IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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COUNTY OF HAWAIʻI, a municipal corporation of the State of Hawaiʻi, Respondent-/Plaintiff-/Counterclaim Defendant-Appellee/Cross-Appellee,

vs.

ALA LOOP HOMEOWNERS, an unincorporated association, Respondent-/Defendant-/Counter-Claimant-/Cross-Claimant-Appellee/Cross-Appellant,

and

WAIʻOLA WATERS OF LIFE CHARTER SCHOOL, a public school organized under the law of the State of Hawaiʻi, Respondent-/Defendant-/Cross-Claim Defendant-Appellant/Cross-Appellee;

and

ALA LOOP COMMUNITY ASSOCIATION, an unincorporated non-profit association, Petitioner-/Defendant-/Counter-Claimant-/Cross-Claimant-/Third-Party Plaintiff-Appellee/Cross-Appellant;

vs.

LAND USE COMMISSION, STATE OF HAWAIʻI, Respondent-/Third-Party Defendant-Appellee/Cross-Appellee.

NO. 27707

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 03-1-0308)

JULY 9, 2010

MOON, C.J., NAKAYAMA, DUFFY, AND RECKTENWALD, JJ.;
WITH ACOBA, J., CONCURRING SEPARATELY AND DISSENTING

OPINION OF THE COURT BY RECKTENWALD, J.

Respondent Waiʻola Waters of Life Charter School (Waiʻola)[1] acquired land in an agricultural use district on Ala Loop Road on the Island of Hawaiʻi in 2003, with the intention of using it as a working farm and as a campus for its school. A dispute arose between Waiʻola and neighboring residents regarding whether Waiʻola should be required to obtain a special use permit under Hawaiʻi Revised Statutes (HRS) chapter 205. The County of Hawaiʻi filed a complaint in the Circuit Court of the Third Circuit (circuit court) seeking declaratory relief with regard to that issue, naming Waiʻola and Petitioner Ala Loop Community Association (Ala Loop)[2] as defendants. Ala Loop filed a cross-claim against Waiʻola, seeking to enforce the provisions of chapter 205.

The circuit court subsequently entered default against Waiʻola on Ala Loop's cross-claim, but denied Ala Loop's request for an award of attorney's fees.[3] Both parties then appealed from the circuit court's First Amended Final Judgment.

The Intermediate Court of Appeals (ICA) filed a summary disposition order (SDO) on March 12, 2009. The ICA, citing Pono

[1] Waiʻola is a new century charter school chartered pursuant to HRS § 302A-1181, *et seq.*

[2] Ala Loop is a non-profit unincorporated association whose members are residents and owners of lots abutting Ala Loop Road, and was formed pursuant to Hawaiʻi Revised Statutes (HRS) chapter 429.

[3] The Honorable Greg K. Nakamura presided.

v. Molokai Ranch, Ltd., 119 Hawaiʻi 164, 194 P.3d 1126 (App. 2008), cert. rejected, 2008 WL 5392320 (Haw. Dec. 29, 2008), concluded that Ala Loop did not have a private right of action to enforce its HRS chapter 205 claims against Waiʻola, and, therefore, the circuit court lacked jurisdiction to determine the claims. The ICA entered judgment pursuant to the SDO on April 22, 2009.

Ala Loop filed an application for writ of certiorari (application), requesting this court to review the ICA's judgment. In its application, Ala Loop argues, inter alia, that Pono was wrongly decided because it failed to consider article XI, section 9 of the Hawaiʻi State Constitution[4] and HRS § 607-25 (Supp. 2002).[5]

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[4] 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.

[5] HRS § 607-25 (Supp. 2002) provides in relevant part:

> **§607-25 Actions based on failure to obtain government permit or approvals; attorney's fees and costs. . . .**
> . . . .
> (c) For purposes of this section, the permits or approvals required by law shall include compliance with the requirements for permits or approvals established by chapters . . . 205, . . . and ordinances or rules adopted pursuant thereto under chapter 91.
> . . . .
> (e) In any civil action in this State where a private party sues for injunctive relief against another private party who has been or is undertaking

On August 5, 2009, Waiʻola filed a response in opposition (response) to the application, in which it contended that this court should reject the application on mootness grounds.

For the reasons set forth below, we conclude that this dispute is not moot, and that in any event review is appropriate under the public interest exception to the mootness doctrine. We further conclude that article XI, section 9 of the Hawaiʻi Constitution creates a private right of action to enforce chapter 205 in the circumstances of this case, and that the ICA accordingly erred in its analysis in the SDO. Finally, we conclude that the circuit court erred in declining to set aside the entry of default against Waiʻola.

Accordingly, we vacate the April 22, 2009 judgment of the ICA and the December 12, 2005 First Amended Final Judgment of the circuit court, and remand to the circuit court for further proceedings. In view of this disposition, we do not address the

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any development without obtaining all permits or approvals required by law from government agencies:

(1) The court may award reasonable attorneys' fees and costs of the suit to the prevailing party.

(2) The court shall award reasonable attorneys' fees and costs of the suit to the prevailing party if the party bringing the civil action:

. . . .

(B) Posts a bond in the amount of $2,500 to pay the attorneys' fees and costs provided for under this section if the party undertaking the development prevails.

other issues raised by Ala Loop in its application, or by Ala Loop and Waiʻola in their appeals to the ICA.

I. BACKGROUND

A. Dispute over whether Waiʻola must obtain a special use permit

Waiʻola is a new century charter school, chartered pursuant to HRS chapter 302A (Supp. 1999). In July of 2003, Waiʻola acquired ownership of a 28 acre parcel of land formerly known as the Sunshine Farm property, located in a district designated for agricultural use by the Land Use Commission (LUC) of the State of Hawaiʻi. Waiʻola intended to maintain the property as a working farm and to use it as a campus for its school.

When residents in the area learned of the acquisition, they began contacting various county officials to express concern. On July 21, 2003, Ala Loop received a letter from the County of Hawaiʻi Planning Department stating that:

> We have received your letter dated July 11, 2003 regarding the Waters of Life Charter School in escrow to purchase the old Sunshine Farm property on Ala Loop.
>
> The Planning Department has received numerous inquiries regarding the operation of charter schools within the State Land Use Agricultural District in regards to H.R.S. § 302A-1184,[6] which exempts charter

[6] HRS § 302A-1184 (Supp. 2002), provides in pertinent part, as follows:

> **New century charter schools; exemptions.** Schools designated as new century charter schools shall be exempt from all applicable state laws, except those regarding:
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> (1) Collective bargaining under chapter 89; provided that:

> schools from state laws, except those relating to health and safety, and a few other exceptions. Based on this law and a legal opinion received from the County Corporation Counsel, we are exempting charter schools from state land use laws not expressly related to health and safety.
>
> The major effect of this exemption is that charter schools located in the State Land Use Agricultural District do not have to obtain special permits. Normally, a school in the agricultural district would need a special permit with a process that requires notice to nearby landowners and a public hearing.
>
> Charter school facilities may need other approvals and permits, including those related to building, fire, and sanitation.
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> The law exempting the charter schools is open to interpretation and the courts have the final say. You, as homeowners concerned about the traffic impacts this operation may have on your community, have the right to take this matter to court to have a judge decide if this charter school needs a special permit.

On August 14, 2003, Ala Loop through counsel wrote to the County of Hawaiʻi Office of the Corporation Counsel (Corp. Counsel), inquiring "whether the proposed operation of Waters of Life Charter School upon land zoned for agriculture and accessed

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> (A) The exclusive representatives defined in chapter 89 may enter into agreements that contain cost and noncost items to facilitate decentralized decisionmaking;
> (B) The exclusive representatives and the local school board of the new century charter school may enter into agreements that contain cost and noncost items;
> (C) The agreements shall be funded from the current allocation or other sources of revenue received by the new century charter school; and
> (D) These agreements may differ from the master contracts;
>
> (2) Discriminatory practices under section 378-2; and
>
> (3) Health and safety requirements.
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> . . . .

This section was repealed in 2006 and reenacted as HRS § 302B-9 (Supp. 2006). 2006 Haw. Sess. Laws Act 298, §§2-3 at 1210-11, 1216.

through Ala Loop Road in the absence of a state or county land use regulatory process was proper." The letter also stated that Waiʻola purchased the property for the purpose of operating a charter school, and included background on the property as well as the reasons for Ala Loop's opposition to the operation of the charter school. Ala Loop requested that Corp. Counsel review HRS § 302A-1184 (Supp. 2002) which exempts new century charter schools from all applicable state laws except, inter alia, "health and safety requirements."

The letter explained Ala Loop's disagreement with the County's interpretation of HRS § 302A-1184 as follows:

> As we understand, the County of Hawaii has previously interpreted certain statutes, particularly HRS Section 302A-1184, as exempting charter schools from applicable State land use district law to the effect that charter schools have been deemed exempt from obtaining special permits for the operation of charter schools on lands within the State agricultural district. Based upon our review of Section 302A-1184 and other applicable law, we find that:
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> 1. There is no exemption from land use regulatory law that has been established for the purpose of protecting the public health and safety, and
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> 2. There is no express exemption from or preemption of county land use laws and regulations.
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> We therefore believe that the County's interpretation is contrary to the plain language and intent of Section 302A-1184 and that the failure to require the Waters of Life school to undergo the scrutiny of a special permit or other land use approval process will severely compromise the health, safety and welfare of the residents of the Ala Loop community, students and others who work at or visit the proposed school, and the public at large. For this reason, we ask that you review the current interpretation that the County has apparently adopted in light of the [above] information and to provide us with your position on the issue.

In summary, Ala Loop argued that

> a special permit was required for the charter school, pursuant to HRS § 205-6 (2001), county zoning laws, and Land Use Commission (LUC) rules, because the special permit requirements specifically involve a review of health and safety issues before an otherwise impermissible use can be established on land within the state agricultural district. [Ala Loop's] attorneys concluded that Waiʻola was not exempt from compliance with State land use laws and county zoning laws, and that a use permit was required under county zoning laws in the absence of a special use permit.

In a letter to the Hawaiʻi County Council dated October 9, 2003, Corp. Counsel opined that HRS § 302A-1184 exempts new century charter schools from obtaining a special permit under HRS § 205-6,[7] but that such schools are required to obtain a county use permit under Chapter 25 of the Hawaiʻi County Code 1983 (1995 ed.).

In a letter dated October 22, 2003, the Attorney General (AG) of the State of Hawaiʻi advised Corp. Counsel that

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[7] HRS § 205-6 (2001) provides in pertinent part:

> **Special permit.** (a) The county planning commission may permit certain unusual and reasonable uses within agricultural . . . districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural . . . district other than for an agricultural . . . use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition.
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> . . . .
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> (d) Special permits for land the area of which is greater than fifteen acres shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting such approval, including the adherence to representations made by the applicant.

> Although the Office of the Attorney General has not issued a formal opinion concerning [whether charter schools are exempt from the special permit requirement set forth in HRS chapter 205], our position is that new century charter schools are required to adhere to special permit requirements prescribed in H.R.S. chapter 205.
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> . . . .
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> Based upon legislative intent and statutory language, our interpretation of H.R.S. §302A-1184 is that new century charter schools are exempted from state laws that relate to the regulation of education. However new century charter schools are subject to laws that apply to the general public and other state agencies and entities (i.e. criminal statutes, zoning regulations, etc.). It would be inconceivable to conclude that H.R.S. §302A-1184 exempts new century charter schools from laws that the general public and other state agencies are required to adhere to.
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> . . . .
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> . . . As to the issue of whether new century charter schools are required to adhere to county use permit requirements, we would initially defer to the Office of the Corporation Counsel, but note that in considering the phrase "health and safety requirements" and its applicability to county use permit requirements, you may, of course, consider the rationale of this letter.

On November 14, 2003, the County filed a Complaint for Declaratory Relief against Ala Loop and Waiʻola. The complaint sought, inter alia, judicial confirmation that new century charter schools "are exempt from obtaining a State special permit, but are required to obtain a County use permit, pursuant to Chapter 25 of the Hawaiʻi County Code[.]"

On November 20, 2003, Ala Loop filed an answer to the County's complaint, a counterclaim against the County, and a cross-claim against Waiʻola. Ala Loop's counterclaim and cross-claim included five counts.

In Count I, Ala Loop requested declaratory relief

"determining that [Waiʻola] must obtain a special permit from the Planning Commission and the LUC pursuant to HRS Section 205-6 and the applicable rules and regulations of the Planning Commission and the Land Use Commission, prior to operating a charter school on [the property]."

In Count II, Ala Loop requested temporary and permanent injunctive relief enjoining and restraining:

> A. The County of Hawaii, its agencies, officers, directors, and employees from issuing any building permits, occupancy permits, or similar permits that would encourage, allow, or permit [Waiʻola] to operate a charter school, or any components or activities connected with the charter school, on [the property] until and unless a special permit has been issued for [the property] and [Waiʻola] has complied with all applicable conditions and laws for the operation as may be established by the Planning Commission and LUC and as may be required by applicable State and County law.
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> B. [Waiʻola], its agents, officers, directors, employees, teachers or representatives from conducting any classes or school related activities on [the property] until and unless a special permit has been issued for [the property] and [Waiʻola] has complied with applicable conditions for the operation as may be established by the Planning Commission and LUC.

In Count III, Ala Loop alleged that it was entitled to damages, attorneys' fees, and costs from the County. In Count IV, Ala Loop sought damages, attorneys' fees, and costs from Waiʻola based on nuisance per se and HRS § 607-25. Count V sought a production of documents from the County as well as attorneys' fees and costs related to obtaining those records.[8]

[8] On December 2, 2003, Ala Loop filed a joinder and third party complaint against the LUC, alleging that the LUC has an interest in the subject and disposition of this action because the LUC has jurisdiction over the approval of special permits for land within the land use agricultural

Ala Loop's cross-claim was served on November 21, 2003. On November 24, 2003 Waiʻola sought legal representation from the AG. In a letter dated January 21, 2004 to James Killebrew, Chair of the Waiʻola School Board, AG Mark Bennett stated that the Rules of Professional Conduct would preclude the Department of the Attorney General from representing Waiʻola because, although "we have concluded that [HRS] § 302A-1184 does not exempt charter schools categorically from the State's land use laws," "[i]t is my understanding that [Waiʻola] rejects this advice." The letter advised Waiʻola "to apply (through this Department) to the Governor for a waiver under [HRS] § 28-8.3[9] so that [Waiʻola] may contract directly with a private attorney to represent it in

district consisting of more than 15 acres in area.

