DAVID M. LOUIE 2162
Attorney General
DEIRDRE MARIE-IHA 7923
Deputy Solicitor General
Appellate Division
Department of the Attorney General
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1360
Counsel for Respondent/Petitioner-Appellant
Aloha Tower Development Corp

SCWC NO. 30484

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Application of HONOLULU CONSTRUCTION AND DRAYING COMPANY, LIMITED, to register title to land situate at Honolulu, City and County of Honolulu, State of Hawaii.	APPLICATION FOR CERTIORARI REGARDING THE FINAL JUDGMENT FILED ON JANUARY 18, 2013 (CAAP 30484, Civil No. 01-1-0007)
ALOHA TOWER DEVELOPMENT CORPORATION, Petitioner, vs. (*caption continued on next page*)	

ALOHA TOWER DEVELOPMENT CORPORATION'S OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

DECLARATION OF DEIRDRE MARIE-IHA

EXHIBITS A – D

CERTIFICATE OF SERVICE

STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, TRUSTEES OF WILLIAM G. IRWIN CHARITY FOUNDATION, SCENIC HAWAII, INC., THE OUTDOOR CIRCLE, HISTORIC HAWAII FOUNDATION, HAWAII'S THOUSAND FRIENDS, LIFE OF THE LAND, AND INTERVENOR CITY AND COUNTY OF HONOLULU,

Respondents.

and

SCENIC HAWAII, INC.,

Petitioner/Respondent-Appellee,

vs.

ALOHA TOWER DEVELOPMENT CORPORATION,

Respondent/Petitioner-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

This case is about the award of attorneys' fees under the private attorney general doctrine. In Sierra Club v. Dep't of Transp., 120 Hawaii 181, 202 P.3d 1226 (2009) (Sierra Club II), this Court adopted the doctrine and identified the three pertinent factors. The Intermediate Court of Appeals (ICA) applied those factors and determined that Scenic Hawaii[1] was not entitled to fees. In re Honolulu Constr. & Draying Co., 129 Hawaii 68, 293 P.3d 141 (App. 2012).[2] As discussed below, the ICA evaluated those factors in light of the facts underlying this case and correctly applied this Court's precedent. Certiorari should be denied.

STATEMENT OF THE CASE

A. Factual Background of the Deed Restriction

In 1930, Mrs. Helena Irwin Fagan conveyed the property now known as "Irwin Park" to the Territory of Hawaii with the condition that it be maintained as a public park.[3] 3 ROA at 1019, 1025 (ATDC opp. to mot. dismiss, Exs. 6 & 7). Irwin Park is a small piece of land between Aloha Tower Marketplace and Nimitz Highway. It presently houses the parking lot in front of Aloha Tower and some green space. 14 ROA at 5374 (FOF/COL).

Mrs. Fagan retained a reversionary interest in the property, if the property was abandoned as a public park. 3 ROA at 1019, 1025 (ATDC opp. to mot. dismiss, Exs. 6 & 7). In 1939 (nine

---

[1] *Parties.* The Aloha Tower Development Corporation (ATDC), Respondent here, was the petitioner before the land court, and the appellant before the ICA. Scenic Hawaii, Petitioner here, was an intervenor-defendant before the land court, and an appellee before the ICA. "Scenic Hawaii" refers to all five organizations who were jointly represented during the proceeding: Scenic Hawaii, The Outdoor Circle, Historic Hawaii Foundation, Hawaii's Thousand Friends, and Life of the Land. 1 ROA at 116 (mot. interv.); 1 ROA at 268 (order).

[2] Citations are given to the ICA's slip opinion, which is attached to Scenic Hawaii's application.

[3] The basic facts underlying ATDC's petition are included here for context. Scenic Hawaii omits several critical facts from its summary. App. at 3-4. The statement that its summary of the facts is "undisputed," id. at 3 n.4, is therefore misleading. See Slip op. at 2-3 (summarizing actions taken in the 1950s to secure waiver of deed restriction).

years after conveying the property), she signed a supplemental agreement which stated, in part, that parking of vehicles was allowed on the property "upon whatever terms and conditions deemed proper" by the Territory. 3 ROA at 1029 (Ex. 8). In 1951, the Territory began plans to construct what is now Nimitz Highway. 3 ROA at 1033 (Ex. 9). Land from Irwin Park was needed to build this new highway. Id.; 3 ROA at 1034 (Ex. 10). In late 1951, after repeated correspondence, Mrs. Fagan sent a letter indicating her intent to lift the restrictions on Irwin Park. 3 ROA at 1042 (Ex. 14). That same letter stated that "Mrs. Fagan realizes that public convenience must take precedence over personal sentiment and is willing to release the . . . restrictions contained in the deed dated November 7, 1930 . . . . " Id.

In early 1952, as the contract for the construction of Nimitz Highway awaited completion, Mrs. Fagan signed a statement at the bottom of a letter, indicating her waiver of the deed restriction:

> Waiver is hereby made of any and all damages resulting from a breach of the conditions contained in that certain deed above referred to. It is hereby agreed that the restrictive covenants contained in such deed will be withdrawn and cancelled.

3 ROA at 1014 (Ex. 4). The cover letter transmitting this statement conveys the same message: "[w]hile Mrs. Fagan is sorry that the original intention in connection with the park had to give way to progress, under these circumstances she is most happy to cooperate." 3 ROA at 1046 (Ex. 16). The Territory relied on this waiver letter, and Nimitz Highway was constructed. 3 ROA at 1050 (Ex. 20).

Later correspondence from the 1950s indicates that Mrs. Fagan's representatives understood at the time that the restriction in the deed had been waived. 3 ROA at 1052 (Ex. 21). Mrs. Fagan passed away in 1966. 3 ROA at 1056 (Ex. 22).

In 1993, the State of Hawaii Department of Transportation leased the property to ATDC. 3 ROA at 972 (Decl. of B. Minaai); 3 ROA at 976 (ATDC opp. mot. dismiss, Ex. 2).

B. ATDC's Petition to Expunge the Deed Restriction and the Land Court's Decision

In May 2001, ATDC filed its petition in land court to expunge the deed restriction on Irwin Park. 1 ROA at 1 (pet.). The petition was served on Jane Olds Bogart and William Olds, as the Trustees of the William G. Irwin Charity Foundation. 1 ROA at 95. William Olds and Jane Olds Bogart, the grandchildren of Mrs. Fagan, were added as parties in their own right in June 2001. 1 ROA at 194 (Olds and Bogart ans.). Mrs. Fagan's grandchildren were her heirs, and the Foundation was the principal beneficiary of Mrs. Fagan's residuary estate. 14 ROA at 5374 (FOF/COL). Mrs. Fagan's grandchildren and the Foundation opposed the petition. 1 ROA at 194 (Olds and Bogart ans.); 1 ROA at 141 (Foundation ans.).

Scenic Hawaii and four other organizations jointly moved to intervene in the proceeding. 1 ROA at 116. This motion was granted in September 2001. 1 ROA at 268 (order). The City & County of Honolulu also intervened, in opposition to the petition. 1 ROA at 390 (order); Slip op. at 5 (outlining City's position).

A non-jury trial was held in 2002. 14 ROA at 5373 (FOF/COL). In 2008, the land court concluded, as a factual matter, that Mrs. Fagan had not waived the deed restriction and that the original restriction was still in place, and consequently rejected the petition. 14 ROA at 5394-95. ***Nothing about this decision turns on ATDC's statutory obligations or on any public interest in open spaces.*** Id. ***The only question the land court resolved was the factual one: whether the deed restriction had been waived.*** Id. ATDC elected not to appeal the ruling on the merits.

Scenic Hawaii moved for fees and costs, premised in part on the private attorney general doctrine. 14 ROA at 5074 (mot.). ATDC contended that Scenic Hawaii did not meet the three prongs of the private attorney general doctrine test. 14 ROA at 5357-60 (opp.). ATDC also objected to block billing and vagueness in the request itself. Id. at 5361-63.

