NO. 29440

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI`I

KAUAI SPRINGS, INC.,	)	Civil No. 07-1-0042
	)	(Other Non-Vehicle Tort)
Plaintiff-Appellant/Appellee,	)	
	)	APPEAL FROM THE SEPTEMBER 23, 2008
vs.	)	FINAL JUDGMENT ON THE COURT'S
	)	SEPTEMBER 17, 2008 FINDINGS OF FACT,
PLANNING COMMISSION OF THE	)	CONCLUSIONS OF LAW, AND ORDER
COUNTY OF KAUA`I,	)	REVERSING IN PART AND VACATING IN
	)	PART APPELLEE PLANNING
Defendant-Appellee/Appellant.	)	COMMISSION OF THE COUNTY OF
	)	KAUA`I PLANNING COMMISSION'S
	)	FINDINGS OF FACT, CONCLUSIONS OF
	)	LAW, DECISION AND ORDER RE: USE
	)	PERMIT U-2007-1, SPECIAL PERMIT SP
	)	2007-1, AND CLASS IV ZONING PERMIT
	)	Z-IV-2007-1 (DATED JANUARY 23, 2007)
	)	
	)	FIFTH CIRCUIT COURT
	)	
	)	HONORABLE
	)	KATHLEEN N.A. WATANABE

APPELLANT PLANNING COMMISSION OF THE COUNTY OF KAUA`I'S REPLY BRIEF

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APPELLANT PLANNING COMMISSION OF THE COUNTY OF KAUA`I'S REPLY BRIEF

I. INTRODUCTION

Appellant Planning Commission of the County of Kaua`i (the "Commission"), by and through its attorneys, McCorriston Miller Mukai MacKinnon LLP, hereby respectfully submits this Reply Brief in this appeal from the Fifth Circuit Court's Findings of Fact, Conclusions of Law, and Order Reversing in Part and Vacating in Part the Planning Commission's Findings of Fact, Conclusions of Law, Decision and Order re: Use Permit U-2007-1, Special Permit SP 2007-1, and Class IV Zoning Permit Z-IV-2007-1 (dated January 23, 2007), filed on September 17, 2008 ("September 17, 2008 Decision and Order"), and Final Judgment, filed on September 23, 2008.

The bottom line in this case is that Appellee failed to present sufficient evidence of its right to commercialize Kaua`i's ground-water resources and whether its use of water was adequately regulated and non-detrimental to its neighbors and to the People of Kaua`i. The Commission could not comply with its public trust duties and, simultaneously, approve the requested permits based on the evidence presented by Appellee and the equivocal responses by agencies tasked with water regulation. This Court should reverse the Circuit Court's decision to deem the Use and Class IV Zoning permits automatically approved because Appellee failed to meet its burden of proof that the requirements were satisfied and Appellee assented to delay the deadlines by its actions and representations. The Court should reverse the Circuit Court's decision to order the Commission to grant the Special Permits because Appellee failed to meet its burden of proof.

II. DISCUSSION

A. The Circuit Court Erred in Concluding that Appellee Carried its Burden of Proof by Presenting Sufficient Evidence of its Right to Commercialize Kaua`i's Ground-Water Resources and that its Use of Water was Adequately Regulated and Non-Detrimental to its Neighbors and to the People of Kaua`i.

Although the Answering Brief properly acknowledges that the Commission fulfilled its duty by considering Appellee's actual and proposed use of fresh-water resources, it fails to adequately address the central issue of this appeal: *whether Appellee actually carried its burden of proof by presenting sufficient evidence of its right to commercialize ground-water from Kahili Mountain and whether its actual and proposed use of water was adequately regulated and non-*

detrimental to its neighbors and the general welfare. Reversal of the September 17, 2008 Decision and Order is warranted because the Circuit Court erred in concluding as a matter of law that Appellee met those burdens. *See* Opening Brief at 14-15 ¶¶ D & E.

1. Appellee alone bore the burden of proof to establish its right to commercialization fresh-water resources taken from Kahili Mountain and whether its actual and proposed use was adequately regulated and non-detrimental to the community and to the general welfare.

