SCWC-12-0000496

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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MARGARET WILLE, Petitioner/Appellant-Appellant,

vs.

BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES; WILLIAM J. AILA, JR., in his official capacity as Chairperson of the Board of Land and Natural Resources; STATE OF HAWAIʻI; and PARKER RANCH INC., Respondents/Appellees-Appellees.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-12-0000496; CIV. NO. 11-1-202K)

DISSENT BY ACOBA, J., WITH WHOM POLLACK, J., JOINS

I would accept the Application for Certiorari (Application) filed by Petitioner/Appellant-Appellant Margaret Wille (Wille), because it merits further review.[1] Respectfully,

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[1] HRS § 602-59 (Supp. 2011) provides:

(a) After issuance of the intermediate appellate court's judgment or dismissal order, a party may seek review of the intermediate appellate court's decision and judgment or dismissal order only by application to the supreme court for a writ of certiorari, the acceptance or rejection of which shall be discretionary upon the supreme court.

(b) The application for writ of certiorari shall tersely state its grounds, which shall include:
(1) Grave errors of law or of fact: or

(continued...)

in denying certiorari, the majority fails to consider potential bases upon which the Circuit Court of the Third Circuit (the court) would have subject matter jurisdiction over Wille's appeal, and upon which Wille had standing to bring a petition for a contested case hearing before the Board of Land and Natural Resources (BLNR).

I.

A.

The property at issue in this appeal is located in Waimea, South Kohala. Three parcels of land are leased to Respondent/Appellee-Appellee Parker Ranch, Inc. (Parker Ranch), General Lease Nos. S-4464, S-4465, and S-4474. According to the petition filed by Wille with the BLNR, she lives at Tax Map Key No. (3)6-5-007:034, which is in close proximity to Tax Map Key No. (3) 6-5-001:020, one of the parcels under lease to Parker Ranch. The existing leases to Parker Ranch had been held for thirty-five years, and were set to expire on February 28, 2011. Pursuant to Hawai‘i Revised Statutes (HRS) § 171-36 (Supp. 2005)[2], Parker Ranch requested that the BLNR extend the leases by

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[1](...continued)

> (2) Obvious inconsistencies in the decision of the intermediate appellate court with that of the supreme court, federal decisions, or its own decision, and the magnitude of those errors or inconsistencies dictating the need for further appeal.

[2] HRS § 171-36(b) provides, in part:

> (b) The [BLNR] from time to time, upon the issuance or

(continued...)

twenty years.

During the BLNR's regularly scheduled meetings on February 11, 2011 and February 25, 2011, the Board considered the extension of the leases. The BLNR received oral and written testimony from members of the community. Wille indicated her opposition to the lease extension during her testimony on February 11, 2011. She stated that she was not opposed to Parker Ranch's continued use of the land, but asked for a multi-use plan rather than a single-use plan for the land. During her testimony, she also stated that "in the event the Board approves this lease as requested by Parker Ranch, I plan to appeal. Pursuant to [Hawai‘i Administrative Rules (HAR)] § 13-1-29, please therefore consider this as my request for a contested case hearing on this matter made prior to the close of the February 11, 2011 Board meeting." The BLNR unanimously approved the lease extensions.

Following the approval, Wille submitted a Petition for a Contested Case Hearing (Petition) to the Department of Land and Natural Resources (DLNR) Administrative Proceedings Office. Wille stated in the Petition that the BLNR's action would affect her interest inasmuch as she "would like to have access [to] the

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[2](...continued)

> during the term of any intensive agricultural, aquaculture, commercial, mariculture, special livestock, pasture, or industrial lease, may:
> . . . .
> (3) Extend the term of the lease[.]

pu‘u of Kohala mountains up to the reserve forest -- to hike for pleasure and health." She also stated that she had "a cultural-a[e]sthetic interest in not being surrounded by a place of extraordinary beauty that is bordered by 'no trespassing signs,' especially where these places are of historic and cultural significance." The BLNR unanimously agreed to deny Wille's Petition.

