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SCWC-14-0000828

IN THE SUPREME COURT OF THE STATE OF HAWAII

COUNTY OF KAUA'I, Plaintiff/Appellee/ Respondent, vs. HANALEI RIVER HOLDINGS, LTD., a Cook Islands corporation, et al. Defendants/Appellants/ Petitioners.	)	Civil No. 11-1-0098 (Condemnation) APPEAL FROM JUDGMENT ENTERED ON APRIL 25, 2014 FIFTH CIRCUIT COURT STATE OF HAWAII HONORABLE KATHLEEN N.A. WATANABE

PLAINTIFF/APPELLEE/RESPONDENT COUNTY OF KAUA'I'S RESPONSE TO DEFENDANTS/APPELLANTS/PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI IN THE SUPREME COURT FILED JULY 10, 2016

APPENDIX 1

CERTIFICATE OF SERVICE

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PLAINTIFF/APPELLEE/RESPONDENT COUNTY OF KAUA'I'S
RESPONSE TO DEFENDANTS/APPELLANTS/PETITIONERS' APPLICATION FOR WRIT
OF CERTIORARI IN THE SUPREME COURT FILED JULY 10, 2016

Plaintiff/Appellee/Respondent COUNTY OF KAUAI ("County") hereby responds to the Application for Writ of Certiorari filed on July 10, 2016 ("Application" or "App.") by Defendants/Appellees/Petitioners HANALEI RIVER HOLDINGS, LTD., a Cook Islands corporation ("HRHL"), and MICHAEL G. SHEEHAN ("Sheehan"), hereinafter also referred to jointly as "Petitioners."

I. **SUMMARY OF ARGUMENT**

The Application should be denied for the following reasons:

1. The record amply supports the holding of the Intermediate Court of Appeals ("ICA")[1] that Petitioners were not entitled to severance damages pursuant to *City and County of Honolulu v. Bonded Investment Co.*, 54 Haw. 523, 511 P.2d 163 (1973) (hereinafter, *"Bonded Investment*"). In addition to lack of physical unity, as pointed out by the ICA, in opposing summary judgment Petitioners completely failed to put forward any admissible evidence controverting the County's proof that there was no unity of use or unity of title between the property taken and "Area 51." Additionally, based on the arguments now being made by Petitioners, entitlement to severance damages has become moot because the property could not be put to "unitary" boatyard use.

2. The ICA adjusted the amount of blight summons damages awarded in response to the arguments again made by Petitioners here. Although the County disputes the ICA's adjustment,

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[1] *County of Kaua'i v. Hanalei River Holdings, Ltd.*, No CAAP-14-0000828, 2016 WL 2907523 (*"Hanalei River*").

the amount in contention is so small ($6,419.18), see *infra* n. 7, that the issue should not be further considered by this Court.

3. The ICA correctly ruled that a condemnor can withdraw a portion of the estimate of just compensation. Petitioners suffered no harm because the blight of summons damages formula compensates, by an award of interest, for any reduction in the estimate of just compensation, and the ICA addressed that with regard to Petitioners' second contention.

II. STATEMENT OF THE CASE

A. Severance Damages

To expand "Black Pot Beach Park" in Hanalei, the County condemned three parcels—Parcels 33, 34 and 49. (Dkt. 48, RA Vol. 1 at 9; Dkt. 48, RA Vol. 1 at 79).[2] Sheehan owned Parcel 49 (Dkt. 50, RA Vol. 2 at 250); HRHL owned Parcels 33 and 34. (Dkt. 50, RA Vol. 2 at 64.)

Sheehan formerly operated a boatyard on the property being taken. The Kaua'i County Planning Commission, however, revoked Sheehan's boatyard permits in June of 2010 for Sheehan's violation of conditions contained therein.[3] *Sheehan* at *1 - *5. Sheehan appealed to the Circuit Court, which affirmed the County's revocation of the permits. *Sheehan* at *5. Sheehan then appealed to the ICA, which again affirmed the County's revocation of the permits. *Sheehan* at *14. This Court denied certiorari review of the ICA's opinion. *Sheehan v. County of Kaua'i*, 2015 WL 248858 (Jan. 16, 2015).

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[2] Citations are to the electronic record. Accordingly, citations include the electronic docket number ("Dkt."), followed by the record volume ("RA") and PDF page number.

[3] The history of the revocation of the permits is contained in *Sheehan v. County of Kaua'i*, 134 Hawai'i 132, 337 P.3d 53 (App. 2014) (memorandum opinion) (hereinafter "*Sheehan*"), a copy of which is attached as Appendix 1.

When Petitioners belatedly produced their appraisal report prepared by Paul Cool, MAI, the County learned for the first time that Sheehan (but not HRHL) sought severance damages. Before then, neither Petitioner asserted such a claim: not in their respective Answers (HRHL—(Dkt. 50, RA Vol. 2 at 64-65); (Sheehan—Dkt. 50, RA Vol. 2 at 250-51), their Pretrial Statement (Dkt. 50, RA Vol. 2 at 281-282), or elsewhere.

In the appraisal report and at trial, Petitioners asserted that residential use was the highest and best use for the three condemned parcels through their valuation expert and he valued them accordingly.[4] (See Dkt. 54, RA Vol. 4 at 179-80).

In addition to his valuation of the three parcels based upon residential use, Mr. Cool opined that a portion of the property adjacent to HRHL's Parcel 34 and not being acquired by the County (referred to by him as "Area 51") suffered severance damages, related to boatyard use, in the approximate range of between \$250,000 - \$300,000. This amount constituted the estimated cost of replicating on Area 51 certain improvements located on HRHL's Parcels 33 and 34 once used in connection with Sheehan's shuttered boatyard. (Dkt. 54, RA Vol. 4 at 155).

In response, the County sought partial summary judgment on the severance damages issue on August 13, 2013. (Dkt. 54, RA Vol. 4 at 132-316; Dkt. 56, Vol. 5 at 70-97). The County challenged on the grounds of lack of physical unity (severance damages were only being claimed by Sheehan and not by HRHL, whose Parcel 49 was separated by Area 51 by Parcels 33 and 34), lack of unity of title (Area 51 was a part of larger Lot 127, a Land Court lot owned by Sheehan's former wife, Patricia Sheehan), and lack of unity of use (Parcel 49 – a vacant parcel

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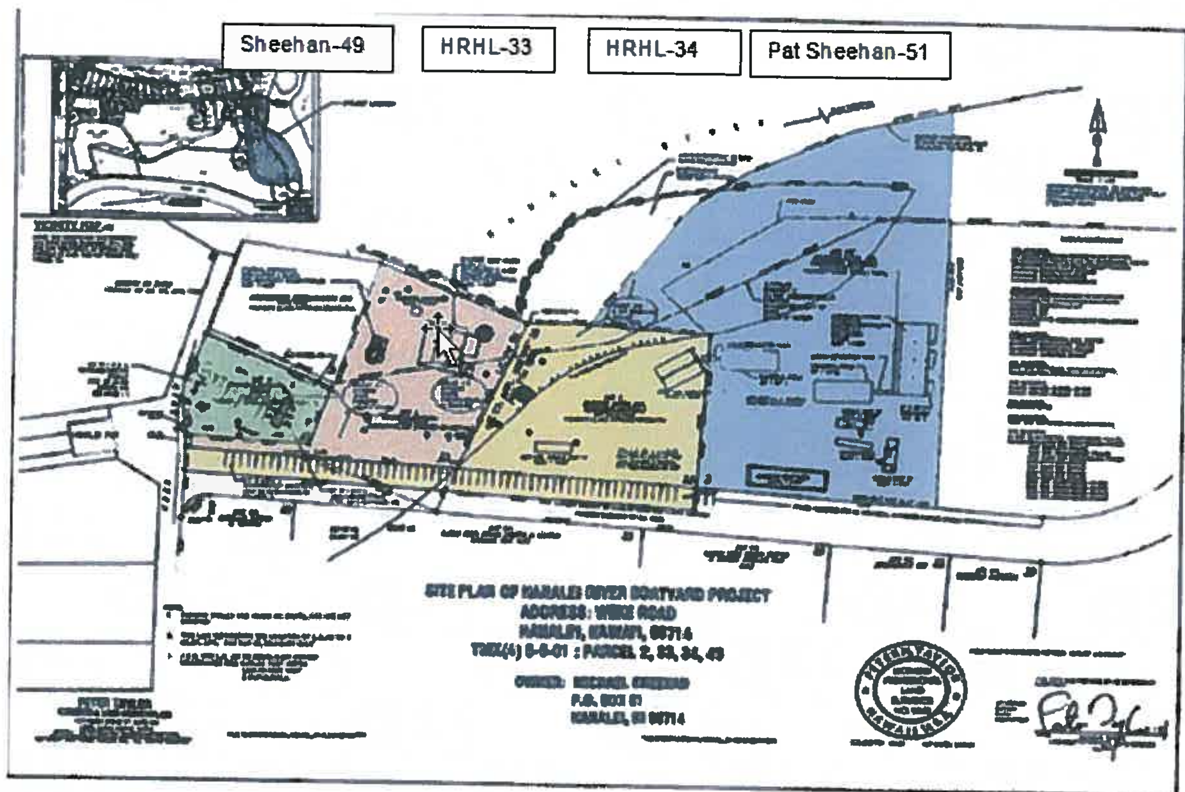
[4] Just compensation is fair market value, measured by the "highest and best" use of the property: "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined . . . . The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered. . . . ." *Cty. of Hawaii v. Sotomura*, 55 Haw. 176, 185, 517 P.2d 57, 63-64 (1973) (quoting from *Olson v. United States*, 292 U.S. 246, 255-56 (1934)).

