NO. 29035

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawaii; et al.,

Plaintiffs/Appellants/
Cross-Appellees,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; HAWAII SUPERFERRY, INC., et al.,

Defendants/Appellees/
Cross-Appellants.

Hawaii Second Cir. Ct.
Civil No. 05-1-0114(3)

(Declaratory Judgment)

Judge Joseph E. Cardoza

ANSWERING BRIEF OF STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
ON ACT 2

APPENDICES 1 - 3
(Filed As Separate Document)

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STATEMENT OF THE CASE

1. Introduction; Nature of the Case

Plaintiffs-appellants are environmental organizations. Defendants-appellees are: (1) the Hawaii Department of Transportation and two of its officers (collectively, "the Department" or "the State"); and (2) Hawaii Superferry, Inc. (Superferry), a Hawaii corporation.

Plaintiffs filed two separate opening briefs on June 6, 2008. This answering brief of the Department responds to plaintiffs' merits brief challenging Act 2 of the second special session of the 2007 Hawaii Legislature.[1]

In August 2007, the Hawaii Supreme Court decided Sierra Club v. Department of Transp., 115 Haw. 299, 167 P.3d 292 (Sierra Club I). The primary issue in Sierra Club I was whether the Department had correctly determined in February 2005 that the proposed improvements at Kahului Harbor to accommodate Superferry were sufficiently minor to justify exemption from the environmental assessment requirements of HRS chapter 343.

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[1] Plaintiffs' second opening brief seeks to increase the amounts of the attorneys' fees and costs awarded to plaintiffs by the circuit court. The Department is filing contemporaneously with this answering brief a short separate answering brief in response to plaintiffs' second opening brief. The answering brief is short because, on July 8, 2008, the Department filed its opening brief on its own appeal, pointing out that plaintiffs were not the prevailing parties and were not entitled to any attorneys' fees or costs.

The Hawaii Supreme Court resolved that issue adversely to the Department.

In Sierra Club I, the Hawaii Supreme Court (1) held that plaintiffs had established standing to sue; (2) held that the Department's exemption determination was erroneous as a matter of law; (3) reversed the circuit court's entry of summary judgment in favor of the Department with instructions to enter summary judgment in favor of plaintiffs; and (4) remanded to the circuit court for such other and further disposition of any remaining claims as may be appropriate. Sierra Club I; 2007 WL 2428467 (Order, Aug. 23, 2007)(5R 1552).

2. Post-Remand Circuit Court Proceedings

This appeal is the post-remand sequel to Sierra Club I.

The August 23, 2007 order of the Hawaii Supreme Court in Sierra Club I instructed the circuit court to enter summary judgment in favor of plaintiffs on their claim for an environmental assessment. The circuit court did so on August 24. (5R 1554 [S.J. Order]).

On August 27, 2007, plaintiffs moved for preliminary and permanent injunction. (5R 1577 [Mot. Aug. 27, 2003]). The Department and Superferry separately opposed the motion for injunction. (5R 1788 [Ferry Opp'n]; 6R 1928 [State Opp'n]).

The primary grounds for the oppositions were that: (1) plaintiffs had not sought injunctive relief in the first two and

one-half years of the case; (2) nothing in the Sierra Club I opinion required the circuit court to enter an injunction; and (3) while plaintiffs had prevailed on the merits of their claim for an environmental assessment under HRS chapter 343, the circuit court could not grant injunctive relief without considering the traditional balance of harm and public interest factors. Id.

The circuit court decided to take evidence on the motion for preliminary and permanent injunction. (Tr. Aug. 29, 2007 at 57-59).[2] The evidentiary hearing on the motion for injunction commenced September 10 and concluded October 9, 2007. (Trs.).

On October 9, 2007, the circuit court ruled from the bench, enjoining Superferry from operating and partially voiding the 2005 operating agreement between the Department and Superferry. (Tr. at 9-31).[3] Later in the day, the circuit court entered a

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[2] The court had previously granted plaintiffs' ex parte motion for temporary restraining order prohibiting Superferry from operating (other than to return stranded passengers to their port of origin). (5R 1570 [Order, Aug. 27, 2007]). On plaintiffs' motion, the ex parte TRO was extended through the resolution of the motion for preliminary and permanent injunction. (8R 2935 [Order, Nov. 7, 2007]

[3] "What the Court will be doing with respect to its order is the following: The Court will issue an injunction preventing the use of the Kahului Harbor and its related improvements until the environmental assessment process, as set forth in Chapter 343, is lawfully completed. The Court, in connection with this order, will declare that the operating agreement is void inasmuch as the Department of Transportation did not have the power or authority to issue the entitlement to use the state lands in question that

written order to the same effect, pending the preparation of findings of fact and conclusions of law. (7R 2273-81). And, on November 9, 2007, the court entered its findings of fact and conclusions of law in support of the October 9, 2007 rulings. (9R 2946-2972).

In the interval between (1) the October 9, 2007 bench ruling and written order on plaintiffs' motion for injunction; and (2) the November 9, 2007 FOF/COL on that motion, the 2007 legislature passed Act 2 of its second special session. Act 2 took effect when the governor signed it November 2, 2007. (App. 1).[4]

Act 2--discussed in the fact section below--allows large capacity ferry vessels to operate in Hawaii waters and to use state harbor improvements subject to all the conditions and protocols of Act 2, notwithstanding any requirements of chapter 343. (App. 1 at § 3 p. 10).