The land court heard the fees and costs motion in November 2008. Tr. Nov. 10, 2008. In a minute order dated May 1, 2009, 15 ROA at 5530, the land court granted Scenic Hawaii's motion in part and denied it in part. Id. at 5551-53. The land court noted that the application of the second prong of the private attorney general test (the necessity of private enforcement) was troubling, when private litigants with private land interests were already involved in the litigation. Id. at 5537. The court nevertheless concluded that Scenic Hawaii was entitled to some fees premised on the private attorney general doctrine. Id. at 5552; 15 ROA at 5556 (order). After allowing Scenic Hawaii to file a renewed motion to address block billing and vague entries, the court awarded total fees of $130,674.09. 15 ROA at 5552-53; 16 ROA at 5887 (order). ATDC timely appealed. HRAP 4; 16 ROA at 5907 (notice of appeal).[4]

C. The ICA's Decision

On December 19, 2012, the ICA ruled that the land court had abused its discretion when it granted attorneys' fees premised on the private attorney general doctrine. Slip op. After analyzing this Court's precedent regarding the private attorney general doctrine, the ICA held that Scenic Hawaii did not meet the first or second prongs of the private attorney general test. Id. at 12-14. As to the first prong (strength or societal importance of public policy vindicated), the ICA concluded that ATDC's "statutory duty" was not at issue during the land court proceedings, and "[t]he public policy advocated by Scenic Hawaii, however laudable, had no connection to or impact on the factual dispute regarding whether Fagan had waived the deed restrictions or gifted the reversionary interest." Id. at 12. That is, the land court's ruling was not based on a public interest in preserving open spaces, but *solely* on whether Mrs. Fagan had waived the deed restriction.

[4] Scenic Hawaii initially filed a cross-appeal, but later dismissed it. 17 ROA at 6170 (notice of appeal); ICA Order, Oct. 14, 2010.

As to the second prong (necessity of private enforcement), the ICA concluded that the participation of the respondents to ATDC's land court petition—the holders of the private reversionary interest—meant that there was no necessity of private enforcement by Scenic Hawaii. Id. at 13. The ICA also noted that the City & County of Honolulu had intervened in the case, "for the purpose of defending essentially the same public interests that Scenic Hawaii sought to protect." Id. "Scenic Hawaii did not serve as the sole representative of the vindicated public interest." Id. at 14 (citation and internal quotation marks omitted). Because Scenic Hawaii had failed to satisfy the first and second prongs of the test, the ICA did not address the third prong (number of people standing to benefit). As the ICA noted, "a trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the facts of the case." Id. (citation omitted). Because the trial court misapplied the prongs of the private attorney general test to the facts here, the ICA found that it had abused its discretion. Id.

ARGUMENT

A. The ICA Correctly Followed This Court's Precedent

The ICA's opinion is based on a careful analysis of the three cases where this Court has addressed the private attorney general doctrine: In re Water Use Permit Applications, 96 Hawaii 27, 25 P.3d 802 (2001) (Waiahole II), Maui Tomorrow v. State of Hawaii, 110 Hawaii 234, 131 P.3d 525 (2006), and Sierra Club II. Slip op. at 6-11. The ICA correctly followed this precedent, and evaluated each of the prongs of the private attorney general test in turn. The three prongs are:

> (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, [and] (3) the number of people standing to benefit from the decision.

Sierra Club II, 120 Hawaii at 218, 202 P.3d at 1263 (internal quotation marks and citation omitted). Scenic Hawaii does not quarrel with the ICA's highlighting of Waiahole II's note that "limiting the application of the doctrine to exceptional cases pursuant to the three-prong test . . . provides effective constraints on judicial discretion." Waiahole II, 96 Hawaii at 31, 25 P.3d at 806; Slip op. at 8, 14; App.[5] Nor does Scenic Hawaii contend that the ICA misidentified the relevant factors. App. The ICA made no error of law, and certiorari should be denied.

This Court's willingness to apply the private attorney general doctrine in Sierra Club II does ***not***, by itself, establish that Scenic Hawaii is also entitled to fees. Scenic Hawaii asserts that Sierra Club II itself answers this question. App. at 6 (this Court "held that Sierra Club met all three prongs of the PAGD. Sierra Club II supports Petitioner Scenic Hawaii's argument that it met all three prongs of the PAGD[.]") See also App. at 7, 8. This is conclusory. Sierra Club II established a ***test*** for the application of the private attorney general doctrine. The grant of fees in that case was based—as it should be—on the particular facts of that case. Sierra Club II, 120 Hawaii at 220, 202 P.3d at 1265. It was *not* a wholesale grant of fees to any litigant who cannot independently establish that *their* case also meets the three prongs of the test. As the ICA discussed, because no important public policy was "vindicated by the litigation" and the private participation obviated the necessity for outsiders to participate, Scenic Hawaii cannot establish its entitlement to fees.[6]

---

[5] ATDC discussed the necessity of limiting private attorney general fees awards to "exceptional" cases at length in the opening brief. Open. Br. at 1, 8, 13-15. The ICA did *not* rule that such a requirement necessarily applied; it ruled that Scenic Hawaii failed to meet prongs one and two of the test. Slip op. at 11-14.

[6] In its decision, the ICA identified three issues it was *not* deciding: (1) the merits of the land court's decision (i.e., that the deed restriction had not been waived), (2) Scenic Hawaii's standing, and (3) the applicability of any sovereign immunity defense. Slip op. at 7 n.5. The ICA correctly noted that ATDC did not raise sovereign immunity in the opening or reply briefs. Id. The decision not to raise sovereign immunity in the briefing for *this* case has no bearing on

B. The ICA Correctly Concluded That Prongs One and Two Were Not Met

The ICA correctly concluded that Scenic Hawaii has not established that it meets prongs one and two of the private attorney general test. These prongs are: "(1) the strength or societal importance of the public policy vindicated by the litigation, [and] (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff[.]" Sierra Club II, 120 Hawaii at 218, 202 P.3d at 1263 (citation and internal quotation marks omitted).[7] For both of these prongs, the ICA's decision was correct, and the application should be rejected.

As to the first prong (strength of the public policy vindicated by the litigation), the ICA concluded that "[t]he public policy advocated by Scenic Hawaii, however laudable, had no connection to or impact on the factual dispute regarding whether Fagan had waived the deed restrictions or gifted the reversionary interest." Slip op. at 12. In other words, Scenic Hawaii's own policy goals were not "vindicated by the litigation," because they were *not the subject of* the litigation. The only thing "vindicated" by the litigation was the conclusion that Mrs. Fagan had

---

other cases. The State of Hawaii has raised sovereign immunity in response to the private attorney general doctrine numerous times. See, e.g., Solomon v. Abercrombie, No. SCPW-11-0000732 (Haw. Mar. 20, 2012) (order denying fees, based in part of absence of waiver of State's sovereign immunity); County of Hawaii v. Ala Loop Homeowners, No. 27707 (Haw. Mar. 21, 2011) (order denying fees because there was no "clear relinquishment" of the State's sovereign immunity); Mauna Kea Anaina Hou v. Univ. of Hawaii Inst. for Astronomy, (App., No. 29032, May 24, 2011) (fees denied, no need to address sovereign immunity arguments), *certiorari denied*, (Order, Haw., Oct. 27, 2011); Alakai Na Keiki v. Matayoshi, SCWC-29742, (Order, Haw., Feb. 19, 2013) (rejecting application of private attorney general doctrine but not specifying reason; State had argued both sovereign immunity and quasi-judicial immunity) (copies of these four orders attached). See also Nelson v. Hawaiian Homes Comm'n, SCWC-30110 (motion for fees pending; sovereign immunity raised in opposition filed June 12, 2012); Babson et al. v. Cronin, Chief Elections Officer, CAAP-10-0000007 (appeal presently pending, sovereign immunity raised in opening brief filed Jan. 5, 2011). (This is not a complete list.)

[7] ATDC addressed the third prong in the opening brief, and stands by its arguments that this prong has also not been met. Open. Br. at 19-20. Scenic Hawaii cites Bitterroot River Protective Ass'n v. Bitterroot Conservation Dist., 251 P.3d 131, 137 (Mont. 2011). App. at 11-12. This case does not establish that Scenic Hawaii meets the third prong. Whether a large number of people in Montana benefitted from a ruling about the status of a waterway there has no bearing whatsoever on how many people would benefit from maintaining Irwin Park as is.

not, in fact, waived the deed restriction during the 1950s. Scenic Hawaii clearly had its own motivations for participating in the litigation. But the public policy goals they sought *were not relevant* to the factual question about whether the deed restriction had been waived and were consequently not "vindicated" by the suit at all.[8] This is the flaw in Scenic Hawaii's analysis. App. at 8-9.

In contrast, the legal result sought by the plaintiffs in Sierra Club II concerned the application of environmental review laws and their standing to pursue the case, and the public policies vindicated were the same. Sierra Club II, 120 Hawaii at 220, 202 P.2d at 1265. Scenic Hawaii claims that Sierra Club II holds that private attorney general doctrine "does not rely upon the technical nature of the initial Petition filed by the State[.]" App. at 8. This is mistaken. Sierra Club II has no such holding, because there was no disconnect between the goals the public policies favored by the environmental organizations that pursued that case and the *actual legal conclusions* reach by this Court. Sierra Club II, 120 Hawaii at 220, 202 P.3d at 1265. The public policies "vindicated" and the legal questions raised were *about the same thing*. Id. Here, they are not. A public interest in preserving open spaces has nothing to do with the factual question of whether Mrs. Fagan had waived the deed restriction. That disconnect shows that no public policy favored by Scenic Hawaii was "vindicated" by the land court's decision. Scenic Hawaii therefore fails to qualify for fees under the first prong of the test, and the ICA's conclusion is correct.

