No. 14087

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALICE MEDEIROS, Et Al. Appellants, vs. HAWAII COUNTY PLANNING COMMISSION, Et Al., Respondents . vs. HAWAII NATURAL ENERGY INSTITUTE, Et Al., Respondents.	APPEALING THE GEOTHERMAL RESOURCE PERMIT GRANTED BY THE PLANNING COMMISSION, COUNTY OF HAWAII, ON AUGUST 15, 1989

OPENING BRIEF

I. STATEMENT OF JURISDICTION

This is an appeal from the Geothermal Resource Permit entered on August 8, 1989. A Notice of Appeal from the decision was timely filed on September 14, 1989. the appeal was timely docketed in this Court on November 2, 1989. This Court has jurisdiction over this appeal pursuant to HRS 205-5.1(g) and the Hawaii County Planning Commission Rule 12-12(a).

bc: H. Olsm.
D. Thomas ✓
[redacted]
M. Metz
N. Yuen

SUBJECT INDEX

II. STATEMENT OF THE CASE

This case begins with submission by the Hawaii Natural Energy Institute and the Research Corporation of the University of Hawaii to the Hawaii County Planning Commission of the first application ever made for a Geothermal Resource Permit.

On February 17, notice of March 7, 1989 public hearing was mailed to property owners within 1000 feet of project boundaries.

On February 19, 1989 a notice was published for the March 7, 1989 Planning Commission public hearing.

On March 2, 1989, the Planning Director notified the applicants that the public hearing of March 7, 1989 was rescheduled by the Hawaii County Planning Department to comply with the requirements of Chapter 343 HRS, relating to environmental impact statements:

> Except as otherwise provided, an environmental assessment shall be required for actions which:
>
> (1) Propose ...the use of State or County funds....

On March 2, 1989, the Planning Commission issued a press release for the notice of a rescheduled hearing on GRP 89-1.

On March 21, 1989 a notice was published for the rescheduled public hearing for April 11, 1989.

On March 31, 1989 the Planning Director acknowledged receipt of GRP 89-1 application, filing fee, and descriptions.

On March 31, 1989, the Planning Director requested written comments on the application from various agencies.

On April 11, 1989, the public hearing on GRP 89-1 was held. At that time, a request for mediation was submitted by Harry Kim, Civil Defense Director of the County of Hawaii. Also at that hearing, the Planning Commission voted to hold a site inspection and continue the hearing.

On April 18, 1989 the Planning Commission notified the applicant of a site inspection and continued hearing, time and place not yet determined.

On April 21, the Planning Director notified the applicant that the site inspection and hearing will be continued to May 9, 1989.

On May 9, 1989, the public hearing was continued. At that time the Planning Commission voted to send the application into mediation and close the public hearing.

On May 16, 1989 the Planning Commission notified the

applicant of mediation.

On May 23, 1989 the mediators were appointed and sessions were held on June 7, 15, 16, 22, 23, 28, 29, July 5 and 6. The parties to the mediation included Christine Batista, Jim Blakey, DBED, Civil Defense, W.R. Craddick, Richard and Lou Ann Jones, Kapoho Community Association, Kapoho Grown (Delan and Jennifer Perry), Fernando Javier, Dave Laughlin, Alice Medeiros, Steve Philips, Gregory Pommerenk, Puna Community Council, Helene Shinde, Yoshio Shinde, Jane Hedtke, and Pele Defense Fund. Pele Defense Fund left the mediation because they felt the applicant was not mediating in good faith, their walkout triggered by the grading of a road through native forest that would service SOH 3 and 4. Jane Hedtke left the mediation because she felt the discussion of conditions would compromise the community's position.

On July 10, 1989, parties to the mediation submitted a letter to the Planning Commission regarding the statement made by the applicant on the last day of mediation that there will be hydrogen sulfide emissions from the SOH wells. Also on that date, the Kapoho Community Association requested a contested case hearing.

On July 13, 1989 the Mediators Report was submitted to the Planning Commission, including the July 10 statement of position by the applicants.

On July 18, 1989, the Planning Commission, with the approval of the applicant, granted a 30 extension of time to give the commission opportunity to review the mediators report.

On August 8, 1989 the Planning Commission voted to approve the application and grant the permit.

On August 15, 1989, the Planning Commission issued written notification of permit approval.

On September 5, 1989, the applicant moved the site for SOH 4 approximately 1000 feet toward Kaohe Homesteads.

STATEMENT OF POINTS ON APPEAL

1. Time limit for presentation and speeding of public hearing and limiting testimony. Objection is due process. (State Constitution, Article 1, Section 5:)

No person shall be deprived of life, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. (Tr 5/9/89 @ 11,12,13,14; Tr 4/11/89).

2. No cross examination of applicant. Due process (ib) (Tr 4/11/89 @ 38, 39).

3. No Environmental Impact Statement was submitted and the Environmental Assessment was deficient. Objection to violation of Hawaii County Planning Commission Rule 12-3 (R#1, #206; (Refer to Rule 12 in appendix).

4. Too strict time restraints on mediation process. Objection to due process (ib) (Hawaii County Planning Commission 12-5-1(g):

Mediation Conference. The initial mediation session shall be held within 15 days after the appointment of the mediator. The mediator shall fix the time and place of each

subsequent mediation session. The conference shall be held within the County of Hawaii unless all parties and the mediator agree otherwise. The mediation period shall not extend beyond thirty days after the initial mediation session, except by order of the Planning Commission. Mediation shall be confined to the issues raised at the public hearing by the respective party or parties requesting mediation.

5. Mediator to be chosen and costs to be born with no input from parties. Objection to due process (ib) (Tr 5/9/89 @ 150, 152, 154, 155)

6. Public comments pertinent to procedure not accepted. objection to due process (ib) (Tr 5/9/89 @ 154, 157)

7. No mediator recommendation. Objection to violation of Rule 12-5-1(m) (R#176)

Recommendation of Mediator. The mediator shall submit a written report containing recommendations to the Planning Commission, based upon any mediation agreement reached between the parties or stating that no agreement was reached, for consideration by the Planning Commission in its final decision. The written report of the mediator shall be filed with the Planning Commission and served on all parties to the mediation within 10 days of the close of the mediation conference.

8. Unilateral extension of time for mediation by mediators. Objection to violation of Rule 12-5-1(g). (ib)

9. Request for second public hearing based on admission of new evidence by applicant not acted upon. Objection to due process (ib) and violation of agency discretion allowed in Rule 12-5-1(n):

Second Public Hearing. If there is no mediation agreement, or if the mediation agreement does not resolve all issues submitted for mediation, the Planning Commission may, in its sole discretion, hold a second public hearing to receive additional comment related to the unresolved mediation issues. The second public hearing, if to be conducted, shall be held within thirty (30) days after receipt of the mediator's report. Within 10 days after the second public hearing, the Planning Commission may receive additional written comment on the unresolved mediation issues raised at the second public hearing by any party.

10. Decision was made based on inadequate factual record. Objection to violation of due process (ib) HRS 91-14(g), and Rule 12-6 (R#183).

(HRS 91-14-g): 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

(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.

Rule 12-6: Criteria for Issuance of Geothermal Resource Permit

The Planning Commission shall grant a geothermal resource permit if it finds that the applicant has demonstrated that:

(a) The proposed geothermal development activities would not have unreasonable adverse health, environmental, or socio-economic effects on residents or surrounding property; and

(b) The proposed geothermal development activities would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection; and

(c) There are reasonable measures available to mitigate the unreasonable adverse effects or burdens referred to above.

STANDARD OF REVIEW

1. Error to be analyzed as relating to a decision of law.
2. Error to be analyzed as relating to a decision of law.
3. Error to be analyzed as relating to a finding of fact.
4. Error to be analyzed as relating to a decision of law.
5. Error to be analyzed as relating to a decision of law.
6. Error to be analyzed as relating to a decision of law.
7. Error to be analyzed as relating to a decision of law.
8. Error to be analyzed as relating to a decision of law.
9. Error to be analyzed as relating to excersize of judicial discretion.
10. Error to be analyzed as relating to a finding of fact.

STATEMENT OF QUESTIONS PRESENTED

1. Did Hawaii County Planning Commission err in only allowing three (3) minutes for oral presentation.

2. Did Hawaii County Planning Commission err in not allowing cross examination of SOH applicant.

3. Did Hawaii County Planning Commission err in accepting deficient application.

4. Did Hawaii County Planning Commission Rule 12 err in not allowing reasonable time for mediation.

5. Did Hawaii County Planning Commission err by not accepting questions from the audience before close of the hearing.

6. Did Hawaii County Planning Commission err in not accepting comments pertinent to procedure after the close of the public hearing but before issuing a decision.

7. Did the Hawaii County Planning Commission err in accepting mediators report without its recommendations.

8. Did the mediator err in extending time of mediation for convenience of SOH applicant.

9. Did the Hawaii County Planning Commission err in not calling a second public hearing to accept new evidence.

10.. Did the Hawaii County Planning Commission err in making a decision based on an inadequate factual record where no determination of fact had taken place.

VI. SUMMARY OF ARGUMENT

The attempts of the State Legislature to amend Act 205.5.1 by Act 378 SLH 1987 and the resulting amendments made to Hawaii County Planning Commission's Rule 12 has resulted in a streamlining of the permitting procedure for geothermal development. Unfortunately the Constitutional guarantees of affected property owners to a due process have not been safe guarded in the haste to permit development in close proximity to residencs, farms, nurseries, and other businesses.

The Hawaii County Planning Commission Rule 12 as interpreted during the public hearing on appeal here was further faulted by other Rules of Practice and Procedure that did not allow for questioning or full comments by the appellants.(Tr 4/11/89 @38, 39; 5/9/89 @ 154,157)

Further, the mediators report did not and could not make the recommendation required under 12-5-1(m) that would have, perhaps determined the factual record.

Thus the factual record has not been fully presented to the Hawaii County Planning Commission by the mediator and that commission did not have the full body of facts on which to base any decision and could not reasonable have determined if 12-6 Criteria for Issuance of a Geothermal Resource Permit were met.

VII. ARGUMENT

The first the property owners within 1000 feet knew that their lives and livelyhoods had been targeted by the principles of the SOH program was by notice mailed February 17, 1989 for a public hearing scheduled on March 7, 1989.

The public hearing was rescheduled to April 11, 1989. This commenced a crash course in geothermal development in general and the SOH project in particular for the affected communities of Puna and the appellants. While many "neighbors of the three locations for which SOH wells were proposed had long known of the HGPA well and power plant, most were shocked that the SOH would in one project, suggest and apply for a permit to drill into far edges of the geothermal resource subzone. For instance, those neighbors, including appellants Delan Perry and Jennifer Perry, are located in the heart of the best papaya orchard land in the world. SOH 2 is surrounded by hundreds of acres of producing orchard. Additionally agriculture, and specifically producing land has been protected by Constitutional Amendment Article XI, Section 3:

> The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally sitable lands...

The appellants in their study of the highly technical field of geothermal well development, determined the existance of a multitude of problems, nuisances, and possibilities of extreme dangers that the State Department of Business and Economic Development, as supervising agency and HNEI/RCUH as contractor were willing to ignore or discount. Whereas appellants subscribed to the need for alternative energy development, study of what would happen to persons and property as far as three miles from a venting well, whether emissions were abated or unabated, could be a threat to persons and property.

Appellants learned some of the major differences in developing the Hawaiian Geothermal resource compared to those in other areas of the world include:

1. Static shut in well head pressures in excess of 1500 psig;
2. H2S levels of 1200 ppm, two to three times fatal dose and many times greater (Geyers average 200 ppm) than any other development area;
3. Temperature at depths of in excess of 600 degrees farenheit;
4. High levels of silica which clogs pipes.

As some of these impacts became known to appellants, letters detailing their specific concerns were submitted to the Hawaii County Planning Commisison. (R 9, 11, 20, 23,24, 25,27,29,32,36,38,39,41,42,44,49,54,58,61,62,65,66,67,

68,69,71,73,81,83,85,99,101,106,108,110,112,114,118).

Prior to the first public hearing of April 11, 1989 the appellants reviewed Rule 12 of the Hawaii County Planning Commission. Rule 12 was mandated by HRS 205.5.1. Act 378 SLH 1987 amended HRS 205.5.1 to replace citizens right to due process by substituting a vague "mediation" procedure for the contested case provisions of HRS 91-9, Administrative Procedures Act, creating severe restraint for fact finding. The contested case hearing, although timely and expensive, remains a fair and equitable system for a substitute to a civil trial. The ability to cross examine witnesses and the preservation of arguments for the review body to assess are key to the most basic citizen rights as included in the Hawaii State Constitution Bill of Rights (Act 1, Section 5).

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

The reality of the mediation procedure that followed bore out the appellants worst concerns that Act 378 SLH 1987 and the amendments to Rule 12 that were spawned by it, coupled to the deficient rules on public hearings in the other rules of the Hawaii County Planning Comission Rules of Practice and

Procedure denied due process for those whose health, environment, and socio economics could be devasted by the SOH project.

The appellee HNEI/RCUH further degraded the procedures specified in Rule 12 by filing an incomplete application not meeting the 16 sets of fact mandated by 12-3(b)(2). Specifically the application should not have been accepted because it was deficient in providing:

> (B) a written statement describing the scope of the planned activities and presenting the applicant's reasons for requesting the permit

The application's response to (B) is "The SOHs are for scientific observation purposes only... The SOHs, in combination with exiting geothermal wells or geothermal wells to be drilled by producers in the future, can be instrumented to provide data relating to reservoir productivity."

The intent of SB 2358 SLH 1988 was to appropriate $3,000,000 ..."to finance the efforts of a consortium involving the University of Hawaii, energy-related organizations, and private industry to stimulate geothermal resource developement through confirmation of the geothermal resource base and initiation of a geothermal technology transfer program."

S.C. Rep 1627 SLH 1988 states the purpose of the bill is to appropriate $3,000,000 to finance the efforts to stimulate the development of geothermal energy and determine the size of Hawaii's geothermal reservoirs. "A consortium involving the University of Hawaii, energy related organizations and the private industry will make efforts to develop a plan which could trigger more than $50 million in private sector and Federal funds and lead to a $2 billion geothermal and deep cable program."

The scope of the application should have included the legislative purposes to confirm the geothermal resource base, stimulate geothermal development, and describe the involvement of private industry, specifically Puna Geothermal Ventures and True Geothermal who hold the mining leases to the parcels being used for the drilling of the SOH wells in this application. This impact should have been addressed in the Environmental Assessment. Such an impact would have changed the determination of the Agency, HNEI, in their issuance of a Negative Declaration.

(c) a preliminary plot or site plan of the property drawn to scale, showing all existing and proposed uses and locations of structures including but not limited to, drill sites, wells, access roadways, water sources, waste water collection and disposal systems ....

No specific location within the huge parcels was

designated as the site for the SOH. No metes and bounds were included in the permit that was approved by the Hawaii County Planning Commission. The site for SOH 4 was relocated after permit approval at the applicants convenience without regard to prior notification of residents and site changes (R 187, 189) and has materially altered who will be affected and the degree of impacts.

On April 11, 1989, the public hearing opened and a new set of due process violations occured.

1. The room chosen was far too small for the overflow crowd of residents, property owners, and interested parties (Tr 4/11/89 @ 44,92 and unrecorded "voices").

2. All testimony, including that of the applicant was limited to 3 minutes (Tr 4/11/89 @ 25,39).

3. No questions were accepted from the "audience" during the presentation of testimonies (Tr 4/11/89 @38.39).

4. Some members of the Planning Commission discovered only at the end of the hearing that they had outdated copies of Rule 12 in their possession (Tr 4/11/89 @ 138).

5. The Chairman of the Planning Commission wanted procedure "speeded up" without thought to due process rights (Tr 4/11/89 @ 69).

6. The Mediator was to be chosen without public input or questioning (Tr 4/11/89 @ 71, 132).

7. The mediator was to keep no record of mediation proceedings (Tr 4/11/89 @ 71).

8. The Chairman of the Commission sought summarized concerns (Tr 4/11/89 @ 72).

9. The Chairman of the Commission tried to discourage participation at the continued hearing and suggested limiting public input further (Tr 4/11/89 @ 134).

In all, 26 persons weathered the inconvenience, cramped room and shortened comment period to testify against the SOH project. Only the applicants and one person spoke for the project.

The hearing was continued to May 9, 1989 to allow for a site inspection and to appoint a mediator.

During this hearing, held in an appropriately sized room this time, the Chairman attempted to limit further testimony (Tr 5/9/89 @ 11,12,13) from anyone who had testified for up to 3 minutes at the last hearing of April 11, 1989. Further:

1. Testimony was limited to 5 minutes (Tr 5/9/89 @ 14) for

reasons of "expediency".

2. The vast majority of testimony was again for permit denial.

3. Costs of participants of mediation was presented in an attempt to discourage participation and estimated to be $2500-$4000, with no selection of the mediator by parties involved. (Tr 5/9/89 @ 150,152,154,155) "You're going to appoint a mediator and we're going to pay for it" (Tr 5/9/89 @ 155).

4. Public comments pertinent to the procedures were not accepted (Tr 5/9/89 @154.157).

And thus ended any direct input to the Planning Commission.

A mediator was chosen by the Planning Commission from the Center for Alternative Dispute Resolution, D.D. Letts, with Kem Lowry , U.H. Department of Urban and Regional Planning, and Richard Spiegel, West Hawaii Mediation Service. Mediation began on June 7, 1989 to a schedule cramped by the 30 requirements of Rule 12-5-1(g). The mediation procedure, constrained by Rule 12-5-1 and in conflict with what the traditional meaning and role of mediation has become, was able to list community concerns, reiterate permittees arguments, list some areas of agreements and disagreements, discuss liability issues, and evaluate Rule 12. No attempt was made

to record statements, assess the facts stated and their validity.

Inadequate time did not allow for full discovery and no procedure was available to enforce discovery. The mediation team did not attempt to meet requirements of Rule 12-5-1(m) to submit a recommendation that might have summarized any findings of fact. Further, the mediators chose to unilaterally extend the time of the mediation procedure beyond 30 days for the convenience of the State and the applicants to submit their statements, without review or comment by other mediation parties. Also no provision was made to allow mediants review of the whole mediation report and it was submitted to the Planning Commission without such review.

During mediation applicants admitted for the first time information not included in their application or Environmental Assessment that there would be H2S emissions (R#210).

This should have triggered a second public hearing as well as an application for a Department of Health permit under DOH Air Quality Regulation 11-60, Chapter 60. A letter requesting such a hearing was sent to the Planning Commisison (R @ 174).

At the Planning Commission meeting of August 8, 1989, appellants tried to submit a letter dealing with the new information that had come up during mediation as to H2S

emissions but said letter was refused by the clerk of the Planning Commission as it was testimony after the public hearing was closed.

The Planning Commission voted to approve the request on August 8, 1989.

VIII. RELEVANT CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS

1. Hawaii County Planning Commission Rule 12 as set out in appendix.

2. HRS 205-5.1, Land Use Commission, Geothermal Resource Subzones, as set out in appendix.

3. Hawaii State Constitution Article I Section 5, Due Process and Equal Protection.

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

4. HRS 91-14, Administrative Procedures, as set out in appendix.

5. HRS 343, Environmental Impact Statements, as set out in appendix.

APPENDIX

1. Decision of the Hawaii County Planning Commission, GRP 89-1, August 15, 1989.

2. Hawaii County Planning Commission Rule 12.

3. HRS 91-14, Administrative Procedures.

4. HRS 205-5.1, Land Use Commission, Geothermal Resource Subzones.

5. HRS 343, Environmental Impact Statements.

No. 14087

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALICE MEDEIROS, Et Al. Appellants, vs. HAWAII COUNTY PLANNING COMMISSION, Et Al., Respondents , vs. HAWAII NATURAL ENERGY INSTITUTE, Et Al., Respondents.	APPEALING THE GEOTHERMAL RESOURCE PERMIT GRANTED BY THE PLANNING COMMISSION, COUNTY OF HAWAII, ON AUGUST 15, 1989 DELAN PERRY JENNIFER PERRY NELSON HO REPLY BRIEF TO HNEI

REPLY BRIEF OF APPELLANTS DELAN PERRY, JENNIFER PERRY, AND NELSON TO THE ANSWERING BRIEF OF RESPONDENT HAWAII NATURAL ENERGY INSTITUTE, AND THE RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII

DELAN PERRY
JENNIFER PERRY
NELSON HO
P.O. Box 537
Pahoa, Hawaii 96778
Appellants, pro se

Appellants Delan Perry, Jennifer Perry and Nelson Ho in replying to this brief, have attempted to not be repetitive of similar arguments made in reply to the answering brief of Hawaii County Planning Commission (hereinafter HCPC). Lack of argument to specific points thus, does not in any way constitute agreement with appellee or negate importance of the points not argued.

REPLY TO HNEI

INDEX

TABLE OF AUTHORITIES

REPLY BRIEF OF APPELLANTS DELAN PERRY, JENNIFER PERRY AND NELSON HO TO ANSWERING BRIEF OF HNEI, ET AL

Herein are addressed the arguments set forth by HNEI:

A. THE DUE PROCESS CLAUSE REQUIRES FAR MORE THAN THE PROCEDURE UTILIZED IN GRANTING THIS PERMIT.

Appellants property and health interests at stake here are fundamental Interests protected by Federal and State Constitutional Requirements of procedural due process. The two step analysis of due process claims in Aquiar v.Hawaii Housing Authority, 522 P.2d 1255, 55 Haw.478 (1974) have been met by the appellants. 1. The Perrys' real estate and business interests meet the level of interest required for standing . Appellant Perry owns and leases six parcels of property adjacent and in near proximity to the site of SOH 2, and is situated so that meteorological conditions would cause geothermal emissions to tresspass onto their residence and farm operation. Appellants allege as stated in the record at Tr 4/11/89 @ 52-56 that geothermal emissions, H2S, and noise will adversely impact their health, property valuation, and business interests. They meet the tests for protection of the constitutional guarantees and require the court's protection as in Mahuiki v Planning Commission 65 Haw 507 (1982) :

> A proceeding before a county planning commission in which a landowner seeks to have the legal rights, duties, and priveleges relative to the development of his land declared over the objections of other landowners and residents of the area is a "contested case" within the meaning of HRS Chapt.91.
>
> One whose legitimate interest is in fact injured by illegal action of an administrative agency or officer should have standing to appeal because justice requires that such a party should have a chance to show that the action that hurts his interest is illegal.

Appellants interest parallel those of Town v Land Use Commission 55 Haw 538, 524 P.2d 84 (1974) where the court ruled:

> A case involving an amendment to district boundaries which is challenged by an adjoining landowner having a property interest in the outcome of said amendment is a"contested case"

The case at bar is distinguishable from Sandy Beach Defense Fund v.City Council of the City and County of Honolulu, 773d P.2d 250, 70 Haw. 361 (1989), where this court found that a legislative-type public hearing afforded adequate procedural due process to the plaintiffs-appellants because the interests asserted by the plaintiffs-appellants were aesthetic and environmental, not property interests entitled to the protection of constitutionally adequate procedural due process. Although this court stated in dicta in Sandy Beach that the legislative-type hearing provided adequate due process even if visual and environmental interests are characterized as property, a number of factors distinguish the situation in Sandy Beach from the case at bar. First, while visual and environmental interests might be characterized as "property", they are arguable not "significant property interests" which mandate the constitutional minimum procedural due process protections articulated in Goldberg v. Kelly, 397 U.S. 254 (1970) Second, in footnote 10 of Sandy Beach, this court noted that:

> The California Supreme Court has recognized that land use decisions which substantially affect the property rights of the owners of adjacent parcels may constitute deprivations of property within the context of procedural due process.

Appellants Perry hold significant property interests very close to the permitted parcel (SOH 2 well) which may be substantially affected by the decision of the HCPC at issue here. Third, the court noted that in the Sandy Beach proceedings there were no less than sixteen separate public meetings of hearings and at no

time were the plaintiffs-appellants denied the opportunity to address the Council or to ask questions of other witnesses. By contrast, in the case at bar all parties were denied the right to question anyone (Tr 4/11/89 @ 38). Fourth the issues raised by the plaintiffs-appellants in Sandy Beach were in the nature of inconvenience, whereas geothermal development is a complex new technology which may directly threaten appellants' health and property. Under some scenarios, such as a major geologic event or a well blow-out releasing large amounts of poisonous hydrogen-sulfide gas, appellants lives may be threatened by respondent's permitted activities and temporary or permanent evacuation of their property may be required.

The minimum procedural requirements to protect appellants due process include (In Re Kauai Elec.Div. of Citizens Util. Co. 60 Haw 182 (1978), Goldberg v Kelly):

1. ample opportunity to obtain and present all their evidence
2. to present testimony both oral and written
3. to cross examine witnesses
4. to argue the issues on their merits
5. to produce a reviewable record

Appellants were denied "meaningful time" to present oral arguments as defined in Mathews v. Eldridge, 424 U.S. 319 (1976). Three minutes and five minutes in this case did not allow for presentation of evidence and argument in a reasonable manner. The requirement for adequate oral presentation is set forth in Goldberg v. Kelly . The HCPC made many suggestions to speed the process up, including the reading of first and last paragraphs (Tr 4/11/89 @69), to point out that they were not interested in examining the testimony of witnesses (Tr 4/11/89 @55,60). The opportunity to be heard implies to all points, and not for a

limited and restrictive time limit. The commission under its rules is allowed to limit only testimony which is "unduly repetitious or lengthy" (2-3c Rules of Practice and Procedure, HCPC). A time limit did in the case of the GRP-1 proceedings, restrict a reasonable presentation of evidence.

It appears the HCPC expected and presumed mediation to review the entire record (Tr. 4/11/89 @ 69-71). Such full review by the mediator however was outside the bounds of Rule 12-5 and even if the mediator had reviewed the whole record, would not have fulfilled the requirement that appellants have adequate time for presentation of evidence and argument. The oral arguments permitted were not meaningful in the test of Mathews v. Eldridge.

