NO. 24621

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

HUI O HEʻE NALU, a non-profit corporation; DA HUI, INC., a Hawaiʻi corporation; and NELSON ARMITAGE, Plaintiffs-Appellants, v. CITY AND COUNTY OF HONOLULU; DEPARTMENT OF PARKS AND RECREATION; and WILLIAM BALFOUR, JR., DIRECTOR, Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIV. NO. 00-01-3486)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Plaintiffs-Appellants Hui O Heʻe Nalu, Da Hui, Inc., and Nelson Armitage (collectively "Plaintiffs") appeal from the Final Judgment entered in the Circuit Court of the First Circuit by Judge Sabrina S. McKenna on September 13, 2001, denying Plaintiffs' claims for injunctive relief, declaratory relief, and damages. Plaintiffs challenge parts of the circuit court's Findings of Fact and Conclusions of Law and Order entered on December 28, 2000 (FsOF, CsOL, and Order). Plaintiffs argue that the circuit court erred when it decided that

(1) Defendant-Appellee City and County of Honolulu (the City) followed its rules and regulations when it denied Plaintiffs' request to use Ehukai Beach Park from January 28, 2001, to February 12, 2001, for a "Back Door Shoot Out" surf contest and

(2) Plaintiffs failed to establish that the City followed

improper procedures in applying its criteria for awarding permits to use Ehukai Beach Park during the 2000-2001 winter surf season. We affirm.

BACKGROUND

On October 24, 1991, the City adopted "Amended Rules and Regulations Governing Use of City Beach Parks and Other Beach Properties Under the Control of the Department of Parks and Recreation to Provide Access to Conduct Shore Water Events" (Amended Rules). Section 3(15)(h) of the Amended Rules states as follows:

> In the event of a scheduling conflict, priority shall be given to those events with a record of good public relations. Recreation Committee members from the North Shore Neighborhood Board and the Sunset Beach Community Association shall assist the Department's surfing specialist and the Parks Permit Section in determining scheduling priority.

On June 14, 2000, Defendant-Appellee William Balfour, Jr. (Balfour), Director of the City Department of Parks and Recreation, sent a letter (Balfour Letter) to Plaintiffs and other surf promoters and organizations. The Balfour Letter is the City administration's specifics of the general requirement in Section 3(15)(h) of the Amended Rules that "priority shall be given to those events with a record of good public relations." The Balfour Letter stated, in relevant part, as follows:

> This letter is to inform you that the City is requiring all persons or organizations interested in obtaining a park use permit to hold a surf or water shore event on [Oahu's] North Shore [during the 2000-2001 winter season] to submit their "Application for Use of Park Facilities" [(Application)] and a completed Event Data Sheet for each event . . . .

The City will be releasing the [2000-2001 North Shore Winter Contest Schedule (Contest Schedule)] after receiving all Applications and pursuant to the Amended Rules and Regulations Governing Use of City Beach Parks and Other Beach Properties Under the Control of the Department of Parks and Recreation to [Provide Access to] Conduct Shore Water Events (hereinafter "Amended Rules"). . . .

In order to allow the City to organize the Contest Schedule, the following are required:

1) That all persons and organizations interested in obtaining a park use permit to hold a surf or water shore event submit their Application [to the Department of Parks and Recreation] no later than 4 p.m. June 26, 2000. . . .

. . . .

4) In the event of scheduling conflicts for the use of [a] City beach park, the City will resort to the resolution process set forth in Section 3(15)(h) of the Amended Rules. Representatives from the North Shore Neighborhood Board [(NSNB)] and the Sunset Beach Community Association [(SBCA)] will only provide input.

