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THIRD CIRCUIT COURT
STATE OF HAWAII

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IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

CITIZENS AGAINST NOISE, a Hawai'i non-profit corporation, Appellant, vs. COUNTY OF HAWAI'I BOARD OF APPEALS; COUNTY OF HAWAI'I PLANNING COMMISSION; MANUIWA AIRWAYS, INC., a Hawai'i corporation; and BERNICE PAUAHI BISHOP ESTATE, a Hawai'i nonprofit corporation, Appellees,	CIVIL No. 98-67K (Agency Appeal) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER Judge Riki May Amano

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter came before the Court on August 28, 1998, on appeal from a decision by the Hawai'i County Board of Appeals ("Board"). Appellant Citizens Against Noise ("CAN") was represented by David L. Henkin of Earthjustice Legal Defense Fund; appellee Board was represented by Deputy Corporation Counsel Ivan M. Torigoe; appellee Hawai'i County Planning Commission ("Commission") was represented by Deputy Corporation

I hereby certify that this is a full, true and correct copy of the original on file in this office.

Clerk, Third Circuit Court, State of Hawaii

Counsel Frederick Giannini; and appellee ManuIwa Airways, Inc., ("ManuIwa") was represented by R. Ben Tsukazaki.[1] The Court, having heard arguments of counsel, and having considered the briefs submitted, as well as the records and files herein, hereby enters the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

To the extent these Findings of Fact contain Conclusions of Law, they shall be deemed as such.

1. In this appeal, appellant CAN challenges the decision of the Board dated February 25, 1998, regarding the extension of the life of Use Permit No. 21, that allows appellee ManuIwa Airways, Inc., to operate a commercial heliport ("Volcano heliport") on the border of Hawai'i Volcanoes National Park. The Volcano heliport is located within the Volcano Golf and Country Club property in the vicinity of the 18th Fairway at Keauhou, Ka'u, Hawai'i.

2. In 1984, ManuIwa applied for a use permit to build and operate the Volcano heliport. County of Hawai'i Planning Department Background Report ("Background Report") at 1, Record on Appeal ("ROA") Exh. A at 219. The Volcano heliport site is located in the district zoned "Open." Id. At 4, ROA Exh. A at 222. At that time, the County's zoning laws authorized the Commission to issue permits for heliports in all zoning

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[1] Appellee Bernice Pauahi Bishop Estate was notified of the August 28, 1998 hearing, but did not participate in either the briefing or oral argument.

districts. Hawai'i County Code § 25-28(a)(8) (1984).

3. ManuIwa's application generated substantial public opposition, since the site for the proposed heliport was on the border of Hawai'i Volcanoes National Park, adjacent to the popular Tree Molds exhibit, and less than half a mile from the Volcano Golf and County Club residential subdivision. Background Report at 4, ROA Exh. A at 222. At Commission hearings, members of the public expressed serious concerns about the impacts of noise from heliport activities on neighboring residents, golfers, park visitors, and endangered nene that reside in the area and feed at the golf course. Letter from Roy Kagawa, Commission, to Richard Okita, ManuIwa (Oct. 3, 1984) at 2, ROA Exh. A at 234. Local residents were also worried about possible accidents resulting from use of the heliport. Id.

4. The Commission limited ManuIwa's use permit -- Use Permit No. 21 -- to one year, starting on the date heliport operations commenced. Letter from Roy Kagawa, Commission, to Richard Okita, ManuIwa (Sept. 17, 1984) at 2, ROA Exh. A at 226. This trial period was intended to provide the Commission with additional information regarding the Volcano heliport's impacts, to inform future decisions regarding applications to extend the permit. ManuIwa began operations at the Volcano heliport on August 15, 1985. Background Report at 2, ROA Exh. A at 220.

5. Before ManuIwa's initial use permit expired, ManuIwa asked the Commission to grant a use permit for the Volcano heliport "on a permanent basis." Background Report at 2, ROA

Exh. A at 220. The Commission rejected this request and, on July 24, 1986, approved a limited extension of Use Permit NO. 21 for five more years. Letter from Barbara A. Koi, Commission, to Richard Y. Okita, ManuIwa (July 30, 1986) at 1, ROA Exh. A at 237. The Commission explained that the one-year trial period "was not adequate to fully assess the impact of this use and its operation to the residents and the nene population in the area." Id. Accordingly, the Commission concluded it was "prudent to continue to monitor the operation of the heliport" for an additional five years so that it could be "more fully informed about the need to apply other conditions, if necessary, to protect the public's health and safety and the nene habitat from this operation in this area." Id.

