CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I would hold that (1) Petitioner-/Defendant-/Counter-Claimant-/Cross-Claimant-/Third-Party Plaintiff-Appellee/Cross-Appellant Ala Loop Community Association (Ala Loop) may seek a declaratory judgment to protect the interests of its members' enjoyment of their real property, (2) Ala Loop and its members have standing to enforce chapter 205 of the Hawaiʻi Revised Statutes (HRS), (3) the Circuit Court of the Third Circuit (the court) did not abuse its discretion in denying the motion to set aside default of Respondent-/Defendant-/Cross-Claim Defendant-Appellant/Cross-Appellee Waiʻola Waters of Life Charter School (Waiʻola), and (4) Ala Loop is not entitled to attorney's fees under HRS § 607-25 (Supp. 2002). I respectfully disagree, then, with the majority's holding that the court abused its discretion in denying Waiʻola's motion to set aside default. Thus, in my view, it is unnecessary to decide that Ala Loop had a private right of action to enforce HRS chapter 205 under article XI, section 9 of the Hawaiʻi State Constitution, but inasmuch as the majority does so hold, I believe it is wrong. Therefore, I would vacate the April 22, 2009 judgment of the Intermediate Court of Appeals (ICA) and affirm the court's December 12, 2005 First Amended Judgment.[1]

[1] I concur with the majority that (1) the dispute in the instant case is not moot; (2) Petitioner may bring its suit inasmuch as it has demonstrated "injury in fact" standing under Sierra Club v. Department of Transportation of the State of Hawaiʻi, 115 Hawaiʻi 299, 328, 167 P.3d 292, 321 (2007) [hereinafter, Superferry I]; and (3) Petitioner has set forth a legally cognizable cause of action in its cross complaint (but on different grounds than set out by the majority). In all other respects, I disagree with the majority's disposition of this case.

I.

Waiʻola is a new century charter school, chartered in July 2000, pursuant to HRS chapter 302A (Supp. 1999). Waiʻola acquired ownership of a 28-acre parcel of land, known as the Sunshine Farm Property (Sunshine Farms), with the intention of using it as a working farm and as a campus for its school. The property is located in an agricultural use district on Ala Loop Road on the Island of Hawaiʻi.

Ala Loop is an unincorporated non-profit association consisting of the residents and owners of the property located adjacent to Ala Loop Road and organized pursuant to HRS chapter 629. The purpose of the association "included those related to the protection of health, safety, welfare and interests of the residents of Ala Loop [Road]." When Ala Loop learned of Waiʻola's acquisition of Sunshine Farms, it began contacting various county officials such as the County of Hawaiʻi Planning Department (Planning Department) and the County of Hawaiʻi Office of the Corporation Counsel (Corp. Counsel).

On July 21, 2003, Ala Loop received a letter from the Planning Department, stating in part that

> [t]he 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, which exempts charter 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 [Corp. 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.

(Emphases added.) The Planning Department did, however, believe that Waiʻola was required to obtain a county use permit under Chapter 25 of the Hawaiʻi County Code 1983 (1995 ed.).

On November 14, 2003, Respondent-/Plaintiff-/Counterclaim Defendant-Appellee/Cross-Appellee County of Hawaiʻi (County) filed its complaint for declaratory relief against Waiʻola and Ala Loop.[2] In its complaint, the County asked that the court (1) exercise jurisdiction over the case and controversy, (2) declare that new century charter schools be exempt from obtaining a State special permit, but be required to obtain a county use permit pursuant to Chapter 25 of the Hawaiʻi County Code, (3) declare that Waiʻola did not, and had not, relied to its detriment on representations made by the County, (4) declare that Waiʻola had no vested right in the continued operation of its school at Sunshine Farms, (5) declare that Waiʻola's continued operation of the school was at its own expense and peril, and subject to Waiʻola obtaining a county use permit, and (7) grant the County its costs, attorney's fees, and other such relief as it deems just.

On November 20, 2003, Ala Loop filed a counter-claim against the County, a cross-claim against Waiʻola, and a third-party complaint against Respondent-/Third-Party Defendant-Appellee/Cross-Appellee Land Use Commission, State of Hawaiʻi

[2] The Ala Loop Community Association was incorrectly named Ala Loop Homeowners in the County's complaint.

(LUC). In Ala Loop's counter-claim against the County and cross-claim against Waiʻola, Ala Loop asserted five counts for relief. The five counts requested (1) a declaratory judgment that Waiʻola must obtain the special permits and follow all applicable rules and regulations from the Planning Commission and the LUC pursuant to HRS § 205-6 (2001 Repl.),[3] (2) temporary and permanent injunctions to restrain the County from issuing any building permits until special permits are obtained and to restrain Waiʻola from conducting school-related activities on the property until special permits are obtained, (3) damages against the County for civil rights violations pursuant to 42 U.S.C. Section 1983, and attorney's fees and costs, (4) damages against Waiʻola for nuisance per se and attorney's fees and costs, and (5) attorney's fees and costs incurred in obtaining records.

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[3] HRS § 205-6 provides in relevant part:

> **Special permit**. (a) The county planning commission may permit certain unusual and reasonable uses within an agricultural . . . district[] other than those for which the district is classified. Any person who desires to use . . . land . . . 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 . . . .
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> (b) The planning commission . . . shall establish by rule or regulation, the time within which the hearing and action on petition for special permit shall occur. The planning commission shall notify the [LUC] and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.
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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 [LUC]. The [LUC] may impose additional restrictions as may be necessary or appropriate in granting such approval, including the adherence to representations made by the applicant.

(Emphases added.)

Waiʻola sought representation from the Attorney General's office (the AG) on November 24, 2003. However, in a letter dated January 21, 2004, the AG stated that the Rules of Professional Conduct precluded it from representing Waiʻola because the AG's position, contrary to Waiʻola's position, was that charter schools were not exempt from the State's land use laws.

On January 30, 2004, Ala Loop, Waiʻola, the County, and the LUC stipulated to an extension for Waiʻola and the LUC to file their answers or responsive pleadings, which extended the deadline from January 15, 2004, to February 16, 2004. The parties subsequently agreed to another extension, giving Waiʻola and LUC until February 25, 2004, to file their answers or responsive pleadings. The LUC filed its answer on February 17, 2004.

On February 25, 2004, Waiʻola filed a motion to extend time to answer or file a responsive pleading for a third time. In its motion, Waiʻola asked for "an extension of no more than 30 days after the motion is decided to answer or otherwise file a responsive pleading." (Emphases added.) At the March 18, 2004 hearing, the court orally granted this motion, giving Waiʻola until April 19, 2004, to comply with its motion. In its written order on April 6, 2004, the court stated that, "[i]f an answer or other responsive pleading is not timely filed, [the County] and

[Ala Loop] may take appropriate action for the entry of default against Waiʻola." (Emphasis added.)

On the April 19, 2004 deadline, Waiʻola again failed to file its answer. Instead, on the day its answer was due, Waiʻola filed a motion for stay of the proceedings by special counsel, to "permit it to obtain an order requiring [the AG] to provide it with legal representation" or again, in the alternative, to extend time to file its responsive pleadings. The declaration of special counsel indicated that a petition for writ of mandamus would be filed in this court requesting that this court order the AG to represent Waiʻola.

Subsequently, on April 29, 2004, Waiʻola filed a petition for a writ of mandamus in this court. The writ requested that this court either compel the AG to defend Waiʻola, or pay for special counsel to represent Waiʻola.

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 on April 19, 2009. At a hearing on May 13, 2004, the court orally denied Waiʻola's motion for stay or, in the alternative, a motion to extend time. On May 24, 2004, the court entered default judgment against Waiʻola.

On June 2, 2004, Waiʻola accepted the AG's representation but agreed to the condition that the AG would not assert that Waiʻola was exempt from State land use laws in defending Waiʻola against default and in other aspects of

representation. This court denied Waiʻola's petition for mandamus on June 10, 2004.

On June 22, 2004, Waiʻola filed a cross-claim and motion to set aside entry of default. On June 29, 2004, the court entered a written order denying Waiʻola's April 19, 2004 motion for a stay or, in the alternative, to extend time. The court entered an order denying the motion to set aside entry of default on August 11, 2004. The order stated:

> 1. Defendant 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 Defendant Waiʻola was guilty only of excusable neglect.
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> . . . .
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> 3. Defendant 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.

(Emphasis added.)

Final Judgment was entered on March 4, 2005. On August 23, 2005, Ala Loop filed a motion for an award of attorney's fees and costs. On October 20, 2005, Ala Loop filed a Motion for Entry of Default Judgment and Permanent Injunction against Waiʻola. On October 28, 2005, the 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, and stated in relevant part:

> 1. Count I: On Count I of [Ala Loop's] Cross-Claim against Waiʻola requesting declaratory relief, more particularly a determination that Cross-Claim Defendant Waiʻola must obtain a special permit from the Planning Commission and the [LUC] pursuant to HRS Section 205-6 prior to operating a charter school on its farm at Ala Loop Road, judgment is hereby entered in favor of [Ala Loop] and against Waiʻola; . . . .

> 2. Count II: On Count II of [Ala Loop's] Cross-Claim against Waiʻola requesting temporary and permanent injunctive relief enjoining and restraining Waiʻola from conducting any classes or school related activities on its farm at Ala Loop Road until and unless a special permit has been issued, judgment is hereby entered in favor of [Ala Loop] and against Waiʻola;[4] . . . .
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> 4. Count IV: As to [Ala Loop's] claim for damages in the form of attorneys and costs in Count IV of [Ala Loop's] Cross-Claim against Waiʻola, consistent with the Order Granting in Part and Denying in Part [Ala Loop's] Motion for Award of Attorney's Fees and Costs Against [Waiʻola], filed herein on October 28, 2005, judgment is hereby entered in favor of Waiʻola on [Ala Loop's] claim for attorney's fees, and judgment is hereby entered in favor of [Ala Loop] and against Waiʻola for costs in the sum of $3,878.64; . . . .

(Emphases added.)

On May 22, 2006, Waiʻola appealed the court's decision to the ICA. On June 2, 2006, Ala Loop filed a cross-appeal to the ICA. On March 12, 2009, the ICA issued a summary disposition order reversing the court's December 12, 2005 First Amended Final Judgment for lack of subject matter jurisdiction. County of Hawaii v. Ala Loop Homeowners, No. 27707, 2009 WL 623377 at *6 (Haw. App. Mar. 12, 2009).

II.

On certiorari, Ala Loop urges this court to rely on case law, HRS § 607-25,[5] and article XI, section 9 of the Hawaiʻi

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[4] By entering judgment in favor of Ala Loop and against Waiʻola and enjoining Waiʻola from activities "until and unless a special permit has been issued" the court in effect and for all practical purposes decided the question of whether the County should have convened a special permit proceeding under HRS § 205-6.

[5] As will be discussed in detail, infra, HRS § 607-25 authorizes the recovery of attorneys' fees and costs by private parties against other private parties who undertake a "development" without obtaining all the permits or approvals required by law. HRS § 607-25 states in pertinent part:

> (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 any development without

(continued...)

Constitution,[6] to determine that there was a private right of action to enforce its rights. It argues that the ICA's analysis is inconsistent with cases of this court that have implicitly recognized private rights of action to enforce laws, including HRS chapter 205. Ala Loop's cross-claim "specifically alleged that [Ala Loop's] members (all of whom reside on neighboring property) have already been deprived of the right to participate in agency hearings[.]"

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[5](...continued)

> obtaining all permits or approvals required by law from government agencies:
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> (1) The court may award reasonable attorneys' fees and costs of the suit to the prevailing party.
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> (2) The court shall award reasonable attorneys' fees and costs of the suit to the prevailing party if the party bringing the civil action:
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> (A) Provides written notice, not less than forty days prior to the filing of the civil action, of any violation of a requirement for a permit or approval to:
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> (i) The government agency responsible for issuing the permit or approval which is the subject of the civil action;
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> (ii) The party undertaking the development without the required permit or approval; and
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> (iii) Any party who has an interest in the property at the development site recorded at the bureau of conveyances.
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> (B) Posts a bond in the amount of $2,500 to pay the attorneys' fees and costs provided for under this action if the party undertaking the development prevails.

[6] Article XI, section 9 of the Hawaiʻi Constitution, entitled Environmental Rights, states:

> 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.

A.

1.

This court has indeed recognized a private right of action that allows adjoining landowners to challenge land use decisions that interfere with the enjoyment of their property. See Mahuiki v. Planning Comm'n, 65 Haw. 506, 515, 654 P.2d 874, 880 (1982) (recognizing that "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 [the adjacent landowners'] environment"); E. Diamond Head Ass'n v. Zoning Bd. of Appeals of City & County of Honolulu, 52 Haw. 518, 521-22, 479 P.2d 796, 798 (1971) (allowing adjoining property owner to "seek redress" in court to protect his realty from "threatening neighborhood change") (citation omitted); Dalton v. City & County of Honolulu, 51 Haw. 400, 403, 462 P.2d 199, 202 (1969) (allowing adjoining property owners to bring a declaratory judgment action to declare ordinances enacted by the City and County of Honolulu as unconstitutional).

