

CONCURRING OPINION BY NAKAMURA, C.J.

I agree with the majority's conclusion that the political question doctrine does not preclude the justiciability of the dispute over whether the Legislature, pursuant Article XII, Section 1 of the Hawai'i Constitution, has made "sufficient sums" available for the purposes identified in that constitutional provision. I therefore concur in the result reached by the majority to vacate the Final Judgment of the Circuit Court of the First Circuit (circuit court) and to remand the case for further proceedings. I write separately to explain my analysis.

I.

Prior to its amendment in 1978, Article XII, Section 1 of the Hawai'i Constitution<sup>1</sup> provided, in relevant part: "The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms of [the Hawaiian Homes Commission] Act, and the legislature may, from time to time, make additional sums available for the purposes of said Act by appropriating the same in the manner provided by law." (Emphasis added.) Thus, prior to the 1978 amendment, it was clear that the Legislature had discretion regarding whether to make additional sums available for the purposes of the Hawaiian Homes Commission Act (HHCA).

Pursuant to amendments proposed by the 1978 Constitutional Convention and approved by voters, Article XII, Section 1 was amended in relevant part to read as follows:

The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms and spirit of [the Hawaiian Home Commission] Act. The legislature shall make sufficient sums available for the following purposes: (1) development of home, agriculture, farm and ranch lots; (2) home, agriculture, aquaculture, farm and ranch loans; (3)

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<sup>1</sup> The predecessor to the current Article XII, Section 1 of the Hawai'i Constitution was set forth in Article XI, Section 1. As a result of amendments proposed by the 1978 Constitutional Convention and adopted by voters, the previous Article XI, entitled "Article XI Hawaiian Home Lands," was renumbered and redesignated as "Article XII Hawaiian Affairs." For simplicity, I will use "Article XII, Section 1" when referring to the current Article XII, Section 1 as well as its pre-1978 predecessor, Article XI, Section 1.

rehabilitation projects to include, but not limited to, educational, economic, political, social and cultural processes by which the general welfare and conditions of native Hawaiians are thereby improved; (4) the administration and operating budget of the department of Hawaiian home lands; in furtherance of (1), (2), (3) and (4) herein, by appropriating the same in the manner provided by law.

(Emphasis added.) The 1978 amendment changed the language of the constitutional provision from "the legislature may, from time to time, make additional sums available" to "[t]he legislature shall make sufficient sums available" for the identified purposes.

II.

Plaintiffs-Appellants Richard Nelson III; Kaliko Chun; James Akiona, Sr.; Sherilyn Adams; Kelii Ioane Jr.; and Charles Apia (collectively, "Plaintiffs") filed an amended complaint against Defendants-Appellees Hawaiian Homes Commission (HHC); the Department of Hawaiian Home Lands (DHHL); the Chair and the members of the HHC in their official capacities; the State Director of Finance in her official capacity; and the State of Hawai'i (State) (collectively, "Defendants").<sup>2</sup> Plaintiffs sought declaratory and injunctive relief against Defendants for "violation of the constitutional duty [under Article XII, Section 1 of the Hawai'i Constitution] to sufficiently fund the [DHHL]" (Count 1) and for "breach of trust obligation to seek sufficient funds from the legislature" (Count 2).<sup>3</sup> The circuit court granted summary judgment in favor of Defendants on Counts 1 and 2 and dismissed those counts, concluding that:

Although Plaintiffs raised allegations that were of concern to this Court, the Court finds that the political question doctrine bars justiciability of Plaintiffs' claims. There are no judicially discoverable and manageable standards for resolving

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<sup>2</sup> Defendants-Appellees the HHC, the DHHL, and the Chair and the members of the HHC in their official capacities will collectively be referred to as the "DHHL Defendants," and Defendant-Appellees State and the State Director of Finance in her official capacity will collectively be referred to as the "State Defendants."

<sup>3</sup> The remaining counts of the amended complaint, Counts 3 and 4, were dismissed pursuant to a stipulation of the parties and are not in issue in this appeal.

the dispute over the definition and determination of "sufficient sums" under Article XII, Sections 1 and 2<sup>4</sup> of the Constitution of the State of Hawaii without making initial policy determinations of a kind clearly for nonjudicial discretion.

III.

This appeal turns on whether the question underlying Plaintiffs' claims, namely, whether the Legislature has made "sufficient sums" available under Article XII, Section 1, involves a nonjusticiable political question.

