

NO. 27707

IN THE SUPREME COURT OF THE STATE OF HAWAII

EM. RIMANDU  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

2009 JUL 28 AM 11:41

FILED

COUNTY OF HAWAII, a municipal  
corporation of the State of Hawaii,

Plaintiff/Counterclaim  
Defendant/Appellee/Cross-  
Appellee,

vs.

ALA LOOP HOMEOWNERS, an  
unincorporated association,

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

vs.

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

[caption continued on next page]

) CIVIL NO. 97-0383(2)  
) (Declaratory Relief)  
)

) 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 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/THRID-PARTY  
) PLAINTIFF ALA LOOP COMMUNITY  
) ASSOCIATIONS'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

Amicus Curiae Native Hawaiian Legal Corporation's Brief in Support of Writ of Certiorari

Appendix A  
Certificate of Service

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DAVID KIMO FRANKEL 5791

JOHN DOES 1-10; JANE DOES 1-10;	)
DOE CORPORATIONS 1-10; AND DOE	)
ENTITIES 1-10	)
	)
Defendants/Appellees/Cross-	)
Appellees.	)
_____	)
	)
ALA LOOP COMMUNITY	)
ASSOCIATION, an unincorporated non-	)
profit association,	)
	)
Third-Party Plaintiff/	)
Defendant/Counterclaimant/	)
Cross-Claimant/Appellee/Cross-	)
Appellant	)
	)
vs.	)
	)
LAND USE COMMISSION, STATE OF	)
HAWAII	)
	)
Third-Party Defendant/Appellee/	)
Cross-Appellee.	)
_____	)

**AMICUS CURIAE NATIVE HAWAIIAN LEGAL CORPORATION’S BRIEF  
IN SUPPORT OF WRIT OF CERTIORARI**

**I. INTRODUCTION**

Amicus Curiae Native Hawaiian Legal Corporation asks this Court to correct the Intermediate Court of Appeals’ grave error in holding that no private cause of action exists to enforce HRS chapter 205, the State Land Use Law – a radical departure from settled precedent. This Court should grant a writ of certiorari because the Intermediate Court of Appeals overlooked: decades of Hawai`i Supreme Court case law; Article XI § 9 of the State constitution, which authorizes private rights of action; and HRS § 607-25, a statute that manifestly shows that the legislature intended there to be a private right of action to enforce HRS Chapters 205.

**II. QUESTION PRESENTED**

Does a private cause of action no longer exist to enforce HRS chapter 205, the State Land Use Law?

### **III. STATEMENT OF PRIOR PROCEEDINGS**

Amicus Curiae Native Hawaiian Legal Corporation adopts the Statement of Prior Proceedings articulated by Ala Loop Community Association in its application for writ of certiorari.

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

Without delving into the facts of the case, the Intermediate Court of Appeals ruled that as a matter of law, 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. Amicus Curiae Native Hawaiian Legal Corporation adopts the discussion of the facts articulated by Ala Loop Community Association in its application for writ of certiorari.

### **V. ARGUMENT**

The Intermediate Court of Appeals' decision disregards the will of the voters in amending their state constitution, legislative intent in enacting HRS § 607-25, and decades of analysis from this Court. In so doing, the Intermediate Court of Appeals closes the court house doors to Native Hawaiians and other members of the public. It leaves members of the public unable to protect their rights – particularly when faced with a bureaucratic institution uninterested or unable to enforce the law.

#### **A. The Intermediate Court of Appeals Ignored Decades of Hawai'i Supreme Court Precedent Giving the Public Access to the Courts to Enforce Environmental Laws.**

Unlike the federal courts that have limited jurisdiction, the state circuit courts are courts of general jurisdiction. *State v. Villados*, 55 Haw. 394, 397, 520 P.2d 427, 430 (1974). We defined jurisdiction as "the power and authority on the part of the court to hear and judicially determine and dispose of the cause pending before it." *Id.* at 396, 520 P.2d at 430. HRS § 603-21.5 gives the circuit court subject matter jurisdiction over civil actions and proceedings. Thus, the circuit court has jurisdiction over all civil causes of action unless precluded by the State Constitution or by statute.

*Sherman v. Sawyer*, 63 Haw. 55, 58, 621 P.2d 346, 348-9 (1980).