The lower court based its decision, in part, upon the improper belief and conclusion that the Commission was required to find "that Kauai Springs *did not* carry any of its burdens to show it was entitled to the three permits . . . ." Record on Appeal ("ROA") V.2 at 190 ¶ 74 (emphasis added). On the contrary, Appellee was required to show that it *did* carry the burdens imposed under both the public trust doctrine and Kaua`i's Comprehensive Zoning Ordinance ("CZO"). The Rules of Practice and Procedures of the Planning Commission ("RPP") clearly require that "the party initiating Commission consideration *shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion.*" RPP § 1-6-17(b) (emphasis added). Moreover, when water resources subject to the pubic trust are at issue, "*the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust*[,]" and private commercial uses demand a "higher level of scrutiny." In re Water Use Permit Applications, 94 Hawai`i 94, 142, 9 P.3d 409, 454 (2000) (hereinafter "Waiahole I") (emphasis added); In re Wai`ola O Moloka`i, Inc., 103 Hawai`i 401, 429, 83 P.3d 664, 692 (2004).

Therefore, the Commission had the burden of inquiry and Appellee had the burden to respond with concrete evidence. The Commission could not comport with its land use and public trust duties by merely rubber stamping Appellee's application without sufficient evidence.

Appellee was required to show that its actual and proposed water use was non-detrimental to its neighbors and the community, properly regulated, and based on legitimate rights to the water. The CZO requirements for granting Use, Class IV Zoning, and Special permits specifically required the Commission to inquire into Appellee's water use. "A Use Permit may be granted only if . . . [the] activity or use in a particular case is a compatible use and is not detrimental . . . *and will not cause any substantial harmful environmental consequences . . . on other* lands or *waters* . . . ." Kauai County Code ("KCC") § 8-20.5(a) (emphasis added); *see* id. at 8-19.6(b) (applying the standard set forth in Section 8-20.5(a) to the issuance of a Class

IV Zoning permit). To grant the Special Permit, the Commission was required to verify that "*[t]he use would not unreasonably burden public agencies to provide . . . water*[.]" RPP § 13-6(a) (emphasis added).

Constitutional and common law principles required the Commission to consider water rights and regulation of Appellee's use of fresh water, because the Commission on Water Resources Management ("CWRM") will generally not assert jurisdiction outside of ground-water management areas. Under Hawai`i law, when the CWRM declines to assert jurisdiction over waters subject to the public trust, the political subdivisions located in non-ground-water management areas retain their common law duties to protect, control and regulate the use of these water resources. See Waiahole I, 94 Hawai`i at 179, 9 P.3d at 491 ("In [water management areas], the permitting provisions of the Code prevail; water rights in non-designated areas are governed by the common law.") (quoting Ko`olau Agric. Co. Ltd. v. Comm'n on Water Res. Mgmt., 83 Hawai`i 484, 491, 927 P.2d 1367, 1374 (1996)). The Island of Kaua`i has not been designated as a ground-water management area. Administrative Record of the proceedings before the Kaua`i Planning Commission, numbered 000001 to 000684 ("KPC"), at 411 (Letter from Dean A. Nakano to Ian K. Costa (Sept. 26, 2006)).

In an attempt to downplay the Commission's duties to protect and conserve fresh-water resources, Appellee enumerates three so-called "standards" concocted from the opinion in Kelly v. 1250 Oceanside Partners. See Answering Brief at 26-27. Under its first Kelly "standard," Appellee argues that examining its use of ground water resources "was beyond [the Commission's] jurisdiction and competency" because "[i]n Kelly, the County's public trust duty was limited and related to its responsibility to issue grading permits." Answering Brief at 27 ¶ 1. This argument assumes that the Commission's authority to issue land-use permits did not require it to consider Appellee's water use. However, as explained supra, the applicable[1] CZO and RPP provisions specifically required the Commission to evaluate whether Appellee's water use was detrimental to the community and the general welfare. Appellee also blatantly disregards the Commission's duties to "conserve and protect . . . all natural resources, including . . . water . . . and to promote the development and utilization of [fresh water] in a manner consistent with [its] conservation and in furtherance of the self-sufficiency of the State." Haw. Const. art. XI, § 1.

