NO. 27707

IN THE SUPREME COURT OF THE STATE OF HAWAII

COUNTY OF HAWAII, 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	Civil No. 03-1-308 APPEAL FROM 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, 2005; **(4)** FIRST AMENDED FINAL JUDGMENT ENTERED ON DECEMBER 12, 2005; **(5)**

[Caption continued on next page]

ALA LOOP COMMUNITY ASSOCIATION'S
RESPONSE TO WAI'OLA WATERS OF LIFE MOTION FOR RECONSIDERATION
FILED HEREIN ON JULY 19 , 2010

CERTIFICATE OF SERVICE

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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, 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.	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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Defendant/Counter-Claimant/ Cross-Claimant/Appellee/ Cross-Appellant,	)
vs.	)
LAND USE COMMISSION, STATE OF HAWAII,	)
Third-Party Defendant/ Appellee/Cross-Appellee.	)

ALA LOOP COMMUNITY ASSOCIATION'S RESPONSE TO WAI'OLA WATERS OF LIFE MOTION FOR RECONSIDERATION FILED HEREIN ON JULY 19 , 2010

Pursuant to the Hawaii Supreme Court's July 26, 2010 Order, the Ala Loop Community Association ("Ala Loop") hereby submits its opposition to the Motion for Reconsideration ("the Motion") filed herein by Wai'ola Waters of Life ("WOL") on July 19, 2010.

I. INTRODUCTION

WOL's Motion constitutes a shotgun list of objections to this Court's decision, including matters previously and thoroughly disposed of by this Court. On its face the Motion reasserts arguments already disposed of by the Court, including whether Ala Loop's claims were moot, and whether Hawaii land use law, Chapter 205, constitutes a law relating to "environmental quality, including control of pollution and conservation, protection and enhancement of natural resources."

Reduced to its essence, WOL's new arguments mistakenly assert that:

1. The Court's Decision violates the separation of powers doctrine by usurping the legislative authority and responsibility for developing Hawaii's land use law when it did not discuss Haw. Const., Art. XI, § 3, which provides that the legislature shall provide standards and criteria to conserve and protect agricultural lands.

2. The parties who may be affected by the decision did not have an opportunity to participate.

3. The doctrines of primary jurisdiction and exhaustion of administrative remedies will be undermined by the Court's Decision.

Before addressing WOL's principal arguments in more detail, Ala Loop summarizes its response to WOL's various assertions by pointing out that:

A. While the appeal came to the Intermediate Court of Appeals ("ICA") by way of appeal from a default judgment, that judgment was based upon deposition testimony and documents that were submitted in a manner which would have satisfied summary judgment standards, and the trial court made detailed findings of fact and conclusions of law based on the evidence submitted. Interestingly, no party has disputed the merits of the trial court's conclusions that HRS § 302A-1184 did not exempt WOL from complying with Chapter 205 or that WOL was required to obtain a special permit. In addition to WOL, the County of Hawaii and the Land Use Commission of the State of Hawaii ("LUC") had ample opportunity to advance their positions on the substantive issues, but inexplicably failed to do so.

B. While this Court has vacated the default judgment, this does not vitiate or affect the right of Ala Loop to continue to prosecute its cross-claim against WOL or its counterclaim against the County, and the trial court's determination on the issue of whether WOL is required to obtain a special permit to operate on the subject lands or on agricultural lands will help clarify issues in a manner affecting the public interest. There also remains for determination what permanent relief should be issued against WOL relating to the site as well as the issue of the recovery of fees and costs by Ala Loop against both WOL and the County under the private attorney general doctrine and HRS §607-25.

C. WOL's unfounded assertion that Ala Loop did not file its own claim for declaratory relief is belied by Count I of Ala Loop's Counterclaim and Cross-Claim, which expressly requested that the trial court "enter declaratory relief that Defendant WOL must obtain a special permit from the Planning Commission and the LUC pursuant to HRS § 205-6" (see Counterclaim and Cross-Claim, Appendix "C" to Ala Loop's Application for Writ of Certiorari filed on July 21, 2010). Ala Loop's claim for declaratory relief provided Ala Loop the procedural context to pursue its right to enforce Chapter 205 in accordance with Haw. Const., Art. XI, § 9.

