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.	)	
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	)	**FIFTH CIRCUIT COURT**
	)	**HON. KATHLEEN N.A. WATANABE**
	)	

APPELLEE KAUAI SPRINGS, INC.'S RESPONSE TO BRIEF OF AMICI CURIAE MALAMA KAUAI AND HAWAII'S THOUSAND FRIENDS (filed Dec. 8, 2010)

CERTIFICATE OF SERVICE

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APPELLEE KAUAI SPRINGS, INC.'S RESPONSE TO BRIEF OF AMICI CURIAE MALAMA KAUAI AND HAWAII'S THOUSAND FRIENDS (filed Dec. 8, 2010)

"Maybe" is not a valid reason for an agency to refuse to issue a zoning permit. Denying a permit for no other reason than "there *may be* outstanding regulatory processes" is the essence of arbitrary and capricious agency action because there is no realistic way to respond to "may be." That zoning permits must be denied until these unidentified regulatory processes are exhausted, however, lies at the core of the theory advanced by Malama Kauai and Hawaii's Thousand Friends (collectively MKHTF), when they argue it was incumbent upon Kauai Springs to guess whether there were any "regulatory processes" outstanding and pursue them, when the Kauai Planning Commission (Planning Commission) itself did not know what those processes might be or whether they were likely to yield any relevant information.

The Planning Commission's secondary administrative appeal presents two issues: (1) whether Kauai Springs could assent to an extension of the autoapprove deadlines for issuing zoning permits in Haw. Rev. Stat. § 91-13.5 (1993), and (2) whether the circuit court correctly concluded that the Planning Commission made "appropriate assessments" and took "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). MKHTF's brief addresses neither issue with any substance, however. Instead, it asks this Court to graft a "precautionary principle" onto the public trust doctrine, which would require an agency to refuse to issue a permit merely because it claims it does not know whether issuing the permit *might* affect water. MKHTF's brief adds nothing to this Court's consideration of the case

I. AUTOAPPROVE DEADLINES ARE NOT DEEMED WAIVED WHENEVER THE PUBLIC TRUST IS RAISED

MKHTF's brief only cursorily addresses the primary issue in the case – whether the circuit court correctly concluded that the Planning Commission acted arbitrarily and capriciously when it denied the zoning permits sought by Appellee Kauai Springs, even though the autoapprove deadlines in section 91-13.5 had passed. MKHTF's only argument is that the public trust mandates that Kauai Springs must be deemed to have consented to an extension of the autoapprove deadlines. *See* MKHTF Br. at 13. Without citing any authority directly supporting that claim, MKHTF in essence asserts that the statutory autoapprove deadlines are completely illusory. Because every state and county agency has public trust duties, *see Kelly v. 1250*

Oceanside Partners, 111 Haw. 205, 228, 140 P.3d 985, 1008 (2006), and under MKHTF's theory the public trust requires every agency to make an open-ended inquiry into an applicant's connection to water, under MKHTF's theory agencies are *never* bound by section 91-13.5 or the county ordinances adopted in compliance with the statute. MKHTF's theory means that an invocation of "public trust" will override the statutory time deadlines and allow agencies to take as much time as they deem necessary to see whether "there may be outstanding regulatory processes," even where, as here, the agency itself does not know what those processes might be, or whether there is anything to gain by them. Contrary to MKHTF's assertion, however, the public trust is not a blanket exception to section 91-13.5, nor is the statute the nullity that MKHTF asserts. As the Hawaii Supreme Court held in *Kelly*, the public trust does not transform every agency into a quasi-water tribunal, and agencies must only make "appropriate assessments" and take "reasonable measures" under the circumstances to protect the trust resource. *Kelly*, 111 Haw. at, 228, 140 P.3d at 1008. What is appropriate and reasonable is dependent upon the situation presented, and the circuit court concluded that the Planning Commission made appropriate assessments and took reasonable measures given that Kauai Springs was requesting zoning permits. FOF/COL ¶ 72, at 24 (citing *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006)).

II. *KELLY* REQUIRES AGENCIES MAKE "APPROPRIATE ASSESSMENTS" AND TAKE "REASONABLE MEASURES"

The second issue in this appeal is whether the circuit court correctly concluded under Haw. Rev. Stat. § 91-14 (1993) that the Planning Commission arbitrarily and capriciously refused to issue 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. R. CV07-1-0042 at 176. The circuit court expressly followed *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 228, 140 P.3d 985, 1008 (2006), which held that all state and municipal agencies have public trust duties, to conclude that the Planning Commission made the required "appropriate assessments" and took "reasonable measures" to protect the trust resource. The circuit court concluded that the Planning Commission did what *Kelly* required:

> 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, the circuit court did not hold that the Planning Commission had *no* duty under the public trust doctrine, only that the Planning Commission fulfilled those duties when it sought input from the State Commission on Water Resources Management (Water Commission) and the State Public Utilities Commission (PUC), which are appropriate and reasonable actions when zoning permits are sought.