[9] HRS § 28-8.3 (Supp. 2003) provides in relevant part:

> **Employment of attorneys.** (a) No department of the State other than the attorney general may employ or retain any attorney, by contract or otherwise, for the purpose of representing the State or the department in any litigation, rendering legal counsel to the department, or drafting legal documents for the department; provided that the foregoing provision shall not apply to the employment or retention of attorneys:
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> . . . .
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> (19) By a department, in the event the attorney general, for reasons deemed by the attorney general good and sufficient, declines, to employ or retain an attorney for a department; provided that the governor thereupon waives the provision of this section.
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> (b) For purposes of this section the term "department" includes any department, board, commission, agency, bureau, or officer of the State.

that litigation (at [Waiola's] own expense)."

On January 30, 2004, the parties stipulated to an extension for Waiʻola to file an answer or responsive pleading from January 15, 2004 to February 16, 2004. The parties subsequently agreed to another extension giving Waiʻola until February 25, 2004 to file an answer or responsive pleading.

On February 25, 2004, Deputy Attorney General (DAG) Charleen Aina, appearing specially on behalf of Waiʻola, filed a motion requesting an extension of time for Waiʻola to answer or otherwise respond to the complaint and cross-claim. The motion explained that the AG "would ordinarily appear on behalf of Waiʻola in this action, inasmuch as Waiʻola is a state agency," however, the AG's position regarding whether HRS § 302A-1184 exempts Waiʻola from obtaining a special permit under HRS chapter 205 was contrary to Waiola's position. The motion further explained that although Waiʻola had been informed that the office would not be able to represent it and that it should avail itself of the provisions of HRS § 28-8.3, Waiʻola disagreed that it must bear the cost of retaining legal services. As to the extension of time requested, DAG Aina reasoned that "[b]ecause this motion will not be heard until March 18, 2004, and that interval may be long enough to work out the differences that remain, we respectfully request an extension of no more than 30 days after the motion is decided for counsel to answer or otherwise file a responsive pleading to the complaint and cross-claim."

On March 10, 2004, Ala Loop filed a memorandum in opposition arguing that the "[AG] and [Waiʻola] have had more than ample time to sort out any differences between them as to who should represent [Waiʻola] and the terms of such representation" and that "[a]ny further delays in the case being at issue may result in irreparable harm to the public, the interests of the residents of Ala Loop, and possibly the students of [Waiʻola]."

After a March 18, 2004 hearing,[10] the circuit court entered an order on April 6, 2004 granting Waiola's request for an extension of time to file an answer or responsive pleading. The order provided that:

> 2. Defendant Waiʻola [has] until April 19, 2004 to file an answer or other responsive pleading to the complaint of the County of Hawaii, and the cross-complaint of Defendant-Cross Complainant Ala Loop Homeowners Association filed herein; and
>
> 3. If an answer or other responsive pleading is not timely filed, the County of Hawaii and the Ala Loop Homeowners Association may take appropriate action for the entry of default against Waiʻola.

On April 19, 2004, Sandra Pechter Song, an attorney appearing specially for Waiʻola, filed a motion for stay of proceedings, or in the alternative to extend time to file responsive pleadings (motion for a stay). Waiʻola alleged in its motion that it has a "clear and definite right to representation by Bennett." However, Bennett has "refused to defend Waiʻola in

[10] A transcript of the March 18, 2004 hearing is not included as part of the record on appeal.

the subject action, either through his office or through special counsel appointed by his office" and that "[Waiʻola] has no funds to hire private counsel; nor does it have the ability to represent itself in this case." Accordingly, Waiʻola requested that this "proceeding be stayed to permit it to obtain an order requiring Bennett to provide it with legal representation." In an attached declaration, Song stated that she had agreed to "file a petition for a writ of mandamus in the Supreme Court on behalf of Waiʻola," directing Bennett and his office to represent Waiʻola in the subject case.

On April 29, 2004, Song filed a petition for writ of mandamus with this court. In the petition, Song argued that AG Bennett was obliged to provide legal representation to Waiʻola, and requested that this court either compel him to defend Waiʻola or pay for special counsel to represent Waiʻola. In an attached declaration, the director of Waiʻola stated the following:

> 4. Although Waiʻola receives State and Federal funds, those funds are barely sufficient to provide for the daily classroom needs. The State has never given any funds to Waiʻola that were specifically earmarked for a school building or other capital improvement. To my knowledge, all non-conversion charter schools are left to find facilities for their schools without any State assistance.
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> . . . .
>
> 16. Mr. Bennett has repeatedly offered to obtain the consent of the governor to permit Waiʻola to hire private counsel to represent Waiʻola in Civil No. 03-1-0308. However, Waiʻola has no funds to retain a private attorney.

On May 4, 2004, Ala Loop opposed Waiola's motion for a stay on several grounds including that "[f]urther delay

would be unreasonable" because "[i]nstead of retaining special counsel to seek mandamus, [Waiʻola] could as well have retained counsel to defend it in this proceeding" or alternatively "have its current special counsel provide representation in its defense, and also concurrently seek the mandamus action it has threatened."

On May 4, 2004, Ala Loop filed a request for entry of default against Waiʻola because Waiʻola did not file an answer to Ala Loop's cross-claim.

At a May 13, 2004 hearing,[11] the circuit court orally denied Waiola's motion for a stay. The court entered a written order denying the motion on June 29, 2004, stating that:

> in the event that a request for a hearing on any issue [related to the entry of default judgment] is requested by any party herein, [Waiʻola] should have the opportunity to retain counsel for the purpose of representation of the school in any such hearing, and the Court considers a 45-day period of time after May 13, 2004 to be a reasonable period of time for [Waiʻola] to retain counsel for that purpose, should it choose to do so.

Default was entered against Waiʻola on May 24, 2004.

On June 2, 2004, the AG sent a letter to Waiʻola outlining the terms of its offer of representation, which included the stipulation that "in defending Waiʻola against the default and in other aspects of the representation, the

[11] A transcript of the May 13, 2004 hearing is not included as part of the record on appeal. However, portions of what appears to be a transcript were attached as an exhibit to a July 6, 2004 motion to set aside entry of default filed by Waiʻola in the circuit court.

Department of the Attorney General will proceed without asserting the defense that 'State Land Use laws do not apply to charter schools.'"

On June 2, 2004, Waiʻola accepted the AG's offer of representation.

On June 10, 2004, this court issued an order denying Waiola's petition for writ of mandamus.

On June 22, 2004, Waiʻola, now represented by the AG, filed an answer to Ala Loop's cross-claim. On July 6, 2004, Waiʻola filed a motion to set aside entry of default. Waiʻola argued that the entry of default should be set aside because the court may not have jurisdiction over the claims that Ala Loop asserts against Waiʻola, Ala Loop has not proven all of its claims, Waiʻola has made continuous efforts to secure counsel, Waiola's defenses are meritorious, and defaults are generally disfavored. On July 14, 2004, Ala Loop filed a memorandum in opposition.

On August 11, 2004, the circuit court entered an order denying the motion,[12] finding and concluding that:

> 1. [Waiʻola] made a conscious choice not [to] be represented by private legal counsel and therefore, failed to answer Ala Loop's cross-claim in a timely manner. Therefore, it cannot be said that [Waiʻola] was guilty only of excusable neglect.
>
> 2. If it is assumed that [Waiʻola] is a State agency, Rule 55(e), Hawaii Rules of Civil Procedure (HRCP), does not prohibit a default judgment against a State agency. HRCP Rule 55(e) allows for a default

[12] The motion was decided without a hearing.

> judgment against a State agency if the claimant State agency establishes a claim or right to relief by evidence satisfactory to the court. Therefore, where there is an entry of default, a claimant may obtain a default judgment against a State agency, if there is a hearing in which the claimant presents sufficient evidence establishing a claim or right to relief. 10 Moore's Federal Practice § 55.3[2][a](Matthew Bender 3rd ed.)
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> 3. [Waiʻola] has failed to satisfy the necessary criteria for setting aside an entry of default, and therefore, its Motion to Set Aside Entry of Default Dated May 24, 2004, Filed Herein July 6, 2004, should be denied.

On October 20, 2004, Ala Loop filed a Motion for Entry of Default Judgment and Permanent Injunction Against Defendant Waiʻola (motion for entry of default judgment). The motion was supported, inter alia, by the record, pleadings, attached declarations of neighbors, excerpts of depositions of Waiʻola officials, and correspondence with county officials.

The circuit court held a hearing on December 2, 2004. With respect to the declaratory relief sought by Ala Loop, the circuit court stated the following:

> The subject land abutting Ala Loop Road is classified as agricultural. Consistent with the State Deputy Attorney General's position set forth in that letter dated October 22nd, 2003, charter schools are required to comply with chapter 205 of the Hawaii Revised Statutes. As such, the subject real property may be used only for the purposes permitted under HRS Section 205-4 . . . unless a special permit is granted pursuant to HRS Section 205-6.
>
> Waiola has indicated that it will not undertake construction on the land until a special permit is secured. However this does not mean that the matter is not ripe for adjudication at this juncture. Waiola initially indicated that it did not intend to obtain a special permit and now states that it will. The Court's concern is that unless there's a Court order in place, Waiola is free to change its mind and generate another--create another generation of litigation.
>
> Also there is the issue of whether Waiola's ongoing activities are permitted under HRS Section

> 205-4 . . ., and we are here on a motion for entry of default judgment.
>
> So, the Court will order as follows.
>
> One, declare that Waiola is subject to the restrictions of Chapter 205 of the Hawaii Revised Statutes.
>
> Two, order that Waiola not construct facilities, educational facilities, on the real property unless it first receives a special permit.
>
> And, third, will order that Waiola not violate Chapter 205, HRS, with its ongoing activities.

With respect to the injunctive relief sought by Ala Loop, the circuit court stated that "no instruction or educational meetings are to occur on the premises[,]" but that "farming activities" and a "once-a-week field trip per student would be acceptable."

On February 4, 2005, the circuit court entered Findings of Fact, Conclusions of Law and Judgment which stated in pertinent part:

> **I. Findings of Fact.**
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> . . . .
>
> 12. Since the acquisition of the Subject Property, Waiʻola has used the Subject Property for the following purposes: (a) operating its administrative offices; (b) storing its office equipment, files, computers and books; (c) holding instructional and laboratory classes; and (d) the growing of crops and associated activities, such as testing, conducting experiments and making observations.
>
> 13. Waiʻola students have been bussed to the Subject Property.
>
> 14. It is Waiʻola's intention to use the Subject Property for school activities and associated facilities, to include a school building, an athletic field, athletic building, amphitheater and smaller structures for classes.
>
> 15. If Waiʻola is to use the Subject Property as a school, certain improvements relating to health and safety are necessary or appropriate: to include: (a) an expansion of the Ala Loop, (b) an increase in water availability to fight fires, and (c) an individual waste water system.
>
> 16. Members of [Ala Loop], as neighbors of the Subject Property, may suffer injury if the Subject Property is used as a school.
>
> 17. Initially, Waiʻola declined to obtain a

special permit even though it understood from the Attorney General, State of Hawaiʻi, pursuant to a letter dated October 22, 2003, that it was the Attorney General's Office's opinion that Waiʻola, even though it was a new century charter school, was subject to the requirements of Chapter 205, HRS.

18. While Waiʻola now asserts that it intends to obtain a special permit, it seeks to use the Subject Property for uses other than permitted under Chapter 205, HRS, while its application for a special permit is pending.

II. Conclusions of Law.

1. [Ala Loop] has standing to assert its claims regarding Waiʻola's use of the Subject Property. In particular, it has suffered an actual or threatened injury as a result of Waiʻola's conduct, the injury is fairly traceable to the conduct of Waiʻola and a favorable decision would likely provide relief for [Ala Loop's] injury.

2. Since the Subject Property is located in an agricultural use district, its use is limited by HRS § 205-4.5. Schools and school activities are not permitted under HRS § 205-4.5.

3. HRS § 302A-1184 does not apply to so as [sic] to exempt a new century charter school from complying with the requirements and limitations of Chapter 205, HRS.

4. Under HRS § 205-6, an entity may obtain [a] special permit to make "unusual and reasonable uses" of agricultural land which are not otherwise permitted under HRS § 205-4.5.

5. Since the acquisition of the Subject Property, Waiʻola has used the Subject Property in violation of Chapter 205, HRS, at least in the following ways: (a) operating its administrative offices; (b) storing its office equipment, files, computers and books; and (c) holding instructional and laboratory classes.

6. There is a reasonable apprehension that Waiʻola may use the Subject Property in violation of the requirements and limitations of Chapter 205, HRS, unless it is enjoined from doing so.

7. [Ala Loop] is entitled to a permanent injunction against Waiʻola enjoining Waiʻola from violating the requirements of Chapter 205, HRS.

8. There is an actual controversy regarding the applicability of Chapter 205, HRS, to Waiʻola. [Ala Loop] is entitled to a declaratory judgment against Waiʻola.

9. [Ala Loop] has provided evidence satisfactory to the Court that is entitled to relief as required by Rule 55(e), HRCP.