D. As to the "public interest" exception to the mootness doctrine, WOL's suggestion that the participation of parties subject to the laws or having responsibility for enforcing them was lacking is similarly without basis. The County of Hawaii, having express statutory authority

to enforce Chapter 205, was noticeably silent on the merits of the issue when the default judgment was moved on. Instead, the County acknowledged in its position memo on the motion for default judgment that: "[Ala Loop] certainly has a right to make their arguments concerning the applicability of County and State zoning laws with respect to charter schools." Ala Loop and its members represented the public interest.

The LUC was specifically joined as a party by Ala Loop in order that the LUC, which also administers special permit proceedings when the property exceeds 15 acres, could weigh in on the issues. But, the LUC declined this opportunity, stating that it did not wish to comment since it might be considering a special permit application if one was applied for, even though the issue below was not the merits of such an application, but the threshold issue of whether a special permit was required.

These no position stances by the County and the LUC was not for lack of opportunity, but highlighted Ala Loop's concern that if neither the County or the LUC were willing to enforce the special permit requirement of Chapter 205, who was?

E. WOL raises the specter that the Court's decision "has the potential for significantly diminishing the force of administrative processes and proceedings previously established by the Legislature and the counties," but without saying how or why. WOL makes the unfounded statement that "pending proceedings will be abandoned altogether in favor of actions brought directly in the courts." As more fully discussed below, the circumstances of this case and the Court's decision do not contravene these processes, rather, Ala Loop's cross-claim sought to require the implementation of these processes, in the absence of which the doctrine of primary jurisdiction is inapplicable.

F. WOL's continued insistence that Chapter 205, HRS is not an "environmental quality" law ignores the context of Haw. Const., Art. XI, § 9 which expressly states that the private right of action includes 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.*" Agricultural lands, and the soils thereon are considered to be just as important a component of Hawaii's natural resources as are lands in conservation and other districts. As stated in HRS §205-42, the objective of identifying important agricultural lands is to plan for the maintenance of "a strategic agricultural *land*

resource base, to protect agricultural lands from the encroachment of non-agricultural uses." Moreover, while this case involved the issue of enforcement of the provisions of Chapter 205 relating to agricultural lands, what should the conclusion be if this case involved the improper use of conservation lands in the absence of proper authority to do so?

G. WOL argues that Haw. Const., Art. XI, § 3 of the Constitution authorizes the Legislature to provides standards and criteria to assure the conservation and protection of agricultural lands, and that this Court's decision somehow violates the separation of powers doctrine. WOL misses the point here. Haw. Const., Art. XI, § 3 lends yet more support to the argument that Hawaii's agricultural lands are part of Hawaii's natural resources which deserve protection. While Section 3 provides the legislature with the authority to provide standards and criteria for the protection of agricultural lands, it does not affect the enforcement provisions of Haw. Const., Art. XI, § 9.

H. WOL suggests that the Court should have specified the procedural parameters under which suits could be filed under Haw. Const., Art. XI, § 9, an argument which itself contravenes the separation of powers doctrine. This Court exercised its authority to interpret Hawaii's Constitution. The Legislature has the authority to set reasonable limitations on the private right of action and it is not the province of the Court to dictate these limitations to the Legislature. To do so would cross the line which WOL claims should not be crossed. As discussed below, the private right of action to enforce laws relating to environmental quality are already subject to certain reasonable limitations as the Legislature may impose or which may already be provided by law. WOL improperly suggests that the Court should have engaged in hypothetical decision or policy making, an argument which the case or controversy requirement for declaratory relief actions does not allow. This Court's Decision was made "in the circumstances of this case," and in this case only.