not adjacent to any waterway - did not have the boatyard improvements which Mr. Cool claimed were being lost and had to be replicated on Area 51). (Dkt. 54, RA Vol. 4 at 177). The County also pointed out that any right to use the condemned property as well as Area 51 for a boatyard ceased in 2010 when the permits were revoked. (*Id.* at 140). Finally, the County argued that Petitioners were estopped from claiming severance damages because of their actions prior to trial in not fully responding to discovery requests. (*Id.* at 143-46).

In support of summary judgment (and in its Answering Brief at 18, the County submitted a map showing the locations of Parcels 33, 34 and 49 *vis-à-vis* Area 51:



Three weeks later, Petitioners opposed the motion supported only by an argumentative declaration of counsel (Dkt. 56, RA Vol. 5 at 31-32) and an <u>unsigned</u> declaration drafted for Sheehan's signature. (Dkt. 56, RA Vol. 5 at 35). Petitioners never requested more time pursuant

to Hawaii Rules of Civil Procedure ("HRCP") 56(f) to obtain facts supportive of their opposition.

In Petitioner's memorandum in opposition, counsel for Petitioners argued that Sheehan had rights in Area 51 because of a grant of easement in 2004 from Sheehan's former wife, Patricia Sheehan. (Dkt. 56, RA Vol. 5 at 27). The County, however, had already established that the easement, by its own terms, was no longer valid because of the revocation of the boatyard permits. The Grant of Easement stated in pertinent part that "[i]n the event the Special Management Use Permit, SMA(U) 87-8; Special Permit SP-87-9; Use Permit U-87-32, and Class IV Zoning Permit Z-IV-87-40, and the authority to use the easement premises as a boat baseyard is withdrawn, cancelled or revoked by the Planning Commission of the Count of Kauai, State of Hawaii, this 'Grant of Easement' shall expire and be null and void . . . ." (Dkt. 54, RA Vol. 4 at 270). Further, on February 18, 2013, Sheehan quitclaimed any rights he had in Lot 127 (of which Area 51 was a part) back to Patricia Sheehan. (Dkt. 54, RA Vol. 4 at 263-67).

When the trial court orally granted the County's motion, Petitioners requested submission of proposed Findings of Fact and Conclusions of Law because they "disagree(d) that there are no disputed issues of material fact." (Dkt. 70,Tr. 9/10/13 at 40). Petitioners, however, never submitted their own proposed Findings and Conclusions, nor did they object to the County's. The trial court entered its Findings/Conclusions and Order on October 3, 2013 setting forth multiple bases why Petitioners had failed to make a factual and legal showing they were entitled to severance damages. (Dkt. 56, RA Vol. 5 at 305-18). A signed Sheehan declaration was not filed with the trial court until approximately five (5) months after the trial court's Order had been entered—long after the jury trial determining just compensation had been completed. (Dkt. 60, RA Vol. 7 at 4).

B. Withdrawal of Deposit and Blight of Summons Damages

The trial court entered its order granting possession to the County (Dkt. 48, RA Vol. 1 at 99-121). As required by law, the County deposited its estimated just compensation with the clerk of court. HRS §101-29. The County based its deposit upon the October 19, 2010 appraisal initially prepared for the County when the County was considering expanding the beach park. (Dkt. 52, RA Vol. 3 at 88).

Petitioners made no effort to withdraw the deposit until almost a year later. (Dkt. 52, RA Vol. 3 at 44-55). Before they ever tried to withdraw the deposit,[5] the County asked its appraiser, Alan Conboy, MAI, to update his appraisal by valuing the property as of the applicable valuation date. (Dkt. 52, RA Vol. 3 at 67-68, 102-03).

In his updated appraisal, the appraiser concluded that the fair market value had declined. The County then moved to reduce its deposit to reflect the new appraisal. (Dkt. 52, RA Vol. 3 at 86-92, 149-55). The trial court granted the motion. (Dkt. 52, RA Vol. 3 at 157-58).

Petitioners' effort to withdraw the deposit was complicated by the fact that the condemned property was not owned by the same parties. To allow Petitioners to withdraw the money on deposit without apportioning entitlement, the County entered into a Stipulation (Dkt. 52, RA Vol. 3 at 132-35) and related Agreement (Dkt. 58, RA Vol. 6 at 363-65) with Petitioners. Petitioner Sheehan then withdrew the deposit. (Dkt. 52, RA Vol. 3 at 136-42).

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[5] Petitioners wrongly inferred in their Opening Brief filed with the ICA that the County sought to reduce its deposit in response to Petitioners' motion to withdraw the deposit. The record establishes otherwise. The County did move to withdraw the excess deposit shortly after Petitioners moved to withdraw the deposit, but the timing was unrelated. The County's motion was based upon Mr. Conboy's revised appraisal requested before Petitioners ever tried to withdraw the deposit.

III. ARGUMENT

A. The ICA Properly Determined that Petitioners Did Not Meet the Test for Severance Damages

The County demonstrated in its summary judgment motion that Sheehan met none of the three prongs of the test for entitlement to severance damages. As set forth in *Bonded Investment*, to be entitled to severance damages for a parcel of land there must be a showing that there is (1) unity of title, (2) physical unity and (3) unity of use. 54 Haw. at 525, 511 P.2d at 165. In support of its motion for summary judgment, as demonstrated by the Findings of Fact, Conclusions of Law and Order, the County established that there was (1) no unity of title (Parcel 49 was owned by Sheehan, Area 51 was owned by his ex-wife Patricia Sheehan and the easement for Area 51 was no longer valid); (2) no physical unity (maps showed that Parcel 49 was remote from Area 51 and was physically separated by the two parcels owned by HRHL); and (3) no unity of use (because the improvements whose alleged loss by condemnation caused the alleged severance damage to Area 51 were not even located on Sheehan's Parcel 49, but were located on the land of HRHL). (Dkt. 56, RA Vol. 5 at 309-18).

None of that was controverted by Petitioners in opposition to the motion, other than by argument by Petitioners' counsel in his memorandum in opposition and at hearing. But no admissible evidence was put forward by Petitioners, as required by HRCP Rule 56. Sheehan's signed declaration was not submitted until five months later, not only after the trial court's summary judgment order had been entered, but after the jury trial on valuation had been completed.[6] A reference to the trial transcripts will also readily show that not only was Sheehan

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[6] This easily distinguishes this situation from *Crichfield v. Grand Wailea Co.*, 93 Hawai'i 477, 6 P.3d 349 (2000). There, this Court indicated it was not an abuse of discretion for the trial court to consider unsigned affidavits as part of its order on a summary judgment motion. There, however, counsel had submitted a proper HRCP Rule 56(f) affidavit demonstrating the

not unavailable during the five month period before his declaration was submitted, he sat through the entire jury trial.

The ICA's emphasis of the physical unity prong of the test is clearly understandable in light of the fact that it had maps in front of it that showed Parcel 49 was physically remote from Area 51, and Petitioners had put nothing in the record showing that there was unity of use of the two parcels. While Petitioners now argue that the ICA erred because the more modern trend is to emphasize unity of use over physical unity (e.g., App. at 5-6), in fact there was no evidence in the record as to unity of use. Failing to do so, they cannot now be heard to complain that in its opinion the ICA focused on the lack of physical unity. As pointed out by the leading treatise on eminent domain in its analysis of the case law nationally, "[a]s will be noted below by analysis of fact patterns in numerous cases, courts will deny recovery in various jurisdictions based on technical defects in ownership and contiguity, but they are more reluctant to deny damage where a strong case is made for unity of use." 8A Nichols on Eminent Domain § 14B.03[1] (3rd ed. 2015). Here, no case for unity of use was made.

