

NO. 27707

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

COUNTY OF HAWAI'I, a municipal	)	Civil No. 03-1-308
corporation of the State of	)	
Hawaii,	)	
	)	APPEAL TO THE INTERMEDIATE
Plaintiff/Counter-	)	COURT OF APPEALS AND THE
Claim Defendant/	)	SUPREME COURT OF THE STATE OF
Appellee/Cross-	)	HAWAI'I FROM THE (1) ORDER
Appellee,	)	DENYING WAI'OLA WATERS OF
	)	LIFE PUBLIC CHARTER SCHOOL'S
vs.	)	MOTION TO SET ASIDE ENTRY OF
	)	DEFAULT DATED MAY 24, 2004,
ALA LOOP HOMEOWNERS, an	)	FILED HEREIN ON JULY 6, 2004,
unincorporated association,	)	ENTERED ON AUGUST 11, 2004;
	)	(2) FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW AND
Defendant/Counter-	)	JUDGMENT ENTERED ON FEBRUARY
Claimant/Cross-	)	4, 2005; (3) FINAL JUDGMENT
Claimant/ Appellee/	)	ENTERED ON MARCH 4, 2005; (4)
Cross-Appellant,	)	FIRST AMENDED FINAL JUDGMENT
	)	ENTERED ON DECEMBER 12, 2005;
	)	(5)

[Caption continued on next page]

BRIEF OF AMICUS CURIAE HAWAII'S THOUSAND FRIENDS

APPENDIX "A"

CERTIFICATE OF SERVICE

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HAWAII'S THOUSAND FRIENDS

KAWAHAU  
CLERK OF THE COURTS

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and )  
 )  
WAI'OLA WATERS OF LIFE CHARTER )  
SCHOOL, a public school )  
organized under the laws of )  
the State of Hawaii, )  
 )  
Defendant/Cross- )  
Claim Defendant/ )  
Appellant/Cross- )  
Appellee, )  
 )  
and )  
 )  
JOHN DOES 1-10; JANE DOES 1- )  
10; DOE CORPORATIONS 1-10; DOE )  
PARTNERSHIPS 1-10; AND DOE )  
ENTITIES 1-10, )  
 )  
Defendants/Appellees )  
/Cross-Appellees. )  
 )  
 )  
ALA LOOP COMMUNITY )  
ASSOCIATION, an unincorporated )  
non-profit association, )  
 )  
Third-Party )  
Plaintiff/Defendant/ )  
Counter-Claimant/ )  
Cross-Claimant/ )  
Appellee/Cross- )  
Appellant, )  
 )  
vs. )  
 )  
LAND USE COMMISSION, STATE OF )  
HAWAI'I, )  
 )  
Third-Party )  
Defendant/Appellee/ )  
Cross-Appellee. )  
 )  
 )

ORDER GRANTING IN PART AND  
DENYING IN PART  
DEFENDANT/THIRD-PARTY  
PLAINTIFF ALA LOOP COMMUNITY  
ASSOCIATION'S MOTION FOR  
AWARD OF ATTORNEY'S FEES AND  
COSTS AGAINST DEFENDANT  
WAI'OLA WATERS OF LIFE  
CHARTER SCHOOL, ISSUED ON  
OCTOBER 28, 2005  
  
THIRD CIRCUIT COURT  
  
HONORABLE GREG K. NAKAMURA  
JUDGE

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

COUNTY OF HAWAI'I, a municipal corporation of the State of Hawaii,

Plaintiff/Counter-Claim Defendant/Appellee/Cross-Appellee,

vs.

ALA LOOP HOMEOWNERS, an unincorporated association,

Defendant/Counter-Claimant/Cross-Claimant/ Appellee/ Cross-Appellant,

and

WAI'OLA WATERS OF LIFE CHARTER SCHOOL, a public school organized under the laws of the State of Hawai'i,

Defendant/Cross-Claim Defendant/Appellant/Cross-Appellee,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; AND DOE ENTITIES 1-10,

Defendants/Appellees /Cross-Appellees.

