No. 29440

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

KAUAI SPRINGS, INC, Appellant-Appellee, vs. PLANNING COMMISSION OF THE COUNTY OF KAUAI, Appellee-Appellant.	Civil No. 07-1-0042 (Agency Appeal) APPEAL FROM THE SEPTEMBER 23, 2008 FINAL JUDGMENT ON THE COURT'S SEPTEMBER 17, 2008 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER REVERSING IN PART AND VACATING IN PART APPELLEE PLANNING COMMISSION OF THE COUNTY OF KAUAI'S FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER RE: USE PERMIT U-2007-1, SPECIAL PERMIT SP 2007-1, AND CLASS IV ZONING PERMIT Z-IV-2007-1 (DATED JANUARY 23, 2007) FIFTH CIRCUIT COURT HON. KATHLEEN N.A. WATANABE

ANSWERING BRIEF FOR THE APPELLEE KAUAI SPRINGS, INC.

APPENDICES "1" - "3"

APPELLEE'S STATEMENT OF RELATED CASES

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (cont'd)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES (cont'd)

Page

CONSTITUTIONAL PROVISIONS

Haw. Const.

TABLE OF AUTHORITIES (cont'd)

Page

STATUTES AND ORDINANCES

RULES

OTHER AUTHORITIES

STATEMENT OF THE CASE

I. NATURE OF THE CASE

A. Summary

The Kauai Planning Commission (Planning Commission) asks this Court to validate a remarkable theory: that in the course of reviewing whether Kauai Springs, Inc. (Kauai Springs) was entitled to three simple zoning permits for its agriculturally-zoned land, the public trust doctrine required the Planning Commission to determine water rights and water usage – issues acknowledged as beyond the Planning Commission's competence, and beyond its jurisdiction.

The Planning Commission's consideration of the zoning permits required it to determine whether Kauai Springs' use of its land was "compatible with the neighborhood" and whether it was "reasonable use of land situated within the Agricultural or Rural District." Further, Haw. Rev. Stat. § 91-13.5 (1998) and Kauai's "deemed approved" ordinances mandate that if the Planning Commission did not process the applications within certain times, they were automatically approved.

The Planning Commission, however, did not focus on these issues. Instead, after the "deemed approved" deadlines has expired, it denied the zoning permits because "the land use permit process should insure that all applicable requirements and regulatory processes relating to water rights, usage, and sale are satisfactorily complied with prior to taking action on the subject permits." R:CV07-1-0042 at176. The only such "regulatory process" identified by the Planning Commission was that Kauai Springs had not "proactively sought a declaratory ruling" from either the State Commission on Water Resources Management (Water Commission or CWRM) or the State Public Utilities Commission (PUC), even though these agencies had already informed the Planning Commission they had no concerns with Kauai Springs. The Planning Commission even second-guessed the PUC's conclusion that none of the water bottling companies in the state – including Kauai Springs – is a "public utility" when it denied the zoning permits because Kauai Springs had not sought a PUC declaratory ruling to that effect.

Consequently, the circuit court rejected the Planning Commission's claim that the public trust doctrine requires an open-ended and standardless inquiry, and concluded that the Planning Commission fulfilled any duties it may have had under the public trust because it had done everything it said it needed to do. The court also concluded the zoning permits had been approved

by operation of law, and that the Planning Commission's denial – lacking any substantial justification – was arbitrary and capricious.

In this secondary appeal, the Planning Commission focuses on the circuit court's "implicit holdings" rather than what the circuit court actually held. *See, e.g.*, Op. Br. at 12 (the circuit court "erred in *implicitly* holding in its Conclusions of Law that the Planning Commission had *no duty* under the public trust to consider [Kauai Springs]'s water use.") (emphasis added). The circuit court did not hold the Planning Commission had "no duty" under the public trust: it acknowledged the Planning Commission has public trust duties, but determined "[t]here is nothing in the Record of this case to show that the Planning Commission did not fulfill any duty it may have under the public trust." R:CV07-1-0042 at189 (citing *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006)).[1]

At no time during the series of hearings it conducted, or in the circuit court, did the Planning Commission point to any information it lacked. Even now, its Opening Brief fails to articulate what its public trust duties supposedly encompass beyond having Kauai Springs prove "that the use of water was legal" (and it does not explain what this is supposed to entail). Op. Br. at 1. Indeed, the Planning Commission's written findings were internally contradictory, got undisputed facts wrong, and appear to have been hastily drafted in an attempt to avoid the "deemed approved" deadlines.

Consequently, the circuit court correctly concluded the Planning Commission's decision to deny the three zoning permit applications was "in violation of statutory provisions, in excess of the statutory authority or jurisdiction of the Planning Commission, made upon unlawful procedure, affected by other error of law, clearly erroneous, and arbitrary, or capricious." R:CV07-1-0042 at 190. The circuit court's findings of fact are not clearly erroneous and it made no reversible errors of law. The judgment of the circuit court should be affirmed.

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1. The circuit court also concluded there was nothing in the Planning Commission's record that issuance of zoning permits to Kauai Springs "might affect water resources subject to the public trust." *See* Findings of Fact, Conclusions of Law, and Order Reversing in Part and Vacating in Part Appellee Planning Commission of the County of Kauai's Findings of Fact, Conclusions of Law, Decision and Order re: Use Permit U-2007-1, Special Permit SP 2007-1, and Class IV Zoning Permit Permit Z-IV-2007-1 (Dated January 23, 2007) (FOF/COL) at 23, Conclusion of Law (COL) ¶¶ 63, 72 (filed Sep. 17, 2008) (R:CV07-1-0042 at189). A copy of the circuit court's FOF/COL and Order is attached as Appendix 1.

B. Questions Presented

1. Did the circuit court clearly err when it determined that Kauai Springs did not expressly or impliedly assert to a waiver of the "deemed approved" deadlines?

2. The public trust requires that state and county agencies take "reasonable measures" to consider the public trust resource, and "make appropriate assessments."The Planning Commission denied Kauai Springs' applications for three zoning permits because "there may be outstanding regulatory processes with [the Water Commission] that [Kauai Springs] must satisfy." The Water Commission and other agencies including the PUC earlier had informed the Planning Commission that they had no concerns with Kauai Springs, and the Planning Commission identified no other "regulatory processes" that could be undertaken. The second question presented is whether the circuit court correctly concluded the Planning Commission fulfilled its public trust duty.

II. STATEMENT OF FACTS

A. Kauai Springs' Agriculturally-Zoned Parcel

Kauai Springs is a small, Kauai-family-owned business operated by Jim and Denise Satterfield, with the help of their five children. R:CV07-1-0042 at 167.[2] Kauai Springs fills 5-gallon water bottles, which are delivered to homes, businesses, and offices across Kauai. *Id.* Kauai Springs' customers include departments and agencies of the County of Kauai. *Id.* State law regulates "bottled water" and "bottled water plants." *See* Haw. Rev. Stat. ch. 328D (1993).[3]

On July 4, 2004, the State of Hawaii Department of Health issued a permit approving Kauai Springs as a "bottled water manufacturer." R:CV07-1-0042 at 168. Kauai Springs was inspected and found to be in full compliance. *Id.* On July 9, 2004, the Department of Health found Kauai Springs

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2. Rule 28(b)(3) of the Hawaii Rules of Appellate Procedure requires that "each statement of fact" in a brief be supported by a reference to the Record. Critical portions of the Planning Commission's brief fail to substantially comply with this requirement by referencing "facts" not actually in the Record. In the first two pages alone, for example, the brief refers to "commercial exploitation," the "ambitious water-bottling company with big aspirations to profit""reluctantly" applying, and "pretending to cooperate," without supporting Record references. These characterizations are not supported by Record references because there are none. Lacking a factual basis in the Record, the brief's editorializing should be viewed for what it is: an improper not-so-subtle *ad hominem* attempt to shift the focus in this appeal away from the Record.

3. The Planning Commission's brief asserts the five-gallon bottles are "shipped to customers." Op. Br. at 3. More accurately, they are personally "delivered" by pickup truck by Jim Satterfield and his teenage boys to Kauai Springs' customers.

in compliance with Hawaii Administrative Rules chapter 12 (Food Service and Food Establishment Code) and Hawaii Revised Statutes chapter 328D (Bottled Water), and issued a "Food Establishment Permit" (No. K3323) to Kauai Springs to "engage in the business of Bottled Water Manufacturer." R:CV07-1-0042 at 168-69.

