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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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KEAHOLE DEFENSE COALITION, INC., a Hawai'i  
nonprofit corporation; PEGGY J. RATLIFF  
MAHI COOPER, Appellants-Appellees

vs.

BOARD OF LAND AND NATURAL RESOURCES, STATE OF  
HAWAI'I; DEPARTMENT OF LAND AND NATURAL RESOURCES,  
STATE OF HAWAI'I; HAWAII ELECTRIC LIGHT COMPANY, INC.,  
a Hawai'i corporation, DEPARTMENT OF HAWAIIAN HOME  
LANDS, STATE OF HAWAI'I, Appellees-Appellees

and

WAIMANA ENTERPRISES, INC., a Hawai'i  
corporation, Appellee-Appellant  
(CIV. NO. 02-1-0068K)

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DEPARTMENT OF HAWAIIAN HOME LANDS, STATE  
OF HAWAI'I, Appellant-Appellee

vs.

DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF  
HAWAI'I; BOARD OF LAND AND NATURAL RESOURCES, STATE OF  
HAWAI'I; HAWAII ELECTRIC LIGHT COMPANY, INC., a Hawai'i  
corporation, PEGGY J. RATLIFF, MAHI COOPER, KEAHOLE  
DEFENSE COALITION, INC., a Hawai'i nonprofit corporation,  
Appellees-Appellees

and

WAIMANA ENTERPRISES, INC., a Hawai'i  
corporation, Appellee-Appellant  
(CIV. NO. 02-1-0079K)

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NO. 26305

APPEAL FROM THE THIRD CIRCUIT COURT  
(CIV. NOS. 02-1-68K & 02-1-0079K)

MAY 18, 2006

MOON, C.J., LEVINSON, ACOBA, JJ., CIRCUIT  
JUDGE DEL ROSARIO FOR NAKAYAMA, J., RECUSED, AND  
CIRCUIT JUDGE CHAN FOR DUFFY, J., RECUSED; WITH CIRCUIT  
JUDGE DEL ROSARIO CONCURRING SEPARATELY  
AND WITH WHOM ACOBA, J., JOINS

OPINION OF THE COURT BY ACOBA, J.

We hold that (1) Appellee-Appellant Waimana Enterprises, Inc. (Waimana) lacked standing to challenge the decision of Appellee-Appellee Board of Land and Natural Resources (BLNR) regarding a time extension that it granted to Appellee-Appellee Hawaii Electric Light Company, Inc. (HELCO) to complete construction of HELCO's Keāhole power station inasmuch as Waimana (a) was barred by collateral estoppel, and (b) does not have a sufficient property interest to have suffered a due process violation under the Fourteenth Amendment to the United States Constitution<sup>1</sup> or article I, section 5 of the Hawai'i Constitution;<sup>2</sup> (2) notwithstanding the lack of a property

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<sup>1</sup> The Fourteenth Amendment to the United States Constitution states in part that:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

<sup>2</sup> Article I, section 5 of the Hawai'i Constitution, entitled "Due Process and Equal Protection," provides that:

(continued...)

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interest, Waimana was given due process; (3) Waimana fails to establish an equal protection violation; and (4) Waimana has failed to establish a breach of the public trust, and, thus, (5) the circuit court of the third circuit (the court),<sup>3</sup> did not abuse its discretion in vacating its November 7, 2002 final judgment reversing the decision of the BLNR. For the foregoing reasons, the court's November 28, 2003 first amended final judgment, vacating the October 3, 2002 order reversing the decision of the BLNR and November 7, 2002 final judgment, is affirmed.

I.

This appeal arises from a dispute, spanning more than a decade, over plans by HELCO to expand the Keāhole Generating Station on the Island of Hawai'i.<sup>4</sup> See Hawaii Elec. Light Co. v. Dep't of Land & Natural Res., 102 Hawai'i 257, 75 P.3d 160 (2003) [hereinafter, HELCO]. On August 26, 1992, HELCO filed a conservation district use application (CDUA) with BLNR. The CDUA was designated as CDUA HA-487A. Following a hearing on CDUA HA-487A, Waimana, Appellee-Appellee Department of Land and Natural

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<sup>2</sup>(...continued)

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

<sup>3</sup> The Honorable Ronald Ibarra presided.

<sup>4</sup> The Keāhole Generating Station has operated as a "peaking," or part-time, generating station.

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Resources (DLNR), and Appellants-Appellees Mahi Cooper (Cooper) and Peggy Ratliff (Ratliff) requested contested case hearings. See id. at 262, 75 P.3d at 165. On May 13, 1994, while the requests for contested case hearings were pending,<sup>5</sup> BLNR voted on a DLNR staff member's recommendation to deny CDUA HA-487A without prejudice. Id. BLNR apparently took the vote without holding a contested case hearing in order to meet the May 18, 1994 deadline for acting upon the CDUA.<sup>6</sup> See id. The vote was two in favor of denial, three against, and one recusal. Id. On the vote to grant the application, no one voted in favor, two voted against, with one recusal and three not voting. Id. On May 17, 1994, Waimana appealed to the court. This appeal was docketed as Civ. No. 94-123K. On May 29, 1994, the court granted Waimana's motion for stay of agency action, staying any legal effect of the May 13, 1994 "non-action" of BLNR regarding approval/disapproval of CDUA HA-487A, including any claim that the CDUA was automatically granted.

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<sup>5</sup> The hearing officer assigned to preside over the contested case had fallen ill and the chairperson of Appellee-Appellee Board of Land and Natural Resources (BLNR) postponed the contested case indefinitely.

<sup>6</sup> Pursuant to Hawai'i Revised Statutes § 183-41 (1993), BLNR had 180 days to rule on the conservation district use application (CDUA) or, by default, Appellee-Appellee Hawaii Electric Light Company, Inc. (HELCO) could put the land to the use requested. See infra note 8. See also Hawaii Electric Light Co. v. Dep't of Land & Natural Res., 102 Hawai'i 257, 262, 75 P.3d 160, 165 (2003) [hereinafter Helco] (explaining that "efforts to meet the statutory deadline were frustrated by incidental problems").

