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IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT

STATE OF HAWAII

KAUAI SPRINGS, INC., Appellant, vs. COUNTY OF KAUAI PLANNING COMMISSION, Appellee.	Case No. 07-1-0042 (Agency Appeal) **REPLY BRIEF OF APPELLANT KAUAI SPRINGS, INC.; CERTIFICATE OF SERVICE** **Date: August 20, 2008** **Time: 1:00 p.m.** **Judge: Hon. Kathleen N.A. Watanabe**

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REPLY BRIEF OF APPELLANT KAUAI SPRINGS, INC.

To justify its denial of three routine Ag zoning permits, the Kauai Planning Commission ("KPC") stakes everything on two arguments.

First, it asserts the public trust mandated denial of the applications because Kauai Springs, Inc. ("Kauai Springs") had not "proactively sought a declaratory ruling" from either the State Commission on Water Resource Management ("CWRM") or the State Public Utilities Commission ("PUC") "prior to the [KPC] hearings." KPC Brief at 14. Second, KPC claims Kauai Springs "assented" to extensions of the deadlines for KPC to grant or deny the applications.

Neither argument is persuasive. The Court need not determine whether KPC could deny the permits under the public trust even assuming such a duty exists, because the Record is clear KPC satisfied its own standards by seeking the input of CWRM and PUC. Additionally, the public trust does not transform every state and county agency into a water rights tribunal whenever the agency can make a connection – however attenuated – between an application and "water." Finally, KPC's claim Kauai Springs "assented" to a waiver of the statutory autoapprove deadlines is factually and legally incorrect. Kauai Springs did not consent to extensions merely by appearing at the hearing and offering to waive the deadlines. If it is deemed to have done so, those portions of the Kauai County Code allowing an applicant to assent to an extension of the autoapprove deadlines exceed the authority granted by the enabling statute, which permits extensions only for "national disaster, state emergency, or union strike," and do not allow the County to add "assent" as an additional reason. Haw. Rev. Stat. § 91-13.5(e) (1993).

I. EVEN IF KPC HAD A PUBLIC TRUST DUTY, IT SATISFIED ITS OWN STANDARDS BY RECEIVING THE INPUT OF CWRM AND PUC

KPC admits the standards contained in the Kauai Zoning Code and KPC's own regulations do not permit it to regulate water uses, but argues its public trust duties required it to deny Kauai Springs' zoning permit applications and shift the burden to the applicant to "proactively" seek a "formal opinion" and a "declaratory ruling" from both CWRM and PUC. KPC Brief at 13-14. This Court need not reach these "issues of first impression" KPC suggests are presented by this appeal, KPC Brief at 1, because even assuming for argument's sake that KPC had a public trust duty to review Kauai Springs' zoning permit applications for water law issues, KPC plainly satisfied its own standards for fulfilling that duty when it sought and received input from both CWRM and PUC.

KPC's Brief recognizes, as it must, that CWRM has determined "that [Kauai Springs] *did not require* a water use permit." KPC Brief at 12 (emphasis added). Like CWRM, the PUC

plainly disclaimed regulatory authority over Kauai Springs. Despite those undisputed facts, KPC continues to maintain the public trust required it to deny Kauai Springs' zoning permit applications because Kauai Springs has not "proactively sought a declaratory ruling from the PUC and CWRM." KPC Brief at 14. Beyond obtaining the "formal opinion" of those agencies, KPC's Brief points to no other "outstanding regulatory processes" it claims are necessary to satisfy its public trust duties.[1] If the input of these agencies is all that is required to satisfy KPC's claimed public trust duty, and even if Kauai Springs bears the burden of proving those agencies are not interested, then the burden was more than satisfied as reflected in the Findings of Fact and Conclusions of Law. *See* RA at 342 (FOF #18); RA at 342 (FOF #19.a); RA at 343 (FOF #19.b). *See also Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006) (holding the county had a public trust duty, but there was no evidence it breached the duty).

