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NO. 29250

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KULEANA KU'IKAHI, LLC, Appellant-Appellant,
v.
STATE OF HAWAI'I, LAND USE COMMISSION; STATE OF HAWAI'I, OFFICE OF PLANNING; COUNTY OF MAUI, DEPARTMENT OF PLANNING; KAUA'ULA LAND COMPANY, LLC; R. CHARLES BERGSON; GAIL L. BERGSON; RICHARD SARGENT; SUE SARGENT; ROBERT A. COE; CAROL Y. COE; DOUGLAS L. SALISBURY, Trustee of the DLS Living Trust Dated May 4, 1988, as Amended in its Entirety on January 18, 2001; J & J MAUI R/E LLC; DAVID NEAL BYARS; SANDRA VENTIMIGLIA-BYARS; ROBERT T. NORTON; GEORGIA R. NORTON; MICHAEL J. GRONEMYER; ROSS RANDOLPH SCOTT; ANNA MARGARETHA SCOTT; MPB ENTERPRISES, LLC; BRAUN TRADING CO., LTD.; HOWARD CLARK PIETSCH; VERONICA ANNE PIETSCH; A. DAVID STROEVE; JESSICA ERIN STROEVE; GARRETT HALL; SHELLEY W. HALL; ARNOLD J. WEINSTEIN, Trustee of the Arnold J. Weinstein Revocable Living Trust Dated December 21, 1999; MASAKATSU MIYATA; JACQUELINE MIYATA; BRUCE CHADWICK; BONNIE SUE CHADWICK; JAMES J. GRIBAUDO; SANDRA K. GRIBAUDO; GERALD D. BARNES and DEBORAH M. BARNES, Trustees of the Barnes Family Inter Vivos Trust Dated July 1, 1991, as Amended and Restated June 3, 1999; STEVEN J. KIKUCHI; QUAN H. VAN; LUCY PHAM AND LINDY LU, LLC; CONCETTA CUEVAS; JASON M. CUEVAS, Appellees-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 06-1-0152)

MEMORANDUM OPINION
(By: Nakamura, C.J., Foley and Fujise, JJ.)

Appellant-Appellant Kuleana Ku'ikahi, LLC, (Kuleana) appeals from the Final Judgment entered on June 10, 2008 in the

Circuit Court of the Second Circuit[1] (circuit court). The circuit court entered judgment pursuant to the June 29, 2007 "Findings of Fact, Conclusions of Law and Order Affirming Land Use Commission Order Issued December 14, 2004, and Order Issued April 10, 2006," (Order) in favor of Appellees-Appellees State of Hawai'i, Land Use Commission (LUC); State of Hawai'i, Office of Planning; County of Maui, Department of Planning (County of Maui); Kaua'ula Land Company, LLC; R. Charles Bergson; Gail L. Bergson; Richard Sargent; Sue Sargent; Robert A. Coe; Carol Y. Coe; Douglas L. Salisbury, Trustee of the DLS Living Trust Dated May 4, 1988, as Amended in its Entirety on January 18, 2001; J & J Maui R/E LLC; David Neal Byars; Sandra Ventimiglia-Byars; Robert T. Norton; Georgia R. Norton; Michael J. Gronemyer; Ross Randolph Scott; Anna Margaretha Scott; MPB Enterprises, LLC; Braun Trading Co., Ltd.; Howard Clark Pietsch; Veronica Anne Pietsch; A. David Stroeve; Jessica Erin Stroeve; Garrett Hall; Shelley W. Hall; Arnold J. Weinstein, Trustee of the Arnold J. Weinstein Revocable Living Trust Dated December 21, 1999; Masakatsu Miyata; Jacqueline Miyata; Bruce Chadwick; Bonnie Sue Chadwick; James J. Gribaudo; Sandra K. Gribaudo; Gerald D. Barnes and Deborah M. Barnes, Trustees of the Barnes Family Inter Vivos Trust Dated July 1, 1991, as Amended and Restated June 3, 1999; Steven J. Kikuchi; Quan H. Van; Lucy Pham and Lindy Lu, LLC; Concetta Cuevas; and Jason M. Cuevas (collectively, Appellees) and against Kuleana.

