

NOT FOR PUBLICATION

NO. 24465

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

ANTHONY AKO ANJO, Appellant-Appellant, v. PLANNING
COMMISSION, COUNTY OF HAWAII; PLANNING DEPARTMENT AND VIPASSANA
HAWAII aka HAWAII INSIGHT MEDITATION CENTER and STEVEN AND
MICHELLE SMITH AS APPLICANTS FOR VIPASSANA HAWAII, INSIGHT
MEDITATION CENTER, Appellees-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Civ. No. 01-1-37)

ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION
(By: Burns, C.J., Watanabe, and Foley, JJ.)

In this secondary appeal, Appellant-Appellant Anthony Ako Anjo (Anjo) challenges the Decision on Appeal entered on July 10, 2001 by the Circuit Court of the Third Circuit (the circuit court).^{1/} The Decision on Appeal affirmed a December 26, 2000 letter decision and order by Appellee-Appellee Planning Commission, County of Hawaii (the Commission), which granted Appellee-Appellee Vipassana Hawaii (Vipassana) a special permit to establish the Hawaii Insight Meditation Center on fifteen acres of land designated for agricultural use under the State of Hawaii land use law, Hawaii Revised Statutes (HRS) chapter 205.

We conclude that the circuit court lacked jurisdiction to consider the merits of Anjo's appeal and, accordingly, we also lack jurisdiction over Anjo's appeal.

^{1/} Judge Greg K. Nakamura entered the Decision on Appeal.

Anjo's appeal to the circuit court from the Commission's decision regarding Vipassana's application for a special permit was brought pursuant to HRS § 91-14 (1993).^{2/} In

^{2/} Hawaii Revised Statutes § 91-14 (1993) states, in relevant part:

Judicial review of contested cases. (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.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court except where a statute provides for a direct appeal to the supreme court, which appeal shall be subject to chapter 602, and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

. . . .

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(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:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or

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Public Access Shoreline Hawaii [(PASH)] v. Hawai'i County Planning Commission, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995), the Hawai'i Supreme Court discussed the requirements which must be present for a circuit court to have jurisdiction to hear an HRS § 91-14 appeal from an agency hearing:

[F]irst, the proceeding that resulted in the unfavorable agency action must have been a "contested case" hearing--i.e., a hearing that was 1) "required by law" and 2) determined the "rights, duties, and privileges of specific parties"; second, the agency's action must represent "a final decision and order," or "a preliminary ruling" such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved "in" the contested case; and finally, the claimant's legal interests must have been injured--i.e., the claimant must have standing to appeal.

(Emphasis added.)

The record in this case reveals that the Commission held public hearings on November 1 and December 1, 2000 regarding Vipassana's application for a special permit. While Anjo appeared at the December 1, 2000 hearing and submitted both oral and written testimony against the application, he never applied to intervene as a party to the proceedings in the manner set

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- 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.
- (h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order.

forth in Rule 4 of the Commission's Rules of Practice and Procedure (the Rules).^{3/} Because Anjo did not follow agency

^{3/} Rule 4-1 of the Rules of Practice and Procedure (the Rules) of Appellee-Appellee Planning Commission, County of Hawai'i (the Commission) states, in relevant part, that Rule 4

governs contested case procedure before the Commission whenever it is required by law; . . . This procedure shall be used in all cases where the action of the Commission is the final action of a County official or agency, prior to the opportunity for appeal to Circuit Court, whenever it is required. It shall therefore be followed in all cases where State statutes provide for direct appeal from the Commission to Circuit Court.

Rule 4-2(6) of the Rules defines a party as "any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party in a proceeding." Rule 4-7 of the Rules explains how an interested person can be admitted as a party to a proceeding before the Commission:

