Administrative Appeals in Hawaii Courts: How do You Get There, and How do You Get Out?

Hawaii State Bar Association
Appellate Law Section

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Robert H. Thomas
rht@hawaiilawyer.com

DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
808-531-8031

www.inversecondemnation.com

I. JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURES ACT

§ 91-14 Judicial review of contested cases. (a) Any ***person aggrieved*** by a ***final decision and order*** in a ***contested case*** or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, ***the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency***.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within ***thirty days*** after the preliminary ruling or within ***thirty days after service*** of the certified copy of the final decision and order of the agency pursuant to rule of court, except where a statute provides for a direct appeal to the intermediate appellate court, subject to chapter 602. In such cases, the appeal shall be treated in the same manner as an appeal from the circuit court to the intermediate appellate court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions or the confirmation of any fine as a judgment pursuant to section 92-17(g); but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;

(2) Irreparable damage to the subject person will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be ***confined to the record***, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(g) 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 r***everse 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.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order.

II. RECENT ADMINISTRATIVE LAW DECISIONS OF INTEREST

A. Demand a Contested Case, And There's a Good Chance You'll Get One

...or at least an *appeal* from a contested case.

The Hawaii Supreme Court has issued its latest opinion in the apparently eternal metaphysical question of the circuit courts' appellate jurisdiction to review decisions under the Hawaii Administrative Procedures Act, Haw. Rev. Stat. § 91-14 of state and county agencies acting in their quasi-judicial capacities.

That statute gives the circuit court jurisdiction to review agency final decisions in "contested cases" (agency hearings which are required "by law," *i.e.*, rule, statute, or due process requirements, and that determine the "legal rights, duties, or privileges of specific parties").

"Contested cases" do not need to be labeled as such, but are fairly easy to identify: for the most part, they look like trials (witnesses, evidence, and the like). But not always so: pretty much any agency ruling in a that is the result of a hearing in the agency's non-legislative capacity could be deemed a "contested case," as the decision we discuss below confirms. If an agency holds a contested case and makes a final decision, then any person aggrieved by that decision has the ability to go to circuit court for appellate review of the administrative record.

But what about agency decisions that are not actually the product of a contested case? The Hawaii Supreme Court previously held that someone who demands a contested case can appeal the denial pursuant to § 91-14. And in *Kilakila O Haleakala v. Board of Land & Natural Resources*, No. SCWC-11-0000353 (Dec. 13, 2013) (*http://www.inversecondemnation.com/files/scwc-11-0000353.pdf*), the court has now concluded that an appeal lies from an agency's

decision to grant a use permit even though it did not hold a contested case, if it has not resolved a third-party's demand for a contested case.

This case involved a challenge to the University of Hawaii's plans for a high-tech telescope up on the top of Maui's Haleakala. To build the telescope, UH needed a Conservation District Use Permit from the Board of Land and Natural Resouces. It applied for a CDUA, but a group "dedicated to the protection of the sacredness of the summit of Haleakala" asked the agency to hold a contested case on the application. The agency did not grant or deny the request, but instead held a public hearing, after which it issued the CDUA, without acting on the contested case demand.

The opposing group appealed to the circuit court under § 91-14, but after the appeal was filed and the agency sought dismissal (for lack of jurisdiction), the agency granted the request for a contested case. When the circuit court "expressed concerns regarding the implementation of the permit in light of the pending contested case hearing," the agency responded that issues regarding a stay of the permit could be addressed in the agency's contested case hearing. The circuit court dismissed the appeal, "but it encouraged [the agency] to stay the permit until the contested case hearing concluded."

The opponents went to the court of appeals, which affirmed the circuit court's dismissal for lack of jurisdiction. The court concluded that the agency had not held a contested case, and thus § 91-14 jurisdiction could not be invoked. The Supreme Court agreed to review the case. The court rejected UH's argument that the case was moot because the agency eventually granted the demand for a contested case, and thus the relief requested by the opponent group (hold a contested case) has been granted. The opponents argued that the appeal was not moot, because they also wanted to court to halt the construction of the telescope. The Supreme Court agreed, and held that because "the permit remains in effect [and] UH can still build on Haleakala," the issue was not moot.

