CONCURRING OPINION BY CIRCUIT JUDGE
DEL ROSARIO, WITH WHOM ACOBA, J., JOINS

In my view, Waimana's argument that the settlement agreement, which was reviewed and accepted by the court, and the 2003 vacatur order, which was entered by the court, are contrary to law, and therefore unenforceable, also necessitates discussion.

Waimana appears to argue that even if it lacks standing to oppose the motion, this court should still conclude that the vacatur was improper based on the effects on non-parties, contending that "when considering whether to grant vacatur in order to facilitate a post-judgment settlement, a court cannot assume that only the litigants have an interest in the judgment. Instead, a court must recognize that its judgment may have implications for parties not directly before it." In this regard, Waimana attacks the integrity of the court, the judicial system, and the governmental agencies involved in this case. Waimana asserts that:

> Another major concern is that settlement conditioned upon vacatur places in issue the integrity of the judicial process. . . . The concern is that the very purpose and integrity of the judicial system is at stake when courts vacate decisions to assist settlements. . . . [Public] trust can be seriously undermined if judgments and decisions are vacated purely on the basis of the parties' settlement arrangement because the public will perceive courts and their precedent [as] "for sale.". . . In short, public respect for the courts erodes when parties who lose at the trial level can, in effect, purchase the nullification of the adverse judgment at the appellate level.

(Emphasis added.) In a footnote, Waimana argues the following:

> In a recent report, prepared for the Judiciary, State of Hawaii, the perceptions of the general public regarding

> the Judiciary were made known. The primary perception was that the Hawaiian courts are not open "because many trial decisions are perceived to have resulted from 'back room deals' . . . out of the public view."

(Emphasis added.) (Citation omitted.) Waimana also maintains that the governmental agencies have breached their public duty and the public trust by agreeing to the settlement, and implies that this court would be abdicating its responsibility as an appellate court if it does not find that vacatur was an abuse of the court's discretion.

Further, Waimana appears to challenge enforcement of the settlement agreement and the 2003 vacatur order. Specifically, Waimana maintains that expansion of the Keahole Generating Station by way of the settlement agreement is prohibited by law:

> The [Environmental Impact Statement (EIS)] completed in 1994, for HELCO's substantially different project, does not cover construction of the Keahole project, which is the subject of the Settlement Agreement. . . . HELCO does not have a CDUP for the redesigned Keahole project. HELCO cannot obtain an appropriate CDUP as a matter of procedure, without an EIS. Finally, HELCO, as a matter of law, cannot construct within the statutory deadline recognized by the lower court in its reversal of the BLNR extension. . . . The settlement is conditioned upon State agency approvals for changes and allowances which are prohibited by numerous federal and state laws. . . . While HELCO's CDUP was pending, the legislature enacted Act 270 . . . The change in law precluded the construction of a fossil-fuel based power plant on conservation land. . . . HELCO cannot legally expand the Keahole facility pursuant to the settlement reached with the State Appellees. . . . It is without question that the law in force "hereinafter" forbids the construction of HELCO's power plant on conservation land. . . . The State Appellees, however, agreed to the settlement in circumvention of this law.

(Some emphases added and some in original.) I believe these points must be addressed.

A.

First, Waimana asserts that vacatur of the underlying decision was not in the public interest. As sub-points to this argument, Waimana contends that (1) the appellees "actively sought to moot the appeal in S.Ct. No. 25446[,]" (2) "[b]y failing to address the settlement on the merits and as insisted upon by [Waimana], the lower court did not serve the interest of the public trust as required by law[,]" (3) the "settlement conditioned upon vacatur places in issue the integrity of the judicial process[,]" (4) vacatur ignores the "social value of judicial precedents[,]" and (5) "[t]he [s]ettlement [a]greement circumvents regulatory requirements and protections."

As set forth previously, the court vacated the October 3, 2002 order and November 7, 2002 judgment pursuant to HRCP Rule 60(b) as indicated in the following conclusions:

> 4. HRCP Rule 60(b) provides that:
>
> > On a 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 Court'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, and reduced visual impact, as well as water and solar energy benefits for DHHL, that would not otherwise have been achieved.

(Emphases added.)

Much discretion is afforded to a trial court in deciding whether to set aside a judgment under HRCP Rule 60(b).