In Trustees of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 737 P.2d 446 (1987), the Hawai'i Supreme Court cited and applied the test articulated by the United States Supreme Court in Baker v. Carr, 369 U.S. 186 (1962), for determining whether a case involves a nonjusticiable political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence.

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<sup>4</sup> Article XII, Section 2 of the Hawai'i Constitution provides:

The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that section 1 hereof be included in this constitution, in whole or in part, it being intended that the [Hawaiian Homes Commission] Act or acts of the Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

Yamasaki, 69 Haw. at 170, 737 P.2d at 455 (quoting Baker v. Carr, 369 U.S. at 217).

IV.

Defendants<sup>5</sup> rely upon two elements of the Baker v. Carr formulation in support of their argument that the dispute over whether the Legislature has made "sufficient sums" available involves a political question: (1) the "lack of judicially discoverable and manageable standards for resolving [the dispute]"; and (2) "the impossibility of deciding [Plaintiffs' claims] without an initial policy determination of a kind clearly for nonjudicial discretion." See Yamasaki, 69 Haw. at 170, 173, 737 P.2d at 455, 457. In their brief, the State Defendants assert that "there are no judicially discoverable or manageable standards for evaluating whether a particular level of legislative funding to DHHL satisfies any obligation imposed by Article XII, Section 1, and any attempt to resolve that question would require resort to non-judicial policy determinations."

Central to Defendants' argument is their assertion that Plaintiffs' claims involve a nonjusticiable political question if a court cannot determine with particularity how much money the Legislature is required to make available to the DHHL under Article XII, Section 1. Defendants' basic reasoning is as follows:

1. A court cannot decide whether the Legislature has satisfied the "sufficient sums" requirement of Article XII, Section 1 unless the court can determine with particularity how much money ("the 'correct' dollar figure") the Legislature is required to appropriate to the DHHL.

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<sup>5</sup> The State Defendants and the DHHL Defendants make the same basic arguments with respect to the political question doctrine in their briefs on appeal. In the circuit court, the DHHL Defendants joined in the State Defendants' motion for summary judgment which argued that Plaintiffs' claims were barred by the political question doctrine. In this concurring opinion, arguments attributed to either the State Defendants or the DHHL Defendants apply to both of them.

2. The only way to determine with particularity how much money the Legislature is required to appropriate is to know how many home, agriculture, farm, and ranch lots the DHHL must develop within a certain period of time.<sup>6</sup>

3. How many lots the DHHL must develop within a certain period of time is "totally unknowable" from the language of Article XII, Section 1. Any attempt by a court to determine this number would require it to make policy decisions reserved for nonjudicial discretion.

4. Thus, the question of whether the Legislature has made sufficient sums available for development of home, agriculture, farm, and ranch lots presents a "classic political question."<sup>7</sup>

Plaintiffs dispute Defendants' premise that for Plaintiffs' claims to be justiciable and to avoid the political question bar, the court must be able to calculate a specific sum of money that the Legislature is required to provide. Plaintiffs state that they "seek no specific damages" and that it is not necessary for this court "to determine precisely how much money would be sufficient for DHHL" under Article XII, Section 1 to rule in Plaintiffs' favor. Plaintiffs emphasize that they "are not asking the Court to determine what funds would be sufficient; only that what is currently provided is plainly insufficient." Plaintiffs assert that "by any reasonable definition of 'sufficient funds,' the State has not been providing 'sufficient funds' to DHHL and is breaching this constitutional provision."

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<sup>6</sup> The State Defendants describe the Legislature's making sufficient sums available for development of home, agriculture, farm, and ranch lots as "the principal directive of Article XII, Section 1."

<sup>7</sup> Defendants argue that a similar analysis applies to the question of whether the Legislature has made sufficient sums available for the other purposes identified in Article XII, Section 1.

V.

In construing the language of Article XII, Section 1, the following standards set forth by the Hawai'i Supreme Court apply:

[The Hawai'i Supreme Court has] long recognized that the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional [provision] is to give effect to that intent.

The general rule is that, if the words used in a constitutional provision are clear and unambiguous, they are to be construed as they are written. Furthermore, in interpreting a constitutional provision, this court may look to the object sought to be established and the matters sought to be remedied along with the history of the times and state of being when the constitutional provision was adopted.

