

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

[Caption continued on next page]

THIRD-PARTY PLAINTIFF/DEFENDANT/COUNTER-CLAIM DEFENDANT/  
 COUNTER-CLAIMANT/CROSS-CLAIMANT/APPELLEE/CROSS-APPELLANT  
 ALA LOOP COMMUNITY ASSOCIATION'S  
APPLICATION FOR WRIT OF CERTIORARI

APPENDICES "A" - "G"

CERTIFICATE OF SERVICE

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ALA LOOP COMMUNITY ASSOCIATION, an  
unincorporated non-profit association

2005 JUL 21 PM 1:56  
 L. DREW BERRY  
 THIRD CIRCUIT COURT  
 STATE OF HAWAII  
 EX OFFICIO

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. )

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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 )  
HAWAII, )

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 )

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	)	PLAINTIFF ALA LOOP COMMUNITY
Defendant/Cross-Claim	)	ASSOCIATION'S MOTION FOR
Defendant/Appellant/Cross-	)	AWARD OF ATTORNEY'S FEES AND
Appellee,	)	COSTS AGAINST DEFENDANT
	)	WAI'OLA WATERS OF LIFE CHARTER
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JOHN DOES 1-10; JANE DOES 1-10; DOE	)	THIRD CIRCUIT COURT
CORPORATIONS 1-10; DOE	)	
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ENTITIES 1-10,	)	JUDGE
	)	
Defendants/Appellees/Cross-	)	
Appellees.	)	
	)	
ALA LOOP COMMUNITY ASSOCIATION,	)	
an unincorporated non-profit association,	)	
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 Plaintiff/Defendant/Counter- )  
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 LAND USE COMMISSION, STATE OF )  
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***THIRD-PARTY PLAINTIFF/DEFENDANT/COUNTER-CLAIM DEFENDANT/  
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 APPLICATION FOR WRIT OF CERTIORARI***

***I. INTRODUCTION***

Petitioner Defendant- Counterclaimant/Cross-Claimant/Third Party Plaintiff/Appellee/Cross/Appellant Ala Loop Community Association (hereinafter "Petitioner"), seeks to correct the error of the Intermediate Court of Appeals ("ICA") in determining that Petitioner lacked standing to seek declaratory relief relating to the applicability of the exemption provisions of HRS Section 302A-1184 as it relates to charter schools and to seek declaratory and injunctive relief relating to the enforcement of the provisions of Section 205-6, HRS.<sup>1</sup> See Summary Disposition Order filed on March 12, 2009, Appendix "A".

The ICA vacated the Third Circuit Court's judgment determining that Defendant/Appellant Wai'ola Waters of Life Charter School ("Appellant") was not exempt from complying with the special permit requirements of Chapter 205, HRS. It is Petitioner's position that the ICA:

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<sup>1</sup> HRS Section 302A-1184 was repealed and replaced by HRS Section 302B-9 in 2006. Section 302A-1184 provided that charter schools were exempt from state laws in conflict with Chapter 302A, except for those regarding "health and safety requirements".

(1) ignored Petitioner's standing under HRS Section 632-1 based on the personal stake its members had in the controversy relating to the exemption issue,

(2) ignored the direct procedural injury suffered by its members when they were deprived of the opportunity to participate in public hearings and contested case hearings which are available under the applicable special permit procedures mandated under HRS Section 205-6,

(3) ignored the provisions of Article XI, Section 9 of the Hawaii State Constitution or the legislative intent of HRS Section 607-25, which expressly provides private parties with the right to sue for injunctive relief when a development is undertaken without obtaining all permits or approvals required by law, including permits required by Chapter 205, and

(4) did not account for the fact that Petitioner was named as a defendant to the action, in which both the County of Hawaii and the Land Use Commission of the State of Hawaii ("LUC") were parties, and the County of Hawaii sought declaratory relief as to the same issues.