Since that time, Kauai Springs has been bottling water on land located in Koloa, on the east side of Maluhia Road (Tax Map Key No. (4) 2-008-002:5) (the Property). R:CV07-1-0042 at 168. The Property is licensed to Kauai Springs by Makana Properties, LLC. *Id.*[4] The Property is located in the state "Agricultural" Land Use District, is designated "Agricultural" by the Kauai General Plan, and a portion of it (a former cane haul road) is zoned "Open District (O)." *Id.*

Kauai Springs does not have control over the source of the water it bottles, or of the system of tunnels and pipes by which the water reaches the Property, which is located miles away from the source. R:CV07-1-0042 at 169. Kauai Springs purchases its water from EAK Knudsen Trust (Knudsen), which owns the source, an underground spring 1,000 feet up Kahili Mountain. RA at 261-262, 657-61. While Kundsen owns the spring and the water, it is transmitted by a gravity-fed private system originally constructed by Koloa Sugar Mill in the 1890's to irrigate the ahupuaa of Koloa, but which is now owned by Grove Farm Company (Grove Farm). R:CV07-1-0042 at 169.

Kauai Springs receives the water from a pipe that runs across the Property. *Id.* In addition to supplying Kauai Springs, the pipe provides domestic water to eleven homes along Wailaau Road, makai of the Property. *Id.* Kauai Springs does not bottle surface water. *Id.* The water it purchases from Knudsen is ground water, from a spring. *Id.* In that sense, Kauai Springs is no different than every other water bottler in Hawaii. *Id.*

B. Prior To Opening, Kauai Springs Obtained County And State Permits

On April 17, 2003, the County of Kauai approved of the construction of a "watershed" on Kauai Springs' Property. R:CV07-1-0042 at 168 (Class IV Zoning Permit Z-912-03, issued to Kauai Springs for an electrical temporary drop for construction of a watershed) ("[t]he construction, work, use or activity approved in this permit shall be subject to inspection by the Planning Inspector . . ."). *Id.* According to Barbara Pendragon, the County planner originally assigned to process Kauai

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4. Although the transfer occurred after the Record was compiled, the land is no longer owned by Makana Properties, LLC. It is now owned by Wailaau Properties Family Ltd. Partnership. This is not a material fact, but if it is deemed to be, the parties will supplement the Record.

Springs' application, the watershed "looked like any other ag. building at the time." R:CV07-1-0042 at 170.

On September 17, 2003, the County issued Building Permit #03-709 for a 1,600 square foot watershed on the Property. R:CV07-1-0042 at 168. Plainly written on the Building Permit Application form are the words, "Bottled Water Purifying Facility," and the County's approval stamps. *Id.* The Planning Department approved the Building Permit. *Id.* The County's database denotes this permit was for "Botteled [sic] Water Processing." *Id.*

C. The Planning Department Demanded Kauai Springs Apply For Further Permits

Following a complaint believed to have been instituted by an Oahu competitor of Kauai Springs, on May 15, 2006, the Planning Department issued a cease and desist letter to the owner of the Property citing alleged violations of the Kauai County Zoning Code, including "the activity of processing and packaging [bottled water] without the proper permits" and "[t]he use of the above mentioned premises for Industrial processing and packaging purposes is not generally permitted within the Agricultural District." R:CV07-1-0042 at 169. On July 5, 2006, the Planning Department accepted Kauai Springs' completed application for three zoning permits: (1) Use Permit U-2007-1; (2) Special Permit SP-2007-1; and (3) Class IV Zoning Permit Z-IV-2007. R:CV07-1-0042 at 170. Kauai Springs requested to maintain its existing use, and expand it to include bottling water in smaller bottles for wider distribution. *Id.*

D. Zoning Permits Must Be Processed Within A Fixed Time, Or They Are Deemed Approved Under State and County Law

The Planning Department's acceptance of the applications triggered the commencement of deadlines for consideration. In Haw. Rev. Stat. § 91-13.5 (1998), the Legislature required State and County agencies adopt rules to provide for a maximum time during which a land use permit application may be considered by an agency. If the agency has not granted or denied the application during that time, it is deemed to be automatically approved. Pursuant to this authority, the County of Kauai adopted rules and ordinances specifying the maximum time periods for agency consideration, and Kauai Springs' zoning permit applications were governed by provisions in the Kauai County Code and Planning Commission Rules setting forth the time in which the County must process them, or they were "deemed approved." R:CV07-1-0042 at 179. Use Permits must be

processed in 105 days after acceptance of an application. R:CV07-1-0042 at 180; Kauai County Code § 8-20.6; Kauai County Code § 8-19.5. Special Permits must be processed within 210 days of acceptance of an application. R:CV07-1-0042 at 181-82; Rules of Practice and Procedures of the Planning Commission, County of Kauai §§ 13-7, -8. Class IV Zoning Permits must be processed within 120 days of acceptance of an application. R:CV07-1-0042 at 182; Kauai County Code § 8-19.6.

E. The Water Commission And Public Utilities Commission Disclaimed Any Interest In Kauai Springs

The Planning Department requested input from various State and County agencies.R:CV07-1-0042 at 170. On September 26, 2006 in a letter from the Water Commission to Ian K. Costa, Plamning Director, County of Kauai, the Water Commission informed the Planning Department that "[t]he Island of Kauai has not been designated as a ground-water management area; therefore a water use permit from the Commission is *not* required to use the existing source(s) or to change the type of water use." R:CV07-1-0042 at 170 (emphasis added).

The Planning Director followed up with the Water Commission in a November 6, 2006 letter. *Id.* He attempted to confirm the Planning Department's understanding of the Water Commission's position that "no permit is required for the Applicant's use of water from the existing water system: (a) The tunnel is not being changed ... (b) The existing source has been registered and is basically grandfathered ... (c) There is a closed line from the tunnel to the tank." R:CV07-1-0042 at 170-71. The Planning Director stated, "Please advise if you concur with the foregoing, and if pursuant to those conditions, *no permit is required from the Commission on Water Resources*." R:CV07-1-0042 at 171 (emphasis added).

The Water Commission responded:"[w]e concur with your summary of our comments and *confirm that no permits from the Commission are required for the proposed use of water* under the three conditions outlined in your letter." *Id.* (emphasis added).

The Planning Department also inquired whether the PUC had jurisdiction over Kauai Springs as a public utility. *Id.* The PUC's Chief Counsel responded in a letter to the Planning Director that Kauai Springs is not a public utility, and is not subject to PUC jurisdiction:

> "[w]ith respect to the Kauai Springs bottling operation, *it does not appear that Kauai Springs would be a public utility subject to commission jurisdiction.* Such operations

> may not rise to services of such a public character and of public consequence and concern that is to be regulated under HRS Chapter 269, as bottled water may be obtained from a number of competing sources and providers. *The commission does not currently exercise jurisdiction over any water bottling facilities in the State.* Similarly, although the commission regulates companies that provide gas through pipelines to homes an businesses, the commission does not regulate entities that bottle and distribute liquefied petroleum gas (i.e., propane)".

Id. (emphasis added).

Many other County and State agencies provided input, but none recommended denial of the permits. *Id.* The County Public Works Department recommended a setback from the road. *Id.* The County Water Department advised that water service would not be available from the County. *Id.* The Kauai Fire Department had no objections. R:CV07-1-0042 at 172. The State Department of Health merely reminded about its sanitation criteria. *Id.* The State Historic Preservation stated that "no historic properties will be affected, because . . . residential development/urbanization has altered the land." *Id.* The State Land Use Commission sought additional information to confirm the land area, but had no further comment. *Id.*

F. After The Comment Period Closed, The Planning Commission Accepted A Back-Dated Objection From OHA

However, after the public hearing period had expired, in a letter dated November 30, 2006 but authored later and backdated, the Office of Hawaiian Affairs (OHA) urged the Planning Commission to deny Kauai Springs' applications. R:CV07-1-0042 at 173. *See* Letter from Clyde Namuo, Administrator, to Randall Nishimura, Chairperson (Document No. 000348-000350, Administrative Record of the Planning Commission (KPC Record) (R:CV07-1-0042 at 258)). A copy of this letter is attached as Appendix 2). OHA's letter is dated November 30, 2006, but references a phone conversation with Planner Barbara Pendragon that occurred on December 1, 2006, the day *after* the letter purportedly was written. *Id.* OHA's letter was not received by the Planning Department until December 5, 2006. *Id.* The letter acknowledges that the public hearing comment period was closed five business days after November 28, 2005. *Id.* OHA recognized that the "Planning Commission's specific kuleana is focused on land use and not water use." *Id.* OHA also recognized that "the Planning Commission [had] already acted on its important [public] trust

duty by requesting clarification on public trust issues from [the Water Commission] and the [PUC]." *Id.* Despite this acknowledgment, OHA objected, and requested denial of Kauai Springs' permits:

> We request, therefore, for the reasons outlined below, that the Commission continue to uphold its public trust responsibilities by denying Kaua'i Springs' permit applications without prejudice, until the applicant can show, and the appropriate agencies can concur, that Kaua'i Springs' proposed use is reasonable-beneficial and will not interfere with public trust purposes. At a minimum, this would required Kaua'i Springs to obtain and act on a declaratory order from [the Water Commission] regarding the need for an instream flow standard amendment and a final decision from the PUC regarding the need to register as a public utility.