KPC does not inform the Court what the declaratory rulings it claims Kauai Springs should have obtained would accomplish, given PUC's straightforward disclaimer of jurisdiction over not only Kauai Springs, but every other water bottling company in the State, and CWRM's statement to the Planning Department that "a water use permit from the Commission is not required to use the existing source(s) or to change the type of water use." RA at 464 (Letter from CWRM to Ian K. Costa, Planning Director, County of Kauai (Sep. 26, 2006). Indeed, PUC could not issue a declaratory ruling. *See* Haw. Admin. R. § 6-61-164 (1992) (PUC may refuse to issue a declaratory order where the matter is not within the jurisdiction of the commission). Hawaii law does not require pursuit of futile administrative processes. *See, e.g., Poe v. Hawaii Labor Relations Bd.*, 97 Haw. 528, 536, 40 P.3d 930, 938 (2002). Both CWRM and PUC recognize Kauai Springs does not control the source, does not divert water, and does not control the transmission system. Their interpretations of their own rules and jurisdictions must be given deference by the reviewing court, *see, e.g., Application of Wind Power Pacific Investors-III*, 67 Haw. 342, 344, 686 P.2d 831, 833 (1984), and KPC is similarly bound.

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1. KPC's Brief asserts that CWRM permits "may be required" in the future, contingent upon the affect of "[g]round-water withdrawals" on streamflows. KPC Brief at 12. This is pure fancy, and not a proper basis on which to deny permit applications. Decisions on permits must be grounded in fact and the Record, not vague speculation. KPC's claim also ignores the fact that Kauai Springs does not control withdrawals from the source or the transmission system, and only purchases the water from its owner.

KPC, however, maintains Kauai Springs should have pursued these "outstanding regulatory processes" because of KPC's vague alleged "fears" Kauai Springs might affect water resources. Ill-defined "fears," however, are no basis to deny a zoning permit, especially when the Record is devoid of any factual foundation for the alleged apprehension; indeed, the facts in this case actually and specifically contradict those fears. Basing a decision on amorphous trepidation – rather than concrete facts – is the essence of arbitrary and capricious action because it is a meaningless standard, for how can an applicant be expected to muster evidence to overcome an agency's "fears?" In fact, any such fears are unfounded because Kauai Springs is not, legally speaking, materially different than other commercial bottlers of water in Hawaii, none of which are subject to vague "outstanding regulatory processes," and none of which have been required to "proactively" seek CWRM or PUC declaratory rulings. For example, Menehune Water, the largest bottled water company (which is also sold in premium packages as "Hawaii Water"), bottles thousands of gallons of Oahu groundwater. *See* "Hawaii Water a Menehune Water Company – Taste the Difference!," *available at* http://www.menehunewater.com. Menehune has been bottling groundwater since 1985, and exports this water to other islands, the mainland, and internationally. *See* "The Menehune Water Co. Story," *available at* http://www.menehunewater.com/about-us.asp. The source for Menehune Water is an "underground aquifer" in an "environmentally-pristine, virgin rain forest." *See* "Our Hawaiian Source," *available at* http://www.menehunewater.com/ultra-pure-hawaii-water.asp. Another major bottler of ground water, Hawaiian Springs, bottles its water at the source on the Big Island. *See* "Source Geology," *available at* http://www.hawaiianspring.com/source.html. According to Hawaiian Springs, its well system "(designated as Well #3802-6) was built in 1981 and is equipped with a 10" inside diameter casing. The well system is 251.22 feet deep and the pump intake is at a depth of 241'. . . Our source is a large ground water body between the village of Pahoa to the south, and the city of Hilo to the north of Kea'au." *Id.* Hawaiian Springs has been bottling Big Island ground water since 1995. *See* "History," *available at* http://www.hawaiianspring.com/history.html. The PUC "does not currently exercise jurisdiction over these or any other water bottling facilities in the State," because "bottled water may be obtained from a number of competing sources and providers." RA at 414-418 (Letter from Stacey K. Djou to Ian K. Costa, Planning Director (Nov. 22, 2006). CWRM also specifically informed KPC that no water use permits were needed by Kauai Springs.

