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# Mauna Kea Anaina Hou v. Board of Land and Natural Resources

Wesley J. Furlong

Alexander Blewett III School of Law at the University of Montana, wfurlong@narf.org

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***Mauna Kea Anaina Hou v. Board of Land and Natural Resources*, 363 P.3d 224 (Haw. 2015)**

**Wesley J. Furlong**

Native Hawaiians and the scientific community have been pitted against each other in a decades-long culture war over the construction of observatories and telescopes on sacred landscapes. In *Mauna Kea Anaina Hou*, the Hawai'i Supreme Court handed a victory to Native Hawaiian culture and rights by halting the construction of a new telescope on Mauna Kea. The decision must be read cautiously, however, as it is firmly rooted in the strict application of procedural due process.

## I. INTRODUCTION

Representing the most recent iteration of the decades-long culture war between Native Hawaiians and the scientific community, *Mauna Kea Anaina Hou v. Board of Land and Natural Resources* specifically centered on the Board of Land and Natural Resources's ("BLNR") approval of a Conservation District Use Application ("CDUA") and issuance of a Conservation District Use Permit ("CDUP") to construct the new Thirty Meter Telescope ("TMT") on the top of Mauna Kea, on the island of Hawai'i.<sup>1</sup> The scientific community argued that the TMT was essential to advancing our understanding of the universe, while Native Hawaiians, Native Hawaiian rights groups, and conservation organizations ("Appellants") argued its construction would violate their rights and desecrate sacred landscapes.<sup>2</sup> The BLNR eventually approved the project, and the Appellants appealed, arguing the approval violated their due process rights, statutes, and rules.<sup>3</sup> The Supreme Court of the State of Hawai'i agreed with the Appellants and vacated the CDUP and CDUA, remanding the case to the BLNR.<sup>4</sup>

## II. FACTUAL AND PROCEDURAL BACKGROUND

Mauna Kea is an origins place in Native Hawaiian cosmology:

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1. *Mauna Kea Anaina Hou v. Bd. of Land and Natural Res.*, 363 P.3d 224, 227 (Haw. 2015).

2. *Id.* at 228.

3. *Id.*

4. *Id.*

“[i]t’s where the heaven and the earth come together, where all life forms originated from. . . . It is a temple, but one not made by man but for man, so that man could learn the ways of the heavens and the laws of this earth, which mean how do we live with each other; how do we live in relationship to the earth; how do we live in relationship to the heaven.”<sup>5</sup>

In 2010, the University of Hawai’i at Hilo (“UHH”) submitted a CDUA to the DLNR to construct the TMT on the top of Mauna Kea.<sup>6</sup> The CDUA proposed the construction of the observatory and ancillary facilities on a five-acre site, as well as access roads.<sup>7</sup> The proposed site would sit within the astronomy precinct of the Mauna Kea Science Reserve, which is within the Conservation District Resource subzone.<sup>8</sup> The CDUA explained that Mauna Kea was the ideal location for the TMT “principally because of the superb viewing conditions that its high-altitude/mid-ocean location provides.”<sup>9</sup> The CDUA noted that the Mauna Kea observatories “have helped Hawai’i become one of the most important centers for astronomical research in the world.”<sup>10</sup>

On December 2 and 3, 2010, the BLNR held public hearings on the CDUA and the proposed project.<sup>11</sup> Nearly 200 people attended; eighty-four testified.<sup>12</sup> The BLNR also received numerous written comments.<sup>13</sup> There were at least six requests for a contested case hearing.<sup>14</sup> In the following weeks, the Office of Conservation and Coastal Lands (“OCCL”) issued a report to the BLNR summarizing the CDUA and the comments, including the requests for a contested case hearing.<sup>15</sup> The OCCL recommended that the BLNR approve the CDUA and issue a CDUP.<sup>16</sup> The OCCL did not recommend that the BLNR hold a contested

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5. *Id.* at 234 (quoting testimony of Kealoha Pisciotta, President, Mauna Kea Anaina Hou) (ellipses in original).

6. *Id.* at 229.

7. *Id.*

8. *Id.* The CDUA noted that thirteen astronomy observatory facilities are currently located on Mauna Kea. *Id.*

9. *Id.* (internal citation omitted in original).

10. *Id.* (internal citation omitted in original).

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 229-30.