> It is well-settled that the trial court has a very large measure of discretion in passing upon motions under Rule 60(b) and its order will not be set aside unless we are persuaded that under the circumstances of the particular case, the court's refusal to set aside its order was an abuse of discretion.
>
> An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party-litigant.

Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 428, 16 P.3d 827, 833 (App. 2000) (internal quotation marks and citations omitted). See State v. Hawaiian Dredging Co., 50 Haw. 49, 50, 430 P.2d 319, 321 (1967) (noting that "the trial court has discretion to grant or deny a motion to reopen under [HRCP] Rule 60(b)[]" and that "[n]o abuse of discretion has been shown on the part of the trial judge in denying the motion to reopen[]").

Waimana relies on U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994), to argue that the "Supreme Court of the United States has established a rule disfavoring vacatur based upon post-judgment settlement, absent exceptional circumstances." Although Bonner Mall held "that mootness by reason of settlement does not justify vacatur of a judgment under

review" absent "exceptional circumstances[,]"[1] id. at 29, that case is not applicable here. The issue in Bonner Mall was "whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari sought." Id. at 19. Hence, Bonner Mall's "exceptional circumstances" test is the standard by which appellate courts determine whether vacatur of a lower court decision is proper. In other words, Bonner Mall would control if this court had vacated the 1994 remand order. See Am. Games, Inc. v. Trade Prods., Inc., 142 F.3d 1164, 1169 (9th Cir. 1998) (restricting Bonner Mall to situations where "the Supreme Court itself decides whether to vacate a lower court decision," and noting that the "Court did not discuss the proper standard at the district court level"). However, as previously discussed, on

---

[1] U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 24 (1994), does not conclusively preclude vacatur where the parties have reached a settlement that renders an appeal moot. As the Court explained:

> [M]ootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur--which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed. Of course[,] even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b).

513 U.S. at 29 (emphases added).

October 14, 2003, this court remanded S.Ct. No. 25446 for the court to consider vacatur of its own decision.[2]

"According to post-Bonner Mall Ninth Circuit decisions," the "court below" may vacate "its own judgment using" an "equitable balancing test even" where the parties have "mooted their case by settlement."[3] American Games, 142 F.3d at 1169. See Ringsby Truck Lines, Inc. v. W. Conference of Teamsters, 686 F.2d 720, 722 (9th Cir. 1982) (refusing to vacate the district court's judgment where the parties, by settlement, agreed to such a vacatur, but leaving it to the district court to "balance between the competing values of right to relitigate and finality of judgment"). The Ninth Circuit has deemed it "appropriate that a district court should enjoy greater equitable discretion when reviewing its own judgments than do appellate courts operating at a distance." American Games, 142 F.3d at 1170.

Thus, contrary to Waimana's assertions, a court may vacate its own judgment upon a balancing of the equities pursuant to American Games, as opposed to a finding of "exceptional circumstances" which, pursuant to Bonner Mall, is the standard for appellate courts. Indeed, the balancing of equities standard is consistent with HRCP Rule 60(b)(5), the court's stated basis

---

[2] The remand of S.Ct. No. 25446 was made pursuant to Life of the Land v. Ariyoshi, 57 Haw. 249, 252, 553 P.2d 464, 466 (1976) (holding that, "where an appeal is pending in this court[,]" HRCP Rule 60(b) motions "may be made and considered in the circuit court" and if "that court indicates that it will grant the motion, the appellant may then move in this court for a remand of the case").

[3] Thus, Waimana's sub-point (1), emphasizing that the case was mooted by actions of the parties, is not persuasive.

for ordering vacatur, which provides that "the court may relieve a party . . . from a final judgment, order, or proceeding [if] . . . (5) . . . it is no longer equitable that the judgment should have prospective application[.]" (Emphasis added.)

In that connection, it cannot be said that the court abused its discretion in determining that "it is no longer equitable that the reversal order and final judgment [entered March 25, 2002 and November 7, 2002, respectively] have prospective application." Waimana maintains that "[i]n vacating its judgment, the [court] did not examine the equities which included the presence of third party interests and the possibility that its judgment would have a preclusive effect on later litigation regarding the Keahole power plant, thus depriving the community as a whole of its constitutional rights to due process and equal protection." However, as it stated in conclusion no. 5, the court did "not vacate its [o]rders lightly."