III. Judgment.

Based upon the foregoing, it is hereby ordered, adjudged and decreed as follows:

> 1. Notwithstanding HRS § 302A-1184, Waiʻola is subject to the limitations and requirements of Chapter 205, HRS. Accordingly, Waiʻola may not conduct school activities on the Subject Property which would otherwise violate Chapter 205, HRS, unless Waiʻola first receives a special permit under HRS 205-6.
>
> 2. Accordingly, Waiʻola, and its agents, representatives, faculty and students, are permanently enjoined from undertaking school activities on the Subject Property which would otherwise violate Chapter 205, HRS, unless Waiʻola first receives a special permit under HRS § 205-6 which permits the otherwise unpermitted activities. The prohibited school activities on the Subject Property, include, but are not limited to:
>
> a. Operating administrative offices;
> b. Storing office equipment, files, computers and books;
> c. Holding instructional and laboratory classes;
> d. Holding parent-teacher conferences and staff meetings; and
> e. The construction of educational facilities.
>
> However, Waiʻola, and its agents, representatives, faculty and students are specifically allowed use of the Subject Property as follows:
>
> a. A student may be bussed no more than once a week to the Subject Property during school hours for agricultural activities; and
> b. Permitted agricultural activities by students using the Subject Property include the cultivation of crops, the making of observations of crops, the undertaking of individual tests or experiments designed to improve the cultivation of crops and the receipt of individual advice from faculty members regarding the cultivation of crops or the [] individual tests or experiments.

Final judgment was entered on March 4, 2005. Waiʻola filed a notice of appeal on March 4, 2005. On July 29, 2005, this court issued an order dismissing the appeal because the judgment did not comply with Jenkins v. Cades Schutte Fleming & Wright, 76 Hawaiʻi 115, 119-120, 869 P.2d 1334, 1338-39 (1994).

On August 23, 2005, Ala Loop filed a motion for an award of attorney's fees and costs against Waiʻola. A hearing

was held on the motion on September 13, 2005. On October 28, 2005, the circuit court entered an order granting Ala Loop all of its costs, but denying Ala Loop its attorney's fees.

A First Amended Final Judgment was entered on December 12, 2005. The First Amended Final Judgment entered judgment in favor of Ala Loop and against Waiʻola on Counts I and II. As to Count IV, the circuit court dismissed with prejudice Ala Loop's cross-claim against Waiʻola alleging damages on the basis of nuisance per se, and entered judgment in favor of Waiʻola on Ala Loop's claim for attorney's fees, and against Waiʻola for costs in the sum of $3,878.64.[13]

Waiʻola timely filed a Notice of Appeal on January 10, 2006. Ala Loop filed a Notice of Cross-Appeal on January 24, 2006.

B. ICA Appeal

On May 22, 2006, Waiʻola filed its opening brief in which it raised the following points of error:

> 1. "Because [Ala Loop] lacked standing and its claim to require Waiʻola to obtain a special use permit was either moot or not ripe, the circuit court did not have subject matter jurisdiction, and erred by proceeding to adjudicate [Ala Loop's] cross-claim to judgment";
>
> 2. "The circuit court erred in failing to recognize that [Ala Loop's] claims for declaratory and injunctive relief and for nuisance per se against Waiʻola as a state agency are barred by sovereign immunity";
>
> 3. "The circuit court misapplied HRCP Rule 55(c)

[13] The court noted in a footnote that Counts III and V sought relief solely from the County of Hawaiʻi.

> and abused its discretion in denying Waiʻola's Motion to Set Aside Entry of Default";
>
> 4. "The circuit court lacked sufficient admissible, competent evidence for, and therefore erred in entering default judgment under [HRCP Rule] 55(e) in [Ala Loop's] favor"; and
>
> 5. "The circuit court erred in concluding that Waiʻola was using its farm in violation of the State's and the County's land use and zoning laws."

On June 2, 2006, Ala Loop filed its opening brief which raised the following points of error on cross-appeal:

> 1. "The Court erred in determining that [Ala Loop] was required by HRS Section 607-25(e)(2) to post a bond at the time it filed its Answer and Cross-Claim against [Waiʻola], thus denying [Ala Loop] a mandatory award of attorneys' fees and costs";
>
> 2. "The Court erred when it failed to award [Ala Loop] attorneys[']] fees under HRS Section 607-25(e)(1)";
>
> 3. "The Court erred when it determined that HRS Section 607-25 did not include [Waiola's] activities of operating the school on the Property and that such activities did not constitute 'development' under the statute"; and
>
> 4. "The Court erred when it determined that [Waiʻola] was not considered a private party under HRS Section 607-25."

The ICA's March 12, 2009 SDO reversed the circuit court's December 12, 2005 First Amended Final Judgment. The ICA cited its decision in Pono v. Molokai Ranch, Ltd., 119 Hawaiʻi 164, 180-90, 194 P.3d 1126, 1142-52 (App. 2008), cert. rejected, 2008 WL 5392320 (Haw. Dec. 29, 2008),[14] for the proposition that "private citizens do not have a private right of action to enforce the provisions of HRS chapter 205 and, therefore, lack

[14] The parties in this action filed their opening briefs with the ICA prior to the ICA's decision in Pono. Pono was decided on October 21, 2008, and the ICA's disposition in this case was filed on March 12, 2009.

standing to invoke a circuit court's jurisdiction to determine their claims to enforce Chapter 205." Accordingly, the ICA concluded that "[Ala Loop] did not have a private right of action to enforce their Chapter 205 claims and, therefore, the Circuit Court lacked subject matter jurisdiction over [Ala Loop's] claims." Based on that conclusion, the ICA did not "reach the merits of Waiʻola's other grounds for challenging the Circuit Court's rulings in favor of [Ala Loop] and against Waiʻola on [Ala Loop's] cross-claim."

As for Ala Loop's cross-appeal, the ICA noted that "[i]n light of our conclusion that [Ala Loop] has no authority to prosecute a private action against Waiʻola to enforce HRS § 205-6," "we need not address the other issues raised by [Ala Loop] in conjunction with their request for an award of attorneys' fees."

The ICA entered judgment on April 22, 2009.

C. Application

Ala Loop timely filed its application on July 21, 2009. In its application, Ala Loop stated that:

> .... It is Petitioner's position that the ICA:
> (1) ignored Petitioner's standing under HRS Section 632-1 based on the personal stake its members had in the controversy relating to the exemption issue,
> (2) ignored the direct procedural injury suffered by its members when they were deprived of the opportunity to participate in public hearings and contested case hearings which are available under the applicable special permit procedures mandated under HRS Section 205-6,
> (3) ignored the provisions of Article XI, Section 9 of the Hawaii State Constitution or the legislative intent of HRS Section 607-25, which expressly provides private parties with the right to

> sue for injunctive relief when a development is undertaken without obtaining all permits or approvals required by law, including permits required by Chapter 205, and
>
> (4) did not account for the fact that Petitioner was named as a defendant to the action, in which both the County of Hawaii and the Land Use Commission of the State of Hawaii ("LUC") were parties, and the County of Hawaii sought declaratory relief as to the same issues.

Accordingly, Ala Loop characterized the "question for decision" as

> [W]hen property is being used by an entity in violation of Chapter 205, HRS and the entity claims an exemption from the coverage of the land use statute, does an association comprised of neighbors of the entity named as a party have standing to obtain declaratory relief as to the exemption issue particularly when the public agencies provided with express statutory authority to enforce the chapter have failed to do so, or should the neighbors be without a remedy?[15]

Waiʻola timely filed its response on August 5, 2009. In its response, Waiʻola contends that this court should reject

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[15] Ala Loop also raised the following subsidiary questions:

> 1. Whether [Ala Loop has] established standing
>
> 2. Did the Circuit Court have jurisdiction to enter a judgment in favor of [Ala Loop] when the County of Hawaii and Land Use Commission have specific notice of a violation of Chapter 205, . . .?
>
> 3. Where as here, the neighbors also sought injunctive relief based on the law of nuisance, did the Circuit Court have jurisdiction to determine that the activities upon which the nuisance claim is based are in violation of Chapter 205 when the public agencies provided express authority to enforce the statute are named as parties and have the opportunity to provide input on the issues?
>
> 4. As a matter of procedural due process, did the circuit court have jurisdiction to consider the position of [Ala Loop] on the issues raised by the County in its Complaint, and by [Ala Loop] in its Counterclaim and Cross-claim?

the application on mootness grounds.

On August 6, 2009, this court ordered Ala Loop to show cause why this case is not moot. On August 11, 2009, Ala Loop filed its response to the order to show cause.

On July 28, 2009, the Native Hawaiian Legal Corporation filed an amicus curiae brief (NHLC amicus brief) in support of Ala Loop's application for writ of certiorari. On July 29, 2009, Hawaii's Thousand Friends filed an amicus curiae brief (HTF amicus brief) also in support of the application.

II. STANDARDS OF REVIEW

A. Mootness

This court has stated that

> It is axiomatic that mootness is an issue of subject matter jurisdiction. Whether a court possesses subject matter jurisdiction is a question of law reviewable de novo.

Hamilton ex rel. Lethem v. Lethem, 119 Hawaiʻi 1, 4-5, 193 P.3d 839, 842-43 (2008) (citation and internal quotation marks omitted).

B. Interpreting the Hawaiʻi Constitution

In interpreting constitutional provisions:

> "[W]e have long recognized that the Hawaiʻi 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." Hirono v. Peabody, 81 Hawaiʻi 230, 232, 915 P.2d 704, 706 (1996)(citation omitted). "This intent is to be found in the instrument itself." State v. Kahlbaun, 64 Haw. 197, 201, 638 P.2d 309, 314 (1981).
>
> As we recently reiterated in State of Hawaiʻi, ex rel. Bronster v. Yoshina, 84 Hawaiʻi 179, 932 P.2d 316 (1997), "[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." Id. [at 186], 932 P.2d 323 (quoting Blair [v. Cayetano], 73 Haw. [536,] 543, 836 P.2d [1066,] 1070, [(1992)] (citation omitted)). "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." Pray v. Judicial Selection Comm'n, 75 Haw. 333, 342, 861 P.2d 723, 727 (1993) (citation, internal quotation marks, brackets, and ellipses omitted).
>
> 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[.]" Carter v. Gear, 16 Haw. 242, 244 (1904), affirmed, 197 U.S. 348, 25 S.Ct. 491, 49 L.Ed. 787 (1905).

In re Water Use Permit Applications, 94 Hawaiʻi 97, 131, 9 P.3d 409, 443 (2000) (brackets in the original) (quoting Hawaii State AFL-CIO v. Yoshina, 84 Hawaiʻi 374, 376, 935 P.2d 89, 91 (1997)).

C. Motion to Set Aside An Entry of Default

The application of HRCP Rule 55, which governs the entry of default judgment, is reviewed for abuse of discretion. See Gonsalves v. Nissan Motor Corp., 100 Hawaiʻi 149, 158, 58 P.3d 1196, 1205 (2002).

III. DISCUSSION

A. Ala Loop's chapter 205 claim is not moot and would, in any event, fall within the "public interest" exception to the mootness doctrine

In its response to Ala Loop's application, Waiʻola contends that this court should not accept the application because the case is moot. Waiʻola asserts that "Waiʻola School no longer owns the property . . . on Ala Loop Road where the events

and controversies that spawned this case occurred,"[16] and that it "no longer conducts classes or other school activities on the Ala Loop property, see declaration of Daniel Caluya, and would need the current owner's permission before it could do so."[17] Accordingly, Waiʻola argued, "[b]ecause Waiʻola School no longer owns the subject property, and no longer conducts classes or activities at that location, the issues and claims for relief raised by [Ala Loop] are moot."

However, we conclude that Waiʻola failed to establish that Ala Loop's cross-claim is moot, and even if this case is moot, the "public interest" exception applies.

This court has stated that:

> A case is moot if it has lost its character as a present, live controversy of the kind that must exist if courts are to avoid advisory opinions on abstract propositions of law. The rule is one of the prudential rules of judicial self-governance founded in concern about the proper-and properly limited-role of the courts in a democratic society. We have said the suit must remain alive throughout the course of litigation to the moment of final appellate

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[16] Attached to Waiola's response is a certified copy of a warranty deed conveying the property back to its former owner.

[17] The declaration of Daniel Caluya, which was attached to the response, provides:

> I, DANIEL CALUYA, declare as follows:
> 1. I have personal knowledge of the following facts and am competent to testify to them.
> 2. I am the current director of Waiʻola Waters of Life Public Charter School ("Waiʻola School").
> 3. Waiʻola School no longer owns the property that is located at Ala Loop, and that is the subject of this case.
> 4. Waiʻola [S]chool no longer conducts classes or activities at that location.
>
> I declare the foregoing to be true and correct under penalty of perjury.

> disposition to escape the mootness bar.

Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 87, 734 P.2d 161, 165 (1987) (internal quotation marks, citations, and brackets omitted).

In sum, "[a] case is moot if the reviewing court can no longer grant effective relief." Kahoʻohanohano v. State, 114 Hawaiʻi 302, 332, 162 P.3d 696, 726 (2007) (brackets in original) (emphasis and citations omitted).

Waiʻola failed to establish that Ala Loop's cross-claim is moot. In its February 4, 2005 order, the circuit court found, inter alia, that Waiʻola was storing computers and equipment at the property as well as using the property as the site for its administrative offices,[18] and concluded that these activities violated chapter 205 in the absence of a special use permit. However, Mr. Caluya's declaration is silent as to whether Waiʻola continues to store equipment or supplies at the site, or remains in possession of any portion of the property.

Moreover, although Waiʻola states that it "no longer owns the property" and "no longer conducts classes or other activities on the Ala Loop Property," it does not assert that it has abandoned its attempts to operate a school there. Rather, Waiʻola states that "it would need the current owner's permission" before operating a school on the property. Thus,

[18] These findings are supported by deposition testimony.

Waiʻola could lease or otherwise secure the property for future school operations. Cf. Lathrop v. Sakatani, 111 Hawaiʻi 307, 313, 141 P.3d 480, 486 (2006) (holding that sale of property rendered appeal moot because the property plaintiffs sought to record a *lis pendens* upon was no longer owned by defendants).

Even if Ala Loop's claim is moot, it falls within the "public interest" exception to the mootness doctrine. Doe v.Doe, 116 Hawaiʻi 323, 327, 172 P.3d 1067, 1071 (2007). When analyzing the public interest exception, this court reviews the following three factors: "(1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for future guidance of public officers, and (3) the likelihood of future recurrence of the question." Id. (citations omitted).

