No. 29440

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

KAUAI SPRINGS, INC.,	)	Civil No. 07-1-0042
	)	(Agency Appeal)
Appellant-Appellee,	)	
	)	**APPEAL FROM THE SEPTEMBER 23, 2008 FINAL JUDGMENT ON THE COURT'S SEPTEMBER 17, 2008 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REVERSING IN PART AND VACATING IN PART APPELLEE PLANNING COMMISSION OF THE COUNTY OF KAUAI'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)**
vs.	)	
	)	
PLANNING COMMISSION OF THE COUNTY OF KAUAI ,	)	
	)	
Appellee-Appellant.	)	
	)	
	)	**FIFTH CIRCUIT COURT**
	)	**HON. KATHLEEN N.A. WATANABE**
	)	

APPELLEE KAUAI SPRINGS, INC.'S RESPONSE TO AMICUS CURIAE BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS (filed Nov. 22, 2010)

CERTIFICATE OF SERVICE

ROBERT H. THOMAS 4610-0
MARK M. MURAKAMI 7342-0
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
www.hawaiilawyer.com
Telephone: (808) 531-8031
Facsimile: (808) 533-2242
Attorneys for Appellee
KAUAI SPRINGS, INC.

APPELLEE KAUAI SPRINGS, INC.'S RESPONSE TO AMICUS CURIAE BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS (filed Nov. 22, 2010)

The last minute brief of the Office of Hawaiian Affairs (OHA) focuses on points not germane to this appeal, seriously misstates the circuit court's holding, and attempts to raise an issue already waived. Its brief adds nothing to this Court's consideration of the case.[1]

I. OHA'S BRIEF ARGUES A DIFFERENT CASE

The Kauai Planning Commission's appeal is about (1) its claim that Kauai Springs could waive the "deemed approved" deadlines (an issue OHA's brief does not address), and (2) whether the Planning Commission could deny the zoning permits sought by Kauai Springs because the Planning Commission failed to make "appropriate assessments" and take "reasonable measures" to satisfy its public trust duties as required by *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 228, 140 P.3d 985, 1008 (2006). No party contends, and the circuit court did not hold, that the Planning Commission had *no* duty under the public trust doctrine.

Yet, rather than deal with what the circuit court actually held – that the Kauai Planning Commission made "appropriate assessments" and took "reasonable measures" to execute its public trust duties – OHA's brief seems to be arguing a different case than the one being considered by this Court. Its brief focuses exclusively on an issue that is not disputed: whether the Planning Commission has public trust duties at all. *See* OHA Br. at 6-12. However, the question of whether state and municipal agencies have duties under the public trust was settled by the Hawaii Supreme Court in *Kelly*, which concluded that all agencies have such duties. *Kelly* did not require that every agency be a water law expert or employ a staff of hydrologists, but only to make "appropriate assessments" and take "reasonable measures" to protect the public trust. Thus, the majority of OHA's brief is a distraction as it appears to be devoted to a settled issue, and sounds of "[o]ld unhappy, far-off things, [a]nd battles long ago." William Wordsworth, *The Solitary Reaper* (1803) *quoted in Kaiser Aetna v. United States*, 444 U.S. 164,

[1] OHA is the same party that filed a back-dated objection in the Planning Commission. *See* Ans. Br. at 7-8 ("However, after the public hearing period had expired, in a letter dated November 30, 2006 but authored later and backdated, the Office of Hawaiian Affairs (OHA) urged the Planning Commission to deny Kauai Springs' applications. R:CV07-1-0042 at 173. … OHA's letter is dated November 30, 2006, but references a phone conversation with Planner Barbara Pendragon that occurred on December 1, 2006, the day *after* the letter purportedly was written.") (emphasis original).

177 (1979). OHA's brief does not address the circuit court's conclusion that Kauai Springs did everything the Planning Commission asked of it, except with a cursory (and unsupported) statement that the Planning Commission "acted appropriately in denying the permits," which adds nothing to the analysis of this case. OHA Br. at 14. For that reason alone, OHA's brief need not be considered by this Court in its resolution of this appeal.

II. OHA's BRIEF MISSTATES THE CIRCUIT COURT'S HOLDING

OHA's brief also bases its argument on a serious mischaracterization of the administrative record and the circuit court's order. The grossest misstatement is the brief's assertion that:

> [t]he Circuit Court's COL ¶ 72 stating that *the Planning Commission had no duty* to address issues related to the impact of Kauai Springs' operations on the public trust resource is simply wrong.

OHA Br. at 13 (emphasis added). The Circuit Court's Conclusion of Law No. 72, however, says no such thing. Rather it states:

> There is nothing in the Record of this case to show that the Planning Commission did not fulfill any duty it may have under the public trust.