On the merits, the court held that the lack of a "formal" contested case hearing was no impediment to the circuit court exercising administrative § 91-14 jurisdiction. It concluded that the agency public hearing was, in fact, a "contested case" determining the "rights, duties, and privileges" of UH because the university could not go forward with building the telescope without a CDUA, and thus an

appeal lay from the agency's "final decision" issuing the permit to UH. The agency's failure to act on the opponents' demand for a contested case "became an effective denial" when the agency issued the permit. Finally, the court concluded that by reqesting a contested case, the opponents were "involved" in a contested case, and, given its doctrine of wide-open standing in cases such as these, concluded that the opponents had alleged a sufficient interest to allow them to appeal.

Two justices (Acoba and Pollock) concurred separately, concluding that the state constitutional provision protecting native Hawaiian rights and the public trust would independently give the court jurisdiction over the opponents' claims.

Here are you takeaways from this decision:

- It doesn't matter what the agency labels its process: if a hearing is required by rule, statute, or due process – even a public hearing – that's going to qualify as a "contested case."

- The circuit courts' administrative appellate jurisdiction under § 91-14 is read very broadly by the Hawaii Supreme Court. A case like this might have been better treated (at least conceptually) under the circuit courts' original jurisdiction, since the relief the opponents sought reminds us of that in a mandamus or declaratory action, and rather than going somewhere we're not sure the Legislature intended to go in § 91-14, the parties and the court shoehorned it into the Administrative Procedures Act. But no matter: it is now well-established under Hawaii decisional law that circuit courts have very broad and nearly plenary jurisdiction to review decisions by state and county agencies, even if there has not been a "formal" contested case.

- So here's your strategy: when in doubt, demand a contested case. If granted and you lose on the merits after the contested case, appeal. If denied a contested case, appeal. If the agency doesn't act on your request, appeal. Got it?

- The interesting issue left open to be resolved in a future case is whether someone who challenges an agency's action *must* do so under the Administrative Procedures Act (and the short 30-day repose period) as the

court just held she may, or whether she also has the option of seeking declaratory or injunctive relief in an original jurisdiction action. We'll see.

- Here's a tip for agencies: don't issue permits and only afterwards act on requests for contested cases. You may have had some reason for doing so in this case, but it just looks bad, man. You don't win appeals by sitting on these requests until after you have already issued the permit being challenged, and then arguing in court that either the court has no jurisdiction becase there was no contested case, or in the alternative that the case is moot because we now are holding one. We still can't figure out why that happened here.

As for the telescope project? The case was sent back to the circuit court for a ruling on the opponents' request for a stay.

B. SCT Defines "Contested Case" Broadly, Reviews Autoapproval Statute

In a decision that at first blush seems to have little to do with land use law, the Hawaii Supreme Court reiterated the standard for when an agency hearing is a "contested case" under the Administrative Procedures Act, and clarified what constitutes agency "action" for purpose of the permit application autoapproval statute.

1. Contested Case Broadly Defined

The first issue in *E & J Lounge Operating Co. v. Liquor Comm'n of the City & County of Honolulu*, No. 27940 (July 29, 2008) (*http://www.inversecondemnation.com/hawaiiappellate/2008/07/e-j-lounge-operating-company-inc-v-liquor-commission-of-the-city-and-county-of-honolulu.html*) was whether, as the caption of the case indicates, a public hearing before the Honolulu Liquor Commission was a contested case under Haw. Rev. Stat. § 91-1(5). The court held it was.

This case is important for land use law since many of the public hearings before agencies are not formally defined as contested cases. The court held that the designation did not matter, and an agency hearing is a contested case, and subject to judicial review under chapter 91 when

- the hearing is an agency hearing required by law, and
- the hearing determines the rights, duties, or privileges of specific parties.

