NO. CAAP-14-0000751

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

THE HILO PROJECT, LLC; ROBERT AND PATRICIA FERAZZI; SUSAN MUNRO AND KERRY GLASS; MARCUS G. SPALLEK AND ELAINE MUNRO,
Appellants-Appellants,
and
BRIDGET RAPOZA; RAQUEL DOW, Appellants,
v.
COUNTY OF HAWAIʻI WINDWARD PLANNING COMMISSION; ZENDO KERN, in his official capacity as Chairman,
Appellees-Appellees,
and
HU HONUA BIOENERGY, LLC, Intervenor-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 11-1-0238)

MEMORANDUM OPINION
(By: Fujise, Presiding Judge, Ginoza and Chan, JJ.)

Appellants-Appellants The Hilo Project, LLC, Robert and Patricia Ferazzi, Susan Munro and Kerry Glass, Marcus G. Spallek, and Elaine Munro (**collectively Appellants**) appeal from the Final Judgment, filed on March 10, 2014, in the Circuit Court of the Third Circuit (**Circuit Court**),[1] entered in favor of Appellees-Appellees County of Hawaiʻi Windward Planning Commission (**Planning Commission**), Gregory Henkel,[2] in his official capacity as Chairman, County of Hawaiʻi Windward Planning Commission

[1] The Honorable Greg K. Nakamura presided.

[2] Gregory Henkel is automatically substituted for Zendo Kern, who was originally named in this case as Chairman of the Planning Commission.

(**collectively County Appellees**), and Intervenor-Appellee-Appellee Hu Honua Bioenergy, LLC (**Hu Honua**).

On appeal, Appellants contend that the Circuit Court erred when it (1) failed to consider the entire record made before the Planning Commission by the Appellants; (2) failed to consider certain arguments raised in Appellants' opening brief to the Circuit Court; and (3) failed to properly apply the public trust doctrine in assessing the probable adverse impacts of Hu Honua's application to amend its Special Management Area (**SMA**) permit.[3]

I. Background

On January 15, 2010, Hu Honua, after having obtained an SMA permit for a coal storage and coal burning energy plant in 1985, filed an "Amendment to Special Management Area Permit No. 221" (**SMA Permit Application**) with the County of Hawaiʻi Planning Department (**Planning Department**). Hu Honua stated that it was "proposing to convert the former Hilo Coast Power Company ("HCPC") coal-burning electric generating power plant into a renewable electrical power generation facility fueled by locally grown sustainable biomass." To convert the power plant from coal to biomass burning, Hu Honua would need to make some improvements and additions to the facility equipment "namely the boiler and air emissions control equipment, and support facilities require refurbishment, construction, or repair." Further, the existing SMA permit "restricts the plant operator to using only washed low-sulfur Class B sub-bituminous coal" and "[s]ubstitutions are not allowed without approval from the State Department of Health [(**DOH**)] and the [Planning Department]."

[3] "'Special management area' means the land extending inland from the shoreline as delineated on the maps filed with the authority[.]" Hawaii Revised Statutes (**HRS**) § 205A-22 (2001). At the time of Hu Honua's application, "Special management area use permit" was defined as "an action by the authority authorizing development the valuation of which exceeds $125,000 or which may have a substantial adverse environmental or ecological effect, taking into account potential effects." HRS § 205A-22 (2001).

A six-day contested case hearing was held on October 18, 19, 20, 21, 22, and 27, 2010.[4] Appellants, as real property owners located adjacent to the power plant, objected to the SMA Permit Application and intervened in the contested case hearing.

On June 7, 2011, the Planning Commission entered its "Findings of Fact, Conclusions of Law, and Decision and Order" (**Planning Commission Decision and Order**). The Planning Commission approved the SMA Permit Application subject to sixteen conditions.

On July 6, 2011, Appellants filed a Notice of Appeal to the Circuit Court from the Planning Commission Decision and Order. Attached to the Notice of Appeal was a seventy-nine page Statement of the Case, in which Appellants argued, among other things, that: (1) the Planning Commission failed to resolve conflicting evidence; (2) the Planning Commission failed to follow its own rules; and (3) the public trust must be considered because "[g]ranting or denying the SMA Use Permit can and will affect the land on and around where the plant is being proposed, the ocean waters of the Hamakua coastline, the [ ] quality of air that Big Island residents are breathing, and the energy policy of the State of Hawaiʻi." In the Statement of the Case, the Appellants also challenged nearly all ninety-five Findings of Fact (**FOF**) from the Planning Commission Decision and Order, as well as Conclusions of Law (**COL**) 2 through 10. The Appellants requested that the Circuit Court remand the case back to the Planning Commission or in the alternative reverse or modify the Planning Commission Decision and Order.

On July 26, 2011, the County Appellees filed an answer to Appellants' Statement of the Case.

On October 4, 2011, after the Circuit Court granted its motion to intervene, Hu Honua filed a response to Appellants' Statement of the Case. Hu Honua argued that Appellants' Statement of the Case should be stricken because it violated Hawaiʻi Rules of Civil Procedure (**HRCP**) Rule 72(e) as, at

[4] Robert J. Crudele presided as the Hearing Officer for the contested case hearing.

seventy-nine pages, it was not short and plain and it was repetitive and confusing.

