NOS. 26184 and 26285

IN THE SUPREME COURT OF THE STATE OF HAWAII

WAYNE LESLIE,

Plaintiff-Appellant-Appellee,

vs.

BOARD OF APPEALS OF THE COUNTY OF HAWAII, EVARTS FOX, in his capacity as Chairperson of the BOARD OF APPEALS OF THE COUNTY OF HAWAII, CHRISTOPHER YUEN in his capacity as Planning Director of the County of Hawaii,

Defendants-Appellees-Appellants,

KI'ILAE ESTATES LLC, PROTECT KEOPUKA 'OHANA, JIM MEDEIROS, JACK KELLY,

Defendants-Appellees-Appellees.

CIVIL NO. 03-1-0050K

APPEAL FROM: 1) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING APPEAL ENTERED SEPTEMBER 24, 2003; 2) FINAL JUDGMENT ENTERED SEPTEMBER 25, 2003; AND 3) AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING THE APPEAL ENTERED NOVEMBER 12, 2003

THIRD CIRCUIT COURT



**AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION URGING REVERSAL**

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# AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION URGING REVERSAL

Pacific Legal Foundation submits this Amicus Curiae Brief in support of the arguments of the Defendants-Appellees-Appellants Board of Appeals of the County of Hawaii, et alia (collectively County) and Defendant-Appellee-Appellee Ki'ilae Estates LLC (Ki'ilae). This brief is limited to Point of Error number 2 regarding the necessity of obtaining a Special Management Area (SMA) Use Permit for a subdivision entirely outside the SMA.

## I. QUESTION PRESENTED

When a property owner proposes no use within the SMA, does the Coastal Zone Management Act, Haw. Rev. Stat. ch. 205A (2001 & Supp. 2003) (CZMA) nonetheless require the owner obtain a SMA Use Permit prior to subdividing the non-SMA portion of its property?

## II. ARGUMENT

### A. Summary of Argument

Ki'ilae's proposed subdivision, located entirely outside the SMA, is precisely the planning envisioned by the Legislature when it required permits for use within the CZMA. An expressed goal of the CZMA is to "[e]ncourage those developments which are not coastal dependent to locate in inland areas." Haw. Rev. Stat. § 205A-2(c)(3)(D) (Supp. 2003). Which is exactly what Ki'ilae did.

The plain language of the CZMA unambiguously states that SMA Use Permits need only be sought for "development ***within*** the SMA." If no use is located in the SMA, the authority does not need to determine whether the use is a "development" or might have an impact on the SMA. The circuit court, however, erroneously concluded that the possible impact of a proposed subdivision located outside the SMA must be considered in determining whether the

subdivision applicant must first obtain a SMA Use Permit, in essence shifting the SMA boundary line mauka and enlarging the SMA by approximately 462 acres, a function the Legislature delegated to the Planning Commission. Alternatively, even if the subdivision is determined to be a use "within the SMA," the circuit court did not make a sufficient factual finding to support a conclusion that the subdivision falls within the definition of "development." The circuit court's conclusions are wrong and the judgment should be reversed.

### B. The CZMA Limits SMA Use Permit Jurisdiction To "Development Within The SMA"

The CZMA's permit requirement unambiguously limits the geographic scope of the jurisdiction of the County to the regulation of uses, activities, or operations that take place within the SMA:

> No ***development*** shall be allowed in any county ***within the special management area*** without obtaining a permit in accordance with this part.

Haw. Rev. Stat. § 205A-28 (2001) (emphasis added). *See also* County of Hawaii Planning Comm'n R. 9.8(A) ("No development shall be allowed ***within the [SMA]*** without obtaining a permit. . . .") (emphasis added). Section 205A-22 reiterates the Legislature's intent to require a permit only for activity actually taking place in the SMA:

> "Development" means any of the uses, activities, or operations on land or in or under water ***within a special management area*** that are included below . . .

Haw. Rev. Stat. § 205A-22 (Supp 2003) (emphasis added). *See also Alaloa v. Maui Planning Comm'n*, 68 Haw. 135, 136, 705 P.2d 1042, 1043 (1985) (legislature enacted SMA Use Permit process to control development of the SMA). Consequently, the first question is not whether the Ki'ilae's subdivision application proposed simply a "development," but rather whether it

proposed a "development ***within the SMA***." In *Hawaii's Thousand Friends v. City and County of Honolulu*, the Supreme Court held:

> However, ***because the entire area of the proposed park lies within a coastal zone management area***, the City was required to determine . . . whether it must acquire a SMA use permit prior to the demolition.