II. ARGUMENT

A. WOL Abuses Rule 40 HRAP by Attempting to Relitigate this Case on Legal Theories That Could Have But Were Not Advanced Previously

WOL's Motion for Reconsideration relies heavily on two new legal theories that it failed to advance in either its Answering Brief to the ICA, or in its Response in Opposition to Ala Loop's Application for Writ of Certiorari, or at oral argument: (1) separation of powers; and

(2) Haw. Const., Art. XI, § 3.[1] WOL's discussion of these matters consists entirely of matters which could and should have been presented prior to the issuance of this Court's opinion in this case on July 9, 2010. Rule 40, HRAP, should be considered analogous to Rule 59, HRCP, and "[w]hile a motion for reconsideration is addressed to the court's discretion, *Anderson v. Oceanic Properties, Inc.*, 3 Haw. App. 350, 650 P.2d 612 (1982], it "will not lie to relitigate old matter." 6A Moore's Federal Practice ¶ 59.07 (1979)." *K. M. Young & Associates, Inc. v. Cieslik*, 4 Haw. App. 657, 666, 675 P.2d 793, 801 (1983). WOL should not now be permitted to relitigate new legal theories that could have but were not raised earlier. In any event, these new theories are unpersuasive.

B. ***WOL's Own Brief Demonstrates That Ala Loop's Dispute with the County of Hawaii over Charter School's Use of Lands Within the Agriculture District Is Not Moot***

WOL's Response in Opposition to Ala Loop's Application for Writ of Certiorari relied heavily on the argument that the case was moot. After receiving additional briefing on the issue, this Court quite rightly held that the case was not moot and that, even if it were moot, the Court should answer the important public policy issues at issue in this case under the "public interest" exception to the mootness doctrine. Slip Op., at 31. WOL has not provided any new information or argument that affects this conclusion, and the mootness issue has properly been disposed of. Nothing has changed since that time to make the facts more favorable to a decision of mootness, but WOL nevertheless seeks to relitigate the issue. Facts set forth in WOL's own brief, however, demonstrates that the basic dispute between Ala Loop and the County of Hawaii over the applicability of Chapter 205 to charter school operations on land within the Agriculture District is very much alive. As WOL notes,

> "Public charter schools must find their own facilities and pay for them out of their annual operating allotments. Most charter schools struggle to locate affordable facilities for their operations. Lands classified agricultural are frequently the sites for charter school campuses because more lands are classified agricultural and they are more affordable, even if special use permits have to be secured before the land can be used as sites for schools."

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[1] The "it's not an environmental law" argument WAS raised at oral argument and thoroughly disposed by this Court.

WOL's Memorandum in Support of Motion for Reconsideration, at 4 fn.1. Because there is no suggestion in the record that the County of Hawaii has changed its position that charter schools need not obtain special use permits before setting up operations on land within the agricultural district, Ala Loop faces a very real likelihood that the County will again approve a charter school seeking to set up shop on the same parcel of land at issue in this case, even if WOL itself would foreswear or show itself to be incapable of implementing any such intention (which it has not). WOL also fails to consider that the issues in this case which remain for disposition also include the issue of whether Ala Loop is entitled to the recovery of fees and costs under HRS §607-25, or the private attorney general doctrine recently enunciated by this Court in *Sierra Club v. DOT*, 120 Haw. 181, 218, 202 P.3d 1226 (2009)[2]

C. ***Enforcement of HRS Chapter 205 Does Not Violate The Separation of Powers Doctrine***

WOL argues that the Court's recognition of a private right of action to enforce HRS Chapter 205 under Haw. Const., Art. XI, § 9, somehow intrudes impermissibly into the constitutionally mandated policy-making role of the Legislature. WOL misunderstands Haw. Const., Art. XI, § 9, and the careful manner in which the Court's interpretation of that provision does not conflict with but instead implements the intent of its Framers.