Id.

OHA was operating on an erroneous assumption: "because this appears to be the first attempt to bottle and sell Hawai'i's *surface* water, the Planning Commission could be setting a dangerous precedent if this application is approved." App. 2 at 000348. Kauai Springs, as noted earlier, does not bottle surface water. R:CV07-1-0042 at 169. The water it purchases from Knudsen is *ground* water, from a spring. *Id.*

G. Planning Department Staff: Kauai Springs Is "Relatively Low Impact"

For the August 8, 2006 public hearing, the Planning Department prepared a staff report. R:CV07-1-0042 at 172. Planner Barbara R. Pendragon provided the Department's preliminary evaluation which stated, "[t]he existing water bottling facility is relatively low impact at the subject location in its current function and capacity." *Id.* She later discussed the potential impact should the facility someday expand. *Id.*

H. Planning Commission Distracted By Irrelevant Issues And Parties

Throughout the Summer and Fall of 2006, the Planning Commission held a series of public hearings on Kauai Springs' zoning applications. R:CV07-1-0042 at 172. On November 14, 2006, the Planning Commission held a public hearing, where it was informed by Planning Department staff that the Water Commission was not concerned with Kauai Springs:

> Staff: . . .I spoke with Mr. Ed Sukoda at the [Water Commission] and in discussing it with him it appears as though this *would not be of a concern to them* because it is not inducing additional water out of the tunnel.

Id. See KPC Record at 000195 (Transcript of Nov. 14, 2006 KPC hearing) (emphasis added). The Water Commission got it precisely right – Kauai Springs does not control the source.

R:CV07-1-0042 at 169. A second hearing was held on November 28, 2006, where KPC was again informed that Kauai Springs was not within the jurisdiction of the Water Commission or the PUC:

> Mr. Weinstein: Barbara on the two reports we got from the PUC and the CWRM they are both basically out of their jurisdiction. Is that what I understand? We got two today.
>
> Staff: Yes. Are you saying that this applicant's issue is outside of their jurisdiction?
>
> Mr. Weinstein: Well we just got it today and I didn't get a chance to read the whole thing but the PUC says that or don't they say that?
>
> Staff: I think they say that Grove Farm may be regulated *but the applicant's application would not.*
>
> Mr. Weinstein: It would be Grove Farm but *not this water bottling operation.*
>
> Staff: *Right.*

KPC Record at 000168 (Transcript of Nov. 28, 2006 hearing) (emphasis added).

Planner Bryan Mamaclay, the Planning Department staffer who replaced Barbara Pendragon as the lead planner processing Kauai Springs' application when it was ready for KPC consideration, stated his reasons for recommending denial during his January 23, 2007 testimony. R:CV07-1-0042 at 172-73. Mamaclay's testimony reveals that his "comfort level" was not satisfied that "other requirements" of the Water Commission were met while in the same breath he acknowledged that KPC's jurisdiction is "land use." R:CV07-1-0042 at 173. He did not clarify what he believed those "other requirements" might be:

> The thinking was, was there a process where the Applicant [Kauai Springs] or the owner of the land, Grove Farm in this case, at the intake level – *did they go through a process to insure that there's no violation of any CWRM rules.* So, um, I didn't just have, you know . . . *we didn't have that comfort level, in saying that, ah, other requirements from CWRM* . . . so . . . *I know it's a land use issue.* But I think we, we taking a look at the whole now, the whole system of, um, the Applicant's effort in getting the water.

KPC Record at 000136 (Transcript of Jan. 23, 2007 hearing) (emphasis added). The transcript of the hearing further reveals where the KPC's decision-making process was derailed by irrelevant and extrajurisdictional concerns about whether Kauai Springs made a profit, whether it had the right to

"draw water" (as noted earlier, Kauai Springs does not extract or divert any water, it simply purchases it from Knudsen), and whether it should be selling bottled water. R:CV07-1-0042 at 173.

> Mr. Hollinger: Question. So basically this operation because *he is making a profit is not legal*. Is that what we are talking about?
>
> Staff: Yes there is some uncertainty in our review that the applicant does not have the right to draw the water.
>
> Mr. Hollinger: So can we cut those eleven people off because what is there rights? They have no rights. If they are taking the water then that's the same to me. I mean if we are opening it up lets rip the top off and people down the line....
>
> Mr. Nishimura: I think those people down the line traditionally have drawn water from the system. That was part of that original water supply that Grove Farm furnished for the employees and eventually went down to the old mill.
>
> Mr. Chaffin: But a wrong is a wrong.
>
> Mr. Weinstein: But they are not re-selling it.
>
> Mr. Nishimura: Yes they are not re-selling that water. I think there is a slight difference.

KPC Record at 000135-000138 (emphasis added). The autoapprove deadlines were plainly in the forefront of the Planning Commission's and the Planning Department's thoughts (even though both appeared to wrongly assume only the 210-day autoapprove deadline for Special Permits was applicable, and did not recognize the deadlines for the other two permits had already expired):

> Chair: Bryan [Mamaclay] this was closed on 12/12 so the 60 days would be?
>
> Staff: *Actually we are dealing with a 210 days under the Special Permit rules and regulations so the actual deadline for action is today. The absolute deadline is next week Tuesday on January 31st.*
>
> . . . .
>
> Mr. Chaffin: I would like to see this deferred with the applicants permission?
>
> Chair: We cannot.

KPC Record at 000135-000138 (emphasis added); R:CV07-1-0042 at 173.

I. Planning Commission Hunts For A "Perpetrator" For Water Issues

The Planning Commission allowed the inquiry into Kauai Springs' zoning permits to devolve into an inquisition as to whether Knudsen had the right to the ground water, and whether Grove Farm had the right to transport it, not whether Kauai Springs' was an appropriate use of land zoned Agriculture and Open:

> Mr. Hollinger: So how do we go after the perpetrator?
>
> Staff: There's no perpetrator I believe at this time.
>
> Mr. Hollinger: Grove Farm.

KPC Record at 000135-000138. At a subsequent hearing, at least one KPC member appeared to understand that issues with Grove Farm were not within KPC's jurisdiction when considering Kauai Springs' zoning permit applications, while other members did not seem to understand this limitation on KPC's jurisdiction:

> Mr. Hollinger: WE are going after a small dog, *I want the big dog and he's the small dog.* It doesn't do anything and it disappears and we haven't done anything to address the situation of where that source is coming from.
>
> . . . .
>
> Mr. Aiu: *None the less I feel the water rights issue is more important.* . . . I am terribly afraid of doing anything that commercializes our water systems.

KPC Record at 0005, 00017 (Transcript of Feb. 13, 2007 hearing) (emphasis added). Other Planning Commission members appeared to understand that water issues were beyond the commission's jurisdiction:

> Mr. Weinstein: So I would like to see some type of State agency review and give us a decision and tell us if it's ok. I think land use, we can make that decision but it's out of our jurisdiction to make those decisions on water until somebody else can make those decisions for us on water use. So is there an agency out there we can correspond to?
>
> Staff: The only agency I can think of would be the Commission on Water Resource Management.
>
> . . . .

Mr. Nishimura: My contention is that land use is predicated on the ability to remove the water resources ....

. . . .

Chair: I don't think this is the body where we decide whether the applicant can continue his business.

KPC Record at 00015, 00018.