[8] "Vindicate" means to "confirm, substantiate," or "to provide justification or defense; justify." *Webster's Ninth New Collegiate Dictionary* (1990) at 1316. It does not mean a result a party agrees with by happenstance. The land court's decision that Mrs. Fagan had not waived the deed restriction does not confirm, substantiate, or justify the public policy objectives sought by Scenic Hawaii in any way. They therefore cannot meet this prong of the private attorney general test.

As to the second prong (necessity for private enforcement), the ICA concluded that the private landowners' (that is, the holders of the reversionary interest) participation in the case meant that there was no need for private enforcement by others. Slip op. at 13. As the ICA noted, this Court's decision in Waiahole II is instructive on this point. Waiahole II, 96 Hawaii at 30, 25 P.3d at 805 (exception to the American Rule justified only when the litigated issues are "of enormous significance to the society as a whole, [but] *do not involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts.*") (emphasis added, citation omitted), cited slip op. at 13.[9] The private attorney general doctrine is an exception to the American Rule. A departure from our courts' usual practice in apportioning fees is warranted only when the participation of outside individuals or organizations is truly necessary. Scenic Hawaii's interest in Irwin Park does not establish this necessity when other parties were already present and participating in the case on their side, including the Irwin Foundation, Mrs. Fagan's grandchildren, and the City & County of Honolulu. The ICA correctly analyzed this prong.

Scenic Hawaii emphasizes that the three plaintiff organizations in Sierra Club II did not act alone. From this, Scenic Hawaii concludes that even though multiple parties participated in this case, it can meet the second prong of the test. App. at 10. See also App. at 8 n.5. This is illogical. Scenic Hawaii and its fellow organizations were jointly represented for the length of this proceeding, as were the plaintiffs in Sierra Club II. App.; Ans. Br.; 1 ROA at 268 (order mot. intervene); Sierra Club II, 120 Hawaii at 184, 202 P.3d at 1230. In addition, Scenic Hawaii

[9] Scenic Hawaii attempts to set aside this language from Waiahole II because the Court did not apply the private attorney general doctrine in that case. App. at 10. This is transparently flawed. Waiahole II was the first of this Court's cases to address the private attorney general doctrine, and it is part of the Hawaii law discussing the proper application of the doctrine. It was discussed at length in Sierra Club II. See Sierra Club II, 120 Hawaii at 219, 202 P.3d at 1264.

represents that it was solely responsible for the attorneys' fees. App. at 2 n.1. Since Scenic Hawaii's counsel jointly represents all five organizations, id., these organizations are clearly acting as one, and should be treated as such. Sierra Club II does not hold otherwise. App. at 10. The plaintiffs in Sierra Club II were also treated as one. Sierra Club II, 120 Hawaii at 221, 202 P.3d at 1266. In any event, the "necessity of private enforcement" does not depend on how many like-minded plaintiff organizations jointly participate in the case, but on *whether their participation was necessary at all.*

Scenic Hawaii has also misunderstood the ICA's decision. Scenic Hawaii claims that "no governmental entity" opposed the ATDC's petition. App. at 10. As the ICA explained, this is inaccurate, as the City & County of Honolulu did oppose the petition. Slip op. at 5. Even if Scenic Hawaii's statement was correct, it is not relevant. The second prong requires that *Scenic Hawaii* demonstrate that *its* participation was necessary. What position any government agency takes does not, by itself, answer this question.[10]

Finally, this Court need not give credence to Scenic Hawaii's statements regarding the necessity of its own participation in the case. App. at 10-11. Scenic Hawaii offers no record citation to support its assertion that "there were numerous questions whether anyone would oppose the State," App. at 11, before they intervened. More importantly, the record does *not* support that conclusion. The Irwin Foundation and Mrs. Fagan's grandchildren (the holders of the reversionary interest) both answered the complaint *before* Scenic Hawaii's motion to

[10] Scenic Hawaii's comments regarding the ATDC, the State of Hawaii, and the Attorney General are misplaced and inappropriate. App. at 5, 12. ATDC's primary objective is to establish a vibrant commercial center at Aloha Tower. Hawaii Revised Statutes (HRS) § 206J-1. This policy goal was set by the Legislature. Id. It is the Legislature's prerogative to set public policy priorities. Lee v. Corregedore, 83 Hawaii 154, 171, 925 P.2d 324, 341 (1996). The fact that Scenic Hawaii may have differing policy priorities does not justify their commentary regarding the appropriateness of ATDC's actions.

intervene was granted. 1 ROA at 194 (Olds & Bogart ans.); 1 ROA at 141 (Foundation ans.). They both resisted the ATDC's petition from the start. Id.

Even if the private parties did not "vigorously" participate in the case until later, Scenic Hawaii is still not entitled to attorneys' fees. It is the full participation of the private landowners (the holders of the reversionary interest) that obviated the "necessity for private enforcement" here. It is of no moment that Scenic Hawaii might have approached the case differently if *it* held the reversionary interest. The private attorney general doctrine does not contemplate such second-guessing of private counsel's decisions.[11] It is especially inappropriate to do so here, where the private landowners *prevailed* before the land court. 14 ROA at 5394-95 (FOF/COL).

C. The ICA Correctly Applied the Abuse of Discretion Standard

An attorneys' fees award is reviewed for an abuse of discretion. Sierra Club II, 120 Hawaii at 197, 202 P.3d at 1242. The ICA correctly identified and applied this standard here.[12] Slip op. at 6, 14. Scenic Hawaii mentions this standard, App. at 5, but does not specifically challenge the ICA's application of it. And Scenic Hawaii's recitation of the abuse of discretion standard is incomplete. Id. An error of law is necessarily an abuse of discretion. See Maui Tomorrow, 110 Hawaii at 242, 131 P.3d at 525 ("[t]he trial court abuses its discretion if it bases its ruling on an erroneous view of the law[.]") (citation and internal quotation marks omitted).

---

[11] The Rules of Professional Conduct do not require the application of the private attorney general doctrine here. App. at 11. The doctrine has no relevance in determining what obligations Scenic Hawaii's counsel might have had to provide continued representation to their clients. It answers only the question of *who will pay for it.*

[12] In the opening brief, ATDC noted that other courts apply a more rigorous standard to attorneys' fees premised on the private attorney general doctrine. Open. Br. at 7-8. See, e.g., Utahns for Better Dental Health-Davis, Inc. v. Davis County Clerk, 175 P.3d 1036, 1038 (Utah 2008) ("unique policy implications" of private attorney general doctrine require application of *de novo* standard of review.). California recently confirmed that a more rigorous test applies when reviewing orders under their private attorney general statute, when the question presented "amounts to . . . a question of law." Serrano v. Stefan Merli Plastering Co., Inc., 262 P.3d 568, 573 (Cal. 2011). The ICA's decision is correct under either standard.

The ICA correctly applied the abuse of discretion standard here. Its analysis depended on evaluating the first two prongs of the private attorney general test in light of the facts from this case. The prongs of the test are a matter of ***law***. Sierra Club II, 120 Hawaii at 218, 202 P.3d at 1263. The central facts are: (1) that the case actually turned on a factual question about whether the deed restriction had been waived, not on any public interest in open spaces, and (2) that the parties who held private, reversionary interests in the land participated in the proceeding and objected to the ATDC's petition, along with the City & County of Honolulu. Slip op. at 11-14. Because the land court misconstrued *how the law applies* to these facts, it abused its discretion. Id. The ICA's ruling was correct, and certiorari should be denied.

CONCLUSION

Scenic Hawaii cannot establish that it is entitled to fees under the private attorney general doctrine, and the ICA's decision is completely consistent with this Court's precedent. The application for writ of certiorari should be rejected.

DATED: Honolulu, Hawaii, April 3, 2013.

Respectfully submitted,

/s/ Deirdre Marie-Iha
Deirdre Marie-Iha
Deputy Solicitor General

Attorney for Aloha Tower Development Corp.,
Respondent

SCWC NO. 30484

IN THE SUPREME COURT OF THE STATE OF HAWAII

In the Matter of the Application

of

HONOLULU CONSTRUCTION AND DRAYING COMPANY, LIMITED,

to register title to land situate at Honolulu, City and County of Honolulu, State of Hawaii.

APPLICATION FOR CERTIORARI REGARDING THE FINAL JUDGMENT FILED ON JANUARY 18, 2013 (CAAP 30484, Civil No. 01-1-0007)

ALOHA TOWER DEVELOPMENT CORPORATION,

Petitioner,

vs.

STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, TRUSTEES OF WILLIAM G. IRWIN CHARITY FOUNDATION, SCENIC HAWAII, INC., THE OUTDOOR CIRCLE, HISTORIC HAWAII FOUNDATION, HAWAII'S THOUSAND FRIENDS, LIFE OF THE LAND, AND INTERVENOR CITY AND COUNTY OF HONOLULU,

Respondents.

and

SCENIC HAWAII, INC.,

Petitioner/Respondent-Appellee,

vs.

ALOHA TOWER DEVELOPMENT CORPORATION,

Respondent/Petitioner-Appellant

DECLARATION OF DEIRDRE MARIE-IHA

I, Deirdre Marie-Iha, do declare and would competently testify as follows.

1. I am a Deputy Solicitor General, employed with the Appellate Division of the Department of the Attorney General. I am assigned to represent the Aloha Tower Development Corporation, Respondent, for this appeal.

2. Attached as Ex. A is a true and correct copy of this Court's order on Petitioners' motion for fees and costs in Solomon v. Abercrombie, SCPW-11-0000732 (Haw. March 20, 2012). This document was retrieved from our files.

3. Attached as Ex. B is a true and correct copy of this Court's order denying the request for attorneys' fees and costs in County of Hawaii v. Ala Loop Homeowners, No. 27707 (Haw. March 21, 2011). This document was retrieved from our files.

4. Attached as Ex. C is a true and correct copy of the ICA's decision in Mauna Kea Anaina Hou v. Univ. of Hawaii Inst. for Astronomy, (App., No. 29032, May 24, 2011). This document was retrieved from our files.

5. Attached as Ex. D is a true and correct copy of this Court's order from Alakai Na Keiki v. Matayoshi, SCWC-29742, dated Feb. 19, 2013. This document was retrieved from our files.

6. All four of these documents are attached to comply with Hawaii Rules of Appellate Procedure (HRAP) 35(c), which provides that "a copy of a cited unpublished disposition" shall be attached to the memorandum where the disposition is cited.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, April 3, 2013.

/s/ Deirdre Marie-Iha
Deirdre Marie-Iha

NO. SCPW-11-0000732

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MALAMA SOLOMON, STATE SENATOR, 1ST SENATORIAL DISTRICT; LOUIS HAO; PATRICIA A. COOK; and STEVEN G. PAVAO,
Petitioners,

vs.

NEIL ABERCROMBIE, GOVERNOR, STATE OF HAWAI'I; SCOTT NAGO, CHIEF ELECTION OFFICER, STATE OF HAWAI'I; STATE OF HAWAI'I 2011 REAPPORTIONMENT COMMISSION; VICTORIA MARKS; LORRIE LEE STONE; ANTHONY TAKITANI; CALVERT CHIPCHASE IV; ELIZABETH MOORE; CLARICE Y. HASHIMOTO; HAROLD S. MASUMOTO; DYLAN NONAKA; and TERRY E. THOMASON,
Respondents.

ORIGINAL PROCEEDING

ORDER GRANTING IN PART PETITIONERS' MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS
(By: Recktenwald, C.J., Nakayama, Acoba, Duffy, and McKenna, JJ.)

Upon consideration of petitioners' motion for award of attorney's fees and costs, filed on February 3, 2012, the papers in support, in opposition, in reply, and the record, it appears that petitioners' mandamus action was brought pursuant to the Hawai'i Constitution, article IV, section 10. The constitutional provision contains no waiver of the State's sovereign immunity from damages in a proceeding brought thereunder and the provision is not a basis for waiver of the State's sovereign immunity under

HRS § 661-1 (1993). Respondent Reapportionment Commission's failure to apportion the state legislature in accordance with article IV, sections 4 and 6 is not evidence that commission members acted with a malicious or improper purpose and commission members, pursuant to HRS § 26-35.5 (2009), are immune from liability for damages. An award of attorney's fees pursuant to HRS § 602-5(7) (Supp. 2011) was raised for the first time in petitioners' reply memorandum and is deemed waived.

It further appears that the costs itemized by Stanley Roehrig are: (1) necessary as to $730.55 for filing fees, intrastate travel expenses and certain postage and copying items; (2) not taxable as to costs of $340.02 unrelated to petitioners' mandamus proceeding; and (3) unreasonable as to unidentified copying costs of $1,251.00 and unidentified long distance telephone costs of $88.89.

It finally appears that the costs of $314.93 itemized by Robert Kim are necessary and reasonable. Therefore,

IT IS HEREBY ORDERED that: (1) attorney's fees are denied and (2) costs of $1,045.48 are taxed against respondent Reapportionment Commission pursuant to HRAP 39(a) and (b) and HRS §§ 607-9 and 607-24.

DATED: Honolulu, Hawai'i, March 20, 2012.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ James E. Duffy, Jr.

/s/ Sabrina S. McKenna

NO. 27707

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

COUNTY OF HAWAI'I, a municipal corporation of the State of Hawai'i, Respondent-/Plaintiff-/Counterclaim Defendant-Appellee/Cross-Appellee,

vs.

ALA LOOP HOMEOWNERS, an unincorporated association, Respondent-/Defendant-/Counterclaimant-/Cross-Claimant-Appellee/Cross-Appellant,

and

WAI'OLA WATERS OF LIFE CHARTER SCHOOL, a public school organized under the law of the State of Hawai'i, Respondent-/Defendant-/Cross-Claim Defendant-Appellant/Cross-Appellee;

and

ALA LOOP COMMUNITY ASSOCIATION, an unincorporated non-profit association, Petitioner-/Defendant-/Counterclaimant-/Cross-Claimant-/Third-Party Plaintiff-Appellee/Cross-Appellant;

vs.

LAND USE COMMISSION, STATE OF HAWAI'I, Respondent-/Third-Party Defendant-Appellee/Cross-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 03-1-0308)

ORDER DENYING REQUEST FOR ATTORNEY'S FEES AND COSTS

Upon consideration of the request for attorney's fees and costs submitted by petitioner Ala Loop Community Association

(Ala Loop), respondent Waiʻola Waters of Life Charter School's opposition, and Ala Loop's reply memorandum, it appears that Ala Loop's request is barred by sovereign immunity. "[A]n award of costs and fees to a prevailing party is inherently in the nature of a damage award." Sierra Club v. Dep't of Transp., 120 Hawai'i 181, 226, 202 P.3d 1226, 1271 (2009) (quotation marks and citation omitted). Accordingly, to properly award attorney's fees and costs against the State, "there must be 'a clear relinquishment' of the State's immunity[.]" Id. (quoting Bush v. Watson, 81 Hawai'i 474, 481, 918 P.2d 1130, 1137 (1996)). Here, there has not been a "clear relinquishment" of the State's sovereign immunity. Therefore,

IT IS HEREBY ORDERED that Ala Loop's request for attorney's fees and costs is denied.

DATED: Honolulu, Hawai'i, March 21, 2011.

FOR THE COURT:

/s/ Mark E. Recktenwald

Chief Justice

Unpublished Disposition
2011 WL 2002223
Only the Westlaw citation is currently available.
Unpublished disposition. See
HI R RAP Rule 35 before citing.
Intermediate Court of Appeals of Hawai'i.

Mauna Kea Anaina HOU; Royal Order Of Kamehameha I; Sierra Club, Hawai'i Chapter; and Clarence Ching, Plaintiffs/Appellants–Appellees/Cross–Appellants,
v.
UNIVERSITY OF HAWAI'I INSTITUTE FOR ASTRONOMY, Defendant/Appellee–Appellant/Cross–Appellee,
and
Board of Land and Natural Resources; Harry Fergestrom; and Hawai'i Island Economic Development Board, Inc., Defendants/Appellees–Appellees.

No. 29032. | May 24, 2011.

Appeal from the Circuit Court of the Third Circuit (Civil No. 04–1–0397).

Attorneys and Law Firms

Paul Alson, William M. Tam, Blake Oshiro, Shannon M.I. Lau, (Alston Hunt Floyd & Ing), Dexter K. Kaiama, on the briefs, for Plaintiffs/Appellants–Appellees/Cross–Appellants.

Darolyn H. Lendio, (University General Counsel), (Bruce Matsui, Associate General Counsel, on the Supplemental Brief), (University of Hawai'i), Lisa Woods Munger, Lisa A. Bail, (Goodsill Anderson Quinn & Stifel), on the briefs, for Defendant/Appellee–Appellant/Cross–Appellee University of Hawai'i Institute for Astronomy.

Deirdre Marie–Iha, Deputy Solicitor General, on the briefs, for Defendant/Appellee–Appellee Board of Land and Natural Resources.

Michael W. Moore, (Tsukazaki Yeh & Moore), on the briefs, for Defendant/Appellee–Appellee Hawai'i Island Economic Development Board, Inc.