Slip op. at 16 (citing *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 79 Haw. 425, 903 P.2d 1246 (1995)). Applying that standard, the court held that a hearing is "required by law" when it is required by rule, statute, or the constitution.

The Intermediate Court of Appeals decision, in contrast, held that a contested case was a quasi-adjudicatory agency hearing, and differed greatly from a quasi-legislative public agency hearing. Contested cases are like trials, while other public hearings are like legislative hearings. The Supreme Court rejected the distinction, holding that the statutory definition of contested case does not require that the hearing be like a trial. *See* slip op. at 23-25. The court also held that a hearing does not need to be labeled a "contested case" in order for the statutory definition to apply. Slip op. at 27-28.

This decision reaffirms the need for vigilance because under Haw. Rev. Stat. § 91-14, a person aggrieved by an agency decision in a contested case has a fairly short time in which to seek judicial review.

2. Autoapproval Statute

The Supreme Court also held that under the automatic approval statute, Haw. Rev. Stat. § 91‑13.5, an agency must act to grant or deny a permit application within a certain time period, but is not required to make a "legally effective" decision, at least procedurally. Slip op. at 64-65. Section 91-13.5 requires agency "take action to grant or deny" applications within certain time frames, or they are "deemed approved" –

> (c) All such issuing agencies shall take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved ...

In the *E & J Lounge* case, one member of the Liquor Commission was not present at the first meeting of the agency, and the agency did not comply with section 91-11. Thus, when the Commission denied the permit applications, the denial was "legally ineffective." The applicant asserted that because the agency had not properly denied the application within the time limits, it was deemed approved. The court disagreed, holding that a mere procedural error would not result in automatic approval. It was enough that the agency purported to act, and seemed to be proceeding in good faith, with no party claiming that the error deprived the agency of the power to act. Slip op. at 64-65.

This decision should be applied with caution, however, since it does not give agencies blanket license to disapprove applications and thereby beat an autoapproval deadline. It would presumably be a different case, for example, if an agency's denial was not the consequence of a good faith—but mistaken—belief that it had the power to act, if the procedural error deprived it of jurisdiction, or if an application is denied because the agency has run out of time. The court made no ruling on those situations, which were not presented by the facts of the case.

C. ICA: Plaintiff Need Not Change The Law To Ripen Takings Claim

In *Leone v. County of Maui*, No. 29696 (June 22, 2012) (*http://www.inversecondemnation.com/files/leone-v-cty-of-maui-6-22-2012.pdf*), the Hawaii Intermediate Court of Appeals held that a plaintiff alleging a regulatory taking is not required to seek an amendment to a Community Plan in order to ripen her claim. A CP amendment is a legislative act, and plaintiffs are not required to try to change the law before they seeks just compensation.

The trial court determined the plaintiffs' regulatory takings claims were not ripe because they should have tried to change offending land use regulations which allegedly deprive their property of all economically beneficial uses. The trial court's decision is available here.

Disclosure: we filed an amicus brief in the case in support of the property owner, arguing that *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) does not require a takings plaintiff to attempt to change the law to ripen her claim. The ICA adopted that reasoning, concluding:

> Because a Community Plan amendment is not an administrative act, it cannot reasonably be required as a step in reaching a final agency determination for ripeness purposes. Ripeness requires only that landowners take advantage of any available variances or waivers under existing law; it does not require them to undertake changing the law itself.

Slip op. at 21 (citations omitted).

D. State Agency Approval Not a Ripeness Bar To a Challenge To County Approvals

Here's a recent case which details how the very broad way Hawaii Supreme Court treats claims of jurisidictional ripeness. In *Blake v. County of Kauai Planning Comm'n*, No. SCWC-11-0000342 (Dec. 19, 2013), the court held that a third-party challenge to the Kauai Planning Commission's subdivision approval was ripe for adjudication, and that the trial court should have exercised subject-matter jurisdiction.

This case was not an administrative appeal under the Administrative Procedures Act, but nonetheless turned on the issue of whether a state agency had taken "final agency action" under the judicially-adopted doctrine of ripeness. The court concluded that the fact that a state agency's approval which was necessary before a subdivision could go forward was not an impediment to a challenge to a county's subdivision approval.