J. Planning Commission Denied The Applications Because "there may be outstanding regulatory processes with CWRM that the Applicant must satisfy"

On January 23, 2007, the Planning Commission issued its Findings of Fact, Conclusions of Law, Decision and Order (Planning Commission's Decision and Order), denying Kauai Springs' applications. KPC Record at 000342-000347. A copy of the Planning Commission's Decision and Order is attached as Appendix 3. The KPC Decision and Order first acknowledged the legal standards to which the Planning Commission was required to adhere when considering whether to issue the zoning permits:

STANDARDS FOR ISSUANCE FOR USE PERMITS

15. Section 8-20.1 of the Kauai County Code, 1987, as Amended, states:

"The purpose of the 'use permit' procedure is to assure the proper integration into the community of uses which may be suitable only in specific locations in a district, or only under certain conditions, or only if the uses are designed, arranged or conducted in a particular manner, and to prohibit such uses if the proper integration cannot be assured."

16. Section 8-20.5 of the Kauai County Code, 1987, as Amended, further states:

"A Use Permit may be granted only if the Planning Commission finds that the establishment, maintenance, or operation of the construction, development, activity or use in the particular case is a compatible use and is not detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of the proposed use or detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the community, and will not cause any substantial or harmful environmental consequences on the land of the applicant or on other

lands or waters, and will not be inconsistent with the intent of this Chapter and the General Plan."

STANDARDS FOR ISSUANCE OF SPECIAL PERMITS

17. Section 13-6 of the Rules and Practice of Procedures of the Commission (Guidelines for Issuance of Special Permit) states:

"The Planning Commission may approve a Special Permit under such protective restrictions as may be deemed necessary if it finds that the proposed use:

(a) Is an unusual and reasonable use of land situated with the Agricultural or Rural District, whichever the case may be. The Planning Commission shall consider the following guidelines in determining unusual and reasonable use:

1) Such use shall not be contrary to the objectives sought to be accomplished by Chapters 205 and 205A HRS, and the rules of the Land Use Commission;

2) The desired use would not adversely affect the surrounding property;

3) The use would not unreasonably burden public agencies to provide roads and streets, sewer, water, drainage, school improvements, and police and fore [sic] protection;

4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and

5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district; and

(b) Would promote the effectiveness and objectives of Chapter 205, HRS, as amended."

KPC Record at 000342-000343.

The Planning Commission's Decision and Order set forth only four Conclusions of Law, which are reproduced in their entirety here:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject permits under provisions of Article XIV of the Kauai County Charter, Sections 8-20.5 and Section 8-21.2 of the Comprehensive Zoning Ordinance, and Chapter 13 of the Rules of Practice and Procedures of the Kauai Planning Commission.

2. Due notice was given and all parties were offered an opportunity to present evidence and argument on the requested permits.

3. In view of the comments received from CWRM and PUC the land use permit process should insure that all applicable requirements and regulatory processes relating to water rights, usage, and sale are satisfactorily complied with prior to taking action on the subject permits. The Applicant, as a party to this proceeding should also carry the burden of proof that the proposed use and sale of the water does not violate any applicable law administered by CWRM, the PUC or any other applicable regulatory agency.

4. There is no substantive evidence that the Applicant has any legal standing and authority to extract and sell the water on a commercial basis.

KPC Record at 000346. The Planning Commission Decision and Order states the permits were denied because the Planning Commission was unsure whether to grant the permits:

> As evidenced by additional testimony provided by the Office of Hawaiian Affairs and concerned parties, the Planning Commission is being requested *to exercise caution and deny* the Applicant's request in its role as decision makers in the land use permit process.

KPC Record at 000346 (emphasis added). The Planning Commission's Findings of Fact (FOF) show that it had the input of the Water Commission and the PUC, both of which informed the Planning Commission that Kauai Springs was not within their respective jurisdictions:

> 18. The delay in reaching a decision on this proceeding was attributed to staff's effort in obtaining additional information relating to the Applicant's authority and right to obtain and extract the water for commercial purposes. Therefore, additional comments in early November, 2006 were sought from the State Commission on Water Resource Management and the State Public Utilities Commission to determine the Applicant's standing relative to its status with other regulatory agencies that may have jurisdiction in the overall process of obtaining the water for commercial purposes.

KPC Record at 000344 (FOF #18). The Water Commission informed KPC that Kauai Springs required "no permits" because "the Applicant's use of the water is not affecting the source in any way (i.e., not inducing more water to come out of the source or tunnel)," "the existing source has been registered and is basically grandfathered, and there is an agreement between the new user (Applicant) and the operator of the system," and "there is a closed line from the tunnel to the tank." KPC Record at 000344 (FOF #19.a). The Water Commission also informed the Planning Commission that future changes to *the source* (which is owned by Knudsen, not Kauai Springs) might be of interest to the Water Commission. KPC Record at 000345 (FOF #19.b).

The Planning Commission's Decision and Order also acknowledged that the PUC similarly disclaimed interest in Kauai Springs. "In response to the Planning Department's letter dated November 6, 2006, it appears according to the PUC, that *Kauai Springs would not be a public utility subject to commission jurisdiction since the commission does not currently exercise jurisdiction over any water bottling facility in the State.*" KPC Record at 000345 (FOF #19.a [sic]) (emphasis added). This Finding of Fact also states that the PUC might have some interest in *Grove Farm*, the owner of the water transmission system, but *does not mention Kauai Springs*:

> b. The PUC further draws interest in its findings relating to Grove Farm as the seller of the water from its system to the Applicant and its status with the PUC. As stated by the PUC staff:
>
> > . . . **"there is a possibility that *Grove Farm* may be operating as a public utility under HRS Chapter 269. The analysis to determine whether *Grove Farm*, as to its operation of the water system, is a public utility under HRS Chapter 269 would include the following issues: 1) whether *Grove Farm* provides water service, directly or indirectly, for the public's use, as a class, or to just particular individuals; and 2) the amount of control, if any, its customer may be able to exert over *Grove Farm*'s water system and its operations. Additional information, including a review of all relevant facts and possibly testimony from all concerned parties, would be necessary before a determination could be made as to whether *Grove Farm* is a public utility under HRS Chapter 269".**
>
> c. The PUC staff further qualified itself in its response that this was an "informal opinion" based on the limited information provided in the department's inquiry and such opinion is not binding on the PUC. In order to

> obtain a formal opinion, a petition may be sought for declaratory relief pursuant to Chapter 6-61, Subchapter 16, Hawaii Administrative Rules.

KPC Record at 000345 (FOF #19.b., c. [sic]) (emphasis added) (bold original).

In the following (unnumbered) paragraphs of the Decision and Order, the Planning Commission seemingly ignored the above statements by the Water Commission, PUC, and its own Planning Department staff, and determined that "there may be outstanding regulatory processes with CWRM that the Applicant must satisfy" –

> In view of the foregoing, there may be outstanding regulatory processes with CWRM that the Applicant must satisfy. Based on the comments provided by CWRM and staff observations during the field trip, it should be the Applicant's responsibility to confirm and determine the need for any permits that may be required for the construction of the concrete stem wall and the steel panel mounted over the tunnel entrance. The permit requirements administered by CWRM are cited in HRS Section 174C-71(3)(A). (Protection of Instream Uses) ... and requires persons to obtain a permit from the Commission prior to undertaking stream channel alteration provided that routine streambed and drainage way maintenance activities and maintenance of existing facilities are exempt from obtaining a permit.
>
> Comments received from the PUC also draws interest to the extent that as a purchaser of water from Grove Farm, the operation may be subject to PUC regulation. The PUC in this regard encourages that a declaratory ruling be sought to allow more diligent review of the relevant facts and information associated with the proposed water bottling facility.
>
> As evidenced by additional testimony provided by the Office of Hawaiian Affairs and concerned parties, the Planning Commission is being requested to exercise caution and deny the Applicant's request in its role as decision makes in the land use permit process.

KPC Record at 000345-000346.

Kauai Springs afforded the Planning Commission the opportunity to remedy the errors in COL#3, COL#4, and the Decision and Order by seeking reconsideration on February 13, 2007. R:CV07-1-0042 at 176. On February 15, 2007, the Planning Commission denied the request. *Id.*; KPC Record at 000329.