Petitioner (whose members included next door neighbors to Appellant's un-permitted non-agricultural operations) had been named by the County of Hawaii as a defendant and was the only party actively advancing the claims for declaratory and injunctive relief. Indeed, the absence of input by both the County of Hawaii and the LUC on issues which implicated environmental concerns and which directly and adversely affected the health and welfare of the Petitioner's members, provide a classic example of the circumstances under which the Hawaii State Legislature deemed it appropriate to provide a private right of action to enforce Hawaii's land use law.

Related to the procedural injury which Petitioner was attempting to rectify was the fact that under HRS Section 205-6 when the property exceeds fifteen acres (Appellant's operations were occurring on a 28 acre parcel), the Land Use Commission also needs to approve the application. The LUC can approve, modify the planning commission approval, or deny the petition. The operation of a charter school by the Appellant in the absence of a special permit or properly administered public hearing and contested case hearing under Chapter 91 deprived Petitioner and its members the opportunity to be heard, to raise environmental and public health and safety issues, and deprived it of due process.

As a party and named defendant in the action, Petitioner had a right to participate in the declaratory action, and to advocate its position on the same issues which had been raised by the County. As expressed in both the Hawaii State Constitution, Section 607-25 and a long line of

standing principles, most recently enunciated in *Sierra Club v. Department of Transportation*, 115 Haw. 299, 167 P.3d 292 (2007) (“Superferry I”), where as here, a party has suffered an actual or threatened injury traceable to the defendant, and a favorable decision would likely provide relief, the Petitioner had a sufficient stake in the controversy to obtain the requested relief.

## **II. QUESTIONS PRESENTED FOR DECISION**

The main question presented is when property is being used by an entity in violation of Chapter 205, HRS and the entity claims an exemption from the coverage of the land use statute, does an association comprised of neighbors of the entity named as a party have standing to obtain declaratory relief as to the exemption issue particularly when the public agencies provided with express statutory authority to enforce the chapter have failed to do so, or should the neighbors be without a remedy? Subsidiary questions also include:

1. Whether the Petitioner have established standing based on injury in fact or procedural injury.
2. Did the Circuit Court have jurisdiction to enter a judgment in favor of the Association when the County of Hawaii and Land Use Commission have specific notice of a violation of Chapter 205, and do not take any steps to enforce the provisions of the chapter?
3. Where as here, the neighbors also sought injunctive relief based on the law of nuisance, did the Circuit Court have jurisdiction to determine that the activities upon which the nuisance claim is based are in violation of Chapter 205 when the public agencies provided express authority to enforce the statute are named as parties and have the opportunity to provide input on the issues?
4. As a matter of procedural due process, did the circuit court have jurisdiction to consider the position of the Petitioner on the issues raised by the County in its Complaint, and by the Petitioner in its Counterclaim and Cross-claim?

## **III. PRIOR PROCEEDINGS IN THE CASE**

On November 14, 2003, the County of Hawaii filed a Complaint for Declaratory Relief in the Circuit Court for the Third Circuit, naming Petitioner and Appellant as defendants. The Complaint requested the Circuit Court to determine the primary issue as to whether Appellant, as a new century charter school, was exempt from obtaining a special permit under HRS Section 302A-1184, but was required to obtain a use permit from the County of Hawaii under its Zoning Code.

Petitioner was named as a party whose members were homeowners or business proprietors who lived or transacted business on or near Ala Loop, where Appellant was operating its school. (Appendix "B", ROA V. I, pp.1-45).

On November 20, 2003, Petitioner filed its Answer, along with a Counterclaim against the County of Hawaii and a Cross-Claim against Appellant. The Counterclaim and Cross-Claim asserted that the Attorney General's office had issued an August 23, 2003 advisory opinion that charter schools were not exempt from the special permit provisions of Section 205-6, HRS, and alleged that the County, through its Department of Public Works was preparing to issue a temporary building structure permit to allow the school's operations to occur before any use permit or special permit was issued. Petitioner alleged that by failing to require application for either a use permit or special permit, the County was depriving the Association and its members of the opportunity to participate in public hearings (or contested case hearings) and that this constituted a deprivation of property rights without due process and an opportunity to be heard. As a result, Petitioner prayed for declaratory relief, seeking a determination that a special permit was required, and for injunctive relief. (Appendix "C", ROA V. I, pp. 49-39).