Kaho'ohanohano v. State, 114 Hawai'i 302, 339, 162 P.3d 696, 733 (2007) (internal quotation marks, citations, and ellipsis points omitted). The supreme court does not "ascribe to the constitutional framers the intent to enact laws devoid of any real substance and effect[.]" In re Water Use Permit Applications, 94 Hawai'i 97, 142, 9 P.3d 409, 454 (2000).

VI.

I do not agree with Defendants' principal argument that this court must hold that Plaintiffs' claims involve a nonjusticiable political question unless we can say with particularity how much money the Legislature is required to appropriate to the DHHL under Article XII, Section 1.

Prior to its amendment by the 1978 Constitutional Convention, Article XII, Section 1 left the matter of legislative funding to the Legislature's discretion by providing that "the legislature may, from time to time, make additional sums available for the purposes of [the HHCA] . . . ." The 1978 amendment changed the language of the constitutional provision to read that "[t]he legislature shall make sufficient sums available" for the purposes identified in Article XII, Section 1.

Is it clear that the "shall make sufficient sums available" language in Article XII, Section 1 was prompted by the

dissatisfaction of the constitutional framers (the 1978 Constitutional Convention delegates) with the prior extent of the progress being made in providing lands to native Hawaiian beneficiaries under the HHCA and the Legislature's funding support for the DHHL. The amendment to Article XII, Section 1 at issue in this appeal was proposed by the Committee on Hawaiian Affairs of the 1978 Constitutional Convention. The Committee on Hawaiian Affairs explained the background and intent of the proposed "sufficient sums" amendment, which was subsequently approved by voters, in Standing Committee Report No. 56 (the "Hawaiian Affairs Committee Report"):

Your committee proposal makes it expressly clear that the legislature is to fund DHHL for purposes which reflect the spirit and intent of the [HHCA]. Your Committee decided to no longer allow the legislature discretion in this area.

Your Committee decided that the legislature should provide sufficient funds to DHHL for the following projects:

1. For the development of site improvements for homes, agriculture, farm and ranch lots. Development shall include but not be limited to off-site and on-site improvements which are necessary to provide grading, access (roads) and utility services (drainage, sewerage, water and electrical systems) for the developed lots;

2. For lessee loans in the areas of home construction and farm and ranch construction and equipment. Under this loan mandate, DHHL is authorized to request loans for lessees or native Hawaiians for agricultural purposes, which includes but is not limited to aquaculture;

3. For various rehabilitation projects, including education, social, political, economic and cultural processes which contribute to the general welfare and betterment of native Hawaiian conditions; and

4. For administrative and operational costs, which expenditure requests are to be utilized for all of the above-mentioned.

. . . . .

Your Committee determined that DHHL has approximately 200,000 acres under its present land inventory (deleting congressional land withdrawals and land exchanges between DHHL and the Department of Land and Natural Resources). The intent of the [HHCA], *inter alia*, was to perpetuate the native Hawaiian race by encouraging Hawaiian people to return to the land to till the soil. The evil sought to be corrected was the departure of the Hawaiian people from the soil and the consequent weakening of their structure of society under the impact of western civilization. One of

the basic causes of this departure was the fact that the Hawaiians did not actually receive one third of the domain which was supposed to have been set aside for them at the time of the Great Mahele, so that many persons had no land of their own when the change from feudal land tenures to common law land tenures was made.

Yet, in the 57 years since passage of the [HHCA], less than 12-1/2 percent (25,000 acres) of the total "available lands" (200,000 acres) have actually been disposed of to native Hawaiians. This averages about 435 acres of Hawaiian home lands per annum. At that rate, it would take over 400 years to lease the remaining 175,000 acres to native Hawaiians; by the year 2378 the last square foot of available land will be awarded to a native Hawaiian. Nearly 25 generations will have passed before the goal of the HHCA is fully realized.

. . . .

Your Committee reports that there are nearly 60,000 native Hawaiians within the State and approximately 2,800 lessees have been placed on the land. There are more than 5,200 applicants on the waiting list for homes.

Stand. Comm. Rep. No. 56, in 1 Proceedings of the Constitutional Convention on Hawaii of 1978, at 630-31 (1980) (emphases added).

The Hawaiian Affairs Committee Report also expressed the committee's concern with the amount of the "available lands" being used by the general public and with the DHHL's leasing to the general public of land that could otherwise be used for awards to beneficiaries, in order to generate revenues to support the DHHL's administrative and operating budget. The Hawaiian Affairs Committee Report noted that of the approximately 200,000 acres under the DHHL's land inventory, 57 percent had been released to the general public; over 90,000 acres were in agricultural-related uses by the general public; over 16,000 acres were under Governor Executive Order and were used for public projects, with no income return from such lands; and over 44,000 acres were used by federal, state, and county government agencies. Id. at 631. The Hawaiian Affairs Committee Report further stated:

The department's current budget is approximately \$1.3 million. Its revenue from general leases, licenses and revenue permits is approximately \$1.1 million. . . .