On November 28, 2012, the Circuit Court filed a Briefing Schedule, which ordered, *inter alia*, that the Appellants' opening brief be filed by January 11, 2013. The order also provided:

> Opening and Answering Briefs shall not exceed thirty-five (35) pages in length. Reply Briefs shall not exceed ten (10) pages in length.
>
> Briefs shall include, at a minimum, (1) a Statement of the questions presented for decision, (2) a brief statement of the facts (which need not duplicate the statement of the case separately required under Rule 72 of the Hawaii Rules of Civil Procedure), (3) a concise argument, and (4) a conclusion specifying the relief sought.

Appellants failed to file their opening brief by the January 11, 2013 deadline. Hu Honua filed a motion to dismiss for lack of prosecution, which the County Appellees joined. In turn, Appellants filed a motion seeking a new briefing schedule, asserting that they first became aware of the briefing schedule after the due date for the opening brief had passed.

While Appellants' motion was pending before the Circuit Court, and thus without leave of the court, Appellants filed a nine-page opening brief on March 20, 2013. The opening brief states, in part: "Appellants incorporate by reference as though fully set forth herein the Statement of the Case, including the Statement of Points of Error and Exhibits A and B attached to and filed in conjunction with Appellants' Notice of Appeal filed July 6, 2011." In the Standard of Review section of the opening brief, Appellants reference the public trust doctrine and state, "[g]ranting or denying the SMA Use Permit can and will affect the land on and around where the plant is being proposed, the ocean waters of the Hamakua coastline, the air quality of air that Big Island residents are breathing, and the energy policy of the State of Hawaiʻi."

In the last paragraph of page eight of their opening brief, Appellants further argued:

> The County's failure to follow the law dealing with historic properties is consistent with its other failings identified in the Statement of the Case, including the Statement of Points of Error attached to the Notice of Appeal, which include, *inter alia*, its failure to articulate

> any analysis on the considerable conflicts and uncertainty of the evidence, its failure to resolve conflicting evidence, its failure to require environmental review under Ch. 343, H.R.S., its failure to gain scientific, public health, historical and other information necessary to make a sound decision on whether the project is advisable as an amendment to the SMA Use Permit, and its disregard of uncontroverted evidence supplied by J.P. Michaud, Ph.D. that the operation of the power plant enabled by the amended SMA Use Permit will endanger the health of Appellants and surrounding community and degrade the environment.

On March 27, 2013, County Appellees filed a Motion to Strike Appellants' Opening Brief and/or to Dismiss Appeal. County Appellees argued that "Appellants' Opening Brief, with 'incorporated' points and arguments, far exceeds the 35-page limit set by this honorable Court's Briefing Schedule filed on November 28, 2012." County Appellees further argued that the opening brief was untimely filed and failed to include the minimum content and organization that the Briefing Schedule required. On April 1, 2013, Hu Honua filed a Joinder to the County Appellees' Motion to Strike Appellants' Opening Brief and/or to Dismiss Appeal.

On May 10, 2013, the County Appellees filed their answering brief. County Appellees argued, *inter alia*, that the public trust doctrine was not applicable to this case and Appellants failed to "'cite any authority which supports the application of the public trust doctrine, as set forth in Article XI, section 1 of the Hawaiʻi Constitution' to the Appellees under the circumstances of this case." (citing Hall v. Dep't of Land and Nat. Res., 128 Hawaiʻi 455, 473, 290 P.3d 525, 543 (App. 2012)).[5]

On May 14, 2013, Hu Honua filed its answering brief.

On June 10, 2013, the Circuit Court filed an "Order Granting in Part and Denying in Part [County Appellees'] Motion to Strike Opening Brief and/or to Dismiss Appeal" (**Order Limiting**

[5] The County Appellees argue in the current appeal that the public trust issues were waived because they were not raised before the Planning Commission, but it does not appear from our record that this waiver argument was made to the Circuit Court.

Review of Appellants' Opening Brief).[6] The Circuit Court ordered, *inter alia*, the following:

> Appellants' Opening Brief filed herein on March 20, 2013 is not stricken, but is considered filed under an amended briefing schedule, except that the Court will not address: (a) The arguments raised only in the Statement of Case, including its Statement of Points of Error and Exhibits A and B attached to and filed in conjunction with Appellants' Notice of Appeal filed herein on July 6, 2011; and (b) The points or issues raised in the last full paragraph on page 8 of said Opening Brief[.]

The Circuit Court also denied Hu Honua's motion to dismiss.

Subsequently, the Circuit Court ordered a partial remand to the Planning Commission to clarify two conditions in its Decision and Order. After further proceedings in the Planning Commission and a supplemental decision by the Planning Commission, the parties filed supplemental briefs in the Circuit Court.

On January 15, 2014, the Circuit Court filed its "Findings of Fact, Conclusions of Law, and Order Affirming the Decision and Order and Supplemental Decision and Order of the County of Hawaiʻi Windward Planning Commission" (**Circuit Court Decision and Order**).[7] The Circuit Court concluded, *inter alia*, the following:

> 4. Regarding the public trust doctrine, Appellants rely on Article XI, Section 1, of the Hawaiʻi State Constitution, which states as follows:
>
> > 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.

[6] The Order Limiting Review of Appellants' Opening Brief indicates that a hearing was held on April 2, 2013, which addressed the Planning Commission's Motion to Strike Opening Brief and/or To Dismiss Appeal. However, the transcript of the April 2, 2013 hearing does not appear to be in the record on appeal to this court.