The ICA clearly pointed out that Petitioners failed to demonstrate a genuine issue of material fact as to any of the three prongs. *Hanalei River*, slip op. at 19. At worst, the ICA's statement regarding parcels needing to abut one another was *dicta* regarding Petitioners' failure to meet one of the three prongs. It did not serve to modify the broader three unities test set forth in *Bonded Investment*.

B. The Arguments Now Being Made By Petitioners for Severance Damages Are Moot, and Should Not Be Considered by This Court

Petitioners argue that the ICA erred in denying severance damages because it misapplied the *Bonded Investment* test as to physical unity. Sheehan urges repeatedly that this Court should

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declarations were unsigned because of unavailability on the Mainland, and the signed affidavits were submitted prior to entry of the order. 93 Hawai'i at 487, 6 P.3d at 359.

hold that there was unity of use because Parcels 33, 34, 49, and Area 51 allegedly had all been used as a boatyard:

> *"The Respondent County of Kauai ('County') did not dispute the condemned parcels and Area 51 were integral to and all previously used as a boatyard owned, operated and controlled by Petitioner Sheehan . . . The County was judicially estopped from denying Petitioner Sheehan owned Area 51 or that the properties were collectively used as a boatyard."*

App. at 4, 4 n.1 (emphasis added).

> *"In light of the County's prior acknowledgment that Petitioner Sheehan controlled Area 51 and that all of the properties, Lots 49, 33, 34, and Area 51 were utilized as a boatyard, Petitioner Sheehan's countervailing declaration was unnecessary."*

App. at 5 n. 5 (emphasis added).

> *"Petitioners note that the County is estopped from disputing that Petitioner Sheehan operated a commercial boatyard on the condemned parcels as well as Area 51 . . . and that the parties 'do not dispute that Sheehan has a purported easement on 'Area 51' to operate a boat baseyard (to the extent permitted by the County)."*

App. at 7 n.8 (emphasis added). It is because of this alleged unity of use that the ICA should have not strictly applied the physical unity prong of the *Bonded Investment* test, say Petitioners.

As already demonstrated in this response, Sheehan could not use Parcel 49 or Area 51 as a boatyard. His permits had been revoked by the Kauai Planning Commission, and that revocation was subsequently upheld by the Circuit Court of the Fifth Circuit and the ICA, and certiorari review was subsequently denied by this Court. Although the revocation was technically not final at the time of the condemnation trial because it was being appealed, there is now no question that Petitioners could not legally have used Parcel 49 and Area 51 for a boatyard, and thus there was no unity of use.

The County notes also that Petitioners have blown "hot and cold" on the unity of use issue throughout these condemnation proceedings. They sought just compensation for the

parcels taken based upon residential use, i.e., its highest and best use. And yet now they argue that, for severance damage purposes, for unity purposes the property condemned must be considered as being used for a boatyard. Petitioners cannot have it both ways, and essentially "double dip" for compensation. They should be estopped from claiming that unity of use is for a boatyard. *Roxas v. Marcos*, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1998).

Since neither the condemned property nor Area 51 could be used as a boatyard because of revocation of the permits, the severance issue is now moot. "[A] case is moot if the reviewing court can no longer grant effective relief." *Kaho'ohanohano v. State*, 114 Hawai'i 302, 332, 162 P.3d 696, 726 (2007) (quoting *City Bank v. Saje Ventures II*, 7 Haw. App. 130, 134, 748 P.2d 812, 815 (1988). "Stated another way, the central question before us is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1129 (9th Cir. 2005) (internal quotation marks and citations omitted). "[An appellate court] may not decide moot questions or abstract propositions of law." *Life of the Land v. Burns*, 59 Haw. 244, 580 P.2d 405, 409 (1978) (internal quotation marks and citation omitted).

> It is well-settled that the mootness doctrine encompasses the circumstances that destroy the justiciability of a case previously suitable for determination. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where "events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised." *Wong v. Board of Regents, University of Hawaii*, 62 Haw. 391, 394, 616 P.2d 201, 203-4 (1980).

In re Thomas, 73 Haw. 223, 225-26, 832 P.2d 253, 254 (1992) (ellipsis in original). *See also, In re Thomas H. Gentry Revocable Trust*, SCWC-13-0000428, slip op. at 30-31 (June 28, 2016).

Since jurisdiction is lacking to determine the severance issue because of mootness, the Court should deny review at this point. Alternatively, it could partially vacate the ICA decision as to severance damages because of mootness, while still affirming the remainder of the ICA's opinion and upholding the jury verdict.

C. The ICA ruled correctly on the issue of blight damages and the right of the County to withdraw a portion of the estimate of just compensation.

With respect to Petitioners' second and third points of error, Respondent stands by the position set forth in its Answering Brief. The trial court did not abuse its discretion. It applied the statutory blight formula to any period where it concluded there was a shortfall in the deposit. To the extent that the County's withdrawal of a portion of its deposit reduced the deposit below the jury verdict, Appellants were awarded blight of summons damages.

HRS §101-33 entitles condemnees blight of summons damages (interest) on any "shortfall" between the amount of the deposit and the amount of just compensation determined by the jury. The County notes that application of the ICA's blight calculation results in an additional $6,419.18 in blight damages for Petitioners.[7] Though Respondent disagrees with the conclusion of the ICA, it contends that the difference is not of a magnitude warranting this Court's further review.

IV. CONCLUSION

On the issue of severance damages, Respondents failed to act diligently and in compliance with the rules. Despite not submitting any evidence opposing summary judgment, and not even bothering to submit a signed declaration until months after the jury trial, Respondents now urge this Court to send the case back for another jury trial on severance

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[7] The ICA concluded that Petitioners were entitled to 5 days (from 4/5/13 – 4/10/13) interest at 5% on $5.8 million, and 19 days (from 4/10/13 – 4/26/13) interest at 5% on $940,000.

damages.[8] To do this would be fundamentally unfair to the County, which followed the rules and did everything properly. In the event this Court does consider a modification to the rule set forth in *Bonded Investment*, it should only be done prospectively and should not be retroactively applied to this case.

The Application should be denied in its totality. The ICA correctly ruled on the issues of severance damages, blight of summons damages, and the right of the County to withdraw a portion of the estimate of just compensation. Additionally, Petitioners' arguments regarding claimed unity of use for use of a boatyard demonstrate that their severance damage claim is moot because it is legally impossible to operate a boatyard on the property.

DATED: Honolulu, Hawai'i; July 25, 2016.

/s/ Rosemary T. Fazio
MAUNA KEA TRASK
ROSEMARY T. FAZIO
JAMES K. MEE

Attorneys for Plaintiff/Appellee/Respondent
COUNTY OF KAUA'I

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[8]In straining to make their case, Petitioners play fast and loose with the facts. For example, they state on page 1 of the Application in support of their collective severance damage argument: "Petitioners own Parcel 49. They use Parcel 49 together with a fourth parcel, Area 51, as a boat yard." In fact, only Petitioner Sheehan sought severance damages at the trial court level; he alone owned Parcel 49; Parcel 49 is a vacant lot not adjacent to the water; Area 51 is not a separate parcel but is merely a portion of a parcel owned by Sheehan's former wife, Defendant Patricia Sheehan; Petitioner HRHL never operated a boat yard; Petitioner Sheehan lost his permit to do so, and previous litigation renders moot the issue of severance damages associated with boatyard use.

APPENDIX 1

134 Hawai'i 132
Unpublished Disposition
Unpublished disposition. See HI R RAP Rule 35 before citing.
Intermediate Court of Appeals of Hawai'i.

Michael G. **SHEEHAN**, Appellant–Appellant,
v.
COUNTY OF KAUA'I, **County** of Kaua'i Planning Commission, Doe Defendants 1–10, Appellees–Appellees,
and
Hui Ho'Omalu i Ka'Aina, Intervenor–Appellee.

No. CAAP–11–0000601.
|
Oct. 17, 2014.

Appeal from the Circuit Court of the Fifth Circuit (Civil No. 10–1–0161).

Attorneys and Law Firms

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David J. Minkin, Laura S. Lucas, (McCorriston Miller Mukai MacKinnon LLP), on the briefs, for Appellees–Appellees.

Harold Bronstein, on the briefs, for Intervenor–Appellee.

FOLEY, Presiding Judge, FUJISE and GINOZA, JJ.

