

NO. 27707

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 Defendant/Appellee/Cross-Appellee,)	APPEAL TO THE SUPREME COURT AND INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII 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,
vs.)	
ALA LOOP HOMEOWNERS, an unincorporated association,)	
)	
Defendant/Counter-Claimant/Cross-Claimant/Appellee/Cross-Appellant,)	

[Caption continued on next page]

DEFENDANT/CROSS-CLAIM DEFENDANT/APPELLANT/CROSS-APPELLEE WAI'OLA WATERS OF LIFE CHARTER SCHOOL'S RESPONSE IN OPPOSITION TO THIRD-PARTY PLAINTIFF/DEFENDANT/COUNTER-CLAIM DEFENDANT/COUNTER-CLAIMANT/CROSS-CLAIMANT/APPELLEE/CROSS-APPELLANT ALA LOOP COMMUNITY ASSOCIATION'S APPLICATON FOR WRIT OF CERTIORARI

DECLARATION OF JAMES C. PAIGE

EXHIBITS "A" and "B"

DECLARATION OF DANIEL CALUYA

CERTIFICATE OF SERVICE

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CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

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
HAWAII,

Third-Party
Defendant/Appellee/Cross-
Appellee.

) 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

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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
WAI'OLA WATERS OF LIFE CHARTER SCHOOL'S RESPONSE IN OPPOSITION TO
THIRD-PARTY PLAINTIFF/DEFENDANT/COUNTER-CLAIM DEFENDANT/COUNTER-
CLAIMANT/CROSS-CLAIMANT/APPELLEE/CROSS-APPELLANT
ALA LOOP COMMUNITY ASSOCIATION'S APPLICATION FOR WRIT OF CERTIORARI

I. Introduction.

Pursuant to Rule 40.1(e) of the Hawaii Rules of Appellate Procedure Defendant/ Cross-Claim Defendant/Appellant/Cross-Appellee Wai'ola Waters of Life Charter School ("Wai'ola School") by and through its attorneys, Mark J. Bennett, Attorney General, State of Hawaii, and his undersigned deputies, submits its Statement of Reasons why the Application for Writ of Certiorari filed by Third-Party Plaintiff/Defendant/Counter-Claim Defendant/Counter-Claimant/Cross-Claimant/Appellee/Cross-Appellant Ala Loop Community Associations ("Ala Loop Association") should not be accepted¹.

II. Statement Of Reasons Why The Application For Writ of Certiorari, With Amicus Curiae Briefs in Support, Should Not Be Accepted.

1) The Case is Moot.

Wai'ola School no longer owns the property designated as TMK No. (3) 1-7-08:003 ("Subject Property") on Ala Loop Road where the events and controversies that spawned this case occurred. Attached hereto as Exhibits "A" and "B" are certified copies of the warranty deeds pursuant to which Wai'ola School took ownership of the Subject Property, in 2003, and subsequently conveyed the Subject Property back to its former owner in June of 2009.

Wai'ola School also no longer conducts classes or other school activities on the Ala Loop property, See declaration of Daniel Caluya, and would need the current owner's permission before it could do so.

¹ The Native Hawaiian Legal Corporation and Hawaii's Thousand Friends as Amicus Curiae have both filed briefs in support of the Application for Writ of Certiorari, for the same reasons set forth below their briefs should not be accepted as a basis upon which to grant the application.

Counts I and II of the Ala Loop Association's Counterclaim against the County and Cross-Claim against the Wai'ola School allege and request as follows:

Count I

The Association requests that the Court enter declaratory relief determining that Defendant WOL [Wai'ola School] must obtain a special permit from the Planning Commission and the LUC pursuant to HRS Section 205-6 and the applicable rules and regulations of the Planning Commission and the Land Use Commission, prior to operating a charter school on Parcel 3.

Count II

The Association requests the Court to issue temporary and permanent injunctive relief enjoining and restraining:

- A. The County of Hawaii, its agencies, officers, directors, and employees from issuing any building permits, occupancy permits, or similar permits that would encourage, allow, or permit Defendant WOL to operate a charter school, or any components or activities connected with the charter school, on Parcel 3 until and unless a special permit has been issued for Parcel 3 and Defendant WOL has complied with all applicable conditions and laws for the operation as may be established by the Planning Commission and LUC and as may be required by applicable State and County Law.
- B. Defendant WOL, its agents, officers, directors, employees, teachers or representatives from conducting any classes or school related activities on Parcel 3 until and unless a special permit has been issued for Parcel 3 and Defendant WOL has complied with applicable conditions for the operation as may be established by the Planning Commission and LUC.

See Ala Loop Association's Answer to Complaint , Counterclaim and Cross-Claim Filed on November 20, 2003, and attached to Petitioner's Application for Writ as Appendix "C" at p. 7 and 8.

Because Wai'ola School no longer owns the subject property, and no longer conducts classes or activities at that location, the issues and claims for relief raised by the Ala Loop Association are moot.

It is well-settled that:

The mootness doctrine is said to encompass the circumstances that destroy the justiciability of a suit previously suitable for determination. Put another way, the suit must remain alive throughout the course of litigation to the moment of final appellate disposition. Its chief purpose is to assure that the adversary system, once set in operation, remains properly fueled. The doctrine seems appropriate where events subsequent to the judgment of the trial court have so affected the relations between the parties that the two conditions for justiciability relevant on appeal—adverse interest and effective remedy—have been compromised.

Hamilton ex rel. Lethem v. Lethem, 119 Haw 1, 5, 193 P.3d 839, 843 (2008) (citing Lathrop v Sakatani, 111 Haw. 307, 312-313, 141 P.3d 480, 485-86 (2006) (citations omitted) (format altered))

A court should not give opinions on moot questions, and lacks jurisdiction to decide moot cases.