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On November 9, 1994, the court issued an order invalidating BLNR's votes<sup>7</sup> and remanding CDUA HA-487A back to BLNR (the 1994 remand order). In the 1994 remand order, the court concluded that "[i]n this instance, in the absence of a relevant statute or rule, the BLNR is 'required by law' to hold a contested case hearing upon these third party requests provided that Waimana, Cooper, and Ratliff have constitutionally protected interests which entitle them to a contested case hearing by constitutional due process[.]" The court then determined that "[b]y failing to provide Cooper and Ratliff with a contested case hearing, the BLNR denied these parties their constitutional right to due process, and, consequently, they were prejudiced." But as to Waimana, the court rendered the following conclusions of law:

(5) Although Waimana argues it is a native Hawaiian-controlled entity whose economic interests, environmental interests and interests in ceded lands are at stake and that, therefore, it has constitutionally protected property interests, . . . the court concludes otherwise; as an entity neither physically located near the site of HELCO's proposed expansion nor whose purpose is to protect environmental or Hawaiian interests, Waimana's interest in contesting the CDUA appears to be purely economic, an interest which the DLNR recognized in recommending Waimana's intervention in the CDUA process:

[Waimana] is an energy company. It has conducted studies and obtained a lease for development of a

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<sup>7</sup> As this court related in HELCO,

[o]n November 9, 1994, the court invalidated the votes of the Board and held that: 1) because the Board failed to garner four votes to either approve or to reject HELCO's application, the Board took no "action" on the application; and 2) it would be a denial of procedural due process to allow HELCO to automatically expand the Keahole generating station while there were requests for contested cases still pending that the Board had not acted upon. The court then remanded the case and ordered the Board to hold a contested case hearing within 49 days, or as extended by the Board.

generator station at an alternative site, Kawaihae, that may be superior to the Keahole site. Expansion of the Keahole generating station may suppress development of [Waimana's] project.

(6) Waimana does not have a due process right to a contested case hearing because its economic interest does not constitute "property" within the meaning of the due process clauses of the federal and state constitutions; . . . ;

(7) Therefore, the fact that the BLNR admitted Waimana as a party to the case and granted it a contested case hearing did not constitute a determination that [Waimana] had a property interest protectable under the Fourteenth amendment;

(8) Not having a right to a contested case hearing by statute, rule or by the constitution, Waimana lacks standing to file this Appeal pursuant to [Hawai'i Revised Statutes (HRS)] Section 91-14(a)[.]

(Emphases added.) The court further concluded that

[a]lthough Cooper and Ratliff are designated as Appellees in this Appeal, their interests are aligned with Appellant Waimana in contesting the agency's actions . . . [and, thus, i]n order to avoid dismissal of Cooper's and Mahi's interests due to [Waimana's] dismissal from this action, the Court confers standing on Cooper and Ratliff as "de facto Appellants," considering that they are pro se parties and that there would appear to be little or no prejudice to the other parties by granting them such status[.]

Waimana did not appeal the 1994 remand order; it did not challenge the court's determination that it lacked standing. On remand to BLNR, however, Waimana was made a party to the contested case by stipulation among all of the parties. HELCO, 102 Hawai'i at 262, 75 P.3d at 165. The 1994 remand order was incorporated in a December 5, 1997 final judgment, which stated as follows:

Judgment is entered in favor of Appellant Waimana Enterprises, Inc. and Appellees Peggy Ratliff and Mahi Cooper and against Appellees Department of Land and Natural Resources, Board of Land and Natural Resources and Hawaii Electric Company, Inc., remanding the Conservation District Use Application HA-487A to the Board of Land and Natural Resources for further hearing consistent with the [c]ourt's November 9, 1994 Order.

Judgment is entered nunc pro tunc to November 9, 1994 and is limited to the disposition of issues before the [c]ourt as of November 9, 1994.

Following the contested case hearing that was held over a five-day period in November 1995, the hearing officer recommended that the CDUA be denied. Id. BLNR denied CDUA HA-487A based on a three-to-two vote. Id. at 264, 75 P.3d at 167. On May 17, 1996, HELCO appealed to the court. Id. On May 22, 1996, Cooper, Ratliff, and Waimana filed separate notices of appeal. Id. "On January 2, 1997, the court ruled that the failure to deny the application by four votes constituted non-action on the part of the Board and, by operation of HRS § 183-41, HELCO could put the Keahole conservation land to use as requested in the application[.]"<sup>8</sup> Id.

II.

In tandem with litigation over what then became CDUP (conservation district use permit) HA-487A, Appellant-Appellee Keahole Defense Coalition (KDC) maintained a separate action, filed in the court on February 5, 1997, against the Department of Health (DOH), BLNR, and HELCO. This action, docketed as Civ. No. 97-00017K, sought to compel enforcement of various environmental regulations on HELCO's expansion project.

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<sup>8</sup> On July 8, 2003, this court affirmed the court's determination that HELCO could put the land to the use requested in the CDUA because BLNR failed to take "action" within the statutorily required time period. HELCO, 102 Hawai'i at 261, 75 P.3d at 164. This court held that "[i]nsofar as a majority of the Board did not affirmatively approve or disapprove of HELCO's application within the time established, . . . the Board failed to render a 'decision' so as to avoid the 180-day default mechanism of HRS § 183-41" which "allows the applicant to implement the use requested in the application if the department 'fails to give notice, hold a hearing, and render a decision.'" Id. at 269, 75 P.3d at 172 (brackets and emphasis omitted).

III.

HELCO's construction deadline under CDUP HA-487A expired on April 26, 1999. On March 25, 2002, following an evidentiary hearing in which HELCO, Appellee-Appellee Department of Hawaiian Home Lands (DHHL), Cooper, Ratliff, KDC, and Waimana participated,<sup>9</sup> BLNR granted HELCO a time extension to complete construction of improvements at the Keāhole power station. The new deadline under the CDUP was December 31, 2003. On April 8, 2002, KDC, Cooper, and Ratliff filed a notice of appeal to the court, challenging BLNR's grant of this time extension. This appeal was docketed as Civ. No. 02-1-0068K. Waimana did not appeal BLNR's decision. Waimana was named as an appellee, apparently because it participated in the hearing before BLNR.

On October 3, 2002, the court reversed BLNR's decision, finding that BLNR exceeded its statutory authority in granting the extension. On November 1, 2002, HELCO filed its notice of appeal to this court, challenging the court's October 3, 2002 order. This secondary appeal was docketed as S.Ct. No. 25446. Final judgment by the court relating to the October 3, 2002 order was entered on November 7, 2002.

While HELCO's appeal in S.Ct. No. 25446 concerning the time extension was pending before this court, the court granted HELCO's motion to compel alternative dispute resolution in Civ.

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<sup>9</sup> According to HELCO, the contested case hearing for the extension request was docketed as "DLNR Contested Case Hearing No. 01-03-HA."