As part of the Cross-Claim against the Appellant, the Petitioner also alleged nuisance per se based on the violation of statute, and as against the County, damages and attorneys fees based on civil rights violations. While not yet disposed of, these damages claims were also predicated on the issue of what procedural steps and permits the Appellant was required to take prior to operation of the school. (Appendix "C", ROA V. I, pp. 49-89).

On December 2, 2003, Petitioner also joined the Land Use Commission of the State of Hawaii as a Third Party Defendant on the basis that since the subject real property was 26 acres in size, the LUC should be made a party. See Petitioner's Joinder and Third-Party Complaint against the LUC. (Appendix "D", ROA V. I, pp. 96-99, without exhibits attached).

After the issues were joined and discovery taken by the Petitioner, on October 20, 2004, Petitioner filed a Motion for Default Judgment and Permanent Injunction. On November 23, 2004, the LUC filed a position statement stating that it should remain "neutral" on the permit requirement and injunction issue because a special permit application might eventually need to be heard by it. (Appendix "E", ROA V. II, pp. 8-12). This position made no sense, because the issue was not

whether a special permit should be issued, but whether Appellant required a special permit before operating.

The County also skirted taking position on the very issue it had filed suit on, on the basis that the relief sought was only directed at the Appellant. However, the County did acknowledge Petitioner's right to litigate the issues. See County's Response, Appendix "F", ROA V. III, pp. 13-35. Given the lassitude of the LUC and the County on the issues, during which Appellant continued to operate a school on the premises for over a year, Petitioner was left with the task of advocating the exemption and special permit issues.

On February 4, 2005, the Circuit Court entered its Findings of Fact, Conclusions of Law and Judgment, including that Appellant was operating administrative offices, using office equipment and computers, and the holding instructional and laboratory classes on the property. (See Appendix "G", ROA V. III, pp. 462-467). On December 12, 2005, an Amended Final Judgment determined that Appellant must obtain a special permit from the Planning Commission and LUC pursuant to HRS Section 205-6 prior to operating a charter school.

In its summary disposition order, the ICA held that private citizens have no standing to invoke a circuit court's jurisdiction to authority to enforce Chapter 205, citing its prior decision in *Pono v. Molokai Ranch, Ltd.*, 119 Haw. 164, 194 P.3d 1126 (App. 2008).

#### **IV. STATEMENT OF THE CASE**

As the Circuit Courts Findings made clear, Appellant was operating a charter school in the absence of a special permit.

Despite these deficiencies, the County's Department of Public Works was encouraging Appellant to obtain a temporary structure permit. Under these circumstances, what was the Petitioner to do? Let the agency given authority to enforce the law encourage violation of the law it was mandated to enforce? Should the holding in *Pono, supra*, be interpreted to bar Petitioner's standing in this case?

#### **V. ARGUMENT**

HRS § 632-1 grants the courts the ability to make binding adjudications where an actual controversy exists. HRS § 632-6 provides with respect to HRS Chapter 632:

This chapter is declared to be remedial. Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to



maintain an ordinary action therefor. It is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.

The Hawaii Supreme Court has cited to HRS § 632-1 and 632-6 as authority for a private party to seek to enforce HRS Chapter 205 as well as other land use statutes. In *Citizens for Protection of the North Kohala Coastline v. County of Hawaii*, 91 Haw. 94, 979 P.2d 1120 (1999), a community group sued, pursuant to HRS § 632-1, over violations of HRS Chapter 205 (as well as Chapter 343). The Court reiterated the state's liberal standing doctrine and held that HRS § 632-1 did not present a barrier to adjudication. Accepting the ICA's conclusions in this case would leave no remedy to a private party whose interests are left to the whims of agencies who fail to actively enforce, or choose to selectively enforce, Hawaii's land use and environmental laws.