[7] It appears from the Circuit Court Decision and Order that the Circuit Court held hearings on June 14, 2013 and October 31, 2013. However, the transcripts of these hearings do not appear to be in the record before this court.

> All public natural resources are held in trust by the State for the benefit of the people.
>
> Article XI, Section 1, Hawaiʻi State Constitution.
>
> 5. This constitutional provision protects public natural resources. Clearly, in this State, "the public trust doctrine applies to all water resources without exception or distinction." *In re Water Use Permit Applications*, 94 Hawaiʻi 97, 133 (2000). However, this case deals with land. It appears that in order for land to be considered a natural resource subject to the public trust doctrine, the State must have title to the land. *See e.g. King v. Oahu Railway & Land Co.*, 11 Haw. 717 (1899); *County of Hawaiʻi v. Sotomura*, 55 Haw. 176, 184 (1973).
>
> 6. Therefore, in this case, the public trust doctrine does not apply because the State does not have title to the land which is the subject of this case. Moreover, there is an insufficient basis to find or conclude that the land itself has such significance as a natural resource that it can be considered a public natural resource.

The Circuit Court ordered that judgment be entered in favor of the County Appellees and Hu Honua and against Appellants.

On March 10, 2014, the Circuit Court entered the Final Judgment.

On April 9, 2014, Appellants timely filed their Notice of Appeal from the Circuit Court's Final Judgment.

II. Standards of Review

A. Secondary Appeals

> Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) to the agency's decision. This court's review is further qualified by the principle that the agency's decision carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences.

Curtis v. Bd. of Appeals, 90 Hawaiʻi 384, 392, 978 P.2d 822, 830 (1999) (citation omitted).

HRS § 91-14(g) (2012) provides:

> (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 reverse 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:
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> (1) In violation of constitutional or statutory provisions; or
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> (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.

B. Public Trust

> Review of an agency decision under the public trust doctrine requires additional rigor. "Clarity in the agency's decision is all the more essential 'in a case such as this where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.'"

Kauai Springs, Inc. v. Planning Comm'n of Cty. of Kauai, 133 Hawaiʻi 141, 164, 324 P.3d 951, 974 (2014) (citation omitted). "Questions of constitutional law require the court to 'exercise its own independent judgment based on the facts of the case' under the right or wrong standard." Id. at 165, 324 P.3d at 975 (citation and internal brackets omitted).

III. Discussion

A. Appellants' Statement of the Case

Appellants challenge the Circuit Court's Order Limiting Review of Appellants' Opening Brief, contending that the Circuit Court misinterpreted HRS § 91-14(g) when it ordered it would not address the arguments from the Appellants' Statement of the Case that was attached to the Notice of Appeal to the Circuit Court. Appellants contend

> [i]n limiting its review to those portions of Appellants' Opening Brief that did not include incorporated portions of the Statement of the Case, the [Circuit Court] appears to have interpreted the "review of the record" required by HRS § 91-14(g) to mean "review of the limited portion of the record set out anew in the Opening Brief and excluding that portion of the record incorporated by reference from the Statement of the Case."

Appellants also argue that the Circuit Court misapplied HRCP Rule 72(e) because it failed to treat the Statement of the Case as an original complaint.

HRS § 91-14(g) provides:

> 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 reverse 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.

(Emphasis added.) The Legislature intended HRS § 91-14 to conform with HRCP Rule 72. Friends of Makakilo v. D.R. Horton-Schuler Homes, LLC, 134 Hawaiʻi 135, 141, 338 P.3d 516, 522 (2014). HRCP Rule 72 addresses appeals to the Circuit Court and provides in pertinent part:

> (d) *Record on Appeal*.
>
> (1) DESIGNATION. The appellant shall, within the time provided for filing the notice of appeal or within such further time, not to exceed 30 days, as may be allowed by the court for good cause shown, prepare and present to the clerk of the circuit court a designation, which shall specify the papers, transcripts, minutes and exhibits which the appellant desires filed in the circuit court in connection with the appeal. . . .
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> . . . .
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> (e) *Statement of Case*. The appellant shall file in the circuit court concurrently with the filing of appellant's designation, a short and plain statement of the case and a prayer for relief. . . . The statement shall be treated, as near as may be, as an original complaint and the provision of these rules respecting motions and answers in response thereto shall apply.
>
> (f) *Briefs; oral argument*.
>
> (1) BRIEFS; DEADLINES. The opening brief shall be filed within 40 days after the filing of the record on appeal. The answering brief shall be filed within 40 days after service of the appellant's opening brief. Within 14 days after service of the appellee's answering brief, the appellant may file a reply brief. Reply briefs shall be confined to matters presented in the answering brief. . . .
>
> (2) REQUIREMENTS. The opening, answering, and reply briefs shall be subject to the page limitations set forth in Rule 28(a) of the Hawaiʻi Rules of Appellate Procedure and shall include, at a minimum:
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> (A) a statement of the questions presented for decision;
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> (B) a brief statement of the facts (that need not duplicate the statement of the case separately required under Rule 72(e));

> (C) a concise argument; and
> (D) a conclusion specifying the relief sought.[8]

(Emphasis added.) Thus, HRCP Rule 72, *inter alia*, provides three separate sections: (1) designation of the record on appeal; (2) the notice of appeal, which includes a statement of the case; and (3) the opening, answering, and reply briefs.