In Dalton, the plaintiffs filed a complaint seeking a declaratory judgment that four Honolulu ordinances were null and void and an injunction restraining the enactment of further ordinances relating to a parcel of land "across the street from" their properties. 51 Haw. at 400-01, 403, 462 P.2d at 201-02. The trial court granted summary judgment in favor of the defendants, and the plaintiffs appealed. This court determined,

inter alia, that summary judgment in favor of defendants on the validity of the ordinances should not have been granted. Id. The plaintiffs in Dalton "reside[d] in very close proximity to the proposed development[,]" and the developer's plan to build high rise apartment buildings would have "restrict[ed] the scenic view, limit[ed] the sense of space and increas[ed] the density of [the] population." Id. at 403, 462 P.2d at 202. As a result, Dalton held that neighboring plaintiffs landowners had "a concrete interest[,]" id. (internal quotation marks and citations omitted), that could be legally protected. Hence, in addressing the merits of whether the ordinances were null and void, id. at 408-17, 462 P.2d at 205-09, Dalton necessarily decided that neighboring landowners had a right of action to protect that "concrete interest in a legal relation[,]" id. at 403, 462 P.2d at 202. See Black's Law Dictionary 1349 (8th ed. 2004) (defining a "right of action" as "[t]he right to bring a specific case to court" or "[a] right that can be enforced by legal action; a chose in action").

This right of action was confirmed in East Diamond Head, where this court reaffirmed the same "concrete interest in a legal relation" recognized in Dalton. There, adjoining landowners challenged a variance that enabled a neighboring landowner to use its land as a location for a movie production. 52 Haw. at 519, 479 P.2d at 797. The adjoining landowners asserted that "the movie operation interfered with the enjoyment

of their property" and "presented evidence of an increase in noise, traffic, and congestion during day and night hours, inconvenience by electrical and telephone work crews, and a fear that the studio's facilities would permanently remain and detract from the aesthetic residential character of the neighborhood." Id. at 521, 479 P.2d at 797-98. Citing Dalton, 51 Haw. at 403, 462 P.2d at 202, this court recognized that "an owner whose property adjoins land subject to rezoning has a legal interest worthy of judicial recognition should he seek redress in our courts to preserve the continued enjoyment of his realty by protecting it from threatening neighborhood change" and that "[e]ach [landowner in that case] asserts . . . such a right." E. Diamond Head, 52 Haw. at 521-22, 479 P.2d at 798 (emphases added).

As a result, East Diamond Head confirmed that adjoining landowners had a "right" in "preserv[ing] the continued enjoyment of [their] realty by protecting [them] from threatening neighborhood change." Id. Furthermore, the rights of those adjoining landowners were "worthy of judicial recognition." Id. at 521, 479 P.2d at 798. Accordingly, such landowners could bring suit to protect their right inasmuch as this court recognized that the landowners could "seek redress in our courts" to vindicate that right. Id.

Thus, this court has held that adjoining landowners have a "right" denoted as a "a legal interest worthy of judicial

recognition . . . [that is] redress[able] in our courts to preserve the continued enjoyment of . . . realty by protecting it from threatening neighborhood change." Id. at 521-22, 479 P.2d at 798. "Each landowner" then can bring suit to "assert[] . . . such a right," id. at 522, 479 P.2d at 798, in the "enjoyment of his [or her] realty[,]" id. at 521, 479 P.2d at 798. Consequently, Ala Loops's cross claim sounds in a legally cognizable cause of action.

2.

This adjoining landowners' right of a "legal interest worthy of judicial recognition" has also been confirmed in HRS chapter 205 proceedings, similar to that in controversy here. See Perry v. Planning Comm'n of County of Hawaii, 62 Haw. 666, 619 P.2d 95 (1980) (allowing property owners adjoining a proposed quarry site within an agricultural district to challenge the LUC's order approving the grant of a special land use permit authorizing quarrying operations under HRS § 205-6); Town v. Land Use Comm'n, 55 Haw. 538, 524 P.2d 84 (1974) (allowing plaintiffs to challenge the LUC's approval of a neighbor's petition to amend the district designation of neighbor's land from agricultural to rural because it violated HRS § 205-4). For example, in Town, a landowner filed a petition with the LUC to amend the district designation of his property from agricultural to rural. 55 Haw. at 539, 524 P.2d at 86. After four public hearings, the LUC approved the landowner's petition. Id. at 539-40, 524 P.2d at

86. The appellant, an adjoining property owner to the subject property, filed an appeal challenging the LUC's decision. Id. at 540, 524 P.2d at 86. The appellant argued that the petition was null and void because the approval was not decided after forty-five, but within ninety days, following a public hearing required under HRS § 205-4, the statute that governs amendments to district boundaries involving land greater than fifteen acres.[7]

[7] HRS § 205-4 at that time read:

> **Amendments to district boundaries.** Any department or agency of the State or county, or any property owner or lessee may petition the [LUC] for a change in the boundary of any district. Within five days of receipt, the commission shall forward a copy of the petition to the planning commission of the county wherein the land is located. Within forty-five days after receipt of the petition by the county, the county planning commission shall forward the petition, together with its comments and recommendations, to the commission. Upon written request by the county planning commission, the commission may grant an extension of not more than fifteen days for the receipt of any comments and recommendations. The commission may also initiate changes in a district boundary which shall be submitted to the appropriate county planning agency for comments and recommendations in the same manner as any other request for a boundary change.
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> After sixty days but within one hundred and twenty days of the original receipt of a petition, the commission shall advertise a public hearing to be held on the appropriate island in accordance with the requirements of section 205-3. The commission shall notify the persons and agencies that may have an interest in the subject matter of the time and place of the hearing. Within a period of not more than ninety days and not less than forty-five days after the hearing, the commission shall act upon the petition for change. The commission may approve the change with six affirmative votes. . . .

Town, 55 Haw. at 542 n.2, 524 P.2d 87 n.2 (emphasis added). HRS § 205-4 has subsequently been amended and now reads in part:

> **Amendments to district boundaries involving land greater than fifteen acres.** (a) Any department or agency of the State, any department or agency of the county in which the land is situated, or any person with a property interest in the land sought to be reclassified, may petition the [LUC] for a change in the boundary of a district. . . .
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> (b) Upon proper filing of a petition pursuant to subsection (a) the commission shall, within not less than

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Id. at 542, 524 P.2d at 87. The circuit court rendered summary judgment in favor of the LUC and the appellant appealed. Id. at 540, 524 P.2d at 86. Town concluded, inter alia, (1) that the time period in HRS § 205-4 "requiring a decision to be rendered after 45 days and before 90 days ha[d] elapsed following the public hearing clearly [was] a mandatory requirement[,]" id. at 543, 524 P.2d at 88, (2) that the time limitation could not be waived solely by the applicant, id., (3) that the decision rendered 175 days after initial public hearing was void, id. at 544, 524 P.2d at 89, and (4) that the case was a "contested case" within the Hawaiʻi Administrative Procedure Act (HAPA), id. at 548, 524 P.2d at 91.

Concluding that the time limitation could not be waived solely by the landowner applying for the amendment, this court noted that "[a]n interested party . . . especially where he is an adjoining property owner, has an inherent interest in the

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[7](...continued)

> sixty and not more than one hundred and eighty days, conduct a hearing on the appropriate island in accordance with the provisions of sections 91-9, 91-10, 91-11, 91-12, and 91-13, as applicable.
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> . . . .
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> (g) Within a period of not more than three hundred sixty-five days after the proper filing of a petition, unless otherwise ordered by a court, or unless a time extension, which shall not exceed ninety days, is established by a two-thirds vote of the members of the commission, the commission, by filing findings of fact and conclusions of law, shall act to approve the petition, deny the petition, or to modify the petition by imposing conditions necessary to uphold the intent and spirit of this chapter or the policies and criteria established pursuant to section 205-17 or to assure substantial compliance with representations made by the petitioner in seeking a boundary change. . . .

(Emphases added.)

decision no matter what that decision may be and he is entitled to have that decision within the specified period of time." Id. at 543-44, 524 P.2d at 88 (emphasis added). Furthermore, "[t]he impact that the change in boundary will have, if approved, to the use and value of adjoining property are factors that must be considered." Id. at 544, 524 P.2d at 88. Town also determined that the proceeding was a "contested case" within the definition of HRS § 91-1(5)[8] because the "appellant has a property interest in the amending of a district boundary when his property adjoins the property that is being redistricted[,]" id. at 548, 524 P.2d at 91 (citing E. Diamond Head, 52 Haw. 518, 479 P.2d 796; Dalton, 51 Haw. 400, 462 P.2d 199) (emphasis added), and, "[t]herefore[,] 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. (emphasis added). Thus, Town reiterated that an adjoining landowner had legal rights, as held by this court in East Diamond Head and Dalton, which could be asserted in administrative and in court proceedings.

In Perry, landowners adjoining a proposed quarry site appealed the LUC's order approving the grant of a special permit pursuant to HRS § 205-6. 62 Haw. at 672, 619 P.2d at 101. They alleged, inter alia, that "the application was void because the

[8] HRS § 91-1(5) defines the term "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."

Planning Commission failed to conduct a hearing within one hundred twenty days of its receipt, and therefore, the [LUC] lacked jurisdiction to act on the permit."[9] Id. Among other matters, the circuit court agreed with the landowners on this point. The County and the LUC appealed. This court determined that the timing requirements for the hearing were "to counter possible administrative sluggishness" and "[s]ince the interests of neither the county planning commission, the adjoining landowners, nor the public were likely to be advanced by quick administrative action . . . , [this court] believe[d that] the provision was enacted for the primary benefit of those seeking such permits . . . ." Id. at 675, 619 P.2d at 102. Thus, this

[9] HRS § 205-6 at the time that the approval was granted read, in pertinent part:

> **Special permit**. The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use his land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which his land is located for permission to use his land in the manner desired.
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> The planning commission shall conduct a hearing within a period of not less than thirty nor more than one hundred twenty days from the receipt of the petition. The planning commission shall notify the [LUC] and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.
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> The planning commission may under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would promote the effectiveness and objectives of this chapter. . . .

Perry, 62 Haw. at 672 n.4, 619 P.2d at 101 n.4 (emphasis added). The provision for a hearing within "a period of not less than thirty nor more than one hundred twenty days from the receipt of the petition" was deleted by Act 166 of the 1978 legislative session. Id. See 1978 Haw. Sess. Laws Act 166 § 1, at 337. However, the requirement that a hearing shall be conducted was not. See HRS § 205-6 (Supp. 2001).

court concluded that the timing requirements had a "non-mandatory effect" because "[t]here was no discernible loss or destruction of advantage, benefit, or right on anyone's part occasioned by the delay." Id. at 677, 619 P.2d at 103. However, the court also noted that "[w]here public interests and private rights are adversely affected by procedural irregularity or agency indiscretion, we would not hesitate to follow Town[,]" id. at 678, 619 P.2d at 104 (emphasis added), which, as discussed above, rendered a LUC decision void. Again, Perry confirmed the "private right" acknowledged in Town, established in Dalton in a court proceeding, and reaffirmed in East Diamond Head in an administrative proceeding.

Similar to the appellant in Town and the landowners in Perry, the members of Ala Loop are adjacent landowners who have a "right" in the preservation of "the continued enjoyment of [] realty by protecting it from threatening neighborhood change." E. Diamond Head, 52 Haw. at 521-22, 479 P.2d at 798; see Town, 55 Haw. at 543-44, 524 P.2d at 88; Perry, 62 Haw. at 678, 619 P.2d at 104; see also Mahuiki, 65 Haw. at 515, 654 P.2d at 880 (recognizing that "a decision to permit construction . . . on undeveloped land in the special management area could only have an adverse effect on [the adjacent landowners'] environment"); Dalton, 51 Haw. at 403, 462 P.2d at 202 (recognizing that adjacent landowners have a "concrete interest" in scenic views, sense of space, and density of population). The members of Ala

Loop have a right to protect their property from the claimed increase in noise and traffic, as well as from inadequate infrastructure and sewer and water facilities attributed to Waiʻola. In that regard, this court has confirmed that Ala Loop's members have the legal right to contest agency decisions affecting their "concrete interest[s]" before the agency that issued the decision, see Mahuiki, 65 Haw. at 515, 654 P.2d at 880; Town, 55 Haw. at 543-44, 524 P.2d at 88; E. Diamond Head, 52 Haw. at 521-22, 479 P.2d at 798; as well as in court, see E. Diamond Head, 52 Haw. at 512, 479 P.2d at 798; Dalton, 51 Haw. at 403, 462 P.2d at 202.

B.

As noted before, see supra note 3, HRS § 205-6 requires, in part, that "the planning commission . . . shall establish by rule or regulation, the time within which the hearing and action on petition for special permit shall occur" and "shall notify the [LUC] and such persons and agencies that may have an interest in the subject matter" of the hearing. HRS § 205-6(b). Absent a hearing, adjoining landowners affected by changes in land use would be deprived of the right to protect their interests in the permitting process; therefore, there is clearly a "discernible loss" if a permit hearing is wrongfully denied. See Perry, 62 Haw. at 677, 619 P.2d at 103. Because the "public interests and private rights are adversely affected by procedural irregularity or agency indiscretion," id. at 678, 619

P.2d at 104, Ala Loop is entitled to seek redress in our courts for Waiʻola's failure to obtain a special permit and the County's alleged erroneous decision to not conduct a special permit hearing under HRS § 205-6.