Testimony of many individuals was directed at specific areas of concern. Certain repetitiveness by different persons must be allowed as many individuals would be affected by similar occurances and each need have his full reasons for denial expressed to preserve his own right. In fact, members of the Kapoho Community Association met to divide responsibilities to present specific points,but most were cut short in their presentations. The HCPC should have been required to hear this testimony in full.

The report of the Senate Standing Committee on amending HRS 205-5.1 (S.C. Report 1118, 1978 Senate Journal @ 1388) properly sets the responsibility of assuring adequate due process in the HCPC.

Thus a procedure that does not allow for obtaining evidence is a violation of due process for these qualifying appellants. Cross examination is a critical way to get accurate and concise answers to questions bearing obtaining evidence and is

required and even goes beyond the compelling circumstances of mandatory cross examination in Goldberg v. Kelly .

Notwithstanding the HCPC's failure to allow appellants to obtain, present and argue the issues on these merits, the burden of proof that adverse effects would not occur rests with the applicant (Rule 12.6) In Reynolds Metals Co.v YTurbide, 258 F.2d 321 (1958) where a cattle rancher brought action to recover for poisoning emanating from an aluminum reduction plant, the court ruled that:

> In determining standard of reasonable conduct, actor should recognize that his conduct involves a risk of causing invasion on another's interest if a person possessing such superior perception as actor himself has would infer that act creates an appreciable chance of causing such invasion.

An inadequate discovery process, coupled with a) glaring deficiencies of the application to meet the detailed information requirements of Rule 12.3 ; b) vague and illusive replies of appellee during the hearing ; and c) appellants' subsequent inability to address an ever changing project description, led to an incomplete record on which the HCPC had no business reaching a decision.

All these failures of procedure resulted in a guarantee that the process and record would be inadequate to protect the fundamental constitutionally protected interests of the appellants and inadequate for purposes of decision making.

Appellants contend that a full adjudicatory hearing could have preserved these minimum due process rights. The requirements of a full hearing are necessary for an accurate record by which HCPC can base a decision. Whether this hearing is called "contested case" or "mediation" it must not be encumbered by the traditional trappings of mediation that the HCPC added to Rule 12 but that are not part of HRS 205-5.1.

B. THE HAWAII COUNTY PLANNING COMMISSION DID MAKE PROCEDURAL AND SUBSTANTIVE ERROR IN GRANTING GRP-1.

Planning Department was in error in acknowledging application as proper and complete (ROA 2). Even if the Environmental Assessment is taken to be part of the application, hearing participants and agencies concluded information contained in them to be inadequate (Roa @57, Tr 4/11/89 A 41).

It would be reasonable for HNEI to provide information on the consequences of exploratory drilling, for beyond the wells the project itself drills, the SOH program specifically includes actions by developers holding the exploratory leases on the same lands. State sponsored exploration in an area heretofore devoted to intensive agriculture, as the area surrounding SOH2,must account for its full range of effects, not just a small part of the program, such as was presented by HNEI. This court ruled in Hui Malama Aina O Koolau v Pacarro 4 Haw App 304 that "development" includes that which is planned.

The HNEI EA states "The Hawaii State Legislature has appropriated $3 million for this effort with cost sharing from private developers."(ROA 206) The industry side of the equation was never described to the HCPC.

Further some findings of the HCPC were erronious because the full scope and intentions of the SOH project were not submitted as part of the application or mediator's report.

The siting of the SOH holes was never specific in the application. The Answering Brief calls the HNEI plan "preliminary" (p 24). The commission had they known that many changes would be made in the plan and application would and should have sent it

back until the application had some substance that could be counted on to base a decision.

The argument of too strict time restraint on mediation process is offered by appellants not only as a violation of due process but as a unanimous response of mediants and mediators (ROA @210). In this case, due to the complexity of issues and unwillingness of HNEI to cooperate freely with informational requests, 30 days proved too short a time to obtain all the facts sought and pertinent to an accurate assessment of the adverse effects on appellants.

Appellee also misreads Mediator's Report as to recommendations. In a contested case hearing as before the HCPC, a recommendation is "setting forth findings of fact, conclusion of law, and the reasons therefore and a recommended order.."(Rules of Practice and Procedure, HCPC 4-29). This definition of recommendation is reasonable for mediation. However only one agreement was reported reached between all parties, and no attempt was made by mediator to recommend the set of conditions presented by a few mediants who were "emphatic" that the permit must not be granted under any condition (ROA 210).

The Mediator's Report also devotes 2 pages to a critique of Rule 12. Many of these aspects should be included in revision of Rule 12. These include:

1. Time constraints were too severe
2. No record of proceedings/ nothing binding
3. No accountability for statements made
4. No subpoena power
5. No provision for the community to review the mediator's report before it becomes finalized.

The record does show (ROA 210) that DBED and HNEI statements were submitted after mediation closed without commission approval or mediants' review.

Appellants argument that a second public hearing was required is based on Rule 12-5-1(n). HCPC may hold a hearing if there were unresolved mediation issues, of which there were many. But further, the HCPC is bound by the constitution to allow all evidence to be heard. In this case, HNEI had admitted during mediation, contrary to its application and EA that there would be emissions of H2S and other non condensible gases. Further, the effect of these emissions will be a severe detriment to appellants. Under the criteria for issuance of a GRP (12-6) the HCPC should have permitted a hearing on these effects and demanded a demonstration by the applicant that emissions would not have unreasonable adverse health, environmental, or socio-economic effects. (See Mahuiki v Planning Commission generally). The HCPC may have acted in a void of inadequate knowledge of this new evidence if they had not carefully read the mediators report. Appellant Jennifer Perry attempted to bring this procedural question to their attention but was denied acceptance of her letter in the belief it was substantive and would have been in violation of accepted procedures for public hearings (Appendix 1). It was not intended to be substantive but to let the HCPC know they had an obligation to hear all new evidence and were obligated to allow appellants a hearing in which to present and argue this evidence.

Appellants see a resulting abuse of discretion because HCPC was not willing to spend any more time listening to appellants present more evidence. Such letter presented but not

accepted by the clerk of the HCPC was unconstitutionally rejected. There could have been a review procedure to determine if it was substantive or procedural. Denial of its acceptance and thus denial of a second hearing were serious errors to the detriment of appellants.

The Mediator by accepting the July 10 letters (ROA 210) admitted new evidence into the record in violation of rule 12 and HCPC rules of Practice and Procedure. This letter states a contradiction to the application and to applicants' testimony presented at the public hearing. To wit:

1. Regarding emissions:

"There will be no gaseous emissions," (Tr 4/11/89 @33); v.

"...to restrict all emissions from the holes, to the greatest degree possible, after drilling that will allow us to obtain monitoring information from the well," ROA 210

2. Regarding project scope:

"This is a stand alone project" (Tr 4/11/89 @37); v.

"The immediate objectives of the program are ...to stimulate commercial development of Hawaii's geothermal resources," ROA 210.

3. Regarding time limitations:

"The impact of the program will be temporary... The holes will not be flow tested" (Tr 5/9/89 @ 122), v.

"...can be monitored throughout the development life of the field and will permit regulatory agencies to evaluate the long term impacts of fluid withdrawal from or reinjection into the field," ROA 210

Further, some of the information contained in these illegally admitted statements contain new information. This court should find these two documents in ROA 210 were received after the close of the public hearing thereby not giving appellants the chance to rebut the new substantive changes to the application, in

violation of appellants due process as required in Waikiki Shore Inc.v Zoning Board of Appeals 2 Haw.App.43, 625 P.2d 1044 (1981) .

Appellants do not expect this court to sift through the record. We believe this should have been done by the HCPC staff to arrive at an accurate finding of fact and conclusion of law. But through the deficiencies of Rule 12, the overly restrictive time constraints of HRS 205 and the abuse of discretion in dealing with new inportant information, the record has come up to this court seriously deficient.

CONCLUSION

The appellants seek to have the record remanded to

1. acquire full disclosure of applicants intentions and technical aspects of this project;
2. to be able to adequately present their own testimony and argue appellee's points; and
3. to produce a reviewable record.

In order to accomplish this, Rule 12 procedures will have to be changed (amended). This can be accomplished by remanding the Rule 12 to the HCPC with directives as to truly preserving the significant interest of appellants, or by rewriting the procedure in this court.

Dated: Hilo, Hawaii 2/15/90

Respectfully submitted,

DELAN PERRY, pro se

JENNIFER PERRY, pro se

KAPOHO GROWN
P.O. BOX 537
Pahoa, Hawaii 96778
808-965-8699

County of Hawaii
Planning Commission
25 Aupuni Street
Hilo, Hawaii 96720

July 18, 1989

Chairman Mizuno and members of the Planning Commission:

The mediator's report you are reviewing has left unanswered or unsubstantiated many of the HNEI's statements.

Part of the reason for this is that the State and HNEI's "statements of position" were submitted after the mediation process ended on July 7. These statements were intended as the last word and a rebutal of the community's reasons for denial (which were distributed to all parties during mediation), but were put forward so mediation participants could not review them.

Those statements should not be part of the report and the community should be given the opportunity to discuss with the Planning Commission the State and HNEI's "mistatements" and other items which were left out of the report.

We understand the difficulties you face in your decision making and ask that you deny the permit application in view of the communities reasons for denial submitted in the mediators report.

Delan and Jennifer Perry

Jennifer Perry

Reply HNEI Appendix 1

No. 14087

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALICE MEDEIROS, Et Al. Appellants, vs. HAWAII COUNTY PLANNING COMMISSION, Et Al., Respondents , vs. HAWAII NATURAL ENERGY INSTITUTE, Et Al., Respondents.	APPEALING THE GEOTHERMAL RESOURCE PERMIT GRANTED BY THE PLANNING COMMISSION, COUNTY OF HAWAII, ON AUGUST 15, 1989 DELAN PERRY JENNIFER PERRY NELSON HO REPLY BRIEF TO HAWAII COUNTY PLANNING COMMISSION

REPLY BRIEF OF APPELLANTS DELAN PERRY, JENNIFER PERRY, AND NELSON TO THE ANSWERING BRIEF OF RESPONDENT HAWAII COUNTY PLANNING COMMISSION

DELAN PERRY
JENNIFER PERRY
NELSON HO
P.O. Box 537
Pahoa, Hawaii 96778
Appellants, pro se

Appellants Delan Perry, Jennifer Perry and Nelson Ho in replying to this brief, have attempted to not be repetitive of similar arguments made in reply to the answering brief of Hawaii Natural Energy Institute and Research Corporation of the University of Hawaii. Lack of argument to specific points thus, does not in any way constitute agreement with appellee or negate importance of the points not argued.

REPLY TO HCPC

INDEX PAGES

TABLE OF AUTHORITIES

REPLY BRIEF OF APPELLANTS DELAN PERRY,JENNIFER PERRY, AND NELSON HO TO ANSWERING BRIEF OF HAWAII COUNTY PLANNING COMMISSION

A. DUE PROCESS WAS IN FACT DENIED BY HAWAII COUNTY PLANNING COMMISSION PROCEDURE AND HRS 205-5.1.

Appellants have argued they meet the two step test of Aguiar v. Hawaii Housing Authority, 522 P.2d 1255, 55 Haw 478 (1974) to establish their qualification for due process protection of their residence and farm business and the procedures violated in their Reply Brief to HNEI and will not repeat them here. Appellants affirm they have a significant property interest in six parcels adjacent to and in near proximity to the SOH 2 site. These property interests are part of the record at Tr 4/1/89 @ 51-57, ROA 208 and others. These interests go far beyond those referred to in Sandy Beach Defense Fund v. City Council of the City and County of Honolulu, 70 Haw 361, 773 P.2d 250 (1989) and amount to their and their employees economic, health, safety and well being as well as aesthetic and environmental reasons.

The procedures which violated due process are:

1. Time restraints at hearing did not allow full oral presentation or arguments;
2. Inability to obtain all evidence from applicant; and
3. No record of mediation made to preserve an adequate record.

The Rule 12 procedures used by the Hawaii County Planning Commission (hereinafter HCPC) in the issuance of GRP-1 were substituted for a contested case hearing.

In seeking to institute HRS 205-5.1 amendments to substitute a mediation process for a contested case process, the HCPC did not preserve the substantial rights of appellants.

HRS 205-5.1 broadened the scope of standing to participate in the procedure to "any party who submitted comment at the public hearing." The process was given time restrictions which could be extended by the HCPC. However, the Rule 12 procedures that were adopted failed to incorporate the principals of due process that they replaced, including that substantial rights of petitioners have been prejudiced, decision was made upon unlawful procedure, and that not all the evidence was presented.

Some part of this Rule 12 needed to address the rights of appellants with significant property interests. As such, the whole public hearing and mediation components must be in concert to allow all the facts in the matter to be presented to the Planning Commission. The combination of grossly limiting testimony by interested parties with specific property rights and then not allowing their full presentations made during mediation to be made via not allowing an accurate record of mediation to be kept (12-5-1-l,m) caused an undue burden to fall on the mediator. The mediator was not to impose a settlement on the parties (12-5-1-h). The mediator was required, with no aid of an accurate record to make a recommendation (12-5-1-m) based on any mediation agreements. The only agreements ever made with all parties was (ROA 210) that the County should develop an enforcement program. The statements presented in the mediators report were submitted by various individuals and groups and none of those represented an agreement which could have been presented as a recommendation.

The Chairman of the Planning Commission acknowledged that the public hearing was not intended to allow all facts to be presented by asking for summaries, reading of first and last

paragraphs, speed it up (Tr 4/11/89 @ 55, 60, 69).

The mediation process was expected to find areas of agreement and disagreement among various groups and individuals. However, the mediator's report only highlighted various discussions and was never the comprehensive document it should have been to present to the Planning Commission the missing facts (recommendations and agreements) they were expecting it to. Numerous points mediants had asked the mediator to include in the report were omitted. No review of the document was made prior to closing of mediation on July 7, 1989.

The HCPC limited time in anticipation that the mediator's report would fill the void of what is an extremely complex and potentially devastating project: geothermal development of the hazardous Hawaiian resource in close proximity to neighboring homes and businesses and farms.TR 5/9/89 @ 26, TR 4/11/89 @69.

B. THE HAWAII COUNTY PLANNING COMMISSION DID ERR BY ACCEPTING AN APPLICATION WHICH WAS PRELIMINARY, DEVOID OF DETAIL AND HAS SUBSEQUENTLY BEEN CHANGED BY HNEI.

The HCPC recognizing the technical complexity of the SOH project should have required substantially more detail than the often one sentence statements made in order to address the many details required of Rule 12-3. Some of these points have still not been submitted to the Planning Commision even after drilling has begun such as pre-exploration meteorological and ambient air quality measurements (Rule 12-3-I).

Additionally Appellee HNEI never submitted an accurate statment of project scope (12-3-B) which, had it been submitted, would have required far more information as to the adverse effects

of project noise, air emissions and groundwater contamination on neighbors.

The HCPC should have rejected the application initially. The HNEI attempted to hide the true scope of its project in order to avoid submission of proper information as well as to avoid Department of Health permit procedures.(TR 5/9/89 @137-141) The HNEI project is intended to open up new areas to geothermal development that will adversely affect the property interests of appellants.

Whether or not the Environmental Assessment met the requirments of HRS 343-5a(1), the more stringent requirements of 12-5-3 should have been met and were not.

The lack of the details in the application that should have been a part of the application has allowed HNEI to significantly move the sites of wells, change drill rigs, not get DOH approval of its air quality and waste water controls, all after the permit was granted. All of these have affected neighbor's property interests and will affect apellants' property interests when HNEI drills SOH2.

C. THE RECORD ON WHICH THE HAWAII COUNTY PLANNING COMMISSION GRANTED GRP-1 WAS INADEQUATE.

Mediation, which was requested by the first non applicant speaker at the first public hearing was known from the begginning of the public hearing to be a part of the GRP-1 procedure.

The purpose of mediation was to report agreements and non agreements of parties and develop a recommendation (12-5-1-m). HRS 205-5.1 clearly states that mediation is an integral part of the information gathering process preceeding a decision. "...the

county authority shall conduct a public hearing. Upon appropriate request for mediation from any party....(205-5.1e)" The information thus developed in mediation must be submitted as part of the report, in order that the HCPC could conclude that "the desired use would not have unreasonable adverse health, environmental or socio-economic effects on residents and surrounding property (205- 5.1-e-1)." The requirements of 12-5-1,k,j,i clearly compromise the mediator's ability to prepare a report that can adequately answer the tests of 205-5-e-1. Thus HCPC rules made it impossible that the record would be aedequate and complete. In fact, many arguments, points, and some expert witness's statements were not included. Their inclusion would have caused the HCPC to rule the appellant had not demonstrated undue adverse effects.

Answering Brief of appellant County of Hawaii (p.14) cannot conclude that the conditions attached to GRP-1 adequately protect appellants rights. Missing information contained in the mediator's report would have led to a different determination.

In fact, HNEI,through their admission in mediation (ROA 210, Community Statement) admitted that there will be gaseous air emissions in violation of GRP-1 condition #8 that "unabated open venting of geothermal steam shall be prohibited" (ROA 183). This new evidence was crucial in that it was the first realization and confirmation of gaseous emissions as not stated anywhere in the record and contrary to previous admissions of the applicant.

D. THE MEDIATION PROCEDURE WAS VIOLATED BY THE HAWAII COUNTY PLANNING COMMISSION.

Contrary to Answering Brief @16, the Mediator's report makes no recommendation. In fact it clearly states in several places that "all community members in these discussions (on conditions) were emphatic that the permit should not be granted under any condition (Sec 2 ROA 210) There was only one general agreement. This agreement did not become a permit condition:

> That the County should develop an enforcement program within six months for geothermal. Said program to be developed in consultation with the community and developers.

The other list of agreements to condition was the work of a small subset of mediants and should not detract from the "community statement" which listed reasons for denial which represented all those who filed for mediation.

The lack recommendation demonstrates the failure of Rule 12 to properly judge the points of fact that were brought out in the mediation procedure. Such inability of a traditionally defined "mediator" to sit in judgement of the information gathering and assessment process may have caused the HCPC to discount the report, diminishing the value of the only avenue open to appellants to gather irformation albeit the appellees did their best not to answer any questions put to them. In fact, the mediatior's report devotes 2 pages to criticizing Rule 12 (ROA 210)

The Answering Brief of HCPC makes no challenge to the appellants statement of question #8 that the mediator did extend the time of mediation in violation of 12-5.1g by allowing the HNEI and state opportunity for unrefuted rebuttal after the close of mediation but included in mediator's report as "State's Position

Why the SOH Project Should be Approved", and HNEI's "Statement of Position on Scientific Observation Holes" submitted on July 10, 1989). Such unilateral granting rebuttal to the appellees after the close of mediation on July 6, 1989 served to undermine appellants statements and discredit their conclusions. Such inclusion was objected to on July 6, 1989 by appellant Delan Perry to the mediators. The rebuttal in fact included new information on H2S emissions, project life, use of data by regulatory agencies, and flow testing.

E. THE HAWAII COUNTY PLANNING COMMISSION DID ERRONEOUSLY REFUSE TO ACCEPT PUBLIC COMMENTS

At the August 8, 1989 meeting of the HCPC with a duly published agenda item relating to GRP-1 appellants did try to bring to the attention of the commission that there was new information available, gained during mediation, that necessitated a second public hearing. Appellants had authority to raise such procedural questions as a court must answer a motion. No other means was open to bringing up the possibility of procedural error by affected parties.

F. THE HAWAII COUNTY PLANNING COMMISSION WAS IN ERROR IN NOT NOT HOLDING A SECOND PUBLIC HEARING AFTER MEDIATION.

The HCPC having learned, via the community statement of the mediator's report and the illegally admitted State and HNEI statements of position, that HNEI had admitted there would be H2S emissions, should have held a second public hearing.

The adverse effects of H2S emissions on surrounding property values, crops, human health, and employee satisfaction is well documented. The appellant should have been required, during a second public hearing to prove that there would be no adverse

effects from these emissions. No demonstration was made that H2S emissions would not have unreasonable effects and thus, the Commission's refusal to hold a second public hearing abused their discretion.

Among other consequences of the admissions of emission, HNEI would have been required to obtain an Authority To Construct permit from the DOH.

The reasoned conclusion of the Commission required evidence that H2S emisisons as well as a project life to monitoring the SOHs throughout the development life of the fields (30years) would not adversely affect appellant's substantial interests. No such showing was made. The burden of this showing was on the applicant (HRS 205-5.1,e). In Mahuiki v.Planning Commission 65 Haw 511 (1982) this court ruled that:

> The Planning Commission made no finding that the development would "not have any substantial adverse evnironmental or ecological effect", or that the adverse effect was "clearly outweighed by public health and safety" prior to approval.

Appellants do not expect this Court to comb the record at hand. Appellants allege that the record is inadequate to support the findings and decision of the HCPC. See American Can Co v Davis, 28 Or.App.207,216, 559 P.2d 898,905(1977) . Kilauea Neighborhood v Land Use Commission 751 P.2d 1031 (1988) :

> Agency's findings must be sufficient to allow reviewing court to tract steps by which agency reached its decision. HRS 91-14

CONCLUSION

Procedural error, invalidity of portions of Rule 12, and loss of due process in protecting their substantial property interests were committed by the Commission. Therefore appellants Delan Perry, Jennifer Perry and Nelson Ho requests this court to

remand the Commissions issuance of GRP-1 and promulgate new rules.

Dated Hilo, Hawaii February 15, 1990

Respectfully submitted,

DELAN PERRY, pro se

JENNIFER PERRY, pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing document were served upon the following by mailing the same, postate prepaid, on February 15, 1990:

RICHARD I. MIYAMOTO 848
Corporation Council
STEVEN CHRISTENSEN
FREDERICK GIANNINI 2472
Deputy Corporation Counsel
County of Hawaii
Hilo Lagoon Centre
101 Aupuni Street, Suite 325
Hilo, HI 96720

Attorneys for Respondent Hawaii County Planning Commission, Gary Mizuno, Jeanne Comer, Marion Bush, Fred Y. Fujimoto, Dennis B. Holt, Tommy Ishimaru, Phillip "Mike" Luce, Tom Poy, and Nemesio Sanchez.

ANNETTE CHOCK
Deputy Attorney General
465 South King St. B-2
Honolulu, HI 96813

Attorney for respondent
Hawaii Natural Energy Institute

THOMAS E. LUEBBEN
809 Copper N.W. Suite 200
Albuquerque, N.M. 87102

(505)842-6123
Attorney for appellant
Pele Defense Fund

ANTHONY RANKIN
Lowenthal, August & Graham
2261 Aupuni St.
Wailuku, HI 96793

Attorney for appellant
Pele Defense Fund

CITIZENS FOR RESPONSIBLE ENERGY DEVELOPMENT
WITH ALOHA AINA (CREDAA)
P.O. Box 358
Mt. View, HI 96771

ALICE MEDEIROS
P.O. Box 527
Pahoa, HI 96778

GREGORY POMMERENK
DEBORAH POMMERENK
P.O. Box 1588
Pahoa, HI 96778

KAPOHO COMMUNITY ASSOCIATION
Barbara Bell
P.O. Box 553
Pahoa, HI 96778

DELAN A. PERRY
APPELLANT, PRO SE

NO. 14087

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALICE MEDEIROS; MARGARET McGUIRE; TIM SULLIVAN; ROBERT PETRICCI; RALPH ROUBIQUE; JIM BLAKEY; BARBARA BELL; ROLF W. SALZER; WILLIAM REICH; STEVE PHILLIPS; RANDAL LEE; RUSSELL E. RUDERMAN; JAMES JOHNSON; CLIVE CHEETAM; BRADLEY SORTE; CELINE LOGAN, (ATTORNEY IN FACT) FOR DONIE LOGAN, GREGORY C. POMMERENK and DEBORAH E. POMMERENK; DELAN PERRY; JENNIFER PERRY; NELSON HO; CITIZENS FOR RESPONSIBLE ENERGY DEVELOPMENT WITH ALOHA AINA (CREDAA); and PELE DEFENSE FUND, a Hawaii non-profit corporation, Appellants, vs. HAWAII COUNTY PLANNING COMMISSION; GARY MIZUNO, in his capacity as Chairman of the Hawaii County Planning Commission; JEANNE COMER, MARION BUSH, FRED Y. FUJIMOTO, DENNIS B. HOLT, TOMMY ISHIMARU, PHILLIP "MIKE" LUCE, TOM POY, and NEMESIO SANCHEZ, in their capacity as members of the Hawaii County Planning Commission; and HAWAII NATURAL ENERGY INSTITUTE UNIVERSITY OF HAWAII, RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII, Respondents.	APPEAL FROM THE FINAL DECISION OF THE HAWAII COUNTY PLANNING COMMISSION FILED AUGUST 15, 1989 HAWAII COUNTY PLANNING COMMISSION

MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION TO REMAND

CERTIFICATE OF SERVICE

cc: D. Thomas
M. Metz
N. Yuen.

RICHARD I. MIYAMOTO 848
Corporation Counsel

FREDERICK GIANNINI 2472
Deputy Corporation Counsel
County of Hawaii
Hilo Lagoon Centre
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720
Tel. No. 961-8251

Attorneys for Respondents Hawaii County Planning Commission; Gary Mizuno, in his capacity as Chairman of the Hawaii County Planning Commission

NO. 14087

IN THE SUPREME COURT OF THE STATE OF HAWAII

ALICE MEDEIROS; MARGARET McGUIRE; TIM SULLIVAN; ROBERT PETRICCI; RALPH ROUBIQUE; JIM BLAKEY; BARBARA BELL; ROLF W. SALZER; WILLIAM REICH; STEVE PHILLIPS; RANDAL LEE; RUSSELL E. RUDERMAN; JAMES JOHNSON; CLIVE CHEETAM; BRADLEY SORTE; CELINE LOGAN, (ATTORNEY IN FACT) FOR DONIE LOGAN, GREGORY C. POMMERENK and DEBORAH E. POMMERENK; DELAN PERRY; JENNIFER PERRY; NELSON HO; CITIZENS FOR RESPONSIBLE ENERGY DEVELOPMENT WITH ALOHA AINA (CREDAA); and PELE DEFENSE FUND, a Hawaii non-profit corporation, Appellants, vs. HAWAII COUNTY PLANNING COMMISSION; GARY MIZUNO, in his capacity as Chairman of the Hawaii County Planning Commission; JEANNE COMER, MARION BUSH, FRED Y. FUJIMOTO, DENNIS B. HOLT, TOMMY ISHIMARU, PHILLIP "MIKE" LUCE, TOM POY, and NEMESIO SANCHEZ, in their capacity as members of the Hawaii County Planning Commission; and HAWAII NATURAL ENERGY INSTITUTE UNIVERSITY OF HAWAII, RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII, Respondents.	APPEAL FROM THE FINAL DECISION OF THE HAWAII COUNTY PLANNING COMMISSION FILED AUGUST 15, 1989 HAWAII COUNTY PLANNING COMMISSION

MEMORANDUM IN OPPOSITION TO APPELLANT'S MOTION TO REMAND

On December 14, 1989, Respondent Hawaii County Planning Commission received a copy of the Motion to Remand filed by Appellant Pele Defense Fund dated December 11, 1989. Respondent

Hawaii County Planning Commission asks that this motion be denied, because it is premature.

