*****NOT FOR PUBLICATION*****

NO. 26519

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

WAIMANA ENTERPRISES, INC. and ALBERT S.N. HEE,
Appellants-Appellants

vs.

BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAI‘I; DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAI‘I; HAWAII ELECTRIC LIGHT CO., INC., a Hawai‘i corporation, Appellees-Appellees

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 03-1-0199K)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Acoba, JJ., Circuit Judge Del Rosario in Place of Nakayama, J., Recused, and Circuit Judge Chan in Place of Duffy, J., Recused)

Appellants-Appellants Waimana Enterprises, Inc. (Waimana) and Albert S.N. Hee (Hee) [collectively, Appellants] appeal from the March 23, 2004 final judgment of the circuit court of the third circuit (the court),[1] granting a motion to dismiss in favor of Appellees-Appellees Board of Land and Natural Resources (BLNR), Department of Land and Natural Resources (DLNR), and Hawaii Electric Light Co., Inc. (HELCO). For the reasons provided herein, the court's judgment is affirmed.

I.

The prior procedural history underlying this appeal has been referred to in Keahole Def. Coalition v. Hawaii Elec. Light

[1] The Honorable Ronald Ibarra presided.

Co., No. 26305, slip op. at 3-14 (May 18, 2006). See also Hawaii Elec. Light Co. v. Dep't of Land and Natural Res., 102 Hawai'i 257, 75 P.3d 160 (2003) [hereinafter, HELCO]. Keahole Defense concerned BLNR's grant of HELCO's first extension of time to complete construction under conservation district use permit (CDUP) HA-487A. Keahole Defense, slip op. at 7-8. The original construction deadline was April 26, 1999. Id. at 8. The new deadline under the first extension was December 31, 2003. Id. The present appeal, S.Ct. No. 26519, is specifically concerned with HELCO's request for a second extension of time under CDUP HA-487A.

The pertinent facts pertaining to the second extension follow. On September 23, 2003, in anticipation of the December 31, 2003 deadline under the first extension of time, HELCO requested a second extension. HELCO requested the second extension while the original appeal regarding the first extension, S.Ct. No. 25446, was pending before this court.[2]

The request for a second extension was put on the agenda for BLNR's September 26, 2003 meeting, but it was not actually heard at that meeting due to procedural defects.[3] The

[2] This court dismissed S.Ct. No. 25446 on January 13, 2004, following the court's 2003 vacatur of the judgment that gave rise to the appeal. See Keahole Def. Coalition v. Hawaii Elec. Light Co., No. 26305, slip op. at 14.

[3] Hawai'i Revised Statutes (HRS) chapter 92 (1993 & Supp. 2005), known as the "Sunshine Law," requires proper notice for all items being heard at agency meetings. Pursuant to HRS § 92-7(b) (Supp. 2005), notice of all agenda items must be given at least six days prior to the public meeting. The request to add the second extension on the agenda was made on September 23,

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request for a second extension came before BLNR again on October 10, 2003. On that date, at its regularly scheduled public meeting, BLNR granted HELCO a further extension of nineteen months to complete its plans for Keāhole under CDUP HA-487A. The minutes of the October 10, 2003 meeting stated:

> Construction on the project commenced on April 29, 2003, but was stopped by July 6, 2003 when the [court] reversed the Board's decision. The decision is currently being appealed. In anticipation of the December 31, 2003 deadline, HELCO is requesting a time extension to complete the project should the courts permit construction to commence.

(Emphasis added.) The minutes of that meeting indicate that no one in attendance opposed the second extension.

Appellants did not receive direct notice of the October 10, 2003 BLNR agenda containing HELCO's request and did not learn of BLNR's actions until some time later. On December 16, 2003, Appellants appealed to the court from BLNR's October 10, 2003 decision to grant HELCO's request for a second extension of time pursuant to Hawai‘i Revised Statutes (HRS) § 91-14 (1993). On December 24, 2003, HELCO filed a motion to dismiss the appeal. The motion was heard on January 15, 2004, and on February 26, 2004, the court entered findings of fact, conclusions of law, and an order dismissing the appeal.

The court concluded, inter alia as follows: BLNR "had jurisdiction to consider the HELCO Extension Request at its October 10, 2003 meeting"; because the appeal did "not arise from

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[3](...continued)
2003, only three days before the scheduled meeting and, thus, the extension could not be heard by BLNR at that time.

a hearing 'required by law,'" the court lacked appellate jurisdiction; BLNR "complied with all of the notice provisions of HRS Ch. 92 with respect to its October 10, 2003 meeting"; the court's finding that Waimana lacked standing in its 1994 order remanding the CDUA back to BLNR (1994 remand order)[4] was binding on the parties in the instant appeal as a matter of res judicata; and Hee also lacked standing because he was in privity with Waimana. Final judgment dismissing the appeal was entered on March 23, 2004. Appellants filed a notice of appeal to this court on April 16, 2004.