On June 9, 2011, Wille filed a Notice of Appeal and Statement of the Case with the court. As a basis for jurisdiction in the court, Wille cited, inter alia, HRS § 91-14(a) (Supp. 2004)[3] and her status as a beneficiary of the public lands trust under article XII, section 4 of the Hawai‘i Constitution[4]. Parker Ranch filed its Answer to Wille's

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[3] HRS § 91-14(a) provides:

> (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.

[4] Article XII, section 4 of the Hawai‘i Constitution provides:

> The lands granted to the State of Hawai‘i by Section 5(b) of the Admission Act and pursuant to [a]rticle XVI, [s]ection 7, of the State Constitution, excluding therefrom lands defined as 'available lands' by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

Statement of the Case on June 25, 2011, contending that Wille's appeal should be dismissed for lack of jurisdiction. Respondents/Appellees-Appellees State of Hawai'i, BLNR, DLNR, and William J. Aila, Jr., in his capacity as Chairperson of the Board and Director of the DLNR (collectively, State Respondents) filed their Answer to Wille's Statement of the Case on June 2011, also arguing, inter alia, that the case should be dismissed for lack of jurisdiction.

The court ultimately concluded, among other things, that it did not have jurisdiction under HRS § 91-14 because the BLNR decisions in granting the lease extensions were not contested case hearings, and Wille was not entitled to a contested case hearing based on those decisions. It determined that HRS § 171-26 (1993)[5] did not apply because those provisions apply only to "dispositions" of public land, and the definition of "disposition," under HRS § 171-13 (Supp. 2002)[6] does not

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[5] HRS § 171-26 states, in relevant part, that:

> Prior to the disposition of any public lands, the board of land and natural resources shall lay out and establish over and across such lands a reasonable number of rights-of-way from established highways to the public beaches, game management areas, public hunting areas, and public forests and forest reserves in order that the right of the people to utilize the public beaches, game management areas, public hunting areas, and public forests and forest reserves shall be protected.

(Emphasis added.)

[6] HRS § 171-13 provides that:

> Except as otherwise provided by law and subject to other provisions of this chapter, the board may:

(continued...)

include lease extensions. Therefore, the court held, no contested case was required by law because no "disposition" of land was made. The court further determined that Wille did not have a protect-able property interest in the extension of the leases that would have required a contested case hearing. The court entered a "Final Judgment" in favor of the State Respondents and Parker Ranch on April 19, 2012.

B.

Wille appealed the court's decision to the Intermediate Court of Appeals (ICA), and the ICA issued a Memorandum Opinion on April 22, 2013, holding that the court lacked subject matter jurisdiction and affirming dismissal of Wille's administrative appeal. Wille v. Bd. of Land & Natural Res., No. CAAP-12-0000496, 2013 WL 1729711, at *2 (App. April 22, 2013). Like the court, the ICA concluded that there was no statute or agency rule

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[6](...continued)

> (1) Dispose of public land in fee simple, by lease, lease with option to purchase, license, or permit; and
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> (2) Grant easement by direct negotiation or otherwise for particular purposes in perpetuity on such terms as may be set by the board, subject to reverter to the State upon termination or abandonment of the specific purpose for which it was granted, provided the sale price of such easement shall be determined pursuant to section 171-17(b).
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> No person shall be eligible to purchase or lease public lands, or to be granted a license, permit, or easement covering public lands, who has had during the five years preceding the date of disposition a previous sale.

(Emphasis added.)

requiring that the BLNR hold a hearing before extending Parker Ranch's lease. Id. at *4. As such, the ICA concluded that Wille had failed to establish jurisdiction under HRS § 91-14, because no contested case hearing was required by law, and thus the court did not have jurisdiction to review her appeal. Id. at *4-5.

The ICA held that there was no statute or agency rule requiring the Board to hold a hearing before extending an existing pasture lease and that Wille's asserted property interests "(1) her ownership of property adjoining the land under the [l]eases, (2) her recreational-health and aesthetic interests, and (3) her status as a beneficiary of the public trust under [a]rticle XII, section 4 of the Hawai'i State Constitution[,]" did not entitle her to due process protection which would have afforded a contested case hearing. Id. at *5. The ICA also held that there was no independent basis for jurisdiction in the court pursuant to article XII, section 4 of the Hawai'i Constitution. Id. at *6.