Civil No. 03-1-308

APPEAL TO THE INTERMEDIATE COURT OF APPEALS AND THE SUPREME COURT OF THE STATE OF HAWAI'I FROM THE (1) ORDER DENYING WAI'OLA WATERS OF LIFE PUBLIC CHARTER SCHOOL'S MOTION TO SET ASIDE ENTRY OF DEFAULT DATED MAY 24, 2004, FILED HEREIN ON JULY 6, 2004, ENTERED ON AUGUST 11, 2004; (2) FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ENTERED ON FEBRUARY 4, 2005; (3) FINAL JUDGMENT ENTERED ON MARCH 4, 2005; (4) FIRST AMENDED FINAL JUDGMENT ENTERED ON DECEMBER 12, 2005; (5) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT/THIRD-PARTY PLAINTIFF ALA LOOP COMMUNITY ASSOCIATION'S MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS AGAINST DEFENDANT WAI'OLA WATERS OF LIFE CHARTER SCHOOL, ISSUED ON OCTOBER 28, 2005

THIRD CIRCUIT COURT

HONORABLE GREG K. NAKAMURA JUDGE

ALA LOOP COMMUNITY ASSOCIATION, )  
 an unincorporated non-profit )  
 association, )  
 )  
 Third-Party )  
 Plaintiff/Defendant/ )  
 Counter-Claimant/ )  
 Cross-Claimant/ )  
 Appellee/Cross- )  
 Appellant, )  
 )  
 vs. )  
 )  
 LAND USE COMMISSION, STATE OF )  
 HAWAI'I, )  
 )  
 Third-Party )  
 Defendant/Appellee/ )  
 Cross-Appellee. )  
 )

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BRIEF OF AMICUS CURIAE HAWAII'S THOUSAND FRIENDS

I. INTRODUCTION

Amicus Hawaii's Thousand Friends ("HTF") asks that this Court grant the application for certiorari of the Ala Loop Homeowners Association ("Association") to review County of Hawai'i v. Ala Loop Homeowners, 120 Hawai'i 256, 203 P.3d 676 (Table) (Hawai'i App. March 12, 2009) ("Ala Loop"), which held that "private citizens do not have a private right of action to enforce the provisions of HRS Chapter 205 and, therefore, lack standing to invoke a circuit court's jurisdiction to determine their claims to enforce Chapter 205." Ala Loop, slip op. at 9 (citing Pono v. Molokai Ranch, Ltd., 119 Hawai'i 164, 194 P.3d 1126 (App. 2008), *cert. rejected*, 2008 WL 5392320 (Hawai'i

12/29/08) ("Pono").

HTF asks this Court to recognize that Pono and Ala Loop are flatly contrary to a binding precedent of this Court and to the express language of relevant statutes and constitutional provisions, fly in the face of this Court's declaration that "standing requirements should not be barriers to justice," Sierra Club v. Dept. of Transportation, 115 Hawai'i 299, 319, 167 P.3d 292, 313 (2007) ("Superferry I") (citation omitted), and render citizens unable to enforce restrictions the Hawai'i State Legislature has imposed on land development activities when county officials tasked with that enforcement abdicate their responsibilities. Accordingly, Pono and Ala Loop should be overruled and Ala Loop should be vacated and remanded for further proceedings.

## II. QUESTION PRESENTED

Do the circuit courts have jurisdiction to adjudicate a citizen suit seeking to enjoin construction of a development project which has failed to obtain a permit or approval required under HRS Chapter 205?

HTF takes no position on matters at issue in Ala Loop other than the question of the public's right to enforce Chapter 205.

## III. STATEMENT OF PRIOR PROCEEDINGS

HTF adopts by reference the Statement of Prior Proceedings set forth in the Association's Application for Writ of Certiorari Filed July 21, 2009, at 4-6 ("Prior Proceedings in the Case").

IV. STATEMENT OF THE CASE

In July 2003, Wai'ola Waters of Life Public Charter School ("Wai'ola") purchased a 28-acre parcel of land in the County of Hawai'i (the "Subject Property"), allegedly for the purpose of operating a charter school. Ala Loop, Slip Op. at 2-3. The Subject Property is "located in an agricultural use district designated by the Land Use Commission of the State of Hawai'i." Id., at 2. The Association contends, inter alia, that the proposed use cannot proceed without a special permit issued by the Land Use Commission pursuant to HRS § 205-6 (2001). Ala Loop, slip op. at 4-5.

V. ARGUMENT

- A. Pono and Ala Loop failed to acknowledge binding precedent recognizing the circuit courts' jurisdiction over citizen suits seeking declaratory and injunctive relief for the enforcement of Chapter 205.

