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NO. CAAP-24-0000346

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

CLAUDIA ROHR, Plaintiff-Appellant, v.
COUNTY OF HAWAIʻI PLANNING DEPARTMENT; HUI HOʻOLEIMALUO; and
KA ʻUMEKE KAʻEO PCS, Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 3CCV-22-0000266)

SUMMARY DISPOSITION ORDER
(By: Nakasone, Chief Judge, Leonard and Guidry, JJ.)

Self-represented Plaintiff-Appellant Claudia Rohr (**Rohr**) appeals from the April 1, 2024 Final Judgment (**Judgment**), entered by the Circuit Court of the Third Circuit (**Circuit Court**).[1] Rohr also challenges the Circuit Court's March 3, 2023 Order Granting Defendant[-Appellee] County of Hawaiʻi Planning Department's [(**Planning Department's**)] Motion to Dismiss Complaint, Filed on November 18, 2022; March 3, 2023 Order Granting Defendant[-Appellee] Hui Hoʻoleimaluō's [(**Hui's**)] Motion to Dismiss and Substantive Joinder in [the Planning Department's] Motion to Dismiss Complaint, Filed November 21, 2022; March 3, 2023 Order Granting Defendant[-Appellee] Ka ʻUmeke K[ā]ʻeo PCS

[1] The Honorable Henry T. Nakamoto presided.

(**Charter School's**) Substantive Joinder in [the Planning Department's] Motion to Dismiss Complaint Filed on November 18, 2022 (collectively, the **Dismissal Orders**; the Planning Department, the Hui, and the Charter School are collectively referred to as **Appellees**); and March 4, 2024 Order Denying [Rohr's] Motion to Reconsider or Amend [the Dismissal Orders] (**Order Denying Reconsideration**).

Rohr raises three points of error on appeal, contending that the Circuit Court erred when it: (1) treated Appellees' November 18, 21, and 22, 2022 Hawaiʻi Rules of Civil Procedure (**HRCP**) Rule 12(b) motions (**Motions to Dismiss**) as tolling motions; (2) dismissed the Amended Complaint under the doctrine of primary jurisdiction; and (3) left Rohr unfairly disadvantaged by the court's remedy.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised, we resolve Rohr's points of error as follows:

(1) Rohr argues that the Circuit Court erred by treating the Motions to Dismiss as "tolling" motions with respect to Appellees' deadline to file an answer to the Amended Complaint. In short, when the Circuit Court granted Rohr's request to file an amended complaint, rather than requiring the Appellees to file new – and likely substantially similar – motions to dismiss the Amended Complaint, the Circuit Court essentially kept Appellees' existing Motions to Dismiss pending

as to Rohr's claims, and allowed them to supplement the Motions to Dismiss, if necessary, to address the Amended Complaint.

Rohr raised no objection to this procedure. It is well-settled that issues not raised in the lower court will not be considered on appeal. See, e.g., Kawamata Farms, Inc. v. United Agri Prods., 86 Hawaiʻi 214, 248, 948 P.2d 1055, 1089 (1997). Accordingly, we conclude that Rohr's argument that the Circuit Court abused its discretion in streamlining the pleadings response process in this manner is waived.

(2) Rohr argues that the Circuit Court erred in applying the primary jurisdiction doctrine and dismissing the Amended Complaint.

Primary jurisdiction "comes into play whenever enforcement of the claim requires the resolution of issues which, under the regulatory scheme have been placed within the special competence of an administrative body." Pac. Lightnet, Inc. v. Time Warner Telecom, Inc., 131 Hawaiʻi 257, 268, 318 P.3d 97, 108 (2013) (cleaned up). While "conceptually analogous" to the exhaustion of administrative remedies doctrine, the primary jurisdiction doctrine "does not require a determination that the court lacks jurisdiction over the matter." Id. at 268-69, 318 P.3d at 108-09 (citations omitted; emphasis in original). "Instead, primary jurisdiction presumes that the claim at issue is originally cognizable by both the court and the agency." Id. at 269, 318 P.3d at 109 (emphasis in original) (citing Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Hawaiʻi 192, 202, 891 P.2d 279, 289 (1995)).

Here, Rohr initiated proceedings at the agency level. She petitioned the County of Hawaiʻi Board of Appeals (**Board of Appeals**) on June 14, 2022, seeking reversal of the issuance of an SMA Minor Permit to the Hui, arguing, *inter alia*, that the challenged Kaumaui Project violated the General Plan, community plan, and zoning, and therefore violated Hawaii Revised Statutes (**HRS**) § 205A-26 (Supp. 2020).

