No. 27707

IN THE SUPREME COURT OF THE STATE OF HAWAII

COUNTY OF HAWAII, a municipal Corporation of the State of Hawaii,	) CIVIL NO. 03-1-0308
Plaintiff/Counter-Claim Defendant/Appellee/ Cross-Appellee,	) APPEAL TO THE SUPREME COURT AND) INTERMEDIATE COURT OF APPEALS) OF THE STATE OF HAWAII FROM THE) (1) ORDER DENYING WAI'OLA) WATERS OF LIFE PUBLIC CHARTER) SCHOOL'S MOTION TO SET ASIDE) ENTRY OF DEFAULT DATED MAY 24,) 2004, FILED HERIEN 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
vs.	
ALA LOOP HOMEOWNERS, an unincorporated association,	
Defendant/Counter-Claimant/Cross-Claimant/ Appellee/Cross-Appellant,	
and	

[Caption continued on next page]

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DECLARATION OF CHARLEEN M. AINA

APPENDIX

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 DOE 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.	ENTERED ON DECEMBER 12, 2005; (5) ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT/THIRD-PARTY PLAINTIFF ALA LOOP COMMUNITY ASSOCIATION'S MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS AGAINST DEFENDANT WAI'OLA WATERS OF LIFE CHARTER SCHOOL, ISSUED ON OCTOBER 28, 2005 THIRD CIRCUIT COURT HONORABLE GREG K. NAKAMURA JUDGE

WAI'OLA WATERS OF LIFE MOTION FOR RECONSIDERATION

Respondent-/Defendant-/Cross-Claim Defendant-Appellant Wai'ola Waters of Life public charter school, moves for reconsideration of the opinion filed in this appeal on July 9, 2010.

Specifically, Wai'ola asks that the Court reconsider its holdings that

(1) The Association's cross-claim is not moot;

(2) The Haw. Rev. Stat. ch. 205, the State's land use law is an "environmental quality" law; and

(3) Article XI, section 9 of the State Constitution, without further action by the Legislature implies and thus creates a private right of action to protect the right to a clean and healthful environment that the section confers, without further action by the Legislature.;

Wai'ola asks for reconsideration for three reasons. First, the Court has made new law that will significantly affect multiple sectors of our community, all levels of state and county government, and countless administrative and judicial proceedings that are pending in the courts and before state and county land use and environmental regulatory agencies.

Given the present procedural posture of the case, the principle of judicial restraint counsels against addressing the argument the Ala Loop Association and amicus advanced on certiorari, that article XI, section 9 implies a private right of action to enforce "laws relating to environmental quality:"

1. The appeal came to the Intermediate Court of Appeals and this Court pursuant to a default judgment that was entered in the Ala Loop Association's cross-claim. The default judgment was entered solely on the basis of evidence that only the Association presented pursuant to Haw. R. Civ. Proc. 55(e). The

Association did not press its counterclaim against the County of Hawaii or its third-party complaint against the State Land Use Commission, and neither the County nor the Commission participated in the Rule 55(e) proceedings;

2. The default judgment has been vacated, and the case has been remanded to the circuit court for further proceedings;

3. The County of Hawaii initiated this case to secure a declaratory judgment as to whether the State's education law excepted public charter schools from the State's land use law; the declaratory judgment action has not been adjudicated since it was filed;

4. The Association sought to enforce the State's land use law by its cross-claim in this case, without filing a petition for declaratory ruling as to the applicability of the State's land use law and provisions of Hawaii County's zoning laws, Hawaii County Code ch. 25, to Wai'ola use of the farm it previously owned on Ala Loop; and

5. The opinion relies on the "public interest" exception to the mootness doctrine to establish an implied private right of action to enforce all "laws relating to environmental quality," without the participation and benefit of input from those subject to those laws or responsible for enforcing them.

Further, the opinion has the very real potential for significantly diminishing the force of the administrative processes and proceedings previously established by the Legislature and the counties for the purpose of protecting each person's right to a clean and healthful environment. There is a real possibility that pending proceedings will be abandoned altogether in favor of actions brought directly in the courts.