Waiʻola argues that the "[public interest exception] is not implicated here because the neighbors[']counterclaim against the county is still pending in the Third Circuit Court." However, this argument is inconsistent with Waiola's contention that the cross-claim is moot, since presumably the same mootness arguments would apply to the counterclaim as to the cross-claim. Moreover, Waiʻola cites no authority for the proposition that the public interest exception should not apply to claims against one party based on the possibility that the issues could be litigated in connection with claims against another party.

All three prongs of the public interest test are satisfied here. First, even if this dispute is viewed as one

between two private parties, the ICA's ruling that there is no private right of action under chapter 205 "inject[ed] the requisite degree of public concern" in support of having the public interest exception apply. See id. (finding that, although the underlying proceedings were private in nature, the family court's invalidation of the grandparent visitation statute made the question public in nature). Second, because the availability of private enforcement is a potentially important consideration for public officers to take into account in performing their own duties under HRS chapter 205, public officials need guidance with regard to whether private citizens have a private right of action to enforce HRS chapter 205. As for the third prong, given the volume of land development activity in the State and the frequency with which issues relating to chapter 205 have been litigated, the question regarding whether a private party may seek to enforce HRS chapter 205 is likely to recur in the future.[19]

This case is similar to Kona Old, where an environmental group challenged the county planning director's issuance of "special management area minor permit" to the owner of property situated within a special management area. The owner

[19] Waiʻola contends that "the plain language of HRS § 205-12 obviates any need for a court to determine who is responsible for enforcing land use classification laws." However, this argument goes more to the merits rather than the question of mootness, and makes no attempt to address the arguments regarding the significance of article XI, section 9, HRS § 607-25, or this court's previous decisions. See sections III(B)(4) and (5), infra.

moved to dismiss the appeal as moot, arguing that no work remained to be done under the minor permit. 69 Haw. at 86-87, 734 P.2d at 165. Although it was unclear whether all construction was in fact complete, this court nevertheless proceeded to the merits of the group's appeal reasoning that the questions raised were "of public concern." Id. at 87-88, 734 P.2d at 165-166.

Likewise, the question of whether there is a private right of action to enforce claims brought under chapter 205 is of equal "public concern." Accordingly, we will address the merits of Ala Loop's application even if Waiʻola has sold the property where the events underlying this case took place.

B. Ala Loop had a private right of action to enforce HRS chapter 205

1. Pono erred in failing to consider the effect of article XI, section 9 of the Hawaiʻi Constitution

Since the ICA relied on Pono in determining that Ala Loop did not have a private right of action, and that the circuit court accordingly lacked subject matter jurisdiction, we begin our analysis there. The ICA held in Pono that private citizens do not have the authority to enforce the provisions of HRS chapter 205 and, therefore, lack standing to invoke a circuit court's jurisdiction to adjudicate their claims under chapter

205.[20] 119 Hawaiʻi at 167, 194 P.3d at 1129. The plaintiffs, an unincorporated association and several of its members (collectively Pono), filed a complaint in circuit court against Molokai Ranch (MR) for allegedly violating HRS chapter 205 by developing fifteen overnight campgrounds on agricultural lands without obtaining a special use permit pursuant to HRS § 205-6.[21] The complaint alleged jurisdiction "pursuant to HRS §§ 6E-13, 603-21.5, 603-21.7(b), 632-1, and Article XI, Sec. 9, Hawaii Constitution." Id. at 173-74, 194 P.3d at 1135-36 (footnotes omitted). The circuit court, relying on a Special Master's

[20] While the term "standing" is sometimes used to describe the private right of action inquiry, see, e.g., Pono 119 Hawaiʻi at 167, 194 P.3d at 1129, nevertheless, our cases make clear that the two inquiries involve distinct policy considerations and distinct tests, see, e.g., Pele Defense Fund v. Paty, 73 Haw. 578, 591, 837 P.2d 1247, 1256-57 (1992) (finding that, in action under 42 U.S.C. § 1983 for alleged breach of trust by the state, this court separately analyzes whether plaintiff had a "right to sue" "to enforce federal rights created by § 5(f) of the Admission Act" and whether plaintiff had "standing" under the injury-in-fact test). The private right of action inquiry focuses on the question of whether any private party can sue to enforce a statute, while the standing inquiry focuses on whether a particular private party is an appropriate plaintiff. See Sierra Club v. Hawaiʻi Tourism Auth., 100 Hawaiʻi 242, 271, 59 P.3d 877, 906 (2002) (Moon, C.J., dissenting) ("This court has long acknowledged that '[s]tanding is that aspect of justiciability focusing on the party seeking a forum rather than on the issues he [or she] wants adjudicated.'") (brackets in the original) (quoting Citizens for Prot. of N. Kohala Coastline v. County of Hawaiʻi, 91 Hawaiʻi 94, 100, 979 P.2d 1120, 1126 (1999)).

[21] Prior to Pono filing its lawsuit, the Director of the Department of Public Works and Waste Management stated in a letter dated December 11, 1995 to MR's vice president that "camping is a permitted use in agricultural districts having a soil classification rating of C, D, E, or U[.]" Id. at 170, 194 P.3d at 1132. Based on the director's opinion, MR did not apply for a special use permit for its proposed campgrounds. Id. at 170-71, 194 P.3d at 1132-33. Thereafter, MR applied to the Department of Public Works and Waste Management (DPW) for, and was issued, approximately one hundred building permits for construction of different camping facilities along the Great Molokai Ranch Trail. Id. at 171, 194 P.3d at 1133.

report,[22] dismissed the complaint and Pono appealed. Id. at 179, 194 P.3d at 1141.

The ICA began its analysis by noting that this court in Reliable Collection Agency v. Cole, 59 Haw. 503, 584 P.2d 107 (1978), had utilized the United States Supreme Court's approach set forth in Cort v. Ash, 422 U.S. 66 (1975), to determine whether "'a private remedy is implicit in a statute not expressly providing one'--an analysis that also involves the determination of whether a statute creates a right upon which a plaintiff may seek relief." Pono, 119 Hawaiʻi at 184-85, 194 P.3d at 1146-47. The ICA further noted that the Reliable court discussed the following three relevant factors used in Cort to make this determination:

> First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted['].-that is, does the statute create a...right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?...Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Id. at 185, 194 P.3d at 1147 (emphasis and citations omitted).

The ICA also cited to Rees v. Carlisle, 113 Hawaiʻi 446, 153 P.3d 1131 (2007), wherein this court stated that

> Subsequent to Cort, decisions of the United States Supreme Court have emphasized that "the key inquiry is

[22] The Special Master, relying on Kona Old, in which this court held that judicial relief is not available unless the party affected has taken advantage of the procedures provided for in the administrative process, concluded that the circuit court lacked jurisdiction over Pono's HRS chapter 205 claims because Pono failed to appeal its chapter 205 claim to the Maui County Board of Variances and Appeals (BVA). Id. at 178-79, 194 P.3d at 1140-41.

> whether Congress intended to provide the plaintiff with a private right of action." Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat Charters, Inc., 110 Hawaiʻi 302, 313 n.20, 132 P.3d 1213, 1224 n.20 (2006) (quoting First Pac. Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1121-22 (9th Cir. 2000)). Therefore, as we recognized in Whitey's Boat Cruises, "we apply Cort's first three factors in determining whether a statute provides a private right of action though understanding that legislative intent appears to be the determinative factor." Id. See also Gonzaga Univ. v. Doe, 536 U.S. 273, 284, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002) (For a statute to create private rights, its text must be phrased in terms of the persons benefitted.); Alexander v. Sandoval, 532 U.S. 275, 286, 121 S.Ct. 1151, 149 L.Ed.2d 517 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.").

Pono, 119 Hawaiʻi at 185, 194 P.3d at 1147 (quoting Rees, 113 Hawaiʻi at 458, 153 P.3d at 1143).

Applying the Rees/Reliable test, the ICA first concluded that no statute expressly creates a private right to enforce HRS chapter 205. Id. at 187, 194 P.3d at 1149. Unlike other statutes enacted by the legislature which expressly authorize private causes of actions for violations of those statutes, the ICA noted that "there is no provision in HRS chapter 205 that expressly authorizes a private individual to enforce the chapter." Id. at 187, 194 P.3d at 1149.

As to the second factor, the ICA concluded that there was no indication of legislative intent, explicit or implicit, to create a private right of action to enforce chapter 205, and that implying a private right of action on the basis of legislative silence would be a "hazardous enterprise, at best." Id. at 189, 194 P.3d at 1151 (quoting Touche Ross & Co. v. Redington, 442

U.S. 560, 571 (1979)).

Finally, as to the third factor, the ICA concluded that recognizing a private right of action to enforce HRS chapter 205 is not consistent with the underlying purposes of HRS chapter 205. Id. The ICA noted that pursuant to HRS § 205-12 (1993),[23] "the legislature has delegated enforcement of the restrictions and conditions relating to land-use-classification districts in a county to the county official charged with administering the zoning laws for that county[.]" Id. Relying on Lanai Co. v. Land Use Commission, 105 Hawaiʻi 296, 97 P.3d 372 (2004), in which this court held that HRS § 205-12 authorizes counties, but not the LUC, to enforce chapter 205, the ICA concluded that "it would be incongruous to hold that the legislature intended to grant private citizens a right to enforce the provisions of HRS chapter 205 against violators of the chapter." Pono, 119 Hawaiʻi at 190-91, 194 P.3d at 1152-53.

In a concurring opinion, Judge Foley, relying on Kona Old, stated that, "I would hold that Pono did not exhaust its administrative remedies prior to bringing suit in the circuit court because Pono did not appeal [the DPW director's] decision

[23] HRS § 205-12 (1993) provides:

> **Enforcement.** The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 206-4.5 and shall report to the commission all violations.

to the BVA." Id. at 200, 194 P.3d at 1162. Judge Foley noted that at the time of the events that led to Pono's lawsuit, Section 8-5.4(2) of the Maui County Charter provided that the BVA "[h]ear and determine appeals alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision and building ordinances." Id. at 199, 194 P.3d at 1161. Under the Maui County Code, the DPW was charged with the "enforcement of zoning, subdivision and building ordinances." Id. at 200, 192 P.3d at 1162. Pursuant to § 8-5.4(2), the BVA had the authority "to hear and determine appeals alleging error from any person aggrieved by a decision or order" of the DPW director. Id. Accordingly, in Judge Foley's view, Pono was required to exhaust its administrative remedies, by appealing the DPW's determination that camping was a permitted use and that a special use permit accordingly was not required, before it could seek judicial review. Id.

Ala Loop and the amicus fault the ICA's analysis in Pono on several grounds. First, they note that the ICA did not consider the effect of article XI, section 9 of the Hawaiʻi Constitution in its Rees/Reliable analysis. Second, they argue that the ICA failed to consider the effect of HRS § 607-25, which authorizes the award of attorneys' fees in actions brought by private parties to enjoin development undertaken without permits, including permits required under Chapter 205. Finally, they argue that the ICA's analysis is inconsistent with cases of this

court that granted standing to plaintiffs in environmental cases, and with cases of this court which have implicitly recognized private rights of action to enforce environmental laws, including chapter 205.

We conclude that Ala Loop had a private right of action to enforce chapter 205 against Waiʻola. While the Rees/Reliable test is appropriately used to determine whether the legislature intended to create a private right of action when it enacts a statute, it is not applicable when the state constitution creates the private right of action. In Reliable, the question was whether the legislature intended to create a private right of action when it enacted prohibitions on the unauthorized practice of law. 59 Haw. at 506, 584 P.2d at 109. In Rees, the question was whether the ordinances of the City and County of Honolulu created a private right of action by which a citizen could seek to enforce the provisions of the city's ethics code against a public official. 113 Hawaiʻi at 456-459, 153 P.3d at 1141-1144. Neither case addressed the question of whether a provision of the state constitution had created a private right of action. Thus, the ICA erred in Pono and here by applying the Rees/Reliable analysis to chapter 205, without also addressing the question of whether article XI, section 9 created a private right of action for the enforcement of that chapter.

For the reasons set forth below, article XI, section 9 creates a private right of action to enforce chapter 205 in the

circumstances of this case, and the legislature confirmed the existence of that right of action by enacting HRS § 607-25, which allows recovery of attorneys' fees in such actions.

2. Article XI, section 9

Article XI, section 9 of the Hawaiʻi Constitution 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.

This provision was proposed by the 1978 Constitutional Convention, and approved by the voters in the November 7, 1978 general election. See Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of 1978, at 689 (1980). It has both a substantive and a procedural component. First, it recognizes a substantive right "to a clean and healthful environment," with the content of that right to be established not by judicial decisions but rather "as defined by laws relating to environmental quality."[24] Second, it provides for the

[24] As the committee report from the 1978 Constitutional Convention observed regarding this section:

> Your Committee believes that a clean and healthful environment is an important right of every citizen and that this right deserves constitutional protection. The definition of this right 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, a point of fairness important to parties which have

enforcement of that right by "any person" against "any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law."

In order to determine the relevance of article XI, section 9 here, we must answer several questions. First, is chapter 205 a "law[] relating to environmental quality" within the meaning of article XI, section 9? Second, is article XI, section 9 self-executing, i,e., does the legislature need to act before the ability to "enforce this right" can be realized? Finally, if the provision is self-executing, has the legislature acted to impose "reasonable limitations and regulation" that are applicable in the circumstances of this case, and which would preclude Ala Loop from maintaining an action for alleged violations of Chapter 205?

3. Chapter 205 is a "law[] relating to environmental quality" within the meaning of article XI, section 9

> invested or are investing large sums of money to comply with present laws.
>
> 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 or regulation laws [sic] in light of the latest scientific evidence and federal requirements and opportunities. Thus, the right can be reshaped and redefined through statute, ordinance and administrative rule-making procedures and not inflexibly fixed.

Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawaiʻi of 1978, at 689.

Article XI, section 9 establishes the right to a clean and healthful environment, "as defined by laws relating to environmental quality." The provision goes on to set forth examples of such laws, including laws relating to "control of pollution" and the "conservation, protection and enhancement of natural resources."

HRS chapter 205 is a law relating to the conservation, protection and enhancement of natural resources, and thus falls within the scope the enforcement right established by article XI, section 9. When the legislature enacted what became HRS chapter 205 in 1961, it stated that the purpose of the statute was "to preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare[.]" 1961 Haw. Sess. Laws Act 187, § 1. A committee report on the bill stated that its purpose was to "protect and conserve through zoning the urban, and agricultural and conservation lands within all counties" in order to, inter alia, "conserve forests, water resources and land." See H. Stand. Comm. Rep. No. 395, in 1961 House Journal, at 855. Moreover, in Curtis v. Board of Appeals, County of Hawaiʻi, 90 Hawaiʻi 384, 978 P.2d 822 (1999), this court examined the "reason and spirit" of the statute and concluded that its "overarching purpose . . . is to 'protect and conserve' natural resources and foster 'intelligent,' 'effective,' and 'orderly' land allocation and development." Id. at 396, 978 P.2d at 834 (emphasis added,

citation omitted).

Consistent with that understanding, the provisions of chapter 205 expressly require consideration of issues relating to the preservation or conservation of natural resources. See HRS § 205-17(3) (requiring that the land use commission in reviewing any petition for reclassification of district boundaries consider among other things "[t]he impact of the proposed reclassification" on the "[p]reservation or maintenance of important natural systems or habitats," the "[m]aintenance of valued cultural, historical, or natural resources" and the "[m]aintenance of other natural resources relevant to Hawaii's economy, including, but not limited to, agricultural resources"); HRS § 205-2(e) (mandating that land classified as conservation districts include "areas necessary for protecting watersheds and water sources; preserving scenic and historic areas; providing park lands, wilderness and beach reserves; conserving indigenous or endemic plants, fish and wildlife....").

Finally, HRS § 607-25 reflects the legislature's determination that chapter 205 is an environmental quality law. That determination is particularly pertinent since article XI, section 9 does not itself define the substantive content of the right to a clean and healthful environment, but rather leaves it to the legislature to determine. HRS § 607-25 is a fee recovery statute that authorizes the recovery of attorneys' fees and costs by private parties against other private parties who undertake

development without "obtaining all permits or approvals required by law from government agencies[.]" HRS § 607-25(e). HRS § 607-25(c) provides that "[f]or purposes of this section, the permits or approvals required by law shall include compliance with the requirements for permits or approvals established by chapter[] . . . 205 . . . and ordinances or rules adopted pursuant thereto under chapter 91." Thus, permits or approvals required by chapter 205 are expressly covered by the statute.

The legislature explained the purpose of HRS § 607-25 as follows:

> The legislature finds that article XI, section 9, of the Constitution of the State of Hawaii has given the public standing to use the courts to enforce laws intended to protect the environment. However, the legislature finds that the public has rarely used this right and that there have been increasing numbers of after-the-fact permits for illegal private development. Although the legislature notes that some government agencies are having difficulty with the full and timely enforcement of permit requirements against private parties, after-the-fact permits are not a desirable form of permit streamlining. For these reasons, the legislature concludes that to improve the implementation of laws to protect health, environmental quality, and natural resources, the impediment of high legal costs must be reduced for public interest groups by allowing the award of attorneys' fees, in cases involving illegal development by private parties.

1986 Haw. Sess. Laws Act 80, § 1 at 104-105 (emphasis added).

Thus, in enacting HRS § 607-25, the legislature recognized that chapter 205 implements the guarantee of a clean and healthful environment established by article XI, section 9. Accordingly, we conclude that chapter 205 is a "law[] relating to environmental quality" within the meaning of article XI,

section 9.

4. Article XI, section 9 is self-executing in the circumstances presented here

In State v. Rodrigues, 63 Haw. 412, 629 P.2d 1111 (1981), this court held that a constitutional provision is self-executing "if it supplies a sufficient rule by means of which the right may be enjoyed and protected, or the duty imposed may be enforced[.]" Id. at 414, 629 P.2d at 1113 (citing Davis v. Burke, 179 U.S. 399, 403 (1900)). However, a provision "is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Id.

The Hawaiʻi Constitution itself addresses the subject of whether its provisions are self-executing, providing in article XVI, section 16 that "[t]he provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit."

In Rodrigues, the question was whether article I, section 11 relating to the appointment of independent grand jury counsel was self-executing.[25] Id. at 413-14, 629 P.2d at 1113.

[25] That provision, which was adopted in 1978, provides:

> Whenever a grand jury is impaneled, there shall be an independent counsel appointed as provided by law to advise the members of the grand jury regarding matters brought before it. Independent counsel shall be selected from among those persons licensed to practice law by the supreme court of the State and shall not be a public employee. The term and compensation for independent counsel shall be provided by law.

We evaluated the plain language of the provision, as well as the intent of the framers as reflected in the standing committee reports from the 1978 Constitutional Convention. Id. at 416-17, 629 P.2d at 1114-15. We concluded that the provision's reference to the appointment, term and compensation of the independent counsel "as provided by law" reflected the framers' intent that "subsequent legislation was required to implement the amendment[,]" since at the time the amendment was adopted, "there [were] no other constitutional provisions or statutes to which the phrase could refer." Id. at 415, 619 P.2d at 1114.

We have revisited the analysis of Rodrigues in several subsequent cases. In In re Water Use Permit Applications, 94 Hawaiʻi 97, 131-32, 9 P.3d 409, 443-44 (2000), this court considered a challenge to actions taken by the Commission on Water Resource Management, including the apportionment of water for various uses. The Commission had cited the public trust doctrine, in addition to the State Water Code, as support for its decisions. Id. at 113, 9 P.3d at 425. We held that article XI, section 1[26] and article XI, section 7[27] adopted the public trust

[26] Article XI, section 1 provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

doctrine as a fundamental principle of constitutional law in Hawaiʻi, and rejected a claim that the doctrine was not self-executing. Id. at 132 n.30, 9 P.3d at 444 n.30. We examined the history of the provisions, and concluded that "[w]hereas review of the history of article I, section 11 in Rodrigues evidenced the intent to require further legislative action, the same inquiry here reveals that the framers intended to invoke the public trust in article XI, section 7." Id. We cited to article XVI, section 16 as further support for that conclusion. Id.

In United Public Workers, AFSCME, Local 646 v. Yogi, 101 Hawaiʻi 46, 62 P.3d 189 (2002), this court considered whether a statute which prohibited public employers and public employee unions from collectively bargaining over cost items for the 1999-2001 biennium violated article XIII, section 2[28] of the Hawaiʻi

> All public natural resources are held in trust by the State for the benefit of the people.

[27] Article XI, section 7 provides:

> The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people.
>
> The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

[28] Article XIII, section 2 [formerly Article XII, section 2] provides that:

Constitution. Id. at 47, 62 P.3d at 190. This court noted that at the time article XII, section 2 was amended in 1968,[29] "collective bargaining as provided by law" had a well recognized meaning, usage and application under both federal and state laws. Id. at 51, 62 P.3d at 194. Thus, we concluded that "Rodrigues is inapposite[,]" and explained:

> The context in which the phrase "as provided by law" in Rodrigues was used is factually distinguishable from the situation presented in the instant case. Unlike the amendment at issue in Rodrigues, when article XII, section 2 was amended in 1968, there were pre-existing federal and state statutes, constitutional provisions, and court cases which give meaning to the term "collective bargaining."

Id.

After evaluating the intent of the framers as reflected in committee reports from the 1968 Constitutional Convention as well as the voters' understanding of the term "collective bargaining" as reflected by its common definition at the time,

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> Persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law.

[29] In a footnote this court explained that:

> Prior to the 1968 amendment, article XII, section 2 provided that "[p]ersons in public employment shall have the right to organize and to present their grievances and proposals to the State, or any political subdivision or any department or agency thereof." Article XII, section 2 was amended in 1968 to read, "[p]ersons in public employment shall have the right to organize for the purpose of collective bargaining as prescribed by law." Ten years later, at the 1978 Constitutional Convention, article XII, section 2 was renumbered to article XIII, section 2, and the phrase, "as prescribed by law" was replaced with as "provided by law."

101 Hawaiʻi at 47 n.5, 62 P.3d at 190 n.5 (internal citations omitted).

this court concluded that the provision's reference to "collective bargaining" had a clear meaning which entailed the "ability to engage in negotiations concerning core subjects such as wages, hours, and other conditions of employment." Id. at 53, 62 P.3d at 196. Accordingly, this court held that lawmakers did not have the absolute discretion to define the scope of collective bargaining. Id.

In Save Sunset Beach Coalition v. City and County of Honolulu, 102 Hawaiʻi 465, 78 P.3d 1 (2003), this court considered whether article XI, section 3[30] relating to the conservation and protection of agricultural land was self-executing. Id. at 474-76, 78 P.3d at 10-12. This court concluded that article XI, section 3 read as a whole required future action be taken by the legislature in order for the "two-thirds vote of the body responsible for the reclassification or rezoning action" provision to be effective. Id. This court explained that since the text imposes a duty on the legislature

[30] Article XI, section 3 provides:

> 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 accomplish the foregoing.
>
> Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.

to "provide standards and criteria to accomplish the foregoing [mandate with respect to the preservation of agricultural lands]," it did not appear that the framers considered article XI, section 3 to be "complete in itself," and instead required implementing legislation. Id. at 475-76, 78 P.3d at 11-12.

Several principles emerge from these cases. First, we closely review the language of the provision at issue to determine whether it indicates that the adoption of implementing legislation is necessary. While a reference to a right being exercised "as provided by law" may reflect an intent that implementing legislation is anticipated, see Rodrigues, 63 Haw. at 415, 629 P.2d at 1114, it can be interpreted in other ways, such as simply referring to an existing body of statutory and other law on a particular subject, see Yogi, 101 Hawaiʻi at 51-53, 62 P.3d at 194-96.[31] Second, we review the history of the

[31] Thus, we respectfully disagree with the dissent's reliance on Board of Education of State of Hawaii v. Waihee, 70 Haw. 253, 264 n.4, 768 P.2d 1279, 1286 n.4 (1989) for the proposition that "[t]he phrase 'as provided by law' in the context of . . . state constitutional provisions [is a directive] to the legislature to enact implementing legislation" in the circumstances here. Dissenting opinion at 70-71 & 71 n.23 (ellipses and brackets in the original). Waihee is distinguishable from the instant case because Waihee concerned whether what had been "provided by law" was consistent with the constitutional provisions, not whether the provisions were self-executing.

Moreover, the case from which Waihee draws this proposition, State v. Rodrigues, 63 Haw. 412, 415, 629 P.2d 1111, 1114 (1981) considered the phrase "as provided by law" in the context of a constitutional amendment where, "[a]t the time the amendment was adopted, there was no other constitutional provision or statute to which the phrase could refer. Absent such provision, subsequent legislation was required to implement the amendment." Id. However, in the instant case, the framers specifically noted that "[d]efining the right in terms of present laws imposes no new legal duties on parties," indicating that, at the time the amendment was adopted, there were other laws in existence to which the phrase "as provided by law" could refer. Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawaiʻi of 1978, at 689 (1980) (emphasis added); see discussion

provision, to determine if the framers' intent as reflected in that history confirms our analysis of the plain language.

The plain language of article XI, section 9 suggests that the right of enforcement described in the provision is self-executing. While the right is "subject to reasonable limitations and regulation as provided by law," that provision does not suggest that legislative action is needed before the right can be implemented. Put another way, although the provision preserves the ability of the legislature to impose reasonable limitations on the exercise of the right, the right exists and can be exercised even in the absence of such limitations.

It is noteworthy that some limitations already existed in the State's environmental laws at the time the amendment was approved in 1978. For example, HRS § 343-7(a) (Supp. 1975) provided that judicial proceedings challenging the failure to prepare an environmental impact statement must be brought within 180 days. Absent the final clause in article XI, section 9, it could be argued that such provisions would be unconstitutional because they restrict the right to enforce environmental quality laws. Thus, the situation here is similar to that in Yogi, where the phrase "as provided by law" in article XIII, section 2 was interpreted as a reference to the existing law of collective bargaining, rather than that in Rodrigues, where article I,

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infra.

section 11 established a new right to grand jury counsel, and the phrase "as provided by law" reflected the framers' understanding that administrative details such as the compensation of the counsel needed to be addressed by the legislature first.

It is also worth noting that the right at issue here--i.e., the right to seek enforcement "through appropriate legal proceedings"--is within the ability of the judiciary to implement without legislative action. Unlike the establishment of a new right to grand jury counsel, which raised issues of implementation such as who gets to serve as such counsel and how much they will be paid, establishing a right to enforce environmental rights does not raise practical issues of implementation.

This interpretation of the plain language of article XI, section 9 is confirmed by an examination of the intent of its framers, as reflected in the proceedings of the 1978 Constitutional Convention. The report of the Committee on Environment, Agriculture, Conservation and Land observed:

> Your Committee believes that a clean and healthful environment is an important right of every citizen and that this right deserves constitutional protection.
>
> . . . .
>
> Your Committee believes that this important right deserves enforcement and has removed the standing to sue barriers, which often delay or frustrate resolutions on the merits of actions or proposals, and provides that individuals may directly sue public and private violators of statutes,

> ordinances and administrative rules relating to environmental quality. The proposal adds no new duties but does add potential enforcers. This private enforcement right complements and does not replace or limit existing government enforcement authority.
>
> Your Committee intends that the legislature may reasonably limit and regulate this private enforcement right by, for example, prescribing reasonable procedural and jurisdictional matters, and a reasonable statute of limitations.
>
> Your Committee believes that this new section adequately recognizes the right to a clean and healthful environment and at the same time would prevent abuses of this right. Concern was expressed that the exercise of this right to a clean and healthful environment would result in a flood of frivolous lawsuits. However, your Committee believes that if environmental law enforcement by government agencies is adequate in practice, then there should be few additional lawsuits, given the barriers that litigation costs present.
>
> Moreover, your Committee is convinced that the safeguards of reasonable limitations and regulations as provided by law should serve to prevent abuses of the right to a clean and healthful environment.

Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of 1978, at 689-690 (1980).

The committee report does not indicate that the framers understood that implementing legislation was needed before enforcement actions could be brought pursuant to article XI, section 9. To the contrary, the report explicitly recognizes that the provision "provides that individuals may directly sue public and private violators."[32] Id. at 690. While the report

[32] A 1978 study prepared for the constitutional convention by the Legislative Reference Bureau contained a section entitled "The Right to Sue For Environmental Grievances." Hawaii Constitutional Convention Studies, Article X: Conservation and Development of Resources, Legislative Reference Bureau, at 35-38 (May 1978). The study examined provisions from other states, including one from Illinois which it characterized as "[p]erhaps the strongest constitutional expression of the right to sue[.]" Id. at 35-36 (citing Illinois Constitution, Art. XI, § 2, which provided in relevant part that "Each person has the right to a healthful environment" and "[e]ach person may enforce this right against any party, governmental or private, through

recognizes that the legislature retains the power to impose reasonable limits on the right to bring suit, such as statutes of limitations,[33] it does not suggest that such limits must be in place before actions can be brought.[34] Id. at 689-90.

This interpretation is further confirmed by the subsequent actions of the legislature, which reflect its understanding that the provision was self-executing. In 1979, the State House appointed the committees on Ecology and

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appropriate legal proceedings subject to reasonable limitations and regulation by law."). The study did not indicate that implementing legislation would be required; to the contrary, it clearly assumed the opposite. Id. at 36 ("[t]here are a number of advantages to the inclusion of a constitutional provision, in contrast to a statute, granting the right to sue[.]").

[33] The standing committee report of the 1978 constitutional convention provides that "the legislature may reasonably limit and regulate this private enforcement right by, for example, prescribing . . . a reasonable statute of limitations." Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of Hawaiʻi of 1978, at 690 (1980) (emphasis added). "[T]he term 'may' is generally construed to render optional, permissive or discretionary the provision in which it is embodied," State v. Kahawai, 103 Hawaiʻi 462, 465, 83 P.3d 725, 728 (2004) (citations omitted), and there is nothing about the context of its use here to suggest a contrary meaning. Thus, we respectfully disagree with the dissent's assertion that "the framers clearly intended that a specific statute of limitations be enacted" before article XI, section 9 can be enforced. Dissenting opinion at 75 (emphasis in original).

Thus, the legislature may, consistent with article XI, section 9, enact a specific statute of limitations applicable to actions seeking to enforce the provisions of HRS Chapter 205. Alternatively, statutes of limitations of general application can be applied to such claims consistent with article XI, section 9. Cf. Pele Defense Fund v. Paty, 73 Haw. 578, 595, 837 P.2d 1247, 1259 (1992).

[34] We respectfully disagree with the dissent's suggestion that the plain language of article XI, section 9 does not reflect the clearly-stated intention in the committee report that the right of enforcement be self-executing without further action by the legislature. To the contrary, for the reasons set forth supra, the text of article XI, section 9 unambiguously establishes a self-executing private right of action, and is therefore completely consistent with the committee report's understanding that by recommending adoption of that provision, the committee "has removed the standing to sue barriers" and thereby "provide[d] that individuals may directly sue public and private violators." Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of 1978, at 689-690 (1980) (emphasis added).

Environmental Protection and the Judiciary to serve as a joint Interim Committee to review article XI, section 9 "to determine whether legislation is necessary to implement" the right to a clean and healthful environment established by the provision. H. Spec. Comm. Rep. No. 22, in 1980 House Journal, at 1247. The joint Interim Committee reviewed the provision and its history, and held a hearing at which various witnesses testified, including four former delegates who served on the committee that drafted the provision. Id. at 1247-48. The committee reported to the House as follows:

> Your joint Interim Committee . . . finds that both of the constitutional rights contained in the environmental rights amendment took effect and were granted to each person in Hawaii immediately upon ratification, at the general election of November 7, 1978, of the amendment to the Hawaii State Constitution now designated as Article XI, Section 9.
>
> Your Committee relatedly finds and concludes that the environmental rights amendment (Article XI, Section 9) is self-executing or self-implementing, and that no legislation is necessary at this time to implement its provisions.

Id. at 1248.

The committee further reported that "[a]lthough Article XI, Section 9 does not mandate the legislature to enact limitations and regulations, testimonies presented by representatives from the private sector . . . expressed concern that the broad, liberalized standing-to-sue provision in the subject amendment will encourage a flood of lawsuits[.]" Id. at 1250. The report noted that the experience to date in Hawaiʻi with the provision, as well as that in other states (such as

Illinois) with similar provisions, did not justify those concerns. Id. Thus, the report concluded that "your joint Interim Committee on Environmental Rights recommends no legislation, at this particular time, to implement, limit or regulate the provisions of, or the rights granted by[]" article XI, section 9. Id. (emphasis in original).

The report is not dispositive in our analysis since it cannot change the meaning of article XI, section 9 as approved by the voters in 1978, and since it sets forth the views only of the joint committee, rather than the legislature as a whole. Nevertheless, it is relevant to the extent that it provides an explanation for the non-action of the legislature, which is the body that would be charged with enacting legislation to implement the provision if it was not self-executing.

Even stronger evidence of the legislature's views on the self-executing nature of article XI, section 9 came in 1986, when the legislature enacted Act 80, which was codified as HRS § 607-25. When the legislature enacted Act 80, it specifically included chapter 205 among the list of provisions for which attorneys' fees could be recovered in a suit by one private party against another for an injunction against development undertaken without permits or approvals. See 1986 Haw. Sess. Laws Act 80, § 607 at 105 ("[f]or purposes of this section, the permits or approvals required by law shall include compliance with the requirements for permits or approvals established by chapter[]

. . . 205 . . . and ordinances or rules adopted pursuant thereto under chapter 91.").

Although one might read the inclusion of chapter 205 within HRS § 607-25 as creating a cause of action under HRS § 607-25, the legislature's findings and committee reports all suggest that the legislature understood that such causes of action already existed and were authorized by article XI, section 9. See 1986 Haw. Sess. Laws Act 80, § 1 at 104-05 ("The legislature finds that article XI, section 9 of the Constitution of the State of Hawaii has given the public standing to use the courts to enforce laws intended to protect the environment. However, the legislature finds that the public has rarely used this right . . . ."); H. Stand. Comm. Rep. No. 766-86, in 1986 House Journal, at 1373 ("Your Committee further finds that if the bill is adopted, it will give fuller effect to Article XI, Section 9 of the State Constitution, which gives Hawaii's people the right to bring lawsuits enforcing environmental laws."); S. Stand. Comm. Rep. No. 450-86, in 1986 Senate Journal at 976 ("The bill will give fuller effect to Article XI, Section 9 of the Constitution of the State of Hawaii, which gives Hawaii's people the right to bring lawsuits enforcing environmental laws.").

In sum, it appears that the legislature found in 1986 that article XI, section 9 was self-executing. Moreover, to ensure that the public was not dissuaded from asserting their rights under that provision, the legislature enacted HRS § 607-25

to allow citizens to recover their attorneys' fees for bringing a successful civil action against a private party for a violation of the enumerated chapters (including chapter 205) contained within the statute.

This view is consistent with this court's discussion of HRS § 607-25 in Kahana Sunset Owners Association v. Maui County Council, 86 Hawaiʻi 132, 948 P.2d 122 (1997). In Kahana, the plaintiffs failed to prevail on appeal in an action against a private defendant with regard to the approval of a rezoning application. Id. at 133, 948 P.2d at 123. After a review of the legislative history of HRS § 607-25, this court concluded "that the legislature intended that individuals and organizations would help the state's enforcement of laws and ordinances controlling development by acting as private attorneys general and suing developers who did not comply with the proper development laws." Id. at 134-35, 948 P.2d at 124-25. We concluded that an award of attorney's fees to the defendants was not warranted, because the plaintiffs' arguments were not frivolous. Id. at 135, 948 P.2d at 125.

The conclusion that article XI, section 9 is self-executing is also widely supported in the scholarly writing about the provision. See Susan Morath Horner, Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife, 35 Land & Water L. Rev. 23, 65 (2000) (describing article XI, section 9 as expressing a "manifest self-executing nature"); Janelle P.

Eurick, The Constitutional Right to a Healthy Environment: Enforcing Environmental Protection Through State and Federal Constitutions, 11 Int'l Legal Persp. 185, 208 (2001) (noting that this court in Kahana found that "Hawaii's environmental constitutional provision, Article XI, Section [9], gives citizens standing to use the court to protect the environment"); Carole L. Gallagher, The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present, 9 Fordham Envtl. L. Rev. 107, 139 (1997) (noting that this court in Kahana "affirmed that article XI, section 9 gives the Hawaiian people the right to bring lawsuits to enforce environmental laws"); David Kimo Frankel, Enforcement of Environmental Laws in Hawaii, 16 U. Haw. L. Rev. 85, 135 (1994) (noting that article XI, section 9 was "intended to be self-executing" and that "[t]he plain language and history of [that] provision declare that citizens have the right to sue, but that this right can be limited and regulated by the Legislature").

This court's other decisions have not directly addressed whether article XI, section 9 is self-executing. See Sierra Club v. Dep't of Transp. (Superferry I), 115 Hawaiʻi 299, 320 n.28, 167 P.3d 292, 313 n.28 (2007) (stating that "[a]lthough this court has cited [article XI, section 9] as support for our approach to standing in environmental cases, we have not directly interpreted the text of the amendment," and declining to discuss the meaning of article XI, section 9 further because the

environmental statute at issue contained specific language regarding who may enforce the law and the parties did not discuss the constitutional provision in their appellate briefs) (internal citations omitted)); Life of the Land v. Land Use Comm'n, 63 Haw. 166, 172 n.5, 623 P.2d 431, 438 n.5 (1981) (noting that standing requirements are "tempered" by article XI, section 9); see also Bremner v. City & County of Honolulu, 96 Hawaiʻi 134, 145 n.3, 28 P.3d 350, 361 n.3 (App. 2001) (addressing the text of article XI, section 9 to the extent it recognized that, "[i]n his complaint, Bremner asserts the omission of an environmental assessment violated his environmental rights under article XI, section 9 of the Hawaiʻi Constitution. The manner in which Bremner's rights under article XI may be enforced, however, is governed by section 9's qualification that any such legal proceeding be 'subject to reasonable limitations and regulation as provided by law.' Haw. Const. art. XI, § 9. Because Hawaiʻi Revised Statutes ch. 343 provides reasonable limitations and regulations for adjudicating disputes involving environmental assessments, Bremner's failure to comply with its provisions forecloses further consideration of his constitutional claim."). While several of our decisions have touched upon the existence of private rights of action for violations of environmental laws, they did not consider article XI, section 9. See Citizens for the Prot. of the N. Kohala Coastline v. County of Hawaiʻi, 91 Hawaiʻi 94, 979 P.2d 1120 (1999); Whitey's Boat Cruises, Inc. v. Napali-Kauai Boat

Charters, Inc., 110 Hawai'i 302, 132 P.3d 1213 (2006).[35]

For the foregoing reasons, we conclude that article XI, section 9 is self-executing. Having determined that article XI, section 9 is self-executing, we turn to whether the legislature has acted to impose "reasonable limitations and regulation" that might preclude Ala Loop from maintaining an action for alleged violations of chapter 205.

5. HRS § 205-12 does not preclude Ala Loop from bringing an action to enforce chapter 205 against Waiʻola

Article XI, section 9 provides that the legislature has the authority to impose "reasonable limitations and regulation" on potential litigants, such as Ala Loop, who seek to bring private actions to enforce laws relating to environmental quality. In its response to the application, Waiʻola argues that

[35] In Citizens for the Protection of North Kohala Coastline, a community group sought declaratory and injunctive relief alleging that the county wrongfully failed to allow for proper state land use review as required by HRS chapter 205. 91 Hawai'i at 96, 979 P.2d at 1122. This court emphasized the state's liberal standing doctrine "where the interests at stake are in the realm of environmental concerns," id. at 100, 979 P.2d at 1126 (citation omitted), and reasoned that "[b]ecause a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to this proceeding and will foster 'the needs of justice,'" the community group had standing to participate in the action for declaratory and injunctive relief, id. at 101-02, 979 P.2d at 1127-28. This court then reached the merits of the group's claim and concluded that the county did not violate HRS chapter 205. Id. at 106, 979 P.2d at 1132.

In Whitey's Boat Cruises, several commercial tour boat operators brought common law tort claims against other operators and promoters, alleging that their failure to obtain permits required by state and county regulations promulgated under HRS chapters 200 and 205A amounted to unfair competition and tortious interference with prospective business advantage. This court found that the regulations in question did not provide the parties a private right of action "in the circumstances of this case" because the regulations "were not promulgated with the objective of protecting business interests or competition but rather with the objective of protecting and preserving the environment for the general public[.]" 110 Hawai'i at 313, 132 P.3d at 1224. Whitey's Boat Cruises is thus distinguishable from the circumstances here, where there are no allegations of commercial injury.

the legislature has expressly delegated enforcement of chapter 205 to the counties in HRS § 205-12,[36] and thereby precluded a private right of action by Ala Loop. In support of its argument, Waiʻola cites to Lanai Co. v. Land Use Commission, 105 Hawaiʻi 296, 318, 97 P.3d 372, 394 (2004).