Haw. Const., Art XI, § 9 carefully recognizes the separate but complementary supportive roles of the Legislature and private plaintiffs initiating citizen suits. The first sentence in this provision states that "[e]ach 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.*" Id. (in part) [emphasis added]. Clearly, then, it is up to the Legislature to enact statutes (such as Chapter 205) that "define" the "clean and healthful environment" to which each person is entitled. The Court's decision does not purport to interfere with this policy-making function of the Legislature.

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[2] Factors to be considered in determining the issue of recovery of fees under this doctrine include three basic factors: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, and (3) the number of people standing to benefit from the decision.

The second sentence of Haw. Const., Art. XI, § 9, provides that "[a]ny 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." In other words, once the Legislature has defined the scope of the constitutional right to a "clean and healthful environment" through the enactment of appropriate statutes, the power to enforce that right, as already defined by the Legislature, is available to "*any person,*" subject to reasonable limitations as provided by law, not merely those officials of the State and county governments who are tasked by statute with certain enforcement responsibilities. Private enforcement of the standards already established by the Legislature in no way intrudes on the policy-making authority of the Legislature to establish those standards. The Constitutional right to a clean and healthful environment, and the public's ability to enforce this right was not intended to be dependent upon further legislative authorization in every instance. The separation of powers argument is not supported by the express language of Haw. Const., Art. XI, § 9, and this Court properly exercised its power in interpreting this provision.

D. Wai'ola Seeks to Erect a False Dichotomy Between Environmental Laws and Economic Development Laws; in Fact, HRS Chapter 205 Serves Both Purposes

Recognizing that Haw. Const., Art. XI, § 9 does in fact create a private right of action, WOL next claims that HRS Chapter 205 is, in its view, an "economic development law" and therefore cannot be an "environmental quality" law. WOL's Motion for Reconsideration, at 3. This makes no sense. In an island state where land is limited and where cultural sites and native plants and animals are likely to be adversely affected by changes in land use, Chapter 205 as the State of Hawaii's most comprehensive land use law is the most fundamental of all "environmental quality" laws. The text of Chapter 205 itself makes this connection explicit, as the decision-making criteria for reclassification of district boundaries include consideration of "[t]he impact of the proposed reclassification on the following areas of statewide concern: (A) Preservation or maintenance of important natural systems or habitats; [and] (B) Maintenance of valued cultural, historical, or natural resources." §§ 205-17(3)(A) and (B), HRS. The fact that these decision-making criteria also include "Maintenance of other natural resources relevant to Hawaii's economy, including agricultural resources," § 205-17(3)(C), HRS, in no way diminishes legislative history cited by the Court, and the main purpose of the bill enacting

Chapter 205 was to protect and conserve the urban and agricultural lands within all counties in order to, *inter alia*, "conserve forests, water resources and land," and to protect and conserve nature resources. Slip Op at pp. 40-41.

WOL then argues that private enforcement of Chapter 205 is somehow precluded by or inconsistent with the provisions of Haw. Const., Art. XI, § 3, regarding protection of agricultural lands. This attempt to focus the argument on agricultural lands ignores the fact that Chapter 205 also encompasses regulations and guidelines for the permissible uses of lands within the urban, rural and conservation districts. Enforcement of Chapter 205 should no different if WOL had engaged in urban uses on conservation land and had threatened resources on such lands. Agricultural lands are of no less importance than conservation lands and Haw. Const., Art. XI, § 3 elevates this importance by requiring that standards and criteria for the classification and uses of such lands be established so that the State may achieve its aim to "conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands." Haw. Const., Art. XI, § 3 (in part).

The Legislature exercises its proper role when it enacts laws protecting agricultural lands such as HRS § 205-41, et. seq., and those laws provide the necessary "standards and criteria" by which agricultural lands are to be identified and their protections specified. Once those criteria have been established by the Legislature, the recognition of a private right of action to enforce Chapter 205 (and other laws relating to "environmental quality") in no way interferes with the Legislature's ability to determine the "standards and criteria" that are to be enforced in such an action. Indeed, private enforcement of Chapter 205 directly furthers the purposes of Haw. Const., Art. XI, § 3 and HRS Chapter 205, and in no way hinders them, by assuring that the public will have a judicial remedy when county or other public officials seek to undermine Haw. Const., Art. XI, §§ 3 and 9, by declining to enforce the Legislature's established "standards and criteria" for agricultural lands, including its land use laws.