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[1] Appellee's hypothetical on page 28 of its Answering Brief is irrelevant and distinguishable. This Court may take judicial notice that, unlike the CZO and RPP provisions in this case, the DMV provisions alluded to do not require that agency to consider water use.

The Commission complied with these standards by inquiring into, for example: (1) the effects of the proposed fourteen-fold increase in water usage on the capacity of the ground-water source, KPC at 221, 241-242, 263; (2) whether discharge of chlorinated water from Appellee's operation might cause environmental harm to neighboring streams, KPC at 210-212; (3) Appellee's right to commercialize and distribute water subject to the public trust, KPC at 134-135; and (4) whether Appellee complied with CWRM and Public Utilities Commission ("PUC") regulations intended to protect and conserve fresh-water resources, KPC at 344 ¶ 28, 346 ¶ 3. Because Appellee failed to present concrete evidence that its use was integrated, properly regulated, and based on legitimate rights the Commission properly denied the permits.

2. The Planning Commission properly denied the permits because Appellee failed to meet its burdens of proof and the feedback from the CWRM and the PUC did not resolve questions applicable to granting of the permits.

The Circuit Court erred in concluding that "[t]he Decision and Order contains no finding, and there is no evidence in the Record, that [Appellee] did not meet the criteria for issuing the three permits at issue . . . ." Opening Brief at 30 (citing ROA V.2 at 188 ¶ 59). As explained supra, it was improper for the Circuit Court to impose a duty on the Commission to prove that Appellee did *not* meet the criteria. Instead, Appellee was required to bear the burden of proof by presenting relevant and conclusive evidence—which it failed to do. The Circuit Court never seriously considered whether Appellee actually met *its* burdens.

Appellee presented no concrete evidence of its right to commercialize the water, or that such use was properly regulated, or that its proposed fourteen-fold increase in use would be non-detrimental to its neighbors and the general welfare. Although Appellee was well aware from the beginning that its operation was traversing "new and uncharted ground . . . in a very gray and dimly lit regulated area," it made no attempt to investigate the issue of water rights. KPC at 134-135, 661 ¶ 5; Opening Brief at 6, 11. The Supplemental Document included with Appellee's application was riddled with irrelevant information and unsupported conclusions and utterly failed to present any concrete evidence relating to the legality and integration of its actual and proposed use of ground water. Opening Brief at 6-7, 25, 29-30.[2] Neither Appellee nor the purported owner of the fresh water could even present conclusive evidence of the total volume of

[2] Planner Barbara Pendragon's assertion that Appellee's bottling facility was "relatively low impact *at the subject location*" was, and is, irrelevant to its impact on other lands and water resources—as well as to the issue of water rights. See Answering Brief at 8.

water percolating from the cave. Opening Brief at 7, 29-30. During the public hearings, Appellee made unclear and contradictory statements—including the amount of water that it proposed to extract and commercialize. Opening Brief at 9. Under these circumstances, the Commission was justifiably concerned about the lack of tangible evidence regarding Appellee's use of water resources held in trust for the benefit of the public. Opening Brief at 25.

To distract the Court from this lack of tangible evidence, Appellee attempts to dilute and downplay the Commission's public trust duties by enumerating two additional Kelly "standards." Answering Brief at 26-27. These later two "standards" derive from the language of the Hawai`i Supreme Court's analysis as it applied the County of Hawai`i's public-trust duties to the specific facts in Kelly. Under Appellee's purported "standards," "an agency must only take `reasonable measures' to consider the public trust resource" and "must only `make appropriate assessments' in order to satisfy its public trust duties." Answering Brief at 25 ¶¶ 2 & 3. However, Appellee ignores the actual standards set forth in Kelly, which are based in large measure on the plain language of the State Constitution and controlling precedents. Under these "actual" standards, the Commission was required and empowered to:

(1) protect and promote the State's water resources, defined as "all waters" including ground water;

(2) ensure continued availability and existence of water for present and future generations;

(3) promote the development and utilization of water in a manner consistent with conservation and in furtherance of the self-sufficiency of the State; and

(4) maximize the water resource's social and economic benefits by protecting the water in its natural state.