Second, the opinion overlooked the purpose and objectives of article XI, section 3 of the State Constitution. Had its provisions and related constitutional history been considered

more closely, the opinion would have concluded that Haw. Rev. Stat. ch. 205, the State's land use law, is an economic development law and **not** an "environmental quality" law, and that it was not necessary to address the arguments the amicus and the Ala Loop Association made on certiorari that article XI, section 9 of the State Constitution implies a private right of action to enforce "laws relating to environmental quality."

By not addressing article XI, sections 3 the opinion invades the exclusive province of the Legislature to enact land use laws to implement its provisions in violation of the principles of the political question and separation of powers doctrines, and seriously undercuts both the laws the Legislature has already enacted for that purpose, and body of case law, including the doctrines of primary jurisdiction and exhaustion of administrative remedies, that has been developed to effectuate those laws.

Third, the opinion appears to overlook that part of the constitutional history to article XI, section 9 that suggests that the drafters intended that **the Legislature** create the private right of action the Court concludes the Constitution confers by implication. Accordingly, even if ch. 205 is an "environmental quality" law, the Court should have limited its decision to acknowledging the right of action and the need for the Legislature to enact laws both to refine existing laws, and specify the procedural parameters for suits could be filed.

This motion is made pursuant to Haw. R. App. Proc. 40, and supported by the attached memorandum of law, and declaration of counsel.

DATED: Honolulu, Hawaii, July 19, 2010.

Mark J. Bennett
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By Charleen M. Aina
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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION

I. INTRODUCTION

The precise holdings in this appeal are: (1) the claims of the Ala Loop Association, the cross-claimant informal unincorporated association of persons who live next to or near a farm on Ala Loop in the Puna District of the County of Hawaii that Waters of Life public charter school no longer owns, are not moot; (2) the default judgment entered against Waters of Life and in favor of the Association is vacated and the case is remanded to the circuit court for further proceedings; (3) the State's land use law is a "law relating to environmental quality," and (4) the Association had a private right of action to enjoin violations of Haw. Rev. Stat. ch. 205, the State's Land Use Law, under article XI, section 9 of the State Constitution.

Reconsideration is particularly necessary because the holdings generate far-reaching consequences. First and most obviously, every law "relating to environmental quality" now can be enforced by private individuals and entities against other private persons and entities, and state and county agencies and officials, without further action by the Legislature, and irrespective of whether the Legislature has established a regulatory scheme, including a process to enforce the law. The

law sought to be enforced only needs to be a law that "relate[s] to environmental quality."

Second, given that all state land use laws are now "laws relating to environmental quality," it is unclear whether county zoning laws are "laws relating to environmental quality," and if they are, whether the implied private right of action in subjects the State and its agencies to both the zoning laws and suits to enforce zoning laws.

Third, the Legislature can no longer enact a law that vests enforcement of a law "relating to environmental quality" entirely and exclusively in a state or county agency or official.

Fourth, it remains to be determined whether some or all of the existing laws that prescribe how land use and other "environmental quality" laws are to be enforced by state and county regulatory agencies constitute "reasonable limitations and regulations" of the implied private right of action the Court's opinion establishes.

Fifth, it is also unclear whether a private person or entity may file a lawsuit in court directly and forego initiating proceedings before the governmental agencies designated by state law to administer and enforce the State's land use laws altogether, or whether a suit may be filed in the courts only after all proceedings before the agencies

established and designated to administer the State's land use laws are completed. Stated more directly, it is unclear whether the doctrines of primary jurisdiction and exhaustion of administrative remedies can even apply to suits to enforce the right to a clean and healthful environment, and the State's land use laws.

II. ARGUMENT

A. The Association's Cross-Claim Is Moot, and the Procedural Posture of This Case Makes It Particularly Inappropriate to Proceed Under the Public Interest Exception to Mootness

The Association's cross-claim is moot. It "does not rest on existing facts" and "the two conditions of justiciability relevant on appeal - adverse interest and effective remedy - have been compromised." McCabe Hamilton & Renny Co. Ltd. v. Chung, 98 Hawai'i 107, 116-17, 43 P.3d 244, 255-55.