In the seminal case *Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982), the Hawai'i Supreme Court considered whether citizens enjoy a private right of action to protect public rights as well as the applicability of *Cort v. Ash*, 422 U.S. 66 (1975). The Court held "it is unjust to deny members of the public the ability to enforce the public's rights when they are

injured.” *Akau*, 65 Haw. at 388, 652 P.2d at 1134. The *Akau* court discussed the concept of “private rights of action” as a part of its discussion of “standing” in roman numeral two (II) of the Court’s opinion which addresses “the standing issue.” *Id.* at 386, 652 P.2d at 1133. The Court observed that the legislature may preclude private rights of action. Nevertheless, the court observed in that case that private enforcement would further the goals of the relevant environmental statutes.

The *Akau* court’s reasoning that the issue regarding “private rights of action” is a subset of the issue of “standing” echoes the court’s analysis in *Reliable Collection Agency v. Cole*, 59 Haw. 503, 510-511, 584 P.2d 107, 111 (1978). In that case the Hawai’i Supreme Court specifically examined the case law on standing in determining whether a private right of action existed. Thus, the Court made clear that standing case law is particularly relevant in interpreting whether any private right of action exists.

Since then, the Hawai’i Supreme Court has repeatedly emphasized that standing barriers should be removed so that Native Hawaiians and other members of the public can sue to enforce environmental laws.

[O]ur opinions over the past decade have reflected an awareness of the transition from ‘legal right’ to ‘injury in fact’ as the federal standard in the realm of environmental concerns for judging whether a plaintiff’s stake in a dispute is sufficient to invoke judicial intervention.

*Life of the Land v. Land Use Commission*, 63 Haw. 166, 174, 623 P.2d 431, 439 (1981). *See also, Ka Pa`akai O Ka`aina v. Land Use Commission*, 94 Hawai’i 31, 42-3, 7 P.3d 1068, 1079-80 (2000), *Citizens for Protection of the North Kohala Coastline v. County of Hawai’i*, 91 Hawai’i 94, 100-1, 979 P.2d 1120, 126-7 (1999), *Sierra Club v. Department of Transportation*, 115 Hawai’i 299, 320 167 P.3d 292, 313 (2007)(“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”) and the cases cited therein.

Furthermore, the Hawai’i Supreme Court has held that Native Hawaiians have a clear right of action to protect their constitutionally recognized traditional and customary rights:

With regard to native Hawaiian standing, this court has stressed that “the rights of native Hawaiians are a matter of great public concern in Hawai[‘]i.” *Pele Defense Fund v. Paty*, 73 Haw. 578, 614, 837 P.2d 1247, 1268 (1992), certiorari denied, 507 U.S. 918, 113 S. Ct. 1277, 122 L. Ed. 2d 671 (1993). Our “fundamental policy [is] that Hawaii’s state courts should provide a forum for cases raising issues of broad public interest, and that

the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by *allowing a plaintiff to bring claims before the court.*"

*Ka Pa`akai*, 94 Hawai`i at 42, 7 P.3d at 1079.

Suits to enforce environmental laws in Hawai`i are generally filed pursuant to HRS § 632-1. HRS § 632-1 grants the courts the ability to make binding adjudications where some right is at issue. 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 Hawai`i Supreme Court has repeatedly rendered decisions in private rights of action pursuant to HRS § 632-1 to enforce HRS Chapter 205 as well as other land use statutes. For example, in *Citizens for Protection of the North Kohala Coastline v. County of Hawai`i*, 91 Hawai`i 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 specifically discussed the fact that the community group sued pursuant to HRS § 632-1. The Court reiterated the state's liberal standing doctrine and held that HRS § 632-1 did not present a barrier to adjudication. The Court then interpreted HRS § 205-3.1(a) to conclude that there was no violation of the State Land Use Law.

In *Save Sunset Beach Coalition v. City & County of Honolulu*, 102 Hawai`i 465, 78 P.3d 1 (2003) residents sued, in part, over the city and the developer's failure to comply with HRS Chapter 205. The Hawai`i Supreme Court held that the issue as to whether the developer would comply with HRS Chapter 205 was not ripe. "This should not, however, bar the Plaintiffs from raising this issue again as may be appropriate." *Id.* at 483, 78 P.3d at 19. The Court never indicated that the plaintiffs did not have the right to even bring their claim.

In *Hawaii's Thousand Friends v. City & County*, 75 Haw. 237, 858 P.2d 726 (1993), an environmental organization sued to enforce HRS Chapter 205A pursuant to HRS § 632-1. The Court held that plaintiffs were clearly allowed to bring a generic declaratory action over the City's failure to obtain a special management area use permit for the demolition of camp structures. *Id.* at 245. *See also, Dalton v. City & County of Honolulu*, 51 Haw. 400, 462 P.2d 199 (1969)(allowing citizens to seek a declaratory judgment and injunction for violations of

general plan amendment process); *Hall v. City & County*, 56 Haw. 121, 530 P.2d 737 (1975)(striking down city ordinance inconsistent with charter); *Kaiser Hawaii Kai Development Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989)(in which Bishop Estate had a right of action to ensure compliance with HRS § 46-4)

Thus, the Intermediate Court of Appeals' opinion conflicts with past judicial precedent. It also overlooks relevant constitutional and statutory provisions.