FOF/COL ¶ 72, at 24 (citing *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006)). Thus, rather than concluding the Planning Commission does not have public trust duties as OHA's brief wrongly states, the circuit court acknowledged that the Planning Commission, like every agency, has such duties *and that it fulfilled them*. OHA's brief is also inconsistent with the position it took in the Planning Commission. In its back-dated letter (*see supra* note 1), OHA informed the Planning Commission that "the Planning Commission [had] already acted on its important [public] trust duties by requesting clarification on public trust issues from [the State Commission on Water Resource Management] and the [State Public Utilities Commission]." R:CV07-1-0042 at 173.

It is also a mischaracterization of the record for OHA to assert that "[t]he Circuit Court was plainly incorrect in ruling that the Planning Commission had exceeded its authority by investigating the use of water by Kauai Springs." OHA Br. at 12. Again, this is not what the circuit court held. The circuit court did not hold that the Planning Commission could not investigate. Rather, it concluded that Kauai Springs complied with every request by the Planning Commission, which did all it said it needed to do to fulfill its public trust duties. All that is

required by *Kelly* is that an agency make "appropriate assessments" and take "reasonable measures" to protect the public trust. *Kelly* left the question of what is "appropriate" and what is "reasonable" to an agency-by-agency and case-by-case determination, and the circuit court concluded that the Planning Commission was appropriate and reasonable, and that Kauai Springs complied with every request put to it.

It bears noting that neither the Planning Commission nor OHA really claim that issuing the three zoning permits to Kauai Springs would run afoul of the public trust. Nor is their claim that Kauai Springs withheld critical information from the Planning Commission. Rather, because they are stuck with the fact that Kauai Springs complied with every demand made by the Planning Commission, they ask this Court to graft a "precautionary principle" onto the public trust doctrine, which would require an agency reject an application for a simple zoning permit if *the agency itself* does not inform the applicant what additional "applicable requirements" and "regulatory processes" the applicant can supposedly pursue. *See* KPC Record at 000346 ("As evidenced by the additional testimony provided by the Office of Hawaiian Affairs and concerned parties, the Planning Commission is being requested *to exercise caution and deny* the Applicant's request in its role as decision makers in the land use permit process.") (emphasis added). In its Decision and Order, the Planning Commission did not point to any other approvals that Kauai Springs lacked, only concluding that "there *may be* outstanding processes with [the State Commission on Water Resources Management] that the Applicant must satisfy." KPC Record at 000345-000346 (emphasis added). Having never concluded that there are "outstanding processes," identified what those "outstanding processes" are or might be, or whether those "outstanding processes," once identified, would gain anything given the Water Commission's and the PUC's express disclaimers of any interest in Kauai Springs, the Planning Commission and OHA instead would have this Court adopt a rule requiring zoning permit applicants to be mind readers to intuit what "processes" the agency believes are "outstanding," and comply with them.

The circuit court correctly concluded that for the Planning Commission to deny the zoning permits for the vague reason that "the land use process should insure that all applicable requirements and regulatory processes relating to water rights, usage, and sale are satisfactorily complied with prior to taking action on the subject permits" while not setting out what those

"applicable requirements and regulatory processes" are, was arbitrary and capricious under Haw. Rev. Stat. § 91-14 (1993). R:CV07-1-0042 at 176.

Given OHA's mischaracterization of the record and the circuit court's order, its brief is wholly unhelpful to this Court's analysis of the issues in this appeal.

III. POINTS OF ERROR NOT RAISED BY APPELLANT ARE WAIVED AND CANNOT BE CONSIDERED

OHA's brief attempts to raise a new Point of Appeal. *See* OHA Br. At 5-6. ("Amicus Curiae Office of Hawaiian Affairs agrees with the Points of Error as listed by the Kauai Planning Commission on pages 12-15 of its Opening Brief … OHA *further* contends that the Circuit Court also erred . . .") (emphasis added).

To preserve a Point of Error for consideration by an appellate court, however, the point must have been raised by the Appellant in the opening brief. Haw R. App. P. 28(b)(4) (the "opening brief … shall contain[] … [a] concise statement of the points of error set forth in separately numbered paragraphs."). In its Opening Brief, the Planning Commission did not raise OHA's Point of Appeal, and it was thus waived. *See Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982) (failure to raise issue in merits brief was a waiver). *See also State v. Kahua Ranch. Ltd.*, 47 Haw. 466, 471, 390 P.2d 737, 741 (1964) (failure to make argument in brief is waiver); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) (issues not sufficiently argued by appellee's brief are waived); *Molnar v. Conseco Medical Ins. Co*., 830 N.E.2d 800, 802–03 (Ill. Ct. App. 2005) (argument not raised by appellee in answering brief are waived).