The present appeal is brought directly to the Hawaii Supreme Court pursuant to HRS §205-5.1. Appellant seeks to overturn the decision by Respondent Hawaii County Planning Commission to grant a geothermal resource permit to Respondent Hawaii Natural Energy Institute. In addition to the Motion to Remand, Appellant Pele Defense Fund, on December 4, 1989, filed a Motion to Extend Time to File Opening Brief. In support of this Motion to Extend Time to File Opening Brief, Appellant Pele Defense Fund filed an affidavit by its attorney, Anthony L. Ranken, which stated, in part:

> Both appeals will principally focus upon due process deficiencies of HRS §205-5.1 the statute providing for the issuance of geothermal resource permits. (emphasis supplied)

Assuming that Appellant Pele Defense Fund intends to argue that §205-5.1 is defective, the Motion to Remand is premature. If the case were remanded to the Hawaii County Planning Commission for the taking of more evidence, the decision on the permit would still be controlled by HRS §205-5.1. If the permit were granted, Appellant would still be able to appeal to the Supreme Court, still alledging defects in the statute. Therefore, it would be a misuse of time to remand for further hearings while the constitutionality and legality of HRS §205-5.1 is in question. A decision on the constitutionality and legality could possibly render the motion to remand moot.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing document were served upon the following by mailing the same, postage prepaid, on December 18, 1989:

ANTHONY L. RANKEN, ESQ.
P. O. Box 261
Wailuku, Hawaii 96793
Attorney for Plaintiff-Appellant
Pele Defense Fund

THOMAS E. LEUBBEN, ESQ.
201 Broadway SE
Alburquerque, NM 87102
Attorney for Plaintiff-Appellant
Pele Defense Fund

ANNETTE CHOCK, ESQ.
Deputy Attorney General
465 South King Street, B-2
Honolulu, Hawaii 96813

MS. DEE DEE LETTS
P. O. Box 2560
Honolulu, HI 96804

MR. MAURICE KAYA
DBED-Energy Division
335 Merchant Street, Room 110
Honolulu, HI 96813

RICHARD & LOU ANN JONES
P. O. Box 2092
Pahoa, HI 96778

KAPOHO GROWN
Attn: Delan Perry
P. O. Box 537
Pahoa, HI 96778

MR. DAVID LAUGHLIN
P. O. Box 772
Pahoa, HI 96778

MR. STEVE PHILIPS
P. O. Box 1267
Keaau, HI 96749

MS. HELENE SHINDE
83 Kapiolani Street, Apt. 3
Hilo, HI 96720

MR. RALPH MATSUDA
Planning Department
200 So. High Street
Wailuku, HI 96793

MS. CHRISTINE BATISTA
P. O. Box 573
Pahoa, HI 96778

W. R. CRADDICK
1668 Oneawa Way
Hilo, HI 96720

KAPOHO COMMUNITY ASSOCIATION
Attn: Lon Rankin
P. O. Box 553
Pahoa, HI 96778

KAPOHO GROWN
Attn: Jennifer Perry
P. O. Box 537
Pahoa, HI 96778

MS. ALICE MEDEIROS
P. O. Box 527
Pahoa, HI 96778

MR. GREGORY POMMERENK
P. O. Box 1588
Pahoa, HI 96778

MR. YOSHIO SHINDE
P. O. Box 134
Pahoa, HI 96778

DR. HARRY OLSEN/HNEI
Holmes Hall 240
2540 Dole Street
Honolulu, HI 96822

MR. JIM BLAKEY
P. O. Box 328
Pahoa, HI 96778

MS. JANE HEDTKE
P. O. Box 937
Pahoa, HI 96778

KAPOHO COMMUNITY ASSOCIATION
Attn: Barbara Bell
P. O. Box 553
Pahoa, HI 96778

FERNANDO JAVIER
LOIS J. WEST
P. O. Box 1414
Pahoa, HI 96778

PELE DEFENSE FUND
Waiakea Villas
400 Hualani Street, Room 292
Hilo, HI 96720

PUNA COMMUNITY COUNCIL
Attn: R. Phillips
P. O. Box 1294
Pahoa, HI 96778

KEM LOWRY
2424 Maile Way, Porteus 107J
Honolulu, HI 96822

Patricia K. O'Toole for

FREDERICK GIANNINI
Deputy Corporation Counsel
County of Hawaii

JOHN WAIHEE
GOVERNOR

WARREN PRICE, III
ATTORNEY GENERAL

CORINNE K. A. WATANABE
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
~~STATE CAPITOL~~ 425 Queen Street
HONOLULU, HAWAII 96813
~~(808) 548-4740~~ (808) 548-1942

TRANSMITTAL LETTER

[ ] Hand Delivered
[ ] Mailed

TO: Mr. Art Seki
Hawaii Natural Energy Institute
University of Hawaii

FROM: Annette Y. W. Chock Annette Y. W. Chock (co)
Deputy Attorney General

DATE: March 28, 1990

RE: Alice Medeiros, et al. v. Hawaii County Planning Commission, et al., No. 14087, Supreme Court of the State of Hawaii

COPIES	DATE	DESCRIPTION
1		Answering Brief of Respondents-Appellees Hawaii Natural Energy Institute, The University of Hawaii, and The Research Corporation of the University of Hawaii
1		Reply Brief of Appellants Delan Perry, Jennifer Perry, and Nelson to the Answering Brief of Respondent Hawaii Natural Energy Institute, and The Research Corporation of the University of Hawaii
1		Reply Brief of Appellants Delan Perry, Jennifer Perry, and Nelson to the Answering Brief of Respondent

TRANSMITTED FOR: Hawaii County Planning Commission

[xx] Your information & files
[ ] Your signature & return
[ ] Your signature & forwarding as indicated below
[ ] Your appropriate action
[ ] Your approval
[ ] Your review & comments
[ ] Per your request
[ ] See remarks below

PLEASE CALL OUR OFFICE SHOULD YOU HAVE ANY QUESTIONS

REMARKS:

NO. 14087

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1989

ALICE MEDEIROS, MARGARET MCGUIRE, TIM SULLIVAN, ROBERT PETRICCI, RALPH ROUBIQUE, JIM BLAKEY, BARBARA BELL, ROLF W. SALZER, WILLIAM REICH, STEVE PHILLIPS, RANDAL LEE, RUSSELL E. RUDERMAN, JAMES JOHNSON, CLIVE CHEETHAM, BRADLEY SORTE, CELINE LOGAN, (ATTORNEY IN FACT) FOR DONIE LOGAN; DELAN PERRY, JENNIFER PERRY, and NELSON HO; MRS. DEBORAH E. POMMERENK, GREGORY C. POMMERENK; CITIZENS FOR RESPONSIBLE ENERGY DEVELOPMENT WITH ALOHA AINA (CREDAA); and PELE DEFENSE FUND, a Hawaii non-profit corporation, Appellants, vs. HAWAII COUNTY PLANNING COMMISSION, GARY MIZUNO in his capacity as Chairman of the Hawaii County Planning Commission, JEANNE COMER, MARION BUSH, FRED Y. FUJIMOTO, DENNIS B. HOLT, TOMMY ISHIMARU, PHILLIP "MIKE" LUCE, TOM POY, and NEMESIO SANCHEZ in their capacity as members of the Hawaii County Planning Commission; and HAWAII NATURAL	DOCKET GRP 89-1 APPEAL FROM THE FINAL DECISION OF THE HAWAII COUNTY PLANNING COMMISSION GRANTING A GEOTHERMAL RESOURCE PERMIT TO THE HAWAII NATURAL ENERGY INSTITUTE, THE UNIVERSITY OF HAWAII, AND THE RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII FILED AUGUST 15, 1989 HAWAII COUNTY PLANNING COMMISSION (direct appeal)

ENERGY INSTITUTE, UNIVERSITY)
OF HAWAII, and THE RESEARCH)
CORPORATION OF THE UNIVERSITY)
OF HAWAII,)
)
Respondents-)
Appellees.)
)

ANSWERING BRIEF OF RESPONDENTS-APPELLEES HAWAII NATURAL ENERGY INSTITUTE, THE UNIVERSITY OF HAWAII, AND THE RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII

and

CERTIFICATE OF SERVICE

WARREN PRICE, III 1212
Attorney General
State of Hawaii

ANNETTE Y. W. CHOCK 1251
Deputy Attorney General
State of Hawaii

109 Bachman Hall
2444 Dole Street
Honolulu, Hawaii 96822
Telephone: 948-6602

Attorneys for Hawaii Natural
Energy Institute, The University
of Hawaii, and The Research
Corporation of the University
of Hawaii

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

PAGE

HAWAII REVISED STATUTES

RULES OF PRACTICE AND PROCEDURE OF THE COUNTY OF HAWAII COMMISSION

NO. 14087

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1989

ALICE MEDEIROS, MARGARET MCGUIRE, TIM SULLIVAN, ROBERT PETRICCI, RALPH ROUBIQUE, JIM BLAKEY, BARBARA BELL, ROLF W. SALZER, WILLIAM REICH, STEVE PHILLIPS, RANDAL LEE, RUSSELL E. RUDERMAN, JAMES JOHNSON, CLIVE CHEETHAM, BRADLEY SORTE, CELINE LOGAN, (ATTORNEY IN FACT) FOR DONIE LOGAN; DELAN PERRY, JENNIFER PERRY, and NELSON HO; MRS. DEBORAH E. POMMERENK, GREGORY C. POMMERENK; CITIZENS FOR RESPONSIBLE ENERGY DEVELOPMENT WITH ALOHA AINA (CREDAA); and PELE DEFENSE FUND, a Hawaii non-profit corporation, Appellants, vs. HAWAII COUNTY PLANNING COMMISSION, GARY MIZUNO in his capacity as Chairman of the Hawaii County Planning Commission, JEANNE COMER, MARION BUSH, FRED Y. FUJIMOTO, DENNIS B. HOLT, TOMMY ISHIMARU, PHILLIP "MIKE" LUCE, TOM POY, and NEMESIO SANCHEZ in their capacity as members of the Hawaii County Planning Commission; and HAWAII NATURAL ENERGY INSTITUTE, UNIVERSITY	DOCKET GRP 89-1 APPEAL FROM THE FINAL DECISION OF THE HAWAII COUNTY PLANNING COMMISSION GRANTING A GEOTHERMAL RESOURCE PERMIT TO THE HAWAII NATURAL ENERGY INSTITUTE, THE UNIVERSITY OF HAWAII, AND THE RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII FILED AUGUST 15, 1989 HAWAII COUNTY PLANNING COMMISSION (direct appeal)

OF HAWAII, and THE RESEARCH)
CORPORATION OF THE UNIVERSITY)
OF HAWAII,)
)
Respondents-)
Appellees.)
)

ANSWERING BRIEF OF RESPONDENTS-APPELLEES HAWAII NATURAL ENERGY INSTITUTE, THE UNIVERSITY OF HAWAII, AND THE RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII

I. COUNTERSTATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to HRS § 205-5.1(g). HRS § 205-5.1(g) provides for direct appeal to this Court from the decision to issue a geothermal resource permit made by the Hawaii County Planning Commission.

After a hearing on August 15, 1989, conducted in accordance with the procedures set forth in HRS § 205-5.1(e) and (f) and Rule 12, Rules of Practice and Procedure of the Hawaii County Planning Commission, the Hawaii County Planning Commission granted a geothermal resource permit to Hawaii Natural Energy Institute (HNEI), The University of Hawaii, and The Research Corporation of the University of Hawaii (RCUH). Appellant timely filed a Notice of Appeal with the Hawaii

County Planning Commission on September 14, 1989, which was docketed in this Court on September 25, 1989.

II. COUNTERSTATEMENT OF THE CASE

Appellant contends in this appeal that the provisions of HRS §§ 205-5.1 and Rule 12, Rules of Practice and Procedure of the Hawaii County Planning Commission are unconstitutional because they do not require that a contested case hearing be conducted by the Hawaii County Planning Commission prior to the issuance of a geothermal resource permit. Further, appellant claims the Hawaii County Planning Commission made various procedural and substantive errors in the decision to grant the permit. HNEI proposed to conduct a Scientific Observation Hole program to evaluate the geology, hydrology and sub-surface thermal regime in the Puna District of the Island of Hawaii within the Geothermal Resource Subzones of the Kilauea Middle and Lower East Rift Zones by the drilling of four exploratory wells. The wells were to be instrumented to take measurements and provide data of the geothermal resource and are not designed as production wells to produce fluids, or to be flow tested. RA 1 and 183. Because exploration is defined as a "geothermal development

activity" under HRS § 205-5.1(a), HNEI was required to obtain a geothermal resource permit for its project. This case arises from the issuance of a geothermal resource permit to Hawaii Natural Energy Institute, University of Hawaii, and The Research Corporation of the University of Hawaii by the Hawaii County Planning Commission.

HRS §§ 205-5.1(e) and (f) set forth the procedure to be followed by the Hawaii County Planning Commission in the issuance of a geothermal resource permit:

1. The Commission must conduct a public hearing after the receipt of an application.

2. Mediation may be requested by any party who submitted comment at the public hearing. This request must be made within five days after the close of the hearing.

3. In the event a request for mediation is made the Commission must appoint a mediator within five days after receipt of the request for mediation.

4. The Commission must give notice to any person who submitted a request for mediation of the date, time, and place of mediation conference. This notice must be mailed no later than ten days before the commencement of the mediation conference. The conference is required to be held on the island where the public hearing is held.

5. The Commission shall require the parties to participate in mediation.

6. The mediator must not be an employee of any county agency or its staff.

7. The mediation period must not extend beyond thirty days after mediation has commenced unless approved by the Commission.

8. Mediation must be confined to the issues raised at the public hearing by the party requesting mediation.

9. The mediator will submit a written recommendation to the Commission, based upon any mediation agreement reached between the parties for consideration by the Commission in its final decision.

10. If there is no mediation agreement, the Commission may conduct a second public hearing to receive additional comment related to the mediation issues. Within ten days after the second public hearing, the Commission may receive additional written comment on the issues raised at the second public hearing from any party.

11. The Commission shall consider the comments raised at the second hearing before rendering its final decision.

12. The Commission shall then determine whether a geothermal resource permit shall be granted to authorize the geothermal development activities described in the application. The Commission shall grant the permit if it finds that the applicant has demonstrated that:

a. The desired uses would not have unreasonable adverse health, environmental, or socio-economic effects on residents or surrounding property;

b. The desired uses would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection; and

c. That there are reasonable measures available to mitigate the unreasonable adverse effects or burdens referred to above.

13. The Commission must make a decision on the application within six months of the date a complete application was filed. The time limit may be extended by mutual agreement between the applicant and the Commission.

The Record shows that the Commission complied with the requirements set forth in HRS §§ 205-5.1(e) and (f). Application for the permit was filed with the Hawaii County Planning Department, RA 1. As part of its normal review procedure, comments from cooperating agencies were requested by the staff of the Hawaii County Planning Commission. RA 3 and 5. Such comments noted how the proposed use would affect the public agencies providing services such as roads and streets, sewers, water, civil defense, and other public

services. RA 4, 6, 7, 11, 12, 13, 14, 15, 17, 34, 41, 56 and 59. Also, upon receipt of the Negative Declaration for the project, the staff requested comments from cooperating agencies, RA 46, which noted how the proposed use would affect the health, environment, or community. RA 55, 57 and 63. The Record also shows that numerous comments were received from the community. All of these comments were utilized in forming the staff recommendation to the Planning Commission. RA 207.

Prior to the hearing, notice of the public hearing as required by Rule 12-5(c), (d) and (e), Rules of Practice and Procedure of the Hawaii County Commission, was given to all property owners within 300 feet of the affected property, all residents within 1,000 feet of the perimeter boundary of the affected property, and all owners of all property described in the permit application. Published notice was also provided. RA 8, 16, 18, 19, 31, 139 and 145. Appellant received notice of the hearing. RA 31 (p. 33). Before proceeding to a hearing, the Planning Department acknowledged that the application was a proper and complete application which included supporting data. RA 47.

The Hawaii County Planning Commission conducted a public hearing on April 11, 1989. RA 212. Testimony from

approximately 29 witnesses was received. RA 212. Written testimony was also received. RA 208, Appendix B-3. Upon reaching the "end of the list of people who had signed up to speak," RA 212, p. 127, ll.12-13, the Hawaii County Planning Commission voted to continue the hearing and to view the site. RA 100 and 212, p. 140, ll.23-25, p. 141, ll.1-17.

When the hearing reconvened on May 9, 1989, further testimony, both oral and written, were received. Approximately 45 witnesses testified. RA 213, 208, and Appendix B-. The Hawaii County Planning Commission accommodated some of the same witnesses who had testified at the April hearing by permitting them time to testify at the continued hearing in May. Among such witnesses, Appellant was permitted to testify twice. RA 212, p. 51; RA 213, p. 111. (His wife, Jennifer Perry was also allowed to testify at both hearing times. RA 212, p. 57; RA 213, p. 108.) The hearing was closed on May 9, 1989. RA 213, p. 148, ll.6-11. The first of several requests for mediation (RA 209; RA 212, p. 40, ll.3-5) was made during the hearing by Harry Kim, Civil Defense Director, County of Hawaii, as part of his testimony. RA 98 and 212, p. 40, ll.3-5. Dee Dee Letts, Program on Alternative Dispute Resolution, The Judiciary, State of

Hawaii, and Dr. Kim Lowry, Department of Urban and Regional Planning, University of Hawaii, were appointed mediators. RA 166 and 168. The mediators were assisted by Richard Spiegel, West Hawaii Mediation Services. RA 176 and 210 (p. 5). Mediation meetings were held on nine days from June 7, 1989 to July 7, 1989. RA 176 and 210 (p. 5). Appellant participated in the mediation. RA 176 and 210 (Appendices, p. 28). A report was submitted by the mediators, reflecting areas of agreement and of no agreement. RA 176 and 210 (pp. 16-21). Requiring additional time to consider the report submitted by the mediators, the Hawaii County Planning Commission obtained an agreement to extend the time within which to make a decision on the application. RA 178 and 180. At the action meeting on August 8, 1989 the Hawaii County Planning Commission approved the permit, RA 181, and issued GRP No. 1 to HNEI, and RCUH on August 15, 1989. RA 183. The permit imposed 26 conditions to control and mitigate any adverse effects, RA 183 (pp. 4-11). Condition No. 25 provides for a public hearing "to gather additional input regarding the impact of the activities at SOH 4." RA 183 (p. 10). Work on SOH 4 is to commence first. Condition No. 25 also provides for status reports to be submitted to the Hawaii County

Planning Commission, which will review them in order to verify compliance with the conditions. RA 183 (p. 10).

III. COUNTERSTATEMENT OF STANDARD OF REVIEW

The applicable standard of review is set forth in HRS § 205-5.1(g) which provides for an appeal directly on the record, governed by HRS § 91-14(b) and (g), notwithstanding the lack of a contested case hearing. HRS § 91-14(g) provides that the decision of an agency, after a review of the record, may be reversed or modified if the substantial rights of the petitioners have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(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.

Further, a review of the decision of an agency includes the recognition that:

> In order to preserve the function of administrative agencies in discharging their delegated duties and the function of this court in reviewing agency determination, a presumption of validity is accorded to decisions of administrative bodies acting within their sphere of expertise and one seeking to upset the order bears 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.'

In re Hawaii Electric Light Co., Inc., 60 Haw. 625, 630, 594 P.2d 612, 617 (1979) (quoting Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944). Under the clearly erroneous standard of review of administrative decisions in the Hawaii Administrative Procedure Act, a reviewing court will not reverse the decision of the agency unless examination of the complete record leaves the court with a definite and firm conviction that a mistake has been made. Agsalud v. Lee, 66 Haw. 425, 664 P.2d 734 (1983). Findings of fact are reviewable for clear error; conclusions of law are freely reviewable. Kilauea Neighborhood Ass'n. v. Land Use Commission of the State of Hawaii, 7A Haw. App. 11884, 751 P.2d 1031 (1988). The

standard of review employed by an appellate court in reviewing constitutional and statutory issues is the right/wrong standard. SGM Partnership v. Nelson, 5 Haw App. 526, 705 P.2d 49 (1985).

IV. COUNTERSTATEMENT OF QUESTIONS PRESENTED

A. Is HRS §§ 205-5.1(e) and (f) on its face in violation of the due process clause of the state and federal constitutions?

B. Are there valid claims of procedural and substantive error in the decision by the Hawaii County Planning Commission requiring an order of remand by this Court?

V. ARGUMENT

A. The due process clause does not require more process than the provisions for two hearings and mediation in HRS §§ 205-5.1(e) and (f).

Appellant contends that because HRS § 205-5.1 did not require the Hawaii County Planning Commission to conduct a contested case proceeding prior to issuing a geothermal resource permit to HNEI, his constitutional right to

procedural due process under article I, section 5 of the Hawaii Constitution was violated. Among his chief complaints with the permit process received appear to be the imposition of time constraints in connection with the hearing and the mediation, and the inability to conduct cross examination of the applicant. Appellant's Br. at 8, 14 and 17.

This court follows the traditional two-step analysis for procedural due process claims enunciated by the U.S. Supreme Court in applying the Fourteenth Amendment. Under this test, this Court considers whether the particular interest which the claimant seeks to protect by a hearing is property within the meaning of the due process clauses, and, then, if so, what specific procedures are required to protect it. Sandy Beach Defense Fund v. City Council of the City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989) (citing Aguiar v. Hawaii Housing Authority, 55 Haw. 478, 495, 522 P.2d 1255, 1266 (1974)). As part of this Court's discussion as to the level of interest which qualifies as "property" within the meaning of the constitution required in order to assert a right to procedural due process, this Court quoted Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548, 561 (1972):

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. 70 Haw. at 377. (citation omitted.)

Appellant expresses some vague concerns that his property and physical well-being may possibly be threatened. Appellant's Br. at 16. "Procedural due process protects only against a deprivation of liberty or property interests." See, IBEW v. Haw Tel., 713 P.2d 943, 956 (Haw. 1986) (also citing Board of Regents v. Roth, 408 U.S. 564 (1972)). Moreover, he does not develop an argument to support the requisite property interest entitled to invoke procedural protection consistent with due process in the judicial sense. For example, Appellant merely expresses fear of possible danger associated with geothermal wells but fails to elaborate and to articulate a basic need of which he had been deprived.

The fact that a party may be "specially, personally and adversely affected by the agency's action, Life of the Land, Inc. v. Land Use Commission, 61 Haw. 3, 8, 594 P.2d 1079 (1979), has no bearing on whether for Due Process purposes one has "a legitimate claim of entitlement." Moreover, "[T]he opportunity granted abutting landowners and aggrieved persons to appeal decisions of planning and zoning commissions is

purely procedural and does not give rise to an independent interest protected by the Fourteenth Amendment." Fusco v. State of Connecticut, 815 F.2d 201, 205-06 (2d Cir. 1987).

In order to present a "property interest" warranting protection as a matter of procedural due process, a litigant claiming a potential government benefit must present "plausible arguments" or "arguable issues" justifying the granting of that benefit. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 544, (1985) (analyzing "process due" prong). Process does not exist for its own sake, and "[a]n expectation of receiving process is not, without more, [a]n interest protected by the Due Process Clause." Olim v. Wakinekona, 461 U.S. 238, 250 n. 12 (1983). Appellant cites no authority that the interest he has rises to the level of "property" meriting due process protection. Even if we assume, arguendo, that Appellant's interest (however characterized) constitutes "property" within the meaning of the due process clause, no valid claim, requiring that a contested case proceeding be conducted prior to the issuance of a geothermal resource permit, can be presented.

In Sandy Beach Defense Fund v. City Council of the City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989),

this Court discusses at length the process due a claimant demonstrating "a legitimate claim of entitlement." This Court states:

> Due process is not a fixed concept requiring a specific procedural course in every situation. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972). The full rights of due process present in a court of law, including presentation of witnesses and cross-examination, do not automatically attach to a quasi-judicial hearing. See Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974). The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest. Matthews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18, 32 (1976); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 605-606, 95 S. Ct. 719, 722, 42 L. Ed. 2d 751, 756-57 (1975).
>
> Determination of the specific procedures required to satisfy due process requires a balancing of several factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail. Mathews v. Eldridge, 424 U.S. at 335,

96 S. Ct. at 903, 47 L. Ed. 2d at 33; Silver v. Castle Memorial Hospital, 53 Haw. at 484, 497 P.2d at 571. Sandy Beach, supra, 70 Haw. at 378.

Although the Commission did not conduct a contested case proceeding, the Record supports the fact that the requirements of due process, notice and an opportunity to be heard, were satisfied by the procedure actually provided by the Commission. The Record substantiates the fact that notice by mail was given to all property owners within 300 feet of the affected property, all residents within 1,000 feet of the perimeter boundary of the affected property, and all owners of all property described in the permit application. Published notice was also provided in the Hawaii Tribune Herald on March 21, 1989. RA 8, 16, 18, 19, 31, 139 and 145. Appellant received notice of the public hearings, RA 31 (p. 33).