[4] As discussed in Keahole Defense, the court rendered the following pertinent conclusions of law in the 1994 remand order:

> (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:
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> > [Waimana] is an energy company. 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 generating station may suppress development of [Waimana's] project.
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> (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)[.]

Slip op. at 5-6 (emphases in original).

II.

Appellants argue that the court "erred in affirming BLNR's October 10, 2003 decision granting HELCO an additional 19 months in which to complete a 56-megawatt power plant."[5] Specifically, they contend that (1) BLNR did not have jurisdiction to consider HELCO's request for a second extension to complete construction after CDUP HA-487A had expired, (2) "BLNR failed to provide proper notice of HELCO's request for an extension of time," (3) the court erred in denying Hee standing inasmuch as (a) "Hee is currently on the [Department of Hawaiian Home Lands (DHHL)] wait-list for an award of agricultural land on the Island of Hawaii," (b) Hee, as a native Hawaiian, has a protected interest as a beneficiary of a public trust, (c) Hee's due process rights were violated, and (d) "Hee has not been afforded equal protection under the law," and (4) the court erred in determining that Waimana lacked standing based on the 1994 remand order, insofar as (a) standing is addressed de novo and Waimana was subsequently granted an exclusive license to provide communications services to land

[5] The court did not expressly "affirm" BLNR's October 10, 2003 decision. In conclusion of law (conclusion) no. 5, the court ruled that the request for a second extension heard on October 10, 2003 was not a further extension of the contested case hearing at issue in the pending supreme court case docketed as S.Ct. No. 25446. Therefore, the court ruled in conclusion no. 6 that BLNR had jurisdiction to consider the second extension request. In conclusion no. 10, the court decided that because "the instant appeal does not arise from a hearing 'required by law,' . . . [it] lack[ed] appellate jurisdiction to consider this appeal." Having concluded that it lacked jurisdiction, the court could not make any decision regarding BLNR's decision and was required to dismiss the appeal. See Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003) (holding that if a court concludes that it lacks subject matter jurisdiction, the only disposition allowed is dismissal).

abutting the Keāhole site, and (b) Waimana, "as a native Hawaiian corporation[,] is given, by law, preferential treatment for the use of Hawaiian home lands, over non-Hawaiian entities."

Answering briefs were filed by both BLNR and HELCO. In response, Appellees state that the sole issue is whether the court, pursuant to HRS § 91-14, properly dismissed the appeal for lack of subject matter jurisdiction. BLNR asserts that (1) Appellants did not participate in a contested case hearing, as required, to obtain judicial review of an administrative agency action under HRS § 91-14, (2) all notice requirements were fulfilled for BLNR's October 10, 2003 regular meeting, and (3) "Appellants failed to request a contested case [hearing] prior to filing their appeal." Specifically, HELCO argues that (1) the court's conclusion that BLNR's October 10, 2003 meeting was not a contested case hearing required by law must be affirmed, (2) BLNR's October 10, 2003 meeting was not a continuation of the contested case hearing on HELCO's first extension request, and (3) Appellants lack standing to bring this appeal pursuant to the doctrine of res judicata.

In reply, Appellants maintain that (1) "HELCO has consistently managed to circumvent legal requirements in its effort to construct a baseload power plant," (2) "jurisdiction is inherent to the issues raised on appeal," and (3) "HELCO's reliance on res judicata is misplaced." Appellants do not make a specific request for relief sought from this court in their

conclusion as required by Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(9). Presumably, Appellants desire that this court reverse the court's March 23, 2004 final judgment and remand to the court with instructions to remand to the BLNR.

III.

"[I]t is well settled that an appellate court is under an obligation to ensure that it has jurisdiction to hear and determine each case and to dismiss an appeal . . . where it concludes it lacks jurisdiction." Ditto v. McCurdy, 103 Hawai‘i 153, 157, 80 P.3d 974, 978 (2003) (citations omitted). Questions of jurisdiction are reviewed de novo. In re Doe Children, 105 Hawai‘i 38, 52, 93 P.3d 1145, 1159 (2004) (citations omitted). Accordingly, questions of standing, which implicate the court's jurisdiction, are also reviewed de novo. Mottl v. Miyahira, 95 Hawai‘i 381, 388, 23 P.3d 716, 723 (2001).

Appellants appealed BLNR's October 10, 2003 decision granting HELCO's second extension request pursuant to the Hawai‘i Administrative Procedure Act (HAPA), HRS § 91-14.[6] In order to

[6] HRS § 91-14 (1993) provides, in pertinent part, as follows:

> **HRS §91-14 Judicial review of contested cases.**
> (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another

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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.

Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 431, 903 P.2d 1246, 1252 (1995) [hereinafter, PASH] (emphases added).