MEMORANDUM OPINION

I. Introduction

***1** This secondary appeal stems from Appellees–Appellees **County** of Kaua'i and **County** of Kaua'i Planning Commission's (collectively, the Planning Commission) revocation of Appellant–Appellant Michael G. **Sheehan's** (**Sheehan**) land use permits due to violations of enumerated permit conditions. **Sheehan** appeals from a Judgment filed on July 21, 2011, in the Circuit Court of the Fifth Circuit (circuit court).[1] The circuit court entered judgment against **Sheehan** and in favor of the Planning Commission and Intervenor–Appellee Hui Ho'omalu i Ka 'Aina (Hui), affirming in its entirety the Planning Commission's "Findings of Fact, Conclusions of Law; Decision and Order" (Commission's FOF/COL) that revoked four permits which authorized **Sheehan** to own and operate a boatyard at the mouth of the Hanalei River on Kaua'i.

On appeal, **Sheehan** asserts that the circuit court erred by (1) concluding that **Sheehan** failed to comply with the conditions of his permits, thus triggering the Planning Commission's authority to revoke; (2) disregarding and ignoring the deposition testimony of Planning Director Ian Costa; (3) concluding that **Sheehan's** constitutional rights were not violated; (4) affirming the Planning Commission's decision to revoke **Sheehan's** permits because the decision was contrary to the reliable, probative, and substantial evidence on the whole record; and (5) concluding that Hui had standing to intervene.

For the reasons stated below, we affirm the Judgment.

II. Background

Sheehan operated a boatyard on property located on the Hanalei River in the **County** of Kaua'i (Property) pursuant to four permits issued by the Planning Commission in 1987:[2] Special Management Area (SMA) Use Permit (U)87–8, Use Permit U–87–32, Special Permit SP–87–9, and Class IV Zoning Permit 2–IV–87–40 (collectively, the permits).[3] In its order approving the four permits, the Planning Commission enumerated thirteen (13) conditions. Of the thirteen conditions, the following are pertinent for this appeal:

> 2. The following conditions be resolved with the Public Works Department:
>
> > a. All construction must conform to the requirements of the Flood Control Ordinance.
> >
> > ...
> >
> > c. Submit plans for preliminary review prior to requiring building permit.
>
> 4. Approval of these permits shall be on a temporary basis and shall be reviewed after a one (1) year period by the Planning Commission. Should the [Department of Transportation (DOT)] develop a long-range solution/facility to accommodate the commercial tour boat operations at another location, the Planning Commission reserves the right to modify conditions or revoke the

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permits.

5. No new commercial tour boat operations other than those with existing [Department of Land and Natural Resources (DLNR)]/DOT revocable permits shall be allowed to use this facility. A listing of occupants of the proposed baseyard shall be submitted to the Planning Department for verification on a yearly basis. Any request for boat or vessel substitution, additional boats, transfer of revocable permits, increase in passenger capacity of commercial tour boat operations shall be subject to the review of the Planning Commission.

***2** 6. No launching/landing of commercial boats from the river side of the project site shall be allowed, unless permitted by the State [DOT].

...

8. The Commission further reserves the right to require additional parking stalls on site if deemed necessary. At minimum, 100 parking stalls shall be provided initially, and need not be paved unless required by the Planning Commission after the annual review, or sooner if traffic hazards result.

...

12. The Planning Commission reserves the right to modify or revoke these permits should unforeseen problems arise or should the applicant violate conditions of this approval.

In July 2007, in response to complaints from community members, the Kaua'i **County** Planning Department (KPD) conducted a field inspection[4] of the Property and issued a "Violation Notice" (July Notice) to **Sheehan**. The July Notice noted violations of Conditions 2, 5, 6, and 8, the triggering of Condition 4, and recommended that the Planning Commission issue an order to show cause as to why **Sheehan's** permits should not be modified, amended, or revoked.

Subsequently, the Planning Commission issued an "Order to Show Cause" (OSC) instructing **Sheehan** to appear at a hearing before the Commission.[5] In the OSC, the Planning Commission described the alleged facts that the KPD contended demonstrate, by a preponderance of the evidence,[6] that **Sheehan** violated Conditions 2, 5, 6, and 8 of his permits. The OSC provided that

[In violation of Condition 2, n]o current plans or building permit applications have been submitted, nor zoning or building permits issued for the many noted structures presently existing within the boat baseyard facility. One noted structure is being used as a dwelling. The placement of structures on the boat baseyard property without zoning and building permits for such structures constitutes a violation.

Staff notes that in October 1998, applicant had submitted plans and applications for one of the noted un-permitted storage structures. The [KPD] responded in writing on 12/17/98 that the application was incomplete and required additional information. This requested information was never resubmitted.

...

[In regard to Condition 4, s]ince the Governors [sic] closure of Hanalei Commercial boating permits for access to the Na Pali Coast, the [DOT], Harbors Division and DOT'S successor, DLNR, Department of Boating and Ocean Recreation [DBOR], which regulates small boat harbor other than Nawiliwili and Port Allen, have permitted moorings and ramp permits at Kikiaola small boat harbor, Port Allen Harbor and Port Allen small boat harbor for such operators. No permits for commercial moorings or ramp permits within Hanalei Bay have been issued to date other than Temporary Mooring Permits issued to the enjoined commercial boaters, Whitey', Captain Sundown and Ralph Young. With the provided alternate venues for access to the Napali Coast, the Commission has the right to amend, modify or revoke the above referenced permits.

***3** ...

[In violation of Condition 5, b]oth [current commercial operators using the boatyard] and their vessels, along with tender vessels, are not of the original identified entities permitted thru DOT issued permits....

...

[In violation of Condition 6, t]he identified commercial tour boat operators and/or the noted commercial boats/vessels operating out of the boat yard do not have commercial mooring or ramp permits issued from the managing agency DLNR–DBOR. It is also noted that neither the DOT or DLNR–DBOR agencies have to date not [sic] extended the launch and retrieve corridor to the canoe club facility from the Hanalei River mouth.

...

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> [In regards to Condition 8, f]ield inspections on site and review of the approved/permitted plot plan have been conducted by the Department. Based on the current site conditions and implementation of parking stall size standards, the area being provided for the operation of the facility provides for much less than the minimum one hundred (100) parking stalls required.

The Planning Commission referred the OSC to a hearing officer.

Contested hearings were held on fourteen (14) days between March and June 2009. On April 14, 2010, the hearing officer issued his Proposed Findings of Fact, Conclusions of Law, Recommended Decision and Order[7] (hearing officer's FOF/COL) which concluded that the Planning Department met its burden to demonstrate by a preponderance of the evidence that **Sheehan** violated Conditions 2, 5, 6, and 8, that Condition 4 was triggered, and that the Planning Commission could revoke the permits pursuant to Conditions 4 and 12.

The Planning Commission held a hearing to consider the hearing officer's recommendations.[8] At the conclusion of the hearing, the Planning Commission adopted the hearing officer's FOF/COL in its entirety. On June 21, 2010, the Planning Commission issued its FOF/COL, which in pertinent part concluded

> 20. The Planning Commission, based upon reliable probative and substantial evidence on the record, concludes that the Planning Department has met its burden of proving, by a preponderance of the evidence that [**Sheehan**] has violated Condition 2 of the Permits.
>
> ...
>
> 23. The various structures on the property, including a dwelling unit, and storage containers require a building permit. [**Sheehan**] does not have such building permit or approval from the Commission.
>
> ...
>
> 30. The placement of two 12′ x 8′6″ x 40′ mini storage containers and Matson type storage containers, the stock piling of miscellaneous waste material ... and the construction of a wooden frame shed structure, without prior Planning Commission review and SMA approval, as required by [Hawaii Revised Statutes (HRS) § 205A–29(b) (2001)3, has resulted not only in numerous violations of HRS Section 205A–28 [(2001)] and Section [10.0] of [**Kauai's** SMA Rules], but, by necessity, has resulted in the violation of Condition 2 of the Permit since no required building permits can be issued by the Department of Public Works without prior SMA approval. (HRS Section 205A–29(b))
>
> ***4** ...
>
> 40. The Planning Commission, based upon reliable, probative and substantial evidence on the record, concludes that the Planning Department has met its burden of proving, by a preponderance of the evidence, that the DOT has developed a long-range solution/facility to accommodate the commercial tour boat operators at another location and that, therefore, the Planning commission [sic] may lawfully exercise its expressly reserved right [under Condition 4] to modify conditions or revoke the permits.
>
> ...
>
> 48. The Planning Commission concludes that based upon reliable, probative and substantial evidence on the record, that the Planning Department has met its burden of proving by a preponderance of the evidence that [**Sheehan**] violated Condition 5 of the Permits.
>
> ...
>
> 52. [**Sheehan**] violated this provision of Condition 5, by allowing Hanalei River Enterprises Inc., and/or Lady Ann Tours, Inc., to use the subject facilities because these companies are not commercial tour boat operations that had been issued DLNR revocable permits to operate out of Hanalei Bay on or before June 24, 1987, when the **Sheehan** Permits were issued.
>
> ...
>
> 62. However, even, [sic] assuming that Hanalei River Enterprises Inc. and Lady Ann Tours, Inc. were commercial tour boat operations with existing DLNR/DOT revocable Permits as of June 24, 1987, [**Sheehan**] would have been required by Condition 5 to submit a request to the Planning Commission for its review and approval in 2007, by requesting substitution, additional boats, or transfer of revocable Permits prior to allowing ... these vessels to use the subject boatyard facilities.
>
> ...
>
> 64. The Planning Commission, based upon reliable probative and substantial evidence on the record,