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No. 97-00017K. On May 15, 2003, the court ordered KDC, HELCO, DOH, BLNR, and DLNR "to mediate the legal disputes involving the expansion of the Keahole power plant."<sup>10</sup> Although Waimana was not a party to Civ. No. 97-00017K, counsel for HELCO contacted counsel for Waimana by letter dated April 26, 2003, to determine Waimana's position in light of the order to mediate. On April 28, 2003, counsel for HELCO also wrote to Albert S.N. Hee (Hee), President of Waimana, to document the particulars of a conversation. That letter stated that Hee "expressed great doubt that HELCO would be successful in negotiations with DHHL as long as HELCO's objective remained to finish construction at Keahole" and that "Hee indicated [he] view[ed] these settlement efforts as a waste of time." Counsel for HELCO informed Waimana by letter that HELCO would continue negotiating with the other parties and

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<sup>10</sup> Prior to the order compelling mediation, the Center for Alternative Dispute Resolution contacted Appellee-Appellant Waimana Enterprises, Inc. (Waimana) to facilitate mediation regarding the HELCO appeal, S.Ct. No. 21369 (consolidating S.Ct. Nos. 21263 and 21422 under S.Ct. No. 21369). By letter dated February 28, 2003, Albert S.N. Hee, President of Waimana, informed the Center for Alternative Dispute Resolution as follows:

Waimana welcomes and is willing to participate in any and all efforts to resolve the disputes now before the Supreme Court provided any effort has a reasonable chance to succeed. The mediation which you proposed does not have a reasonable opportunity to succeed. This is due to the unstructured manner in which "you encourage" the parties to meet privately without a mediator. If the parties could reach agreement among ourselves, we would not be in the Supreme Court today.

Waimana continues to be willing to participate provided we are convinced that it is not a further waste of our resources. Waimana firmly believes there is a solution available outside of the judicial system. However, Waimana does not believe it is possible to find that solution if one of the parties drives the process.

(Emphasis added.)

would keep Waimana's "perspective in mind." Waimana did not respond.

KDC, Cooper, Ratliff, HELCO, DOH, BLNR, DLNR, and DHHL<sup>11</sup> began several months of settlement discussions with the assistance of a court appointed mediator. They eventually reached a "settlement in principle" in Civil No. 97-00017K. Waimana did not participate in the settlement negotiations. As part of the settlement, the parties agreed to a vacatur of the court's November 7, 2002 final judgment reversing BLNR's decision to extend the construction deadline to December 31, 2003 in Civil No. 02-1-0068K, which was on appeal as S. Ct. No. 25446. On September 17, 2003, the mediator notified Waimana of an upcoming status conference in Civil No. 02-1-0068K. On September 19, 2003, the court held a status conference with all parties, including Waimana, and on September 29, 2003, the court expressed its "inclination" to vacate the November 7, 2002 judgment reversing BLNR's decision to grant the time extension under CDUP HA-487A in Civil No. 02-1-0068K, which was on appeal as S.Ct. No. 25446. In light of the court's "inclination," on October 14, 2003, this court remanded the appeal in S.Ct. No. 25446 to allow the court to consider the motion to vacate its November 7, 2002

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<sup>11</sup> Appellee-Appellee Department of Hawaiian Home Lands (DHHL) participated in the mediation although it was not a party to Civ. No. 97-00017K.

judgment.<sup>12</sup>

Upon remand, on October 17, 2003, KDC, Ratliff, Cooper, and DHHL moved to vacate the October 3, 2002 order and November 7, 2002 judgment pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 60(b). HELCO, BLNR, and DLNR filed joinders to this motion. Waimana filed a memorandum in opposition. On November 12, 2003, the court vacated its October 3, 2002 order and November 7, 2002 final judgment (2003 vacatur order). In the 2003 vacatur order, the court rendered the following relevant findings of fact (findings) and conclusions of law (conclusions):

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<sup>12</sup> This court's October 14, 2003 order recognized that

(2) during the pendency of this appeal [(S.Ct. No. 25446)], the circuit court, in a separate related case, ordered the parties to mediate the legal disputes involving the HELCO project; (3) although the mediation was ordered only in Civil No. 97-0001[7]K, the parties in that proceeding are involved in the instant appeal; (4) as a result of the mediation, the parties have reached a tentative agreement of all issues; (5) part of the agreement involves the vacation of the circuit court order and judgment at issue in this appeal; and (6) the circuit court indicated its inclination to grant a [Hawai'i Rules of Civil Procedure (HRCP)] Rule 60(b) motion if this court remands the matter to the circuit court. Therefore,

IT IS HEREBY ORDERED that:

1. Pursuant to Life of the Land v. Ariyoshi, 57 Haw. 249, 553 P.2d 464 (1976), the motion for remand and stay of briefing is granted. . . .

2. Within sixty days from the date of this order, the circuit court shall enter its order on the HRCP Rule 60(b) motion to vacate the order and judgment at issue in this appeal.

4. Thereafter, Appellant [(HELCO)] shall take the necessary steps to dismiss this appeal. If the circuit court does not enter the order granting the HRCP Rule 60(b) motion within the time provided, [HELCO] shall file its reply brief on January 9, 2004.

(Emphases added.)

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FINDINGS OF FACT

1. . . . Although the [c]ourt's mediation orders were entered in Civ. No. 97-017K, the parties to that proceeding are substantially the same as the parties in related proceedings involving the Keahole expansion project.
4. While the settlement will resolve KDC and DHHL's concerns with respect to the Keahole expansion project, of greater significance is the fact that the benefits of the settlement, if effectuated, will also accrue in the public interest as a whole. The effect of the settlement is to secure, by agreement, greater protections for the public interest than could be expected to be imposed solely by the Land Use Commission through its consideration of a petition to "rezone" the land at issue from Conservation to Urban.
5. The additional significant protections provided by the settlement will mitigate against the impact of the project in terms of air and noise pollution, potable water, and aesthetic concerns. In addition, HELCO has agreed to provide DHHL with fresh water, and to assist DHHL in a solar water-heating program for its housing project in the area. HELCO has further agreed to support KDC's request to participate in the Public Utilities Commission rate base docket. All of these terms provide significant and tangible benefits for the public.
6. Pursuant to the settlement, HELCO has agreed to petition the Land Use Commission, State of Hawaii, to amend the existing land use district boundary for the land on which the Keahole project sits from the Conservation District to the Urban district. In addition, HELCO has agreed to petition the County of Hawaii to change the General Plan designation and county zoning district from its current designation and district to a designation and district appropriate for industrial activity. These processes will allow all interested parties additional opportunities to provide input on the Keahole expansion project.
7. The parties have also agreed [that] the parties to the settlement will comply with all federal, state, and county laws and regulations.
8. Waimana . . . is a Hawaii corporation whose primary purpose is to engage in the generation of electricity. [Waimana] is neither physically located near the site of HELCO's proposed expansion nor whose purpose is to protect environmental or Hawaiian interests. [Waimana's] interest in the Keahole expansion is purely economic, as it has conducted studies and obtained a lease for development of a generator station at an alternative site, Kawaihae, that may be superior to the Keahole site. Expansion of the Keahole site may suppress development of [Waimana's] site.