Prehearing Procedure

- (a) In all proceedings where the Commission's action is directly appealable to Circuit Court, the applicant and the Planning Director will be designated parties to the action. Any other person seeking to intervene as a party shall file a written request in a form as provided in Appendix A and accompanied by a filing fee of \$100 no later than seven (7) calendar days, prior to the Commission's first meeting on the matter. If the request for intervention is withdrawn in writing before the commencement of the hearing, the \$100 filing fee shall be refunded to the applicant.
- (b) Upon receipt of a written request to intervene, the Commission, at the first meeting on the matter, shall hold a hearing on the written request. If the movant can demonstrate that:
 - 1) His or her interest is clearly distinguishable from that of the general public; or
 - 2) Government agencies whose jurisdiction includes the land involved in the subject request; or
 - 3) That they have some property interest in the land or lawfully resides on the land; or
 - 4) That even though they do not have an interest different than the public generally, that the proposed action will cause them actual or threatened injury in fact; or
 - 5) Persons who are descendants of native Hawaiians who inhabited the Hawaiian islands prior to 1778, who practiced those rights which were

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customarily and traditionally exercised for subsistence, cultural or religious purposes.

then they shall be admitted as parties. The Commission will grant or deny such written request prior to any further action on the matter.

- (c) Appeal from Denial. Any petitioner who has been denied standing as a party may appeal such denial to the Circuit Court pursuant to Section 91-14, Hawaii Revised Statutes.
- (d) After establishing the parties to the proceeding, the Commission may either proceed with the hearing, or upon written request by any party, and for good cause, continue the matter to a more appropriate time and date.
- (e) The Commission may join as a party any other person subject to service of process if complete relief cannot be accorded among those already parties or that person has an interest in the matter so that the action of the Commission may impair or impede that person's ability to protect that interest or create a risk of multiple or otherwise inconsistent actions. Should such an order of joinder be issued, further proceedings will be suspended until a date not less than 20 days from service of the order, so that the joined party might properly respond.
- (f) Prior to proceeding further, the Commission may vote upon the motion of any member, to refer the matter for further proceedings to either a hearings officer, or to one or more members to act as hearings officer(s).

(Emphases added.)

Rule 4-25 of the Rules provides that decisions and orders of the Commission that are adverse to a party must be accompanied by separate findings of fact and conclusions of law:

Issuance of Decisions and Orders

Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or to the party's attorney of record. Every decision and order shall be prepared by the Presiding Officer.

Pursuant to Rule 4-28 of the Rules, parties are entitled to appeal
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rules by intervening in the proceeding before the Commission, he was not "involved 'in' the contested case" and thus failed to meet the third requirement of the PASH test. See Simpson v. Department of Land & Natural Resources, 8 Haw. App. 16, 791 P.2d 1267 (1990) (holding that because the applicant for a commercial mooring permit failed to request a contested case proceeding before the Board of Land and Natural Resources, there was no contested case decision entered by the Board from which an HRS § 91-14 appeal could be taken to the circuit court). See also Pele Defense Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 69 n.10, 881 P.2d 1210, 1215 n.10 (1994) (approving the holding in Simpson, but stating that the Simpson case should not have been remanded to the circuit court "with direction to remand the matter to the [Department of Land and Natural Resources] for a contested case hearing" because "[l]acking jurisdiction, the circuit court could do nothing but dismiss the appeal").

Since Anjo never made any attempt to intervene before the Commission, the Commission never determined whether he had standing, as required by Rule 4-7(b) of the Rules. Furthermore, because Anjo failed to properly intervene, the trial-like procedures laid out in the Rules were not followed and the Commission did not make separate findings of fact and conclusions

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a decision of the Commission:

Appeal from the Commission's Decision

Any party may seek judicial review of the Commission's final decision in the manner set forth in section 91-14, Hawaii Revised Statutes.

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of law as to Anjo, as required by Rule 4-25 of the Rules. The trial-like procedures are expressly provided for when there are "adverse parties" to a proceeding before an administrative agency because they assist an appellate court in reviewing an agency's decision. Simpson, 8 Haw. App. at 24-25, 791 P.2d at 1273.

Anjo admits that Simpson, PASH, and Pele seem to bar his appeal but claims that those cases were wrongly decided because "nothing in Section 91-14(a), HRS allows [this court] and [the supreme court] to add their desire for a more complete agency record as a condition to a citizen's statutory right to judicial review." Anjo specifically asks the supreme court to "clarify" this point. However, Anjo's case was assigned to this court, which is not in a position to overrule the supreme court's decisions in Pele and PASH.

For the reasons discussed above, Anjo's appeal is hereby dismissed.

DATED: Honolulu, Hawai'i, July 22, 2003.

Chief Judge

Associate Judge

Associate Judge