On appeal, Kuleana contends the circuit court erred in affirming the decision of LUC because LUC erred:

(1) in deciding it lacked jurisdiction concerning Issues 2, 3, 4, 6, and 7 of Kuleana's Petition For Declaratory Order (Petition);

(2) in confining the hearing on Issue 1 of the petition to the question of whether the past and proposed uses of agricultural lands by Appellees were not in conformity with and

[1] The Honorable Joel E. August presided.

were in direct violation of applicable state laws and regulations;

(3) in ruling Kuleana would not be entitled to a hearing on Issue 5 of the Petition until after an affirmative finding on Issue 1;

(4) in finding Kuleana would not be allowed to present evidence during the hearing concerning the lack of sufficient water necessary to use the property at issue for agricultural purposes; and

(5) in deciding Kuleana would not be allowed to provide evidence concerning the infringements upon Hawaiian rights.

I. BACKGROUND

On July 22, 2004, Kuleana filed its Petition requesting LUC to issue a declaratory ruling pursuant to Hawaii Revised Statutes (HRS) § 91-8 (1993) and Hawaii Administrative Rules (HAR) § 15-15-98. Kuleana sought a declaratory order determining that certain lands adjacent to land owned by Kuleana or its members were being used in violation of State of Hawai'i and County of Maui laws. The lands at issue are known as Pu'unoa I, II and III Subdivisions, and Kaua'ula Subdivision (collectively, Subdivisions). Specifically, Kuleana raised seven issues:

> 1. The current and proposed uses of lands by the developers and land owners are not in conformity with and are in direct violation of county and State laws, rules, and regulations pertaining to uses of agricultural lands;
>
> 2. It was improper for the County of Maui to approve the agricultural subdivisions without first determining that there was an adequate supply of non-potable water to support compliance with the agricultural zoning requirements by each lot owner, and that it was improper for the County of Maui to approve building permits to land owners in the subdivisions without first determining that there was an adequate supply of water and proper soil conditions which are needed to support the required level of farming on the lots;
>
> 3. The waters of Kaua'ula Stream are a valued cultural, historic and natural resource and that the native Hawaiian tenants in the Kaua'ula Valley have the right to practice their traditional and customary rights, including the right to use the waters of the Kaua'ula Stream for traditional and customary uses, and that their rights in that regard are adversely affected by removing the water for use on the subdivision properties;

> 4. The current and proposed uses of the lands in the subdivisions do not comply with the purposes or intent of specified constitutional and statutory provisions regulating the uses of agricultural lands;
>
> 5. The County of Maui's system of enforcement, practice of taking no enforcement measures or taking only after-the-fact enforcement measures concerning the use of agricultural lands does not conform to the statutory provisions regulating the uses of agricultural lands;
>
> 6. The actions of the developers and landowners concerning the current and proposed developments are creating and will create an interruption of the natural and historic flows of waters in the Kaua'ula Stream resulting in damages to the entire eco-system of the streambed and that such actions do not conform with HRS § 205-17; and
>
> 7. The lands along the Kaua'ula Stream required protection and preservation.

On December 14, 2005, LUC adopted its "Order Dismissing Issues 2, 3, 4, 6, and 7 and Setting Issues 1 and 5 of Petition for Declaratory Order for Hearing," (Dismissal Order) ruling that it lacked jurisdiction to address Issues 2, 3, 4, and 6. LUC dismissed Issue 7 on the ground that Kuleana had not demonstrated any ownership interest in the lands adjacent to its property. LUC set a hearing on Issue 1 pursuant to HAR §§ 15-15-100 and 15-15-103. LUC decided to set a hearing on Issue 5 only upon an affirmative finding on Issue 1.

After the hearing on Issue 1, LUC issued its "Findings of Fact, Conclusions of Law, and Decision and Order" (LUC Order) on April 10, 2006. The LUC held that Kuleana "failed to meet its burden of proof that the present and proposed uses of agricultural lands on the [Subdivisions] are not in conformity with and are in direct violation of applicable State laws, rules, and regulations[.]"

On April 26, 2006, Kuleana appealed the LUC Order and the Dismissal Order to the circuit court. On June 29, 2007, after briefing and argument, the circuit court entered its Order affirming the LUC Order and Dismissal Order. On June 10, 2008, the circuit court entered Final Judgment. On July 8, 2008, Kuleana timely filed its notice of appeal.

II. STANDARD OF REVIEW

> Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. In an appeal from a circuit court's review of an administrative decision the appellate court will utilize identical standards applied by the circuit court. Questions of fact are reviewed under the "clearly erroneous" standard. In contrast, an agency's legal conclusions are freely reviewable. An agency's interpretation of its rules receives deference unless it is plainly erroneous or inconsistent with the underlying legislative purpose.