CONCLUSIONS OF LAW

2. This [c]ourt concluded that [Waimana] lacks standing in its Order Remanding HELCO's CDUA back to [BLNR], Civ. No. 94-059K. This [c]ourt held that [Waimana] does not have a due process right to a contested case hearing because its economic interests do not constitute "property" within the meaning of the due process clauses of the federal and state constitutions. [Waimana] has never appealed that holding; therefore the holding still stands on the issue of whether [Waimana] has standing to participate in this proceeding. This [c]ourt concludes, that, as a matter of law, it does not.
3. Even assuming arguendo, that [Waimana] has standing, it has not suffered any constitutional prejudice, as its due process rights have not been denied. [Waimana] had a full and fair opportunity to participate in the mediation with all of the parties, but repeatedly declined. The settlement agreement is not binding on [Waimana], and [Waimana] has every opportunity to pursue legal remedies, if any, in the courts.
4. HRCP Rule 60(b) provides that:  
On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . . (5) . . . It is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of judgment.
5. This [c]ourt does not vacate its Orders lightly. A court may vacate a judgment "whenever that action is appropriate to accomplish justice." In Re Hana Ranch Co., 3 Haw. App. 141, 642 P.2d 938 (1982).
6. Rule 60(b) "may be utilized to seek the vacation of a judgment on the ground that the case has been settled so that it would not be equitable to have it remain in effect . . ." Wright, Miller & Kane, Federal Practice and Procedure; Civil 2d § 2863.
7. This [c]ourt finds that the parties to this agency appeal, pursuant to this [c]ourt's order compelling mediation in the main enforcement action, Civ. No. 97-017K, have worked diligently to resolve their differences regarding the Keahole expansion project, and the agency appellants have rescinded their objections to the completion of the project. As such, there is no present case or controversy, the issues in this agency appeal are now moot, and it is no longer equitable that the reversal order and final judgment have prospective application.
8. In addition, the [c]ourt finds that vacating the [c]ourt's previous Order is in the public interest, as the parties have agreed to enhanced air quality

protection, reduced noise mitigation,<sup>13</sup> and reduced visual impact, as well as water and solar energy benefits for DHHL, that would not otherwise have been achieved.

(Emphases added.) On November 28, 2003, the court entered its first amended final judgment in favor of HELCO, BLNR, DLNR, KDC, Ratliff, Cooper, and DHHL, and against Waimana. Waimana filed its notice of appeal from the first amended final judgment on December 26, 2003. On January 13, 2004, this court granted HELCO's motion to dismiss its appeal in S.Ct. No. 25446.

IV.

In this appeal, S.Ct. No. 26305, Waimana challenges the court's November 12, 2003 vacatur of the November 7, 2002 final judgment as well as what it refers to as the court's "sua sponte" determination that Waimana "lacked standing to oppose the basis for the vacatur." Waimana argues that (1) vacatur of the underlying decision violated its due process and equal protection rights, (2) vacatur of the underlying decision was not in the public interest, (3) State appellees breached the public trust, (4) the court lacked authority to determine Waimana's standing, and (5) the court erred in holding that Waimana lacked standing in Civ. No. 02-1-0068K (KDC, Cooper, and Ratliff's appeal to the court concerning the extension of time).

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<sup>13</sup> Although the court stated the settlement will result in "reduced noise mitigation," finding of fact (finding) 5 states in relevant part that "[t]he additional significant protections provided by the settlement will mitigate against the impact of the project in terms of air and noise pollution." This finding makes clear that the settlement will reduce noise pollution, not reduce efforts to mitigate noise pollution.

Four answering briefs have been filed -- one by KDC, Ratliff, and Cooper,<sup>14</sup> and the remaining three by HELCO,<sup>15</sup> BLNR,<sup>16</sup> and DHHL.<sup>17</sup> Essentially, the appellees maintain that (1) Waimana lacked standing to oppose the motion to vacate, (2) Waimana was precluded from relitigating the issue of standing to appeal pursuant to the doctrine of res judicata or collateral estoppel, (3) Waimana waived its standing argument by not appealing the 1994 remand order which determined Waimana lacked standing to challenge CDUA HA-487A, (4) Waimana does not have a legitimate due process interest and, in any event, it received substantial

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<sup>14</sup> Specifically, KDC, Ratliff, and Cooper assert that (1) "the [court] did not deny Waimana due process," (2) "the [court] did not deny Waimana equal protection," (3) "Waimana lacked standing," (4) "the [court] had the authority to determine Waimana's standing below," (5) "vacatur is in the public interest," (6) "the vacatur and settlement agreement is the only vehicle by which the public's interest could be and can be vindicated," (7) "vacatur does not jeopardize any judicial interest for the finality of judgments," (8) "the state agencies have not breached their trust or other statutory obligations," and (9) "[Hawai'i Administrative Rules (HAR)] Title 13, Chapter 5 and Chapter 343, HRS do not apply."

<sup>15</sup> In particular, HELCO argues that (1) "[Waimana] lacks standing to bring this appeal, and it must be dismissed for lack of appellate jurisdiction," (2) "although [Waimana] has no legitimate due process interest in this proceeding, it received substantial due process before the [court] in connection with the motion to vacate," (3) "the [court's] finding that the settlement and vacatur was in the public interest was amply supported by the record, was not 'clearly erroneous' and must be affirmed," and (4) "the [S]tate appellees acted properly and responsibly with respect to the settlement, and did not 'breach the public trust.'"

<sup>16</sup> Specifically, BLNR argues that (1) "[Waimana] lacks standing to bring this appeal," (2) "the vacatur of the order reversing [BLNR's] decision was not a violation of [Waimana's] due process or equal protection rights," and (3) "the [S]tate appellees did not breach their public trust duties by participating in the settlement agreement."

<sup>17</sup> In its answering brief, DHHL maintains that (1) "[Waimana] lacks standing to appeal the [court's] first amended final judgment," (2) "the [court] correctly found no due process violation," and (3) "vague and unsupported references to the public trust doctrine do not provide a basis to over turn the [court's] decision."

due process before the court on the motion to vacate, (5) the court's finding that the settlement and vacatur was in the public interest was amply supported by the record, and (6) State appellees did not breach the public trust.

In reply, Waimana maintains that (1) "[Waimana's] standing is not determined by the [court's] nunc pro tunc ruling in an unrelated civil action," (2) "the standing issue was not timely raised below," (3) "[Waimana] was an aggrieved party," (4) "[Waimana] did not receive due process in Civil No. 02-1-0068K," (5) there is a "need for precedence" to assist future litigants, and (6) "the public interest is not best served where a lower court approves a settlement implicating state and federal rights without first consulting the Keahole community as a whole." Waimana requests that this court reverse the vacatur and reinstate the proceedings in S.Ct. No. 25446 (which arose from Civ. No. 02-1-0068K) for final adjudication.