5) The City will consider input pursuant to Section 3(15)(h) of the Amended Rules and the following factors before making a final decision on the scheduling conflicts. The relative importance of each factor is specified in parenthesis [sic].

a) Community Relations Record (60%)
- Whether the applicant effectively addressed community traffic concerns in the past.
- The applicant's plan to address community traffic concerns during the permit period.
- Whether the applicant proactively responded to community concerns during the event in the past.
- The applicant's plan to respond to community concerns during the permit period.
- How the event has benefitted the community, City and State in the past.
- How the event will benefit the community, City and State.
- Whether the applicant complied with all park rules and regulations, City ordinances and State law in the past as applied to its event.
- Whether the applicant effectively addressed water safety concerns during the event in the past.
- The applicant's plan to address water safety concerns during the permit period.

b) Diversity of Events (20%)
- Whether the event provides the City with a diversity of water shore events.
- Track Record of Event - how long event has been in existence.

c) Diversity of Participants (20%)
- Whether the event provides opportunities for female participants.
- Whether the event provides opportunities for variety of ages.
- Whether the event provides opportunities for a range of skill levels.

The Event Data Sheet will be reviewed prior to making a final decision. . . .

It is the City's desire to prepare a Contest Schedule that accommodates all interested parties and complies with the Amended Rules and release a schedule by July 5, 2000.

(Emphasis in original.)

Bodyboard Productions, Inc. (Bodyboard), requested the use of Ehukai Beach Park for January 25, 2001, through February 4, 2001, for a "bodysurfing/bodyboarding competition."

Plaintiffs requested the use of Ehukai Beach Park for the dates January 28, 2001, through February 12, 2001, for the "Back Door Shoot Out."

HPAC Events, Inc., requested the use of Aliʻi Beach Park for the dates January 29, 2001, through February 9, 2001, for a "Surfing Pro-am."

NSSA-Hi requested the use of Aliʻi Beach Park for the dates February 3, 4, 10, and 11, 2001, for an "AM. surfing & bodyboard & H.S."

Wilfred Ho (Ho), Windward Oahu Manager of the City's Department of Parks and Recreation, scheduled a July 6, 2000 meeting and invited the members of the SBCA Surf Committee and

the NSNB to attend. The combined number of members for both groups was twenty-four. Only five of the twenty-four attended the meeting and only four ultimately participated.[1/]

At the July 6, 2000 meeting, Ho and the four examined the permit applications. In a November 30, 2000 declaration, Ho stated, in relevant part, as follows:

> 14. Following discussion, the members of the committee "decided" that Bodyboard Productions' event should be arbitrarily moved to March of 2001, a date that was unacceptable to Bodyboard Productions.
>
> 15. It was clear these members were not attempting to use the established criteria to prioritize the applications, since at least one member, . . . stated he did not agree with the criteria.[2/]
>
> 16. In an effort to obtain comment from other members of the [SBCA] Surf Committee and [NSNB] all members were contacted and given the opportunity to provide comment to the Department. Nineteen of the 24 persons contacted chose to provide comment[.] . . .[3/]
>
> 17. The manner in which the comments were solicited was that I read a "script" setting forth the nature of the conflict and the information sought. . . .
>
> 18. Miles Hazama of the Department of Parks and Recreation participated in telephone calls to ensure all responses were accurately recorded.
>
> 19. The responses were then reviewed by four employees of the Department of Parks and Recreation: Miles Hazama, District Recreation Supervisor; Glenn Kajiwara, Recreation Specialist III; Craig Kaneshiro, Recreation Director IV; and myself.

[1/] Although five members of the Sunset Beach Community Association Surf Committee attended the July 6, 2000 meeting organized by Wilfred Ho, only four members ultimately participated in the decision made at the July 6, 2000 meeting.

[2/] The fact that a person disagrees with the criteria does not prevent that person from using the criteria. The fact that one of four disagrees with the criteria does not establish that the other three disagree with the criteria or that none of the four were using the criteria to prioritize the applications. Moreover, two of the four submitted declarations saying they considered the criteria.

[3/] The nineteen included the four who had participated in the decision made at the July 6, 2000 meeting.