16. *Id.* at 230.

case hearing.<sup>17</sup> On February 17, 2011, the BLNR issued notice that it would “consider” the CDUA at its next meeting on February 25, 2011.<sup>18</sup>

At the February 25 meeting, the BLNR allowed for limited public comment.<sup>19</sup> Forty-one individuals testified on both sides, and several requests for a contested case hearing were made.<sup>20</sup> The BLNR voted to approve the CDUA and then, shortly after, voted to hold a contested case hearing.<sup>21</sup> Beginning in August 2011, a hearing officer, appointed by the BLNR, held a contested case hearing, soliciting “voluminous written direct testimony” as well as oral testimony from twenty-six witnesses.<sup>22</sup> On November 30, 2012, the hearing officer issued his determination, granting the CDUA and issuing the CDUP.<sup>23</sup> The hearing officer’s determination was appealed to the BLNR, which, on April 12, 2013, issued its own decision granting the CDUA and issuing the CDUP.<sup>24</sup>

Throughout the process, opponents of the TMT testified that the observatory “would negatively affect the viewplanes [sic] of cultural practitioners, . . . cultural practices[,] and the environment.”<sup>25</sup> The opponents also continuously argued that the BLNR’s decision to hold a contested case hearing after deciding to grant the CDUA and issue the CDUP violated their due process.<sup>26</sup>

The BLNR’s decision was appealed to the Hawai’i State Circuit Court for the Third Circuit.<sup>27</sup> The Appellants argued that the contested case hearing violated their due process, statutes, and rules.<sup>28</sup> The circuit court upheld the BLNR’s decision, stating that the timing of the decisions did not have “legal consequence” because the BLNR

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17. *Id.*

18. *Id.* (internal citation omitted in original).

19. *Id.*

20. *Id.*

21. *Id.* at 231-32.

22. *Id.* at 233.

23. *Id.* at 235.

24. *Id.*

25. *Id.* at 234. The CDUP was not uniformly opposed by Native Hawaiians. Indeed, the Supreme Court noted testimony that the TMT “was ‘compatible with the sacred landscape,’” as it allowed mankind to “learn more about ourselves, our God, and what’s out there beyond the stars.” *Id.* (quoting testimony of Wallace Ishibashi, Jr.). Testimony in support compared the mission of the TMT’s “search for knowledge and understanding to a search for the aumakua or ancestral origins of the universe.” *Id.*

26. *Id.* at 236.

27. *Id.*

28. *Id.*

“preliminarily grant[ed]” the CDUP “essentially simultaneously with” granting a contested case hearing.<sup>29</sup> The circuit court found that the CDUP did not prejudice the Appellants because they were granted a contested case hearing and the construction had been stayed.<sup>30</sup> The Appellants appealed to the Hawai’i Supreme Court.

### III. ANALYSIS

The Supreme Court determined that the issue before it was whether the Appellants had been afforded “an opportunity to be heard in a meaningful time and in a meaningful manner when” the BLNR granted a contested case hearing after issuing the CDUP.<sup>31</sup> While the requirements of due process may be flexible and depend on many factors, “there are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding,’ including those before administrative agencies.”<sup>32</sup> The Court noted that the most “basic elements of due process are notice and an opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>33</sup> The Court, however, emphasized that merely “giving a person ‘a day in court’” does not assure that the process is fair.<sup>34</sup>

The Supreme Court held that it was “undisputed that [the] Appellants were entitled to a contested case hearing.”<sup>35</sup> The Court noted that the “substantial interests of Native Hawaiians in pursuing their cultural practices on Mauna Kea” would be protected from “erroneous deprivation” by a contested case hearing, and that there was a “lack of undue burden on the government in affording [the] Appellants a contested case hearing.”<sup>36</sup> The Court held that “a contested case hearing was ‘required by law’” because the Appellants’ “substantial interests”

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29. *Id.* (quoting *Mauna Kea Anaina Hou v. Bd. Land and Natural Res.*, No. 13-1-349, slip op at 2 (Haw. 3d Cir. Apr. 1, 2014), available at <http://ilind.net/misc%20/2015/TMT-3rd-Circuit-Court.pdf>).

30. *Id.* (quoting *Mauna Kea Anaina Hou*, slip op. at 3).

31. *Id.* at 237.

32. *Id.* (quoting *Sifagaloa v. Bd. of Trs. of Emps.’ Ret. Sys. of Haw.*, 840 P.2d 367, 371 (Haw. 1992)) (discussing HAW. CONST. art I, § 5) (internal citation and bracket omitted).