The Record substantiates the fact that opportunity to be heard was afforded since the hearing, conducted on two days, permitted both oral and written testimony to be received. RA 212, 213 and 208. Appellant participated on both days, presenting both oral and written testimony. RA 212, p. 51; RA 213, p. 111. The Commission heard testimony from his wife, Jennifer Perry at both days of hearing. RA

212, p. 57; RA 213, p. 108. Also, both Perrys presented written testimony. RA 208. Thus, notice and an opportunity to be heard were provided by the actual procedure which adequately meets the minimum due process requirement to a litigant in Appellant's position as articulated in the Sandy Beach case and no additional safeguard would appear necessary to protect Appellant's level of interest.

HRS § 205-5.1 was amended in 1987 to delete the requirement of a contested case proceeding in the issuance of a geothermal resource permit. The accompanying committee reports manifest an express intent that permitting agencies provide procedural due process even though contested case proceedings were eliminated:

> Your Committee realizes that the effectiveness of the procedures established in this amended bill rests with the administrative agency involved. Therefore, your Committee has directed the affected agencies to take responsibility for the rulemaking that will assure due process is served and provide for an adequate record for judicial review. These procedures should include, but are not limited to, notice to interested parties, transcripts of proceedings, and an adequate opportunity for interested parties to be heard.
>
> The public hearing and appeal procedure is well settled in the federal sector, where

> agencies involved in important decision making, as is the case here, utilize the public hearing process to obtain opinion and comment on proposed actions. For example, under the Clean Air Act, 42 USC Sections 7604 and 7607, appeals are taken directly from the record of a public hearing to a circuit court of appeal. The judicial review procedure proposed in this bill has passed constitutional scrutiny in the federal courts. It is already utilized in Chapter 343, Hawaii Revised Statutes.

Sen. Stand. Comm. Rep. No. 1118, in 1978 Senate Journal, at 1388. The Commission, having provided notice, transcript of proceedings and an opportunity to be heard, has complied with HRS § 205-5.1. There is no violation of procedural due process requiring a remand as Appellant requests this Court to do, and therefore the decision of the Commission to grant a geothermal resource permit to HNEI should be affirmed.

B. The Hawaii County Planning Commission made no procedural or substantive error in the decision to grant the permit.

The applicable standard of review of the decision of the Commission is contained in HRS § 205-5.1(g):

> 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

(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.

Appellant contends in point 1 that the "time limit for presentation and speeding of public testimony and limiting of testimony," Appellant's Br. 8, is objectionable because it is a violation of due process rights based upon article I, section 5 of the Hawaii Constitution.

There is no authority to permit unlimited time for testimony to be given. In fact, the U.S. Supreme Court expressly rejected the notion that oral testimony of any sort is a necessary component of Due Process. "There is no inexorable requirement that oral testimony must be heard in

every administrative proceeding in which it is tendered." Federal Deposit Insurance Corp. v. Mallen, 108 S. Ct. 1780, 1791, (1988) (citing Califano v. Yamasaki, 442 U.S. 682, (1979)). This is especially applicable where, as here, the Commission provided the opportunity to present both oral and written testimony. Further, one might infer that the reason for limiting time on testimony was due to the volume of repetitive evidence presented. See Outdoor Circle v. Harold K. L. Castle Trust Estate, 4 Haw. App. 633, 643, 675 P.2d 784 (1983). A review of the testimony on record demonstrates that much of the same or similar testimony was repeated by each person coming up to testify or submitting written testimony. There is no evidence that anyone was denied an opportunity to participate either orally or in writing.

In point 2, Appellant complains of the lack of cross examination of the applicant as a violation of due process. Appellant's Br. 8. As discussed above, even though the provisions of §§ 205-5.1(e) and (f) do not provide for cross examination of the applicant, the actual hearing conducted comported with the requirements of due process. Sandy Beach Defense Fund v. City Council of the City and County of Honolulu, 70 Haw. 361, 773 P.2d 250 (1989) noted that without

a showing of a "property" interest within the meaning of the due process clause in the state and federal constitution, notice and an opportunity to be heard adequately satisfy minimum due process requirements.

In point 3, Appellant contends that Rule 12-13 was violated because there had been no environmental impact statement and the environmental assessment was deficient. Appellant's Br. 8. Rule 12-3, Rules of Practice and Procedure of the Hawaii County Planning Commission, does not require the submission of an environmental impact statement. Appellant cites no authority to support a violation of Rule 12-3. Relief for this objection is in HRS, Chapter 343, and may not be sought in this appeal. See, McGlone v. Inaba, 64 Haw. 27, 636 P.2d 158 (1981). This issue is improperly raised because this Court lacks jurisdiction. Further, Appellant did not follow the procedure as provided in HRS § 343-7, and any challenge to the determination of a negative declaration would be untimely.

Specifically, Appellant argues that the deficiencies in the application are failures to comply with Rule 12-3(b)(2)(B) and (C). Rule 12-3(b)(2)(B) requires a description of the scope of the planned activities and the

reasons for requesting a permit. He argues that the scope and reason should be broadened to indicate future geothermal development as a result of the SOH project. While the development of production wells is a probable likelihood, the project itself does not involve production wells and it would be unreasonable for HNEI to provide information for actions or projects of others over which HNEI exercises no control. Nonetheless, review of the staff recommendation, AR 207, and the permit, AR 183, show extensive recommendations and findings, respectively, concerning environmental issues. Moreover, HRS § 205-5.1(e) lists criteria which the permit methodically addresses, providing the reasons supporting the conclusions of the Commission. RA 183 (pp. 1-4). In addition, in issuing the permit, the Planning Commission imposed condition 25, among others, to provide for monitoring of compliance with the permit and a reservation of right to call a public hearing for the purpose of gathering input regarding the impact of the project. RA 183(10).

Rule 12-3(b)(2)(C) requires a preliminary plot or site plan showing, among other things, locations of structures such as drill sites. Appellant contends that the plan lacked a metes and bounds description which permitted applicants to

move the site of SOH 4 after permit approval, resulting in a material alteration of "who will be affected and the degree of impacts." Appellant's Br. 20.

A study of the letters at RA 187 and 189 do not support the contention of a material alteration. The letters, however, reflect the preliminary nature of the plan and the agreement of HNEI reached during mediation, RA 176 and 210 (p. 17), approved by the Commission to accommodate one of the residents near SOH 4. Work on SOH 4 is addressed in condition 25 of the permit, providing for monitoring and a reservation of right to call a public hearing for the purpose of gathering input regarding the impact of the project. RA 183 (p. 10). There is no evidence of non-compliance with Rule 12-3.

Points 4-8 relate to complaints with the mediation process. HRS §§ 205-5.1(e) and (f) in pertinent part provide for mediation as follows:

> . . . Upon appropriate request for mediation from any party who submitted comment at the public hearing, the county authority shall appoint a mediator within five days. The county authority shall require the parties to participate in mediation. The mediator shall not be an employee of any county agency or its staff. The mediation period shall not extend beyond thirty days after mediation started,

> except by order of the county authority. Mediation shall be confined to the issues raised at the public hearing by the party requesting mediation. The mediator will submit a written recommendation to the county authority, based upon any mediation agreement reached between the parties for consideration by the county authority in its final decision. If there is no mediation agreement, the county authority may have a second public hearing to receive additional comment related to the mediation issues. . . .
>
> * * *
>
> (f) Requests for mediation shall be received by the board or county authority within five days after the close of the initial public hearing. Within five days thereafter, the board or county authority shall appoint a mediator. Any person submitting an appropriate request for mediation shall be notified by the board or county authority of the date, time, and place of the mediation conference by depositing such notice in the mail to the return address stated on the request for mediation. The notice shall be mailed no later than ten days before the start of the mediation conference. The conference shall be held on the island where the public hearing is held.

In point 4 Appellant complains of "too strict time restraints on mediation process," Appellant's Br. 8. The Commission complied with the time requirements of HRS §§ 205-5.1(e) and (f) and Rule 12-5-1(g) which is nearly identical to the statutory provision. No authority is presented in support of any right to a different procedure. Appellant had notice and

an opportunity to participate in the mediation, which is indicated in the mediator's report. RA 176 and 210. Minimum due process requires no more than notice and an opportunity to be heard, as discussed above. Appellant has not shown that he is entitled to more than what is required by the statute and the rule. Also, as argued above, there is no right to unlimited time to enable Appellant to do everything he desired to do. Appellant did in fact participate in the mediation. The mediator's report reflects 9 days of meetings and active participation. Agreements were reached and mediation was completed within the 30 day time requirement. The mediator's report does not reflect that the mediation could not be completed within the time required. Therefore, Appellant fails to present any valid claim of error or violation of due process. RA 176 and 210. In point 5, Appellant objects to the selection of a mediator by the Commission, and in point 6, he complains that "[P]ublic comments pertinent to procedure not accepted." Appellant's Br. 9.

In selecting a mediator, the conduct of the Commission was consistent with HRS § 205-5.1 which provides that the Commission appoint a mediator after request for mediation is made. Input from the parties in the selection of

a mediator is not required by HRS 205-5.1. Further, Appellant does not challenge the qualifications of the mediators appointed nor does he argue that they were unsuited to serve as mediators due to bias or conflict of interest. No authority is cited by Appellant in support of any right to participate in the selection process. Therefore, there is no error requiring this Court to remand the decision back to the Commission.

In point 7, Appellant contends that there is no mediator recommendation as required by Rule 12-5-1(m) Appellant's Br. 9. However, the Record shows that a mediator's report, containing certain proposals, which had been agreed to by the parties, for the imposition of various conditions to the permit, was made to the Commission. RA 176 and 210. A comparison of the proposed conditions in the mediator's report with those imposed by the Planning Commission, shows that the mediator's report had been considered because many of the agreements were adopted as conditions of the permit. RA 176 and 210 (pp. 17-19), and 183. No violation of Rule 12-1-5(m) has been established and therefore, no valid error has been shown to support the relief requested by Appellant.

The next objection, Point 8, Appellant's Brief at 9, is related to an extension of time of the mediation procedure beyond the 30 day limit under Rule 12-5-1(g). The rule closely follows the statutory provisions related to time limitations. HRS § 205-5.1 requires that such an extension of time be ordered by the Commission. No other person is required to approve such an extension. The Record does not show any extension of time of the mediation procedure beyond the 30 day limit. In fact, mediation commenced on June 7, 1989 and ended on July 6, 1989, RA 176 and 210 (p. 5) as required under HRS § 205-5.1 and Rule 12-5-1(g). Further, the mediator's report was submitted within the requirement of 10 days after the close of the mediation conference in compliance with Rule 12-5-1(m). RA 176. The mediation procedures under HRS § 205-5.1 and Rule 12-5-1 have been fully complied with as evidenced by the Record. No error has been demonstrated by Appellant.

Appellant complains that the mediation report was not submitted for review by the parties prior to its submittal to the Commission. Appellant s Br. 23. No requirement for this procedure is found in HRS § 205-5.1 and no authority is referred to in support of such procedure. Moreover, this

Court will not search the record to discover what evidence supports the finding allegedly based upon insufficient evidence. Associated Engineers & Contractors, Inc. v. State, 58 Haw. 187, 567 P.2d 397, reh. den. 58 Haw. 322, 568 P.2d 512 (1977).

Appellant in point 9 complains that the Commission was required to hold a second public hearing which is an error based upon a violation of due process and upon an abuse of discretion by the Commission. Appellant's Br. 10. HRS § 205-5.1 and Rule 12-5-1(n) do not require the Commission to conduct a second hearing unless there is no mediation agreement. Further, the language states that the mediator's report must be based upon "any mediation agreement reached between the parties." (Emphasis supplied.) There were agreements which were reflected in the mediator's report. Therefore, a second hearing did not become necessary. Moreover, the language of the statute with respect to the initial hearing is mandatory, "shall conduct." However, the use of "may" with respect to having a second hearing supports an interpretation that unless there is an abuse of discretion, the decision to have a second hearing should not be overturned

on appeal. Title Guaranty Escrow Services, Inc. v. Powley, 2 Haw. App. 265, 270, 630 P.2d 642 (1981). "Appellant bears the burden of showing that the . . . decision 'clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" Title Guaranty, supra, 2 Haw. App. at 270 (citations omitted). The Record does not reflect that the Commission exceeded the bounds of reason or disregarded rules of law or practice. In fact, the Record clearly shows that a substantial amount of evidence was received by the Commission during the hearing. Moreover, it considered also its staff's report and the mediator's report. RA 178 and 180.

Further, there was no abuse of discretion by the Commission in excluding the letter by Jennifer Perry as testimony submitted after the close of the public hearing. Evidence received after the close of a hearing results in reversible error. See Waikiki Shore, Inc. v. Zoning Board of Appeals, 2 Haw. App. 43, 45, 625 P.2d 1044 (1981) (citing Town v. Land Use Commission, 55 Haw. 538, 524 P.2d 84 (1974)). Therefore, there is no violation of due process or error based upon an abuse of discretion.

Appellant claims the decision is based upon an inadequate factual record in Point 10, Appellant's Brief 10, citing a violation of due process, HRS § 91-14(g), and Rule 12-6.

The decision of an administrative agency, acting within their sphere of expertise, is accorded a presumption of validity, and one seeking to find error bears a heavy burden of making a convincing showing that the decision is invalid. See Costa v. Sunn, 5 Haw. App. 419, 697 P.2d 43, cert. den. 67 Haw. 685, 744 P.2d 781 (1985) (citing In re Kaanapali Water Corp., 5 Haw. App. 711, 678 P.2d 584 (1984)).

As this Court has noted, "an appellate court is not required to sift through a volumious record for documentation of a party's contentions," International Brotherhood of Electrical Workers, Local 1357 v. Hawaiian Telephone Co., 713 P.2d 943, 956 (Haw. 1986). Appellant does not bring forward facts to support his contentions in order to justify a finding of error.

Unless the findings of an agency are incomplete and insufficient to provide a basis for judicial review, the remand of an agency decision is not appropriate pursuant to

HRS § 91-14(g). Id. Moreover, remand would be proper if the court finds as a result of error of law, the agency failed to make appropriate findings. Myers v. Board of Trustees of Employees' Retirement System, 704 P.2d 902 (Haw. 1985).

The Record shows that both oral and written testimony were received by the Commission at a public hearing on which to base a decision. Also, its staff presented a recommendation. The mediator's report was considered. Further, a review of the permit readily supports the fact that the findings are based upon substantial evidence. HRS § 205-5.1(e) lists criteria which the permit addresses. Reasons are provided by the Commission to support its conclusions. Further, 26 conditions are imposed upon HNEI, providing for the mitigation measures, if necessary, for adverse effects such as noise, traffic congestion, emergency situations (monitoring), air pollution, lighting interference, safety measures, etc.

Further, there is no requirement that all the evidence support the decision. See, Protect Ala Wai Skyline v. Land Use Controls Committee of the City and County of Honolulu, 6 Haw. App. 540, 735 P.2d 950 (1987). Moreover, the mere quantity of the same evidence does not support any

contention that the decision is not supported. Therefore, Appellant's contention cannot stand because it fails to demonstrate any basis for error.

VI. RELEVANT STATUTES AND RULES

See Appendix A.

VI. CONCLUSION

Based upon the failure to establish any valid claim to procedural due process in the requirement of a contested case hearing prior to the issuance of a geothermal resource permit pursuant to HRS § 205-5.1 and a failure to establish any procedural or substantive error pursuant to HRS § 91-14(g) in the decision to issue said permit, HNEI and RCUH urge this court to affirm the decision of the Hawaii County Planning Commission. While it is appreciated that the SOH project has raised deep-felt public concerns, the applicable law to this appeal does not afford the vehicle for resolving these

"profound differences." See Heckler v. Chaney, 470 U.S. 821, 838 (1985).

DATED: Honolulu, Hawaii, January 29, 1990.

WARREN PRICE, III
Attorney General
State of Hawaii

By _____
ANNETTE Y. W. CHOCK
Deputy Attorney General

Attorney for Hawaii Natural Energy Institute, The University of Hawaii, and The Research Corporation of the University of Hawaii

STATEMENT OF RELATED CASES

No other pending related case except for No. 14197, Pele Defense Fund v. Puna Geothermal Venture, Supreme Court, State of Hawaii, docketed December 12, 1989. The case involves the same parties and the same or closely related issues as a result of the approval by the Hawaii County Planning Commission of a second geothermal resource permit.

•••

[am L 1986, c 93, §1; am L 1987, c 336, §7; am L 1988, c 352, §2]

Revision Note

Only the subsections amended are compiled in this Supplement. "359G-4.1", referred to in text, is repealed.

Cross References

Boundary change approvals for housing finance development corporation projects, see note at end of chapter 201E.

§205-5.1 Geothermal resource subzones. (a) Geothermal resource subzones may be designated within the urban, rural, agricultural, and conservation land use districts established under section 205-2. Only those areas designated as geothermal resource subzones may be utilized for geothermal development activities in addition to those uses permitted in each land use district under this chapter. Geothermal development activities may be permitted within urban, rural, agricultural, and conservation land use districts in accordance with this chapter. "Geothermal development activities" means the exploration, development, or production of electrical energy from geothermal resources and direct use applications of geothermal resources; provided that within the urban, rural, and agricultural land use districts, direct use applications of geothermal resources are permitted both within and outside of areas designated as geothermal resource subzones pursuant to section 205-5.2 if such direct use applications are in conformance with all other applicable state and county land use regulations and are in conformance with this chapter.

(b) The board of land and natural resources shall have the responsibility for designating areas as geothermal resource subzones as provided under section 205-5.2; except that the total area within an agricultural district which is the subject of a geothermal mining lease approved by the board of land and natural resources, any part or all of which area is the subject of a special use permit issued by the county for geothermal development activities, on or before May 25, 1984, is designated as a geothermal resource subzone for the duration of the lease. The designation of geothermal resource subzones shall be governed exclusively by this section and section 205-5.2, except as provided therein. The board shall adopt, amend, or repeal rules related to its authority to designate and regulate the use of geothermal resource subzones in the manner provided under chapter 91.

The authority of the board to designate geothermal resource subzones shall be an exception to those provisions of this chapter and of section 46-4 authorizing the land use commission and the counties to establish and modify land use districts and to regulate uses therein. The provisions of this section shall not abrogate nor supersede the provisions of chapters 182 and 183.

(c) The use of an area for geothermal development activities within a geothermal resource subzone shall be governed by the board within the conservation district and, except as herein provided, by state and county statutes, ordinances, and rules not inconsistent herewith within agricultural, rural, and urban districts, except that no land use commission approval or special use permit procedures under section 205-6 shall be required for the use of such subzones. In the absence of provisions in the county general plan and zoning ordinances specifically relating to the use and location of geothermal development activities in an agricultural, rural, or urban district, the appropriate county authority may issue a geothermal resource permit to allow geothermal development activities. "Appropriate county

authority" means the county planning commission unless some other agency or body is designated by ordinance of the county council. Such uses as are permitted by county general plan and zoning ordinances, by the appropriate county authority, shall be deemed to be reasonable and to promote the effectiveness and objectives of this chapter. Chapters 177, 178, 182, 183, 205A, 226, 342, and 343 shall apply as appropriate. If provisions in the county general plan and zoning ordinances specifically relate to the use and location of geothermal development activities in an agricultural, rural, or urban district, the provisions shall require the appropriate county authority to conduct a public hearing on any application for a geothermal resource permit to determine whether the use is in conformity with the criteria specified in subsection (e) for granting geothermal resource permits; provided that within the urban, rural, and agricultural land use districts, direct use applications of geothermal resources are permitted without any application for a geothermal resource permit both within and outside of areas designated as geothermal resource subzones pursuant to section 205-5.2 if such direct use applications are in conformance with all other applicable state and county land use regulations and are in conformance with this chapter.

(d) If geothermal development activities are proposed within a conservation district, with an application with all required data, the board of land and natural resources shall conduct a public hearing and, upon appropriate request for mediation from any party who submitted comment at the public hearing, the board shall appoint a mediator within five days. The board shall require the parties to participate in mediation. The mediator shall not be a member of the board or its staff. The mediation period shall not extend beyond thirty days after the date mediation started, except by order of the board. Mediation shall be confined to the issues raised at the public hearing by the party requesting mediation. The mediator will submit a written recommendation to the board, based upon any mediation agreement reached between the parties for consideration by the board in its final decision. If there is no mediation agreement, the board may have a second public hearing to receive additional comment related to the mediation issues. Within ten days after the second public hearing, the board may receive additional written comment on the issues raised at the second public hearing from any party.

The board shall consider the comments raised at the second hearing before rendering its final decision. The board shall then determine whether, pursuant to board rules, a conservation district use permit shall be granted to authorize the geothermal development activities described in the application. The board shall grant a conservation district use permit if it finds that the applicant has demonstrated that:

(1) The desired uses would not have unreasonable adverse health, environmental, or socio-economic effects on residents or surrounding property; and

(2) The desired uses would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, and police and fire protection; or

(3) There are reasonable measures available to mitigate the unreasonable adverse effects or burdens referred to above.

A decision shall be made by the board within six months of the date a complete application was filed; provided that the time limit may be extended by agreement between the applicant and the board.

(e) If geothermal development activities are proposed within agricultural, rural, or urban districts and such proposed activities are not permitted uses pursuant to county general plan and zoning ordinances, then after receipt of a properly filed

and completed application, including all required supporting data, the appropriate county authority shall conduct a public hearing. Upon appropriate request for mediation from any party who submitted comment at the public hearing, the county authority shall appoint a mediator within five days. The county authority shall require the parties to participate in mediation. The mediator shall not be an employee of any county agency or its staff. The mediation period shall not extend beyond thirty days after mediation started, except by order of the county authority. Mediation shall be confined to the issues raised at the public hearing by the party requesting mediation. The mediator will submit a written recommendation to the county authority, based upon any mediation agreement reached between the parties for consideration by the county authority in its final decision. If there is no mediation agreement, the county authority may have a second public hearing to receive additional comment related to the mediation issues. Within ten days after the second public hearing, the county authority may receive additional written comment on the issues raised at the second public hearing from any party.

The county authority shall consider the comments raised at the second hearing before rendering its final decision. The county authority shall then determine whether a geothermal resource permit shall be granted to authorize the geothermal development activities described in the application. The appropriate county authority shall grant a geothermal resource permit if it finds that applicant has demonstrated that:

(1) The desired uses would not have unreasonable adverse health, environmental, or socio-economic effects on residents or surrounding property;

(2) The desired uses would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection; and

(3) That there are reasonable measures available to mitigate the unreasonable adverse effects or burdens referred to above.

Unless there is a mutual agreement to extend, a decision shall be made on the application by the appropriate county authority within six months of the date a complete application was filed; provided that the time limit may be extended by agreement between the applicant and the appropriate county authority.

(f) Requests for mediation shall be received by the board or county authority within five days after the close of the initial public hearing. Within five days thereafter, the board or county authority shall appoint a mediator. Any person submitting an appropriate request for mediation shall be notified by the board or county authority of the date, time, and place of the mediation conference by depositing such notice in the mail to the return address stated on the request for mediation. The notice shall be mailed no later than ten days before the start of the mediation conference. The conference shall be held on the island where the public hearing is held.

(g) Any decision made by an appropriate county authority or the board pursuant to a public hearing or hearings under this section may be appealed directly on the record to the supreme court for final decision and shall not be subject to a contested case hearing. Sections 91-14(b) and (g) shall govern the appeal, notwithstanding the lack of a contested case hearing on the matter. The appropriate county authority or the board shall provide a court reporter to produce a transcript of the proceedings at all public hearings under this section for purposes of an appeal.

(h) For the purposes of an appeal from a decision from a public hearing, the record shall include:

(1) The application for the permit and all accompanying supporting docu-

ments, including but not limited to: reports, studies, affidavits, statements, and exhibits.

(2) Staff recommendations submitted to the members of the agency in consideration of the application.

(3) Oral and written public testimony received at the public hearings.

(4) Written transcripts of the proceedings at the public hearings.

(5) The written recommendation received by the agency from the mediator with any mediation agreement.

(6) A statement of relevant matters noticed by the agency members at the public hearings.

(7) The written decision of the agency issued in connection with the application and public hearings.

(8) Other documents required by the board or county authority. [L 1983, c 296, pt of §3; am L 1984, c 151, §2; am L 1985, c 226, §1; am L 1986, c 167, §1, c 187, §1 and c 290, §1; am L 1987, c 372, §§2, 3 and c 378, §1]

Note

Chapters 177 and 178, referred to in text, are repealed effective July 1, 1989.

§205-5.2 Designation of areas as geothermal resource subzones. ***

(d) After the board has completed a county-by-county assessment of all areas with geothermal potential or after any subsequent update or review, the board shall compare all areas showing geothermal potential within each county, and shall propose areas for potential designation as geothermal resource subzones based upon a preliminary finding that the areas are those sites which best demonstrate an acceptable balance between the factors set forth in subsection (b). Once such a proposal is made, the board shall conduct public hearings pursuant to this subsection, notwithstanding any contrary provision related to public hearing procedures. Contested case procedures are not applicable to these hearings.

(1) Hearings shall be held at locations which are in close proximity to those areas proposed for designation. A public notice of hearing, including a description of the proposed areas, an invitation for public comment, and a statement of the date, time, and place where persons may be heard shall be published and mailed no less than twenty days before the hearing. The notice shall be published on three separate days in a newspaper of general circulation statewide and in the county in which the hearing is to be held. Copies of the notice shall be mailed to the department of business and economic development, to the planning commission and planning department of the county in which the proposed areas are located, and to all owners of record of real estate within, and within one thousand feet of, the area being proposed for designation as a geothermal resource subzone. The notification shall be mailed to the owners and addresses as shown on the current real property tax rolls at the county real property tax office. Upon such action, the requirement for notification of owners of land is completed. For the purposes of this subsection, notice to one coowner shall be sufficient notice to all coowners.

(2) The hearing shall be held before the board, and the authority to conduct hearings shall not be delegated to any agent or representative of the board. All persons and agencies shall be afforded the opportunity to

agency may incorporate its findings and rulings in its decision. 4 H. App. 633, 675 P.2d 784.

