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STATE OF HAWAII

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

MAUNA KEA ANAINA HOU; CLARENCE KUKAUAKAHI CHING; FLORES-CASE 'OHANA; DEBORAH J. WARD; PAUL K. NEVES; and KAHEA: THE HAWAIIAN ENVIRONMENTAL ALLIANCE, a domestic non-profit corporation,

Appellants,

vs.

CIVIL NO. 13-1-0349
(AGENCY APPEAL)

DECISION AND ORDER AFFIRMING BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION AND ORDER GRANTING CONSERVATION DISTRICT USE PERMIT FOR THE

I hereby certify that this is a full, true and correct copy of the original on file in this office.

4826-1091-2704

Clerk, Third Circuit Court, State of Hawaii

BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII; DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII; WILLIAM AILA, JR., in his official capacity as Chair of the Board of Land and Natural Resources and Director of the Department of Land and Natural Resources, and the UNIVERSITY OF HAWAI'I AT HILO,

Appellees.

THIRTY METER TELESCOPE AT THE MAUNA KEA SCIENCE RESERVE DATED APRIL 12, 2013

HEARING DATES: December 13, 2013 and February 20, 2014

I. INTRODUCTION

This case is an appeal of the April 12, 2013 Board of Land and Natural Resources ("BLNR" or "Board") Findings of Fact ("FOF"), Conclusions of Law ("COL") and Decision and Order ("Decision and Order") granting the Conservation District Use Permit ("CDUP") for the University of Hawai'i at Hilo's ("UHH") Thirty Meter Telescope Project (the "Project") to be located in the Mauna Kea Science Reserve. Appellants Mauna Kea Anaina Hou ("MKAH"), Clarence Kukauakahi Ching, Flores-Case 'Ohana, Deborah J. Ward, Paul K. Neves, and KAHEA: The Hawaiian Environmental Alliance ("KAHEA") (collectively, "Appellants") filed their Notice of Appeal on May 13, 2013. Initial briefing was completed on November 19, 2013, and oral arguments were heard on December 13, 2013. Later on December 13, 2013, the Hawai'i Supreme Court rendered its decision in *Kilakila 'O Haleakala v. Board of Land and Natural Resources*, 131 Hawai'i 193, 317 P.3d 27 (2013). The parties notified the Court of the decision, and Appellees requested supplemental briefing to address whether that case had any impact on the present action. On December 19, 2013, the Court granted the request for supplemental briefing. On January 2, 2014, the TMT Observatory Corporation filed a Motion for Leave to File Brief as Amicus Curiae, which the Court subsequently granted. The parties submitted supplemental briefs on January 21, 2014, and additional oral arguments were heard on February 20, 2014. Richard N. Wurdeman, Esq. appeared for Appellants MKAH, Ching, Flores-Case 'Ohana, Ward, Neves, and KAHEA. David M. Louie, Esq., Daniel A. Morris, Esq., and Julie H. China, Esq. appeared for Appellees BLNR and William J. Aila, Jr. Jay S. Handlin, Esq. and Ian L. Sandison, Esq. appeared for Appellee UHH.

Based on the record on appeal, the briefs submitted, arguments of counsel, and applicable law, the Court finds as follows:

II. DESCRIPTION OF THE PROJECT

1. On September 2, 2010, UHH submitted the Conservation District Use Application ("CDUA") for the Project to the Department of Land and Natural Resources. FOF 9.

2. In November 2010, written comments on the CDUA were submitted by MKAH (by Kealoha Pisciotta), KAHEA, Mr. Neves (claiming to represent the Royal Order of Kamehameha I ("ROOK I")), Sierra Club Hawai'i (by Ms. Ward), and Mr. Ching. FOF 10.

3. On December 2 and 3, 2010, the DLNR held public informational hearings on UHH's CDUA in Hilo and Kona, respectively. MKAH (Ms. Pisciotta), Mr. Neves, Ms. Ward, and Mr. Ching offered live testimony at the Hilo hearing. MKAH (Ms. Pisciotta), Ms. Ward, Mr. Ching, and Mr. Flores and his family testified at the Kona hearing. FOF 11.