FOLEY, Presiding J., Circuit Judges, PERKINS and LEE, in place of NAKAMURA, C.J., FUJISE, LEONARD, REIFURTH, and GINOZA, JJ., all recused.

Opinion

MEMORANDUM OPINION

*1 Plaintiffs/Appellants–Appellees/Cross–Appellants Mauna Kea Anaina Hou; Royal Order of Kamehameha I; Sierra Club, Hawai'i Chapter; and Clarence Ching (collectively, Appellants) cross-appeal from the "Final Judgment *in Favor of* Appellants Mauna Kea Anaina Hou, Royal Order of Kamehameha I, Sierra Club, Hawai'i Chapter, and Clarence Ching and *Against* Appellees Board of Land and Natural Resources, State of Hawai'i, University of Hawai'i Institute for Astronomy, Harry Fergestrom, and Hawai'i Island Economic Development Board, Inc." (Final Judgment) filed on January 29, 2008 in the Circuit Court of the Third Circuit [1] (circuit court). The Final Judgment

1 The Honorable Glenn S. Hara presided.

(1) incorporated the September 13, 2007 "Order Denying Appellants' Motion for Award of Attorneys' Fees and Taxation of Costs Filed on June 21, 2007" (Order Denying Fees/Costs), in which the circuit court denied attorneys' fees and costs to Appellants arising out of their appeal from the grant by the Board of Land and Natural Resources (BLNR) of a conservation-district use permit to Defendant/Appellee–Appellant/Cross–Appellee University of Hawai'i Institute for Astronomy (UHIFA); and

(2) reversed in part and affirmed in part BLNR's decision regarding the conservation-district use permit and related management plan.

The only issue before this court on appeal is the circuit court's denial of Appellants' attorneys' fees and costs, and Appellants contend the circuit court in its Order Denying Fees/Costs erred in finding as follows:

(1) "Even assuming arguendo that the [private attorney general] doctrine has been adopted in this State, the Court finds no basis for applying it to the particular circumstances of this case."

(2) "The Court further finds that Appellants' [Motion for Award of Attorneys' Fees and Taxation of Costs (Motion for

Fees/Costs)] is not supported by any statute, rule of court, bad faith, agreement, or precedent."

I. BACKGROUND

Some of the facts set forth in this section are from the circuit court's January 19, 2007 "Decision and Order: (1) Reversing BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8 Meter Outrigger Telescopes Within the Summit Area of the Mauna Kea Science Reserve Dated October 29, 2004; (2) Reversing BLNR's Finding[s] of Fact, Conclusions of Law and Decision and Order Dated October 29, 2004; and (3) Affirming in Part BLNR's Finding[s] of Fact, Conclusion[s] of Law and Decision and Order for Management Plan Dated October 29, 2004." The circuit court's findings are not challenged on appeal and are therefore binding on this court. *Hui Kako'o Aina Ho'opulapula v. Bd. of Land & Natural Res.*, 112 Hawai'i 28, 40, 143 P.3d 1230, 1242 (2006).

The summit of Mauna Kea is public land owned by the State of Hawai'i (State) under the jurisdiction of the BLNR and located in the Conservation District, in a Resource Subzone. In 1968, BLNR leased the Mauna Kea Science Reserve, located at the summit, to the University of Hawai'i (UH). The following year, UHIFA was established and "eventually assumed responsibility within the UH system for Mauna Kea."

***2** UHIFA has addressed the development of astronomical research facilities at the summit in a number of planning documents, not all of which were approved by BLNR. UHIFA's 1985 Master Plan, approved by BLNR, included a "General Description of Planned Astronomy Development" for the reserve that included thirteen steel-framed, domed telescope facilities, including two 10–meter telescopes comprising the William M. Keck Observatory (Keck Observatory). In 1995, BLNR adopted a "Revised Management Plan," which superceded the 1985 plan, but "did not provide for the same scope or coverage" as the 1985 Master Plan. The 1995 plan was "virtually silent on the matter of future development of astronomy facilities on Mauna Kea." In 2000, UHIFA developed the Mauna Kea Science Reserve Master Plan (2000 Master Plan), which was adopted by the UH Board of Regents, but not approved by BLNR.

In 2001, UHIFA filed a Conservation–District Use Permit Application with BLNR to construct and operate up to six Outrigger Telescopes, adjacent to the Keck Observatory telescopes (Outrigger Telescopes Project). Initially, UHIFA did not submit a management plan that would support the project, but later submitted a "project specific management plan" covering approximately five acres near the Keck Observatory.

Appellants and other parties requested a contested case hearing. Following the hearing, BLNR granted a permit to the Outrigger Telescopes Project and approved the management plan (Outrigger Management Plan) on October 29, 2004.

On November 29, 2004, Appellants filed an appeal with the circuit court contesting (1) BLNR's October 29, 2004, decision granting the conservation-district use permit (CDUP); (2) BLNR's October 29, 2004 Findings of Fact, Conclusions of Law and Decision and Order; (3) BLNR's October 29, 2004 Findings of Fact, Conclusions of Law and Decision and Order for Management Plan; and (4) all orders and rulings incorporated in these documents. Appellants contended: (1) BLNR erred by accepting UHIFA's conservation-district use permit application as complete where it lacked an environmental impact statement or environmental assessment and an "approved management plan"; (2) BLNR denied Appellants due process where it did not adequately notify interested parties that UHIFA sought approval of a management plan; (3) BLNR's notice of the contested case hearing did not adequately inform interested parties; (4) UHIFA's environmental assessments "failed to fully assess impacts of the UHIFA's Management Plan Drafts"; (5) BLNR erred by approving UHIFA's planning documents because they "were not comprehensive management plans designed to address long term 'cumulative land use proposals' " as required by Chapter 13 of the Hawaii Administrative Rules (HAR); (6) BLNR erroneously approved the CDUP; (7) BLNR failed to "properly evaluate and protect [Appellants'] PASH[2] rights to the extent feasible as required by Article XII, Section 7 of the Hawai'i Constitution"; (8) BLNR violated its public trust duties; (9) Appellants were denied due process when BLNR and its hearing officer did not allow Appellants to present testimony regarding deficiencies in UHIFA's 2000 Master Plan; (10) BLNR denied Appellants due process by excluding Appellants' expert's testimony regarding the National Historic Preservation Act; and (11) BLNR failed "to collect fair market value lease rent from third-party non-state entities,"

in breach of trust and in violation of Hawaii Revised Statutes (HRS) Chapter 171.

2 *Public Access Shoreline Hawaii v. Hawai'i Cnty. Planning Comm'n,* 79 Hawai'i 425, 903 P.2d 1246 (1995) (holding that Native Hawaiians retained right, with regard to undeveloped land, to pursue traditional activities).

*3 The circuit court ruled in favor of Appellants and made the following conclusions of law, which are relevant to this appeal:

> 18. The plain meaning of the term "comprehensive management plan" and the DLNR's [Department of Land and Natural Resources'] own past interpretation of that term support the conclusion that, as a matter of law, DLNR Administrative Rule [HAR] § 13–5–24, for the R–3 Resource Subzone requires a management plan which covers multiple land uses within the larger overall area that UHIFA controls at the top of Mauna Kea in the conservation district.
>
> 19. The Outrigger Management Plan covers only a single project, *not* the comprehensive "multiple land uses" and large land area required by the definition of "management plan" in [HAR] § 13–5–2.
>
> 20. Thus, the Outrigger Management Plan does *not* qualify as a "management plan" under [HAR] § 13–5–24.
>
> 21. A "management plan" under [HAR] § 13–5–24 is a precondition to granting a CDUP for the R3 Resource Subzone land use at issue here.
>
> 22. Although a Court will normally give deference to an agency's expertise and experience in its particular field, the agency's decision must be consistent with the legislative purpose in its own authorizing statute. In this instance, BLNR's decision approving the Outrigger Management Plan involves a mixed question of law and fact. However, BLNR's interpretation is not consistent with the Legislature's stated purpose in managing the Conservation District. [HRS] § 183C–1 expressly provides:
>
> > The legislature finds that lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply. It is therefore, the intent of the legislature to conserve, protect and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.
>
> [HRS] § 183C–1 (2005 Supp.) (emphasis added).
>
> 23. The resource that needs to be conserved, protected and preserved is the summit area of Mauna Kea, *not* just the area of the Outrigger Telescopes Project.
>
> 24. Allowing management plans on a project by project basis would result in foreseeable contradictory management conditions for each project or the imposition of special conditions on some projects and not others.
>
> 25. The consequence would be projects within a management area that do *not* conform to a comprehensive management plan.
>
> 26. This result would *not* be consistent with the purposes of appropriate management nor the promotion of long-term sustainability of protected resources required by [HRS] § 183–1.
>
> 27. The Court concludes that BLNR *failed* to follow the provisions of [HAR] § 13–5–24.
>
> 28. [Appellants'] substantial rights have been prejudiced by the BLNR's approval of CDUP for UHIFA's Outrigger Telescopes Project and approval [of] the Outrigger Management Plan without an approved comprehensive management plan.
>
> *4 29. Because these legal determinations are dispositive, the Court does not need to reach any other legal or factual issues.