II.

In her Application, Wille asks: "(1) Whether [she] adequately asserted subject matter jurisdiction based on Hawai'i Constitution [a]rticle XII[,] [s]ection 4 [] to allow for judicial review here considering that she continually raised this jurisdictional basis[;]" and "(2) Whether the [c]ourt also has subject matter jurisdiction to hear this case based on HRS § 91-

14(a) 'Judicial Review of Contested Cases', when the challenger has judicially cognizable due process interests at stake: (a) her tangible (real) property interest, since she resid[es] on her property adjacent to one of the subject parcels of public lands; (b) her judicially cognizable (intangible) property interest at stake given her recreational/health and cultural heritage interests in hiking in this area where she lives; and (c) her trustee property interest in the public trust lands -- given her status as a member of the beneficiary class of 'the general public'."

III.

To reiterate, HRS § 91-14(a) provides that:

> (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.

(Emphasis added.) This provision sets forth the means by which judicial review of administrative contested cases can be obtained. A "contested case" is defined as "an agency hearing that is 1) required by law and 2) determines the rights, duties, or privileges of specific parties." Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994) (citing HRS § 91-1(5) (1993)). An agency hearing is "required by

law" where it is required by statute or agency rule and non-discretionary. See id. (citing Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 134-35, 870 P.2d 1272, 1278-79 (1994)). An agency hearing is also "required by law" under constitutional due process protections "whenever the claimant seeks to protect a property interest, in other words, a benefit to which the claimant is legitimately entitled." Id. (citations and internal quotation marks omitted).

In this case, this court should accept certiorari because a contested case hearing was required by law pursuant to HRS § 171-26. Also, the BLNR would be required to hold a contested case hearing because Wille had standing as a member of the public to bring suit to enforce the public trust, pursuant to article XI, section 1 of the Hawai'i Constitution.[7]

IV.

As noted, HRS § 171-26 states in part, that:

> Prior to the disposition of any public lands, the [BLNR] shall lay out and establish over and across such lands a reasonable number of rights-of-way from established highways to the public beaches, game management areas, public hunting areas, and public forests and forest reserves in order that the right of the people to utilize the public beaches, game management areas, public hunting areas, and public forests and forest reserves shall be protected.

(Emphases added.) HRS § 171-13, titled "Disposition of public

[7] Wille relies on the public trust doctrine underlying In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawai'i 228, 287 P.3d 129 (2012), involving Art. XI of the Hawai'i Constitution, and In re Water Use Permit Applications, 94 Hawai'i 97, 9 P.2d 409 (2000) ("Waiahole I"), involving Art. XI, §§ 1 and 7 of the Hawai'i Constitution. Thus, the public trust under the Hawai'i Constitution article XI, § 1 is implicated in her Application.

lands", states that "[e]xcept as otherwise provided by law and subject to other provisions of this chapter, the board may: (1) Dispose of public land in fee simple, by lease, lease with option to purchase, license or permit[.]" Thus, reading these two provisions together, a lease by extension, that is, a new lease term, plainly is a disposition of land, and any disposition of land requires that the BLNR "lay out and establish . . . a reasonable number of rights-of-way . . . in order that the right of the people to utilize the . . . public forests and forest reserves shall be protected." HRS § 171-26. It would contravene the inclusive language of the statute to hold that, where the BLNR grants an additional lease term for a period of twenty years, it should not be considered a "disposition" of public land within the meaning of HRS § 171-13 and thus be subject to HRS § 171-26.

In this case, with respect to the twenty-year extension of the Parker Ranch leases, the BLNR did not hold a hearing to establish the potential rights of way over the subject property. The ICA concluded that "nothing in [HRS § 171-26] requires a hearing in connection with this process." Wille, 2013 WL 1729711, at *4. However, the requirement that BLNR "shall" lay out rights of way would mean that the BLNR's failure to set forth reasonable rights of way would amount to a violation of its statutory mandate, which, if reviewed by a court on appeal, could

result in a remand, reversal or modification of the agency's decision and order. HRS § 91-14(g)(1).