Furthermore, similar to Town, this dispute would be subject to contested case requirements stemming from § 91-1(5) if a hearing were held.[10] See Mahuiki, 65 Haw. at 515, 654 P.2d at 880 (holding that landowners who filed their objections in conformity with notice published by the county planning commission satisfied the requirement of "adversary participation" for purposes of appeal); Town, 55 Haw. at 548, 524 P.2d at 91 (holding that proceeding was a "contested case" under HRS § 91-1 inasmuch as appellant had "a property interest in the amend[ment] of a district boundary when his property adjoins the property that is being redistricted" and that "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"); E. Diamond Head, 52 Haw. at 518-21, 479 P.2d at 796-98 (holding that adjoining landowners were "person(s) aggrieved" within the meaning of HRS § 91-14(a)). In this case, the members of Ala Loop have a legal right to protect their properties from

[10] HRS § 91-1(5) (1993) defines the term "contested case" as "a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing."

threatening neighborhood change, Dalton, 51 Haw. at 403, 462 P.2d at 202, and Ala Loop has pled that its interest would be "adversely affected," Perry, 62 Haw. at 678, 619 P.2d 104, by the improvements its neighbor Waiʻola had contemplated making. The question of whether or not Waiʻola required a special permit to make such improvements falls squarely within HRS § 205-6. Under HRS § 205-6, a special permit application is subject to notice and hearing requirements for "interested part[ies]." Town, 55 Haw. at 543, 524 P.2d at 88. Therefore, Ala Loop 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. In light of the fact that adjoining landowners have been afforded the right to a hearing to adjudicate their interests under HRS § 205-6, and this court has confirmed that adjoining landowners have a "right" in terms of "a legal interest . . . redress[able] in our courts to preserve the continued enjoyment of . . . realty[,]" E. Diamond Head, 52 Haw. at 521, 479 P.2d at 797, Ala Loop's cross claim correctly sounds, inter alia, for a declaratory judgment that Waiʻola obtain a special permit and for allied injunctions to issue.

C.

Unable to assert its rights in a HRS § 205-6 proceeding because the County will not convene such a proceeding, Ala Loop properly sought relief under the declaratory judgment statute. The declaratory judgment statute, HRS § 632-1 (1993), grants

courts of record the power to make "binding adjudications of right" in justiciable cases, under three types of situations:

> [1] where an actual controversy exists between contending parties, or [2] where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or [3] where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein.

Rees v. Carlisle, 113 Hawaiʻi 446, 458, 153 P.3d 1131, 1143 (2007) (quoting HRS § 632-1) (emphases added). A court must be "satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding." Id. at 457, 153 P.3d at 1142. Also, "[a]s the declaratory judgment statute thus makes clear, there must be some 'right' at issue in order for the court to issue relief." Id.

Moreover, HRS chapter 632 is to be "liberally interpreted and administered, with a view of making the courts more serviceable to the people." HRS § 632-6 (emphasis added).[11] The original purpose of HRS § 632-1 was to "allow parties in dispute and in controversy over any issue to obtain judicial determination of their respective rights and obligations before a

[11] HRS § 632-6 states:

> This chapter is declared to be remedial. Its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle the party to maintain an ordinary action therefor. It is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people.

(Emphasis added.)

cause of action accrue[d] by breach of such right of either party[,]" S. Stand. Comm. Rep. No. 263, in 1921 Senate Journal, at 616, and to "enable the settlement of legal rights which are in doubt or dispute, and not to answer merely hypothetical questions involving no uncertain relations or conflicting claims[,]" H. Stand. Comm. Rep. No. 594, in 1921 House Journal, at 1296.

However, since its enactment in 1921, HRS § 632-1 has undergone several amendments. In 1945, a pertinent amendment was made to HRS § 623-1 with the intent "to expand the proceedings for declaratory judgments to a scope that will render such proceedings of real value[.]" S. Stand. Comm. Rep. No. 235, in 1945 Senate Journal, at 656. Furthermore, the House Committee on the Judiciary noted that the amendment would "afford greater relief by declaratory judgment than the present law." H. Stand. Comm. Rep. No. 76, in 1945 House Journal, at 566. This court has recently determined that, by this amendment, the legislature "intended to 'afford [citizens] greater relief,'" and, therefore, a petitioner was not precluded "from bringing a declaratory judgment action under the current HRS § 632-1, even though [relief through another right of action was] available provided that 'the other essentials to such relief [were] present.'" Dejetley v. Kahoʻohalahala, 122 Hawaiʻi 251, 268, 226 P.3d 421, 438 (2010) (quoting HRS § 632-1). Thus, the right to bring a declaratory judgment action is broadly construed.

As a community association of adjoining landowners to Waiʻola's Sunshine Farms, Ala Loop is a party that may bring an action to protect its members' land. HRS § 632-1. As exemplified in the case law, Ala Loop's members had a legal right to protect their interests against encroachment by Waiʻola, and in conjunction therewith, to challenge the County's decision to not conduct a hearing otherwise required under HRS chapter 205. Thus, there was "some 'right' at issue in order for the court to issue relief." Rees, 113 Hawaiʻi at 458, 153 P.3d at 1143. The failure of Waiʻola to obtain a special permit was clearly a "challenge or denial of a . . . right . . . by an adversary party[,]" HRS § 632-1, and therefore, "'the other essentials to such relief are present[,]'" Dejetley, 122 Hawaiʻi at 268, 226 P.3d at 438 (quoting HRS § 632-1) (emphasis omitted). Given the command by HRS § 632-6 to the courts to "liberally interpret[] and administer[]" HRS chapter 632 governing declaratory judgments, Ala Loop's attempt to seek relief under the declaratory judgment statute was correct.

D.

In its opening brief, Waiʻola argues that the "[l]egislature clearly kn[ew] how to draft provisions to allow a citizen's suit to be brought" but "did not," and instead enacted HRS § 205-12, which gives enforcement power to the counties. Waiʻola also quotes Lanai Co. Inc., v. Land Use Comm'n, 105 Hawaiʻi 296, 97 P.3d 372 (2004), as support for the proposition

that a private person cannot enforce HRS § 205-6, stating that, "[i]f the principal agency for the implementation of the State's land use laws is without authority to bring an action for injunctive relief to correct violations of [HRS chapter] 205, then most certainly the neighbors of a public charter school must be foreclosed from doing the same[.]" Waiʻola's argument here is wrong.

This court in Lanai determined that as between two government entities (the LUC or the county), the county was the entity expressly authorized by the legislature to enforce HRS chapter 205. In Lanai, a land developer appealed a LUC's cease and desist order, which had found that the developer had violated a condition amending the developer's land from agricultural to rural. 105 Hawaiʻi at 306, 97 P.3d at 382. On appeal, the circuit court reversed the LUC's decision, holding that the LUC's interpretation of the condition was erroneous. Id. The LUC and a citizens group appealed the circuit court's decision. Id.

Lanai held that the circuit court properly interpreted the condition in the LUC order and that the LUC's findings in support of the order were inadequate to determine whether the developer had violated the condition and, thus, remand was required. Id. at 316, 97 P.3d at 392. It was decided 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. at 318, 97 P.3d at 394, but that, "the LUC does not have the

power to enforce a cease and desist order[,]" id. at 319, 97 P.3d at 395. Instead, "the power to enforce the LUC's conditions and orders . . . lies with the various counties." Id. (citing HRS § 205-12).

However, Lanai also determined that "the county has an affirmative duty to enforce the LUC's conditions, according to HRS § 205-12." Id. at 319, 97 P.3d at 395 (emphasis added). Thus, Lanai does not preclude private persons from asserting a right of action when the County allegedly fails to act pursuant to its affirmative duties to enforce HRS chapter 205, as in Town, 55 Haw. at 545, 524 P.2d at 89. Cf. E. Diamond Head, 52 Haw. at 522, 479 P.2d at 798. A contrary interpretation may enable a county to avoid its alleged legal and affirmative duty to uphold HRS chapter 205 by failing to conduct a public hearing on a permit application, or as in this case, deciding that a permit is not needed at all. Such alleged violations obviously give rise to a cognizable suit in which the right to a hearing afforded to persons who "may have an interest in the subject matter" under HRS § 205-6, may be brought. See Mahuiki, 65 Haw. at 515, 654 P.2d at 880; Perry, 62 Haw. at 678, 619 P.2d at 103; Town, 55 Haw. at 543-44, 524 P.2d 88; E. Diamond Head, 52 Haw. at 519-20, 479 P.2d at 797.

E.

The majority asserts that while the ICA used the appropriate test in Pono v. Molokai Ranch, Ltd., 119 Hawaiʻi 164,

194 P.3d 1126 (App. 2008), "to determine whether the legislature intended to create a private right of action when it enact[ed] a statute," the ICA erred in Pono by not "addressing the question of whether article XI, section 9 [of the Hawaiʻi Constitution] created a private right of action." Majority opinion at 37. Respectfully, this assertion is wrong for the reasons stated above and under Pono.

In Pono, an unincorporated association and several of its members filed a complaint in circuit court challenging defendant Molokai Ranch's development of fifteen campgrounds on agricultural land without obtaining a special permit under HRS § 205-6. 119 Hawaiʻi at 174-75, 194 P.3d 1136-37. The ICA determined that private citizens do not have the authority to enforce the provisions of HRS chapter 205, and therefore, private citizens lacked standing to invoke a circuit court's jurisdiction to adjudicate their claims under HRS chapter 205. Id. at 167, 194 P.3d at 1129. In arriving at this conclusion, the ICA stated that "the supreme court . . . [has] made clear that in order for a private citizen to seek a declaratory judgment that a statute has been violated, the private citizen must, as a threshold matter, have a private right of action to enforce the statute." Id. at 186, 194 P.3d 1148 (citations omitted). To determine whether "'a private remedy is implicit in a statute not expressly providing one[,]'" the court applies the three factors set forth in Reliable Collection Agency v. Cole, 59 Haw. 503, 584 P.2d 107

(1978), and Rees, 113 Hawaiʻi 446, 153 P.3d 1137.[12] Pono, 119 Hawaiʻi at 185, 194 P.3d at 1147 (quoting Reliable, 59 Haw. at 507, 584 P.2d at 109) (other citation omitted).

As explained above, Ala Loop, as an association of adjoining landowners to Waiʻola's property, had a right, recognized by our courts, to challenge the County's decision that Waiʻola was exempt from HRS § 205-6. See Mahuiki, 65 Haw. at 515, 654 P.2d at 880; Town, 55 Haw. at 543-44, 524 P.2d at 88; E. Diamond Head, 52 Haw. at 518-19, 479 P.2d at 796. Thus, the Pono requirement that private citizens seeking a declaratory judgment "ha[d] a private right of action to enforce the statute" has been satisfied here. 119 Hawaiʻi at 186, 194 P.3d at 1148. The determination of whether "a private remedy is implicit in a statute not expressly providing one[,]" id. at 185, 194 P.3d at 1147, is thus not material.

Second, Pono is distinguishable from the present case. Unlike Ala Loop, there is no indication that the plaintiffs in Pono were adjoining landowners. See id. at 165-66, 194 P.3d at 1127-28. As explained above, this court has recognized that

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[12] These three factors are:

> 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?

Rees, 113 Hawaiʻi at 458, 153 P.3d at 1143 (brackets and ellipses in original) (emphases omitted) (quoting Reliable, 59 Haw. at 507, 584 P.2d at 109).

adjoining landowners have the right to enforce concrete interests that are not shared with other members of the public. See Mahuiki, 65 Haw. at 515, 654 P.2d at 880; Town, 55 Haw. at 543-44, 524 P.2d at 88; E. Diamond Head, 52 Haw. at 522, 579 P.2d at 798; Dalton, 51 Haw. at 403, 462 P.2d at 202. As members of the general public who were not adjacent landowners, the plaintiffs in Pono could not rely on such case law, which recognized that a change in the use of adjoining land creates a "legal interest worthy of judicial recognition," E. Diamond Head, 52 Haw. at 521, 579 P.2d at 798, and presents an "actual controversy" and not merely a hypothetical question, Dalton, 51 Haw. at 403, 462 P.2d at 202.

Third, the tests utilized in Pono and set forth in Reliable and Rees are employed to determine whether the legislature intended to create a private right of action when it enacted a statute. In Reliable, the issue was whether a private individual had a private right of action to challenge the unauthorized practice of law under HRS § 605-14. 59 Haw. at 506, 584 P.2d at 109. In Rees, the issue was whether a private citizen could seek to enforce the city's code of ethics provided in section 3-8.6 of the Revised Ordinances of Honolulu against a public official. 113 Hawaiʻi at 456-59, 153 P.3d at 1141-44. Neither of these cases involved an existing right of action already afforded by the courts.

F.

The majority argues that (1) "to the extent that [Dalton, East Diamond Head, Town, Perry, and Mahuiki] focus on the status of the plaintiffs as adjoining landowners, they did so in the context of assessing standing[,]" majority opinion at 64, (2) "East Diamond Head[], Town, Perry, and Mahuiki were brought pursuant to chapter 91, and do not establish the existence of a private right of action outside that context[,]" id., and (3) "at no point in [this court's] discussion in those cases did [this court] suggest that [adjoining landowners] had a cause of action independent of chapter 91 based on their status as neighboring landowners[,]" id. at 72 (citing Ponohu v. Sunn, 66 Haw. 485, 487, 666 P.2d 1133, 1135 (1983)). I respectfully disagree with the majority for the reasons following.

1.

With regard to majority's first argument, the majority contends that (a) Dalton discussed adjoining landowner's "concrete interest . . . in standing terms[,]" "without addressing whether the plaintiffs had a private right of action to challenge the ordinances[,]" id. at 71-72; (b) Dalton should not control because it "was decided prior to the United States Supreme Court's decision in Cort v. Ash, 422 U.S. 66 (1975)," which was "utilized" by this court's "analysis for determining whether a statute authorized an implied private right of action in Reliable," majority opinion at 65 n.38; (c) East Diamond Head,

Town, and Mahuiki "directly addressed . . . whether the adjoining landowners had standing to appeal an agency action in a contested case hearing under HRS § 91-14[,]" id. at 72; and (d) Perry "was an agency appeal, and did not directly discuss standing or private rights of action[,]" id.

