IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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KILAKILA ʻO HALEAKALĀ, Petitioner/Appellant-Appellant,

vs.

BOARD OF LAND AND NATURAL RESOURCES, DEPARTMENT OF LAND AND NATURAL RESOURCES, SUZANNE CASE, in her official capacity as Chairperson of the Board of Land and Natural Resources, and UNIVERSITY OF HAWAIʻI,
Respondents/Appellees-Appellees.

SCWC-13-0003065

CERTIORARI FROM THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0003065; CIV. NO. 12-1-3070)

OCTOBER 6, 2016

CONCURRING OPINION BY McKENNA, J.

I have joined the majority opinion. I write to address a few additional points, but not to address all of the dissent's characterizations of my concurrence.

1. The Board Of Land And Natural Resources' Approval Of Conservation District Use Permits Before Conducting Contest Case Hearings Departed From Previous Practice

Approving conservation district use ("CDU") permits before contested case hearings, the process initially followed by the Board of Land and Natural Resources ("BLNR") for the Advanced Technology Solar Telescope ("ATST") before our remand in Kilakila I[1] and for the Thirty Meter Telescope ("TMT") on Mauna Kea before our remand in Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawaiʻi 387, 363 P.3d 224 (2015), was a major departure from BLNR's prior CDU permitting procedure. For example, as outlined in Morimoto v. Bd. of Land & Nat. Res., 107 Hawaiʻi 296, 300, 113 P.3d 172, 176 (2005), BLNR issued a CDU permit allowing upgrades to Saddle Road after a contested case hearing that considered challenges based on impacts on the Palila and endangered and threatened species. As reflected in Dedman v. Bd. of Land & Nat. Res., 69 Haw. 255, 257-58, 740 P.2d 28, 30-31 (1987), the BLNR issued a CDU permit allowing development of geothermal energy in the Kilauea Middle East Rift Zone after conducting contested case hearings that considered free exercise of religion challenges. Finally, Stop H-3 Assoc. v. State Dep't of Transp., 68 Haw. 154, 157, 706 P.2d 446, 448-49 (1985), points out that the initial BLNR CDU permit for a

[1] Kilakila ʻO Haleakala v. Bd. of Land & Nat. Res., 131 Hawaiʻi 193, 317 P.3d 27 (2013).

realigned H-3 was invalidated by the circuit court because a contested case hearing on environmental challenges had not been held before its issuance.

BLNR's new procedure of approving CDU permits before conducting contested case hearings was based on its mistaken interpretation of what was allowed by the 2009 amendments to its administrative rules. Mauna Kea, 136 Hawaiʻi at 398, 363 P.3d at 246. Thus, in Kilakila I, this court held "that a contested case hearing should have been held, as required by law and properly requested by KOH on UH's application prior to BLNR's vote on the [CDU permit] application." 131 Hawaiʻi at 206, 317 P.3d at 40. Then in Mauna Kea, a majority of this court also held that approval of a CDU permit before a contested case hearing violated the due process rights of parties with standing to assert Native Hawaiian traditional and customary rights. Mauna Kea, 136 Hawaiʻi 387, 363 P.3d 224.

2. Issuance Of The Second CDUA Permit For The ATST Met Constitutional Due Process Requirements

The first permit in this case, issued before a contested case hearing, was effectively invalidated by our ruling in Kilakila I. A second permit issued in late 2012, after a contested case hearing and report by the second hearing officer, and a new vote by a reconstituted BLNR, which had several new members, including a new Chair. This second permit superseded

the first permit improperly issued before a contested case hearing. Thus, although the process was less than ideal, the second permit minimally comported with Mauna Kea's procedural due process requirement

3. "Pressure" On The First Hearing Officer

The dissent focuses on the pressure placed on the first hearing officer to hurry up and issue his report due to apparent concerns regarding possible loss of funding for the ATST. The pressure apparently started after about five months had elapsed after the first contested case hearing had finished. There is no suggestion of any attempt at direct contact with the hearing officer by staff from Senator Inouye or the Governor's offices. Rather, the hearing officer's administrative supervisors from the state executive branch asked the hearing officer when the report would issue, and later requested daily reports.

It is not unusual for adjudicative officers, including judges, to report to administrative supervisors regarding the status of decisions that remain outstanding. Requests for updates as to when a decision will be forthcoming are not improper, as long as the administrative supervisor does not comment at all on the substance of the decision. The first hearing officer was clear that the pressure never included any suggestion that he should reach a particular result. Although the hearing officer was apparently told at some point that these

requests for updates had come from persons other than his administrative supervisors, there is no indication that there was any request to convey that information to the hearing officer. In other words, there is no indication that there was an actual attempt to effectuate ex parte communications with the first hearing officer, even if only on procedural matters.