Based on Act 2, the Department and Superferry moved to dissolve the injunction and to vacate the order voiding the operating agreement. (8R 2544 [Superferry], 2551 [State] Nov. 5, 2007). Plaintiffs opposed the motions. (9R 2974 [Opp'n, Nov. 13, 2007].

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were the subject of the exemption determination." (Tr. Oct 9, 2007 at 30).

[4] Appendix 1, containing Act 2, also contains Executive Order No. 07-10 (8R 2794-2802) issued by the governor November 4, 2007 pursuant to Section 4(c) at pages 15-17 of Act 2.

On November 14, 2007, the circuit court heard and granted the defense motions to dissolve and vacate. (Tr. at 73-91) (App. 2); 10R 3336-3340 [Order])(App. 3).

The circuit court entered its final judgment on January 31, 2008 in favor of defendants and against plaintiffs. (11R 3718, [Jan. 31, 2008]). Counts I, III, IV, and V of the first amended complaint, based on HRS chapter 343, were dismissed with prejudice as moot in light of Act 2. Count II was dismissed without prejudice in light of plaintiffs' successful motion for voluntary dismissal.[5]

The parties filed timely notices of appeal and cross-appeal first from the January 31, 2008 judgment and then from the February 13, 2008 bench ruling and March 27, 2008 order granting in part plaintiffs' motion for reimbursement of reasonable attorneys' fees and costs.[6]

3. Facts

The significant fact of this case is the enactment of Act 2, effective November 2, 2007. On that date, Act 2 supplanted HRS

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[5] The order granting plaintiffs' motion for voluntary dismissal of any remaining, residual claims was filed the same day the final judgment was filed. (11R 3704 [Jan. 31, 2008]).

[6] (11R 3898 [Pls. Appeal, Feb 29, 2008]); 11R 3936 [State Cross-Appeal, Mar. 13, 2008]; 11R 3884 [Ferry Cross-Appeal, Mar. 14]; 12R 4124 [State Appeal, Apr. 3, 2008]; 12R 4141 [Ferry Appeal, Apr. 4, 2008]; 12R 4217 [Pls. Cross-Appeal] Apr. 15, 2008]).

chapter 343 as the law applicable to large capacity ferry vessels.

In summary, Act 2: (1) allows large capacity ferry vessels to operate during and after environmental reviews and studies; (2) authorizes enforcement, execution, or re-execution of operating agreements between the State and large capacity ferry vessel companies; and (3) allows related harbor improvements to be constructed and used by the State, large capacity ferry vessel companies, and others. (Act 2).

In enacting Act 2, the legislature adopted a new public policy for Hawaii and amended and clarified existing law to provide that notwithstanding HRS chapter 343, large capacity ferry vessels could operate during the environmental review process, subject to all conditions imposed by Act 2 (such as those regarding whale encounters and invasive species). (Act 2 at 10-18). Moreover, large capacity ferry vessels were subject also to conditions or protocols imposed by executive order of the governor to mitigate potentially significant environmental effects. The governor issued executive order No. 07-10 on November 4, 2007. (8R 2794-2802 [Ex. H State Mot. Dissolve])(App. 1).

The legislature did <u>not</u> exempt large capacity ferry vessels from environmental review. Rather, the legislature <u>required</u> the

preparation of an environmental impact statement (even if one was not then legally required). (App. 2 at 3, 23-44).

Act 2 contains specific legislative findings concerning the public interest and the need to revise public policy. The legislature noted "the unique nature and critical importance of the inter-island ferry service industry to the people of our state . . . ." The legislature found that the large capacity ferry vessel concept was in the public interest in that "it provides a real and innovative alternative to existing modes of transporting people, motor vehicles, and cargo between the islands of the state." The legislature noted the usefulness to the State of large capacity ferry vessels for disaster relief. The legislature declared the inter-island operation of large capacity ferry vessels to be a required public convenience and necessity. And, the legislature found that it was "clearly in the public interest that a large capacity ferry vessel service should commence as soon as possible . . . ." (Act 2 at 2, 3, 5, 11)(emphasis added).

As of this writing, the environmental review process required by Act 2 is underway, Superferry is operating between Honolulu Harbor and Kahului Harbor, and plaintiffs do not dispute that Superferry and the Department are complying with all the conditions and protocols of Act 2.

STATEMENT OF THE ISSUES [7]

This appeal presents two issues, both of which should be answered affirmatively:

1. Is Act 2 constitutional?

2. Did the circuit court properly apply Act 2 to the proceedings before it?

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[7] In the last footnote of their brief, on page 34, plaintiffs attempt to raise three issues not included in their points of error and not briefed. This tactic is at odds with Rules 28(b)(4) and 28(b)(7) of the Hawaii Rules of Appellate Procedure. Likewise, the provisions of the Hawaii Constitution mentioned in footnote 1 on page 12 of plaintiffs' opening brief are not connected to any argument that is briefed.

STANDARDS OF REVIEW

1. Issues of constitutional interpretation present questions of law that are reviewed de novo. Hanabusa v. Lingle, 105 Haw. 28, 31, 93 P.3d 670, 673 (2004)(citation omitted). The appellate court's review is governed by the principles that (1) every legislative enactment is presumptively constitutional; (2) the party challenging the enactment has the burden of showing unconstitutionality beyond a reasonable doubt, and (3) the constitutional defect must be clear, manifest, and unmistakable. E.g., In re Guardianship of Carlsmith, 113 Haw. 236, 239, 151 P.3d 717, 720 (2007)(upholding statute defining incapacitated person); Hawaii Hous. Auth. v. Lyman, 68 Haw. 55, 71, 704 P.2d 888, 898 (1985)(upholding Hawaii land reform act)(internal quotation marks and citation omitted).