Facts are particularly important in this appeal because the Court holds for the first time that even though the State's land use law's stated purpose is to protect agricultural lands specifically and promote ordered economic development generally, the law is an "environmental quality" law, and article XI, section 9 of the State Constitution creates a private right of action by which the Association may press its claim that Wai'ola misused agriculturally classified in violation of the State's land use law.

The facts are, however, that Wai'ola no longer owns nor uses the land on Ala Loop that the Association accuses it of misusing, and conducts all of its charter school activities elsewhere.

B. In Overlooking Article XI, Section 3 and Its Express Direction that the Legislature Determine How the State's Agricultural Lands Are To Be Protected, the Opinion Violates the Political Question Doctrine and Separation of Powers

The opinion of this Court filed on July 9, 2010 needs to be reconsidered because it overlooked article XI, section 3 of the State Constitution in concluding that Haw. Rev. Stat. ch. 205 is a "law relating to environmental quality," and thus may be enforced by lawsuits a person initiates against a private or public party under article XI, section 9.[1]

The opinion reaches too far into the exclusive province of the Legislature to determine how agricultural lands are to be protected to ensure the continued availability of agriculturally suitable land for diversified agriculture and agricultural self-

[1] Wai'ola brings this motion for reconsideration because it believes that it and other public charter schools are particularly vulnerable to the suits to enforce "laws related to environmental quality" that the Court's opinion now allows private individuals or entities to bring against public and private entities. 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.

sufficiency under article XI, section 3 of the Constitution. No consideration seems to have been given to the substance of article XI, section 3 before the Court concluded that the State's land use law was a "law relating to environmental quality."

In seeming contravention of the political question doctrine and separation of powers, the opinion allows the courts to share, if not usurp the Legislature's exclusive authority and responsibility for developing the State's land use law, reduces, if not eliminates the implied right of the community to participate in the Legislature's formulation of that law, undermines the credibility of the regulatory scheme the Legislature has already established, and seriously risks calling into question, the continued applicability of the doctrines of primary jurisdiction and exhaustion of administrative remedies to suits to enforce the State's land use laws.

With respect to separation of powers, this Court in its per curiam opinion in In re Honolulu Community-Media Council, 121 Hawai'i 179, 180, 215 P.3d 411, 412 (2009), recently reiterated that

> the separation of powers doctrine "is intended to preclude a commingling of ... essentially different powers of government in the same hands and thereby prevent a situation where one department would be controlled by, or subjected, directly or indirectly to the coercive influence of either of the other departments."

Quoting from Pray v. Judicial Selection Commission, 75 Haw. 333, 353, 861 P.2d 723, 732 (1993)(emphasis added).

This Court has also reiterated that

> "The separation of powers doctrine is not expressly set forth in any single constitutional provision, 'but like the federal government, [Hawaii's government] is one in which the sovereign power is divided and allocated among three co-equal branches.' " **583 *70 *Biscoe v. Tanaka*, 76 Hawai''i 380, 383, 878 P.2d 719, 722 (1994) (quoting *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 170-71, 737 P.2d 446, 456 (1987)) (brackets omitted). The doctrine provides that " 'a department ... may not exercise powers not so constitutionally granted, which from their essential nature, do not fall within its division of governmental functions, unless such powers are properly incidental to the performance by it of its own appropriate functions.'"

Hawaii Insurers Council v. Lingle, 120 Hawai'i 51, 69-70, 201 P.3d 564, 582-583 (2008)(emphasis added).

With respect to the political question doctrine, this Court, citing Trustees of OHA v. Yamasaki, 69 Haw. 154, 170, 737 P.2sd 446, 455 (1987), said: "the political question doctrine is "essentially a function of the separation of powers,'" OHA v. HCDCH, 117 Hawai'i 174, 209, 177 P.3d 884, 919 (2008), and

> Prominent on the surface of any case held to involve a political question is found[: (1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] a lack of judicially discoverable and manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] the

> impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Emphasis added. Thus, the courts cannot intrude into an area the Constitution expressly assigns to the Legislature, particularly when "initial policy determination[s]" must be made, and competing interests identified and weighed before effective laws can be enacted. Yamasaki, 69 Haw. at 172, 737 P.2d at 446. And, they cannot ignore or alter the words of the Constitution under the guise of exercising their exclusive authority to interpret the Constitution.