Hawaii Teamsters & Allied Workers, Local 996 v. Dep't of Labor & Indus. Relations, 110 Hawai'i 259, 265, 132 P.3d 368, 374 (2006) (internal quotation marks and citations omitted).

III. DISCUSSION

A. LUC properly limited its jurisdiction to issues of state law (Issues 1 and 2).

Kuleana argues that LUC erred in its decision that it lacked jurisdiction concerning Issue 2 of the Petition. Kuleana also argues that LUC "erred in its decision that it would confine the hearing on [Issue 1] to the question of whether the past and proposed uses of agricultural lands . . . are in direct violation of applicable State laws[.]" (Emphasis added) As stated above, Kuleana contended in Issue 2 that

> [i]t was improper for the County of Maui to approve the agricultural subdivisions without first determining that there was an adequate supply of non-potable water to support compliance with the agricultural zoning requirements by each lot owner, and that it was improper for the County of Maui to approve building permits to land owners in the subdivisions without first determining that there was an adequate supply of water and proper soil conditions which are needed to support the required level of farming on the lots[.]

On appeal, Kuleana argues that LUC has "jurisdiction to require that counties fulfill their responsibilities regarding enforcement" of county and state laws and regulations.

"[I]t is fundamental that authority to zone is conferred by the legislature on the counties." Save Sunset Beach Coalition v. City and Cnty. of Honolulu, 102 Hawai'i 465, 481, 78 P.3d 1, 17 (2003). "The counties of our state derive their zoning powers from HRS § 46-4." Kaiser Hawaii Kai Dev. Co. v.

City and Cnty. of Honolulu, 70 Haw. 480, 483, 777 P.2d 244, 246 (1989). The counties were clearly granted the power to enforce and regulate zoning.

Furthermore, under HRS § 205-12 (2001 Repl.) the counties, not LUC, are charged with enforcing use classification districts. HRS § 205-12 provides that "[t]he appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5[.]"

The counties were clearly granted the power to enforce and regulate zoning. Kuleana cites to no authority that would give LUC the power to oversee county zoning and regulations. "An administrative agency can only wield powers expressly or implicitly granted to it by statute. Implied powers are limited to those reasonably necessary to make an express power effective." TIG Ins. Co. v. Kauhane, 101 Hawai'i 311, 328, 67 P.3d 810, 827 (App. 2003) (internal quotation marks, brackets and citation omitted). LUC simply does not have the authority to approve or condemn county actions; therefore, LUC did not err in finding it lacked jurisdiction over Issue 2, nor did it err by limiting Issue 1 to questions of state law.[2]

B. LUC did not have jurisdiction over Issues 3, 4, 6, and 7.

1. Without the need for a reclassification of district boundaries, HRS § 205-17 (Supp. 2011) does not confer jurisdiction to LUC over Issues 3, 4, 6, and 7.

[2] Kuleana also argues on appeal that LUC erred in ruling that a hearing on Issue 5 would only be set upon an affirmative finding of Issue 1. Issue 5 alleges that County of Maui failed to enforce state agricultural rules and regulations. However, under Issue 1, LUC did not find any violation of state agricultural rules or regulations. Kuleana fails to cite to any authority that would require LUC to review County of Maui's enforcement of state law absent a finding that those laws have been violated.

Under Issues 3 and 4, Kuleana argues that native Hawaiian traditional and customary rights are being adversely affected by the use of the Subdivisions, and that such uses are prohibited under HRS § 205-17. Similarly, Issues 6 and 7 contend that the use of the Subdivisions interrupts the flow of Kaua'ula Stream and damages the eco-system in violation of HRS § 205-17.[3]

While it is true that HRS § 205-17 requires LUC to take into account the preservation or maintenance of cultural historical or natural resources, HRS § 205-17 governs LUC's review of a petition for reclassification of district boundaries. A district boundary amendment from LUC was never sought and, as LUC's findings on Issue 1 indicate, an amendment was not needed because the proposed use of the Subdivisions' lots was for agricultural purposes. As such, LUC does not have jurisdiction over Issues 3, 4, 6, and 7 under HRS § 205-17.