> 20. Each employee provided their own score for each of the four organizations in conflict. The scores were added and the total was compared to determine which organization should receive priority. . . .
>
> 21. Based on the scores, NSSA was the prevailing organization. However, since NSSA only runs contest[s] on weekends, Bodyboard Productions would be able to obtain its contest dates by agreeing to a break in the waiting period. Bodyboard Productions did agree and was given a permit on that basis.

(Footnotes added.)

Pursuant to the "script" noted in paragraph "17" above, the person called was advised about the conflicting applications and then asked the following questions:

> 1. Do you have any comment about these events?
>
> 2. Was [sic] there any problems or concerns that you are aware of? Such as parking, traffic, excessive rubbish, etc.
>
> 3. Has the event promoter been responsive to community concerns?
>
> 4. In your opinion, does the community, island or State receive a benefit from any of these events[?]

The record does not reveal how much supervisory control, if any, Ho had over the other three employees referred to in paragraph "19" above. Ho and the other three City employees used a "Criteria Rating Sheet" form for each applicant. Each sheet stated three categories that, in essence, conformed to the rated considerations stated in part "5)" of the Balfour Letter quoted above. Each of the four rated each applicant after considering the application and the comments received from the nineteen members of the SBCA Surf Committee or the NSNB who responded to the telephone inquiry. The points awarded by each of the four raters varied considerably, but the rankings were

quite consistent. The four scored/ranked the applicants in the following order:

	Bodyboard	Hui O He'e Nalu	HPAC	NSSA
Miles Hazama	70/2	55/3	45/4	85/1
Glenn Kajiwara	75/2	75/2	65/4	100/1
Wilfred Ho	60/2	50/3	40/4	70/1
Craig Kaneshiro	40/2	40/2	25/4	70/1
TOTAL/RATING	245/2	220/3	175/4	325/1

On November 14, 2000, Plaintiffs filed a "Complaint for Injunctive and Declaratory Relief and for Damages" (Complaint) against the City and Balfour, in his capacity as Director of the Department of Parks and Recreation. In Count I of the Complaint, Plaintiffs sought

> preliminary and permanent injunctive relief against [Balfour and the City] to prevent [Balfour and the City] from implementing the current calendar for North Shore surfing events for [the] . . . year 2000 - 2001 because said calendar was created in violation of [the City's] rules and regulations and/or was entered into in a manner that was arbitrary and capricious[,] violating legal and equitable rights maintained by Plaintiffs.

In Count II of the Complaint, Plaintiffs asked the

> Court to declare that the . . . schedule decided upon during the summer of 2000, which granted priority to Plaintiffs' event over [Phillips' event], is the lawful and appropriate schedule . . . or, in the alternative, Plaintiffs' [sic] seek a declaration from this Court declaring that the rules, regulations and criteria [used by the City in formulating the Contest Schedule] are unduly vague and ambiguous and therefore lead to arbitrary and capricious results and therefore are void.

In Count III of the Complaint, Plaintiffs alleged that

> Plaintiffs reasonably relied upon the representations of [Balfour and the City] that [Balfour and the City] would follow and apply their rules and regulations and criteria in an objective and fair manner and were thereby induced to undertake actions of a substantial nature thereby incurring substantial fees and costs. [Balfour and the City] knew that Plaintiffs would reasonably rely upon such representations and, by [Balfour and the City's] failure to follow their own rules, regulations and criteria, Plaintiffs

have sustained substantial pecuniary damages in an amount to be proved at trial.

The answer was filed on November 24, 2000.

On November 16, 2000, Plaintiffs filed "Plaintiffs' Motion for a Preliminary Injunction."[4/] A response

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[4/] Hawai'i Rules of Civil Procedure Rule 65 (2003) states as follows:

> (a) *Preliminary injunction.*
>
> (1) NOTICE. No preliminary injunction shall be issued without notice to the adverse party.
>
> (2) CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.
>
> (b) *Temporary restraining order; notice; hearing; duration.* A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained a temporary restraining order

(continued...)

was filed on December 4, 2000.