V.

The issue of standing implicates this court's jurisdiction, and, therefore, must be addressed first. Because standing is a jurisdictional issue that may be addressed at any stage of a case, an appellate court has jurisdiction to resolve questions regarding standing, even if that determination ultimately precludes jurisdiction over the merits.<sup>18</sup> United Pub.

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<sup>18</sup> In its reply brief Waimana argues that its standing in Civil No. 02-1-0068K and S.Ct. No. 25446 was not challenged by the parties or the court. Waimana appears to argue that the appellees are estopped "from now taking a

(continued...)



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Workers, Local 646 v. Brown, 80 Hawai'i 376, 379, 910 P.2d 147, 150 (App. 1996) ("[B]ecause standing is a jurisdictional issue that needs to be addressed at any stage of the case, . . . we have jurisdiction here on appeal, not of the merits, but for the purpose of correcting an error in jurisdiction." (Internal quotation marks and citations omitted.)).

"Generally, the requirements of standing to appeal are:

- (1) the person must first have been a party to the action;
- (2) the person seeking modification of the order or judgment must have had standing to oppose it in the trial court; and (3) such person must be . . . 'one who is affected or prejudiced by the appealable order.'" Keпо'о v. Watson, 87 Hawai'i 91, 95, 952 P.2d 379, 383 (1998) (quoting Waikiki Malia Hotel, Inc. v. Kinkai Props., Ltd. P'ship, 75 Haw. 370, 393, 862 P.2d 1048, 1061 (1993) (emphasis added). In its 2003 vacatur order, the court ruled that Waimana did not have standing to oppose the motion to vacate inasmuch as the court had previously ruled in the 1994 remand order that (1) Waimana did not have a due process right entitling

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<sup>18</sup>(...continued)

position which is inconsistent with the one they have taken from the filing of Civil No. 02-1-0068K and up to and including October 2003." However, as indicated above, the question of standing implicates jurisdiction which may be addressed by a court at any time, regardless of any position taken by any party. Waikiki Discount Bazaar, Inc. v. City & County of Honolulu, 5 Haw. App. 635, 640, 706 P.2d 1315, 1319 (1985) (stating that "[t]he question of whether [a] plaintiff has standing to bring the action or to appeal its dismissal may be raised sua sponte by the court having jurisdiction over the case" and noting that "[t]he judiciary's ability to control its caseload by requiring plaintiffs and appellants to have standing does not depend on the ability and desire of defendants and appellees to notice and raise the issue"). Accordingly, Waimana's judicial estoppel argument is not persuasive.

it to a contested case hearing on CDUA HA-487A and (2) Waimana never appealed that holding. These determinations negate the second prong of the Kepo'o test for standing to appeal. Thus, if we agree with the court that Waimana lacked standing to challenge the motion to vacate, Waimana would also lack standing to appeal here, thereby divesting this court of jurisdiction to entertain Waimana's remaining arguments.

By way of review, the 1994 remand order resolved Waimana's appeal concerning BLNR's failure to hold a contested case hearing before ruling upon CDUA HA-487A. The court remanded the CDUA for BLNR to hold a contested case hearing as requested by Ratliff and Cooper, but not as requested by Waimana. As mentioned before, with respect to Waimana, the court ruled, in conclusion no. 4, that "Waimana [did] not have a due process right to a contested case hearing because its economic interest [did] not constitute 'property' within the meaning of the due process clauses of the federal and state constitutions." In conclusion no. 8, the court determined that by "[n]ot having a right to a contested case hearing by statute, rule or by the constitution, Waimana lack[ed] standing to file [the appeal] pursuant to HRS Section 91-14(a)[.]"<sup>19</sup>

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<sup>19</sup> HRS § 91-14(a) (1993) provides, in relevant part, that "[a]ny 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[.]"

As the court noted in the 2003 vacatur order, Waimana never challenged conclusion nos. 4 and 8. Hence, Waimana's failure to appeal the 1994 remand order's issue of standing raises doubt as to its ability to contest the court's conclusions here.<sup>20</sup>

VI.

An apparent waiver of the standing argument notwithstanding, Waimana was precluded from opposing the motion to vacate inasmuch as it was collaterally estopped from relitigating the issue of its standing to challenge decisions regarding CDUA HA-487A. This court has recognized that collateral estoppel is "an aspect of res judicata." Dorrance v. Lee, 90 Hawai'i 143, 148, 976 P.2d 904, 909 (1999) (quoting Foytik v. Chandler, 88 Hawai'i 307, 314-15, 966 P.2d 619, 626-27 (1998)). "[Res judicata and collateral estoppel . . . share the common goals of preventing inconsistent results, preventing a multiplicity of suits, and promoting finality and judicial economy." Id. at 148-49, 976 P.2d at 909-10. Collateral estoppel, or issue preclusion, "applies to a subsequent suit between the parties or their privies on a different cause of action and prevents the parties or their privies from relitigating any issue that was actually litigated and finally

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<sup>20</sup> HELCO and DHHL argue that Waimana's failure to appeal the 1994 remand order constituted a waiver of the right to challenge the court's conclusion that Waimana lacked standing.

decided in the earlier action.” Id. at 148, 976 P.2d at 909 (emphases in original).

[T]he doctrine of collateral estoppel bars relitigation of an issue where: (1) the issue decided in the prior adjudication is identical to the one presented in the action in question; (2) there is a final judgment on the merits; (3) the issue decided in the prior adjudication was essential to the final judgment; and (4) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication.

Id. at 149, 976 P.2d at 910; Citizens for the Prot. of the N. Kohala Coastline v. County of Hawai‘i, 91 Hawai‘i 94, 102, 979 P.2d 1120, 1128 (1999) [hereinafter, Citizens]. The fourth prong of the collateral estoppel test is easily met here. Waimana, the party against whom collateral estoppel is being asserted, was a party, indeed the appellant, to the prior adjudication that resulted in the 1994 remand order. The remaining three prongs require greater analysis.