The reason for mandating (i.e., "shall") the BLNR to lay out rights of way pursuant to HRS § 171-26 is "in order that the right of the people to utilize the public beaches, game management areas, public hunting areas, and public forests and forest reserves shall be protected." HRS § 171-26 (emphases added). A determination that no hearing is required under HRS § 171-26 in this case, where the BLNR is granting a twenty-year additional lease, would effectively abrogate public rights established by the statute.

For, how else could those significant public rights be enforced except through judicial review of the BLNR's decision to deny a right expressly extended to the public, such as the right of way to "public forests and forest reserves"? HRS § 171-26 (emphasis added). The law commands that such rights "shall be protected." Id. See Akau v. Olohana Corp., 65 Haw. 383, 388-89, 652 P.2d 1130, 1134 (1982) (holding that plaintiffs had class action standing to sue where they were prevented from using a public right of way, and the relevant statutory chapter stated that "[t]he purpose of this chapter is to guarantee the right of public access to the sea and shorelines and transit along the shorelines . . . .").

A hearing is required by law because the provisions of HRS § 171-26 direct that "the right of the people to utilize . . . [public areas] shall be protected." Such a hearing would "determine[] the rights, duties, or privileges of specific parties[,]" Puna Geothermal, 77 Hawai'i at 67, 881 P.2d at 1213, whose rights were specifically singled out for legal protection, such as Wille. A contested case hearing pursuant to HRS § 91-14(a) thus is required. The court would have subject matter jurisdiction over the denial of her claim to a contested case hearing. HRS § 91-14(a). See Town v. Land Use Comm'n., 55 Haw. 538, 549, 524 P.2d 84, 91 (1974) ("The appellant has a property interest in the amending of a district boundary when his property adjoins the property that is being redistricted . . . . [t]herefore any action taken on the petition for boundary change is a proceeding in which appellant has legal rights as a specific and interested party and is entitled by law to have a determination on those rights.").

V.

Alternatively, Wille was entitled to a contested case hearing on due process grounds, as a member of the public with standing to assert a claim of a violation of the public trust. "Constitutional due process protections mandate a hearing whenever the claimant seeks to protect a 'property interest,' in other words, a benefit to which the claimant is legitimately

entitled." Puna Geothermal, 77 Hawai‘i at 68, 881 P.3d at 1214 (citing Bush v. Hawaiian Homes Comm'n, 76 Hawai‘i 128, 136, 870 P.2d 1272, 1280 (1994)). Article XI, section 1 of the Hawai‘i Constitution provides that all public natural resources are held in trust by the State:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
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> All public natural resources are held in trust by the State for the benefit of the people.

In Waiahole I, this court said that due process mandated a contested case hearing with respect to petitions to amend interim instream flow standards and new water use permit applications because "of the individual instream and offstream 'rights, duties, and privileges' at stake." 94 Hawai‘i at 119 n.15, 9 P.3d at 431 n.15. This case presents the question of whether Wille's standing as a proponent of the public trust created a "property interest" entitling her to due process protections in the form of a contested case hearing.

"Under our precedent, individuals may sue to vindicate the rights of the public if the individual can demonstrate that he or she has suffered an 'injury in fact.'" In re ‘Iao, 128 Hawai‘i at 276, 287 P.3d at 178 (Acoba, J., concurring) (quoting Akau, 65 Haw. at 388-89, 652 P.2d at 1134). In connection with the injury in fact requirement, "this court has held 'that a

member of the public has standing to sue to enforce the rights of the public even though [that person's] injury is not different in kind from the public's generally, if he [or she] can show that he [or she] has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action.'" Id. at 278, 287 P.3d at 179 (alterations in original) (quoting Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989)).