IV.

However, in Keahole Defense, this court held that Waimana was collaterally estopped from re-litigating its standing to challenge CDUA HA-487A based on the resolution of the standing issue in the litigation resulting in the 1994 remand order (1994 remand order litigation). Keahole Defense, slip op. at 19-23. Logically, inasmuch as Waimana could not contest HELCO's first request for extension of time under CDUA HA-487A because it was

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

collaterally estopped by the determination of standing from the 1994 remand order litigation, the doctrine of collateral estoppel, which is again based on the resolution in the 1994 remand order litigation, operates to bar Waimana's challenge to HELCO's second request for extension of time as well.[7] In other words, because Waimana was collaterally estopped to challenge the first extension of time by the determination that it lacked standing in the 1994 remand order litigation, it is also collaterally estopped to challenge the second extension by that same determination.

V.

The doctrine of collateral estoppel would also operate against Hee, who, although not a party in Keahole Defense, is in privity with Waimana as its president. Dorrance v. Lee, 90 Hawai'i 143, 148, 976 P.2d 904, 909 (1999) (stating that "[i]ssue preclusion, or collateral estoppel, on the other hand, 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 decided in the earlier action" (some emphases added and some omitted)); Marine Midland Bank v. Slyman, 995 F.2d 362,

[7] As stated supra, to support its position that it had a due process "property" right giving rise to standing to challenge the second extension request, Waimana argues that (1) it has a constitutionally protected property interest in the 153-acre tract of Department of Hawaiian Home Lands (DHHL) property adjacent to the Keāhole power plant via an exclusive license with DHHL to provide telecommunications services and (2) "as a native Hawaiian corporation, [Waimana] is given, by law, preferential treatment for the use of Hawaiian home lands, over non-Hawaiian entities." These very arguments were rejected in Keahole Defense. See Keahole Defense, slip op. at 27-35.

365 (2d Cir. 1993) (finding that parties who were officers, directors, and sole shareholders of a corporation were in privity with it); In re Teltronics Servs., Inc., 762 F.2d 185, 190 (2d Cir. 1985) (holding that the founder, president, chairman of the board, and substantial shareholder of a corporation was in privity with the corporation); Drier v. Tarpon Oil Co., 522 F.2d 199, 200 (5th Cir. 1975) (opining that the president of a corporation, who was also a major stockholder, was in privity with the corporation); Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384-85 (N.D. 1992) (concluding that privity existed between a closely held corporation and its president for purposes of res judicata and collateral estoppel where the president was the sole shareholder).

Similar to Waimana, Hee contends that he has a constitutionally protected property interest in the DHHL land adjacent to the Keāhole power plant because he "is currently on the DHHL wait-list for an award of agricultural land on the Island of Hawaii," is a "beneficiary of State-ceded lands upon which HELCO's peaking station at Keahole is located," and is a beneficiary of the public trust.[8]

[8] Article XI, section 1 of the Hawai'i Constitution, entitled "Conservation and Development of Resources," provides:

> **Section 1.** For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of

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Hee's argument that he has a protected interest in the DHHL land at Keāhole based on his placement on the DHHL wait list for agricultural land is unpersuasive. That land is intended for development as a residential area with single family homes, a shopping center, and possibly a day care center. In contrast, Hee is on the wait list for an award of agricultural land. Based on DHHL's current plans for its land at Keāhole, Hee would not receive any land in that particular tract and, thus, does not have a property interest in it.

Hee also maintains that

> as a beneficiary of State-ceded lands upon which HELCO's peaking station at Keahole is located, [he] is entitled to enforce covenants and restrictions related to the conveyance of such land[, that b]y operation of U.S. Congressional mandate and State law, he is conferred with inalienable rights to property originating from designated ceded lands[, and that t]hese rights may not be diluted or extinguished.

Aside from these statements, Hee does not explain how his rights as a ceded lands beneficiary were violated. He does not establish a property interest that would entitle him to a hearing.

Also as with Waimana's arguments, Hee's argument that "native Hawaiians have a protected interest as beneficiaries of a public trust" is unpersuasive. Hee does not explain how his status as a beneficiary of the public trust constitutes a "legitimate claim of entitlement" which would then afford him a

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> the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

due process right to a hearing. Moreover, as observed in Keahole Defense, under the settlement agreement, the land will in fact benefit from more protection because HELCO is required to install pollution and noise control measures. See Keahole Defense, slip op. at 12. Hence, Hee has not established that his status as a public trust beneficiary entitled him to a hearing. In light of our disposition we do not reach the question of whether Appellants satisfied the requirements set forth in PASH.

VI.

Based on the foregoing, the court's March 23, 2004 judgment dismissing Appellants' appeal is affirmed.

DATED: Honolulu, Hawai'i, May 25, 2006.

On the briefs:

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