The details of the case are set out at length in Chief Justice Recktenwald's opinion (*http://www.inversecondemnation.com/files/scwc-11-0000342.pdf*), but here are the salient facts. A Kauai landowner sought subdivision approval from the county Planning Commission, and all the parties assumed that a road bordering one phase of the proposed development was owned by the County. The road is apparently "historic," so the State Historic Preservation Division weighed in, recommending conditions including a study, and mitigation measures should any historic stuff be discovered. The Planning Commission tentatively approved the subdivision, subject to SHPD's conditions. After an environmental impact statement, the Commission gave its final approvals. The property owner began construction of the project.

But after Blake instituted an original jurisdiction action in circuit court challenging the subdivision approval under a variety of theories (public trust, Native Hawaiian rights, faulty historic review, shoreline problems, etc., etc.; any Hawaii land use lawyer knows the drill), it was discovered the road was *not* owned by the County, but rather by the State. Blake added two more counts to his complaint and everyone filed motions for summary judgment.

The State asserted Blake's complaint was not ripe, and that the court lacked subject matter jurisdiction because the property owner could not go forward with its project until it obtained an easement from the State across the road. Because the state agency tasked with considering a request for such an easement had not yet approved it, there was no final agency action. The circuit court agreed, and dismissed some of Blake's claims as unripe. His ripe claims were also dismissed as a matter of judicial economy. The Court of Appeals affirmed.

In concluding that all of Blake's claims were ripe, the Supreme Court held that the state agency had done enough to fix its position. The court's analysis strayed into the territory of our old "friend," the *Williamson County* ripeness doctrine from regulatory takings law, most recently considered by the Hawaii ICA in *Leone v. County of Maui*, 128 Haw. 183, 284 P.3d 956 (Haw. App. 2012) (a decision detailed in these materials) (disclosure: we filed an amicus brief in *Leone*, arguing that a property owner need not change the law in order for its regulatory takings challenge to be ripe under *Williamson County*). The Supreme Court noted that *Leone* concluded the takings challenge was ripe because in that case because the Planning Commission, in rejecting the property owner's application, had taken a position definitive enough for a reviewing court to determine what was allegedly "taken."

In *Blake*, the court held that the situation was similar: even though state agency approval for the easement was needed, the Kauai Planning Commission's final approval of the subdivision fixed its position well enough for Blake to assert his myriad claims against the Planning Commission:

> Although [the state agency] would need to grant an easement over Hapa Road, the pendency of that approval does not "per se affect the finality of the [Planning Commission's] approval of the [subdivision application] for purposes of appeal" because Blake is challenging the

> Planning Commission's action, and not the action of BLNR.

Slip op. at 21. The court also rejected each of the other reasons the circuit court and the ICA dismissed Blake's remaining claims. *See id*. at 23-29.

Justice Acoba concurred and dissented, agreeing with the other justices that all of Blake's claims were ripe, but concluding that the case should not have been remanded for further proceedings on the merits. Since all parties agreed that no material facts were disputed and had moved for summary judgment, Justice Acoba saw no reason why the Supreme Court could not rule as a matter of law on the merits.

What the case ultimately means is that even if the development could not continue without subsequent state approvals (and the lack of those approvals may be enough to stop the project), the fact that the county agency had definitively acted was sufficient to render a challenge ripe. What this means is that you should not treat "development approvals" holistically, but as separate processes for ripeness purposes. This should also mean that any statutes of limitation or repose should start ticking from the time the agency has reached "final" action, even if the development project has not obtained all other approvals necessary to go forward from other agencies.

This decision also reflects that the Recktenwald Court is continuing the Moon Court's policies of keeping the door to the courthouse doors opened as wide as possible. That's the position the court of appeals took in *Leone* regarding regulatory takings plaintiffs, and we're glad to see that the Supreme Court has adopted it, and made that case a precedent applicable statewide.