2. Questions of law are reviewed de novo. Kemp v. State of Hawaii Child Support Enforcement Agency, 111 Haw. 367, 383, 141 P.3d 1014, 1030 (2006).

ARGUMENT

ACT 2 DOES NOT VIOLATE THE STATE OR FEDERAL CONSTITUTION

1. Introduction

This case exemplifies the effective functioning of the tripartite system of democratic governance.

The judicial branch of government construes and interprets the laws that are relevant to disposition of a case, but does not itself legislate or make laws. E.g., State v. Haugen, 104 Haw 71, 75, 85 P.3d 178, 182 (2004).

In Sierra Club I, the Hawaii Supreme Court interpreted the then-governing law--HRS chapter 343, the accompanying administrative rules, and precedential caselaw--in holding that an environmental assessment was required for the Superferry-related improvements at Kahului Harbor. The Hawaii Supreme Court properly remanded the case to the circuit court for appropriate disposition of any remaining claims. (7R 2233-34 [Judg., Oct. 3, 2007]).

On remand, the circuit court elected to hold an evidentiary hearing on plaintiffs' claims for injunctive relief, and, at the conclusion of the evidentiary hearing on October 9, 2007, granted injunctive relief based on HRS chapter 343. (7R 2273 [Order]; Tr. Oct. 9, 2007).

The governor--in whom the executive power of the Hawaii government is vested--properly exercised her authority under

Article III, Section 10 of the Hawaii Constitution to convene both houses of the legislature in special session commencing October 24, 2007. (9R 3054-55 [Proclamation, Oct. 23, 2007]).[8]

The legislature, in passing Act 2 (and the governor in signing it) properly discharged their respective responsibilities. The legislature speaks for the people. See Island County v. Washington, 955 P.2d 377, 380 (Wash. 1998). The legislative power is "the power to enact laws and to declare what the law should be." Bissen v. Fujii, 51 Haw. 636, 638, 466 P.2d 429, 431 (1970) (citations omitted).

The law is not static. Rather, "[I]t is the paramount role of the legislature as a coordinate branch of our government to meet the needs and demands of changing times and legislate accordingly." Id. The principal function of the legislature is to make laws that establish the policy of the state; legislative

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[8] Plaintiffs' contention that the governor's proclamation was "illegal and void" (Open Br. at 31) does not make sense. The contention disregards the crystalline language of Article III, Section 10 of the Hawaii Constitution: "The governor may convene both houses or the senate alone in special session." (emphasis added).

Plaintiffs' contention is instead based on a statute (HRS § 601-5) concerning the independence of the judiciary. The Constitution of course trumps the statute.

Moreover, convening a special legislative session does not and cannot interfere with judicial independence. Once a special legislative session commences, the legislature may pass or not pass bills as it pleases and, in so doing, may of course react with corrective legislation to judicial decisions with which the legislature disagrees.

policies are inherently subject to review and revision; and any law "merely declares a policy to be pursued until the legislature shall ordain otherwise." National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co., 470 U.S 465-66 (1985)(citations omitted). Based on its perception of the public interest in late 2007, the legislature in passing Act 2 purposefully changed the policy of HRS § 343 as applied to large capacity ferry vessels to allow such vessels to operate during and after the environmental review process.

After Act 2 took effect in November 2007, the circuit court properly applied Act 2 to the ongoing remand proceeding, dissolved the injunctive relief based on HRS chapter 343 that had been granted in October 2007, and entered judgment in favor of the Department and Superferry and against plaintiffs. "When a change in the law authorizes what had previously been forbidden it is an abuse of discretion for a court to refuse to modify an injunction founded on the superseded law." Proctoseal Co. v. Barancik, 23 F.3d 1184, 1187 (7th Cir. 1994)(quoting American Horse Prot. Ass'n v. Watt, 694 F.2d 1310, 1316 (D.C. Cir. 1982).

2. Act 2 Did Not Violate Plaintiffs' "Vested Rights"

Plaintiffs' lead-off argument--and the lynchpin of their entire appeal--is the argument that the "final judgment" of the Hawaii Supreme Court in Sierra Club I conferred on them "vested rights" under HRS chapter 343 that are forever fixed in time without regard to subsequent amendments of chapter 343. (Open Br. at 9-12).

Plaintiffs' argument does not make sense procedurally or substantively. Procedurally, the supreme court's judgment in Sierra Club I is captioned "Judgment on Appeal," not "Final Judgment." Whatever the caption, the judgment did not end or even purport to end the case. Rather, the judgment on appeal remanded the case to the circuit court for further proceedings. (7R 2233-34). The further proceedings in circuit court--in the form of plaintiffs' request for injunctive relief under HRS chapter 343--were ongoing when Act 2 supplanted chapter 343 as to large capacity ferry vessels. The further proceedings were ongoing when the Department and Superferry moved to dissolve the injunction and to vacate the order partially voiding the operating agreement. And the further proceedings are continuing now in the form of this appeal and the companion appeals on attorney's fees and costs.

The circuit court succinctly rejected plaintiffs' vested rights theory:

> Next, whether Act 2 mandates a reopening of a final judgment and is therefore unconstitutional, the Court finds that in this particular case no final judgment has been entered. There has been a judgment on appeal that is in this proceeding, not a final judgment, and indeed [plaintiffs'] motion for voluntary dismissal that is pending before this Court only serves to confirm that no final judgment could have been entered in these proceedings.