Although the response does not discuss article XI, section 9, Waiola's argument amounts to a contention that HRS § 205-12 is a "reasonable limitation[] and regulation" within the meaning of the provision. However, HRS § 205-12 does not preclude Ala Loop's private right of action to enforce chapter 205. In Lanai Co., this court considered the power of the Land Use Commission (LUC) to enforce the provisions of chapter 205. After examining the authority granted to the LUC under chapter 205, we concluded that "the LUC must necessarily be able to order that a condition it imposed be complied with, and that violation of a condition cease." Id. However, we further concluded that HRS § 205-12 gave the counties, rather than the LUC, the authority to enforce the provisions of chapter 205. Id. We noted that although HRS § 205-12 expressly gave enforcement authority to the counties, "[t]here is no provision in HRS § 205-

[36] HRS § 205-12 (1993) provides:

> **Enforcement.** The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

12 that expressly delegates enforcement power to the LUC." Id. We added that "[i]f the legislature intended to grant the LUC enforcement powers, it could have expressly provided the LUC with such power." Id.

Thus, the issue in Lanai Co. was which of two governmental entities (the LUC, or the county) was authorized by the legislature to enforce chapter 205. There was no suggestion that article XI, section 9 was relevant to that analysis, or that HRS § 205-12 reflected any intent by the legislature to preclude private enforcement. Thus, Lanai Co. is not dispositive of the issues here.

In any event, if we were to interpret HRS § 205-12 as Waiʻola suggests, it would exceed the power granted to the legislature in article XI, section 9 to impose "reasonable limitations and regulation" on the right of private enforcement. The inclusion of the word "reasonable" in that phrase clearly indicates that the power to limit or regulate is not unfettered. The abolishment of the private right altogether by HRS § 205-12, on the theory that the county would enforce the same underlying substantive interests, would not be a "reasonable" limitation within the meaning of the provision.

This interpretation is supported by the history of article XI, section 9. After discussing the right to a clean and healthful environment, the report of the 1978 Constitutional Convention's Committee on Environment, Agriculture, Conservation

and Land observed:

> Your Committee believes that this important right deserves enforcement and has removed the standing to sue barriers, which often delay or frustrate resolutions on the merits of actions or proposals, and provides that individuals may directly sue public and private violators of statutes, ordinances and administrative rules relating to environmental quality. The proposal adds no new duties but does add potential enforcers. This private enforcement right complements and does not replace or limit existing government enforcement authority.
>
> Your Committee intends that the legislature may reasonably limit and regulate this private enforcement right by, for example, prescribing reasonable procedural and jurisdictional matters, and a reasonable statute of limitations.
>
> Your Committee believes that this new section adequately recognizes the right to a clean and healthful environment and at the same time would prevent abuses of this right. Concern was expressed that the exercise of this right to a clean and healthful environment would result in a flood of frivolous lawsuits. However, your Committee believes that if environmental law enforcement by government agencies is adequate in practice, then there should be few additional lawsuits, given the barriers that litigation costs present.
>
> Moreover, your Committee is convinced that the safeguards of reasonable limitations and regulations as provided by law should serve to prevent abuses of the right to a clean and healthful environment.

Stand. Comm. Rep. No. 77, in 1 Proceedings of the Constitutional Convention of 1978, at 690 (emphasis added).

As the highlighted sections of the report indicate, the framers understood that private enforcement would "complement" government enforcement, rather than be supplanted by it. The clear import of the passage is that "reasonable limitations and regulation" would encompass matters such as statutes of limitations or procedural or jurisdictional limitations. While such restrictions might preclude a particular plaintiff from

bringing suit in a particular circumstance, the framers did not envision that they would be used to eliminate private enforcement altogether.

Accordingly, we conclude that HRS § 205-12 does not limit or restrict the ability of Ala Loop to enforce the provisions of chapter 205 against Waiʻola.

Finally, we note that Waiʻola has not identified any other "reasonable limitations or regulation." Specifically, it has not suggested that exhaustion or primary jurisdiction applies. Accordingly, we do not address whether the application of those doctrines would constitute a reasonable limitation or restriction under the facts of this case. Cf. Pono, 119 Hawaiʻi at 192-201, 194 P.3d at 1154-1163 (Foley, J., concurring) (concluding that Pono's action was properly dismissed since Pono did not exhaust its administrative remedies prior to bringing suit in the circuit court, because Pono did not appeal the decision of the director of Public Works and Waste Management to the Board of Variances and Appeals).

6. The cases cited by the dissent address requirements for standing and do not establish the existence of a statutory private right of action

We respectfully disagree with the dissent's suggestion that this court has recognized a private right of action for "adjoining landowners" who are affected by "land use decisions that interfere with the enjoyment of their property," dissenting

opinion at 10, based on our holdings in Dalton v. City and County of Honolulu, 51 Haw. 400, 462 P.2d 199 (1969), East Diamond Head Association v. Zoning Board of Appeals of the City and County of Honolulu, 52 Haw. 518, 479 P.2d 796 (1971), Town v. Land Use Commission, 55 Haw. 538, 524 P.2d 84 (1974), Perry v. Planning Commission of the County of Hawaii, 62 Haw. 666, 619 P.2d 95 (1980), and Mahuiki v. Planning Commission and Planning Department of the County of Kauai, 65 Haw. 506, 654 P.2d 874 (1982). To the extent the cases cited by the dissent focus on the status of the plaintiffs as adjoining landowners, they did so in the context of assessing standing.[37] Moreover, the appeals in East Diamond Head Association, Town, Perry, and Mahuiki were brought pursuant to chapter 91, and do not establish the existence of a private right of action outside of that context.

In Dalton, the plaintiffs, who "apparently 'live[d] across the street from [the] real property'" at issue, sought a declaratory judgment that four Honolulu zoning ordinances were null and void. 51 Haw. at 400-01, 403, 462 P.2d at 201, 202. The defendants, lessees and developers of land rezoned under the ordinances, "argued that plaintiffs lacked standing to sue." Id. at 402, 462 P.2d at 202 (emphasis added). This court identified

[37] As noted in n.20, supra, while the term "standing" is sometimes used to describe the private right of action inquiry, see, e.g., Pono 119 Hawaiʻi at 167, 194 P.3d at 1129, nevertheless, our cases make clear that the two inquiries involve distinct policy considerations and distinct tests, see e.g., Pele Defense Fund v. Paty, 73 Haw. 578, 591, 837 P.2d 1247, 1256-57 (1992).

"the issues to be resolved" as "standing, laches, and the validity of the ordinances." Id. (emphasis added). In addressing the defendants' standing argument, this court concluded that "[p]laintiffs' interest in this case is that they 'reside in very close proximity' to the proposed development. . . . Clearly this is a 'concrete interest' in a 'legal relation'." Id. Accordingly, this court concluded that "plaintiffs have standing to challenge the validity of the ordinances in question." Id. (emphasis added). Without addressing whether the plaintiffs had a private right of action to challenge the ordinances,[38] this court went on to address the plaintiffs' contention that the ordinances were null and void, and concluded that the trial court's grant of summary judgment in favor of defendants was erroneous. Id. at 408, 417, 462 P.2d at 205, 209.

In East Diamond Head Association, an association of neighboring landowners challenged the trial court's order concluding that the association was not a "person aggrieved" within the meaning of the Hawaiʻi Administrative Procedures Act (HAPA), and was therefore not entitled to judicial review of the

[38] We note that Dalton was decided prior to the United States Supreme Court's decision in Cort v. Ash, 422 U.S. 66 (1975). This court first utilized the Cort analysis for determining whether a statute authorized an implied private right of action in Reliable Collection Agency v. Cole, 59 Haw. 503, 584 P.2d 107 (1978). Thus, our analysis of private rights of action has been modified since our decision Dalton, and we therefore respectfully disagree with the dissent's assertion that Dalton should control our analysis here.

zoning board's issuance of a variance allowing a parcel of land to be used for movie production.[39] 52 Haw. at 518-19, 479 P.2d at 796-97. The zoning board had held a public hearing on the movie studio's petition for the variance, at which members of the association had testified that "the movie operation interfered with the enjoyment of their property[.]" Id. at 520-21, 479 P.2d at 797-98. After the zoning board's decision to issue the variance, the association "instituted proceedings for a judicial review under [§] 91-14(a) (1968) of the [HAPA]." Id. at 521, 479 P.2d at 798. The trial court dismissed the association's agency appeal, finding that the association was not "entitled to review as a person aggrieved by a final decision and order in a contested case as provided for in HRS Chapter 91 and HRS [§] 91-14(a)" because it had not "intervened in the board's proceedings[.]" Id.

This court disagreed and concluded both that the association was a "person aggrieved" and that the public hearing was a "contested case." Id. at 522, 524, 479 P.2d at 798, 799. In concluding that the association was a "person aggrieved," this court noted that the "[s]tudio's industrial use within [the

[39] We have since characterized the determination of whether a party is a "person aggrieved" for the purposes of chapter 91 as comprising part of the standing inquiry. See Bush v. Hawaiian Homes Comm'n, 76 Hawaiʻi 128, 133-34, 870 P.2d 1272, 1277-78 (1994) ("Appellants' standing to invoke judicial review under the HAPA is contingent upon a showing that they are 'person[s] aggrieved by a final decision and order in a contested case' conducted before an administrative agency") (brackets in the original; citation omitted).

association members'] residential neighborhood as sanctioned by the board's zoning variance immediately and directly affects each homeowner[,]" and that the association members were therefore not "merely tangentially touched by the zoning change[.]" Id. at 522, 479 P.2d at 798. In holding that the public hearing was a "contested case," this court concluded that the association had "done everything possible to perfect an appeal" by "comport[ing] with all board procedural dictates[.]" Id. at 524, 479 P.2d at 799. Accordingly, this court remanded the case for a new trial. Id.

In Town, adjoining landowners challenged the trial court's grant of a motion for summary judgment in favor of the Land Use Commission (LUC), where the LUC had approved a petition to amend the district designation for a parcel of land from agricultural to rural. 55 Haw. at 539, 524 P.2d at 85. The LUC had held a public hearing on the petition, at which the adjoining landowners "spoke in opposition to the [] petition." Id. at 539, 524 P.2d at 86. Two subsequent meetings were held, at which a decision on the petition was deferred. Id. At a third meeting, where the adjoining landowners were not present, the owner of the parcel spoke to "rebut all statements made by the opposition to his petition and submitted documents for the consideration of the [LUC.]" Id. at 540, 524 P.2d at 86. A motion to approve the petition was carried, but the Vice-Chairman of the LUC noted that

the motion was "'not based on anything that was said here today because these facts were made known to us before.'" Id. The adjoining landowners appealed, seeking reversal of the LUC's decision. Id.

In the adjoining landowners' agency appeal, this court concluded that the meeting at which the petition was approved was a "contested case," id. at 548, 524 P.2d at 91, the provisions of the HAPA were applicable, id. at 545, 524 P.2d at 89, and the LUC had violated the provisions of the HAPA in accepting the owner's testimony and evidence, id. at 549, 524 P.2d at 91. In concluding that the meeting was a "contested case"[40] within the meaning of HRS § 91-1(5), we noted that:

> The appellant has a property interest in the amending of a district boundary when his property adjoins the property that is being redistricted. Therefore, any action taken on the petition for boundary change is a proceeding in which appellant has legal rights as a specific and interested party and is entitled by law to have a determination on those rights.

Id. at 548, 524 P.2d at 91 (citations and footnoted omitted).

This court further concluded that the approval of the petition "was rendered in violation of HRS [§§] 205-3 and 205-4 as well as Land Use Regulation 2.35" because the LUC had failed to act on the petition within the prescribed statutory period.

[40] We have also characterized a party's participation in a "contested case" as a standing requisite in an administrative appeal. See Bush, 76 Hawaiʻi at 134, 870 P.2d at 1278 (noting that a party "'must have participated in [a] contested case before [an] administrative agency[,]' to acquire standing to challenge the decision in court") (brackets in the original; citation omitted).

Id. at 542-545, 524 P.2d at 87-89.

In Perry, adjoining landowners challenged the grant of a special permit to Shield-Pacific, Ltd. and Kapoho Land and Development Company (hereinafter Applicants), who had filed an application with the County of Hawai'i Planning Commission (planning commission) seeking permission to use a parcel of land for quarrying purposes. 62 Haw. at 669, 619 P.2d at 99. "Since the land was within an 'agricultural' district for purposes of Land Use Law, HRS Chapter 205, favorable actions upon the request by both the [planning commission] and the [LUC] were necessary before such use was permissible." Id. The planning commission held a public hearing, at which opponents "object[ed] to the proposed quarrying operations[.]" Id. at 670-71, 619 P.2d at 100. The planning commission later voted to permit the requested use, and the planning commission's decision was transmitted to the LUC pursuant to HRS § 205-6. Id. at 671, 619 P.2d at 100. Following a lengthy public meeting in which "opponents of the application again voiced their . . . concerns," the LUC approved the special permit. Id. at 672, 619 P.2d at 101. The owners of property adjoining the proposed quarry site appealed from the decision and order of the LUC, and the circuit court set aside the grant and approval of the special permit on several grounds, including that the planning commission had not acted on the application in a timely manner and that the LUC therefore lacked

jurisdiction to act on the permit. Id. at 672-73, 619 P.2d at 101. The government agencies and the Applicants appealed the circuit court's judgment. Id. at 673, 619 P.2d at 101.

On appeal of the circuit court's judgment, this court did not address jurisdiction, but instead proceeded directly to address the appellants' arguments on the merits and reversed the circuit court. Id. at 673-686, 619 P.2d at 101-108. Thus, although Perry provides an example of adjoining landowners bringing a chapter 91 appeal of a LUC decision,[41] it contains no discussion directly relevant to the issues here.