E. Private Enforcement of HRS Chapter 205 under the Circumstances of this Case Does Not Interfere with Agency Procedures or Contravenes the Doctrines of Primary Jurisdiction and Exhausting Administrative Remedies

WOL's appeal to the doctrine of "primary jurisdiction" and the need to exhaust administrative remedies might have some weight if this were a case where a private plaintiff was

seeking to mount a collateral attack on a decision by the County to issue a special use permit to authorize a land use not otherwise allowed under Chapter 205 or the County's special permits. Here, however, the County had decided that Chapter 205 simply had no application in the case at hand. There was no administrative proceeding under Chapter 205 in which Ala Loop could have sought to intervene, and the County had continued to allow WOL to proceed with its project notwithstanding the absence of such a special permit proceeding. The doctrines of "primary jurisdiction" and "exhaustion of administrative remedies" can have no application where there is no administrative proceeding with which a citizen suit can be said to have interfered.

Without analyzing the issue, WOL simply asks the rhetorical question of whether the doctrines of primary jurisdiction or exhaustion of administrative remedies will continue to apply, citing a land use case and an Employees Retirement System ("ERS") case, being *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 734 P. 2d 161,(1987) and *Fratinardo v. Employees Retirement System*,121 Haw. 462, 220 P. 3d 1043 (Haw. App. 2009), respectively.

In *Kona Old*, a citizens group sought to challenge the issuance of a Special Management Area (SMA) minor permit issued for the development of a 4-lot subdivision along the coastline. This Court held that while HRS § 205A- 6 authorized any person to commence a civil action alleging that any agency has breached the policies and guidelines of the Coastal Zone Management Act ("CZMA"), the doctrine of administrative remedies applied, and the challenge to the issuance of the SMA minor permit should not have preceded the resolution by the Board of Appeals of the question of whether the issuance of the permit was proper. Under Hawaii County's Charter, the Board of Appeals was provided authority to hear and determine "all appeals from the actions of the planning director and planning commission."

The Court in *Kona Old* discussed the doctrines as follows:

> "'Primary jurisdiction' ... applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body[;)" *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956). When this happens, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* at 64 (citation omitted). In effect, "[t]he courts are divested of whatever

> original jurisdiction they would otherwise possess[.]" B. Schwartz, *supra,* § 8.24, at 488 (emphasis omitted). And "even a seemingly contrary statutory provision will yield to the overriding policy promoted by the doctrine." *Id.*
>
> "Exhaustion," on the other hand, comes into play "where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." *United States v. Western Pac. R.R.,* 352 U.S. at 63. "The exhaustion principle asks simply that ... the avenues of relief nearest and simplest should be pursued first." *Moore v. City of East Cleveland,* 431 U.S. 494, 524 (1977) (Burger, C.J., dissenting). "Judicial review of agency action will not be available unless the party affected has taken advantage of all the corrective procedures provided for in the administrative process." B. Schwartz, *supra,* § 8.30, at 502. Under this principle, Kona Old clearly had no right to seek judicial review.

69 Haw., at 93.

In the case at bar, no permit was issued or "action" taken by the Planning Director, nor any enforcement action taken. The Corporation Counsel merely sent a letter to the County Council in which it opined without further analysis that HRS § 302A-1184 exempts a charter school from complying with Chapter 205, but a charter school was required to obtain a County use permit. The threshold issue of whether a charter school was exempt from compliance with Chapter 205 by reason of HRS §302A-1184 was not a matter placed within the special competence of the Planning Department or the Board of Appeals as would have been the case had a special permit proceeding been in place. Section 25-2-20 of the County's Zoning Code allows the jurisdiction of the Board of Appeals to be invoked in matters where the appellant is "aggrieved by the decision of the director *in the administration or application of this chapter*" (Appendix "A" to WOL's Motion). There was no "decision" administering Chapter 25, only an opinion, which coupled with WOL's ongoing operations, made the case ripe for judicial intervention. As with HRS § 205A-6 or Haw. Const., Art. XI, § 9 provided Ala Loop with a remedy for the Planning Department's non-compliance with Chapter 205 when no administrative proceeding was in place.