(Tr. Nov. 14, 2007 at 81-82)(App. 2)(emphasis added).

Substantively, the Hawaii Supreme Court honors the presumption that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." Office of Hawaiian Affairs v. State, 110 Haw. 338, 352, 133 P.3d 767, 781 (2005)(quoting Dodge v. Board of Educ., 302 U.S. 74, 79 (1937)).

Given this presumption, plaintiffs' claim of "vested rights" under HRS chapter 343 after the effective date of Act 2 is an assault on the inherent, essential power of the legislature to speak for the people and to revise the public policies of the State as the legislature determines is necessary.

3. Act 2 Does Not Violate Hawaii Constitution Article I, Section 21.

Plaintiffs' assertion that Act 2 is unconstitutional special legislation is based on two provisions of the Hawaii Constitution: Article I, Section 21; and Article XI, Section 5. (Open. Br. at 12-13).

Article I, Section 21 is entitled "Limitations of Special Privileges" and provides, "The power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities."

Act 2 does not violate Article I, Section 21. Indeed, Act 2 does not violate any of the three elements of Article I, Section that together comprise a violation: (1) making an irrevocable grant, (2) of special privileges and immunities, that (3) would impair the general welfare.

First--and dispositively--Act 2 does not irrevocably grant anything to Superferry or to any other large capacity ferry vessel company.

The 1950 Constitutional Convention Journal explained the "irrevocable grant" language of Act I, section 21:

> The purpose of this section is to prevent the State from impairing its power to act in the general welfare by making any irrevocable grant of special privileges or immunities. This, of course, will not prevent the State from making revocable grants of special privileges and immunities authorized by this Constitution, such as tax exemptions, etc. Your Committee recommends that this section be adopted.

1 Proceedings of the Constitutional Convention of Hawaii of 1950, at 304 (1961)(emphasis added).

There is nothing irrevocable about Act 2. Section 19 of Act 2 provides that Act 2 shall be repealed on the earlier of the forty-fifth business day following adjournment of the 2009

regular legislative session or of acceptance of the final EIS required by Act 2. (Act 2 at 51-52). Moreover, the legislature may at any time it is in session repeal or otherwise amend Act 2.

Because Act 2 does not irrevocably grant any privilege or immunity to Superferry or any other large capacity ferry vessel, the other two elements of Article I, Section 21 will be discussed only briefly. The legislature, in passing Act 2, repeatedly found that Act 2 was in the public interest. (Act 2 at 2, 3, 5, 11). Act 2 has in no way impaired the power of the State to act in the general welfare, and plaintiffs do not contend otherwise. Further, Act 2 does not confer "special benefits and immunities" on Superferry because Act 2 applies equally to all large capacity ferry vessels, not specifically to Superferry. This point is included in the immediately following subsection concerning general and special legislation under Article XI, Section 5.

4. Act 2 Does Not Violate Hawaii Constitution Article XI, Section 5

Article XI, Section 5 is entitled "General Laws Required; Exceptions" and provides in relevant part that, "The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws . . . ."

Plaintiffs contend that Act 2 is an unconstitutional special law. (Open. Br. at 13-25). Their lead-off argument in this

regard is that, based on a prior opinion of the Attorney General, the Department is judicially estopped from arguing that Act 2 is not special legislation. (Open Br. at 13-15). The estoppel argument does not make sense procedurally or substantively (and does not even apply against Superferry).[9]

Act 2 does not violate either of the two required elements required for violation of Article XI, Section 5: (1) the legislative exercise of power over lands owned or controlled by the State, (2) by special rather than general legislation.

A. The Legislature Did Not Exercise Power Over State Lands

Act 2 authorizes large capacity ferry vessels to operate inter-island in Hawaii during and after the environmental review process and subject to numerous conditions and protocols. The circuit court noted in granting the post-Act 2 motions to dissolve the injunction and to vacate the order partially

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[9] Procedurally, judicial estoppel precludes a party from assuming inconsistent positions in the course of the one judicial proceeding. Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 219, 664 P.2d 745, 752 (Haw. App. 1983). In this one judicial proceeding initiated by plaintiffs, the State has consistently maintained in both the circuit court and on appeal that Act 2 is general, not special, legislation under Article XI, Section 5. (10R 3276, 3281-86 [State Reply, Nov. 14, 2007]).

Substantively, the Attorney General opinion (No. 2007-02)(Open Br. App. E) on which plaintiffs base their judicial estoppel theory is based on the very different circumstances that the legislature, not an executive branch administrative agency, had required the State to grant exclusive use of a specific parcel of land to one specific organization.

invalidating the operating agreement, "Act 2 does not involve the exercise of legislative power over the lands of the State. Act 2 instead alters the applicability of Chapter 343 of the Hawaii Revised Statutes and the environmental review process of this state as it relates to large capacity ferry vessels." (Tr., Nov. 14, 2007 at 82)(App. 2)(emphasis added).

The circuit court was correct. Act 2, as its very title indicates, is simply not about exercising control over lands. It is an Act that, in the public interest, temporarily exempts large capacity ferry vessels from the environmental review otherwise required under HRS chapter 343.

Plaintiffs' argument that the legislature in passing Act 2 improperly exercised power over the lands owned by the State is based solely on the 2005 operating agreement (5R 1621-1738) between the Department and Superferry. (Open Br. at 15-17).