§91-13 **Consultation by officials of agency.** No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law. [L 1961, c 103, §13; Supp, §6C-13; HRS §91-13]

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

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

(c) The proceedings for review shall not stay enforcement of the agency decisions; but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;
(2) Irreparable damage to the subject person will result if a stay is not ordered;
(3) No irreparable damage to the public will result from the stay order; and
(4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the record, except that in the cases where a trial de

novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(g) 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
(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.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order. [L 1961, c 103, §14; Supp, §6C-14; HRS §91-14; am L 1973, c 31, §5; am L 1974, c 145, §1; am L 1979, c 111, §9; am L 1980, c 130, §2; am L 1983, c 160, §1]

Attorney General Opinions

Cost of record transmitted to the reviewing court is borne by the agency. Att. Gen. Op. 64-4.

Law Journals and Reviews

Standing to Challenge Administrative Action in the Federal and Hawaiian Courts. 8 HBJ 37.

Case Notes

Section contained appropriate statute of limitations for State to file action in federal court under Education For All Handicapped Children Act. 695 F.2d 1154.

Review of decision of civil service commission is on the record. 48 H. 278, 398 P.2d 155.

Question whether provision for appeal of preliminary ruling overrides provisions of specific statutes governing administrative agencies, raised but not decided. 50 H. 22, 428 P.2d 411.

Procedure applicable to grant of summary judgment after appeal to circuit court. 50 H. 169, 434 P.2d 312.

Subsection (g) referred to: 50 H. 426, 442 P.2d 61.

Where zoning variance is granted after public hearing, owner of land adjoining the property subject to variance is "person aggrieved." 52 H. 518, 479 P.2d 796.

"Person aggrieved", to be entitled to judicial review, must have been involved in the contested case. 53 H. 431, 495 P.2d 1180.

Test under "clearly erroneous" standard is whether appellate court has a firm and definite conviction mistake was made. 56 H. 552, 545 P.2d 692; 4 H. App. 26, 659 P.2d 77.

Where tenure hearing not required, application did not create "contested case". 56 H. 680, 548 P.2d 253.

Department of education was not a "person" with standing to appeal administrative action. 65 H. 219, 649 P.2d 1140.

"Person aggrieved." 56 H. 260, 535 P.2d 1102; 64 H. 451, 643 P.2d 73.

"Clearly erroneous" standard applies to review of Labor and Industrial Relations Appeals Board decisions. 57 H. 296, 555 P.2d 855.

Nature of appeal to circuit court under this section discussed. 58 H. 292, 568 P.2d 1189.

Appeal from decision of administrative agency acting without jurisdiction confers no jurisdiction on appellate court. 60 H. 65, 587 P.2d 301.

Paragraph (g) cited as authority to remand a cause to the public utilities commission to make appropriate findings to support its order. 60 H. 166, 590 P.2d 524.

"Clearly erroneous" standard of review discussed. 60 H. 166, 590 P.2d 524; 66 H. 401, 664 P.2d 727; 67 H. 212, 685 P.2d 794; 2 H. App. 421, 633 P.2d 564.

Final order means an order ending the proceedings. Appellee's actions were not clearly erroneous or arbitrary and capricious where appellant's filing of a grievance was untimely. 60 H. 513, 591 P.2d 621.

Standard of review under subsection (g) for decisions of administrative agencies acting with-

in sphere of expertise. 60 H. 625, 594 P.2d 612; 5 H. App. 71, 678 P.2d 584.

Organization opposing reclassification of properties and which is composed of members who live in vicinity of properties is a "person aggrieved" under subsection (a). 61 H. 3, 594 P.2d 1079.

"Participation in contested case" discussed. 61 H. 3, 594 P.2d 1079.

Timely appeal. 61 H. 3, 594 P.2d 1079.

Mere failure to include name of agency (which rendered decision being appealed) in caption of notice of appeal does not render appeal defective. 62 H. 444, 616 P.2d 1368.

Finality of order, what determines. 63 H. 85, 621 P.2d 361.

Land use commission. Final order. 63 H. 529, 631 P.2d 588.

So long as requirements of subsection (a) are met, the circuit court is vested with jurisdiction to hear appeal. 63 H. 85, 621 P.2d 361.

Court did not abuse discretion in refusing to allow expert witnesses to testify in court, or refusing to require transcript of oral comments before agency. 64 H. 27, 636 P.2d 158.

Decision of administrative agency was clearly erroneous. 65 H. 146, 648 P.2d 1107.

Granting of special management area permit by county planning commission. 65 H. 506, 654 P.2d 874.

Agency's decision to reduce welfare benefits is reviewable only by appeal under this section and not by declaratory judgment action. 66 H. 485, 666 P.2d 1133.

Agency's procedural irregularities did not prejudice appellant's substantial rights. 67 H. 342, 686 P.2d 831.

Cited in reviewing decision of the labor and industrial relations appeal board. 1 H. App. 350, 619 P.2d 516.

In overturning agency's order, court was required to make detailed findings of fact and conclusions of law. 2 H. App. 92, 626 P.2d 199.

Finality of order. 2 H. App. 219, 629 P.2d 125.

Order of board not a "final order" where it remands a case to determine service-connected issue. 4 H. App. 526, 669 P.2d 638.

Standard used by appellate court when reviewing circuit court's review of agency decision. 4 H. App. 633, 675 P.2d 784; 5 H. App. 59, 678 P.2d 576; 5 H. App. 325, 690 P.2d 28.

Review of agency decision confined to issues properly raised in record of proceedings leading up to decision. 5 H. App. 115, 678 P.2d 1101.

Cited: 47 H. 1, 24, 384 P.2d 536; 50 H. 172, 435 P.2d 21.

Hawaii Legal Reporter Citations

Timeliness of appeal. 79 HLR 79-0643

§91-15 Appeals. Review of any final judgment of the circuit court under this chapter shall be governed by chapter 602. [L 1961, c 103, §15; Supp, §6C-15; HRS §91-15; am L 1979, c 111, §10]

Case Notes

An administrative agency is "an aggrieved party" from a judgment which overturns a decision of the agency with respect to implementation of legislation. 60 H. 436, 591 P.2d 113.

Standard used by appellate court when reviewing circuit court's review of agency decision. 4 H. App. 633, 675 P.2d 784.

Hawaii Legal Reporter Citations

No appeal by administrative agency of an adverse decision. 79 HLR 79-0573.

§91-16 Severability. If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable. [L 1961, c 103, §16; Supp, §6C-16; HRS §91-16]

§91-17 Federal aid. The provisions of section 91-14 shall not be applicable where such applicability would jeopardize federal aid or grants of assistance. [L 1961, c 103, §19; Supp, §6C-17; HRS §91-17]

§91-18 Short title. This chapter may be cited as the Hawaii Administrative Procedure Act. [L 1961, c 103, §20; Supp, §6C-18; HRS §91-18]

§91-12 Decisions and orders.

Case Notes

Does not require notices of tax assessment be accompanied by findings of fact and conclusions of law. 6 H. App. (No. 10762), 718 P.2d 1122.

§91-13.1 Administrative review of denial or refusal to issue license or certificate of registration. Except as otherwise provided by law, any person aggrieved by the denial or refusal of any board or commission listed in section 26H-4 to issue a license or certificate of registration, shall submit a request for a contested case hearing pursuant to chapter 91 within sixty days of the date of the refusal or denial. Appeal to the circuit court under section 91-14, or any other applicable statute, may only be taken from a board or commission's final order. [L 1986, c 181, §1]

§91-14 Judicial review of contested cases. ***

(c) The proceedings for review shall not stay enforcement of the agency decisions or the confirmation of any fine as a judgment pursuant to section 92-17(g); but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;
(2) Irreparable damage to the subject person will result if a stay is not ordered;
(3) No irreparable damage to the public will result from the stay order; and
(4) Public interest will be served by the stay order.

***

[am L 1986, c 274, §1]

Revision Note

Only the subsection amended is compiled in this Supplement.

Law Journals and Reviews

Appellate Standards of Review in Hawaii. 7 UH L. Rev. 273. (See also 7 UH L. Rev. 449.)

Case Notes

Standard used by appellate court when reviewing circuit court's review of agency decision, cert. denied. 67 H. 3, 677 P.2d 965.

Board's denial of a motion for reconsideration is a "final order". 67 H. 603, 699 P.2d 26.

Police chief is a "person" with a standing to appeal civil service commission's ruling. 68 H. (No. 10792), 718 P.2d 1076.

Apprenticeship committee was not "person aggrieved" by labor director's rejection of its recommendation; apprentice denied back wages and attorney's fees and costs upon reinstatement was "person aggrieved". 68 H. (No. 10933), 723 P.2d 753.

Unincorporated association was "person aggrieved" by decision to grant special management area permit, but association did not participate in a "contested case". 69 H. (No. 11228), 734 P.2d 161.

Judicial review of an agency determination must be confined to issues properly raised in the record of the administrative proceedings. 69 H. (No. 11312), 736 P.2d 1271.

Public employers directly affected by agency's order were "aggrieved persons" and their filing of amicus briefs with agency was sufficient "adversary participation"; standard used by appellate court when reviewing circuit court's review of agency decision. 5 H. App. 533, 704 P.2d 917.

Does not require that all evidence before agency support its findings; sufficient if findings supported by reliable, probative, and substantial evidence. 6 H. App. (No. 11313), 735 P.2d 950.

PLANNING COMMISSION
COUNTY OF HAWAII

RULE 12. GEOTHERMAL RESOURCE PERMITS

12.1 Purpose and Authority

This rule governs geothermal resource permit procedures pursuant to authority conferred by section 205-5.1, Hawaii Revised Statutes, as amended, upon the Planning Commission to determine whether proposed geothermal development activities should be allowed. The Planning Commission is the issuing authority for geothermal resource permits in geothermal resource subzones located within Agricultural, Rural and Urban State Land Use Districts in the County.

The Planning Commission's approval of an application for a geothermal resource permit shall not in any way abrogate nor supercede the provisions of Chapters 182 and 183, HRS, and rules promulgated thereunder.

12.2 Definitions

As used herein, "geothermal development activities", whether for research or commercialization purposes, means exploration, development, or production of electrical energy from geothermal resources, or as otherwise defined in Hawaii Revised Statutes, Section 205-5.1.

12.3 Contents of Application

Any person who desires to conduct geothermal development activities on land that is located within a geothermal resource subzone and located within either the Agricultural, Rural or Urban State Land Use Districts shall apply to the Planning Commission for a geothermal resource permit. An application for a geothermal resource permit shall be filed in the Planning Department's office and shall include the following:

(a) Non-refundable filing and processing fee of one thousand dollars.

(b) Original and twenty-five copies of:

(1) Application form;

(2) Written and appropriate graphic descriptions of the property and the proposed geothermal development activities including, but not limited to:

(A) A description of the property for which a permit is being requested to include the property's real property tax map key designation and a

description of the property's location within the County.

(B) A written statement describing the scope of the planned activities and presenting the applicant's reasons for requesting the permit.

(C) A preliminary plot or site plan of the property, drawn to scale, showing all existing and proposed uses and locations of structures including, but not limited to, drilling sites, wells, access roadways, water sources, waste water collection and disposal systems, the geothermal steam and/or brine collection and disposal systems, power plant(s) and electrical power distribution systems.

(D) Preliminary elevation drawings of the proposed temporary and permanent structures.

(E) The proposed locations and elevations and depths of all superstructures and drilling rigs, bottom hole locations, casing program, proposed well completion program, size and shape of drilling sites, and location of all existing and proposed access roads.

(F) Areas of potential temporary and/or permanent surface disturbance, including, but not limited to, excavation and grading sites, the location of camp sites, airstrips, and other support facilities, excavation and borrow pits for roads and other construction activities.

(G) A written description of the methods for disposing of well effluent and other wastes.

(H) A geologist's report on the site and surrounding area's surface and subsurface geology, nature and occurrence of known or potential geological hazards and geothermal resources, surface and ground water resources, topographic features of the land, and drainage patterns.

(I) Pre-exploration meteorological, ambient air quality and noise level measurements that demonstrate the potential effects on surrounding properties through air quality and noise impact analysis.

(J) A written description of the measures proposed to be taken for protection of the environment,

including, but not limited to, the prevention and/or control of:

(i) Fires,
(ii) Soil erosion,
(iii) Surface and ground water contamination,
(iv) Damage to fish and wildlife or other natural resources,
(v) Air and noise emissions,
(vi) Hazards to public health and safety,
(vii) Socio-economic impact(s), and
(viii) Impact(s) on public infrastructure and services.

(K) Statement(s) addressing how the proposed development would mitigate or reconcile:

(i) Any effects to residents or surrounding properties in the areas of health, environment and socio-economic activities;

(ii) The burdening of public agencies to provide support infrastructure such as roads, sewers, water, drainage, school and related services and police and fire protection.

(L) Preliminary provisions and/or plans for the monitoring of environmental effects such as noise and air and water quality during each proposed phase of the project (exploration, development and production) demonstrating how the applicant intends to comply with this rule, the rules of the State's Department of Health, and the rules of the State Board of Land and Natural Resources.

(M) A preliminary plan of action for emergency situations which may threaten the health, safety, and welfare of employees and other persons in the vicinity of the proposed project site including, but not limited to, procedures to facilitate coordination with appropriate Federal, State and County officials and the evacuation of affected individuals.

(N) Preliminary timetable(s) and/or schedule(s) for each proposed phase of the project.

(O) Method(s) of presenting timely progress reports to the Planning Commission.

(P) Other pertinent information or data such as an archaeological survey which the Planning Director

may require to support the application for the utilization of geothermal resources and the protection of the environment.

(c) Graphic representations suitable for both staff analysis and public presentation, including the depiction of the project boundaries, reference points (roadways, shoreline, etc.), existing and proposed structures and appurtenances. Graphics for public presentation shall be a minimum of 2 feet by 3 feet in dimension, drawn to scale on a map or maps of 1:24,000 scale, or larger when required by the Commission.

12.4 Properly Filed Application

Within twenty days of receipt of an application, the Planning Director shall review it to determine if it is complete in that it includes the supporting data required pursuant to Section 12.3 of this rule. An application that is determined to be complete shall be officially accepted within twenty days of receipt of the application and the applicant shall be so notified in writing.

12.5 Hearing and Notification

(a) The Planning Director, on behalf of the Planning Commission, shall set a date for a public hearing to be held within a period of ninety days from the date of official acceptance of a properly filed and completed application.

(b) The Planning Commission shall conduct a public hearing [and]. [u]Upon appropriate request [a contested case hearing pursuant to the Planning Commission rules pertaining to public and contested case hearings.] for mediation from any party who submitted comment at the public hearing, the Planning Commission shall order the requesting party or parties, the applicant and the appropriate agencies to submit to the mediation process outlined in Section 12.5.1 of this rule.

(c) Promptly after the Planning Director fixes a date for the public hearing and at least 15 days before the date of the public hearing, the applicant shall mail a notice of the hearing to owners of interests in properties, as shown on the current real property tax rolls at the County Real Property Tax Office, within a minimum of three hundred feet of the perimeter boundary of the property for which a permit is being requested (or as determined by the Planning Director), and to other interested persons or groups as may be determined by the Planning Director. The applicant shall also make a reasonable attempt or best effort in notifying residents within one thousand feet of the

perimeter boundary of the property of the public hearing. Such notice shall state:

(1) Name of the applicant;

(2) Precise location of the property involved;

(3) Nature of the proposed geothermal development activities; and

(4) Date, time, and place of the hearing.

(d) If the notification requirement set forth in section 12.5 (c) has not been met, the Planning Commission shall not conduct a hearing and further action on the application shall be deferred until the notification requirement is met.

(e) In addition to said notice and at least fifteen days prior to the date of the hearing, the Planning Commission shall publish notice of the hearing in a newspaper of general circulation in the County which includes the information provided under section 12.5(c)(1-4) of this rule.

12.5.1 Mediation

(a) Persons Entitle to Request Mediation. Any person, including interested government agencies, who submitted comment at the public hearing may, upon appropriate request, seek mediation of issues raised by that person at the initial public hearing. Upon receipt of an appropriate request, the Planning Commission shall require the parties to participate in mediation. All appropriate requests for mediation shall be consolidated in a single mediation conference. The Planning Commission shall not be a party to the mediation, and shall not be permitted to attend mediation conferences. The Planning Department may be a party to the mediation if it makes an appropriate request.

(b) Requests for Mediation. A request for mediation shall be made in writing to the Planning Commission, shall contain a brief statement of the issue or issues raised by that person at the public hearing, and shall contain the name, address, phone number and signature of the person requesting mediation.

(c) Time for Submission of Request. The original and ten (10) copies of the request for mediation shall be filed with the Planning Commission within five days after the close of the initial public hearing and one copy of the request shall be served on the applicant.

(d) Appointment of a Mediator. Within five days after receipt of a timely request, the Planning Commission shall appoint

a qualified mediator. Appointment of the mediator by the Planning Commission shall be final, except as provided in Section 12.5.1(e).

(e) Qualifications of Mediator. No person shall serve as a mediator in any dispute in which that person has any financial or personal interest in the result of the mediation, except by the written consent of all parties to the mediation. Prior to accepting an appointment, the prospective mediator shall disclose any circumstances likely to create a presumption of bias or prevent the prompt completion of the mediation. Upon receipt of such information, the Chairperson shall either replace the mediator or immediately communicate the information to the parties for their comments. In the event the parties are unable to agree as to whether the mediator shall serve, or in the event the appointed mediator becomes unable or unwilling to serve, the Chairperson will appoint another mediator. The mediator shall not be an employee of any County agency or its staff.

(f) Notice of Mediation Conference. The applicant and any person submitting a timely request for mediation shall be notified by the Planning Commission of the date, time, and place of the first mediation conference by depositing such notice in the mail to the return address stated in the application and in the request for mediation. The notice shall be mailed no later than ten days before the start of the mediation conference.

(g) Mediation Conference. The initial mediation session shall be held within 15 days after the appointment of the mediator. The mediator shall fix the time and place of each subsequent mediation session. The conference shall be held within the County of Hawaii unless all parties and the mediator agree otherwise. The mediation period shall not extend beyond thirty days after the initial mediation session, except by order of the Planning Commission. Mediation shall be confined to the issues raised at the public hearing by the respective party or parties requesting mediation.

(h) Authority of Mediator. The mediator shall attempt to help the parties reach a satisfactory resolution of their dispute, but shall not have authority to impose a settlement upon the parties. The mediator may conduct joint and separate meetings with the parties and make oral and written recommendations for settlement.

(i) Privacy. Mediation sessions shall be private. The parties and their representatives shall have the right to attend the joint mediation sessions. Other persons may attend

only with the permission of all parties to the mediation and the consent of the mediator.

(j) Confidentiality. Confidential information disclosed to a mediator by any party in the course of the mediation shall not be divulged by the mediator to anyone, including other parties to the mediation. All records, reports, or other documents received by a mediator while serving in such capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any administrative proceedings or judicial forum.

(k) The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, administrative, or other proceeding:

(i) views expressed or suggestions made by any other party with respect to a possible settlement of any disputed issue;

(ii) statements or admissions made by any other party in the course of mediation proceedings;

(iii) proposals made or views expressed by the mediator;

(iv) the fact that the other party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

(l) Stenographic Record. There shall be no stenographic record or electronic recordation of the mediation process.

(m) Recommendation of Mediator. The mediator shall submit a written report containing recommendations to the Planning Commission, based upon any mediation agreement reached between the parties or stating that no agreement was reached, for consideration by the Planning Commission in its final decision. The written report of the mediator shall be filed with the Planning Commission and served on all parties to the mediation within 10 days of the close of the mediation conference.

(n) Second Public Hearing. If there is no mediation agreement, or if the mediation agreement does not resolve all issues submitted for mediation, the Planning Commission may, in its sole discretion, hold a second public hearing to receive additional comment related to the unresolved mediation issues. The second public hearing, if to be conducted, shall be held within thirty (30) days after receipt of the mediator's report. Within 10 days after the second public hearing, the Planning Commission may receive

additional written comment on the unresolved mediation issues raised at the second public hearing by any party.

(o) If a second hearing is held, the Planning Commission shall consider the comments raised at the second hearing before rendering its final decision. The Planning Commission shall then determine whether a geothermal resource permit shall be granted for geothermal development activities described in the application.

(p) Expenses. The parties shall each bear their respective costs, fees and expenses.

12.6 Criteria for Issuance of Geothermal Resource Permit

The Planning Commission shall grant a geothermal resource permit if it finds that the applicant has demonstrated [by a preponderance of evidence] that:

(a) The proposed geothermal development activities would not have unreasonable adverse health, environmental, or socio-economic effects on residents or surrounding property; and

(b) The proposed geothermal development activities would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection; and

(c) There are reasonable measures available to mitigate the unreasonable adverse effects or burdens referred to above.

12.7 Action

(a) Unless there is mutual agreement [by the Planning Director, the applicant, and, if applicable, any intervenors in a contested case hearing] to extend the period of time for the Planning Commission's action, the Planning Commission shall take action on a properly filed and complete application within six months (180 days) of the date a [properly filed] complete application is [officially accepted] filed; provided that [if a contested case hearing is held, the Planning Commission shall take action within nine months (270 days) of the date a properly filed application is officially accepted.] the time limit may be extended by agreement between the applicant and the Planning Commission.

(b) The Planning Commission's action shall either:

(1) Grant the geothermal resource permit as requested by the applicant based upon the satisfaction of criteria in section 12.6 above and stating the reasons

therefore, subject to performance, reporting and other appropriate conditions imposed by the Commission.

(2) Grant the geothermal resource permit as may be modified from the applicant's request and stating the reasons therefore, subject to performance, reporting, and other appropriate conditions imposed by the Commission.

(3) Grant the geothermal resource permit in phases or increments dependent upon the timely and progressive completion of a precedent phase or increment and stating the reasons therefore, subject to performance, reporting, and other appropriate conditions imposed by the Commission.

(4) Deny the geothermal resource permit and stating the reasons therefore.

(c) The Chairperson of the Commission shall issue official written notification to the applicant of the Commission's action including any performance, reporting, and other appropriate conditions imposed by the Commission.

12.8 Requirements Prior to Initiating Construction

Prior to initiating construction of an approved project or any phase of an approved project, the applicant shall submit the following to the Planning Director:

(a) Copies of approved permits and other applicable approvals for the project or any phase of the project from other County, State or Federal agencies as applicable.

(b) Final plans or provisions for monitoring environmental effects of the project or any phase of the project such as noise, air and water quality as may be required to insure compliance with County rules and the rules of the State's Department of Health and Board of Land and Natural Resources, and other permit-issuing agencies.

(c) A final plan of action to deal with emergency situations which may threaten the health, safety, and welfare of the employees and other persons in the vicinity of the proposed project site. The plan shall include procedures to facilitate coordination with appropriate State and County officials and the evacuation of affected individuals.

(d) A final site plan and elevations of proposed temporary and/or permanent structures for the project or any phase of the project.

12.9 Amendments of Permit and Conditions

(a) For any amendments to the geothermal resource permit or its conditions the permittee shall set forth in writing:

(1) The specific amendment requested;

(2) The reasons for the request, including statements addressing the criteria listed under section 12.6(1) through (3) of this rule; and

(3) Any other applicable information requested by the Planning Director.

(b) In the case of any amendment concerning a time extension to the permit or its conditions, the permittee shall file the request not less than ninety days prior to the deadline for performance of the condition, setting forth:

(1) The affected condition;

(2) The length of time requested; and

(3) The reasons for the request.

If either the Planning Director or the Planning Commission is not able to act on a properly filed time extension request prior to the deadline for a time extension, the geothermal development activities allowed by the Geothermal Resource Permit may be continued by the Planning Director.

(c) All of the procedures set forth in sections 12.4 through 12.12 of this rule and the procedures set forth in other applicable Planning Commission rules shall apply.

12.10 Enforcement of Permit and Conditions

(a) If the Planning Director determines that there is noncompliance with the geothermal resource permit or its conditions, the Planning Director shall so inform in writing the permittee and, if applicable, other appropriate County, State or Federal agencies, setting forth the grounds of his determination. Upon receiving notice of the determination of noncompliance, the permittee shall have five days to provide a written response to the notice of determination of noncompliance.

(b) Notwithstanding any written response submitted by the permittee, if the Planning Director affirms the determination of noncompliance, he shall so advise the permittee in writing. The permittee shall have five days thereafter to correct the noncompliance; provided that the Planning Director may allow a longer period upon a finding

of good cause, such as where circumstances beyond the permittee's control will prevent compliance within the five-day period.

(c) The permittee may request a hearing with the Planning Commission to amend the permit, should compliance be impossible or impractical to meet.

(d) If the permittee fails to correct the noncompliance within the required time period, the Planning Director shall refer the matter with his recommendations to the Planning Commission for further disposition, which may include, but is not limited to, either the revocation or the modification of the permit.

(e) Notwithstanding any other provision of this section, pending a hearing by the Planning Commission the Planning Director may immediately and temporarily suspend the permit and operations allowed thereunder. Notice of a temporary suspension shall be provided in writing or orally with subsequent written confirmation within three days to the permittee and shall set forth the reasons for the temporary suspension. The Planning Director may reactivate the permit upon a subsequent finding of the permittee's compliance with the permit condition. Subject to the Planning Commission rules, the permittee may at any time request a hearing before the Planning Commission for its review and action with regard to the permit's temporary suspension or any subsequent refusal of the Planning Director to reactivate the permit. Referrals by the Planning Director to the Planning Commission and reviews by the Planning Commission of the Planning Director's action shall be heard at the Commission's next meeting when the matter can be placed on the Commission's agenda.

12.11 Penalties

If a permittee, its successors or assigns do not comply with any provision of a permit or its conditions issued under this Rule they may be subject to a civil fine not to exceed those provided for by applicable statutes.

12.12 Appeals

[Any person aggrieved by the action of the Planning Commission in the issuance of a geothermal resource permit or an amendment of condition or permit under Section 12.9 shall be entitled to appeal such decision to the applicable court of the State of Hawaii.]

(a) Any decision made by the Planning Commission pursuant to a public hearing or hearings under this rule may be appealed directly on the record to the supreme court for final decision and shall not be subject to a contested case

hearing. Sections 91-14(b) and (g), Hawaii Revised Statutes, as amended, shall govern the appeal, notwithstanding the lack of a contested case hearing on the matter. The Planning Commission shall provide a court reporter to produce a transcript of the proceedings at all public hearings under this rule for purposes of an appeal.