> concludes that the Planning Department has met its burden of proving by a preponderance of the evidence, that [**Sheehan**] failed to comply with, and therefore, violated Condition 6 of the Permits.
>
> ...
>
> 78. The Planning Commission concludes that based upon reliable, probative and substantial evidence on the record, the Planning Department has met its burden of proving by a preponderance of the evidence that [**Sheehan**] has failed to provide the "minimum, 100 stalls" and therefore violated Condition 8 of the Permits.
>
> ...
>
> 81. [**Sheehan's**] contention that Condition 8 merely requires that he provide sufficient "space" for 100 parking stalls ... is without merit. Condition 8 specifically requires a minimum of "100 parking stalls". The Planning Commission concludes that providing "space and plans for 100 parking stalls" does not satisfy the requirement for actually providing "100 parking stalls.".
>
> ...
>
> 83. The Planning Commission, therefore, concludes that pursuant to its rights expressly reserved in Condition 12 of the subject Permits, and it's [sic] inherent and implied authority as recognized by the Supreme Court of Hawaii in [*Morgan v. Planning Dept., Cnty. of* ***Kauai***, 104 Hawai'i 173, 86 P.3d 982 (2004)], has the authority to modify or revoke the subject Permits.

***5** Consequently, pursuant to Conditions 4 and 12, the Planning Commission revoked **Sheehan's** permits "[b]ased on [**Sheehan's**] continued violations of and non-compliance with Conditions 2, 5, 6 and 8, and the fact that there no longer appears to be a need to continue this boatyard operation[.]"

On July 15, 2010, **Sheehan** filed a Notice of Appeal to the circuit court. Besides challenging the Planning Commission's revocation of his permits, **Sheehan** argued that the decision to revoke the permits violated **Sheehan's** due process and equal protection rights, as well as the KPD's own procedures, and the hearing officer's decision to allow Hui to intervene violated section 1–4–1 of the Rules of Practice and Procedures of the Planning Commission (1993) (Planning Commission Rules).

On May 27, 2011, the circuit court entered its "Findings of Fact, Conclusions of Law and Order" (circuit court's FOF/COL). The circuit court concluded the following:

> 17. **Sheehan** has not met his heavy burden of making a convincing showing that the Commission's decision to adopt the Hearings Officer's Recommendations and to revoke the. Permits was unjust and unreasonable.
>
> ...
>
> 19. The Commission's exercise of discretion in revoking the Permits was not arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> ...
>
> 22. The Hearings Officer's findings of fact, all of which were adopted by the Commission, were not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.
>
> 23. The Commission's decision to revoke the Permits was not clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.
>
> 24. This Court is not left with a firm and definite conviction that a mistake has been made.
>
> ...
>
> 36. The Commission did not violate any constitutional provisions by revoking the Permits.
>
> 37. The process involved in revoking the Permits did not violate any constitutional provisions.
>
> ...
>
> 49. The Hearings Officer, vested with the discretion and authority delegated to him by the Commission, properly permitted the Intervenor to intervene.

The circuit court also concluded that, as a matter of law, **Sheehan** violated Conditions 2, 5, 6, and 8 of his permits, Condition 4 was triggered, and the Commission properly invoked Condition 12. On July 21, 2011, the circuit court entered its Judgment affirming the Planning Commission's FOF/COL in its entirety.

III. Discussion

Sheehan contends the circuit court erred by affirming the Planning Commission's decision to revoke the permits, concluding the revocation of the permits did not violate **Sheehan's** constitutional rights, and concluding the

hearing officer's decision to allow Hui to intervene was proper.

However, in his opening brief, **Sheehan** fails to challenge any of the circuit court's FOFs beyond an assertion that FOF nos. 47–129 do not consider certain deposition testimony. Thus, **Sheehan** does not challenge the accuracy of the FOFs, just that the court allegedly did not afford proper weight to particular evidence which **Sheehan** asserts is favorable to him. **Sheehan** also does not challenge any of the Planning Commission's FOFs beyond a similar argument that the Commission ignored the same evidence allegedly favorable to **Sheehan**.

***6 Sheehan** asserts that he did not need to specifically challenge any FOFs in his opening brief because he challenged some of the hearing officer's FOFs/COLs before the Planning Commission, he incorporated those same arguments into his filings with the circuit court, and the "vast majority" of the circuit court's FOFs merely reiterated the findings of the hearing officer. Despite **Sheehan's** contentions, Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) provides that "[w]here applicable, each point [of error] shall also include the following: ... (C) when the point involves a finding or conclusion of the court or agency, either a quotation of the finding or conclusion urged as error or reference to appended findings and conclusions[.]" **Sheehan** failed to comply with HRAP Rule 28(b)(4)(C).

While noncompliance with Rule 28 does not always result in waiver of. points of error or arguments, *Marvin v. Pflueger,* 127 Hawai'i 490, 496, 280 P.3d 88, 94 (2012), **Sheehan** does not indirectly challenge the accuracy of any of the circuit court's or Planning Commission's FOFs. *See id.* at 497, 280 P.3d at 95 ("Though defendants do not directly cite FOF 104, they argue throughout that adjudication of [one party's] rights affect [another party's] rights, thus challenging the finding of no prejudice stated in FOF 104." (Footnote omitted)). Unchallenged FOFs are binding on this court. *Okada Trucking Co. v. Bd. of Water Supply,* 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002).

Additionally, **Sheehan** does not cite or quote any COLs from the circuit court or the Planning Commission in his points of error section as required by HRAP Rule 28(b)(4)(C). However, if the other sections of the opening brief provide the necessary information, this court affords litigants the opportunity to have their cases heard on the merits where possible. *Marvin,* 127 Hawai'i at 496, 280 P.3d at 94. In the argument section of his opening brief, **Sheehan** specifically challenges the circuit court's COL nos. 32–34 (regarding Planning Director Costa's declaration), cites to nos. 39 and 44–47 (constitutional challenges) and makes clear reference to nos. 22–30 (violation of conditions), 35–38 (constitutional challenges), and 48–50 (intervenor). In his reply brief, **Sheehan** confirms his reference to these COLs.[9] There is no confusion that **Sheehan** is challenging these COLs as evidenced by the fact that the Planning Commission and Hui were able to sufficiently provide this court with a thorough response on the merits. *Id.* at 497–98, 280 P.3d at 95–96. We therefore review **Sheehan's** contentions in this regard.

As a secondary appeal,

> [t]he standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91–14(g) to the agency's decision. This court's review is further qualified by the principle that the agency's decision carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences.
>
> > ***7** HRS § 91–14(g) (1993) enumerates the standards of review applicable to an agency appeal and provides: Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
> >
> > (1) In violation of constitutional or statutory provisions; or
> >
> > ...
> >
> > (3) Made upon unlawful procedure; or
> >
> > (4) Affected by other error of law; or
> >
> > (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> >
> > (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> ....
>
> > A COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts

> and circumstances of the particular case. When mixed questions of law and fact are presented, an appellate court must give deference to the agency's expertise and experience in the particular field. [T]he court should not substitute its own judgment for that of the agency.

Curtis v. Bd. of Appeals, Cnty. of Hawai'i, 90 Hawai'i 384, 392–93, 978 P.2d 822, 830–31 (1999) (emphasis added) (citations and internal quotation marks omitted).

In addition, "[i]f a finding is not properly attacked, it is binding; and any conclusion which follows from it and is a correct statement of law is valid." *Kawamata Farms, Inc. v. United Agri Prods.,* 86 Hawai'i 214, 252, 948 P.2d 1055, 1093 (1997) (citation and internal quotation marks omitted). As such, any conclusions which flow from the circuit court's and the Planning Commission's unchallenged FOFs, and are correct statements of law, are not in error.