As to (a), the majority's assertion that Dalton did not "address[] whether the plaintiffs had a private right of action to challenge the ordinances," id. at 65, is plainly wrong. This court in Dalton stated that the "issues to be resolved . . . are standing, laches, and the validity of the ordinances." 51 Haw. at 402, 462 P.2d at 202 (emphasis added). Therefore, the validity of the ordinances was an issue separate from the matter of standing. This court decided that the trial court erred in granting summary judgment in favor of the defendants with respect to the ordinances. The ruling on the validity could only be rendered on a right of action brought by the plaintiffs. The plaintiffs in Dalton, then, necessarily had to have had a private right of action in order to challenge the ordinances. That they did was confirmed in East Diamond Head.

In East Diamond Head, the court stated that the right of action recognized in Dalton was an adjoining landowners's right to "preserve the continued enjoyment of his realty by protecting it from threatening neighborhood change":

> Several weeks after the above mentioned ruling [by the board], we held in [Dalton, 51 Haw.] at 403, 462 P.2d [at 202,] that an owner whose property adjoins land subject to rezoning has a legal interest worthy of judicial recognition should he seek redress in our courts to preserve the

> continued enjoyment of his realty by protecting it from threatening neighborhood change.

52 Haw. at 521-22, 479 P.2d at 798. Therefore, contrary to the majority's position, Dalton decided, apart from the issue of standing, that a right of action inured to adjoining landowners to protect the enjoyment of their property. Thus, as observed previously, Dalton stands for the proposition that adjoining landowners have a right to challenge land use decisions in order to preserve the continued enjoyment of their property.

In East Diamond Head, the recognition of that right of action was reconfirmed inasmuch as this court said, in referring to Dalton, "Each appellant here [in East Diamond Head] asserts just such a right." E. Diamond Head, 52 Haw. at 522, 479 P.2d at 798 (emphasis added). As East Diamond Head expressly stated, that right of action was affirmed in both Dalton and East Diamond Head.

In East Diamond Head, the determination that this right of action existed was quite apart from the standing issue of whether the plaintiffs were persons "aggrieved by a final decision and order in a contested case . . . as provided for in HRS Chapter 91 and HRS § 91-14(a)." 52 Haw. at 521, 479 P.2d at 798 (internal quotation marks omitted). As to the standing issue, this court said that plaintiffs were "aggrieved" because "the board's zoning variance immediately and directly affect[ed] each homeowner." Id.

As to (b), the majority disagrees that "Dalton should control," because it "was decided prior to the United States Supreme Court's decision in [Cort], . . . [,]" that this court utilized in Reliable, "for determining whether a statute authorized an implied private right of action[,]" and thus, the majority asserts, "our analysis of private rights of action has been modified since our decision in Dalton[.]" Majority opinion at 65 n.38. However, this court required that plaintiffs have a right of action even prior to this court's decision in Reliable.[13] Thus, the fact that Rees and Reliable were decided subsequent to Dalton does not suggest that plaintiffs prior to Reliable could bring suit without a right of action. Moreover, as discussed supra, the test set forth in Rees and Reliable would not apply where an existing right of action has already been afforded by the courts, as in this case. In light of the fact that Dalton necessarily addressed whether the adjoining landowner had a cause of action, and this court required that plaintiffs have a right of action even prior to this court's decision in Reliable, Dalton and its progeny are controlling here.

[13] See, e.g., Fonseca v. Pac. Const. Co., 54 Haw. 578, 579, 513 P.2d 156, 157 (1973) (determining whether a worker, who received a compensable injury against a third person other than his direct employer, had a common law rights of action); Halberg v. Young, 41 Haw. 634, 646 (Haw. Terr. 1957) (determining whether a child has a right of action for personal injury to a parent not resulting in death); Kamanu v. E.E. Black, Ltd., 41 Haw. 442, 444 (Haw. Terr. 1956) (determining "whether the widow and children had a common-law right of action for the wrongful death of the husband and father at 'Hawaiian common law'"); cf. Olokele Sugar Co. v. McCabe, Hamilton & Renny Co., 53 Haw. 69, 71, 487 P.2d 769, 770 (1971) (recognizing that "in the absence of a contractual or statutory provision authorizing a direct action against or the joinder of a liability insurer, an injured person . . . has no right of action at law against the insurer and cannot join the insured and the liability insurer as parties defendant").

As to (c), East Diamond Head, Perry, Town, and Mahuiki reaffirmed that "owner[s] whose property adjoins land subject to rezoning" have "such a right" of action "to preserve" and "protect" that right "from threatening neighborhood change" through "redress in our courts." E. Diamond Head, 52 Haw. at 521-22, 479 P.2d at 798 (citing Dalton, 51 Haw. at 403, 462 P.2d at 202) (emphasis added). In these cases, the question of standing was either separate and apart from any reference to a private right of action, or was not in dispute. For example, as discussed above, in East Diamond Head, the determination that adjoining landowners had a right of action derived from Dalton was decided separately from the standing issue of whether the plaintiffs were persons "aggrieved by a final decision and order . . . as provided for in HRS [c]hapter 91[.]" Id. (internal quotation marks omitted).

Contrary to the majority's view, Town did not involve any standing dispute. The question in Town was whether the proceeding was a contested case within the meaning of HRS § 91-1(5). 55 Haw. at 548, 524 P.2d at 91. This court found that the proceeding was a contested case because "the petition for boundary change is a proceeding in which appellant has legal rights as a specific and interested party[.]" Id. However, this court first established that the legal rights existed, citing

East Diamond Head and Dalton,[14] because "the appellant ha[d] a property interest in the amending of a district boundary when his property adjoins the property that is being redistricted." Id. (citing E. Diamond Head, 52 Haw. 518, 479 P.3d 796; Dalton, 51 Haw. 400, 462 P.2d 199).

In Mahuiki, the question related to "the appellants' standing to seek review of the administrative action" approving applications to develop a parcel of land. 65 Haw. at 508, 654 P.2d at 876. Appellants challenged that approval. This court noted that appellants had standing because "such a party should have a chance to show that the action that hurts his legal interest is illegal." Id. at 513, 654 P.2d at 878 (citing E. Diamond Head, 52 Haw. at 523 n.5, 479 P.2d at 799 n.5). Again, East Diamond Head indicated that recognizing the adjoining landowner's right was treated separately from the question of whether the particular landowner had standing.

As discussed supra, East Diamond Head's discussion of an adjoining landowner's right of action was derived from Dalton, which was a court action, and not an action brought under HRS chapter 91. This same legal right was the same one asserted in the HRS chapter 91 proceedings in East Diamond Head, Town and Mahuiki. Thus the majority's contention that these cases only pertained to standing under chapter 91 and not to a right that

[14] It should be noted that Town, East Diamond Head, and Dalton were all authored by Justice Bert Kobayashi.

could be asserted in court and in an administrative proceeding is plainly wrong.

As to (d), the majority maintains that "although Perry provides an example of adjoining landowners bringing a [HRS] chapter 91 appeal of a LUC decision, it contains no discussion directly relevant to the issues here." Majority opinion at 70.[15] To the contrary, Perry is obviously relevant here. It is a clear example of this court affording adjoining landowners the right to bring an administrative action challenging the grant of a special permit for failing to comply with the provisions of HRS § 205-6, reconfirming the line of cases originating in Dalton. As discussed supra, Perry stated that this court "would not hesitate to follow Town" where "private rights are adversely affected." 62 Haw. at 678, 619 P.2d at 104. These private rights are the same rights of adjoining landowners acknowledged in Town, which rested on Dalton and East Diamond Head.

2.

With regard to the majority's second argument, the majority asserts that East Diamond Head, Town, Perry, and Mahuiki "addressed questions relating to . . . standing . . . under HRS § 91-14[,]" "but do not establish the existence of a private right of action outside of that context." Majority opinion at

[15] Contrary to the majority's assertion, Perry is not "an example of adjoining landowners bringing a [HRS] chapter 91 appeal of a LUC decision[.]" Majority opinion at 71-72, 72 n.41. It should be evident from a plain reading of Perry that this court neither cited nor discussed HRS chapter 91 or maintained that chapter 91 applied, but relied only on the procedure set forth in HRS chapter 205 in deciding the case.

64, 72. This is incorrect, as the foregoing discussion points out. The majority also states in two footnotes that this court has (1) "characterized the determination of whether a party is 'a person aggrieved' . . . as comprising part of the standing inquiry[,]" id. at 66 n.39, and (2) "characterized a party's participation in a 'contested case' as a standing requisite[,]" id. at 68 n.40.

The majority's first footnote does not raise anything in dispute. The determination of a person aggrieved is part of the standing inquiry under chapter 91 and it is not argued otherwise. The majority's contention that East Diamond Head decided issues of whether a party is a "person aggrieved" does not mean that the right asserted by adjoining landowners found its source in HRS chapter 91. That was but one issue in the case. As shown above, prior to deciding whether the adjoining landowner was a person aggrieved in East Diamond Head, this court reconfirmed adjoining landowners' rights pursuant to Dalton. Similarly, the majority's second footnote, stating that a party's participation in a "contested case" is a standing requisite, is also not in dispute. As discussed supra, Town did not involve a standing dispute. Furthermore, Town established that the legal rights of adjoining landowners existed under Dalton and East Diamond Head.

As evident from the foregoing discussion, while East Diamond Head, Town, and Mahuiki may have been subject to HRS

chapter 91 judicial review because these cases were decided by agencies, the right upon which adjoining landowners could sue was not derived from HRS chapter 91. HRS chapter 91 is not a source of substantive rights. Instead, HRS chapter 91 applies if there exists the attributes of a proceeding defined as a contested case under HRS § 91-1(5). In such a contested case, a person may be considered aggrieved for HRS chapter 91 purposes if the person's "personal or property right has been injuriously or adversely affected by an agency's action." Life of the Land, Inc. v. Land Use Comm'n, 61 Haw. 3, 7, 594 P.2d 1079, 1082 (1979) (emphasis added); Application of Hawaiian Elec. Co., 56 Haw. 260, 264, 535 P.2d 1102, 1105 (1975) (emphasis added). Thus, if a contested case exists, an aggrieved person is entitled to "judicial review under [HRS chapter 91.]" HRS § 91-14(a). As our case law indicates, the personal or property rights of the landowners whose cases are discussed supra, that were asserted in HRS chapter 91 proceedings, however, have a source independent of HRS chapter 91. See E. Diamond Head, 52 Haw. at 521, 479 P.2d at 798. In this case, the right afforded to neighboring landowners rests on case law as established in Dalton and reconfirmed in East Diamond Head, Town, Perry, and Mahuiki.

In sum, HRS chapter 91 is relevant in the foregoing cases insofar as the adjoining landowners' interests were affected by "a final decision and order [of an agency] in a contested case[.]" HRS § 91-14(a). As made clear in Dalton,

upon which Town, East Diamond Head, and Mahuiki relied, the concrete interest of adjoining landowners to protect their land from, among other things, "restrict[ion of] scenic view, limit[ations in the] sense of space, and increas[e in] the density of the population," bore a right of action recognized without respect to HRS chapter 91. Dalton, 51 Haw. at 403, 462 P.2d at 202. Accordingly, the majority's argument that the right of adjoining landowners is not "independent of" HRS chapter 91, majority opinion at 72, is wrong.

3.

With regard to the majority's third argument, the majority's assertion that East Diamond Head, Town, Perry, Mahuiki and Punohu, do not "suggest that [there is] a cause of action independent of chapter 91[,]" majority opinion at 72, is also wrong. As discussed in depth supra, Dalton recognized an adjoining landowner's right of action. East Diamond Head reconfirmed this right, recognizing this right as separate from the issue of standing under HRS chapter 91. Similarly, Town, Mahuiki, and Perry reconfirmed the right originating in Dalton; thus, these cases do not suggest that the right is limited to cases pursuant to HRS chapter 91, as the majority would have it.

Punohu does not alter the foregoing. In Punohu, welfare recipients sought declaratory and injunctive relief against reductions in benefits paid by the Department of Social Services and Housing of the State of Hawaiʻi (the Department). 66

Haw. at 487, 666 P.2d at 1134. The Department had sent each of the recipients notices informing him or her of the reductions and of his or her right to appeal and have a "fair hearing" before the Department as mandated by HRS § 346-12 (1983).[16] Id. This court said that "[s]uch a hearing was held in each case and the reductions in benefits were upheld." Id. The recipients then filed suit in circuit court asking for declaratory and injunctive relief on the grounds that the notice given was inadequate. Id.