The operating agreement preexisted Act 2. Act 2 in 2007 refers to existing operating agreements with large capacity ferry vessels (E.g., Act 2 at 5, 7, 8, 10) but Act 2 did not create any such agreements.

The operating agreement resulted from the exercise of executive branch power in 2005, not of legislative branch power in 2007 or any other time. Specifically, HRS chapter 266 is entitled "Harbors." HRS § 266-1 provides that all commercial harbors, roadsteads, and waterfront improvements belonging to or

controlled by the State shall be under the care and control of the department of transportation. The Department has issued Hawaii Administrative Rules Title 19, chapters 41-44 to implement its authority over the State's commercial harbors. These administrative rules were cited as supporting authority in the introductory "whereas" clauses of the operating agreement. (5R 1626).

In short, the operating agreement between the Department and Superferry does not support plaintiffs' allegation of a misuse of legislative power under Article XI, section 5 of the Hawaii Constitution. The operating agreement results from the exercise of executive branch power.

Not only is the 2005 operating agreement between Superferry and the Department not an exercise of legislative power, but the operating agreement does not confer special treatment on Superferry. The opposite is true: in the 2005 operating agreement, the Department granted Superferry the "non-exclusive right" to use the harbor facilities and specifically required that Superferry "will be required to share" the harbor facilities with other users. (5R 1621 [2005 Op. Agree.] at 1632, 1634).

Plaintiffs' claim that the operating agreement was void ab initio (Open. Br. at 10, 16, 33) is legally incorrect and of no

consequence here. The argument is based on a studied disregard of Act 2. [10]

The legislative history of Article XI, Section 5 further demonstrates its inapplicability here. "[T]he real purpose of this section is to prevent the alienation of lands into private hands," and to prevent "exchanges by special law which would work to the disadvantage of the State." "It is put in so as to

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[10] The critical fact here is that Act 2 repetitively provides that operating agreements between the State and large capacity ferry vessels found to have been executed in violation of HRS chapter 343 may be enforced as written or as executed or re-executed. (Act 2 at 5, 8, 11).

The Hawaii Supreme Court in Sierra Club I did not address the operating agreement. During the remand proceedings, the circuit court partially voided the operating agreement in October 2007 and then, immediately after Act 2 took effect, reversed itself and, applying Act 2, vacated the portion of its October order concerning the operating agreement. (7R 2273, 2279-80 [Oct. 2007 order]; 10R 3366 [Nov. 14, 2007 order](App. 3)).

The 2005 operating agreement was not ultra vires. The Department is fully empowered under HRS § 266-2 to enter into exactly such contracts. And, of course, even if the operating agreement had been ultra vires--which it was not--the law is that the legislature may ratify even an ultra vires contract entered into by a public entity for a public purpose and, when ratified, the contract will be valid and binding as if authorized in the first instance. E.g. New Haven Water Co. v. City of New Haven, 40 A.2d 763, 766 (Conn. 1944).

There can be no question here that plaintiffs' "void ab initio" argument cannot withstand the plain language of Act 2 preserving the operating agreement as written or as executed or as re-executed.

restrict possible special land exchange deals or things of that nature which as we know in the past have definitely caused a considerable loss to the Territory." 2 Proceedings of the Constitutional Convention of Hawaii of 1950, at 631, 641 (1961).

"Alienation" of land of refers to the conveyance of title. See, Black's Law Dictionary (8th ed. 2004)(Bryan Garner, ed.) at 80 ("[A]ny transfer of real estate short of a conveyance of the title is not an alienation of the estate.")(citation omitted).

In sum, neither the passage of Act 2 by the legislature in 2007 nor the execution of the operating agreement by the Department in 2005 supports plaintiffs' claim of the unconstitutional exercise of legislative power over the State's lands.

B. Act 2 Is General, Not Special, Legislation

Plaintiffs contend that Act 2 is not a general law as required by Article XI, Section 5 of the Hawaii Constitution, but is instead a special law that creates a class of one that is limited to Superferry. (Open Br. at 17-25).

(i) Governing Principles. The relevant law does not support plaintiffs' argument.[11] There are two governing legal principles relevant to the issue whether legislation is general or special.

[11] There is no counterpart in the federal constitution to Article XI, Section 5 of the Hawaii Constitution. Other state

The first governing legal principle, which is not disputed, is that legislation qualifies as general rather than prohibited special legislation if the classification established by the legislation is rationally related to a legitimate state interest, even one not identified by the legislature. For example, the Supreme Court of Illinois, in upholding a statute challenged as special legislation, held that "the statute is constitutional if the classification it establishes is rationally related to a legitimate state interest" and that "[i]f this court can reasonably conceive of any set of facts that justifies distinguishing the class the statute benefits from the class outside its scope, it will uphold the statute." Crusius v. Illinois Gaming Board, 837 N.E.2d 88, 94-95 (Ill. 2005)(citations omitted). See also CLEAN v. Washington, 928 P.2d 1054, 1064 (1997)(stating that "In order to survive a challenge as special legislation, any exclusions from a statute's applicability, as well as the statute itself, must be rationally related to the purpose of the statute." (emphasis added)(citation omitted).