In *Fratinardo,* a class action lawsuit challenging retirement benefit calculations was filed. In that case, the Circuit Court held that as the issues had not yet been determined by the ERS Board, the matter should be remanded to the Board and the action stayed pending the outcome of the Board's determination. In affirming the circuit court's decision, the ICA held that while the ERS Board had primary jurisdiction on the issue, a dismissal was not mandated as in other cases where subject matter jurisdiction did not exist, since the stay could serve purposes such as avoiding statutes of limitations issues, conserving judicial resources to allow an administrative agency with expertise to decide the predicate issues, and to avoid unfair disadvantage to the plaintiffs. Interestingly, the ICA also reviewed and distinguished two cases which ERS cited as authority for its argument that in lieu of a stay, the claims should be dismissed. *Aha Hui Malama O Kaniakupuku v. LUC*, 111 Haw. 124, 139 P.3d 712 (2006) and *Hui Kako'o Aina Ho'opulapula v. BLNR*, 112 Haw. 28, 143 P.3d 1230 (2006). Those case were distinguished, as they involved issues as to whether the circuit court had jurisdiction to review appeals from administrative actions based on HRS § 91-14(a)[3], involving contested case hearings. In both those cases, there was no subject matter jurisdiction under HRS § 91-14(a), as the administrative decisions were not taken in the context of "contested case hearings" (in *Aha Hui*, the hearing was not one "required by law", and in *Hui Kako'o*, specific procedures for requiring a contested case hearing were not followed by the appellant). In this case, Ala Loop relied upon HRS § 632-1 and the Planning Department's opinion was not done in the context of a contested case hearing or an agency decision which the Board of Appeals had jurisdiction over.

This Court's holding is entirely consistent with the primary jurisdiction and exhaustion of administrative remedy doctrines. The issue of WOL's exemption from compliance with Chapter 205 was not within the special competence of either the Planning Department or the

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[3] "§91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is a party to a contested case proceeding before that agency or another agency."

Board of Appeals, there was no permit issued which Ala Loop could appeal, and the claim was not cognizable in the first instance by the Board of Appeals, which did not have authority to interpret HRS § 302A-1184. Ala Loop had the right to seek enforcement of the special permit requirement of HRS § 205-6.

F. The Issue of Whether a Special Permit Is Required and the Analysis That Accompanies a Special Permit Application Clearly Relates to Environmental Quality, Pollution, and Natural Resources

In its memo, WOL rehashes old territory which this Court has covered in a thorough manner in its decision. WOL attempts to narrowly define and isolate the several terms contained in Haw. Const., Art. XI, § 9, and makes much of the fact that the section does not specifically use the term land use laws when discussing pollution, conservation, and protection of natural resources. But § 9 is not so limited, and uses the term "laws *relating* to environmental quality, *including* ...," language which is inclusive, not restrictive.

The general statutory scheme of Chapter 205 and the purposes behind its enactment relating to environmental quality were amply covered by this Court (see pages 39-43). Moreover, the briefing in this matter has identified the issues which must be addressed in a special permit application, namely, Chapter 205-6, HRS and Hawaii County Planning Commission's Rule 6, relating to Special Permits. In conjunction with determining the issue of whether the proposed use under a special permit constitutes an "unusual and reasonable" use, Rule 6 requires the Planning Commission to find, *inter alia*, that the desired use shall not adversely affect surrounding properties, and shall not unreasonably burden public agencies to provide sewers, water and drainage. Ala Loop had pointed out that sanitation and drainage issues affecting natural resources and a "clean and healthful environment" were being directly implicated by WOL's use. The irony is that had a special permit application been submitted by WOL, Ala Loop would have had the opportunity to raise these issue relating to pollution and environmental quality, and been involved in a statutory Chapter 91 process where it would have administrative remedies to avail itself of.