75 Haw. 237, 238, 858 P.2d 726, 728 (1993) (emphasis added). Conversely, since Ki'ilae proposed nothing "within the SMA," section 205A-28 exempts the County from further inquiry and it need not have determined whether Ki'ilae needed a SMA Use Permit prior to the subdivision application. Section 205A-28 is conjunctive – a proposed use must be determined to be ***both*** "development" ***and*** "within the SMA" before a SMA Use Permit is necessary; proposed uses outside the SMA do not require a SMA Use Permit as a matter of law. Put another way, section 205A-28 commands that no permit need be sought for any activity wholly outside the SMA regardless of whether that activity might otherwise fall within the definition of "development" in section 205A-22. Section 205A-28 is unambiguous, and "it is a cardinal rule of statutory interpretation that, where the terms of the statute are plain, unambiguous and explicit, [the court is] not at liberty to look beyond the language for a different meaning. Instead, [the court's] sole duty is to give effect to the statute's plain and obvious meaning." *Alvarez v. Liberty House, Inc.*, 85 Haw. 275, 278, 942 P.2d 539, 542 (1997). Thus, the circuit court erred in concluding:

> The first step in determining whether a [SMA Use Permit] is required for a particular development, ***is to ascertain whether the activity is included in the definition of "development"*** in Haw. Rev. Statutes § 205A-22.

Amended Findings of Fact; Conclusions of Law; and Order Granting the Appeal (Circuit Court COL) at 7, ¶ 11 (Nov. 12, 2003). Determining whether an activity is a "development" only is

necessary if the activity is proposed ***within the SMA***, and the circuit court's analysis ignores the critical words "within the special management area" in sections 205A-28 and 205A-22. "Courts are bound, if rational and practicable, to give effect to ***all parts of a statute***, and . . . ***no clause, sentence, or word shall be construed as superfluous***, void, or insignificant if a construction can be legitimately found which will give force to and preserve ***all words of the statute***." *Richardson v. City and County of Honolulu*, 76 Haw. 46, 54-55, 868 P.2d 1193, 1201-02 (1994) (emphasis added). *See also In re Robert's Tours & Transp.*, No. 22952, 2004 Haw. LEXIS 105, at *13 (Haw. Feb. 19, 2004). In analysis pursuant to section 205A-28, a use is either "within the SMA" or it is not. If not, no permit required. If a use is determined to be within the SMA, then pursuant to section 205A-22, it is either "development" or it is not. In the present appeal, Ki'ilae proposed no "uses, activities, or operations on land or in or under water ***within a special management area***," Haw. Rev. Stat. § 205A-22, and the subdivision was sought on the non-SMA portion of its property. Thus, the County was correct in holding that no SMA Use Permit was necessary regardless of whether the subdivision otherwise might fit the definition of "development." The circuit court's "development" analysis was simply unnecessary, as it should have *first* determined where the proposed subdivision was to take place.

The CZMA is replete with language reflecting the Legislature's intent to require a SMA Use Permit only if a use is proposed within the SMA, confirming the above analysis. For example, section 205A-26 provides:

> In implementing this part, the authority shall adopt the following guidelines for the review of developments proposed ***within the special management area***:
>
> (1) All development ***in the special management area*** shall be subject to reasonable terms and conditions set by the authority in order to ensure . . . .

Haw. Rev. Stat. § 205A-26 (2001) (emphasis added). Similarly, section 205A-29(b) provides:

> No agency authorized to issue permits pertaining to any ***development within the special management area*** shall authorize any development unless approval is first received in accordance with the procedures adopted pursuant to this part.

*Id.* § 205A-29(b) (emphasis added). Section 205A-21 limits the geographic area for "special control" to developments within the SMA:

> The legislature finds that, special controls on ***developments within an area along the shoreline*** are necessary to avoid permanent losses of valuable resources and foreclosure of management options . . . .

*Id.* § 205A-21 (emphasis added). *See also Sandy Beach Defense Fund v. City and County of Honolulu*, 70 Haw. 361, 364 n.2, 773 P.2d 250, 254 n.2 (1989) (SMA encompasses critical coastal lands immediately adjacent to the shoreline requiring special attention).

Finally, the Legislature describes CZMA permits as "Special Management area use permits," further indicating its intent that permits are only to be required for the "use" of the SMA. *See, e.g.,* Haw. Rev. Stat. § 205A-29 (2001) ("Special management area use permit procedure"). Consequently, every SMA Use Permit decision by this Court has involved actual or contemplated use within the SMA. *See, e.g., Curtis v. Board of Appeals*, 90 Haw. 384, 387, 978 P.2d 822, 825 (1999) (construction of cell tower in SMA); *Young v. Planning Comm'n*, 89 Haw. 400, 404, 974 P.2d 40, 44 (1999) (operation of a boat "within the boundaries of the SMA"); *Hawaii's Thousand Friends*, 75 Haw. at 238, 858 P.2d at 728 ("the entire area of the proposed park lies within a coastal zone management area"); *Sandy Beach*, 70 Haw. at 364-65, 773 P.2d at 253 ("Because a portion of the project was located within the boundaries of the 'Special Management Area' (SMA) . . . Kaiser was required to obtain an SMA use permit.") (footnote omitted); *Alaloa*, 68 Haw. at 136, 705 P.2d at 1043 (development proposed within SMA). Here,

Ki'ilae's subdivision application proposed no "use" of the SMA, so no SMA Use Permit was necessary.