4. The BLNR held a public hearing on UHH's CDUA on February 25, 2011. At that hearing, there was extensive public testimony, including from MKAH (Ms. Pisciotta), KAHEA, and Mr. Ching. Members of the Board and its Chairperson directed numerous questions to the representatives of UHH. At the conclusion of the comments and questions, the Board rendered a preliminary ruling, voting unanimously to grant CDUP HA-3568 for the Project. Essentially simultaneously, on its own motion, the Board directed that a contested case be held; provided a date for interested parties to petition to participate in a contested case; and expressly conditioned implementation of the CDUP upon UHH prevailing in any resulting contested case. FOF 15.

5. On February 23, 2011, E. Kalani Flores submitted a written petition for a contested case hearing on behalf of himself, B. Pualani Case, and their two daughters, Hawane Rios and Kapulei Flores. FOF 26. Hawane Rios and Kapulei Flores were later withdrawn as potential parties to the contested case. FOF 51. Thus, for purposes of the underlying proceeding and this appeal, the Flores-Case 'Ohana is an unincorporated association consisting of Mr. Flores

and Ms. Case. FOF 5.

6. On March 7, 2011: Ms. Pisciotta submitted a written petition for a contested case hearing on behalf of MKAH, an unincorporated association, FOF 3, 18; Ms. Martha Townsend submitted a written petition for a contested case hearing on behalf of KAHEA, a nonprofit Hawaii environmental organization, FOF 2, 20; Mr. Neves, a native Hawaiian cultural practitioner, submitted a written petition for a contested case hearing on behalf of himself and on behalf of ROOK I (the petition for ROOK I was subsequently withdrawn), FOF 7, 23; and Mr. Ching, a native Hawaiian cultural practitioner, and Ms. Ward, a recreational user of Mauna Kea land, also submitted written petitions for a contested case hearing on behalf of themselves as individuals, FOF 4, 6, 22, 25.

7. On April 7, 2011, Paul Aoki, Esq. was selected as the Hearing Officer. FOF 31. After a hearing on standing, the Hearing Officer issued an order admitting Mr. Ching, KAHEA, MKAH, Ms. Ward, Mr. Neves, and the Flores-Case 'Ohana as parties to the contested case. FOF 52.

8. The contested case proceeding included a site visit to the Mauna Kea Science Reserve on August 11, 2011, and evidentiary hearings on August 15, 16, 17, 18, and 25, 2011 and September 26 and 30, 2011. FOF 76, 81. Following the hearing, each side submitted proposed findings of fact and conclusions of law, comments on the other side's proposed findings and conclusions, and briefs responding to the comments. The Hearing Officer deliberated and then rendered his Proposed Findings of Fact, Conclusions of Law and Decision and Order on November 30, 2012. *See* ROA, Vol. 5, Doc. 108. On January 9, 2013, the parties submitted exceptions to the Proposed Findings of Fact, Conclusions of Law and Decision and Order, and on January 23, 2013, the parties filed responses to one another's exceptions. *See*

ROA, Vol. 5, Docs. 112 - 116. On April 12, 2013, the BLNR issued its Findings of Fact, Conclusions of Law and Decision and Order.

III. STANDARD OF REVIEW

1. Hawai'i Revised Statutes ("HRS") § 91-14(g) sets forth the standard of review for an agency appeal:

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

2. "Under HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6)." *Paul's Elec. Serv. v. Befitel*, 104 Hawai'i 412, 416, 91 P.3d 494, 498 (2004) (citations omitted).