2. The declaratory ruling procedure under HRS § 91-8 is not a proper means to seek review of County of Maui decisions.

In addition to its HRS § 205-17 argument, Kuleana argued under Issue 3 and 4 that LUC had jurisdiction to order the Subdivisions to comply with the laws regarding traditional access rights under Article XII, section 7 of the Hawai'i Constitution.[4] Similarly, with respect to Issues 6 and 7, Kuleana argues that Article XI, section 7 places a duty on the State and its political subdivisions "to protect, control and regulate the use

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[3] Kuleana also argues LUC erred in not allowing Kuleana to provide evidence concerning adequate supply of water for agricultural uses, and evidence regarding the alleged infringements upon Hawaiian rights (points on appeal 4 and 5). In those points, Kuleana merely rehashes arguments made concerning LUC's dismissal of Issues 3, 4, 5, and 6; as such, those arguments are addressed here.

[4] Article XII, section 7 of the Hawai'i Constitution states:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

of Hawai'i's water resources for the benefit of its people."

While it is true that the State and its political subdivisions have a constitutional duty to protect both Native Hawaiian rights and natural resources, the effect of the Subdivisions on the constitutional rights of Kuleana and its members has already been answered by County of Maui. Both Article XI, section 7 and Article XII, section 7 apply to the counties as well as the state. Public Access Shoreline Hawaii v. Hawai'i Cnty. Planning Com'n, 79 Hawai'i 425, 437, 903 P.2d 1246, 1258 (1995); Kelly v. 1250 Oceanside Partners, 111 Hawai'i 205, 226, 140 P.3d 985, 1006 (2006). On April 27, 2001 and April 24, 2003, County of Maui gave final approval for phases I and II of the Subdivisions, respectively. Any question as to the Subdivisions' effect on Native Hawaiian rights or natural resources under the constitution was impliedly answered when County of Maui approved the Subdivisions. Thus, by seeking a declaratory ruling from LUC under HRS § 91-8 as to the constitutional implications of the Subdivisions, Kuleana is essentially seeking review of County of Maui's approval of the Subdivisions.

The Hawai'i Supreme Court has already decided the scope of HRS § 91-8. "[T]he declaratory ruling procedure of HRS § 91-8 is meant to provide a means of seeking a determination of whether and in what way some statute, agency rule, or order, applies to the factual situation raised by an interested person. It was not intended to allow review of concrete agency decisions for which other means of review are available." Citizens Against Reckless Dev. v. Zoning Bd. of Appeals of City and Cnty. of Honolulu, 114 Hawai'i 184, 196-97, 159 P.3d 143, 155-56 (2007). The supreme court held that under the plain reading of HRS § 91-8 "it cannot seriously be maintained that the procedure was intended to review already-made agency decisions." Id. at 197, 159 P.3d at 156.

The supreme court reasoned that "[u]se of the declaratory ruling procedural device only makes sense where the applicability of relevant law is unknown, either because the

agency has not yet acted upon particular factual circumstances, or for some other reason the applicability of some provisions of law have not been brought into consideration." Id. The supreme court further reasoned that "the legislature acted intentionally when it chose the term 'applicability' to denote a special type of procedure, whereby an interested party could seek agency advice as to how a statute, agency rule, or order would apply to particular circumstances not yet determined." Id. at 197-98, 159 P.3d at 156-57. Because the purpose of HRS § 91-8 is to determine the "applicability" of a law, HRS § 91-8 may not be used to review already-made agency decisions, for in such cases, "the agency has already spoken as to the 'applicability' of the relevant law to the factual circumstances at hand[.]" Id. at 197, 159 P.3d at 156.

By requesting LUC to find that the Subdivisions approved by the County of Maui are harming traditional and customary rights as well as natural resources, Kuleana is attempting to use HRS § 91-8 as a mechanism to require LUC to review the decisions of County of Maui. Review of another body's decisions is simply not a proper use of HRS § 91-8. "HRS § 91-8 only allows for declaratory ruling as to questions of 'applicability[.]'" Citizens Against Reckless Development, 114 Hawai'i at 200, 159 P.3d at 159. Any questions of the applicability of any law or rule, including constitutional questions, were answered when County of Maui approved the Subdivisions.

Without the need for a district boundary amendment, the jurisdiction to enforce use classification districts and their restrictions resides with the counties under HRS § 205-12. Because County of Maui already approved the Subdivisions, and HRS § 91-8 is not an appropriate means of reviewing that decision, LUC did not err in holding that it lacked jurisdiction over Issues 3, 4, 6, and 7, and the circuit court properly affirmed LUC's dismissal of these issues.

IV. CONCLUSION

The Final Judgment entered on June 10, 2008 in the Circuit Court of the Second Circuit is affirmed.

DATED: Honolulu, Hawai'i, April 27, 2012.

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