6. ManuIwa's application for renewal of its use permit in 1991 again faced vocal public opposition. Neighboring property owners and representatives from the National Park Service testified regarding the adverse noise and visual impacts associated with ManuIwa's use of the Volcano heliport, as well as ManuIwa's failure to comply with permit conditions. Letter from Mike Luce, Commission, to Richard Okita, ManuIwa (Mar. 11, 1992) at 1-2 ("1992 Permit"), ROA Exh. A at 239-40. Hawai'i Volcanos National Park Superintendent Hugo Huntzinger strongly urged the Commission to require ManuIwa to "move to the Hilo airport" and to "deny further permission" for use of the Volcano heliport. Letter from Superintendent Huntzinger to Duane Kanuha, Commission (Aug. 9, 1990) at 1, 3, ROA Exh. A at 345, 347.

7. On March 11, 1992, the Commission granted "temporary use of the [Volcano heliport] site in order to allow the applicant time to work toward relocation of his operation to an approved heliport." 1992 Permit at 2, ROA Exh. A at 240. Condition No. 4 (life of permit) of this 1992 Permit expressly provided that the permit was "effective for a five year period starting from the effective date of this amendment [March 11, 1992] with no requirement to renew." Id. at 3; ROA Exh. A at 241 (redlining omitted). Additionally, the Commission eliminated a permit provision that had allowed ManuIwa to transfer or assign its permit to another operator. Id. at 2, ROA Exh. A at 240.

8. ManuIwa did not relocate. At the end of 1996, ManuIwa applied for a use permit with an unlimited duration or, in the alternative, for a ten-year use permit. ManuIwa Request for Amendment to Use Permit (filed Dec. 5, 1996) at Attachment No. 1, ROA Exh. A at 4.

9. At the time ManuIwa filed its extension request, the County was amending its zoning laws. The new Zoning Code, effective December 7, 1996, severely restricts the operation of heliports. Unlike the old Zoning Code, which permitted heliports in any zoning districts with a use permit, the newly-amended Zoning Code generally relegates heliports to Limited Industrial (ML) and General Industrial (MG) zoned districts. Hawai'i County Code §§ 25-5-142(a)(2) (permitted use in ML districts); 25-5-152(a)(2) (permitted use in MG districts); see also Letter from Kevin M. Bowleg, Commission, to Richard Okita, ManuIwa (Apr. 4,

1997) at 2 ("1997 Permit"), ROA Exh. A at 653.[2] The new Zoning Code no longer permits heliports in districts zoned "Open," where the Volcano heliport is located. Hawai'i County Code §§ 25-4-4 (use not listed among permitted uses in zoning district generally prohibited in that district), 25-5-162 (list of uses permitted in "Open" districts).

10. Despite the clear language of the newly amended Zoning Code and extensive public opposition to continued operation of the Volcano heliport, on April 4, 1997, the Commission granted ManuIwa a ten-year extension of Use Permit No. 21. 1997 Permit at 1, ROA Exh. A at 652. In issuing this new permit, the Commission acknowledged that ManuIwa's use of the heliport did not conform with the new Zoning Code. Id. at 2, ROA Exh. A at 653. The Commission explained its decision by claiming merely that "an extension of time to continue operations would be in keeping with the original intent for approving this use." Id.

11. CAN timely appealed the Commission's decision to the Board on May 2, 1997. In its General Petition for Appeal to the Board, CAN alleged that its members are directly and adversely impacted by ManuIwa's operations at the Volcano heliport. Specifically, CAN alleged that its president J. Barclay Stokes, is a resident and property owner in the Volcano Golf and Country Club subdivision (lots 23 & 24, Golf Links Road) and that his

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[2] Heliports are also allowed in districts zoned Agricultural (A). Hawai'i County Code § 25-5-72(c)(2). A special permit is required if the building site is located within the state land use agricultural district. Id.

residence is located approximately one-half mile from the Volcano heliport used by ManuIwa pursuant to Use Permit No. 21. CAN's General Petition for Appeal (May 5, 1997) at 4, ROA at 6. CAN further alleged that repeated take-offs and landings of ManuIwa helicopters generate noise that interferes with Mr. Stokes' quality of life, destroying his peaceful enjoyment of his land. Id.