Pursuant to HRCP Rule 72(d)(1), the record is designated as "papers, transcripts, minutes and exhibits[.]" Under a separate heading, HRCP Rule 72(e) provides that the statement of the case consists of "a short and plain statement of the case and a prayer for relief." Thus, HRCP Rule 72 distinguishes the "record" from the "statement of the case." Further, HRCP Rule 72 distinguishes the opening brief as a separate filing from the statement of the case. See HRCP Rule 72(e) and (f). The purpose of HRCP Rule 72(e) is to subject "the statement of the case to the same kinds of motions, such as to strike, for more definite statement, or to dismiss, as is a complaint. However, . . . the statement is only an outline by appellant of the nature of the case and its progress through the administrative machinery as indicated by the record[.]" Costa v. Sunn, 5 Haw. App. 419, 429, 697 P.2d 43, 50 (1985) (emphasis added). By contrast, pursuant to HRCP Rule 72, the opening brief must contain a "statement of the questions presented for decision"; "a brief statement of the facts (that need not duplicate the statement of the case separately required under Rule 72(e)"; "a concise argument"; and "a conclusion specifying relief sought." HRCP Rule 72(f)(2) (emphasis added).

[8] Prior to January 1, 2012, HRCP Rule 72(f) did not include details regarding opening, answering, reply briefs and, rather, was merely marked as "(Reserved)." See Middleton v. State, No. CAAP-13-0002468, 2017 WL 663538, at *1 (Haw. App. Feb. 17, 2017). Appellants' Notice of Appeal to the Circuit Court was filed on July 6, 2011, prior to the adoption of the current language in HRCP Rule 72(f) on January 1, 2012. However, the Circuit Court filed its briefing schedule on November 28, 2012, after the adoption of the current language of HRCP Rule 72(f), and the requirements set out in the briefing schedule for opening, answering, and reply briefs mirror the language of HRCP Rule 72(f). Further, the opening brief deadline was set for January 11, 2013, well after the adoption of the current language of HRCP Rule 72(f). Thus, we apply the current language of HRCP Rule 72(f) to this case.

Therefore, because a statement of the case pursuant to HRCP Rule 72 is a separate filing made on appeal, and is not part of the record made at the agency level, the Circuit Court did not ignore parts of the record when it did not address the issues from Appellants' Statement of the Case.

Both County Appellees and Hu Honua treated the Statement of the Case like a complaint as required by HRCP Rule 72(e) by filing answers to the Statement of the Case as if it were a complaint. Thus, the Circuit Court did not violate HRCP Rule 72(e) when it ordered that the Statement of the Case would not be addressed as part of the opening brief.

In addition, the practice of incorporating by reference arguments from other pleadings into an opening brief, and thus exceeding the thirty-five page limit, has been rejected by the Hawaiʻi Supreme Court based on the Hawaiʻi Rules of Appellate Procedure (**HRAP**) Rule 28(a). Kapiolani Commercial Ctr. v. A & S P'ship, 68 Haw. 580, 584-85, 723 P.2d 181, 184-85 (1986) ("[I]n violation of our 35-page limitation set forth in HRAP Rule 28(a), [cross-appellant] attempts to incorporate by reference in its brief, the arguments made before the trial court. Since this is in violation of our rules, we will disregard those points."); see also HRCP Rule 72(f)(2) ("The opening, answering, and reply briefs shall be subject to the page limitations set forth in Rule 28(a) of the Hawaiʻi Rules of Appellate Procedure[.]").

Here, Appellants' Statement of the Case is seventy-nine pages, not including Exhibits A and B, and thus it far exceeded the thirty-five page limit set for the opening brief.

Therefore, the Circuit Court did not base its order upon unlawful procedure under HRS § 91-14(g) when it ordered that it would not address the arguments that were only raised in the Statement of the Case filed in conjunction with Appellants' Notice of Appeal.

B. The last full paragraph on page eight of the opening brief.

Appellants challenge the Circuit Court's Order Limiting Review of Appellants' Opening Brief contending that this court

"should interpret H.R.S. § 91-14(g) *de novo* and hold that the [Circuit Court] erred as a matter of law when it limited its review and consideration of the record made before the Windward Planning Commission to exclude [the last paragraph of page eight of the opening brief to the Circuit Court]."

The last full paragraph of page eight of the opening brief to the Circuit Court states:

> The County's failure to follow the law dealing with historic properties is consistent with its other failings identified in the Statement of the Case, including the Statement of Points of Error attached to the Notice of Appeal, which include, *inter alia*, its failure to articulate any analysis on the considerable conflicts and uncertainty of the evidence, its failure to resolve conflicting evidence, its failure to require environmental review under Ch. 343, H.R.S., its failure to gain scientific, public health, historical and other information necessary to make a sound decision on whether the project is advisable as an amendment to the SMA Use Permit, and its disregard of uncontroverted evidence supplied by J.P. Michaud, Ph.D. that the operation of the power plant enabled by the amended SMA Use Permit will endanger the health of the Appellants and surrounding community and degrade the environment.