### C. Ignoring The Statutory Jurisdictional Limitation Usurps The Planning Commission's Function Of Establishing The SMA Boundary

The circuit court's analysis under section 205A-28 should have terminated once it recognized the County correctly determined Ki'ilae's subdivision application did not propose a use "within the SMA." The court, however, unnecessarily determined that the non-SMA subdivision could be defined as "development" in section 205A-22 by examining the purported impact of the subdivision on the SMA. Circuit Court COL at 8–9, ¶¶ 12–17. In so doing, the circuit court effectively supplanted the Planning Commission's judgment with its own of where the SMA boundary should lie. The Legislature delegated the determination of the establishment and amendment of the location of the SMA boundary to the county "authority." *See* Haw. Rev. Stat. § 205A-23(b) (2001) (SMA boundaries to be established by counties no later than 1979). The County acknowledges its CZMA authority stops at the SMA boundary,[1] and the County has the power to move the established SMA boundary if it determines Ki'ilae's land mauka of Old Government Road is of SMA interest but it has not done so. Haw. Rev. Stat. § 205A-23(c) (2001) ("Nothing in this chapter shall preclude the authority from amending its special management area boundary at any point in time."). Until this case, the County limited its SMA Use Permit jurisdiction to land makai of Old Government Road. The practical effect of the circuit court's decision, however, is to shift the SMA boundary line mauka to encompass the

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1. *See* County of Hawaii Planning Comm'n R. 9.1 ("Pursuant to the authority conferred by [the CZMA], the Rules and Regulations hereinafter contained are hereby established and ***shall apply to all lands within the Special Management Area*** of the County of Hawaii.") (emphasis added).

entirety of Ki'ilae's parcel, enlarging the SMA by approximately 462 acres, and compelling the County to unwillingly regulate under the CZMA activities in an area which the county disclaimed a legitimate SMA interest in regulating. *Cf. Alaloa,* 68 Haw. at 136, 705 P.2d at 1043 (legislature enacted permit process to control development of the SMA). The circuit court's conclusion means that if any small portion of a parcel of land is within the SMA boundary even though ***no*** activity is proposed within that portion, the entire parcel is bootstrapped into the SMA, effectively moving the SMA boundary to conform to the parcel's boundary, something the Planning Commission might have done but chose not to.[2] This result was not intended by the Legislature when it enacted the CZMA and augurs severe constitutional issues, as imposition of regulation on property where the government lacks a legitimate state interest is a taking and denial of due process. *See, e.g., Chevron U.S.A., Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000) (legislation was a taking when it failed to substantially advance a legitimate state interest).

### D. *Hawaii's Thousand Friends* Does Not Support The Circuit Court's Conclusion

Relying exclusively on *Hawaii's Thousand Friends*, 75 Haw. at 249, 858 P.2d at 732, the circuit court held "[t]he law requires an inquiry as to whether an overall project ***may*** have a significant environmental impact." Circuit Court COL at 8, ¶ 15 (emphasis original). The circuit court concluded:

> Under *Hawaii's Thousand Friends*, "the possible cumulative impacts" of ***the whole project, not just the parcel located in the [SMA]***, must be taken into consideration when assessing the environmental or ecological effect on the [SMA]. If the project "may have a significant environmental or ecological effect on the [SMA]," then the project "shall be defined as 'development' and will require a SMA use permit."

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2. See also the similarly illogical movement of the "bomb line" in Joseph Heller's classic *Catch-22*.

*Id.* at 8–9, ¶ 16 (emphasis added). *Hawaii's Thousand Friends* is a case involving section 205A-22, which provides in relevant part:

> "Development" does ***not*** include the following:
> . . . .
> (11) Subdivision of land into lots greater than twenty acres in size;
> . . . .
> (15) Nonstructural improvements to existing commercial structures; provided that whenever the authority finds that any ***excluded use,*** activity, or operation may have a cumulative impact, or a significant environmental or ecological effect on a special management area, that use, activity, or operation shall be defined as "development" for the purpose of this part.