***A. The Hawaii Supreme Court's Longstanding Precedent Provides Ample Basis for Finding Standing on the Part of Petitioner.***

In *Superferry I*, this Court discussed standing principles at length. The Court stated that the "touchstone" of this Court's notion of standing is "the needs of justice," and that "standing requirements should not be barriers to justice." Instead, "one whose legitimate interest is in fact injured by illegal action of an agency or 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." *Id.*, at P.319. By the County's failure to actively require Appellant to seek a special permit from the Planning Commission and allowing Appellant to continue its non-agricultural operations on the property, the Association and its members were injured by the deprivation of their right to participate, seek a contested case hearing, and at a minimum request certain health and safety standards be implemented as a condition of operation. This Court has stated that in the realm of environmental concerns, "we have not been inclined to foreclose administrative challenges to administrative determinations through restrictive applications of standing requirements." *Id.*, at P.320.

In *Superferry I*, this Court addressed the issue of a party's standing based on whether the party or in the case of an association, its members, have suffered injury in fact or a procedural injury. As to the issue of injury in fact, the Court requires a "personal stake" in the outcome of a controversy which may arise from a defendant's infringement of personal or special interests that are separate and distinct from the public. *Id.*, at P.321. As to the injury in fact issue, the Petitioner had presented ample evidence of the personal stake its members had in the health and safety

aspects of Appellant's operations, being noise, traffic, inadequate infrastructure, fire protection, sewage and water issues.

As to the procedural injury issue, in *Superferry I*, this Court noted the following features in the procedural standing doctrine:

"In order to establish a procedural injury, in accord with both federal precedent and our caselaw, a plaintiff must show that: (1) the plaintiff has been accorded a procedural right, which was violated in some way, see *City of Sausalito*, 386 F.3d at 1197 (requiring that "the agency violated certain procedural rules"), e.g., as here, a failure to conduct an EA; (2) the procedural right protects the plaintiff's concrete interests; and (3) the procedural violation threatens the plaintiff's concrete interests, thus affecting the plaintiff "personally," which may be demonstrated by showing (a) a "geographic nexus" to the site in question and (b) that the procedural violation increases the risk of harm to the plaintiff's concrete interests." *Id.*, at P.329. (Emphasis added).

In this case, the County was taking the position that a County use permit must be obtained from the Planning Commission under the County's "use permit" process, thereby depriving Petitioner of the procedures mandated by HRS Section 205-6. During the pendency of the lawsuit, it took no action to obtain even this erroneous determination while the Appellant was operating. By failing to mandate the special permit process, Petitioner had no opportunity to present its position to both the Planning Commission and Land Use Commission. This denial of a procedural right was clearly coupled with the concrete interest of the Petitioner and its members, who clearly had the requisite geographical nexus and interest in providing input on health and safety issues.

The issue of standing in *Superferry I* was framed in the context of whether the petitioners' "concrete interests were threatened by the decision to exempt the harbor improvements from the environmental review process." *Id.*, at P.330. The issue in *Life of the Land v. Land Use Commission*, 63 Haw. 166 (1981) ("LOL") was whether the association had standing to challenge the LUC's land use district classification decision in the context of its authority under Chapter 205. In *LOL*, the Court determined that the petitioners' had requisite standing as interested parties under HRS Section 91-7 and HRS Section 632-1, which authorizes courts of record to issue declaratory judgments in cases of actual controversy. *Id.*, at P.177-178.

Under the foregoing principles, there is no question that Petitioner had standing to seek a determination that Appellant was not exempt from Hawaii's land use law, and was required to obtain a special permit through a process that allowed Petitioner an opportunity to be heard.