As stated above, HRCP Rule 72(d)(1) designates the record as "papers, transcript, minutes and exhibits[.]" HRCP Rule 72(f) provides that the opening brief is a separate filing to the Circuit Court and therefore not part of the record. Insofar as the last paragraph of page eight appears to summarize a reference to the Statement of the Case, and because the Circuit Court did not violate HRS § 91-14(g) when it did not address the Statement of the Case, it also did not violate HRS § 91-14(g) when it did not address the last full paragraph on page eight of the opening brief.

C. Public Trust Doctrine

Appellants contend that the Circuit Court Decision and Order misapplies the public trust doctrine and thus the Circuit Court erred when it concluded that the public trust doctrine does not apply in this case.[9]

The Circuit Court's Decision and Order concludes in pertinent part:

[9] We do not address the County Appellees' argument that Appellants waived any public trust issues, because the waiver argument does not appear to have been raised in the Circuit Court. As previously noted, the transcripts from hearings before the Circuit Court are not in the record.

> 5. [Article XI, section 1] protects public natural resources. Clearly, in this State, "the public trust doctrine applies to all water resources without exception or distinction." *In re Water Use Permit Applications*, 94 Hawaiʻi 97, 133 (2000). However, this case deals with land. It appears that in order for land to be considered a natural resource subject to the public trust doctrine, the State must have title to the land. *See e.g. King v. Oahu Railway & Land Co.*, 11 Haw. 717 (1899); *County of Hawaiʻi v. Sotomura*, 55 Haw. 176, 184 (1973).
>
> 6. Therefore, in this case, the public trust doctrine does not apply because the State does not have title to the land which is the subject of this case. Moreover, there is an insufficient basis to find or conclude that the land itself has such significance as a natural resource that it can be considered a public natural resource.

Appellants contend that under the SMA Permit Application the proposed change to the power plant impacts the water quality of the ocean. Appellants contend that the public trust doctrine applies to the SMA Permit Application "because the operation of the power plant adjacent the shoreline has the potential to adversely impact the State's coastal waters." In their reply briefs to both County Appellees and Hu Honua, Appellants state "[t]he Record shows that [Hu Honua's] discharge of tens of millions of gallons of water daily into the ocean and [Hu Honua's] incomplete storm water discharge scheme have the potential for adverse impacts on the nearshore marine environment."[10]

Article XI, section 1 of the Hawaiʻi State Constitution, known as the public trust doctrine, provides:

> 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.

[10] With regard to the public trust doctrine, Appellants' opening brief to the Circuit Court states in pertinent part: "[g]ranting or denying the SMA Use Permit can and will affect the land on and around where the plant is being proposed, the ocean waters of the Hamakua coastline, the air quality of air that Big Island residents are breathing, and the energy policy of the State of Hawaiʻi." Transcripts are not included in this court's record on appeal and thus it is unclear what the Appellants argued at the two oral arguments before the Circuit Court.

> All public natural resources are held in trust by the State for the benefit of the people.

Haw. Const. art. XI, § 1 (emphasis added).

"[T]he public trust doctrine applies to all water resources without exception or distinction." Kelly v. 1250 Oceanside Partners, 111 Hawaiʻi 205, 222, 140 P.3d 985, 1002 (2006) (citation omitted). The duty to "protect" and "promote" established in article XI, section 1 of the Hawaiʻi State Constitution, "includes the duty to 'ensure the continued availability and existence of its water resources for present and future generations" and "the duty to promote 'the development and utilization of water resources *in a manner consistent with their conservation* and in furtherance of the self-sufficiency of the State." Id. at 223, 140 P.3d at 1003 (citations and brackets omitted). "[M]aximizing the water resource's social and economic benefits includes the protection of the resource in its natural state." Id. (citation omitted). In addition, "the plain language of article XI, section 1 mandates that the County [has] an obligation to conserve and protect the States's natural resources." Id. at 224-25, 140 P.3d at 1004-05 (brackets omitted). Further, "[a]rticle XI, section 7 [of the Hawaiʻi Constitution] reiterates that '[t]he State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.'" Kauai Springs, 133 Hawaiʻi at 171, 324 P.3d at 981 (emphasis added).

In Kauai Springs, the Hawaiʻi Supreme Court provided a framework for how an agency should approach a proposed use of a public trust resource. The supreme court stated:

> When an agency is confronted with its duty to perform as a public trustee under the public trust doctrine, it must preserve the rights of present and future generations in the waters of the state. An agency must take the initiative in considering, protecting, and advancing public rights in the resource at every stage of the planning and decision-making process. The agency measures the proposed use under a "reasonable and beneficial use" standard, which requires examination of the proposed use in relation to other public and private uses. The agency must apply a presumption in favor of public use, access, enjoyment, and resource protection.

Id. at 173, 324 P.3d at 983 (citing In re Water Use Permit Applications, 94 Hawaiʻi 97, 9 P.3d 409 (2000)). Further, the supreme court stated that "it is manifest that a government body is precluded from allowing an applicant's proposed use to impact the public trust in the absence of an affirmative showing that the use does not conflict with those principles and purposes [of the public trust doctrine]." Id. at 174, 324 P.3d at 984 (emphasis added).