II. THE ZONING PERMIT APPLICATIONS DID NOT "PROPOSE THE USE OF WATER"

The Court may also avoid the constitutional public trust inquiry requested by KPC by affirming that the public trust doctrine is not implicated because Kauai Springs does not extract or transport water. *See Rees v. Carlisle*, 113 Haw. 446, 456, 153 P.3d 1131, 1141 (2007) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.") (quoting *City and County of Honolulu v. Sherman*, 110 Haw. 39, 57 n.7, 129 P.3d 542, 559 n.7 (2006)). KPC's Brief is premised on an incorrect fact: it asserts Kauai Springs "had the burden of justifying its *proposed use of the water* under the public trust doctrine." KPC Brief at 19 (emphasis added). KPC also incorrectly asserts that Kauai Springs "extracts" water. *Id.* at 2.

Contrary to KPC's claims, however, Kauai Springs' applications for Use, Special and Class IV zoning permits did not propose, and did not seek KPC's approval for, "use of water." Rather, Kauai Springs sought approval for its building and related operations. *See* KPC Brief at 3 (noting the cease and desist letter issued by the Planning Department objected to the "'processing and packaging without the proper permits' and '[i]ndustrial processing and packaging' in an agricultural district.'"). The Findings of Fact confirm: under the heading "PROPOSAL FOR DEVELOPMENT," FOF ¶ 12 states that Kauai Springs sought permission only for "after-the-fact permits for a spring water bottling facility which is gravity fed by a private water line from a tunnel located at the 1,000 feet elevation on Kahili Mountain." Finding of Fact ¶ 12 (Record on Appeal (RA) at 342 (attached as Exhibit 4 to the Opening Brief)). Further, the application did not seek KPC's permission to "extract" water because Kauai Springs does not control the source or the transmission system. All it does it open a tap on a pipeline that crosses its property. In that regard, Kauai Springs is no different than any person or business on Kauai that purchases water from someone else, or fills a bottle with a garden hose.

III. PUBLIC TRUST DUTIES DO NOT TRANSFORM EVERY AGENCY DECISION INTO A WATER RIGHTS ISSUE

KPC asks this Court to accept the theory that because Kauai Springs is a water bottling company, its use of the land must involve the public trust. That doctrine, however, does not transform every state and county agency into a water rights tribunal merely because a connection can be made between a permit application and the public's water resources. In *Kelly v. 1250 Oceanside*

Partners, 111 Haw. 205, 140 P.3d 985 (2006), the Hawaii Supreme Court held that county agencies have public trust duties, and may not delegate these duties to other agencies, but the court did not hold that the public trust doctrine is a blank check allowing agencies to stray far afield of their expertise and jurisdiction simply because water may be involved. The public trust is not so pervasive, and only requires action by an agency when its jurisdiction includes regulation of activities that impact water resources. It does not allow an agency to deny an application because of "fears," or because it asserts it lacks information. None of the cases relied upon by KPC to support its conclusion that Kauai Springs should have "proactively sought a declaratory ruling from the PUC and CWRM prior to the hearings" impose such a requirement. *See* KPC Brief at 14.[2]

For example, in *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006), the County of Hawaii claimed it had no duty whatsoever to do anything to protect Class AA ocean waters ("the most protective classification for marine waters, [which] requires that the waters remain pristine, or in 'wilderness' condition") from runoff when it issued grading and grubbing permits for parcels abutting the ocean. *Id.* at 223, 140 P.3d at 1003. After a heavy rainstorm hit and the developer's erosion control measures failed, runoff polluted the adjacent ocean. *Id.* at 211, 140 P.3d at 991. The County asserted it was the State's responsibility to protect the ocean, but the court held the County had duties under a state statute, its own ordinances, and under the public trust to prevent pollution from runoff when it issues grading and grubbing permits. *Id.* at 227-28, 140 P.3d at 1007-08. Contrast the present case, where KPC has not pointed to anything in its governing ordinances or rules requiring it to inquire about water uses when evaluating land use permit applications. Finally, *Kelly* held the County did not violate its public trust duties, since there was nothing in the record of the case showing a lack of reasonable erosion controls. *Id.* at 228, 140 P.3d at 1008 ("Accordingly, inasmuch as the record is devoid of evidence adduced at trial that there was a lack of reasonable erosion control measures or that the County failed to make appropriate