(b) For the purposes of an appeal from a decision from a public hearing, the record shall include:

(1) The application for the permit and all accompanying supporting documents, including but not limited to; reports, studies, affidavits, statements, and exhibits.

(2) Staff recommendations from County agencies submitted to the Planning Commission in consideration of the application.

(3) Oral and written public testimony received at the public hearings.

(4) Written transcripts of the proceedings at the public hearings.

(5) The written recommendation received by the Planning Commission from the mediator with any mediation agreement.

(6) A statement of relevant matters officially noticed by the Planning Commission and/or any of its members at the public hearings.

(7) The written decision of the Planning Commission issued in connection with the application and public hearings.

(8) Other documents required by the Planning Commission.

12.13 Severability

If any portion of this rule, or its application to any person or circumstance, shall be held unconstitutional or invalid, the remainder of this rule and the application of such portion to other persons or circumstances shall not be affected thereby.

ADOPTED this 12th day of January, 1988.

Thomas A. Krieger

THOMAS A. KRIEGER, Chairman
Planning Commission
County of Hawaii

APPROVED AS TO FORM AND LEGALITY:

Patricia K. O'Toole
Corporation Counsel

APPROVED this 27th day of January, 1988.

Dante K. Carpenter
DANTE K. CARPENTER, Mayor
County of Hawaii

CERTIFICATION

I, THOMAS A. KRIEGER, Chairman of the Planning Commission, do hereby certify that attached hereto is a copy of a document entitled, "Rule 12, Geothermal Resource Permits," the original of which is on file with the Commission, and that the requirements as prescribed in Section 91-3 of the HRS has been followed.

Thomas A. Krieger

THOMAS A. KRIEGER, Chairman
Planning Commission
County of Hawaii

RECEIVED THIS 2nd day of FEBRUARY, 1988.

R. B. Legaspi

R. B. LEGASPI
County Clerk

Planning Commission
25 Aupuni Street, Rm. 109 • Hilo, Hawaii 96720 • (808) 961-8288

Bernard K. Akana
Mayor

CERTIFIED MAIL

August 15, 1989

Dr. Harry Olsen
HEI/Spark Matsunaga Fellow
in Geothermal Research
Hawaii Natural Energy Institute
Holmes Hall 240
2540 Dole Street
Honolulu, HI 96822

Dear Dr. Olsen:

Geothermal Resource Permit Application (GRP 89-1)
Hawaii's Scientific Observation Hole (SOH) Program
Lilewa, Kapoho, and Halekamahina, Hawaii
TMK: 1-2-10: 01; 1-4-01: 2; and 1-4-02: 32

The Planning Commission at its duly held meeting on August 8, 1989, considered this Geothermal Resource Permit Application and approved this request based on the following findings:

(1) The proposed geothermal development activities would not have unreasonable adverse health, environmental, or socio-economic effects on residents or surrounding property.

Approximately a quarter acre of land will be cleared and leveled for each drill site. Each drill site will be constructed so that surface water runoff is contained within the site and will drain into the mud pit.

There are no surface streams or ponds in the vicinity of the proposed drill sites. Groundwater will be protected by cementing casing into the hole to depths below sea level.

There are no habitats for aquatic life in the area; however, other wildlife and natural resources will be affected by loss of habitat at the drill site and along any access roads that will be constructed. This habitat loss will be limited to the duration of drilling, testing, and monitoring operations, after which the site will be restored. The area at SOH 4 will

be surveyed for rare and endangered species and archaeological remains prior to clearing activity, and, if necessary, the site will be relocated to avoid undesirable impact. Similarly, the area affected by SOH 1 and SOH 2 will be surveyed by an ornithologist. To minimize any adverse impacts to the endangered 'I'o, the ornithologist's recommendations will be sought.

Geothermal emissions will not be vented to the atmosphere, and no other aspects of drilling should affect public health. The sites have been located in agricultural areas away from urban population concentrations. The sites will also be located to take advantage of existing vegetation to muffle or block noise from the drilling operations. The drilling area will be within an area designated as a "hard hat" area. The general public will not be permitted within this area.

The drill operator will bring into the area three crews composed of two men each plus a drilling foreman. Other technical personnel associated with the project will include a drilling supervisor, a mud technician, various suppliers and subcontractors, the principal investigator, and several researchers and field supervisors. These people will rent housing in the Hilo-Pahoa-Kalapana area. The maximum number of persons at the project at one time should not exceed twenty. Local suppliers and contractors will be used wherever possible. Drilling the SOH's should take approximately twelve to sixteen months to complete, depending upon drilling conditions and the depth to which the holes are drilled.

As previously stated, the socio-economic impacts of this activity would not be unreasonable. The economic benefits and security implications of reducing Hawaii's dependence on imported fuels for energy production have been recognized for a long period of time at all levels of government. This has resulted in a general policy of support for alternative energy research and development. The establishment of Geothermal Resource Subzones, where exploration and development are allowable activities, acknowledges the potential higher use of the lands in volcanic rift zones which are generally of marginal value for agriculture and other cultural uses. Results of these scientific observations could lead to development of indigenous geothermal resources for the general social and economic well-being of the residents of Hawaii.

(2) The proposed geothermal development activities would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection.

There should be negligible impact on public infrastructure and services. Personnel associated with the drilling operations will be temporary and small in number. Most of the personnel will be on temporary duty and will not bring their families. These people will utilize existing facilities and will not require additional services that are not already provided by the County.

Fire extinguishers are standard equipment on drilling rigs to control fires associated with drilling operations. The rig will utilize either a pipeline or water haulage truck to supply water for the drilling fluids. This water can be used to extinguish any fires that may develop. In addition, drilling muds can be pumped onto any fire that may develop in the vicinity of the rig.

Drilling operations will require no provisions from public agencies in the form of roads or streets, sewers, drainage, or school enlargement or improvements, and only the normally afforded police and fire protection will be expected. Any necessary access roads will be constructed by the applicant, and water for drilling will be purchased and supplied by temporary pipeline or transported to the site in tank trucks by the drilling contractor.

(3) There are reasonable measures available to mitigate the unreasonable adverse effects or burdens referred to above.

Hydrogen sulfide monitors will be operable at the drill site during rotary and core drilling operations. The applicant will comply with all federal, state, county, or local rules regarding environmental monitoring.

During drilling operations, noise levels will be monitored at several sites at and adjacent to the drilling rig, and mitigating measures will be taken if noise levels exceed acceptable levels.

The drillers will receive safety instructions and instructions on how to contact emergency facilities in the

area. Phone numbers for police, fire department, hospital, and other emergency services will be posted in a prominent place at the drill rig, together with phone numbers for the drill supervisor, principal investigator, field manager, and appropriate state and county regulators.

As drilling will be conducted on a 24 hours-a-day, 7 days-a-week basis once the core drilling commences, the drill site will be lighted during the hours of darkness to permit continuous operations and to provide safe working conditions. The rig will be sited so as to be as unobtrusive as possible and will conform to all Hawaii outdoor lighting regulations. Copies of Hawaii Outdoor Lighting Regulations will be provided to the drilling contractor to insure compliance. After the rig is operational, a lighting survey will be made, and lights adjusted or shielded as necessary to cause the minimum impact.

Approval of this request is subject to the following conditions:

1. The petitioners, its successors, or assigns shall be responsible for complying with all of the stated conditions of approval.

2. Prior to the commencement of any grubbing or grading activity, the petitioner shall:

   a. Mark the boundaries of the designated SOH site(s), and the access road right-of-way(s), and no construction or transportation equipment shall be permitted beyond the prescribed boundaries of the said SOH site(s) and road right-of-way(s);

   b. Conduct an archaeological reconnaissance survey and an endangered flora and fauna survey at all SOH Holes and the access road right-of-way leading to them and submit the results of the surveys to the County Planning Department for review; and

   c. Comply with all requirements of the County grading ordinance.

3. Prior to any drilling activity, the petitioner shall submit and secure approval from the Planning Department or its designee a noise monitoring plan to be implemented when the SOH drilling and testing period begins. This plan shall

include the monitoring of noise at the specific sites at least one week prior to the start of drilling to establish a site specific baseline. This plan should allow the coordination of noise complaints with noise measurements, the meteorological conditions, and the type of operations which occurred at the SOH site. The data obtained shall be available upon request by the appropriate governmental agencies including the Planning Department. The noise monitoring program shall be in operation during all active phases of the project.

The applicant shall meet the guidelines for noise included as Condition No. 12 below for all aspects of this project including all rigs used at the respective sites; however, the applicant shall also make every attempt to make drilling as quiet as possible to reduce noise to meet community concerns. The applicant shall schedule cable rig drilling during daylight hours which is defined as the hours between 7:00 a.m. and 7:00 p.m.

The applicant shall make available one mobile noise monitoring station to do site specific monitoring.

4. Prior to any drilling activity, the petitioner shall submit and secure approval from the Planning Department or designee an air quality monitoring plan to be implemented when the SOH drilling period begins. The plan shall include provisions for installation, calibration, maintenance, and operation of recording instruments to measure air contaminant concentrations. The specific elements to be monitored, the number of stations involved, and the frequency of sampling and reporting shall be specified by the Planning Department or its designee. The air quality monitoring program shall be in operation during all phases of the project.

5. Prior to any drilling activity, the petitioner shall submit and secure approval from the Hawaii County Civil Defense Agency a plan of action to deal with emergency situations which may threaten the health, safety, and welfare of the employees/persons in the vicinity of the proposed project. The plan shall include procedures to facilitate coordination with appropriate State and County officials as well as the evacuation of affected individuals. The plan shall also include provisions for the applicant to provide

alternate transportation from the area for those affected in the event of a hazard associated with well drilling operations; for training the drill crews to handle emergencies; and to have available on site cement batching to plug the SOH in the event of an emergency.

6. The petitioner shall maintain a record in a permanent form suitable for inspection and five (5) copies shall be filed with the Planning Department on a monthly basis during drilling and for six (6) months after the completion of drilling to establish a hole specific baseline and such record shall be available to the community. The record shall include:

   a. Occurrence and duration of any start-up, shut-down, and operation mode of any SOH/facility.

   b. Performance testing, evaluation, calibration checks, and adjustment and maintenance of the continuous emission monitor(s) that have been installed.

   c. Emission measurements reported in units compatible with applicable standards/guidelines.

7. The petitioner, its successors, or assigns shall apply the "Best Available Control Technology" (BACT) with respect to geothermal emissions during all phases of the project, including SOH drilling and testing. "Best available control technology" means the maximum degree of control for noise and air quality concerns taking into account what is known to be practical but not necessarily in use. BACT shall be determined by the Planning Department in consultation with recognized experts and other appropriate governmental agencies involved in the control or regulation of geothermal development. Should it be determined that BACT is not being employed, the Planning Department is authorized to take any appropriate action including suspension of any further activities at the project site or referral of the matter to the Planning Commission for review and disposition.

8. Unabated open venting of geothermal steam shall be prohibited.

9. The petitioner shall provide, install, calibrate, maintain, and operate a meteorological station and conduct continuous meteorological monitoring at the site(s) or at another location as may be mutually agreed to by the petitioner and the Planning Department. The data shall be provided in a format agreeable to the Planning Department on a monthly basis and shall include temperature, wind velocity, wind direction, and other information deemed necessary by the Planning Department.

10. The petitioner shall publish a telephone number for use by local individuals in case of noise or odor complaints and have an employee available at the drill site, 24 hours a day, to respond to any local complaints.

11. The petitioner shall submit five (5) copies of a status report to the Planning Department on a quarterly basis (by the first day of January, April, July, and October of each year), or, within 30 days of the completion of any SOH. The status reports shall be available to the public. The status report shall include, but not be limited to:

    a. A detailed description of the work undertaken during the current reporting period including drilling activity report;

    b. A description of the work being proposed over the next reporting period;

    c. The results of the environmental/noise monitoring activities;

    d. A log of the complaints received and the responses thereto;

    e. The current status of exploration activities in the context of long-range program goals; and

    f. Any other information that the Planning Department may require which will address environmental and regulatory concerns involving the requirements of the Geothermal Resource Permit.

    g. This condition shall remain in effect until all of the conditions of approval have been complied with, then

after which these reports shall be every six (6) months for the duration of the project.

h. These reports shall include a financial accounting of the resources expended by the project.

12. Until such time as noise regulations are adopted by the State or County, the petitioner shall comply with the following guidelines which shall be enforced by the Planning Department:

a. A general noise level of 55 dba during daytime and 45 dba at night shall not be exceeded except as allowed under b. For the purposes of these guidelines, night is defined as the hours between 7:00 p.m. and 7:00 a.m.;

b. The allowable noise levels may be exceeded by a maximum of 10 dba; however, in any event, the generally allowed noise level should not be exceeded more than 10% of the time within any 20 minute period;

c. The noise level guidelines shall be applied at the existing residential receptors which may be impacted by the geothermal operation; and

d. Sound level measurements shall be conducted using standard procedures with sound level meters using the "A" weighting and "slow" meter response unless otherwise stated.

13. A disposal site or sites approved by the State Department of Health, prior to any disposal activity covered by this permit, shall be provided for sump contents and other waste materials to be disposed of from the drilling activity.

14. All sumps/ponds shall be purged in a manner meeting with the approval of the State Department of Health. In the event there are no DOH requirements, the applicant and the Planning Department shall request for guidelines from the DOH for the purging of sumps and ponds. Said guidelines shall be available to the community.

15. When SOH's are completed or abandoned, all denuded areas on and around the drilling site shall be revegetated in a

manner meeting with the approval of the Planning Department upon consultation with the Forestry Division of the Department of Land and Natural Resources and the property owners.

16. The petitioner shall grant unrestricted access to the subject property(ies) to authorized governmental representatives or to consultants or contractors hired by governmental agencies for inspection, enforcement, or monitoring activities. A designated employee shall be available at all times for purposes of supplying information and responses deemed necessary by the authorized governmental representative in connection with such work.

17. Large vehicle deliveries to the drill site shall be limited to daylight hours. For the purposes of this condition, daylight hours is defined as the hours between 7:00 a:m and 7:00 p.m. The applicant shall make every attempt to confine water deliveries between the hours of 8:00 a.m. and 5:00 p.m. This condition shall not apply for vehicles responding to emergencies.

18. The lighting used shall not interfere with the operations at the observatories located on Mauna Kea. To meet this requirement, the petitioner shall comply with the requirements of Chapter 14, Article 9 of the Hawaii County Code, relating to outdoor lighting.

19. This Geothermal Resource Permit shall be effective until December 31, 1991.

20. All other applicable rules, regulations and requirements, including those of the Hawaii County Department of Water Supply, State Department of Health and the State Department of Land and Natural Resources shall be complied with.

21. An extension of time for the performance of conditions within the permit may be granted by the Planning Director upon the following circumstances: 1) the non-performance is the result of conditions that could not have been foreseen or are beyond the control of the applicants, successors or assigns, and that are not the result of their fault or negligence; 2) granting of the time extension would not be contrary to the general plan or zoning code;

3) granting of the time extension would not be contrary to the original reasons for the granting of the Geothermal Resource Permit; and 4) the time extension granted shall be for a period not to exceed one (1) year and 5) if the applicant should require an additional extension of time, the Planning Director shall submit the applicant's request to the Planning Commission for appropriate action.

22. Should the Department of Water Supply's water well near SOH 2 be used as a water source during the drilling of SOH 2, the water well shall be monitored for increases in the saline level of the water.

23. Within 48 hours after an earthquake registering 6 or above on the Richter Scale and/or within 48 hours after an eruption has occurred, all SOH's within 10 kilometers of the epicenter or eruptive center, shall be examined for any physical changes which would alter its downhole integrity. A report of this examination shall be filed with the Planning Department within 48 hours of the examination.

24. As each SOH is drilled, each SOH will be precisely logged to determine the precise location of the pipestring to facilitate its plugging in the event of a blowout.

25. SOH 4 shall be the first drill site. A status report for the completion of the second stage (of three stages) of SOH 4 shall be submitted to Planning Commission prior to drilling more than 200 feet below ground level at either SOH 1 or SOH 2. Within thirty (30) days after submission of said report, the Planning Commission shall meet to review said status report to verify compliance of the initial drilling activities related to the first and second stages with all above conditions. The Planning Commision reserves the right to call a public hearing, if necessary, to gather additional input regarding the impact of the activities at SOH 4.

26. Should any of the foregoing conditions not be met or substantially complied with in a timely fashion, the Planning Director may immediately and temporarily suspend the permit and operations allowed thereunder. Notice of a temporary suspension shall be provided in writing or orally with subsequent written confirmation within three days to

the permittee and shall set forth the reasons for the temporary suspension.

Sincerely,

Gary Mizuno, Chairman
Planning Commission

cc: Dee Dee Letts
Kem Lowry
Christine Batista
Jim Blakey
Department of Business and Economic Development, Energy Division (Attn: Maurice Kaya)
Civil Defense Agency (Attn. Harry Kim)
W. R. Craddick
Jane Hedtke
Richard F. and Lou Ann K. Jones
Kapoho Community Association (Attn: Lou Rankin)
Kapoho Community Association (Attn: Barbara Bell)
Kapoho Grown (Attn: Delan Perry)
Kapoho Grown (Attn: Jennifer Perry)
Fernando Javier/Lois J. West
David Laughlin
Alice Medeiros
Pele Defense Fund (c/o Paul W. Y. Takehiro)
Steve Philips
Gregory C. Pommerenk
Puna Community Council, Inc. (Attn: Ronald C. Phillips)
Helene Shinde
Yoshio Shinde
Ralph Matsuda

Syllabus

SANDY BEACH DEFENSE FUND, FRIENDS OF QUEEN'S BEACH, LIFE OF THE LAND, SHIRLEY M. LUM, PHILIP I. ESTERMANN, ELIZABETH G. MATTHEWS and URSULA RETHERFORD, Appellants–Appellants, v. **CITY COUNCIL OF THE CITY AND COUNTY OF HONOLULU and KAISER DEVELOPMENT COMPANY**, Appellees–Appellees, and **KAISER HAWAII KAI DEVELOPMENT COMPANY**, Intervenor–Appellee

(CIV. NO. 87-1596)

AND

SANDY BEACH DEFENSE FUND, FRIENDS OF QUEEN'S BEACH, LIFE OF THE LAND, SHIRLEY M. LUM, PHILIP I. ESTERMANN, ELIZABETH G. MATTHEWS and URSULA RETHERFORD, Plaintiffs–Appellants, v. **CITY COUNCIL OF THE CITY AND COUNTY OF HONOLULU**, Defendant–Appellee, and **KAISER HAWAII KAI DEVELOPMENT COMPANY and KAISER DEVELOPMENT COMPANY**, Intervenors–Appellees

(CIV. NO. 87-1597)

NO. 12879

APPEAL FROM THE FIRST CIRCUIT COURT
HONORABLE SIMEON R. ACOBA, JR., JUDGE
HONORABLE ROBERT G. KLEIN, JUDGE

APRIL 18, 1989

LUM, C.J., NAKAMURA, PADGETT, HAYASHI, AND WAKATSUKI, JJ.

MUNICIPAL CORPORATIONS — *ordinances in general — construction and operation.*

A legislative act predetermines what the law shall be for the regulation of future cases falling under its provisions. A non-legislative act executes or administers a law already in existence.

ZONING AND PLANNING — *permits, certificates and approvals — proceedings to procure — in general.*

Approval of a Special Management Area use permit application constitutes a non-legislative, not a legislative act.

STATUTES — *construction and operation — general rules of construction.*

Where there is no ambiguity in the language of a statute, and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the purposes and policies of the statute, there is no room for judicial construction and interpretation, and the statute must be given effect according to its plain and obvious meaning.

ADMINISTRATIVE LAW AND PROCEDURE — *in general — agencies and proceedings affected.*

The City Council, as the legislative branch of the county, is not an "agency" within the meaning of the Hawaii Administrative Procedures Act (HAPA), and is therefore exempt from HAPA when acting in either a legislative or non-legislative capacity.

SAME — *same —same.*

ZONING AND PLANNING — *permits, certificates, and approvals, proceedings to procure — in general.*

Provision of Coastal Zone Management Act, requiring each county authority to establish "pursuant to Chapter 91" procedures for processing special management area use permit applications, does not subject the City Council, otherwise exempt from the requirements of Hawaii Administrative Procedures Act, to conduct "contested case" proceedings when acting upon individual permits.

SAME — *same — same.*

City Council, otherwise exempt from the requirements of the Hawaii Administrative Procedures Act, nevertheless complied with the act's rule-making provisions when it adopted an ordinance establishing procedures for processing special management area use permit applications, and therefore did not violate provision of Coastal Zone Management Act requiring each county authority to establish pursuant to Chapter 91 its special management area permit procedures.

CONSTITUTIONAL LAW — *due process of law — property and rights protected — in general.*

In order to assert a right to procedural due process, a party must make a preliminary showing that he has a property interest within the meaning of the due process clause.

SAME — *same — same.*

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it; he must, instead, have a legitimate claim of entitlement to it.

SAME — *same — deprivation of property in general — notice and hearing requirement.*

The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.

SAME — *same — administrative proceedings — in general.*

Due process is not a fixed concept requiring a specific procedural course in every situation. Due process is flexible and calls for such procedural protections as the particular situation demands.

SAME — *same — same — same.*

Determination of the specific procedures required to satisfy due process requires a balancing of several factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

SAME — *same — same — particular proceedings.*

Even assuming Appellants' visual and environmental interests in opposing a special management area use permit for development within the coastal zone constitute property interests protected by the constitution, their rights to procedural due process were satisfied by notice and an opportunity to be heard.

SAME — *equal protection of laws — bases for discrimination affected in general — rational or reasonable basis.*

Unless fundamental rights or suspect classifications are implicated, we will apply the rational basis standard of review in examining a denial of equal protection.

SAME — *same — same — same.*

To prevail, a party challenging the constitutionality of a statutory classification on equal protection grounds has the burden of showing, with convincing clarity, that the classification is not rationally related to statutory purpose or that the challenged classification does not rest on some ground of difference having fair and substantial relation to the object of legislation, and is therefore, arbitrary and capricious.

SAME — *same — same — same.*

Discrimination between classes is not per se objectionable so long as any state of facts reasonably can be conceived to sustain it.

SAME — *same — zoning and planning regulations — particular proceedings.*

City Council's decision to provide for public hearings when acting upon special management area use permit applications, while other counties provide contested case hearings pursuant to the Hawaii Administrative Proce-

dures Act, was not clearly arbitrary and therefore did not violate equal protection clause.

OPINION OF THE COURT BY LUM, C.J.

This appeal involves a challenge to the validity of the procedures employed by Appellee, the City and County of Honolulu (County) when acting upon applications for Special Management Area (SMA) use permits pursuant to the Coastal Zone Management Act (CZMA), Hawaii Revised Statutes (HRS), Chapter 205A. Appellants, residents and community groups, challenge the County's issuance of an SMA use permit to Appellee Kaiser Development Co. (Kaiser). They contend that the Honolulu City Council was required to hold a "contested case" [1] hearing pursuant to the Hawaii Administrative Procedures Act (HAPA), HRS Chapter 91, when it issued the permit, and that the Council's failure to do so violated the CZMA and deprived Appellants of their constitutional rights to due process and equal protection. The court below dismissed the case, finding no constitutional violation and ruling that the CZMA does not require a legislative body, otherwise exempt from HAPA, to conduct "contested case" hearings in issuing SMA use permits. We agree and therefore affirm the judgment of the court below.

I.

This case arises from the issuance of an SMA use permit to Kaiser by the Honolulu City Council. Kaiser sought to develop approximately 200 single-family homes in the vicinity of Sandy Beach Park on Oahu. Because a portion of the project was located within the boundaries of the "Special Management Area" (SMA) [2] established by the County pur-

---

[1] "Contested case" is defined in HRS § 91-1(5) as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HRS §§ 91-9 through 91-14 specify the procedural requirements for contested cases.

[2] "Special Management Areas" encompass critical coastal lands immediately adjacent to the shoreline requiring special management attention because of unique coastal values or characteristics. HRS §§ 205A-21, -22(4).

suant to the CZMA, Kaiser was required to obtain an SMA use permit. HRS § 205A-28.

Because this appeal involves a challenge to the procedures adopted by the County pursuant to the CZMA for administering the "Special Management Area" on Oahu, we turn first to a brief examination of the regulatory scheme before discussing the facts particular to the permit issued in this case.

A.

The CZMA imposes special controls on the development of real property along shoreline areas in order "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." HRS § 205A-21. Chapter 205A designates the counties as the "authority" to administer the permit system and requires the counties to adopt procedures for issuing permits. HRS §§ 205A-22(2), -29. The Honolulu City Council designated itself as the "authority" for the City and County of Honolulu unlike the other counties of Maui, Kauai, and Hawaii which delegated this function to their respective county planning commissions. *See* HRS § 205A-22(2).

The Honolulu City Council processes permit applications under procedures set forth in Revised Ordinances of Honolulu (Revised Ordinances), Chapter 33. Pursuant to this ordinance, initial processing of such applications is delegated to the Department of Land Utilization (DLU). DLU holds a public hearing on the application, and transmits its findings and recommendations to the City Council. Revised Ordinances § 33-5.3, -5.4. The Council generally refers SMA use permit applications to its Committees on Planning and Zoning which make a recommendation to the Council as a whole. The Council grants, denies, or conditions the permit by resolution. Revised Ordinances § 33-5.5.

In processing permit applications, DLU and the Council are guided by the policies, objectives, and guidelines of the CZMA.[3] HRS § 205A-26. The "authority" must make findings that the proposed

---

[3]The policies and objectives of Chapter 205A encompass seven major areas of legislative concern: (1) provision and protection of recreational resources; (2) protection and restoration of historic and cultural resources; (3) improvement of

development (a) will not have any substantial adverse environmental or ecological effects; (b) is consistent with the objectives, policies, and guidelines of Chapter 205A; and (c) is consistent with the county general plan and zoning. HRS § 205A-26(2).

3.