However, "[t]he injury in fact test relates essentially to individual harm and therefore emphasizes the private interest . . . [,]" and therefore "such a formulation would appear ill-suited as a basis for determining standing to sue to vindicate the public trust doctrine." Id. at 281, 287 P.3d at 182 (citing Akau, 65 Haw. at 389, 652 P.2d at 1134-35). Instead, "a public trust claim can be raised by members of the public who are affected by potential harm to the public trust." Id. at 282, 287 P.3d at 183. Where the public trust is at issue, "the common good is at stake, and this court is duty-bound to protect the public interest." Id. at 281, 287 P.3d at 182. See Waiahole I, 94 Hawai‘i at 143, 9 P.3d at 445 ("'Just as private trustees are judicially accountable to their beneficiaries for dispositions of the res, so the legislative and executive branches are judicially accountable for the dispositions of the public trust. . . . The check and balance of judicial review provides a level of

protection against improvident dissipation of an irreplaceable res.'") (quoting Arizona Cent. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 168-69 (Ariz. Ct. App. 1991)).

This formulation of standing to bring a claim under the public trust doctrine is supported by Waiahole I, which cites with approval National Audubon Society v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983), which held that "any member of the general public has standing to raise a claim of harm to the public trust."[8] 658 P.2d at 717 n.11; see Waiahole I, 94 Hawai'i at 140, 9 P.3d at 452; see also In re 'Iao, 128 Hawai'i at 282, 287 P.3d at 183 (Acoba, J., concurring). This holding, that "any member of the general public has standing to raise a claim of harm to the public trust[,]" see Audubon, 658 P.2d at 717 n.11, was a basis for Waiahole I's determination that a contested case hearing was required in Waiahole I, and therefore that this court had jurisdiction over the appeal pursuant to HRS § 91-14(a).

Similarly, the court in this case had jurisdiction over Wille's HRS § 91-14(a) appeal because a contested case hearing

[8] In Audubon, the California supreme court stated that "[j]udicial decisions . . . have greatly expanded the right of a member of the public to sue as a taxpayer or private attorney general." 658 P.2d 716 n.11. According to the court in Audubon, an earlier California supreme court case, Marks v. Whitney, 491 P.2d 374 (Cal. 1971), "expressly held that any member of the general public has standing to raise a claim of harm to the public trust." Id. Thus, the Audubon court concluded that the plaintiffs in that case had standing to sue to protect the public trust. Id.

was required, inasmuch as the denial of Wille's due process "property" interest was a harm to the public trust. Although Waiahole I addressed the public trust in the context of water rights, and Wille asserts rights in access and enjoyment of public land as a neighboring property owner, this court has previously recognized property interests similar to those asserted by Wille in this case.

In Akau, this court held that the plaintiffs had standing to bring a class action to enforce rights-of-way along once public trails to the beach that crossed the defendant's property, because "difficulty in getting to the beach hampers the use and enjoyment of it and may prevent or discourage use in some instances[.]" 65 Haw. at 390, 652 P.2d 1130. This "recreational interest" in Akau was sufficient such that the plaintiffs were deemed to have standing. Id. In East Diamond Head Association v. Zoning Board of Appeals, 52 Haw. 518, 479 P.2d 796 (1971), this court held that the appellants had standing to challenge movie operations that interfered with the enjoyment of their property because "evidence of an increase in noise, traffic, and congestion . . . inconvenience by electrical and telephone work crews, and a fear that studio's facilities would permanently remain and detract from the aesthetic residential character of the neighborhood" showed that each appellant was a "person

aggrieved." 52 Haw. at 521-22, 479 P.2d at 798-99. In East Diamond Head, therefore, the aesthetic concerns of neighboring property owners were taken into consideration in concluding that the appellants were "person[s] aggrieved within the meaning of HRS § 91-14(a)." Id.

Thus, inasmuch as Wille was an individual vindicating the public trust before the BLNR, see Haw. Const. Art. XI, § 1, she had a valid "property interest." Therefore, she was entitled as a matter of due process of law to a contested case hearing before the BLNR.

VI.

Based on the foregoing, I would accept certiorari in this case to determine whether the ICA erred in concluding that the court lacked jurisdiction over Wille's appeal brought pursuant to HRS § 91-14(a).

DATED: Honolulu, Hawai'i, September 4, 2013.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack