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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

MAUNA KEA ANAINA HOU, ROYAL
ORDER OF KAMEHAMEHA I, SIERRA
CLUB, HAWAI'I CHAPTER; KAHEA
and CLARENCE CHING,

Appellants/Petitioners,

vs.

CIVIL NO. 09-1-336

(Agency Appeal)

ORDER GRANTING APPELLEES
UNIVERSITY OF HAWAI'I AND
UNIVERSITY OF HAWAI'I
INSTITUTE FOR ASTRONOMY'S
MOTION TO DISMISS APPEAL
FILED OCTOBER 20, 2009

I hereby certify that this is a full, true and correct
copy of the original on file in this office.

Clerk, Third Circuit Court, State of Hawaii

BOARD OF LAND AND NATURAL
RESOURCES; UNIVERSITY OF
HAWAI'I (Respondent); UNIVERSITY
OF HAWAI'I INSTITUTE FOR
ASTRONOMY (Respondent),

Appellees.

HEARING

Date: December 9, 2009

Time: 9:00 a.m.

Judge: Hon. Glenn S. Hara

**ORDER GRANTING APPELLEES UNIVERSITY OF HAWAI'I AND
UNIVERSITY OF HAWAI'I INSTITUTE FOR ASTRONOMY'S MOTION
TO DISMISS APPEAL FILED OCTOBER 20, 2009**

Appellees University of Hawai'i and University of Hawai'i Institute for Astronomy's Motion to Dismiss Appeal, filed *ex officio* herein on October 20, 2009 ("University's Motion to Dismiss"), was heard on December 9, 2009 before the Honorable Glenn S. Hara. Colin A. Yost, Esq. appeared for Appellants/ Petitioners Mauna Kea Anaina Hou, Royal Order of Kamehameha I, Sierra Club, Hawai'i Chapter, KAHEA and Clarence Ching. Julie H. China, Esq. appeared for Appellee Board of Land and Natural Resources ("BLNR"). Lisa Woods Munger, Esq. and Lisa A. Bail, Esq. appeared for Appellees University of Hawai'i and University of Hawai'i Institute for Astronomy ("University"). The Court having considered the written submissions, oral argument and applicable law grants the University's Motion to Dismiss in its entirety and finds as follows:

1. This case is presented as an appeal from the decision of the BLNR on April 9, 2008, following public hearings on April 8 and 9, 2009, to accept and approve the University's then proposed Comprehensive Management Plan ("CMP") covering areas of the Mauna Kea mountain on the Island of Hawai'i that are under lease or control

by the University and the decision of the BLNR denying Appellant's request for a contested case hearing on the adoption of the CMP. In paragraph 48 of the Appellant's Statement of the Case filed on October 1, 2009, it is stated this court has jurisdiction to hear this appeal from an agency action pursuant to Hawaii Revised Statutes § 91-14.

2. On October 20, 2009, the University filed a motion to dismiss appeal on the grounds that this Circuit Court lacked jurisdiction to entertain the appeal.

3. This Court finds that the discussion, analysis and holding in *Aha Hui Malama O Kaniakapupu v. Land Use Commission*, 111 Haw. 124, 139 P.3d 712 (2006) ("*Kaniakapupu*") dispositive of the jurisdictional issues raised by the instant motion to dismiss. In this case the Supreme Court stated:

"HRS § 91-14(a) provides the means by which judicial review of administrative contested cases can be obtained. Among its prerequisites, the section requires that a contested case must have occurred before appellate jurisdiction may be exercised." *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994) (citation omitted). HRS § 91-1(5) (1993) defines a "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS § 91-1(6) (1993), in turn, defines an "agency hearing" as "such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14." Thus, "[a] contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties." *Pub. Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n*, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) (internal quotation marks and citation omitted) (emphasis added) [hereinafter, PASH].

Kaniakapupu, 111 Haw. at 132, 139 P.3d at 720.

4. The Supreme Court further stated that, "In order for an agency hearing to be 'required by law,' it may be required by (1) agency rule, (2) statute, or (3) constitutional due process." *Kaniakapupu*, 111 Haw. at 132, 139 P.3d at 720. Pursuant to Hawaii Administrative Rules ("HAR") §§ 13-5-30 and 40 a public hearing on the Board's acceptance and approval of the CMP was required and held by BLNR. The hearing was thus "required by law."

5. A further requirement for determining whether a contested case hearing is required, however, is whether the hearing determines the rights, duties, or privileges of specific parties. The hearing held for the acceptance and approval of the CMP did not determine the rights, duties or privileges of the Appellants. Appellants have failed to meet their burden of showing that their rights, duties and privileges have been adversely affected by the adoption of the CMP. Specifically, the court finds that the Appellants' participation in Civil No. 04-1-397, Third Circuit Court, State of Hawai'i, did not endow them with any special or other interest in this BLNR proceeding relating to the CMP that rose to the level of entitling them to a contested case hearing as to the acceptance and adoption of the CMP.

6. The court also finds the adoption of the CMP is not a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive the Appellants of adequate relief. If no further action is taken on the CMP, and it remains an unimplemented plan, this court cannot discern how the Appellants' rights, duties and privileges would be affected. It may be that a future

implementation of the CMP might trigger a requirement for a contested case, but the action of the BLNR in accepting and approving the CMP in and of itself does not do so. Thus, the BLNR decision on April 9 accepting and approving the CMP is: (1) not a final BLNR decision and order in a contested case hearing or a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive the Appellants of adequate relief, requiring a contested case hearing; (2) not appealable under H.R.S. § 91-14; and (3) this court has no jurisdiction to hear the instant appeal.

7. As to the issue of BLNR's denial of the Appellants' application for a contested case hearing on the adoption of the CMP, one of the holdings in *Kaniakapupu* is that if the circuit court has no jurisdiction to hear an agency appeal under H.R.S. § 91-14, it may not consider whether to review an agency decision to deny a request for a contested case hearing. *Kaniakapupu*, 111 Haw. at 134-37, 139 P.3d at 722-25.

8. The University's Motion to Dismiss Appeal filed on October 20, 2009 is hereby granted.

DATED: Hilo, Hawai'i, JAN 27 2010

GLENN S. HARA (SEAL)

JUDGE OF THE ABOVE-ENTITLED COURT

Mauna Kea Anaina Hou, et al. v. Board of Land and Natural Resources, et al.

Civil No. 09-1-336 (Agency Appeal)

Order Granting Appellees University of Hawai'i and University of Hawai'i
Institute for Astronomy's Motion to Dismiss Appeal Filed October 20, 2009

APPROVED AS TO FORM:



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