E. ICA: Third-Party Objector Must Seek Administrative Relief To Challenge Halloween Party

Anyone who practices land use law is familiar with the primary jurisdiction and exhaustion of administrative remedies doctrines. These rules require courts to either dismiss claims or abstain from exercising jurisdiction unless and until an administrative agency has first developed the record and passed on the issues. If you've got notice of the action you claim is wrong, you must challenge that

decision and seek a contested case in the agency's review process as a prerequisite to obtaining judicial review.

The latest case from the Hawaii Intermediate Court of Appeals, *Dancil v. Arakawa*, No. CAAP-11-001029 (Nov. 16, 2012) (*http://www.inversecondemnation.com/files/caap-11-0001020.pdf*), presents these issues in a familiar context: the County of Maui approved a coastal zone permit allowing a Halloween party to go forward in Lahaina, and someone was against it. After the County issued the permit, the objector did not appeal that decision up through the County's administrative appeals process within the 10-day statute of repose, but instead filed an original jurisdiction action in state court.

The court dismissed the action, holding that primary jurisdiction over the claim lay in the administrative tribunal, and the ICA affirmed. The challenger should have brought its claim in the administrative forum and the 10 day window had long since closed, so end of story and nothing much to see here, folks, please move along. Read the opinion for a fairly straightforward application of primary jurisdiction.

But this case raises two points worth noting:

- The opinion does not really deal with the more interesting issues of when a third-party is obligated to utilize the administrative process, and whether Due Process requires notice informing a party that they've got a short time frame in which to use the administrative review process. In cases where the permit applicant is denied a permit and it is clear that the applicant must challenge that decision immediately, it is clear that they have notice and should be subject to the exceedingly short statutes of repose that are often presented in such cases (in this case, 10 days). But what about those cases where a third party may not have received actual notice of the permit? Is the third party presumed to have knowledge by virtue of a mere publication of notice (in this case, the State Office of Environmental Quality Control is required to publish notice of the County's decision)? And what about those cases where party is not made aware of the short statute of repose and the requirement of pursuing relief in a specialized forum, and it is not obvious that it must do so? May the agency remain silent and let the statute of repose pass? In those cases, at least one court has held that the agency has an

obligation to provide the party with express notice. *See Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005). While these questions are interesting, they were not answered by the *Dancil* opinion, and will be left for future resolution.

- Finally, what do the facts in this case say about the level of regulation that exists for what most (the plaintiffs perhaps excepted) believed was a fairly inconsequential activity in the coastal zone? Yes, the County determined that the Halloween party would not have a significant impact on the environment, but the regulatory scheme required a complex process to assess whether the proposed activity would have an impact. If this level of scrutiny is given a Halloween party, is it any wonder that Hawaii landowners believe that their proposals for more intense uses are subject to a dizzying and seemingly endless array of regulations? We wonder whether a challenge to a Halloween party was the most efficient use of regulatory and judicial resources.

F. ICA: Water Commission Needs To Conduct Constested Case When Amending Instream Flow Standards

Guess what? The Water Commission got it wrong again. The Hawaii Intermediate Court of Appeals held in this unpublished memorandum order (*http://www.inversecondemnation.com/files/caap-10-0000161mop.pdf*) that the Commission must hold a "contested case" hearing upon demand when the Commission sets "interim instream flow standards" under the Water Code (in other words, how much water should be allocated to whom and where for particular streams).

The dispute in this appeal was whether the process to establish those standards is about setting policy—meaning the Commission need only hold a legislative-type public hearing—or determined particular parties' rights—in which case a trial-like contested case is required. The ICA concluded it was the latter. There are three instances when an agency must hold an adjudicatory hearing: when required by the agency's own rules, when required by a statute, or when required by due process because the party asking for a contested case has some "property interest" that could be affected by the agency's decision.