3. An agency's conclusions of law "are freely reviewable to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law." *Ka Pa'akai O Ka'Aina v. Land Use Comm'n,* 94 Hawai'i 31, 41, 7 P.3d 1068, 1078 (2000) (citations and internal quotation marks omitted). When reviewed under HRS § 91-14(g)(5), an agency's findings of fact "are not

clearly erroneous and will be upheld if supported by reliable, probative and substantial evidence unless the reviewing court is left with a firm and definite conviction that a mistake has been made." *Brescia v. N. Shore Ohana*, 115 Hawai'i 477, 491-92, 168 P.3d 929, 943-44 (2007) (citation omitted).

4. Mixed questions of fact and law are reviewed under the clearly erroneous standard. *In re Waiola O Molokai, Inc.*, 103 Hawai'i 401, 421, 83 P.3d 664, 684 (2004). Where mixed questions are presented, "deference will be given to the agency's expertise and experience in the particular field and the court should not substitute its own judgment for that of the agency." *Dole Hawai'i Division-Castle & Cooke, Inc. v. Ramil*, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990) (citation omitted).

IV. DISCUSSION

A. THE BLNR'S APPROVAL OF CDUP HA-3568 PRIOR TO THE CONTESTED CASE HEARING DOES NOT WARRANT REVERSAL

1. The Court finds that the Hawai'i Supreme Court's discussion, analysis, and holding in *Kilakila* is dispositive of whether the preliminary approval of the CDUP in this case was appropriate. The *Kilakila* case addressed the specific question of:

> whether a circuit court has jurisdiction over an HRS § 91-14 appeal when an agency makes a final decision on a given matter – in this case, an application for a conservation district use permit – without either granting or denying an interested party's request for a contested case hearing on the matter.

Kilakila, 131 Hawai'i at 195, 317 P.3d at 29.

2. In *Kilakila*, the BLNR approved a conservation district use permit after a public board meeting without granting or denying the appellant's request for a contested case hearing. Kilakila 'O Haleakala ("KOH") appealed to the circuit court. The circuit court dismissed the appeal for lack of jurisdiction because a contested case hearing had not been held. The circuit

court also determined that the appeal was moot because the BLNR subsequently granted a contested case hearing. A consequence of this decision was that construction under the conservation district use permit was allowed.

3. In reversing the circuit court's decision, the Hawai'i Supreme Court concluded in *Kilakila* that:

> [b]ecause BLNR voted to grant the permit without having held a contested case hearing as requested by KOH prior to taking that vote, BLNR effectively rendered a final decision and order within the meaning of HRS § 91-14, and KOH at that point had the right to appeal to circuit court.

Id. at 196, 317 P.3d at 30. Thus, the focus of *Kilakila* was the issue of finality of the BLNR decision and order. If the decision and order were final, then KOH had the right to appeal it to the circuit court.

4. Of particular concern to the Hawai'i Supreme Court in *Kilakila* was the fact that unless KOH had the right to appeal, it would not have had the opportunity to seek effective relief. This is evident in the context of the Hawai'i Supreme Court's discussion of mootness. Here, the Hawai'i Supreme Court stated:

> Crucially, the BLNR had neither stayed nor revoked the permit, not even when KOH appealed or BLNR granted KOH a contested case hearing on the already issued permit. Because the permit remains in effect despite BLNR's failure to hold a contested case hearing before voting to grant the permit, UH can still build on Haleakala and KOH can still seek effective relief against UH. Consequently, we agree with KOH's position and conclude that this case is not moot.

Id. at 199, 317 P.3d at 33.

5. Having reviewed the record on appeal and the BLNR's FOF and COL, the Court finds that the present case is distinguishable from *Kilakila*. In this case, the BLNR granted a contested case hearing essentially simultaneously with the preliminary grant of the CDUP. The continued viability of the preliminary grant of the CDUP depended upon a final grant of the

permit after a contested case hearing. Unless and until there was a final grant of the CDUP after a contested case hearing, construction under the CDUP was not to occur. Thus, in the March 3, 2011 conditional CDUP, Condition 21 imposed by the BLNR stated: "If the contested case proceeding is initiated, no construction shall occur until a *final decision* is rendered by the Board in favor of the applicant or the proceeding is otherwise dismissed." ROA, Vol. 2, Doc. 14 (emphasis added). By stating that its "final decision" would come only after conclusion of the contested case hearing, the Board made clear that its February 25, 2011 vote on the CDUP was a preliminary ruling.