The first prong of the collateral estoppel test necessitates a comparison of the issue decided in the prior adjudication with the issue presented in the action in question. This prong is satisfied only where both issues are “identical.” The standing issue resolved in the 1994 remand order was whether Waimana had standing to challenge BLNR’s vote on CDUA HA-487A absent a contested case hearing. The standing issue presented here is whether Waimana had standing to challenge the motion to vacate the order reversing BLNR’s decision to grant HELCO an extension of time under CDUP HA-487A. Although the first appeal addressed whether the CDUA could be approved at all and the

second addressed one of the conditions of the CDUA, the standing issues pose the same question -- whether Waimana has standing to challenge CDUA HA-487A. Additionally, the standing issues were raised in HRS § 91-14 agency appeals, which further supports a finding of identicalness. Cf. Citizens, 91 Hawai'i at 102, 979 P.2d at 1128 (holding that "the issue of standing to appeal an agency decision under HRS § 91-14, decided in [a] prior agency appeal, is not 'identical' to . . . [t]he issue of . . . standing to pursue an action for declaratory relief under HRS § 632-1"). Hence, the question of standing resolved in the 1994 remand order and the question of standing presented by the 2003 motion to vacate were "identical," satisfying the first prong of the collateral estoppel test.

As to the second prong, if the party against whom collateral estoppel is being asserted was given "the opportunity to fully" litigate the issue, "the final judgment from that proceeding [is deemed to have been] 'on the merits.'" Dorrance, 90 Hawai'i at 150, 976 P.2d at 911 ("Where a party, . . . had the opportunity to fully defend herself against claims of negligent driving -- the same issue here -- the final judgment from that proceeding was 'on the merits.'"). As previously mentioned, Waimana appealed to the court in Civ. No. 94-123K, challenging BLNR's decision to hold a vote on CDUA HA-487A before completing a contested case hearing.

As the appellant before the court, Waimana filed briefs and participated in the October 31, 1994 oral argument on the matter. Finding no. 20 of the 1994 remand order, which describes Waimana, references Waimana's opening brief and an affidavit by its counsel. Conclusion no. 5 of the 1994 remand order also cites to Waimana's reply brief. These references to Waimana's briefs indicate that the court considered Waimana's arguments to render its 1994 decision on standing. Thus, not only did Waimana have ample opportunity to assert its bases for standing, but the court "heard" its arguments. Accordingly, the December 5, 1997 final judgment flowing from the 1994 remand order denying standing was "on the merits."

Finally, the third prong of the collateral estoppel test inquires as to whether the issue decided in the prior adjudication was "essential" to the final judgment. In Dorrance, this court held that the issue of negligence was "essential to the earlier judgment[] inasmuch as it established liability for [the plaintiff's] injuries." 90 Hawai'i at 150, 976 P.2d at 911 (emphasis added). Likewise here, the issue of Waimana's standing to contest CDUA HA-487 was "essential" to the December 5, 1997 final judgment of remand. By determining Waimana did not have standing in the 1994 remand order, the court, in order to avoid dismissal of Cooper's and Ratliff's interests "due to [Waimana's] dismissal from [the] action, . . . confer[red] standing on Cooper and Ratliff as 'de facto Appellants[.]'" This designation, in

turn, allowed the court to remand CDUA HA-487A for a contested case hearing to correct BLNR's denial of Cooper's and Ratliff's constitutional due process rights. Hence, the underlying determination that Waimana lacked standing was "essential" inasmuch as it ultimately led to the determination that Cooper and Ratliff were entitled to a contested case hearing. Therefore, all four prongs of the Dorrance test being satisfied, Waimana was collaterally estopped from relitigating the standing issue.

BLNR observes that if Waimana "does not have standing to contest HELCO's underlying CDUA, it does not have standing to appeal a decision of the Board relating to one of the conditions of the same CDUA." We believe BLNR's contention is correct. See Kepo'o, 87 Hawai'i at 95, 952 P.2d at 383 (holding that in order to have standing to appeal, "the person seeking modification of the order or judgment must have had standing to oppose it in the trial court"). Because Waimana does not satisfy the second requirement of Kepo'o, it lacks standing to appeal. Accordingly, the court was correct to conclude that Waimana did not have standing to challenge the 2003 motion to vacate "as a matter of law." (Emphases added.)

#### VII.

Turning to Waimana's specific arguments with regard to standing, Waimana relies on the language of the December 5, 1997 judgment which states, "Judgment is entered nunc pro tunc to

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November 9, 1994 and is limited to the disposition of issues before the [c]ourt as of November 9, 1994." Waimana argues that "the 1994 [r]emand [o]rder, even if correct, was limited 'to the disposition of issues before the [c]ourt as of November 9, 1994[.]'" It reasons that

[t]he cases have consistently emphasized that the power of courts to enter judgments nunc pro tunc is limited to giving its judgments proper retroactive effect. . . . It is clear that reliance upon the 1994 [r]emand order in this matter was eliminated by the December [5], 1997 Judgment in Civil No. 94-123K. There is absolutely no authority supporting the lower court's prospective application of a nunc pro tunc order in Civil No. 02-1-0068K.

(Citations omitted.) (Some emphases in original and some added.)

A "nunc pro tunc order relates back to the original date of the matter it affects." Poe v. Hawai'i Labor Relations Bd., 98 Hawai'i 416, 423, 49 P.3d 382, 389 (2002) (Acoba, J., dissenting).

The term nunc pro tunc signifies or means "now for then" or that a thing is done now that shall have the same legal force and effect as if done at the time it ought to have been done. The doctrine seems to apply to delays of the court and not to premature actions of the parties. Where through no fault of the complaining party some act which the court must perform is not done at the time it ought to be done, the court, in the interest of justice, may and should presently do or perform that act as of the date it should have been done.

Makainai v. Lalakea, 24 Haw. 518, 522 (1918) (citation omitted).

Hence, the court's judgment "nunc pro tunc" indicates that the three-year lapse between the 1994 remand order and the December 5, 1997 judgment was not due to fault of the parties. The inclusion of the "nunc pro tunc" language had the effect of making the judgment relate back to November 9, 1994, as if the



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judgment had been rendered on that date. The nunc pro tunc judgment did not, as Waimana contends, eliminate future reliance on the 1994 remand order. Indeed, none of the cases cited by Waimana support its position that judgments nunc pro tunc have only "retroactive effect."<sup>21</sup> As HELCO observes, adopting Waimana's position "would result in the anomalous situation of having a court conform a judgment or order to 'speak the truth' yet being unable to prospectively enforce that very same order or judgment."

Additionally, the language in the judgment "limit[ing] . . . the disposition of issues before the [c]ourt as of November 9, 1994" was apparently included to specify that judgment was final as to the issues resolved in the 1994 remand order only, given the existence of subsequent issues to be determined on remand. Inasmuch as Waimana's standing was one of the issues so resolved in the 1994 remand order, that issue was subject to the December 5, 1997 final judgment and, as discussed supra, could not be relitigated.