One need look no further than at the contents of Section 205-6 relating to special permits to understand that it contains express provisions relating to the protection of environmental resources in the context of a special permit application. HRS § 205-6 (f) provides as follows:

"(f) Land uses substantially involving or supporting educational ecotourism, related to the preservation of native Hawaiian endangered, threatened, proposed, and candidate species, that are allowed in an approved habitat conservation plan under section 195D-21 or safe harbor agreement under section 195D-22, which are not identified as permissible uses within the agricultural district under sections 205-2 and 205-4.5, may be permitted in the agricultural district by special permit under this section, on lands with soils classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U."

WOL also implies that the Legislature has not already spoken on the issue of whether Chapter 205 should be considered an environmental quality law which the public may enforce under Haw. Const., Art. XI, § 9. WOL ignores the Legislature's clearly expressed purpose and findings when HRS § 607-25 was enacted by the 1986 State Legislature as Act 80. Act 80, § 1:

"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 . . . .

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 further of this legislative and constitutional policy, the Legislature then expressly included Chapter 205 as one of the laws intended to protect environmental quality and natural resources, and for which citizens have standing to enforce and to seek the recovery of attorneys fees. The Legislature has already spoken clearly on the issue of whether Chapter 205 is considered a law "relating to environmental quality" under Haw. Const., Art. XI, § 9.

G. The Court's Decision Was Well Reasoned and All Necessary Parties with a Sufficient Interest in the Issues Involving the "Public Interest" Were Represented

In the name of the "public interest", WOL asserts that the parties most likely to be the subject of the laws or responsible for enforcing same did not participate in this appeal. It is not clear who WOL is referring to since at least two representatives from the Attorney General's Office and the County's Office of Corporation Counsel, representing agencies charged with enforcement of land use law, could have weighed in on the issue, but chose not to.

When speaking about the public interest, WOL seems to forget that Ala Loop represented members of the Ala Loop community, who are members of the public. WOL's interest as a landowner/user were also represented. Amicus briefs were filed by other entities interested in the question, and this Court did not deny any person or entity wishing to file such briefs this opportunity.

WOL also seems to forget that the public interest raised by Ala Loop in this case involved the fact that by failing to require WOL to apply for a special permit before operating a school on the premises, Ala Loop and its members was deprived of the opportunity to participate

in public hearings and possibly Chapter 91 proceedings before the Planning Commission and the LUC.

In this case, Ala Loop was advancing the public interest by asserting WOL's obligations under Chapter 205. It is this basic right which Haw. Const., Art. XI, § 9 was intended to protect and which the Legislature has acknowledged. This case also fits within HRS § 632-6, which states that Chapter 632 is intended to be remedial, and "is to be liberally interpreted and administered, *with a view to making the courts more serviceable to the public.*" This Court's Decision has not been made in a vacuum, and the issues have been thoroughly considered.

H. Private Right of Action to Enforce Laws Relating to Environmental Quality Will Not Interfere with Existing Limitations and Regulations Concerning the Right

Throughout its argument, WOL raises the specter that this Court's decision will somehow open floodgates of litigation relating to land use or environmental laws in an uncontrollable manner. Yet WOL fails to specify how this will happen, and as will be more fully discussed below, there are already a number of laws which set forth reasonable limitations and regulations covering the circumstances under which the enforcement of such laws may be undertaken in legal proceedings. Such laws and regulations already include:

A. Hawaii's declaratory relief statute allows for the determination of requests for declaratory relief when there if a justiciable case or controversy.

B. Hawaii's case law provides a number of additional limitations on whether a plaintiff may bring a suit to enforce, including accepted principles of standing, whether a case is ripe for decision, whether laches may apply, and the currently rehashed mootness doctrine.