At a December 12, 2000 hearing on "Plaintiffs' Motion for a Preliminary Injunction," Plaintiffs' attorney stated, in relevant part, as follows:

> I believe that [the parties will] be proceeding . . . in a bifurcated manner, treating this hearing [on Plaintiffs' Motion for a Preliminary Injunction] . . . as a trial on the merits with respect to the motion for preliminary injunction in [sic] our request for declaratory relief. Reserving perhaps for another time our claim for damages.
>
> It's my understanding that the City has agreed, as we have, to stipulate into evidence all of the exhibits that have been submitted to the Court, as well as some additional exhibits that the City has. . . . [T]hen we will leave the matter to argument, and then [to] the Court's judgment.

(...continued)

> shall proceed with the application for a preliminary injunction and, if that party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.
>
> (c) *Security.* In all cases, the court, on granting a temporary restraining order or a preliminary injunction or at any time thereafter, may require security or impose such other equitable terms as it deems proper. No such security shall be required of the State or a county, or an officer or agency of the State or a county.
>
> The provisions of Rule 65.1 apply to a surety upon a bond or undertaking under this rule.
>
> (d) *Form and scope of injunction or restraining order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.
>
> (e) *Civil defense and emergency act cases.* This rule shall not modify section 128-29 of the [Hawai‘i] Revised Statutes.

The court confirmed the understanding of the parties and proceeded to hear arguments based on a record that included written declarations and exhibits. The court heard no testimony.

On December 28, 2000, the court entered Findings of Fact and Conclusions of Law and Order (December 28, 2000 FsOF, CsOL, and Order) stating, in relevant part, as follows:

> Before the hearing on [Plaintiffs'] motion for Preliminary Injunction, counsel for the parties agreed to bifurcate trial in this case between the Requests for Preliminary and Permanent Injunctive Relief and Request for Damages. The parties agreed to allow the Court, pursuant to Rule 65(a)(2) of the Hawaii Rules of Civil Procedure, to advance the trial on the merits regarding the Request for Permanent Injunctive Relief, . . . with the hearing on [the] Motion for Preliminary Injunction.
>
> . . . .
>
> **FINDINGS OF FACT**
>
> . . . .
>
> 2. Rule [3(15)(h)] of [the City's Amended Rules] provides:
>
> > In the event of a scheduling conflict, priority should be given to those events with a record of good public relations. Recreation Committee Members from the [NSNB] and the [SBCA] shall assist the Department's Surfing Specialist and the Parks Permit Section in determining scheduling priority.
>
> 3. The evidence shows that City officials followed [the] procedures [of Rule 3(15)(h)] before reaching their decision. As depicted in [the Balfour Letter], the City had come up with weighted criteria to be applied in evaluating "Good Public Relations." The Plaintiffs did not challenge the weighted criteria, but rather, [(1)] the procedure used by City Officials, i.e., rejecting the recommendation of four individual Recreation Committee Members in July, 2000, then contacting all Recreation Committee members by telephone and asking general questions rather than questions specifically tailored to the weighted criteria; and (2) the City Officials' interpretations and applications of the criteria to the instant circumstances.
>
> . . . .

CONCLUSIONS OF LAW

. . . .

2. In order to prevail on their motion for Preliminary Injunction, Plaintiffs must prove (1) a likelihood of prevailing on the merits; (2) that the balance of irreparable harm favors issuance of injunctive relief; and (3) that the public interest supports granting the injunction. In order to prevail on the Request for Permanent Injunction, Plaintiffs must prevail on the merits.

3. On consideration of all the evidence submitted, the arguments of counsel, and applicable law, the Court finds and concludes that Plaintiffs have failed to meet the burden of establishing all three requirements for preliminary injunction.