III. PROCEEDINGS IN THE COURT BELOW

On March 15, 2007, Kauai Springs timely appealed the Planning Commission's decision and order to the circuit court pursuant to Haw. Rev. Stat. § 91-14 (1993) and Haw. Rev. Stat. § 205-6(e)

(2005) (denial of a special permit is independently appealable to the circuit court). R:CV07-1-0042 at 1-10; R:CV07-1-0042 at 177 (COL ¶ 4). Shortly thereafter, the Planning Department ordered Kauai Springs to shut down. KPC Record at 000326. When the Planning Department refused to stay this order pending resolution of Kauai Springs' appeal, on April 20, 2007, the circuit court entered a temporary restraining order preventing the Planning Department from summarily driving Kauai Springs out of business while the court considered the appeal. R:CV07-1-0042 at 86-87. On May 15, 2007, the court extended the temporary restraining order. R:CV07-1-0042 at 225-27. The court also preliminarily enjoined the Planning Commission. R:CV07-1-0042 at 228-31.

On June 7, 2007, the Planning Commission filed a motion to dismiss the appeal, arguing the appeal was untimely (R:CV07-1-0042 at 232-54), but one week later withdrew the motion (R:CV07-1-0042 at 255-57).

After briefing by the parties, and a hearing on August 20, 2007, the circuit court entered its FOF/COL and order on September 17, 2007. R:CV07-1-0042 at 166-91. The circuit court reversed the Planning Commission, and ordered that Kauai Springs' Use Permit and Class IV Zoning Permit were approved. *Id.* The circuit court vacated the Planning Commission's denial of Kauai Springs' application for the Special Permit, and remanded the case to the Planning Commission with an order to issue the Special Permit to Kauai Springs immediately. *Id.*

The circuit court concluded that the Planning Commission missed the autoapprove deadlines. R:CV07-1-0042 at 183-84. It also concluded the Planning Commission fulfilled its duty under the public trust. R:CV07-1-0042 at 188-89. The circuit court held the Planning Commission exceeded its authority or jurisdiction, and that its denials of the three zoning permit applications were "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and is arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id.* The court made permanent the May 20, 2007 preliminary injunction, and permanently enjoined the Planning Commission from enforcing its decision and order. *Id.*

On September 23, 2007, the circuit court entered final judgment in favor of Kauai Springs. R:CV07-1-0042 at 193-92.

STANDARD OF REVIEW

"On secondary judicial review of an administrative decision, Hawaii appellate courts apply the same standard of review as that applied upon primary review by the circuit court." *Kaiser Found. Health Plan, Inc. v. Dep't of Labor & Indus. Relations*, 70 Haw. 72, 80, 762 P.2d 796, 800-01 (1988) *quoted in Peroutka v. Cronin*, 117 Haw. 323, 326, 179 P.3d 1050, 1053 (2008). Thus, this court applies the standards of review in Haw. Rev. Stat. § 91-14, which provides:

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
>
> (1) In violation of constitutional or statutory provisions; or
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> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedure; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Haw. Rev. Stat. § 91-14(g) (1993). *See Save Diamond Head Waters LLC v. Hans Hedemann Surf, Inc.*, 121 Haw. 16, 24, 211 P.3d 74, 82 (2009) (citing *Citizens Against Reckless Dev. v. Zoning Bd. of Appeals*, 114 Haw. 184, 193, 159 P.3d 143, 153 (2007); *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*, 87 Haw. 217, 229, 953 P.2d 1315, 1327 (1998)).

Pursuant to section 91-14(g)(5), "administrative findings of fact are reviewed under the clearly erroneous standard, which requires [the appellate] court to sustain its findings 'unless the court is left with a firm and definite conviction that a mistake has been made.'" *Peroutka*, 117 Haw. at 326, 179 P.3d at 1053 (quoting *Bumanglag v. Oahu Sugar Co., Ltd.*, 78 Haw. 275, 279, 892 P.2d 468, 472 (1995)). Administrative conclusions of law "are reviewed under the *de novo* standard

inasmuch as they are 'not binding on an appellate court.'" *Peroutka*, 117 Haw. at 326, 179 P.3d at 1053 (quoting *Bumanglag*, 78 Haw. at 279, 892 P.2d at 472).[5] A conclusion of law that is supported by the circuit court's findings of fact and "that reflects an application of the correct rule of law will not be overturned." *Paul v. Dep't of Transportation*, 115 Haw. 416, 426, 168 P.2d 546, 556 (2007) (quoting *AIG Hawaii Ins. Co. v. Estate of Caraang*, 74 Haw. 620, 628-29, 851 P.2d 321, 326 (1993)).

ARGUMENT

The circuit court correctly held the Planning Commission arbitrarily and capriciously denied Kauai Springs' zoning permits. Kauai Springs did not expressly or impliedly assent to an extension of the autoapprove deadlines, nor could it.

The circuit court also correctly determined that the Planning Commission fulfilled its public trust duty to take "reasonable measures" to consider the public trust resource, and "make appropriate assessments" in order to satisfy its public trust duties by seeking – and receiving – input from the Water Commission and the PUC, both of whom informed the Planning Commission they had no interest in Kauai Springs. *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 227-28, 140 P.3d 985, 1007-08 (2006). Having failed to identify what other "regulatory processes" it claims are available, the Planning Commission could not shift the burden to Kauai Springs to define the Planning Commission's duties.

I. KAUAI SPRINGS COULD NOT– AND DID NOT – ASSENT TO AN EXTENSION OF THE AUTOMATIC APPROVAL DEADLINES

The Planning Commission does not claim it met the automatic approval deadlines in its own rules. Instead, it argues that Kauai Springs impliedly "assented" to an extension of those deadlines, and impliedly waived them. This argument fails for two reasons. First, if the Kauai County Code

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5. *In re Waiola O Molokai, Inc.*, 103 Haw. 401, 82 P.3d 664 (2004) does not stand for the proposition that the decisions of the Kauai Planning Commission are given extra deference simply because they may involve the public trust. *Cf.* Op. Br. at 16-17("In cases such as this, involving an agency's duties under the public trust doctrine, the presumption of validity imposes a heavier burden on the party challenging the agency decision."). In *Waiola*, the court concluded decisions of the *State Water Commission* are to be accorded heightened deference on water issues, which makes sense because the Water Commission is considered an expert agency on water matters. *Id.* at 421, 82 P.3d at 684 ("The presumption is particularly significant where the appellant challenges a substantive decision within the agency's expertise"). Here, the Kauai Planning Commission possesses no special expertise on water issues. In any event, *Waiola* concluded that since the public trust is a constitutional doctrine, the courts are the "ultimate tribunal." *Id.*

permits an applicant to assent to an extension, that provision is invalid because it exceeds the scope of the enabling statute, Haw. Rev. Stat. § 91-13.5 (1993). Second, as the circuit court concluded, Kauai Springs did not, in fact, assent to an extension, expressly or by conduct. R:CV07-1-0042 at 183-84.

A. The Kauai County Code Violates Superior State Law If It Allows Waiver Of Autoapprove Deadlines

A permit applicant is prohibited by superior state law from assenting to an extension of the automatic approval deadlines, and to the extent that Kauai ordinances or Planning Commission rules allow waiver, they are inapplicable.

The Planning Commission does not contest that under Kauai County Code § 8-20.6 and Kauai County Code § 8-19.5, it had 105 days after acceptance of an application for a Use Permit to process it. Nor does it contest that under the Rules of Practice and Procedures of the Planning Commission, County of Kauai §§ 13-7, -8, that it has 201 days from acceptance of a Special Permit application to process it. Nor does it contest that under Kauai County Code § 8-19.6, it had 120 days after acceptance of an application for a Class IV Zoning Permit to process it.[6]

These ordinances and rules were adopted by the County of Kauai pursuant to the requirement in Haw. Rev. Stat. § 91-13.5, which provides, in relevant part:

> (a) Unless otherwise provided by law, an agency shall adopt rules that specify a maximum time period to grant or deny a business or development-related permit, license, or approval; provided that the application is not subject to state administered permit programs delegated, authorized, or approved under federal law.
>
> (b) All such issuing agencies shall clearly articulate informational requirements for applications and review applications for completeness in a timely manner.
>
> (c) All such issuing agencies shall take action to grant or deny any application for a business or development-related permit, license, or approval within the established maximum period of time, or the application shall be deemed approved; provided that

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6. The Planning Commission's argument in footnote 12 (Op. Br. at 32 n.12) that the autoapprove time deadlines did not start running until the Planning Commission had "received" all information, rather than when the Planning Department accepted Kauai Springs' permit applications was raised for the first time in the footnote, and has been waived. *Alvarez Family Trust v. Ass'n of Apt. Owners of Kaanapali Alii*, 121 Haw. 474, 488 221 P.3d 452, 466 (2009) ("It is well-established in this jurisdiction that, where a party does not raise specific issues on appeal to the ICA or on application to this court, the issues are deemed waived and need not be considered.").