(Emphasis in original.)

On June 21, 2007, Appellants filed the Motion for Fees/Costs, requesting $218,895.99 in fees and $3,277.38 in costs. Appellants cited the private attorney general doctrine as the sole basis for an award of attorneys' fees.

UHIFA and BLNR filed opposition memoranda to the motion, and the Hawai'i Island Economic Development Board, Inc., filed a joinder in their memoranda.

The circuit court heard arguments on the motion on August 22, 2007. In support of the motion, Appellants' attorney stated that he had spent more than 700 hours working on the case, forgoing other work during that time, and that without the ability to recoup some attorneys' fees under the doctrine,

fewer attorneys would be likely to take public-interest cases such as this in the future. Appellants' attorney also argued that the complex issues involved here could not be handled by pro se litigants. BLNR's attorney argued that the private attorney general doctrine "should not be applied to BLNR when it acts a tribunal."

The parties argued over the applicability of a three-prong test set forth in *In re Water Use Permit Applications*, 96 Hawai'i 27, 29, 25 P.3d 802, 804 (2001) (*Waiahole II*). The circuit court denied Appellants' Motion for Fees/Costs, stating:

> [A]s to prong 2 [of *Waiahole II*], the Court basically is focusing on the aspect of ... requiring that the government completely abandon the activity opposed by [Appellants].
>
> In this case it doesn't appear to the Court that the BLNR —BLNR abandoned its responsibilities as opposed to, um interpreting the administrative rules and the applicable statutes in a manner that was adverse to [Appellants]. And the Court's view is that in that scenario it's not abandoning its role in the area as much as interpreting it in a manner that [Appellants] find not acceptable to them.

The circuit court acknowledged being sympathetic to attorneys working pro bono, but then stated:

> [O]n the other hand, um, I really have a problem about awarding fees in this type of a case. And I just can not [sic] see where there would be a logical limitation as to when fees would not be imposed any time there is an agency decision which involves some interpretation that affects, um, whatever we might want to put a spin on that involves public policy.

On September 13, 2007, the circuit court issued its Order Denying Fees/Costs, which provided in part:

> While the Supreme Court of Hawaii has reviewed the background of the [private attorney general] doctrine, it has never applied it. Even assuming arguendo that the doctrine has been adopted in this State, the Court finds no basis for applying it to the particular circumstances of this case. The Court further finds that the Appellants' motion is not supported by any statute, rule of court, bad faith, agreement, or precedent.

*5 On January 29, 2008, the circuit court entered the Final Judgment, which provided:

> In accordance with Rules 54(b), 72(k) and 58 of the Hawai'i Rules of Civil Procedure [HRCP]; and
>
> Pursuant to the *Decision and Order: (1) Reversing BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8 Meter Outrigger Telescopes Within the Summit Area of the Mauna Kea Science Reserve Dated October 29, 2004; (2) Reversing BLNR's Finding[s] of Fact, Conclusions of Law and Decision and Order Dated October 29, 2004; and (3) Affirming in Part BLNR's Finding[s] of Fact, Conclusion[s] of Law and Decision and Order for Management Plan Dated October 29, 2004,* filed January 19, 2007 in this Court; and
>
> Pursuant to the *Order Denying Appellants' Motion for Award of Attorneys' Fees and Taxation of Costs Filed on June 21, 2007* filed September 13, 2007.
>
> All claims were resolved and no further claims remain in this case.
>
> There is no just reason for delay in entry of this Judgment.
>
> Therefore, JUDGMENT IS HEREBY EXPRESSLY ENTERED: (1) IN FAVOR OF Appellants MAUNA KEA ANAINA HOU, ROYAL ORDER OF KAMEHAMEHA I, SIERRA CLUB, HAWAI'I CHAPTER, and CLARENCE CHING (collectively "Mauna Kea Appellants"), and AGAINST Appellees the BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI'I ("BLNR"), the UNIVERSITY OF HAWAI'I INSTITUTE FOR ASTRONOMY ("UHIFA"), HARRY FERGESTROM, and the HAWAI'I ISLAND ECONOMIC DEVELOPMENT BOARD, INC. on the claims adjudicated by this Court's January 19, 2007 Decision and Order; and (2) AGAINST Mauna Kea Appellants on their Motion for Attorneys' Fees pursuant to this Court's Order filed September 13, 2007.

UHIFA filed its notice of appeal on February 26, 2008, but subsequently moved to dismiss the appeal, which was

approved by this court.[3] Appellants timely filed their notice of cross-appeal on February 28, 2008.

3 On August 8, 2008, UHIFA filed a motion to dismiss its appeal, which this court granted on September 2, 2008. *Mauna Kea Anaina Hou, et al., v. Univ. of Hawai'i Inst. for Astronomy,* 2008 WL 4147581 (Haw.App. Sept. 2, 2008).

II. STANDARD OF REVIEW

"The trial court's grant or denial of attorney's fees and costs is reviewed under the abuse of discretion standard." *Sierra Club v. Dep't of Transp. of State of Hawai'i,* 120 Hawai'i 181, 197, 202 P.3d 1226, 1242 (2009) (*Sierra Club II*)[4] (internal quotation marks, citation, and brackets omitted). "An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant." *Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawai'i,* 106 Hawai'i 416, 431, 106 P.3d 339, 354 (2005) (internal quotation marks and citation omitted).

4 In this opinion, we will refer to *Sierra Club v. Dep't of Transp. of State of Hawai'i,* 120 Hawai'i 181, 202 P.3d 1226 (2009), as *Sierra Club II; Sierra Club v. Dep't of Transp. of State of Hawai'i,* 115 Hawai'i 299, 167 P.3d 292 (2007), as *Sierra Club I;* and both cases collectively as *Sierra Club.*

III. DISCUSSION

A. JURISDICTION

In its Answering Brief, UHIFA argues that this court lacks jurisdiction because the Final Judgment was not a final, appealable judgment under *Jenkins v. Cades Schutte Fleming & Wright,* 76 Hawai'i 115, 869 P.2d 1334 (1994).

Pursuant to HRS § 91–15 (1993), "[r]eview of any final judgment of the circuit court under this chapter shall be governed by chapter 602." HRS § 602–57(1) (Supp.2010) provides that this court has jurisdiction "[t]o hear and determine appeals from any court or agency when appeals are allowed by law." HRS § 641–1(a) (Supp.2010) authorizes appeals to this court from "final judgments, orders, or decrees of circuit ... courts." Appeals "shall be taken in the manner ... provided by the rules of court." HRS § 641–1(c) (1993).

*6 In *Jenkins,* the Hawai'i Supreme Court held:

> (1) An appeal may be taken from circuit court orders resolving claims against parties only after the orders have been reduced to a judgment and the judgment has been entered in favor of and against the appropriate parties pursuant to HRCP 58; (2) if a judgment purports to be the final judgment in a case involving multiple claims or multiple parties, the judgment (a) must specifically identify the party or parties for and against whom the judgment is entered, and (b) must (i) identify the claims for which it is entered, and (ii) dismiss any claims not specifically identified; (3) if the judgment resolves fewer than all claims against all parties, or reserves any claim for later action by the court, an appeal may be taken only if the judgment contains the language necessary for certification under HRCP 54(b); and (4) an appeal from any judgment will be dismissed as premature if the judgment does not, *on its face,* either resolve all claims against all parties or contain the finding necessary for certification under HRCP 54(b).
>
> ....
>
> ... If claims are resolved by a series of orders, a final judgment upon all the claims must be entered. The "judgment shall not contain a recital of the pleadings," HRCP 54(a), but it must, *on its face,* show finality as to all claims against all parties. An appeal from an order that is not reduced to a judgment in favor of or against the party by the time the record is filed in the supreme court will be dismissed. If a judgment purports to be certified under HRCP 54(b), the necessary finding of no just reason for delay must be included in the judgment.

76 Hawai'i at 119–20, 869 P.2d at 1338–39 (citation and footnote omitted; emphasis in original).

HRCP Rule 72(k) requires that, upon a circuit court's determination of an administrative appeal, "the court having jurisdiction shall enter judgment." The requirements of *Jenkins* apply to circuit court judgments entered in appeals from agency decisions. *Raquinio v. Nakanelua,* 77 Hawai'i 499, 500, 889 P.2d 76, 77 (App.1995) (applying *Jenkins* in an appeal from a decision by the Director of Labor and Industrial Relations).