The second governing principle is that a class "may consist of one person or corporation as long as the law applies to all members of the class." CLEAN, 928 P.2d at 1063 (emphasis added) (upholding Stadium Act that benefitted only counties with more

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constitutions have comparable provisions against special legislation.

than one million people when only one county qualified). See also Crusius, 837 N.E. 2d at 95-96 (noting that only one non-operational licensee--Emerald--could qualify under the Riverboat Gambling Act and holding that it was rational for the legislature to conclude that recommencing Emerald's operations would promote the economic goals of the Act); Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 432 A.2d 36, 46 (N.J. 1981)(holding that "The fact that only one entity that meets the specific provisions of the amendment has been identified thus far does not render legislation special. . . . [I]t is settled that a class of one is constitutionally permissible.")(citation omitted).

(ii) Hawaii Caselaw

The Hawaii appellate courts do not seem to have addressed the meaning of "general laws" in Article XI, Section 5. However, in Bulgo v. County of Maui, 50 Haw. 51, 430 P.2d 321 (1967) the Hawaii Supreme Court addressed the meaning of "general laws" in Article VIII, Section 1 of the Hawaii Constitution (at the time numbered Article VII, Section 1). It provides: "The legislature shall create counties, and may create other political subdivisions within the State, and provide for the government thereof. Each political subdivision shall have and exercise such powers as shall be conferred under general laws." (emphasis added).

In Bulgo, the newly-reelected Chair of the Maui Board of Supervisors ("Board") died in December 1966, shortly after his reelection in the November 1996 general election. The Board passed a resolution asking the legislature to adopt legislation for a special election. 50 Haw. at 52, 430 P.2d at 323. The legislature did so, providing in part that:

> The governor shall issue a proclamation within ten days after the approval of this Act requiring special elections to be held if any person elected in the general election of 1966 to the office of chairman of the board of supervisors of a county died before January 2, 1967 . . . ."

Act 47 (1967).

Plaintiff in Bulgo challenged this provision on the ground that the legislature had passed an invalid special law rather than a general law:

> [T]he challenged provision, although it is couched in general language and does not mention any county by name, is a special law because it applies to Maui only and cannot possibly apply to any other county."

50 Haw. at 57, 430 P.2d at 325-26 (emphasis added).

The Hawaii Supreme Court upheld Act 47 as a constitutional general law:

> The power given by Act 47 is the power to hold special elections . . . where the chairman-elect dies before January 2 following his election. The Act confers this power upon every county in which the contingency occurs. . . .
>
> The challenged provision does not give the county of Maui any power which is different from that which the Act gives to the counties of Hawaii and Kauai. It neither favors nor discriminates against Maui. The

> contingency contemplated in the Act now exists on Maui. The provision brings Maui within the scope of the Act in the present situation.
>
> We hold that Act 47, including the challenged provision, is a general law and complies with Article VII, Section 1 of the State constitution.

50 Haw. at 59, 430 P.2d at 326.

In the present case, given the governing legal principles that the statutory classification must be rationally related to a conceivable state purpose, and that a class may consist of one person or corporation as long as the law applies to all members of the class, Act 2 is clearly general legislation.

This is not a case in which the court is required to itself conceive of some rational basis for the challenged classification between large capacity ferry vessels and other vessels.[12] Rather, this is a case in which the legislature's own findings are clear and logical and contain multiple rational reasons for allowing large capacity ferry vessels to operate pending environmental review. (Act 2 § 1 at 2-3). These reasons include, for example, providing disaster relief, and providing a real and innovative

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[12] See Child Support Enforcement Agency v. Doe, 104 Haw. 449, 459, 91 P.3d 1092, 1102 (Haw. App. 2004) (holding "[i]t is not necessary that the legislature state a rational basis for this differential treatment. A classification will pass constitutional muster if we can conceive of some rational basis for the distinction.") (quoting Gallaher v. Elam, 104 S.W. 3d 455, 462 (Tenn. 2003).

alternative to existing modes of transporting people, motor vehicles, and cargo between islands.

There can be no question in this case--and plaintiffs raise none--that Act 2's classification of "large capacity ferry vessel" is rationally related to legitimate state interests.

Plaintiffs instead contend that Act 2 is unconstitutional special legislation because it can apply only to Superferry. (Open Br. at 17-25). This contention is incorrect. As discussed above, if--and the "if" has occurred here--the classification that results in a "class of one" rests upon a rational basis that is relevant to the purposes of the legislation, then the legislation is constitutional general legislation. Crusius v. Illinois Gaming Board, 837 N.E.2d 88, 95-96 (Ill. 2005); CLEAN v. Washington, 928 P.2d 1054, 1063 (1997); Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc., 432 A.2d 36, 46 (N.J. 1981); Bulgo v. County of Maui, 50 Haw. at 59, 430 P.2d at 327.

Put another way, because plaintiffs do not challenge the underlying rationality of the large capacity ferry vessel classification in light of Act 2's purposes, plaintiffs are in no position to complain that the one-person effect of the reasonable classification invalidates Act 2.

In the interests of completeness, the Department notes that, while Superferry is presently the only large capacity ferry vessel in Hawaii, worldwide there are numerous large capacity

ferry vessels.[13] Even if none is presently seeking to service the Hawaii market, that does not rule out such a development in the near or more distant future.

Plaintiffs also argue that the short duration of Act 2 (based on its present repeal date of mid-2009) evidences special rather than general legislation. (Open Br. at 24-25). This argument, like the "class of one" argument, is irrelevant in light of the undisputed rational relationship between the large capacity ferry vessel classification and legitimate state interests.