Although this Court has not used the term "private right of action" in reference to HRS Chapter 205, it has nevertheless expressly held that the circuit courts have jurisdiction to adjudicate private suits to enjoin violations of HRS Chapter 205. Citizens for Protection of North Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 979 P.2d 1120 (1999). In Citizens, this Court addressed a private plaintiff's claims that a proposed development project violated various land use laws, among them HRS Chapter 205. In considering the circuit court's jurisdiction, this Court stated as follows:

As a preliminary matter, Citizens' first amended complaint, filed on June 23, 1995, fails to cite the proper statute to invoke the circuit court's jurisdiction for declaratory relief. Citizens instead relies on substantive statutes such as HRS §§ 46-1 (1993), 205-1 (1993), 343-1 (1993) and 92-12(b) (1993), which do not confer subject matter jurisdiction on the circuit court. Regardless of the erroneous recitation by Citizens' attorneys, it is clear that the relief being sought was based on HRS §§ 603-21.5 (1993) (general jurisdiction of the circuit courts) and 632-1 (1993) (declaratory judgments). Thus the circuit court properly accepted jurisdiction.

Citizens, 91 Hawai'i at 100 fn.4, 979 P.2d 1120, 1125 fn.4 (1999) (emphasis added). While the Court went on to reject Citizens' Chapter 205 claim on the merits, Citizens at 107, 979 P.2d at 1133, that in no way weakens the force of its holding that the circuit court had properly exercised jurisdiction over this action by a private citizen to enforce Chapter 205, thus implicitly recognizing that such an action may proceed notwithstanding the absence in Chapter 205 itself of any explicit "private right of action" language. Despite its obvious relevance, Citizens was not cited in either Pono or Ala Loop.

B. Pono ignored the express language of relevant statutes, including in particular HRS § 607-25.

The lower court's opinion in Ala Loop did not analyze the relevant statutes to determine whether or not the Legislature had intended HRS Chapter 205 to be enforceable by citizens in an action for declaratory and injunctive relief pursuant to HRS § 632-1, but instead relied entirely on that court's earlier decision in Pono. Ala Loop, slip op. at 9. In Pono, the court

looked to the language and legislative history of HRS Chapter 205, 119 Hawai'i at 1150-51, 194 P.3d at 188-89, and concluded that:

[t]here is no indication in the legislative history of any of the acts that were ultimately codified in HRS chapter 205 that the legislature intended to provide private citizens with the right to enforce the land-use provisions of HRS chapter 205. Implying a private right of action on the basis of legislative silence would thus be a "hazardous enterprise, at best."

Pono, 119 Hawai'i at 1151, 194 P.3d at 189 (citation omitted).

Pono failed to consider, however, the relevance of HRS § 607-25 (1993 & Supp. 2008) (cited in Ala Loop, slip op. at 2, 8, 10).

HRS § 607-25, entitled "Actions based on failure to obtain government permit or approvals; attorney's fees and costs," provides that:

[i]n any civil action in this State where a private party sues for injunctive relief against another private party who has been or is undertaking any development [as defined in HRS § 607-25(a)] without obtaining all permits or approvals required by law from government agencies: (1) The court may award reasonable attorneys' fees and costs of the suit to the prevailing party [and that] (2) The court shall award reasonable attorneys' fees and costs of the suit if the party bringing the civil action [fulfills the prerequisites set forth in HRS §§ 607-25(e)(2)(A) and -25(e)(2)(B)].

HRS § 607-25(e) (1993 & Supp. 2008). "For the purposes of this section, the permits or approvals required by law shall include compliance with the requirements for permits or approvals established by chapters 6E, . . . **205**, . . . and 343 and ordinances or rules adopted pursuant thereto under chapter 91."



HRS § 607-25(c) (1993 & Supp. 2008) (emphasis added).

HRS § 607-25 is clearly relevant to the question of whether or not a private right of action exists to allow citizens to bring an action for injunctive and declaratory relief to enjoin a project that has failed to obtain a permit or approval necessary under Chapter 205 because the enactment of a statute allowing the award of fees and fees to the prevailing private plaintiff in such an action necessarily assumes that such a private plaintiff has the right to bring such an action in the first place.

This court has adopted a three-step approach when interpreting statutes that appear to relate to the same subject matter:

First, legislative enactments are presumptively valid and "should be interpreted [in such manner as] to give them effect." State v. Spencer, 68 Haw. 622, 624, 725 P.2d 799, 800 (1986) (citation omitted).

Second, "[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another." HRS § 1-16 (1985); Kam v. Noh, 70 Haw. 321, 325, 770 P.2d 414, 417 (1989). Third, "where there is a 'plainly irreconcilable' conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. However, where the statutes merely overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored." Mahiai v. Suwa, 69 Haw. 349, 356-57, 742 P.2d 359, 366 (1987) (citations omitted).