Whether or not such pressure should have been placed on the first hearing officer, as noted in the majority opinion, any concern of impropriety in this regard was removed when the first hearing officer was replaced. This was the relief requested by Kilakila, and it was granted.

Therefore, these allegations regarding pressure on the first hearing officer are not directly relevant to the legal issues in this case.

4. **There Is No Actual Evidence Of Decision Makers Engaging In Improper Ex-parte Communications**

With respect to the communications with the Chair of BLNR, the Chair is a member of the Governor's Cabinet, and represents the BLNR and the Department of Land and Natural Resources. The Chair is the obvious person to respond to the Governor and to the community regarding the procedural status of the work of the BLNR, even on adjudicative matters. Hawaiʻi Administrative Rules ("HAR") §13-1-37 (effective 1982) recognizes as much, by allowing ex parte communications on procedural matters.

With respect to the assertions or questions whether Senator Inouye's chief of staff was acting as a representative of UH at the March 2012 meeting, I note that the January 2012 e-mail from the Senator's chief of staff to the UH representative offering to "carry the uh message" was before the first hearing officer issued his preliminary report in February. The urgent need for issuance of that report was the "message" to be conveyed. By the time the meeting took place in March, however, the first hearing officer had already issued his report the month before. Therefore, the reason to "carry the uh message" no longer existed.

Although the March meeting should have been avoided due to the questions it raises, it was not improper just because it was undisclosed. As the Chair was not meeting with a party and because the subject matter concerned procedural matters, it did not constitute an ex-parte communication prohibited by HRS § 91-9(g) and/or HAR §13-1-77. I also note that the Attorney General of the State of Hawaiʻi was present at the meeting. The Attorney General is a member of the Hawaiʻi bar and Senator Inouye's chief of staff is also a lawyer. Lawyers are well aware of prohibitions on ex parte communications with adjudicators, except on procedural questions.

Finally, it is important to note that despite Kilakila's knowledge of communications and the meeting involving the Chair

well before issuance of the second hearing officer's report and the BLNR's vote granting the second permit, it did not request that the Chair be disqualified, as it had with the first hearing officer.

Despite my analysis, I do not in any way condone meetings and discussions with administrative adjudicators. Hawaiʻi Revised Statutes § 171-4(b) (2011 & Supp. 2014) prohibits BLNR members from participating in or voting on any matters in which they have a direct or indirect interest, and BLNR rule HAR § 13-1-37 prohibits ex parte communications by parties with BLNR members concerning the substance of and during the pendency of potential or actual contested case matters. Due process considerations, however, prohibit administrative adjudicators from discussing the substance of contested case matters during the pendency of potential or actual contested case matters, whether with parties or with others. It is therefore preferable and indeed advisable that procedural questions be raised and responded to in writing, so that questions do not linger whether improper communications took place regarding the substance of contested matters. Thus, although BLNR members differ from judges, as administrative adjudicators, they must not allow ex parte communications on substantive matters during the pendency of potential or actual contested case matters and would be well

advised to ensure that any communications regarding procedural matters are disclosed in writing to all parties.

5. The BLNR Performed Its Functions In A Manner That Fulfills The State's Affirmative Obligations Under The Hawaiʻi Constitution

In Mauna Kea, in addition to the due process holding, a majority of this court held that a state agency must perform its functions in a manner that fulfills the State's affirmative obligations under the Hawaiʻi constitution. 136 Hawaiʻi at 414, 363 P.3d at 262 (Pollack, J., concurring).

Applying this second holding, I believe the BLNR performed its functions in a manner that fulfills the State's affirmative obligations under the Hawaiʻi constitution. In this case, those duties included considering and applying the State's obligations under Article XI, section 1 and Article XII, section 7 of the Constitution of the State of Hawaiʻi, which provide as follows:

> Article XI, section 1:
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> 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.
>
> All public natural resources are held in trust by the State for the benefit of the people.
>
> Article XII, section 7:
>
> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupuaʻa tenants who are descendants of

> native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Although not necessarily couched in the language of these constitutional provisions, the findings and conclusions of the BLNR, as outlined in the majority opinion, illustrate that the BLNR carefully considered and applied the applicable constitutional considerations.

Therefore, as to the CDU permit for the ATST at Haleakalā, the requirements set out by the majority opinions in Mauna Kea were met.

For these and the reasons stated therein, I join the majority opinion.

/s/ Sabrina S. McKenna