Moreover, this court's decision in Bulgo rebuts plaintiffs' "short duration" argument. The challenged provision that was upheld in Bulgo required the governor to issue a proclamation by May 10, 1967 requiring special elections if any person elected chairman of a county board of supervisors in the November 1966 general election had died before January 2, 1967. By May 1967,

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[13] As defined by Act 2, a large capacity ferry vessel can carry per voyage at least 500 passengers, 200 motor vehicles, and cargo between the islands of the state. (Act 2 at 9).

This court may take notice of the existence of non-Superferry large capacity ferry vessels meeting the Act 2 definition. These include the ferries that run between Maine and Nova Scotia (775 passengers/250 cars) and the ferries that run in British Columbia (2100 passengers/470 cars).

See http://www.bcferries.com/about/fleet/ and http://www.catferry.com/the-ship/?source=nflbay (last visited August 14, 2008).

the class was already closed because every county chair who was going to die before January 2, 1967 had already done so.

In sum, there is no merit to plaintiffs' claim that Act 2 was not a general law as required under Article XI, Section 5 of the Hawaii Constitution. Plaintiffs cannot overcome Act 2's presumptive constitutionality, and cannot prove, much less prove beyond a reasonable doubt, any clear, manifest, and unmistakable constitutional defect.

5. The Circuit Court Properly Applied Act 2 To The Remand Proceeding

Plaintiffs contend that "The application of Act 2 in this case is unconstitutional." (Open. Br. at 25). Plaintiffs offer up several theories on why the circuit court erred in applying Act 2 to this case after Act 2 supplanted HRS chapter 343 for large capacity ferry vessels. (Open. Br. at 25-34). Plaintiffs' theories are loosely based on "separation of powers" and largely based on reiteration of the notion--rebutted above--that the October 3, 2007 judgment of the Hawaii Supreme Court was a "final judgment" conferring unalterable vested rights on plaintiffs.

The law is that the legislature may amend existing law during the pendency of litigation without infringing separation of powers. In Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992), environmental groups in two separately-filed cases sought to prevent logging in old growth forests. Congress passed

legislation that addressed the pending cases by name and specifically provided a compromise result to the litigation.

The Supreme Court held that the new law permissibly "compelled changes in law, not findings or results under old law." 503 U.S. at 438. The Court found that "what Congress directed--to agencies and courts alike--was a change in law, not specific results under old law." 503 U.S. at 439. The Court in Robertson held that Congress had clearly and expressly changed existing law and reminded the lower courts of the obligation to find a constitutional interpretation of construction of federal "as long as [that interpretation] was a possible one." Id. at 441.

Measured by the applicable Robertson test, Act 2 did not violate constitutional doctrines of separation of powers. Act 2 permissibly changed existing law--supplanting HRS chapter 343 as to environmental reviews for large capacity ferry vessels. And, Act 2 certainly did not compel findings and results under the old law (HRS chapter 343), because Act 2 eliminated all applicability of HRS chapter 343 to large capacity ferry vessels.

A. Reopening of Closed Judgment

In a reprise of their "vested rights" theory that there was a final judgment in this case (even as the litigation continued

apace in circuit court), plaintiffs rely on Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). (Open. Br. at 26-27).

The Eighth Circuit has recently and succinctly summarized Plaut: "[T]he Supreme Court reiterated Congress possesses the power to amend existing law even if the amendment affects the outcome of pending cases . . . . The Court explained the separation of powers doctrine is violated only when Congress tries to apply new law to cases which have already reached a final judgment . . . . " Lundeen v. Canadian Pac. Ry. Co., 532 F.3d 682, 689 (8th Cir. 2008)(emphasis added).

As explained above, Act 2 did not reopen any final judgment because the remand proceedings required by the non-final October 3, 2007 judgment of the Hawaii Supreme Court were ongoing in circuit court when Act 2 took effect on November 2, 2007 (and the remand proceedings were of course subject to appellate review following the circuit court judgment).

Moreover, as the Supreme Court explained in Miller v. French, 530 U.S. 327, 344 (2000): "Plaut, however, was careful to distinguish the situation before the Court in that case--legislation that attempted to reopen the dismissal of a suit seeking money damages--from legislation that "altered the prospective effect of injunctions entered by Article III courts." Here, the circuit court's November 14, 2007 prospectively altered the effect of the October 9, 2007 order that had enjoined the

operation of Superferry and partially voided the operating agreement.

The Court in Plaut traced the history of the judicial branch/legislative branch separation of powers principle of Article III to pre-Constitution times, and noted that "Apart from the statute we review today, we know of no other instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation." Id. at 1453-1456, 1458 (emphasis added).

Act 2 cannot fit into the exceedingly narrow Plaut mold. Rather, Act 2 is a commonplace example of the legislature's exercise of its prerogative to revisit and re-set public policy following a judicial decision.[14] Put another way, Act 2 is an integral part of the process that maintains equilibrium among the branches of government.

B. Re-weighing The Equities

Plaintiffs contend that the Hawaii legislative and executive branches "reweighed the equities and directed a different outcome

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[14] See William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991) (in about two decades, Congress passed 187 separate statutes, overriding 344 total court decisions, including 124 Supreme Court decisions). The fact that none of these 344 statutes has been overturned on separation of powers grounds by itself rebuts plaintiffs' Plaut-based claims.

through Act 2 thus violating Article III of the Constitution." (Open Br. at 26-30).

This argument reiterates plaintiffs' argument under Plaut. There is no need for the Department to re-respond.