**B. The Intermediate Court of Appeals Overlooked the State Constitution and HRS § 607-25.**

In 1978, the voters of this State amended the Hawai'i State Constitution to add a provision, Article XI § 9 which provides:

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.

The amendment to the constitution “provides that individuals may directly sue public and private violators of statutes, ordinances and administrative rules relating to environmental quality.” *Proceedings of the Constitutional Convention of Hawai'i of 1978*, Volume 1, Journal and Documents, at 690 (1980). The framers of this constitutional provision noted the definition of environmental rights is “accomplished by relying on the large body of statutes, administrative rules and ordinances relating to environmental quality.” *Id.* at 689).<sup>1</sup> The constitutional right was defined in “terms of present laws” – including HRS Chapter 205. *Id.* See also, *Life of the Land v. Land Use Commission*, 63 Haw. at 177, 623 P.2d at 441; *Sierra Club v. DOT*, 115 Hawai'i at 320 n.28, 167 P.3d at 313 n. 28; 16 U. HAW. L. REV. 85, 135 (1994).

One of the “overarching” purposes of the State Land Use Law is to “protect and conserve’ natural resources.” *Curtis v. Board of Appeals, County of Hawai'i*, 90 Hawai'i 384, 396, 978 P.2d 822, 834 (1999). Thus, HRS Chapter 205 protects the environment for the general

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<sup>1</sup> The Hawai'i Supreme Court has long recognized that “the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional principle is to give effect to that intent. The general rule is that, if the words used in a constitutional provision . . . are clear and unambiguous, they are to be construed as they are written.” *Kaho'ohanohano v. State*, 114 Hawai'i 302, 339, 162 P.3d 696, 733 (2007)(emphasis added, internal quotation marks and citations omitted).

public. It protects environmental rights and recreational interests.<sup>2</sup> Furthermore, HRS Chapter 205 protects native Hawaiian rights. *Ka Pa`akai O Ka`aina v. Land Use Commission*, 94 Hawai`i 31, 44-5, 7 P.3d 1068, 1081-2 (2000). There can be no doubt that the State Land Use Law establishes environmental rights that each person can enforce.

There is no question then that when the voters of this State amended the constitution, they intended that any person would have a private right of action to sue to enforce these laws that protect our environment.

Furthermore, in enacting HRS § 607-25, the Legislature demonstrated its intent that the public would have a private right of action to enforce HRS Chapter 205. 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.” *Kahana Sunset Owners v. Maui Cty Council*, 86 Hawai`i 132, 134-5, 948 P.2d 122, 124-5 (1997). The Legislature sought to “encourage individuals and organizations to enforce the law.” *Id.* at 135, 948 P.2d at 125. The Legislature observed, “The bill will give fuller effect to Article XI, Section 9 of the Constitution of the State of Hawaii, which gives Hawaii’s people the right to bring lawsuits enforcing environmental laws.” Sen. Stand Comm. Rep. No. 450-86 in 1986 Senate Journal at 976. “In broad terms, the focus of HRS § 607-25 is civil suits that seek to enjoin parties that have been or are ‘undertaking any development without obtaining all permits or approvals required by law from government agencies[.]’ HRS § 607-25(e).” *Sierra Club v. DOT of Haw.*, 2009 Haw. LEXIS 118, 125-126 (May 13, 2009). HRS § 607-25(c) specifically defines the laws to which developers must comply to includes HRS Chapter 205, the State Land Use Law. The plain language of HRS § 607-25, the committee reports enacting it, and the Supreme Court’s

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<sup>2</sup> “In review of any petition for reclassification of district boundaries pursuant to this chapter, the commission shall specifically consider . . . (3) the impact of the proposed reclassification on the following areas of state concern: (A) Preservation or maintenance of important natural systems or habitats; (B) Maintenance of valued cultural, historical, or natural resources; (C) Maintenance of other natural resources relevant to Hawaii’s economy, including natural resources . . .” HRS § 205-17. “Conservation districts shall include areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness and beach reserves; conserving indigenous or endemic plants, fish and wildlife . . .” HRS § 205-2(e).

interpretation of it all make it abundantly clear that the legislature has intended that citizens enjoy a private cause of action to enforce chapter 205.<sup>3</sup>