> a delay in granting or denying an application caused by the lack of quorum at a regular meeting of the issuing agency shall not result in approval under this subsection; provided further that any subsequent lack of quorum at a regular meeting of the issuing agency that delays the same matter shall not give cause for further extension, unless an extension is agreed to by all parties.

Haw. Rev. Stat. § 91-13.5 (1993). The three zoning permits sought by Kauai Springs each were "a business or development-related permit, license, or approval" subject to these autoapprove deadlines. *Id.* § 91-13.5(g).

When it required state and county agencies enact deadlines for expeditious processing of permit applications, the Legislature specifically noted only three circumstances under which the time periods designated by the agencies could be extended:

> The maximum period of time established pursuant to this section *shall be extended in the event of a national disaster, state emergency, or union strike, which would prevent the applicant, the agency, or the department from fulfilling application or review requirements.*

Haw. Rev. Stat. § 91-13.5(e) (1993) (emphasis added). The statute does not include the applicant's "assent" as a reason to extend the deadline. The inclusion of a specific matter in a statute implies the exclusion of others, and infers the item not mentioned was intended to be excluded from the statute's scope. *See, e.g., International S&L Ass'n v. Wig*, 82 Haw. 197, 201, 921 P.2d 117, 121 (1996) (citing 82 C.J.S. *Statutes* § 333, at 670 (1953)). Autoapprove statutes and ordinances are strictly construed. *See, e.g., Leslie v. Bd. of Appeals, County of Hawaii*, 109 Haw. 384, 126 P.3d 1071 (2006) (when county ordinances or rules require that a county agency "shall" undertake an action, it is mandatory); *Demolition Landfill Svcs, LLC v. City of Duluth*, 609 N.W.2d 278, 282 (Minn. App. 2000) ("administrative ease, while a legitimate concern, does not justify an interpretation of a statute which is inconsistent with its purpose;" agency's rejection of resolution granting permit is not the same as a denial, and failure of agency to specifically deny application within statutory time is deemed an approval).

Thus, if Kauai Springs is deemed to have impliedly assented pursuant to the Kauai Code or the Planning Commission's rules, those portions of the Code and rules which permit an applicant to expressly or impliedly agree to an extension conflict with superior state law and are invalid. Haw. Rev. Stat. § 46-1.5(13) (1993) (each county has the power to enact ordinances "not inconsistent with,

or tending to defeat, the intent of any state statute"); Haw. Rev. Stat. § 50-15 (1993) ("Notwithstanding the provisions of this chapter, there is expressly reserved to the state legislature the power to enact all laws of general application throughout the State on matters of concern and interest and laws relating to the fiscal powers of the counties, and neither a charter nor ordinances adopted under a charter shall be in conflict therewith."); *Stallard v. Consolidated Maui, Inc.*, 103 Haw. 468, 473, 83 P.3d 731, 736 (2004) (ordinances conflicting with state laws are invalid); *Save Sunset Beach Coalition v. City and County of Honolulu*, 102 Haw. 465, 481, 78 P.3d 1, 17 (2003) (state districting scheme prevails over city land use ordinance); *Kaiser Hawaii Kai Dev. Co. v. City and County of Honolulu*, 70 Haw. 480, 488, 777 P.2d 244, 250 (1989) (statute superior to conflicting charter provision)

Thus, it is beyond the power of the County to enact any provision regarding applicant "assent" to suspension of autoapprove deadlines. Counties and their agencies have no inherent police power and are administrative conveniences; they derive their power to enact ordinances by legislative grant, and any exercise of the power must be within the confines of the grant. *See, e.g., Kaiser Hawaii Kai Dev. Co*, 70 Haw. at 484, 777 P.2d at 247 (counties must exercise zoning power within the confines of the delegation from the state); *McKenzie v. Wilson*, 31 Haw. 216, 234 (Terr. 1930) ("Counties, cities and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the state otherwise provides").

In section 91-13.5, the Legislature required the counties to enact autoapprove rules, and mandated the only reasons for extending the deadlines would be "national disaster, state emergency, or union strike." The statute does not mention an "applicant's assent." The Planning Commission understood the legislative intent behind Haw. Rev. Stat. § 91-13.5 would be violated if the applicant could assent to an extension. KPC Record at 000003-000004 (Counsel: "Your rule on Special Permits has an automatic approval procedure and from what I have been told the legislative history behind this rule is even if the applicant were to request *it wouldn't apply.*") (emphasis added). Permitting an applicant to assent would utterly defeat the purpose of an autoapprove deadline because as a practical matter, it would result in no time limits, because no applicant would have the fortitude, when "asked" by a tribunal for more time, to deny the request. *See October Twenty-Four,*

Inc. v. Planning and Zoning Comm'n, 646 A.2d 926, 931 (Conn. App. Ct. 1994) ("It was reasonable for [the applicant] to await the commission's decision rather than to risk alienating the commission and being subjected to the strict judicial standards applicable to mandamus actions.").

B. Kauai Springs Did Not Assent To An Extension

Even in the absence of a state law prohibition on assent or waiver, the circuit court made the factual finding that Kauai Springs did not assent to an extension of the autoapprove deadlines by showing up at the Planning Commission's hearings after the Planning Commission had missed the deadlines.

First, the Planning Commission does not claim that Kauai Springs expressly assented, only that it impliedly did so because the Planning Commission might have interpreted its conduct that way. See Op. Br. at 31 ("Thus, the [circuit] Court's appraisal of whether Appellee assented to a delay of the automatic-approval deadline may consider whether Appellee's words or conduct were *understood by the Planning Commission* to manifest Appellee's willingness to postpone final decision.") (emphasis original). Because the Legislature expressly set out in section 91-13.5(e) when deadlines could be extended ("a national disaster, state emergency, or union strike"), implied assent to extensions cannot be favored. The circuit court concluded that "[i]t was reasonable for Kauai Springs to await the Planning Commission's decision." R:CV07-1-0042 at 184.

Second, merely appearing at a hearing after an autoapprove deadline has passed does not constitute waiver or affirmation. *See, e.g., October Twenty-Four, Inc. v. Planning and Zoning Comm'n*, 646 A.2d 926, 931-32 (Conn. App. Ct. 1994). In that case, the court of appeals upheld the trial court's determination that the applicant's attendance at a hearing did not constitute waiver of an automatic approval deadline:

> *The trial court concluded that [the applicant]'s presence at the commission's meetings after the date of automatic approval did not constitute waiver.* Waiver is the "intentional relinquishment of a known right." Examples of actions that have been deemed to result in a waiver of the right to automatic approval generally include cases where the applicant either expressly granted extensions of time or voluntarily withdrew the application. These applicants could not later claim that their applications had been approved by operation of law.
>
> The trial court found as a fact that [the applicant] never consented to an extension of time, nor did it intentionally relinquish its right to automatic approval simply by attending meetings. *The court noted that there is no requirement that an*

> *applicant approach the zoning commission on the day following automatic approval and demand that its applicant be approved. It was reasonable for [the applicant] to await the commission's decision rather than to risk alienating the commission and being subjected to the strict judicial standards applicable to mandamus actions.* The failure to adhere to the time constraints was due solely to the actions of the commission.

Id. at 931 (emphasis added) (citing *Dragan v. Conn. Medical Examining Bd*, 613 A.2d 739 (Conn. 1992)). The court noted that time deadlines could be waived by affirmative conduct such as an applicant requesting extra time, *see Frito-Lay, Inc. v. Planning & Zoning Comm'n*, 538 A.2d 1039 (Conn. 1988), or an applicant withdrawing the application. *October Twenty-Four*, 646 A.2d at 931 n.4 (citing *M & L Homes, Inc. v. Zoning & Planning Comm'n*, 445 A.2d 591 (Conn. 1982)).[7] In the present case, Kauai Springs did not ask for extra time, nor did it withdraw its applications, and its appearance at the hearing, standing alone, cannot be considered "assent" to more time.[8]

The Planning Commission also argues Kauai Springs affirmatively assented at the February 13, 2007 hearing when its counsel stated "we *would be willing* to execute a document, I'm happy to work with the County Attorney, a waiver of our rights." KPC Record at 000175 (emphasis added). Waiver is the intentional relinquishment of a known right, *Hiraga v. Baldonado*, 76 Haw. 365, 369, 31 P.3d 222, 326 (Haw. Ct. App. 2001), and this statement cannot be construed as an affirmative

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7. The unpublished federal trial court order denying a motion for reconsideration of a motion denying summary judgment because facts were disputed, relied upon by the Planning Commission (*see* Op. Br. at 33-34) is not persuasive contrary authority. In *Koloa Marketplace, LLC v. County of Kauai*, 2007 U.S. Dist. LEXIS 56274 (D. Haw. 2007), the parties did not raise – and the court did not analyze – the question of whether superior state law preempted the "assent" provisions in the Kauai Zoning Code. Hawaii courts are the arbiters of Hawaii law, not unpublished federal court decisions. *Bennett v. Yoshina*, 140 F.3d 1218, 1225 (9th Cir. 1998) ("[T]he Hawaii Supreme Court is by definition the final arbiter of Hawaii law.").