Here, there isn't a rule or a statute requiring the Commission to conduct a trial to set interim instream flows, so the court analyzed whether the parties demanding a contested case had some constitutional rights at stake. Referencing a recent Hawaii Supreme Court decision from the same petition which the ICA characterized as holding that "the Commission's decisions setting or amending the IIFS can affect constitutionally protected property interests," the ICA concluded that the ability to "live, work, and play" in the areas of the streams at issue, and the native Hawaiian rights that stem therefrom, are a property interest protected by the Due Process Clause. These rights are "new property" entitlements (see *Board of Regents v. Roth*, 408 U.S. 564 (1972)) because they have a statutory basis in the Water Code. Because setting instream flows might affect these rights, the Commission needed to hold an adjudicatory hearing if asked.

- **Thought 1:** Water rights in Hawaii are supposed to be about the "public trust" as well as private rights. But decisions like these mean that for the public to have its voice heard when the Commission establishes stream flows, it must do so in the context of an adjudicatory hearing under the Administratve Procedures Act. Which means you aren't testifying unless you are a precipient or expert witness. You have no stake in the outcome unless you formally intervene in a timely fashion and establish that you have some material stake in the outcome. You can't contact the agency members ex parte. The material the Commission can consider is limited to the (admittedly very expansive) rules of evidence. We're not sure how these limitations can be squared with the public's right to participate in setting stream flows which, after all, are supposed to be for public benefit. Implicit in these type of decisions are that certain private rights are more important than the public's general rights. Which may not be a bad thing.

- **Thought 2:** The Hawaii Supreme Court has a very strong body of decisional law concluding that all sorts of expectations are constitutionally-protected property. This case adheres to that line of cases, so is not really surprising.

Disclosure: we represent one of the many parties to this appeal, but did not take a position on these issues.

G. SCT: Appellate Jurisdiction Triggered By Signed Water Commission Minutes

In *In re Petition to Amend Interim Instream Flow Standards for Waikamoi, Puohokamoa, Haipuaena, Punalau/Kolea, Honomanu, West Wailuaiki, East Wailuaiki, Kopiliula, Puakaa, Waiohue, Paakea, Kapaula, and Hanawi streams*, the Hawaii Supreme Court considered on a certiorari the question of appellate jurisdiction. The Water Commission denied the petitioner's request for a contested case, and the ICA dismissed the appeal from the Water Commssion because under the Hawaii Admistraitve Procedures Act, there was no final order from which the petitioners could appeal. The Supreme Court summarily vacated the ICA's dismissal, and sent the appeal back to that court "for disposition" on the merits. *See http://www.inversecondemnation.com/files/scwc-11-0001005am.pdf*.

Under the Water Code, the ICA has appellate jurisdiction to review under section 91-14 of the APA a final decision of the Water Commission in a "contested case." The Hawaii Supreme Court has previously concluded that an order denying a request for a contested case is itself appealable from the "appeals from contested cases" provision in this statute.

The court concluded the ICA has appellate jurisdiction because the Acting Deputy Director to the Chairperson of the Board of Land and Natural Resources certified the Water Commission minutes by signing them, and "[t]he decision, as reflected in the minutes of the Commission's October 18, 2010 meeting, is a final decision of the Commission for which judicial review may be sought pursuant to HRS § 91-14(a)." Order at 2.

In our view, the more interesting question to be resolved is whether the Water Commission's setting or amending interim instream flow standards under the Water Code must be accomplished by a "contested case" (a quasi-judicial administrative hearing). Under Haw. Rev. Stat. § 91-1, a "contested case" is an agency 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." The issue of whether establishing the amount of water that must be in a stream in order to "protect the public interest in [that] particular stream" is one that determines the rights of specific parties and thus must be accomplished by litigation, or is more in the nature of a legislative determination, is one we will be following closely.

Disclosure: we represent the Hawaii Farm Bureau in this case, although we did not file a brief or take a position on the issue presented in the application for certiorari.