Less than three months later, before the Board of Appeals had completed its decision-making, on September 6, 2022, Rohr filed this suit in the Circuit Court, primarily arguing that the SMA Minor Permit was approved without requiring the preparation of an Environmental Assessment (**EA**) and, therefore, was issued in violation of HRS chapter 343 (**HEPA**), Hawaiʻi Administrative Rules (**HAR**) chapter 11-200.1, subchapter 9, and article XI, section 9 of the Hawaiʻi Constitution. At that point, the agency and the court proceedings took place alongside one another. The Board of Appeals heard testimony concerning Rohr's petition on September 9, and November 4, 2022. The Board of Appeals Decision was issued on February 2, 2023. In light of the Board of Appeals Decision, the Circuit Court orally stated at the February 10, 2023 hearing on the Motions to Dismiss that Rohr "can go through the proper procedures and appeal" via HRS § 91-14[2] and that the court was dismissing this case without prejudice.

[2] Thereafter, Rohr did in fact timely file a notice of appeal from the notice of Board of Appeals Decision.

The primary jurisdiction doctrine applies here because, pursuant to HRS § 343-7(a) (Supp. 2021), the circuit courts have original jurisdiction over proceedings challenging the lack of an EA required under HRS § 343-5 (Supp. 2021). See, e.g., Maui Lani Neighbors, Inc. v. State, 156 Hawaiʻi 520, 542, 575 P.3d 610, 632 (2025).[3] Under HRS § 343-7(a),[4] a suit must be initiated within 120 days of the agency's decision to carry out or approve the action, as Rohr did here, or within 120 days after the proposed action is started if no formal determination was made. In addition, an agency's action, including a determination not to require an EA, is within the special competence of the

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[3] In Maui Lani Neighbors, the supreme court stated:

> HRS chapter 343 establishes a system of environmental review to ensure that environmental concerns are given appropriate consideration along with economic and technical considerations in decision-making processes. This allows for parties to challenge agency actions directly through the court system, as HRS § 343-7 explicitly contemplates a "judicial proceeding." Indeed, our courts frequently hear HEPA claims. See, e.g., Umberger v. Dep't of Land & Nat. Res., 140 Hawaiʻi 500, 403 P.3d 277 (2017); Kepoʻo v. Kane, 106 Hawaiʻi 270, 103 P.3d 939 (2005); [Citizens for Prot. of] N. Kohala [Coastline v. Cnty. of Hawaiʻi], 91 Hawaiʻi 94, 979 P.2d 1120 [(1999)]. Clearly, the circuit court has jurisdiction to hear challenges brought pursuant to HRS § 343-7 given the plain language of the statute and extensive history of our courts hearing such cases.

156 Hawaiʻi at 542, 575 P.3d at 632.

[4] HRS § 343-7(a) provides:

> **§ 343-7 Limitation of actions.** (a) Any judicial proceeding, the subject of which is the lack of assessment required under section 343-5, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action, or, if a proposed action is undertaken without a formal determination by the agency that a statement is or is not required, a judicial proceeding shall be instituted within one hundred twenty days after the proposed action is started. The office, any agency responsible for approval of the action, or the applicant shall be adjudged an aggrieved party for the purposes of bringing judicial action under this subsection. Others, by environmental court action, may be adjudged aggrieved.

administrative body issuing an SMA permit and may be challenged through the appeals procedure set forth in HRS § 91-14, as referenced by the Circuit Court. Thus, a HEPA claim is originally cognizable by both the court and the agency and the Circuit Court did not err in concluding that the primary jurisdiction doctrine was applicable in this case.

(3) Rohr further argues that, even if the Circuit Court did not err in applying the primary jurisdiction doctrine, she was unfairly disadvantaged by the court's remedy, *i.e.*, dismissal of the case, as opposed to retaining jurisdiction and staying the proceeding.

This court has previously held:

> Where the doctrine of primary jurisdiction applies, the court has the "discretion either to retain jurisdiction [and stay the proceedings] or, if the parties would not be unfairly disadvantaged, to dismiss the case without prejudice." Reiter v. Cooper, 507 U.S. 258, 268–69, 113 S.Ct. 1213, 1220, 122 L.Ed.2d 604 (U.S.N.C.1993).

Dancil v. Arakawa, 132 Hawaiʻi 472, 478, 323 P.3d 116, 122 (App. 2012).