This court declared that "we have held that where such a statutory remedy exists, declaratory judgement does not lie." Id. (citing Traveler's Ins. Co. v. Hawaii Roofing, Inc., 64 Haw. 380, 651 P.2d 1333 (1982)). Punohu recognized that "the fair hearing was a 'contested case' under the provisions of [HRS] § 91-1(5)" and, therefore, "was reviewable only in accordance with the provisions of § 91-14, HRS." Id. at 488, 666 P.2d at 1135 (emphases added). Because the welfare recipients were entitled to a fair hearing under HRS § 346-12 regarding the reduction of benefits, the fair hearing was subject to the "contested case" requirements of HRS § 91-1(5). This court applied the holding in Travelers, recognizing that "where such a

[16] HRS § 346-12 entitles an applicant or recipient aggrieved to an appeal and a fair trial. HRS § 346-12 states:

> **Fair Hearing**. An applicant or recipient, deeming oneself aggrieved, shall be entitled to appeal to the director of social services in the manner prescribed by department of social services and housing regulations and shall be afforded reasonable notice and opportunity for a fair hearing.

statutory remedy exists, declaratory judgment does not lie." Id. at 488, 666 P.2d at 1134 (citing Traveler's, 64 Haw. 380, 641 P.2d 1333). Thus, Punohu held "that the remedy of appeal provided by § 91-14, HRS, is a statutorily provided special form of remedy for the specific type of case involved here and that declaratory judgment action, pursuant to § 632-1, HRS, did not lie." Id. at 488, 666 P.2d at 1135 (emphasis added). Unlike Punohu, Ala Loop did not have any hearing that would be considered a contested case under the provisions of HRS § 91-1(5). As a result, Ala Loop could not seek judicial review under HRS § 91-14, and thus, "there is no statutorily provided special form of remedy" available in the instant case. Therefore, the holding of Punohu does not foreclose the right to a declaratory judgment action brought by Ala Loop.

Given that (1) case law has recognized that adjoining landowners have rights independently derived from Dalton, (2) Ala Loop was entitled to assert its rights in a HRS § 205-6 special permit proceeding against Waiʻola on the same basis as the adjoining landowners in Town, Perry, East Diamond Head, and Mahuiki, (3) Ala Loop was denied that proceeding when Waiʻola and the County took the position that a special permit was not necessary under HRS chapter 205, and (4) declaratory judgments are to be liberally interpreted and administered under HRS § 632-1, Ala Loop was entitled to bring its action for declaratory judgment.

III.

On certiorari, Ala Loop argues that it had standing under both the traditional injury-in-fact and procedural injury tests iterated in Superferry I, 115 Hawaiʻi at 319, 167 P.3d at 312, to file suit. In regard to injury-in-fact standing, Ala Loop contends that it "had presented ample evidence of the personal stake its members had in the health and safety aspects of [Waiʻola's] operations, being noise, traffic, inadequate infrastructure, fire protection, sewage and water issues." In regard to procedural standing, Ala Loop contends that because of the County's "fail[ure] to mandate the special permit process, [it] had no opportunity to present its position to both the Planning Commission and the LUC" and that "[t]his denial of a procedural right was clearly coupled with the concrete interest of [Ala Loop] and its members, who clearly had the requisite geographical nexus and interest in providing input on health and safety issues."

With respect to injury in fact standing, the three-part standing test requires that the following questions be answered in the affirmative: "(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." Id. (quoting Mottl v. Miyahira, 95 Hawaiʻi 381, 389, 23 P.3d 716, 724 (2001)) (ellipses,

footnote and citation omitted). The members of Ala Loop satisfy the foregoing test.

First, the members of Ala Loop have shown both actual an threatened injury to their health and safety interests from Waiʻola's activity on Sunshine Farms. There is ample evidence in the record to support Ala Loop's assertion that the proposed school may adversely impact the health, safety, and welfare of Ala Loop's small community because of the increase in noise and traffic, and the inadequate infrastructure, fire protection, sewage, and water facilities.[17] These were concrete interests, some of which are similar to those recognized as concrete interests in past cases. See id. at 331, 167 P.3d at 324 (recognizing the "potential impact of the Superferry on increasing traffic, possible increase in the movement of drugs, and possible effects on recreational users of the harbor" as concrete interests); Pele Def. Fund v. Puna Geothermal Venture,

[17] Kerinne Smith, president of Ala Loop and a resident of that community, expressed concerns about the health and safety impact a school would have on Ala Loop's small community. She asserted that according to the fire department requirements, Ala Loop Road was a substandard road that would need to be widened for a school and that the water supply was not sufficient. Shelley Hanaoka, a farmer who shared a property line with Waiʻola, was concerned that Waiʻola did not have sanitary facilities for the 300 projected students, and operation of a school without the facilities posed a risk to residences and students as the property is bisected by an active flood channel. She was also concerned about the safety issues posed by a single-lane blind-turn road, and dangerous highway access. Paul Saviskas, who worked sixty feet away from, and shares a property line with Waiʻola's property, was concerned about Waiʻola's unsafe practices of allowing students to walk through a flood zone to get to their classes and allowing its students to walk on Ala Loop Road unsupervised. Ed Torrison, another farmer on Ala Loop Road, also expressed his concerns with possible pesticide contamination because Waiʻola's property was previously used as a nursery. He also expressed traffic concerns with the scores of cars going in and out of Ala Loop Road.

77 Hawaiʻi 64, 70, 881 P.2d 1210, 1216 (1994) (recognizing the "potential harm including diminished property values . . . and possible physical injury resulting from the permitted operations").

Second, these actual and threatened injuries were directly traceable to Waiʻola's use of Sunshine Farms as a school. Ala Loop alleged on behalf of its members that "[Waiʻola's] operations constitute[d] an unlawful use of [Sunshine Farms], a threat to their health, safety and welfare, and a risk of harm to their well being." Ala Loop's declarations established that Waiʻola's use of the property created traffic risks on Ala Loop's narrow road. For example, Ala Loop member Paul Saviskas stated in his declaration that he observed a Waiʻola student walking around the blind corner of Ala Loop Road, and that once, while driving his truck, he had to slow down to go around a group of Waiʻola students who were in the middle of the road. Ala Loop member Ed Torrison also confirmed in his declaration that he had seen children from Waiʻola playing around the front of the property and on the street. Accordingly, the second prong is also met inasmuch as the alleged injuries are "fairly traceable" to Waiʻola's actions. Superferry I, 115 Hawaiʻi at 319, 167 P.3d at 312.

Third, the court's decision in favor of Ala Loop for a declaratory judgment and injunctive relief would likely provide relief for the injury. The actual and threatened injuries raised

by Ala Loop would have been addressed and potentially mitigated or avoided had Waiʻola applied for a special permit under HRS § 205-6. Thus, a decision granting a declaratory judgment and temporary and permanent injunctions in Ala Loop's favor would "likely provide relief" for Ala Loop's injury. Id. Because Ala Loop had standing under the injury-in-fact test and is entitled to bring a declaratory judgment action, it is not necessary to address Ala Loop's argument that it had procedural standing in detail.[18]

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[18] In order to establish procedural injury standing, Ala Loop is required to demonstrate that:

> (1) the plaintiff has been accorded a procedural right, which was violated in some way, . . . (2) the procedural right protects the plaintiff's concrete interests; and (3) the procedural violation threatens the plaintiff's concrete interests, thus affecting the plaintiff "personally," which may be demonstrated by showing (a) a "geographic nexus" to the site in question and (b) that the procedural violation increases the risk of harm to the plaintiff's concrete interests.

Superferry I, 115 Hawaiʻi at 329, 167 P.3d at 322 (citation omitted).

While this procedural injury standing need not be discussed in detail, the following may be observed. First, HRS § 205-6(b) accorded Ala Loop a procedural right, which was violated when Waiʻola and the County took the position that a HRS § 205-6 special permit was not necessary. As noted before, HRS § 205-6(b) states in part that "[t]he county planning commission shall notify the [LUC] and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing." Ala Loop and its members are persons with interests in the subject matter of the hearing.

Second, similar to the first prong of the injury-in-fact standing test, Ala Loop's concerns that the school would adversely impact the health and safety of Ala Loop's small community because of the increase in noise and traffic, and inadequate infrastructure, fire protection, and sewage and water facilities are concrete interests similar to those recognized as concrete interests in past cases. See id. at 334, 167 P.3d at 331.

Third, the procedural violation threatened the plaintiff's concrete interests. As adjoining landowners of Sunshine Farms, the members of Ala Loop have a "geographical nexus to the site in question." Id. at 329, 167 P.3d at 322. Moreover, the denial of the HRS § 205-6 procedures increased the risk of harm to Ala Loop's concrete interests, because a special permit hearing would have allowed the threatened injuries raised by Ala Loop to be addressed and potentially remedied. Thus, Ala Loop has shown it is entitled to procedural standing.

IV.

Having decided that Ala Loop had a right of action and standing to sue for a declaratory judgment, I respectfully disagree with the majority's position that the court abused its discretion when it denied Waiʻola's motion to set aside default under Hawaiʻi Rules of Civil Procedure (HRCP) Rule 55(c).[19] A motion to set aside an entry of default under HRCP Rule 55(c) is addressed to the sound discretion of the trial court. Nature Conservancy v. Nakila, 4 Haw. App. 584, 589, 671 P.2d 1025, 1030 (1983). Generally, to constitute an abuse of discretion, a court must have clearly "exceed[ed] the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party" litigant. Rearden Family Trust v. Wisenbaker, 101 Hawaiʻi 237, 253, 65 P.3d 1029, 1045 (2003) (quoting Shanghai Inv. Co. v. Alteka Co., 92 Hawaiʻi 482, 491-92, 993 P.2d 516, 525-26 (2000)). With regard to motions to set aside default judgment, a court may and should grant a motion to set aside a default "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." BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976) (citations omitted).

[19] HRCP Rule 55(c) states: "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)."

A.

To reiterate, on November 20, 2003, Ala Loop filed its cross-claim against Waiʻola and a third-party complaint against the LUC. On January 30, 2004, Ala Loop and Waiʻola stipulated to an extension for Waiʻola to file an answer or responsive pleading, which extended the deadline from January 15, 2004 to February 16, 2004. The parties subsequently agreed to a second extension, giving Waiʻola until February 25, 2004, to file its answer or responsive pleading. On February 25, 2004, Waiʻola filed a motion to extend its time to answer or file a responsive pleading for a third time. In its motion, Waiʻola asked for "an extension of no more than 30 days after the motion is decided to answer or otherwise file a responsive pleading." (Emphases added.) On March 18, 2004, the court granted this motion, giving Waiʻola until April 19, 2004, to comply with its motion.

The court explicitly informed Waiʻola in a written order on April 6, 2004, that if an answer or other responsive pleading was not filed by April 19, 2004, then Ala Loop would be permitted to request entry of default. Rather than comply with its own representations to the court that it required an extension of "no more than 30 days," (emphasis added), Waiʻola apparently abandoned any effort to file an answer or responsive pleading. Despite having been previously notified by the court that entry of default may enter against Waiʻola for failure to answer or respond on April 19, 2004, Waiʻola did not file an answer on April 19,

2004 as ordered. Instead, on the April 19, 2004 deadline, Waiʻola filed a motion for stay or, in the alternative, for another extension of time, even though Waiʻola had requested and had been granted the 30-day extension, in addition to the other two extensions. While this motion was pending, Waiʻola filed a writ of mandamus in this court. It appears Waiʻola moved to stay the proceedings so that it could pursue its application for a writ. Waiʻola's decision not to answer the complaint after three extensions was plainly deliberate. Hence, Waiʻola's actions were, at the least, a result of inexcusable neglect, and more likely, a wilful act. Black's Law Dictionary at 1133 (defining "inexcusable neglect" as "neglect that implies more than unintentional inadvertence" and "wilful" as "[v]oluntary and intentional, but not necessarily malicious").

1.

Waiʻola's actions were more than an "unintentional inadvertence." Id. Ala Loop filed its cross-claim against Waiʻola on November 20, 2003. Subsequently, Waiʻola had from November 20, 2003, until April 19, 2004, to file its answer. During this time Waiʻola was given two extensions of time by agreement of the parties, and one extension of time by the court. In the April 6, 2004 order granting Waiʻola's third extension, the court specifically warned that if Waiʻola failed to answer by April 19, 2004, the court would allow Ala Loop to file an entry of default against Waiʻola. Waiʻola knew that it needed to file

its answer by April 19, 2004, and was aware of the court's warning. Thus, it cannot be said that Waiʻola's failure to answer was inadvertent or unintentional. Instead, Waiʻola's failure was at the least a result of inexcusable neglect. Citicorp Mortgage, Inc. v. Bartolome, 94 Hawaiʻi 422, 439, 16 P.3d 827, 844 (2000) ("[W]e conclude that [defendant's] failure to answer the complaint or otherwise appear prior to the entry of summary judgment (or, the alleged default judgment) was indeed the product of "'inexcusable neglect'"); Pogia v. Ramos, 10 Haw. App. 411, 416, 876 P.2d 1342, 1345 (1994) ("[T]he weight of authority has not recognized ignorance of the law . . . to be excusable neglect justifying invocation of relief[.]"); Nakila, 4 Haw. App. at 591, 671 P.2d at 1031 (finding no abuse of discretion in denying motion to set aside entry of default when non-defaulting party would suffer prejudice, and there was no excusable neglect when defaulting party failed to take any action for more than six months); Paxton v. State, 2 Haw. App. 46, 49, 625 P.2d 1052, 1055 (1981) (determining that failure to answer interrogatories was the result of inexcusable neglect where the appellant did nothing to attempt to alleviate the problem of his failure to respond for 24 days); Hupp v. Accessory Distrib., Inc., 1 Haw. App. 174, 176-78, 616 P.2d 233, 235-36 (1980) (holding that the court properly refused to set aside a default when defendant's insurer failed to file an answer for nine months based on the insurer's understanding that it had an "open extension of time" (quotation

marks omitted)). Waiʻola failed to answer Ala Loop's cross-claim from November 20, 2003, to April 19, 2004. This delay of approximately five months, which is well over the 20 days provided under HRCP Rule 12 to file an answer,[20] cannot be excused as inadvertent.