In this case, Hu Honua affirmatively showed that it would protect the ocean as a public trust resource because as part of the operation of the power plant, Hu Honua must obtain a National Pollutant Discharge Elimination System (**NPDES**) permit from the DOH.[11] The SMA Permit Application states:

> **Coastal Ecosystems** - Water quality from the facility will not change significantly from previous power plant operations. The thermal discharge was the primary controlled pollutant and will continue to be covered under the future permit. The water discharge point source permit requires the facility to meet current water quality standards and to conduct biological studies of the reef in the area.

The application further states:

> Non-contact cooling water for the steam condenser will be discharged to surface water (Pacific Ocean) through the same outfall on-site that was used for prior operations. Up to 21.6 [million gallons per day] will be discharged, which is based on the three existing pumps, each with a rated capacity of 5,000 gallons per minute. A new individual NPDES permit will be obtained from the State DOH Clean Water Branch to allow this discharge.[12]

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[11] In Kelly, the supreme court explained:

> The United States Congress established and authorized the National Pollutant Discharge Elimination System (NPDES) regulatory and permitting system under the Clean Water Act, 33 U.S.C. §§ 1251-1386. *See Molokai Chamber of Comm. v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1392-94 (D. Haw. 1995) (describing the federal and state NPDES system). In general, the federal government delegated to the State of Hawaiʻi the authority to implement the NPDES system, subject to federal statutes and regulations.

111 Hawaiʻi at 210 n.11, 140 P.3d at 990 n.11 (citation omitted).

[12] Rules relating to NPDES permits obtained from the State Department of Health are set forth in Hawaii Administrative Rules (**HAR**) Title 11, Chapter 55. Pursuant to HAR § 11-55-01 (2014), "cooling water" is defined as

> water used for contact or noncontact cooling, including water used for equipment cooling, evaporative cooling tower

(continued...)

Further, in a supplemental report attached to the SMA Permit Application, Hu Honua stated:

> The project will not disturb more than one acre of soil during construction; therefore, a [NPDES] Notice of Intent for General Permit - Construction, is not necessary from the Department of Health. However, best management practices (BMPs) will be instituted during plant upgrade and construction. These measures may include the following:
>
> - Restoring and stabilizing disturbed areas, and using hydro mulch, geotextiles, or binding substances, as soon as possible after working;
> - Placing structural controls including silt fences, gravel bags, sediment ponds, check dams, and other barriers in order to retard and prevent the loss of sediment from the site;
> - Minimizing disturbance of soil during periods of heavy rain;
> - Constructing a stabilized construction vehicle entrance, with designated vehicle wash area that discharges to a sediment pond;
> - Maintaining BMPs; and
> - Cleaning up significant leaks or spills and disposal at an approved site, if they occur.

Hu Honua submitted several exhibits to the Hearing Officer to support its assertion that it would obtain an NPDES permit prior to any power plant operation and that the NPDES permit would properly ensure protection to the ocean resources. In a letter dated January 26, 2010 to Hu Honua from the Planning Department, the Planning Department requested that Hu Honua

> provide detailed information as to the status of Hū Honua's permits regarding pollutant discharge elimination from DOH, information regarding the reasons that a permit is required and how these impacts are mitigated, description of applicant's efforts and outcomes of reef monitoring (which is required as a condition of these permits) and other condition requirements of the permit.

Hu Honua responded to the Planning Department's request in a letter dated March 1, 2010 stating, *inter alia*:

> Hu Honua intends to conform to regulations and controls required by the DOH and, as such, will be subject to the following permits and issuance schedules:
>
> 1. **Storm Water Notice of General Permit Coverage (NGPC)**, Industrial Activity. A NGPC for the facility was issued on October 3, 2008 by the DOH Clean Water Branch to cover storm water discharges associated with the industrial

[12](...continued)
makeup, and dilution of effluent heat content. The intended use of the cooling water is to absorb waste heat rejected from the process or processes used, or from auxiliary operations on the facility's premises.

activities, even though the existing facility is not operating or producing electricity. This permit expires on October 21, 2012, unless a Notice of Cessation (NOC) is submitted by the facility. Hu Honua intends to operate and comply with this permit until the Individual Permit covering storm water is issued for the plant; expected before the current permit expires.

2. **Individual NPDES Permit, Non-contact cooling water, Industrial Discharges and Storm Water.** A new Individual NPDES permit will be required before discharges commence for the renovated facility. The Permit will cover: (i) non-contact cooling water from three on-site water wells used for temperature control in the steam condenser on the turbine, (ii) miscellaneous plant maintenance water, and (iii) storm water discharges.

   The individual permit covering the former plant required the completion of a yearly Bottom-Biological study designed to assess the impact of water discharged from the plant into the ocean. The results of these studies showed the plant's water discharge did not significantly impact the marine environment. The renovated plant will produce similar nature and quantity of water as the former plant, and therefore, will not have significant impact on the marine environment. Hu Honua expects it will be required by the State to perform similar annual marine monitoring as part of conditions of the permit.

3. **Storm Water NCPC - Construction Activity.** Generally, a facility conducting construction activity and disturbing more than one acre of ground would need to submit a Notice of Intent to discharge storm water and obtain a NGPC for Construction Activity. While Hu Honua does not expect to disturb more than one acre, the facility would be required at a minimum to modify its existing Industrial Activity NCPC to include the construction activities. The purpose of modifying the existing NGPC permit is to assure an approved storm water pollution control plan stipulates best management practices for workers during construction. Modifications to the current NGPC and associated storm water pollution control plan will be required, approved, and put in place prior to commencing construction.