C. Doctrines such as primary jurisdiction and the exhaustion of administrative remedies provide reasonable limitations on the circumstances under which the enforcement of laws relating to environmental quality may be enforced, when a proceeding within the area of expertise is before the agency as discussed above.

D. Cases involving appeals from contested case decisions pursuant to HRS Chapter 91 will not be affected.

E. At least some statutes cited in HRS § 607-25 contain specific enforcement limitation provisions or allow enforcement to take place and are subject to the aforementioned

legal doctrines[4]. HRS § 607-25 itself contains limitations on the circumstances under which attorneys fees may be awarded, and requires private parties to first notify the party alleged to be violating the environmental quality law at issue as well as to seek enforcement from the respective agency responsible for enforcement authority to take enforcement action, failing which the private party may seek enforcement and fees.

F. The legislature has the authority to adopt additional reasonable limitations relating to the enforcement of laws relating to environmental quality. Such regulations might include requirements as to prior notice, notice contents, limitations of actions, and the award of attorneys fees and costs where frivolous actions are sought against public agencies.

G. Finally, the practical reality is that the costs of prosecuting enforcement litigation is itself a real and practical limitation. This case has drained the resources of the Association and its counsel. Unlike WOL's representation by the Attorney General, Ala Loop is

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[4] As examples of such limitations, see:

HRS §6E-13	Historic Preservation, Injunctive Relief (Allowed when irreparable injury established).
HRS §195D-32	Conservation of Aquatic Life, Wildlife and land Plants, Citizen Suits (No action less than 60 days after written notice of violation provided to agency, except that action can be taken immediately after notice if there is significant risk to any species of wildlife or plant).
HRS §205A-6	Coastal Zone Management, Cause of Action (Action must be commenced within 60 days of the act which is the basis of action).
HRS §342B-56	Air Pollution control, Citizen Suits (No action commenced less than 60 days after notice has been given to director, department or alleged violator or if director has commenced diligent prosecution of civil action to require compliance).
HRS §343-7	Environmental Impact Statements, Limitation of Actions A. Judicial proceedings re lack of assessment must be initiated within 120 days of agency's approval, or if action is undertaken without formal determination of necessity of statement, then within 120 days of commencement of action; B. Judicial proceedings re determination that statement is required must be initiated within 60 days of public notification of determination; or if the determination that a statement is not required, must be initiated within 3o days of public notification of determination; C. Judicial proceedings re acceptance of EIS must be initiated within 60 days of public notification of acceptance.

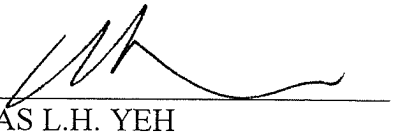
a small community association which could ill afford this lawsuit and appeal, but has had no choice but to continue to prosecute the action.

III. CONCLUSION

WOL's Motion for Reconsideration should be denied. The County's failure to enforce HRS Chapter 205, coupled with its erroneous interpretation of HRS § 302A-1184 deprived Ala Loop of the opportunity to participate in administrative proceedings which would have assured that the right of the members of Ala Loop to a clean and healthy environment would be properly protected. The doctrines of primary jurisdiction and exhaustion of administrative remedies have not been undermined by this Court's decision, and the Court's interpretation of Haw. Const., Art. XI, § 9 neither violate the separation of powers doctrine or interfere with the Legislature's authority to enact reasonable limitations on lawsuits seeking the enforcement of Hawaii's environmental quality laws, such as HRS § 607-25. The Court's decision is amply supported by the facts and circumstances of this case.

Dated: Hilo, Hawaii, August 4, 2010.

TSUKAZAKI YEH & MOORE

By 

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CERTIFICATE OF SERVICE

I hereby certify that a *file-stamped* copy of the foregoing document was duly served upon each of the following parties by U.S. Mail, first-class postage prepaid, on the date indicated below:

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