**B. *The Hawaii State Constitution and Statutory Law Expressly Provides for a Private Right of Action to Enforce Laws Relating to Environmental Quality, Including Hawaii's Land Use Law.***

Article XI, Section 9 of the Hawaii State Constitution states as follows:

“Section 9. 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 party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law. [Add Const Con 1978 and election Nov 7, 1978]” (Emphasis added).

HRS Section 607-25, which is a statutory private attorney general fee recovery statute, and contemplates the recovery of attorney’s fees and costs against a private party who has been undertaking development without obtaining all “permits or approvals required by law”. provides in subsection (c) as follows:

“§607-25 Actions based on failure to obtain government permit or approvals: attorney’s fees and costs.

(c) For 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, 46, 54, 171, 174C, 180C, 183, 183C, 184, 195, 195D, 205, 205A, 266, 342B, 342D, 342F, 342H, 342J, 342L, and 343 and ordinances or rules adopted pursuant thereto under chapter 91. (Emphasis added).

As recognized in the ICA’s Summary Disposition Order, the Association’s claims and the relief granted by the trial court involved the determination that Wai’ola had failed to obtain all permits required by law, including compliance with Chapter 205, HRS, and that the Association was entitled to an injunction preventing activity for which a special permit was required. These facts fall squarely within the terms of HRS Section 607-25. The ICA made no attempt to square the provisions of Article XI, Section 9 of the Hawaii State Constitution and HRS Section 607-25 with the facts of this case, and focused solely on whether Chapter 205 provided a private right of action.

Section 607-25 recognizes that as in this case, where a government agency does nothing to actively enforce laws it was *intended to initially have a right to enforce*, a private party should then have the opportunity to seek and obtain injunctive relief when the agency is unwilling or unable to

enforce the pertinent statute. The statute provides the private party with a remedy in such an instance. By issuing its decision, the ICA has rendered both the legislative intent and the remedy provided by the statute nugatory.

HRS Section 607-25 was adopted after the enactment of the enforcement provisions of Chapter 205. While the ICA has cited to its opinion in *Pono v. Molokai Ranch, Ltd.*, 119 Haw. 164, 194 P.3d 1126 (App. 2008), the effect of Article XI, Section 9 of the Hawaii State Constitution or of HRS Section 607-25 had not been raised or addressed in that case, nor any arguments presented as to the relationship between these provisions and the standing issue. Moreover, in *Pono*, no request for injunctive relief was made, and in the ICA restricted its analysis to the four corners of Chapter 205 to determine whether a private right of action existed under that Chapter. While there was no prohibition against such a private right of action contained in Chapter 205, the Court stated that when the legislature desires to provide a private cause of action to remedy a statutory violation, "it knows how to do so and has done so expressly. It has not done so in the case of Chapter 205." *Id.*, at P.188. This statement erroneously failed to consider the express inclusion of Chapter 205 in Section 607-25 and ignored the Hawaii State Constitution.

That the Legislature did in fact intend to provide such a private right of action was clearly supported by the Hawaii Supreme Court in *Kahana Sunset Owners v. Maui City Council*, 86 Haw. 132, 948 P.2d 122 (1986). The Court emphasized the purpose of the statute as reflected in the legislative history behind HRS Section 607-25, which was intended to make more meaningful the private rights of action found in Article XI, Section 9, of the Hawaii State Constitution.

The Court in *Kahana* cited both the constitutional and legislative intent of allowing private parties to act as private attorneys general:

"HRS § 607-25 was enacted by the 1986 State Legislature as Act 80. Act 80, § 1, explained the purpose of the statute as follows:

The legislature finds that article XI, section 9, of the Constitution of the State of [Hawai'i] has given the public standing to use the courts to enforce laws intended to protect the environment. However, the legislature finds that the public has rarely used this right and that there have been increasing numbers of after-the-fact permits for illegal private development. Although the legislature notes that some government agencies are having difficulty with the full and timely enforcement of permit requirements against private parties, after-the-fact permits are not a desirable form of permit streamlining. For these reasons, the legislature concludes that to improve the

implementation of laws to protect health, environmental quality, and natural resources, the impediment of high legal costs must be reduced for public interest groups by allowing the award of attorneys' fees, in cases involving illegal development by private parties. (Emphasis added).