The department presently general leases its lands to obtain moneys for administrative expenses and salaries. In



order to keep up with a built-in inflation rate and to rehire prospective employees through SCET losses, DHHL continues to general lease more of its lands. These employees are necessary to keep up with the current housing output. DHHL averages 10 dollars per acre on its general leases.

DHHL cannot afford to lease more acreage to the general public for the purpose of generating income to accommodate a minimal employee level.

It is clear to your Committee that the intent and spirit of the [HHCA] would be better moneys [sic] served by releasing the department of its present burden to generate revenues through the general leasing of its lands. Your Committee decided that through legislative funding this dilemma would be resolved. In that manner more lands could be made available to the intended beneficiaries.

Id. at 631-32 (emphasis added).

Concerns raised in the Hawaiian Affairs Committee Report were echoed in the Committee of the Whole Report No. 11 (the "Committee of the Whole Report") on Committee Proposal No. 11, which included the "sufficient sums" amendment to Article XII, Section 1 proposed by the Committee on Hawaiian Affairs. The Committee of the Whole Report stated, in relevant part:

Your Committee recognized that the intent and purpose of [Committee Proposal] No. 11 is to provide the means to locate more Hawaiians on the lands specified for them through the Hawaiian Homes Commission Act, 1920, as amended. Your Committee learned that the department of Hawaiian home lands must finance its own program through the general leasing of its lands and that it is the only one of 17 state departments which must fund itself. Therefore the land of any value through the years has been general leased for revenue purposes which are used by the department for its operating budget.

## VII.

In construing a constitutional provision, a court must give "due regard to the intent of the framers" and it may look to the "matters sought to be remedied" and the historical context in which the provision was adopted. See Kaho'ohanohano, 114 Hawai'i at 339, 162 P.3d at 733. In my view, the historical context of the 1978 amendment to Article XII, Section 1, the matters sought to remedied, and the intent of the framers as revealed in the Hawaiian Affairs Committee Report and the Committee of the Whole Report (collectively, the "Committee Reports") provide judicially

discoverable and manageable standards for addressing the dispute over whether the Legislature has made sufficient sums available to the DHHL as required by Article XII, Section 1.

As noted, the 1978 amendment to Article XII, Section 1 was prompted by the framers' dissatisfaction with the prior extent of the progress being made in providing lands to native Hawaiian beneficiaries under the HHCA and the Legislature's funding support for the DHHL.<sup>8</sup> Accordingly, the level of the Legislature's funding support for the DHHL prior to 1978 combined with and viewed in the context of the level of the DHHL's progress in awarding lands to native Hawaiian beneficiaries prior to 1978 (the "pre-1978 levels") provide a means for deriving a minimum baseline or a floor for measuring and determining whether the Legislature has made sufficient sums available under Article XII, Section 1.<sup>9</sup> The framers also expressed their concern with the DHHL's leasing of land to the general public that could otherwise be used for awards to beneficiaries, in order to generate revenues to support the DHHL's administrative and operating budget.

The pre-1978 levels and the framers' intent, including their concern with the DHHL's leasing of lands to the general public, provide a context and a framework for a court to use in construing the meaning of "sufficient sums" as used in Article XII, Section 1. Accordingly, they provide a court with judicially discoverable and manageable standards for evaluating whether the Legislature has satisfied the "sufficient sums"

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<sup>8</sup> The record does not contain specific information regarding the funding support provided by the Legislature to the DHHL prior to 1978. Appropriation acts enacted by the Legislature prior to 1978 indicate that the Legislature provided funds to the DHHL for various projects. See, e.g., 1974 Haw. Sess. Laws Act 218; 1975 Haw. Sess. Laws Act 195; 1976 Haw. Sess. Laws Act 226; 1977 Haw. Sess. Laws Acts 9 and 10.

<sup>9</sup> Legislative funding support would at least have to exceed, in relative terms, a minimum baseline or floor derived by reference to the pre-1978 levels before it could be considered to be sufficient.

requirement of Article XII, Section 1 without resort to nonjudicial policy determinations.