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2. The cited cases arose in completely different contexts, and involved permits to divert water or to drill wells. *See, e.g.*, *In re Contested Case Hearing on the Water Use Permit Application Filed by Kukui (Molokai) Inc.*, 116 Haw. 481, 486,174 P.3d 320, 325 (2007) (involving applications for "*water use permit to divert water*" from well in Water Management Area) (emphasis added); *In re Contested Case Hearing on Water Use, Well Construction and Pump Installation Permit Applications Filed by Waiola O Molokai, Inc.*, 103 Haw. 401, 407, 83 P.3d 664, 670 (2004) (involving applications for a "water use permit, well construction permit, and pump installation permit" submitted to utilize well located within an aquifer system of the Kamiloloa Water Management Area); *In re Water Use Permit Application*, 94 Haw. 97, 9 P.3d 409 (2000).

assessments, the [trial] court's conclusion [that the County breached its public trust duties] cannot be sustained."). As set forth above, if in the present case KPC had a public trust duty, there is nothing in the Record to suggest it failed to make appropriate assessments, and it cannot rely on the public trust to support its denial of Kauai Springs' permit applications.

Under KPC's theory, any connection to "water" is sufficient. For example, if Kauai Springs were to apply to the Department of Motor Vehicles of the Kauai Department of Finance for commercial drivers licenses for the drivers of its *water* delivery vehicles, the public trust doctrine requires the DMV deny the licenses until Kauai Springs obtained "formal opinions" from (at least) both CWRM and PUC confirming Kauai Springs has the authority to "extract and sell water on a commercial basis." This, of course, is nonsense, but under KPC's public trust theory, the Kauai DMV must take into account the fact that Kauai Springs' vehicles transport *water*.

To reiterate: the source of the water Kauai Springs bottles is not on the property in question. Kauai Springs has no control over the source, or how much water comes from it. It does not control the transmission system. Thus, any issue as to how the water is extracted from its source should be taken up with either the EAK Knudsen Trust or Grove Farm Company, the owners of the source and the transmission system. KPC blames Kauai Springs for not asking "Grove Farms about Grove Farms' legal rights to the water." KPC Brief at 2. But Kauai Springs has no obligation, as a condition of obtaining zoning permits, to determine whether its supplier has "legal rights." Kauai Springs simply taps a pipe that crosses its property. The same pipe also provides domestic water to eleven homes makai of Kauai Springs. Presumably, none of those homeowners ask "Grove Farms about Grove Farms' legal rights to the water" before they turn on their water taps, either.

IV. KAUAI SPRINGS DID NOT (AND COULD NOT) "ASSENT" TO EXTENSIONS OF THE AUTOMATIC APPROVAL DEADLINES

KPC does not claim it met the automatic approval deadlines in its own rules. Instead, it argues that Kauai Springs "assented" to an extension of those deadlines. This argument fails for two reasons. First, Kauai Springs did not assent to an extension. Second, if the Kauai County Code permits an applicant to assent to an extension, that provision is invalid because it exceeds the scope of the enabling statute, Haw. Rev. Stat. § 91-13.5 (1993).

A. Kauai Springs Did Not Assent To An Extension

Kauai Springs did not "assent" to an extension of the autoapprove deadlines by showing up at KPC's hearings, because merely appearing does not constitute waiver or affirmation.