Contrary to Waimana's assertions, the court balanced the equities inasmuch as it concluded that the parties "worked diligently to resolve their differences" and that vacatur would be "in the public interest[.]"[4] As to the public interest determination, the court specifically noted that "the parties have agreed to enhanced air quality protection, reduced noise mitigation, and reduced visual impact, as well as water and solar

[4] Thus, Waimana's argument in sub-point (2) that the court failed to consider the interests of the public trust should be rejected.

energy benefits for DHHL, that would not otherwise have been achieved."[5]

Waimana's concern that "under the terms of the settlement, the public is left with no direct vehicle to enforce the State Appellees' responsibilities" must be similarly rejected. As the court determined in finding no. 6, HELCO has agreed to "processes [that] will allow all interested parties additional opportunities to provide input on the Keahole expansion project." According to finding no. 7, the "parties have also agreed [that] the parties to the settlement will comply with all federal, state, and county laws and regulations."[6]

Thus, Waimana inaccurately and prematurely presumes that vacatur "effectively gives HELCO carte blanche to pursue construction of a power plant, . . . which is substantially different than the project for which HELCO originally obtained a CDUP by default," the project would "fail to meet necessary criteria for approval of construction" as set forth in HAR § 13-

---

[5] The court's finding no. 4 explains that the settlement will "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." Finding no. 5 lists the terms of the settlement that "provide significant and tangible benefits for the public." Waimana does not challenge these findings.

[6] In its reply brief, Waimana asserts that "the [court] approved a settlement without any evidence of any prior compliance on the part of HELCO and without any input from the Keahole Community as a whole." Waimana does not elaborate on what "prior compliance" HELCO has failed to meet. As indicated infra, the settlement recognized that government permits and approvals are required. Further, as indicated above, HELCO has agreed to processes which will allow for additional input from interested parties. As Waimana concedes, KDC, Ratliff, and Cooper participated in the settlement discussions and agreement. Waimana further fails to establish that any other member of the Keāhole community sought to provide input.

5-40,[7] and the project "triggers the need for an Environmental Assessment, if not an Environmental Impact Statement" (EIS).[8] As HELCO maintains, "while the parties agreed to cooperate in effectuating the settlement, the parties also confirmed that the negotiated remedies and benefits were subject to 'obtaining necessary government permits and approvals,' and that the government agencies involved in the litigation 'shall retain their primary agency jurisdiction, as provided by law.'"

As for Waimana's concerns that the vacatur impairs the "integrity of judicial process" and "social value of judicial precedents,"[9] these are determinations initially allocated to the court's discretion when balancing the equities. See American Games, 142 F.3d at 1168 (confirming that "the district court can decide whether to vacate its judgment in light of the consequences and attendant hardships of dismissal or refusal to dismiss and the competing values of finality of judgment and right to relitigation of unreviewed disputes" (internal quotation marks and citations omitted)). Here, the court was cognizant of the seriousness of ordering vacatur of its prior decision, noting in its conclusion no. 5 that it "does not vacate its [o]rders lightly," but that it may do so to "accomplish justice."

---

[7] HAR § 13-5-40 explains when a public hearing "shall be held" and the process for conducting the hearings.

[8] Hence, Waimana's sub-point (5) that the settlement "circumvents regulatory requirements and protections" should be rejected.

[9] These are Waimana's sub-points (3) and (4).

Further, this court has acknowledged the strong public policy in favor of settlement of claims. See State v. Gano, 92 Hawai'i 161, 167, 988 P.2d 1153, 1159 (1999) (noting that "[t]he public policy of [Hawai'i] appellate courts favors the resolution of controversies through compromise or settlement rather than by litigation" (internal quotation marks and citation omitted)); Gossinger v. Ass'n of Apartment Owners of Regency of Ala Wai, 73 Haw. 412, 424, 835 P.2d 627, 633 (1992) (noting that public policy "favors the finality of negotiated settlements that avoid the costs and uncertainties of protracted litigation"); In re Doe, 90 Hawai'i 200, 208, 978 P.2d 166, 174 (App. 1999) (concluding that "[a] settlement agreement will be enforced by our courts because public policy favors the resolution of controversies through compromise or settlement"). Given that the settlement resolved a decade-long dispute that had already engaged substantial judicial and agency resources and, in addition, apparently afforded greater protections for the public interest, the court did not abuse its discretion in granting the HRCP Rule 60(b) motion to vacate.