2.

Waiʻola's failure to file an answer or responsive pleading by the April 19, 2004 deadline is also a wilful act. Again, the court explicitly informed Waiʻola in its April 6, 2004 order that if an answer or other responsive pleading was not filed by April 19, 2004, Ala Loop would be permitted to request entry of default. Instead of complying with its own representations to the court that it needed an extension of "no more than 30 days" (emphasis added), Waiʻola abandoned any effort to file an answer or responsive pleading. Waiʻola knew that the court's order required it to file its answer on April 19, 2004, or be subject to a possible entry of default by the County or Ala Loop. However, on April 19, 2004, Waiʻola made a conscious decision to file a motion to stay or, in the alternative, to extend time so that it could pursue an application for writ of

[20] Rule 12(a)(2) of the HRCP states:

> A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counter-claim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs.

(Emphasis added.)

mandamus with this court. Consequently, Waiʻola failed to answer the complaint and was defaulted.

Waiʻola's decision not to file an answer, in complete disregard of the previous representation it had made to the court, was a voluntary and wilful act. Dillingham Inv. Corp. v. Kunio Yokoyama Trust, 8 Haw. App. 226, 228-29, 797 P.2d 1316, 1317 (1990) (holding there was no abuse of discretion where appellants wilfully failed to answer the complaint after determining that their land was not involved with the lawsuit); Chrysler Credit Corp. v. Macino, 710 F.2d 363, 367 (7th Cir. 1983) (stating that "failure to file an answer for over two months after it was due, despite the fact that the district court granted the extension of time requested, is strong evidence that the litigation was not handled with due diligence[;] . . . counsel's failure to efficiently handle his docket constitutes wilfulness"). In Dillingham, the appellants' motion to set aside default was denied after the appellants failed to respond to the complaint. The appellants had determined the complaint "talked about" Grant 3038, which was not the three kuleanas owned by the appellants. Dillingham, 8 Haw. App. at 232, 797 P.2d at 1319. The ICA held that the trial court did not abuse its discretion because the appellants "'wilfully' failed to answer the complaint" when they determined that their land was not involved in the lawsuit, and therefore failed to satisfy the third-prong BDM test. Id. at 236, 797 P.2d at 1321. Similarly, in this

case, Waiʻola failed to answer Ala Loop's cross-claim, after three extensions of time, when it apparently determined that it would rather pursue a writ of mandamus instead of filing its answer on the April 19, 2004 deadline, as it had previously represented it would. As a consequence, the court permitted Ala Loop to move for entry of default against Waiʻola as it indicated it might.

Based on the facts that Waiʻola (1) was allowed two extensions by agreement, (2) made representations in its February 25, 2004 motion to extend time that it needed an extension of "no more than 30 days," (3) was granted the third extension by the court, (4) was warned that default may enter in the absence of a filing, and (5) voluntarily chose not to file an answer, Waiʻola's actions were obviously wilful. Thus, the court acted within reason when it determined that "[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."

B.

The majority cites three reasons to support its conclusion that default judgment must be set aside and the motion to set aside the default should have been granted. The majority states that (1) "the showing necessary to set aside the entry of default was lower than that needed to set aside a default judgment," majority opinion at 75, (2) defaults are generally disfavored, id., and (3) denial of the motion was the "ultimate

sanction" and lesser sanctions would better serve the interest of justice, id. at 80.

As to the majority's first point, the majority argues that a "showing necessary to set aside default [may be] lower than [what is] needed to set aside a default judgment."[21] Id. at 75. However, BDM states that "[d]espite [the difference between defaults and default judgments], the elements advanced in support of a motion under Rule 55(c) will be the same whether relief is sought from a default entry or from a default judgment." 57 Haw. at 76, 549 P.2d at 1150 (emphasis added). As stated above, one of the three elements that would support relief from the entry of default is that "the default was not the result of inexcusable neglect or a wilful act." Id. Thus, a motion to set aside default can be properly denied where entry of default was a result of inexcusable neglect or a wilful act.

As to the majority's second point, while defaults are generally disfavored, under the three-part BDM test, a default should not be set aside if the default results from inexcusable neglect or a wilful act. Id. (stating that a motion to set aside stay should be only granted if "(1) . . . the nondefaulting party will not be prejudiced by the reopening, (2) . . . the defaulting party has a meritorious defense, and (3) . . . the default was

[21] For this proposition, the majority quotes BDM which states, "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." Majority opinion at 75 (quoting BDM, 57 Haw. at 76, 549 P.2d at 1150).

not the result of inexcusable neglect or a wilful act"). This approach is consistent with GLA Inc. v. Spengler, 1 Haw. App. 647, 649, 623 P.2d 1283, 1285 (1981), wherein the ICA recognized that "there is a policy favoring a full trial on the merits," but concluded that this policy "do[es] not cause us to reverse the lower court's decision in this case" where dismissal was due to inexcusable neglect.

As to the majority's third point, the majority relies on Rearden in asserting that "'lesser sanction[s]' would 'better serve the interest of justice.'" Majority opinion at 80 (quoting Reardon, 101 Hawaiʻi at 255, 65 P.3d at 1047). However, setting aside the default does not "better serve the interest of justice" in the situation where a party deliberately fails to file its answer or responsive pleading after having been given three extensions of time and after making representations that it would file an answer by a date certain. This court should refuse to reverse the court's decision where the circumstances indicate the court exercised its discretion within the bounds of reason and dismissal followed inexcusable neglect or a wilful act. GLA, 1 Haw. App. at 649, 623 P.2d at 1285. In GLA, the court recognized that there is a "policy disfavoring dismissals with prejudice if there are lesser sanctions that could vindicate the purpose of the rules and the desire to avoid court congestion." Id. However the ICA refused to reverse the lower court's decision because the dismissal was not due to excusable neglect. Id.

Similarly, in this case, Waiʻola's default was not due to excusable neglect, and thus this court should affirm the court's decision.

This case is also distinguishable from Rearden. In Rearden, this court held that the trial court abused its discretion in denying the defendant's motion to set aside default judgment, when defendant failed to attend a settlement conference, violating a court order requiring him be present. 101 Hawaiʻi at 255, 65 P.3d at 1047. The settlement conference was rescheduled from April 12, 1997, to April 20, 1997, because the defendant had a prior business commitment on April 12, 1997. Id. at 241, 65 P.3d at 1033.

Prior to the date of the settlement conference, defendant requested that the court continue the settlement conference and submitted an affidavit averring that he was "unable to travel from Dallas, Texas to Hilo" for the April 20, 1997 settlement conference, he needed to care for his eighty-four-year-old father, and his personal appearance at the conference was an extreme and personal hardship. Id. at 242, 65 P.3d at 1034. Additionally, the Rearden court noted that defaulting the defendant for failing to appear at the conference did not appear warranted when the plaintiffs had also violated the same order by not timely filing a "settlement conference statement until June 10, 1997, well after the April 20, 1997 conference date." Id. at 255, 65 P.3d at 1047.

In Rearden, there were no facts to indicate that the defendant ever made statements to the court that he could attend the April 20, 1997 settlement conference. In contrast, Waiʻola made an explicit representation to the court that it needed an extension of "no more than 30 days" to file its answer (emphasis added), and then failed to carry out its commitment. Additionally, unlike the plaintiffs in Rearden, who failed to follow the order themselves, there is no indication that Ala Loop had violated any orders or had not fulfilled its obligations to the court.

C.

Inasmuch as Waiʻola (1) failed to answer Ala Loop's cross-claim for approximately five months, (2) was allowed two extensions by agreement of the parties, (3) made representations in its February 25, 2004 motion to extend time that it needed an extension of "no more than 30 days," (4) was given until April 19, 2004 to file an answer or responsive pleading, (5) was warned by the court that default may enter if an answer was not filed by April 19, 2004, and (6) voluntarily chose not to file an answer on the April 19, 2004 deadline, the court did not "exceed[] the bounds of reason or disregard[] rules or principles of law or practice to the substantial detriment of a party." Rearden, 101 Hawaiʻi at 253, 65 P.3d at 1045. The court acted within reason when it determined that "[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." Thus, I respectfully disagree with the majority's view that the court abused its discretion and that the First Amended Final Judgment should be vacated.

V.

A.

Because the court did not abuse its discretion in denying Waiʻola's motion to set aside the default, it is appropriate to determine whether the court erred in finding that Ala Loop was not entitled to attorney's fees under HRS § 607-25. 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 a "development" without obtaining all the permits or approvals required by law. HRS § 607-25(e) states in part:

> 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 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.
>
> . . . .

(Emphasis added.) This court has made clear that only two types of parties may be awarded attorney's fees under HRS § 607-25.

> [T]he two types of parties who may be awarded [statutory] attorneys' fees [as prevailing party, in suit for injunctive relief relating to property development,] are: (1) a member of the public who prevails against a private party who has been or is undertaking development without obtaining all permits or approvals required by law from government agencies; and (2) a defendant private party who prevails against a plaintiff who has brought a frivolous action.

Kahana Sunset Owners Ass'n v. Maui County Council, 86 Hawaiʻi 132, 135, 948 P.2d 122, 125 (1997).

In this case, Ala Loop failed to prove either of these requirements. First, Ala Loop is not a member of the public who prevailed against a private party who has been undertaking development. Although Waiʻola was originally a non-profit organization, it became a public entity when it received its charter in July of 2000. As a charter school, Waiʻola is a state agency, and is therefore not a private party. Second, while Ala Loop may be a private party, it did not prevail against "a plaintiff who has brought a frivolous action." Id. Thus, Ala Loop is not entitled to attorney's fees under this statute.

B.

As to the first requirement,[22] Ala Loop argues that even if Waiʻola is a charter school, the statutory framework did not recognize charter schools as public entities until July 1, 2005, after the legislature amended the definition of "public schools" to include charter schools. Thus, Ala Loop contends that since all claims and actions in this case occurred before July 1, 2005, Waiʻola was a private party and, until then, Ala Loop is entitled to recover attorney's fees. In response, Waiʻola argues that there is substantial evidence to show that the legislative history, the Board of Education, and the attorney general treated

[22] Further discussion of the second ground is not undertaken inasmuch as Waiʻola is not a plaintiff.

charter schools as public entities prior to July 1, 2005. Waiʻola's argument is persuasive.

While the definition of "public schools" did not expressly refer to charter schools until July 1, 2005, the legislative history of Act 62 of the 1999 legislative session, which created new century charter schools, indicates that the Act was passed to re-create and add more public schools with alternative education programs. Act 62, Section 1 states in part:

> Both existing public schools and new schools may be established as new century charter schools, and these schools will allow educators to better tailor the curriculum to enhance the learning of the students.
>
> The purpose of this Act is to increase the flexibility and autonomy at the school level by allowing existing public schools and new schools to be designated as new charter schools[.]

1999 Haw. Sess. Laws, Act 62, § 1 at 77. Part of the legislature's intent in creating charter schools was to allow existing public schools "greater autonomy and flexibility in the formation of alternative educational programs independent from the governance of the board of education[,]" S. Stand. Comm. Rep. No. 819, in 1999 Senate Journal, at 1283, and to "allow the State to dramatically improve its educational standards for the twenty-first century." H. Stand. Comm. Rep. No. 1404, in 1999 House Journal, at 1571. The Act created new charter schools consisting of both "public schools and new schools" to "allow the State . . . to improve its educational standards." 1999 Haw. Sess. Laws Act 62, § 1 at 77. By the use of this language, the legislature signified that charter schools were considered part

of the State's efforts to improve "its" standards, signifying that charter schools would be part of the "State" educational system. Thus, the legislative history indicates that charter schools were public entities. Waiʻola, then, upon receiving its charter, became a public entity, and therefore is not a private party under HRS § 607-25.

The assertion that charter schools are public entities is also consistent with Waiʻola's charter school application form submitted to the Hawaiʻi Department of Education and the audit report to the Governor and the Legislature of the State of Hawaiʻi on the Audit of Na Wai Ola Waters of Life Charter School. The heading of Waiʻola's charter school application form for the Hawaiʻi Department of Education is entitled, "HAWAIʻI DEPARTMENT OF EDUCATION, New Century Public Charter School, Detailed Implementation Plan." The application also states that "the term 'Public Charter School' shall be included in the name or identified clearly as a public school to communicate that it is a public school that subscribes to the precepts of public education, e.g., open enrollment, no tuition, non-discriminatory, etc.). (Emphasis added.)

The State audit on Waiʻola conducted in January 2005 also indicated that charter schools are considered public entities. For example, the report declared, "The audit was conducted pursuant to Section 23-4, [HRS], which requires the Auditor to conduct postaudits of the transactions, accounts,

programs, and performance of all departments, offices, and agencies of the State and its political subdivisions." Also, the report recognized that the attorney general took the position that charter schools were a public entity. The report recounted that "[i]n some states, charter schools are considered legally independent entities. Hawaiʻi's charter schools, on the other hand, have recently been determined by the attorney general to be state agencies under current law."

VI.

Finally, I cannot agree with the majority's view that HRS chapter 205 is "a law relating to environmental quality within the meaning of article XI, section 9" of the Hawaiʻi Constitution. Majority opinion at 39 (internal quotation marks omitted). In my view, (1) the issue of whether Ala Loop has a private right of action should not be decided on constitutional grounds, (2) the findings of fact (findings) issued by the court related to land use, not environmental quality, and these findings are binding on this court, (3) the legislative history of HRS chapter 607 does not apply to establish that HRS chapter 205 relates to "environmental quality," (4) Ala Loop does not have a private right of action under article XI, section 9, and (5) the legislative reports that the majority relies upon to contend that HRS chapter 205 is a "law relating to environmental quality" under article XI, section 9 are not dispositive because

ultimate authority to interpret that provision is vested in the courts, and not the legislature.