The Final Judgment complies with the separate document rule of HRCP Rule 58, incorporating the "Decision and Order (1) Reversing BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8

Meter Outrigger Telescopes Within the Summit Area of the Mauna Kea Science Reserve Dated October 29, 2004; (2) Reversing BLNR's Finding[s] of Fact, Conclusions of Law and Decision and Order Dated October 29, 2004; and (3) Affirming in Part BLNR's Finding[s] of Fact, Conclusion[s] of Law and Decision and Order for Management Plan Dated October 29, 2004" and the Order Denying Fees/ Costs. Moreover, the Final Judgment enters judgment as to all parties in the case and states that "[a]ll claims were resolved and no further claims remain in this case." The Final Judgment did not, however, address the eleven "claims for relief" or "counts" listed by Appellants in their statement of the case.

*7 Nevertheless, the Final Judgment did contain an express finding that there was "no just reason for delay in entry of this Judgment." Thus, the Final Judgment contains the certification required by HRCP Rule 54(b) and *Jenkins* and is appealable.

Appellants' notice of cross-appeal was filed on February 28, 2008—two days following the filing of UHIFA's notice of appeal. Under Hawai'i Rules of Appellate Procedure Rule 4.1(b)(1), the notice of cross-appeal was timely. Therefore, we have jurisdiction to consider Appellants' appeal.

B. PRIVATE ATTORNEY GENERAL DOCTRINE

The sole issue on appeal is whether the circuit court erred in declining to award attorneys' fees to Appellants, undisputedly the prevailing party below. "Normally, pursuant to the 'American Rule,' each party is responsible for paying his or her own litigation expenses. This general rule, however, is subject to a number of exceptions: attorney's fees are chargeable against the opposing party when so authorized by statute, rule of court, agreement, stipulation, or precedent." *Waiahole II,* 96 Hawai'i at 29, 25 P.3d at 804 (internal quotation marks and citation omitted).

As a judicially-created exception to the American Rule, the private attorney general doctrine is "an equitable rule that allows courts in their discretion to award attorneys' fees to plaintiffs who have 'vindicated important public rights.' " *Id.* (internal quotation marks and citation omitted). At the time of the circuit court's decision, the doctrine had been discussed, but not expressly adopted, in two Hawai'i Supreme Court cases: *Waiahole II* and *Maui Tomorrow v. State of Hawai'i Bd. of Land & Natural Res.,* 110 Hawai'i 234, 131 P.3d 517 (2006). During the pendency of the instant appeal, the Hawai'i Supreme Court expressly adopted the private attorney general doctrine and awarded attorneys' fees against the State of Hawai'i Department of Transportation (DOT) and Hawaii Superferry, Inc. (Superferry), a private company, based on the doctrine. *Sierra Club II,* 120 Hawai'i at 225, 202 P.3d at 1270.

In evaluating whether a party is entitled to attorney's fees under the doctrine, Hawai'i adopted the three-prong approach enunciated by the California Supreme Court.[5] *Id.* at 218, 202 P.3d at 1263; *see also Waiahole II,* 96 Hawai'i at 29, 25 P.3d at 804. The three factors that the court considers when applying the doctrine are: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." *Sierra Club II,* 120 Hawai'i at 218, 202 P.3d at 1263 (quoting *Maui Tomorrow,* 110 Hawai'i at 244, 131 P.3d at 527); *see also Serrano v. Priest,* 569 P.2d 1303, 1314 (Cal.1977) (en banc).

5 The California Supreme Court adopted the doctrine in response to *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612 (1975), which rejected the doctrine in federal courts. *See Serrano v. Priest,* 569 P.2d 1303, 1313 (Cal.1977) (en banc); Ann K. Wooster, Annotation, *Private Attorney General Doctrine—State Cases,* 106 A.L.R.5th 523, 557 (2003). The United States Supreme Court cautioned that the doctrine would allow courts to encroach "on a policy matter that Congress has reserved for itself," and leave courts "to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." *Alyeska,* 421 U.S. at 269. The Supreme Court held that federal courts could not grant attorney's fees without statutory authorization and, in doing so, "invited Congress to instruct the courts as to which fee-shifting policies Congress wished the courts to enforce." David Shub, *Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs,* 42 Duke L.J. 706, 710 (1992).

C. APPLICATION OF THE THREE–PRONG TEST OF THE PRIVATE ATTORNEY GENERAL DOCTRINE

1. First Prong: Strength or Societal Importance of the Public Policy Vindicated by the Litigation

*8 In the three Hawai'i Supreme Court cases discussing the private attorney general doctrine, the court concluded that the first prong was met in cases that involved "constitutional rights of profound significance," *Waiahole II,* 96 Hawai'i at 31, 25 P.3d at 806 (water rights case "involved constitutional rights of profound significance"); involved a provision of the Hawai'i Constitution, *Maui Tomorrow,* 110 Hawai'i at 244–45, 131 P.3d at 527–28; and established "the principle of procedural standing in environmental law," *Sierra Club II,* 120 Hawai'i at 220, 202 P.3d 1265.

In the instant case, the circuit court held that BLNR had failed to apply an administrative regulation: HAR § 13–5–24 (promulgated pursuant to HRS § 183C–3). Clearly, this was not a case involving "constitutional rights of profound significance." However, the circuit court did not expressly address this first prong.

2. Second Prong: Necessity of Private Enforcement and the Magnitude of the Resultant Burden on the Plaintiff

The circuit court, in its oral findings, held that Appellants had not demonstrated their entitlement to attorneys' fees under the second prong of the test ("the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff"). This prong was not met by the plaintiffs in *Waiahole II* and *Maui Tomorrow,* but was satisfied by the plaintiffs in *Sierra Club II.* In *Sierra Club II,* the Hawai'i Supreme Court concluded that the State agency "wholly abandoned" its duty to the public, 120 Hawai'i at 221, 202 P.3d at 1266, and the plaintiffs were "solely responsible" for challenging DOT'S interpretation of its duties. *Id.* at 220, 202 P.3d at 1265.

a. *Waiahole II*

Waiahole II was the second in a series of Hawai'i Supreme Court opinions concerning the "extended dispute over the water distributed by the Waiahole Ditch System, a major irrigation infrastructure on the island of O'ahu supplying the island's leeward side with water diverted from its windward side." *In re Water Use Permit Applications,* 94 Hawai'i 97, 110, 9 P.3d 409, 422 (2000) (*Waiahole I*). Out of the twenty-five parties that had participated in the contested case hearing, *id.* at 113, 9 P.3 at 425, four parties (Windward Parties) requested attorneys' fees under the private attorney general doctrine. *Waiahole II,* 96 Hawai'i at 28, 25 P.3d at 803. The supreme court held that if it "were to embrace the doctrine as a general matter," the doctrine did not apply "to the particular circumstances" presented. *Id.* at 31, 25 P.3d at 806. In particular, the supreme court noted that " 'the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff,' is less convincing" than cases applying the doctrine. *Id.* (citing to *Stewart v. Utah Pub. Serv. Comm'n,* 885 P.2d 759, 783 (Utah 1994); *Serrano,* 569 P.2d at 1315 n.20; *Montanans for Responsible Use of Sch. Trust v. Montana ex rel. Bd. of Land Comm'rs.,* 989 P.2d 800, 812 (Mont.1999)). The supreme court stated that in the other cases, the plaintiffs had "served as the sole representative of the vindicated public interest" and "[t]he government either completely abandoned, or actively opposed, the plaintiff's cause." *Waiahole II,* 96 Hawai'i at 31, 25 P.3d at 806. The supreme court further stated that the Windward Parties, on the other hand, "represented one of many competing public and private interests in an adversarial proceeding before the governmental body designated by constitution and statute as the primary representative of the people with respect to water resources." *Id.* The supreme court concluded:

> *9 The relevant point, of course, is not the extent of the Windward Parties' success on appeal, but, rather, the role played by the government. In sum, unlike other cases, in which the plaintiffs single-handedly challenged a previously established government law or policy, in this case, the Windward Parties challenged the decision of a tribunal in an adversarial proceeding not contesting any action or policy of the government. The Windward Parties cite no case in which attorneys' fees were awarded in an adversarial proceeding against a tribunal and the losing parties and in favor of the prevailing party, based on the reversal of the tribunal's decision on appeal. Nor does such a rule appear prudent from a policy standpoint, where public tribunals in adversarial settings must invariably consider and weigh various "public interests." Therefore, we hold that this case does not qualify for an award of attorneys' fees under the conventional application of the private attorney general doctrine.