8. Implying assent in this circumstance would also present due process concerns, since after July 3, 2006, Kauai Springs had a "legitimate claim of entitlement"to the Use Permit by virtue of the autoapprove deadline in Kauai County Code § 8-19.5, and after November 2, 2006, Kauai Springs similarly possessed a property interest in its Class IV Permit pursuant to the autoapprove deadline in Kauai County Code § 8-19.6. *See Bd. of Regents v. Roth,* 408 U.S. 564, 577 (1972) ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."). Hawaii law defines "property" for Due Process purposes very broadly, and treats issued government permits as property rights that cannot be taken away without notice and hearing, or for arbitrary or capricious reasons. *See, e.g., Brown v. Thompson*, 91 Haw. 1, 11, 979 P.2d 586, 596 (1999) (mooring and live-aboard permits for a derelict boat, although virtually worthless, are property and may not be revoked without due process); *Kernan v. Tanaka*, 75 Haw. 1, 21, 856 P.2d 1207, 1218 (1993) (driver's licenses are property).

relinquishment because it is prospective, indicating only that Kauai Springs *might consent in the future* if the waiver was accomplished in writing and if it would allow the Planning Commission to consider granting the permits. No such agreement was executed and instead, the Planning Commission denied the applications.

II. THE PLANNING COMMISSION FULFILLED ITS PUBLIC TRUST DUTIES

A. The Circuit Court Did Not Hold The Planning Commission Has "No Duty" Under The Public Trust

The core of the Planning Commission's appeal is constructed on a faulty premise. The Planning Commission asserts it was error for the circuit court to conclude the it "had *no duty* under the public trust doctrine to consider [Kauai Springs'] water use." Op. Br. at 12 (emphasis added) (Point of Error "A"). The circuit court's conclusions, however, reflect a vastly different reality; namely that the circuit court recognized the Planning Commission has public trust duties, and satisfied them:

> 61. The State of Hawaii and its political subdivisions have duties under the public trust. Haw. Const. art. IX; *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006).
>
> 62. "Political subdivisions" of the State include the County of Kauai. *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006).
>
> 63. Decisions on permit applications must be grounded in fact and the Record, not speculation, and the Record in this case is devoid of any evidence that Kauai Springs existing or proposed uses might affect water resources subject to the public trust.
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> . . . .
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> 71. The Planning Commission did not identify any other outstanding regulatory processes that it claimed must have been fulfilled in order to satisfy any duty under the public trust that it may have had.
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> 72. There is nothing in the Record of this case to show that the Planning Commission did not fulfill any duty it may have under the public trust. *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006).

R:CV07-1-0042 at 188-89.The circuit court recognized settled Hawaii law that the state and its political subdivisions have duties under the public trust doctrine. *See* Haw. Const. art. IX; *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006). The Planning Commission's first Point of Error – the core of its appeal – fails on that basis alone.

B. *Kelly*: The Planning Commission Made "Appropriate Assessments" And Took "Reasonable Measures"

In *Kelly v. 1250 Oceanside Partners*, 111 Haw. 205, 140 P.3d 985 (2006), the Hawaii Supreme Court held that all state and county agencies have public trust duties, but did not specify in detail what those duties may entail. In that case, the County of Hawaii claimed it had no duty whatsoever to do take into account the possibility of runoff into ocean waters when it issued grading and grubbing permits for parcels abutting the ocean. *Id.* at 223, 140 P.3d at 1003. Ocean waters are subject to the public trust. After a heavy rainstorm, the developer's erosion control measures failed and runoff polluted the adjacent ocean. *Id.* at 211, 140 P.3d at 991. The County asserted it was the State's responsibility to protect the ocean, but the court held the County had duties under a state statute, its own ordinances, and under the public trust to consider runoff when it issues grading and grubbing permits. *Id.* at 227-28, 140 P.3d at 1007-08.[9] This should hardly be surprising, since one of the purposes of a grading permit is to prevent erosion (in other words, to control runoff).

For the case at bar, the key holding of *Kelly* is the Hawaii Supreme Court's conclusion the County took all necessary steps to protect the public trust, since there was nothing in the record demonstrating a lack of reasonable measures by the County:

> Accordingly, inasmuch as the record is devoid of evidence adduced at trial that there was a lack of reasonable erosion control measures or that the County failed to make appropriate assessments, the [trial] court's conclusion [that the County breached its public trust duties] cannot be sustained.

Id. at 228, 140 P.3d at 1008. Thus, *Kelly* provides three standards for determining the scope of an agency's public trust duty:

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9. Contrast the present case, where the Planning Commission has not pointed to anything in its governing ordinances or rules requiring it to inquire about water uses when evaluating land use permit applications.

1. The public trust is not *carte blanche* for the Planning Commission to go beyond its jurisdiction and competency. In *Kelly*, the County's public trust duty was limited and related to its responsibility to issue grading permits. *Kelly*, 111 Haw. at 227-28, 140 P.3d at 1007-08.

2. An agency must only take "reasonable measures" to consider the public trust resource. *Id.* at 228, 140 P.3d at 1008.

3. An agency must only "make appropriate assessments" in order to satisfy its public trust duties. *Id.*

Applying these *Kelly* standards to the case at bar reveals that the circuit court correctly concluded the Planning Commission fulfilled the public trust duty.

First, the circuit court concluded the Planning Commission's public trust duty was tied to its responsibility to issue zoning permits. Kauai Springs' applications for Use, Special and Class IV zoning permits did not propose – and did not seek the Planning Commission's approval for – a "use of water." Rather, Kauai Springs sought approval for its building and related operations under the standards set forth in the Kauai Zoning Code. Further, the application did not seek the Planning Commission's permission to take or "extract" water because Kauai Springs does not control the source or the transmission system. All it does it open a tap on a pipeline that crosses its property, and in regard, it is no different than any person or business statewide that purchases water from someone else, or fills a bottle with a garden hose.[10] Thus, the Planning Commission's public trust inquiry was

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10. In fact, Kauai Springs is not materially different than other commercial bottlers of water in Hawaii, none of which are subject to vague "outstanding regulatory processes," and none of which have been required to seek Water Commission or PUC declaratory rulings. For example, Menehune Water, the largest bottled water company (which is also sold in premium packages as "Hawaii Water"), bottles thousands of gallons of Oahu groundwater. *See* "Hawaii Water a Menehune Water Company – Taste the Difference!," available at http://www.menehunewater.com. Menehune has been bottling groundwater since 1985, and exports this water to other islands, the mainland, and internationally. *See* "The Menehune Water Co. Story," available at http://www.menehunewater.com/about-us.asp. The source for Menehune Water is an "underground aquifer" in an "environmentally-pristine, virgin rain forest."*See* "Our Hawaiian Source," available at http://www.menehunewater.com/ultra-pure-hawaii-water.asp. Another major bottler of ground water, Hawaiian Springs, bottles its water at the source on the Big Island. *See* "Source Geology," available at http://www.hawaiianspring.com/source.html. According to Hawaiian Springs, its well system "(designated as Well #3802-6) was built in 1981 and is equipped with a 10" inside diameter casing. The well system is 251.22 feet deep and the pump intake is at a depth of 241'. . . Our source is a large ground water body between the village of Pahoa to the south, and the city of Hilo to the north of Kea'au." *Id.* Hawaiian Springs has been bottling Big Island ground water since 1995. *See* "History," available at http://www.hawaiianspring.com/history.html. The PUC "does not currently exercise jurisdiction over these (continued...)