Additionally, the legislative history stated:

Your Committee find[s] that the volume of development throughout the State is a limiting factor on State or County investigation of alleged abuses against public resources and the environment . . . .

The bill will give fuller effect to Article XI, Section 9 of the Constitution of the State of [Hawai'i], which gives Hawaii's people the right to bring lawsuits enforcing environmental laws.

Members of the public interested in using their constitutional standing may be deterred by the high cost of litigation. Awarding attorney's fees and costs will enable individuals and organizations to assist the state in enforcing laws and ordinances controlling development. They are to be awarded costs if they prevail after fruitlessly bringing the violation to the attention of those undertaking the development and the relevant state agency.

This bill will help assure that the state honors the commitment to its environment that is reflected in its laws concerning development.

Sen. Stand. Comm. Rep. No. 450-86, in 1986 Senate Journal, at 976 (Emphasis added).

From the legislative history, we are able to determine that the legislature intended that individuals and organizations would help the state's enforcement of laws and ordinances controlling development by acting as private attorneys general and suing developers who did not comply with the proper development laws. To encourage individuals and organizations to enforce the law, the legislature allowed the individual or organization to recover attorneys' fees if it prevailed in its lawsuit.

86 Haw. 132, 134-135.

In sum, both the Hawaii State Constitution and the Legislature intended that private parties such as the Association have the right to seek enforcement of laws such as Chapter 205 and to obtain redress where the agency given direct authority to provide enforcement is unwilling or unable to do so. Given the lassitude of the County in enforcing land use laws, Petitioner was provided with clear authority to act as private attorney general and to recover fees and costs incurred when the conditions of HRS Section 607-25 are satisfied.

*C. As a Named Defendant Sued by the County in Recognition of Its Standing, Petitioner was Entitled to Advocate the Same Issues Raised by it and the County as a Matter of Due Process.*

Under HRCP Rule 12 (b), "every defense in law or fact, ...whether a claim, counterclaim, cross-claim, or third-party complaint, shall be asserted in the responsive pleading thereto if one is required..." HRCP Rule 13 required or allowed Petitioner to file a counterclaim against the County seeking a determination from the Court that a special permit, and not merely a County use permit, was required before the Appellant could operate. HRCP Rule 14 also allowed Petitioner to join the LUC as a party, given its stake in the outcome, and in order that no argument could be raised that all indispensable parties to the issue had not been joined.

Petitioner was at risk if it failed to defend and advance its position as required under the rules. As a matter of procedural due process, Petitioner had the right as a party to advocate its position on the issues, and the ICA's determination that Petitioner did not have standing to litigate the issues under these circumstances is a deprivation of procedural due process under both the Hawaii State Constitution at Article 1, Section 5, and the U. S. Constitution at Article XIV, Section 1, both as to (1) Petitioner's right to protect its interests in participating in special permit proceedings before the Planning Commission and Land Use Commission, and (2) in advancing its interests as a party litigant under the Hawaii Rules of Civil Procedure.

**VI. CONCLUSION**

Based on the above, petitioner respectfully requests this Court to accept this Petition, determine that Petitioner has standing to seek relief from the Circuit Court, sustain that portion of the Circuit Court's decision enjoining Appellant from operating a school on the premises in the absence of a special permit, and either remand this matter, or decide upon the remaining issues in this appeal.

Dated: Hilo, Hawaii, July 21, 2009.

TSUKAZAKI YEH & MOORE



By \_\_\_\_\_  
THOMAS L.H. YEH