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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONS. CHARTERS, AND RULES

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There is no better illustration of what Petitioner Mark C. Kellberg (Kellberg) was up against in this case than Respondent's Opposition (Resp. Opp.) (Dkt. 10). Respondent does not meaningfully address, much less refute, the two main issues in Petitioner's Application (Dkt. 1) demonstrating the ICA gravely erred when it concluded that in order to challenge the admittedly illegal subdivision approval, Kellberg was required to have appealed to the Board of Appeals (BOA) a letter sent by the Director some 15 months *after* the subdivision's final approval, in which the Director merely stated, "I am not going to do anything to undo this situation at this time." Respondent then faults Kellberg for failing to appeal a subsequent decision by the BOA, which leaves this Court—like Kellberg below—guessing exactly which decision the Director claims Kellberg was required to have appealed, and why.

This Court should accept certiorari and reverse the ICA's affirmance of the circuit court's jurisdictional dismissal. It is not necessary for this Court to devote inordinate time to resolving the issues presented, precisely because the ICA affirmed dismissal for lack of subject matter jurisdiction, and the Director has not seriously responded to any of the issues in Petitioner's Application. Under Haw. R. App. P. 40.1(g) and (i), this Court could accept Kellberg's Application, summarily vacate the judgment of the ICA, and remand the case to the ICA for consideration of the substantive points raised by his appeal.

I. WHICH "DECISION" IS THE DIRECTOR CLAIMING KELLBERG WAS REQUIRED TO HAVE APPEALED?

The first issue the Opposition fails to address is which action by the Director it claims Kellberg was required to have appealed to the BOA in order to challenge the illegal subdivision approval. The only action that Kellberg need have appealed was the Director's July 2005 final decision approving the subdivision. The Charter delegates the BOA jurisdiction to review only "final decisions," not *all* decisions as held by the ICA. *See* Charter of the County of Hawaii § 6-9.2(a) (2012) (BOA's jurisdiction limited to "appeals from final decisions of the planning director or the director of public works regarding matters within their respective jurisdictions[.]"). Here, the "final decision" regarding the illegal subdivision was the Director's final approval in July 2005, not a decision some 15 months later to do nothing to rectify the admittedly erroneous approval. The subsequent letter did not supplant final subdivision approval, and Kellberg need not have appealed it in order to preserve his right to challenge the subdivision approval.

The Opposition has no response, but appears to have merely recycled the Director's circuit court briefs.[1] It doesn't even attempt to defend the ICA's erroneous rationale for affirming the circuit court's dismissal of the case: that the BOA Rules (and not the Charter) define the BOA's jurisdiction, which required Kellberg to have appealed all decisions of the Director. *See* ICA Memo. Op. (App. 1) at 7 ("In contrast, the BOA Rules define the BOA's jurisdiction broadly, allowing for appeals of *any* 'decision of the Director in the administration or application of the Zoning, Subdivision, and Advertising and Sign chapters of the Code[.]'") (emphasis added).

The Opposition also does not acknowledge that the ICA's Opinion could not have been more clear about which decision the court concluded Kellberg should have appealed: the Director's October 2006 "do nothing" letter, which the ICA erroneously held was the Director's rejection of Kellberg's motion for reconsideration (even though the Director had no authority to reconsider a 15-month old final subdivision approval, another point the Opposition does not even attempt to refute). *See* ICA Memo. Op. (App. 1) at 6 ("The Planning 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.").

Instead, the Opposition—much like the Director, the Planning Department, and the BOA below—presents a constantly moving target regarding which of the Director's actions it claims Kellberg must have appealed. It shifts seamlessly among an array of actions, arguing that Kellberg should have appealed any—or perhaps all—of the following actions:

(1) The July 2005 final subdivision approval. *See* Resp. Opp. at 2 ("Petitioner sought to challenge the then seven-lot subdivision.").

(2) The October 2006 "do nothing" letter. *See* Resp. Opp. at 3 ("Petitioner failed to exhaust his administrative remedies because he failed to appeal the final determination to the BOA that nothing would be done further relative to the subdivision approval."). *See also* Resp. Opp. at 6 ("The October 23, 2006 letter clearly stated no further action would be taken, thus a final order which in the ambit of the rules promulgated by the BOA constituted an appealable order.").

(3) The Director's May 2000 decision to recognize preexisting lots. *See* Resp. Opp. at 5 ("Therefore, Petitioner had thirty days to file an appeal of the Planning Director's decision to

[1] *See, e.g.*, Resp. Opp. at 6 ("Therefore, Petitioner has failed to exhaust his administrative remedies and this Court cannot grant relief. As a result, it is clear this Court is without jurisdiction and this case must be dismissed.").

recognize six pre-existing lots or grant final subdivision approval.").

