

FILED

✓ COLIN A. YOST, ESQ.  
LISA WOODS MUNGER, ESQ.  
JULIE H. CHINA, ESQ.

2009 DEC 29 PM 1:05

J. YAGI, CLERK  
THIRD CIRCUIT COURT  
STATE OF HAWAII

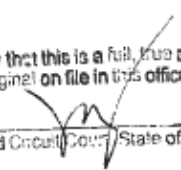
IN THE CIRCUIT COURT OF THE THIRD CIRCUIT  
STATE OF HAWAII

MAUNA KEA ANAINA HOU, et. al.,	)	CIVIL No. 09-1-336
	)	
Appellants/Petitioners,	)	MEMORANDUM OF DECISION ON
	)	APPELLEES UNIVERSITY OF HAWAII'S
vs.	)	AND UNIVERSITY OF HAWAII
	)	INSTITUTE FOR ASTRONOMY'S
BOARD OF LAND AND NATURAL	)	MOTION TO DISMISS APPEAL FILED
RESOURCES, et. al.,	)	ON OCTOBER 20, 2009
	)	
Appellees.	)	
_____	)	

MEMORANDUM OF DECISION ON APPELLEES UNIVERSITY OF  
HAWAII'S AND UNIVERSITY OF HAWAII INSTITUTE FOR ASTRONOMY'S  
MOTION TO DISMISS APPEAL FILED ON OCTOBER 20, 2009

1. This case is presented as an appeal from the decisions of the Board of Land and Natural Resources, State of Hawaii ("BLNR") on April 8 and 9, 2008, following public hearings, to accept and approve the Appellees University of Hawaii's then proposed Comprehensive Management Plan ("CMP") for the summit of Mauna Kea mountain on the Island of Hawaii and

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

  
Clerk, Third Circuit Court, State of Hawaii

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STATE OF I-AWAPI

MAUNA KEA ANAINA I-IOU, ct. al., fl CIVIL No. O9-1-336

Appellants/Petitioners, MEMORANDUM OF DECISION ON

APPELLEES UNIVERSITY OF HAWAI'I'S

vs. II AND UNIVERSITY OF HAWAI'I

II INSTITUTE FOR ASTRONOMY 'S BOARD  
OF LAND AND NATURAL ) MOTION TO DISMISS APPEAL FILED RESOURCES, ct. al., ) ON  
OCTOBER 20, 2009

) Appellees. II

MEMORANDUM OF DECISION ON APPELLEES UNIVERSITY OF HAWAI'I'S AND  
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FEED ON OQTOBER 20.2009

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Management Plan ("CMP")for the summit of Manna Kea mountain on the Island of Hawaii and

the decision of the BLNR denying Appellants' request for a contested case hearing on the adoption of the CMP. In paragraph 48 of the Appellant's Statement of the case filed on October 1, 2009, it is stated this court has jurisdiction to hear this appeal from an agency action pursuant to H.R.S. §91-14.

2. On October 20, 2009, Appellees University of Hawaii and University of Hawaii Institute for Astronomy filed a motion to dismiss appeal on the grounds that this Circuit Court lacked jurisdiction to entertain the appeal.

3. This court finds that the discussion, analysis and holding in *Aha Hui Malama O Kaniakapupu v. Land Use Commission*, 111 Hawaii 124 (2006) (*Kaniakapupu*) dispositive of the jurisdictional issues raised by the instant motion to dismiss. In this case the Supreme Court stated:

" HRS § 91-14(a) provides the means by which judicial review of administrative contested cases can be obtained. Among its prerequisites, the section requires that a contested case must have occurred before appellate jurisdiction may be exercised." *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994) (citation omitted). HRS § 91-1(5) (1993) defines a "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS § 91-1(6) (1993), in turn, defines an "agency hearing" as "such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14." Thus, "[a] contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties." *Pub. Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) (internal quotation marks and citation omitted) (emphasis added) [hereinafter, PASH].