**C. The Supreme Court Cases Cited by the Intermediate Court of Appeals are Inapplicable to the Enforcement of Environmental Laws.**

The “key inquiry” is whether the court can determine that there was an intent “to provide the plaintiff with a private right of action.” *Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc.*, 110 Hawai`i 302, 313 n.20, 132 P.3d 1213, 1224 n. 20 (2006).<sup>4</sup>

The laws at issue in this case are unlike the one discussed in *Rees v. Carlisle*, 113 Hawai`i 446, 153 P.3d 1131 (2007). There, the issue was compliance with a city ordinance relating to conduct of city employees – not protecting the environment. The plaintiff had no right at issue – defined by constitution or statute. Furthermore, violation of the ordinance at issue included criminal penalties. The Court held that a violation of that ordinance was more properly addressed in a criminal prosecution. *Id.* at 458, 153 P.3d at 1143. Plaintiffs here are not seeking criminal penalties or civil penalties or damages. Finally, the ordinance specifically authorized multiple enforcers to address potential conflicts (prosecutor, attorney general, and ethics commission). In contrast, HRS Chapter 205 only authorizes enforcement by the County and no other government entity, *Lanai Co. v. Land Use Comm'n*, 105 Hawai`i 296, 97 P.3d 372 (2004). Where, as here, the County refuses to enforce the law, the plaintiffs would have no remedy for noncompliance if there is no private right of action.

Similarly, in *Reliable Collection Agency v. Cole*, 59 Haw. 503, 506, 584 P.2d 107 (1978), violation of a statute prohibiting the unauthorized practice of law involved criminal sanctions – which are not involved here. Enforcers included the attorney general and any bar association.

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<sup>3</sup> The fact that the legislature has provided specific limitations, procedures, and remedies in the enforcement of HRS chapters 128D, 342B and 343 does not imply that it has *sub silentio* prohibited the enforcement of HRS chapter 205 and the other environmental statutes identified in HRS § 607-25 – and authorized by Article XI § 9 of the State Constitution.

<sup>4</sup> Because we are dealing with state law, Congressional intent is irrelevant. At the state level such an intent can be manifested both by the legislature as well as by the State Constitution. *Cf. Life of the Land v. Land Use Comm'n*, 63 Haw. at 172, 623 P.2d at 438 (standing may be “tempered, or even prescribed, by legislative and constitutional declarations of policy”)



*Id.* The Court was reluctant to allow the public to enforce a law “where there is nothing to indicate any laxity on the part of the public official charged with the enforcement responsibility.” *Id.* at 511, 584 P.2d at 111-112. That, of course, is not the case here. In addition, in *Reliable* – unlike the present one – the grievant sought damages. Finally, the Court held that there was no private right of action because there could be no implication that the statute was enacted to protect these particular grievants. In particular, the Court noted that the statute was enacted to protect “the welfare of the recipients of legal services” – not “persons against whom legal proceedings might be directed by unlicensed practitioners” as the individuals in that case were. *Id.* at 508, 584 P.2d at 110.

The same analysis was applied in *Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc.*, 110 Hawai'i 302, (2006). This Court held that commercial boating operators seeking to protect their business interests do not have a private right of action to sue pursuant to environmental laws. The Court held that the environmental laws at issue “were not promulgated with the objective of protecting business interests or competition but rather with the objective of protecting and preserving the environment for the general public.” *Id.* at 313. Thus, the Court held, these commercial interests had no private right of action to enforce them. In addition, the County had taken enforcement action.

These instances in which this Court has found no private right of action are clearly distinguishable from this case. First, none of the cases in which the Hawai'i Supreme Court found no private right of action are cases involving enforcement of environmental laws to protect the environment. Second, in each of those cases there were multiple enforcement authorities who could take action. In this case, there is only one authority, and that authority has refused to enforce the law. Third, in those cases the relevant law was clearly directed to benefit parties other than the plaintiff, which is not the case here. Fourth, plaintiffs here are not seeking damages, financial reward or criminal penalties.

## **VI. CONCLUSION**

Closing the court house doors is inconsistent with the decades of judicial precedent, the plain language of Article XI section 9, the framer's intent in drafting Article XI section 9, and the legislative intent in adopting HRS § 607-25. If certiorari is not granted, Native Hawaiians and other ordinary citizens would be unable to ensure that traditional and customary practices as well as the environment are protected.

Dated: Honolulu, Hawaii, July 24, 2009.

A handwritten signature in black ink, appearing to read 'DK Frankel', written over a horizontal line.

DAVID KIMO FRANKEL