H. ICA Clarifies What Actions by Planning Dep't Trigger Administrative Zoning Appeals

The Hawaii Intermediate Court of Appeals, in a unanimous panel opinion authored by Judge Foley, held that a "zoning verification" by the Director of the City and County's Department of Planning and Permitting is not a "decision of the Director" which a property owner must administratively appeal to the Honolulu Zoning Board of Appeals. *Hoku Lele, LLC v. City and County of Honolulu*, No. CAAP-11-0001064 (Jan. 25, 2013). (*http://www.inversecondemnation.com/files/016493772.pdf*). The circuit court had dismissed the complaint for lack of jurisdiction because the property owner did not seek administrative review.

We represent the property owner/plaintiff/appellant in the case, so we're not going to analyze the issue in detail, and leave it up to you to read the opinion. Needless to say, we think it is a correct and well-reasoned decision.

I. ICA: Must Pursue Administrative Process To Object To Vacation Rentals (And Other *Ala Loop*-ish Claims)

The Hawaii Intermediate Court of Appeals issued an opinion in *Pavsek v. Sandvold*, No. 29179 (June 13, 2012) (*http://www.inversecondemnation.com/files/ica29179.pdf*), holding that a person complaining about a vacation rental cannot circumvent the City's enforcement procedures and the administrative appeal process by instituting an original jurisdiction lawsuit claiming that a homeowner is renting her property in violation of the City's prohibition on rentals of less than thirty days:

> We hold that: (1) HRS § 46-4(a) does create a private right of action in favor of a real estate owner directly affected by an alleged LUO [Land Use Ordinance] zoning violation, but that the owner's action is subject to the doctrine of primary jurisdiction; (2) under the doctrine of primary jurisdiction, the Pavseks are required to seek an administrative determination of their claim that their neighbors have been violating the LUO before proceeding

> with their suit to obtain judicial enforcement of the LUO; (3) the nuisance claims raised by the Pavseks in their complaint were derived from their claim of the LUO violation and therefore are also subject to the primary jurisdiction doctrine; (4) the Circuit Court properly dismissed the claims alleging breach of fiduciary duty and unjust enrichment for failure to state a claim for relief; and (5) the Circuit's Court's remedy of dismissal with prejudice of the claims subject to the primary jurisdiction doctrine is not consistent with the remedies applicable to the doctrine.

Slip op. at 2-3 (emphasis original). This office represents the prevailing property owners, and argued the case. The briefs are posted here.

III. RECENT APPELLATE PROCEDURE DECISIONS OF INTEREST

A. A Rule 59 Motion For Recon May Be Deemed Denied In 90 Days, But It's Not Appealable Until An Order Is Entered

We all know that under the Hawaii Rules of Appellate Procedure, the timely filing of a motion for reconsideration under Haw. R. Civ. P. 59 tolls the time when a notice of appeal must be filed to "until 30 days after entry of an order disposing of the motion." Haw. R. App. P. 4. That same rule also provides that if the circuit court has not acted on the motion for reconsideration within 90 days after filing, the motion is deemed denied. So the question arose whether a party that wanted to appeal the circuit court's ruling must have done so within 30 days of the "deemed denied" date, or it could wait until the court actually entered an order.

In *Ass'n of Condominium Homeowners of Tropics at Waikele v. Sakuma*, No. SCWC-12-0000870 (Dec. 17, 2013) (*http://www.inversecondemnation.com/files/scwc-12-0000870.pdf*), the Hawaii Supreme Court concluded that the 30-day appeal window only opens once the circuit court actually enters an order disposing of the motion for recon, even where the motion is deemed denied by operation of Rule 4. The court relied on the plain language of the rule, quoted above, and noted that under the rules, an order is "entered when it is filed in the office of the clerk of the court."

Which means that an automatic denial does not count as an order "entered."

So even though you lose a recon motion automatically, there's no appeal until the court actually enters an order memorializing that.

Justice Nakayama dissented, concluding that the majority's strict reading effectively renders the deemed denied language surplusage:

> Under the majority's interpretation, a "deemed denial" is not ripe for appeal until the court affirmatively issues an order disposing of the post-judgment motion. By stating that a "deemed denial" is not an "order disposing of the motion," the "deemed denial" is stripped of all legal effect.

Dissent at 3-4.