4. First, . . . , Plaintiffs have failed to prove their likelihood of prevailing on the merits. In addition, the Court finds and concludes against Plaintiffs on the merits.

. . . .

6. The evidence shows that City officials followed [the] procedures [of Rule 3(15)(h)] before reaching their decision. As depicted in [the Balfour Letter], the City had come up with weighted criteria to be applied in evaluating "Good Public Relations." The Plaintiffs did not challenge the weighted criteria, but rather, [(1)] the procedure used by City Officials, i.e., rejecting the recommendation of four individual Recreation Committee Members in July, 2000, then contacting all Recreation Committee members by telephone and asking general questions rather than questions specifically tailored to the weighted criteria; and (2) . . . City Officials' interpretations and applications of the criteria to the instant circumstances.

7. The Court finds and concludes, however, that Plaintiffs have failed to establish that City Officials followed improper procedures in applying the [prioritization] criteria. The Plaintiffs have failed to prove that the procedure adopted by the City to evaluate the . . . [prioritization] criteria, including making phone calls and asking general, rather than specific, questions, which constitutes an interpretation of the City's own rules, was manifestly erroneous, inconsistent with underlying legislative purposes, arbitrary, capricious, unreasonable, irrational, or unjust. The Court also finds and concludes that Plaintiffs have failed to establish that the City Officials' interpretations and application of the weighted criteria to the instant circumstances was manifestly erroneous, inconsistent with underlying legislative purposes, arbitrary, capricious, unreasonable, irrational, or unjust.

. . . .

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, . . .

> **IT IS HEREBY ORDER[ED], ADJUDGED, AND DECREED** that Plaintiffs' Motion for Preliminary Injunction . . . is **DENIED. IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED** that Plaintiffs' Request for Permanent Injunctive Relief to bar [Balfour and the City] from scheduling another event other than the Back Door Shoot Out . . . at Pipeline/Ehukai Beach Park between January 29, 2001 and February 9, 2001 is also **DENIED**.

(Emphases in original.)

On September 13, 2001, the court entered Final Judgment in favor of the City and Balfour and against Plaintiffs. The September 13, 2001 Final Judgment denied Plaintiffs' requests for preliminary and permanent injunctive relief, declaratory relief, and damages. Plaintiffs filed their Notice of Appeal on October 12, 2001.

In their appeal, Plaintiffs challenge FOF no. 3 and CsOL nos. 6 and 7. Plaintiffs ask this court to reverse and remand for a determination of damages.

STANDARD OF REVIEW

"'Ordinarily, deference will be given to decisions of administrative agencies acting within the realm of their expertise.'" Coon v. City and County of Honolulu, 98 Hawai'i 233, 245, 47 P.3d 348, 360 (2002) (citing Māhā'ulepū v. Land Use Comm'n, 71 Haw. 332, 335, 790 P.2d 906, 908 (1990)).

DISCUSSION

A.

Hawai'i Rules of Civil Procedure (HRCP) Rule 52(a) (2003) specifies, in relevant part, that

> [i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon, . . . and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.

The parties opted to leave the question of damages for a subsequent hearing. The order in the December 28, 2000 FsOF, CsOL, and Order denied Plaintiffs' request for a preliminary injunction and a permanent injunction. The September 13, 2001 Final Judgment leaped two steps further and denied Plaintiffs' requests for injunctive relief, declaratory relief, and damages. The points on appeal are silent regarding this leap. Therefore, it is not an issue in this appeal.

B.

In Wong v. Board of Regents, Univ. of Hawai‘i, 62 Haw. 391, 616 P.2d 201 (1980), the Hawai‘i Supreme Court stated that

> [t]he mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation, remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal – adverse interest and effective remedy – have been compromised.
>
> . . . .
>
> The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. . . .
>
> . . . .

> . . . We . . . note that historically the objection to deciding moot cases was that the judgment of the court could not be carried into effect, or that relief was impossible to grant.