*Kaniakapupu* at 132.

adoption of the CMP. In paragraph 48 of the Appellant's Statement of the case filed on October 1, 2009, it is stated this court has jurisdiction to hear this appeal from an agency action pursuant to H.R.S. §91-14.

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*Kaniakapupu at 132.*

4. The Supreme Court further stated that, "In order for an agency hearing to be 'required by law,' it may be required by (1) agency rule, (2) statute, or (3) constitutional due process." *Kaniakapupu* at 132. Pursuant to Hawaii Administrative Rule (HAR) 13-5-30 and 40 public hearing on the Board's acceptance and approval of the CMP were required and were held by BLNR and the hearing was thus "required by law."

5. A further requirement for determining whether a contested case hearing is required, however, is whether the hearing determines the rights, duties, or privileges of specific parties. The hearing held for the acceptance and approval of the CMP did not determine the rights, duties or privileges of the Appellants. Appellants have failed to meet its burden of showing that their rights, duties and privileges have been adversely affected by the adoption of the CMP. Specifically, the court finds that the appellants participation in Civil No 04-1-397, Third Circuit Court, State of Hawaii, did not endow them with any interest in proceeding of the BLNR that rose to the level of entitling them to a contested case hearing as to the acceptance and adoption of the CMP.

6. The court also finds the adoption of the CMP is not a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive the appellant of adequate relief. If no further action is taken on the CMP, and it remains an unimplemented plan, this court cannot discern how the appellants rights, duties, and privileges would be affected. It may be that a future implementation of the CMP might trigger a requirement for a contested case, but the action of the BLNR in accepting and approving the CMP in and of itself does not do so. Thus, the BLNR decisions on April 8 and 9 accepting and

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6. The court also finds the adoption of the CMP is not a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive the appellant of adequate relief. If no further action is taken on the CMP, and it remains an unimplemented plan, this court cannot discern how the appellants rights, duties, and privileges would be affected. It may be that a future implementation of the CMP might trigger a requirement for a contested case, but the action of the BLNR in accepting and approving the CMP in and of itself does not do so. Thus, the BLNR decisions on April 8 and 9 accepting and

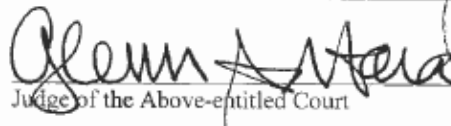
approving the CMP are (a) not final BLNR decisions and orders in a contested case hearing or a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive the appellant of adequate relief, requiring a contested case hearing (2) are not appealable under H.R.S. 91-14 and (3) this court has no jurisdiction to hear the instant appeal.

6. As to the issue of BLNR's denial of the Appellant's application for a contested case hearing on the adoption of the CMP, one of the holdings in *Kaniakapupu* at pp134-137, is that if the circuit court has no jurisdiction to hear an agency appeal under HRS 91-14, it may not consider whether review an agency decision to deny a request for a contested case hearing.

7. Appellees University of Hawaii's and University of Hawaii Institute for Astronomy's Motion to Dismiss Appeal filed on October 20, 2009 is hereby granted. Ms. Munger is to prepare the Order and appropriate separate judgment in favor of the movants dismissing the appeal.

Dated: Hilo, Hawaii, \_\_\_\_\_

DEC 29 2009

  
Judge of the Above-entitled Court



preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive the appellant of adequate relief, requiring a contested case hearing (2) are not appealable under I—I.R.S. 91-14 and (3) this court has no jurisdiction to hear the instant appeal.

6. As to the issue of BLNR's denial of the Appellant's application for a contested case hearing on the adoption of the CMP, one of the holdings in Kaniakapupu at pp134-137, is that if the circuit court has no jurisdiction to hear an agency appeal under HRS 91-14, it may not consider whether review an agency decision to deny a request for a contested case hearing.

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