A.

First, because Ala Loop, as an association of members whose properties adjoin Ala Loop Road, had the right to bring a declaratory judgment action following the denial of a HRS § 205-6 hearing, as discussed supra, I would refrain from deciding the constitutional question of whether HRS chapter 205 is a law relating to environmental quality under article XI, section 9 of the Hawaiʻi Constitution, as it is unnecessary. This court has said that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, . . . [this court] will decide only the latter." State v. Lo, 66 Haw. 653, 657, 675 P.2d 754, 757 (1983) (quoting Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 347 (1936)) (ellipses and brackets in original). Thus, "[t]he question at threshold whenever constitutional questions are passed upon us for decision, [] is whether there may be another ground upon which the case can be decided." Id. (citations omitted).

In its application for writ of certiorari, Ala Loop argues that it has a private right of action for the reasons following. First, Ala Loop argues that "HRS § 632-1 grants the courts the ability to make binding adjudications where an actual controversy exists." Second, Ala Loop argues that article XI,

section 9 expressly provides for a private right of action to enforce Hawaii's land use laws. Third, Ala Loop argues that HRS § 607-25 provides a private party with a right of action "where a government agency does nothing to actively enforce laws it was intended to initially have a right to enforce." As explained above, Ala Loop's first argument that it has a right to seek a declaratory judgment is meritorious. Applying the principles of Lo, I would not decide this case on constitutional grounds.

B.

Furthermore, this case involves issues of land use, and not issues relating to environmental quality. The question is whether Ala Loop had standing to assert a right of action against Waiʻola for conducting school activities in an agricultural district without a special permit required under HRS § 205-6. The court's findings, entered on February 4, 2005, indicate that this case alleged the illegal use of land. The findings stated, in pertinent part:

> 3. The real property which is the subject of this action is located at 17-705 Ala Loop Road and is designated as TMK No. (3) 1-7-08:003 . . . . [Sunshine Farms] contains approximately 28 acres and located [sic] in an agricultural use district designated by the [LUC].
>
> 4. In or about July, 2003, Waiola acquired ownership of [Sunshine Farms].
>
> 5. On November 14, 2003, the County filed the Complaint for Declaratory Relief (the "Complaint) against Waiola and the [Ala Loop]. The Complaint sought a declaratory judgment determining that HRS § 302A-1184 exempts Waiola from having to obtain a special permit pursuant to HRS § 205-6, but that Waiola is required to obtain a use permit pursuant to Chapter 25 of the Hawaiʻi County Code.
>
> 6. On November 20, 2003 [Ala Loop] answered the Complaint and filed a cross-claim against Waiola (the "Cross-Claim").

> 7. In the Cross-Claim, [Ala Loop] sought a declaratory judgment determining that Waiʻola was required to obtain a special permit pursuant to HRS § 205-6 before operating a school on [Sunshine Farms]. Further, [Ala Loop] sought injunctive relief enjoining Waiʻola from engaging in classes or school-related activities on [Sunshine Farms] unless Waiʻola first obtains a special permit.
>
> . . . .
>
> 12. Since the acquisition of [Sunshine Farms], Waiola has used [Sunshine Farms] 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. Waiola students have been bussed to [Sunshine Farms].
>
> 14. It is Waiʻola's intention to use [Sunshine Farms] for school activities and associated facilities, to include a school building, an athletic field, athletic building, amphitheater and smaller structures for class.
>
> 15. If Waiʻola is to use [Sunshine Farms] as a school, certain improvements relating to health and safety are necessary or appropriate; to include: (a) and expansion of the Ala Loop [Road], (b) an increase in water availability to fight fires, and (c) an individual waste water system.
>
> 16. Members of [Ala Loop], as neighbors of [Sunshine Farms], may suffer injury if [Sunshine Farms] is used as a school.
>
> . . . .
>
> 18. While Waiola now asserts that it intends to obtain a special permit, it seeks to use [Sunshine Farms] for uses other than permitted under Chapter 205, HRS, while its application for a special permit is pending.

(Emphases added.) A review of the findings demonstrate that 1) the County's complaint sought a declaratory judgment that Waiʻola was exempt "from having to obtain a special permit under HRS § 205-6," 2) in its cross-claim, Ala Loop sought a "declaratory judgment determining that Waiʻola was required to obtain a special permit pursuant to HRS § 205-6 before operating a school on [Sunshine Farms]" and injunctive relief from Waiʻola for "engaging in classes and school related activities on [Sunshine Farms] unless Waiʻola first obtains a special permit," 3) "Waiola has used [Sunshine Farms]" for administrative offices, storage, and holding instructional classes, 4) Waiʻola intends to

"use [Sunshine Farms] for school activities and associated facilities," 5) Waiʻola may "suffer injury if [Sunshine Farms] is used as a school[,]" and 6) Waiʻola seeks to use [Sunshine Farms] while its application for a special permit is pending. Thus, the findings indicate that the crux of this litigation was Ala Loop's objection to Waiʻola's present and future use of Sunshine Farms as a school. None of the findings involve "environmental quality" or the "conservation, protection and enhancement of natural resources." Majority opinion at 40.

Since neither Ala Loop nor Waiʻola has challenged the court's findings, the findings are binding on this court. Kelly v. 1250 Oceanside Partners, 111 Hawaiʻi 205, 227, 140 P.3d 985, 1007 (2006) (stating that, "[g]enerally, a court finding that is not challenged on appeal is binding upon [the appellate court]"). The findings reflect that the injuries sustained and relief sought derived from Waiʻola's present and proposed uses of Sunshine Farms as a school in violation of HRS § 205-6. Thus, it must be concluded that the application of land use law rather than "environmental quality" law is primarily at issue.

C.

The majority uses the legislative history of HRS § 607-25 to support the propositions that "chapter 205 is a law relating to environmental quality within the meaning of article XI, section 9." Majority opinion at 42-43 (internal quotation marks and brackets omitted). However, HRS § 607-25 does not

apply in this case. As fully discussed supra, Ala Loop failed to prove that it is one of the two types of parties that may be awarded attorney's fees under HRS § 607-25. First, Ala Loop is not "a member of the public who prevail[ed] against a private party who has been or is undertaking development without obtaining all permits or approvals required by law[,]" Kahana, 86 Hawaiʻi at 135, 948 P.2d at 125, because Waiʻola, as a state agency, is not a private party. Second, Ala Loop is not "a defendant private party who prevail[ed] against a plaintiff who [] brought a frivolous action." Id. Accordingly, HRS § 607-25 and its legislative history are not pertinent to this case.

D.

Inasmuch as the majority nevertheless concludes that Ala Loop has a right of action under article XI, section 9 to enforce HRS chapter 205, I must respectfully disagree. As noted supra, section 9 of article XI states:

> 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.

(Emphases added.) The plain language of article XI, section 9 provides that "[a]ny person may enforce this right [to a clean an healthful environment] against any party[.]" However, this enforcement right is to be enforced "through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law." Haw. Const. art. XI, § 9 (emphases added).

Because the phrases "as defined by laws relating to environmental quality" and "as provided by law" are undefined, examination of the framers' intent is necessary.

A report by the Committee on Environment, Agriculture, Conservation and Land during the 1978 Constitutional Convention states in part as follows:

> 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.
>
> . . . .
>
> Developing a body of case law defining the content of the right could involve confusion and inconsistencies. On the other hand, legislatures can adopt, modify or repeal environmental laws and regulation laws 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.
>
> 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 statues, 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 safeguard 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 Hawaiʻi of 1978, at 689-90 (1980) [hereinafter the Report] (emphases added).

As reflected in the Report, the constitutional convention intended that "the definition of this right would be acknowledged by relying on the large body of statutes, administrative rules and ordinances relating to environmental quality." Id. at 689 (emphasis added). The term "laws" in the phrase "as defined by laws," then, has a particular and concrete meaning and refers to the legislative product of the legislature, administrative agencies, and county councils. Accordingly, although the constitutional right is guaranteed, it is one demarcated by specific legislative enactments having to do with "environmental quality." The right is not intended to be a fixed and immovable one inasmuch as the Report states that "the right can be reshaped and modified through statute, ordinance and administrative rule-making procedure and [is] not inflexibly fixed." Id. (emphasis added).

The Report vests the responsibility for defining the content of the right in "legislatures, county councils[,] and administrative agencies" because, according to the Report, these bodies "can adopt, modify, or repeal environmental laws and regulation laws in light of the latest scientific evidence and federal requirements and opportunities." Id. Indeed, the Committee specifically eschews development of the right by the

courts in favor of the foregoing legislative bodies. As stated in the Report, "[d]eveloping a body of case law defining the content of the right could involve confusion and inconsistencies." Id. Hence, the right is referable to specific legislative enactments.

This is also confirmed by the second sentence in section 9, having to do with enforcement. That provision provides that "[a]ny person may enforce this right . . . through appropriate legal proceedings, subject to reasonable limitations and regulations as provided by law." Haw. Const. art. XI, § 9 (emphasis added). Contrary to the majority's view that the Report "does not indicate that the framers understood that implementing legislation was needed before enforcement actions could be brought[,]" majority opinion at 51, the Report, with respect to the phrase "as provided by law," indicates (a) that "the Committee intends that the legislature may reasonably limit and regulate this right by . . . prescribing reasonable procedural and jurisdictional matters and a reasonable statute of limitations[,]" and (b) by "safeguards of reasonable limitations and regulations as provided by law . . . to prevent abuses of the right[,]" the Report at 690 (emphases added). Apparently no legislative enactments exist with respect to these prescriptions.

Accordingly, the Committee intended that the legislature regulate the right to sue under the constitution, by "prescribing" safeguards such as a reasonable statute of

limitations. However, as to a right to sue under article XI, section 9, there are no procedural or jurisdictional bases, no specific safeguards, and no statute of limitations for bringing suit that are presently in place. In light of these circumstances, reasonably, there can be no private enforceable rights to sue unless such rights are discretely set forth in particular statutes, ordinances, or rules.

While the term "may" is "generally construed to render optional, permissive or discretionary the provision in which it is embodied[,]" majority opinion at 52 n.33, the "may" in the Report must be viewed as confirming authority. As noted before, the Report states that "the legislature may reasonably limit and regulate this private enforcement right." The Report at 690 (emphasis added). However, article XI, section 9 itself provides that "[a]ny person may enforce this right" "subject to reasonable limitations and regulations as provided by law." This language, unlike the statement in the Report, assumes that enforcement is "subject to" "reasonable limitations and regulations" that are "provided by law." In light of the controlling textual language in article I, section 9, "may," as used in the Report (stating that the "Committee intends that the legislature may reasonably limit and regulate this private enforcement right"), must be viewed as confirming authority to prescribe regulation of the right, rather than as permissive only. The Report at 690; cf. Bd. of Educ. of State of Hawaii v. Waihee, 70 Haw. 253, 264 n.4,

768 P.2d 1279, 1286 n.4 (1989) ("The phrase 'as provided by law' in the context of . . . state constitutional provisions [is a directive] to the legislature to enact implementing legislation. . . . And the subject matter modified by the phrase 'may be dealt with by the Legislature as it deems appropriate.'" (Brackets in original.)) (Internal citations omitted.).[23] Black's Law Dictionary at 1000 ("In dozens of cases, courts have held may to be synonymous with shall or must, usu[ally] in an effort to effectuate legislative intent." (Emphases in original.)). Enforcement procedures for such rights, then, must be found in a specific statute, ordinance, or rule. This construction of the enforcement provision is consistent with the overall intent of

[23] The majority states that 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." Majority opinion at 48 n.31. To the contrary, in Waihee, the Board of Education (Board), some of the members of the Board, and the Hawaiʻi State Teachers Association [collectively, "the plaintiffs"] challenged the acts of the governor and director of budget and finance [collectively, "the defendants"] in connection with the state education budget as violating article X, section 3 of the Hawaiʻi Constitution, which stated in relevant part that the "[Board] shall have the power, as provided by law, to formulate policy and to exercise control of the public school system[.]" 70 Haw. at 256, 768 P.2d at 1282. In determining what powers were vested to the Board under article X, section 3, this court noted that "the phrase 'as provided by law' in the context of . . . state constitutional provisions [is a directive] to the legislature to enact implementing legislation." Id. at 264 n.4, 768 P.2d at 1286 n.4 (brackets and ellipses in original) (citation omitted).

Waihee recognized that article X, section 3 could "hardly be characterized as a constitutional declaration emancipating the [Board] from all executive direction[,]" and also "what ha[d] been 'provided by law' [wa]s consistent with the intent of the framers not to divest the Governor of his . . . 'executive powers' or his authority over the executive budget." Id. at 264, 768 P.2d at 1286. Thus, Waihee exemplifies that this court has recognized the phrase "as provided by law" as a directive to the legislature to enact implementing legislation.

the framers that the content of the right be defined by flexible legislative prescription and not by judicial case law.[24]

On the other hand, the majority's position is contrary. The majority attempts to define the constitutional right as encompassing the entirety of HRS chapter 205 through judicial "case law" in its opinion. Without the prescription of "reasonable procedural and jurisdiction matters, and a reasonable statute of limitations[,]" the Report at 690, this approach invites havoc in future applications of a private right of action with respect to HRS chapter 205. HRS chapter 205 contains none of the aforementioned parameters and is primarily related to land use, as indicated in the previous section.