Kelly, 111 Hawai`i at 222-23, 140 P.3d at 1002-03. Under either set of standards, however, the Commission upheld its public trust duties by denying the three permits.

To ascertain the legality of Appellee's commercial use of water, the Commission sought input from the CWRM and the PUC. The Commission denied the three permits in large part because the responses from CWRM and PUC failed to resolve questions about the regulatory requirements for Appellee's water use and any associated rights thereto.

Although CWRM declined to assert jurisdiction over Appellee, it warned that Appellee's use of water could affect instream flows requiring an instream flow permit. Opening Brief at 7-8 (citing KPC at 411). To resolve uncertainties in CWRM's initial response, the Planning Director wrote to the CWRM seeking clarification of the conditions under which that agency would *not*

require a permit from Appellee. One of the three conditions stated that "[t]he tunnel is not being changed, and *the Applicant's use of the water is not affecting the source in any way (i.e. not inducing more water to come out of the source or tunnel).*" KPC at 408 (emphasis added). The letter requested CWRM to "advise if you concur with the foregoing [conditions], and *if pursuant to those conditions, no permit is required from the [CWRM].*" KPC at 409 (emphasis added). While concurring with the conditions, the CWRM's response did not address whether those conditions were satisfied and did not conclude that no permits were required. Opening Brief at 8 (citing KPC at 407). Moreover, the letter did not address which agency should determine whether those conditions were satisfied. In the absence of clarification as to whether Appellee was required to obtain an instream flow permit, the Commission could not issue the three permits while complying with its public trust duties.

Both Appellee and the Circuit Court misrepresented the import of the CWRM's response and the Commission's interpretation. Finding of Fact #54 of the Circuit Court's Decision and Order misconstrues the Commission's finding by substituting the word "because" in place of the word "if"—thereby treating the three "conditions" as if they were "conclusions." Opening Brief at 26 (citing ROA V.2 at 174-175). Appellee continues to perpetuate this incorrect interpretation in its representations to this Court. Answering Brief at 15, 29.

The PUC responded that "it does not *appear* that Kauai Springs would be a public utility subject to commission jurisdiction." KPC at 418 (emphasis added). The agency warned, however, that this initial assessment was informal and non-binding, limited by the facts provided, and subject to change based on evolving law in Hawai`i. KPC at 418. In light of these equivocal responses, the Commission struggled to decide whether it should ignore a potentially illicit use of public trust waters and "approve the land based activity [even if doing so] directly suggests or approves the transport and consumption of the water." KPC at 184 (Comments of Mr. Matsukawa, Nov. 28, 2006, Hearing).

After affording Appellee 210 days to present sufficient evidence, the Commission found that "there may be outstanding regulatory processes with CWRM that Applicant must satisfy[,]" and "PUC . . . encourages that a declaratory ruling be sought to allow more diligent review of the relevant facts and information associated with the proposed water bottling facility." KPC at 345-346; Opening Brief at 11, 27. Because Appellee provided insufficient information, and thereby failed to meet its burden of proof, the agencies were unable to draw reasonable conclusions. At the January 23, 2007 Hearing, Planner Bryan Mamaclay explained:

> [G]etting comments [from] these agencies was an issue because . . . we need some comfort level or some certainty that the applicant has the right or the authority to extract and draw the water on a commercial basis. Going to . . . [CWRM], if you look at their letter yes they say they don't need any permits but the letter does contain some caveats or some qualifying statements that there may be some permits required for the alterations made where the water enters the tunnel.
>
> . . .
>
> [I]f you look at the response you see "it's provided that" so those kind of words really, it really drew interest in my evaluation because the thinking was, was there a process where the applicant or the owner of the land Grove Farm in this case at the intake level, did they go through a process to ensure that there is no violation of any [CWRM] rules. So we didn't have that comfort level in saying that they have met other requirements from [CWRM]. I know it's a land use issue but we are taking a look at the whole system of the applicant's effort in getting the water.[3]
>
> . . .
>
> [T]here is some uncertainty in our review that the applicant doesn't have the right to draw the water.