B.

Next, Waimana contends that the vacatur deprived it of its rights to due process and equal protection. As to the due process claim, Waimana asserts that (1) "the record is clear that [Waimana] has clearly maintained property interests which arise from its rights to enforce conditions to HELCO's land grant (ceded lands) for the Keahole site, and its right as an

established statutory beneficiary of Hawaiian Home lands to challenge the impact of any power plant proposed by HELCO upon adjoining Hawaiian Home lands property[,]" and that (2) Waimana "was denied notice to challenge the proposed settlement reached in Civil No. 97-00017K."

As discussed supra in the discussion on standing, Waimana's "property interests" were specifically rejected by the court as not falling within the parameters of due process protection. The court determined in conclusion nos. 5 and 6 of the 1994 remand order, 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 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[.]"

With respect to Waimana's notice argument, the court concluded in the 2003 vacatur order that Waimana "had a full and fair opportunity to participate in the mediation with all of the parties, but repeatedly declined." The record supports this determination. Although Waimana was not a party to Civ. No. 97-00017K, HELCO contacted Waimana's counsel in an April 26, 2003 letter to determine Waimana's position in light of the court's order "to mediate the legal disputes involving the expansion of the Keahole power plant." HELCO also contacted Waimana's president, Hee, and documented the conversation in an April 28,

2003 letter. According to the letter, Hee "view[ed] the[] settlement efforts as a waste of time." Although Waimana knew of the settlement negotiations ordered by the court, Waimana voluntarily chose not to participate in the mediation and, thus, its contention that it "was never contacted during the course of the expanded mediation until immediately prior to a status conference in Civil No. 97-00017K" is not persuasive.

Additionally, Waimana asserts that "[b]y pursuing a status conference in lieu of a HRCP Rule 60(b) motion[,] to properly address the bases upon which the [court] would determine its inclination on vacatur, [Waimana] was denied timely notice and meaningful opportunity to state its position."[10] On September 17, 2003, the mediator notified Waimana that the court

---

[10] In its reply brief, Waimana asserts that "the die was cast against [Waimana] when the lower court ruled its inclination to grant the non-existent HRCP Rule 60(b) motion based only on oral representations and a bare and unsigned settlement agreement," (emphasis in original), at a status conference on September 19, 2003. As stated supra, on October 17, 2003, KDC, Ratliff, Cooper, and DHHL filed a HRCP Rule 60(b) motion. Waimana appears to object to the fact that the court expressed its inclination to grant a HRCP Rule 60(b) motion without having the motion before it. Waimana claims that Life of the Land "anticipates that the [court] would have certified its 'inclination' upon a fully briefed record." (Emphasis in original.) Life of the Land does not discuss what a court should consider in ruling on a HRCP Rule 60(b) motion, or require a "fully briefed record" as Waimana suggests. As stated supra, Life of the Land refers to a procedure for granting Rule 60(b) motions in cases that are on appeal similar to what occurred in this case.

It is stated in that case that "the [HRCP Rule 60(b)] motion may be made and considered in the circuit court. If that court indicates that it will grant the motion, the appellant may then move in [the supreme court] for a remand of the case." 57 Haw. at 252, 553 P.2d at 466 (emphasis added). In actuality, and contrary to Waimana's argument, Life of the Land anticipates that trial courts may express their "inclination" to grant HRCP Rule 60(b) motions and allows parties to act accordingly. Furthermore, as recounted above, trial courts are given broad discretion in determining whether a judgment should be set aside under HRCP Rule 60(b). Here the court entered findings of fact and conclusions of law in support of its order granting the motion and stated in conclusion no. 5 that it did not vacate its order "lightly." Waimana then fails to establish that the court abused its discretion in holding the status conference and in expressing its inclination to grant a HRCP Rule 60(b) motion.

had scheduled a status conference for September 19, 2003. Waimana apparently maintains that two days' notice was insufficient. Waimana, however, participated in the status conference and upon this court's remand in S.Ct. No. 25446, filed a memorandum in opposition to the motion to vacate, filed a declaration of counsel and additional exhibits, participated in the hearing on the motion to vacate, and filed a "supplemental memorandum." Hence, inasmuch as the court accepted Waimana's briefs and allowed Waimana to participate in the hearing, Waimana was given due process.