limited to whether public resources would be impacted by Kauai Springs' building on agriculturally-zoned land. The Planning Commission in essence argues the public trust transformed it from a land use agency to a water rights tribunal. Op. Br. at 19 ("Because the island of Kauai has not been designated as a ground-water management area, KPC at 411, responsibility for upholding the public trust remains with other public agencies – including the Planning Commission."). While this is undoubtedly correct as a general statement, *see Kelly*, 111 Haw. at 227-28, 140 P.3d at 1007-08, it does not address the scope of an agency's public trust duties. The Planning Commission simply assumes that once it has public trust duties, that alone invests it with the power to turn the usual zoning permit process into an open-ended and standardless inquiry in which it is free to stray outside of its delegated responsibilities merely because a connection can be made between a permit application and water resources. An agency's public trust responsibilities are meant to compliment – not supplant – the agency's core competency and responsibilities. *Id.*

A hypothetical helps illustrate the fallacy of the Planning Commission's argument that any connection to water is sufficient to allow an agency to place the burden on an applicant to"prove the legality of [an applicant's] water use." Op. Br. at 20. For example, if one of Jim and Denny Satterfield's teenage sons were to apply to the Department of Motor Vehicles of the Kauai Department of Finance for a drivers's license in order to (among the other things that teenagers do with cars) be able to drive one of the family's pickup trucks to make water deliveries, according to the Planning Commission's theory, the public trust doctrine requires the DMV to decline to issue the driver's license until Kauai Springs first "prove[s] the legality of its commercialization of fresh-water resources taken from Kahili Mountain" (Op. Br. at 22) or, at the very least obtains "formal opinions" from both the Water Commission and PUC confirming that Kauai Springs has the authority to bottle water. This would be an absurd result, of course, but under the Planning Commission's public trust theory, the Kauai DMV – as a county agency with public trust duties – must take into account and investigate the fact that the holder of the drivers' license may drive vehicles that transport *water*.

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10. (...continued)
or any other water bottling facilities in the State," because "bottled water may be obtained from a number of competing sources and providers." *See* Letter from Stacey K. Djou to Ian K. Costa, Planning Director (Nov. 22, 2006) (R:CV07-1-0042 at 188-89).

Second, unlike *Kelly*, the Record here is not"devoid of evidence" that Kauai Springs' use impacts public trust resources, because the Planning Commission took "reasonable measures" and had before it affirmative evidence that Kauai Springs would not have an effect. For example, the Water Commission informed the Planning Commission that Kauai Springs required "no permits" because "the Applicant's use of the water is not affecting the source in any way (i.e., not inducing more water to come out of the source or tunnel)," "the existing source has been registered and is basically grandfathered, and there is an agreement between the new user (Applicant) and the operator of the system." KPC Record at 000344 (FOF #19.a). There is no evidence in the Record that Kauai Springs is doing anything different than any other water company in the state.[11]

Third, there is evidence in the Record showing that by seeking input from the Water Commission, the PUC, and other agencies, the Planning Commission made "appropriate assessments" to protect public trust resources if any were involved. The Water Commission and the PUC informed the Planning Commission they had no interest in, or authority over, Kauai Springs' activities. The Water Commission determined "that [Kauai Springs] did not require a water use permit." R:CV07-1-0042 at 96 (Defendant-Appellee Planning Commission of the County of Kauai's Answering Brief at 12 (May 28, 2008)). Similarly, the PUC disclaimed regulatory authority over Kauai Springs. These facts are reflected in the Planning Commission's Decision and Order:

> The delay in reaching a decision on this proceeding was attributed to staff's effort in obtaining additional information relating to the Applicant's authority and right to obtain and extract the water for commercial purposes. Therefore, additional comments in early November, 2006 were sought from the State Commission on Water Resource Management and the State Public Utilities Commission to determine the Applicant's standing relative to its status with other regulatory agencies that may have jurisdiction in the overall process of obtaining the water for commercial purposes.

KPC Record at 000344 (FOF #18). The Water Commission informed the Planning Commission that Kauai Springs was not a concern. The Decision and Order also acknowledged the PUC disclaimed interest in Kauai Springs. "In response to the Planning Department's letter dated November 6, 2006,

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11. The source of Kauai Springs' water is not on the property for which it sought the three zoning permits. Further, Kauai Springs has no control over the source, or how much water comes from it. It does not control the transmission system. Kauai Springs simply taps a pipe that crosses its property. The same pipe also provides domestic water to eleven homes makai of Kauai Springs. R:CV07-1-0042 at 169.

it appears according to the PUC, that Kauai Springs would not be a public utility subject to commission jurisdiction since the commission does not currently exercise jurisdiction over any water bottling facility in the State." KPC Record at 000345 (FOF #19.a [sic]).

Thus, the Record in the case at bar is stronger than in *Kelly*, since here, rather than a "record . . . devoid of evidence,"[12] there is undisputed evidence of the Planning Commission's "measures" taken and "assessments" made, and the results of those assessments.

C. The Planning Commission Only Claimed That Kauai Springs Should Have Pursued "Outstanding Regulatory Processes" Without Identifying What Those "Processes" Might Be

Rather than deal with the circuit court's actual holding and the Record in this case, the Planning Commission's Opening Brief focuses on "implied" holdings (*see, e.g.*, Points of Error "A" and "C") and factual suppositions. It argues the Planning Commission properly denied the zoning permits because Kauai Springs should have pursued "outstanding regulatory processes." R:CV07-1-0042 at 188. As the circuit court determined, "[t]he only regulatory process asserted by the Planning Commission as being outstanding was that Kauai Springs had not 'proactively sought a declaratory ruling' from either the Water Commission or the PUC." *Id.* As noted above, both of these agencies had already expressly informed the Planning Commission they had no interest in Kauai Springs. Thus, declaratory rulings would add virtually nothing of substance. *See Poe v. Hawaii Labor Relations Bd.*, 97 Haw. 528, 536, 40 P.3d 930, 938 (2002) (the law does not require pursuit of futile administrative processes).

This reinforces the circuit court's conclusion that "[t]here is nothing in the Record of this case to show that the Planning Commission did not fulfill any duty it may have under the public trust," R:CV07-1-0042 at 189, because an agency cannot simply sit back and shift the burden to an applicant to determine what the agency's public trust duties might entail. Yet, that is precisely what the Planning Commission did to Kauai Springs. The record of the evidence in the Planning Commission shows that the Planning Commission already had the information it claimed in its Decision and Order to need as a prerequisite to granting the permits. Despite that, the Planning Commission asserted it could deny the applications because Kauai Springs had not *disproven* that

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12. *Kelly*, 111 Haw. at 228, 140 P.3d at 1008.

the Water Commission or the PUC might not exercise jurisdiction, even though the Planning Commission actually knew both of these agencies repeatedly had disclaimed interest.

The public trust doctrine does not empower an agency to deny an application for zoning permits simply because the agency asserts it lacks information. Basing a denial on amorphous trepidations or on a purported lack of information – rather than concrete facts – is the essence of arbitrary and capricious action because it is a meaningless standard, for how can an applicant be expected to muster evidence to overcome it? The Planning Commission has never revealed what the declaratory rulings it claims Kauai Springs should have obtained would accomplish, given the PUC's straightforward disclaimer of jurisdiction over not only Kauai Springs, but every other water bottling company in the State, and the Water Commission's statement to the Planning Department that "a water use permit from the Commission is not required to use the existing source(s) or to change the type of water use." *See* KPC Record at RA at 000464 (Letter from the Water Commission to Ian K. Costa, Planning Director, County of Kauai (Sep. 26, 2006)).

CONCLUSION

The circuit court correctly held the Planning Commission arbitrarily and capriciously denied Kauai Springs' zoning permits. Kauai Springs did not expressly or impliedly assent to an extension of the autoapprove deadlines, nor could it. The circuit court also properly concluded that the Planning Commission met its own standards for fulfilling the its public trust duties by seeking – and receiving – input from the Water Commission and the PUC, both of whom informed the Planning Commission they had no interest in Kauai Springs, and that the Planning Commission's findings that the zoning permits should be denied because these agencies should be further consulted, was clearly erroneous.

The circuit court's Findings of Fact, Conclusions of Law, and Order Reversing in Part and Vacating in Part Appellee Planning Commission of the County of Kauai's Findings of Fact, Conclusions of Law, Decision and Order re: Use Permit U-2007-1, Special Permit SP 2007-1, and

Class IV Zoning Permit Permit Z-IV-2007-1 (Dated January 23, 2007) (Sep. 17, 2008), and the circuit court's Final Judgment (Sep. 23, 2008) should be affirmed.

DATED: Honolulu, Hawaii, June 1, 2010.

Respectfully submitted,

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