In Mahuiki, a limited partnership sought to develop a condominium and single family residence project at Haena on Kauaʻi. 65 Haw. at 508, 654 P.2d at 876. The partnership sought various approvals from the Kauaʻi Planning Commission, including a special management area use permit under the Coastal Zone Management Act (CZMA), HRS chapter 205A. Id. at 508, 654 P.2d at 876. The commission held a hearing on the request, and approved the permit with conditions. Id. at 511, 654 P.2d at 877-78. The appellants, who were "adjacent landowners or residents of Haena," id. at 515, 654 P.2d at 880, appealed to the circuit court,

[41] Although Perry does not explicitly mention chapter 91, the court's discussion of the LUC proceedings clearly reflects that it was an administrative appeal. 62 Haw. at 668, 672, 619 P.2d 98, 101 (noting that "[t]his case is before us on an appeal from an order and judgment of the Circuit Court of the Third Circuit reversing and vacating an order of the Land Use Commission of the State of Hawaii" and that the appellees "filed a timely Notice of Appeal from the foregoing decision and order [of the LUC] to the circuit court") (emphasis added).

challenging the commission's approval of the permit on numerous grounds, id. at 512, 654 P.2d at 878. The circuit court dismissed the appeal "on the ground that appellants had not participated in the administrative proceedings." Id.

On appeal, this court first considered "the appellants' standing to seek review of the administrative action[,]" and concluded that two of the appellants had satisfied the requirements of HRS § 91-14 since there was a final decision and order in a contested case, appellants' interests were injured, and they had submitted written testimony in opposition to the permit request and thus were involved in the contested case proceedings. Id. at 508, 512, 514-15, 654 P.2d at 876, 878-80. With regard to the injury to the appellants' interests, we noted that:

> The interests asserted by appellants were "special" and "personal" unto themselves, as they are adjacent landowners or residents of Haena. And a decision to permit the construction of multi-family housing units on undeveloped land in the special management area could only have an adverse effect on their environment.

Id. at 515, 652 P.2d at 880.

We then concluded that the planning commission erred by omitting a required finding, and accordingly vacated the dismissal of the case. Id. at 519, 654 P.2d at 883.

In sum, each of these five cases addressed standing requisites. Dalton expressly discussed its determination that adjoining landowners had "a 'concrete interest' in a 'legal

relation'" in standing terms. 51 Haw. at 403, 462 P.2d at 202. Mahuiki, Town and East Diamond Head Association directly addressed questions relating to whether the adjoining landowners had standing to appeal an agency action in a contested case under HRS § 91-14.[42] Perry, similarly, was an agency appeal, and did not directly discuss standing or private rights of action. Moreover, to the extent that Mahuiki, Town and East Diamond Head Association discussed the nature of the parties' status as adjoining landowners, they did so in the context of determining whether they were "person[s] aggrieved" for purposes of HRS § 91-14. Because the landowners lived adjacent to the properties that were the subject of the proposed land use action at issue in each case, we determined that they had a sufficient stake to be aggrieved persons. Thus while the nature of the impacts that the neighboring landowners alleged provided the basis for determining that they had standing under HRS § 91-14 as "persons aggrieved," at no point in our discussion in those cases did we suggest that they had a cause of action independent of chapter 91 based on their status as neighboring landowners. See Ponohu v. Sunn, 66 Haw. 485, 487, 666 P.2d 1133, 1135 (1983) (holding that "it would

[42] We have elsewhere characterized the discussion in Mahuiki and East Diamond Head Association as addressing the question of "standing." Sierra Club v. Hawaiʻi Tourism Auth., 100 Hawaiʻi 242, 252, 59 P.3d 877, 887 (2002) (plurality opinion) (finding that Mahuiki held that "adjacent landowners [] had standing to invoke judicial review" and East Diamond Head Association held that neighboring landowners "had standing to challenge movie operation" based on impacts that showed "each appellant was a person aggrieved") (internal quotation marks omitted).

be anomalous to permit a declaratory judgment action to be substituted for an appeal from an agency determination in a contested case").

Accordingly, we respectfully disagree with the dissent's interpretation of these cases, and conclude that they did not recognize the existence of a private right of action in the circumstances here.

7. Conclusion

Ala Loop had a private right of action under article XI, section 9 of the Hawaiʻi Constitution to enforce its chapter 205 claims against Waiʻola.[43] Accordingly, the ICA erred in its

[43] Ala Loop also had standing to bring its claims. Hawaiʻi courts determine "whether a plaintiff has the requisite stake" in an action so as to have standing by asking "(1) has the plaintiff suffered an actual or threatened injury . . . ; (2) is the injury fairly traceable to the defendant's actions; and (3) would a favorable decision likely provide relief for plaintiff's injury." See Sierra Club v. Dep't of Transp., 115 Haw. 299, 319, 167 P.3d 292, 312 (2007) ("Superferry I"). (footnote and citation omitted; ellipses in original). Here, the record amply supports the circuit court's conclusion that:

> [Ala Loop] has standing to assert its claims regarding Waiʻola's use of the Subject Property. In particular, it has suffered an actual or threatened injury as a result of Waiʻola's conduct, the injury is fairly traceable to the conduct of Waiʻola and a favorable decision would likely provide relief for [Ala Loop's] injury.

For example, the record includes declarations from residents of Ala Loop detailing, inter alia, the impact of Waiola's school operations on traffic in the neighborhood, and the potential impacts that expanded operations could have on sewage and water systems. Accordingly, Ala Loop has shown that it suffered an "actual or threatened injury" that is "fairly traceable" to Waiola's use of the property without a permit, and that relief could be provided by the court. See Superferry I, 115 Haw. at 319, 167 P.3d at 312.

Because we conclude that Ala Loop has standing under the traditional injury-in-fact test, we need not reach whether the doctrine of procedural standing is applicable in this case.

March 12, 2009 SDO, and the ICA's April 22, 2009 judgment must be vacated.

C. The circuit court abused its discretion in denying the motion to set aside default

Waiʻola argues that the circuit court abused its discretion in denying its motion to set aside the entry of default. In denying the motion, the circuit court ruled in its August 11, 2004 order as follows:

> 1. [Waiʻola] made a conscious choice not [to] be represented by private legal counsel and therefore, failed to answer Ala Loop's cross-claim in a timely manner. Therefore, it cannot be said that [Waiʻola] was guilty only of excusable neglect.
>
> . . . .
>
> 3. [Waiʻola] has failed to satisfy the necessary criteria for setting aside an entry of default, and therefore, its Motion to Set Aside Entry of Default Dated May 24, 2004, Filed Herein July 6, 2004, should be denied.

HRCP Rule 55 governs the entry of default and default judgments. With regard to the entry of default, it provides in pertinent part as follows:

> **(a) Entry**. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
>
> . . . .
>
> **(c) Setting Aside Default**. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

We review the denial of a motion to set aside default for abuse of discretion. Hupp v. Accessory Distrib., Inc., 1 Haw. App. 174, 177, 616 P.2d 233, 235 (1980) (holding that "an

application under Rule 55(c), Hawaiʻi Rules of Civil Procedure to set aside entry of default is addressed to the sound discretion of the court"); see also Gonsalves v. Nissan Motor Corp., 100 Hawaiʻi 149, 158, 58 P.3d 1196, 1205 (2002).

Defaults are generally disfavored. See Rearden Family Trust v. Wisenbaker, 101 Hawaiʻi 237, 254, 65 P.3d 1029, 1046 (2003) (holding that "defaults and default judgments are not favored and [] any doubt should be resolved in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits") (citations omitted). In BDM, Inc., v. Sageco, Inc., 57 Haw. 73, 549 P.2d 1147 (1976), this court held that a party seeking to set aside a default must demonstrate the following three factors:

> In general, a motion to set aside a default entry or a default judgment may and should be granted whenever the court finds (1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a wilful act.

Id. at 76, 549 P.2d at 1150 (citations omitted).

In BDM, we observed that the showing necessary to set aside the entry of default was lower than that needed to set aside a default judgment. Id. ("It should be noted that a motion to set aside a default entry, which may be granted under Rule 55(c) 'for good cause shown', gives the court greater freedom in granting relief than is available on a motion to set aside a default judgment where the requirements of Rule 60(b) must be

satisfied.") (citation omitted). This is a reasonable distinction, since the entry of default occurs at a more preliminary stage of the case than does the entry of judgment.

Applying these principles here, we conclude that the circuit court abused its discretion in denying the motion to set aside the entry of default. In denying the motion, the circuit court appeared to find that Waiola's conduct constituted inexcusable neglect. However, the circumstances here are dissimilar from those in which relief from default is typically denied. For example, this is not a case in which a defendant that was properly served with a complaint fails to answer without any reason, or for an improper reason. See, e.g., Pogia v. Ramos, 10 Haw. App. 411, 416-17, 876 P.2d 1342, 1345 (1994) (noting that the circuit court properly refused to set aside default when defendant claims that she did not answer because "she was having 'problems with her marriage,'" claimed that she "did not understand what the legal papers meant," and believed that when she signed the summons, "that was all she 'had to do.'"). To the contrary, Waiʻola wanted to defend against the cross-claim, tendered the defense to the AG within a few days of being served, and continued to aggressively pursue representation by the AG thereafter, culminating in the filing of the petition for writ of mandamus.

Nor is this a case in which the defaulting party failed

to file an answer without seeking the approval of the court for the delay. See, e.g., Hupp v. Accessory Distrib., Inc., 1 Haw. App. at 178-79, 616 P.2d at 236 (holding that the circuit court properly refused to set aside default when defendant's insurer failed to file an answer for nine months without seeking approval of the court, based on insurer's understanding that it had an "'open' extension of time from [plaintiff's] attorneys"). After stipulating with Ala Loop for two extensions to answer, Waiʻola, with the AG specially appearing on its behalf, filed a motion on February 25, 2004, asking for an extension of time to answer or otherwise respond. The motion noted the existence of the conflict between Waiʻola and the AG, and suggested that the court extend the deadline until approximately 30 days after the motion was heard on March 18, 2004, since "that interval may be long enough to work out the differences that remain[.]" The court granted the extension to April 19, 2004. On April 19, Waiʻola filed the motion for a stay, noting that it had been unable to resolve the dispute with the AG and accordingly was about to file a petition for writ of mandamus.

Nor is this a case in which there was a lengthy delay between the entry of default and the filing of the motion to set the default aside. See, e.g., Pogia, 10 Haw. App. at 413-14, 876 P.2d at 1344 (noting that the motion to set aside entry of default and default judgment was not filed until more than 3

years after entry of default and nine months after entry of judgment). Default was entered on May 24, 2004, Waiʻola agreed to representation by the AG on June 2, 2004, and the motion to set aside default was filed on July 6, 2004.

In the circuit court's August 11, 2004 Order denying Waiola's motion to set aside default, the court found that "[Waiʻola] made a conscious choice not [to] be represented by private legal counsel and therefore, failed to answer [the] cross-claim in a timely manner. Therefore, it cannot be said that [Waiʻola] was guilty only of excusable neglect." However, the record does not support the conclusion that Waiʻola could have retained private counsel to file an answer. To the contrary, the record contains a declaration from Waiola's director that details the organization's extremely limited financial resources, and states that Waiʻola could not afford to retain private counsel.

Ala Loop argues that Waiola's ability to obtain attorney Sandra Song to appear specially on its behalf to file the motion to stay and the petition for a writ of mandamus indicates that it could have retained private counsel to file an answer. However, it is unclear from the record whether Song was retained or acting pro bono, and whether she would have been willing to appear for the purpose of filing an answer, with the potentially more significant involvement in ongoing litigation

that such an appearance could entail. Ala Loop also contends that in January of 2004, Waiola's board authorized the expenditure of $10,000 to construct a temporary building on the site at issue here. However, the record does not establish that those funds were in fact expended.

Finally, it is noteworthy that once default was entered, Waiʻola agreed to the AG's demand that it relinquish its potential HRS § 302A-1184 defense, and the AG entered the case on Waiola's behalf. The fact that Waiʻola eventually accepted representation from the AG under these circumstances belies the suggestion that it had the resources available to hire its own counsel.

This is not to say that Waiʻola was without fault in its approach to its dispute with the AG. Most notably, Waiʻola should not have waited until April 19, 2004, the last day of the extension that had been granted by the circuit court, to file the motion for a stay so that it could pursue the mandamus petition. The circuit court, in its order granting the extension, had clearly warned Waiʻola that it could be defaulted for failing to answer or otherwise respond by April 19. In those circumstances, the entry of default was appropriate, as would be other sanctions such as requiring Waiʻola to pay Ala Loop's attorneys' fees and costs in connection with the ensuing motion to set aside default. However, the circuit court went further and denied the motion to

set aside, thereby imposing the ultimate sanction of denying Waiʻola the opportunity to defend on the merits. In the circumstances of this case, where Waiʻola could not afford private counsel and could obtain representation by the attorney general only by relinquishing its primary defense on the merits, imposition of that sanction was an abuse of discretion.[44] Rearden Family Trust, 101 Hawaiʻi at 255, 65 P.3d at 1047 (concluding that circuit court abused its discretion by defaulting defendant for failing to attend a settlement conference, since "lesser sanction[s]" would "better serve the interest of justice") (citation and internal brackets omitted). This is particularly so given the fact that the court was being asked to set aside the entry of default, rather than a default judgment, see BDM, 57 Haw. at 76, 549 P.2d at 1150, and the relative promptness with which the motion was brought.

IV. CONCLUSION

Ala Loop had a private right of action under article XI, section 9 of the Hawaiʻi Constitution to enforce its chapter 205 claims against Waiʻola. Accordingly, we vacate the April 22, 2009 Judgment of the Intermediate Court of Appeals.

[44] The circuit court did not address the first two prongs of the three-part BDM test, i.e., lack of prejudice to the non-defaulting party and the existence of a meritorious defense. BDM, 57 Haw. at 76, 549 P.2d at 1150. However, both of those requirements were satisfied here. There was no apparent prejudice to Ala Loop, other than the burden of having to litigate its claims, and Waiʻola raised significant issues concerning whether its activities on the site at the time of the motion violated chapter 205 and whether there was a ripe dispute.

We further conclude that the Circuit Court of the Third Circuit erred in failing to set aside the entry of default against Waiʻola, and accordingly we vacate the circuit court's First Amended Final Judgment entered on December 12, 2005, and remand to the circuit court for further proceedings.

In view of this disposition, we need not address the other issues raised by Ala Loop in its application, or by Ala Loop and Waiʻola in their appeals in the ICA.

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