Based on the foregoing considerations, our review is limited to whether **Sheehan** has demonstrated that the unchallenged FOFs do not support violations of the permit conditions such that the Planning Commission's conclusions and resulting revocation are clearly erroneous; whether **Sheehan** has demonstrated that the revocation violated **Sheehan's** constitutional rights; and whether the hearing officer erred in allowing Hui to intervene.[10]

A. Violation of Conditions and Revocation of Permits

Sheehan contends that the circuit court erred in affirming the Planning Commission's revocation of his permits because he did not violate Conditions 2, 5, 6, and 8 of the permits. Condition 4 was not triggered, and a conclusion to the contrary is counter to the reliable, probative, and substantial evidence on the whole record. Specifically, **Sheehan** argues that the circuit court, the Planning Commission, and the hearing officer ignored evidence in his favor.

The circuit court's COL nos. 22–30 provide that (1) the hearing officer's findings of fact were not clearly erroneous; (2) the Planning Commission's decision to revoke the permits was not clearly erroneous; (3) the circuit court did not have a firm conviction that a mistake was made; and (4) that as a matter of law, **Sheehan** failed to comply with Conditions 2, 5, 6, and 8, Condition 4 was triggered, and the Planning Commission properly invoked Condition 12.

***8** Condition 12 of the permits reserved "the right to modify or revoke these permits should unforeseen problems arise or should the applicant violate conditions of this approval." **Sheehan's** lone argument against the application of Condition 12 is that the KPD did not assert unforeseen problems had arisen so as to trigger Condition 12. However, the plain language of Condition 12 provides for the alternative situation where Condition 12 can be used to revoke the permits when other conditions have been violated. Thus, per Condition 12, if any of the Planning Commission's conclusions that **Sheehan** violated a condition of his permits are not clearly erroneous, the revocation of the permits was proper.

1. Planning Director Costa's Deposition

Sheehan's arguments on appeal depend to a large degree on his contention that the circuit court, Planning Commission, and hearing officer completely ignored Planning Director Costa's deposition testimony and instead relied on his oral testimony at the hearing. **Sheehan** contends it was error for the Planning Commission and hearing officer not to treat Costa's deposition testimony as conclusive evidence which **Sheehan** alleges establishes he did not violate the conditions of the permits. Yet, in COL nos. 32–34, the circuit court held that

> 32. It would have been improper for the Hearings Officer to have given greater weight to [Planning Director] Costa's deposition testimony, which was hearsay and not subject to cross-examination, than to the testimony of live witnesses, including that of Costa, who were subject to cross-examination at the OSC hearing.
>
> 33. **Sheehan** opened the door to potentially inconsistent deposition and hearing testimony by voluntarily calling Costa as a witness at the OSC hearing after he had deposed him prior to the OSC hearing.
>
> 34. Furthermore, **Sheehan**, by failing to contest Costa's hearing testimony either during or after the OSC hearing, waived any objection to and his right to challenge on appeal Costa's testimony at the OSC hearing that was at odds with Costa's deposition testimony.

Thus, as an initial issue, we must determine whether the circuit court erred in determining the proper weight afforded Costa's deposition. These conclusions of law are not binding on this court and are freely reviewable. *Nani Koolau Co. v. K & M Const., Inc.,* 5 Haw.App. 137, 141, 681 P.2d 580, 585 (1984).

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Sheehan asserts that the circuit court's COL no. 33 is erroneous because he did not assume the risk that Planning Director Costa would provide different testimony than his deposition and Sheehan was forced to call Costa as a witness because the hearing officer ignored the deposition evidence in considering Sheehan's motion to dismiss.[11] Sheehan's contentions are unavailing. If Sheehan wanted to simply read the deposition into testimony at the contested hearing, section 1–6–17(g) of the Planning Commission Rules permitted the admission of prepared testimony. Instead, he called Costa to testify. Costa was subject to questioning by all parties. Planning Commission Rules §§ 1–6–11(b), (i). Sheehan could have impeached his witness with the prior deposition. *See* Planning Commission Rules §§ 1–6–11(b), (i). COL no. 33 is not in error.

***9** Sheehan contends COL no. 34 is erroneous because he has consistently challenged the hearing officer's decision to ignore Planning Director Costa's deposition testimony. However, besides not objecting to Costa's oral testimony at the contested hearing (he called Costa as a witness) and his failure to impeach Costa, Sheehan did not assert to the Planning Commission that Costa's oral testimony was inadmissible; Sheehan only argued that the deposition testimony was a part of Costa's testimony that must be considered. At the hearing before the Planning Commission on whether to adopt the hearing officer's FOF/COL, Sheehan's counsel stated that "[Planning Director Costa's deposition] is testimony. it is probative, <u>it gets the same weight as his testimony at the contested case proceeding.</u> And in fact Mr. Costa's testimony doesn't change." (Emphasis added). Thus, any argument that the hearing officer should have ignored Costa's oral testimony because it was at odds with his deposition is waived. COL no. 34 is not error.

Sheehan further argues that Planning Director Costa's deposition amounts to a party admission binding the KPD to a position that Sheehan did not violate the conditions of his permits and Condition 4 had not been triggered, thus precluding the Commission's conclusion otherwise. Sheehan asserts that because the deposition was binding on the KPD, it is not hearsay[12] and it is the KPD's burden to explain any disparity despite the fact that Sheehan requested deposing Costa and called him as a witness.

However, this argument is without merit. First, we note that before the circuit court, Sheehan admitted that the Planning Commission was not bound by the testimony of Planning Director Costa. Sheehan does not dispute COL no. 35 which provides that the trier of fact, in this case the hearing officer, had the discretion to assess the credibility of witnesses and the weight to be given their testimony.

Second, we note that before the Planning Commission, Sheehan asserted that Costa's deposition and oral testimony were consistent. Plus, review of the deposition reveals that Costa specifically denied that he concluded Sheehan was not in violation of the conditions of his permits, merely acknowledged that some of the evidence submitted appeared to show Sheehan complied with certain conditions, and that, in his personal opinion, Condition 4 was not triggered. Even if Costa could bind the KPD, his personal conclusion regarding Condition 4 is not dispositive regarding the propriety of revocation under Condition 12.

As noted above, Sheehan has waived any argument that Planning Director Costa's deposition should be considered at the expense of inconsistent oral testimony. Costa's deposition is not presumptively conclusive and binding on the hearing officer, Planning Commission, or this court. It is not disputed that it was within the hearing officer's and the Planning Commission's discretion to weigh the evidence.

2. Condition 2

***10** Sheehan argues that the evidence demonstrates he did not violate Condition 2. Condition 2 provides

> 2. The following conditions be resolved with the Public Works Department:
>
> a. All construction must conform to the requirements of the Flood Control Ordinance.
>
> ....
>
> c. Submit plans for preliminary review prior to requiring building permit.

Sheehan contends that Costa's deposition provides that, as written. Condition 2 gave authority to the Public Works Department (PWD) to determine compliance. Sheehan argues that he was in the process of working with the PWD to resolve any relevant issues. Sheehan further asserts that Costa admitted during deposition that a letter from the PWD indicating that Sheehan was in compliance would satisfy Condition 2. However, the entirety of the evidence, even Costa's deposition, demonstrates that Sheehan misinterprets the evidence, and that the Planning Commission's conclusion that Sheehan violated Condition 2 was not clearly erroneous.

The Planning Commission and hearing officer concluded that because Sheehan did not currently have permits for

the structures located on the Property,[13] and could not get building permits without SMA approval, which Sheehan had not sought from the Planning Commission,[14] Sheehan was in violation of Condition 2 and could not be in compliance. Therefore, the focus was on whether, in the twenty years since issuance of the permits, Sheehan had obtained the required building permits, not his new effort to comply.[15]

The text of Condition 2 requires Sheehan to resolve Condition 2a and c with the PWD. However, Planning Director Costa testified at the hearing that Condition 2 requires Sheehan to obtain a building permit and get the required inspections to render the permit process completed to the satisfaction of the KPD, not simply begin the process to obtain building permits. Coastal Zone Management Inspector Leslie Milnes (CZM Inspector Milnes) further testified that all building permit applications require review by the KPD. The Planning Commission noted that former-Planning Director Avery Youn (Planning Director Youn)[16] testified that any structure in the flood zone must be cleared by the PWD and then confirmed by the KPD.