KPC at 135-137.

B. The Circuit Court Erred in Determining that Appellee did not Expressly or Impliedly Assent to Waive Two of the Three Applicable Automatic Approval Deadlines.

The Circuit Court erred in concluding that Appellee did not assent to extend the automatic approval deadlines for the Use and Class IV Zoning permits and that the "failure to adhere to the time requirements was due solely to the actions of the Commission." Opening Brief at 15 ¶ F, 30. By its conduct, Appellee led the Planning Commission to reasonably believe that Appellee assented to a delay in the final decision on these permits.

The Circuit Court concluded without inquiry that the deadlines for granting or denying the Use and Class IV Zoning permits had expired. However, it is clear that Appellee's application was not complete on July 5, 2005[4] and that Appellee expressly and impliedly assented to extend the deadlines for granting or denying these two permits.

1. HRS Section 91-13.5(e) does not preclude local law from incorporating assent-to-delay provisions, but only dictates circumstances when waiver of the automatic approval deadlines is mandatory.

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[3] Appellee plainly misquoted the Administrative Record. See Answering Brief at 9.

[4] It is well-settled that appellate courts may consider novel issues if "justice so requires" and "the question is of great public importance." Paul v. DOT, 115 Hawai`i 416, 428, 168 P.3d 546, 558 (2007) (quoting Hill v. Inouye, 90 Hawai`i 76, 82, 976 P.2d 390, 396 (1998)).

Contrary to Appellee's overly restrictive interpretation of Section 91-13.5(e), see Answering Brief at 21, that provision creates a mandatory requirement to waive the automatic approval deadlines under certain circumstances and does not preclude local law from permitting assent-to-delay provisions. Section 91-13.5(e) (emphasis added) states that:

> The maximum period of time established pursuant to this section *shall* be extended in the event of a natural disaster, state emergency, or union strike, which would prevent the applicant, the agency, or the department from fulfilling application or review requirements.

Using Appellee's own logic, Section 91-13.5(e) does not preclude the assent-to-delay provisions contained in Section 8-19.5(g) and 8-19.6(e) of the CZO, because these provisions are not mandatory in nature. Opening Brief at 30-31. Appellee relies upon the ancient maxim of *expressio unius est exclusio alterius* to support its argument that Section 91-13.5(e) rendered pre-existing assent-to-delay provisions of the CZO unlawful. Answering Brief at 20-23. However, as stated by the Hawai`i Supreme Court, "[t]he inclusion of a specific matter in a statute implies the exclusion of another '*only where in the natural association of ideas the contrast between a specific subject matter which is expressed and one which is not mentioned leads to an inference that the latter was not intended to be included within the statute.*'" Int'l S&L Ass'n v. Wiig, 82 Hawai`i 197, 201, 921 P.2d 117, 212 (1996) (emphasis added) (quoting 82 C.J.S. Statutes § 333, at 670 (1953)). Section 91-13.5(e) dictates circumstances when local law "must" waive the automatic approval deadlines but not when it "may" permit the applicant's voluntary assent to a delay. The application of *expressio unius est exclusio alterius* to Section 91-13.5(e) precludes the CZO from creating other situations when the automatic approval deadlines "must" be waived. However, the CZO provisions at issue do not create such mandatory waivers.

Moreover, the maxim cited by Appellee was never meant to nullify legislative intent when it is clear. "The maxim, *expressio unius est exclusio alterius*, exists only as an aid to statutory interpretation and *its application should be limited to ascertaining legislative intent which is not otherwise apparent.*" Wiig, 82 Hawai`i at 201, 921 P.2d at 212 (citing Mass. Trustees of Eastern Gas and Fuel Assocs. v. United States, 312 F.2d 214, 220, aff'd, 377 U.S. 235 (1963)) (emphasis added). In this case the legislative history for Section 91-13.5(e) shows that it was never intended to override established local provisions, unless they were clearly inconsistent.