The dispute out of which this case and appeal arise was, and still is whether Wai'ola, in using land classified agricultural by the State Land Use Commission, violated state and county land use laws, Haw. Rev. Stat. ch. 205, and chapter 25 of the County of Hawaii's zoning ordinances.

This Court has said,

In construing the constitution, . . .

> Because constitutions derive their power and authority from the people who draft and adopt them, we have long recognized that the Hawaii Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent. This intent is to be found in the instrument itself.

> [T]he general rule is that, if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written. In this regard, the settled rule is that in the construction of a constitutional provision the words are presumed to be used in their natural sense unless the context furnishes some ground to control, qualify, or enlarge them.
>
> Moreover, a constitutional provision must be construed in connection with other provisions of the instrument, and also in the light of the circumstances under which it was adopted and the history which preceded it.

Sierra Club v. Department of Transportation, 120 Hawai'i 181, 196, 202 P.3d 1226, 1241 (2009) (emphases added; cites omitted).

If there is any ambiguity, "'a court may look to the object sought to be accomplished and the evils sought to be remedied by the [constitutional] amendment, along with the history of the times and the state of being when the constitutional provision was adopted.'" Everson v. State, 122 Hawai'i 402, 228 P.3d 282, 288 quoting from State v. Kahlbaun, 64 Haw. 197, 202, 638 P.2d 309, 315 (1981) (brackets added).

And, when two different provisions of the State Constitution affect a particular situation, the Court must determine whether and to what extent one provision limits or qualifies the other, and respect the limitation or qualification. Nakano v. Matayoshi, 68 Haw. 140, 148-49, 706 P.2d 814, 819 (1985).

This Court has also noted specifically with respect to land use laws that

> [p]rudential rules of judicial self-governance founded in concern about the proper-and properly limited-role of courts in a democratic society, considerations flowing from our coequal and coexistent system of government, dictate that we accord those charged with drafting and administering our laws a reasonable opportunity to craft and enforce them in a manner that produces a lawful result.

Life of the Land v. Land Use Commission, 63 Haw. 166, 172, 623 P.2d 432, 438 (1981).

Article III, section 1 provides: "The legislative power of the State shall be vested in a legislature."

Article XI, section 3 of the State Constitution, entitled "Agricultural Lands," provides in pertinent part:

> The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to assure the foregoing.

(Emphasis added). It expressly directs that the Legislature enact laws to effectuate its provisions. At pages 47 and 48 of the opinion, this Court recognized that "read as a whole [the section] required further action be taken by the legislature" and that the section's "text imposes a duty on the legislature to 'provide standards and criteria to accomplish [the mandate with respect to the preservation of agricultural lands] . . . ."

Standing Committee Report No. 77, I Proceedings of the Constitutional Convention of Hawaii of 1978 (1980) at 687-88, explains that article XI, section 3 was added to the State Constitution in 1978 because of "a renewed emphasis on preserving valuable and important agricultural lands," and

> [i]n response to increasing concerns regarding the future of agriculture in the State [and] to provide policy direction to the State. Moreover, the section has been amended to safeguard existing agricultural lands . . . classified as agricultural by the state Land Use Commission.

Those who supported the addition urged its adoption in order to effect "some fundamental changes in the system for regulating land uses,"[2] "reinforce the [existing land use] system rather than create a new layer of government control," "mandate[] that the legislature set out specific criteria and standards for enforcing the policy set forth in the first sentence [of section 3]," and "preserve agriculture as an economic base for the Islands and keep agricultural lands to the extent possible as open space."[3]

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[2] Floor speech of Delegate Harris, I Proceedings of the Constitutional Convention of Hawaii of 1978 at 440 (1980).