Haw. Rev. Stat. § 205A-22(1) – (15) (Supp. 2003) (emphasis added). As detailed *supra*, Ki'ilae's non-SMA subdivision of land is not one of the fifteen "excluded uses" in section 205A-22 (1) – (15) because the circuit court never should have reached the question of whether the subdivision is a "development" because it was not "within the SMA." *Hawaii's Thousand Friends* does not alter that analysis. In that case the Court held that when "the entire area of the proposed park" was within the SMA, the demolition of old buildings could be defined as "development" under section 205A-22 if the entire project might have an impact on the SMA. Thus, even though the demolition alone may not have significant impact, when it was part of a larger project within the SMA, cumulative impacts may be considered. *Hawaii's Thousand Friends*, 75 Haw. at 238, 858 P.2d at 728. *See also Sandy Beach*, 70 Haw. at 364-65, 773 P.2d at 253 (construction to take place in SMA, so SMA Use Permit required). The facts of the present case are different, and *Hawaii's Thousand Friends* does not stand for the proposition the circuit court cited it for – that as a general rule, non-SMA uses must be considered to determine whether a SMA Use Permit is needed pursuant to section 205A-28. Because Ki'ilae's subdivision is wholly outside the SMA, *Hawaii's Thousand Friends* is not authority for the circuit court's conclusion. The analysis of "impact" on a SMA in section 205A-22(15) was only necessary if

some activity was proposed within the SMA, and the circuit court should never have reached the issue of whether Ki'ilae's subdivision application was an "excluded use."

The Legislature did not intend that a finding of "impact" alone – when not accompanied by a use within the SMA – to be defined as a CZMA "development." *See* Haw. Rev. Stat. §§ 205A-21, -22, -26, -28 (quoted *supra*). Subsection (15) of section 205A-22 does not compel a different result, as the question of "impacts" only arises *after* a determination that a use within the SMA is planned. The Legislature could not have intended to stretch the definition of "development" to encompass non-SMA activities simply because a portion of the parcel is within the SMA when ***no*** activity is taking place in the SMA. *See id.* §§ 205A-21, -22, -26, -28. Any other reading of section 205A-22(15) would not make sense. Under the circuit court's rationale, a non-SMA use of property, wholly outside of the SMA (even on a separate parcel owned by a different person miles away), may require that owner to obtain a SMA Use Permit if the use "may," in some small way, contribute to an impact on a SMA. Such loose analysis would result in literally all uses outside the SMA potentially subject to the requirement of being defined as "development within the SMA," necessitating a SMA Use Permit. In an island state, it is not difficult to foresee how activity far upland and geographically removed from the shoreline "may" affect the SMA:

> With no point in Hawai'i more than 29 miles from the shore, ***almost any activity that accurs [sic] inland will impact Hawai'i's coastal and ocean resources***.[3]

The Legislature never intended section 205A-22(15) to be a vehicle to extend the reach of SMA regulation to areas physically located outside the SMA.

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3. Office of Ocean & Coastal Res. Mgmt, U.S. Nat'l Oceanic & Atmospheric Admin., *Hawaii Coastal Management Program*, <http://www.ocrm.nos.noaa.gov/czm/czmhawaii.html> (last visited Mar. 18, 2004).

### E. Even If Ki'ilae's Subdivision Was A Use "Within The SMA," It Was Not "Development"

Assuming, *arguendo*, Ki'ilae's subdivision proposed a use "within the SMA," it was nevertheless exempt from seeking a SMA Use Permit as it was not a "development." The circuit court failed to make the required finding that the subdivision "may have a cumulative impact, or a significant environmental or ecological effect on a special management area," and was therefore a "development." Haw. Rev. Stat. § 205A-22(15) (Supp. 2003). The circuit court's sole finding was that the Planning Director stated that the subdivision "may adversely affect coastal resources." Circuit Court COL at 8, ¶ 14. A single out-of-context reference to this general truism does not comply with section 205A-22(15) – as shown on the previous page at the quotation accompanying note 3, almost any activity inland "may" affect coastal resources – and is not a finding sufficient to overturn the presumption of validity afforded administrative agencies in discharging their duties within their fields of expertise. *See In re Hawaiian Elec. Light Co.*, 60 Haw. 625, 630, 594 P.2d 612, 617 (1979).

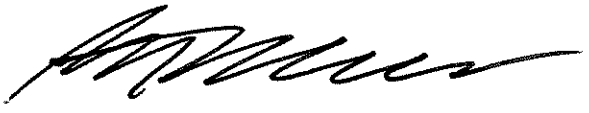
## III. CONCLUSION

Amicus Curiae Pacific Legal Foundation respectfully submits the Amended Finding of Fact; Conclusion of Law; and Order Granting the Appeal (Nov. 12, 2003) of the court below should be reversed and judgment entered in favor of the County and Ki'ilae.

DATED: Honolulu, Hawaii, March 25, 2004.

Respectfully submitted,

DAMON KEY LEONG KUPCHAK HASTERT



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NOS. 26184 and 26285

IN THE SUPREME COURT OF THE STATE OF HAWAII

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this date a true and correct copy of foregoing document was duly served upon the following individuals by mailing said copy, postage prepaid, to their last known addresses as follows:

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