State v. Batson, 99 Hawai'i 118, 120, 53 P.3d 257, 259 (2002)

(citations omitted). HRS Chapter 205 and HRS § 607-25 are "laws

in pari materia, or upon the same subject" because the latter facilitates the enforcement of the former and makes express reference to it. The Pono court's holding that no private right of action exists to allow citizen enforcement of HRS Chapter 205 violates the command that these statutes, including the fee shifting provisions of HRS § 607-25, "should be interpreted [in such manner as] to give them effect," Batson, 99 Hawai'i at 120, 53 P.3d at 259, because an interpretation of Chapter 205 that precludes private enforcement renders superfluous the language in HRS § 607-25 expressly intended to encourage such private enforcement. See County of Hawai'i v. C & J Coupe Family Limited Partnership, 120 Hawai'i 400, 412, 208 P.3d 713, 725 (2009) (quoting Carlisle v. One (1) Boat, 119 Hawai'i 245, 255, 195 P.3d 1177, 1187 (2008)) ("stating that "[i]t is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to and preserve all the words of the statute") (emphasis added by the C & J Coupe Court).

- C. Pono's holding that private citizens lack standing and a private right of action to enforce HRS Chapter 205 violates this Court's declaration that "standing requirements should not be barriers to justice."

"As this court has recognized, 'the appellate courts of this state have generally recognized public interest concerns that

warrant the lowering of standing barriers in . . . cases . . .  
pertaining to environmental concerns.' " Superferry I, 115  
Hawai'i at 320, 167 P.3d at 313. This Court long ago recognized  
that:

[c]omplexities about standing are barriers to justice;  
in removing the barriers the emphasis should be on the  
needs of justice. One whose legitimate interest is in  
fact injured by illegal action of an officer should  
have standing because justice requires that such a  
party should have a chance to show that the action that  
hurts his interest is illegal.

East Diamond Head Ass'n v. Zoning Bd. of Appeals, 52 Haw. 518,  
524 fn.5, 479 P.2d 796, 799 fn.5 (1971) (citation omitted), and  
this expansive view of the right of Hawaii's citizens to enforce  
the State's environmental laws was enshrined in our Constitution  
with the ratification of Haw. Const., Art. XI, § 9, entitled  
"Environmental Rights."<sup>1</sup> The Pono court's analysis of Reliable  
Collection Agency, Ltd. v. Cole, 59 Haw. 503, 584 P.2d 107  
(1978), and Rees v. Carlisle, 113 Hawai'i 446, 153 P.3d 1131  
(2007), Pono, 119 Hawai'i at 184-87, 194 P.3d at 1146-49, is  
fatally defective because both the relevant statutes and our  
Constitution require that an affirmative answer be given to the  
question "does the statute create a . . . right in favor of the

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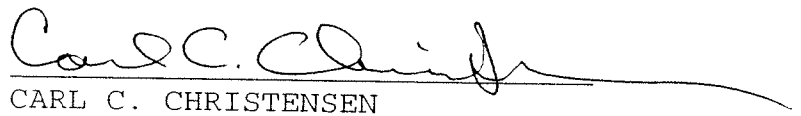
<sup>1</sup>**Environmental Rights.** Each person has the right to a clean and  
healthful environment, as defined by laws relating to  
environmental quality, including control of pollution and  
conservation, protection and enhancement of natural resources.  
Any person may enforce this right against any person, public or  
private, through appropriate legal proceedings, subject to  
reasonable limitations and regulation as provided by law. Haw.

plaintiff?" Pono, at 185, 194 P.3d at 1147 (quoting Reliable Collection Agency, 59 Haw. at 507, 584 P.2d at 109). As this Court recently reaffirmed in Superferry I, the "touchstone" of Hawai'i's law of standing remains "the needs of justice," id., 115 Hawai'i at 319, 167 P.3d at 312 (citations omitted), and it is well-established that "standing requirements should not be barriers to justice." Id. (citations omitted). Pono and Ala Loop would import into our law a hostility to citizen enforcement of environmental laws that is both forbidden by our Constitution and inconsistent with this Court's precedents.

VI. CONCLUSION

For all of the above reasons, Amicus Curiae Hawaii's Thousand Friends asks this Court to grant the Association's Application for Writ of Certiorari, to overrule Pono and Ala Loop, and to hold instead that private citizens have standing and a private right of action to sue in circuit court to enjoin violations of HRS Chapter 205 where a proposed development project lacks an approval or permit required under that Chapter.

DATED: Honolulu, Hawai'i, July 29, 2009.

  
CARL C. CHRISTENSEN

Attorney for Amicus Curiae  
HAWAII'S THOUSAND FRIENDS

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Const., Art. XI, § 9 (1993) (emphasis added).