Rohr argues, *inter alia*, that "[a]ny judicial proceeding, the subject of which is the lack of assessment required under section 343-5, shall be initiated within one hundred twenty days of the agency's decision to carry out or approve the action;" however, that period "expired before the Board of Appeals acted on Rohr's Petition for an appeal of the Planning Director's decision to issue the SMA minor permit." This argument has merit. The SMA Minor Permit was issued to the Hui on June 6, 2022. Rohr petitioned the Board of Appeals on June 14, 2022. The Board of Appeals Decision was not issued until February 2, 2023. Had Rohr waited until the Board of

Appeals promulgated its decision, the statute of limitations for her claims would have run pursuant to HRS § 343-7(a).

The Planning Department argues that the running of a statute of limitations is not *per se* an unfair disadvantage. Both the Planning Department and the Hui argue that Rohr could have raised the HEPA issue in her petition to the Board of Appeals, but chose not to do so. Regarding the latter argument, HRS § 343-7(a) expressly provides for a judicial action and the Appellees provide no authority for the proposition that the statutory right of action is foreclosed if the issue could have been raised in an agency proceeding. Regarding the former argument, under the circumstances of this case, we conclude that Rohr was in fact disadvantaged by the dismissal of the Circuit Court action "without prejudice," as prejudice effectively attached when the case was dismissed because any newly filed suit would be untimely under HRS § 343-7(a). See generally Fratinardo v. Emps.' Ret. Sys. of State of Haw., 121 Hawaiʻi 462, 469, 220 P.3d 1043, 1050 (App. 2009) (noting federal cases finding that the running of a statute of limitations constitutes a disadvantage). Presumably, Appellees will at least argue that HRS chapter 91 review of Rohr's HEPA challenge is waived in the agency appeal because she did not raise it in her initial petition to the Board of Appeals. Accordingly, we conclude that the Circuit Court's dismissal, rather than the staying of Rohr's HEPA claims, precluded Rohr from having her claims heard on the merits, notwithstanding having properly and timely filed suit pursuant to HRS § 343-7, and constituted an abuse of discretion.

Finally, as we have pointed to the supreme court's opinion in Maui Lani Neighbors concerning the judicial right of action under HRS chapter 343-7, we note the supreme court's further comment on the potential remedy for an insufficient HEPA review:

> Unlike the other claims alleged in the complaint, the HEPA challenge does not get to the substance of the Planning Commission's decision, i.e., whether the [project] uses were consistent with county zoning requirements. Rather, a successful HEPA challenge "merely places a hold" on the development of the project until the agency "complies with the procedural and informational requirements of the statute." Kepoʻo, 106 Hawaiʻi at 292, 103 P.3d at 961 (citations omitted). As we further explained in Kepoʻo, voiding the permit "does not affirmatively dictate how the land may be used, . . . but, rather, has the incidental effect of stalling the proposed project." Id. at 292-93, 103 P.3d at 961-62 (brackets omitted) (internal quotation marks omitted).
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> To be clear, our holding that [the appellant's] HEPA claims may proceed without application of the doctrine of administrative remedies does not automatically vitiate the [subject permit]. Indeed, the record reflects that there are additional findings necessary to resolving the HEPA issue on remand, including those regarding the timeliness of [appellant's] HEPA challenge.
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> Further, we recognize that should there be a determination by the circuit court that environmental review was insufficient, traditional remedies under HRS chapter 343 may not be available due to the length of time this case has been pending on appeal. Nonetheless, as we recently held in Unite Here! Local 5 v. PACREP LLC, HEPA claims are not rendered moot by a completed action. No. SCAP-22-0000601, --- Hawaiʻi ----, ---- - ----, --- P.3d ----, 2025 WL 573299, at *15-16 (Haw. Feb. 21, 2025) [157 Hawaiʻi 442, 458-59, 580 P.3d 622, 638-39 (2025).] At bottom, "the environmental review process is intended to be informational and forward-looking." Id. at ----, --- P.3d ----, 2025 WL 573299 at *16. [Id. at 459, 580 P.3d at 639.] Accordingly, where invalidating the permit would not serve the interests of equity, "the issue of remedies for a HEPA violation is one of equitable discretion." Id. ("Even if a project has been completed, completion of a proper environmental review can provide forward-looking information, including, but not limited to, possible mitigation measures to ameliorate environmental effects.").

156 Hawaiʻi at 543, 575 P.3d at 633.

For the reasons set forth above, the Circuit Court's April 1, 2024 Judgment is vacated and this case is remanded to the Circuit Court for further proceedings consistent with this Summary Disposition Order.

DATED: Honolulu, Hawaiʻi, October 30, 2026.

On the briefs:

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Hui Hoʻoleimaluō

/s/ Karen T. Nakasone
Chief Judge

/s/ Katherine G. Leonard
Associate Judge

/s/ Kimberly T. Guidry
Associate Judge