As noted in the Report, defining the right by case law "can involve confusion and inconsistencies," and such definition should be legislative in nature. Id. at 689. Thus, the majority's approach conflicts with the framers' intent. There is no jurisdictional or procedural basis for enforcing such a right and certainly no statute of limitations as to such a right under article XI, section 9. Hence, under the majority's approach, a

[24] According to the majority, the Report states that "the provision 'provides that individuals may directly sue public and private violators.'" Majority opinion at 51 (quoting the Report at 690). However, the Report also states that the committee "intends that the legislature may reasonably limit and regulate this private enforcement by, for example . . . a reasonable statute of limitations." The Report at 690. As just discussed, inasmuch as the article I, section 9 states that the right is subject to reasonable limitations, the term "may" in the Report must be viewed as confirming authority to enact "reasonable procedural and jurisdictional matters" as well as a "reasonable statute of limitations." Id. Therefore, I respectfully disagree with the majority's assertion that the Report "does not indicate that the framers understood that implementing legislation was needed[.]" Majority opinion at 51.

suit on an alleged violation of HRS chapter 205 pursuant to article XI, section 9 could be brought in perpetuity and without the specific safeguards contemplated in the Report.

Nevertheless, the majority believes that "[w]hile the [committee] report recognizes that the legislature retains the power to impose reasonable limits on the right to bring suit, such as statutes of limitations, it does not suggest that such limits must be in place before actions can be brought." Majority opinion at 51-52 (citing the Report at 689-90) (footnotes omitted). Also, the majority states in two footnotes that "the text of article XI, section 9 unambiguously establishes a self-executing private right of action," id. at 52 n.34, and the Report recognizes that "the legislature may, consistent with article XI, section 9, be able to enact a specific statute of limitation applicable to actions seeking to enforce the provisions of HRS Chapter 205" or "[a]lternatively, statutes of general application can be applied to such claims consistent with article XI, section 9[,]" id. at 52 n.33. These assertions are incorrect for the reasons following.

First, the text of article XI, section 9 does not "unambiguously establish[] a self-executing private right of action[.]" Id. at 52 n.34. As mentioned supra, the text of article XI, section 9 states that a right of enforcement under that article was "subject to reasonable limitations as provided by law." (Emphasis added.) The phrase "as provided by law" must

be construed. Thus, the text of article XI, section 9, including that phrase, is not unambiguous and must be interpreted. Moreover, because the right to sue would be "subject to" reasonable limitations, it would appear self evident that indeed, "such must be in place before the actions can be brought." To allow such actions without defining parameters only engenders "confusion and inconsistencies" the Committee sought to avoid. The Report at 689.

Second, the Report stated that the "Committee intends that the legislature may reasonably limit and regulate this private enforcement right by . . . a reasonable statute of limitations." The Report at 689 (emphases added). This statement in the Report, contrary to the majority's assertion, does not recognize that the legislature may enact a "specific statute of limitations applicable to . . . enforce the provisions of HRS Chapter 205[,]" majority opinion at 52 n.33, but instead contemplates the legislature's ability to enact a specific statute of limitations to limit and to regulate the "private enforcement right" that was created in article XI, section 9.

Third, the majority's assertion that "[a]lternatively, statutes of limitations of general application [could] be applied to such claims consistent with article XI, section 9[,]" id., is incongruent with the intent of the framers as reflected in the Report. To reiterate, the Report stated that the "Committee intends that the legislature may reasonably limit and regulate

this private enforcement right by . . . a reasonable statute of limitations" and the "Committee is convinced that the safeguards of reasonable limitations and regulations as provided by law should serve to prevent abuses of the right[.]" The Report at 689 (emphases added). Hence, the use of a general statute of limitations was not considered for this particular private right of enforcement, but the framers clearly intended that a specific statute of limitations be enacted by the legislature to enforce a new private right of action under article XI, section 9.

Furthermore, if the framers contemplated that an existing general statute of limitations would be applied, the Report could have plainly said so. However, the Report does not reference any existing general statute of limitations. See id. Instead, the Report refers to "a," i.e. single, "reasonable statute of limitations and regulations as provided by law," indicating that one would be enacted with respect to "this private right of action." Id. at 690 (emphases added). To date, no statute of limitations nor any "reasonable procedural and jurisdictional matters" have been enacted by the legislature with respect to "this private enforcement right" under article XI, section 9. Id. Yet these statutes of "reasonable limitations and regulations" were advanced as "safeguards" to prevent "abuses of the right" of action under article XI, section 9.

The majority contends that this case "is similar to that in [United Public Workers, AFSCME, Local 646, AFL-CIO v.

Yogi, 101 Hawaiʻi 46, 62 P.3d 189 (2002)], where the phrase 'as provided by law' . . . was interpreted as a reference to the existing law of collective bargaining,[25] rather than that in Rodrigues, where . . . 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." Majority opinion at 49-50; see majority opinion at 48 n.31. I respectfully disagree.

In Rodrigues, this court held, inter alia, that article I, section 11 of the Hawaiʻi Constitution was not self-executing. 63 Haw. at 414, 629 P.2d at 1113. In deciding that article 1, section 11 was not self-executing, it was noted that "[a]t the time the amendment was adopted, there was no other constitutional provision or statute to which the phrase could refer[,]" id. at 415, 629 P.2d at 1114, and that "[w]hile the framers created the position of an independent grand jury counsel, they instructed the legislature to enact legislation defining the appointment, term, and compensation of the independent counsel[,]" id. at 416, 629 P.2d at 1114 (citing Stand. Comm. Rep. No. 69, 3d Hawaiʻi Const. Conv. 4, reprinted in I Proceedings of the Constitutional

[25] Yogi determined that article XIII, section 2 of the Hawaiʻi Constitution was self-executing. Article XIII, section 2 provided that "persons in public employment shall have the right to organize for the purpose of collective bargaining as provided by law." 101 Hawaiʻi at 58 n.4, 62 P.3d at 201 n.4 (quoting Haw. Const. art. XIII, § 2). Unlike article I, section 11 in State v. Rodrigues, 63 Haw. 412, 629 P.2d 1111 (1981), article XIII, section 2 did not direct the legislature to implement further legislation. Rather, this court distinguished Rodrigues, noting that the phrase "'collective bargaining as provided by law' had a well recognized meaning, usage, and application under both federal and state laws as well as case law." 101 Hawaiʻi at 51, 62 P.3d at 194.

Convention of Hawaiʻi of 1978 at 673 (1978); II Proceedings of the Constitutional Convention of Hawaiʻi of 1979 at 670 (1979)).

Rodrigues cited to cases in other jurisdictions to support its ruling that "[t]he phrase 'as provided by law' in the context of other state constitutional provisions has been construed as a direction to the legislature to enact implementing legislation[,]" 63 Haw. at 415, 629 P.2d at 1114, and that "'the subject matter which this phrase modifies is not "locked" into the Constitution but may be dealt with by the [l]egislature as it deems appropriate[,]'" id. (quoting Agnew v. Schneider, 253 N.W.2d 184, 187 (N.D. 1977)), and "the phrase 'directs the legislature to provide the rules by which the general rights which it (constitutional provision) grants may be enjoyed and protected,'" id. (quoting Wann v. Reorganized Sch. Dist. No. 6, 293 S.W.2d 408, 411 (Mo. 1956)). In this case, article XI, section 9 of the Hawaiʻi Constitution instructs the legislature to enact "reasonable limitations and regulations as provided by law." Like the framers' actions with regard to article I, section 11 in Rodrigues, the Report for article XI, section 9 instructed the legislature to "prescrib[e] reasonable procedural and jurisdictional matters, and a reasonable statute of limitations." The Report at 690 (emphasis added). As explained supra, the legislature has not prescribed any "reasonable procedural and jurisdictional matters" or "a reasonable statute of limitations." Id.

E.

Finally, the majority cites various legislative reports issued subsequent to the 1978 constitutional convention to support its position that Ala Loop had a private right of action to enforce HRS chapter 205 under article XI, section 9. As noted supra, the majority relies upon the legislative history of HRS § 607-25 to support its determination that HRS chapter 205 is an environmental quality law. Majority opinion at 41-43. The majority also relies upon a 1979 special committee report, id. at 52-53, and the legislative history of HRS § 607-25, id. at 54-55, as evidence to support its position that article XI, section 9 is self-executing. With all due respect, such reliance is misplaced.

The ultimate authority for interpreting Hawaiʻi's constitutional guarantees is vested in the courts of this state. In re Water Use Permit Applications, 94 Hawaiʻi 97, 143, 9 P.3d 409, 455 (2000) ("The public trust . . . is a state constitutional doctrine" and "[a]s with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawaiʻi rests with the courts of this state." (Citing State v. Quitog, 85 Hawaiʻi 128, 130 n.3, 938 P.2d 559, 561 n.3 (1997) (recognizing the Hawaiʻi Supreme Court as the "ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawaiʻi Constitution").)). The legislature is not the final arbiter of the meaning of

constitutional provisions. Rather, "American legislatures must adhere to the provisions of a written constitution. . . . Our ultimate authority is the Constitution; and the courts, not the legislature, are the ultimate interpreters of the Constitution." State v. Nakata, 76 Hawaiʻi 360, 370, 878 P.2d 699, 709 (1994) (quoting State v. Shak, 51 Haw. 612, 617, 466 P.2d 422, 425, cert. denied, 400 U.S. 930 (1970) (emphasis added)); id. (citing Marbury v. Madison, 5 U.S. 137, 180 (1803) (laws repugnant to the Constitution are void)); Convention Ctr. Auth. v. Anzai, 78 Hawaiʻi 157, 164, 890 P.2d 1197, 1204 (1995) (determining that the legislative findings were not dispositive of whether the revenues met the "substantially derived" test under article VII, section 12(9) of the Hawaiʻi Constitution because "the courts, not the legislature, are the ultimate interpreters of the Constitution," and therefore, this court turned to its own analysis of the issue); accord Taomae v. Lingle, 108 Hawaiʻi 245, 256, 118 P.3d 1188, 1199 (2005) ("It is well settled that the courts, not the legislature, are solely vested with the responsibility to determine whether a constitutional amendment has been validly adopted.") Del Rio v. Crake, 87 Hawaiʻi 297, 304, 955 P.2d 90, 97 (1998) (stating that "the question as to the constitutionality of a statute is not for legislative determination, but is vested in the judiciary, and a statute cannot survive constitutional challenge based on legislative declaration alone" (citation omitted)). In that regard, the constitutional convention history

is what is pertinent and controlling. See Sierra Club v. Dep't of Transp. of State of Hawai'i, 120 Hawai'i 181, 196, 202 P.3d 1226, 1241 (2009) (observing that this court has "long recognized that the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting it, and the fundamental principle in interpreting a constitutional provision is to give effect to that intent" (quoting Hanabusa v. Lingle, 105 Hawai'i 28, 31-32, 93 P.3d 670, 673-74 (2004))); Kaho'ohanohano v. State, 114 Hawai'i 302, 342, 162 P.3d 696, 736 (2007) (construing the intent of article XVI, section 2 of the Hawai'i Constitution from the Committee of the Whole Report of the Constitutional Convention of 1950); State v. Mallan, 86 Hawai'i 440, 448, 950 P.2d 178, 186 (1998) (utilizing "the committee reports and debates in the Constitutional Convention" to determine the intent of the framers); Cobb v. State by Watanabe, 68 Haw. 564, 565, 722 P.2d 1032, 1033 (1986) (recognizing that "[w]hen resolving ambiguity, we have repeatedly held 'that the fundamental principle in construing a constitutional provision is to give effect to the intention of the framers and the people adopting it'" (quoting Huihui v. Shimoda, 64 Haw. 527, 531, 644 P.2d 968, 971 (1982))). The meaning of constitutional provisions must be gleaned from the convention that drafted it, see Anzai, 78 Hawai'i at 167, 890 P.2d at 1207 (stating that "we have long recognized that the Hawai'i Constitution must be construed with due regard to the intent of the framers and the people adopting

it, and that the fundamental principle in interpreting a constitutional provision is to give effect to that intent") (internal quotation marks and citations omitted), not from post ad hoc legislative reviews which may reflect conflicting contemporary views, see United States v. Texas, 507 U.S. 529, 535 (1993) (stating that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress" (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990))); United States v. Price, 361 U.S. 304, 313 (1960) (noting that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978), superseded by statute on other grounds as stated in Pac. Rivers Council v. Thomas, 30 F.3d 1050 (9th Cir. 1994); SEC v. Sloan, 436 U.S. 103, 119-22 (1978). Thus, a subsequent legislature's opinion of what the constitutional convention intended by virtue of article XI, section 9 is not determinative of the meaning of a constitutional provision.

VII.

For the foregoing reasons, I would hold that Ala Loop has the right to bring a declaratory judgment action to enforce a HRS chapter 205 claim against Waiʻola, the court did not abuse its discretion in denying Waiʻola's motion to set aside default, and Ala Loop is not entitled to attorney's fees under HRS § 607-25. I would vacate the April 22, 2009 judgment of the ICA and affirm

the court's December 12, 2005 First Amended Judgment. I disagree with the majority's conclusion that the court abused its discretion in denying Waiʻola's motion to set aside default, and that, in this case, Ala Loop had a private right of action to enforce HRS chapter 205 under article XI, section 9 of the Hawaiʻi State Constitution. For these reasons, I respectfully concur in part, see supra note 1, and dissent in part.