To the extent that plaintiffs rely on Natural Resources Defense Council v. Winter, 527 F.Supp.2d 1216 (C.D. Cal. 2008), aff'd 518 F.3d 658 (9th Cir. 2008), that reliance is misplaced. The passage from the Ninth Circuit NRDC decision that plaintiffs quote (Open Br. at 29) is contained in a footnote in which the Ninth Circuit, like the federal district court, expressly declined to address the Plaut separation of powers argument made by NRDC. 518 F.3d at 686 n. 47.[15]

The relevance, if any, of NRDC to the present case lies only in the district court's accurate summary/reaffirmation of the legislature's right to change the law (and the case outcome) in mid-litigation.[16]

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[15] The United States Supreme Court has granted certiorari in NRDC v. Winter. (S Ct. Dkt No. 07-1239).

[16] "Although the political branches may neither review the decisions of the courts, nor direct the results of pending cases, United States v. Klein, 80 U.S.(13 Wall.) 128, 20 L.Ed. 519 (1872) **Congress may change or amend the underlying law, even if this would change the outcome in pending litigation**. Plaut, 514 U.S. at 214, 115 S.Ct. 1447; see also Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1432 (9th Cir. 1989)(citing Friends of the Earth v. Weinberger, 562 F. Supp. 265, 270 (D.D.C. 1983)("Through the passage of legislation which governs this lawsuit, **Congress can effectively moot a controversy notwithstanding its pendency**

6. Act 2 Does Not Effect A Denial Of Due Process

Plaintiffs also argue that Act 2 unconstitutionally denies due process. (Open Br. at 32-34). This argument is wrong because (1) the legislature did not apply Act 2 retroactively but only on a going forward basis; (2) the Department and Superferry moved to dissolve the injunctive relief granted under HRS chapter 343, not to apply Act 2 retroactively; and (3) plaintiffs have no vested property rights and therefore no due process claim.

First, the effective date of Act 2 was November 2, 2007. Act 2 applied from that day forward to large capacity ferry vessels. The circuit court did not apply Act 2 retroactively in dissolving the injunctive relief entered under HRS 343. Rather, the court followed the existing law based on the changed circumstance: "When a change in the law authorizes what had previously been forbidden it is an abuse of discretion for a court to refuse to modify an injunction founded on the superseded

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before the courts.")). In Plaut, the Supreme Court held that requiring the courts to reopen final judgments in civil lawsuits violated the separation of powers. . . . Later, in Miller v. French, Justice O'Connor explained that "[p]rospective relief under a continuing, executory decree remains subject to alteration due to changes in the underlying law." 530 U.S. 327, 344, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000). As prospective relief requires "continuing supervisory jurisdiction by the court," such relief "may be altered according to subsequent changes in the law. Id. at 347, 120 S.Ct. 2246."

527 F. Supp. 2d at 1234-35 (emphases added).

law." Proctoseal Co. v. Barancik, 23 F.3d 1184, 1187 (7th Cir. 1994)(quoting American Horse Prot. Ass'n v. Watt, 694 F.2d 1310, 1316 (D.C. Cir. 1982).

Second, plaintiffs' reprise of their "vested right' claim does not resurrect HRS 343. "The doctrine of vested rights . . . like the separation-of powers expounded in Plaut, depends on the existence of a final judgment . . . . In essence, the vested rights doctrine is really only the due process analogue of the separation-of powers doctrine that prevents Congress from reopening final judgments." District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 176 (D.C. 2008)(quoting Gavin v. Branstad, 122 F.3d 1081, 1090-91 (8th Cir. 1997)(emphasis added).

The court in Beretta held that "while the plaintiffs' cause of action under the [superceded legislation] "is a species of property protected by . . .[d]ue process . . . they received "all the process that is due . . . when Congress barred pending actions such as theirs from proceeding as a rational means "to give comprehensive effect to a new law that it considered salutary." 940 A.2d 163 at 178 (citations omitted). See also Biodiversity Assocs. v. Cables, 357 F.3d 1152, 1156 (10th Cir. 2004)(upholding legislation permitting logging in certain forests and overriding otherwise applicable environmental laws and administrative review procedures, and explicitly superseding a settlement agreement between the National Forest Service and

various environmental groups regarding management of these lands).

The Biodiversity court reaffirmed that, "[W]hen rights are the creatures of Congress . . . Congress is free to modify them at will, even though its action may dictate results in pending cases and terminate prospective relief in concluded ones." 357 F.3d at 1171.

Finally, plaintiffs argue that the circuit court applied Act 2 retroactively when it vacated its order partially voiding the operating agreement. (Open. Br. at 32-34). The legislature in Act 2 specifically ratified the operating agreement, providing that it may be "enforced, executed, or re-executed". (Act 2 at 8).

The circuit court order partially voiding the operating agreement was filed October 9, 2007. (6R 2273). That order was vacated by the November 14, 2007 order. (App. 3). The November 14, 2007 order clearly stated that it was "effective the filing of this order." The November 14, 2007 order did not apply retroactively.

CONCLUSION

Act 2 is presumptively constitutional. Plaintiffs have failed to show that Act 2 is unconstitutional beyond a reasonable doubt (or by any standard), and have failed to show a clear, manifest, and unmistakable constitutional defect in Act 2. As set forth above, Act 2 does not violate the Hawaii Constitution or relevant federal constitutional provisions. The judgment below should be affirmed for the reasons given in this brief and in the circuit court rulings and judgment.

Respectfully submitted,

08-18-08
Date

Dorothy Sellers
State Solicitor General