In the instant case, the County accepted Kaiser's application for a permit on February 3, 1986. On April 1, 1986, DLU held a public hearing which was attended by twelve persons. Subsequently, the agency transmitted its findings and recommendation of approval to the Council, which referred the application to its Planning and Zoning Committee for consideration. During the following year, the Council as a whole or in committee publicly reviewed and discussed the application at least ten times.

In response to growing concerns over the potential impact of the proposed development, the Council held a public hearing on April 1, 1987, at which over 80 persons offered written and oral testimony both for and against the project. Those testifying expressed concerns regarding the development's impact on coastal views, preservation of open space, traffic, potential flooding, and sewage treatment. Several of the Appellants testified at the public hearings. Appellants include individuals and organizations whose members reside in the area or use the shoreline and open space resources near the proposed development.

The published notice advertising the hearing stated that speakers would be limited to a three minute presentation; however, many persons testifying, including Appellants, were allowed to speak at length. At the close of the April 1, 1987 hearing, the Council deferred action on Kaiser's application to allow consideration of the extensive testimony received and to permit the preparation of findings. Further public testimony was permitted at the City Council meeting held on April 15, 1987, at which time the Council adopted Resolution No. 87-65 granting the permit and made extensive findings of fact.

---

scenic and open space areas; (4) protection of coastal ecosystems; (5) provision for coastal-dependent economic uses; (6) reduction of coastal hazards; and (7) improvement of the process for managing development of coastal resources, including public participation. *See* HRS § 205A-2.

On May 12, 1987, Appellants filed two nearly identical lawsuits in the circuit court challenging the issuance of the permit: (1) an administrative appeal pursuant to HRS § 91–14(g) which provides for judicial review of agency decisions in "contested cases"; and (2) an action under HRS § 205A–6, which accords a person aggrieved by a county agency's failure to comply with the CZMA a right thereunder to initiate a civil action against the non–complying agency.[4] Appellants claimed in both actions that their personal, economic, and aesthetic interests would be injured and adversely affected by the project. Appellant Elizabeth Matthews, who resides in the closest proximity to the proposed development, directly across a golf course from the development, claimed the project would affect her view of the ocean and decrease the value of her property. Both suits further alleged that the failure of the City Council to hold "contested case" hearings in SMA use permit proceedings violated HRS § 205A–29, Chapter 91, and the due process and equal protection clauses of the fourteenth amendment to the United States Constitution and article I, section 5 of the Hawaii Constitution. Appellees Kaiser Development Company and Kaiser Hawaii Kai Development Company intervened as defendants and the two cases were consolidated.

On December 29, 1987, the court issued an order denying Appellants' motion for summary judgment. The court held that HRS § 205A–29(a) does not require a legislative body, otherwise exempt from HRS Chapter 91, to conduct a contested case hearing on SMA use permit applications. Appellees moved to dismiss, arguing that the sole issue in the case, whether the Council was required to hold a contested case hearing, had already been decided by the court in its order denying the motion

---

[4] HRS § 205A–6 reads in pertinent part:

(a) Subject to chapters 661 and 662, any person or agency may commence a civil action alleging that any agency:

(1) Is not in compliance with one or more of the objectives, policies, and guidelines provided or authorized by this chapter within the special management area and the waters from the shoreline to the seaward limit of the State's jurisdiction; or

(2) Has failed to perform any act or duty required to be performed under this chapter; or

(3) In exercising any duty required to be performed under this chapter, has not complied with the provisions of this chapter.

for summary judgment. The lower court granted the motion to dismiss on January 29, 1988, and this appeal followed.

II.

We first consider Appellants' contention that the City Council, although not an "agency" within the meaning of HAPA, is required by the CZMA to conduct "contested case" hearings pursuant to HRS Chapter 91 when it acts upon SMA use permit applications. We conclude that the Council, as the legislative body of the County, is not subject to HAPA, and that the CZMA does not require the Council to conduct contested case proceedings in issuing SMA use permits.

A.

Turning first to an examination of the Hawaii Administrative Procedures Act, we find that HRS § 91-1 specifically exempts legislative and judicial bodies from its purview. Section 91-1 defines "agency" as follows:

> For the purpose of this chapter:
> "Agency" means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, ***except those in the legislative or judicial branches***. (Emphasis added).

Article III of the Revised Charter of the City and County of Honolulu (Charter) vests the legislative power of the City and County of Honolulu in the City Council. *See* Charter § 3-101. Therefore, the Council clearly falls within the exception created by HRS § 91-1.

Appellants concede that HAPA does not apply to the "legislative" functions of the City Council; however, they argue that the Council acts in a "quasi-judicial" or "administrative" capacity when issuing SMA use permits, and therefore, seek to invoke HAPA's procedural requirements, specifically the provisions relating to "contested cases." HAPA mandates a trial-type hearing in contested cases before administrative agencies.[5]

---

[5] HRS §§ 91-9 *et seq.* set forth the procedures to be afforded the parties to a "contested case" including: (1) reasonable notice, (2) the opportunity to present evidence and argument, (3) an agency decision on the record, (4) rules of

It is well established that the City Council has both legislative and non–legislative powers. Section 3–201 of the Charter provides: "Every legislative act of the council shall be by ordinance. Non–legislative acts of the council may be by resolution[.]" In ***Life of the Land v. City Council***, 61 Haw. 390, 423–24, 606 P.2d 866, 887 (1980), we recognized that the Council has both legislative and non–legislative powers and distinguished between them as follows:

> A legislative act predetermines what the law shall be for the regulation of future cases falling under its provisions.
>
> . . . .
>
> A non–legislative act executes or administers a law already in existence. (Citations omitted).

The issuance of an SMA use permit involves the application of general standards to specific parcels of real property. Therefore, the City Council's approval of Kaiser's SMA use permit application was a non–legislative act because it administered a law already in existence, the Coastal Zone Management Act.

We find no indication in the language of Chapter 91 that legislative bodies are excepted from the statutory definition of "agency" only when they are performing "legislative" activities, but are otherwise included in that definition. Section 91–1 clearly excludes the legislative ***branch*** from the definition of "agency" and therefore, from compliance with the procedural requirements contained in Chapter 91. It is well settled that

> where there is no ambiguity in the language of a statute, and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the purposes and policies of the statute, there is no room for judicial construction and interpretation, and the statute must be given effect according to its plain and obvious meaning.

State v. Palama, 62 Haw. 159, 161, 612 P.2d 1168, 1170 (1980).

The legislative history of HRS § 91–1 provides further support for the exclusion of the City Council from HAPA. In adopting HRS Chapter 91, the House Judiciary Committee stated:

---

evidence, including the right of cross–examination, (5) a written decision accompanied by findings of fact and conclusions of law, and (6) prohibition against ex parte communications.

> It is also the intention of your Committee that the definition of agency does not include the state legislature, ***city council*** and board of supervisors of the state and county government as well as the various courts including those which by statute the Supreme Court of the State of Hawaii is given rule–making authority over. (Emphasis added).

Hse. Stand. Comm. Rep. No. 8, in 1961 House Journal, at 656.

Moreover, this court has previously recognized HAPA's express exemption of the City Council. In ***Kailua Community Council v. City & County***, 60 Haw. 428, 591 P.2d 602 (1979), we found that where the chief planning officer and the planning commission of the county acted in a purely advisory capacity to the Council in fulfilling its legislative function, their actions were not subject to HAPA. We noted that "[t]o hold otherwise would, by indirection, extend the application of the HAPA to the actions of the city council which by its terms the Act has excluded from its operation." *Id.* at 434, 591 P.2d at 606 (citing HRS § 91–1(l)).

We conclude, therefore, based upon the plain language of HRS § 91–1 and its legislative history, that the City Council, as the legislative branch of the County, is not subject to the procedural requirements of HAPA when acting in either a legislative or non–legislative capacity.

B.

Appellants further contend that the CZMA overrides the exemption for legislative bodies set forth in HRS § 91–1 by requiring the county "authorities" which administer the permit process to comply with HAPA regardless of whether the "authority" is a legislative or administrative body. They claim that the CZMA incorporates Chapter 91, thus subjecting all "authorities" administering SMA use permits, including the City Council, to the requirements of HAPA. Appellants rely on several provisions of the CZMA to which we now turn.

HRS § 205A–27 designates an "authority" in each county to carry out the objectives, policies, and procedures for Special Management Areas set forth in Chapter 205A. Section 205A–22(2) defines "authority" to include both legislative ***and*** administrative bodies:

> "Authority" means the county planning commission, except in counties where the county planning commission is advisory only, ***in which case "authority" means the county council***

> or such body as the council may by ordinance designate. The authority may, as appropriate, delegate the responsibility for administering this part. (Emphasis added).

Accordingly, the Honolulu City Council designated itself as the "authority" pursuant to § 33–1.3 of the Revised Ordinances of Honolulu.[6]

The CZMA defines "agency" as follows:

> "Agency" means any agency, board, commission, department, or officer of a county government or the state government, ***including the authority as defined in part II***[.] (Emphasis added).

HRS § 205A–1.

Appellants argue that because the "authority" is included within the definition of "agency," the legislature intended to designate the City Council as an "agency" subject to the procedural requirements of HAPA. We disagree. Section 205A–1 defines "agency" for the purposes of Chapter 205A, not for the purposes of Chapter 91. As discussed above, Chapter 91 provides its own definition of "agency" which excludes the legislative branch.

Appellants rely primarily on HRS § 205A–29(a), arguing that this provision of the CZMA specifically requires the City Council to comply with HAPA in adopting rules and in conducting hearings. HRS § 205A–29(a) reads in pertinent part:

> The authority in each county, upon consultation with the essential coordinating agency, ***shall establish and may amend pursuant to Chapter 91, by rule or regulation the special management area use permit application procedures***, conditions under which hearings must be held, and the time periods within which the hearing and action for special management area use permits shall occur. The authority shall provide for adequate notice to individuals whose property rights may be adversely affected and to persons who have requested in writing to be notified of special management area use permit hearings or

---

[6] Revised Ordinances § 33–1.3 defines "Council" as "the city council of the city and county of Honolulu, which body shall act as the 'authority' under chapter 205A, Hawaii Revised Statutes."

> applications. The authority shall also provide written public notice once in a newspaper of general circulation in the State at least twenty days in advance of the hearing. (Emphasis added).

Appellants contend that by employing the language "pursuant to chapter 91," the legislature contemplated that the City Council would provide "contested case" hearings as defined in Chapter 91 rather than public hearings as required by the County's current procedures. *See* Revised Ordinances § 33–5.3.

While the plain language of HRS § 205A–29(a) can be construed to require the "authority" to comply with Chapter 91 in establishing rules for administering its Shoreline Management Areas, we find that the statute does not require the City Council, otherwise exempt from HAPA, to conduct "contested case" hearings when acting upon individual permits. As we noted in ***Chang v. Planning Comm'n of County of Maui***, 64 Haw. 431, 441 n.11, 643 P.2d 55, 63 n.11 (1982), "HRS § 205A–29(a) refers the county authority to chapter 91 in its promulgation of rules governing SMA use permit hearings but is otherwise silent on the manner in which the hearings must be conducted."

Furthermore, the legislative history of the original act and its amendments does not indicate any intent by the legislature to require a contested case hearing, as defined in Chapter 91, in SMA use permit procedures. On the contrary, Senate Committee Report No. 143 reflects that the legislature was concerned with providing "public" hearings:

> Improved means for participation by the public in decisions affecting the coastal zone are necessary and desirable. Although public hearings afford the opportunity for public participation in certain agency decisions, many agency actions on permits affecting the coastal zone may now occur without the requirement for a public hearing. To afford the public an adequate opportunity to participate in all major decision making affecting the coastal zone during the interim until the program is implemented, provision should be made for ***public hearings*** on required permits where such hearings would otherwise not be required. (Emphasis added).

Sen. Stand. Comm. Rep. No. 143, in 1975 Senate Journal, at 917. Furthermore, when the CZMA was amended in 1979, the legislature stated:

> Your Committees heard testimony that present procedures regarding ***public hearings*** in connection with SMA permit

> applications are adequate. Therefore, the bill has been amended to allow the county authorities to determine the conditions under which hearings must be held, instead of requiring hearings in cases where they are requested by any person or agency. (Emphasis added).

Hse. Stand. Comm. Rep. No. 629, in 1979 House Journal, at 1442.

The pattern and purpose of the CZMA lead to the conclusion that the legislature intended the hearing held by the county authority in conjunction with the application for an SMA use permit be informational in nature in order to permit members of the public to present their views and relevant data as an aid to the administrative decision on the particular application as well as long-term planning policy for the entire coastal area.

We find, therefore, that neither the language nor the legislative history of the CZMA supports Appellants' contention that the City Council is required to conduct contested case hearings in SMA use permit proceedings. Rather, it is apparent that the legislature in HRS § 205A-29 allowed each authority to decide for itself the nature of the hearings it would conduct in reviewing SMA use permit applications.

In support of their argument that SMA use permit proceedings are "contested cases" within the meaning of Chapter 91, Appellants rely on decisions of this court in which we recognized that the hearings held by the planning commissions of the counties of Maui and Kauai in issuing SMA use permits were "contested cases." ***Chang v. Planning Comm'n***, 64 Haw. 431, 436, 643 P.2d 55, 60 (1982); ***Mahuiki v. Planning Comm'n***, 65 Haw. 506, 513, 654 P.2d 874, 879 (1982).

As noted previously, while the City Council of the City and County of Honolulu appointed itself the "authority" to administer the Shoreline Management Area, the counties of Maui, Kauai, and Hawaii have delegated this function to their respective planning commissions. ***See*** HRS § 205A-22(2). County planning commissions are clearly "agencies" as defined by HAPA. ***See*** HRS § 91-1(l). Therefore, the permit application proceedings we considered in ***Chang*** and ***Mahuiki*** fell within the definition of "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for ***agency hearing***." HRS § 91-1(5); ***Mahuiki***, 65 Haw. at 513, 654 P.2d at 879 (emphasis added). These decisions, therefore, are

not dispositive of the question in this case, whether a legislative body is subject to the contested case procedures of HAPA.

C.

While we find that HRS § 205A–29 does not subject the City Council to Chapter 91 contested case procedures when acting upon SMA use permits, we recognize that § 205A–29(a) can be interpreted to require the Council's adherence to Chapter 91 in establishing a regulatory scheme for administering SMA use permit application procedures. Specifically, the first sentence of § 205A–29(a) provides that:

> The authority in each county, upon consultation with the central coordinating agency, ***shall establish and may amend pursuant to chapter 91***, by rule or regulation the special management area use permit application procedures, conditions under which hearings must be held, and the time periods within which the hearing and action for special management area use permit shall occur. (Emphasis added).

Thus, while the City Council is not an "agency" as defined by Chapter 91, § 205A–29(a) nevertheless appears to require the "authority" to comply with the rule–making provisions of Chapter 91 in adopting its SMA use permit application procedures. We therefore turn to an examination of the manner in which the County adopted its procedural scheme for issuing SMA use permits.

In 1984, the City Council adopted Ordinance No. 84–4, subsequently codified as Revised Ordinances of Honolulu Chapter 33, setting forth a regulatory scheme for processing SMA use permit applications.[7] Because the promulgation of rules governing SMA procedures was a legislative act, the Council was required by the Revised

---

[7] The CZMA was enacted by the legislature in 1977, and replaced the Shoreline Protection Act of 1975, an interim act. Prior to 1984, the County apparently processed SMA use permits under Ordinance No. 4529 which was repealed by Ordinance 84–4. For the purposes of this case, Ordinance 84–4 is the operative law.

Charter of the City & County of Honolulu (Charter) to adopt an ordinance.[6]

The procedure for the adoption of rules by agencies is set forth in HRS § 91–3(a):

> Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall:
>
> (1) Give at least 20 days' notice for a public hearing. Such notice shall include a statement of the substance of the proposed rule, and of the date, time and place where interested persons may be heard thereon. The notice shall be mailed to all persons who have made a timely written request of the agency for advance notice of its rulemaking proceedings, and published at least once in a newspaper of general circulation in the State for state agencies and in the county for county agencies.
>
> (2) Afford all interested persons opportunity to submit data, views, or arguments, orally or in writing. The agency shall fully consider all written and oral submissions respecting the proposed rule. The agency may make its decision at the public hearing or announce then the date as to when it intends to make its decision. Upon adoption, amendment, or repeal of a rule, the agency shall, if requested to do so by an interested person, issue a concise statement of the principal reasons for and against its determination.

HRS § 91–3(c) provides that in the case of county agencies, the rule shall be subject to the approval of the mayor.

The record indicates that the City Council conducted a public hearing on January 17, 1984, prior to adoption of Ordinance No. 84–4. Notice was published on December 27, 1983 and January 6, 1984, specifying the

---

[6] The City Council does not "make rules"; rather, it "adopts ordinances." The Charter provides that "[e]very legislative act of the council shall be by ordinance." Charter § 3–201.

date, time and place of the hearing. The notice explained in some detail the contents of the proposed ordinance. It provided that persons wishing to speak at the hearing should sign up at the City Clerk's Office, that their presentations would be limited to three minutes, and requested them to submit fifteen copies of their statement. The notice further provided for the filing of written statements with the City Clerk up to the day before the subject matter was discussed in committee. The ordinance was adopted by the Council on February 10, 1984, and was subsequently signed by the mayor.

We conclude, based upon the facts outlined above, that the procedure followed by the Council in adopting Ordinance 84–4 was in accordance with the rule–making provisions of Chapter 91. Consequently, the County complied with HRS § 205A–29(a) in establishing "pursuant to Chapter 91" its SMA use permit application procedures.

III.

We next consider Appellants' contention that the procedures employed by the City Council in issuing the SMA use permit to Kaiser violated their constitutional right to procedural due process under the fourteenth amendment to the United States Constitution and article I, section 5 of the Hawaii Constitution. Appellants claim that, even if the City Council was not subject to the requirements of HAPA, the Council nevertheless had a constitutional responsibility to afford them a trial–type adjudicatory hearing because they possess constitutionally protected "property" interests. Therefore, Appellants argue, they were entitled to the full panoply of contested case procedures including cross–examination of witnesses, findings of fact and conclusions of law limited to the evidence, and prohibition on ex parte communications by decisionmakers. We disagree that a trial–type adjudicatory hearing was mandated by the constitution in this case and conclude that the hearings provided Appellants were consistent with the requirements of procedural due process.

In *Aguiar v. Hawaii Hous. Auth.*, 55 Haw. 478, 495, 522 P.2d 1255, 1266 (1974), we set forth a two–step analysis for claims of a due process right to a hearing: (1) is the particular interest which claimant seeks to protect by a hearing "property" within the meaning of the due process clauses of the federal and state constitutions, and (2) if the interest is "property," what specific procedures are required to protect it. Therefore,

in order to assert a right to procedural due process, Appellants must possess an interest which qualifies as "property" within the meaning of the constitution.

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." ***Board of Regents v. Roth***, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548, 561 (1972). In ***Aguiar***, we concluded that the plaintiffs' interest in continuing to receive low-cost public housing benefits was a "property" interest.[9] 55 Haw. at 496, 522 P.2d at 1267. In ***Silver v. Castle Memorial Hosp.***, 53 Haw. 475, 497 P.2d 564 (1972), we found that a medical doctor's interest in his continued practice of medicine in a federally-funded private hospital rose to the level of a constitutionally protected property interest.

The property interests in ***Aguiar*** and ***Silver*** involved basic needs of housing and employment to which the plaintiffs had "a legitimate claim of entitlement." In contrast, the property interests asserted by the Appellants who oppose the SMA use permit in this case are of an aesthetic and environmental nature. While we have recognized the importance of aesthetic and environmental interests in determining an individual's standing to contest the issue, ***Life of the Land, Inc. v. Land Use Comm'n***, 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979), we have not found that such interests rise to the level of "property" within the meaning of the due process clause, and Appellants refer us to no authorities so holding.[10]

---

[9] Since the governmental body involved, the Hawaii Housing Authority, was an "agency" as defined by Chapter 91, HAPA procedures were statutorily invoked and it was unnecessary for us to determine what procedures were constitutionally required. 55 Haw. at 495-96, 522 P.2d at 1267.

[10] The California Supreme Court has recognized that land use decisions which substantially affect the property rights of owners of adjacent parcels may constitute deprivations of property within the context of procedural due process. ***See, e.g., Horn v. County of Ventura***, 24 Cal. 3d 605, 156 Cal. Rptr. 718, 596 P.2d 1134, 1139 (1979); ***Scott v. City of Indian Wells***, 6 Cal. 3d 541, 99 Cal. Rptr. 745, 492 P.2d 1137 (1972). None of the Appellants in this case are owners of property contiguous to the development which is the subject of the SMA use permit application.

Even if we assume, ***arguendo***, that Appellants' visual and environmental interests constitute "property" interests within the meaning of the due process clause, no due process violation appears.

Due process is not a fixed concept requiring a specific procedural course in every situation. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." ***Morrissey v. Brewer***, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972). The full rights of due process present in a court of law, including presentation of witnesses and cross-examination, do not automatically attach to a quasi-judicial hearing. ***See Goss v. Lopez***, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); ***Arnett v. Kennedy***, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974). The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest. ***Mathews v. Eldridge***, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18, 32 (1976); ***North Georgia Finishing, Inc. v. Di-Chem, Inc.***, 419 U.S. 601, 605-606, 95 S. Ct. 719, 722, 42 L. Ed. 2d 751, 756-57 (1975).

Determination of the specific procedures required to satisfy due process requires a balancing of several factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail. ***Mathews v. Eldridge***, 424 U.S. at 335, 96 S. Ct. at 903, 47 L. Ed. 2d at 33; ***Silver v. Castle Memorial Hosp.***, 53 Haw. at 484, 497 P.2d at 571.

Assuming for present purposes that Appellants can demonstrate protectible property interests sufficient to trigger procedural due process protection, we must weigh those interests against the risk of erroneous deprivation through the procedures actually provided by the Council, the probable value of providing an adjudicatory-type hearing, and the Council's interest in adhering to its current procedures. We find, in considering these factors, that Appellants' rights to procedural due process were satisfied by notice and an opportunity to be heard, and that the due process clause does not require the additional procedures sought by Appellants.

An examination of the record in this case reveals that the Council provided ample notice of the public hearings and in fact Appellants do not

complain that they did not receive adequate notice. The Council complied with its own notice procedures which require notice be given to all property owners within 300 feet of the affected property as well as to all owners of all property described in the permit application. Published notice was also provided. *See* Revised Ordinances § 33–5.3.

The record also reveals that Appellants were afforded numerous opportunities to be heard. City Clerk Raymond Pua submitted an affidavit listing *sixteen* separate public meetings or hearings in which members of the public were permitted to address the DLU or City Council regarding Kaiser's SMA use permit application. In substance, all interested persons were given the opportunity to present their positions orally and in writing for the purpose of adding to the information and data available to the Council in evaluating the application and deciding whether or not to grant the permit.

Thus, Appellants were afforded numerous opportunities to present argument and testimony before the DLU, the Zoning Committee, and the Council as a whole. Several of the Appellants participated in the proceedings by presenting oral and written testimony. At no time during the proceedings were they denied the opportunity to address the Council or to ask questions of other witnesses. There is no evidence of procedural impropriety or other corruption of the hearing and decision–making processes.

We conclude, based on the record, that the proceedings conducted by the City Council in acting upon Kaiser's SMA use permit application satisfied the requirements of procedural due process. Therefore, we find no violation of the due process clause.

IV.

Finally, we turn to Appellants' contention that the City Council's decision to provide for public hearings, while other counties have chosen to provide contested case hearings pursuant to Chapter 91, results in a denial of the equal protection of the laws. Appellants' equal protection argument appears directed at HRS § 205A–29(a) as it has been applied by the City and County of Honolulu in adopting its own SMA use permit procedures. We conclude that the City Council's practice of holding public hearings rather than contested case hearings does not violate the equal protection clause.

We recognize that, unless fundamental rights or suspect classifications are implicated, we will apply the rational basis standard of review in examining a denial of equal protection claim. ***Nakano v. Matayoshi***, 68 Haw. 140, 151–52, 706 P.2d 814, 821 (1985). Under this standard, to prevail, a party challenging the constitutionality of a statutory classification on equal protection grounds has the burden of showing, with convincing clarity that the classification is not rationally related to the statutory purpose, or that the challenged classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation, and is therefore not arbitrary and capricious. ***Washington v. Fireman's Fund Ins. Cos.***, 68 Haw. 192, 199, 708 P.2d 129, 134 (1985). Thus, discrimination between classes is not per se objectionable, so long as any state of facts reasonably can be conceived to sustain it. ***State v. Freitas***, 61 Haw. 262, 272, 602 P.2d 914, 922 (1979).

As we have recognized,

> equal protection does not mandate that all laws apply with universality to all persons; the State "cannot function without classifying its citizens for various purposes and treating some differently from others." The legislature may not, however, . . . do so arbitrarily. The classification must be reasonably related to the purpose of the legislation.

Fireman's Fund, 68 Haw. at 199, 708 P.2d at 134 (quoting ***Joshua v. MTL, Inc.***, 65 Haw. 623, 629, 656 P.2d 736, 740 (1982)).

The legislature in HRS § 205A–29 allowed each county "authority" to decide for itself the nature of hearings it would conduct in reviewing SMA use permit applications. In so doing, the legislature was most likely concerned that imposition of the CZMA review process not disrupt the general structure of county government. The legislative history reflects a deliberate choice by the legislature to utilize existing county authorities in the coastal zone permit process rather than creating a statewide coastal zone commission to manage coastal areas. *See* Sen. Comm. Rep. No. 143, in 1975 Senate Journal, at 916. The Committee also declared:

> Rather than implement a new permit system to achieve interim control of development in the coastal zone, such control could be achieved expeditiously by requiring existing agencies to adopt guidelines pursuant to a policy established by the Legislature. Such guidelines would apply to all agency actions

including the granting of permits for actions within the coastal zone.

Id. at 917. Each county has its own unique resources, problems, and considerations to evaluate in deciding what hearing procedure will best suit its needs. Any resulting differences between the procedures adopted by the various counties do not result in a denial of equal protection unless they are clearly arbitrary.