[3] Floor speech of Delegate Waihee, I Proceedings of the Constitutional Convention of Hawaii of 1978 at 441 (1980).

See also the extensive floor speech of Delegate Hornick reminding the delegates that "Hawaii enacted the state land use law [in 1961] for the purpose, as stated in its preamble, of protecting the State's dwindling supply of prime agricultural land and preventing scattered urban subdivisions [and among

Despite all of this, it does not appear that the Court considered section 3's substance in concluding that the State's land use laws are "laws relating to environmental quality" and thus are enforceable by the implied private right of action the opinion establishes. The opinion contradicts the delegates' express direction that the Legislature enact laws that manifest policy decisions it makes to protect agricultural lands, promote diversified agriculture, and increase agricultural self-sufficiency. Going forward, it drastically contracts the exclusive prerogative the Legislature was given to enact laws to implement article XI, section 3, and confuses, if not undercuts the viability and force of the laws the Legislature has enacted to enforce the land use laws in the 30+ year interval since section 3 was added to the State Constitution.

The opinion violates the political question doctrine and separation of powers in concluding that the State land use law is an "environmental quality" law. While the land use law clearly includes provisions that require the Land Use Commission to act consistently with, and do its part to further "laws relating to environmental quality," the principal objective of the State Constitution's land use provision is to authorize the Legislature to formulate policies and enact laws to protect and

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several other reasons protecting] an important source of (export) income and employment . . . ." Id.

promote agriculture and agricultural self-sufficiency specifically, and the State's economic well-being generally. The Court's opinion invades the province of the Legislature to enact those laws, and requires reconsideration.

B. The Implied Private Right of Action to Enforce the State's Land Use Laws the Opinion Confers Violates Separation of Powers

Article XI, section 9 provides:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

It literally says that the right to "a clean and healthful environment" is to be "defined" by "laws relating to environmental quality." It uses the terms "pollution," and "natural resources" to describe the kinds of laws the delegates anticipated the Legislature would enact. There is no reference to "land use" or directions to change the existing "land use" laws to inform the public that those laws now also defined the "right to a clean and healthful environment" that the addition of section 9 conferred. The phrase "defined by laws" strongly suggests that future action on the part of the Legislature.

The constitutional history similarly makes no reference to "land use" or "land use laws." Standing Committee Report No.

77, I Proceedings of the Constitutional Convention of Hawaii of 1978 at 689-90 (1980), explains that

> The definition of [the right to a clean and healthful environment] would be accomplished by relying on the large body of statutes, administrative rules and ordinances relating to environmental quality. Defining the right in terms of present laws imposes no new legal duties on parties . . .
>
> Developing a body of case law defining the content of the right could involve confusion and inconsistencies. On the other hand, legislatures, county councils and administrative agencies can adopt, modify or repeal environmental laws and regulations laws in light of the latest scientific evidence and federal requirements and opportunities.

Emphases added. The constitutional history confirms that the delegates expected the Legislature to enact "environmental quality" laws to define what the "right to a clean and healthful environment" encompassed. To the extent existing laws were expected to "define" the newly conferred right, it would seem that they would have either had to already have expressly referred to the environment or use terms that were understood in ordinary parlance to refer to environmental qualities.[4] At the very least, the delegates had to have contemplated that the Legislature would need to amend Haw. Rev. Stat. ch. 205 to indicate that its provisions "related to environmental quality"

[4] The report's reference to "scientific evidence and federal requirements" also suggests that the State's "land use laws" were not among the "environmental quality" laws the drafters expected the Legislature to enact to "define" the constitutional right. Fed

or were enacted to protect the environment, if that was what the Legislature had intended when the law was first enacted.

The Court needs to reconsider its holding that Haw. Rev. Stat. ch. 205 is an "environmental quality" law. Given the exclusive responsibility the Constitution vests in the Legislature, to define the boundaries of the "right to a clean and healthful environment, the Court's opinion cannot make the State's land use law into something the Legislature never intended it to be. The Court's exclusive authority to interpret the Constitution does not extend so far as to add provisions that the delegates themselves did not expressly include, or reasonably imply.