6. In this case, the preliminary grant of the CDUP did not have such a legal consequence that a contested case hearing was required prior to this action being taken. The BLNR contemplated and did actually afford a contested case hearing prior to the entry of a final decision and order. Moreover, Appellants were not prejudiced during the pendency of the contested case hearing because construction under the CDUP was prohibited.

7. In summary, in *Kilakila*, the Hawai'i Supreme Court determined that a final decision and order was entered because the BLNR voted to grant the permit while deferring decision on the request for a contested case hearing, and did not stay the permit, even when the objectors immediately sought to appeal. In this case, by contrast, after preliminarily granting the CDUP, the BLNR immediately ordered that a contested case hearing be held, stayed the permit, and only entered its final decision and order after the contested case hearing had been concluded; and, after the preliminary vote on the permit, there was no immediate request for an appeal.

8. Further, the preliminary grant of the CDUP did not alter the burden of proof placed on UHH under Hawaii Administrative Rules ("HAR") § 13-5-30(c). *See* COL 29.

9. The Court's finding that the *Kilakila* decision has no impact on the BLNR's

approval of the CDUP for the Thirty Meter Telescope Project is further supported by the Hawai'i Supreme Court's recent decisions in *Blake v. County of Kaua'i Planning Comm'n*, 131 Hawai'i 123, 315 P.3d 749 (2013), and *Kellberg v. Yuen*, 131 Hawai'i 513, 319 P.3d 432 (2014) .

10. In *Blake*, which was decided on December 19, 2013, the Hawai'i Supreme Court found two considerations to be paramount in determining whether an agency action was "final": (1) whether the agency's decision reflected its "definitive position" on the matter being challenged, *i.e.*, "the consummation of the agency's decision-making process, rather than merely . . . a tentative or interlocutory" determination; and (2) whether the agency's actions allowed construction to commence. *Blake*, 131 Hawai'i at 133-35 & n.9, 315 P.3d 759-61 & n.9. Then, in *Kellberg*, decided on January 22, 2014, the Hawai'i Supreme Court found that a final agency decision is one that is "decisive" and "conclusive," "not to be altered or undone"; it "connotes a state of being final, settled or complete." *Kellberg*, 131 Hawai'i at ___, 319 P.3d at 447.

11. These decisions confirm that the BLNR's February 25, 2011 vote on the CDUP was not a final decision. The facts recited above show that the preliminary grant of the CDUP was interlocutory and construction was not allowed to proceed until, if ever, a final decision in favor of the Project was rendered. Condition 21 imposed by the BLNR made plain that the initial CDUP could be altered or undone by the outcome of the contested case hearing, and so the preliminary ruling was not conclusive. Under *Kilakila*, *Blake*, and *Kellberg*, the preliminary grant of the CDUP was not a final agency action.

12. For all of the reasons stated herein, the Court finds that *Kilakila* does not apply to the BLNR's February 25, 2011 vote, and that reversal of the Decision and Order under the standards set forth under HRS § 91-14(g) is not warranted.

B. THE FOF AND COL RELATING TO THE CRITERIA SET FORTH UNDER HAR § 13-5-30(c) DO NOT WARRANT REVERSAL

1. HAR § 13-5-30(c) (2011) sets forth the eight criteria to be applied by the BLNR in evaluating the merits of a proposed land use in the conservation district.

2. The clear inference from Appellants' arguments is that Appellants' premise is that the use of conservation district land for astronomy facilities inherently violates the eight criteria identified in HAR § 13-5-30(c). However, HAR § 13-5-24(c) makes clear that astronomy facilities under an approved management plan are appropriate in the Resource subzone, which is where the Project is to be located. Accordingly, the Court finds that Appellants' premise that use of conservation district land for astronomy facilities inherently violates Section 13-5-30(c) lacks merit.