In a letter dated May 18, 2010, the DOH submitted comments to the Planning Department regarding the SMA Permit Application. The DOH, *inter alia*, stated:

1. Any project and its potential impacts to State waters must meet the following criteria:
   a. Antidegradation policy (HAR, Section 11-54-1.1), which requires that the existing uses and the

> level of water quality necessary to protect the existing uses of the receiving State water be maintained and protected.
> b. Designated uses (HAR, Section 11-54-3), as determined by the classification of the receiving State waters.
> c. Water quality criteria (HAR, Sections 11-54-4 through 11-54-8).
> 2. An individual [NPDES] permit application shall be required to be submitted for the proposed discharges of non-contact cooling water, industrial discharges, and storm water runoff from the proposed industrial facility. . . .
> 3. The proposed site work at the facility may be required to obtain a [NPDES] permit for the discharge of storm water runoff associated with construction activity into State surface waters . . . .

Further, Richard K. McQuain (**McQuain**), the President of Hu Honua, submitted written testimony and an affidavit dated October 2, 2010. The affidavit stated, *inter alia*, the following:

> 17. Existing NPDES Permit. Questions and concerns have arisen regarding water discharge into the ocean. Most of the concerns raised really relate to past operations fueled with bagasse, a by-product of sugar cane, or coal, and do not acknowledge that the proposed Hu Honua operation will be fundamentally different from past operations. The new Hu Honua facility design dramatically reduces the amount of waste water generated and incorporates new measures to insure that the temperature of the cooling water discharge is within the limits prescribed by current environmental regulatory standards. Hu Honua has an existing general [NPDES] permit for the site governing storm water runoff. Hu Honua will apply for an individual NPDES permit that will govern storm water runoff and non-contact cooling water discharge prior to the operation of the plant. The terms and conditions of such permits will be in accordance with what the [DOH] and the [Environmental Protection Agency (**EPA**)] require to protect marine resources. Hu Honua will also comply with the appropriate Hawaii County Department of Public Works requirements during construction.

With regard to the discharge of water into the ocean from the power plant, the Planning Commission Decision and Order states the following in pertinent part:

> 45. Consideration No. 8 (Water Quality). The facility will be required to operate within the parameters set by the DOH to ensure safe operations and to minimize any potential adverse impacts on water discharge.
> 46. Hu Honua has an existing [NPDES] permit governing storm water discharge for the Subject Property. Hu Honua will apply for an individual NPDES permit that will govern storm water runoff and non-contact cooling water and other water discharge prior to the operation of the Power Plant. The terms and conditions of such permits will be in

> accordance with DOH and EPA requirements. Further, any impacts from soil erosion and runoff during site preparation and construction phases will be adequately mitigated through compliance with existing regulations and proper construction practices required by the Department of Public Works.
>
> 47. In order to further mitigate any potential negative impacts on water quality, Hu Honua's facility design will dramatically reduce the amount of waste water generated by the facility. This will be done through the utilization of a drag chain system instead of water to transport ash through the upgraded Power Plant. Additionally the upgraded Power Plant design incorporates new measures to ensure that the temperature of the cooling water discharged is within the limits prescribed by current environmental regulatory standards.
>
> 48. Pursuant to Conditions No. 4 and 16 of the Planning Department Recommendation, Hu Honua's Amended SMA Permit will be subject to revocation should Hu Honua be unable to comply with applicable County, State and/or Federal requirements relating to water quality and discharge.

(Citations omitted).[13] Thus, the Planning Commission approved the SMA Permit Application subject to the condition that Hu Honua obtain the appropriate state permits to discharge non-contact cooling water and storm water into the ocean.

The Appellants do not point to any evidence in the record that shows that an NPDES permit would not adequately protect the ocean as a public trust resource. Therefore, under the facts of this case, Hu Honua made an affirmative showing that once an individual NPDES permit is obtained and Hu Honua complies with the requirements set forth by the DOH in the permit, the power plant's discharge of non-contact cooling water and storm

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[13] Conditions 4 and 16, which are set forth in the "Hearing Officer's Recommended Findings of Fact, Conclusions of Law, and Decision and Order" dated March 23, 2011, provide:

> 4. Operation of the biomass facility shall comply with all applicable County, State and Federal requirements related to air quality, water quality and discharge, and noise. Copies of compliance reports and related correspondences shall be submitted to the Planning Department concurrent with their submittal to and receipt from the applicable County, State and Federal agencies.
>
> . . . .
>
> 16. Should any of the foregoing conditions not be met or substantially complied with in a timely fashion, the Planning Director may initiate procedures to revoke the permit.

water will not conflict with the principles and purposes of the public trust doctrine.

Appellants also challenge the Circuit Court's COL 6 which states "there is an insufficient basis to find or conclude that the land itself has such significance as a natural resource that it can be considered a public natural resource[.]" Appellants point to the Coastal Zone Management Act, HRS § 205A-21 (2001)[14] to support that controls on developments within an area along the shoreline are necessary.

Article XI, section 1 provides in pertinent part that "the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land . . . . All public natural resources are held in trust by the State for the benefit of the people." (Emphasis added). Further, the Hawaiʻi Supreme Court has held that land along the shoreline below the high water mark of the ocean is a natural resource, owned by the state, and held in trust for the enjoyment of certain public rights. Hawaii Cty. v. Sotomura, 55 Haw. 176, 183-84, 517 P.2d 57, 63 (1973). Thus, the Circuit Court's COL 6 is incorrect.