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<sup>21</sup> Waimana cites to Wong v. Wong, 79 Hawai'i 26, 897 P.2d 953 (1995), City & County of Honolulu v. Caetano, 30 Haw. 1 (1927), and Makainai, supra. However, Wong and Caetano did not address judgments or orders nunc pro tunc. To the extent that Caetano's discussion on amendments of judgment "for the purpose of making the record speak the truth" is analogous, that opinion did not bar prospective application of such amendments. 30 Haw. at 6. Finally, Makainai addressed the standard for entering orders nunc pro tunc, see 24 Haw. at 521 (opining that "[b]efore one has the right to invoke the exercise of this power it should be made to appear affirmatively that the delay was occasioned either by the court or the opposite party and not by the complaining party[]"), but it did not circumscribe prospective application of such orders. Accordingly, these cases do not support Waimana's contention that judgments and orders nunc pro tunc are limited to retroactive application.

Waimana also contends that the court lacked authority to determine the issue of its standing, arguing that "[i]t is plain on its face that [this court's October 14, 2003] order of remand [in S.Ct. No. 25446] was limited in scope and that the trial court exceeded its authority by addressing the newly-raised standing issue" in its 2003 vacatur order. To reiterate, this court's October 14, 2003 order of remand stated, in pertinent part, that "[w]ithin sixty days from the date of this order, the circuit court shall enter its order on the HRCF Rule 60(b) motion to vacate the [October 3, 2002] order and [November 7, 2002] judgment at issue in this appeal." Upon remand, KDC, Ratliff, Cooper, and DHHL filed a motion to vacate the October 3, 2002 order reversing BLNR's March 25, 2002 decision and the November 7, 2002 final judgment on appeal. HELCO, BLNR, and DLNR filed joinders to the motion. Waimana then filed a memorandum in opposition to the motion to vacate and joinder. Waimana also participated in the November 10, 2003 oral argument on the motion.

Given that Waimana was contesting the motion to vacate, the court was compelled to address Waimana's position in order to comply with this court's October 14, 2003 order of remand for the court to consider vacatur under HRCF Rule 60(b). Inasmuch as a court may assess standing, a jurisdictional question, at any stage of a case, see Gustetter v. City & County of Honolulu, 44 Haw. 484, 490, 354 P.2d 956, 959 (1960) (stating that "[t]he

question of jurisdiction is always open and can be raised at any time" (internal quotation marks and citation omitted)), the court had the prerogative to address that issue in order to reach its determination on the motion to vacate. Contrary to Waimana's assertion, the court, then, did not "exceed[] its authority" in addressing Waimana's standing.

Waimana's final argument with regard to the standing issue is that this court "must look to [Waimana's] standing as it existed at the time of the vacatur, and during the time in which [Waimana] was a named party to both Civil No. 02-1-0068K and S.Ct. No. 25446." (Emphasis in original.) Waimana contends that "[b]etween 1994 and 1995, [it] negotiated an agreement with DHHL to provide telecommunication services to all DHHL properties throughout the State," including a 153-acre parcel adjacent to the Keāhole power plant site. As such, argues Waimana,

[t]he 1994 [r]emand [o]rder was filed before [Waimana] was granted the exclusive license. Therefore, in Civil No. 02-1-0068K, which was filed approximately seven (7) years after [Waimana] was granted the license, the trial court was faced with entirely different circumstances, both factually and legally.

According to Waimana, "[t]he court, by relying on the 1994 [r]emand [o]rder, failed to address the standing issue on the appropriate merits."

As previously mentioned, in conclusion no. 2 of the November 12, 2003 vacatur order, the court resolved that its earlier determination in the 1994 remand order was dispositive of the standing issue. Consistent with the first prong of the

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standing test in Pub. Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) [hereinafter, PASH],<sup>22</sup> conclusion no. 2 stated:

[Waimana] does not have a due process right to a contested case hearing because its economic interests do not constitute "property" within the meaning of the due process clauses of the federal and state constitutions. [Waimana] has never appealed that holding; therefore the holding still stands on the issue of whether [Waimana] has standing to participate in this proceeding. This [c]ourt concludes, that, as a matter of law, it does not.

(Emphasis added.)

Regarding the showing a party must make to assert a due process right, it is well-settled that

[t]he claim to a due process right to a hearing requires that the particular interest which the claimant seeks to protect be "property" within the meaning of the due process clauses of the federal and state constitutions. A "property interest" is not limited to "the traditional 'right-privilege' distinction, . . . but also includes a benefit which one is entitled to receive by statute." "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."

Bush v. Hawaiian Homes Comm'n, 76 Hawai'i 128, 136, 870 P.2d 1272, 1280 (1994) (brackets and citations omitted) (emphasis

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<sup>22</sup> In order to invoke the court's appellate jurisdiction under HRS § 91-14, a would-be appellant must meet four requirements:

[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.

Pub. Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) (citation omitted) (emphases added).

added). Waimana apparently maintains that the 1995 exclusive telecommunications services license, executed after the 1994 remand order, constituted "property" which entitled Waimana to a hearing, thereby giving rise to a basis for standing to contest the motion to vacate.<sup>23</sup>

First, the exclusive license, though executed after the 1994 remand order, is nonetheless the type of "economic" interest rejected by the court as being insufficient for standing purposes. To reiterate, in conclusion no. 5 of the 1994 remand order, the court stated that "as an entity neither physically located near the site of HELCO's proposed expansion nor whose purpose is to protect environmental or Hawaiian interests, Waimana's interest in contesting the CDUA appears to be purely economic[.]" In conclusion no. 6, the court determined that "Waimana does not have a due process right to a contested case hearing because its economic interest does not constitute 'property' within the meaning of the due process clauses of the federal and state constitutions[.]"

These conclusions were based on the court's finding no. 20 that "Waimana is a native Hawaiian entity, an economic

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<sup>23</sup> Waimana arguably waived the argument that it had a constitutionally protected property interest in the exclusive license. The exclusive license was executed on May 9, 1995. The 1994 remand order was not reduced to final judgment until December 5, 1997. Hence, Waimana had two years to raise its due process argument before the court entered judgment. Again, Waimana never appealed the court's conclusion in the 1994 remand order that it lacked standing to appeal BLNR's decision and, therefore, that order remains final.