C. The Opinion Should Be Reconsidered Because It Makes New Law Without the Benefit of Participation by Those It Directly Affects, Undermines the Credibility of the Existing Land Use Regulatory Scheme, and Risks the Continued Vitality of the Primary Jurisdiction and Exhaustion of Administrative Remedies Doctrines.

The opinion of the Michigan Supreme Court in Woodman v. Kera LLC, 2010 WL 24071902 (Mich. 2010)(cites and footnotes omitted), speaks volumes for reconsideration of the Court's opinion here.

> As a general rule, making social policy is a job for the Legislature, not the courts. This is especially true when the determination or resolution requires placing a premium on one societal interest at the expense of another: 'The responsibility for drawing lines in a society as complex as ours-of identifying priorities, weighing the relevant

considerations and choosing between competing alternatives-is the Legislature's.

* * *

> The judiciary, by contrast, is designed to accomplish the discrete task of resolving disputes, typically between two parties, each in pursuit of the party's own narrow interests. We are " 'limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance purely private interests.' " We do not generally consider the views of nonparties on questions of policy, and we are limited to the record developed by the parties. The reality of our judicial institutional limitations is a significant liability in regard to our ability to make informed decisions when we are asked to create public policy by changing the common law.

The opinion of the Court in this appeal abandons precedent and extends the common law of Hawaii with regard to "environmental quality" and "land use" far beyond its prior boundaries. Particularly because the Court invoked the "public interest" exception to mootness to extend the law, and did not have the benefit of the participation and input from those most likely to be subject to those laws or responsible for enforcing them, the Court should reconsider the wisdom of rendering the far-ranging opinion it filed.

In the interval since article XI, sections 3 and 9 of the State Constitution were adopted if not before, the state and county legislatures adopted statutes, ordinances, and administrative rules to enforce both the State's land use and

environmental quality laws.[5] While the Court's opinion does not strike down Haw. Rev. Stat. § 205-12 or the county ordinances and rules that flesh out how the state land use laws are enforced, how likely is it that an individual will avail him or herself of those administrative procedures when the individual or an association to which the individual belongs, can file suit in the courts directly (and possibly recover attorneys' fees under the private attorney general doctrine, if the suit is successful).

Prior to the Court's opinion here, it was well-established that

> [u]nder the doctrine of primary jurisdiction, when a court and an agency have concurrent original jurisdiction to decide issues which have been placed within the special competence of an administrative agency, the judicial process is suspended pending referral of such issues to the administrative body for its views . . .

Fratinardo v. ERS, 121 Hawai'i 462, 465-66, 220 P.3d 1043, 1046-47 (Haw. App. 2009). Will that doctrine continue to apply in suits brought to enforce the State's land use laws, or does the Court's opinion repeal Haw. Rev. Stat. § 205-12 and all of the ordinances and administrative rules the counties have adopted to

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[5]All of the counties' ordinances and administrative rules of practice and procedure for enforcing the land use laws are reproduced in Appendix A. An extensive but not necessarily all inclusive list of the statutes the Legislature has enacted to enforce state environmental quality laws in included in Appendix B.

effectuate that statute. Similarly, will the doctrine of exhaustion of administrative remedies which applies where a claim "is cognizable in the first instance by an administrative agency alone," Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 93, 734 P.2d 161, 169 (1987), ever apply after the Court's opinion in this appeal.

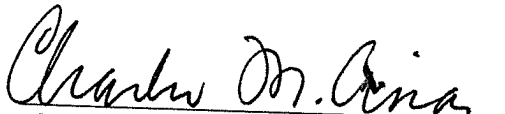
At the very least, this Court needs to clarify whether the private right of action to enforce the State's land use laws "replaces," or "complements" the existing land use regulatory scheme's enforcement processes and procedures.

III. CONCLUSION

For the foregoing reasons, Wai'ola respectfully requests that the Court reconsider the opinion filed in this appeal.

Dated: Honolulu, Hawaii, July 19, 2010.

Mark J. Bennett
Attorney General
State of Hawaii

By 
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