33. *Id.* at 239 (citing *Sandy Beach Def. Fund v. City Council of City and Cnty. of Honolulu*, 773 P.2d 250, 261 (Haw. 1989)).

34. *Id.* at 237 (quoting *Haw. v. Brown*, 776 P.2d 1182, 1185 (Haw. 1989)).

35. *Id.* at 238.

36. *Id.*

were affected by the CDUP.<sup>37</sup> When a contested case hearing is required, due process mandates that the parties be given a meaningful opportunity to be heard.<sup>38</sup>

The BLNR and the UHH argued that the decision to issue the CDUP was “merely preliminary and tentative pending a contested case hearing.”<sup>39</sup> The Supreme Court determined that regardless of whether the approval was “‘preliminary’ or not,” the BLNR nevertheless approved the CDUP.<sup>40</sup> Examining the administrative record and the expressed intent of the BLNR, the Court concluded that the BLNR’s approval of the CDUA and the issuance of the CDUP “was a determination on the merits.”<sup>41</sup>

Due process “prohibits decisionmakers [sic] from being biased, and more specifically, prohibits decisionmakers [sic] from prejudging matters and *the appearance of having prejudged matters*.”<sup>42</sup> The Court concluded simply that “sequence matters.”<sup>43</sup> The BLNR issued the CDUP “despite pending requests for a contested case hearing.”<sup>44</sup> It was only after the BLNR issued the CDUP that it decided to hold a contested case hearing.<sup>45</sup> The Court stated, “[t]his sequence plainly gives rise to the appearance of prejudice and did not provide [the] Appellants with a meaningful opportunity to be heard.”<sup>46</sup> The Court concluded, “the circumstances of this case give rise to the reality and appearance of impropriety, and thereby violate the Due Process Clause . . . of the Hawai’i Constitution.”<sup>47</sup>

The Supreme Court found unpersuasive the BLNR’s and the UHH’s alternative argument that the BLNR was not required to provide the Appellants a contested case hearing.<sup>48</sup> Hawaiian law requires an agency to hold a contested case hearing after a public hearing on the same subject matter.<sup>49</sup> While the Court noted that the case hearing was held after a public hearing, the “rule did *not* authorize [the] BLNR to

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37. *Id.* (quoting *Sandy Beach Def. Fund*, 773 P.2d at 261).

38. *Id.* at 239.

39. *Id.*

40. *Id.*

41. *Id.* at 241.

42. *Id.* at 237 (citing *Sussel v. City and Cnty. of Honolulu Civil Serv. Comm’n*, 784 P.2d 867, 871 (Haw. 1989)) (emphasis added).

43. *Id.* at 241.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (discussing HAW. CONST. art. I, § 5, cl. 1).

48. *Id.*

49. *Id.* at 235 (quoting HAW. CODE R. § 13-1-28(b) (2009))

decide the merits and issue the permit before the contested case hearing, or before the request for a contested case hearing had been resolved.”<sup>50</sup> The Court concluded that “[i]n any event, due process would prohibit such a procedure.”<sup>51</sup>

Throughout the permitting process, the Supreme Court found the “appearance of prejudgment continue[d].”<sup>52</sup> The Court succinctly concluded that the “BLNR acted improperly when it used the permit prior to holding a contested case hearing.”<sup>53</sup> The Court vacated the CDUP and remanded the case to the circuit court to remand to the BLNR “so that a contested case hearing can be conducted before the [BLNR] or a new hearing officer.”<sup>54</sup>

#### IV. CONCLUSION

While the Hawai’i Supreme Court’s decision in *Mauna Kae Anaina Hou* can be fairly read as a victory for Native Hawaiian rights, it should also be read in light of what the Supreme Court actually decided: procedural due process. The fact that Native Hawaiian cultural practices might be infringed upon by the CDUP certainly played a part in the Court’s decision. The Court did not decide, however, the merits underlying the BLNR’s decision to issue the CDUP. The new contested case hearing has yet to be held and a final decision on the issuance of the CDUP must still be made. Only then will the Appellants have the opportunity to challenge the merits of the decision to issue the CDUP. In any regard, the future development of observatories on Mauna Kae will continue to be the battleground in a culture war between Native Hawaiians and the scientific community.

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50. *Id.* at 246 (emphasis in original).

51. *Id.*

52. *Id.*

53. *Id.* at 247.

54. *Id.*