> Your Committee's intent is that all agencies to which this bill applies shall adopt rules implementing the purpose of this bill and that *the status quo shall not be*

> *altered until such rules are adopted. Specifically, this bill is not meant to change the existing legal requirements for actions necessary to approve applications and petitions which must be voted on by boards and commissions, as long as the actions are taken within the time limits established by statute or rule.*

Conf. Com. Rep. No. 143 on S.B. No. 2204, in 1998 House Journal, at 1015 (emphasis added). Appellee claims that the assent-to-delay provisions at issue were adopted "pursuant to" Section 91-13.5, but this is incorrect. Answering Brief at 5, 20. In fact, CZO Sections 8-19.5(g) (1976) and 8-19.6(e) (1987)—as well as the provision for Special Use permits[5]—pre-date HRS Section 91-13.5, which was enacted in 1998.

2. Appellee expressly and impliedly assented to delay by continuing to advocate and negotiate for issuance of the Use and Class IV Zoning permits even after the alleged deadlines had expired.

The Circuit Court erred in concluding that Appellee did not assent to extend the automatic approval deadlines for the Use Permit and Class IV Zoning Permit. Opening Brief at 15 ¶ F. Although Appellee argues that its "mere attendance" did not constitute assent, see Answering Brief at 23, Appellee and its counsel did far more than merely attend the hearings, and these actions were reasonably interpreted as Appellee's assent to delay the deadlines.

As explained on pages 33-34 of the Opening Brief, "active participation, which goes well beyond mere attendance, is inconsistent with an intention to stand on the right to a deemed approval and constitutes an implicit, on-the-record agreement to continue with the hearing process . . . ." Southeastern Chester County Refuse Authority (SECCRA) v. Bd. of Supervisors of London Grove Township, 954 A.2d 732, 738 (Pa. Cmwlth. 2008); see also Koloa Marketplace, LLC v. County of Kauai, Civ. No. 06-00570, 2007 U.S. Dist. LEXIS 56274, at *23-24 (D. Hawai'i July 31, 2007). Appellee and its counsel attended and were fully engaged in deliberations and negotiations throughout the five public hearings and never raised the issue of deadlines. See Opening Brief at 31-34. On November 14, 2006—more than one week after both purported deadlines had passed—Appellee sought to amend its application to resolve continuing concerns over its lack of evidence. At the November 28, 2006 hearing—weeks after the purported deadlines expired—Appellee's attorney continued to negotiate for the granting of a conditional Use Permit. Appellee also agreed to a "conditional approval, conditioned on

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[5] As Appellee pointed out, see Answering Brief at 10, the Commission was well-aware that the assent-to-delay provision did not apply to the issuance of a Special Use permit. Contrary

clarifying some of these water right issues." KPC at 134. Weeks later at the January 23, 2007 Hearing, Appellee and its counsel continued to argue vehemently against the proposed Decision and Order denying the three permits. KPC at 67-69, 72. At the February 13, 2007 Hearing, Appellee offered to accept conditional permits and asked for a continuance to obtain more evidence relevant to the "remaining issues." KPC at 2-3. These actions, which occurred weeks and months after the automatic approval deadlines, were reasonably and objectively interpreted as manifesting Appellee's assent to delay the final action on the Use and Class IV permits.

III. CONCLUSION

For the foregoing reasons, the Commission respectfully requests this Court to reverse the September 17, 2008 Decision and Order and remand the case back to the Commission with instructions to: (1) seek a declaratory ruling from the CWRM as to whether Appellee's commercial use of fresh-water is adequately regulated, non-detrimental to the public trust, and based on legitimate water rights; (2) seek a declaratory ruling from the PUC to clarify Appellee's control over the water and whether Grove Farm and/or Appellee is operating as a public utility; and (3) permit Appellee to operate during these determinations. These declaratory rulings would add necessary "substance" by attempting to resolve lingering issues relating to water rights and possible regulatory requirements. Contra Answering Brief at 30.

DATED: Honolulu, Hawai`i, JUN 24 2010

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to Appellee's assertion, there is no evidence that the Commission was unaware of the 105-day and 120-day deadlines for action on the Use and Class IV Zoning permits.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a file-stamped copy of foregoing document was duly served on the following via U.S. mail as addressed below:

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