review of the months-earlier final subdivision approval. The ICA attempted to distinguish its holding in *Hoku Lele* but ignored this omission, suggesting the Director's only obligation was to not affirmatively mislead Kellberg. App. 1 at 7 ("Moreover, in *Hoku Lele*, we noted the planning director's letters *actively discouraged* the plaintiffs from appealing by indicating his letters were not an appealable decision within the zoning board of appeals' limited jurisdiction.") (emphasis added) (citing *Hoku Lele*, 129 Haw. at 168-69, 296 P.3d at 1076-77). But Due Process requires more than an absence of overt government deception, and

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the publication (i.e., that it began the thirty-day appeal period), or of the statutory procedure for challenging the determination." *Brody*, 434 F.2d at 126. The court held the government must inform a party it has taken an action, and that the party has a certain amount of time to challenge it. While a party may be charged with constructive notice of the general legal process for appealing, the court rejected the government's call for a blanket rule that an owner is always on constructive notice of the details of those processes: "we conclude that due process requires the condemnor to give as much notice as is practicable in attempting to inform an affected property owner of a proceeding that threatens to deprive the owner of that property interest; however, beyond that, property owners are generally charged with knowledge of the laws relating to property ownership." *Id*. at 132.

what is critical here is that the Director did not inform Kellberg of both the BOA appeal process and the short time in which he must utilize it, because "the average landowner would [not] have appreciated" that the letter triggered an exclusive challenge period, after which his claim disappeared. *Brody*, 434 F.3d at 132.

2. Kellberg's Property Interests. The property interest jeopardized by the Director's lack of notice, as in *Brody* and *Hoku Lele*, is "constitutionally significant." Property owners have a right to notice and to object when the government is being asked to allow a more intense use of an adjacent parcel. *See, e.g.*, *Town v. Land Use Comm'n*, 55 Haw. 538, 543-44, 524 P.2d 84, 88 (1974) (adjoining property owner has an "inherent interest" because the impact that the new use of the neighboring parcel will have, if approved, to the use and value of his own property); *East Diamond Head Ass'n v. Zoning Bd. of Appeals*, 52 Haw. 518, 521-22, 479 P.2d 796, 798 (1971) ("[W]e held in *Dalton v. City and Cnty. of Honolulu*, [51 Haw. 400, 403, 463 P.2d 199, 202 (1969)], that an owner whose property adjoins land subject to rezoning has a legal interest worthy of judicial recognition should he seek redress in our courts to preserve the continued enjoyment of his realty by protecting it from threatening neighborhood change.").

3. Minimal Agency Burden. The burden, if any, on the Director to inform recipients that a letter represents a "final decision" and that they must challenge it via the exclusive BOA process within 30 days, is "comparatively small." Doing so would require nothing more than some words on a page, a matter of a few drops of toner. Indeed, the Director's letters to Kellberg explained at length why he was not going to do anything, which shows that a few more words (*e.g.*, "you must appeal this decision to the BOA if you disagree") would have been easy to add and would not have been burdensome. Similarly, another phrase—"you have thirty days to challenge the Director's action in the BOA"—to put Kellberg on notice of the truncated limitations period is not a significant burden by any stretch of the imagination. Underscoring the minimal effort required to provide clear and conspicuous notice is the approach of the City and County of Honolulu. Its letters that must be appealed to the Zoning Board of Appeals disclose that process:

> The Director Designate (Director) of the Department of Planning and Permitting (DPP) has **APPROVED** the above Special District Permit, subject to certain conditions. . . .
>
> Any party (to the case) wishing to appeal the Director's action must submit a written petition to the Zoning Board of Appeals (ZBA) within 30 calendar days from the date of mailing or personal service of the Director's written decision (Zoning Board of Appeals Rules Relating to Administrative Procedure, Rule 22-2, Mandatory Appeal filing deadline). Essentially, the Zoning Board of Appeals rules require that a petitioner show that the Director acted in an

> arbitrary or capricious manner, or manifestly abused his discretion. Generally, the ZBA can only consider the evidence previously presented to the Director of the DPP. The filing fee for appeals to the ZBA is $200 (payable to the City and County of Honolulu).[8]

If an appeal of the Director's October 2006 letter to the BOA was the exclusive means for Kellberg to challenge the 2005 subdivision approval, the Director failed his due process duty to let Kellberg know. Thus, the letter did not affect Kellberg's right to institute a lawsuit to invalidate the subdivision approval. Those who deal with agency officials must be provided notice, especially when constitutionally protected rights hang in the balance.

CONCLUSION

This Court should accept certiorari and reverse the ICA's opinion and judgment, and remand the case for consideration of the remaining issues raised by Kellberg's appeal.

DATED: Honolulu, Hawaii, September 17, 2013.

Respectfully submitted.

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[8] Letter from George I. Atta, director Designate, Department of Planning and Permitting, City and County of Honolulu, to Keith Kurahashi at 1 (Mar. 19, 2013) (App. 4). In addition to the ICA in *Hoku Lele*, at least one circuit court has applied the *Mullane*/*Brody* analysis, concluding that a property owner subject to an eminent domain action could not be held to the 10-day limitations period in Haw. Rev. Stat. § 101-34 for objecting to a taking, because the government "in a condemnation action has a duty to inform the defendant of the ten-day limit to file objections pursuant to section 101-34 of the Hawaii Revised Statutes, as amended." *Cnty. of Hawaii v. C&J Family Ltd. P'ship*, Nos. 00-1-181k, 05-1-015K (Haw. 3d Cir. Sep. 25, 2007) (citing *Brody*, 434 F.3d at 128-29).