12. On February 25, 1998, by a 4-2 vote, the Board denied CAN's appeal of the Commission's grant of an extension to the life of Use permit No. 21 and modified Condition No. 4 (life of permit) to convert ManuIwa's use of the Volcano heliport from a temporary use to a permanent one. Findings of Fact, Conclusions of Law, Decision and Order at 20-22 (Feb. 25, 1998) ("Decision"), ROA at 598-600.

13. CAN timely appealed the Board's decision to this Court on May 25, 1998.

CONCLUSIONS OF LAW

To the extent these Conclusions of Law contain Findings of Fact, they shall be deemed as such.

1. This Court has jurisdiction over the claims for relief in this action by virtue of H.R.S. §§ 91-14 (review of contested cases) and § 603-21.8.

2. Venue lies in this judicial circuit by virtue of H.R.S. § 603-36 because the claims for relief arose here.

3. CAN has standing to bring this appeal.

4. ManuIwa filed its request to amend Condition No. 4

(life of permit) of its 1992 Permit after December 1, 1996, and, accordingly, this request is subject to the new Zoning Code's provisions. County of Hawai'i, Ordinance No. 96-160 § 7 (Dec. 7, 1996).

5. Under the new Zoning Code, heliports are no longer permitted in the "Open" district in which the Volcano heliport is located. Hawai'i County Code §§ 25-4-4 (use not listed among permitted uses in zoning district generally prohibited in that district), §§ 25-5-162 (list of uses permitted in "Open" districts). Since the Volcano heliport no longer "conform(s) to the regulations for the zoning district in which it is located," it is, by definition, a nonconforming use. Id. at § 25-1-5(b)(79)(defining "non-conforming use").

6. A nonconforming use of land generally may continue only "to the extent it existed at the time of adoption" of the Zoning Code or any amendments thereto. Hawai'i County Code § 25-4-61(a) (emphasis added). The Zoning Code does not authorize any extension or expansion of nonconforming uses of land that is applicable to the facts of this case.

7. Condition No. 4 of the 1992 Permit expressly limited the life of ManuIwa's operation of the Volcano heliport. When the new Zoning Code went into effect on December 7, 1996, ManuIwa held a limited five-year permit that authorized "temporary use of the [Volcano heliport] site in order to allow the applicant time to work toward relocation of his operation to an approved heliport." 1992 Permit at 2, ROA Exh. A at 240 (emphasis added).

8. Under section 25-4-61(a) of the new Zoning Code, ManuIwa's nonconforming use of the heliport could not continue beyond the 1992 Permit expiration date of March 11, 1997.

9. Section 25-4-61 defines the limited circumstances under which nonconforming uses may continue after adoption of the new Zoning Code; it does not authorize the granting of new life to nonconforming uses like ManuIwa's, operating under short-term use permits that have expired. State v. Kaakimaka, 84 Haw. 280, 291, 933 P.2d 617 (1977) ("When the legislature expresses things through a list, the court assumes that what is not listed is excluded.")

10. The Court rejects appellees' claim that section 25-2-61(b) of the new Zoning Code "grandfathers" ManuIwa's use of the Volcano heliport. This provision authorized the expansion of the facility's operations, but only if such expansion were "in full compliance with this chapter and the applicable district regulations." Hawai'i County Code § 25-2-61(b). The temporal expansion of ManuIwa's short-term, nonconforming use of the Volcano heliport was not in compliance with either the Open district regulations or section 25-4-61(a). Accordingly, section 25-2-61(b) does not apply under the facts of this case.

11. The substantial rights of Appellant CAN have been prejudiced because the Board's decision allowing the extension of Use Permit No. 21 is in violation of the Zoning Code and clearly erroneous in view of the record. Therefore, the Board's decision is reversed. H.R.S. 91-14(g).

ORDER

THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Board's February 25, 1998 Findings of Fact, Conclusions of Law, Decision and Order, denying CAN's appeal of the Commission's grant of an extension to the life of Use Permit No. 21 and modifying Condition 4 (life of permit) of this permit to convert ManuIwa's use of the Volcano heliport from a temporary use to a permanent one is REVERSED;

2. ManuIwa's Use Permit No. 21 is void.

3. ManuIwa shall have thirty (30) days from the entry of this order to remove any structures authorized by Use Permit No. 21 and to cease operations at the Volcano heliport;; and

4. As the prevailing party, appellant CAN shall recover its reasonable costs of suit as provided in Hawai'i Rule of Civil Procedure 54(b), upon submission of an appropriate motion.

DATED: Hilo, Hawai'i, JAN 2 9 1999

JUDGE RIKI MAY AMANO
Third Circuit Court