Planning Director Costa's deposition testimony does not refute the above. The deposition testimony cited by Sheehan simply acknowledged that the PWD is responsible for deciding whether Sheehan complies, and that documents from the PWD providing that Sheehan was in compliance with Condition 2 would satisfy the condition. However, Costa also testified during his deposition that the KPD was not dependent on the PWD's conclusion to determine if Sheehan complied. Further, Sheehan did not obtain documentation from the PWD that states Sheehan was in compliance. Sheehan argues that a January 23, 2009 letter from Douglas Haigh, Chief of the Building Department of the PWD, states he was in compliance. However, the portion of the letter quoted by Sheehan merely provides that the PWD had not issued a notice of violation because Sheehan had a pending application due to his renewed pursuit of permits. This does not show the PWD determined Sheehan was in compliance with Condition 2.

***11** Sheehan has not demonstrated the Planning Commission's conclusion that Sheehan violated Condition 2 was clearly erroneous.

3. Condition 5

Sheehan contends that the evidence demonstrates he did not violate Condition 5. Condition 5 provides

> 5. No new commercial tour boat operations other than those with existing DLNR/DOT revocable permits shall be allowed to use this facility. A listing of occupants of the proposed baseyard shall be submitted to the Planning Department for verification on a yearly basis. Any request for boat or vessel substitution, additional boats, transfer of revocable permits, increase in passenger capacity of commercial tour boat operations shall be subject to the review of the Planning Commission.

The Planning Commission concluded that Sheehan violated all three clauses of Condition 5:(1) he allowed new commercial tour boat operations other than those who possessed DLNR/DOT revocable permits at the time of issuance of Sheehan's permits; (2) he failed to provide a list of occupants of the boatyard on a yearly-basis; and (3) he failed to obtain approval of any boat or vessel substitution, additional boats, or transfer of permits.

Sheehan asserts that his two current occupants (Bali Hai Charters, Inc. and Lady Ann Tours, Inc.) are entities that had existing DLNR/DOT revocable permits as required by Condition 5, and the current owners obtained the original permits through transfer of the entity. Also, Sheehan contends that the plain language of Condition 5 only requires Sheehan to submit lists of occupants on a yearly basis and inform the Planning Commission of boat changes or permit transfers subject to the Commission's review, not review and approval.

Sheehan contends that Planning Director Costa testified in his deposition that Sheehan provided documents demonstrating compliance with Condition 5 and all that is required to satisfy Condition 5 is review, not approval. However, while Costa acknowledged Condition 5 only states "review" and not "review and approval", Costa testified that when "review" is used, the Commission does not just review for no reason, but to approve. Planning Director Youn further testified that it was his understanding "review" probably means "review and approval." This is in line with the use of the word "request" in Condition 5.

Sheehan also contends that because Costa testified at the hearing that he was not aware of a procedure by which one could file a request for boat or vessel substitution, the Planning Commission cannot hold Sheehan's failure to comply against him. However, the fact remains

uncontested that neither **Sheehan** nor the two occupants attempted to file any documentation that could constitute a request for transfer of permits.

Further, even assuming that the permits could be transferred without approval of a permitting agency, there is no evidence that the permits were transferred in this case. **Sheehan** cites his 1987 original list of permitted commercial boat operators which identifies Bali Hai Charters and Lady Ann Cruises as permittees. However, **Sheehan** offers no substantive argument against, and does not challenge, the circuit court's FOFs that:

> ***12** 83. According to a list of valid commercial permittees in operation as of September 30, 1988, Peter Favre was the permittee for Bali Hai Charters, and Don and Ann Moses were the permittees for Lady Ann Cruises, Inc. *See* ROA at 003201–003203.
>
> 84. The DOT has not issued any permits for commercial vessel operations since October 1, 1998. *See* ROA at 003201–003203.
>
> 85. The entity known as Hanalei River Enterprises, dba Bali Hai Charters and owned by **Sheehan**, was not listed as one of the tour boat operators operating in Hanalei Bay in the late 1980's [sic]. *See* ROA at 001048.
>
> ....
>
> 89. The entity known as Lady Ann Tours, Inc., dba Napali Explorer and owned by Mary Kagawa–Garcia, was not listed as one of the tour boat operators operating in Hanalei Bay in the late 1980's [sic]. *See* ROA at 001047–001048.

Sheehan offers no evidence refuting CZM Inspector Milnes's testimony that the original Bali Hai Charters was involuntary dissolved in 1991, whereas **Sheehan's** Hanalei River Enterprises was involuntarily dissolved in 2004, reinstated in 2005, and subsequently rebranded as Bali Hai Charters the same year. Further, **Sheehan** does not explain the difference in names between Lady Ann Cruises (on the first list) and the current occupant, Lady Ann Tours. Notably, **Sheehan** does not cite to any permits involved in this case. **Sheehan** has not demonstrated that the Planning Commission's conclusions are clearly erroneous.

Lastly, **Sheehan** argues that because he submitted lists in 1988 and 1989 that contained hand-written substitutions of permittees, the Planning Commission cannot contend **Sheehan** is now in violation of Condition 5. However, **Sheehan** cites no authority for an estoppel or waiver argument. Whether **Sheehan's** previous lists from nearly twenty years prior were compliant is irrelevant as the Planning Commission determined his current list was not. It is understandable that the Planning Commission would view a list that contains no original permittees as violative of Condition 5.

The Planning Commission did not clearly err in concluding that **Sheehan** violated Condition 5.

Because the Planning Commission was not clearly erroneous in concluding that **Sheehan** violated Conditions 2 and 5 of his permits, the Planning Commission did not err in revoking the permits under Condition 12 and the circuit court was correct in so ruling. We need not review **Sheehan's** remaining arguments regarding alleged violations of other conditions or the triggering of Condition 4.

B. Constitutional Claims

Sheehan contends that the circuit court erred in concluding that neither the Planning Commission's decision to revoke the permits nor the process utilized violated **Sheehan's** due process or equal protection rights. "A COL is not binding upon an appellate court and is freely reviewable for its correctness." *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 119, 839 P.2d 10, 28 (1992).

1. Due Process

***13 Sheehan** asserts his due process rights were violated because he was not given an opportunity to respond before the Planning Commission issued its OSC, the hearing officer denied a purported motion for summary judgment despite the clear deposition testimony of Planning Director Costa,[17] and his permits were modified without notice or hearing. **Sheehan** cites no legal authority to support his claims, and also fails to provide any citation to constitutional provisions, state or federal, under which he asserts his rights have been violated, as required by HRAP Rule 28(b)(7) and (8). Failure to comply with HRAP Rule 28 constitutes waiver of the arguments. HRAP Rule 28(b)(7); *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai'i 92, 111, 176 P.3d 91, 110 (2008) (holding that where an appellant fails to properly raise a point on appeal and does not cite to relevant authority, the court can disregard the argument).

Even considering **Sheehan's** arguments, he has not presented a sufficient due process claim. In COL nos. 44–46, the circuit concluded that **Sheehan's** due process

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rights were not violated because he was given ample notice and an opportunity to be meaningfully heard.. It is unchallenged that **Sheehan** received the July Notice, submitted documents in response to the July Notice and the OSC, and participated fully in the contested hearing before the hearing officer and the Planning Commission. **Sheehan** does not cite any rule or procedure that the Planning Commission has purportedly violated.

Sheehan has not demonstrated that the Planning Commission violated his due process rights.

2. Equal Protection

Sheehan contends that both his state and federal equal protection rights were violated because he was treated differently than other permittees. **Sheehan** cites no legal authority to support his claims as required by HRAP Rule 28(b)(7). Failure to comply with HRAP Rule 28 constitutes waiver of the arguments. HRAP Rule 28(b)(7); *Kamaka,* 117 Hawai'i at 111, 176 P.3d at 110.

Even considering **Sheehan's** general equal protection claims, **Sheehan** has not made a meritorious argument. In COL nos. 38–39, the circuit court concluded that **Sheehan** did not assert a cognizable equal protection claim and failed to present any specific, credible evidence of actual differences in any decision involving similarly situated permittees. **Sheehan** acknowledges in his opening brief that he must demonstrate he was treated differently from similarly situated persons. *Mahiai v. Suwa,* 69 Haw. 349, 360–61, 742 P.2d 359, 368 (1987). **Sheehan** cites only to testimony from Coastal Zone Management Planner Michael Laureta that, in Laureta's opinion, the KPD did not respond to **Sheehan's** filings in response to the July Notice and the OSC in the same manner as it responded to other permittees. Thus, **Sheehan** has presented no substantive evidence of other similarly situated persons who were not subject to an OSC for similar violations or whose permits were not revoked in similar circumstances. The circuit court was not erroneous.