Id. at 394-95, 616 P.2d at 203-204 (citations omitted).

In the instant case, Plaintiffs sought injunctive relief barring the City from implementing the 2000-2001 North Shore Winter Contest Schedule. Inasmuch as the date for the 2001 Back Door Shoot Out (January 28, 2001, to February 12, 2001) has already passed, a decision by this court will not afford Plaintiffs any relief with regard to their request for injunctive relief.

C.

Assuming no changes have been made to the rules, regulations, and criteria used by the City in formulating its 2000-2001 North Shore Winter Contest Schedule, the request by Plaintiffs for "a declaration . . . that the rules, regulations and criteria are unduly vague and ambiguous and therefore lead to arbitrary and capricious results and therefore are void" may not be moot. However, the points of error are silent regarding this request by Plaintiffs. Therefore, it is not an issue on appeal.

D.

Plaintiffs contend that the City "clearly did not follow its own rule, and the resulting decision was not based on the relevant factors and was a clear error of judgment." They note that there is no record (1) of the "Department's surfing specialist" being involved and (2) of the "Parks Permit Section"

being involved. They allege that it is established that (3) the City "summarily reject[ed] the assistance from the [NSNB] and the [SBCA]" and (4) the City failed to use all of its mandated criteria as set out in the Balfour Letter.

1.

At the hearing, the City disclosed that it did not "have a person that's entitled surfing specialist[.]" Therefore, such a person could not be involved. This fact did not violate Section 3(15)(h) of the Amended Rules. The words "shall assist the Department's surfing specialist" did not obligate the City to have an employee with a "surfing specialist" job title.

2.

It was Plaintiffs' burden to prove that the City's "Parks Permit Section" was not involved and they failed to do so. It appears that the City's "Parks Permit Section" was involved.

3.

The allegation that the City "summarily reject[ed] the assistance from the [NSNB] and the [SBCA]" is not supported by the record. The City was required to obtain the assistance of the "Recreation Committee members from the [NSNB] and the [SBCA]." Ho scheduled a July 6, 2000 meeting and invited the members of the SBCA Surf Committee and the NSNB to attend. Out of twenty-four members, only five attended and four participated. Plaintiffs argue that the City "did not follow its own rule when

it, without any stated reason, rejected the assistance and decision of the [NSNB] and the [SBCA]." We disagree. First, the recommendation of four of the twenty-four is not "the assistance and decision of the [NSNB] and the [SBCA]" and that is especially true because no one from the NSNB was involved. Second, even if it was the recommendation by the twenty-four, the City was not required to follow the recommendation. The Balfour Letter expressly stated that "[r]epresentatives from the [NSNB] and the [SBCA] will only provide input" and the City "will consider [that] input."

4.

Plaintiffs failed to prove that the City failed to consider the relevant factors before making a final decision on the scheduling conflicts. The fact that the script questions asked of the twenty-four members of the SBCA Surf Committee and/or NSNB did not include questions regarding "Diversity of Events" and "Diversity of Participants" does not prove that the four City employees referred to in paragraph "20" of Ho's Declaration did not consider those factors when they decided "which organization should receive priority."

5.

In their opening brief, Plaintiffs allege that they were the victims of "the arbitrary discretion of four employees who were not even allowed under the stated criteria and rules to

be involved in the decision making process." They do not cite the basis for their allegations. The basis not being apparent, we cannot respond.

CONCLUSION

Accordingly, we affirm the September 13, 2001 Final Judgment.

DATED: Honolulu, Hawai'i, September 15, 2003.

On the briefs:

Pablo P. Quiban
(Evangelista & Quiban)
for Plaintiffs-Appellants. Chief Judge

Don S. Kitaoka and
Dawn D. M. Spurlin,
Deputies Corporation Counsel, Associate Judge
City and County of Honolulu,
for Defendants-Appellees.

Associate Judge