Moreover, “[t]he duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” *Wong*, 62 Haw. at 395, 616 P.2d at 204. Thus, courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so. *Id.*

In re. App’n of J.T. Thomas. 73 Haw. 223, 226, 832 P.2d 253, 255 (1992)

Accordingly this case is moot. Moreover, although there are exceptions to the mootness doctrine, none of the exceptions are applicable in this case.

[T]his court has explicitly recognized two exceptions to the mootness doctrine: (1) the “capable of repetition, yet evading review” exception [hereinafter, CRER exception] ; and (2) the public interest exception.

Hamilton ex rel. Lethem v. Lethem, 119 Haw 1, 5, 193 P.3d 839, 843 (2008)

With respect to the first exception, the physical proximity between the parties that prompted the controversy and prompted the Ala Loop Association to sue for injunctive relief no longer exists. Wai‘ola School no longer owns property and no longer conducts classes or activities in the neighborhood.

Additionally, the Ala Loop Association has presented no evidence to show that Wai'ola School will buy property in the neighborhood again, or use their former property, or some other Ala Loop property to conduct school activities. Thus, the factual situation underlying this dispute is unlikely to recur, and there can be no reasonable expectation that it will recur. Moreover, even if the dispute between the school and the neighbors were to recur, the controversy would not escape review as the neighbors could do again what they did here, sue for injunctive relief, move for summary judgment, and appeal if necessary.

With respect to the public interest exception to the mootness doctrine, that exception is not implicated here because the neighbors counterclaim against the county is still pending in the Third Circuit Court. Moreover, the plain language of HRS §205-12 obviates any need for a court to determine who is responsible for enforcing land use classification laws.

2) Stare Decisis Confirms the Plain Language of HRS §205-12, the Legislature has Conferred Responsibility to Enforce the State's Land Use Laws on the Counties.

HRS chapter 205 unambiguously provides for enforcement by the appropriate governmental agencies. HRS §205-12 entitled "Enforcement" provides as follows:

The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restrictions on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

HRS §205-12 (2001)

This Court has recognized that the power to enforce chapter 205 is with the counties:

[p]ursuant to their enforcement duties under §205-12, counties have the responsibility to take necessary action against violators . . . Thus, looking to the express language of HRS § 205-12, it is clear and unambiguous that enforcement power resides with the appropriate officer or agency charged with the administration of county zoning laws, namely the counties, and not the LUC.

Lanai Co. v. Land Use Comm'n, 105 Hawaii 296, 318, 97 P.3d 372, 394 (2004). The Intermediate Court of Appeals (ICA) decision in Pono v. Molokai Ranch, Ltd., 119 Haw. 164, 194 P.3d 1126 (App. 2008) merely effectuates the clear language of the statute. Where a statute is clear, the Court's duty is to give effect to the plain meaning of the statute.

Where the language of the statute is plain and unambiguous, and the literal application of the language would not produce an absurd or unjust result, and the language is clearly consistent with the purposes and policies of the statute, judicial construction is inappropriate and it is our duty to give effect to the law according to its plain and obvious meaning.

Puchert v. Aagsalud, 67 Haw. 25, 34, 677 P.2d. 449, 456 (1984). (citing State v. Palama, 62 Haw. 159, 612 P.2d 1168 (1980)).

This is precisely what the ICA did in this case and there is no basis for granting the writ. Those seeking to establish a private right of action under chapter 205 should pursue that goal with the legislature.

- 3) Should The Court Determine That This Matter is Not Moot, Then The Proper Course Is Remand To The ICA To Address The Other Issues That Were Not Decided On Appeal.

The ICA did not address the other issues raised in the appeal:

We conclude that the Association did not have a private right of action to enforce their Chapter 205 claims and, therefore, the Circuit Court lacked subject matter jurisdiction over the Association's claims. See Pono, 119 Hawai'i at 180-90, 194 P.3d at 1142-52; see also Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai'i 296, 97 P.3d 372 (2004) (HRS § 205-12 authorizes the counties, not the LUC to enforce Chapter 205); accord Rees v. Carlisle 113 Hawaii 446, 153 P.3d 1131 (2007) (circuit court lacked jurisdiction because the subject ordinance did not create a private right of action). Thus, we do not reach the merits of Wai'ola's other grounds for challenging the Circuit Court's rulings in favor of the Association and against Wai'ola on the Association's Cross-Claims.

See Summary Disposition Order Filed on March 12, 2009, and attached to Petitioner's Application for Writ as Appendix "A" at p. 10. The ICA also did not address the issues raised by the Ala Loop Association in conjunction with their request for an award of attorneys' fees. Id

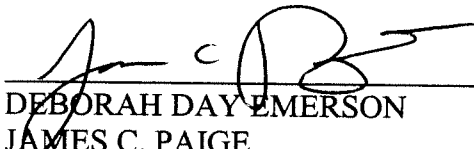
at 10-11. If this matter is not determined to be moot and the Court reverses the ICA's Summary Disposition Order, then this appeal must be remanded to the ICA for further proceedings to decide the remaining issues on appeal.

III. Conclusion.

This case is moot as Wai'ola School is no longer a neighboring landowner. Accordingly, the Writ for Certiorari should not be accepted. If this court were to determine that the case is not moot, and reverse the ICA's Summary Disposition Order, then this appeal must be remanded to the ICA so that the ICA can consider the other issues on appeal.

DATED: Honolulu, Hawaii, August 5, 2009.

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