***14** Further, **Sheehan** does not offer a substantive argument against the following COLs

> 40. Even if **Sheehan** could show some inconsistency, "[a] claim that an administrative agency has made different decisions in different cases, in different years, does not give rise to a claim for relief on equal protection grounds." *See Seven Star, Inc. v. United States,* 873 F.2d 225, 2.27 (9th Cir.1989).
>
> 41. "Municipal decisions are presumptively constitutional and, therefore, need only be rationally related to a legitimate state interest, unless the distinctive treatment of the party involves either a fundamental right or a suspect classification." *Del Monte Dunes v. Monterey,* 920 F.2d 1496, 1508 (9th Cir.1990) (citations omitted).
>
> 42. **Sheehan's** equal protection argument is subject to the rational basis review because neither a suspect classification nor a fundamental right is implicated.
>
> 43. The Commission's decision to revoke the Permits was directly related to the legitimate State interest in protecting Hawaii's shoreline.

Sheehan has not demonstrated the Planning Commission violated his equal protection rights.

C. Intervenor

Sheehan argues that the circuit court erred in concluding that the hearing officer properly allowed Hui to intervene in the contested hearing. Pursuant to Chapter 4 of the Planning Commission Rules, Hui filed a petition to intervene in the OSC hearing.[18] **Sheehan** does not dispute that the hearing officer had the discretion to grant Hui's motion to intervene. Instead, **Sheehan** solely argues that Hui does not possess the requisite interest in the proceeding to justify intervention.

Sheehan contends that the hearing officer erred because Planning Commission Rules § 1–4–1(a) requires that the intervenor demonstrate that they will be "so directly and immediately affected by the proposed project that their interest in the proceedings is clearly distinguishable from that of the general public [.]" However, Planning Commission Rules § 1–4–1(b) permits "[a]ll other persons" to apply in writing for leave to intervene. Thus, assuming arguendo Hui lacked a sufficient interest under subsection (a), Hui was not precluded from petitioning to intervene by the Planning Commission Rules. **Sheehan's** contention is thus without merit.

IV. Conclusion

For the foregoing reasons we affirm the Judgment filed on July 21, 2011, in the Circuit Court of the Fifth Circuit.

All Citations

134 Hawai'i 132, 337 P.3d 53 (Table), 2014 WL 5326516

Footnotes

1 The Honorable Kathleen N.A. Watanabe presided.

2 The permits were originally issued to **Sheehan** and his ex-wife, Patricia W. **Sheehan**. Patricia is no longer involved in the operation or ownership of the boatyard and is not a party to this case.

3 The circuit court's POF no. 7 provides

> [A Special Management Area (SMA)] Use Permit was required since the property and proposed development are within the SMA. *See* ROA at 003236. A Special Permit was required since portions of the property and proposed development are located within the State Land Use Agricultural District and such development and use were not generally permitted in that district. *Id.* A Use Permit was required since portions of the property are zoned Agricultural and Open Districts and the proposal was not a permitted use in those districts. *Id.* A Class IV Zoning Permit was required as a procedural requirement for issuance of a Use Permit. *Id.*

4 From late 2006 through 2007, the KPD conducted numerous field inspections of the Property.

5 At the hearing, the KPD was the petitioner who held the burden of demonstrating to the Planning Commission that **Sheehan** violated the conditions of his permits. *See* Rules of Practice and Procedures of the Planning Commission (1993) (Planning Commission Rules) §§ 1–6–1, –2, –11(b),–18, –19.

6 Section 1–6–17(b) of the Planning Commission Rules provides

> (b) Burden of Proof. Except as otherwise provided by law, the party initiating Commission consideration shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.

7 Section 1–6–19(a) of the Planning Commission Rules provides in pertinent part

> 1–6–19 Post Hearing Procedures for Hearing Conducted by Hearing Officer. (a) Recommendation of hearing officer:
>
> (1) Upon completion of taking of the evidence, the hearing officer shall prepare a report setting for [sic] the proposed findings of fact, conclusions of law, the reasons therefore, and a recommended order, and shall submit the report of the proceeding to the Commission.

8 Section 1–6–19(e) of the Planning Commission Rules provides in pertinent part

> (e) Commission Action. (1) In the event no statement of exceptions is filed, the Commission may proceed to reverse, modify, or adopt the recommendations of the hearing officer.

9 In his reply brief, **Sheehan** identifies circuit court's COL nos. 22–29 and 32–50 as the ones he challenged in his opening brief.

10 The Planning Commission did not issue COLs related to **Sheehan's** arguments on appeal regarding alleged violations of his constitutional rights or that the hearing officer erred in allowing Hui to intervene.

11 In its unchallenged FOFs nos. 30–32, the circuit court found that **Sheehan** deposed Planning Director Costa prior to the contested hearings, only **Sheehan's** counsel asked questions of Costa at the deposition, **Sheehan** voluntarily called Costa to testify at the hearings, and **Sheehan** did not attempt to impeach Costa with his prior deposition testimony during the contested hearings.

12 **Sheehan** challenges the notion in COL no. 32 that Costa was not subject to cross-examination at his deposition, essentially arguing that **Sheehan** should not be punished because Hui and the KPD chose not to cross-examine. But **Sheehan** only makes this point to claim that neither Hui nor the Planning Commission can challenge the admissibility of the deposition. The deposition was taken into evidence by the hearing officer and the circuit court did not conclude that Costa's deposition was inadmissible. The admissibility of Costa's deposition is not at issue.

13 **Sheehan** does not appear to contest that the structures on the Property required building permits.

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14 The Planning Commission concluded that "[t]he placement of two 12' X 8'6" X 40' mini storage containers and Matson type storage containers, the stock piling of miscellaneous waste material, including concrete ruble, lumber and meter scrape and the construction a wooden frame shed structure" constituted "development" within HRS Chapter 205A and the SMA. Rules and Regulations of the **County** of Kaua'i (1993) (SMA Rules) and **Sheehan's** failure to obtain SMA approval amounted to violations of the SMA Rules. **Sheehan** asserts that there is no evidence in the record that a second SMA Use Permit was required for the added structures. Notwithstanding **Sheehan's** contentions and the accuracy of the Planning Commission's COL that the structures constitute "development", the identified structures were not part of the original SMA Use Permit, the **County** of **Kauai's** SMA rules require that "[a]ny person proposing a use, activity, or operation" within an SMA file for an assessment as to whether further SMA review is required, SMA Rules §§ 7.1, .2, .3, and it is undisputed **Sheehan** did not seek approval before placing the structures on the Property. Without the requisite determination, no **county** department may issue other permits. SMA Rules § 10.0.

15 **Sheehan** does not dispute that he was warned in 1993 that he needed to obtain building permits for some of the pertinent structures on the Property, it was not until five years later that **Sheehan** applied for the proper permits from the PWD, he did not complete the process due to his failure to file sufficient information, and he did not renew pursuit of applicable permits until 2008, after issuance of the OSC.

16 Youn was the Planning Director at the time **Sheehan** was issued his permits in 1987.

17 **Sheehan** cites no authority to support the notion that a motion for summary judgment or a motion to dismiss the OSC is an appropriate motion at a contested hearing before the Planning Commission, or in what circumstances it should be granted.

18 In its petition, Hui self-identifies that "[o]ur organization was founded in 1985 to address the impacts of illegal activities on the traditional, cultural and subsistence practices of the lawai'a and mahi'ai of moku Halele'a."

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SCWC-14-0000828

IN THE SUPREME COURT OF THE STATE OF HAWAII

COUNTY OF KAUA'I, Plaintiff/Appellee/ Respondent, vs. HANALEI RIVER HOLDINGS, LTD., a Cook Islands corporation, et al. Defendants/Appellants/ Petitioners.	)	Civil No. 11-1-0098 (Condemnation) APPEAL FROM JUDGMENT ENTERED ON APRIL 25, 2014 FIFTH CIRCUIT COURT STATE OF HAWAII HONORABLE KATHLEEN N.A. WATANABE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date set forth below a true and correct copy of Plaintiff/Appellee/Respondent County of Kauai'i's Responset to Defendants/Appellants/Petitioners' Application for Writ of Certiorari In the Supreme Court Filed July 10, 2016 was duly served upon the following parties by electronic mail:

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PATRICIA WILCOX SHEEHAN, Individually and as Trustee of that certain unrecorded Revocable Trust Agreement of Patricia Wilcox Sheehan, dated December 21, 1994

DATED: Honolulu, Hawai‘i, July 25, 2016.

/s/ Rosemary T. Fazio
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