So here's what this decision means:

- File your motion for recon on a timely basis, and the appeal period is tolled.

- If the court affirmatively denies the motion and enters an order to that effect, you have 30 days to appeal.

- If the court does nothing for 90 days, you motion has been deemed denied. If the court does not enter an order memorializing that (as it may not, since it let the 90 days slip by without action), one of the parties should submit a draft order for the circuit court to execute and enter.

- When that document is filed, the appealing party has 30 days to file its Notice of Appeal.

We're not sure whether the analysis of the majority or Justice Nakayama is the "correct" one, but ultimately, we like anything that brings more clarity to the rules about the triggers to an appeal, especially when the risk of uncertainty is that you miss a jurisdictional deadline. This ruling makes it less likely that you will do so.

B. Supreme Court Clarifies "Final, Appealable Order" And *Forgay* Doctrine

If there's one thing that keeps appellate lawyers up at night, it's jurisdictional questions. Too late and you're toast: failing to appeal within the short appellate time frames are usually fatal to your case. Although there's usually no harm in an early filing, it can be awkward when you've teed up a case only to have the court of appeals find some problems and dismiss.

Hawaii appellate nerds know the latter problem as the "*Jenkins*" or "*Cades*" issue, after the seminal case reminding us that the sine qua non of civil appellate jurisdiction in most cases is the entry of a final judgment by the trial court disposing of all claims against all parties. *See Jenkins v. Cades Schutte Fleming & Wright*, 76 Haw. 115, 869 P.2d 1334 (1994).

And by "judgment" the Supreme Court means a separate piece of paper that has the magic words on it. Many a lawyer has been caught up by this when they—and the trial court—think there's been a final, appealable judgment entered, but something still remains, at least (not) on paper. Even the best of us. Even after the case was fully briefed and awaiting argument.

Not us, of course. We'd *never*, *ever* fall into that trap.

What we're getting at is that we appreciate anything that makes the rules about when you can appeal—and when you must appeal—clearer. So we're glad the Hawaii Supreme Court has added *Lambert v. Teisina*, No. SCWC-12-0001024 (Jan. 10, 2014) (*http://www.inversecondemnation.com/files/scwc-12-0001024.pdf*) to the Hawaii Reports, because it does just that.

The case was a dispute over two parcels on Oahu's north shore. The trial court ultimately ordered partition, but did not dispose of the entire case. You can read the short per curiam opinion for the details. But suffice it to say that as part of its ruling, the trial court ordered one part of one parcel to be partitioned and auctioned.

When one party appealed from this order, the ICA dismissed the case under *Jenkins*, part way through the briefing. The Hawaii Supreme Court accepted cert,

and asked the parties for additional briefing on whether *Forgay v. Conrad*, 47 U.S. 201 (1848) was applicable, since apparently that case had not been raised in the cert papers. In *Forgay*, the U.S. Supreme Court held that a non-final order may be immediately appealable if hardship or irreparable injury would result by waiting for final judgment. Although the Hawaii Supreme Court had mentioned Forgay in dictum, it had never said the magic words "we hold that..."

Now it has:

> Although narrow in scope and limited in use, the Forgay doctrine permits a direct appeal from a non-final, interlocutory order or decree that commands the immediate transfer of property, where the losing party will be subjected to undue hardship and irreparable injury if appellate review must wait until the final outcome of the litigation. The *Forgay* doctrine is therefore an appropriate exception to the final judgment requirement in light of the consequences of an order or decree requiring an immediate change in the ownership or possession of real property.

Slip op. at 10-11 (citations omitted).

The court held that a partition order is a decree requiring an immediate change in the ownership or possession of real property, even though it "does not command the immediate execution of the property." Slip op. at 13. It's appealable because it confirms the sale of the land to a trustee, directs a commissioner to convey the property, and orders the current owners to surrender it. Thus, it "effectively terminates" the present owners' rights, "and they will suffer irreparable injury if appellate review is postponed until final judgment." Slip op. at 13-14.

Clarity is good. It helps us sleep nights.

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