See, e.g., October Twenty-Four, Inc. v. Planning and Zoning Comm'n, 646 A.2d 926, 931-32 (Conn. App. Ct. 1994). In that case, the court of appeals upheld the trial court's determination that the applicant's attendance at a hearing did not constitute waiver:

> *The trial court concluded that [the applicant]'s presence at the commission's meetings after the date of automatic approval did not constitute waiver.* Waiver is the "intentional relinquishment of a known right." Examples of actions that have been deemed to result in a waiver of the right to automatic approval generally include cases where the applicant either expressly granted extensions of time or voluntarily withdrew the application. These applicants could not later claim that their applications had been approved by operation of law.
>
> The trial court found as a fact that [the applicant] never consented to an extension of time, nor did it intentionally relinquish its right to automatic approval simply by attending meetings. *The court noted that there is no requirement that an applicant approach the zoning commission on the day following automatic approval and demand that its applicant be approved. It was reasonable for [the applicant] to await the commission's decision rather than to risk alienating the commission and being subjected to the strict judicial standards applicable to mandamus actions.* The failure to adhere to the time constraints was due solely to the actions of the commission.

Id. at 931 (emphasis added) (citing *Dragan v. Conn. Medical Examining Bd*, 613 A.2d 739 (Conn. 1992)). The court noted that time deadlines could be waived by affirmative conduct such as an applicant requesting extra time, *see Frito-Lay, Inc. v. Planning & Zoning Comm'n*, 538 A.2d 1039 (Conn. 1988), or an applicant withdrawing the application. *October Twenty-Four*, 646 A.2d at 931 n.4 (citing *M & L Homes, Inc. v. Zoning & Planning Comm'n*, 445 A.2d 591 (Conn. 1982)). In the present case, Kauai Springs did not ask for extra time, nor did it withdraw its applications, and its appearance at the hearing, standing alone, cannot be considered "assent" to more time.

KPC relies on *Bickel v. City of Piedmont*, 946 P.2d 427 (Cal. 1997), a case whose rationale actually supports Kauai Springs. In *Bickel*, the court found that plaintiffs' statement at a commission hearing that they wanted a continuance "was not a relinquishment of the right to have the commission approve or disapprove the application within the statutory time limit" and that this fact, standing alone, did "not establish that plaintiffs had waived the Act's time limitations." *Id.* at 434-35. The court's determination the applicant waived the deadline was based on other facts not present in the case at bar such as the fact it "did not submit their revised plans to the Planning

Commission for approval until *after* expiration of the time in which the commission had to indicate either approval or disapproval." *Id.* at 435 (emphasis original).[3]

Finally, KPC argues Kauai Springs affirmatively assented at the February 13, 2007 hearing when its counsel stated "we *would be willing* to execute a document, I'm happy to work with the County Attorney, a waiver of our rights." RA at 000004 (emphasis added). This statement was not an affirmative waiver or assent because it is prospective, indicating only that Kauai Springs *might consent in the future* if the waiver was accomplished in writing and if it would allow KPC to consider granting the permits. No such agreement was executed and KPC instead purported to deny the applications. This statement cannot be deemed an affirmative consent, as autoapprove statutes and ordinances are strictly construed. *See, e.g.*, *Demolition Landfill Svcs, LLC v. City of Duluth*, 609 N.W.2d 278, 282 (Minn. App. 2000) ("administrative ease, while a legitimate concern, does not justify an interpretation of a statute which is inconsistent with its purpose;" agency's rejection of resolution granting permit is not the same as a denial, and failure of agency to specifically deny application within statutory time is deemed an approval).

B. The Kauai County Code Must Remain Within The Grant Of Power By The Legislature

An applicant may not assent to an extension of the automatic approval deadlines. If Kauai Springs is deemed to have assented, those portions of the Kauai Code which permit an applicant to expressly or impliedly agree to an extension conflict with superior state law and are invalid. Haw. Rev. Stat. § 46-1.5(13) (1993) (each county has the power to enact ordinances "not inconsistent with, or tending to defeat, the intent of any state statute"); Haw. Rev. Stat. § 50-15 (1993) ("Notwithstanding the provisions of this chapter, there is expressly reserved to the state legislature the power to enact all laws of general application throughout the State on matters of concern and interest and laws relating to the fiscal powers of the counties, and neither a charter nor ordinances adopted under a charter shall be in conflict therewith."); *Stallard v. Consolidated Maui,*