OHA cannot inject new issues into this appeal by way of an amicus brief filed months after the Opening Brief. The parties have already framed the issues, and a brief raising new arguments not contained in the merits briefs of the parties is improper and should be stricken. *See*, *e.g.*, *Tyler v. City of Manhattan*, 118 F.3d 1400, 1403 (10th Cir. 1997) (issue raised by amicus could not be considered when party it supported did not make the argument in its merits brief or incorporate amicus brief's arguments by reference); *Zurich Ins Co. v. Raymark Indus. Inc*., 514 N.E.2d 150, 167 (Ill. 1987) (amicus brief relying upon materials not in the record was stricken on motion by the appellant); *Verizon New England, Inc. v. City of Rochester*, 855 A.2d

497, 505 (N.H. 2004) (court granted motion to strike amicus brief because issue not raised in court below or on appeal by parties).[2]

This rule is universal in state appellate courts. *See, e.g., California Ass'n for Safety Educ. v. Brown*, 36 Cal. Rptr. 2d 404, 410 (Cal. Ct. App. 1994) (nonjurisdictional issues raised by amicus that were not raised below and were not presented as an issue on appeal would not be considered); *Younger v. State*, 187 Cal. Rptr. 310, 314 (Cal. Ct. App. 1982) (issue raised only by amicus was not properly before court of appeals and was not reviewable); *People v. P.H.*, 582 N.E.2d 700, 711 (Ill. 1991) (amicus takes the case as she finds it, with issues framed by the parties); *Gem Stores, Inc. v. O'Brien*, 374 S.W.2d 109, 118 (Mo. 1963) (amicus cannot inject new issues into case, and grounds for invalidity of statute urged by amicus but not presented by the parties would not be considered); *Crockett v. First Federal Sav. & Loan Ass'n of Charlotte*, 224 S.E.2d 580, 588 (N.C. 1976) (parties did not raise issue, or incorporate amicus arguments by reference); *Maryland-National Capital Park and Planning Comm'n v. Crawford*, 511 A.2d 1079, 1085 n.6 (Md. 1986) (courts of appeal will not consider issue raised by amicus when no party raises it; only issues such as jurisdiction which the court may raise *sua sponte*, may be considered).

This is the rule in federal courts of appeals as well. *See, e.g., Eldred v. Ashcroft*, 255 F.3d 849, 851 (D.C. Cir. 2001) (amicus not permitted to argue grounds for invalidity of statute that parties did not argue); *Russian River Watershed Protection Committee v. City of Santa Rosa*, 142 F.3d 1136, 1141 (9th Cir. 1998) (court of appeals does not review issue raised only by amicus curiae); *United States v. Sturm, Ruger & Co., Inc.*, 84 F.3d 1, 6 (1st Cir. 1996) (while an amicus brief may be helpful in assessing litigants' positions, it cannot introduce new argument in the appeal); *Resident Council of Allen Parkway Village v. U.S. Dep't of Hous. & Urb. Dev.*, 980 F.2d 1043, 1049 (5th Cir. 1993) (amicus cannot expand the scope of appeal to implicate issues not presented by the parties to the appeal); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d

[2] Additionally, since the administrative record in this case (this is a secondary appeal under the Administrative Procedures Act) does not contain any objections or facts regarding the issue OHA now attempts to raise, the new point of appeal was not preserved for review by the circuit court. Since "[o]n secondary review of an administrative decision, Hawaii appellate courts apply the same standard of review as that applied upon primary review by the circuit court," *Kaiser Found. Health Plan, Inc. v. Dep't of Labor & Indus. Relations*, 70 Haw. 72, 80, 762 P.2d 796, 800-01 (1988), OHA's new point of appeal must be disregarded.

685, 705 n.22 (1st Cir. 1994) (amicus cannot usurp litigants' prerogative and introduce new issues or issue not properly preserved for appeal); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 861 (9th Cir. 1982) (amicus who had not attempted to intervene in suit could not raise issue on appeal that was not raised in the parties' merits briefs).

IV. CONCLUSION

Nothing in OHA's brief calls into question the circuit court's conclusion that the Planning Commission arbitrarily and capriciously denied Kauai Springs' zoning permits, and that the Planning Commission met its own stated standards for fulfilling its public trust duties. The circuit court's holding should be affirmed.

DATED: Honolulu, Hawaii, December 9, 2010.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Robert H. Thomas

ROBERT H. THOMAS
MARK M. MURAKAMI

Attorneys for Appellee
KAUAI SPRINGS, INC.