As to Waimana's equal protection claim, other than explaining the purpose of the equal protection clauses of the state and federal constitutions and citing to cases that support the proposition that "parties must be given equal opportunities to present their case" (citing In re Primus, 436 U.S. 412 (1978)), Waimana does not elaborate on its statement that the vacatur "completely extinguished" its "equal protection right to procedural due process." Thus, it does not establish an equal protection violation.[11]

---

[11] Regarding due process and equal protection, in its reply brief, Waimana claims that

> [t]here could be no due process where, as here, the [court] forced a settlement obtained in one action, which did not incorporate [Waimana's] rights, to vacate another separate and distinct action which did involve [Waimana] and its rights. Waimana has a constitutional right to have its claims adjudicated. Vacatur serves to block [Waimana's] equal protection rights to procedural and substantive due process.

First, it should be noted that the record is wholly devoid of any indication (continued...)

C.

Finally, Waimana contends that the State appellees breached the public trust. It argues that (1) repeal of HRS § 183-41 and the enactment of HRS § 183C-4(e) "precluded the construction of a fossil-fuel based power plant on conservation land[,]" (2) the "Keahole project, if completed, will compromise the use and value of viable DHHL land adjoining the northeastern boundary of Keahole Station[,]" (3) the State appellees "did not consider nor evaluate any new or supplemental EIS to determine the proposed project's 'compatibility with land use plans and policies[,']" and (4) "the lower court failed to hold the 'settlement in principle' to a higher level of scrutiny."

The issue regarding the repealed HRS § 183-41, sub-point (1), was previously argued and resolved in HELCO. In HELCO, "Ratliff and KDC maintain[ed] that HRS § 183-41 was invalid and should not have been applied in [that] case because it was repealed in 1994, before the contested case hearing on HELCO's application." 102 Hawai'i at 265 n.20, 75 P.3d at 168 n.20. However, this court decided that, pursuant to HRS § 1-10 (1993) (governing the effect of repeal on accrued rights),

---

[11](...continued)
that the court "forced" a settlement in the instant case and Waimana has not directed this court to any support in the record for this assertion. Further, as indicated above, despite the fact that Waimana lacked a property interest in the instant case, Waimana did in fact receive due process because it joined in the status conference, participated in the hearing on the motion to vacate, and submitted documents and exhibits to the court regarding its position on the motion. Finally, as illustrated, Waimana fails to establish an equal protection violation or support its conclusory statement that it "has a constitutional right to have its claims adjudicated."

because "HELCO submitted its application in 1992[,] . . . the repeal of HRS § 183-41 did not affect HELCO's previously accrued rights." Id. Inasmuch as the instant appeal concerns the same CDUA that was filed in 1992, pursuant to HELCO, the repeal of HRS § 183-41 continues to be irrelevant. Cf. Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 352 n.8, 944 P.2d 1279, 1295 n.8 (1997) (noting that the doctrine of the law of the case "states that a determination of a question of law made by an appellate court in the course of an action becomes the law of the case and may not be disputed by a reopening of the question at a later stage of the litigation").

As to sub-point (2), Waimana does not explain how plans for adjacent DHHL land will be "compromised" and, therefore, that argument is of no avail.

With respect to sub-point (3) concerning a supplemental EIS, it appears that HELCO's final EIS was accepted by DLNR at some time in 1993 or early 1994. HELCO, 102 Hawai'i at 262, 75 P.3d at 165. Should HELCO's plans fall outside the uses covered in that EIS, nothing in the settlement agreement bars the State appellees from requiring HELCO to prepare a new or revised EIS. Hence, contrary to Waimana's assertions, the State appellees have not failed to consider the necessity of a new or revised EIS.

As to sub-point (4), Waimana does not explain how the court failed to hold the settlement "to a higher level of scrutiny." On the contrary, as stated supra, based on the court's findings and conclusions, the court seriously considered

the mediated settlement, determining that it would provide "significant and tangible benefits for the public."

Waimana's contention that the State appellees negotiated a settlement agreement in violation of law is not borne out by the record. The settlement agreement lists the permits HELCO is required to obtain for its expansion project. Waimana, then, has no basis for maintaining that the State appellees have relinquished their trust duties to regulate the project. Therefore, it has not been established that the State appellees have breached the public trust.