The Honolulu City Council's decision to provide public hearings rather than contested case hearings was not clearly arbitrary. The legislative history of the CZMA indicates that the legislature desired to facilitate public participation in the decision–making process. *See* Senate Stand. Comm. Rep. No. 143, *supra*, at 917. Furthermore, the CZMA itself enunciates a policy to "[c]ommunicate the potential short and long–term impacts of proposed significant coastal developments early in their life–cycle and in terms understandable to the general public to facilitate public participation in the planning and review process." HRS § 205A–2(c)(7)(C).

Thus, the City Council's decision to provide for public hearings may well have been directed towards serving the legislature's goal of maximizing public participation in managing the coastal zone. In the instant case, over 100 individuals presented testimony at public meetings before the Council, thus allowing a full airing of public views regarding the proposed development's consistency with CZMA objectives, in particular the protection and preservation of coastal scenic and open space resources. *See* HRS § 205A–2(b)(3).

Thus, there exists in this case a reasonable state of facts to support the County's procedure on equal protection grounds. Consequently, we find that the difference in procedures between Honolulu and the other counties does not constitute a violation of the equal protection clause.

V.

In conclusion, we hold that the Honolulu City Council, as the legislative branch of the City and County of Honolulu, is exempt from the procedural requirements of HRS Chapter 91 when acting upon SMA use permit applications. Furthermore, we find no violation of Appellants' rights of due process or equal protection. Accordingly, we affirm the judgment of

the court below upholding the validity of the SMA use permit issued to Appellee Kaiser.

Ronald A. Albu (*Gerard A. Jervis* with him on the briefs) for Appellants Sandy Beach Defense Fund.

Jane H. Howell, Deputy Corporation Counsel, for Appellee City Council of the City and County of Honolulu.

Kenneth R. Kupchak (*R. Charles Bocken* and *Robert H. Thomas* with him on the answering brief, and *Kamala J. Larsen* with them on the supplemental brief; of counsel, Damon, Key, Char & Bocken) for Appellees Kaiser Hawaii Kai Development Co. and Kaiser Development Co.

Steven S. Michaels, Deputy Attorney General, on the brief for Amicus Curiae State of Hawaii.

DISSENTING OPINION OF NAKAMURA, J.

"This appeal," as the court notes at the outset, "involves a challenge to the validity of the procedures employed by . . . the City and County of Honolulu . . . when acting upon applications for Special Management Area (SMA) use permits pursuant to the Coastal Zone Management Act (CZMA), Hawaii Revised Statutes (HRS), Chapter 205A." The dispositive question on appeal, put bluntly and succinctly, is whether procedures essentially "political" in nature satisfy the demands of due process as they apply to administrative proceedings. The court concludes the procedures do so and affirms the judgment of the circuit court. I cannot join my colleagues because their decision and opinion manifest a "talismanic reliance on labels" rather than a "sensitive consideration of the procedures required [in the circumstances] by due process." ***Board of Curators v. Horowitz***, 435 U.S. 78, 106 (1978) (Marshall, J., dissenting) (footnote omitted).

I.

A.

The Coastal Zone Management Act represents "a comprehensive State regulatory scheme to protect the environment and resources of our shoreline areas." ***Mahuiki v. Planning Comm'n***, 65 Haw. 506, 517, 654

P.2d 874, 881 (1982). And any development of real property in areas designated as special management areas must be consistent with the objectives and policies of the Act. The implementation of its provisions, however, "has been delegated in large part to the counties, and they are responsible for the administration of the special management area use permit procedure and requirements." *Id.* "State primacy nevertheless has been retained as HRS §§ 205A–4 and 205A–28 make clear, and the legislature has sought to maintain the integrity of its declared policy by providing guidelines in HRS § 205A–26 to be followed by the counties in reviewing applications for SMA use permits." *Id.* at 517–18, 654 P.2d at 881 (footnote omitted).

By virtue of HRS § 205A–26(2) no development in a special management area can be approved unless the county permit–granting authority first finds:

> (A) That the development will not have any substantial adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interests. Such adverse effects shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect, and the elimination of planning options;
>
> (B) That the development is consistent with the objectives, policies, and special management area guidelines of this chapter and any guidelines enacted by the legislature; and
>
> (C) That the development is consistent with the county general plan and zoning.

The City and County of Honolulu's legislative arm designated itself as the county permit–granting authority pursuant to HRS § 205A–22; it also adopted procedures governing the consideration of special management area use permit applications pursuant to HRS § 205A–29. These procedures are delineated in chapter 33 of the Revised Ordinances of Honolulu. Section 33–5.3 of the relevant ordinance, consistently with HRS § 205A–29, provides for public hearings on permit applications; but

it is silent on whether the contested–case procedures of the Hawaii Administrative Procedure Act, HRS chapter 91, or other procedures are to be followed. Section 33–9.1 of the ordinance further states that "[a]ppeals shall be in accordance with section 205A–6, Hawaii Revised Statutes[,]" which "affords an interested party an alternative remedy for an agency's noncompliance with the CZMA by authorizing a civil action in which a circuit court 'shall have jurisdiction to provide any relief as may be appropriate.' HRS § 205A–6(c)." ***Kona Old Hawaiian Trails Group v. Lyman***, 69 Haw. ____, ____, 734 P.2d 161, 169 (1987).

B.

The developer's application for a permit was received in February of 1986, and the City's Department of Land Use conducted a hearing thereon in April of 1986.[1] The department's recommendation of approval of the proposed development was forwarded to the City Council shortly thereafter. The Council reviewed the matter on a number of occasions and scheduled a public hearing approximately a year after receiving the department's recommendation. The hearing was attended by over eighty persons who were allowed to express their objections to or support for the proposed development. In format, the hearing was no different from hearings conducted by the Council in considering proposals for legislative action. Further testimony was received at a Council meeting held on April 15, 1987 and the development permit was granted on the same day.

Several organizations and individuals who voiced objections to the development challenged the Council action by filing two suits in the circuit court on May 12, 1987. They invoked the court's jurisdiction under HRS § 91–14(g) in one and under HRS § 205A–6 in the other. The circuit court dismissed the suits on January 29, 1988, agreeing with the City and the developer that the sole issue in the case, whether the Council was obliged to conduct a contested case hearing before issuing a development permit, had been decided earlier when the plaintiffs' motion for summary judgment was denied. The plaintiffs perfected a timely appeal thereafter.

---

[1] The department's role in the processing of permit applications is merely advisory. Thus, the hearing it conducted was not a contested–case hearing within the meaning of the Hawaii Administrative Procedure Act. *See* HRS § 91–1(5).

II.

A.

In affirming the judgment of the circuit court, this court concludes:

(1) "the City Council, as the legislative branch of the County, is not subject to the procedural requirements of [the Hawaii Administrative Procedure Act] when acting in either a legislative or non–legislative capacity[;]"

(2) "the legislature intended the hearing held by the county authority in conjunction with the application for an SMA use permit [to] be informational in nature in order to permit members of the public to present their views and relevant data as an aid to the administrative decision on the particular application as well as long–term planning policy for the entire coastal area[;]"

(3) the interests Appellants sought to protect did not "rise to the level of 'property' within the meaning of the due process clause[;]" and

(4) assuming "that Appellants can demonstrate protectible property interests sufficient to trigger procedural due process protection," the proceedings before the Council "satisfied the requirements of procedural due process."

Unlike my colleagues, I conclude:

(1) the exemption of the legislative branch from coverage under the Administrative Procedure Act is of no consequence;

(2) the hearing conducted by the Council could not have been "informational in nature";

(3) the Appellants have standing to challenge the Council action in court; and

(4) the hearing conducted by the Council did not meet the demands of due process.

The court's opinion, in my view, exhibits an insensitivity to the objectives and policies of the Coastal Zone Management Act, the public and private interests protected thereby, and the demands of due process. Moreover, the opinion in no way explains how the procedures followed by the Council could possibly meet the requirements of due process in a

case where a property owner's permit application is denied after a council "hearing" and he "appeals" from the resolution denying the application "in accordance with section 205A–6, Hawaii Revised Statutes[,]" as directed by section 33–9.1 of the Revised Ordinances of Honolulu.

B.

Inasmuch as the City Council "administered a law already in existence" when it issued the use permit, our concern in this appeal is with administrative law, the branch of the law that "sets forth the powers that may be exercised by administrative agencies, lays down the principles governing the exercise of those powers, and provides legal remedies to those aggrieved by administrative action." B. Schwartz, ***Administrative Law*** § 1.1, at 2 (2d ed. 1984). Among the basic principles that hold administrative action to the rule of law are the following:

> (1) government must practice fairness in its dealings with the citizen; and
>
> (2) an administrative agency does not have the last word on any action taken by it.

See B. Schwartz, ***Fashioning An Administrative Law System***, 40 Admin. L. Rev. 415, 419–31 (1988).

"Fundamental fairness" or "due process" is "a flexible concept." ***Walters v. National Ass'n of Radiation Survivors***, 473 U.S. 305, 320 (1985).

> When the courts had to deal with the applicability of procedural due process to administrative agencies, they based their answer upon the distinction between legislative and judicial powers. If the case involved rulemaking, the courts naturally treated the administrative exercise of legislative powers similarly to the direct exercise of power by the legislature. The agency was no more bound by constitutional procedural requirements than the legislature itself when it enacts a statute. If adjudication was involved, the courts had a ready analogy in the judicial process.

B. Schwartz, ***Administrative Law*** § 5.6, at 211.

At bottom, in proceedings designed to apply policy–type standards in particular situations, the persons whose protected interests will be affected by the forthcoming administrative action "must be given notice and

an opportunity to present their side of the case in a full and fair hearing." B. Schwartz, *supra*, 40 Admin. L. Rev. at 424; *see also Mortensen v. Board of Trustees*, 52 Haw. 212, 473 P.2d 866 (1970) (An applicant for disability retirement benefits from the State Employees' Retirement System is entitled to a trial–type hearing). And the impartial decisionmaker's ruling must "rest solely on the legal rules and evidence adduced at the hearing." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

Obviously too, the decisionmaker cannot have the last word on whether his decision is consistent with the statute that authorized him to act and whether there was fairness in the procedures he followed. "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84 (1936) (Brandeis, J., concurring).

III.

A.

The court recognizes that "the City Council's approval of Kaiser's SMA use permit application was a non–legislative act because it administered a law already in existence, the Coastal Zone Management Act." Relying on "the plain language of HRS § 91–1 and its legislative history," it nonetheless concludes "the City Council, as the legislative branch of the County, is not subject to the procedural requirements of HAPA when acting in either a legislative or non–legislative capacity."

Granted, an "agency" within the meaning of the term as defined by HRS § 91–1 does not include "those in the legislative or judicial branches." But the "exception" from coverage under the Administrative Procedure Act by no means freed the Council from the fundamental requirement that any power it possesses, legislative or administrative, "be exercised in subordination to law." B. Schwartz, *supra*, 40 Admin. L. Rev. at 415. It is immaterial whether the Council is subject to the procedural requirements of HAPA or not. The Council acted in a quasi–judicial

capacity in administering a State law; it therefore was subject to the requirements of due process.

B.

Procedural due process demanded that the Council conduct a full and fair hearing in the judicial sense. The court, however, concludes "the hearing held by the county authority in conjunction with the application for an SMA use permit [was only intended to] be informational in nature." In its view, this justified the legislative–type hearing conducted by the Council. But protected rights and interests were at stake, and a hearing more in the nature of a judicial, rather than a legislative, hearing was in order.

C.

The court, however, rules a "trial–type adjudicatory hearing" was not necessary. "[I]n order to assert a right to procedural due process," it states, one "must possess an interest which qualifies as 'property' within the meaning of the constitution." Aesthetic and environmental interests, it holds, do not "rise to the level of 'property' within the meaning of the due process clause[.]" Yet as the court observes, "due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The particular situation involved an application for a permit to develop land in an area where the legislature has declared special controls on developments "are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure that adequate access . . . to public owned or used beaches, recreation areas, and natural reserves is provided." HRS § 205A–21. Implicated in the proceeding in question were the rights and interests of a property owner who owns land in the special management area extending inland from the shoreline, a developer who has contracted to develop the land, owners of nearby property, persons residing in the area of the proposed development, and the general public. The Council action was one "authorizing development, the valuation of which [far] exceeds $65,000 [and] which may have a substantial adverse environmental or ecological effect[.]" HRS § 205A–22(7). It escapes me why Appellants were not entitled to

invoke procedural protections consistent with due process in the judicial sense.

That the "rights" of the landowner and the developer were subject to protection, of course, is beyond cavil; no one would question that they could "assert a right to procedural due process" in the processing of their permit application. While they have no need to invoke such right under the circumstances, the court's decision consigns anyone seeking a special management area use permit, as well as anyone objecting to its issuance, to the vagaries of the political process where the decision will not "rest solely on the legal rules and evidence adduced at hearing." *Goldberg v. Kelly*, 397 U.S. at 271.

But I believe the Appellants also have protected interests that allowed them to invoke procedural due process. These interests are those established and made judicially cognizable by the legislature under the statutory scheme designed "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." HRS § 205A–21. Among the natural resources designated for preservation, protection, and restoration are "recreational resources," "historic resources," "scenic and open space resources," and "coastal ecosystems." *See* HRS § 205A–2. In my view they constitute property "owned" by the public.

The mandate to the counties is that in implementing the foregoing objectives of the coastal zone management program "full consideration shall be given to ecological, cultural, historic, and esthetic values as well as to needs for economic development." HRS § 205A–4. And "any person or agency" is given a right to "commence a civil action" seeking to remedy an agency's failure to comply with the Coastal Zone Management Act. HRS § 205A–6. I can only conclude this vested concerned members of the public with protectible interests related to the natural resources of the coastal zone of Hawaii.

The court acknowledges that "we have recognized the importance of aesthetic and environmental interests in determining an individual's standing to contest the issue[.]" But since "we have not found that such interests rise to the level of 'property' within the meaning of the due process clause," it implies the Appellants were not subjected to deprivation they can complain about. Still, we are expounding legislatively created

interests in natural resources deemed worthy of protection through judicial processes invocable by "any person or agency."

D.

Though it finds no grounds for the assertion by Appellants of a right to due process, the court gratuitously concludes "the proceedings conducted by the City Council in acting upon Kaiser's SMA use permit application satisfied the requirements of procedural due process." What the Council did was aptly described by the circuit court when it said:

> They're acting as a legislature; they have legislative hearings. People are given notice, they're allowed to show up and be heard, and then the politics decide the issue, whichever way they go.

This court characterizes the hearing before the Council as being "informational in nature in order to permit members of the public to present their views and relevant data as an aid to the administrative decision on the particular application as well as long–term planning policy for the entire coastal area."

But as we observed, a legislative or informational hearing does not satisfy the requirements of due process where legal rights and interests are to be determined by "the administrative decision on the particular application" of a statute enacted by the legislature. A particular application of the guidelines the Council was bound by law to follow turned on facts. "[W]here important decisions turn on questions of fact, due process requires an opportunity to confront and cross–examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. at 269 (citation omitted). Just being "allowed to show up and be heard" is not enough.

Due process further requires that the evidence proving an opponent's case be "disclosed to the individual so that he has an opportunity to show . . . it is untrue." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). "A hearing is not judicial, at least in any adequate sense, unless the evidence can be known." *West Ohio Gas Co. v. Public Util. Comm'n (No. 1)*, 294 U.S. 63, 69 (1935). It was conceded at oral argument that there were ex parte contacts between members of the Council and persons interested in the outcome of the proceeding. If the Council were acting in its customary role, this would have posed no problem; but it was not.

Ex parte contacts breach a fundamental principle of administrative law, "exclusiveness of the record." Thereunder, the "decisionmaker's conclusion must rest solely on the evidence adduced at the hearing." B. Schwartz, ***Administrative Law*** § 7.13, at 367 (footnote omitted).

> The exclusiveness principle and its foundation were well stated by Chief Justice Vanderbilt: "'Where a hearing is prescribed by statute, nothing must be taken into account by the administrative tribunal in arriving at its determination that has not been introduced in some manner into the record of the hearing.' . . . Unless the principle is observed, the right to a hearing itself becomes meaningless. Of what real worth is the right to present evidence and to argue its significance at a formal hearing, if the one who decides the case may stray at will from the record in reaching his decision? Or consult another's findings of fact, or conclusions of law, or recommendations . . . ?"

Id. at 367–68 (footnote omitted).

Prevention of ex parte contacts, however, is not the only purpose served by the principle. There are other sound reasons why it is followed in administrative law:

> First, it helps ensure that the agency does not make decisions without an adequate basis in fact; second, it gives opposing parties the opportunity to challenge the agency's reasoning process and the correctness of its decision; and third, it affords reviewing courts full opportunity to evaluate the decision.

Id. at 368 (footnote omitted).

Since the Appellants were not afforded due process, I would vacate the judgment and remand the case to the circuit court with instructions to void the permit issued to Kaiser Development Company.

LIST OF TESTIMONY APRIL 11, 1989 PLANNING COMMISSION MEETING
SCIENTIFIC OBSERVATION HOLE PROGRAM

Oral Testimony

1. Staff
2. Maurice Kaya, DBED
3. Dan Williamson, HEI
4. Harry Olson,, HNEI
5. Harry Kim, Civil Defense
6. Lon Rankin, Kapoho Community
7. Delan Perry, Kapoho Grown
8. Jennifer Perry
9. Teresa Bonohan
10. Christine Batista
11. Barbara Bell
12. Jane Hedtke
13. Lon Rankin
14. Karen Kimmerle, Sec. Koa'e Comm. Ass.
15. Jim Blakey
16. Clive Cheetham
17. Gregory Pommerenk
18. Greg Braun, Asia Pacific Flowers
19. Max Karge (no written)
20. William Reich (no written)
21. Paul Snider (no written)
22. Andrew Saharnis (no written)
23. Michael Marlin (no written)
24. Nelson Ho, Sierra Club
25. M/M Richard Jones
26. Palikapu Dedman, Pele Defense Fund (no written)
27. Emmett Aluli, Pele Defense Fund (no written)
28. Kaolelo Ulaleo (no written)
29. Michael La Plante

Written Testimony Only

1. Don Weeks
2. Steven & Niki Danner
3. Celine Logan
4. Gregg M. Soleta
5. Mits Sumada, HI Chamber
6.

		WRITTEN TESTIMONY	ORAL TESTIMONY
1.	Bob Herkes	Yes	Yes
2.	Bob Linsey	Yes	Yes
3.	Sandy Lang	Yes	Yes
4.	Herbert Segawa	Yes	Yes
5.	Ron Phillips	Yes	Yes
6.	Lani Stemmerman	No	Yes
7.	Barry Taniguchi/HICC	Yes	Yes
8.	Helene Shinde (see letter of 5/89)	Yes	Yes
9.	Harold Okuhama Hawaii Island Contractors	Yes	Yes
10.	Ann Ricard	Yes	Yes
11.	William Kikuchi Dan Inouye's office	Yes	Yes
12.	Russell Rucderman Waawaa Community Assn.	Yes	Yes
13.	Joe Garcia Dept. R & D	Yes	Yes
14.	Bob Bethea Big Island Business Council	Yes	Yes
15.	Alice Medeiros	Yes	Yes
16.	O. K. Stender	Yes	Yes
17.	George MacClaren (photos+2 exhibits)	No	Yes
18.	Jerry Lesperance Governor's	Yes	Yes
19.	Richard Jones (April 24 pictures)	No	Yes
20.	Luana Jones (May 5 letter w/map)	Yes	Yes
21.	D. H. Laughlin	Yes	Yes
22.	Greg Owen	No	Yes
23.	Patricia Wagatsuma (Waawaa)	No	Yes
24.	Rene Siracusa (Kaohe Homesteads)	No	Yes
25.	Steve Phillips	No	Yes
26.	Margaret Maquire	Yes	Yes
27.	Paul Takehiro	Yes	Yes
28.	Ron Darby	Yes	Yes
29.	Janice Hawkins	No	Yes
30.	Bill Craddick	No	Yes
31.	Kaeo Jones	No	Yes
32.	Emmet Aluli	No	Yes
33.	Jim Blakey	No	Yes
34.	Jane Hedtke	Yes	Yes
35.	Karen Kimmerle	Yes	Yes

		WRITTEN TESTIMONY	ORAL TESTIMONY
36.	Clive Cheetham	Yes	Yes
37.	Lon Rankin	Yes	Yes
38.	Jenny Terry	No	Yes
39.	Delan Perry	Yes	Yes
40.	Gregory Pommerick	No	Yes
41.	Brad Louis	No	Yes
42.	Rebecca Rankin	No	Yes
43.	Harry Olsen	Yes	Yes
44.	Jane Hedtke, Secretary Kapoho Community Assn.	Yes	No
45.	Susanne Kiriaty	Yes	No
46.	Lois West & Fernando Javier	Yes	No
47.	CREDAA	Yes	No
48.	Richard Henderson	Yes	No
49.	Marilynn C. Metz	Yes	No
50.	Harold S. Tanouye	Yes	No
51.	Barbara Bell, V.P. Kapoho Community Assn.	Yes	No
52.	Davianna Pomaikai McGregor	Yes	No

5056d

NO. 14087

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1989

ALICE MEDEIROS, MARGARET MCGUIRE, TIM SULLIVAN, ROBERT PETRICCI, RALPH ROUBIQUE, JIM BLAKEY, BARBARA BELL, ROLF W. SALZER, WILLIAM REICH, STEVE PHILLIPS, RANDAL LEE, RUSSELL E. RUDERMAN, JAMES JOHNSON, CLIVE CHEETHAM, BRADLEY SORTE, CELINE LOGAN, (ATTORNEY IN FACT) FOR DONIE LOGAN; DELAN PERRY, JENNIFER PERRY, and NELSON HO; MRS. DEBORAH E. POMMERENK, GREGORY C. POMMERENK; CITIZENS FOR RESPONSIBLE ENERGY DEVELOPMENT WITH ALOHA AINA (CREDAA); and PELE DEFENSE FUND, a Hawaii non-profit corporation, Appellants, vs. HAWAII COUNTY PLANNING COMMISSION, GARY MIZUNO in his capacity as Chairman of the Hawaii County Planning Commission, JEANNE COMER, MARION BUSH, FRED Y. FUJIMOTO, DENNIS B. HOLT, TOMMY ISHIMARU, PHILLIP "MIKE" LUCE, TOM POY, and NEMESIO SANCHEZ in their capacity as members of the Hawaii County Planning Commission; and HAWAII NATURAL	DOCKET GRP 89-1 APPEAL FROM THE FINAL DECISION OF THE HAWAII COUNTY PLANNING COMMISSION GRANTING A GEOTHERMAL RESOURCE PERMIT TO THE HAWAII NATURAL ENERGY INSTITUTE, THE UNIVERSITY OF HAWAII, AND THE RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII FILED AUGUST 15, 1989 HAWAII COUNTY PLANNING COMMISSION (direct appeal)

ENERGY INSTITUTE, UNIVERSITY)
OF HAWAII, and THE RESEARCH)
CORPORATION OF THE UNIVERSITY)
OF HAWAII,)
)
Respondents-)
Appellees.)
)

CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the Answering Brief Of Respondents-Appellees Hawaii Natural Energy Institute, The University of Hawaii, And The Research Corporation Of The University Of Hawaii were served upon the following individuals by mailing the same to them, postage prepaid, at the following addresses on January 29, 1990:

RICHARD I. MIYAMOTO, ESQ.
Corporation Counsel
STEVEN CHRISTENSEN, ESQ.
FREDERICK GIANNINI, ESQ.
Deputy Corporation Counsel
County of Hawaii
Hilo Lagoon Centre
101 Aupuni Street, Suite 325
Hilo, Hawaii 96720

Attorneys for Respondent Hawaii County Planning Commission, Gary Mizuno, Jeanne Comer, Marion Bush, Fred Y. Fujimoto, Dennis B. Holt, Tommy Ishimaru, Phillip "Mike" Luce, Tom Poy, and Nemesio Sanchez

THOMAS E. LUEBBEN, ESQ.
201 Broadway SE
Albuquerque, N.M. 87102

Attorney for Appellant Pele Defense Fund

ANTHONY L. RANKEN, ESQ
P. O. Box 261
Wailuku, Hawaii 96793

Attorney for Appellant Pele Defense Fund

CITIZENS FOR RESPONSIBLE ENERGY
DEVELOPMENT WITH ALOHA AINA (CREDAA)
P. O. Box 358
Mt. View, Hawaii 96771

Appellant Pro Se

MS. ALICE MEDEIROS
P. O. Box 527
Pahoa, Hawaii 96778

Appellant Pro Se

MS. MARGARET MCGUIRE
P. O. Box 412
Naalehu, Hawaii 96772

Appellant Pro Se

MR. ROBERT PETRICCI
P. O. Box 2011
Pahoa, Hawaii 96778

Appellant Pro Se

MR. STEVE PHILIPS
P. O. Box 1267
Keaau, Hawaii 96749

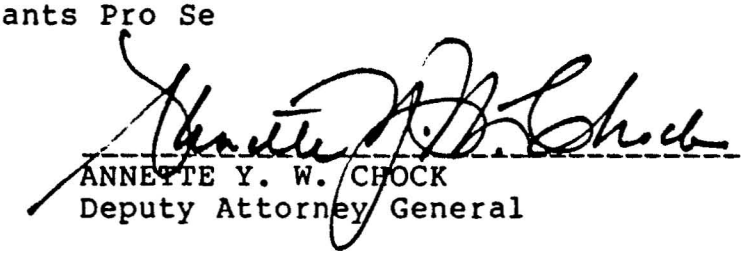
Appellant Pro Se

MR. DELAN PERRY
MS. JENNIFER PERRY
MR. NELSON HO
P. O. Box 537
Pahoa, Hawaii 96778

Appellants Pro Se

MR. GREGORY C. POMMERENK
MS. DEBORAH POMMERENK
P. O. Box 1588
Pahoa, Hawaii 96778

Appellants Pro Se



ANNETTE Y. W. CHOCK
Deputy Attorney General

Attorney for Hawaii Natural Energy Institute, The University of Hawaii, and The Research Corporation of the University of Hawaii