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competitor of HELCO, an independent power producer organized under the laws of the State of Hawaii that is seeking a purchase power agreement . . . and is a lessee of property owned by [DHHL] in Kawaihae, S. Kohala, where it plans to develop a generator station." Waimana does not explain how its current exclusive license is different from the economic interests delineated in finding no. 20. Waimana concedes that it must demonstrate "a legitimate claim of entitlement" to the license to have a property interest in it requiring due process. However, the entirety of Waimana's argument to establish that entitlement is as follows:

In 1994, DHHL acquired a 153-acre parcel adjoining HELCO's Keahole site. ROA:2758. [Waimana] is a native Hawaiian corporation, recognized by DHHL, whose business endeavors inherently concern the welfare and betterment of native Hawaiians. Between 1994 and 1995, [Waimana] negotiated an agreement with DHHL to provide telecommunication services to all DHHL properties throughout the State of Hawaii. ROA:2949-2957. Appellee DHHL issued the license pursuant to Section 207(c)(1)(A)[<sup>24</sup>] of the Hawaiian Homelands Commission Act and [Hawai'i Administrative Rules (HAR)] §10-4-21.[<sup>25</sup>] ROA:2949. In the

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<sup>24</sup> Section 207(c)(1)(A) of the Hawaiian Homelands Commission Act, entitled "Leases to Hawaiians, licenses," provides:

- (c)(1) The department is authorized to grant licenses as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, for:
- (A) Churches, hospitals, public schools, post offices, and other improvements for public purposes.

<sup>25</sup> HAR § 10-4-21 states in relevant part:

- (a) Applications for licenses shall be made in writing and shall state the applicant's status, type and location of the land desired, proposed use of the land, the services or

(continued...)

lease, DHHL ("Leasor") stated that the Leasor "believes and intends that the issuance of this Exclusive Benefit LICENSE will also fulfill the purpose of advancing the rehabilitation and the welfare of native Hawaiians." ROA:2950. This exclusive statutory license extends to the DHHL 153-acre parcel which abuts the northeastern corner of HELCO's present Keahole power plant site. Id. The adjacent DHHL parcel will be made available to [Waimana] to provide telecommunication services under its lease. ROA:2949. [Waimana] has both a statutory entitlement and obligation to provide these services to all DHHL land, including DHHL-held at Keahole.

Waimana's argument consists largely of facts and fails to show why it is entitled to the license. Further, Waimana's conclusory statement that it has a "statutory entitlement" to the license is both unsupported and incorrect. The plain language of the provisions Waimana relies on in Section 207(c)(1)(A) of the Hawaiian Homelands Commission Act and HAR § 10-4-21 does not provide a "statutory entitlement" to any entity which may be granted a license pursuant to them. In fact, these provisions reveal that DHHL in actuality has discretion to grant such licenses as well as discretion to determine the terms and conditions of any lease granted.<sup>26</sup> It is well settled that when a governmental agency has discretion in granting a license,

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<sup>25</sup>(...continued)

facilities to be provided and the term of the license.

(b) The department may negotiate the issuance of a license. The department shall determine such terms and conditions of a license as it deems prudent, reasonable, and proper and in accordance with this chapter and subject to the commission's approval.

<sup>26</sup> We also note that in its answering brief, DHHL argues that Waimana "is no different than any of the other vendors that DHHL contracts with to provide services to DHHL developments." This statement, which Waimana does not dispute in its reply brief, supports our conclusion that DHHL had authority and discretion to contract with Waimana.

parties such as Waimana do not have a legitimate claim of entitlement. Thornton v. City of St. Helens, 425 F.3d 1158, 1164 (9th Cir. 2005) (stating that "a statute that grants the reviewing [governmental] body unfettered discretion to approve or deny [a state operating license] application does not create a property right"); Allocco Recycling, Ltd. v. Doherty, 378 F. Supp. 2d 348, 366 (S.D.N.Y. 2005) (concluding that "when an agency has substantial discretion under state or local law to grant or deny a license or permit, the plaintiff has no legitimate claim of entitlement"); Gabris v. New York City Taxi & Limousine Comm'n, 2005 WL 2560384 (S.D.N.Y. 2005) (holding that "[defendant] is vested with broad discretion to grant or deny a license application, which forecloses plaintiff[] from showing an entitlement to one"). Cf. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972) (opining that a non-tenured teacher did not have a property interest or entitlement to re-employment, and therefore could be terminated without due process).

Waimana maintains that "as a native Hawaiian corporation[, it] is given, by law, preferential treatment for the use of Hawaiian home lands, over non-Hawaiian entities." In support of its assertion, Waimana relies on article XII, section



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4<sup>27</sup> and article XVI, section 7<sup>28</sup> of the Hawai'i Constitution. The plain language of these constitutional provisions does not directly support Waimana's contention that it is deprived of a property right and Waimana has not directed this court to any case law or statutory authority to support its interpretation of these provisions. Second, Waimana's articles of incorporation state that the company's primary purposes are to produce energy and conduct financial transactions in furtherance of that purpose. The articles do not mention any purpose to benefit native Hawaiians. Therefore, Waimana fails to establish that the exclusive license constitutes "property" which would entitle it to due process protection.

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<sup>27</sup> Article XII, section 4 of the Hawai'i Constitution, entitled "Public Trust," provides that:

The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

(Emphasis added.)

<sup>28</sup> Article XVI, section 7 of the Hawai'i Constitution, entitled "Compliance with Trust," provides that:

Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XII.

(Emphasis added.)

Second, assuming the exclusive license constituted "property" for due process purposes, Waimana does not establish how its license would be affected by the Keāhole expansion project. In other words, Waimana does not establish sufficient injury, the fourth element of the PASH test. Pursuant to PASH, Waimana must "demonstrate that its . . . interests were injured." 79 Hawai'i at 1255, 903 P.2d at 434 (quoting Pele Def. Fund v. Puna Geothermal Venture, 77 Hawai'i 64, 69, 881 P.2d 1210, 1215 (1994)) (brackets omitted). Generally, whether a party has standing is determined by the three part "injury in fact" test: "(1) he or she has suffered an actual or threatened injury as a result of the defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for a plaintiff's injury." Bush v. Watson, 81 Hawai'i 474, 479, 918 P.2d 1130, 1135 (1996) (citation omitted); see also United Pub. Workers, 80 Hawai'i at 380 n.3, 910 P.2d at 151 n.3 (listing the elements of the "injury in fact" test as "1) an actual or threatened injury, which 2) is traceable to the challenged action, and 3) is likely to be remedied by favorable judicial action"). The fact that Waimana now has an exclusive license to provide telecommunications services to land adjacent to the Keāhole expansion project site does not "demonstrate" injury. As BLNR observes, Waimana "has not alleged that its license agreement with DHHL has been breached or that it has been deprived of any property. There is

no indication that the generator expansion project will affect DHHL's plans to develop its neighboring property." Moreover, while DHHL may have a constitutionally protected right in the 153-acre tract adjacent to the Keāhole power plant, "constitutional rights may not be vicariously asserted." Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 265, 861 P.2d 1, 9 (1993) (citation omitted).

Based on the foregoing, the court was correct in determining that Waimana lacked standing to challenge the motion to vacate.

VIII.

For the reasons stated herein, the court's November 28, 2003 first amended final judgment, vacating the October 3, 2002 order and November 7, 2002 final judgment, is affirmed.

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