(4) The BOA's jurisdictional rejection of Kellberg's court-ordered appeal. *See* Resp. Opp. at 6 ("The BOA ruled against Petitioner and Petitioner failed to appeal the decision of the BOA. Therefore, it is clear that despite being given a second bite of the apple, Petitioner deliberately failed to exhaust his administrative remedies.").[2]

This is the same kind of shell game Kellberg endured as he went back and forth between the Planning Department, the BOA, the Corporation Counsel's office, and the circuit court, only to be confounded at each step and told that he was challenging the wrong action, was too late, or that he was in the wrong forum. The lack of any serious response by the Director to the questions presented by Kellberg's application underscores the need for this Court's review. If judicial review of an admittedly wrongful subdivision approval can be casually brushed aside with arguments that are difficult to even discern, then the administrative process that the ICA held should have been exhausted is entitled to no deference whatsoever.

II. DUE PROCESS REQUIRED NOTICE OF THE SIGNIFICANCE OF THE DECISION, NOT MERE SILENCE

The Opposition also fails to address the argument that—after Kellberg had been told by both the Director and the BOA that an appeal of the subdivision's approval was no longer possible, if the Director's October 23, 2006, "I am not going to do anything to undo this situation at this time" "decision" is to be understood to be, as the ICA contends, the "final decision" Kellberg needed to appeal—then the Director had a Due Process obligation to notify him of the 30-day BOA appeal window. The Opposition does not respond to the rule that when a separate process to challenge a decision is exclusive and short-fused, Due Process requires the agency provide notice of the consequence, except to assert that "[t]he letter from the Planning Director in no way discouraged, denied or discussed the appealability of the decision to deny Petitioner's request." Resp. Opp. at 7.

[2] The Opposition even asks the reader to infer that the BOA reached the merits of the subdivision issue. Resp. Opp. at 6 ("The BOA conducted an evidentiary hearing and Findings of Fact, Conclusions of Law and Decision and Order was reached by the BOA, ROA 2, pp. 110-115."). Not so. The BOA simply dismissed the court-ordered administrative appeal for lack of jurisdiction. The BOA rejected the circuit court's order "remanding" the case, on the grounds that Kellberg had missed the BOA Rules' 30-day statute of limitations. And as for the "second bite" to which Respondent refers, the ICA did not disturb the circuit court's correct determination that the failure to provide Kellberg notice of the July 2005 final subdivision approval until *the day after* the expiration of the BOA's 30-day appeal window meant that he didn't even have a first bite, much less two.

But this response does not deal with either *Brody v. Vill. of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005) or *Hoku Lele, LLC v. City and Cnty. of Honolulu*, 129 Haw. 164, 168 n.6, 296 P.3d 1072, 1076 n.6 (Haw. App. 2013), which put the onus squarely on the Director to make some effort to insure that Kellberg had actual notice, and to not stand silently by. Due Process also requires more than merely the absence of deception, as the ICA held and the Opposition argues. *See* ICA Memo. Op. at 6 ("Quite the contrary, the Court of Appeals found that the letters sent by the Planning Director actively discouraged the Petitioner from appealing by stating his letters were not an appealable decision within the zoning board of appeals' limited jurisdiction."). *Cf. Brody*, 434 F.3d at 132 ("the average landowner would [not] have appreciated" that the agency's letter triggered an exclusive challenge period, after which his claim vanished).

The Opposition also misapprehends the nature of the notice required by the Due Process clauses. It is not merely notice of the decision, but of the *significance* of the decision. *See Brody*, 434 F.2d at 126 (rejecting argument the agency had no obligation "to inform the reader of the significance of the publication (i.e., that it began the thirty-day appeal period), or of the statutory procedure for challenging the determination."). The Opposition also forgets that it is not a citizen's generalized knowledge of the process that is critical in due process analysis, but whether the Director expressly informed Kellberg that the letter triggered the 30-day BOA appeal window. In other words, the Director had an obligation to not only inform Kellberg that he had made a decision, but that he considered the October 23, 2006 letter appealable, and that Kellberg had 30 days to appeal to the BOA. Consequently, the Opposition does not address *Brody* and *Hoku Lele*'s conclusion that the focus in due process is on what efforts *the agency* took to provide actual notice, not on what the citizen might have known, or whether someone is represented by a lawyer, an argument in which the Opposition seems to place great weight. *See, e.g.*, Resp. Opp. at 7 ("Petitioner had actual knowledge of the appeal requirements and appeal process, he was represented by counsel . . . .").

III. CONCLUSION

Kellberg's Application should be accepted. He properly challenged the Director's July 2005 final subdivision approval by filing an original jurisdiction action in circuit court, and the ICA did not disturb the circuit court's conclusion that Kellberg had no obligation to appeal the Director's final subdivision decision to the BOA because Kellberg had not been timely notified of the approval. The ICA, however, should have also concluded that the Director's 15-months-later

decision to do nothing had no effect on Kellberg's circuit court lawsuit. The Director's lack of response in his Opposition highlights the need for this Court's review, which 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, October 9, 2013.

Respectfully submitted.

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