However, rather than deal with what the circuit court actually held, MKHTF's brief seems to be arguing a different case than the one being considered by this Court, because it focuses almost exclusively on a question not at issue in this appeal: whether the Planning Commission has public trust duties at all. *See* MKHTF Br. at 4-8. 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 transform every state and county agency into *de facto* water commissions, and only required agencies to make "appropriate assessments" and take "reasonable measures" to protect the public trust. *Kelly* did not require agencies to stray from their jurisdiction and expertise, and left the question of what is appropriate and reasonable to an agency-by-agency and case-by-case determination. MKHTF does not address the circuit court's conclusion that the Planning Commission made appropriate assessments given the circumstances (evaluation of Kauai Springs' application for three simple zoning permits). Nor does it address the circuit court's conclusion that Kauai Springs complied with every request put to it, nor the fact that the Planning Commission itself was unable to identify any further "regulatory processes" that could be satisfied, or any missing information.

Nor does MKHTF address the circuit court's conclusion that by obtaining the input of the Water Commission and the PUC (both of which disclaimed interest in Kauai Springs, like every other bottler of water in the state), the Planning Commission fulfilled its public trust duty to take "reasonable measures" to protect the resource.

Finally, MKHTF does not address the circuit court's conclusion that Kauai Springs cannot be faulted because it complied with every request made of it by the Planning

Commission, and thus it was arbitrary and capricious for the Planning Commission to refuse to issue the zoning permits merely because "there *may* be outstanding regulatory processes with [the Water Commission] that [Kauai Springs] must satisfy." KPC Record at 000345-000346.

Remarkably, neither the Planning Commission's appeal, nor MKHTF's brief, actually claims that issuing the zoning permits to Kauai Springs would somehow impact water resources on the island of Kauai (often referred to as "the wettest spot on earth"[1]). Nor do they claim that Kauai Springs withheld information from the Planning Commission. Rather, because they are stuck with the undisputed fact that Kauai Springs complied with every request made by the Planning Commission over the many months of public hearings, they ask this Court to graft a "precautionary principle" onto the public trust doctrine, which would require an agency to reject an application for a simple zoning permit if *the agency itself* does not seem to be able to articulate what additional "applicable requirements" and "regulatory processes" the applicant can supposedly pursue.[2] In its Decision and Order, the Planning Commission did not point to any other approvals that Kauai Springs lacked or information it had not provided, 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 determined that there are "outstanding processes," identified what those "outstanding processes" are or might be, or whether those "outstanding processes," if identified, would gain anything given the Water Commission's and the PUC's express disclaimers of any interest in Kauai Springs, MKHTF instead would have this Court adopt a rule requiring zoning permit applicants to be mind readers to intuit what "processes" the agency believes might be "outstanding" and comply with them, with the penalty for not doing so being an indefinite suspension of the autoapprove deadlines and ultimately, denial of the permit application.

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[1] For one example, which asserts that "[i]n 1982, [Kauai's Mount Waialeale] summit is the rainiest spot on earth," *see* http://en.wikipedia.org/wiki/Mount_Waialeale.

[2] Note that the Planning Commission did not conclude that issuance of the zoning permits would impact water resources, only that it was "exercis[ing] caution" and denying the applications. *See* KPC Record at 000346. As noted earlier in this brief, "maybe" is the essence of an arbitrary and capricious standard.

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 or what they might gain, was arbitrary and capricious under Haw. Rev. Stat. § 91-14 (1993). R:CV07-1-0042 at 176. Rather than deal with these facts, MKHTF merely asserts that "the circuit court nullified the public trust and reversed its mandated burden of proof by requiring [the Planning Commission] to issue permits to Kauai Springs based on bare assumptions of private water rights and no effect on the public trust." MKHTF Br. at 1. Not so. Rather, the circuit court concluded that the Planning Commission did what was appropriate and reasonable to protect public trust resources, and that Kauai Springs did everything that was requested; the court's holding was not based on the public or private nature of water, but on the expiration of the autoapprove deadlines, the impossibly vague nature of the Planning Commission's rationale, and the efforts undertaken by the Planning Commission to fulfill its *Kelly* duties. *See* FOF/COL ¶ 72, at 24 (citing *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006)).

III. CONCLUSION

Nothing in MKHTF's brief calls into question the circuit court's conclusion that the Planning Commission arbitrarily and capriciously denied Kauai Springs' zoning permits when it missed the autoapprove deadlines, 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 28, 2010.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT

/s/ Robert H. Thomas

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date, a true and correct copy of the foregoing document was duly served upon the following individuals by electronic filing system and mailing said copy, postage prepaid, to their last known addresses as follows:

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