Id. at 32, 25 P.3d at 807. The court in *Waiahole II* reasoned that because there were so many parties to the contested case

advocating for different positions, an attorney's fee award was an unnecessary incentive for the litigants.

b. *Maui Tomorrow*

In *Maui Tomorrow,* the Hawai'i Supreme Court found in favor of the opponents as to the second prong to the extent the opponents contested "a policy of the BLNR to lease water rights without performing the required analysis," but found that the second prong was not satisfied because the State "did not 'abandon' or 'actively oppose' [the opponents'] cause." 110 Hawai'i at 245, 131 P.3d at 528. The court reasoned that BLNR "recognized the State's 'duty to protect' " Hawaiian traditional and customary rights "to the extent feasible," but acted upon the belief that another agency "was the appropriate agency to fulfill the State's duty." *Id.*

c. *Sierra Club*

In *Sierra Club II,* the Hawai'i Supreme Court quoted from its opinion in *Maui Tomorrow,* mentioning that the court had been "careful to note ... that the policy [challenged by the opponents in *Maui Tomorrow*] was the result of an 'erroneous' understanding between two state agencies, rather than actions by the State to abandon or actively oppose the [opponents'] cause." *Sierra Club II,* 120 Hawai'i at 220, 202 P.3d at 1265. In contrast to the BLNR in the *Maui Tomorrow* case, the supreme court held that DOT "wholly abandoned [its] duty" under HRS Chapter 343 to get an environmental assessment by "issuing an erroneous exemption to Superferry." *Sierra Club II,* 120 Hawai'i at 221, 202 P.3d at 1266. The court held that by exempting the Superferry from the standard environmental review process, DOT "simply did not recognize its duty to consider both the primary and secondary impacts of the Superferry project on the environment." *Id.*

d. *Mauna Kea*

The instant case is similar to *Sierra Club* in that *Sierra Club II* "clarified DOT'S responsibilities under HRS [C]hapter 343," 120 Hawai'i at 221, 202 P.3d at 1266, and the instant case clarified BLNR's duties under HAR § 13–5–24. Appellants rely on this clarification as evidence that BLNR "wholly abandoned" its responsibilities for managing conservation-district land. Appellants argue that "[a]s in *Sierra Club,* the State Defendants simply did not recognize their duty and refused to carry it out." However, the instant case is distinguishable from *Sierra Club* in factual and procedural respects.

***10** First, DOT'S grant of an exemption from the preparation of an environmental assessment at issue in *Sierra Club* differs from the grant of a permit and approval of the management plan here. DOT'S February 2005 exemption determination was made "[f]ollowing discussions with Hawaii Superferry and consultation with State and County agencies regarding the intended use of the [Kahalui] harbor facility and in consideration of the provisions in Chapter 343, [HRS] and Chapter 11–20[HAR]." *Sierra Club I,* 115 Hawai'i at 310, 167 P.3d at 303. In contrast, BLNR's decision was made following a contested case hearing, in which six non-State parties participated in hearings over eight days. [6]

6 Although Appellants complain of defects in notice provided prior to the contested case hearing, the circuit court made no determination regarding the adequacy of the notice provided.

Second, *Sierra Club* followed a direct action in the circuit court. *Sierra Club I,* 115 Hawai'i at 311, 167 P.3d at 304 (Sierra Club and other environmental groups filed a complaint "for declaratory, injunctive and other relief" against, inter alia, DOT and Superferry). As in *Waiahole II* and *Maui Tomorrow,* the instant case stems from an appeal from an agency decision.

In *Sierra Club I,* the supreme court stated:

> Contrary to the expressly stated purpose and intent of [the Hawai'i Environmental Policy Act], the public was prevented from participating in an environmental review process for the Superferry project by DOT'S grant of an exemption to the requirements of HRS [C]hapter 343.... "All parties involved and society as a whole" would have benefitted had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the Hawai'i Environmental Policy Act.

115 Hawai'i at 343, 167 P.3d at 336. In contrast to the Superferry case where public participation was cut off by DOT'S abandonment of its duties, Appellants participated in the agency proceedings below.

In *Waiahole II,* the supreme court suggested that it was inclined to adopt a rule that forbids attorney's fees in all appeals from contested cases when it asserted that "such a rule" awarding fees "in an adversarial proceeding against a tribunal and the losing parties and in favor of the prevailing

party, based on the reversal of the tribunal's decision on appeal" would not be "prudent from a policy standpoint." 96 Hawai'i at 32, 25 P.3d at 807.

Given the foregoing, we cannot conclude the circuit court abused its discretion to the extent it held Appellants did not satisfy this second prong.

3. Third Prong: The number of people standing to benefit from the decision

Because Appellants did not satisfy the second prong, there is no need to address the number of people standing to benefit from the decision, as required by the third prong. In *Waiahole II,* the supreme court held that the private attorney general doctrine did not apply because although the plaintiffs met the "first and third prongs of the doctrine's three-prong test," they failed to satisfy the second prong. 96 Hawai'i at 31, 25 P.3d at 806.

***11** Therefore, we conclude the circuit court did not clearly exceed the bounds of reason or disregard rules or principles of law or practice to Appellants' substantial detriment.

D. SOVEREIGN IMMUNITY

Because we are affirming the Final Judgment of the circuit court based on its holding that Appellants failed to satisfy the three prongs of the private attorney general doctrine, there is no need to address the parties' arguments concerning the applicability of sovereign immunity.

IV. CONCLUSION

The "Final Judgment *in Favor of* Appellants Mauna Kea Anaina Hou, Royal Order of Kamehameha I, Sierra Club, Hawai'i Chapter, and Clarence Ching and *Against* Appellees Board of Land and Natural Resources, State of Hawai'i, University of Hawai'i Institute for Astronomy, Harry Fergestrom, and Hawai'i Island Economic Development Board, Inc." filed on January 29, 2008 in the Circuit Court of the Third Circuit is affirmed.

End of Document

SCWC-29742

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

ALAKAʻI NA KEIKI, INC.,
Petitioner/Plaintiff-Appellant,

vs.

KATHRYN MATAYOSHI, in her official capacity
as Superintendent of Education
Respondent/Defendant-Appellee.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(ICA NO. 29742; CIV. NO.05-1-1658)

ORDER DENYING REQUEST FOR ATTORNEYS' FEES
(By: Recktenwald, C.J., Nakayama, Acoba, McKenna, and Pollack, JJ.)

Upon consideration of the request for attorneys' fees submitted by Petitioner/Plaintiff-Appellant on June 13, 2012 pursuant to Hawaiʻi Rules of Appellate Procedure Rule 39, the attachments thereto, the opposition filed by Respondent/Defendant-Appellee on June 22, 2012, the reply filed by Petitioner on June 29, 2012, and the record herein,

IT IS HEREBY ORDERED that the request for attorneys' fees is denied.

DATED: Honolulu, Hawai'i, February 19, 2013.

Perry W. Confalone and
Steven M. Egesdal,
for Petitioner

Deirdre Marie-Iha,
for Respondent

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Simeon R. Acoba, Jr.

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

CERTIFICATE OF SERVICE

I certify that respondent/petitioner-appellant's opposition to application for certiorari was either served electronically (through the Court's JEFFS system), or conventionally (by mailing two copies via USPS, first class, postage prepaid), upon the following on April 3, 2013:

JOHN T. HOSHIBATA, ESQ.
JEANNETTE H. CASTAGNETTI, ESQ.
JAE B. PARK, ESQ.
2300 Pauahi Tower
1003 Bishop Street
Honolulu, HI 96813

Attorneys for Petitioner/Respondents-Appellees Scenic Hawaii, Inc.,
The Outdoor Circle, Historic Hawaii Foundation,
Hawaii's Thousand Friends, and Life of the Land

SUSAN M. ICHINOSE, ESQ.
P.O. BOX 240749
Honolulu, HI 96824

Attorney for Respondents
WILLIAM L. OLDS, JR. and JANE OLDS BOGART

DENNIS E.W. O'CONNOR, SR., ESQ.
KELVIN H. KANESHIRO, ESQ.
Reinwald O'Connor & Playdon
24th Floor, Makai Tower
733 Bishop Street
Honolulu, HI 96813

Attorneys for Respondent
Trustees of the William G. Irwin Charity Foundation

LINDA L.W. CHOW, ESQ.
Deputy Attorney General
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813

Attorney for Respondents
State of Hawaii and DLNR

DON S. KITAOKA, ESQ.
Corporation Counsel
City and County of Honolulu
530 S. King Street
Honolulu, HI 96813

Attorney for Intervenor
City and County of Honolulu

DATED: Honolulu, Hawaii, April 3, 2013.

Respectfully submitted,

/s/ Deirdre Marie-Iha
Deirdre Marie-Iha
Deputy Solicitor General

Attorney for Aloha Tower Development Corp.,
Respondent/Petitioner-Appellant