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3. *Bickel* has been superceded by statute because there are obvious problems with implying waiver of statutory requirements by mere inaction. In response to *Bickel*, the California Legislature amended the statute to prohibit courts from determining an applicant impliedly assented to an extension. "In enacting this act, it is the intent of the Legislature to clarify that the Permit Streamlining Act . . . *does not provide for the application of the common law doctrine of waiver* by either the act's purpose or its statutory language." *Riverwatch v. County of San Diego*, 76 Cal. App. 4th 1428, 1439 (Cal. Ct. App. 1999) (citations omitted) (emphasis added).

Inc., 103 Haw. 468, 473, 83 P.3d 731, 736 (2004) (ordinances conflicting with state laws are invalid); *Save Sunset Beach Coalition v. City and County of Honolulu*, 102 Haw. 465, 481, 78 P.3d 1, 17 (2003) (state districting scheme prevails over city land use ordinance); *Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu*, 70 Haw. 480, 488, 777 P.2d 244, 250 (1989) (statute superior to conflicting charter provision)

When it required state and county agencies enact deadlines for expeditious processing of permit applications, the Legislature specifically noted only three circumstances under which the time periods designated by the agencies could be extended.

> The maximum period of time established pursuant to this section *shall be extended in the event of a national disaster, state emergency, or union strike, which would prevent the applicant, the agency, or the department from fulfilling application or review requirements.*

Haw. Rev. Stat. § 91-13.5(e) (1993) (emphasis added). The statute does not include the applicant's "assent" as a reason to extend the deadline. The inclusion of a specific matter in a statute implies the exclusion of others, and infers the item not mentioned was intended to be excluded from the statute's scope. *See, e.g., International S&L Ass'n v. Wig*, 82 Haw. 197, 201, 921 P.2d 117, 121 (1996) (citing 82 C.J.S. *Statutes* § 333, at 670 (1953)).

Thus, it is beyond the power of the County to enact a provision regarding applicant "assent." Counties and their agencies have no inherent police power and are administrative conveniences; they derive their power to enact ordinances by legislative grant, and any exercise of the power must be within the confines of the grant. *See, e.g., Kaiser Hawaii Kai Dev. Co*, 70 Haw. at 484, 777 P.2d at 247 (counties must exercise zoning power within the confines of the delegation from the state); *McKenzie v. Wilson*, 31 Haw. 216, 234 (1930) ("Counties, cities and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the state otherwise provides").

In section 91-13.5, the Legislature required the counties to enact autoapprove rules, and mandated the only reasons for extending the deadlines would be "national disaster, state emergency, or union strike." The statute does not mention an "applicant's assent." KPC recognized the legislative intent behind Haw. Rev. Stat. § 91-13.5 and the Kauai Zoning Code would be violated if the applicant could assent to an extension. RA at 000003-4 (Counsel: "Your rule on Special Permits has an automatic approval procedure and from what I have been told the legislative history behind this rule is even if the applicant were to request *it wouldn't apply.*") (emphasis added).

Permitting an applicant to assent would utterly defeat the purpose of an autoapprove deadline because as a practical matter, it would result in no time limits, since what applicant, when asked by the tribunal for more time, would have the fortitude to deny the request? *See October Twenty-Four*, 646 A.2d at 931 ("It was reasonable for [the applicant] to await the commission's decision rather than to risk alienating the commission and being subjected to the strict judicial standards applicable to mandamus actions.").

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Opening Brief, Kauai Springs respectfully requests this Court (1) reverse the Decision and Order, and either modify the decision to reflect that Kauai Springs' applications for Use Permit U-2007-1, Special Permit SP-2007-1, and Class IV Zoning Permit Z-IV-2007 are approved, or remand the case with instructions to KPC to grant Kauai Springs these permits; (2) declare the Decision and Order exceeds KPC's authority or jurisdiction, is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion; and (3) make permanent the Preliminary Injunction issued on April 30, 2007.

DATED: Honolulu, Hawaii, June 16, 2008.

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