3. As stated in their Opening Brief (at 11-27), Appellants have asserted that "The Reliable, Probative and Substantial Evidence Does Not Support a Decision that" each of the eight criteria in Section 13-5-30(c) is satisfied. In other words, Appellants have challenged the BLNR's findings on the eight criteria as being clearly erroneous. Having reviewed the record on appeal and the BLNR's FOF and COL, the Court finds that the BLNR's findings are amply supported by the reliable, probative, and substantial evidence, and are not clearly erroneous; the Court further finds that Appellants' challenges to the BLNR's FOF and COL with respect to the eight criteria are unfounded and that reversal of the Decision and Order under the standards set forth under HRS § 91-14(g) is not warranted.

C. THE FOF AND COL RELATING TO NATIVE HAWAIIAN CUSTOMARY AND TRADITIONAL PRACTICES DO NOT WARRANT REVERSAL

1. In the contested case hearing, at Appellants' request, the parties stipulated that Appellants Neves, Ching, Flores, Case, and Pisciotta would be recognized as expert witnesses on their cultural practices regarding Mauna Kea. Appellants now argue that this stipulation

somehow resulted in their providing insufficient evidence of traditional and customary native Hawaiian cultural practices. Having reviewed the record on appeal and the BLNR's FOF and COL, the Court finds that Appellants were afforded the full opportunity to provide their written direct testimonies prior to the stipulation, and were also afforded an opportunity to provide oral summaries of their testimonies after the stipulation. Appellants also appear to argue that it was assumed, based on the stipulation, that certain expert opinion testimony would be deemed conclusive. However, clearly, the presentation of expert opinion testimony is not conclusive; as with any testimony, the factfinder may accept or reject it. *See Miyamoto v. Lum*, 104 Hawai'i 1, 16, 84 P.3d 509, 524 (2004). The Court, therefore, rejects Appellants' arguments.

2. Having reviewed the record on appeal and the BLNR's FOF and COL relating to native Hawaiian cultural practices and resources, the Court finds that the BLNR's findings and conclusions relating to native Hawaiian customary and traditional practices were not clearly erroneous, and that reversal of the Decision and Order is not warranted under the standards set forth under HRS § 91-14(g).

D. THE CDUP IS SUBJECT TO A SUFFICIENT MANAGEMENT PLAN

1. HAR § 13-5-24(c) R-3 (D-1) (2011) allows for a land use of "[a]stronomy facilities under a management plan approved simultaneously with the permit."

2. Under HAR § 13-5-2 (2011), a "management plan" is defined as a "project or site based plan to protect and conserve natural and cultural resources." The Court finds that HAR § 13-5-2 does not require that the "management plan" be a "comprehensive plan," as argued by Appellants.

3. The TMT Management Plan not only relates to the Project, but also incorporates components of the Mauna Kea Comprehensive Management Plan and its four subplans. The

Court finds that the TMT Management Plan and the plans that it incorporates are clearly sufficient for the TMT Project.

4. Having reviewed the record on appeal and the BLNR's FOF and COL relating to the TMT Management Plan, the Court finds that reversal of the Decision and Order is not warranted under the standards set forth under HRS § 91-14(g).

E. NONE OF APPELLANTS' OTHER ARGUMENTS WARRANTS REVERSAL

All other arguments not expressly addressed herein have been considered and the Court finds, based upon a review of the record on appeal and the BLNR's FOF and COL, and applying the standards of review set forth above, that such arguments do not warrant reversal of the Decision and Order under the standards set forth under HRS § 91-14(g).

V. DECISION AND ORDER

Based on the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED that the Board of Land and Natural Resources's Findings of Fact, Conclusions of Law and Decision and Order dated April 12, 2013 is AFFIRMED.

DATED: Hilo, Hawai'i, May 5, 2014.

GREG K. NAKAMURA (Seal) SEAL

JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

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