It is true that the pre-1978 levels and the framers' intent, as revealed in the Committee Reports, do not provide a means of determining with precision the amount of funding necessary to satisfy the "sufficient sums" requirement. However, contrary to Defendants' contention, I conclude that Plaintiffs' claims do not become nonjusticiable under the political question doctrine simply because a court cannot determine with precision or particularity how much money the Legislature is required to appropriate based on the constitutional provision.

It is the judiciary's role and responsibility to construe the constitution. See State v. Nakata, 76 Hawai'i 360, 370, 878 P.2d 699, 709 (1994). What is necessary for a court to fulfill its role is not precision, but discoverable and manageable standards. Adopting Defendants' position would mean that the framers had amended the Hawai'i Constitution to impose a mandatory funding obligation on the Legislature that had no substantive effect because the obligation could not be enforced. We should not, however, "ascribe to the constitutional framers the intent to enact laws devoid of any real substance and effect." See In re Water Use Permit Applications, 94 Hawai'i at 142, 9 P.3d at 454. I agree with Plaintiffs that a court may be able to conclude that the Legislature's level of funding is "plainly insufficient" under Article XII, Section 1 without determining "precisely how much money would be sufficient for DHHL" under that provision. For example, legislative funding the relative amount of which fell below a minimum baseline or floor derived by reference to the pre-1978 levels would plainly be insufficient, even if a court could not determine the precise amount that would be sufficient under Article XII, Section 1.

VIII.

Article XII, Section 1 imposes on the Legislature the obligation to make "sufficient sums" available for the identified

purposes. As reflected in the Committee Reports, the framers' dissatisfaction with the prior extent of the progress in awarding land to native Hawaiian beneficiaries and the Legislature's funding support for the DHHL; their concern with the DHHL's leasing of land to the general public that could otherwise be used for awards to beneficiaries, in order to generate revenues to support the DHHL's administrative and operating budget; and their other expressions of intent provide reference points and a basis for a court to evaluate whether the Legislature has made "sufficient sums" available under Article XII, Section 1. Defendants argue that enforcing the "sufficient sums" requirement could bankrupt the State if it is construed in a way that ignored the State's competing budget requirements and economic conditions. However, nothing in the language of Article XII, Section 1 or the Committee Reports suggests that economic reality, the State's budgetary limitations, or the State's economic circumstances should be ignored in construing the "sufficient sums" requirement.

It becomes harder to evaluate whether the Legislature has satisfied the "sufficient sums" requirement of Article XII, Section 1 as the Legislature's funding support rises above levels that are plainly insufficient. However, in my view, the solution is not to decline to address Plaintiffs' claims, but to recognize that the judgments of the Legislature and the DHHL are entitled to reasonable deference and more latitude as the Legislature's funding support for the DHHL rises above levels that are plainly insufficient. This is consistent with the well-established standard used by the courts in reviewing the constitutionality of legislative enactments. Legislative enactments are "presumptively constitutional," and a party challenging a statute enacted by the Legislature "has the burden of showing unconstitutionality beyond a reasonable doubt." Kaho'ohanohano, 114 Hawai'i at 339, 162 P.3d at 733.

IX.

Because the circuit court dismissed Plaintiffs' claims in Counts 1 and 2 based on the political question doctrine, it did not address the merits of those claims. The record was not fully developed on the issue of whether the Legislature had satisfied its obligation to make sufficient sums available for the purposes identified in Article XII, Section 1. For example, the record did not contain detailed information regarding the pre-1978 levels or an analysis of how the pre-1978 levels could be used to derive a minimum baseline or floor to assist in the evaluation of whether the Legislature has made sufficient sums available to the DHHL. Nor did the record address in detail the justifications for the DHHL's general leasing programs and for the funding support provided by the Legislature for the DHHL's administrative and operating budget, given the concerns raised in the Committee Reports, or whether lands that should reasonably be used for awards to native Hawaiian beneficiaries have been leased to the general public to generate revenues to support the DHHL's administrative and operating budget.

On remand, the parties should provide the circuit court with evidence and analysis that permits it to evaluate whether the Legislature has satisfied the "sufficient sums" requirement in light of the purpose and intent of the framers of Article XII, Section 1. It is incumbent upon the Legislature to provide, and the DHHL to request, funding that satisfies the Legislature's obligation to make sufficient sums available to the DHHL under Article XII, Section 1. It is also incumbent upon the Legislature and the DHHL to justify their actions in light of the obligation imposed by Article XII, Section 1.