We thus consider Appellants' argument regarding application of the public trust doctrine to the shoreline. The SMA Permit Application states that the power plant will not restrict access to beaches or fishing grounds. Further, "[a]ll proposed structures will be situated approximately 200 feet at the nearest point from the shoreline." The application also states:

> the facility upgrades are being completed on existing and former facility infrastructure. As such the facility will

[14] HRS § 205A-21 provides:

> The legislature finds that, special controls on developments within an area along the shoreline are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure that adequate access, by dedication or other means, to public owned or used beaches, recreation areas, and natural reserves is provided. The legislature finds and declares that it is the state policy to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii.

> not adversely affect the natural resources or shoreline through exploitation or encroachment or damage. Moreover, no recreational resources will be impacted and public access to fishing spots and the shoreline will be available through existing established easements.

The written testimony of Dennis Poma (**Poma**), who served as an engineer, land use, and permitting consultant for Hu Honua and prepared in large part the SMA Permit Application, testified that the "Plant is situated atop a cliff, set back sufficiently from the edge of the cliff, and not known to be in any sensitive area." Poma further testified regarding how the storm water and non-contact cooling water are discharged into the ocean:

> Outfall 001 was the primary outfall associated with former operations and received the non-contact cooling water and storm water from most areas of the facility. The current permit also allows discharge of storm water from Outfall 003, which receives storm water from the southern portion of the facility and from the adjacent property which stored the coal ash. In light of recent subdivisions, the power plant property was consolidated and the south property line was moved north. As a result of the property re-alignment, Outfall 003 is no longer on Hu Honua Property. Therefore, storm water runoff from the entire facility will be directed to Outfall 001 in the future. The individual NPDES permit will also include one other Outfall known as Outfall 004. This outfall simply conveys storm water into the ocean which runs on the Property from offsite upstream locations and which never comes into contact with industrial activities at any time. It should also be noted that the former flume at Outfall 001 just recently collapsed due to its dilapidated state. The flume structure helped convey water from the cliff to the water line (ocean). The former flume will not need to be replaced, and a new discharge pipe will be installed from the existing concrete structure remaining on top of the cliff to convey water into the ocean to prevent potential shoreline erosion.

During cross-examination at the contested case hearing, Poma testified that at the time that Hu Honua submitted its SMA Permit Application, it did not plan on any construction on the shoreline and requested a waiver of a shoreline survey. However, the application was completed before a portion of Outfall 001 collapsed. Poma testified that the purpose of the outfall extending out into the ocean is to have the discharge water reach the ocean without eroding the cliff face, but the outfall broke off at the cliff face. Poma further testified that Hu Honua was looking at different alternatives to repair the outfall, which included possibly not using the outfall at all. Poma testified that alternatives to repairing the outfall may or may not involve

construction at the shoreline and Hu Honua was still in the process of evaluating the situation. Despite the status of the outfall, Poma testified that he still believed there would be no impact to the shoreline.

Also on cross-examination at the contested case hearing, McQuain testified that Poma was investigating several alternatives to repairing Outfall 001 including replacing a portion of the outfall structure that fell off. McQuain testified there are several ways to complete the replacement. McQuain also testified that Poma was investigating the potential of using ejection wells to discharge water instead of using the outfall.

With regard to construction on the shoreline, the Planning Commission Decision and Order found the following:

> 58. No Construction Within Shoreline Setback. No new construction or grading work will occur within the shoreline setback area, and no new use is being proposed within the shoreline setback area.
>
> . . . .
>
> 73. Beach Protection. The project is consistent with the protection of beaches. The Plant Site is not located near any known public beach, the shoreline boundary of the Plant Site is identified as steep cliffs, and the renovation work proposed will be over 100 feet from the shoreline.

(Citations omitted). The Planning Commission did not make any specific FOFs or COLs about what, if any, impacts there would be on the shoreline due to repairing or replacing Outfall 001. Further, the Planning Commission did not include, within its sixteen conditions to approval of the amended permit, a condition regarding Outfall 001.

In this instance, with regard to the impacts on the shoreline, as a public trust resource, the testimony of Poma and McQuain show that a portion of Outfall 001 collapsed and several alternatives were being discussed. Further, because the damage to Outfall 001 was discovered after the SMA Permit Application was completed, information regarding its repair is not included in the application. Despite Poma and McQuain's testimony regarding Outfall 001, the Planning Commission did not address it in its Decision and Order.

Thus, because it is not clear what repairs or replacements will take place with regard to Outfall 001, Hu Honua did not make an affirmative showing that any work done will not conflict with the principles and purposes of the public trust doctrine. Therefore, under HRS § 91-14(g), the Planning Commission granted the amended SMA permit in violation of constitutional provisions.

IV. Conclusion

Based on the above, the Final Judgment filed on March 10, 2014, in the Circuit Court of the Third Circuit is affirmed, except with respect to application of the public trust doctrine to the shoreline. Specifically, the case is remanded to the Planning Commission to address the impacts on the public shoreline with regard to repairing or replacing Outfall 001.

DATED: Honolulu, Hawaiʻi, January 22, 2018.

On the briefs:

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